

GOLD-DIGGING WITH INVESTOR-STATE LAWSUITS

Canadian mining corporation sues to force Romanians to accept toxic Roșia Montană goldmine

Canadian mining company Gabriel Resources is using an investor-state lawsuit to push through its illegal toxic gold and silver mine in the historical Romanian village of Roșia Montană. The project has faced strong community resistance and is on hold after Romanian courts found that Gabriel had illegally obtained several permits required to operate the mine. Other permits have never been issued as the company failed to submit all necessary data. Gabriel Resources is now using a legal backdoor and suing Romania in an international investment tribunal, potentially demanding billions in taxpayer money as compensation because of the country's alleged 'failure' to issue the permits. The lawsuit foreshadows the massive claims which could hit the EU and its member states if trade deals such as the EU-Canada CETA get concluded and come into force.



Seven churches would be destroyed if the proposed goldmine was fully developed.
Photo: Sebastian Florian

Cover photo: Daniel Vrabioui

Over the past 16 years residents of the town of Roșia Montană in Romania have fought against a proposed multi-billion dollar mining project, which would have destroyed their home and the surrounding environment. Joined by neighbouring villagers, environmentalists, students, priests, academics, and citizens at large, “Save Roșia Montană!” became what was then the largest people’s movement since the country’s 1989 revolution. In a remarkable show of people power, they succeeded in stopping the mine. But the project’s majority owner, Canadian company Gabriel Resources, is now using a parallel legal system for foreign investors in order to demand Romanians pay two per cent of the entire value of their economy in compensation for lost profits. What’s more, the mining company’s legal bills are being financially backed by a Wall Street hedge fund in return for a claim of the spoils. To avoid facing these costs the Romanian Government may be forced to open the mine after all.

If approved, the Roșia Montană mine would become Europe’s largest open-pit gold and silver mine, with huge amounts of rock blasted away and processed. To extract the gold from the rock, 12-15 million kilograms of cyanide, a highly toxic chemical, would be used and released into the environment every year.¹ The European Parliament has called for a cyanide ban in mining, noting that “over the past 25 years more than 30 major accidents involving cyanide spills have occurred worldwide”, and that “there is no real guarantee that such accidents will not occur again”.²

The Roșia Montană mine development... poses a serious environmental threat to the whole region.

European Parliament in its 2004 resolution on Romania’s accession to the EU⁵

One of the worst environmental disasters in Europe since the Chernobyl nuclear catastrophe occurred in the year 2000 near Baia Mare, Romania, where a dam of a tailings pond containing cyanide-poisoned water from a goldmine broke. The contaminated water spilled over farmland and into rivers, killing tons of fish and poisoning drinking water supplies of 2.5 million people in Romania and its neighbouring countries.³ The waste dump, which Gabriel Resources has proposed for the Roșia Montană mine, would be 130 times larger than that of Baia Mare.⁴

AN ECOLOGICAL, SOCIAL, AND CULTURAL BOMB

Resistance to the Roșia Montană mine is not only based on the disastrous experience of the Baia Mare cyanide spill. Residents also fear the negative long-term health effects of cyanide leakage, noise and dust as well as the trauma resulting from the displacement of entire communities with their homes, public spaces, churches, cemeteries, and forests. Impact studies carried out in other mining areas show that while mines create temporary jobs, their long-term effects on the local economy and social dynamics of a community are often negative.⁶ Already today, Roșia Montană is torn between those who have opted to take money from Gabriel Resources and resettled in a nearby neighbourhood, and those who continue to fight the mine. As one villager put it: “They divided us. There was a point when brothers didn’t get along anymore, kids no more with their parents...”⁷

The destruction of the Roșia Montană community – with a history of well over 2,000 years – by resettling the population, demolishing houses (including historical monuments) and churches, as well as resettling cemeteries, is unacceptable and is reminiscent of a period everybody thinks is over.

Romanian Academy of Sciences¹⁰

Roşia Montană is also home to a number of 18th and 19th century houses and churches and to some of the world's most significant 2000-year-old gold mining galleries from the Roman Empire and possibly earlier.⁸ The entire community is on Romania's official list of historical monuments of national importance.⁹ This priceless ancient world treasure would be demolished if the mining project was fully developed.

POWER TO THE PEOPLE

In 2013 concerns over the Roşia Montană mine's disastrous impacts on the environment, local economy and cultural heritage ignited what were then the largest protests in Romania's post-communist history. For weeks tens of thousands took to the streets across the country and in the diaspora to oppose the mine and a law which the government of then-Prime Minister Victor Ponta had quietly introduced during the summer holidays. The law would have fast-tracked the project by granting its promoters extraordinary powers such as the right to swiftly force opposing locals from their homes, to skip certain permissions procedures and to automatically re-issue permits which had previously been cancelled by courts. This so called 'Roşia Montană law' was criticised as severely unconstitutional and a violation of both EU and international law.¹²

The protesters also demanded a national ban on cyanide mining and that the government nominated Roşia Montană as a UNESCO national heritage site. Observers celebrated this "Romanian autumn"¹³ movement for breaking the "suffocating civic apathy in Romania".¹⁴

The whole country was out to protest and support us, people from all the counties and cities took to the streets.

Niculina Jefelea, resident of Roşia Montană¹⁵

Abandoned village of Geamana near Roşia Montană, flooded by a toxic lake resulting from a copper mine. Will Roşia Montană soon look like this, too?
Photo: Sergiu Bacioiu

BOX 1:

The dirty figures of the Roşia Montană mine¹¹

- **4** mountains would be blasted away.
- **10 tons** of dynamite would be used every day to blow up the rock, threatening many buildings in the area.
- **3** beautiful villages would be destroyed.
- **975** houses and churches would be demolished, **42** of them considered national heritage sites.
- Around **2,000** people would be displaced.
- Over the 16 year long life of the mine, **240,000 tons** of toxic cyanide would be used – the equivalent of enough lethal doses for **600,000,000,000** adults!
- Around **130kg** of cyanide would be emitted into the air every single operating day.
- The mine would leave behind a waste lake of heavy metals and cyanide contaminated water the size of **420** football fields.
- The livelihood of **6,000** people living downstream from the waste lake would be at risk.





Across Romania, tens of thousands take to the streets in September 2013 to “Save Roșia Montană!”
Photo: Laura Muresan

Numerous eminent institutions also spoke out against the mine, including Romania’s highest cultural and scientific body, the Romanian Academy,¹⁶ the Bucharest Academy of Economic Studies,¹⁷ the Romanian Architects’ Association,¹⁸ and different churches.¹⁹ The International Finance Corporation, the World Bank’s private lending arm, also denied support to the controversial mine, citing “significant environmental and social issues connected with the project”.²⁰

As a result of massive public pressure against the mine, the Romanian Parliament finally rejected the Roșia Montană law.²¹ In December 2015, the Ministry of Culture classified the entire community of Roșia Montană as a historic site of national importance, confirming and expanding the protection status which had shielded the area from industrial activities, including mining, since the early 1990s.²² In early 2017, the Ministry officially submitted a request to the United Nations to declare Roșia Montană a UNESCO World Heritage site.²³ And in 2016, the Romanian Government tabled a proposal for a ten-year moratorium on the use of cyanide in mining to the Parliament.²⁴

That ordinary people could stop this massively lucrative mining project... counts as a monumental victory.

Researchers Shaazka Beyerle & Tina Olteanu in *Foreign Policy Magazine*²⁵

MURKY POLITICS, VIGILANT COURTS

Ultimately, the mining project was halted in Romanian courts. Environmental and community-based groups had challenged several procedures and permits of Romanian authorities to approve the mine proposal, such as permits related to urban planning, the environment and cultural heritage. In each case, the courts found that the permits had been obtained illegally – because of lack of compliance with environmental laws or evidence of administrative abuse by different authorities. A total of ten permits and plans, which Gabriel Resources needed to develop the mine, were irrevocably annulled by the courts.

From the very inception of the Roșia Montană mine proposal, there were signs of corrupt politics, deception, and poor management involving the company, governments and regulators overseeing Romania’s mining industry. In a recent article for *Foreign Policy*

Magazine, two researchers put it this way: “The Roşia Montană mining project demonstrated how vested interests (including the media, local officials, and even national politicians) who benefit from graft and abuse will try to circumvent rule of law and democratic processes.”²⁶



“Corporations don’t make laws!”

There has been a seemingly close alliance between Gold Corporation, politicians across the political spectrum, and mainstream media.

Alexandra Manea, legal consultant at the World Bank group²⁷

When in 1997 Gabriel Resources formed the Roşia Montană Gold Corporation (RMGG) joint venture with Romanian state-owned company Minvest, the deal was criticised for not meeting public disclosure requirements. In 1999 Minvest was granted a license for developing the goldmine – but without the required bidding process. The license still remains “one of the best-kept secrets of the Romanian government”, even though a report by the Romanian Parliament found no justification for its secrecy.²⁸ A list of public officials who profited financially from RMGG, sent to a special Parliamentary committee in 2013, also remains hidden from public view.²⁹

They use the same tactics as the Securitate [former secret police] used before 1989. Intimidation, deceit, family pressure, corruption. Most of all intimidation.

Eugen David, farmer from Roşia Montană & president of community-organisation Alburnus Maior³³

To delegitimise and oppress opposition to the Roşia Montană mine RMGG also pumped millions into lobby and media campaigns. In 2010 it paid a ‘research trip’ of 20 top journalists and media managers to a goldmine in New Zealand – reportedly spending €10,000 per head.³⁰ In 2013 the National Audiovisual Council of Romania (CNA) found that RMGG had spent so much in advertising to TV and radio stations, newspapers and the blogger-sphere that the regulator stepped in and banned the company’s adverts from all channels.³¹ According to residents RMGG also paid for protests in favour of the mine, busing people into town whenever politicians or the press appeared.³²

GABRIEL’S TRUE GOLDMINE: ISDS

Despite all the millions spent, democratic and legal opposition prevented Gabriel Resources from opening the mine. So the corporation is now trying to force its way via a legal backdoor. Since July 2015 the company has been suing Romania via investor-state dispute settlement (ISDS),³⁴ arguing that the country breached several obligations in its bilateral investment treaties with Canada and the UK because it ‘failed’ to issue the required permits. According to press statements, the company is seeking up to US\$4 billion in compensation for the gold and silver it was unable to extract in Roşia Montană³⁵ – about two per cent of the Romanian economy or half the country’s annual health budget. Forget precious metals: the lawsuit itself could become the company’s true goldmine.

Gabriel Resources claims absurd compensations although we have proven, by the large number of lawsuits won over the years, that the Roşia Montană mining project is illegal.

Stefania Simion, legal team of community-organisation Alburnus Maior³⁶

ISDS is included in thousands of international trade and investment agreements which span the globe. It allows companies to sue governments if actions by Parliaments, governments and courts allegedly violate the treaties’ far-reaching rights for foreign investors. These lawsuits bypass domestic courts and take place before an international tribunal of arbitrators, three private lawyers who have a financial stake in the system³⁷ and decide whether private

BOX 2:

Telling figures from the world of investor-state dispute settlement (ISDS)⁴¹

- Investor-state cases have mushroomed in the last two decades from a total of 3 known treaty cases in 1995 to an average of **49** new cases every year in the past 10 years. 2015 saw the absolute record high of **74** new cases.
- Globally the United Nations counted **767** investor-state disputes as of 1 January 2017, but as arbitrations can be kept confidential under certain circumstances, the actual figure could be much higher.
- In February 2017, **nearly a quarter** of all cases pending at the World Bank's International Centre for Settlement of Investment Disputes (ICSID), where most investor-state disputes are tried, related to oil, gas, and mining.⁴²
- **A quarter** of launched investor-state cases end in settlement, most likely involving payments or changes in laws and regulations to appease disgruntled investors.
- Award figures may reach up to 10 digits. The highest known damages to date, **US\$50 billion**, were ordered against Russia, to the former majority owners of oil and gas company Yukos.
- To date, the main financial beneficiaries have been large companies and rich individuals: **94.5 per cent** of the known awards went to companies with at least **US\$1 billion** in annual revenue or to individuals with over **US\$100 million** in net wealth.⁴³
- Legal costs average roughly **US\$4.5 million** for each side per case,⁴⁴ but can be much higher. In the case against Russia, Yukos' lawyers alone billed **US\$74 million** and the tribunal's three arbitrators took **US\$7.4 million** for themselves.⁴⁵ As legal costs are not always awarded to the winning party, states can end up footing the bill even if they don't lose.

Corporations are attempting to achieve by stealth – through secretly negotiated trade agreements – what they could not attain in an open political process.

Nobel Prize-winning economist Joseph Stiglitz⁴⁰

profits or public interests are more important. They often interpret the law in ways that are favourable to foreign corporations.³⁸ Across the world, investor-state tribunals have granted big business billions of dollars from taxpayers' pockets – often in compensation for public interest measures.³⁹

SECRET PROCEEDINGS, WALL STREET MONEY

As of the date of publication (February 2017), Gabriel Resources and the Romanian government have kept the legal proceedings of the investor dispute hidden from public view. Key documents remain secret and the first hearing took place in Washington without online broadcasting, making it impossible for citizens to follow the case. In ISDS cases, it is up to the disputing parties to allow for more transparency. According to lawyer Marcos Orellana who is advising Alburnus Maior,

a group of Roşia Montană residents who want to make their voice heard in the proceedings, "it is reasonable to conclude that... the Romanian government did not want its citizens to have access" to the case.⁴⁶

Both parties to the case are failing to conduct this arbitration in a transparent manner. This lack of transparency is incompatible with Romania's obligations to uphold its citizens rights of access to information.

Marcos Orellana, Center of International Environmental Law (CIEL)⁴⁷

Despite the secrecy, it has emerged that Gabriel's claim is financially backed by Wall Street hedge fund Tenor Capital Management. Tenor pays Gabriel's lawyers in exchange for getting a share of the compensation that the company might win.⁴⁸ The fund has already

profited handsomely from an ISDS case of another Canadian mining company, Crystallex: it will cash in 35 per cent of a whopping US\$1.4 billion ruling against Venezuela from 2016 – a return of over 1,000 per cent on the US\$36 million that Tenor had initially injected in the claim.⁴⁹ Such funding arrangements allow companies like Gabriel to draw out legal fights, driving up defence costs for states and increase the likelihood that governments give in to corporate demands.⁵⁰ Funders also help investors put together “a playbook” with a “plan of escalation”, including other lawsuits, PR campaigns and interventions in other deals the country wants to get done.⁵¹ In other words: elbow the country into a settlement.



Residents of Roșia Montană were the first to speak out against the proposed goldmine.
Photo: Laura Muresan

When such deep-pocketed financiers back corporate suits against cash-strapped governments, it increases the likelihood that the government will cave and roll back the policies challenged by the corporations.

Environmental group Sierra Club on Tenor's funding of Gabriel's lawsuit⁵²

IS THE GOVERNMENT CAVING TO GABRIEL'S DEMANDS?

And Gabriel Resources already seems to be getting its way. According to a September 2016 press release by the company reporting “progress” of its lawsuit against Romania, the country's fiscal authorities have “partially squashed” a previous demand, according to which Gabriel would have needed to repay certain tax rebates. The authorities have apparently also promised to “rerun” the underlying financial inspection, which Gabriel had considered “time consuming, expensive, and... abusive in nature”. The withdrawn tax claim amounted to approximately US\$ 8.6 million.⁵³

It is not uncommon that the filing or threat of an expensive investor-state lawsuit changes government behaviour, making policymakers realise they may have to pay to protect the environment or their citizens. Germany settled an investor-state lawsuit with Swedish energy company Vattenfall and as part of the settlement, relaxed the environmental restrictions for a coal-fired power-plant, in order to placate the company.⁵⁴ US mining giant Newmont Mining successfully used an investor-state lawsuit against Indonesia to get special exemptions from a proposed mining law – and withdrew the claim after the government had agreed to the company's wishes.⁵⁵

In considering whether to bring a claim... investors should bear in mind that around 30 to 40 per cent of investment disputes typically settle before a final award is issued. Commencing a claim can create leverage to help the investor reach a satisfactory result.

Law firm Dentons' “practical tips” for foreign investors⁵⁶

So there is reason to fear that Gabriel's multi billion dollar lawsuit might lead to a compromise, which would let the Roșia Montană mine go ahead, even though it is illegal under Romanian and EU law. According to the company's website, the project is “fully scoped and currently in the permitting phase”.⁵⁷ And according to a company presentation from February 2015, the “arbitration decision” could pave a “potential route in the project development”.⁵⁸ Since the filing of its



If Gabriel gets its way, this pretty landscape will become a moonscape.
Photo: Stephanie Danielle Roth

BOX 3:

How Gabriel Resources is using foreign investor rights in its legal battle against Romania

Gabriel Resources has justified its 2015 investor-state lawsuit against Romania with “the failure of successive Romanian governments to act on” the Roșia Montană mine.⁶¹ The company, which is headquartered in Canada, but owns its Romanian assets through a subsidiary in the tax haven of Jersey, claims that Romania has violated three foreign investor rights in its bilateral investment treaties with Canada and the UK: the right to be granted fair and equitable treatment, the protection against discrimination, and the protection against direct and indirect expropriation.⁶²

On **expropriation**, the company argues that several actions and inactions of Romania have “blocked and prevented implementation” of the mine, “effectively depriving Gabriel entirely of the value of its investments”.⁶³ It is seeking “full relief.... for the deprivation of its rights to develop the Project”.⁶⁴

According to the company, the **fair and equitable treatment** standard in Romania’s treaties “protects investors against a whole array of potential acts and omissions attributable to the host state” such as “failure to act in a consistent manner” and “breach of legitimate expectations of the investor”.⁶⁵ Gabriel has mentioned “persistent delays in permitting activities”,⁶⁶ Romania’s “successful application for Roșia Montană to be included on the UNESCO World Heritage tentative list”⁶⁷ and “politicizing” the permit process⁶⁸ as evidence of the unfair treatment which it had to endure. More generally, the company has complained that the Roșia Montană mine “is no longer the subject of routine, regulatory analysis by the competent administrative bodies charged with its assessment” but “has become hostage to conflicts between rival political factions”.⁶⁹

Gabriel also accuses Romania of **discrimination**,⁷⁰ but from the scant information that is publicly available, it is unclear what exactly the company is referring to.

Gabriel wants **compensation** for the “very substantial losses and damage”⁷² it has suffered. It states it has spent over US\$650 million to develop the Roșia Montană mine – on studies, explorations, equipment etc.⁷³ But the actual compensation claim is likely to be much higher and also cover value which Gabriel considers inherent in “the Exploitation License and associated property rights”.⁷⁴ In short: profits that the company would have made if it had mined gold and silver from Roșia Montană. According to press statements Gabriel is seeking up to US\$4 billion in compensation⁷⁵ – about two percent of the Romanian economy or half of the country’s annual health budget.

Gabriel will only need to win one of its arguments for the tribunal to order compensation from Romania. Awards can be enforced in local courts around the world.

We have a very strong case for up to
US\$4-billion.

Jonathan Henry, Chief Executive of Gabriel Resources⁷¹

investor-state case, Gabriel has repeatedly stressed that it “continues to seek engagement at a senior level with the Romanian Authorities in order to resolve the dispute amicably” and develop the mine.⁵⁹ But failing that, Gabriel could also just walk away with a vast amount of public money in compensation.

ISDS is so tilted and unpredictable, and the fines the arbitrators can impose are so catastrophically large, that bowing to a company’s demands, however extreme they may be, can look like the prudent choice.

Pulitzer Price winning journalist Chris Hamby⁶⁰



Thousands have taken to the streets against CETA and TTIP across Europe.
Photo: Global Justice Now

MULTIPLYING THE RISK OF ROȘIA MONTANĂ-STYLE ISDS CASES

Meanwhile the European Union is negotiating a number of trade deals which threaten to massively expand the ISDS regime, subjecting states to an unprecedented increase in liability. These include the proposed Transatlantic Trade and Investment Partnership or TTIP, which has been under negotiation with the US since 2013, and the Comprehensive Economic and Trade Agreement, or CETA with Canada, which is currently in the process of being ratified.

In light of the large stock and flows of transatlantic investment, introducing foreign investment protection in TTIP and CETA will potentially lead to a large number of investor-state claims and subsequently to high legal fees and billions of damages paid out of public budgets.

Statement by 101 law professors from 24 EU countries, opposing CETA's & TTIP's investor rights⁷⁶

TTIP alone would dwarf all of the existing treaties allowing for investor-state dispute settlement. In one fell swoop, it could multiply the number of US-based corporations that could challenge European environmental, health and other public safeguards in international tribunals by a factor of eleven. Four out of five US-based corporations operating in the EU (41,811) could use CETA to attack the EU and its member states if they structure their investment through Canadian subsidiaries.⁷⁷ CETA would also increase the risk of challenges in the mining, oil and gas sectors where Canadian investment stocks are significant. Canadian mining corporations are already engaged in a number of controversial natural resource projects across the EU.⁷⁸ No wonder, the industry is celebrating CETA as a “landmark” agreement with “major implications for miners”.⁷⁹

Probably the most significant development in the Comprehensive Economic and Trade Agreement (CETA) for miners on both sides of the Atlantic is the inclusion of an investor-state provision.

Mining publication *Mineweb*⁸⁰

SUING WITH CETA

The complaint which Gabriel Resources has submitted to Romania remains hidden from public view. But its public statements indicate how the company is using the foreign investor rights in Romania’s bilateral investment treaties to potentially demand billions of dollars in compensation (see box 3 on page 9). Under the new name “investment court system” or ICS, EU trade deals like CETA contain by and large the same far-reaching corporate privileges.⁸¹ For example:

- CETA protects a vast universe of “investment” ranging from trademarks to sovereign debt. It explicitly protects “an interest arising from” concessions or similar contracts “to search for, cultivate, extract or exploit natural resources” (article 8.1). In short: a license such as Gabriel’s.
- CETA includes broad and ill-defined investor privileges such as “fair and equitable treatment” (article 8.10), providing an open door for corporations to sue states.
- CETA explicitly protects an investor’s “legitimate expectation” (article 8.10). Gabriel’s claim that “numerous representations” from Romanian authorities created “reasonable expectations” that the mine would go ahead,⁸² which were subsequently frustrated, could well be made under CETA.
- Several of CETA’s limitations and qualifiers, such as an annex to allegedly shield public welfare measures from expropriation claims (Annex 8-A, a near copy of Annex B in the Canada-Romania investment treaty⁸³), are poorly defined and open to interpretation. The burden of proof lies with governments who have to show that their measures were “designed and applied” to achieve “legitimate” objectives and not “excessive”. Gabriel-style arguments that certain government actions were “unjustified”⁸⁴, “abusive and arbitrary”⁸⁵ could easily bypass these qualifiers.
- The possibility of having to compensate investors for lost expected future profits remains in CETA, allowing for demands such as Gabriel’s exorbitant US\$4 billion damages claim for an unbuilt mine.
- Under CETA, investor-state cases would be decided by a tribunal of three for-profit arbitrators. Unlike judges they would not have a fixed salary but be paid per case, with US\$3,000 per day (article 8.27.14, referring to the standard payroll in investment arbitration). In a one-sided system where only investors can sue, this creates a strong incentive to side with them – because as long as the system pays out for investors, more claims mean more money to the arbitrators.

We cannot know how a potential future Gabriel-style claim against the EU or an EU member state would be decided. But the investor rights in CETA and other EU trade deals clearly pave the way for these kind of multi-billion investor lawsuits against states.⁸⁶

BOX 4:

Canada’s dirty secret: mining industry abuses

Approximately three quarters of the world’s mining companies are headquartered in Canada, including the world’s largest gold miner, Barrick Gold Corporation. Canadian mining companies operate over 8000 sites in more than 100 countries.⁸⁸ While Latin America and Africa are their top destinations, 63 Canadian mining companies operated in the EU in 2015, owning significant assets of over Can \$1 billion in Portugal, Spain, and Finland.⁸⁹

The Canadian trade regime has expanded aggressively in recent years, giving Canadian miners greater flexibility to expand into new and emerging markets.

Mining Association of Canada⁹³

Serious human rights abuses at various Canadian-owned mining sites have been widespread, well-documented, and systemic: rape, killings, beatings, forced displacement, death threats, environmental degradation that destroys people’s livelihoods – there are few forms of violence that have not been recorded. According to Human Rights Watch, “the collective human rights impact of Canadian mining firms is enormous”.⁹⁰

Canadian mining corporations are also among the worst in the world when it comes to using investor-state lawsuits to bully governments into environmental backtrack: 62 per cent of the 55 ISDS cases that involved a Canadian investor until 2015 were in the resource or energy sectors. And 58 per cent of the cases challenged resource management or environmental protection measures.⁹¹

The Canadian government has been accused of supporting and financing mining companies involved in human rights abuses – rather than holding them accountable. Consistent with the previous administration, the Trudeau Government has so far failed to monitor, let alone regulate, the human rights conduct of Canadian companies operating abroad, according to Human Rights Watch.⁹²



Residents of Roșia Montană continue to resist: “this property is not for sale”.

Photo: Stephanie Danielle Roth

What is most normal to expect is that if you go to a country to make money, that you subject yourself to the courts of that country. But investors want to have their own court and that is a frontal attack on the concept of the rule of law.

Alfred de Zayas, UN Expert on the Promotion of a Democratic and Equitable International Order⁸⁷

SAVE ROȘIA MONTANĂ!

But CETA and other EU trade deals are facing massive opposition all over Europe – and the deals’ proposed far-reaching privileges for foreign investors are at the heart of the public outcry. A record 3.5 million people have signed a petition against CETA and TTIP.⁹⁴ Trade unions, consumer, environmental and public health groups and small and medium enterprises (SMEs) also reject the agreements.⁹⁵ More than 2,100 local and regional governments have declared themselves TTIP/CETA free zones, often in cross-party resolutions.⁹⁶ Lawyers and several associations of judges have come out against the special rights for foreign investors in both agreements.⁹⁷

Gabriel is effectively trying to make Romanians pay for having pushed their legislators to do the right thing.

Claudia Ciobanu, Romanian journalist⁹⁸

Unsurprisingly, given its experience with Gabriel’s investor dispute, the ‘Save Roșia Montană!’ campaign has been very active in the fight against TTIP and CETA, campaigning for a halt to the TTIP negotiations and against the CETA ratification in Romania and other EU member states. But the campaign also needs international support to put pressure on Gabriel Resources, to stay away from Roșia Montană once and for all, and on the Romanian Government to vigorously defend and not settle Gabriel’s outrageous investor lawsuit, and to fully inform its citizens about what’s going on in the proceedings. Romania needs to protect its people and the environment from destructive mining practices. And it needs to move towards environmental justice that starts at the community level – which may well not include mining at all.

But in order to do so it must be able to protect itself from predatory lawsuits from corporations; as do other states also threatened by ISDS claims.

It would be good if the company just left. We’re going to fight to the last breath. We won’t leave, no matter what happens.

Jozsefina Vajeda, resident of Rosia Montana⁹⁹

STAY INFORMED AND IN TOUCH VIA
WWW.ROSIAMONTANA.ORG

ENDNOTES

- 1 Salvati Rosia Montana, 'All about Rosia Montana mining project'.
- 2 European Parliament, 'European Parliament resolution of 5 May 2010 on a general ban on the use of cyanide mining technologies in the European Union'.
- 3 UNEP/ OCHA, 'The Cyanide Spill at Baia Mare, Romania. Before, During and After', 2000.
- 4 McCrath, Stephen, 'Rosia Montana and Dirty Politics', *Huffington Post*, 21 October 2013.
- 5 European Parliament, 'European Parliament resolution on Romania's progress towards accession (COM(2004)0657 – C6-0151/2004 – 2004/2184(INI))', 16 December 2004.
- 6 See, for example: University of Queensland Centre for Social Responsibility in Mining, 'Social Impacts of Closure of Newmont Waihi Gold operations', October 2009.
- 7 Interviewed for the video 'In Defence of Life' by the Gaia Foundation, 17:47.
- 8 Rosia Montana in Patrimoniul Mondial, UNESCO, 'Outstanding Universal Value – criteria'.
- 9 Rosia Montana in Patrimoniul Mondial, UNESCO, 'Protection and management'.
- 10 'Statement by the Romanian Academy regarding the Rosia Montana mine proposal', 27 February 2006.
- 11 Salvati Rosia Montana, 'All about Rosia Montana mining project'.
- 12 Harosa, Liviu Marius and others: 'Analysis of the draft law to permit the Rosia Montana mining proposal', October 2013.
- 13 Besliu, Raluca, 'The Arab Spring, the Turkish Summer, The Romanian Autumn': Romanian protests as a model of peaceful demonstration', *CNN iReport*, 6 September 2013.
- 14 Victoria Stoiciu, an analyst at the Friedrich Ebert Foundation, quoted in: 'Mass protests in Romania join 'Balkans-wide wave'', *Hurriyet Daily News*, 15 September 2013.
- 15 Interviewed for the video 'In Defence of Life', 22:16.
- 16 'Statement by the Romanian Academy regarding the Rosia Montana mine proposal', 27 February 2006.
- 17 Academia de Studii Economice, 'Adevărul despre proiectul Roşia Montană', 14 June 2010.
- 18 Uniunea Arhitecților din Romania, 'Pozitia UAR privind proiectul Rosia Montana Gold Corporation', 30 November 2010.
- 19 'News Release. Romania's Latest Gabriel Resource Rebel: The Orthodox Church', 12 November 2003.
- 20 'Romanian Gold-Mine Loan Blocked by World Bank Chief', *Wall Street Journal*, 11 October 2002.
- 21 Romanian Parliament, 'Proiect de Lege privind unele măsuri aferente exploataării minereurilor auro-argentifere din perimetrul Roşia Montană şi stimularea şi facilitarea dezvoltării activităţilor miniere în România'.
- 22 Ministerul Culturii, 'Lista Monumentelor 2015'.
- 23 Popescu, Daniel, 'Ministrul Alexandrescu: Am înscris Roşia Montană în Lista indicativă pentru Patrimoniul Mondial', *Agerpres*, 5 February 2016.
- 24 Mining Watch Romania, 'Romanian Government proposes a ban on cyanide use in mining for the next 10 years', 27 December 2016.
- 25 BeyerleShaazka/ Oteanu, Tina: 'How Romanian People Power Took On Mining and Corruption', *Foreign Policy Magazine*, November 2016.
- 26 Ibid.
- 27 Manea, Alexandra, 'The Gold War of Romania: Sustainable Development or Irreversible Damage?', *Sustainable Development Law & Policy* 14:3, 2014, 23-34, p. 28.
- 28 Ibid., p. 25f.
- 29 McCrath, Stephen, 'Rosia Montana and Dirty Politics', *Huffington Post*, 21 October 2013.
- 30 Ibid.
- 31 'CNA a decis sa intrerupa campania publicitara TV pentru Rosia Montana', *EcoMagazin*, 15 October 2013.
- 32 McCrath, Stephen, 'Rosia Montana and Dirty Politics', *Huffington Post*, 21 October 2013.
- 33 Interviewed for the movie 'Rosia Montana, town on the brink' by Fabian Daub, 12:30.
- 34 Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (ICSID Case No. ARB/15/31).
- 35 Quoted in: Koven, Peter, 'Gabriel Resources CEO threatens legal action of Romania rejects Rosia Montana gold mine', *Financial Post*, 11 September 2013.
- 36 Quoted in: Press release by Alburnus Maior, 'Gabriel Resources starts to lose everything at Rosia Montana: the environmental permit for the industrial area's urban plans was suspended', 21 September 2015.
- 37 Corporate Europe Observatory/Transnational Institute, 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom', 2012, chapter 4.
- 38 See: Van Harten, Gus, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', *Osgoode Hall Law Journal* 50.1 (2012), 211-268; Van Harten, Gus, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration', *Osgoode Hall Law Journal* 53.2 (2016), 540-586.
- 39 For a selection of cases, see website of the ISDS platform.
- 40 Stiglitz, Joseph: 'Developing countries are right to resist restrictive trade agreements', *The Guardian*, 8 November 2013.
- 41 UNCTAD, 'World Investment Report 2016', p. 104ff; see also UNCTAD's Investment Dispute Settlement Navigator (accessed on 6 February 2017).

- 42 50 of the 216 cases, which were pending on 6 February related to the oil, gas and mining sector. See the ICSID website.
- 43 Gus Van Harten, 'Who was awarded compensation in past ISDS awards?', 2015.
- 44 Matthew Hodgson, 'Counting the Costs of Investment Treaty Arbitration', *Global Arbitration Review*, 24 March 2014.
- 45 Sebastian Perry, 'The cost of Yukos', *Global Arbitration Review*, 29 July 2014.
- 46 Press release by CIEL and Alburnus Maior, 'Romania's government agrees to a complete lack of transparency in the Rosia Montana arbitration case', 6 October 2016.
- 47 Ibid.
- 48 Gabriel Resources, 'Press release. Closing of Private Placement', 14 July 2016.
- 49 Strickler, Andrew, '\$1.4B Arbitration Windfall A Beacon For Private Funders', *Law360*, 5 May 2016.
- 50 Corporate Europe Observatory/Transnational Institute, 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom', 2012, chapter 5.
- 51 Lawyer and consultant Peter Griffin, quoted in: Hamby, Chris, 'How Big Banks Bled A Tiny Island Nation', *Buzzfeed News investigation*, 31 August 2016.
- 52 Keenlyside, Paul, 'When You Thought Trade Deals Could Not Get Any Worse – Enter Wall Street', 16 December 2016.
- 53 Gabriel Resources, 'Press Release. Corporate Update – Romania Reverses its Prior VAT Assessment/ Arbitration Progress', 27 September 2016.
- 54 For a comprehensive recap on the case, see: Nathalie Bernasconi, 'Background paper on Vattenfall v. Germany arbitration', IISD.
- 55 Transnational Institute, 'The case of Newmont Mining vs Indonesia', 12 November 2014.
- 56 Liz Tout, Michelle Bradfield and Lucille De Silva, 'The latest renewables claim: Abengoa's subsidiary launches investment treaty proceedings against Spain', *Lexology*, 29 November 2013.
- 57 Gabriel Resources, 'Projects: Rosia Montana', accessed on 6 February 2017.
- 58 Gabriel Resources, 'The Rosia Montana Gold & Silver Project: A Project for Romania', presentation at the BMO Capital Markets 24th Global Metals & Mining Conference, February 2015.
- 59 Gabriel Resources, 'Third Quarter Report 2015', p.3.
- 60 Hamby, Chris, 'The Secret Threat That Makes Corporations More Powerful Than Countries', *Buzzfeed News investigation*, 31 August 2016.
- 61 Gabriel Resources, 'Annual Information form of Gabriel Resources LTD for the year ended December 31, 2015', 29 March 2016, p.9.
- 62 Ibid., p.5.
- 63 Gabriel Resources, 'Press release. Gabriel files for international arbitration against Romania', 21 July 2015, p.3.
- 64 Ibid.
- 65 Ibid., p.2.
- 66 Gabriel Resources, 'Press release. Gabriel Seeks Amicable Resolution of Mining Dispute', 20 January 2015.
- 67 Gabriel Resources, 'Press Release. Corporate Update – Romania Reverses its Prior VAT Assessment/ Arbitration Progress', 27 September 2016, p.2.
- 68 Gabriel Resources, 'Annual Information form of Gabriel Resources LTD for the year ended December 31, 2015', 29 March 2016, p.8.
- 69 Gabriel Resources, 'Press release. Gabriel Seeks Amicable Resolution of Mining Dispute', 20 January 2015.
- 70 Gabriel Resources, 'Annual Information form of Gabriel Resources LTD for the year ended December 31, 2015', 29 March 2016, p.5.
- 71 Ibid.
- 72 Ibid., p.10.
- 73 Ibid., p. 7, 10.
- 74 Ibid., p.10.
- 75 Quoted in: Reguly, Eric, 'Gabriel threatens Romania with billion-dollar lawsuit', *The Globe and Mail*, 11 September 2013.
- 76 'Legal statement on investment protection in TTIP and CETA', 17 October 2016.
- 77 Public Citizen, 'Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP', p.1.
- 78 Corporate Europe Observatory and others, 'https://corporateeurope.org/sites/default/files/ceta-trading_away_democracy-2016en.pdf', September 2016, p.7f.
- 79 Keen, Kip, 'Landmark Canada/EU trade agreement could have major implications for miners', 23 October 2013.
- 80 Ibid.
- 81 For an analysis of the EU approach to investment protection, see, for example: Corporate Europe Observatory and others, 'The Zombie ISDS. Rebranded as ICS, rights of corporations to sue states refuse to die', February 2016; Gus van Harten, 'Key flaws in the European Commission's proposal for foreign investor protection in TTIP', Osgoode Legal Studies Research Paper No. 16/2016.
- 82 Gabriel Resources, 'Annual Information form of Gabriel Resources LTD for the year ended December 31, 2015', 29 March 2016, p.8.
- 83 'Agreement between the Government of Romania and the Government of Canada for the Promotion and Reciprocal Protection of Investments', 2009.

- 84 Gabriel Resources, 'Annual Information form of Gabriel Resources LTD for the year ended December 31, 2015', 29 March 2016, p.8.
- 85 Gabriel Resources, 'Press release. 2016 Third Quarter Report', 8 November 2016, p.2.
- 86 See also: Transnational Institute and others, 'Investment Court System put to the test. New EU proposal will perpetuate investors' attacks on health and environment', April 2016.
- 87 Quoted in: van der Wolf, Marthe, 'Secret Arbitration System Affecting Romanian Community', *VOA News*, 6 October 2013.
- 88 MiningWatch Canada, <http://miningwatch.ca/>.
- 89 National Resources Canada, 'Canadian Mining Assets (CMA) by Country and Region, 2014 and 2015'.
- 90 Human Rights Watch, 'World Report 2017. Events of 2016. Canada', 2017.
- 91 Canadian Centre for Policy Alternatives, 'A Losing Proposition. The Failure of Canadian ISDS Policy at Home and Abroad', August 2015, p.6.
- 92 Human Rights Watch, 'World Report 2017. Events of 2016. Canada', 2017.
- 93 The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry', February 2016, p.75.
- 94 'Interactive map of the European Initiative against TTIP and CETA', accessed 7 February 2017.
- 95 See, for example: 'Civil society groups call on European governments to reject the CETA agreement', 22 September 2016; 'Joint Canadian Trade Union statement on CETA', 15 September 2016; Projekt MORE, 'The Comprehensive Economic and Trade Agreement between the EU and Canada: threatening to do more harm than good to SMEs', July 2016.
- 96 'TTIP free zones Europe', accessed 7 February 2017.
- 97 See, for example: 'Legal statement on investment protection in TTIP and CETA', 17 October 2016; 'Statement from the European Association of Judges on the proposal from the European Commission on a New Investment Court System', November 2015.
- 98 Ciobanu, Claudia, 'Rosia Montana, an omen for TTIP', *Euractiv*, 27 July 2015.
- 99 Interviewed for the movie 'Rosia Montana, town on the brink' by Fabian Daub, 1:07:18.
- 100 Roth, Stephanie Danielle and Maier, Jürgen, 'Silence is Golden', 28 November 2016.

This is the story of villagers who decided to break free from the curse of gold and how their example inspired an entire country to come to their support. But the story is far from over – despite binding court sentences, evidence of corruption, expert assessments and unprecedented public opposition including from those whose property rights are guaranteed by the country's constitution.

Activists Stephanie Danielle Roth & Jürgen Maier¹⁰⁰



Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy making. CEO works in close alliance with public interest groups and social movements in and outside of Europe to develop alternatives to the dominance of corporate power.
www.corporateeurope.org



The Independent Center for the Development of Environmental Resource (CIDRM)
CIDRM was founded by a group of communication, legal, design and biodiversity specialists with the aim of assisting grassroots campaigns from Romania to oppose large scale and destructive industrial projects.



Mining Watch Romania

Mining Watch Romania is a network of organizations joining local communities in their efforts to stop destructive and large mine proposals. Mining Watch monitors and analyses planned mining projects and carries out advocacy work to influence decision makers to ensure that local communities can voice their concerns in shaping their own future.
www.miningwatch.ro



Alburnus Maior Association

Alburnus Maior is an NGO based in Roșia Montană. It was founded in 2000 by local property owners from Roșia Montană and from Bucium, a neighboring commune. They oppose selling their properties – lands and houses – to make way for the mining project. The national and international campaign builds around the local opposition and opposes the mine proposal on environmental, social and economic grounds. It also opposes the destruction of a unique cultural heritage.
www.rosiamontana.org