

**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**

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**RESPONDENT'S FURTHER OBSERVATIONS ON  
CLAIMANTS' FIRST REQUEST FOR  
PROVISIONAL MEASURES**

31 August 2016

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**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**

<b>Term</b>	<b>Definition</b>
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 ( <b>Exhibit C-1</b> )
Classified Information Law	Law No. 182/2002 on protection of classified information (as of February 2016) ( <b>Exhibit C-24</b> )
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”
Confidentiality Order	Procedural Order establishing the confidentiality regime for this arbitration
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) ( <b>Exhibit C-11</b> )

<b>Term</b>	<b>Definition</b>
Minvest	<p>Collective reference to both of the following companies, which have successively held a 19.31% share in RMGC:</p> <ul style="list-style-type: none"> <li>- 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,</li> <li>- Minvest Roşia Montană S.A., which was established by government decision in 2013 and has held the shares in RMGC since then</li> </ul>
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) ( <b>Exhibit C-14</b> )
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) ( <b>Exhibit C-12</b> )
Roşia Montană License	License No. 47/1999 regarding the Roşia Montană area
ORNISS	Romanian National Registry Office for Classified Information (the

<b>Term</b>	<b>Definition</b>
	“ <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 ( <b>Exhibit C-20</b> , 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 and its addenda ( <b>Exhibits R-43, R-44, and R-45</b> )
VCLT	Vienna Convention on the Law of Treaties ( <b>Exhibit RLA-1</b> )

## 1 INTRODUCTION

- 1 In accordance with the letter of the Tribunal dated 20 July 2016, Romania (the “**Respondent**”) hereby submits its further 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 This submission both (i) follows the Respondent’s prior Observations on Claimants’ First Request for Provisional Measures dated 3 August 2016 (“**Respondent’s Observations**”) and (ii) responds to the Claimants’ Reply to Respondent’s Observations on Claimants’ First Request for Provisional Measures dated 17 August 2016 (the “**Claimants’ Reply**”).
- 3 Despite the Claimants’ grandstanding and inflammatory rhetoric throughout their pleadings, the issues in dispute between the Parties in connection with the Claimants’ First Request are extremely limited at this stage. The near consensus between the Parties confirms that the Claimants’ recourse to a request for provisional relief in connection with access to and use of the Confidential and Classified Documents was both unnecessary and improper.
- 4 The Claimants’ First Request was unnecessary because, contrary to their persistent accusations, the Respondent has been seeking for months to address this problem.<sup>1</sup> The Parties could have reached an agreement in this regard without involving the Tribunal and as they are effectively doing through these pleadings.
- 5 The Claimants’ First Request was improper since the requirements for an order of provisional measures under the ICSID Convention and the ICSID Rules are not met. It should therefore be denied.

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<sup>1</sup> See [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 8 (paras. 27-28)

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- 6 The Claimants' First Request has evidently been driven by a strategic desire to tarnish the image of the Respondent and its counsel at the very outset of this arbitration, apparently in order to gain some tactical advantage in this arbitration and this, just as the Tribunal was being formally constituted.
- 7 The Claimants suggest that the issue of access to and use of classified documents is in reality a nonissue, that the Respondent – by not immediately acceding to the Claimants' pressing requests and beckoning – is merely seeking to blockade this arbitration, that the Claimants are unreservedly entitled to the Confidential and Classified Documents, and that nothing prevents the Respondent from issuing a decision permitting them to do so. These suggestions are baseless and entirely wrong, as the Claimants know.
- 8 As previously explained, 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.<sup>2</sup>
- 9 However, as also previously explained, the Canada-Romania BIT establishes clear exceptions to the Contracting Parties' disclosure obligations.<sup>3</sup> As a result of these exceptions, Romania cannot be compelled to furnish information the disclosure of which would implicate its national security or violate its domestic laws regarding classified information. For such documents to be disclosed, they thus must first be declassified in accordance with Romanian law.<sup>4</sup>

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<sup>2</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 1 (para. 4).

<sup>3</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 2 (para. 6).

<sup>4</sup> The Claimants' arguments that Romania could enable the disclosure of the Confidential and Classified Documents without going through a declassification procedure are without merit. *See infra* para. 66.

- 10 Nevertheless, the Respondent is prepared to cooperate and has been actively cooperating with the Claimants with respect to organizing access to and use of the Confidential and Classified Documents. The Claimants' contention that the Respondent has "dragged its feet" since they first raised this issue in their Notice of Arbitration in July 2015 is false. Following the Parties' failure to reach agreement regarding a possible President of the Tribunal by 3 March 2016, the Claimants themselves were not in a hurry and dragged their feet for over two months, not requesting the Secretary-General of ICSID to appoint a president until 5 May 2016 (apparently once they were able to arrange for the funding of these proceedings). The Respondent's continued efforts over the past year to address this issue are thus particularly noteworthy given the Claimants' own delay and resulting uncertainty as to whether these proceedings would in fact ever even go forward.
- 11 The Parties for the most part agree on how to address the issue of access to and use of Confidential and Classified Documents. In particular, they agree on the following key points:
- Neither Party presently has access to or use of the Confidential and Classified Documents and both wish to obtain such access and use, also for the benefit of the Tribunal and other individuals involved in this arbitration;<sup>5</sup>
  - The Confidential and Classified Documents should be declassified in accordance with Romanian law in order to be accessed and used for purposes of this arbitration;<sup>6</sup>

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<sup>5</sup> While the Claimants recognize this fact, their request for relief does not entail the Respondent's obtention of access to and use of the Confidential and Classified Documents and would thus be highly prejudicial. See [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 3 (para. 10).

<sup>6</sup> The Claimants contend that declassification is not the only option available to the Respondent and that it could have issued a decision to apply a special regime of access subject to confidentiality for the classified documents at issue. This contention is, however, without merit. In any event, the Claimants adhere to the Respondent's proposal to proceed via a

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- Of the **785 documents** initially at issue, there are now only roughly **150 documents** for which a decision on declassification must still be rendered;<sup>7</sup> and,
  - Once any outstanding documents are declassified, RMGC and NAMR will still need to consent to the access to and use by the Parties and Tribunal (and other individuals involved in this arbitration) to the documents which are subject to contractual and statutory restrictions given their confidential nature.<sup>8</sup>
- 12 At this stage, there are thus only two issues in dispute between the Parties.
- 13 The **first** issue is how (best) to permit NAMR to access the roughly 150 documents for review for purposes of declassification. Although the Claimants wrongly indicate that the Respondent need not review the documents, they recognize that NAMR can request copies of documents from RMGC.<sup>9</sup> Indeed, NAMR must either obtain the originals of the outstanding documents in question (as previously requested) or copies thereof for review for purposes of declassification.
- 14 The **second** issue is the time required by the Respondent to complete the declassification process for the remaining roughly 150 documents. The Claimants arbitrarily argue that that process can be completed within 30

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declassification procedure. *See* Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 6 (para. 17).

<sup>7</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 13 (para. 36).

<sup>8</sup> Respondent's Observations to Claimants' Request for Provisional Measures, p. 6 (para. 18); Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 6 *et seq.* (para. 18).

<sup>9</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 33 (para. 75). Separately, the Claimants acknowledge that the procedure for providing copies of classified documents is burdensome. *See ibid.* at footnote 118.

days from the date of an order granting Claimants' First Request.<sup>10</sup> The Respondent, however, considers that two months would be necessary.<sup>11</sup>

- 15 This submission is divided into four main sections. Following this first introductory section, the second section explains why the plain terms of the Canada-Romania BIT belie the Claimants' contention that they have the right to access and use the Confidential and Classified Documents (**Section 2**).
- 16 The third section describes the facts and events, including the most recent developments of these past few days, leading us to where we are today and relevant to the issues before the Tribunal. It also seeks to correct numerous misstatements by the Claimants (**Section 3**).
- 17 The fourth section demonstrates, once again, that the requirements for an order of provisional relief are not met and why the Claimants' arguments to the contrary are in vain (**Section 4**).
- 18 The fifth and final section describes Romania's proposals regarding the declassification of the remaining documents for which a decision on declassification has not yet been taken as well as how to approach the documents still subject to confidentiality restrictions (**Section 5**).
- 19 The Respondent thus reiterates its request that the Tribunal reject the Claimants' request for provisional relief and permit the outstanding documents still at issue also to be reviewed and declassified in accordance with Romanian law, as have the other documents.<sup>12</sup>

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<sup>10</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 34 (para. 76, c.).

<sup>11</sup> Given that the number of documents at issue has greatly diminished, the Respondent no longer considers six months necessary to complete the declassification process.

<sup>12</sup> As the Claimants note, non-compliance with the applicable laws and regulations is subject to strict criminal sanctions. [Claimants' First Request](#), p. 4 (para. 9).

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## 2 THE CLAIMANTS HAVE NO RIGHT TO ACCESS THE CLASSIFIED DOCUMENTS

- 20 The Claimants' First Request is driven by, and based on, an entirely false premise: that the Claimants have a right to access and use the Confidential and Classified documents for purposes of this arbitration.<sup>13</sup> This premise is false, because the Canada-Romania BIT expressly states that nothing in the BIT shall be construed to require a Contracting Party to furnish or allow access to information the disclosure of which would be contrary to national security or the Contracting Party's law on classified information.<sup>14</sup>
- 21 It is based on this false premise that the Claimants allege that the "only issue for the Tribunal to resolve is whether Respondent's arguments regarding the time and process it claims are necessary are justified".<sup>15</sup> It is true that these are the only outstanding issues that need to be resolved **between the Parties** as discussed in Section 5 below. It is not true that the Tribunal's recommendation of provisional measures in this respect is required or warranted.
- 22 The Claimants **have no right** to access and use the Confidential and Classified unless and until the relevant documents are declassified in accordance with the applicable Romanian law, as demonstrated in the Respondent's Observations.<sup>16</sup> The Claimants have no right to invoke preferential treatment with respect to the application of Romanian law on classified information just because they have filed this arbitration. The "time and process" of access to the Classified and Confidential docu-

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<sup>13</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 2 *et seq.* (para. 6) and p. 31 *et seq.* (para. 71).

<sup>14</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 19 *et seq.* (Section 4.1).

<sup>15</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 29 (para. 67).

<sup>16</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 21 (paras. 65-67).

ments is not a secondary issue as the Claimants purport: both elements are dictated by and result from the Romanian law on classified information, which is also recognized and compelled by Articles XVII(6) and (7) and Article 7 of Annex C(I) of the Canada-Romania BIT. The Claimants' arguments to dismiss or circumvent these provisions of the BIT are unavailing, as shown below.

- 23 Accordingly, the Claimants' repeated protestations about "delay"<sup>17</sup> are entirely irrelevant where the procedure that must be followed is being followed. Imposing a discretionary deadline on the Romanian authorities for the completion of the declassification procedure (which is now suggested as 30 days from the issuance of the Tribunal's decision) on the sole basis of the Claimants' whim<sup>18</sup> would be contrary to the Canada-Romania BIT and must be rejected.
- 24 Romania demonstrates that it has no obligation to allow access to and use of classified documents until they are declassified (**Section 2.1**) and that the only way to access and use these documents for purposes of this arbitration is through declassification, a procedure to which the Claimants agree and which is currently well underway (**Section 2.2**).

## **2.1 The Canada-Romania BIT and Romania's right not to allow access to and use of classified documents**

- 25 Although the Claimants continue to argue that they have a right to access and use classified documents for purposes of this arbitration,<sup>19</sup> they do not meaningfully respond to the Respondent's demonstration to the contrary. Significantly, as further discussed below in Section 4, if they do

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<sup>17</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 2 (para. 3-4), p. 24 (para. 54) and p. 31 (para. 72).

<sup>18</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 2 (para. 5), p. 16 (para. 40) and p. 34 (para. 76, c.).

<sup>19</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 2 *et seq.* (para. 6) and p. 31 (para. 71).

not have a right to access and use the documents, they cannot seek to enforce that right through provisional measures.<sup>20</sup>

- 26 In accordance with the plain terms of the Canada-Romania BIT, Romania does not have an obligation to furnish or allow access to information the disclosure of which would be contrary to (i) its national security and/or (ii) its law protecting classified information:

	<b>English version</b>	<b>Romanian version</b>
Article XVII(6)(a)	“Nothing in this Agreement shall be construed (...) to require any Contracting Party to furnish or allow access to any information the disclosure of which it determines to be <b>contrary to its essential security interests</b> ” <sup>21</sup>	“Nicio dispoziție a acestui acord nu va fi interpretată în sensul (...) de a impune oricărei părți contractante să furnizeze sau să permită accesul la informații a căror divulgare este considerate de aceasta ca fiind <b>contrară intereselor sale esențiale de securitate</b> ” <sup>22</sup>
Article XVII(7)	“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 <b>contrary to the Contracting Party’s law protecting Cabinet confidences</b> , personal privacy or the confidentiality of the financial affairs and accounts of individual customers of financial institutions.” <sup>23</sup>	“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 obstrucționa aplicarea legii sau ar fi <b>contrară legislației părții contractante privind protejarea informațiilor clasificate</b> , secretului personal sau confidențialității tranzacțiilor financiare și a conturilor clienților individuali ai instituțiilor financiare.” <sup>24</sup>
Article 7 of Annex C(I)	“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 <b>contrary to the Contracting Party’s law protecting Cabinet confidences</b> , personal privacy or the financial	“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 <b>contrară legislației părții contractante privind protejarea informațiilor clasificate</b> , secretului personal sau confidențialității tranzacțiilor financiare și

<sup>20</sup> Respondent's Observations to Claimants' Request for Provisional Measures, p. 19 *et seq.* (Section 4.1).

<sup>21</sup> Canada-Romania BIT, at **Exhibit C-1**, p. 20 (Art. XVII(6)(a)).

<sup>22</sup> Romanian version of the Canada-Romania BIT, **Materials evidencing the Canadian BITs entry into force**, at **Exhibit C-2**, p. 23 (Art. XVII(6)(a)).

<sup>23</sup> Canada-Romania BIT, at **Exhibit C-1**, p. 21 (Art. XVII(7)).

<sup>24</sup> Romanian version of the Canada-Romania BIT, **Materials evidencing the Canadian BITs entry into force**, at **Exhibit C-2**, p. 23 (Art. XVII(7)).

	<b>English version</b>	<b>Romanian version</b>
	affairs and accounts of individual customers of financial institution, or which it determines to be <b>contrary to its essential security</b> . <sup>25</sup>	a conturilor clientilor individuali ai institutiilor financiare sau se stabileste a fi <b>contrară securității sale esențiale</b> . <sup>26</sup>

- 27 The Canada-Romania BIT therefore provides two exceptions to the obligation to disclose information. First, under XVII(6)(a) and Article 7 of Annex C(I), Romania is not obligated to disclose information implicating Romania's national security. Second, Romania is not obligated to disclose "*informațiilor clasificate*" (or "classified information") under Articles XVII(6)(a) and (7) and Article 7 of Annex C(I). Romania is entitled to object to a request to access documents which fall in either of these two categories.<sup>27</sup>
- 28 The Claimants allege that these provisions "do not apply to the documents at issue".<sup>28</sup> While they had the burden of proving this central allegation, they have not met that burden in their Reply.
- 29 The Claimants first distinguish between documents classified as work secret from those classified as state secret and contend that the national security exception in these provisions of the BIT does not apply to the former. Stated differently, they argue that, while Romania may not be required to disclose state secret documents, it may in fact be required to disclose work secret documents because they do not involve national security.<sup>29</sup> They also allege that the Confidential and Classified docu-

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<sup>25</sup> Canada-Romania BIT, at [Exhibit C-1](#), p. 26 (Art. 7 of Annex C(I)).

<sup>26</sup> 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)).

<sup>27</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 21 (para. 65).

<sup>28</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 26 (para. 58).

<sup>29</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 26 (para. 59).

ments do not “include anything even remotely reflecting ...matters relating to Romania’s national security”.<sup>30</sup>

- 30 This conclusion is based on a misrepresentation of the applicable law: the classification of a document as work secret only means that its importance for the national security is lower than that attaching to documents classified as “state secret”, not that there is no national security concern at all underlying the classification of documents as “work secret”. As stated in Article 4(1) of the National Standards for the Protection of Classified Information:

“(...) information is classified state secret **or work secret depending on its importance for the national security** and the consequences that might result from its unauthorized dissemination or disclosure.”<sup>31</sup>

- 31 The two relevant provisions of the BIT expressly confirm that it is for Romania to define what documents may endanger its national security (“(...) which **it** determines to be (...)”). Romania’s original decision to classify all documents relating to the Roşia Montană and Bucium projects is therefore protected by the national security carve-out under Article XVII(6)(a), also reaffirmed in Article 7 of Annex C(I) of the Canada-Romania BIT. Under these two provisions, the Claimants have no right to access and use the Classified documents.
- 32 Irrespective of the national security carve-out, the disclosure of the Classified documents would still be contrary to Romania’s law on classified information. Thus, pursuant to Articles XVII(7) and Article 7 of Annex C(I) of the Canada-Romania BIT, Romania is discharged from disclosing the Classified documents also on these grounds.

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<sup>30</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 27 (para. 60).

<sup>31</sup> National Standards for the Protection of Classified Information, at **Exhibit C-14**, p. 5 (Art. 4(1)).

- 33 The Claimants suggest that the Romanian and English versions of Article XVII(7) and Article 7 of Annex C(I) the BIT are contradictory and therefore conflict. They distinguish between the English phrase “Cabinet confidences” and the Romanian phrase “*informațiilor clasificate*,” (or “classified information”). Without any explanation, they imply that the English version of these provisions prevails over the Romanian version.<sup>32</sup> They refer to the Canadian notion of “Cabinet confidences”, which purportedly applies only to “the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public”.<sup>33</sup> According to the Claimants, because the Confidential and Classified Documents do not implicate “Cabinet Confidences,” those documents do not fall within the exception from the obligation to disclose and therefore must be produced.<sup>34</sup>
- 34 The first problem with the Claimants’ argument is that it disregards the applicable law clause in the BIT. The wording “**Contracting Party’s law**”<sup>35</sup> (or “*legislatiei partii contractante*”)<sup>36</sup> in Article XVII(7) and Article 7 of Annex C(I) expresses a *renvoi* to the domestic law of the host State, in this case, Romanian law.
- 35 It is nonsensical to suggest that Canadian law on the protection of “Cabinet confidences” applies to or binds Romania, which does not even

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<sup>32</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 26 *et seq.* (paras. 59-60).

<sup>33</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 26 (para. 59 and note 131).

<sup>34</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 26 (para. 59).

<sup>35</sup> [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 21 (Art. XVII(7)) ; [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 26 (Art. 7 of Annex C(I)).

<sup>36</sup> Romanian version of the Canada-Romania BIT, [Materials evidencing the Canadian BITs entry into force](#), at [Exhibit C-2](#), p. 23 (Art. XVII(7)); 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)).

have a “Cabinet”.<sup>37</sup> Indeed, the Claimants’ reference to the position of the government of Canada in *UPS v Canada*,<sup>38</sup> *Gallo v Canada*<sup>39</sup> and *Merril v Canada*<sup>40</sup> as to the scope of “Cabinet privilege” under Canadian law is entirely irrelevant.<sup>41</sup> Not only does Canadian law not apply here, but also the relevant investment treaty in those cases (NAFTA) did not exclude the production of classified information or Cabinet confidences,<sup>42</sup> as does the Romania-Canada BIT.<sup>43</sup> The Claimants’ efforts to clarify the meaning of the terms “Cabinet confidences” under Canadian law are therefore irrelevant to the question before the Tribunal.

- 36 A similar issue arose in *Eurogas v Slovakia*, where the respondent had proposed the inclusion of wording in a draft procedural order to the effect that it was not required to disclose information protected by Slovakian domestic law,<sup>44</sup> under Annex B of the Canada-Slovakia BIT.<sup>45</sup> The

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<sup>37</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 27 (para. 60).

<sup>38</sup> *UPS v. Canada*, Decision of the Tribunal Relating to Canada’s Claim of Cabinet Privilege, UNCITRAL, 8 October 2004, at **Exhibit CLA-37**, p. 1 (para. 1).

<sup>39</sup> *Vito G. Gallo v. Canada*, Procedural Order No. 3. UNCITRAL, 8 April 2009, at **Exhibit CLA-38**, p. 8 (para. 24).

<sup>40</sup> *Merril & Ring Forestry L. P. v. Canada*, Decision of the Tribunal on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, UNCITRAL, 3 September 2008, at **Exhibit CLA-36**, p. 6 *et seq.* (para. 16).

<sup>41</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 26 (note 131).

<sup>42</sup> 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.”

<sup>43</sup> Respondent's Observations to Claimants' Request for Provisional Measures, p. 21 (para. 65).

<sup>44</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 2 (para. 1), quoting from Slovakia’s draft para. 25(8) of Procedural Order No. 1.

<sup>45</sup> Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, at **Exhibit RLA-25**, p. 24 *et seq.* (Annex B), referred to in *EuroGas Inc. and*

claimants had objected to that proposal.<sup>46</sup> The tribunal found in favor of the respondent, holding that Slovakian law applied.<sup>47</sup> It subsequently accepted that Slovakian law defenses against document production were available to Slovakia, without any reference to the notion of “Cabinet confidences” under Canadian law.<sup>48</sup>

- 37 The second problem with the Claimants' position is that it creates an artificial conflict between the Romanian and English versions of the Canada-Romania BIT.<sup>49</sup> As explained in the Respondent's Observations, the Romanian versions of Article XVII(7) and Article 7 of Annex C(I) refer to “*informațiilor clasificate*” (or “classified information”), while the English version refers to “Cabinet confidences”.<sup>50</sup> Although the English and

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*Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 3 (para. 2).

<sup>46</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 3 (para. 3).

<sup>47</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 5 (para. 7, item 8: “The Tribunal shall not require the Slovak Republic to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Slovak Republic'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.”)

<sup>48</sup> E.g. *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 4, ICSID Case No ARB/14/14, 26 August 2015, at **Exhibit RLA-26**, p. 23 (Annex I) (“Granted, except for confidential or privileged documents. Respondent will identify confidential or privileged documents as precisely as possible, explaining why they are confidential or privileged.”).

<sup>49</sup> *Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures*, p. 27 (para. 60).

<sup>50</sup> *Respondent's Observations to Claimants' Request for Provisional Measures*, p. 21 (para. 64).

Romanian versions of these provisions (which are equally authentic)<sup>51</sup> may be different, they are not contradictory and thus not in conflict.

- 38 Each Contracting Party to the BIT employed the appropriate terminology, in accordance with its own domestic laws and legal system, in the English and Romanian versions of Articles XVII (7) and Article 7 of Annex C(I) of the Canada-Romania BIT. The Romanian version of the BIT provides the relevant legal notion as applicable to Romania and the English version provides the relevant legal notion as applicable to Canada.<sup>52</sup> Under Article 33(3) of the VCLT both are presumed to convey the same meaning:

“The terms of the treaty are presumed to have the same meaning in each authentic text.”<sup>53</sup>

- 39 Both Romanian and English notions are presumed to express the same meaning as applicable to the Canadian and Romanian domestic systems, and there is no reason to depart from that presumption here.
- 40 Even if a conflict between the two versions of the relevant provisions of the BIT existed, the Claimants cannot dismiss the Romanian version of the BIT, nor have they any basis to argue that the English version trumps the Romanian version.<sup>54</sup>
- 41 As stated above, Romania does not have a “Cabinet” or “Cabinet confidences” and thus this expression is meaningless when applied to Romania. Transposing the notion of “Cabinet confidences” to the Romanian

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<sup>51</sup> [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 23 (“Done in duplicate at Bucharest this 8th day of May 2009, in the Romanian, English and French languages, all texts being equally authentic”).

<sup>52</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 21 (note 81).

<sup>53</sup> [Vienna Convention on the Law of Treaties, 23 May 1969](#), at [Exhibit RLA-1](#), p. 340 (Art. 33(3)).

<sup>54</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 26 *et seq.* (paras. 59-60).

legal system would also be contrary to the well-established rules of treaty interpretation of Article 31 of the VCLT.<sup>55</sup>

- 42 In light of the context of the provision, only the Romanian version expresses the scope of Romania's interest in the protection against disclosure of information privileged information such that the relevant notion is "*informațiilor clasificate*" (or "classified information") and not "Cabinet confidences." That Romania is entitled to object to the disclosure of any information which Romanian law protects from disclosure is also reaffirmed by Article I(a) on the BIT in that the protection of "confidential information" encompasses broadly "confidential business information **and information that is privileged or otherwise protected from disclosure**"<sup>56</sup> ("*informația confidențială de afaceri și informația care este privilegiată sau protejată de divulgare în alt mod*").<sup>57</sup>
- 43 As the Claimants are manifestly not entitled to the relief they seek under the Canada-Romania BIT, they belatedly have again<sup>58</sup> sought to rescue their request by turning to the UK-Romania BIT.<sup>59</sup> This reliance is impermissible as shown in the Respondent's previous pleadings and will not be repeated again here: the Claimants cannot pick and choose the provisions of each BIT that are more favorable and make them applicable to both Claimants. Consolidation of claims is not a mechanism to provide a

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<sup>55</sup> Vienna Convention on the Law of Treaties, 23 May 1969, at [Exhibit RLA-1](#), p. 340 (Art. 31). There is no basis to resort to supplementary means of interpretation under Article 32 and the Claimants do not indicate how Article 32 would be of any relevance here, [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 27 (para. 60).

<sup>56</sup> Canada-Romania BIT, at [Exhibit C-1](#), p. 1 (Art. I(a)).

<sup>57</sup> Romanian version of the Canada-Romania BIT, [Materials evidencing the Canadian BITs entry into force](#), at [Exhibit C-2](#), p. 17 (Art. I(a)).

<sup>58</sup> This is the same argument that the Claimants formulated in their request for emergency measures and their Second Request.

<sup>59</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 27 *et seq.* (paras. 62-63).

claimant with more procedural rights than those that the BIT governing its claims grants to it.<sup>60</sup>

- 44 The Respondent must however briefly address the Claimants' misleading position that the *Eurogas* decision only applies to transparency and not to privileged documents.<sup>61</sup> This is plainly incorrect, as discussed above: the *Eurogas* tribunal was seized with a **specific request** for a decision regarding "Cabinet confidences" under Slovakian law.<sup>62</sup> The claimants in that case made the same argument the Claimants are making here, *i.e.*, they objected to the application of the provisions of the Canada-Slovakia BIT on privileged information to the United States claimant since the US-Slovakia BIT did not contain any such provision.<sup>63</sup> The tribunal rejected the claimants' argument, ordering with respect to **both claimants**:

"The Tribunal shall not require the Slovak Republic to furnish or allow access to information the disclosure of which would impede law enforcement **or would be contrary to the Slovak Republic'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."<sup>64</sup>

- 45 As noted above, the English version of the relevant provision of the Slovakia-Canada BIT is in all respects identical to Articles XVII(6) and

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<sup>60</sup> Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 47 *et seq.* (paras. 136-141); Respondent's Letter to the Tribunal dated 14 August 2016, p. 2.

<sup>61</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 28 *et seq.* (paras. 64-66).

<sup>62</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 2 (para. 1), quoting from Slovakia's draft para. 25(8) of Procedural Order No. 1.

<sup>63</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 3 (para. 3).

<sup>64</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 5 (para. 7, item 8).

(7) and Article 7 of Annex C(I) of the Canada-Romania BIT.<sup>65</sup> The Claimants' attempt to distinguish the *Eurogas* decision from this case is entirely unfounded as the relevant facts and applicable rules are the same. The *Eurogas* case is entirely on point and there is no reason for the Tribunal to depart therefrom.

- 46 Finally, to the extent that the Claimants allege that their right to procedural integrity is being breached by Romania's delay in resolving this issue of Classified documents, the First Request is similarly barred under Article XIII(8) as this provision prohibits interim relief enjoining Romania from undertaking measures alleged to breach the Romania-Canada BIT. That applies to both substantive and procedural rights, as shown in the Respondent's Comments to the Claimants' Emergency Relief.<sup>66</sup>

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

- 47 The Claimants argue that declassification is not the only option available to the Respondent. They contend that the Respondent "could have issued a decision to apply a special regime of access subject to confidentiality for the classified documents at issue..."<sup>67</sup>

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<sup>65</sup> [Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments](#), at [Exhibit RLA-25](#) p. 21 (Art.XV(7)) and p. 25 (Art. 7 of Annex B(I)).

<sup>66</sup> [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 16 (Art. XIII(8)) ("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.**") (emphasis added). See [Respondent's Comments on the Request for Emergency Relief](#), p. 22 *et seq.* (Section 4); [Respondent's Observations on the Claimants' Second Request for Provisional Measures](#), p. 46 (para. 135); [Respondent's Letter to the Tribunal dated 14 August 2016](#), p. 2.

<sup>67</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 6 (para. 17, n. 18).

- 48 This argument is, however, misplaced since decisions of the Romanian government, as elsewhere, must be in accordance with the law. The Respondent considered whether issuance of some sort of government decision might be possible and concluded that it was not. The Romanian government would have had and still has no legal basis to issue a decision permitting access to and use of classified documents for purposes of this arbitration since such access to classified documents would fly in the face of its laws protecting classified information.
- 49 In any event, as reflected in their amended prayer for relief, the Claimants begrudgingly recognize that there “is no question that declassification is the most direct approach to permit use of the documents for the present proceeding.”<sup>68</sup>

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<sup>68</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 8 (para. 21); see also *ibid.* at para. 17.

### **3 RELEVANT FACTUAL BACKGROUND**

50 Although the issues in dispute between the Parties are limited, the Claimants go to great lengths in their Reply to besmirch the Respondent's good name and conduct to date. The Respondent has in fact sought to address this issue promptly and in good faith (**Section 3.1**).

51 In its efforts to address efficiently the question of the access to and use of the Confidential and Classified Documents, the Respondent previously sought to clarify the scope of the Claimants' request. Although in their Reply the Claimants dismiss these questions as irrelevant, they have provided many of the requested clarifications (**Section 3.2**).

#### **3.1 The Respondent has sought to cooperate in good faith**

52 The Claimants stoop to inflammatory rhetoric and personal attacks on Respondent and its counsel in connection with their handling of the issue of access to and use of the Confidential and Classified Documents. They contend that the Respondent has been "silen[t]", has sought to delay the resolution of this issue,<sup>69</sup> "feign[ed] cooperation,"<sup>70</sup> and "never acknowledged any intent to cooperate or to find a reasonable solution."<sup>71</sup>

53 The Respondent vehemently rejects these contentions, which are entirely false. On multiple occasions, counsel for the Respondent made clear to the Claimants that the Respondent was examining this issue and trying to find the best way to address it. The Claimants' suggestions that enabling access to and use of the Confidential and Classified Documents should be a simple endeavor are naïve and disregard mandatory Romanian law.

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<sup>69</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 2 (para. 3); see also *ibid.* at paras. 23-24.

<sup>70</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 2 (para. 4).

<sup>71</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 2 (para. 3).

- 54 Albeit creative, the Claimants' suggestion that the Respondent's purported delay in addressing the issue of the documents goes back as far as January 2015, when the Claimants sent notice of this dispute, is absurd.<sup>72</sup> The notice of dispute makes no reference to the issue of access to classified documents and makes clear that the Claimants have not yet initiated arbitration proceedings.<sup>73</sup> The Respondent thus had no reason at that stage to commence a procedure for declassification of documents for an arbitration which had not yet been filed and of which it did not yet know the contours.
- 55 The Claimants' assertion that the "Respondent still did not engage constructively" after the Claimants filed their First Request and "waited *silently for more than six weeks* and only then filed a response after being directed by the Tribunal, on August 3, 2016..." is simply bizarre.<sup>74</sup> After having received the Claimants' First Request, which was anything but "constructive," the Respondent had no choice but to prepare its response thereto. In conjunction with the preparation of its response to the First Request, it continued to liaise internally, and with counsel, to see how to best address this issue.<sup>75</sup>
- 56 The Respondent has responded proactively to the Claimants' request with regard to the access to and use of the Confidential and Classified Documents. As the Claimants recognize, first, NAMR requested that RMGC declassify documents that RMGC had classified.<sup>76</sup> Thus, some 242 doc-

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<sup>72</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 7 (para. 19).

<sup>73</sup> Letter from Gabriel addressed to the President of Romania and to the Prime Minister of Romania dated 20 January 2015, at **Exhibit C-8**.

<sup>74</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 9 (para. 25) (emphasis in original).

<sup>75</sup> See Respondent's Observations to Claimants' Request for Provisional Measures, p. 8 (paras. 27-28).

<sup>76</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 11 *et seq.* (para. 32); Letter from RMGC to NAMR dated 26 July 2016, at **Exhibit R-10**.

uments (of the 491 documents at issue) have been quite recently declassified.<sup>77</sup>

- 57 **Second**, as the Claimants also recognize, NAMR has proceeded to the declassification of several documents, including the Storage Contract<sup>78</sup> and the Roşia Montană License,<sup>79</sup> and has been in contact with other entities, including both Minvest<sup>80</sup> and other entities (Cepromin and Ipromin),<sup>81</sup> with regard to declassification. Thus, as a result of NAMR's

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<sup>77</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 13 (para. 36).

<sup>78</sup> The Claimants noted that, as of their last submission, NAMR had not yet responded to a letter from RMGC requesting permission to share this contract with the Claimants. NAMR has since responded to that letter. Letter from NAMR to RMGC dated 23 August 2016, at **Exhibit R-42**. In any event, the Storage Contract and its addenda are hereby provided as **Exhibit R-43**, **Exhibit R-44**, and **Exhibit R-45**. See also Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 10 (para. 29); RMGC Letter No. 56732 to NAMR dated 4 August 2016, at **Exhibit C-69**.

<sup>79</sup> The Claimants complain that NAMR has not yet declassified the Bucium and Roşia Montană Licenses and their annexes in their entirety. Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 11 (para. 31). However, as previously explained, it is necessary to physically review documents for purposes of declassification and not all of NAMR's archives are physically located in the same building. Thus, NAMR has required time to review these documents and generally requires time to review the few outstanding documents for which a decision on declassification remains to be made. See also NAMR Order regarding the declassification of work secret documents relating to the Rosia Montana License dated 29 July 2016, at **Exhibit R-15**; RMGC Letter No. 56733 to NAMR dated 4 August 2016, at **Exhibit C-70**; NAMR Letter No. 8001 to RMGC dated 4 August 2016, at **Exhibit C-71**.

<sup>80</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 11 *et seq.* (para. 32); see also RMGC Letter No. 56778 to NAMR attaching lists of documents classified by Cepromin, Minvest, and Ipromin dated 11 August 2016, at **Exhibit C-77**; Minvest Protocol No. 1988 dated 25 August 2016, at **Exhibit R-46** (regarding declassification).

<sup>81</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 11 *et seq.* (para. 32); Letter from NAMR to Cepromin dated 28 July 2016, at **Exhibit R-13**.

directions, some 98 documents are being reviewed for purposes of declassification.<sup>82</sup>

- 58 In July, NAMR had asked RMGC to provide it with the Confidential and Classified Documents to review them for purposes of declassification.<sup>83</sup> This option would have been less burdensome than making copies thereof, which the Claimants seem to recognize.<sup>84</sup> As noted below, NAMR still requires access to certain documents for purposes of their review.
- 59 Finally, notwithstanding the Claimants' overheated and pressing demands to access and use immediately the Confidential and Classified Documents, they cannot escape the fact that, in 2007, they resisted Romania's efforts to declassify and render public these documents. In November 2007, RMGC expressly opposed NAMR's request to lift the confidentiality restrictions on these documents (and indicated that it did not agree to their declassification).<sup>85</sup> Although the Claimants seek to pass over these events on the grounds that they "ha[ve] no relevance to the question presented here," had RMGC responded differently at the time, the Parties would not have faced difficulties in accessing the documents held by RMGC relating to this arbitration and would not have found themselves in the present situation.<sup>86</sup>

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<sup>82</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 13 (para. 35).

<sup>83</sup> Letter from NAMR to RMGC dated 22 July 2016, at **Exhibit R-9**.

<sup>84</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 24 (para. 118) ("There are significant restrictions on copying documents that have a classified status that make it burdensome and impracticable to copy the entire set of classified documents as a precaution and particularly in a tight time frame.").

<sup>85</sup> See Letter from NAMR to Gabriel and RMGC dated 18 September 2007, at **Exhibit R-2**; Letter from Gabriel and RMGC to NAMR dated 27 November 2007, at **Exhibit R-3**.

<sup>86</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 22 (para. 50).

## **3.2 The Claimants have clarified the scope of their request**

60 Romania had previously explained why the scope of the Claimants' First Request was not clear and had sought clarification. Although the Claimants protest in their Reply that these requests for clarification were inane, they have nevertheless for the most part provided the requested clarifications, thereby undermining their own protest and allowing progress with this issue.

61 The Claimants first seek to access and use classified documents, some of which are also deemed confidential (**Section 3.2.1**). Second, they seek to access and use documents which are purely confidential (**Section 3.2.2**). The scope of these categories of documents is discussed below.

### **3.2.1 The Classified Documents**

62 In their Reply, the Claimants have clarified that the documents that they wish to access and use are work secret documents and are much more limited in number than they had originally indicated.

#### **3.2.1.1 Work Secret Documents Alone**

63 It was previously unclear whether the Claimants sought access to work secret and state secret documents, or work secret documents alone.<sup>87</sup> Following the Respondent's request, the Claimants have now clarified that they seek access only to work secret documents.<sup>88</sup> This clarification means that Romania will not need to engage in the more burdensome

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<sup>87</sup> Respondent's Observations to Claimants' Request for Provisional Measures, p. 16 (para. 54).

<sup>88</sup> The Claimants contend that Romania should know whether these documents are state secret. Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 20 *et seq.* (para. 47). It, however, provides no support for this contention. Because RMGC holds the Registry and the documents listed therein, it is hardly surprising for the Respondent to request clarification as to the level of classification of those documents.

declassification process for state secret documents and should permit a more expedient declassification of the documents in question.<sup>89</sup>

### 3.2.1.2 A More Limited Number of Documents

- 64 The Claimants recognize that the scope of the documents that are the subject of their request for provisional measures is much narrower than initially indicated. In their First Request, the Claimants defined the scope of the Confidential and Classified Documents as comprising **785 documents**; in their Reply, they recognize that the Confidential and Classified Documents in fact represent only **491 documents**, since the prior list (the original version of Exhibit C-20) was not up to date.<sup>90</sup> This modification to the scope of the documents resulted from NAMR's recent efforts to verify, with RMGC, the content of the Registry.<sup>91</sup>
- 65 The Claimants dismiss the Respondent's concern that the Registry, as originally provided by the Claimants, contained documents not relevant to this arbitration. However, it is undisputed that the original Registry contained documents related to the Baisoara License,<sup>92</sup> and that those documents are not relevant to this arbitration, which relates only to the Roşia Montană and Bucium Licenses.<sup>93</sup> Furthermore, the original Regis-

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<sup>89</sup> See [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 24 *et seq.* (paras. 76 *et seq.*).

<sup>90</sup> See [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 9 (para. 26).

<sup>91</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 12 (para. 34); [Letter from NAMR to RMGC dated 23 June 2016](#), at [Exhibit R-4](#).

<sup>92</sup> See [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 15 (para. 51).

<sup>93</sup> The Claimants incorrectly assert that RMGC only holds documents relating to the Roşia Montană and Bucium Licenses, not documents relating to other licenses. [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 12 (para. 34). The first version of the RMGC Registry that the Claimants provided included documents relating to the Baisoara License. See (original) [Exhibit C-20](#), documents numbered 129, 144, 690, 692-695, 709-712, 714 and 721.

try contained a document relevant to yet another project, the Bolcana Project, which RMGC has also since removed.<sup>94</sup>

- 66 The Parties disagree as to which entity or entities are competent to declassify documents. In this regard, the Respondent had sought clarification regarding the issuers of the documents listed in the Registry.<sup>95</sup> As previously explained, only the party who classified a document may declassify it.<sup>96</sup> In this case, it was not clear whether the “issuers” of the documents listed in the Registry were also the entities that had classified the documents in question.
- 67 In their Reply, the Claimants argue that NAMR “can direct the ... issuers to declassify the various remaining documents, as NAMR has already done with many of the documents relating to the Roşia Montană License.”<sup>97</sup> To be clear, NAMR can only direct third parties to declassify documents if the documents relate to mineral resources<sup>98</sup> and if NAMR determines that it is competent and has the authority to issue that direction. Thus, for each document, it must determine whether it is competent and has the authority to direct a third party to review a document for purposes of declassification. As discussed above, NAMR has already directed several third parties to declassify documents at issue.

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<sup>94</sup> RMGC Letter No. 56805 to NAMR dated 17 August 2016, at **Exhibit C-79**.

<sup>95</sup> Respondent's Observations to Claimants' Request for Provisional Measures, p. 16 (para. 53).

<sup>96</sup> Respondent's Observations to Claimants' Request for Provisional Measures, p. 23 *et seq.* (para. 74); see also NAMR Letter No. 8002 to RMGC dated 4 August 2016, at **Exhibit C-72**, p. 2 and NAMR Letter No. 8003 to RMGC dated 4 August 2016, at **Exhibit C-73**, p. 2 (in which NAMR indicated to RMGC that RMGC was competent to declassify documents that RMGC had issued).

<sup>97</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 20 (para. 46).

<sup>98</sup> See Mining Law No. 85/2003, published in Official Gazette Part I, No. 197, dated Mar. 27, 2003 dated 27 March 2003, at **Exhibit C-11**, p. 2 (Art. 3(14) and (15) (defining the National Geologic Fund and National Fund of Resources/Reserves).

- 68 In any event, the Claimants have clarified the identity and role of several entities listed in the Registry. In recent correspondence submitted by the Claimants, RMGC indicated that several entities listed in the Registry were its subcontractors and that it, RMGC, was accordingly declassifying those documents.<sup>99</sup> This point therefore appears moot at this stage.

### 3.2.2 The Purely Confidential Documents

- 69 The Claimants confirm that their request pertains not only to the documents listed in Exhibit C-20 (in its amended form), but also to other unspecified documents held by RMGC. In its Observations, the Respondent had sought clarification in this regard:

“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.”<sup>100</sup>

- 70 In their Reply, the Claimants confirm that their request extends to documents beyond those contained in Exhibit C-20:

“**Respondent contends that it is unclear whether Claimants request access to and use of documents other than those that were classified (as listed on Exhibit C-20 (updated and resubmitted)). In short, the answer is yes, as confidential documents**

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<sup>99</sup> [RMGC Letter No. 56777 to NAMR attaching list of documents classified by RMGC dated 11 August 2016, at Exhibit C-76](#), p. 2 (referring to the following entities : Spectrum Survey & Mapping (Australia), Resource Service Group (Australia), GRD Minproc Ltd. (Australia), Honesty Air Services SRL and Universitatea Tehnică de Construcții București - UTCB (the Civil Engineering Technical University, Bucharest).

<sup>100</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 15 (para. 49) (emphasis added).

required by the Claimants include a subset of documents that also are classified. As set forth in Claimants' request, Claimants request access to and use of the documents that contain data and information relating to mineral resources that are maintained by RMGC as titleholder of the Roşia Montană and Bucium Licenses. These documents are maintained by RMGC subject to a custody agreement with NAMR. *All of the documents* are subject to obligations of confidentiality set forth in the Mining Law, the terms of RMGC's mining licenses, and the terms of the custody agreement with NAMR. ***Some of the documents are classified, and as such are listed on RMGC's registry of classified information, which registry has been reported periodically to NAMR, and has been updated and submitted herewith as Exhibit C-20.***<sup>101</sup>

- 71 Stated differently, the Claimants have confirmed that Exhibit C-20 represents a list of the documents held by RMGC that are **classified (and possibly also confidential independently of classification)**. Conversely, Exhibit C-20 does not contain documents which are **purely confidential**. Thus, the Claimants wish to access and use not only the documents listed in Exhibit C-20 but also other (purely confidential) documents which they have nowhere listed or otherwise defined.
- 72 The Respondent has no objection to the Claimants accessing and using purely confidential documents held by RMGC, which are not listed in Exhibit C-20. The access to and use of these documents is subject to NAMR and RMGC's consent as well as the Tribunal's issuance of a procedural order establishing the confidentiality regime for this arbitration and the Parties' conclusion of a confidentiality undertaking, as discussed at **Section 5.2** below.
- 73 However, it will be necessary to ensure that RMGC provides the same documents to both Parties. As the Claimants hold a majority share in

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<sup>101</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 17 (para. 41) (italics in original) (bold added).

RMGC, it will in particular be necessary to ensure that Romania obtains the same documents that the Claimants obtain.

- 74 The Respondent thus respectfully requests that the Tribunal direct the Claimants to cause RMGC to provide simultaneously any and all classified or confidential documents relevant to this Project to both Parties within 30 days of the issuance by the Tribunal of a Confidentiality Order, which will establish the procedures for the protection of confidential information in these arbitral proceedings.<sup>102</sup>

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<sup>102</sup> The Parties agree that it is necessary to establish the regime for the confidentiality of these proceedings. The Respondent is prepared to liaise with the Claimants with respect to the preparation of a draft Confidentiality Order, to be issued by the Tribunal, which would also decide on any points of disagreement between the Parties. *See infra* paras. 124-125.

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#### **4 THE REQUIREMENTS FOR RECOMMENDATION OF PROVISIONAL MEASURES ARE NOT MET**

75 The Claimants' amended request for relief<sup>103</sup> can be divided into two parts. With respect to declassification of documents they now request:

“a. 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;<sup>104</sup>

(...)

c. That Respondent be ordered to complete the process for declassifying the remainder of the classified documents among the Classified and Confidential Documents within 30 days from the date of the order granting Claimant's First Request for Provisional Measures;<sup>105</sup>

(...)

e. That the terms of such access and use shall be without regard to the restrictions regarding access and use that may 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 Tribu-

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<sup>103</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 34 *et seq.* (paras. 76-77).

<sup>104</sup> This request replicates the prayer for relief contained in the Claimant's First Request under para. 62, first bullet point.

<sup>105</sup> This prayer for relief is entirely new.

nal 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; (...)”<sup>106</sup>

76 With respect to confidential documents, the Claimants’ amended request is as follows:

“d. That within this 30-day period the Parties cause to be taken all steps necessary to allow for the access to and use of the Classified and Confidential Documents for purposes of this arbitration, including agreeing to the terms of a confidentiality agreement to govern such access and use;”<sup>107</sup>

(...)

f. That if the Parties do not agree on the terms of a confidentiality agreement within this 30-day time period any Party may present a proposed confidentiality agreement to the Tribunal that provides the necessary access and rights of use of the documents in question and request the Tribunal to so order it.”<sup>108</sup>

77 Despite the Claimants’ amended Prayers for Relief with respect to declassification, they have not meaningfully countered the Respondent’s demonstration that the requested measures fall outside of the Tribunal’s jurisdiction (**Section 4.1**) and are not necessary, urgent or proportional to the purported potential harm (**Section 4.2**). Aware that they fail to meet the requirements of an order of provisional measures, the Claimants attempt to circumvent these requirements by submitting the following alternative prayer for relief:

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<sup>106</sup> This request replicates the prayer for relief contained in the Claimant’s first Request under para. 62, second bullet point, except for the replacement of the word “apply” with the words “may apply”.

<sup>107</sup> This prayer for relief is entirely new.

<sup>108</sup> This prayer for relief is entirely new.

“In the alternative, if the Tribunal were to conclude that Claimants are entitled to access and use the Classified and Confidential documents in the manner outlined above to prepare and present their case (recognizing that Respondent likewise would have the ability to access and use the documents), but that the requirements for provisional measures have not been met or the Tribunal prefers to grant such relief in the form of a procedural order, that the relief sought in paragraph 76 above be granted in such a procedural order.”<sup>109</sup>

- 78 Since this Prayer for Relief is requesting an order of provisional measures but without calling it such and giving it instead a different name, this request must also be dismissed, like the request for provisional measures.

#### **4.1 No *prima facie* jurisdiction to recommend the provisional measures sought**

- 79 The Claimants continue to engage in a sterile debate as to whether the registration of this arbitration is sufficient to establish *prima facie* jurisdiction over the provisional measures sought.<sup>110</sup> The Claimants apparently insist on this low threshold for *prima facie* jurisdiction because they cannot establish the Tribunal's jurisdiction with respect to their First Request.
- 80 The Claimants' position regarding registration would nullify the requirement of proving *prima facie* jurisdiction to request provisional measures in ICSID arbitration, since applications for provisional relief can only be made after a case is registered by the ICSID Secretariat. It is therefore natural that no ICSID tribunal has to date asserted jurisdiction over a request for provisional measures solely because the ICSID Secretariat

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<sup>109</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 35 (para. 77).

<sup>110</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 30 (para. 69).

had previously registered the case. The only case cited by the Claimants in support of their extraordinary position – *Pey Casado v Chile* – does not support their argument at all:

“It is intended that registration by the Secretary-General of the Centre does not in any way bind the Tribunal; **nor does registration free it from determining, in a case where its jurisdiction is contested, the prima facie existence of jurisdiction** or, to couch this in negative terms, the absence of a clear lack of jurisdiction.”<sup>111</sup>

- 81 Following *Pey Casado v Chile*, ICSID tribunals have consistently rejected the attempt to eviscerate the applicant's burden of proving *prima facie* jurisdiction by relying on the ICSID Secretariat's registration decisions.<sup>112</sup> As correctly observed by the tribunal in *Millicom v Senegal*:

“For the Arbitral Tribunal, the mere fact that the Request for Arbitration has been registered might certainly constitute a sign of *prima facie* jurisdiction, but under no circumstances may it constitute a sufficient condition. **The registration process is summary in nature and is intended solely to perform an initial check** in order to dismiss immediately any requests manifestly outside the jurisdiction of the Centre.

The decision is taken solely on the basis of the Request for Arbitration and the additional information provided by the requesting party, without waiting for or formally requesting any comments from the other party.

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<sup>111</sup> *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, Decision on the Request for Provisional Measures, ICSID Case No. ARB/98/2, 25 September 2001, (2004) 6 ICSID Reports 373, at **Exhibit CLA-14**, p. 379 (para. 11).

<sup>112</sup> *PNG Sustainable Development Program Ltd v. Independent State of Papua New Guinea*, Decision on the Claimant's Request for Provisional Measures, ICSID Case No. ARB/13/33, 21 January 2015, at **Exhibit CLA-33**, p. 46 (para. 119); *Perenco v. Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/08/6, 8 May 2009, at **Exhibit CLA-32**, p. 16 *et seq.* (para. 39).

**Requirements are necessarily stricter at the provisional measures stage, since the Arbitral Tribunal will have had the opportunity to receive additional information** (whether unprompted or at its own request), which therefore enables it – still on a provisional basis, of course – to give an initial ruling on its own jurisdiction.

**Registration as an argument is therefore insufficient in and of itself to establish the Arbitral Tribunal's prima facie jurisdiction.**"<sup>113</sup>

- 82 The Claimants attempt to reduce the Respondent's demonstration that the Claimants' position with respect to the relevance of registration of a case by the ICSID Secretary-General as the repetition of the views of "a commentator".<sup>114</sup> First, as Claimants' counsel know well, Ms Polasek is not "a commentator", but rather one of ICSID's most senior counsel. Second, her plain rejection of the Claimants' argument is in line with the view of the States that negotiated the ICSID Convention and that of ICSID Secretariat that a registration decision does not and cannot have any bearing on the establishment of *prima facie* jurisdiction for the purpose of provisional measures.<sup>115</sup> The ICSID's registration decision of this case communicated on 30 July 2015 speaks for itself:

"As stated in the enclosed Notice, the registration of this Request **is without prejudice to the powers and functions of the Tribunal with regard to jurisdiction**, competence and the merits, as provided by Articles 41 and 42 of the ICSID Convention."<sup>116</sup>

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<sup>113</sup> *Millicom International Operations B.V. & Sentel GSM S.A. v. Republic of Senegal*, Decision on the Application of Provisional Measures, ICSID Case No. ARB/08/20, 9 December 2009, at **Exhibit CLA-45**, p. 14 (para. 43).

<sup>114</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 30 (para. 69).

<sup>115</sup> 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.

<sup>116</sup> Letter from ICSID to Romania dated 30 July 2015, p. 2.

- 83 In the alternative, the Claimants appear to be arguing that a claimant's mere invocation of jurisdiction by reference to its own request for arbitration is sufficient to establish *prima facie* jurisdiction to order any provisional measures.<sup>117</sup>
- 84 However, whether or not “[o]ther ICSID tribunals have found a *prima facie* basis for jurisdiction based on a claimant's request for arbitration”,<sup>118</sup> is beside the point. When a claimant requests provisional relief at an early stage of the proceedings, a tribunal must consider the position on jurisdiction articulated by that claimant in its request for arbitration and its request for provisional relief. By contrast, when a respondent has specifically objected to a tribunal's jurisdiction to grant the requested provisional measures,<sup>119</sup> as happens here with respect to both of the Claimants' requests for provisional measures, a tribunal may not ignore the respondent's objections and proceed to assume that the facts and arguments articulated in the request for arbitration are correct.<sup>120</sup>
- 85 In other words, *prima facie* jurisdiction does not mean discharge from the burden of proving jurisdiction; it merely means that the tribunal will ap-

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<sup>117</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 30 *et seq.* (para. 70).

<sup>118</sup> Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 30 *et seq.* (para. 70).

<sup>119</sup> This is what the two cases cited by the Claimants show: in the decision on provisional measures in *Occidental v Ecuador*, the tribunal relied on the basis for jurisdiction invoked in the claimants' request for arbitration because **the respondent did not challenge the tribunal's jurisdiction** to order provisional measures, see *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. 18 *et seq.* (paras. 42-54). Similarly, in *Burlington v Ecuador*, **the respondents did not challenge the tribunal's jurisdiction**, see *Burlington Resources Inc. and others v. Republic of Ecuador*, Procedural Order No. 1, ICSID Case No. ARB/08/5, 3 February 2016, at **Exhibit CLA-23**, p. 12 *et seq.* (paras. 34-40).

<sup>120</sup> A tribunal must decide the application based on all the information it received from both parties, see *Millicom International Operations B.V. & Sentel GSM S.A. v. Republic of Senegal*, Decision on the Application of Provisional Measures, ICSID Case No. ARB/08/20, 9 December 2009, at **Exhibit CLA-45**, p. 14 (para. 43).

ply a less stringent standard of review.<sup>121</sup> There is no presumption of jurisdiction to grant provisional measures (or otherwise) and the Tribunal must undertake its independent review of jurisdiction on the basis of all the facts and arguments that are before it. A respondent can show that on a balance or probabilities, *prima facie* jurisdiction has not been established.

- 86 For example, in *Legality of Use of Force* (Yugoslavia v Italy), the ICJ rejected Yugoslavia's application for provisional measures because Yugoslavia was unable to persuade the Court, even *prima facie*, that the acts imputed to the respondent were capable of coming within the provisions of the Genocide Convention.<sup>122</sup> Similarly in *Armed Activities on the Territory of the Congo*, the ICJ rejected a request for provisional measures because Congo had failed to demonstrate that the Court had *prima facie* jurisdiction under any of the conventions or treaties that had allegedly been breached.<sup>123</sup>
- 87 Similarly here, it is clear that there is no jurisdiction to recommend the provisional measures sought. The Claimants cannot make a *prima facie* showing of jurisdiction since, as noted above, the Canada-Romania BIT states that nothing in the BIT shall be construed to require a Contracting Party to furnish or allow access to information the disclosure of which would be contrary to national security or the Contracting Party's law on classified information. "Nothing" in the three relevant provisions of the BIT means nothing, including provisional relief.<sup>124</sup>

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<sup>121</sup> *Millicom International Operations B.V. & Sentel GSM S.A. v. Republic of Senegal*, Decision on the Application of Provisional Measures, ICSID Case No. ARB/08/20, 9 December 2009, at **Exhibit CLA-45**, p. 13 (para. 42).

<sup>122</sup> *Legality of Use of Force (Yugoslavia v. Italy)*, Order of 2 June 1999 (on Provisional Measures), 1999 ICJ Reports 481, at **Exhibit RLA-27**, p. 490 (para. 25).

<sup>123</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Order of 10 July 2002 (on Provisional Measures), 2002 ICJ Reports 219, at **Exhibit RLA-28**, p. 241 (para 58).

<sup>124</sup> See *supra* Section 3.1.

- 88 Likewise, to the extent that the Claimants allege that their right to procedural integrity is being breached by Romania's delay in addressing the issue of access to documents, the First Request is similarly barred under Article XIII(8) of the Romania-Canada BIT,<sup>125</sup> which prohibits enjoining Romania from undertaking measures alleged to breach the BIT. That prohibition applies to both substantive and procedural rights, as explained in the Respondent's Comments to the Claimants' Emergency Relief.<sup>126</sup>
- 89 The Claimants argue that the "Respondent does not offer any observations whatsoever on the basis for jurisdiction that is set forth in the Request for Arbitration and thus does not dispute that a *prima facie* basis for the Tribunal's jurisdiction is thereby established."<sup>127</sup> They add that Romania "has an obligation to raise any such objection 'as early as possible'" under Rule 41(1) of the ICSID Rules and that it "does not have the right to sit back and wait for Claimants' Memorial before deciding to raise an objection to jurisdiction where the information upon which the objection is based is known earlier."<sup>128</sup>
- 90 The Claimants entirely misrepresent the ICSID Rules as well as the Respondent's position.
- 91 **First**, as is clear from the Respondent's Observations, the Respondent challenges the jurisdiction of the Tribunal to award the relief sought, pursuant to Articles XVII(6)(a) and (7) and Article 7 of Annex C(I) of the Canada-Romania BIT. To the extent that the Claimants allege that their

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<sup>125</sup> Canada-Romania BIT, at **Exhibit C-1**, p. 16 (Art. XIII(8)).

<sup>126</sup> See *supra* Section 3.1. See also [Respondent's Comments on the Request for Emergency Relief](#), p. 22 *et seq.* (Section 4); [Respondent's Observations on the Claimants' Second Request for Provisional Measures](#), p. 46 *et seq.* (para. 135); [Respondent's Letter to the Tribunal dated 14 August 2016](#), p. 2.

<sup>127</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 31 (para. 70).

<sup>128</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 31 (note 147).

right to procedural integrity is being breached by Romania's actions in addressing the issue of access to documents, the Respondent similarly objects to the Tribunal's jurisdiction under Article XIII(8).

92 **Second**, the Respondent has no obligation to formulate general objections to the Tribunal's jurisdiction before receiving the Claimants' Memorial on the Merits and submitting its counter-memorial.

93 Indeed, Rule 41(1) of the ICSID Rules states the opposite of what the Claimants suggest:

“Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General **no later than the expiration of the time limit fixed for the filing of the counter-memorial**, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.”

94 Thus, Romania cannot be expected or required to raise jurisdictional objections before the Claimants articulate their full case on jurisdiction and merits. This outcome is particularly true where the Claimants' Request for Arbitration is skeletal and accompanied by **no evidence**, including not **a single** corporate document.<sup>129</sup>

95 In conclusion, the Claimants' First Request should be dismissed for failure to prove jurisdiction to order the provisional relief sought.

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<sup>129</sup> See the list of exhibits to [Claimants' Request for Arbitration](#), p. 28. The entire evidence filed by the Claimants in support of its claims in the Request for arbitration consists of: the two BITs, evidence of entry into force thereof, consents and authorizations to commence this arbitration, a waiver of rights, a power of attorney, the Notice of Dispute and one letter from Gabriel UK to Romania relating to its obligation to negotiate prior to initiating arbitration.

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## **4.2 No necessity, urgency and proportionality of the provisional measures sought**

- 96 The Claimants continue to invoke, as a basis for the First Request, the general principles of due process and of preservation of the integrity of the arbitration.<sup>130</sup> However, the Claimants' case remains abstract and hollow, without any real substance. The Claimants' vague references to the purported urgency and necessity of the measures sought<sup>131</sup> are designed to conceal the lack of any basis for their First Request.
- 97 Because the issue of access to classified documents is not and has never been an issue for provisional measures,<sup>132</sup> it is not surprising that the Claimants fail to prove any of the requirements for interim relief. This much appears to be acknowledged by the Claimants in their alternative Prayer for Relief, whereby they request the Tribunal to exempt them from meeting the requirements for the recommendation of provisional relief.<sup>133</sup>
- 98 While the issue of confidentiality is addressed in Section 5.2 below, the issue of declassification is discussed in this Section. Despite the Claimants' changes to their Prayer for Relief, the measures currently sought are not necessary, urgent or proportional.

### **4.2.1 The Provisional Measures sought are not necessary**

- 99 The Claimants continue to request an order that "Respondent grant Claimants, including Claimants' representatives, counsel, experts, wit-

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<sup>130</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 2 (para. 6) and p. 31 (para. 71).

<sup>131</sup> Not more than one paragraph of the Claimant's Reply is dedicated to discussing the alleged urgency of the measures. The same is true for necessity, *see* [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 32 *et seq.* (para. 74) and p. 31 *et seq.* (para. 72).

<sup>132</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 3 (para. 9) and p. 27 (para. 83).

<sup>133</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 35 (para. 77).

nesses, and consultants, **unrestricted access** to and use of the Confidential and Classified Documents for purposes of this arbitration".<sup>134</sup> They have added a new request (c.) that the Respondent be ordered to complete the process for declassifying the remainder of the classified documents within 30 days.<sup>135</sup> They also make clear in Prayer for Relief (e.) that the Tribunal **must ignore Romanian law** to award such relief: "[t]hat the terms of such access and use shall be without regard to the restrictions regarding access and use that may apply to the Confidential and Classified Documents as a matter of Romanian law".<sup>136</sup>

- 100 The Claimants thus disregard Romanian law and request that the Tribunal do the same. However, as demonstrated above, the only way to access and use these documents is by first declassifying them. Furthermore, the Claimants disregard Romania's equal right to access and use these documents.
- 101 Regarding the right allegedly in peril in support of the requested measures, the Claimants argue that "[t]he integrity of this arbitration depends upon Claimants obtaining access to them for purposes of preparing and presenting their case".<sup>137</sup> It is not clear how the Claimants can take this position given that they do not have access to the documents and allegedly do not know their contents. Their allegations concerning the relevance and materiality of the documents for their claims remains unproven.
- 102 Accepting, however, these assertions at face value for the sake of argument, they do not prove the existence of **a right** to access those documents. Under Articles XVII(6) and (7) and Article 7 of Annex C(I) of

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<sup>134</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 34 (para. 76, a.) (emphasis added).

<sup>135</sup> This prayer for relief is entirely new.

<sup>136</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 34 (para. 76, e.).

<sup>137</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 31 (para. 71).

the Canada-Romania BIT, again, the Claimants have no right to access and use the Classified documents unless and until they are first declassified in accordance with Romanian law.

- 103 The Claimants also contend that they have a “right to prepare and present their case in accordance within a reasonable time frame, not one blocked by a lack of good faith cooperation from Respondent”.<sup>138</sup> Apart from the fact that the Respondent has been cooperating, as evidenced by the fact that many documents have now been declassified, the Claimants have no right to access the documents in circumstances and according to conditions other than those set in Romanian law.
- 104 The Claimants’ purported concern that the procedure will not yield results within “a reasonable time frame”<sup>139</sup> is baseless given the numerous documents already declassified. It is furthermore **irrelevant** since it is for the Respondent, and not for the Claimants, to define what is and what is not lawful and reasonable procedure to be followed under Romanian law. The Respondent is committed to a prompt resolution of this issue but declassification must be done in accordance with the applicable law.
- 105 The Claimants appear to argue that their main due process concern relates to their right to a “reasonably prompt procedure”.<sup>140</sup> The Respondent has proposed and is actively engaged in a prompt procedure for the resolution of this issue. Effectively, the Claimants reduce the declassification procedure to a rubberstamping exercise, which it is not. The Claimants do not explain on what legal or other basis they have now concluded that

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<sup>138</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 31 (para. 71).

<sup>139</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 31 (para. 71).

<sup>140</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 31 (para. 71).

“30 days”<sup>141</sup> is the reasonable timeframe for completing this process. It is not a reasonable timeframe given the number of documents that still need to be reviewed for possible declassification.

- 106 As for the Claimants' protestations about the alleged “obstructionist posture” of Romania,<sup>142</sup> they do not merit any further comment as even if they were true (which is strongly denied) that would not establish a basis for Claimants' allegations of necessity of the measures sought.

#### **4.2.2 The Provisional Measures sought are not urgent**

- 107 Even if the Claimants had a right to access the Confidential and Classified Documents in circumstances other than those set out in Romanian law (*quod non*), the requested measures would still not be urgently required to protect that purported right. There can be no right of the Claimants in peril where there is no disagreement between RMGC and NAMR regarding declassification, a procedure which may be entirely concluded in a reasonable timeframe.
- 108 Significant progress in declassifying the documents has been made and the Claimants have already secured the declassification of a roughly 50% of the documents in question: of the 491 documents in the updated Registry, 242 documents have been declassified. Of the remaining 248 documents at least 98 documents should be declassified shortly as NAMR has directed the relevant party to declassify them.<sup>143</sup> That leaves a total of only 150 documents (approximately 30% of the 491 documents) to be reviewed and declassified by NAMR.
- 109 The Claimants argue that, pending the completion of the declassification process, they “would not be able to prepare or present their Memorial”

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<sup>141</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 2 (para. 5), p. 16 (para. 40) and p. 34 (para. 76, c.).

<sup>142</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 31 *et seq.* (para. 72).

<sup>143</sup> *See supra* Section 3.

and, “[i]n these circumstances, the Tribunal’s intervention is urgently needed to impose a reasonable order on this process”.<sup>144</sup> This is not true, as the Claimants will be obtaining rolling access to documents as they are declassified and may thus start to prepare their Memorial on the Merits.

110 For documents that were both classified and confidential (and not just classified), the Claimants will obtain access as soon as the necessary confidentiality regime is agreed between the Parties and the Tribunal. As noted above, although the Claimants complain of delay and demand urgent relief, nothing has prevented them from submitting to the Respondent a draft proposed order or agreement regarding confidentiality.

#### **4.2.3 The Provisional Measures sought are not proportional**

111 As for proportionality, the Claimants have now changed their mind. They had (correctly) stated in their Request for Arbitration:

**“Because these restrictions apply not only to Gabriel, but also to Romania as Respondent, Gabriel trusts that Romania will agree to address this matter promptly upon commencement of this arbitration so that the parties, their representatives and counsel can fully and freely access, copy, translate, review, and exhibit in this arbitration documents currently subject to this restrictive confidentiality/secretcy regime as may be relevant and necessary.”**<sup>145</sup>

112 They (correctly) confirmed this in their First Request:

**“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**

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<sup>144</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 33 (para. 74).

<sup>145</sup> [Claimants' Request for Arbitration](#), p. 25 *et seq.* (para. 63) (emphasis added).

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.”<sup>146</sup>

- 113 The Claimants now argue that their own position in their previous submissions is “perverse” as “[t]here is no question of Respondent obtaining access to and the right to use the documents at issue.”<sup>147</sup> While their change of position remains unexplained, the reality is that the Respondent’s counsel, like the Claimants’, have no access to the Confidential and Classified Documents.<sup>148</sup>
- 114 The Claimants’ attempt to undermine the procedural equality of the Parties by allowing only one of the Parties to access documents and information that are unavailable to the other is still unacceptable and renders the Claimants’ request for relief not only disproportional, but also highly prejudicial.

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<sup>146</sup> [Claimants' First Request](#), p. 4 *et seq.* (para. 11) (emphasis added).

<sup>147</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 33 (para. 75).

<sup>148</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 22 *et seq.* (Section 4.2.1).

## **5 ROMANIA'S PROPOSED STEPS GOING FORWARD**

115 The only outstanding issues relate to the timing and procedure for  
declassification of those documents that have not yet been declassified  
(**Section 5.1**) as well as the issuance of a separate Procedural Order es-  
tablishing the confidentiality regime for these proceedings (**Section 5.2**).

### **5.1 The Timing and Procedure of Declassification of Remaining Documents**

116 The Claimants contend that all outstanding documents – in other words,  
all classified documents for which a decision on declassification has not  
yet been taken – can and should be declassified within 30 days of the  
Tribunal's decision on the First Request.<sup>149</sup>

117 As noted above, as a result of NAMR's pro-active efforts, and as the  
Claimants recognize, of the 491 documents in the updated Registry, 242  
documents have been declassified. These documents include documents  
that RMGC has declassified, following NAMR's directions.<sup>150</sup>

118 According to the Claimants, the status of the remaining 248 documents is  
as follows:

- i) For 98 documents: NAMR has directed the relevant party to declassi-  
fy the documents;<sup>151</sup>
- ii) For the remaining 150 documents:
  - 83 are documents that NAMR classified (and that it should therefore  
declassify);<sup>152</sup> and,

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<sup>149</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 13 (para. 35).

<sup>150</sup> [RMGC Letter No. 56777 to NAMR attaching list of documents classified by RMGC dated 11 August 2016, at Exhibit C-76](#) ; see also [RMGC Decision No. 56742 regarding declassification dated 5 August 2016, at Exhibit C-74](#)

<sup>151</sup> [See Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 13 (para. 35).

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- 54 are documents for which NAMR should direct other entities to declassify,<sup>153</sup>
- 119 The Respondent notes that the Claimants have indicated that the remaining 13 documents are maps which “are not urgently required” and for which a decision on declassification may be deferred.<sup>154</sup>
- 120 Given that the number of documents at issue has vastly diminished, the Respondent does not require six months to complete the declassification process, as initially requested. NAMR has indicated that it would require up to two months. The Respondent thus respectfully requests two months to carry out this declassification process, with respect to the documents described above.
- 121 Because physical access to the documents is required for purposes of declassification, the Respondent maintains its request that RMGC be directed, through the Claimants, to provide to NAMR the originals of these outstanding documents or, in the alternative, to provide copies of these documents to NAMR upon request.

## **5.2 Confidentiality Agreement and Procedural Order**

- 122 It is undisputed that, once the classified documents have been declassified, some will remain subject to contractual and statutory restrictions given their confidential nature. RMGC and NAMR will thus still need to consent to the access to and use of these confidential documents by the

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<sup>152</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 13 (para. 36).

<sup>153</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 15 (para. 37).

<sup>154</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 16 (para. 38).

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Parties and the Tribunal (and other individuals involved in this arbitration).<sup>155</sup>

- 123 The Claimants request that the Parties should reach agreement on the terms of a confidentiality agreement within 30 days of the Tribunal's decision on the First Request.<sup>156</sup> The Respondent notes that the Claimants have not provided the Respondent with a draft agreement, although nothing would have prevented them from doing so.
- 124 In any event, the Respondent would propose that the Parties first jointly prepare a confidentiality undertaking, in the form of a draft Procedural Order for issuance by the Tribunal (the "**Confidentiality Order**"). As previously explained, it will be necessary for the Tribunal, in consultation with the Parties, to establish procedures for the protection of confidential information via a separate Procedural Order, following the completion of this preliminary phase relating to the access to and use of the Confidential and Classified Documents.<sup>157</sup>
- 125 The Respondent is prepared to liaise with the Claimants with respect to the preparation of this draft order and to revert to the Tribunal in due course.

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<sup>155</sup> [Respondent's Observations to Claimants' Request for Provisional Measures](#), p. 6 (para. 18); [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 6 *et seq.* (para. 18), p. 16 (para. 40), and p. 17 *et seq.* (para. 42).

<sup>156</sup> [Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures](#), p. 13 (para. 35).

<sup>157</sup> [Letter from Respondent to ICSID dated 9 August 2016](#), p. 2 (para. c.); *see also* Procedural Order No. 1 dated 26 August 2016 at Art. 23(1) (referring to "the procedures for the protection of confidential information that shall be agreed by the parties and established in a subsequent Procedural Order of the Arbitral Tribunal...").

## **6 AMENDED PRAYER FOR RELIEF**

126 The Respondent hereby amends its prayer for relief and respectfully requests that the Tribunal:

- a) reject the relief sought by the Claimants in their First Request for Provisional Measures;
- b) issue a Procedural Order:
  - i) ordering the Claimants to cause RMGC
    - to hand over the documents listed in the Registry dated 22 July 2016 (Exhibit C-20 as resubmitted) to NAMR and for which a decision on declassification remains to be taken, for review for purposes of declassification of these documents and to coordinate the hand-over and transportation of documentation in accordance with Romanian law;<sup>158</sup> or,
    - to hand over copies of any documents in the Registry upon NAMR's request, for review for purposes of declassification of these documents and to coordinate this hand-over and transportation of documents in accordance with Romanian law;
  - ii) granting the Respondent two months from the time the Claimants provide the information requested above for the work secret documents to be reviewed and for the Respondent to determine whether they may be declassified for purposes of this arbitration;<sup>159</sup>
  - iii) taking note of the Parties' agreement to seek to agree to a Confidentiality Order and directing them to submit such a draft order for issuance by the Tribunal and for decision on any disputed issues;

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<sup>158</sup> 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](#).

<sup>159</sup> 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.

- iv) ordering the Claimants to cause RMGC to provide, once the process of review of the Confidential and Classified Documents is completed and the documents declassified, the Parties with simultaneous access to those documents (and any other confidential documents relating to the Roşia Montană and Bucium Licenses) within 30 days of the issuance of a Confidentiality Order;
- v) ordering the Claimants to bear the costs relating to this request for provisional measures and compensate the Respondent for all costs that they have incurred in relation thereto, including costs of legal representation.

Respectfully submitted,

31 August 2016

For and on behalf of

**Romania**

LALIVE

Leaua & Asociatii

Veijo Heiskanen  
Matthias Scherer  
Lorraine de Germiny  
Christophe Guibert de Bruet  
David Bonifacio

Crenguta Leaua  
Andreea Simulescu  
Aurora Damcali  
Liliana Deaconescu  
Carmen Saricu