SUING TO FORCE THROUGH A TOXIC GOLDMINE

GABRIEL RESOURCES VS ROMANIA

For nearly 20 years residents of Roşia Montană in Romania have fought against a multi-billion dollar gold mining project, which would have destroyed their homes and the surrounding environment. In a remarkable show of people power, they appealed to the Romanian courts, and succeeded in stopping the mine. Now the project's majority owner, Canadian company Gabriel Resources, is suing Romania in an investment arbitration tribunal, seeking US$5.7 billion in compensation for lost profits — nearly three per cent of the size of the entire Romanian economy.

If approved, Roşia Montană would become Europe's largest open-pit gold mine. To extract gold from the rock, tens of thousands of tonnes of cyanide, a highly toxic chemical, would be used and released into the environment every year. Many residents would have to be forcibly evicted from their homes. Three villages and nearly 1,000 houses and churches would be destroyed – many of them national heritage sites. Roşia Montană is also home to unique mining galleries from the ancient Roman Empire. This priceless world treasure, too, would be demolished if the mining project was fully developed. In their place, the mine would leave behind a waste lake the size of 420 football fields.[1]

> **We will not leave our homes and our lands to make room for your cyanide and enrichment.**
>
> **EUGEN DAVID**
> **FARMER FROM ROŞIA MONTANĂ AND PRESIDENT OF COMMUNITY ORGANISATION ALBURNUS MAIOR**[2]

Right from the beginning the proposed mine faced strong community resistance. Throughout the 2000s, local residents and environmental organisations organised protests and gathered signatures against the mine, the use of cyanide, and the potential forced relocations. When they were joined by students, priests, academics, numerous Romanian institutions and citizens at large, "Save Roşia Montană!" became the largest people's movement since Romania's 1989 revolution. For several weeks in 2013 tens of thousands of people took to the streets across the country to oppose the mine and the so called Roşia Montană law, which would have fast-tracked the project, but was rejected because of the massive public pressure. The movement gave hope to a whole generation of Romanians.[3]

Corporate harassment, vigilant courts

And the mining company? It tried to silence the opposition through intimidating phone calls, threats and physical violence. It also put extreme pressure on residents to sell their houses and created an atmosphere of anxiety in the village.[4] According to Eugen David, a farmer from Roşia Montană, the company used "the same tactics as the Securitate", Romania's notorious secret police under the Communist dictatorship: "Intimidation, deceit, family pressure, corruption. Most of all intimidation."[5]

> **The population here would like to stay and I am under the impression that a foreign company is hindering the functioning of local democracy.**
>
> **MARIE-ANNE ISLER BÉGUIN**
> **FORMER MEMBER OF THE EUROPEAN PARLIAMENT (MEP)**[6]

But in spite of all this, the local community didn't back down. They went to court and challenged the procedures and permits of the Romanian authorities. In each case, the courts found that the permits issued to the company had been obtained illegally – noting the lack of compliance with environmental laws or evidence of administrative abuses. So, ultimately, the toxic mine was halted by the Romanian courts. Till this day, the mining company has still not obtained all necessary permits – simply because it failed to comply with domestic and EU law.[7]

Gabriel's true goldmine: ISDS

The project's majority owner is now trying to force through the gold mine via a legal backdoor, which could render the Romanian court rulings meaningless. Since 2015 the Canadian mining company Gabriel Resources has been suing Romania via investor-state dispute settlement (ISDS).[8] It argues that the country breached obligations in its bilateral investment treaties with Canada and the UK – because it 'failed' to grant the required permits. Amongst other things, the company has listed the Romanian government's application to turn Roşia Montană into a UNESCO World Heritage Site and the fact that it sought Parliamentary approval for the mine, as evidence of the unfair treatment which it had to endure.[9]

According to a May 2019 press release, Gabriel Resources is claiming US$5.7 billion in compensation.[10] That figure is equivalent to 2.7 per cent of Romania's gross domestic product (GDP). It is also eight times more than the money the company allegedly spent on developing the mine – on exploration, equipment etc (US$650 million).[11] Forget precious metals: the lawsuit itself could become the company's true goldmine.

> Gabriel is effectively trying to make Romanians pay for having pushed their legislators to do the right thing.
>
> **CLAUDIA CIOBANU**
> **ROMANIAN JOURNALIST**[12]

Wall Street money funding corporate lawsuits

Gabriel Resources' claim is financially backed by Wall Street hedge fund Tenor Capital Management. Tenor pays the company's lawyers in exchange for getting a share of the money if it wins.[13] Such funding deals allow companies to draw out legal fights, driving up defence costs for states and increasing the likelihood that governments give in to corporate demands to avoid excessive legal costs and the risk of losing (see box 12 on page 64 for more information on such funding arrangements).[14]

There is reason to fear that Gabriel Resources' multibillion lawsuit might force the Romanian government to let the mine be developed in order to settle the case, for example, by changing laws and issuing new permits. A first warning sign was the government's decision to withdraw its application for Roşia Montană to become a UNESCO World Heritage Site in 2018.[15] Another worrying indicator is a proposed new mining law from early 2019, which would enable new permits.[16] If the mine was not approved, the risk is that Gabriel Resources could still just walk away with a vast amount of public money in compensation.

> Romanians opposed the Roşia Montană mine and our courts declared it illegal. But through a parallel legal system a corporation could now force us to open the mine or pay billions.
>
> **ROXANA PENCEA BRĂDĂȚAN**
> **MINING WATCH ROMANIA**[17]

Communities demanding that their voices be heard

In November 2018, the Roşia Montană community, together with environmental groups opposing the mine, wrote to the three private lawyers who will decide Gabriel Resources' ISDS case. They explained how the company had violated its obligations under Romanian, EU and international environmental and human rights law, and should therefore not be protected through special rights for foreign investors.[18] As one of the groups' lawyers put it: "Gabriel Resources has never had the right to mine in Roşia Montană. The company should not use investment arbitration to circumvent the legitimate enforcement of domestic law."[19] The arbitrators accepted the letter, but refused to engage with attached testimonies of residents, effectively excluding the affected community from the proceedings.[20]

BOX

3

When ISDS clashes with EU law: the absurd legal saga of the Micula Brothers vs Romania

The Micula case is another eyebrow-raising investor-state lawsuit against Romania. It demonstrates how investment treaties and arbitration can conflict with national and EU law.

In the late 1990s, Ioan and Viorel Micula (wealthy Romanian brothers who also have Swedish citizenship) were granted tax and other incentives for food and drink firms they operated in Romania. In 2005 these incentives were abolished, as part of reforms which were required for Romania to join the EU. The Miculas challenged the decision and sued Romania via its bilateral investment treaty with Sweden in 2006.[21] While the European Commission intervened in the case, confirming that it had required Romania to end the incentives to comply with EU state aid rules, in 2013 an investment tribunal ruled that a state cannot shun liability towards investors by relying on EU law. The arbitrators ordered Romania to pay €178 million in damages to the Micula Brothers.[22]

The Miculas have been trying to enforce the award in different countries ever since, leaving Romania caught in between the instructions and laws of the EU Institutions and wealthy, determined and litigious investors.

The full amount of costs which Romania has paid on the legal saga is unknown. Defending the investment arbitration proceedings alone has already cost Romanian taxpayers €16.7 million.[24]

> **This case illustrates the risk that a Member State can be successfully sued by a company within ISDS for merely bringing its legislation or policies in line with EU legislation.**
>
> **MONIQUE GOYENS / EUROPEAN CONSUMER ORGANISATION BEUC**[23]

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Photo credits

p13 (foreground left) Laura Muresan, (background) Sebastian Florian
p14 (top) Laura Muresan, (bottom) Kovács László Attila
p15 Cristian Sutu

This case is part of the report *Red carpet courts: 10 stories of how the rich and powerful hijacked justice*, by Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International, June 2019. **www.10isdsstories.org**