

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES**

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

Claimants

VS.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

**RESPONDENT'S OBSERVATIONS TO CLAIMANTS'
FIRST REQUEST FOR PROVISIONAL MEASURES**

3 August 2016

Before:

Ms. Teresa Cheng (President)

Dr. Horacio A. Grigera Naón

Professor Zachary Douglas

Secretary of the Tribunal

Ms Sara Marzal Yetano

LALIVE

LEAUA & ASOCIATII

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

Term	Definition
Canada-Romania BIT	Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, done at Bucharest on May 8, 2009, entered into force on Nov. 23, 2011 (Exhibit C-1)
Classified Information Law	Law no. 182/2002 on protection of classified information (as of February 2016) (Exhibit C-24)
Confidential and Classified Documents	As defined by the Claimant: those “documents and information that are in the custody of ... [RMGC] but that are subject to obligations of confidentiality, including obligations arising from the Romanian laws governing classified information”
DSA	Designated Security Authority, which is the institution legally authorized to establish measures for the coordination and control of the activities related to the protection of information classified as state secret (“ <i>Autoritate Desemnată de Securitate</i> ”)
ICSID Convention	1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
ICSID Rules	ICSID Rules of Procedure for Arbitration Proceedings of April 2006
Mining Law	Mining Law no. 85/2003 (dated March 2003) (Exhibit C-11)
Minvest	Collective reference to both of the following companies, which have successively held a 19.31% share in RMGC: <ul style="list-style-type: none"> - the “<i>Compania Nationala a Cuprului, Aurului si Fierului Minvest Deva S.A.</i>” (or “Minvest Deva National Copper, Gold and Iron Company S.A.”), a state-owned company established in 1998; and, - Minvest Roşia Montană S.A., which was established by government deci-

Term	Definition
	sion in 2013 and has held the shares in RMGC since then
NAFTA	North American Free Trade Agreement
NAMR	Romanian National Agency for Mineral Resources (" <i>Agenția Națională Pentru Resurse Minerale</i> ")
NATO	North Atlantic Treaty Organization
National Standards for the Protection of Classified Information	National Standards for the Protection of Classified Information (approved by Government Decision no. 585/2002) (Exhibit C-14)
Mining Law Norms	Norms dated 14 October 2003 for the implementation of the Mining Law no. 85/2003 (approved by Government Decision no. 1208/2003) (Exhibit C-12)
Roșia Montană License	License no. 47/1999 regarding the Roșia Montană area
ORNISS	Romanian National Registry Office for Classified Information (the " <i>Oficiul Registrului Național al Informațiilor Secrete de Stat</i> ")
Registry	List of documents held by RMGC pursuant to the Storage Contract, dated 22 July 2016 (Exhibit C-20 , as resubmitted)
RIS	Romanian Intelligence Service (" <i>Serviciul Român de Informații</i> ")
Storage Contract	Contract No. 27 for the preservation, storage and protection of data and information dated 12 May 2005
VCLT	Vienna Convention on the Law of Treaties (Exhibit RLA-1)

1 INTRODUCTION

- 1 In accordance with the letter of the Secretary of the Tribunal dated 20 July 2016, Romania (the “**Respondent**”) hereby submits its observations regarding the Request for Provisional Measures submitted on 16 June 2016 (the “**Claimants' First Request**”) by Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. (collectively “**Gabriel**” or the “**Claimants**”) (with the Respondent, the “**Parties**”).
- 2 On 28 July 2016, the Claimants filed a Second Request for Provisional Measures and Request for Emergency Temporary Provisional Measures. This submission does not address that request and the Respondent reserves its rights to respond thereto.
- 3 The Claimants' First Request seeks access to and use of confidential and classified documents for purposes of this arbitration. The Claimants request in relevant part that the Tribunal:

“... recommend that Romania ... 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’).”¹
- 4 The Respondent does not dispute the Claimants' right to due process in this arbitration, including its right to access and adduce the evidence relevant to its claims, in accordance with, and subject to the terms of the applicable BITs, the ICSID Rules and the ICSID Convention.²

¹ [Claimants' First Request](#), p. 1 (para. 2). In the interests of consistency, the Respondent also refers in this submission to the “**Confidential and Classified Documents**” as defined by the Claimants above. As explained below, it is not clear to what extent this category of documents is broader than or equal to the documents listed at [Exhibit C-20](#). See *infra* para. 49.

² [Claimants' First Request](#), p. 20 (para. 42).

- 5 The Respondent also acknowledges the well-established rule of international law that a State cannot rely on its own domestic law to avoid compliance with its international obligations. The rule is reflected, *inter alia*, in Article 27 of the Vienna Convention on the Law of Treaties (the “VCLT”), which provides that a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”³
- 6 However, it does not result from this rule that the Respondent is required to provide access to and use of classified information. Indeed, Romania is entitled to invoke the exceptions to disclosure obligations, which are established expressly in the Canada-Romania BIT. Specifically, that BIT provides that “[n]othing in this Agreement shall be construed to require a Contracting Party to furnish or allow access to information the disclosure of which would ... be contrary to the Contracting Party’s law protecting **Cabinet confidences**...”.⁴ Similarly, Annex C(I) to the BIT provides that the “tribunal shall not require a Contracting Party to furnish or allow access to information the disclosure of which would... be contrary to the Contracting Party’s law protecting Cabinet confidences...”.⁵
- 7 Where the English version of these provisions of the BIT refers to “Cabinet confidences,” the Romanian version of the BIT uses the terms “*informațiilor clasificate*,” which mean “classified information.”⁶ The BIT cannot therefore be construed to require Romania to furnish or allow access to information the disclosure of which would be contrary to the its

³ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 332 *et seq.*, Art. 27, [Vienna Convention on the Law of Treaties, 23 May 1969](#), at [Exhibit RLA-1](#).

⁴ [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 21, Art. XVII(7) (emphasis added).

⁵ [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 26, Annex C(I), Art. 7. Furthermore, Article XVII(6)(a) and Article 7 of Annex C(I) provide that Romania cannot be required “to furnish or allow access to information the disclosure of ... which it determines to be contrary to its essential security.” Documents whose disclosure would be contrary to Romania’s security correspond to classified documents. *See infra* n. 6.

⁶ The law defines “*informații clasificate*” as “any information... of interest for the national security.” *See* original version and English translation of [Classified Information Law](#), at [Exhibit C-24](#), p. 3, Art. 15(b).

domestic laws regarding classified information. Stated differently, Romania cannot be required to produce or allow access to classified documents for purposes of this arbitration.

- 8 Thus, it is clear under the terms of the BIT that, for classified documents to be used and accessed for purposes of this arbitration, they will first need to be declassified.⁷
- 9 Furthermore, Romania is entitled to require that the declassification process be organized in a manner that is in accordance with mandatory Romanian law. Indeed, contrary to the Claimants' allegations, an order of provisional measures is not warranted in this case – or is, at a minimum, premature. Not only are the conditions for such an order not met, but also this is not a matter of interim relief in the first place, but rather a preliminary issue of defining the scope of, and organizing the access and use of, documents that may be relevant and material to the outcome of the case but that have been classified in accordance with Romanian law.
- 10 Like the Claimants (and their counsel), counsel to Romania does not have access to the Confidential and Classified Documents. It is thus in the same position as the Claimants and also requires access to and use of these documents insofar as they are relevant and material to this arbitration and as is permissible under Romanian law. Accordingly, it would be utterly unjust for the Tribunal to grant the Claimants' request in a manner that would not ensure that the Respondent's counsel is provided with equal right to access and use of the Confidential and Classified Documents.
- 11 The Respondent thus is prepared to cooperate with the Claimants with respect to organizing access to and use of documents relevant to this arbitration and has actively taken steps in order to do so. The Claimants' indications that the Respondent has not “engaged” with them on this subject are misplaced, since the Respondent has repeatedly indicated to them

⁷ See *infra* Section 4.

that it was trying to find the best way to address this issue.⁸ It is therefore regrettable that the Claimants have raised this issue via an order of provisional measures instead of seeking to resolve it via cooperation with the Respondent.

- 12 It is for these reasons and as explained below that the Respondent objects to the Claimants' request for provisional measures and requests that the Tribunal permit the Confidential and Classified Documents to be reviewed and declassified in accordance with Romanian law. As the Claimants note, non-compliance with the applicable laws and regulations is subject to strict criminal sanctions.⁹
- 13 Several parties will necessarily be involved in the Parties' obtaining access to and use of the Confidential and Classified Documents for the purposes of this arbitration.
- 14 **First**, RMGC, which is not a party to this arbitration, will nevertheless play an important role in the Parties' access to and use of the documents relevant to the arbitration. RMGC, which was incorporated in 1997, is for 80.69% owned by Gabriel and, for the remaining 19.31%, owned by Romania via Minvest Roşia Montană S.A.¹⁰
- 15 **Second**, the National Agency for Mineral Resources ("NAMR") is the Romanian governmental agency responsible for managing Romania's

⁸ Claimants' First Request, p. 2 (para. 3).

⁹ Claimants' First Request, p. 4 (para. 9); see also National Standards for the Protection of Classified Information, at Exhibit C-14, p. 78, Art. 338 *et seq.*; Classified Information Law, at Exhibit C-24, p. 9, Art. 31(4); Government Decision No. 781/2002 on the Protection of Work Secret Information, published in Official Gazette Part I, No. 575, dated Aug. 5, 2002 dated 5 August 2002, at Exhibit C-10, p. 3, Art. 12.

¹⁰ See Claimants' Request for Arbitration, p. 2 (para. 3). Until 2013, this 19.31% share of RMGC was held by "Compania Nationala a Cuprului, Aurului si Fierului Minvest Deva S.A." (or "Minvest Deva National Copper, Gold and Iron Company S.A."), a state-owned company established in 1998. Minvest Rosia Montana S.A. resulted from the reorganization of Minvest Deva and was established by government decision in 2013. Together these companies are referred to as "Minvest."

mineral resources and licenses.¹¹ In May 2005, RMGC and NAMR concluded a contract whereby RMGC agreed to keep in its custody and store certain classified documents, including documents relating to the Roșia Montană project (the “**Storage Contract**”).¹² The documents held by RMGC pursuant to this contract (and any other confidential and classified documents that RMGC holds in its custody) have been kept in a list which RMGC is required to update annually (the “**Registry**”).¹³ NAMR issued 73 documents listed therein.¹⁴

- 16 **Third**, Minvest, while also is not a party to the arbitration, is a relevant actor as noted above. According to the Registry, Minvest issued 35 of the documents listed therein and may have thus also been the entity which classified those documents.¹⁵ Its consent would thus be necessary to declassify those documents.¹⁶
- 17 **Fourth**, a number of entities other than RMGC, NAMR and Minvest appear to have issued documents listed in the Registry.¹⁷ Insofar as these other entities also classified those documents, they are the entities competent to declassify them.

¹¹ See also [Claimants' Request for Arbitration](#), p. 6 (para. 15).

¹² As explained below, NAMR has requested and RMGC has agreed to the declassification of this contract. See also [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 6, Art. 7 (requiring entities that hold classified documents to keep inventory lists thereof); see also [Government Decision No. 781/2002 on the Protection of Work Secret Information](#), published in [Official Gazette Part I, No. 575](#), dated Aug. 5, 2002 dated 5 August 2002, at [Exhibit C-10](#), Art. 3 (requiring separate registry of work secret documents).

¹³ Gabriel has produced two versions of this list, dated 15 May 2015 and 22 July 2016. See RMGC Registry dated 15 May 2015, at [Exhibit C-20](#) and Updated RMGC Registry dated 22 July 2016, at [Exhibit C-20 \(as resubmitted\)](#)

¹⁴ See e.g. documents numbered 2, 3 and 8 in Updated RMGC Registry dated 22 July 2016, at [Exhibit C-20 \(as resubmitted\)](#)

¹⁵ See e.g. documents numbered 1, 4, 6, and 46 in Updated RMGC Registry dated 22 July 2016, at [Exhibit C-20 \(as resubmitted\)](#).

¹⁶ See *infra* para. 72.

¹⁷ See e.g. documents numbered 5, 9, 12 and 18 in Updated RMGC Registry dated 22 July 2016, at [Exhibit C-20 \(as resubmitted\)](#).

- 18 Two other governmental entities are involved in questions relating to classified documents. Both the Romanian National Registry Office for Classified Information (“**ORNISS**”) and the Romanian Intelligence Service (“**RIS**”) are involved in the coordination and control of the protection of classified information and the declassification of state secret documents.¹⁸ ORNISS also coordinates and oversees, for instance, the issuance of security clearances to specific individuals for access to classified documents.¹⁹ Furthermore, the RIS oversees the transportation of classified correspondence throughout Romania.²⁰
- 19 This submission is divided into five main sections. The first section recounts the chronology of events relevant to the issue of access to and use of the Confidential and Classified Documents and leading up to this submission (**Section 2**). Second, the Respondent explains why the scope of the Claimants’ request is unclear (**Section 3**). Third, it describes the legal regime applicable to the Confidential and Classified Documents and explains why it will be necessary for those documents to be declassified in order for them to be accessed and used in this arbitration (**Section 4**). Fourth, the Respondent demonstrates why the Claimants’ First Request does not meet the conditions for an order of provisional relief (**Section 5**). Finally, the Respondent proposes next steps for going forward (**Section 6**).

¹⁸ See [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 2 *et seq.*, Art. 3 (referring to the institutions charged with the coordination and control of the measures for the protection of classified information); see also [Classified Information Law](#), at [Exhibit C-24](#), Arts. 6(1) and 34 *et seq.* (regarding role of the RIS).

¹⁹ See e.g. [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 35, Art. 141 and 199.

²⁰ [Government Decision No. 1349/2002 on the Collection, Transportation, Distribution and Protection of Classified Correspondence on Romanian Territory](#), published in Official Gazette Part I, No. 909, dated Dec. 13, 2002, as last consolidated on Feb. 22, 2016 dated 22 February 2016, at [Exhibit C-25](#), Art. 1 *et seq.*

2 RELEVANT FACTUAL BACKGROUND

- 20 The Claimants have commenced this arbitration and complained of not being able to access and use certain documents relevant thereto even though they are themselves responsible for this situation.
- 21 On 14 September 2007, Mr Bogdan Gabudeanu, the then president of NAMR wrote to Mr Bogdan Olteanu, the then president of the Romanian Parliament, and described the “special interest” that the Roşia Montană project presented to the Romanian people, NGOs and the media.²¹ He referred to the contractual and statutory confidentiality provisions governing the concession licenses and related documentation and noted that RMGC’s consent was necessary to render public these documents. Mr Gabudeanu also described the classified nature of these documents and indicated that NAMR would “take all necessary diligences in order to declassify the concession deeds...”
- 22 On 18 September 2007, Mr Gabudeanu wrote to Mr Alan Hill, the President & CEO of Gabriel and RMGC, to request to meet regarding the possible declassification of the Project documentation as well as RMGC’s consent to waive the confidentiality restrictions thereto.²²
- 23 On 27 November 2007, RMGC denied NAMR’s request, indicating that “several arguments of legal, contractual, and good practices nature... prevent[ed] the provision of the documents and information requested in relation to the Roşia Montană License to public and mass media.”²³ It thus added that RMGC “may not agree with the declassification and/or release of confidentiality in relation to these documents/information...”
- 24 Moreover, as explained below, RMGC has recently, on 26 July 2016, refused to comply with NAMR’s request that RMGC hand over the Confidential and Classified Documents for purposes of declassification.

²¹ Letter from NAMR to Romanian Parliament dated 14 September 2007, at [Exhibit R-1](#).

²² Letter from NAMR to Gabriel and RMGC dated 18 September 2007, at [Exhibit R-2](#).

²³ Letter from Gabriel and RMGC to NAMR dated 27 November 2007, at [Exhibit R-3](#).

- 25 Accordingly, as a result of RMGC's refusal, the Confidential and Classified Documents were not declassified at the time.
- 26 Nearly eight years later, on 21 July 2015, the Claimants filed their Request for Arbitration and raised the issue of access to documents. They indicated that "many of the core documents relating to the Project and Gabriel's investments in Romania" were subject to a "confidentiality/secretcy regime..."²⁴ Notably, they did not define the exact scope of these "core documents," including the identity of their custodian(s) and the nature of those documents (confidential and/or classified and, if the latter, subject to which type of classification). The Claimants further affirmed that they "trust[ed] that Romania w[ould] agree to address this matter promptly upon commencement of this arbitration..."²⁵
- 27 Since receipt of the Request for Arbitration, the Respondent has actively studied how to address this issue,²⁶ which also affected it, since counsel for the Respondent did not (and still today does not) have access to classified or confidential documents relevant to this arbitration. Romania thus explored ways in which such documents could be made accessible to and used by both Parties, as well as the Tribunal and other individuals involved in this arbitration. In particular, Romania considered whether it would be possible to access and use these documents for the purposes of this arbitration, without declassifying them.
- 28 Counsel for the Respondent and Romanian governmental agencies met on numerous occasions to discuss this issue, including as listed below:
- 12 January 2016 – meeting with the representatives of NAMR;
 - 18 January 2016 – meeting with the representatives of Ministry of Culture and the National Institute for Heritage;

²⁴ [Claimants' Request for Arbitration](#), p. 25 (para. 63).

²⁵ [Claimants' Request for Arbitration](#), p. 25 (para. 63).

²⁶ The Respondent informed counsel for the Claimants on several occasions that it was seeking to find a solution to this issue and thus contests their claims that it did "not engage" with them on this subject. [Claimants' First Request](#), p. 5 (para. 12) and p. 19 (para. 41).

- 19 February 2016 – meeting with the representatives of NAMR;
 - 4 March 2016 – meeting with the representatives of NAMR;
 - 13 May 2016 – meeting with the representatives of NAMR;
 - 16 May 2016 – meeting with the representatives of NAMR and the Ministry of Public Finance;
 - 24 May 2016 – meeting with the representatives of NAMR and the Ministry of Public Finance;
 - 8 June 2016 – meeting with the representatives of the Ministry of Public Finance;
 - 30 June 2016 – meeting with the representatives of NAMR;
 - 4 July 2016 – meeting with the representatives of NAMR, the Chancellery of the Prime Minister, the General Secretariat of the Government and the Ministry of Public Finance;
 - 6 July 2016 – meeting with the representatives of NAMR;
 - 12 July 2016 – meeting with the representatives of NAMR;
 - 13 July 2016 – meeting with the representatives of NAMR;
 - 22 July 2016 – meeting with the representatives of RIS and the Ministry of Public Finance;
 - 27 July 2016 – meeting with the representatives of ORNISS and the Ministry of Public Finance; and,
 - 28 July 2016 – meeting with the representatives of NAMR.
- 29 In October 2015, the Claimants and RMGC wrote to NAMR regarding the need for a declassification of documents. On 2 October 2015, Gabriel wrote to NAMR and requested the “declassification of the documentation relating to the Project” for purposes of this arbitration.²⁷ Shortly thereafter, on 30 October 2015, RMGC wrote to NAMR and, referring to Gabri-

²⁷ Letter from Gabriel Resources Ltd. to NAMR dated 2 October 2015, at [Exhibit C-22](#); see also [Claimants' First Request](#), p. 27 (para. 60).

el's letter dated 2 October 2015, indicated that it "consent[ed] to the declassification of the documents at issue."²⁸

- 30 These letters confirm the Claimants' (and RMGC's) understanding that the only manner in which the Confidential and Classified Documents could be used in this arbitration is subsequent to their declassification in accordance with Romanian law. Indeed, neither Gabriel nor RMGC suggested that those documents might be made available and used in the arbitration despite their classified nature. As explained below, it will indeed be necessary to declassify the Confidential and Classified Documents in accordance with Romanian law in order for the Parties to access and use them for the purposes of this arbitration.²⁹
- 31 On 16 June 2016, five days prior to the Tribunal's formal constitution, the Claimants filed their First Request, in which they provided more detail regarding the scope of the documents at issue.³⁰
- 32 Since receipt of the Claimants' First Request, the Respondent has sought to determine the most effective manner to address this issue and has taken numerous steps in that regard. As indicated above, counsel for the Respondent and Romanian governmental agencies have met on numerous occasions since 16 June 2016 to discuss this issue.³¹
- 33 On 23 June 2016, NAMR wrote to RMGC to request an updated version of the Registry, of which the Claimant provided a version dated 15 May 2015 with its First Request.³² As indicated above, RMGC is required to provide an updated version of this Registry to NAMR annually.³³

²⁸ Letter from RMGC to NAMR dated 30 October 2015, at [Exhibit C-23](#). The two October 2015 letters to NAMR did not describe the exact scope and/or custodian(s) of the documents to which Gabriel referred and for which it sought declassification.

²⁹ See *infra* paras. 70 *et seq.*

³⁰ See *supra* para. 3; see also Registry, [Exhibit C-20](#).

³¹ See *supra* para. 28.

³² Letter from NAMR to RMGC dated 23 June 2016, at [Exhibit R-4](#); Registry, [Exhibit C-20](#).

³³ See *supra* para. 15.

- 34 On 6 July 2016, NAMR representatives met with RMGC representatives to discuss the documents held by RMGC relating to the Project. The NAMR representatives reiterated their request for an updated version of the Registry and asked for a more detailed description of each document listed therein, which RMGC agreed to provide.
- 35 By letter dated 14 July 2016, NAMR confirmed to RMGC that it had considered its October 2015 request to declassify the documents relating to the Roşia Montană and Bucium Licenses.³⁴ It reminded RMGC that it was, however, competent to declassify only the documents initially classified by NAMR and confirmed that it would undertake that review for purposes of declassification.³⁵
- 36 On 22 July 2016, RMGC responded to NAMR's request of 23 June and provided an updated version of the Registry.³⁶ It indicated that the updated version of the Registry included newly-classified documents and excluded documents that had been declassified. RMGC also indicated that the updated table included further details regarding the documents. This updated Registry comprises 491 documents – a number much lower than the 785 documents listed in the prior version of the Registry dated 15 March 2015.³⁷
- 37 That same day, NAMR sent two letters to RMGC. In the first letter, NAMR advised RMGC that, in view of this arbitration, it was necessary to declassify documents relating to the Roşia Montană and Bucium Projects. NAMR furthermore sought clarification regarding the reasons for

³⁴ In 1999, NAMR granted an exploration license to Minvest covering the Bucium area located near Roşia Montană. See *Claimants' Request for Arbitration*, p. 7 (para. 21).

³⁵ Letter from NAMR to RMGC dated 14 July 2016, at [Exhibit R-5](#).

³⁶ Letter from RMGC to NAMR dated 22 July 2016, at [Exhibit R-6](#) attaching Updated RMGC Registry dated 22 July 2016, at [Exhibit C-20 \(as resubmitted\)](#). This letter also included a version of the updated Registry with documents relating solely to the Roşia Montană License. See [Exhibit R-7](#) and *infra* n. 56.

³⁷ See Updated RMGC Registry dated 22 July 2016, at [Exhibit C-20 \(as resubmitted\)](#).

the classification of the Storage Contract, since this contract had been classified by RMGC.³⁸

- 38 In its second letter dated 22 July, NAMR requested that RMGC provide by 27 July 2016 “all of the original documents related to the Exploitation Concession License no. 47/199 regarding the Roşia Montană perimeter and the Exploration Concession License no. 218/1999 on Bucium perimeter in view of the declassification and ... send them to the headquarters of the National Agency for Mineral Resources...”³⁹ In making this request, NAMR invoked Article 13 of Norms to the Mining Law, which provides in relevant part that archive holders “are obligated to hand over to NAMR the items subject to the [storage contracts].... without the possibility to invoke a right to retain them...”⁴⁰
- 39 By a response dated 26 July 2016, RMGC denied that NAMR had the right to request the documents subject to the Storage Contract and concluded that “NAMR’s request to have the Documentation handed over to it, albeit on a temporary basis and for declassification purposes, as long as RMGC has the right to hold it, is not legally grounded.”⁴¹ RMGC contended that, by virtue of the Storage Contract, it could not provide the documents to NAMR until the termination of the relevant licenses.
- 40 RMGC nevertheless affirmed that NAMR could “proceed in full compliance, with the law, to take declassification decision...”⁴² However, as explained below, documents may only be declassified by the governmental agency that classified them and only after their physical review thereof.⁴³

³⁸ Letter from NAMR to RMGC dated 22 July 2016, at [Exhibit R-8](#).

³⁹ Letter from NAMR to RMGC dated 22 July 2016, at [Exhibit R-9](#).

⁴⁰ See Norms, at [Exhibit C-12](#), p. 4, Art. 13.

⁴¹ Letter from RMGC to NAMR dated 26 July 2016, at [Exhibit R-10](#), p. 1.

⁴² Letter from RMGC to NAMR dated 26 July 2016, at [Exhibit R-10](#), p. 2.

⁴³ See *infra* para. 72.

- 41 By a second letter dated 26 July, RMGC agreed to the declassification of the Storage Contract and requested that NAMR give its consent thereto,⁴⁴ which NAMR confirmed on 29 July 2016.⁴⁵
- 42 By letter dated 28 July 2016, NAMR wrote to a company called "CEPROMIN S.A.," which also appears in the Registry, regarding the declassification of certain documents related to the Roşia Montană License No. 47/1999 which Cepromin had classified.⁴⁶ It requested that Cepromin declassify those documents "as a matter of urgency" and send them to NAMR. Cepromin agreed to declassify the documents in question on 2 August.⁴⁷
- 43 On 29 July 2016, the President of NAMR ordered the declassification of the Roşia Montană License, its annexes, and addenda.⁴⁸ On 1 August 2016, NAMR sent this order to RMGC and requested that it physically remove the classification markings on the counterparts of the documents in question which are in RMGC's possession.⁴⁹

⁴⁴ Letter from RMGC to NAMR dated 26 July 2016, at [Exhibit R-11](#).

⁴⁵ Letter from NAMR to RMGC dated 29 July 2016, at [Exhibit R-12](#).

⁴⁶ Letter from NAMR to Cepromin dated 28 July 2016, at [Exhibit R-13](#).

⁴⁷ Letter from Cepromin to NAMR dated 2 August 2016, at [Exhibit R-14](#).

⁴⁸ NAMR Order regarding the declassification of work secret documents relating to the Rosia Montana License dated 29 July 2016, at [Exhibit R-15](#).

⁴⁹ Letter from NAMR to RMGC dated 1 August 2016, at [Exhibit R-16](#).

3 THE SCOPE OF THE CLAIMANTS' REQUEST IS UNCLEAR

44 Since receiving further specifics in the Claimants' First Request, Respondent has taken steps towards obtaining access to and use of the Confidential and Classified Documents. Nevertheless, the scope of the documents referred to by the Claimants in their First Request is unclear.

45 The Claimants request access to and use of the Confidential and Classified Documents...,⁵⁰ which they define as the "documents and information that are in the custody of the project company [RMGC] but that are subject to obligations of confidentiality including obligations arising from the Romanian laws governing classified information..."⁵¹

46 Separately, the Claimants affirm that RMGC keeps a registry of all classified documents in its custody:

"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 resources, and maintains a registry of those documents containing information classified as work secret. The RMGC Classified Information Registry, which was last updated as of March 25, 2015, list 785 documents."⁵²

47 The Claimants in turn provided this list of 785 documents as Exhibit C-20 (the "**Registry**").⁵³

48 These passages from the Claimants' First Request beg the following questions.

⁵⁰ [Claimants' First Request](#), p. 28 (para. 64, first bullet point).

⁵¹ [Claimants' First Request](#), p. 1 (para. 2).

⁵² [Claimants' First Request](#), p. 12 (para. 27).

⁵³ The Claimants subsequently provided an updated version of this list. *See supra* para. 15 and [Updated RMGC Registry dated 22 July 2016, at Exhibit C-20 \(as resubmitted\)](#).

- 49 **First**, it is unclear to what extent the “Confidential and Classified Documents” encompass documents additional to those listed in the Registry (whether it be the original or the updated version thereof). Stated differently, it is unclear whether the Claimants request access to and use of documents other than those listed in the Registry. The Claimants could have, but did not, expressly state that their request for provisional measures was limited to the documents listed in the Registry.
- 50 To the extent that their request does extend to other documents, the Claimants have failed to identify those other documents and the Respondent cannot therefore respond to this broader request.
- 51 **Second**, the Claimants’ request is unclear and potentially overly broad since it may encompass documents not relevant to this case. The “Confidential and Classified Documents” are defined as classified documents in RMGC’s custody;⁵⁴ however, RMGC has classified documents in its custody other than those regarding the Roşia Montană and Bucium Licenses.
- 52 As the Claimants confirm, the Registry includes “**all** the documents in its [RMGC’s] custody that contain data and information regarding mineral resources,” *i.e.*, documents pertaining to not only the Roşia Montană and Bucium Licenses, but also to other licenses and mining projects. Indeed, numerous documents in the Registry dated 15 May 2015 clearly relate to licences other than the Roşia Montană and Bucium Licenses and are therefore not relevant to this arbitration.⁵⁵ Furthermore, it is not clear whether the updated Registry dated 22 July 2016 also encompasses documents related to other licenses.⁵⁶

⁵⁴ See *supra* paras. 3 and 45.

⁵⁵ See *e.g.* documents numbered 129, 144, 690, 692-695, 709-712, 714 and 721 which relate to a different license, the Băișoara License. Registry, [Exhibit C-20](#).

⁵⁶ On 22 July 2016, RMGC provided an updated version of the Registry. RMGC [Letter from RMGC to NAMR dated 22 July 2016, at Exhibit R-6; Exhibit C-20 \(as resubmitted\)](#). Separately, RMGC also provided a list of the documents relating solely to the Roşia Montană License, which includes 407 documents. See [Exhibit R-7](#). This list does not include documents relating to the Bucium License.

- 53 **Third**, the Registry does not identify the governmental agency or entity that classified the document. Although the Registry identifies the “issuer” of each document, it is not clear whether the issuer of a document corresponds to the entity that prepared and/or classified the document. As explained below, only the entity that classified a document is competent to declassify it.⁵⁷ Thus, in order to assess how to proceed vis-à-vis each document in the Registry, it is crucial to know which governmental agency or entity classified it. This information should be marked on the first page of each classified document, next to the classification number.⁵⁸
- 54 **Fourth**, it is not clear whether the Registry includes both documents classified as work secret and documents classified as state secret. As explained below, the procedure for declassification depends on the type of classification.⁵⁹ Although the Claimants suggest that the Registry contains only documents classified as work secret,⁶⁰ the Registry contains items with classification numbers commencing with “0”⁶¹ and “00,”⁶² which is a possible indicator of state secret.⁶³

⁵⁷ See *infra* para. 72; [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 8 *et seq.*, Arts. 20(2) and 24; [Classified Information Law](#), at [Exhibit C-24](#), p. 8, Art. 24(10).

⁵⁸ See e.g. [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p.7, Art. 15 (referring to marking of classified documents), Art. 41(a) (describing the required information that must be specified on classified documents), Art. 42(5) (requiring stamp) and Art. 46 (requiring mention of classification level on each page of classified document).

⁵⁹ See *infra* para. 71 *et seq.*

⁶⁰ See [Claimants' First Request](#), p. 12, para. 27.

⁶¹ See e.g. documents numbered 18, 47-50, and 52 in the [Updated RMGC Registry dated 22 July 2016](#), at [Exhibit C-20 \(as resubmitted\)](#).

⁶² See documents numbered 13-15, 81 and 82 in the [Updated RMGC Registry dated 22 July 2016](#), at [Exhibit C-20 \(as resubmitted\)](#).

⁶³ Documents classified as state secret have registration numbers preceded by “0,” “00,” or “000,” depending on the level of classification. By contrast, work secret documents must have a registration number preceded by the letter “S.” [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 12, Art. 41(b); see also Art. 59(3); [Government Decision No. 781/2002 on the Protection of Work Secret Information](#), published in [Official Gazette Part I, No. 575](#), dated Aug. 5, 2002 dated 5 August 2002, at [Exhibit C-10](#), Art. 2(1).

4 LEGAL REGIME APPLICABLE TO THE CONFIDENTIAL AND CLASSIFIED DOCUMENTS

- 55 The Respondent largely agrees with the Claimants' description of the legal restrictions to the access to and use of the Confidential and Classified Documents, as set out at paragraphs 17 to 24 of their First Request. As the Claimants explain, the documents in RMGC's custody are subject to one or more levels of protection.
- 56 **First**, the documents at issue are classified in accordance with the Classified Information Law and the Standards for Protection of Classified Information, which are based on NATO criteria and recommendations.⁶⁴ Classified information encompasses any data of national security interest, which must be protected given its degree of importance and the consequences that might arise following its unauthorized disclosure or dissemination.⁶⁵ Documents are classified, more specifically, as either "state secret" or "work secret," depending on their importance vis-à-vis national security and the possible consequences of their disclosure.⁶⁶
- 57 As the Claimants explain, documents are classified as work secret when their disclosure could be detrimental to a public or private legal entity.⁶⁷ As discussed above, in their First Request, the Claimants suggest that the Confidential and Classified Documents are classified as work secret, and not state secret.⁶⁸

⁶⁴ Claimants' First Request, p. 9 *et seq.* (paras. 21-22); Classified Information Law, at **Exhibit C-24** and National Standards for the Protection of Classified Information, at **Exhibit C-14**; *see also* Classified Information Law, at **Exhibit C-24**, p. 2, Arts. 6(2) and 7(3) and National Standards for the Protection of Classified Information, at **Exhibit C-14**, p. 2, Arts. 2 and 343 regarding alignment with NATO criteria and recommendations.

⁶⁵ Classified Information Law, at **Exhibit C-24**, p. 4, Art. 15(b).

⁶⁶ National Standards for the Protection of Classified Information, at **Exhibit C-14**, Art. 4.

⁶⁷ Classified Information Law, at **Exhibit C-24**, and National Standards for the Protection of Classified Information, at **Exhibit C-14**, p. 6, Art. 4(3); *see also* Claimants' First Request, p. 10 (para. 22 and n. 31).

⁶⁸ *See supra* para. 54.

- 58 Documents classified as state secret are subject to more stringent restrictions as compared to work secret documents. State secret documents fall into one of three sub-categories: (i) “secret” documents, whose unauthorized disclosure may bring about damage to the national security; (ii) “strictly secret” documents, whose unauthorized disclosure may bring about serious damage to national security; and, (iii) “strictly secret documents of major importance,” whose unauthorized disclosure may bring about damage of an exceptional gravity to national security.⁶⁹ These secrecy levels are equivalent to the NATO descriptions of documents as “confidential,” “strict secret,” and “cosmic top secret.”⁷⁰
- 59 **Second**, the documents at issue are subject to contractual and statutory confidentiality restrictions that result from, *inter alia*, the licenses themselves, the Storage Contract,⁷¹ the Mining Law⁷² and the Norms to the Mining Law.⁷³
- 60 Pursuant to Romanian Law, NAMR has the right to request that RMGC hand over the Confidential and Classified Documents. Under Article 13 of the Norms to the Mining Law, the custodians of the classified documents – in this case, RMGC – must hand over to NAMR the items subject to the storage contracts “without the possibility to invoke a right to

⁶⁹ See [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 5, Art. 4(2) and [Classified Information Law](#), at [Exhibit C-24](#), p. 4, Arts. 15(d) and (f) and 18. State secret documents are classified for 30 to 100 years, depending on their level of secrecy. See [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 7, Art. 12(2). By contrast, the time during which a work secret document remains classified is established by the entity which classifies it.

⁷⁰ See [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 2 *et seq.*, Arts. 2(2) and 4(2); [Classified Information Law](#), at [Exhibit C-24](#), p. 4 *et seq.*, Art. 15(f) and 18(2).

⁷¹ See [Claimants' First Request](#), p. 9 (para. 21). NAMR regularly concludes contracts regarding the storage of classified documents relating to mineral resources and/or mining activities, in accordance with applicable legislation. In this case, the Storage Contract is classified, but Respondent has requested and RMGC has agreed to declassify this document. See *supra* paras. 37 and 41.

⁷² [Claimants' First Request](#), p. 8 (paras. 17-19); [Mining Law](#), at [Exhibit C-11](#).

⁷³ [Claimants' First Request](#), p. 9 (para. 20); [Norms](#), at [Exhibit C-12](#).

retain them...”⁷⁴ Further, NAMR has a “right of free and unhindered access to [such] data and information...”⁷⁵ As explained above, on 22 July, NAMR, in reliance on these provisions, requested that RMGC temporarily provide the Confidential and Classified Documents to NAMR for purposes of reviewing them and in view of their declassification, but RMGC refused to do so.⁷⁶

- 61 As explained below, Romania has the right not to allow access to and use of its classified documents (**Section 4.1**). Thus, the only manner in which the Confidential and Classified Documents may be accessed and used for purposes of this arbitration is through declassification. Furthermore, Romania has the right to organize the access to and use of documents for purposes of this arbitration in accordance with mandatory Romanian law regarding the declassification of documents (**Section 4.2**).

4.1 Romania has the right not to allow access to and use of Classified documents

- 62 As previously noted, the Claimants' right to access and to adduce evidence relevant to their claims in the arbitration is not an unrestricted right. The Canada-Romania BIT has set out the rules under which such right is to be exercised. First, Article XVII(7) of the Canada-Romania BIT provides:

<p>“Nothing in this Agreement shall be construed to 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,</p>	<p>“Nicio dispoziție a acestui acord nu va fi interpretată în sensul de a impune unei părți contractante să furnizeze sau să permită accesul la informații a căror divulgare ar obstructiona aplicarea legii sau ar fi contrară legislației părții contractante privind protejarea in-</p>
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⁷⁴ Norms, at **Exhibit C-12**, p. 4, Art. 13.

⁷⁵ Norms, at **Exhibit C-12**, p. 4, Art. 13.

⁷⁶ See *supra* paras. 38-39.

personal privacy or the confidentiality of the financial affairs and accounts of individual customers of financial institutions.” ⁷⁷	formațiilor clasificate , secretului personal sau confidențialității tranzacțiilor financiare și a conturilor clienților individuali ai instituțiilor financiare.” ⁷⁸
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63 Second, Annex C(I) of the Canada-Romania BIT develops this regime in its Article 7:

“The 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 institution, or which it determines to be contrary to its essential security. ” ⁷⁹	“Tribunalul nu va cere unei părți contractante să furnizeze sau să permită accesul la informații a căror dezvăluire ar împiedica aplicarea legii ori ar fi contrară legislației părții contractante privind protejearea informațiilor clasificate , secretului personal sau confidențialității tranzacțiilor financiare și a conturilor clienților individuali ai instituțiilor financiare sau se stabilește a fi contrară securității sale esențiale. ” (Emphasis added). ⁸⁰
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⁷⁷ Canada-Romania BIT, at [Exhibit C-1](#), p. 21, Art. XVII(7).

⁷⁸ Romanian version of the Canada-Romania BIT, [Materials evidencing the Canadian BITs entry into force](#), at [Exhibit C-2](#), p. 23, Art. XVII(7).

⁷⁹ Canada-Romania BIT, at [Exhibit C-1](#), p. 26, Art. 7 of Annex C(I).

⁸⁰ Romanian version of the Canada-Romania BIT, [Materials evidencing the Canadian BITs entry into force](#), at [Exhibit C-2](#), p. 25, Art. 7 of Annex C(I).

- 64 The Romanian version of the BIT thus refers to the notion of “Cabinet confidences” as “*informațiilor clasificate*” or “classified information”.⁸¹ The additional carve-out of information “which [Romania] determines to be contrary to its essential security interests” in Articles XVII(6)(a)⁸² and Article 7 of Annex C(I), indicates that the latter is a separate and additional exclusion, such that one or both may apply simultaneously in a given case.
- 65 Thus, Romania has **no obligation** to furnish or allow access to information the disclosure of which would be contrary to (i) Romania’s law protecting “classified information” or (ii) Romania’s essential security interests. These are two critical exclusions to which Canada and Romania **specifically agreed** and which go beyond the original scope of exclusions in Article 2105 of the NAFTA, on which these two clauses are based.⁸³
- 66 The classification of documents relating to the Roșia Montană and Bucium projects was based on Romania’s intent to protect any information from disclosure that could endanger national security and defence, public order or the interests of private or public legal entities holding it.⁸⁴
- 67 Accordingly, first, the Claimants have no right to access and to adduce evidence relevant to the Claimants’ claims in the arbitration as long as such information is protected under Articles XVII(6) and (7) and Article 7 of Annex C(I) of the Canada-Romania BIT and is not declassified.

⁸¹ Since all versions of the Canada-Romania BIT are equally authentic, the Romanian version of the treaty provides the relevant legal concept under Romanian law.

⁸² [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 20, Art. XVII(6)(a).

⁸³ [North American Free Trade Agreement, Chapter 21 \(excerpts\)](#), at [Exhibit RLA-2](#), p. 3, Art. 2105: “Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party’s law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.”

⁸⁴ [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 8, Art. 20.

Second, as a matter of procedure, the law of Romania on declassification must be followed, as discussed below.

4.2 Romania has the right to require that access to and use of the Confidential and Classified Documents be in accordance with Romanian law

4.2.1 The only way to access and use the Confidential and Classified Documents for purposes of this arbitration is through declassification

- 68 As the Claimants explain in their First Request, classified documents may only be accessed by specifically authorized individuals, in limited conditions and in the secure location where the documents are stored and, in the case of state secret documents, subject to the approval of the RIS.⁸⁵ Furthermore, the authorization to access classified documents grants only the right to see and study the information; it does not entail a right to discuss, use, copy or disseminate the classified information with unauthorized individuals.
- 69 Romanian law therefore does not provide a mechanism whereby the Confidential and Classified Documents may be accessed and used by the Parties, the Tribunal, and other parties related to this arbitration. Stated differently, it provides no exceptions whereby classified documents may be used for the purposes of an international arbitration or any other exceptions that could be invoked in the current circumstances.
- 70 Accordingly, the only manner in which the Confidential and Classified Documents may be accessed and used for purposes of this arbitration is if

⁸⁵ Claimants' First Request, p. 11 (para. 24); National Standards for the Protection of Classified Information, at [Exhibit C-14](#), p. 2 *et seq.*, Art. 3 referring to "authorization for access to classified information" and section 5 of Chapter II (entitled "Access to classified information"); see also Classified Information Law, at [Exhibit C-24](#), p. 8 *et seq.*, Art. 28; see also generally Government Decision No. 781/2002 on the Protection of Work Secret Information, published in Official Gazette Part I, No. 575, dated Aug. 5, 2002 dated 5 August 2002, at [Exhibit C-10](#), p. 8, Arts. 6-8.

they are declassified.⁸⁶ The Claimants are well aware of this fact, since declassification was the method they, along with RMGC, invoked to NAMR in October 2015.⁸⁷

4.2.2 The procedure for declassification under Romanian law

71 As explained below, the procedure for declassification varies according to the type of classification.

4.2.2.1 Declassification of documents classified as work secret

72 A document may only be declassified by persons authorized by law to do so,⁸⁸ and the entity who classified a document alone has the power to declassify it.⁸⁹

73 In order to declassify a work secret document, an interested party must file an application with the entity that classified the document. The application must include (i) a detailed description of the information requested for declassification such that the entity may specifically identify the document and (ii) the reasons motivating the request for declassification.

74 In order to declassify a document, a representative of that entity must physically review the document in question in order to determine whether it can be declassified. Stated differently, a document may not be declassified by merely looking at a description or summary thereof and it is not

⁸⁶ “Declassification” entails removal of the classification markings on the document in question and discontinuance of the protections stipulated by law for classified documents. [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 2 *et seq.*, Art. 3; *see also* p. 8 *et seq.*, Arts. 19-24 regarding declassification.

⁸⁷ [Letter from Gabriel Resources Ltd. to NAMR dated 2 October 2015](#), at [Exhibit C-22](#); [Letter from RMGC to NAMR dated 30 October 2015](#), at [Exhibit C-23](#).

⁸⁸ [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 9, Art. 24; *see also* p. 8, Art. 20(2) (regarding state secret information).

⁸⁹ [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), p. 48, Art. 203(d); *see also* [Classified Information Law](#), at [Exhibit C-24](#), p. 8, Art. 24(10) (regarding state secret information).

possible to issue a “blanket decision” declassifying a category or group of documents. That representative will then assess whether the document in question may be declassified and will communicate its decision to the head of the entity.

- 75 If the representative recommends declassification, the head of the entity shall decide the declassification through an order,⁹⁰ subject to the approval of that entity's legal department.⁹¹ The physical markings indicating the classified nature of the document are then removed, demonstrating that the document is no longer classified. Furthermore, the reference to the document is removed from the classified information registry.

4.2.2.2 Declassification of documents classified as state secret

- 76 As indicated above, the Claimants have indicated that the Confidential and Classified Documents are work secret, and not state secret, documents.⁹² Nevertheless, in case those documents should also comprise state secret documents, the Respondent sets out below the more stringent procedure for declassification of state secret documents.
- 77 Documents classified as state secret may be declassified by government decision, based on a motivated request of the “originator,” *i.e.* the party that initially classified the document.⁹³
- 78 In order to do so, a representative of that entity, who is authorized by law, must review and assess the application for declassification and the document in question.⁹⁴

⁹⁰ National Standards for the Protection of Classified Information, at [Exhibit C-14](#), p. 9, Art. 24.

⁹¹ See [Excerpt from Regulation regarding the drafting of regulatory acts dated 10 May 2009](#), at [Exhibit R-17](#), Art. 54(4).

⁹² See *supra* para. 57; [Claimants' First Request](#), p. 4 (para. 9).

⁹³ National Standards for the Protection of Classified Information, at [Exhibit C-14](#), p. 8, Art. 19; see also [Classified Information Law](#), at [Exhibit C-24](#), p. 7, Art. 24(4).

⁹⁴ National Standards for the Protection of Classified Information, at [Exhibit C-14](#), p. 8, Art. 20(2).

- 79 Based on that review, the authorized representative decides whether to recommend declassification and issues a note regarding its decision.
- 80 If the government agent proposes to declassify the document, he or she communicates that decision to the Designated Security Authority (or “**DSA**”).⁹⁵ The DSA is the institution legally authorized to coordinate and control the protection of state secret information.⁹⁶ It encompasses the Ministry of National Defence, the Ministry of the Interior, the Ministry of Justice, the RIS, the Foreign Intelligence Service, the Guard and Protection Service, and the Special Telecommunications Service.⁹⁷
- 81 The DSA then analyses the proposal to declassify the document. If it rejects the proposal, it issues and sends a reasoned note to the originator. If the DSA, however, approves the proposal to declassify, it informs the originator and sends a declassification notification to ORNISS. It must then issue a draft government decision, accompanied by a statement of reasons prepared by the originator, a substantiation note or approval report and, if applicable, an impact assessment.⁹⁸ In doing so, the originator must follow the general procedure stipulated by law for enacting a government decision.⁹⁹

⁹⁵ National Standards for the Protection of Classified Information, at [Exhibit C-14](#), p. 8, Art. 20(2).

⁹⁶ National Standards for the Protection of Classified Information, at [Exhibit C-14](#), p. 2 *et seq.*, Art. 3.

⁹⁷ National Standards for the Protection of Classified Information, at [Exhibit C-14](#), p. 2 *et seq.*, Art. 3.

⁹⁸ See Excerpt from Decision no. 1361 regarding the substantiation of legislative acts dated 27 September 2006, at [Exhibit R-18](#), Art. 1; Excerpt from Law No. 24 regarding the drafting of legislation dated 27 March 2000, at [Exhibit R-19](#), Art. 6(3).

⁹⁹ The originator should send the draft government decision and the supporting documents to the General Secretariat of the Government and to the authorities and institutions involved in the approval process. All enactments must bear the endorsement of the Ministry of Justice on issues relating to the merits and the legality of the draft government decision. Further, depending on the level of secrecy of the information subject to declassification, the draft government decision may require an endorsement from the Supreme Council for National Defence and/or other entities. The draft decision must also be endorsed by the Legislative Council. Further, the General Secretariat of the Government verifies if the draft of the Gov-

4.2.3 Effects of the Declassification

- 82 To the extent the documents held by RMGC relevant to this arbitration were declassified, they would then only be subject to the statutory and contractual confidentiality restrictions described above.¹⁰⁰ NAMR and RMGC could then agree to the use of those documents for purposes of this arbitration. Specifically, they could agree to the access and use of the documents by both Parties, the Tribunal and other parties involved in the arbitration, subject to appropriate confidentiality undertakings and/or rulings by the Tribunal.

ernment Decision meets the formal requirements provided by the law and after obtaining all endorsements, the draft is included on the agenda of the Government. If approved, the General Secretariat of the Government finalizes the draft, which is then published in the National Official Gazette and the government decision enters into force.

¹⁰⁰ See *supra* para. 59.

5 THE REQUIREMENTS FOR RECOMMENDATION OF PROVISIONAL MEASURES ARE NOT MET

- 83 As noted above, authorizing access to and use of the Confidential and Classified Documents is not a matter for interim relief; at best, the Claimants' First Request is at a minimum premature at this stage of the proceedings. The Claimants' unilateral application is therefore inappropriate and should be rejected since access to and use of the Confidential and Classified Documents is a matter that concerns **both Parties** and not only the Claimants, and must be addressed accordingly.
- 84 Nonetheless, and subject to its position and reservations as set out above, the Respondent will address below the Claimants' First Request in accordance with the requirements governing interim relief under the ICSID Convention and the ICSID Rules.
- 85 In ICSID arbitration, there is no presumption of jurisdiction and the Claimants have the burden of proving all the facts upon which jurisdiction depends.¹⁰¹ Although the Claimants appear to agree that, by seeking provisional measures, they have the burden of making a *prima facie* showing that the Tribunal has jurisdiction,¹⁰² they assert that they have met that burden through their Request for Arbitration and refer to the ICSID Secretary-General's registration of this case under Article 36(3) of the ICSID Convention.¹⁰³

¹⁰¹ *US Parcel Service v. Government of Canada*, Award on Jurisdiction, UNCITRAL, 22 November 2002, at **Exhibit RLA-3**, p. 12 (para. 30): "(...) parties, notably State parties, to arbitration processes are subject to jurisdiction only to the extent they have consented."

¹⁰² *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on Provisional Measures ICSID Case No. ARB/06/21, 18 November 2007, at **Exhibit CLA-5**, p. 11 (para. 50); *Burlington Resources Inc. v. Republic of Ecuador*, Procedural Order No.1 on Burlington Oriente's Request for Provisional Measures ICSID Case No. ARB/08/5, 29 June 2009, at **Exhibit RLA-4**, p. 16 (para. 49); *Perenco v. Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/08/6, 8 May 2009, at **Exhibit CLA-32**, p. 16 (para. 39); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/06/11, 17 August 2007, at **Exhibit CLA-9**, p. 25 (para. 55).

¹⁰³ *Claimants' First Request*, p. 7 (paras. 15-16).

86 However, while the Secretary-General's registration decision in this case has correctly prompted the ICSID Secretariat to transmit the Claimants' First Request to the Tribunal once it was constituted (ICSID Rule 39(5)), registration does not reflect a *prima facie* decision on jurisdiction:

“The Secretary-General's decision to register **is thus not a determination on, or even a prima facie holding on, jurisdiction.** The drafters of the Convention rejected the *prima facie* jurisdiction approach precisely because they thought it would encroach on the functions of the arbitral tribunal.”¹⁰⁴

87 Accordingly, the Secretary-General's registration of a case has no bearing on an ICSID tribunal's review of its jurisdiction when deciding an application for provisional measures.¹⁰⁵ Furthermore, at present, the Respondent cannot comment on the allegations made in the Request for Arbitration with respect to jurisdiction and reserves its right to raise jurisdictional objections once the Claimants have further developed and substantiated their claims.

88 As for the substantive requirements for provisional relief, the Claimants argue that the measures requested are warranted and necessary to pre-

¹⁰⁴ M. Polasek, "The Threshold for Registration of a Request for Arbitration under the ICSID Convention" (2011) 5 (2) *Dispute Resolution International* 177, at **Exhibit RLA-5**, p. 179 (emphasis added); see also, M. Polasek, "The Threshold for Registration of a Request for Arbitration under the ICSID Convention" (2011) 5 (2) *Dispute Resolution International* 177, at **Exhibit RLA-5**, p. 180: "It has been suggested that a tribunal need not satisfy itself regarding its jurisdiction because the Secretary-General's registration must weigh in favour of the tribunal's power to rule on the request for provisional measures at an early stage of the proceeding. As mentioned above, the Secretary-General was not vested with a screening power that would amount to a *prima facie* holding on jurisdiction. Moreover, the Secretary-General must only reach her decision 'on the basis of the information contained in the request'. This means that ICSID is precluded from considering any objections to jurisdiction that may be filed by the respondent during the screening of the request for arbitration. As a result, a tribunal's reliance on the decision to register a case would mean that it would not take into account the respondent's possible arguments on jurisdiction, however strong they may be." (Emphasis added).

¹⁰⁵ *Perenco v. Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/08/6, 8 May 2009, at **Exhibit CLA-32**, p. 16 (para. 39).

serve a protected right of a party.¹⁰⁶ They allege that the requested measures are necessary to ensure the Claimants' right to present their case in the arbitration.¹⁰⁷ However, as demonstrated below, the Claimants' First Request does not meet the requirements for the recommendation of provisional measures under the ICSID Convention and Rules.

5.1 The requirements for the recommendation of provisional measures under the ICSID Convention and Rules

- 89 As the Claimants seem to acknowledge, under the Canada-Romania BIT and the ICSID Convention and Rules, an applicant for provisional relief must demonstrate that the measures sought (i) seek to protect a right¹⁰⁸ and are (ii) necessary,¹⁰⁹ (iii) urgent,¹¹⁰ and (iv) proportional.¹¹¹
- 90 Article 47 of the ICSID Convention limits a Tribunal's power to order provisional measures to "when the circumstances so require." Interpreting this provision, the *Maffezini v. Spain* tribunal observed that provisional relief under the ICSID Convention is "an extraordinary measure which should not be granted lightly..."¹¹² In the same vein, the *Burimi v Albania* tribunal explained in more detail what that entails:

"Provisional measures are 'extraordinary measures' which should be recommended only in limited circumstances. Specifically, an order for provisional measures will be made only where such

¹⁰⁶ [Claimants' First Request](#), p. 5 *et seq.* (paras. 13-16).

¹⁰⁷ [Claimants' First Request](#), p. 7 (paras 15-16).

¹⁰⁸ [Claimants' First Request](#), p. 20 (paras. 42).

¹⁰⁹ [Claimants' First Request](#), p. 7 (para. 16) and p. 22 (para. 48).

¹¹⁰ [Claimants' First Request](#), p. 23 (para. 49).

¹¹¹ [Claimants' First Request](#), p. 24 (paras. 52-53).

¹¹² [Emilio Agustín Maffezini v. Kingdom of Spain](#), Procedural Order No.2, ICSID Case No. ARB/97/7, 28 October 1999, at [Exhibit CLA-6](#), p. 3 (para. 10).

measures are (i) necessary to avoid imminent and irreparable harm and (ii) urgent.”¹¹³

- 91 Article 47 of the ICSID Convention is clear in that provisional measures must be aimed at “preserv[ing] the respective rights of either party.” The same principle is echoed by Article XIII(8) of the Canada-Romania BIT:

“A tribunal may order an interim measure of protection **to preserve the rights of a disputing party**, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach of this Agreement. For purposes of this paragraph, an order includes a recommendation.”¹¹⁴

- 92 In *City Oriente v Ecuador*, the ICSID tribunal considered that a decision on provisional relief should balance the harm caused by ordering the measures against the harm spared by ordering the measures: only where the latter “exceed[s] greatly” the first would provisional measures be warranted.¹¹⁵ The same test of proportionality has been applied by other tribunals.¹¹⁶
- 93 As shown below, the Claimants’ First Request does not meet these requirements. The request is also unclear and potentially overly broad

¹¹³ *Burimi SRL v. Republic of Albania*, Procedural Order No. 2, ICSID Case No. ARB/11/18, 3 May 2012, at **Exhibit RLA-6**, p. 5 (para. 34).

¹¹⁴ Emphasis added.

¹¹⁵ *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on Provisional Measures ICSID Case No. ARB/06/21, 18 November 2007, at **Exhibit CLA-5**, p. 12 (para. 54).

¹¹⁶ *Hydro Albania S.r.l v. Republic of Albania*, Order on Provisional Measures, ICSID Case No. ARB/15/23, 3 March 2016, at **Exhibit RLA-7**, p. 24 (para. 3.37); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Decision on Provisional Measures, ICSID Case No. ARB/06/2, 26 February 2010, at **Exhibit CLA-11**, p. 23 (para. 70 et seq.).

since it potentially encompasses documents not relevant to this case as demonstrated in Section 3 above.

5.2 The Claimants' First Request does not meet the requirements for the recommendation of provisional measures

- 94 The Claimants' First Request is premature in that the Claimants are not seeking to protect an existing right which is in jeopardy, nor are they seeking relief which is necessary, urgent and proportional. This conclusion becomes clear when considering the exact provisional measures that Claimants are seeking:

“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.”¹¹⁷

- 95 **First**, while the Claimants argue that the right to access and to adduce evidence relevant to one's claim is fundamental to the right to present

¹¹⁷ [Claimants' First Request](#), p. 28 (para. 64).

their case,¹¹⁸ this alleged right is not in peril. The arbitration has only just begun, the Tribunal only having been appointed on 21 June 2016. The Parties have not yet discussed the procedural schedule for the arbitration and the Claimants do not explain why the Parties could not agree to and envisage in that schedule a first phase during which the Confidential and Classified documents would be reviewed and declassified in accordance with Romanian law (and the Canada-Romania BIT). The Claimants' right to present their case is not in jeopardy, and the Respondent does not wish to deprive them of that right. Accordingly, the Claimants' First Request is premature since the case has not advanced to a stage where the Claimants have, for instance, been required to make submissions to the Tribunal but have been prevented from adducing relevant evidence.

- 96 **Second**, provisional measures are not meant to protect against potential or hypothetical harm¹¹⁹ and the Claimants have the burden of proving that, absent the measures sought, they **will** suffer imminent and irreparable harm.¹²⁰ However, they do not specifically identify what harm (let alone imminent and irreparable) will be caused to them absent the measures.
- 97 The Claimants refer generally to “due process” and “the right to be heard”,¹²¹ as well as the right “to prepare and present their claims in this arbitration”.¹²² They allege that the measures are “necessary to vindicate Claimants’ most basic due process rights in this arbitration” and “to permit the arbitration to proceed in a fair and orderly manner, and generally to preserve the integrity of these proceedings”.¹²³ However, the measures

¹¹⁸ Claimants' First Request, p. 20 (para. 42).

¹¹⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/06/11, 17 August 2007, at **Exhibit CLA-9**, p. 41 (para. 89).

¹²⁰ *Emilio Agustín Maffezini v. Kingdom of Spain*, Procedural Order No.2, ICSID Case No. ARB/97/7, 28 October 1999, at **Exhibit CLA-6**, p. 3 (para. 10).

¹²¹ Claimants' First Request, p. 20 (para. 43).

¹²² Claimants' First Request, p. 22 *et seq.* (para. 48).

¹²³ Claimants' First Request, p. 28 (para. 62).

sought **do not correlate** with the alleged harm as they would not assist the Claimants in protecting their alleged right to present their case insofar as only the Claimants (and their representatives, counsel, experts, witnesses, and consultants) would be allowed to access and use the Confidential and Classified Documents and not the Tribunal (or the Respondent).

- 98 **Third**, the issue is not, as portrayed by the Claimants, that Romania “cannot rely on its internal law” to frustrate its (alleged) consent to arbitrate the present dispute.¹²⁴ The Claimants’ concerns about a frustration of the arbitration must be measured against their acknowledgement that both Parties are affected similarly by the same legal restrictions:

“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.”¹²⁵

- 99 There is no such frustration of the alleged consent; rather, the issue is that:

- Romania has, under the Canada-Romania BIT, the right not to furnish classified documents; and
- Romania has the right to ensure that its classified documents are declassified in accordance with its mandatory domestic laws.
- Once declassified, the applicable confidentiality regime must be established for each document, if necessary by way of a decision of the Tribunal.

- 100 Thus, the Claimants seek interim relief to enforce a right to “**unrestricted** access to and use of the Confidential and Classified Documents.”¹²⁶ However, as explained above, the Claimants do not have the right to “un-

¹²⁴ [Claimants' First Request](#), p. 25 (para. 56).

¹²⁵ [Claimants' First Request](#), p. 19 (para. 41).

¹²⁶ [Claimants' First Request](#), p. 28 (para. 64).

restricted access to and use of the Confidential and Classified Documents” under Article XVII(7) and Article 7 of Annex C(I) of the Canada-Romania BIT.¹²⁷

101 Furthermore, although the Claimants are well aware that the Confidential and Classified Documents could only be used in this arbitration following their declassification, the Claimants have not alleged that they will suffer any harm or prejudice by allowing the Romanian authorities to conduct a declassification procedure in accordance with Romanian law. As explained above, it is necessary to declassify the documents in question so as to permit both Parties, their representatives, counsel, experts, witnesses, and consultants, as well as the Tribunal to access and use such information in this arbitration.

102 **Fourth**, Romania disputes the suggestion that the Claimants have the right to decide **when** the relevant documents should be made available for their review irrespective of the applicable law. The Claimants have long since been aware of the restrictions to access and use of Confidential and Classified Documents and did not seek to address this issue before filing for arbitration. They cannot now require Romania to circumvent or waive its mandatory laws regarding classified documents and the procedure to declassify documents, in particular, in order to remedy a situation that exists only because the Claimants rejected the declassification of the Roşia Montană project documents that NAMR requested in 2007.¹²⁸

103 In these circumstances, the requested measures fail to meet the requirements for provisional relief: they are at best premature and, at worse, an impermissible attempt to threaten the procedural equality of the Parties by allowing only one of the Parties to access documents and information that are unavailable to the other. The requested measures are also unclear and may refer to documents entirely unrelated to this arbitration.

¹²⁷ See *supra* Section 4.1.

¹²⁸ See *supra* Section 2.

6 ROMANIA'S PROPOSED STEPS GOING FORWARD

- 104 As explained above, the scope of the Claimants' First Request is unclear. In order to be able to address the Claimants' request for permission to access and use the Confidential and Classified Documents, the Respondent requires further information.
- 105 **First**, as explained above, the updated Registry potentially includes documents not relevant to this Project and therefore not relevant to this arbitration.¹²⁹ The Claimants should therefore specify, with the assistance of RMGC, which documents in the updated Registry (*i.e.*, the re-submitted version of Exhibit C-20) are relevant to this arbitration.¹³⁰
- 106 **Second**, for each of those documents, the Claimants should specify (1) the agency or entity that initially classified it as well as (2) the type of classification of the document, namely, whether it is classified as work secret or state secret and, if the latter, the level of classification.¹³¹
- 107 The updated Registry contains 133 documents that allegedly were "issued" by RMGC.¹³² To the extent that RMGC classified those documents (and/or other documents) listed in the Registry, it may, in its discretion and in accordance with the Classified Information Law, declassify those documents.
- 108 Once the Claimant provides the information requested above, representatives from each of the governmental agencies that initially classified the documents will need to physically review the Registry documents that were classified by their agency in order to determine whether they may be declassified. RMGC should thus provide the Registry documents to NAMR, which may then liaise with each governmental agency that classified documents listed therein with respect to their review of those doc-

¹²⁹ See *supra* paras. 51-52.

¹³⁰ See *supra* paras. 46-47.

¹³¹ See [Classified Information Law](#), at [Exhibit C-24](#), p. 3, Art. 15.

¹³² See *e.g.* documents numbered 2, 3, 30, 70, 294-322, [Updated RMGC Registry dated 22 July 2016](#), at [Exhibit C-20 \(as resubmitted\)](#).

uments in view of their possible declassification. Once that process is completed, NAMR would then return the documents to RMGC. As explained above, if and when each entity declassifies a document, they must physically remove the classification markings thereon and delete that document from the relevant registry.

- 109 The document review process should be carried out in two stages, with NAMR first reviewing those documents that it classified and then other governmental agencies reviewing those documents that they initially classified. The law provides that, where a particular document refers to a preceding classified document, that document must also be classified.¹³³ Conversely, the subsequent document may only be declassified if the preceding document is declassified. Because NAMR is the main governmental entity identified in the Registry,¹³⁴ it would be most efficient if NAMR first reviewed those documents that it classified before other governmental agencies carried out their review.

¹³³ See e.g. [National Standards for the Protection of Classified Information](#), at [Exhibit C-14](#), Art. 14(3) (“summaries ... of classified documents shall receive the class or the secrecy level corresponding to the contents.”) and Art. 56.

¹³⁴ The Registry indicates that NAMR issued 73 documents listed therein. See [Updated RMGC Registry dated 22 July 2016](#), at [Exhibit C-20 \(as resubmitted\)](#).

7 PRAYER FOR RELIEF

110 The Respondent hereby respectfully requests that the Tribunal:

- a) reject the relief sought by the Claimants in their First Request for Provisional Measures;
- b) instruct the Claimant to (i) specify which documents in the Registry dated 22 July 2016 (Exhibit C-20 as resubmitted) are relevant and material to this arbitration; (ii) of those documents, specify the agency or entity that initially classified each document; (iii) identify whether these documents are classified as work secret or state secret;
- c) order RMGC to hand over the documents listed in the Registry dated 22 July 2016 (Exhibit C-20 as resubmitted) to NAMR for purposes of the Respondent's review and possible declassification of these documents and to coordinate this hand-over and transportation of documentation in accordance with Romanian law;¹³⁵
- d) grant the Respondent six months from the time the Claimants provide the information requested above in (c) for the work secret documents to be reviewed and for the Respondent to determine whether they may be declassified for purposes of this arbitration.¹³⁶

¹³⁵ Such transportation and hand-over should be in accordance with Government Decision No. 1349, dated 27 November 2002, regarding the collection, transportation, distribution and protection of classified correspondence on the Romanian territory. See [Exhibit C-25](#).

¹³⁶ To the extent the Registry includes state secret documents, additional time would be needed for those documents to be reviewed and analyzed in view of their possible declassification.

Respectfully submitted,

3 August 2016

For and on behalf of

Romania

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