INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd.

v.

Romania

(ICSID Case No. ARB/15/31)

DECISION ON CLAIMANTS' SECOND REQUEST FOR PROVISIONAL MEASURES

Members of the Tribunal
Ms. Teresa Cheng SC, President of the Tribunal
Prof. Horacio A. Grigera Naón, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal
Ms. Sara Marzal Yetano

November 22, 2016

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I. THE PARTIES

1. The Claimants are Gabriel Resources Ltd., a company incorporated under the laws of Canada ("**Gabriel Canada**"), and Gabriel Resources (Jersey) Ltd., a wholly owned subsidiary of Gabriel Resources Canada incorporated under the laws of Bailiwick of Jersey ("**Gabriel Jersey**") (jointly, the "**Claimants**").

2. The Respondent is the State of Romania ("**Romania**" or the "**Respondent**").

3. The Claimants and the Respondent are hereinafter collectively referred to as the "**Parties**."

II. PROCEDURAL HISTORY

4. On July 21, 2015, the Center received a Request for Arbitration filed by the Claimants against the Respondent (the "**Request for Arbitration**"). The Request for Arbitration concerned an alleged expropriation and other violations by the Respondent of the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "**Canada – Romania BIT**") and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "**UK – Romania BIT**"), in relation to Claimants' alleged investment in a mining project in Romania (the "**Roşia Montană Project**") through their Romanian Subsidiary Roşia Montană Gold Corporation S.A. ("**RMGC**").

5. The Request for Arbitration was registered by ICSID's Secretary-General on July 30, 2016 pursuant to Article 36(3) of the ICSID Convention.

6. On June 16, 2016, Claimants filed a Request for Provisional Measures (the "**Claimants' First Request for Provisional Measures**"). In their First Request for Provisional Measures the Claimants requested the Tribunal to recommend that Respondent grant Claimants unrestricted access to and use of certain confidential and classified documents (the "**Confidential and Classified Documents**") for the purposes of this arbitration. In a cover letter of the same date, Claimants also requested that the time limits for the Parties to present observations on the Claimants' First Request for Provisional Measure be fixed by the Tribunal once constituted, and not by the Secretary-General pursuant to paragraph 5 of ICSID Arbitration Rule 39.

7. On June 21, 2016, the Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention. Its members are: Teresa Cheng (Chinese), President, appointed by the Secretary-General pursuant to the Parties' agreement, Horacio Grigera Naón (Argentine), appointed by the Claimants; and Zachary Douglas (Australian), appointed by the Respondent.

8. On July 20, 2016, the Tribunal invited: (i) the Respondent to file observations on the Claimants' First Request for Provisional Measures by August 3, 2016; (ii) the Claimants to file their response to Respondent's observations within the two following weeks; and

(iii) the Respondent to file any further observations it may have to the Claimants' First Request for Provisional Measures within the two following weeks.

9. On July 28, 2016, the Claimants submitted a Second Request for Provisional Measures (the "**Second Request for Provisional Measures**") that included a Request for Emergency Temporary Provisional Measures pending the determination of this second request (the "**Request for Emergency Temporary Provisional Measures**"). In their Second Request for Provisional Measures, Claimants requested the Tribunal to recommend Respondent:

   (a) a series of measures related to the documents and information obtained by two divisions of Romania's National Agency for the Fiscal Administration ("**ANAF**") as a result of two investigations commenced on RMGC; and

   (b) to refrain from enforcing or taking any action in connection with a VAT assessment served by ANAF on RMGC on July 7, 2016, in the principal amount of approximately USD 6.7 million (the "**VAT Assessment**") pending the resolution of RMGC's administrative and judicial challenge of such VAT Assessment.

10. In their Request for Emergency Temporary Provisional Measures, Claimants also requested the Tribunal to recommend Respondent to refrain from taking any measures of enforcement of the VAT Assessment and any associated interest and penalties pending determination by the Tribunal of the Second Request for Provisional Measures.

11. On August 3, 2016, the Tribunal invited Respondent's comments on the Request for Emergency Temporary Provisional Measures by August 10, 2016. The Tribunal also invited: (i) the Respondent to file observations on the Claimants' Second Request for Provisional Measures by April 17, 2011; (ii) the Claimants to file observations in reply by August 24, 2016; and (iii) the Respondent to file observations by way of rejoinder by August 31, 2016.

12. On that same date, the Respondent submitted its observations on the First Request for Provisional Measures.

13. On August 10, 2016, Respondent submitted its comments on the Request for Emergency Temporary Provisional Measures requesting that it be dismissed for the reasons stated in that submission.

14. On August 11, 2016, Claimants sent a letter to the Tribunal in which, among other things, they informed the Tribunal of recent developments relating to the enforcement of the VAT Assessment and they requested the opportunity to address their Request for Emergency Temporary Provisional Measures during the first session of the Tribunal to be held the next day.

15. On August 12, 2016, the Tribunal held its first session by teleconference. During the first session, the Parties presented their views on, *inter alia*, (i) the procedural items included in

the Tribunal's draft Procedural Order No. 1, which had been circulated by the Tribunal's Secretary on July 27, 2016; and (ii) on the Request for Emergency Temporary Provisional Measures.

16. On that same date and after the first session was finalized, the Claimants submitted a letter with further observations on their Request for Emergency Temporary Provisional Measures.

17. On August 14, 2016 both Parties submitted letters with further observations on the Request for Temporary Provisional Measures.

18. On August 17, 2016, Respondent submitted its observations on the Second Request for Provisional Measures ("**Observations on the Second Request for Provisional Measures**").

19. On that same date, Claimants submitted their reply to the Respondent's observations to the First Request for Provisional Measures

20. On August 19, 2016, the Tribunal informed the Parties that the Request for Emergency Temporary Provisional Measures was rejected. The Tribunal indicated that they had decided to communicate their decision to the Parties, with the full reasons for that decision to follow as soon as possible, in light of Claimants' allegations concerning RMGC's need to post a guarantee by August 25, 2016.

21. On August 25, Claimants submitted their reply to Respondent's observations on the Second Request for Provisional Measures ("**Reply on the Second Request for Provisional Measures**").

22. On August 26, 2016, the Tribunal issued its Procedural Order No. 1.

23. On August 31, 2016, Respondent submitted further observations on the First Request for Provisional Measures as well as its Rejoinder on the Second Request for Provisional Measures ("**Rejoinder on the Second Request for Provisional Measures**").

24. On September 16, 2016, Claimants submitted a letter updating the Tribunal on a number of items relating to both requests for provisional measures.

25. On September 22, 2016, Claimants submitted a letter further updating the Tribunal on events related to the First Request for Provisional Measures.

26. On that same date, Respondent submitted new evidence and legal authorities relating to both requests for provisional measures. Claimants objected to the introduction of such evidence by letter of the same date.

27. On September 23, 2016, a hearing on both requests for provisional measures was held in Washington, DC. By agreement of the Parties, the hearing was broadcasted with one hour

delay to another room save the confidential part of the hearing. The following participated in the hearing:

Members of the Tribunal:
Ms. Teresa Cheng SC, President of the Tribunal
Prof. Horacio A. Grigera Naón, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

ICSID Secretariat:
Ms. Sara Marzal Yetano, Secretary of the Tribunal

Participating on behalf of the Claimants:
Ms. Abby Cohen Smutny, White & Case
Mr. Darryl Lew, White & Case
Mr. Brody Greenwald, White & Case
Mr. Michael Roche, White & Case
Mr. Andrei Popovici, White & Case
Ms. Samantha Fernández-Micone, White & Case
Ms. Anca Puyascu, Tuca Zbarcea & Asociatii
Ms. Ruxandra Nita, Tuca Zbarcea & Asociatii

Participating on behalf of the Respondent:
Mr. Veijo Heiskanen, Lalive
Ms. Lorraine de Germiny, Lalive
Mr. Christophe Guibert de Bruet, Lalive
Ms. Crenguta Leaua, Leaua & Asociatii
Ms. Andreea Simulescu, Leaua & Asociatii
Ms. Liliana Deaconescu, Leaua & Asociatii

28. On October 20, 2016, the Tribunal issued its Procedural Order No. 2, regarding Claimants' First Request for Provisional Measures.

29. On October 21, 2016, the Tribunal issued its Reasoned Decision on Claimants' Request for Temporary Provisional Measures.

30. On November 14, 2016, the Tribunal issued its Procedural Order No. 3 governing the designation, protection, and use of confidential information and documents and the preparation of redacted copies of documents for disclosure.

III. SUMMARY OF THE PARTIES' POSITIONS[1]

31. As mentioned above, in their Second Request for Provisional Measures, Claimants requested the Tribunal to recommend that Respondent:

(a) adopt a series of measures related to the documents and information obtained by two divisions of ANAF as a result of two investigations commenced on RMGC; and

(b) refrain from enforcing or taking any action in connection with a VAT Assessment served by ANAF on RMGC on July 7, 2016, in the principal amount of approximately USD 6.7 million pending the resolution of RMGC's administrative and judicial challenge of such VAT Assessment.

32. During the September 23, 2016 hearing, Claimants informed the Tribunal that on September 21, 2016 the administrative tribunal that heard RMGC's challenge against the VAT Assessment had upheld the challenge and partially quashed the VAT Assessment. A *de novo* assessment is to be carried out by a different tax assessment team. On this basis, Claimants informed the Tribunal that the relief originally sought in their Second Request for Provisional Measures with regards to the VAT Assessment was no longer pursued.[2]

33. For this reason, the present Decision will only address Claimants' request for provisional measures related to the documents and information obtained by two ANAF divisions as a result of the two investigations commenced on RMGC, namely, "that the Tribunal recommend as provisional measures:

(a) With respect to the purported 'anti-fraud' investigation undertaken following Claimants' initiation of this arbitration by the Ministry of Finance through ANAF, that Respondent must ensure that no information or documents coming to the knowledge or into the possession of ANAF as a result of its investigations or audits undertaken in relation to RMGC shall be made available to any person having any role in Respondent's defense in this arbitration;

(b) That, in any event, to avoid any risk to the integrity of this arbitration, Respondent not proffer any evidence gained through ANAF's audits and investigations in relation to RMGC without prior identification to and leave from the Tribunal with an opportunity for Claimants to comment on any such request.[3]

(c) […]

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[1] This summary does not intend to be a detailed and exhaustive description of all of the Parties' arguments. Its objective is merely to establish the general context for this decision.
[2] Hearing on Provisional Measures held on September 23, 2016, Transcript ("Hearing Transcript"), pages 126-129.
[3] Claimants' Reply on the Second Request for Provisional Measures, ¶166.

(d) That Respondent shall refrain from taking any action in connection with […] ANAF audits or ANAF investigations that may aggravate or extend the dispute."

A. CLAIMANTS' ARGUMENTS

34. Claimants state that on October 2015, less than three months after filing their Request for Arbitration, the Romanian Ministry of Finance mobilized ANAF's Fiscal Anti-fraud Directorate ("**DGAC**") to commence an anti-fraud investigation on RMGC.[4] Separately, in March 2016, ANAF's Tax Inspection Service commenced the audit that led to the VAT Assessment.[5]

35. According to Claimants, as a result of these investigations, and particularly the anti-fraud investigation, RMGC has been called upon to (i) respond to numerous requests for detailed information, which have increased in intensity and frequency over time, and (ii) produce tens of thousands of pages of documents constituting essentially all contractual and financial documentation of RMGC and the Roşia Montană Project, down to the invoice level, from 2007 to date and in many instances since the beginning of the Project in 1997.[6]

36. For Claimants, the timing, scope and manner of implementation of these investigations shows that they are excessive and retaliatory and that they are directed at trying to identify evidence to support Respondent's defense in this arbitration, rather than a legitimate regulatory or law enforcement purpose.[7]

37. In response to Respondent's explanation [redacted] Claimants argue that this explanation "cannot credibly justify the excessive investigation being undertaken" but rather confirms the bad faith attempt to "obtain evidence to use in this arbitration."[9]

38. [redacted]

[4] Claimants' Second Request for Provisional Measures, ¶¶34 and 35.
[5] Claimants' Second Request for Provisional Measures, ¶37.
[6] Claimants' Second Request for Provisional Measures, ¶4.
[7] Claimants' Second Request for Provisional Measures, ¶¶6, 39, 42.
[8] Claimants' Reply on the Second Request for Provisional Measures, ¶16.
[9] Claimants' Reply on the Second Request for Provisional Measures, ¶16.
[10] Claimants' Reply on the Second Request for Provisional Measures, ¶¶69-76. [redacted]
[11] Claimants' Reply on the Second Request for Provisional Measures, ¶77.

39. For Claimants, such topics transcend or simply have nothing to do with the purported concerns.[12] [13]

40. Furthermore, Claimants also argue that as a result of these investigations "ANAF and presumably other agents of Respondent are already reviewing and using Classified and Confidential Documents [ ] to undertake discovery on Claimants' investment relevant to the arbitration."[14]

41. Claimants maintain that all of the requirements for the Tribunal to recommend the requested provisional measures are present in this case:

a) The Rights to be Protected

42. Claimants argue that ANAF's investigations on RMGC have become a vehicle for Respondent to harass RMGC and extract documents and information for use in this arbitration, threatening the equality of arms of the Parties and the procedural integrity of the arbitration.[15] [16]

43. In this regard, Claimants maintain that ICSID tribunals have consistently recognized that the need to ensure the procedural integrity of the arbitration may justify a recommendation of provisional measures.[17] More in particular, citing *Methanex v. USA*,[18] Claimants contend that abusing investigative powers to gather evidence outside the ordinary procedure for requesting and exchanging documents in the arbitration undermines the

[12] Claimants' Reply on the Second Request for Provisional Measures, ¶¶17, 18, 78 and 152.
[13] As another example of the unjustified nature of ANAF's investigation on RMGC, Claimants describe the prosecutor's investigation on *See* Claimants' Reply on the Second Request for Provisional Measures, ¶¶82-96. Additionally, Claimants mention that on August 23, 2016, ANAF sent another request for documents to RMGC seeking information related directly to . Claimants argue that "it is not credible to contend that this request has anything to do with any purported concerns, but is clearly aimed at information gathering for use in the State's defense." *See* Claimants Reply on the Second Request for Provisional Measures, ¶152.
[14] Claimants' Reply on the Second Request for Provisional Measures, ¶¶101 and 153.
[15] Claimants' Second Request for Provisional Measures, ¶¶45, 51-56.
[16] Claimants also argue that the intensity of the investigative demands has placed a significant burden on RMGC's limited staff, disrupting RMGC's operations. The alleged harassment and intimation suffered by RMGC's employees has impacted Claimants' ability to develop their claims and, if permitted to continue, may impair their ability to present witnesses. *See* Claimants' Second Request for Provisional Measures, ¶¶41, 43 and 51.
[17] Claimants' Second Request for Provisional Measures, ¶45.
[18] *Methanex Corporation v. United States of America*, NAFTA (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits dated Aug. 7, 2002, Part II – Chapter I (CL-30), ¶ 54.

equality of arms between the parties.[19] To avoid this unfair advantage for the State, the Claimants argue that the *Libananco v. Turkey*[20] tribunal imposed a "rule of separation" between the State's investigative activities and its arbitration defense and ordered the State not to make any documents from its criminal investigation available for use in the arbitration.[21] Similarly, the Claimants note that this objective led the *Churchill Mining v. Indonesia*[22] tribunal to order the respondent to seek leave before introducing evidence which it had obtained or could obtain through a criminal investigation.[23]

44. Claimants also argue that the requested measures are necessary to avoid the aggravation and extension of the dispute.[24]

b) The Requirement of Urgency

45. Claimants argue that the requested provisional measures are urgent. Citing *Quiborax v. Bolivia* and *Churchill Mining v. Indonesia*,[25] Claimants maintain that where the issue relates to the fair conduct of the proceedings, it is clear that measures are urgent since they cannot wait until the end of the arbitration.[26]

c) The Requirement of Necessity

46. Relying on *PNG v. Papua Guinea*,[27] Claimants argue that the "irreparable" harm test should be properly understood as requiring a showing of a "material risk" of serious or grave damage to the requesting party.[28] In this sense, Claimants contend that, given the nature and conduct of the extensive VAT audits and the anti-fraud investigation, "there is, at a minimum, a material risk that Respondent is using its police powers to obtain documents and information in circumvention of arbitration procedure to develop an

[19] Claimants' Second Request for Provisional Measures, ¶54.
[20] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues dated June 23, 2008 (CL-29) ("*Libananco v. Turkey*"), ¶ 79.
[21] Claimants' Second Request for Provisional Measures, ¶55.
[22] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14 (Procedural Measures) dated December 22, 2014 (CL-25) ("*Churchill Mining v. Indonesia*"), ¶¶81-82.
[23] Claimants' Second Request for Provisional Measures, ¶56. Claimants further develop these arguments in Claimants' Reply on the Second Request for Provisional Measures, ¶¶132-135.
[24] Hearing Transcript, page 64, lines 2-5.
[25] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated February 26, 2010 (CL-11) ("*Quiborax v. Bolivia*"), ¶ 153. *Churchill Mining v. Indonesia,* ¶ 90.
[26] Claimants' Second Request for Provisional Measures, ¶¶63 - 65.
[27] *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures dated January 21, 2015 (CL-33) ("*PNG v. Papua New Guinea*"), ¶¶ 109 and 111.
[28] Claimants' Second Request for Provisional Measures, ¶73. Claimants note that some tribunals have observed that nothing in either Article 47 of the ICSID Convention or ICSID Arbitration Rule 39 limits provisional measures to preventing "irreparable" harm, and that the common law principle of requiring irreparable harm to justify injunctive relief is not the applicable test. Claimants' Second Request for Provisional Measures, ¶71.

arbitration defense."[29]

d) The Requirement of Proportionality

47. Claimants point out that the requested provisional measures would be a fair and balanced approach to address the risk of serious harm, in line with the approach taken by the tribunal in *Libananco v. Turkey*, since such measures would not direct Respondent to cease its investigations.[30] According to Claimants, if "the investigations are not motivated by the arbitration and have nothing to do with it, then there is no prejudice to Respondent in these proceedings if its investigative activities are walled off from the presentation of its case in this arbitration."[31]

e) The Prima Facie Jurisdiction Requirement

48. Claimants reject Respondent's argument that ANAF's investigations are "taxation measures" and therefore cannot be the subject of a request for provisional measures given the carve-out established under Article XII of the Canada – Romania BIT. Claimants contend that "the provisional measure requested is not to enjoin the investigation, but rather to regulate the integrity of these arbitration proceedings by monitoring the access to information made available to the parties in relation to the arbitration and by monitoring the evidence that may be introduced. Thus even if the investigations could be considered as tax measures, that would be irrelevant to Claimants' request. In any event, the anti-fraud investigation is not a "taxation measure" within the meaning of the Canada BIT because it is not a decision as to the tax policy of the State, because it is an abuse, and because [redacted][32]

49. Claimants also argue that, in any event, these restrictions do not apply to Gabriel Jersey since its claims arises solely and exclusively from the UK – Romania BIT, which does not establish a similar carve-out. In this regard, Claimants reject the Respondent's interpretation of *EuroGas v. Slovak Republic*[33] and argue that, as other investment tribunals have explained, when different claimants present claims under different instruments in the same arbitration, the tribunal must assess each claimant's claims and requests for relief in accordance with the applicable BIT invoked by each.[34]

[29] Claimants' Second Request for Provisional Measures, ¶75.
[30] Claimants' Second Request for Provisional Measures, ¶83.
[31] Claimants' Reply on the Second Request for Provisional Measures, ¶155.
[32] Claimants' Reply on the Second Request for Provisional Measures, ¶154.
[33] Claimants' Reply on the Second Request for Provisional Measures, ¶¶114-123.
[34] Claimants' Reply on the Second Request for Provisional Measures, ¶¶124-126.

B. RESPONDENT'S ARGUMENTS

50. Respondent requests the Tribunal to dismiss the Claimants' request for provisional measures.

51. Respondent contends that the anti-fraud and tax investigations are in accordance with Romanian law and that the anti-fraud investigation [35] For Respondent, Claimants have provided no evidence that these investigations are in any way related to their initiation of the arbitration.

52. Furthermore, Respondent states that the insinuation that ANAF has seized RMGC documents and may in the future seize future documents, including the Confidential and Classified Documents, to use them in the arbitration is unsupported.[37] Among other reasons, Respondent points out that only the ANAF inspectors in charge of a particular inspection have access to the documents taken from a company under investigation[38] and they "have a duty to keep secret 'all information they have found out through the exercise of their job duties'" and may only transmit such information to public authorities in circumstances prescribed by law.[39]

53. Respondent affirms that "neither it (with the exception of NAMR), nor its counsel, has had access to date to the Confidential and Classified Documents."[40] On this basis, Respondent concludes that the requested provisional measures are unnecessary since "there is already a legal regime in place in Romania that prevents us from using this information until it becomes public." The Tribunal could only grant the provisional measures if it assumed "that Romanian Investigators, the Romanian State, is acting unlawfully."[42]

54. Respondent further contends that the provisional measures sought by Claimants should be dismissed since the necessary requirements are not present in this case:

[35] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶78.
[36] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶79.
[37] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶81.
[38] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶82.
[39] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶84.
[40] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶¶85-88. See also ¶¶89 y 90.
[41] Hearing Transcript, pages 138-239.
[42] Hearing Transcript, page 241, lines 14-21.

a) The Prima Facie Jurisdiction Requirement

55. Respondent argues that the provisional measures requested with regards to the anti-fraud and tax investigations fall outside of the Tribunal's jurisdiction since they do not relate to this dispute. In particular, Respondent points out that Claimants do not allege that such investigations constitute a breach of the two BITs, which for Respondent is proof that there is no link between the rights from the subject of the arbitration proceedings and the provisional measures being sought.[43]

56. Respondent further contends that such measures should also be dismissed because the tax and anti-fraud investigations cannot become part of the dispute since Article XII(1) of the Canada – Romania BIT carves taxation measures out of its protective scope.[44] Citing *EnCana v. Ecuador*,[45] Respondent notes that this carve-out applies unless Claimants can prove – which they have not – that the taxation measures in dispute are entirely unsupported by the applicable domestic rules and aimed at interfering with the pending arbitration proceedings.[46]

57. Moreover, Respondent argues that the provisional measures requested with regards to the anti-fraud and tax investigations also fall outside of the Tribunal's jurisdiction given that under Article XIII(8) of the Canada – Romania BIT a tribunal cannot enjoin the State from applying a measure which an applicant for interim relief contends amounts to a breach of the BIT. [47]

58. Finally, relying on *EuroGas v. Slovak Republic*,[48] Respondent contends that Gabriel Canada cannot avoid the limitations flowing from Articles XII and XIII of the Canada – Romania BIT by invoking the application of the UK – Romania BIT in favor of Gabriel Jersey. For Respondent, where a procedural provision of the Canada – Romania BIT addresses an issue and the UK – Romania BIT does not, the first must apply to both Claimants. "The alternative solution would mean that a claimant could pick and choose the procedural provisions applicable to it at will by filing claims jointly with a co-claimant under a more favorable BIT."[49]

b) The Rights in Peril

59. Respondent contends that the measures sought do not address any plausible peril to the right of due process in the arbitration since, as mentioned before, only the DGAC

[43] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶¶102-103.
[44] Respondent's Observations on the Second Request for Provisional Measures, ¶130. Respondent's Rejoinder on the Second Request for Provisional Measures, ¶114-115.
[45] *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award and Partial Dissenting Opinion dated February 3, 2006 (RLA-13), ¶142.
[46] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶¶124-127.
[47] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶¶135-138.
[48] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No ARB/14/14, Annex to Procedural Order No. 2 dated April 16, 2015 (RLA-34) ("*EuroGas v. Slovak Republic*").
[49] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶¶140-157.

inspectors in charge of a particular inspection have access to the documents taken from a company under investigation and other employees or agents of the Romanian government, including the Ministry of Public Finance, do not have access to these documents.[50]

60. Respondent further argues that not one tribunal to date has prevented a State from relying on documents legitimately gathered through tax investigations and Claimants' allegation to the contrary remains unsubstantiated.[51] Moreover, Respondent points out that at this early stage of the proceedings it is not seeking any evidence to rebut Claimants' claims on the merits since Claimants have not yet filed their Memorial.[52]

61. Respondent states that, "to the extent that any evidence in the possession of ANAF may be necessary to respond to the Claimants' claims, any request to ANAF will be made and responded to in compliance with the existing limitations on access to documents and confidentiality of investigations under Romanian law."[53] For Respondent, Claimants' allegation that there would be anything abusive in Romania possibly requesting documents from ANAF "ignores the fact that Romania is a co-shareholder in RMGC and retains all rights to seek the same documents directly from RMGC, in accordance with Romanian corporate law."[54]

c) The Urgency Requirement

62. Respondent argues that the provisional measures requested by Claimants are not urgently required to prevent the alleged harm, since Claimants have failed to prove that ANAF has requested access or obtained Confidential and Classified Documents and is using them in this arbitration. In any event, Respondent notes that ANAF's strict procedures with regard to the procurement and use of documents from an entity subject to an anti-fraud investigation restrict the access to these documents to the inspectors in charge of the inspection.[55]

d) The Necessity Requirement

63. Respondent claims that Claimants have been unable to establish that the requested provisional measures are necessary given that ANAF's procurement of documents through its anti-fraud investigation does not imperil the procedural integrity of these proceedings.[56]

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[50] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶170.
[51] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶174, *see also* ¶¶160-164.
[52] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶172.
[53] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶173.
[54] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶175.
[55] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶195.
[56] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶182.

e) The Proportionality Requirement

64. Respondent rejects Claimants' argument that the requested measures would cause no prejudice to Romania and points out that "it cannot be excluded that the Respondent's counsel may request, in a manner consistent with ANAF's regulations governing the handling of documents collected from persons under investigation, information regarding RMGC after the Claimants have filed their Memorial."[57] For Respondent, its "right of due process would be compromised by permitting the Claimants to impose artificial limits on which entities Romanian state can be asked to provide information to be used in the State's defence."[58]

IV. TRIBUNAL'S ANALYSIS

A. Whether the Tribunal has Jurisdiction to Recommend Provisional Measures

65. Claimants relied upon Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. The reliefs sought here are for the protection of the procedural rights of the Parties.

66. Claimants submitted that the Tribunal's authority to issue provisional measures have to meet the following four criteria:

(a) The tribunal is properly seized of the dispute submitted to arbitration.[59]

(b) There is a right that is the subject of the requests. It has to be established that the existence of such right is plausible.

(c) There must be a material risk of harm to that right.

(d) The requested measure must be proportional to the risk of harm.

67. Respondent summarized the criteria to be met as follows:

> As noted in both the Respondent's Observations to the First Request and its Comments on the Claimants' Request for Emergency Relief, under the ICSID Convention and the ICSID Rules, an applicant for provisional measures must make a prima facie showing that the

[57] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶202.
[58] Respondent's Rejoinder on the Second Request for Provisional Measures, ¶202. Similarly, in ¶ 96 of its Rejoinder on the Second Request for Provisional Measures, Respondent argues that in the absence of any evidence that the investigations are in any way improper, there is no basis at this early stage of the proceedings for Claimants' request that Respondent's counsel be walled off from seeing documents obtained during such investigations,
[59] The Parties accept that the Tribunal has jurisdiction over the dispute in this arbitration.

> Tribunal has jurisdiction as well as demonstrate that the measures sought (i) seek to protect a right and are (ii) necessary, (iii) urgent, and (iv) proportional.[60]

68. Article 47 of the ICSID Convention provides that provisional measures may be recommended to "preserve the respective rights of either party." Provisional measures are not limited to preserving the very rights in dispute. They can be invoked where the rights have "a link" with the "subject of the proceedings". In *Timor-Leste v. Australia*, the ICJ held that "a link must exist between the rights which form the subject of the proceedings before the court on the merits of the case and the provisional measures being sought."[61] See also *Costa Rica v. Nicaragua*, Certain Activities Carried Out by Nicaragua in the Border Area, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, p. 18 §54.

69. It is accepted that the rights to be protected may include a party's right to the procedural integrity of the arbitration.

    (a) In *Burlington v. Ecuador*, the tribunal stated that "the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the status quo, and to the non-aggravation of the dispute. These latter rights are thus self-standing rights."[62]

    (b) In *Perenco v. Ecuador*, the tribunal referred also to the ICJ decision in the *LaGrand* case[63] pointing out that measures designed "to avoid aggravating or extending disputes have frequently been indicated by the court."[64]

70. The procedural integrity of the arbitration encompasses respect for the parties' rights to due process and equal treatment and the non-aggravation of the dispute. The Tribunal's power to issue provisional measures to ensure the procedural integrity of the arbitration has been upheld in cases such as *Libanaco v. Turkey*,[65] *Quiborax v. Bolivia*[66] and *Churchill*

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[60] Respondent's Observations on the Second Request for Provisional Measures, ¶125.
[61] *Timor-Leste v. Australia*, Questions relating to the Seizure and Detention of Certain Documents and Data, Provisional Measures, Order of March 3, 2014, I.C.J. Reports 2014, p. 152 ¶23.
[62] *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures dated June 29, 2009, ¶60.
[63] *LaGrand (Germany v. United States of America)*, Judgment, I. C. J. Reports 2001, p. 503, §103.
[64] *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 8, 2009, ¶55.
[65] *Libananco v. Turkey* , ¶78.
[66] *Quiborax v. Bolivia*, ¶141. That the rights to be preserved by provisional measures are not limited to the rights in dispute was emphasized by the tribunal in ¶117: "In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the status quo and to the non-aggravation of the dispute. As stated by the Tribunal in *Burlington v. Ecuador*, these latter rights are self-standing rights. The Tribunal in *Biwater Gauff v. Tanzania* reached a similar conclusion."

Mining v. Indonesia.[67]

71. The Tribunal now turns to the applicable standards to be applied.

72. In *PNG v. Papua New Guinea*, the tribunal explained that the term irreparable harm when properly understood means no more than the requirement to show a material risk of serious or grave damage to the requesting party. The proper test should therefore be one of necessity arising from a material risk of serious or grave damage to the requesting party. In *City Oriente v. Ecuador*, it was held that the provisional measure is not merely to prevent irreparable harm but where "the harm spared the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby."[68]

73. The Tribunal observes that the Parties' submissions regarding the standard and criteria to be met are not substantially different. The Tribunal sets out its findings relating to the test based on both Parties' submissions below:

(a) The recommendation of provisional measures must be urgent such that the order cannot await the final award.[69]

(b) The provisional measure to be recommended must be necessary for the protection of the right.[70] The test of necessity is met where the harm is irreparable or where there is a material risk of serious or grave damage to the requesting party.

(c) The Tribunal must balance the harm caused to the requesting party and to the other side when deciding whether or not the provisional measures should be adopted. In striking the balance, the Tribunal has to take into account the degree and nature of the harm that would be suffered by each party so that the provisional measure ordered would be proportional in all the circumstances of the case.[71]

74. Having laid down the general criteria to be met and the applicable standards, the Tribunal turns to the specificities of the objection in this case, namely that:

(a) the actions complained of relate to taxation measures and "taxation measures" are excluded by reason of the tax carve-out provision in Article XII(1) of the Canada –

[67] *Churchill Mining v. Indonesia*, ¶85. In ¶71, the Tribunal observed: "It is well settled that provisional measures may be recommended to protect the rights to the status quo and to the non-aggravation of the dispute, which are self-standing rights vested in any party to ICSID proceedings."
[68] *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters dated May 13, 2008, ("*City Oriente v. Ecuador*"), ¶72.
[69] *PNG v. Papua New Guinea*, ¶116; and *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 dated March 31, 2016, ¶76, where the tribunals observed that the level of urgency required depends on the type of measure requested.
[70] Respondent's Observations on the Second Request for Provisional Measures, ¶125.
[71] The Tribunal in *City Oriente v. Ecuador* observes that whilst City Oriente stated that a harm suffered by the requesting party should "exceed greatly the damage caused to the party affected thereby," it does not change the standard being one of balance of probability.

Romania BIT;

(b) by reason of Article XIII(8) of the Canada – Romania BIT, which permits interim measures of protection to preserve rights but prohibits the tribunal to "order attachment or enjoin the application of the measure alleged to constitute a breach of this Agreement," this Tribunal cannot exercise its power to grant the provisional measures sought here;

(c) Claimants have sought to consolidate their claims under the two BITs and hence Gabriel Jersey is subject to the same restrictions as Gabriel Canada.

75. The Tribunal therefore turns now to the consideration of these arguments of Respondent.

B. THE EFFECT AND IMPLICATION OF CONSOLIDATION AND THE APPLICABILITY OF ARTICLES XII(1) AND XIII(8) OF THE CANADA – ROMANIA BIT

a) Consolidation

76. Gabriel Canada and Gabriel Jersey have jointly filed the Request for Arbitration. Romania has not raised any jurisdictional objection regarding such an approach. The dispute arises out of allegations of breach of the Canada – Romania BIT and the UK – Romania BIT.

77. Gabriel Canada, Gabriel Jersey and Minvest are shareholders of RMGC, the relevant vehicle for the exploration and development of precious metal mineral properties in Romania. RMGC was responsible, as the vehicle registered in Romania, to prepare and make the relevant submissions for permits and approvals to advance the Roşia Montană Project. The acts and omissions of the Respondent complained of by Gabriel Canada and Gabriel Jersey are based on the same facts and circumstances, whilst their legal rights and remedies will be governed by the respective BITs. The background to the disputes, the evidence that would be tendered both in terms of documentary and witness evidence are, on the basis of what is currently before the Tribunal, substantially if not entirely the same. The adoption of the procedure of consolidating these two claims by the two Claimants on the premise of two different BITs is obviously made with a view to avoid inconsistent findings of fact, multiplicity of proceedings and therefore reduce the risk of increased costs and time.

78. As to whether the same or different substantive remedies could be granted by reason of the differences in the BITs will be a matter to be dealt with in the future.

79. At this particular stage dealing with the provisional measures, two specific aspects of the incompatibility of the Canada – Romania BIT and the UK – Romania BIT have been raised by Respondent in contending that the Tribunal does not have jurisdiction to accede to the request vis-à-vis Gabriel Canada and by reason of the consolidation the same conclusion would be applicable to Gabriel Jersey.

80. The two provisions in the Canada – Romania BIT provide:

(a) Article XII(1):

> Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

(b) Article 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. For purposes of this paragraph, an order includes a recommendation.

81. As summarized above, Respondent relies on the *EuroGas* case Procedural Order No. 2[72] suggesting that as Claimants have chosen to consolidate the proceedings, they cannot now try to "pick and choose between what they consider to be the more favorable provisions under the two BITs."[73] The issue under consideration in the *EuroGas* case was one of confidentiality and the Tribunal's ruling was that, given that the Canada – Slovak Republic BIT has an express provision regarding publicity, Belmont could not deviate from that when participating in the consolidated proceedings. In this particular case, the Canada – Romania BIT has a similar provision regarding publicity and Gabriel Jersey has not sought to resile from that.

82. What is being asserted by the Respondent, in the Second Request for Provisional Measures, is that by reason of the tax carve-out in the Canada – Romania BIT, Gabriel Canada is precluded from obtaining the remedy as they all relate to "taxation measures". Further, by the consolidation of the claims, Gabriel Jersey is deemed to have been precluded from bringing any claim relating to "taxation measures" and the Second Request for Provisional Measures should fail. The Tribunal does not have to make any ruling as to whether a substantive claim under "taxation measures" can be brought by Gabriel Jersey. As to whether the Second Request for Provisional Measures can be brought, it turns primarily on the nature of the request and the interpretation of Article XIII(8).

83. The UK – Romania BIT does not contain a provision as set out in Article XIII(8) of the Canada – Romania BIT. The Tribunal cannot see any basis to find that Gabriel Jersey's rights in relation to any provisional measure or interim measure of protection could be said to be affected by this provision in the Canada – Romania BIT. The consolidation of the claims does not amount to a re-writing, substituting or setting aside of the legal entitlements of the parties under the UK – Romania BIT. No argument has been proffered based on any MFN provision. The rights that each claimant can enforce would have to be based on the

[72] *EuroGas v. Slovak Republic*.
[73] Respondent's Observations on the Second Request for Provisional Measures, ¶138.

relevant BIT. The *EuroGas* decision does not, in the Tribunal's view, suggest that the more stringent or narrower provision in two incompatible BITs should always prevail whenever two claims are consolidated. Such a conclusion defies logic. Each case and each application must be considered in its own context.

84. In summary, how this Tribunal will deal with two incompatible BITs will depend on the issues at hand and there is no universal answer. There may be a situation whereby Gabriel Canada cannot seek any remedy by reason of Article XII(1) or Article XIII(8) but that does not, *per se*, preclude Gabriel Jersey from seeking and obtaining such a remedy simply on the basis of consolidation.

b) Article XIII(8) of the Canada – Romania BIT

85. Respondent relies on Article XIII(8) of the Canada – Romania BIT to contend that the Claimants are not entitled to the Second Request for Provisional Measure. This provision may, if construed in accordance with the Respondent's interpretation of "taxation measures" under Article XII(1), preclude Gabriel Canada from obtaining the provisional measure. As noted by the Tribunal, this does not automatically lead to the result that Gabriel Jersey would not be able to obtain such provisional measure if the other substantive requirements are made out.

86. In the first sentence of Article XIII(8), the Tribunal's power to order interim measures of protection is confirmed. One of the purposes of such a measure is to ensure the Tribunal's "jurisdiction is made fully effective." This would include the need to protect the procedural integrity of the arbitration. Without such protection, the jurisdiction of this Tribunal may be flouted and the process rendered ineffective.

87. As to the second sentence, the Tribunal is precluded from ordering any measure to enjoin the application of the measure alleged to constitute a breach of the Canada-Romania BIT.

88. Respondent argues that both the ANAF VAT assessment and the DGAF anti-fraud investigation amount to "taxation measures" and hence the Tribunal is not permitted to enjoin the application of such measures. Claimants made clear that it is not seeking the Tribunal to enjoin or stop the anti-fraud investigation but merely to provide protection regarding the documents that have been obtained. The second sentence of Article XIII(8) is therefore not the subject of this application before the Tribunal. The application relates to the protection of the use of the documents and information obtained by the investigation so that Respondent does not have a procedural advantage.

89. The Tribunal finds that if the substantive requirements of a provisional measure are made out, the Tribunal will have the jurisdiction to grant an appropriate provisional measure so as to ensure that the Tribunal's jurisdiction is made fully effective and/or to protect the Tribunal's jurisdiction. Upon a proper interpretation of Article XIII(8) and the nature of the application here, Article XIII(8) does not bar the Tribunal from exercising such a power. For the reasons set out in Section D below, however, the grounds have not been

made out by Claimants.

C. THE VAT ASSESSMENT

90. As set out in paragraph 32, there is no need for the Tribunal to make any ruling on the provisional measures requested with regards to the VAT Assessment.

D. THE ANTI-FRAUD INVESTIGATION

91. It is not disputed that RMGC ordered, paid for, and received winter jackets from Kadok in late 2012. According to Claimants, a year later they learnt through their banks that together with other companies they were the subject of a tax evasion and money laundering investigation into Kadok. According to Claimants, the winter jackets purchase was the only transaction it had with Kadok. In November 2013, by the action of an administrative authority, funds that were paid to Kadok in the amount stipulated by the contract for the winter jackets were frozen.

92. As summarized above, Claimants' concerns and complaints relate to what might be made of the information and documentary evidence that was collected under this anti-fraud investigation. In short, Claimants were concerned that prejudice would be suffered as these documents would be made available to Respondent in preparing its submissions in advance. Claimants complained that the timing is therefore an issue. Further, the scope of the information that has been collected is also a concern for Claimants, as according to Claimants, they relate to very broad requests for documents and interviews of many employees of RMGC. Claimants complain that Respondent has used police powers in advance of the arbitration to get a vast array of documents, some of which may not be relevant to the anti-fraud investigation itself.

93. Claimants clarify that it is not challenging the lawfulness of the investigation as the requests for documents and the interviews with RMGC employees were carried out in accordance with certain Romanian laws and procedures. Claimants contend that notwithstanding the technical compliance with the requirements in Romania, there are "hallmarks of retaliation and abuse because of the arbitration."[74]

94. Claimants therefore ask for provisional measures of protection to be put in place "that will prevent the authorities of the State, in the exercise of the police powers, from being a conduit of information and documents to the arbitration defense team of Romania in circumvention of the processes that this Tribunal has established."[75] Claimants confirm that they are not asking for a cessation of the investigation but merely an order preventing such information to be passed to the arbitration defense team.

95. Respondent pointed out that the anti-fraud investigation was conducted by the DGAC and

[74] Hearing Transcript, page 104, lines 9-10.
[75] Hearing Transcript, page 105, lines 7-12.

that it is a separate entity within ANAF. It pointed out also that ANAF is separate from the Ministry of Finance, the Ministry involved in the defense of this arbitration.

96. Respondent drew the Tribunal's attention to Romanian laws that would be adequate to address Claimants' concern about disclosing evidence to the defense team:

(a)

(b)

(c)

97. In other words, any information, whether the testimony of RMGC's employees or documents that were collected under the anti-fraud investigation, could not be disclosed or passed to anybody else, including the Ministry of Finance and the arbitration defense team.

98. Respondent has also exhibited the witness statement of Petre Dragos Voinescu explaining that The documents collected from the anti-fraud investigation were stored within DGAF offices. The location where the documentation from RMGC is stored was also set out in the witness statement.[78] Mr. Voinescu also confirmed that the anti-fraud inspectors have not requested classified or confidential documents from RMGC.

99. Claimants' allegation that the actions of ANAF and DGAF are abusive and retaliatory to the commencement of the arbitration is a serious allegation and more cogent and convincing evidence would be required for this to be established. The invitation for a mere inference to be drawn by reason of the timing of the investigations is not, in the Tribunal's view, adequate. The Tribunal has not been shown evidence as to what documents have been improperly or abusively seized or that the witnesses have been asked questions beyond the ambit of the relevant anti-fraud investigation. The Tribunal appreciates that given the confidentiality of the investigation, Claimants may not be able to identify and

[76]
[77]
[78] Witness Statement of Petre Dragos Voinescu, ¶6.

particularize the questions that were asked of the witnesses. Yet, in the absence of such evidence, it is not for the Tribunal to conclude there were such abusive actions as alleged.

100. As to documents that have been collected, the Tribunal is not able to come to any view as to whether or not the scope was beyond what was necessarily required. The Tribunal has evidence that no classified and confidential documents have been collected and this remains unchallenged. There is no allegation that privileged documents such as communications with counsel have been obtained as was in the case of *Libananco*.[79]

101. Such documents as have been collected by the anti-fraud investigation would therefore be the documents that Claimants could have sight of anyway. The concern regarding the sequencing or timing of the sight or use of such documents is therefore not made out.

102. Furthermore, as has been explained by Respondent, the Romanian laws provide explicitly that no disclosure of information and documents collected during the investigation can be made public or disclosed to any other parties. The Ministry of Finance and ANAF are separate ministries and there is no suggestion that these laws will not be observed and complied with. Nonetheless, the Tribunal appreciates the concern that Claimants have given the timing of the commencement of the arbitration and the timing of the investigations. However it would not be safe to draw an inference based purely on this fact alone.

103. As to the timing of the ANAF tax assessment, the Tribunal accepts the explanation given by Respondent regarding the time limits of the tax assessment that will be conducted by ANAF. Claimants confirmed that this is not the only tax assessment that was conducted.

104. As to the risk of the documents getting into the hands of the Respondent's Ministry of Finance and/or arbitration defense team, insofar as timing is concerned, such documents are in the hands of Claimants in any event as they are not classified documents. Respondent's arbitration team has affirmed to the Tribunal that they have not received any such documents as it would be against Romanian law. If a document that was collected by DGAF and that would not otherwise be in the hands of Respondent were to be produced in this arbitration, Claimants would have a good case for infringements and may be able to make out a case of abuse. At the moment, this has not been made out and there is not enough evidence for an inference to be drawn that would necessitate the ordering of the provisional measures. The Tribunal finds that Claimants have failed to make out a material risk.

105. As to what was asked of the employees of RMGC, it is inappropriate, in the Tribunal's view, to speculate as to whether they were fishing beyond the ambit of the anti-fraud investigation. No imminent harm or risk on these individuals has been suggested and it is not enough, merely by reason of the interviews and the taking of testimony of the RMGC employees, for the Tribunal to conclude there was any abusive or retaliatory conduct on

[79] *Libananco v. Turkey*.

the part of Respondent.

106. In conclusion, the Tribunal finds that it has jurisdiction to protect the integrity of the arbitration proceedings if the substantive requirements of provisional measures are made out.

107. The ANAF tax assessment is being carried out *de novo* and there is no need for any order to be made in relation to that.

108. As to the anti-fraud investigation, it is ongoing and the evidence before the Tribunal now is not adequate to establish a material risk of harm necessitating a provisional measure.

E. THE RELIEFS SOUGHT

109. Given that Claimants have withdrawn the reliefs requested in paragraph 166(c), no order is made in relation to that.

110. As to paragraph 166(b), the Tribunal dismisses the application. The requested order seeks to prevent the evidence gained through the ANAF's assessment and the anti-fraud investigations from being passed to the Ministry of Finance and/or the arbitration defense team. There is, in the view of the Tribunal, a regime under Romanian law to preclude that from happening and there is currently no evidence before the Tribunal of a material risk that this will happen.

111. In relation to relief under paragraph 166(a), Respondent's reliance on the provisions in Romanian law and the fact that the documents and information obtained through the investigation would not be made public unless and until [REDACTED] and the absence of evidence that such provisions would not be complied with is sufficient to dismiss this application.

112. Paragraph 166(d) is seeking a very broad relief and Claimants have not been able to particularize or narrow it notwithstanding the invitation from the Tribunal to do so. The real concern is, as has been explained by Claimants, the passing of documents to the arbitration defense team. For the same reasons, as set out above, the Tribunal does not grant an order sought in the terms as are set out in paragraph 166(d).

V. COSTS

113. The Tribunal is of the view that it is not appropriate at this stage to deal with the costs of the Second Request for Provisional Measure. The VAT assessment is undergoing a *de novo* exercise and the anti-fraud investigation is ongoing.

VI. DECISION

114. The Tribunal, after careful consideration, unanimously decides as follows:

(a) Claimants' Second Request for Provisional Measures in paragraph 166(a), (b) and (d) of the Reply is dismissed.

(b) No order is made in relation to paragraph 166(c) of the Reply as it has been withdrawn.

(c) Costs of and occasioned by this application are reserved.

Ms. Teresa Cheng SC	Prof. Horacio Grigera Naón	Prof. Zachary Douglas QC
President of the Tribunal	Arbitrator	Arbitrator
Date: November 22, 2016	Date: November 22, 2016	Date: November 22, 2016