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INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES

**GABRIEL RESOURCES LTD.  
AND GABRIEL RESOURCES (JERSEY) LTD.**

*Claimants*

v.

**ROMANIA**

*Respondent*

ICSID CASE No. ARB/15/31

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**CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES**

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June 16, 2016

**WHITE & CASE<sup>LLP</sup>**

*Counsel for Claimants*

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# CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES

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**I. INTRODUCTION AND NATURE OF THE REQUEST**

1. In accordance with Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, Gabriel Resources Ltd. ("Gabriel Canada") and Gabriel Resources (Jersey) Ltd. ("Gabriel Jersey") (together "Gabriel" or the "Claimants") hereby seek an order of provisional measures from the Tribunal as detailed below.

2. Gabriel respectfully requests that the Tribunal recommend that Romania ("Romania" or "Respondent") consent to permit Claimants unrestricted access to and use of the documents and information that are in the custody of the project company Roşia Montană Gold Corporation S.A. ("RMGC") but that are subject to obligations of confidentiality, including obligations arising from the Romanian laws governing classified information (the "Confidential and Classified Documents").

3. The Confidential and Classified Documents are centrally relevant to the claims in this arbitration. Although Romania has provided several of Claimants' representatives access to the Confidential and Classified Documents from time to time as has been needed for project development, Claimants do not have access to and the right to use the documents for this arbitration. In view of the legal and contractual restrictions that apply under Romanian law to the Confidential and Classified Documents, Claimants need Respondent's consent to provide unrestricted access to the documents and the right to use them for this arbitration. Although Claimants raised this matter approximately one-year ago in the Request for Arbitration and again in communications with Respondent's counsel, Respondent to date has not engaged with Claimants on this matter. As Claimants cannot meaningfully prepare and present their claims without the right to access and use the Confidential and Classified Documents, addressing this matter now, at the outset of these proceedings, is critically necessary to preserve Claimants' right to present their case, to ensure that the arbitration proceeds in a fair and orderly manner, and generally to preserve the integrity of these proceedings. Claimants are prepared to enter into an appropriate confidentiality agreement to ensure that the Confidential and Classified Documents are treated confidentially, if Respondent so wishes, and that Claimants' representatives, counsel, experts, witnesses, and consultants are permitted unrestricted access to and use of the Confidential and Classified Documents for purposes of this arbitration.<sup>1</sup>

4. RMGC is owned by Gabriel (80.69 %) and by the Romanian State through Minvest Roşia Montană S.A. (together with its legal predecessors, "Minvest") (19.31 %).<sup>2</sup> RMGC has been engaged principally in the development of the Roşia Montană gold and silver project (the "Roşia Montană Project").

5. The rights at issue in this arbitration stem from mining licenses held by RMGC. In 1998, the Romanian National Agency for Mineral Resources ("NAMR") issued an exploitation license for the Roşia Montană Project to Minvest as the titleholder and to RMGC as

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<sup>1</sup> As discussed further below, the legal restrictions that apply to the Confidential and Classified Documents apply equally to Respondent's representatives, counsel, experts, witnesses, and consultants as well as to the members of the Tribunal and the ICSID Secretariat.

<sup>2</sup> See Request for Arbitration dated July 21, 2015 ¶ 3.

an affiliated company.<sup>3</sup> The license was approved by Government Decision No. 458/1999 as License No. 47/1999 and entered into effect as from June 21, 1999 (the “Roșia Montană License”). In October 2000, with the approval of NAMR, Minvest transferred title to the Roșia Montană License to RMGC. Since then, RMGC has remained the titleholder of the Roșia Montană License. In addition, by NAMR Order No. 60/1999, in force as from May 20, 1999, NAMR granted an exploration license No. 218/1999 to Minvest as the titleholder and to RMGC as an affiliated company (the “Bucium License”) for the project in the Bucium area located in the vicinity of Roșia Montană (the “Bucium Project”). In August 1999, with NAMR’s approval, Minvest transferred title to the Bucium License to RMGC.<sup>4</sup>

6. As detailed in the Request for Arbitration, Gabriel’s claims arise out of acts and omissions of Romania that violated the protections afforded by the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the “Canada BIT”) and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Protection of Investments (the “UK BIT”) and that have caused losses to Gabriel, including due to the effective expropriation of Gabriel’s sizable investments in Romania. Those investments include, *inter alia*, the rights derived from the Roșia Montană and Bucium Licenses, as well as from the other authorizations and permits issued to RMGC.

7. As referenced in the Request for Arbitration<sup>5</sup> and detailed below, Romanian law provides that all information relating to the State’s mineral resources is subject to obligations of confidentiality and for various categories of such information the law establishes a strict, State-imposed document classification regime that restricts access to and use of the information.

8. Many of the core documents relating to the Roșia Montană and Bucium Projects including, *inter alia*, the Roșia Montană and Bucium Licenses themselves, the correspondence between RMGC and NAMR concerning the development of the Roșia Montană and Bucium Projects and RMGC’s fulfillment of obligations under the licenses, as well as the technical

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<sup>3</sup> See Request for Arbitration dated July 21, 2015 ¶ 18.

<sup>4</sup> See Request for Arbitration dated July 21, 2015 ¶ 21.

<sup>5</sup> See Request for Arbitration dated July 21, 2015 ¶¶ 62-63.

studies and reports prepared in connection with project development, are subject to restrictions of confidentiality that make them effectively inaccessible to Gabriel for purposes of this arbitration. As a matter of Romanian law, RMGC is obligated to maintain all such documents in its custody in accordance with stringent requirements established in a custody agreement with NAMR and, for the majority of such documents, also in accordance with the laws governing the protection of information classified by NAMR as “work secret.”

9. The Confidential and Classified Documents thus are subject to numerous restrictions established in Romanian law on their storage, handling, access, reproduction, transmission, and transport. Among these, access to information classified as work secret is restricted to individuals who receive access authorization following a background check and approval by the Romanian Intelligence Service; documents containing information classified as work secret must be maintained, at all times, in a designated secure location, even for those individuals with authorized access; there are numerous restrictive limitations on the reproduction, transmission, and transport of work secret classified information that prohibit the ordinary transmission by courier, post or email of such material; the Romanian Intelligence Service oversees compliance with the restrictions regarding access and use of such work secret classified information, and violators are subject under Romanian law to serious civil and criminal penalties; and NAMR must give its consent for RMGC to provide access to any of the Confidential and Classified Documents to any third party, including Gabriel.

10. Although RMGC has custody of all of the documents at issue, it maintains those documents subject to legal and contractual restrictions that prohibit it from providing access to Gabriel’s representatives, counsel, experts, witnesses, and consultants for purposes of preparing Gabriel’s claims or for use in this arbitration. Thus, to date, Gabriel has been impaired in its ability to prepare its case.

11. As Claimants understand, the legal restrictions that apply to the Confidential and Classified Documents apply also to Respondent’s representatives, counsel, experts, witnesses, and consultants. Claimants therefore had hoped that Respondent would engage with Claimants on this issue and agree to an approach that would permit both Claimants and Respondent access to the Confidential and Classified Documents for purposes of this arbitration on terms that are

workable in this forum. For that reason, this issue was referenced in the Request for Arbitration.<sup>6</sup>

12. Despite several requests by Claimants in communications between counsel, however, Respondent has failed to engage on this issue. As Gabriel's ability to prepare and present its case is centrally dependent upon access and use of the Confidential and Classified Documents, the Tribunal's intervention is needed.

## II. THE TRIBUNAL'S POWER TO RECOMMEND PROVISIONAL MEASURES

13. The Tribunal's authority to recommend<sup>7</sup> provisional measures is set forth in Article 47 of the ICSID Convention:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

ICSID Arbitration Rule 39 elaborates in relevant part as follows:

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be

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<sup>6</sup> See Request for Arbitration dated July 21, 2015 ¶ 63.

<sup>7</sup> It is well established that a tribunal "recommendation" made pursuant to Article 47 of the ICSID Convention is binding in nature and is equivalent to an "order." See, e.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures dated Aug. 17, 2007 (CL-9) ¶ 58 ("The Tribunal wishes to make clear for the avoidance of doubt that, although Article 47 of the ICSID Convention uses the word 'recommend', the Tribunal is, in fact, empowered to order provisional measures.") (emphasis in original); *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures dated Nov. 19, 2007 (CL-5) ¶ 52 ("The distinction [between the words "recommend" and "order"], however, is more apparent than it is real, since Rule 39 (1) itself does, in its Spanish version, mention[] the '*dictación*' [ordering] of the provisional measures, which demonstrates that, as far as the Rules are concerned, such words are used interchangeably. Even disregarding such semantic discussion, a teleological interpretation of both provisions leads to the conclusion that the provisional measures recommended are necessarily binding. The Tribunal may only order such measures if their adoption is necessary to preserve the rights of the parties and guarantee that the award will fulfill its purpose of providing effective judicial protection. Such goals may only be reached if the measures are binding, and they share the exact same binding nature as the final arbitral award. Therefore, it is the Tribunal's conclusion that the word '*recommend*' is equal in value to the word '*order*.'"); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 dated July 1, 2003 (CL-12) ¶ 4 ("It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal, and the parties are under a legal obligation to comply with them."); *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated Oct. 28, 1999 (CL-6) ¶ 9 (same).

recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

14. It is well established that a tribunal may rule on an application for provisional measures as long as there is a *prima facie* basis for its jurisdiction.<sup>8</sup> In the ICSID context, some tribunals have concluded that requirement is met by virtue of the Secretary-General's registration of the request for arbitration pursuant to Article 36(3) of the ICSID Convention.<sup>9</sup> Other tribunals

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<sup>8</sup> Ibrahim F.I. Shihata and Antonio R. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV.-F.I.L.J. 299, 326 (1999) (CL-21) (noting "the well-settled position in international adjudication, that an international tribunal may decide on provisional measures prior to establishing its jurisdiction over the dispute if it appears that there is, *prima facie*, a basis for asserting such jurisdiction.").

<sup>9</sup> See ICSID Convention Art. 36(3) ("The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre."); Charles N. Brower and Ronald E.M. Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings*, 6 ICSID REV.-F.I.L.J. 431, 454-455 (1991) (CL-15) ("The travaux préparatoires of the ICSID Convention seem to support the view that the Secretary-General's decision to register a dispute thus provides a sufficient determination of jurisdiction upon which to base a recommendation of provisional measures."); *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Request for Provisional Measures dated Sept. 25, 2001 (CL-14) ¶ 8, French and Spanish original, English translation in 6 ICSID REP. 373, 379 (2004) ("According to the dominant and generally accepted opinion, the International Court [of Justice] is satisfied with a '*prima facie test*', and considers itself to have jurisdiction to indicate provisional measures if its lack of jurisdiction is not manifest and if the texts invoked by the claimant to base the Court's jurisdiction '*prima facie*' confer[] it on the Court. But no matter what the case, the question is posed a little differently in the context of ICSID arbitration since each claim is subjected to a preliminary examination (or '*screening*') for the Centre's jurisdiction by the Secretary-General pursuant to Article 36 of the ICSID Convention. Under Article 36, the Secretary-General is required to register a claimant's request for proceedings to be instituted 'unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre', a criterion which to a certain extent resembles, despite the different situations, the '*prima facie*' test of the International Court of Justice."). See also CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 771-772 (2d. ed. 2009) (CL-20) ("The case law of the ICJ has adopted the approach that a *prima facie* showing of jurisdiction is sufficient to establish its power to indicate provisional measures. ... The ICSID Convention has a special feature which is helpful in this regard. Art. 36(3) of the Convention provides that the Secretary-General shall register a request for arbitration unless he finds that the dispute is manifestly outside the jurisdiction of the Centre. Therefore, unlike in other procedures, such as in State-to-State cases brought before the ICJ, there is a preliminary examination of jurisdiction before the case even reaches the tribunal. Although the tribunal is, of course, in no way bound by this preliminary examination of jurisdiction, it provides a useful basis for its power to recommend provisional measures.").



have considered there should be a demonstration beyond registration that there is a *prima facie* basis upon which the tribunal's jurisdiction may be established.<sup>10</sup>

15. In the present case, the *prima facie* basis for the Tribunal's jurisdiction is as set forth in the Request for Arbitration,<sup>11</sup> which the Secretary-General registered on July 30, 2015.<sup>12</sup>

16. Provisional measures are warranted when necessary to preserve a protected right of a party. The right to be protected may include a party's substantive and procedural right to present its case. As the tribunal in *Plama v. Bulgaria* observed:

The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out.<sup>13</sup>

As detailed below, Claimants' right to present their case in this arbitration depends centrally upon their ability to access and use the Confidential and Classified Documents. The requested measures are necessary to ensure Claimants enjoy that fundamental right.

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<sup>10</sup> E.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures dated Aug. 17, 2007 (CL-9) ¶ 55 (requiring *prima facie* basis upon which jurisdiction may be established); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶¶ 108-112 (requiring a *prima facie* basis for jurisdiction).

<sup>11</sup> Request for Arbitration dated July 21, 2015 § VI.

<sup>12</sup> Letter from ICSID to the Parties dated July 30, 2015 attaching Notice of Registration dated July 30, 2015.

<sup>13</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order dated Sept. 6, 2005 (CL-10) ¶ 40.

### **III. CIRCUMSTANCES JUSTIFYING THE REQUEST**

#### **A. Claimants Do Not Have Access to Evidence That Is Centrally Relevant to Their Claims**

##### **1. Romanian Law Restricts Access to and Use of All Information Relating to Romanian Mineral Resources**

17. Under Romanian law, mineral resources located within Romania are public property and “belong to the Romanian State.”<sup>14</sup> Legal or natural persons may be authorized to conduct mining activities in accordance with a license issued by NAMR.<sup>15</sup>

18. The law also provides that all data and information relating to Romanian mineral resources is the property of the State as well:

All data and information, regardless of their manner of storage, concerning the Romanian mineral resources, as referred to under Article 1, shall be placed at the disposal of the competent authority [NAMR] and belong to the Romanian State; the competent authority [NAMR] keeps record of, and manages such information at the country level, in compliance with this law.<sup>16</sup>

The data and information relating to the State’s mineral resources is administered by NAMR, the competent authority.<sup>17</sup>

19. The law gives license holders the right to use data and information obtained in order to exercise the rights and fulfill the obligations of their license:

The titleholders of licenses or permits for mining activities may use the data and information obtained only in their own interest, for the entire duration of the mining activities.<sup>18</sup>

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<sup>14</sup> Law No. 85/2003 (“Mining Law”) (Exh. C-11) Art. 1.

<sup>15</sup> See Mining Law (Exh. C-11) Arts. 3(4), 3(8), 3(34), 4.

<sup>16</sup> Mining Law (Exh. C-11) Art. 5(1).

<sup>17</sup> See Mining Law (Exh. C-11) Arts. 3(13), 55(1)(a), (c).

<sup>18</sup> Mining Law (Exh. C-11) Art. 5(2).

The law provides, however, that license holders must keep the data and information confidential and that third parties may be provided access only with the agreement of NAMR. According to the Mining Law:

Data and information regarding the mineral resources of Romania may be transmitted to other interested parties only with the consent of the competent authority, in compliance to the norms for the application of this law.<sup>19</sup>

The competent authority [NAMR], the titleholders of licenses/permits as well as other public authorities and institutions with attributions in the application of this law are obligated to maintain confidentiality on the data and information submitted by the license/permit titleholders of which they become aware in the exercise of their functions, throughout the duration of the mining activities, in compliance with the law.<sup>20</sup>

20. These provisions are elaborated in the implementing norms for applying the Mining Law.<sup>21</sup> The Norms to the Mining Law provide that all data and information regarding mineral resources are to be characterized as either classified information or information of public interest.<sup>22</sup> All data and information regarding mineral resources, however, even if characterized as information of public interest, remains subject to legal restriction and administration by NAMR,<sup>23</sup> must be separately archived by the license holder,<sup>24</sup> and may be accessed by third parties only based upon written application to NAMR and subject to a confidentiality agreement.<sup>25</sup>

21. License holders that obtain data and information regarding mineral resources must enter into a custody agreement with NAMR setting forth the terms of preservation, storage and protection of such information.<sup>26</sup> Where the data and information has been designated as

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<sup>19</sup> Mining Law (Exh. C-11) Art. 5(3).

<sup>20</sup> Mining Law (Exh. C-11) Art. 5(4).

<sup>21</sup> Norms for the Implementation of the Mining Law No. 85/2003 (annexed to Government Decision No. 1208/2003) (“Norms to the Mining Law”) (Exh. C-12) Arts. 2-15.

<sup>22</sup> See Norms to the Mining Law (Exh. C-12) Arts. 3, 6.

<sup>23</sup> See Norms to the Mining Law (Exh. C-12) Art. 8.

<sup>24</sup> See Norms to the Mining Law (Exh. C-12) Arts. 10(1), 12(1)

<sup>25</sup> See Norms to the Mining Law (Exh. C-12) Arts. 11, 15.

<sup>26</sup> Norms to the Mining Law (Exh. C-12) Art. 12(1).

classified, the custody agreement also must comply with all applicable legal requirements applicable to such classified information.<sup>27</sup>

22. Information designated as classified is subject to the provisions of the Classified Information Law<sup>28</sup> and the Standards for the Protection of Classified Information.<sup>29</sup> There are two categories of classified information: information designated as “state secret” and information designated as “work secret.”<sup>30</sup> Information designated as “state secret” implicates the national security interests of the State, whereas information designated as “work secret” does not, but rather relates to information the designating entity considers necessary to be kept confidential.<sup>31</sup> Information classified as work secret is subject to the Norms on the Protection of Work Secret Information.<sup>32</sup> Each relevant public institution indicates which information within its competence is to be classified as work secret.<sup>33</sup>

23. Information obtained by a license holder in a category that has been classified as work secret must be maintained in a “security structure” in accordance with the laws and regulations in effect governing the protection of work secret classified information,<sup>34</sup> subject to

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<sup>27</sup> *Id.*

<sup>28</sup> See Law No. 182/2002 on the Protection of Classified Information (“Classified Information Law”) (Exh. C-24).

<sup>29</sup> See National Standards for the Protection of Classified Information (annexed to Government Decision No. 585/2002) (Exh. C-14) (“Standards for the Protection of Classified Information”).

<sup>30</sup> See Classified Information Law (Exh. C-24) Art. 15(c). “Work secret” is translated from the Romanian “secrete de serviciu.”

<sup>31</sup> See Classified Information Law (Exh. C-24) Art. 15(d) (defining state secret information as information relating to national security); Art. 15(e) (defining work secret information as information the disclosure of which could be detrimental to a public or private entity). See also Standards for the Protection of Classified Information Law (Exh. C-14) Art. 8 (work secret information should include information that should be known only by those persons who need it in fulfilling their duties).

<sup>32</sup> See Government Decision No. 781/2002 (Exh. C-10) (“Norms on the Protection of Work Secret Information”).

<sup>33</sup> See Classified Information Law (Exh. C-24) Art. 32 (directing public entities to designate information within their competence that is to be classified as work secret). See also Standards for the Protection of Classified Information (Exh. C-14) Art. 7.

<sup>34</sup> Norms to the Mining Law (Exh. C-12) Art. 9.

the control of the Romanian Intelligence Service.<sup>35</sup> The law imposes criminal liability for the negligent handling of information classified as work secret.<sup>36</sup>

24. Among the restrictions applicable to information and documents classified as work secret are the following:

- Secure storage and handling: Holders of classified information must maintain a secure location for the storage and handling of the information, must establish a plan for the prevention of information leakage, to be approved by the Romanian Intelligence Service, and must designate a security officer to implement and oversee such program.<sup>37</sup> Special rules apply to the electronic storage of such information.<sup>38</sup>
- Limited access: Access to work secret information may be granted only to individuals who receive access authorization, subject to the “need to know” principle and subject to the approval of the Romanian Intelligence Service.<sup>39</sup> Individuals applying for access must pass a background check, and those granted access must be trained on the content of the regulations on the protection of classified information, a registry of their access must be maintained, and they must enter into confidentiality agreements in a form established in the law.<sup>40</sup> Those who receive access to work secret information cannot retain documents containing such information except subject to the same restrictions on its storage and handling.<sup>41</sup>
- Limitations on reproduction: Documents containing work secret information must be specially labelled on each page,<sup>42</sup> and are subject to restrictions regarding reproduction,

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<sup>35</sup> Standards for the Protection of Classified Information (Exh. C-14) Art. 191.

<sup>36</sup> Norms on the Protection of Work Secret Information (Exh. C-10) Art. 12 (“[f]ailure to observe the provisions of this Decision entails criminal, civil, contraventional or disciplinary liability, as the case may be, in compliance with the law”); *id.*, Arts. 13-14. *See also* Classified Information Law (Exh. C-24) Art. 31(4) (“Negligence in handling work secret information results in criminal liability, according to the law.”); Standards for the Protection of Classified Information (Exh. C-14) Art. 193(2).

<sup>37</sup> *See* Standards for the Protection of Classified Information (Exh. C-14) Arts. 29-31, 40; Norms on the Protection of Work Secret Information (Exh. C-10) Art. 4.

<sup>38</sup> *See* Standards for the Protection of Classified Information (Exh. C-14) Arts. 236 *et seq.*; Norms on the Protection of Work Secret Information (Exh. C-10) Art. 4.

<sup>39</sup> *See* Standards for the Protection of Classified Information (Exh. C-14) Arts. 33, 191, 339.

<sup>40</sup> *See* Standards for the Protection of Classified Information (Exh. C-14) Arts. 26, 35; Norms on the Protection of Work Secret Information (Exh. C-10) Arts. 6-7.

<sup>41</sup> *See* Standards for the Protection of Classified Information (Exh. C-14) Arts. 38, 60.

<sup>42</sup> *See, e.g.*, Standards for the Protection of Classified Information (Exh. C-14) Arts. 45-48, 61, 67-68. *See also* Norms on the Protection of Work Secret Information (Exh. C-10) Arts. 2-3.

including that reproduction of documents can only be done by those with access authorization and only in “specially designated rooms,” recording the number of copies made on the original.<sup>43</sup> Drafting documents containing work secret information also is subject to restrictions, including as to labeling, storage, reproduction, and access.<sup>44</sup>

- Restrictions on transportation: Documents containing work secret information may be transported within Romania only by a “specialized unit of the Romanian Intelligence Service” per norms established in law, and abroad only “by diplomatic pouch, and by diplomatic couriers selected and trained by the Foreign Intelligence Service.”<sup>45</sup>

## **2. RMGC Retains Custody of the Confidential and Classified Documents Subject to Legal and Contractual Restrictions**

25. As a holder of mining licenses engaged in the exploration and development of mining properties, RMGC acquired a significant volume of data and information regarding mineral resources that it maintains subject to the legal restrictions described above as either confidential or work secret classified information.

26. In accordance with the provisions described above, NAMR issued Order No. 202/2003 designating as work secret classified various categories of information, including numerous categories of information relating to mining activities, as listed in an appendix to NAMR Order No. 202/2003.<sup>46</sup> NAMR has amended Order No. 202/2003 from time to time, updating the categories of information designated as work secret, most recently in 2013.<sup>47</sup> In view of the categories of information thus designated by NAMR, much of the data and information in RMGC’s custody regarding the Roșia Montană and Bucium Projects and their mineral resources is designated as work secret classified.

27. As required by the laws and regulations described above, RMGC archives separately all the documents in its custody that contain data and information regarding mineral

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<sup>43</sup> *E.g.*, Standards for the Protection of Classified Information (Exh. C-14) Arts. 66-69, 71-72.

<sup>44</sup> *E.g.*, Standards for the Protection of Classified Information (Exh. C-14) Arts. 41, 56.

<sup>45</sup> Standards for the Protection of Classified Information (Exh. C-14) Art. 81; Norms on the Protection of Work Secret Information (Exh. C-10) Art. 10; Government Decision No. 1349/2002 on the Collection, Transportation, Distribution and Protection of Classified Correspondence on Romanian Territory (Exh. C-25).

<sup>46</sup> NAMR Order No. 202/2003 (Exh. C-13).

<sup>47</sup> NAMR Order No. 2/2013 (Exh. C-18).

resources, and maintains a registry of those documents containing information classified as work secret.<sup>48</sup> The RMGC Classified Information Registry, which was last updated as of March 25, 2015, lists 785 documents.<sup>49</sup>

28. Also as required by the laws and regulations described above, NAMR concluded agreements with RMGC pursuant to which RMGC maintains custody of the Confidential and Classified Documents and is obligated to safeguard their confidential treatment.<sup>50</sup> RMGC also is legally bound to follow a program for the prevention of leakage of classified information agreed with NAMR and endorsed by the Romanian Intelligence Service, which also addresses the handling of the work secret classified documents in RMGC's possession.<sup>51</sup>

### **3. The Confidential and Classified Documents Are Centrally Relevant to the Claims in this Case**

29. The Confidential and Classified Documents include documents centrally relevant to the claims presented in this arbitration. They include, but are not limited to:

- The Roșia Montană License, the Bucium License, and related documents;<sup>52</sup>

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<sup>48</sup> Inventory List of "Classified Information" Documents Kept in the Security Structure on the Premises of RMGC as of Mar. 25, 2015 ("RMGC Classified Information Registry") (Exh. C-20). The registry itself is not a classified document. Norms on the Protection of Work Secret Information (Exh. C-10) Art. 3; Standards for the Protection of Classified Information (Exh. C-14) Arts. 7, 8

<sup>49</sup> RMGC Classified Information Registry (Exh. C-20).

<sup>50</sup> The referenced agreements with NAMR are classified work secret. RMGC Classified Information Registry (Exh. C-20), Item No. 5 (Registration No. S-18, Contract for the preservation, storage or protection of geological data and information dated 5 May 2005), Item No. 6 (Registration No. S-19, Confidentiality and Use Agreement for data and information recorded 16 May 2005), Item No. 36 (Registration No. S-49, Confidentiality Agreement recorded 22 Dec. 2005). The parties concluded two addenda extending the term of the Contract on the maintenance, storage and security of geological data and information dated 5 May 2005. *See* Addendum No. 2 to Contract No. 27 dated May 8, 2015 (Exh. C-21), Art. I. Addendum No. 2 does not fall within a category of work secret classified information.

<sup>51</sup> *See* RMGC Classified Information Registry (Exh. C-20) , Item No. 16 (Registration No. S-29, The program for the prevention of leaks of classified information of RMGC SA), Item Nos. 18-19 (Registration Nos. S-31, S-32, RIS ALBA Military Unit 0583 Endorsement of program for the prevention of leaks of classified information and Program for the prevention of leaks of information held by S.C. RMGC S.A.).

<sup>52</sup> *See, e.g.*, RMGC Classified Information Registry (Exh. C-20) , Item No. 20 (Registration No. S-33, Delivery-receipt minutes of the license documentations for Roșia Montană project), Item Nos. 27-29 (Registration Nos. S-40 – S-42, Roșia Montană Concession License, Bucium Exploitation License and Bucium Concession License), Item No. 111 (Registration No. S-125, Concession License for exploitation), Item No. 137 (Registration No. S-151, Addendum to Exploitation License No. 47 / 1999 Roșia Montană), Item No. 560

- The annual and semi-annual reports required by law on the status, activities, and progress relating to the Roșia Montană Project;<sup>53</sup>
- Technical studies, updates, and other development plans prepared for the Roșia Montană Project, as well as associated documentary support;<sup>54</sup>
- Project reports and supporting documents produced in connection with the drilling and assaying work done and the mineral resource and mineral reserve estimates for the Roșia Montană Project;<sup>55</sup>
- Correspondence referring to classified information and relating to the Roșia Montană Project, including most of the correspondence between RMGC and NAMR;<sup>56</sup>

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(Registration No. S-574, Exploration license for Bucium perimeter May 2004 - May 2007), Item No. 722 (Registration No. S-736, Addendum No. 7 to Roșia Montană Concession License No. 47/1999 for exploration), Item No. 758 (Registration No. S-5/2012, Documentation on the Delineation of Roșia Montană license 2012).

<sup>53</sup> See, e.g., RMGC Classified Information Registry (Exh. C-20), Item Nos. 599-609 (Registration Nos. S-613 – S-623, Roșia Montană Annual Report 1998 – vols. I-XI), Item Nos. 610-612 (Registration Nos. S-624 – S-626, Roșia Montană Concession License No. 47/1999 for exploitation Annual geological report 1999 – vols. I-III), Item No. 614 (Registration No. S-628, Roșia Montană Project – Annual Report – 2001), Item No. 615 (Registration No. S-629, Roșia Montană exploitation license – Annual Report – 2001), Item No. 616 (Registration No. S-630, Roșia Montană Exploitation License No. 47/1999 Annual Report 2003), Item No. 617 (Registration No. S-631, Roșia Montană Concession License No. 47/1999 for exploitation Annual geological report 2003), Item No. 618 (Registration No. S-632, Roșia Montană Concession License No. 47/1999 for exploitation Geological report Semester I 2003), Item No. 619 (Registration No. S-633, Roșia Montană Concession License No. 47/1999 for exploitation Second Quarter geological report 2003), Item No. 620 (Registration No. S-634, Roșia Montană Concession License No. 47/1999 for exploitation Geological report Semester I 2004), Item No. 621 (Registration No. S-635, Roșia Montană Exploitation License no. 47/1999 Six Monthly Report July 2004), Item No. 622 (Registration No. S-636, Roșia Montană Concession License No. 47/1999 for exploitation Annual geological report 2002), Item No. 623 (Registration No. S-637, Roșia Montană Exploitation License No. 47/1999 Annual Report 2002), Item No. 784 (Registration No. S-1/2015, Roșia Montană – Exploitation License No. 47/1999 Report for Semester II 2014 for the period 1 July – 31 December 2014).

<sup>54</sup> See, e.g., RMGC Classified Information Registry (Exh. C-20), Item No. 485 (Registration No. S-499, Feasibility Study for the exploitation of the gold and silver deposit Roșia Montană, Alba County – Feasibility Study\_Ipromin\_2006), Item No. 486 (Registration No. S-500, Environmental rehabilitation plan and technical project in Roșia Montană perimeter, Alba County – Feasibility Study\_Ipromin\_2006), Item No. 487 (Registration No. S-501, Exploitation development plan in Roșia Montană perimeter, Alba County – Feasibility Study\_Ipromin\_2006), Item No. 488 (Registration No. S-502, Technical documentation for delineating and substantiating Roșia Montană exploitation perimeter, Alba County – Feasibility Study\_Ipromin\_2006), Item No. 489 (Registration No. S-503, Graphic annexes – 153 boards – Feasibility Study\_Ipromin\_2006).

<sup>55</sup> See, e.g., RMGC Classified Information Registry (Exh. C-20), Item Nos. 451-462 (Registration Nos. S-465 – S-476, Documentation on the reassessment of gold and silver resources and reserves in Roșia Montană perimeter – vols. I-II), Item Nos. 463-464 (Registration Nos. S-477, S-478, Documentation on the reassessment of gold and silver resources and reserves in Roșia Montană perimeter Graphic annexes – Graphic annexes Files I & II).



- Maps of the project area;<sup>57</sup> and
- Reports and notes prepared following various on-site inspections to verify compliance with legal requirements and activities relating to the Roșia Montană Project.<sup>58</sup>

These documents constitute the core documents that define the rights and obligations of RMGC as license holder and detail the implementation and fulfillment of RMGC's project development obligations.

30. The Confidential and Classified Documents are thus essential to any evaluation of Gabriel's claims in this arbitration as they detail the legal basis for and many of the steps taken toward development of the Roșia Montană and Bucium Projects.

#### **4. Claimants Do Not Have Access to the Confidential and Classified Documents for Purposes of This Arbitration**

31. Although RMGC, as license holder, has had access to and use of the Confidential and Classified Documents for purposes of fulfilling its rights and obligations under its licenses, including for developing the Roșia Montană and Bucium Projects, Claimants are in a different position. Although Claimants are RMGC's direct and indirect majority shareholders, they are not party to the custody agreements pursuant to which RMGC maintains custody of the Confidential and Classified Documents and thus Claimants do not retain custody of those

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<sup>56</sup> See, e.g., RMGC Classified Information Registry (Exh. C-20), Item No. 48 (Registration No. S-61, Letter from NAMR on the registration of mineral resources), Item No. 83 (Registration No. S-96, Letter from RMGC requesting an endorsement on the "2004 Exploitation Program Roșia Montană"), Item No. 142 (Registration No. S-156, Letter from NAMR enclosing 2 copies of Endorsement No. 2-S-07/01.1998 regarding geological research works through drills for Cetate Roșia Montană Perimeter), Item No. 168 (Registration No. S-182, Letter from Counsel-Engineer Horea Stoia to NAMR Alba Iulia Territorial Inspection Compartment for Mineral Resources (CITRM)), Item No. 780 (Registration No. S-9/2014, Letter from RMGC regarding the drawing up of an Addendum to the Exploitation License No. 47/1999 Roșia Montană).

<sup>57</sup> See, e.g., RMGC Classified Information Registry (Exh. C-20), Item Nos. 178-210 (Registration Nos. S-192 – S-224 (CDs – Aerial photography scans), Item Nos. 233-245 (Registration Nos. S-247 – S-259, Orthophotoplans Spectrum CDs 1-13), Item Nos. 251-447 (Registration Nos. S-265 – S-461, Maps, L-34-71 and L-34-59).

<sup>58</sup> See, e.g., RMGC Classified Information Registry (Exh. C-20), Item No. 103 (Registration No. S-116, Report on the findings and measures established following the inspection carried out in the period 14-17 March 2005), Item No. 171 (Registration No. S-185, Table with the situation of the "SS" classified documents inventoried in the period 26-29 February 2008 at BDC-Roșia Montană), Item No. 580 (Registration No. S-594, Roșia Montană – Findings note of NAMR – CIT [Territorial Inspection Compartment] Alba inspection of 16 April 2008), Item No. 697 (Registration No. S-711, Inspection deed – Roșia Montană perimeter CITRM-Alba and CITRM Deva).

documents. To date, Claimants' arbitration counsel has not had any access to the Confidential and Classified Documents.

32. RMGC is obligated to keep the Confidential and Classified Documents confidential and can provide access to its affiliates and consultants only on the terms agreed with NAMR and, as regards the classified documents, subject to the restrictions set forth in law.

33. As regards the documents that contain information that is confidential but not work secret classified, RMGC may provide access to its affiliates and consultants only with NAMR's consent and subject to a confidentiality agreement.<sup>59</sup> The terms of those agreements permit RMGC to provide access to RMGC's affiliates and consultants as needed for project development activities; however, those agreements do not clearly permit RMGC to provide access to affiliates and consultants for purposes of these proceedings.<sup>60</sup> NAMR's consent therefore would be needed to permit RMGC to provide access to and use of the documents containing confidential information that is not classified to Claimants on terms that would permit their use in these proceedings. To date, such consent has not been provided.

34. The documents that are confidential and also classified as work secret are subject to more restrictive constraints. Only those individuals who are given a security clearance, subject to the control of the Romanian Intelligence Service, may have access to the documents. Such access may be provided for limited terms based strictly on the "need to know" principle.<sup>61</sup> Such access, moreover, is limited as any document that contains information designated as work secret classified (including any document such as a pleading created for purposes of this arbitration) remains at all times subject to all restrictions set forth in Romanian law regarding their storage, handling, copying, transmission, and transport as described above. That means the classified information, and any document containing such information, *inter alia*, may only be viewed by individuals with a security clearance, must be stored within an approved "security

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<sup>59</sup> Mining Law (Exh. C-11) Art. 5(3); Norms to the Mining Law (Exh. C-12) Arts. 11, 15.

<sup>60</sup> As the agreements pursuant to which RMGC retains the confidential documents are themselves classified, Claimants' arbitration counsel has not reviewed the terms of those agreements.

<sup>61</sup> *See* Standards for the Protection of Classified Information (Exh. C-14) Art. 33 (providing that "[a]ccess to classified information is granted with the observance of the need-to-know principle only to individuals holding security clearance certificates or access authorizations valid for the secrecy level of the information necessary for the fulfillment of their work duties.").

structure,” may not be copied except in an approved controlled manner, may not be emailed, may not be sent to a translator unless the translator has been given a security clearance, may not be transmitted to an address outside of Romania except, *e.g.*, via diplomatic pouch, and generally may not be submitted as an exhibit in these proceedings.

35. These restrictions have not prevented RMGC from fulfilling its license obligations and working to develop the Roşia Montană and Bucium Projects, as those permissions that have been needed for RMGC’s shareholder representatives, experts, and consultants for purposes of, *inter alia*, obtaining permitting and supporting project financings, *e.g.*, including for securities disclosures, have been granted.<sup>62</sup>

36. These restrictions, particularly those applicable to documents containing work secret classified information, however, present an unworkable obstacle to Claimants preparing and presenting their claims in this arbitration. There are a number of reasons why that is so, among them are the following:

- An application would have to be made, subject to review by the Romanian Intelligence Service for each individual, including staff, who would need to review the documents and have access to any pleading describing the contents of the documents in order to obtain a security clearance. That requirement would apply to Claimants’ legal team (including counsel and staff), as well as to translators, experts, witnesses, and any consultants. It also would apply to the members of the Tribunal and to the members of the ICSID Secretariat, external service providers retained by the ICSID Secretariat (such as interpreters and court reporters), any Tribunal assistants, as well as (as Claimants understand) to Respondent’s legal team. Apart from the fact that such a requirement would be excessively burdensome, it also would

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<sup>62</sup> *E.g.*, NAMR Permit for Temporary Access to Work Secret Information dated June 17, 2014 (Exh. C-19) (authorizing the temporary access to work secret information for Mr. Simon Lusty in his capacity as Legal Advisor to Gabriel Resources Ltd. for the six-month period June 17, 2014 to December 31, 2014); NAMR Letter No. 5586 to RMGC dated November 1, 2012 (Exh. C-17) (consenting to disclosure of data and information presented in a press release to be made public by RMGC’s shareholder with the Toronto Stock Exchange); NAMR Letter No. 1462 to RMGC dated Aug. 8, 2008 (Exh. C-15) (granting authorization to send one copy of a work secret classified document to the Alba County Council for the sole purpose of supporting application for an Urbanism Certificate); NAMR Letter No. 2633 to RMGC dated Sept. 30, 2010 (Exh. C-16) (same).

interfere with Claimants' due process rights, as Claimants should not have to identify to Respondent the identity of each individual, including any experts, witnesses, and/or consultants, who may assist in the preparation of their claims.

- It is not clear what entity would be expected under Romanian law to sponsor such requests and how the “need to know” principle referenced above would apply in this context. Although NAMR administers access to the documents at issue, it is not the authority with responsibility for the State vis-à-vis investment treaty claims, nor is RMGC a party to this arbitration. Any requests for access to documents would need to be made for purposes of permitting the Claimants to present claims as covered investors, not under any license with NAMR, but under treaties with the Romanian State. Thus, the process that requires RMGC to seek NAMR's consent in this context is ill-suited to the needs of this case.
- Even if all needed security clearances were obtained for the duration of the arbitration, the documents and any pleading describing the contents of the documents would remain subject to the requirement that they be maintained in an approved “security structure” that satisfies the requirements set forth in Romanian law, including as to the special rules applicable to electronically stored information, and subject to inspection by the Romanian Intelligence Service.
- Any pleadings and eventual award describing the contents of the documents would have to be prepared on a secure computer, and the documents at issue could not be copied except as permitted by the applicable laws and regulations, nor could they be emailed or otherwise transmitted or transported within Romania, other than by, *e.g.*, military post, or outside Romania, other than by, *e.g.*, diplomatic pouch. Thus the documents in effect could not be transmitted to counsel or others outside of Romania, pleadings could not reasonably be assembled, nor could the documents be exhibited in the arbitration.

37. In view of the above, Claimants' arbitration counsel to date has not had any access to the Confidential and Classified Documents. That lack of access has been and remains a serious impediment to Claimants' ability to prepare and present their case because the documents

at issue include hundreds of centrally relevant documents, including RMGC's mining licenses and nearly all associated correspondence with and reporting to NAMR made in relation thereto.

38. Respondent has not provided its consent for Claimants to access the confidential documents that are the subject of custody agreements between NAMR and RMGC, nor has Respondent provided its consent for Claimants to access without restriction the confidential documents that also are classified as work secret.

39. Requests for security clearance from the Romanian authorities have not been made on behalf of Claimants' arbitration counsel, because, *inter alia*, access to the classified documents with the framework of the applicable Romanian would not permit Claimants reasonably to use the documents to prepare and present their case. That is, without Respondent's agreement to allow Claimants and their representatives to use the work secret classified documents without such restrictions for purposes of this arbitration, obtaining access to them would effectively mean, for a limited number of individuals, "view-only" access to documents maintained by RMGC within a "security structure" subject to the control of the Romanian Intelligence Service and for the purposes of project development only.

40. Such restricted access would not provide a workable means for Claimants to prepare and present their case because it would not allow Claimants' counsel, *inter alia*, to maintain copies of the documents in their offices or on their computers, to email any of the documents, to obtain translations of the documents unless by a translator who also obtained clearance for these purposes, to consult with experts as to significance and interpretation of their content, to exhibit any of the documents in this arbitration, or to include the classified information derived from such documents in any pleading that may be distributed to individuals without the necessary security clearance. In addition, all the same restrictions would apply to the members of the Tribunal as well as to the ICSID Secretariat.

41. It is Claimants' understanding that the legal restrictions relating to the Confidential and Classified Documents apply equally to Respondent's representatives, counsel, experts, witnesses, and consultants. Claimants therefore raised this matter nearly one year ago in

the Request for Arbitration<sup>63</sup> in the hope that Respondent would engage on this issue amicably and agree to an approach that would permit both Claimants and Respondent access to and use of the documents on terms that are workable for both parties in this forum. Despite several requests by Claimants in communications between counsel and the passage of time, however, Respondent still has failed to engage meaningfully on this issue.

**B. Fundamental Rules of Procedure Require That Claimants Be Permitted Access to the Evidence Necessary to Prepare and Present Their Case**

42. The right to access and to adduce the evidence relevant to one's claim is fundamental to the right to present one's case. A failure to provide access to the documents necessary for a party to present its case may be a denial of justice,<sup>64</sup> and an arbitration proceeding where such basic rights are not observed would be a nullity.<sup>65</sup> As the Commission of Arbitration in the *Ambatielos* case recognized, the notion of access to justice requires "full freedom to appear before the Courts for the protection or defence of [one's] rights, whether as plaintiff or defendant ... [and] to adduce evidence, whether documentary or oral or of any other kind."<sup>66</sup>

43. Recent commentators on principles of due process in international arbitration similarly have observed the basic connection between the right to be heard and the right to access and adduce evidence in relation to one's claims:

[O]ne cannot rule out that the refusal to order production of documents may in certain circumstances be a breach of a party's opportunity or right to be heard. Such right includes the right to present evidence in support of

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<sup>63</sup> Request for Arbitration dated July 21, 2015 ¶ 63.

<sup>64</sup> See, e.g., JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) (CL-19) at 137 ("Government officials have found a number of indirect ways to frustrate access to justice. Their effect is a denial of justice." For example, "[i]n the *Ballistini* case, local officials ignored requests to deliver copies of documents which were formally necessary for him to bring an action.").

<sup>65</sup> See ICSID Convention Art. 52(1)(d) (listing a "serious departure from a fundamental rule of procedure" as among the grounds for annulment of an award).

<sup>66</sup> See 1 SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE (CL-17) at 323 (observing that in the *Ambatielos* case, the Anglo-Greek Commission of Arbitration held that the notion of access to the courts required ". . . that the foreigner shall enjoy full freedom to appear before the Courts for the protection or defence of his rights, whether as plaintiff or defendant. . . [and] to adduce evidence, whether documentary or oral or of any other kind . . .") (internal citation omitted).

one's case. If a party lacks documents indispensable to establish relevant facts for which it bears the burden of proof and such documents are demonstrably within the control of its opponent, one could reasonably argue that a refusal to grant a production request may deprive the party seeking discovery from its opportunity to be heard.<sup>67</sup>

Accordingly, the ICSID Convention and the ICSID Arbitration Rules empower the tribunal to call upon the parties to produce documents and other evidence at any stage of the proceedings.<sup>68</sup>

44. For that reason, ICSID tribunals on numerous occasions have recommended provisional measures when necessary to preserve a party's right to present its case by ensuring access to evidence.<sup>69</sup>

45. In *Caratube v. Kazakhstan*, the claimant sought provisional measures to preserve its ability to present its case fully by ensuring the preservation and return of documents that had been seized from its facilities in Kazakhstan.<sup>70</sup> As the respondent agreed to preserve all documents, to allow the claimant's representatives to copy the documents and to take the copies out of Kazakhstan,<sup>71</sup> the tribunal, having taken note of the respondent's agreement, concluded that it was not necessary to recommend the requested measures.<sup>72</sup>

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<sup>67</sup> See MATTI S. KURKELA AND SANTTU TURUNEN, *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2010) (CL-18) at 188, n.7, quoting Gabrielle Kaufmann-Kohler & Philippe Bärtsch, *Discovery in International Arbitration: How Much Is Too Much?*, *ZEITSCHRIFT FÜR SCHIEDSVERFAHREN* 17 [German Arbitration Journal], Part 1 (2004).

<sup>68</sup> ICSID Convention Art. 43 ("Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate."); ICSID Arbitration Rule 34(2) ("The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts; and (b) visit any place connected with the dispute or conduct inquiries there.").

<sup>69</sup> *E.g.*, *AGIP S.p.A. v. The Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award dated Nov. 30, 1979, 1 ICSID REP. 306, 311 (1993) (CL-1) (tribunal ordered provisional measures to ensure the collection, inventory, and preservation of the books and records of the claimant's locally incorporated subsidiary).

<sup>70</sup> *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures dated July 31, 2009 (CL-4) ¶ 94.

<sup>71</sup> *Id.* ¶ 101 and § I.

<sup>72</sup> *Id.* ¶ 103.

46. Similarly, in *Biwater Gauff v. Tanzania*, the tribunal recognized that its “powers under Article 47 include the power to recommend the preservation of evidence, including documents,” and that “[t]his is one of the most common forms of interim relief.”<sup>73</sup> The tribunal considered that provisional measures were appropriate in view of “the potential need for the evidence in question ... (e.g. to enable each party properly to plead their respective cases).”<sup>74</sup>

47. The tribunal in *Quiborax v. Bolivia*<sup>75</sup> also considered the extent to which provisional measures may be warranted to ensure that a claimant has access to the evidence that may be needed to present its case. After observing that it “has no doubt that it has the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings, in particular the access to and integrity of the evidence,”<sup>76</sup> the Tribunal stated:

The Tribunal considers that the criminal proceedings may indeed be impairing Claimants’ right to present their case, in particular with respect to their access to documentary evidence and witnesses. Claimants have been deprived of their corporate records and, although it appears from the record that Claimants have had access to copies of certain documents, it is unclear whether they are still missing relevant documentation that might assist them in presenting their case on jurisdiction or the merits.<sup>77</sup>

In that case, in response to the claimants’ request, respondent committed to ensure claimants’ access to the documentary evidence at issue. The tribunal therefore took note of the respondent’s commitment regarding documents, but considered that in order to preserve claimants’ rights in relation to potential witness testimony, it was necessary to order the respondent as a provisional measure to suspend the criminal proceedings at issue.<sup>78</sup>

48. Applying the same principles here supports the conclusion that an order of provisional measures is warranted to ensure that Claimants are provided the right to access and

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<sup>73</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 dated Mar. 31, 2006 (CL-2) ¶ 84.

<sup>74</sup> *Id.* ¶ 86.

<sup>75</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11).

<sup>76</sup> *Id.* ¶ 141.

<sup>77</sup> *Id.* ¶ 142.

<sup>78</sup> *Id.* § V.



use the Confidential and Classified Documents to prepare and present their claims in this arbitration.

**C. Measures Are Urgently Required to Preserve the Integrity of this Arbitration and to Permit It to Proceed in a Fair and Orderly Manner**

49. With regard to whether the requested provisional measures are necessary, some tribunals have considered whether the need is “urgent” and so cannot wait until the issuance of the award. Where the right to be preserved is the right to present one’s case, however, there is no question that the requested measures cannot wait until the issuance of the award.

50. The urgency of the need to preserve the right to present one’s case was addressed by the *Biwater Gauff* tribunal which explained:

In the Arbitral Tribunal’s view, the degree of “urgency” which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. .... [T]he level of urgency required depends on the type of measure which is requested.<sup>79</sup>

In that case, the tribunal decided that the urgency requirement was met “because there is a need for such evidence to be preserved before the proceedings progress any further (e.g., to enable each party properly to plead their respective cases).”<sup>80</sup>

51. The tribunal in *Quiborax v. Bolivia* similarly considered that the required urgency was satisfied in such circumstances:

[I]f measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are by definition urgent. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of

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<sup>79</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 dated Mar. 31, 2006 (CL-2) ¶ 76.

<sup>80</sup> *Id.* ¶ 86.

specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.<sup>81</sup>

52. The *Quiborax v. Bolivia* tribunal also stated that “the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures,” and that the tribunal must balance the claimants’ need for the measures with any harm that may be caused to respondent from the measures.<sup>82</sup>

53. In this case, the need for the measures outweighs any harm – indeed, the requested measures would not cause any harm to Respondent. While Claimants’ need for access to and use of the Confidential and Classified Documents is compelling, Respondent does not have any compelling basis to oppose access to and use of the documents for purposes of this arbitration.

54. With regard to the documents that are confidential but not classified, Respondent’s organ, NAMR, has agreed to permit RMGC to provide access to and use of the documents to RMGC’s affiliates, including Claimants, subject to confidentiality undertakings, for purposes of project development.<sup>83</sup> There is no reason Respondent could not agree to permit Claimants access to and use of the same documents also for purposes of this arbitration.<sup>84</sup> To date, however, it has not done so.

55. With regard to the documents that are classified as work secret, the considerations are the same. The classification of the documents as work secret does not implicate any issues of national security; none of the documents at issue is classified “state secret.”<sup>85</sup> As noted above, Respondent’s organ, NAMR, has agreed to provide access and permit disclosure of the

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<sup>81</sup> *Quiborax S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶ 153.

<sup>82</sup> *Id.* ¶ 158.

<sup>83</sup> See paragraph 35 *supra*.

<sup>84</sup> In view of the fact that these documents are subject to a custody agreement between NAMR and RMGC that includes confidentiality undertakings, Claimants are willing, should Respondent so wish, to enter into an agreement to treat the subject documents as confidential.

<sup>85</sup> See NAMR Order No. 2/2013 (Exh. C-18) (listing categories of documents as work secret classified); Classified Information Law (Exh. C-24) Art. 15(d) (defining state secret information as information relating to national security); and Art. 15(e) (defining work secret information as information whose disclosure could be detrimental to a public or private entity).

documentation as needed for implementation of the the Roşia Montană and Bucium Projects.<sup>86</sup> Any concerns regarding confidentiality in this arbitration should be possible to be addressed with a confidentiality agreement, should Respondent so wish. Claimants are prepared to enter into an appropriate confidentiality agreement to ensure that the Confidential and Classified Documents are treated confidentially and that Claimants' representatives, counsel, experts, witnesses, and consultants are permitted unrestricted access to and use of the Confidential and Classified Documents for purposes of this arbitration (including to exhibit such documents). Parties to arbitration proceedings commonly conclude confidentiality agreements to provide for the protection of proprietary and other confidential information.

56. In any event, the classification under Romanian law of certain documents as “work secret” may not be relied upon to frustrate Claimants' right to present their investment treaty claims in arbitration. Having consented in the Canada BIT and the UK BIT to submit investment disputes to ICSID Convention arbitration, including investment disputes relating to mineral resource projects, Romania cannot rely on its internal laws regarding the treatment of the associated documentation to frustrate that process.<sup>87</sup> Nothing in the Canada BIT or the UK BIT provides otherwise.<sup>88</sup>

57. While it is not uncommon for States to classify certain categories of documents as privileged and/or otherwise subject to various degrees of confidentiality, when making those documents available it is necessary to permit a party to present its case in international arbitration, and such classification is not accepted as an unqualified basis to refuse their production. This is reflected, for example, in Article 9(2)(f) of the IBA Rules on the Taking of

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<sup>86</sup> See paragraph 35 *supra*.

<sup>87</sup> See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002, 2005) (CL-16) Art. 32 at 207. See also *id.*, Art. 32, cmt. (2) at 207 (explaining that “Article 32 is modelled on article 27 of the 1969 Vienna Convention on the Law of Treaties, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

<sup>88</sup> Article I(7) of Annex C of the Canada-Romania BIT (Exh. C-1) provides that “[t]he tribunal shall not require a Contracting Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Contracting Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.” That provision does not seem to apply to the information classified as work secret here. As noted above, there are not any documents classified as “state secret” at issue.

Evidence in International Arbitration, which provides that a tribunal may exclude a document from production on the basis that it has been classified by a governmental entity as secret only where the tribunal determines that the grounds for exclusion are “compelling”:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons . . . grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) *that the Arbitral Tribunal determines to be compelling*.<sup>89</sup>

Indeed, investment treaty tribunals generally have viewed such claims “with disfavor.”<sup>90</sup>

58. In this case, use of the documents for purposes of an international arbitration cannot be considered as contrary to Romanian policy. That is because the Mining Law expressly contemplates that disputes regarding mining licenses may be submitted to international arbitration.<sup>91</sup> Accordingly, the Roșia Montană License itself appears to include an agreement to submit disputes to international arbitration before the Austrian Federal Economic Chamber in

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<sup>89</sup> International Bar Association (“IBA”) Rules on the Taking of Evidence in International Arbitration (adopted in 2010) (CL-22) Art. 9(2)(f) (emphasis added).

<sup>90</sup> See, e.g., CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 658-659 (2d. ed. 2009) (CL-20) (“It is not uncommon in investor-State arbitrations for Respondent States to invoke the privileged or politically sensitive nature of certain documents as grounds for refusing production and to invoke executive privilege under their national laws. Tribunals have generally viewed such claims with disfavour”); *Glamis Gold Limited v. United States of America*, UNCITRAL, Award dated June 8, 2009 (CL-7) ¶ 233 (ordering Respondent to produce documents covered by “deliberative process privilege” on basis that claimant’s needs, “particularly given the apparent absence of other documents or other means of proof available . . . [were] sufficiently great to override [the] interests [of the respondent].”); *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Decision of the Tribunal Relating to Canada’s Claim of Cabinet Privilege dated Oct. 8, 2004 (CL-13) ¶¶ 7, 13-14 (tribunal concluding that the public interest justifying claim of privilege must be weighed against the interest in disclosure for the purpose of the arbitration and noting that “a claim for Cabinet privilege would have to be assessed not under the law of Canada but under the law governing the Tribunal. That law does not in this context refer the Tribunal to national law.”); *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Decision of the Tribunal on Production of Documents in Respect of which Cabinet Privilege has been Invoked dated Sept. 3, 2008 (CL-8) ¶¶ 21-22 (ordering the production of documents that were subject to cabinet privilege where the documents “relate[d] to matters that are at the heart of the Investor’s argument in support of its claim,” in view of a balancing of the competing interests). See also *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 dated May 24, 2006 (CL-3) at 8-9 (tribunal ordering the production of documents rejecting objection based on domestic “public interest and policy”).

<sup>91</sup> Mining Law (Exh. C-11) Art. 61 (“Competent to settle the disputes deriving in connection to the interpretation and performance of licenses/permits are the Romanian courts of law, if the parties have not agreed settlement by arbitration, including by international tribunals.”).

Vienna,<sup>92</sup> notwithstanding that the license itself and nearly all documentation associated with it is classified as work secret.

59. Claimants also observe that it appears that a copy of a portion of the Roșia Montană License evidently was unlawfully obtained by the so-called “RISE Project” and posted online in August 2013.<sup>93</sup> Claimants are not aware of any steps taken by Romania to remove the documents from the RISE Project’s website as the documents remain online even now. The fact that a copy of what appears to be a portion of the Roșia Montană License was put into the public domain, however, does not diminish the need for provisional measures in this case. That is because it would appear to be an incomplete copy of only one of the documents at issue, the document cannot be authenticated, and to the extent that it is a true and correct copy of a portion of the license, it is posted unlawfully.

60. Although declassification as a matter of Romanian law cannot be necessary in order for Respondent to agree that the Confidential and Classified Documents may be used for purposes of this ICSID arbitration, in the hope of potentially facilitating access to the documents at issue, in October 2015, Gabriel Canada wrote to NAMR to request the declassification of the work secret classified information for purposes of use in the arbitration.<sup>94</sup> RMGC wrote separately to communicate its agreement to declassification, confirming that “[f]or the avoidance of doubt, RMGC consents to the declassification of the documents at issue.”<sup>95</sup> NAMR did not respond to either letter.

61. The Confidential and Classified Documents are centrally relevant and important to the preparation and presentation of Claimants’ claims. Because Respondent to date has not consented to permit Claimants access to and the right to use these documents as needed for this arbitration provisional measures are urgently needed.

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<sup>92</sup> See Copy of a portion of Roșia Montană Mining License No. 47/1999, available at <http://www.riseproject.ro/articol/documentele-confidentiale-ale-afacerii-rosia-montana/>, Art. 18.2.2.

<sup>93</sup> See RISE Project, “Documentele Confidentiale ale Afacerii Roșia Montană,” <http://www.riseproject.ro/articol/documentele-confidentiale-ale-afacerii-rosia-montana/> (posting what are claimed to be various documents relating to Roșia Montană under the date “31/08/2013”).

<sup>94</sup> Letter from Gabriel Resources Ltd. to NAMR dated Oct. 2, 2015 (Exh. C-22).

<sup>95</sup> RMGC Letter No. 54308 to NAMR dated Oct. 30, 2015 (Exh. C-23).

62. Allowing Claimants unrestricted access to and use of the evidence needed to prepare and present Claimants' claims is necessary to vindicate Claimants' most basic due process rights in this arbitration. In order to permit the arbitration to proceed in a fair and orderly manner, and generally to preserve the integrity of these proceedings, therefore, Respondent must allow Claimants unrestricted access to and use of the Confidential and Classified Documents for purposes of this arbitration, subject, as may be needed at Respondent's request, to confidentiality undertakings.

63. As Respondent has failed to address this matter meaningfully since the filing of the Request for Arbitration in July 2015, Gabriel must seek an order of provisional measures from the Tribunal, as stated below.

#### **IV. REQUEST FOR RELIEF**

64. For all of the reasons set forth above, Claimants respectfully request that the Tribunal recommend as provisional measures pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules:

- That Respondent grant Claimants, including Claimants' representatives, counsel, experts, witnesses, and consultants, unrestricted access to and use of the Confidential and Classified Documents for purposes of this arbitration;
- That the terms of such access and use shall be without regard to the restrictions regarding access and use that apply to the Confidential and Classified Documents as a matter of Romanian law and the confidentiality agreements between RMGC and NAMR regarding those documents, so as to ensure as appropriate and necessary for the orderly and fair conduct of this arbitration, *inter alia*, that the Confidential and Classified Documents may be accessed, used, stored, copied, transmitted, transported, reviewed, and submitted as evidence in this arbitration, including without undue restrictions on access and use by the members of the Tribunal and the ICSID Secretariat, any Tribunal assistants, and external service providers retained by the ICSID Secretariat subject to reasonable undertakings to maintain confidentiality as may be warranted.

65. Claimants reserve the right to respond as appropriate to any observations made by Respondent in relation to this request for provisional measures, to amend this request, and to request such further relief as may be warranted and permitted by the ICSID Convention and the ICSID Arbitration Rules.

Respectfully submitted,

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