

CASE NOTE

## No conflict proven?: Assessing the role of the World Heritage Convention in *Gabriel Resources v. Romania*

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### Abstract

This case note analyzes the arbitral tribunal's assessment in *Gabriel Resources v. Romania*, focusing on the investors' "second alternative claim" that Romania's nomination and subsequent inscription of the *Roșia Montană Mining Landscape* on the World Heritage List constituted a breach of its obligations under the applicable bilateral investment treaties. It examines whether the tribunal's reasoning aligns with prior investment case law involving the World Heritage Convention, and it reflects on certain aspects of the award that may warrant closer scrutiny, particularly in light of the potential normative tensions between the protection of host states' heritage and the rights of foreign investors.

**Keywords:** *Gabriel Resources v. Romania*; international investment arbitration; bilateral investment treaties; World Heritage Convention; foreign direct investments vis-à-vis heritage protection; World Heritage List

### Introduction and scope of the case note

This case note examines the arbitral award rendered in *Gabriel Resources v. Romania*<sup>1</sup> to explore potential normative tensions between the nomination and listing of properties under the World Heritage Convention (WHC)<sup>2</sup> and the protection of foreign investors' rights, particularly under bilateral investment treaties (BITs).

In the late 1990s, Gabriel Jersey, a wholly owned subsidiary of Gabriel Canada (together, "Gabriel"), established the Roșia Montană Gold Corporation (RMGC) to develop a large-scale open-pit gold and silver mine in Romania's Roșia Montană Valley, a site of historical and archaeological importance, home to one of the most extensive Roman underground gold mining systems (the "Project").<sup>3</sup> In 1998, RMGC entered into the Roșia Montană License, which is a concession contract, with the state mining authority and a state-owned company. The following year, the Romanian government approved the license.<sup>4</sup> RMGC carried out

<sup>1</sup> *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Award of 8 March 2024.

<sup>2</sup> "Convention Concerning the Protection of the World Cultural and Natural Heritage" (Paris, 16 November 1972).

<sup>3</sup> *Gabriel Resources v. Romania*, paras 9–10.

<sup>4</sup> *Ibid.*, para. 11.

an initial development phase, but additional permits were required to begin operations, notably an environmental permit, which, given the site's sensitive characteristics, proved difficult to secure.<sup>5</sup>

To facilitate the proceeding of the Project, the Romanian government proposed a special piece of legislation (the "Draft Law"). However, amid widespread protests over environmental and heritage concerns, leading political figures expressed their opposition on 9 September 2013. The Draft Law was subsequently rejected by the Senate.<sup>6</sup> The permitting process stagnated, and, in July 2015, Gabriel filed a request for arbitration under the ICSID Convention.<sup>7</sup>

Gabriel's principal claim alleged that Romania, through a series of acts and omissions culminating in the "political rejection" of the Draft Law, had unduly politicized the permitting process with the intent to terminate the Project, thereby committing an unlawful composite act in breach of Gabriel's rights under the Canada–Romania and UK–Romania BITs,<sup>8</sup> including fair and equitable treatment (FET), full protection and security (FPS), "non-impairment by unreasonable and discriminatory measures," "failure to observe obligations" and expropriation.<sup>9</sup> In a "first alternative claim," Gabriel further submitted that Romania had breached the BITs "as of 9 September 2013" (para. 1170), even if there had been no such composite act.<sup>10</sup>

The arbitral tribunal (the "Tribunal")<sup>11</sup> rejected both claims, arguing that no cohesive pattern or intent on the part of Romania to politicize the permitting process, to terminate the Project, or to force Gabriel to abandon its investment had been proven.<sup>12</sup> Accordingly, it concluded that Romania committed no unlawful act, composite or otherwise.<sup>13</sup>

This case note, however, focuses on the Tribunal's assessment of Gabriel's "second alternative claim," which alleged that Romania's nomination and inscription of the *Roșia Montană Mining Landscape* on the WHL evidenced its intention to terminate the Project and constituted a breach of the investors' rights under the applicable BITs.<sup>14</sup> It further considers whether the Tribunal's decision aligns with prior international investment case law involving the WHC and reflects on certain aspects of the Tribunal's reasoning that may warrant closer scrutiny.

<sup>5</sup> Ibid., paras. 11–13, 18–118.

<sup>6</sup> Ibid., paras. 150–171.

<sup>7</sup> "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (Washington, 18 March 1965).

<sup>8</sup> *Gabriel Resources v. Romania*, paras. 205–207.

<sup>9</sup> Ibid., para. 831.

<sup>10</sup> The arbitral tribunal noted that this claim, in addition to being framed rather vaguely, was "identical to [Gabriel's] principal claim in that it is based on exactly the same facts and the same alleged breaches of the two BITs," *ibid.*, para. 1178.

<sup>11</sup> For convenience, reference will be made to the "Tribunal," even though the award was decided by a majority vote.

<sup>12</sup> *Gabriel Resources v. Romania*, para. 1166.

<sup>13</sup> Ibid., paras. 1166, 1200.

<sup>14</sup> Gabriel's second alternative claim was submitted after the initiation of the proceedings and framed as an extension of the original dispute. In this regard, the Tribunal affirmed that its jurisdiction was not confined to the matters expressly set out in the notice of dispute. It clarified that "subsequent facts or events may be part of or extend the dispute and therefore within the Tribunal's jurisdiction and admissible if they do not change the general character of the case submitted to the Tribunal," *ibid.*, para. 676. With regard to the claim that the inscription of the *Roșia Montană* site on the WHL on 27 July 2021 constituted a breach of the BITs, the Tribunal found it admissible on the grounds that it represented "a continuation of an argument that was made earlier in the case (i.e., the UNESCO application)," *ibid.*, para. 1223.

## Factual background, the parties' arguments, and the Tribunal's decision

### The nomination and inscription process of the *Roșia Montană Mining Landscape* on the World Heritage List and its relevance to the dispute

In November 2013, following the rejection of the Draft Law, the Romanian Senate recommended initiating a public debate on nominating the *Roșia Montană* site for inscription on the World Heritage List (WHL).<sup>15</sup> The government submitted the nomination in February 2016 – covering the entire Project footprint – placing the property on the Tentative List and thereby committing to protect it under the WHC.<sup>16</sup> In June 2018, Romania requested the World Heritage Committee (Committee) deferral of the WHL nomination pending the arbitration, which was accepted.<sup>17</sup> Two years later, the new government resumed the process, stating that the inscription would not change existing protections and that RMGC's mining license remained valid but conditional upon further permits.<sup>18</sup> On 27 July 2021, the site was inscribed by the Committee on the WHL and simultaneously listed as World Heritage in Danger “due to threats posed by plans to resume mining which would damage a major part of the inscribed Mining Landscape” (para. 188).<sup>19</sup>

Gabriel argued, first, that the decisions leading to the inscription of the *Roșia Montană* property in the WHL “were the result of” – and, thus, evidence for – its principal claim: that, by 9 September 2013, the Romanian government had already decided not to proceed with the Project (paras. 1204, 1282). Second, if the Tribunal found Gabriel's investment had not already been “entirely frustrated” as of 9 September 2013, Romania's nomination of the property to the WHL, “without any regard” to Gabriel's interests, did frustrate such investment (para. 1205). According to Gabriel, such nomination made it “legally impossible as a matter of Romanian law” to carry out the Project.<sup>20</sup> Consequently, the nomination to the WHL “would itself be a *de facto* expropriation of [Gabriel's investment] rights (without due process and without compensation) and a denial of fair and equitable treatment, in breach of the BITS.”<sup>21</sup> While Gabriel initially framed the nomination process as a standalone breach,<sup>22</sup> it later clarified that such breach occurred on 27 July 2021, with the listing of the property on the WHL.<sup>23</sup> By adding what Gabriel described as a “further layer of protection ... fundamentally incompatible with RMGC's mining license” (para. 1297), the listing and its legal effects under Romanian law, it argued, constituted an “effective taking of its Project rights,” in breach of the applicable BITS (para. 1206).

Romania argued that the actions and omissions being challenged as part of Gabriel's principal claim were not intended to take control of the investment, and that, taken together as a composite act crystallizing in the political rejection of the Project around 9 September 2013, did not amount to a breach of the BITS.<sup>24</sup> In this context, the decisions that led to the listing of *Roșia Montană* in the WHL could not be seen as demonstrating

<sup>15</sup> *Gabriel Resources v. Romania*, para. 179.

<sup>16</sup> *Ibid.*, para. 182.

<sup>17</sup> *Ibid.*, para. 187.

<sup>18</sup> *Ibid.*

<sup>19</sup> See also *ibid.*, paras 1283–1293.

<sup>20</sup> *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Claimants' Response to Questions Presented by the Tribunal in PO27 of 11 May 2020, para. 217.

<sup>21</sup> *Ibid.*, paras. 219, 223.

<sup>22</sup> See also *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Claimants' Observations on New Evidence of 29 October 2021, paras. 37–38.

<sup>23</sup> *Gabriel Resources v. Romania*, paras. 1206, 1223, 1317.

<sup>24</sup> This line of defence is set out in the section of the award concerning Gabriel's principal claim, *ibid.*, paras. 799–804.

any such wrongful act. Romania also argued that, while triggering a special regime for site protection and management under Romanian law,<sup>25</sup> the nomination process and the subsequent listing of the property could not possibly amount to a violation of the BITs, as they had neither affected the legislation designating the Roşia Montană site as a “historical monument” nor interfered with RMGC’s Project rights.<sup>26</sup> In fact, it was still open to and incumbent on RMGC to submit urban plans for the Project.<sup>27</sup> Moreover, Romania maintained that no causal link had been established between the alleged breaches and the alleged losses.<sup>28</sup>

### *The reasoning and decision of the Tribunal*

In connection with the principal claim, the Tribunal found, as mentioned, that no cohesive pattern or intent on the part of Romania to politicize the permitting process, to terminate the Project, or to force Gabriel to abandon its investment had been proven. Accordingly, it concluded that Romania had not committed a composite unlawful act in breach of the standards of protection under the applicable BITs, including FET, FPS, non-impairment, and expropriation.<sup>29</sup> These findings implied that the inscription of the Roşia Montană property on the WHL could not be regarded as the result of a political rejection of the Project.<sup>30</sup>

Regarding the nomination process itself, the Tribunal noted that the documentary record indicated that the nomination aimed to secure funding and foster development in the area, particularly considering the scenario that Gabriel might not proceed with the Project.<sup>31</sup> Accordingly, the Tribunal held that the proposal was “not unreasonable” – that is, it had not been made *mala fide* to obstruct the Project – and found “nothing unlawful” with it (para. 1296).

Finally, the Tribunal assessed whether the legal effects arising from the listing of the property on the WHL were, as Gabriel contended, “fundamentally incompatible with RMGC’s mining licence.”<sup>32</sup>

First, the Tribunal considered that the WHC only requires “reasonable endeavours” to state parties to “ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on [their] territory” (para. 1301). Accordingly, it held that “the UNESCO Convention itself does not create an obstacle to the Project” (ibid.). Second, the Tribunal noted that, pursuant to Romanian law,<sup>33</sup> “it seems clear, and Claimants do not argue otherwise, that ... the UNESCO listing is not incompatible with the Roşia Montană License” (ibid.). In fact, the license had been renewed in 2019 for a further five years and remained valid at the time of the arbitration.<sup>34</sup> Third, Gabriel had not shown how the listing affected other permits necessary

<sup>25</sup> The Tribunal noted “that the UNESCO listing requires a government approved special management and protection program,” ibid., para. 1300.

<sup>26</sup> *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Respondent’s Observations on New Evidence of 6 December 2021, paras. 11–41, 48.

<sup>27</sup> Ibid., paras. 28–29.

<sup>28</sup> *Gabriel Resources v. Romania*, para. 1211.

<sup>29</sup> Ibid., para. 1166. See previous section, “Introduction and scope of the case note.”

<sup>30</sup> Ibid., para. 1295.

<sup>31</sup> Ibid., para. 1296.

<sup>32</sup> Ibid., para. 1298.

<sup>33</sup> That the Tribunal shifted its analysis to Romanian law is not expressly stated but appears implicit in its reasoning. On this point, see further the subsequent section on “Final assessment.”

<sup>34</sup> Ibid.

for the execution of the Project, such as the “construction permit”<sup>35</sup> or the “archaeological discharge certificates.”<sup>36</sup>

In light of the foregoing, the Tribunal argued that there was no evidence to support Gabriel’s claim that the WHL listing had created impediments that “were fatal to the continuation of the Project” (para. 1302).

The Tribunal concluded that it could not “deduce from Romania’s request to put Roșia Montană on the [WHL] a politically motivated act to derail the Project” in breach of the applicable BITs (paras. 1303–1304, 1306–1307). This formulation is indeed peculiar, as it appears to privilege the absence of intent as a decisive factor in assessing the lawfulness of Romania’s decisions. While the existence of such intent may be relevant to how Gabriel framed its second alternative claim in relation to the principal claim (Romania’s political repudiation of the Project) or to the motivation behind the nomination of the Roșia Montană site to the WHL, it is unclear how it could influence an effects-based assessment of the listing itself, which, moreover, is ultimately decided by the Committee.<sup>37</sup>

The Tribunal also emphasized that, in any event, Gabriel had failed to establish a causal link between Romania’s actions following the rejection of the Draft Law and any injury to its investment, “whether at the time the site was inscribed as a UNESCO protected area or otherwise” (para. 1315).

Overall, the Tribunal’s rejection of Gabriel’s second alternative claim appears well-founded. However, its assessment of the legal effects arising from the nomination and listing of the property on the WHL warrants closer scrutiny, particularly in light of the international investment case law involving the WHC.

### Comment and assessment of the decision

#### *A brief review of international investment case law involving the WHC*

*Gabriel Resources v. Romania* is not the first case in which the inscription of a property on the WHL emerged as a point of contention in a dispute before an international investment tribunal.<sup>38</sup>

In *SPP v. Egypt*, the tribunal’s majority held that the inscription of the *Pyramids Plateau* on the WHL did not justify the measures taken by the Egyptian authorities to cancel SPP’s tourism project, nor did it exclude the investor’s right to compensation.<sup>39</sup> Nevertheless, it considered that any claim for *lucrum cessans* beyond the date of the site’s inscription was inadmissible, since from that moment SPP’s activities would have conflicted with the WHC.<sup>40</sup>

It has been argued that, to the extent that it rejects the possibility that states “set at naught the obligations they owe to investors by taking advantage of their ability to enter into subsequent, incompatible instruments,” this precedent excludes the application of *lex posterior* in resolving conflicts between investment and non-investment obligations.<sup>41</sup> Still,

<sup>35</sup> Required under Romanian law for the construction of mining facilities and the start of mining, *ibid.*, para. 20.

<sup>36</sup> These are administrative acts issued by the Romanian Ministry of Culture that remove the protections previously afforded to a site as an area of “archaeological value,” allowing it to be used for industrial activities, such as mining.

<sup>37</sup> See also Romania’s point in *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Respondent’s Reply to Claimants’ Response to the Tribunal’s Questions regarding Post-2013 Events of 19 September 2022, para. 85.

<sup>38</sup> On the “stormy relationship” between heritage protection and international investment law, see Vadi 2008.

<sup>39</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, para. 154.

<sup>40</sup> *Ibid.*, para. 191.

<sup>41</sup> Santacroce 2019, 154.

it is debatable whether the tribunal even considered this criterion, which is typically applied to conflicting treaties concluded by the same parties and addressing the same subject matter.<sup>42</sup> In this case there were not even two treaties involved, as there was no BIT applicable to the dispute.<sup>43</sup> Rather, the reasoning and tone of the award suggest that the WHC may have been treated as a *lex specialis*<sup>44</sup> – or even as some sort of “*lex praevalens*.”<sup>45</sup>

A different approach was later adopted in *Santa Elena v. Costa Rica*, where the host state’s argument that its international obligations regarding environmental protection and its intention to nominate the area for the WHL should influence the amount of compensation owed to the investor following expropriation was rejected by the arbitral tribunal.<sup>46</sup> The tribunal appears here to apply international investment law in isolation, denying the very possibility of conflict with norms aimed at protecting common interests, such as environmental and heritage preservation.<sup>47</sup>

In *Parkerings v. Lithuania*<sup>48</sup> and *Glamis Gold v. United States of America*,<sup>49</sup> the arbitral tribunals defined the actual scope of the foreign investors’ rights under the applicable BITs, (also) by taking into account the obligations incumbent upon the host states under the WHC. This approach supported the view that, *even if affecting the investment*, the host states’ conduct did not conflict with the investors’ rights. Thus, differently from *SPP*, the tribunals did not identify a normative conflict to be resolved. Nor did they apply international investment law in isolation, as seen in *Santa Elena*. Instead, they arguably relied on the principle of “systemic integration,”<sup>50</sup>

<sup>42</sup> See also Vadi 2023, 415–416.

<sup>43</sup> It is submitted that the principle of *lex posterior*, according to which “the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty” (Article 30(3) of the “Vienna Convention on the Law of Treaties” (Vienna, 23 May 1969) (VCLT)), applies primarily between treaties. The relationship between customary norms and treaty provisions appears more appropriately governed by the principle of *lex specialis*, with treaty rules typically prevailing over more general customary norms, see *Military and Paramilitary Activities in and against Nicaragua v. United States of America* (Merits) I.C.J. Reports 1986, p. 14, para. 274.

<sup>44</sup> According to the criterion of *lex specialis*, “instead of the (general) rule, one should apply the (specific) exception,” International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Mr. Martti Koskeniemi,” UN Doc. A/CN.4/L.682/Add.1 of 13 April 2006, 19. This criterion, however, is not easily applied to resolve conflicts between distinct regimes such as heritage protection and international investment law, as it is not clear which of the two should be regarded as “special,” Vadi 2023, 416.

<sup>45</sup> Meaning a norm to which the tribunal, in balancing public and private interests in deciding the dispute, gives precedence, even though such norm is not “a peremptory norm of general international law,” that is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character,” Article 53 of the VCLT. In this sense, the reasoning of the tribunal’s majority in *SPP* does not amount to an application of the principle of *lex superior*, which safeguards hierarchically superior norms.

<sup>46</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, para. 71.

<sup>47</sup> The tribunal expressly refused to “analyse the detailed evidence submitted regarding what Respondent refers to as its international legal obligation to preserve” the property, *ibid.*, para. 71, fn. 32.

<sup>48</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, paras. 392–396 (where the arbitral tribunal interpreted Lithuania’s conduct in light of its duty to protect a UNESCO site and found no breach of the investor’s right (also) by recognizing that compliance with heritage protection obligations justified differential treatment).

<sup>49</sup> *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award of 8 June 2009, para. 84 (where the arbitral tribunal acknowledged the relevance of the obligations deriving from the WHC to support its conclusion that a series of administrative measures taken by the state of California and at the federal level to preserve the sacred lands of the Quechan Indian tribe did not violate the rights of a Canadian mining company).

<sup>50</sup> According to which, “for the purpose of the interpretation of a treaty ... there shall be taken into account, together with the context, ... any relevant rules of international law applicable in the relations between the parties,” Article 31(3)(c) of the VCLT.

whereby “the BIT has to be construed in harmony with other rules of international law of which it forms part.”<sup>51</sup>

More recently, in *Gosling v. Mauritius*, the tribunal upheld Mauritius’s argument that its conduct – issuing two noncontractual letters of intent encouraging the investors to submit documentation for the construction of a resort in the Le Morne area while nominating the site for inclusion in the WHL and later imposing a complete construction ban – was not contradictory.<sup>52</sup> The majority found that, in light of this conduct, the claimants – which were aware of Mauritius’s objective to nominate the property for listing –<sup>53</sup> could not have had any legitimate expectations protected under the UK–Mauritius BIT.<sup>54</sup>

#### How does the decision in *Gabriel Resources v. Romania* fit within this line of case law?

In *SPP*, the project was formally terminated; in *Santa Elena*, the investment was expropriated; and in *Gosling* a total construction ban rendered the execution of the project impossible – all prior to the WHL listing. By contrast, in *Gabriel*, the Tribunal found, as said, that “the UNESCO Convention itself,” that is, the legal effects of the nomination and inscription of the Roșia Montană site on the WHL under the WHC, “does not create an obstacle to the Project.”<sup>55</sup>

As *Gabriel* failed to demonstrate how the listing of the property affected its investment, no need arose for the Tribunal to interpret the applicable BITs in a manner accommodating Romania’s WHC obligations. Therefore, it is unlikely that the Tribunal implicitly resorted to systemic integration to rule out any breaches to the claimants’ rights, as seen in *Parkerings* and *Glamis Gold*.

Instead, the Tribunal’s conclusion that the listing of the property on the WHL was not incompatible with the Project stemmed from the “minimalist” interpretation – following, to some extent, Romania’s position –<sup>56</sup> that the Tribunal gave of the obligations arising under the WHC, according to which state parties:

“Are required to make “reasonable endeavours” and enjoy broad discretion in adopting measures for the protection and conservation of cultural heritage. No other specific obligations of cultural protection are required of States when cultural and natural heritage is inscribed on the World Heritage List” (para. 1301).<sup>57</sup>

<sup>51</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 1200.

<sup>52</sup> *Thomas Gosling and Others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award of 18 February 2020, paras. 247–248.

<sup>53</sup> *Ibid.*, para. 249.

<sup>54</sup> *Ibid.*, paras. 236, 250.

<sup>55</sup> *Gabriel Resources v. Romania*, para. 1301.

<sup>56</sup> According to Romania, “the UNESCO Convention does not impose any specific legal obligations relating to listed sites.” Moreover, in an interpretation that appears difficult to reconcile with the object and purpose of the WHC, as well as with the principle of good faith, Romania contended that, “if RMGC secures the necessary permits and the social license for the Project, Romania may, if appropriate, take steps to reduce the scope of the UNESCO listed area or alternatively, it may request that the site be delisted,” *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Respondent’s Observations on New Evidence of 6 December 2021, paras. 12–20.

<sup>57</sup> The award refers only to Article 5 of the WHC in a footnote, omitting Articles 4, 6, and 7, which also establish due diligence obligations for state parties.

This narrow reading departs from previous decisions involving circumstances similar to the case at hand.<sup>58</sup> The Tribunal's approach arguably downplays the actual scope of state parties' obligations under the WHC, especially if one considers the Committee's practice of monitoring compliance and promoting implementation, which tends to interpret such obligations rather strictly,<sup>59</sup> at least with respect to the properties inscribed in the Lists system.<sup>60</sup>

In the present case, this interpretative approach implied that Romania could easily comply with the WHC while simultaneously respecting Gabriel's rights under the applicable BITs. This conclusion is reinforced by the Tribunal's reliance on the absence of "fatal impediments" to the development of Gabriel's investment. This "standard" reflects an intent to maintain a high threshold for identifying a normative conflict between the investors' rights and Romania's obligations arising from the nomination and subsequent inscription of the Roşia Montană property on the WHL.

Both elements – the "minimalist" interpretation and the "fatal impediments" threshold – favour and reflect a reliance on the principle of harmonization, according to which "when several norms bear on a single issue they should, to the extent possible, be interpreted so as giving rise to a single set of compatible obligations."<sup>61</sup> Resorting to this principle arguably goes beyond defining the scope of one or more specific standards of protection under a BIT by taking into account other rules of international law. It entails a broader effort to adjust the scope of application of potentially conflicting obligations incumbent upon the host state so that they are compatible in practice.<sup>62</sup> Such recourse is not new in international investment case law involving the reconciliation of investment and non-investment obligations.<sup>63</sup>

### Final assessment

The obligations under the WHC are generally construed as obligations of due diligence.<sup>64</sup> It is for state parties to "endeavour, in so far as possible, and as appropriate" to take the *domestic measures* (legal, technical, administrative, etc.) necessary for the protection and conservation of their heritage of outstanding universal value (OUV).<sup>65</sup>

In light of this, it was somewhat natural that Gabriel's second alternative claim focused primarily on whether the nomination and inscription of the Roşia Montană property on the WHL were intended to trigger legal effects *under Romanian law* that would render the advancement of the Project impossible, rather than on the potentially inhibitive legal

<sup>58</sup> In *Glamis Gold*, which also concerned the negative impact that the development of an open-pit gold mine would have had on a site of historical and cultural importance (the Quechan Indian Tribe's sacred lands, not even included on the WHL), the arbitral tribunal adopted a stronger "normative reading" of the obligations arising under the WHC (paras. 83–84).

<sup>59</sup> There have been several instances in which the Committee expressed concern over the authenticity and integrity of a WH property in the face of mining activities. Among others, reference may be made to the City of Potosí (uncontrolled mining operations), the Okapi Wildlife Reserve (illegal coltan mining activities), and the Aeolian Islands (pumice extraction).

<sup>60</sup> On the Committee's interpretation/application of Article 12 of the WHC, which in theory extends obligations for state parties beyond the properties in the Lists system, see Lanzoni 2024, 302–303.

<sup>61</sup> International Law Commission 2006, Conclusion 4, 178.

<sup>62</sup> Admittedly, the principles of harmonisation and systemic integration tend to overlap in practice.

<sup>63</sup> For instance, this approach was adopted by the arbitral tribunal in *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award of 13 November 2000, paras. 215, 221 to describe how to potentially reconcile Canada's obligations under the North American Free Trade Agreement and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal.

<sup>64</sup> Gestri 2021, 87.

<sup>65</sup> Article 5(d) of the WHC. See also Article 4.

consequences arising directly from the WHC itself,<sup>66</sup> although some limited references to this can be inferred from its pleadings.<sup>67</sup>

By shifting the analysis toward the compatibility between Romanian law and the investor's international rights, this approach obscures the emergence of potential conflicts between international norms.

Apart from the brief considerations reported in the preceding section – where the Tribunal excluded that “the UNESCO Convention itself” represented an obstacle to the Project – the Tribunal adhered to Gabriel's approach. This can be discerned in several passages, such as when it observed that “the UNESCO listing is not incompatible with the Roșia Montană License” (para. 1301), implying that the legal effects under consideration were those under Romanian law. Another example appears when the Tribunal, in support of its finding that Gabriel's rights had not been violated, stressed that “Respondent submits, and Claimants do not attempt to rebut, that, *under Romanian Law*, Claimants' rights under the Roșia Montană License would have to be taken into consideration prior to any approval of urban plans for the UNESCO site” (ibid.).

Nonetheless, while the legal effects of the listing of the Roșia Montană site on the WHL may, in principle, be compatible with the continuation of the Project under Romanian law, the same conclusion – contrary to the Tribunal's (and Romania's) “minimalist” reading – appears debatable in light of Romania's international obligations under the WHC, particularly as interpreted by the Committee.

It is indeed no coincidence that, at the time of inscription, the Committee placed the site on the List of World Heritage in Danger.<sup>68</sup> Although inclusion on the In Danger List does not *per se* necessarily mean that Romania is in breach of its obligations under the WHC, it does imply that the property's authenticity and/or integrity are under serious threat. The Committee recommended that Romania immediately halted all mining permits and adopt planning controls to prevent further mining at the site.<sup>69</sup> It also welcomed the potential positive impact of the Tribunal's dismissal of Gabriel's claim in this regard.<sup>70</sup>

During the proceedings, Romania, to support the argument that, “as a matter of international law,” it was not bound to take “any specific measures that would interfere with RMGC's mining rights,” pointed out that the Committee “does not have the power to impose any mandatory measures” and, therefore, that Romania was “not legally bound by [its] recommendations.”<sup>71</sup> Still, Romania is currently complying with the Committee's recommendations in relation to the property, including by refraining from renewing RMGC's mining license.<sup>72</sup> This circumstance illustrates both the substantive scope and actual normative effect of the obligations arising under the WHC as implemented by the Committee, as well as the difficulty of reconciling those obligations with the pursuit of a

<sup>66</sup> *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Claimants' Response to the Tribunal's Questions regarding Post-2013 Events of 14 June 2022, paras. 67, 76, Claimants' Observations on New Evidence of 29 October 2021, paras. 12–14, 23–34, Claimants' Response to Questions Presented by the Tribunal in PO27 of 11 May 2020, paras. 214–217, 222–223.

<sup>67</sup> Ibid., Claimants' Response to the Tribunal's Questions regarding Post-2013 Events of 14 June 2022, para. 70, Claimants' Observations on New Evidence of 29 October 2021, paras. 11, 32, 34.

<sup>68</sup> Ibid., para. 188.

<sup>69</sup> Decision 44COM8B.26 (2021), para. 6.

<sup>70</sup> Although the Committee appears here to mischaracterise the content of the award, as it did not concern “the annulment of mining permits in 2007,” see Decision 46COM7A.2 (2024), para. 3.

<sup>71</sup> *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Respondent's Observations on New Evidence of 6 December 2021, para. 16.

<sup>72</sup> The non-renewal was justified due to unspecified issues concerning the documentation submitted, without any reference to the Committee's recommendations, Press Release of 21 June 2024, [www.italaw.com/sites/default/files/case-documents/italaw181976.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw181976.pdf).

high-impact project such as Gabriel's. It also highlights potential inconsistencies between the Romanian law implementing the WHC and the WHC obligations as interpreted by the Committee, in the sense that, at least in the circumstances, the level and scope of protection offered by the former do not seem to align with what is required by the latter. This had been hinted at by the International Council on Monuments and Sites (ICOMOS), which operates as an advisory body to the Committee, in its evaluation of the nomination of the Roșia Montană site with regard to the existence of "reserved rights" held by mining license holders in relation to the property.<sup>73</sup>

Such tensions and potential inconsistencies are far from uncommon, as evidenced by the numerous instances in which state parties to the WHC clashed with the Committee over concerns that their economic activities – carried out in accordance with their domestic legislation, including that implementing WHC obligations – could harm the authenticity or integrity of sites included in the Lists system.<sup>74</sup> All three cases of deletion from the WHL (Arabian Oryx Sanctuary, Dresden Elbe Valley, Liverpool Maritime Mercantile City) involved the pursuit of economic activities conducted in accordance with the domestic regulations of the respective state parties.

It should be emphasized that the foregoing does not imply that the nomination and inscription of the *Roșia Montană Mining Landscape* on the WHL constituted a violation of Gabriel's rights. Indeed, even accepting Gabriel's argument that the "further layer of protection" deriving from the site's listing represented the "final legal nail in the coffin" for the advancement of the Project,<sup>75</sup> Gabriel still failed to explain how the resulting non-implementation of the Project would violate its rights under the applicable BITS.<sup>76</sup> Accordingly, the Tribunal's conclusion that, in this case, "the environmental, social, cultural and economic challenges facing a massive mining project ha[d] proven ... to be insurmountable in circumstances where blame cannot be fairly attributed to any one party or any one cause" (para. 1320), would arguably nonetheless stand.<sup>77</sup>

In conclusion, while the award represents a victory for Romania, the Tribunal's minimalist interpretation of the state parties' obligations under the WHC – at least with respect to properties inscribed in the Lists system – is not entirely convincing. Somewhat paradoxically, it may also contribute to the protection of the host states' heritage of OUV when threatened by the activities of foreign investors, insofar as it prevents the nomination and listing of a property on the WHL at the center of an investment from being treated as conflicting with the investors' rights, at least *under international law*.

<sup>73</sup> *Roșia Montană Mining Landscape (Romania)* – No 1552rev of 2021, 270. Romania insisted that "the nomination was made subject to RMGC's rights," *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Respondent's Observations on New Evidence of 6 December 2021, para. 12.

<sup>74</sup> For example: the approval for erecting a skyscraper complex facing the Cologne Cathedral, the initiation of a real estate project in the Historic Centre of Vienna, and the development of a 3-kilometer-long coastal beltway encircling the Historic District of Panama.

<sup>75</sup> *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Claimants' Observations on New Evidence of 29 October 2021, para. 21.

<sup>76</sup> As the Tribunal noted, Gabriel's presentation of its second alternative claim was "brief, if not incomplete," and "Claimants fail to analyse their case in terms of the treaty provisions allegedly violated, particularly with respect to expropriation and the FET provisions," *Gabriel Resources v. Romania*, para. 1224.

<sup>77</sup> Gabriel has filed an application for annulment of the award, arguing that the Tribunal's conclusions regarding the nomination and inscription of the site on the WHL amounted to a manifest excess of powers (for having disregarded the applicable Romanian legal framework); a serious departure from fundamental rules of procedure (for having failed to address the claim); and a failure to state reasons (when concluding that there is no impediment rendering the implementation of the Roșia Montană Project legally impossible under Romanian law). *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Application for Annulment of 5 July 2024, paras. 31, 121–124, 143, 156.

This ambiguity stresses the need for international investment agreements to include explicit limitations or exceptions to foreign investors' rights in order to safeguard the heritage of the host states.<sup>78</sup>

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<sup>78</sup> Vadi 2023, 415.

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