
INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Claimants

v.

ROMANIA

Respondent

ICSID CASE No. ARB/15/31

**CLAIMANTS' REPLY TO RESPONDENT'S OBSERVATIONS
ON CLAIMANTS' SECOND REQUEST FOR PROVISIONAL MEASURES**

August 24, 2016

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I. INTRODUCTION

1. In accordance with the schedule established by the Tribunal in its letter to the Parties dated August 3, 2016, Claimants hereby submit their Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures dated August 17, 2016 ("Respondent's Observations on Second Request"). This Reply is accompanied by the statement of Max Vaughan, Chief Financial Officer of Gabriel Resources Ltd. Claimants incorporate herein the comments and observations set forth in Claimants' Second Request for Provisional Measures dated July 28, 2016 ("Second Request for Provisional Measures") and in the accompanying witness statement of Dragoş Tănase.¹

2. Claimants demonstrated in their Second Request for Provisional Measures that the Tribunal's intervention was urgently needed to preserve the integrity of this arbitration and to

¹ Capitalized terms used but not defined herein have the meaning assigned to them in the Second Request for Provisional Measures.

prevent the serious aggravation and extension of this dispute. Since Claimants submitted their Second Request on July 28, 2016, and contrary to Respondent's claims regarding the summer holidays in Europe, Respondent's agents [REDACTED] and have actively opposed RMGC's requests for a judicial stay of enforcement of ANAF's *prima facie* abusive and unlawful VAT Assessment. Respondent also has continued to [REDACTED] the so-called anti-fraud investigation to include requests manifestly designed to develop Respondent's arbitration defense contrary to the obligation to participate in this arbitration in good faith.

3. Claimants therefore renew their requests for provisional measures on two bases. The first is, to minimize the very serious risk of harm to the procedural integrity of this arbitration posed by Respondent's excessive investigations of RMGC, to call upon Respondent to ensure that no information or documents obtained by ANAF as a result of its audits or investigations in relation to RMGC shall be made available to any person having any role in Respondent's defense in this arbitration, and in any event, that Respondent not proffer any evidence gained through ANAF's audits and investigations in relation to RMGC without prior leave from the Tribunal following an opportunity for Claimants to comment on any such request.

4. The second is, to minimize the very serious risk of harm to the procedural integrity of this arbitration and to avoid the serious aggravation and extension of the dispute, to call upon Respondent to withdraw its opposition to RMGC's request for a judicial suspension of enforcement and otherwise not take steps to enforce the VAT Assessment against RMGC pending the resolution of RMGC's administrative (and if necessary judicial) challenge of the VAT Assessment or, if possible, the posting by RMGC of a guarantee in the amount necessary,

[REDACTED]²

² As Mr. Vaughan explains, [REDACTED]

5. In view of Respondent's continuing aggressive conduct against RMGC, even as Claimants prepare this reply, a recommendation also that Respondent refrain from taking any further action in connection with the VAT Assessment, ANAF audits or ANAF investigations that may aggravate and extend the dispute is demonstrably warranted.

6. Claimants' Second Request for Provisional Measures arises from two separate actions undertaken by different units within ANAF directed at RMGC: (i) an audit of VAT payments from July 1, 2011 to December 31, 2015 commenced in March 2016 leading to the subject VAT Assessment and (ii) a self-styled and far reaching anti-fraud investigation commenced in October 2015. Despite devoting almost 60 pages to the effort, Respondent fails to explain or avoid the consequences of its conduct that give rise to the need for the provisional measures Claimants seek.

7. [REDACTED]

8. [REDACTED]

[REDACTED] See Vaughan ¶ 10.

³ Second Request for Provisional Measures ¶¶ 8, 17, 20.

⁴ [REDACTED]

9. [REDACTED]

[REDACTED] violates RMGC's legitimate expectations based on the law and on the past practice of ANAF itself.⁵ As RMGC demonstrates [REDACTED]

[REDACTED] is unlawful as a matter of Romanian and EU law, both of which require that the tax authority recognize the taxpayer's legitimate expectations derived from prior consistent treatment.

10. Respondent engages in an extended and manifestly irrelevant discussion of why Romanian tax law is consistent with EU law. Claimants do not challenge the content of Romanian law but rather the abusive manner in which it is being applied, which bespeaks retaliation, threatens the integrity of these arbitration proceedings and is being used as a pretext to aggravate and extend this dispute.

11. [REDACTED]

[REDACTED] After the August 26 payment deadline passes, Romania clearly intends during the last week in August to use the VAT

⁵ [REDACTED]

[REDACTED] See also Second Request for Provisional Measures ¶ 21 n. 18 (citing Tanți Anghel, General Director, Ministry of Finance - Tax Procedure Directorate, published in the journal Consultant Fiscal, edited by the Romanian Fiscal Consultants Chamber, Year VIII. n. 49, Mar./Apr. 2016 (Exh. C-50) at 7-8).

⁶ Second Request for Provisional Measures ¶ 21. [REDACTED]

⁷ Claimants' Letter dated Aug. 11, 2016 to Tribunal.

⁸ See Respondent's Observations on Second Request ¶¶ 65-66.

⁹ [REDACTED]

Assessment as a basis to seize and sell RMGC assets as a prelude to dismantling the company and taking what remains of Claimants' investment unless Claimants pay ██████ to obtain a bank guarantee in the full amount of the VAT Assessment (plus the eventual associated interest and penalties) to prevent state execution.

12. It cannot be seriously disputed that Romania's imminent seizure and disposition of RMGC's assets would lead to dire consequences for RMGC, including not only the seizure of its assets, but also its insolvency, the likely annulment of its mining Licenses, and the liquidation of the company.¹⁰ Without provisional measures, the only real way in present circumstances¹¹ to avoid the immediate enforcement of the VAT Assessment and the negative consequences that flow therefrom would be for Gabriel to seek to fund a guarantee by diverting ██████ ██████ it has been able to raise to fund working capital requirements for the next several years and its ability to present its claims in this forum.¹²

13. Given the patently retaliatory and unlawful nature of the VAT Assessment, Respondent should not be able to require Gabriel either to lose access for an extended period of time to material amounts of its available funds or witness the dismantling of RMGC. This is particularly true where (i) RMGC indisputably has ██████ that could satisfy the VAT Assessment if RMGC were to lose its challenge to the VAT Assessment and (ii) a less burdensome alternative exists under Romanian law in the form of a judicially-approved bond to secure the State's interest.¹³ Far from supporting the less burdensome alternative contemplated by Romanian law, ANAF has filed submissions actively opposing RMGC's request for a judicial stay on the basis of a bond in the amount contemplated by law.¹⁴

¹⁰ Second Request for Provisional Measures ¶¶ 10, 25-32, 48-49.

¹¹ ██████ See Vaughan ¶ 10.

¹² Second Request for Provisional Measures ¶¶ 8-10, 16- 29-31, 47-48, 70.

¹³ Second Request for Provisional Measures ¶¶ 9, 11, 25-26, 30, 47, 86, 88.

¹⁴ ██████

14. Respondent's assertion that the VAT Assessment is the lawful result of routine ANAF enforcement action from which Claimants seek a special arbitration exemption beggars belief. The evidence establishes beyond peradventure that the VAT Assessment is *prima facie* abusive and unlawful. Respondent's clear intent to rush to enforce the VAT Assessment, underscored by its opposition to RMGC's request for a judicial stay of enforcement, also is manifestly lacking in good faith. Provisional measures are urgently required to prevent Romania's hostile acts from aggravating the dispute and threatening the integrity of these proceedings.

15. Romania also continues unabated to use the anti-fraud investigation to demand [REDACTED] [REDACTED].¹⁵ The investigation is not in the past, as Respondent suggests,¹⁶ but is on-going.¹⁷

16. Respondent offers an explanation for [REDACTED] ANAF's recent anti-fraud investigation [REDACTED].¹⁸ As demonstrated further below, the explanation itself is suspect and cannot credibly justify the excessive investigation being undertaken. The evidence only confirms that the motivation for the investigation is a bad faith attempt to discredit RMGC and to obtain evidence to use in this arbitration.

17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁵ Second Request for Provisional Measures ¶¶ 35-36.

¹⁶ Respondent's Observations on Second Request ¶ 169.

¹⁷ Tănase ¶¶ 21, 31.

¹⁸ Respondent apparently has sought to address Claimants' request for an explanation for the anti-fraud investigation in its responsive submission.

[REDACTED]

18. [REDACTED]

[REDACTED]

This request obviously has nothing to do with [REDACTED] that allegedly justified the investigation of RMGC by ANAF. The longer it continues, the clearer it becomes that the investigation is a vehicle for Respondent to harass RMGC and extract documents and information for use in the State's defense.

19. Equally if not more troubling, ANAF and presumably now other agents of Respondent evidently are already reviewing and using the Classified and Confidential Documents, including the referenced Roşia Montană License and its addenda, to undertake discovery on Claimants' investment relevant to the arbitration; at the same time, Claimants' counsel still do not have access to such documents as Respondent has refused to approach the matter of those documents cooperatively and instead contends it will take six months or more to

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

make declassification decisions and address the terms of access to such documents in view of confidentiality obligations. Not only does the startling development that ANAF is already using these documents underscore that the relief sought in Claimants' First Request for Provisional Measures should be granted promptly, but as requested here, Respondent's arbitration team must be walled off from the information and documents being collected by Romania's enforcement authorities to avoid serious harm to the integrity of these proceedings.

20. Based on the timing and nature of ANAF's purported anti-fraud investigation, it cannot credibly be denied that this effort is focused on trying to develop arbitration defenses for the State and therefore should be regulated by the Tribunal. Claimants have not sought an order preventing the investigation from proceeding, but rather an order regulating how Respondent may use documents taken from RMGC in relation to this arbitration. This relief remains urgently needed and was not the subject of Claimants' earlier request for emergency temporary provisional measures.

21. Respondent's various arguments in opposition to this Second Request for Provisional Measures are without merit.

22. Contrary to Respondent's contention, neither Claimants nor RMGC are seeking to avoid compliance with any of their obligations. Notwithstanding their abusive character, RMGC has been and continues to comply with all of ANAF's demands, and the provisional relief that Claimants here seek is fully consistent with Romanian law.

23. Respondent argues that Claimants are trying to convert this arbitration into a Romanian tax court. That too is wrong. As addressed further below, Respondent's arguments disregard the applicable legal standard. Claimants do not have to prove that Respondent's conduct is abusive and unlawful in order to demonstrate that the requested provisional measures are warranted.²²

24. Respondent argues that the conduct giving rise to Claimants' request consists of "taxation measures," which cannot form the basis of any claims in this arbitration and that moreover the Tribunal does not have the authority to issue the requested measures. As addressed

²² See *infra* §§ IV.A, IV.B.

further below, that argument is both incorrect and irrelevant. In short, (i) the Canada BIT does not preclude issuance of provisional measures necessary to ensure the integrity of the proceedings and to ensure the tribunal's jurisdiction is made fully effective; (ii) Claimants do not have to present a claim that the VAT Assessment and anti-fraud investigation violate the BITs in order to justify the request for provisional measures at issue; (iii) in any event, they might present such claims as an abuse of fiscal authority does not fall within the scope of the "tax carve-out" of the Canada BIT; (iv) [REDACTED] and (v) the restrictions contained in the Canada BIT, even if they were relevant, which they are not, do not apply to Gabriel Jersey and its request for provisional measures.²³

25. As Claimants demonstrate,²⁴ the requested measures are urgently needed to prevent serious harm to the integrity of these proceedings and the aggravation and extension of the dispute, and the measures are entirely proportionate, as Romania will not suffer any prejudice whatsoever if the measures are granted. No law enforcement activity will be impaired by an order that safeguards the equality of arms between the parties in this arbitration and that governs the introduction of evidence into these proceedings. With respect to the VAT Assessment, the issue presented by the requested relief is only one of timing. Not only is a stay of enforcement pending challenge consistent with Romanian law, but [REDACTED] Respondent would not be put at risk in terms of its ability to enforce the VAT Assessment were it to survive RMGC's challenge.

26. For all these reasons, those elaborated in the Second Request for Provisional Measures, and below, the requested measures are urgently needed to ensure that Respondent's conduct does not impair the integrity of these proceeding or aggravate and extend the dispute.

²³ See *infra* §§ III.B, IV.C.

²⁴ See *infra* § V.

II. BASES FOR REQUEST

A. Romania's VAT Assessment Is Retaliatory and Demonstrates an Intention to Hold Up Gabriel or Take RMGC

27. As Claimants showed in their Second Request and elaborate further below, Romania's rush to forcibly execute its *prima facie* abusive and unlawful post-arbitration VAT Assessment means that RMGC either will imminently be dismantled or Claimants will be bled of resources necessary to fund working capital and to prepare and present their claims. Provisional measures therefore are urgently required to avoid allowing Respondent to aggravate the dispute and impair the integrity of the proceedings.

1. The VAT Assessment Is an Abrupt and Unjustified Departure from 18 Prior VAT Audits of RMGC and Thus Is *Prima Facie* Abusive and Unlawful

28. Claimants demonstrated in their Second Request for Provisional Measures that, in the first VAT audit undertaken since the commencement of this arbitration, ANAF has assessed a VAT liability of approximately RON 27 million (approximately USD 6.7 million), which is contrary to [REDACTED] 18 prior audits [REDACTED]

[REDACTED]²⁵ This unjustified and stunning departure from ANAF's own practice and precedent is as retaliatory as it is unlawful in rejecting VAT deductions that are permitted by law and running roughshod over RMGC's settled expectations.²⁶ Respondent throws up a variety of arguments in an effort to avoid this fundamental reality and the provisional measures it compels, all of which are meritless.

29. Respondent simultaneously asserts that Claimants are trying to make the Tribunal "a parallel tax court of appeal"²⁷ and that Claimants have failed to explain why the VAT

²⁵ Second Request for Provisional Measures ¶¶ 8, 16-17, 20.

²⁶ Second Request for Provisional Measures ¶¶ 8, 17-24.

²⁷ Respondent's Observations on Second Request ¶ 69.

Assessment is unlawful which Respondent says is necessary for Claimants to obtain provisional measures.²⁸ These arguments are contradictory and wrong.

30. RMGC has pursued and will pursue all administrative and judicial challenges available to it in Romania to contest the unlawfulness of the VAT Assessment and its enforcement. Indeed, Romania already has actively opposed RMGC's efforts to stay enforcement of the VAT Assessment,²⁹ [REDACTED]

31. The Tribunal is not called upon to determine the merits of the VAT Assessment but instead to decide whether in the circumstances presented and under the proper legal standard the requested provisional measures are necessary and urgent to ensure the procedural integrity of the arbitration or to prevent the aggravation and extension of the dispute.³⁰ As explained below at § V.B, they manifestly are. To obtain provisional relief, Claimants need not prove that the VAT Assessment violates Romanian law, but need only show that the facts and circumstances of the subject VAT Assessment present a serious risk of harm to the integrity of these proceedings and of an aggravation and extension of the dispute.

32. Respondent's related arguments that Claimants are seeking to "provide RMGC with preferential tax treatment"³¹ "to avoid compliance with decisions taken by competent Romanian authorities taken in accordance with the applicable Romanian law pending completion of the arbitration,"³² are similarly unavailing make-weight. Claimants do not seek preferential or exculpatory treatment. They seek redress for the deleterious effects of Respondent's *prima facie* retaliatory and unlawful conduct in the form of measures to preserve the integrity of the arbitration and the equality of the parties and the non-aggravation of the dispute.

²⁸ Respondent's Observations on Second Request ¶¶ 9, 12 (further asserting that "Claimants would need but fail to show any violation of Romanian law by the Respondent").

²⁹ [REDACTED]

³⁰ See Second Request for Provisional Measures § III.C; *infra* § V.B.

³¹ Respondent's Observations on Second Request ¶ 157.

³² Respondent's Observations on Second Request ¶ 13.

35. These circumstances certainly provide *prima facie* evidence that the VAT Assessment was made in manifest disregard of Romanian and EU law, which require the tax authority to act in accordance with the principles of legal certainty and legitimate expectations and so to accord the same treatment now that it had previously accorded in relation to similar facts concerning the same taxpayer.³⁷ This requirement is expressly set out in both the Romanian Tax Procedure Code³⁸ and the case law of the European Court of Justice.³⁹

36. Indeed, even as the VAT inspection of RMGC was commencing in March 2016, a senior officer within the Ministry of Finance’s own Tax Procedure Directorate confirmed in a prominent Romanian tax law journal that, “[w]hen a new tax inspection is subsequently carried out at the same taxpayer, for the same type of tax, for the same type of operations/transactions with the only difference that they took place in the period subject to verification by the new inspection, and for which the taxpayer applied the same legal opinion as before, *the inspection body cannot conclude, in the new inspection, that the tax law was not properly applied, and consequently establish additional liabilities.*”⁴⁰

37. [REDACTED]

³⁷ See Second Request for Provisional Measures ¶ 21.

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ Tanți Anghel, General Director, Ministry of Finance – Tax Procedure Directorate, published in the journal *Consultant Fiscal*, edited by the Romanian Fiscal Consultants Chamber, Year VIII. N. 49, Mar./Apr. 2016 (Exh. C-50) at 7 (emphasis added) (further observing that “[t]he inspector in such cases must comply with, and must apply the opinion of his colleague from the previous inspection, who appreciated that the taxpayer’s opinion had been correct, and he must do so even when he holds a different legal opinion”).

[REDACTED]

38. [REDACTED]

39. [REDACTED]

⁴¹ Respondent's Observations on Second Request ¶ 11. [REDACTED]

⁴² [REDACTED]

⁴³ Vaughan ¶ 6.

⁴⁴ See Respondent's Observations on Second Request ¶¶ 89-101.

⁴⁵ Respondent's Observations on Second Request ¶ 88.

⁴⁶ [REDACTED]

40.

[REDACTED]

[REDACTED] Try as it might, Respondent cannot obscure or avoid this reality.⁴⁹

41.

[REDACTED]

42.

[REDACTED]

⁴⁷ See Respondent's Observations on Second Request ¶¶ 95.

⁴⁸ See Respondent's Observations on Second Request ¶ 54 [REDACTED]

[REDACTED] See also Vaughan ¶ 6.

⁴⁹ Vaughan ¶ 6.

⁵⁰ See Respondent's Observations on Second Request ¶¶ 97-98.

⁵¹ [REDACTED]

44. [REDACTED]

Respondent's rush to enforce the VAT Assessment, described below, further demonstrates that its true motive is to dismantle RMGC, as retaliation for bringing this case or as part of its defense strategy in relation to this dispute.

2. Respondent's Hurried Enforcement of the VAT Assessment Will Materially Aggravate the Dispute and Upset the Equality of Arms between the Parties

45. Perhaps not surprisingly in light of its evident objective to retaliate against Claimants by dismantling RMGC as quickly as possible based on the *prima facie* unlawful VAT Assessment, Respondent through ANAF is actively opposing RMGC's request for suspension of enforcement.⁵⁷ Thus, unless Gabriel posts a guarantee on RMGC's behalf in the full amount of the VAT Assessment plus the forthcoming interest and penalties (which Claimants estimate could result in a total amount due and owing of more than [REDACTED] ANAF surely will proceed with dispatch to enforce the VAT Assessment against RMGC's bank accounts and fixed assets which will render RMGC insolvent and lead to other dire consequences, including inability to satisfy license and other legal obligations and eventually to liquidation of the company.⁵⁸

⁵⁶ [REDACTED]

⁵⁶ [REDACTED] See Respondent's Observations on Second Request ¶ 100.

⁵⁷ [REDACTED] The Alba Iulia Court of Appeals notified RMGC of ANAF's filing on August 22.

⁵⁸ See Second Request for Provisional Measures ¶¶ 10, 25-32, 48-49.

46. In response, Respondent first asserts that Claimants have “fail[ed] to demonstrate that the requested measures are necessary” or “that the circumstances are urgent.”⁵⁹ The urgency of the circumstances, however, cannot be doubted. [REDACTED]

[REDACTED] Claimants have no reason to doubt that ANAF will act in accordance with [REDACTED] and commence enforcement proceedings at the earliest opportunity. Respondent’s refusal to forebear on enforcement and active opposition to RMGC’s request for suspension reinforce this belief. [REDACTED]

47. Nor is it speculative that the forcible execution of the VAT Assessment would lead to RMGC being considered insolvent because RMGC does not currently have funds available to pay this debt.⁶² Insolvency, in turn, requires either a judicial reorganization plan approved by the creditors or the commencement of bankruptcy proceedings aimed at liquidating the debtor’s assets and paying its outstanding debts.⁶³ Because there is no basis to believe that Respondent as a creditor of RMGC would approve a judicial reorganization plan for RMGC, RMGC faces bankruptcy and liquidation,⁶⁴ the suspension and likely annulment of its mining Licenses,⁶⁵ and the loss of access to its books and records, including in particular the

⁵⁹ Respondent’s Observations on Second Request ¶ 25.

⁶⁰ Respondent’s Observations on Second Request ¶ 109. [REDACTED]

⁶¹ See Second Request for Provisional Measures ¶¶ 26, 33; Tănase ¶ 29; [REDACTED] See also Respondent’s Observations on Claimants’ Second Request for Provisional Measures ¶ 109 n. 159.

⁶² See Second Request for Provisional Measures ¶ 27 n. 38. Under Romanian law, insolvency is defined as the insufficiency of available funds to pay certain, due, and enforceable debts. See Law No. 85/2014 on Insolvency Prevention Measures and Insolvency (“Insolvency Code”) (Exh. C-45) Art. 5(1)(29).

⁶³ See Second Request for Provisional Measures ¶¶ 27-28 n. 38. See also Insolvency Code (Exh. C-45) Arts. 5(1)(45), 5(1)(46), 5(1)(54), 132, 133, 138-139, 145.

⁶⁴ See Second Request for Provisional Measures ¶¶ 27-28 n. 38.

⁶⁵ See Second Request for Provisional Measures ¶ 29. See also Mining Law (Exh. C-11) Arts. 33, 39 (providing that, upon finding that a license holder is subject to judicial reorganization or bankruptcy, NAMR

Confidential and Classified Documents, which are currently in RMGC’s custody in its capacity as titleholder of its Licenses.⁶⁶ Claimants’ ability to access these core documents and thus to present their claims in this arbitration would therefore be in jeopardy because absent a Tribunal order to the contrary, Claimants do not have independent access to the Confidential and Classified Documents for purposes of this arbitration.⁶⁷ In contrast, [REDACTED] Respondent’s agents already appear to have accessed and are using such documents as part of its investigation.⁶⁸

48. Respondent asserts that “a chain of events leading to the eventual bankruptcy of RMGC . . . is unproven and wrong,”⁶⁹ because in the event of RMGC’s insolvency, its principal creditors “would be the Claimants and the Romanian tax authorities,” and “[t]here is no reason to suggest that any of these creditors would refuse a reorganization plan and prefer to collect their claims by liquidation through RMGC’s bankruptcy procedures.”⁷⁰ Respondent further contends that it “would be similarly affected by the appointment of a judicial administrator,” because “both shareholders” would lose control of RMGC’s records.⁷¹

49. Contrary to its hollow protestations, there is little doubt that Respondent’s true motive is to wind up RMGC. In addition to its refusal to forebear on enforcement even while this Tribunal considers Claimants’ pending provisional measures requests, Respondent has proceeded full-tilt with its excessive and abusive investigation of RMGC throughout what Respondent has referred to as Europe’s summer vacation period.⁷²

must suspend its license, and that a license holder’s failure to fulfill any of its obligations, *e.g.*, due to a state of bankruptcy, leads to annulment of the license).

⁶⁶ See Second Request for Provisional Measures ¶ 32. See also First Request for Provisional Measures.

⁶⁷ Respondent’s Observations on First Request ¶¶ 10, 27 (conceding that neither party’s counsel currently has access to access to the Confidential and Classified Documents relevant to this arbitration).

⁶⁸ [REDACTED]

⁶⁹ Respondent’s Observations on Second Request ¶ 152.

⁷⁰ Respondent’s Observations on Second Request ¶ 154.

⁷¹ Respondent’s Observations on Second Request ¶ 155.

⁷² See, *e.g.*, Email from Respondent to the Tribunal dated Aug. 16, 2016 (referring to “[t]he summer holidays throughout Europe, including Romania”); Respondent’s Comments on Request for Emergency Temporary Provisional Measures ¶ 13 (asserting that “Romanian authorities would have difficulty in promptly responding

50. Finally, with respect to the potential fall-out from losing access to RMGC's documents, Claimants observe that they, not Respondent, have the burden of persuasion on their claims in this proceeding. It is therefore untenable to suggest that Romania and Gabriel would be similarly affected by, and that Respondent would seek to avoid, RMGC's liquidation if a judicial administrator were appointed. Moreover, Respondent would retain full access via any judicial administrator that Respondent itself would put in place.

3. The Only Viable Solution Presently Available to Stop Respondent from Dismantling RMGC Would Be for Gabriel to Fund a Punitive Guarantee

51. Based on current facts and circumstances, the only realistic possibility to avoid the consequences set out above would be for Gabriel to divert ██████████ to enable RMGC to post a ██████████ guarantee to cover the full amount of the VAT Assessment, plus eventual interest and penalties.⁷³ Respondent's assertion that options other than a guarantee are available to prevent immediate enforcement is simply wrong.

52. One option suggested by Respondent that RMGC already is pursuing is to petition the Romanian courts for a judicial stay of enforcement based on a bond in an amount far less than a full guarantee.⁷⁴ Respondent now has filed its opposition to RMGC's request before the Court.⁷⁵ Even if RMGC's request were granted, which is doubtful in view of the State's active opposition, the Court's discretionary decision could take several months to be issued as Romanian law does not provide a timeframe by which the Court must render a decision.⁷⁶ While

to the Claimants' allegations given the timing of the Claimants' Second Request, dated 28 July 2016, which coincides with the European holiday period, including in Romania").

⁷³ Second Request for Provisional Measures ¶¶ 8, 26, 30-31, 47-48.

⁷⁴ See Respondent's Observations on Second Request ¶ 121.

⁷⁵ ██████████

⁷⁶ Second Request for Provisional Measures ¶ 30. The briefing schedule established by the Court notably concludes after ANAF may commence enforcement on August 26. ██████████

the Court considers RMGC's application to suspend enforcement, enforcement may proceed apace after August 26.⁷⁷

53. Respondent's next suggestion – that RMGC pay the amount due or post a guarantee – is equally baseless in current circumstances.⁷⁸ As Respondent well knows, Gabriel is RMGC's source of funding and RMGC does not currently have the funds necessary to pay the VAT Assessment.⁷⁹

54. Respondent knows this information not only because the State through Minvest is RMGC's minority shareholder, [REDACTED]

[REDACTED]

[REDACTED] In addition, as explained in Gabriel's Management Discussion and Analysis for the second quarter of 2016 (submitted by Respondent), RMGC then had approximately USD 400,000 in its bank accounts in Romania.⁸²

55. Respondent's related suggestion that RMGC could increase its share capital is disingenuous at best.⁸³ [REDACTED]

⁷⁷ See Respondent's Observations on Second Request ¶ 121 (confirming that "the VAT remains due and payable pending a possible challenge by RMGC and absent issuance of a stay").

⁷⁸ See Respondent's Observations on Second Request ¶¶ 27, 120.

⁷⁹ Second Request for Provisional Measures ¶¶ 27, 48.

⁸⁰ Second Request for Provisional Measures ¶¶ 26 n. 32, 48 n. 60. [REDACTED]

⁸¹ [REDACTED]

⁸² GBU Management Discussion & Analysis – Second Quarter 2016 (Exh. R-20), at 30. That being said, as noted above and in the accompanying witness statement of Mr. Vaughan, [REDACTED]

[REDACTED] See Vaughan ¶ 10.

⁸³ Respondent's Observations on Second Request ¶ 165.

[REDACTED]

56. The third option suggested by Respondent is that RMGC request to pay the VAT Assessment in installments.⁸⁷ This option also is not available to RMGC. Whether to permit a taxpayer to pay in installments is a discretionary decision, made by ANAF, which may take up to 60 days to decide.⁸⁸ In that regard, Romanian law requires an applicant seeking leave to pay in installments to demonstrate a “difficult situation caused by a temporary lack of funds” and that it has “financial capacity to pay throughout the term of the schedule of installments.”⁸⁹ This option thus fails at the threshold. Because RMGC has never generated revenue and does not currently have another source of funds,⁹⁰ it could not now demonstrate the requisite capacity to pay future installments.⁹¹ Moreover, a request to pay in installments entails an agreement to pay the full amount of the VAT Assessment,⁹² plus up to 16% interest on the balance throughout the term of the installment agreement, during which time all assets remain frozen.⁹³

⁸⁴ [REDACTED]

⁸⁵ [REDACTED]

⁸⁶ Vaughan ¶ 8.

⁸⁷ Respondent’s Observations on Second Request ¶¶ 116, 122-124.

⁸⁸ Tax Procedure Code (resubmitted Exh. C-28) Arts. 184(1), 186(1)(a).

⁸⁹ Tax Procedure Code (resubmitted Exh. C-28) Art. 186(1)(a) (further providing that this determination is made by the tax authority “based on the financial restructuring or redress plan,” and/or other documents).

⁹⁰ Second Request for Provisional Measures ¶ 27.

⁹¹ [REDACTED] See Vaughan ¶ 10.

⁹² Tax Procedure Code (resubmitted Exh. C-28) Arts. 184(1), 185(1).

⁹³ Tax Procedure Code (resubmitted Exh. C-28) Art. 193(13).

57. Consequently, the only current, realistic option to avoid RMGC's fixed assets being immediately sold off after August 26 and the dispute being seriously aggravated is for Gabriel to post a guarantee in the full amount of the VAT Assessment. As Mr. Vaughan of Gabriel explains, Gabriel has inquired into the possibility of obtaining such a guarantee and has been informed that to fund an RMGC guarantee, it would need to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁹⁴

58. For reasons known only to Respondent, ANAF has not yet notified RMGC of the amount of interest or penalties that it intends to assess. Claimants estimate, however, that the interest and penalties could push the total amount due and owing by RMGC to beyond ~USD 10 million. Given the requirements for Gabriel to obtain a bank guarantee, it therefore would need to divert in the range of [REDACTED] to obtain a guarantee sufficient to cover the principal amount of the VAT Assessment alone.⁹⁵

59. Respondent cavalierly disregards the significant risk to Claimants of having to part with these funds at least for the lengthy and indeterminate amount of time it could take for the various legal challenges RMGC has mounted and will mount against the VAT Assessment to be decided. According to Respondent, depriving Gabriel of access to these funds "is not significant considering the aggregate amount of funds of which the Claimants currently dispose."⁹⁶ Respondent's observations are not well taken for several reasons.

60. First, it is not for Respondent to decide what level of funds Claimants need to fund their ongoing operations or their arbitration claims in this case. Second, no claimant should be effectively forced to part with any amount of money in response to hostile state actions that are *prima facie* retaliatory and unlawful.

⁹⁴ Vaughan ¶ 12.

⁹⁵ Vaughan ¶ 12.

⁹⁶ Respondent's Observations on Second Request ¶ 166.

61. Third, the impact on Gabriel of obtaining a guarantee in the principal amount at issue in the VAT Assessment, let alone any interest and penalties, would be material.⁹⁷ As reported in its Management Discussion & Analysis report for the second quarter of 2016, Gabriel recently closed two non-brokered private placements that raised aggregate gross proceeds of CAD 60.625 million (approximately USD 46.8 million) “to strengthen and improve the financial position of the Company,” “to provide funding to pursue” this arbitration, and “for general working capital purposes.”⁹⁸ Funding a guarantee to cover the principal amount of the VAT Assessment would require Gabriel to divert and sideline for the duration of the guarantee approximately [REDACTED];⁹⁹ were the eventual guarantee to cover interest and penalties as well, the amount could swell to approximately [REDACTED]. It is unreasonable to assume that Gabriel would simply be able to replenish these funds.¹⁰⁰

62. Given the timing and circumstances of the VAT Assessment, Respondent should not be able to put Claimants in the untenable position at the inception of this arbitration of risking compromising either their ability to run their business or to present their claims by diverting and rendering unavailable [REDACTED] for an indefinite

⁹⁷ Vaughan ¶¶ 15-16.

⁹⁸ GBU Management Discussion & Analysis – Second Quarter 2016 (Exh. R-20) at 3.

⁹⁹

[REDACTED]
[REDACTED] See Vaughan ¶ 15.

[REDACTED] See
Vaughan ¶ 14.

¹⁰⁰ See *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures dated Sept. 2, 2008 (CL-31) ¶ 61 (“Respondent claims that over US\$41 million is currently owed by GEM, under the WPT Law. It appears from the financial statements and taxation reports submitted to the Tribunal that GEM could not proceed to the immediate payment of this total sum out of its own resources. The only alternatives would be either loans from financial institutions or a large equity infusion by shareholders. It has been established to the satisfaction of the Tribunal that, in the current fiscal conditions, no financial institution would consider lending such an amount of money to GEM. And, assuming that Respondent is right in stating that GEM’s net book value assets are worth less than 50% of the amount of WPT owing and the possibility that the Mongolian Parliament would again refuse to amend the WPT Law, it would be very presumptuous for any investor to make additional equity investment in that company.”).

period. Doing so would manifestly aggravate the dispute and materially impair the integrity of these proceedings.

63. Provisional measures thus are warranted to prevent these negative consequences. And, as set forth below, Respondent's interests will not be harmed should its suspect VAT Assessment eventually be upheld.

4. Enforcement of the VAT Assessment, if Upheld, Is Not At Risk

64. [REDACTED]

65. [REDACTED]

[REDACTED] Romania thus already has ample [REDACTED] security against which it will be

¹⁰¹ See Claimants' Second Request for Provisional Measures ¶¶ 11, 86, 88.

¹⁰² [REDACTED]

¹⁰³ [REDACTED]

¹⁰⁴ [REDACTED]

See Second Request for Provisional Measures ¶ 86.

able to enforce the VAT Assessment and any associated interest and penalties if the VAT liability ultimately were upheld, which it should not be.¹⁰⁵

66. [REDACTED]

[REDACTED] Given the existence of [REDACTED] security and the corresponding absence of prejudice, there is no reason other than Respondent's desire to dismantle RMGC or to deprive Claimants of needed resources for Respondent to refuse to withdraw its opposition to RMGC's request for a judicial stay of the enforcement proceedings and/or otherwise not take steps to enforce the VAT Assessment against RMGC pending the resolution of RMGC's administrative and judicial challenges of the VAT Assessment.

B. Romania's Anti-Fraud Investigation Is Excessive and Disproportionate and Threatens to Undermine the Integrity of These Proceedings

67. In apparent response to Claimants' request for an order requiring Respondent to justify the sweeping anti-fraud investigation commenced against RMGC in October 2015,

[REDACTED]

[REDACTED] Claimants of course did not have access to such internal communications from the Romanian authorities and cannot determine whether this selective disclosure is complete or whether the characterizations of conduct in that correspondence are reasonable and supported by evidence.

68. For present purposes, however, and as explained further below, even if one were to assume that the facts Respondent has chosen to share would justify some anti-fraud investigation, [REDACTED] the current investigation of RMGC is excessive and disproportionate,

¹⁰⁵ See Second Request for Provisional Measures ¶¶ 16-24.

¹⁰⁶ [REDACTED]

¹⁰⁷ Respondent's Observations on Second Request ¶¶ 35-48; [REDACTED]

and appears to be a pretext for Respondent to extract documents and information from RMGC for use by Respondent in defending the arbitration. These concerns are heightened because

[REDACTED]

[REDACTED] It is therefore important that the Tribunal grant the relief requested by Claimants to ensure that appropriate processes are in place to regulate any use by Respondent in this arbitration of the [REDACTED] documents and information seized from RMGC.

1. The [REDACTED] Is Not a Credible Basis for the Anti-Fraud Investigation Commenced Following Claimants' Filing of This Arbitration

69. According to the information provided by Respondent, the [REDACTED] of the anti-fraud investigation ANAF launched at RMGC in October 2015 is [REDACTED]

[REDACTED]

70. [REDACTED]

[REDACTED]

¹⁰⁸ [REDACTED]

¹⁰⁹ Respondent's Observations on Second Request § 2.

¹¹⁰ [REDACTED]

[REDACTED]

71. [REDACTED]

72. Whether by happenstance or design, [REDACTED] following Parliamentary hearings on the so-called Roşia Montană law, the passage of which would have facilitated implementation of the Roşia Montană Project.¹¹⁴ As it turned out, the Romanian Senate voted to reject the law on November 19, 2013 – [REDACTED];¹¹⁵ the Chamber of Deputies voted to reject the law in June 2014.¹¹⁶

73. [REDACTED]

¹¹¹ [REDACTED]

¹¹² [REDACTED]

¹¹³ [REDACTED]

¹¹³ [REDACTED] See RMGC Trade Registry excerpt dated Aug. 16, 2016 and RMGC Trade Registry History dated Feb. 12, 2016 (Exhs. R-27 and R-28 re-submitted with corrected translation as Exhs. C-125 and C-119).

¹¹⁴ Request for Arbitration ¶ 35.

¹¹⁵ Senate Letter No. L.475/2013 dated Nov. 19, 2013 to Chamber of Deputies (Exh. C-98).

¹¹⁶ Chamber of Deputies Letter dated June 4, 2014 to Senate (Exh. C-108).

[REDACTED]

74. [REDACTED]

75. [REDACTED]

76. [REDACTED]

[REDACTED] As noted above, the Romanian Chamber of Deputies voted to reject the Roșia Montană law the following month.

117 [REDACTED]

118 [REDACTED]

119 [REDACTED]

120 [REDACTED]

121 [REDACTED]

122 [REDACTED]

123 [REDACTED]

77.

[REDACTED]

78.

[REDACTED]

79.

[REDACTED]

80.

[REDACTED]

124

[REDACTED]

125

[REDACTED]

126

[REDACTED]

[REDACTED]

81. Under the guise of its purported anti-fraud audit, Respondent through ANAF has therefore seen fit to investigate [REDACTED]

[REDACTED]

2. [REDACTED]

82. [REDACTED]

[REDACTED]

127 [REDACTED]

128 [REDACTED]

129 [REDACTED]

130 [REDACTED]

83.

[REDACTED]

84.

[REDACTED]

85.

[REDACTED]

131

[REDACTED]

132

[REDACTED]

133

[REDACTED]

[REDACTED]

86. [REDACTED]

[REDACTED]

87. [REDACTED]

[REDACTED]

134 [REDACTED]

135 [REDACTED]

136 [REDACTED]

137 [REDACTED]

[REDACTED]

88. [REDACTED]

89. [REDACTED]

90. [REDACTED]

138 [REDACTED]

139 [REDACTED]

140 [REDACTED]

141 [REDACTED]

142 [REDACTED]

143 [REDACTED]

[REDACTED]

91. [REDACTED]

92. [REDACTED]

93. [REDACTED]

94. [REDACTED]

144 [REDACTED]

145 [REDACTED]

146 [REDACTED]

147 [REDACTED]

148 [REDACTED]

149 [REDACTED]

[REDACTED]

95. [REDACTED]

96. More importantly for present purposes, it is simply not credible that [REDACTED] justify [REDACTED] ANAF's already excessive anti-fraud investigation. This asserted justification is nothing more than a pretext for ANAF to demand even greater quantities of documents and information from RMGC.

3. The Harassing and Excessive Anti-Fraud Investigation Threatens the Equality of Arms between the Parties

97. ANAF's purported anti-fraud investigation has not only been expansive, [REDACTED] As detailed in Claimants' opening submission and in the unrebutted witness testimony of RMGC General Manager Dragoş Tănase, the ANAF investigators have not only requested and received [REDACTED]

150 [REDACTED]
151 [REDACTED]
152 [REDACTED]

[REDACTED], but also have sought information from RMGC on [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

98. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

99. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

100. [REDACTED]
[REDACTED]

¹⁵³ Tănase ¶ 16.

¹⁵⁴ [REDACTED]
[REDACTED]

¹⁵⁵ Tănase ¶¶ 9-21. [REDACTED]
[REDACTED]

¹⁵⁶ [REDACTED]

¹⁵⁷ [REDACTED]
[REDACTED]

[REDACTED] The longer it goes on, the clearer it becomes that the investigation [REDACTED] and has become a vehicle for Respondent to harass RMGC and extract documents and information for use in this arbitration.

101. Equally if not more troubling is the fact that ANAF and presumably other agents of Respondent are already reviewing and using the Classified and Confidential Documents, like the referenced license and its addenda, to undertake discovery on Claimants' investment relevant to the arbitration. At the same time, Claimants and their counsel still do not have access to such documents as Respondent has made the incredible claim that it will take six months or more to declassify all documents, only after which it could address their confidentiality in order to allow access. Not only should the relief sought in Claimants' First Request for Provisional Measures be granted promptly, but as requested in Claimants' Second Request, Respondent's arbitration team must be walled off from this information collected by Respondent's enforcement authorities lest Respondent gain a decided and unfair advantage in this case.

102. Based on the foregoing, even if one were to assume that some investigation of RMGC could have been legitimately pursued, the timing, nature, and [REDACTED] of the ANAF anti-fraud investigation raise serious questions as to the motivation behind and justification for the expansive and excessive course ANAF has followed, [REDACTED] [REDACTED].¹⁵⁸

103. Moreover, [REDACTED] [REDACTED] as Mr. Tănase attests.¹⁵⁹ Respondent's assertion that "Claimants complain about past conduct of the Romanian authorities"¹⁶⁰ is erroneous as ANAF's anti-fraud investigators [REDACTED]

¹⁵⁸ See Tănase ¶¶ 17-18. [REDACTED]

¹⁵⁹ See Tănase ¶ 32 [REDACTED]

¹⁶⁰ Respondent's Observations on Second Request ¶ 169.

[REDACTED]¹⁶¹ [REDACTED]
[REDACTED]
[REDACTED]¹⁶²

104. Nor is there any basis for Respondent to assert that ANAF’s investigations “affect both parties similarly” by virtue of Romania’s shareholding in RMGC through Minvest.¹⁶³ Indeed, this is not the case as [REDACTED] not by Claimants. The notion that Respondent would assert that it and Claimants are nonetheless similarly situated with respect to RMGC and the impact of ANAF’s investigation on RMGC personnel is hard to fathom. If there were any truth to Respondent’s stated position, then Respondent’s agents would not have engaged in the [REDACTED]
[REDACTED]

105. RMGC has complied with ANAF’s ongoing, excessive, and sometimes abusive requests, and Claimants do not seek an order recommending that ANAF stop its investigation as RMGC has nothing to hide. In the circumstances, although the relief Claimants seek is decidedly modest, it is critically important to the fair conduct of these proceedings. Given the breadth of the documents and information collected so far by ANAF and their evident link to potential issues in this arbitration, Claimants consider it vital for the Tribunal to recognize and address through the procedures Claimants seek the risk to the integrity of the arbitration proceedings were Respondent’s arbitration team effectively to be permitted to use the State’s police powers rather than the applicable arbitral procedures to assemble evidence for the arbitration. The measures Claimants seek are thus consistent with the parties’ obligation of good faith in relation to this arbitration and the principle of equality of arms between the parties.

¹⁶¹ [REDACTED]

¹⁶² See Tănase ¶ 19 n. 27 [REDACTED] Cf. Respondent’s Observations on Second Request ¶ 170.

¹⁶³ Respondent’s Observations on Second Request ¶ 170. In fact, if Respondent drives RMGC into insolvency and eventual bankruptcy, it is Respondent who would appoint a judicial administrator to take over the company. Respondent plainly does not risk loss of access to RMGC’s books and records and is in no way affected similarly.

III. THE CANADA BIT DOES NOT PRECLUDE ISSUANCE OF REQUESTED MEASURES

106. Respondent argues that this Tribunal “does not have jurisdiction” to issue the provisional relief requested.¹⁶⁴ Respondent refers Article XIII(8) of the Canada BIT, which provides:

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 a measure alleged to constitute a breach of this Agreement. For purposes of this paragraph, an order includes a recommendation.¹⁶⁵

Respondent’s argument is wrong. Article XIII(8) of the Canada BIT does not apply to the relief requested by Gabriel Canada, nor does it apply or otherwise operate to exclude the relief requested by Gabriel Jersey under the UK BIT.

A. The Canada BIT’s Limitation on the Power to Issue Provisional Measures Does Not Relate to the Measures Requested

107. Claimants’ requests¹⁶⁶ include that the Tribunal recommend, essentially, that Respondent ensure that no information or documents obtained in the ANAF investigations be used for purposes of this arbitration, unless with leave from the Tribunal.¹⁶⁷ Claimants make these requests in order to safeguard the integrity of these proceedings.¹⁶⁸

108. Nothing in Article XIII(8) limits the Tribunal’s ability to control what evidence may be admitted in the arbitration. Indeed, the Tribunal’s authority to do so is confirmed by the first sentence of Article XIII(8) which permits the Tribunal to order measures to preserve the integrity of the proceeding.

¹⁶⁴ Respondent’s Observations on Second Request ¶¶ 128-142.

¹⁶⁵ Canada BIT (Exh. C-1) Art. XIII(8).

¹⁶⁶ Second Request for Provisional Measures ¶ 90.

¹⁶⁷ See Second Request for Provisional Measures ¶ 90(b), (c).

¹⁶⁸ Second Request for Provisional Measures ¶¶ 34-56.

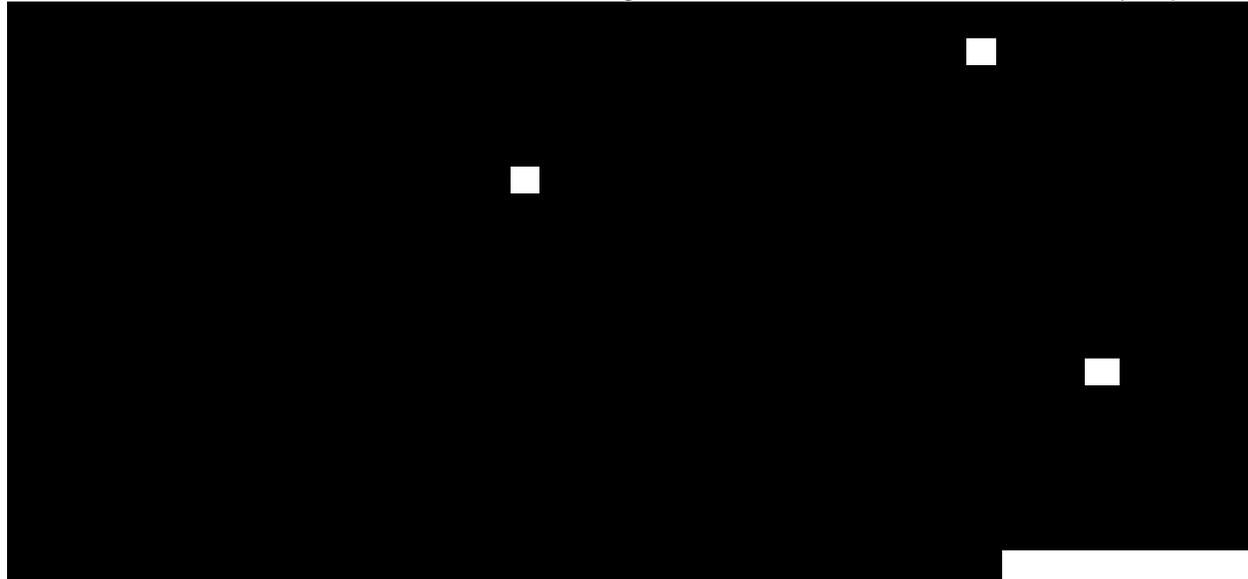
109. The second sentence of Article XIII(8) is not aimed at the procedural rights of the parties, but at the substantive rights in dispute. It limits the Tribunal’s authority, providing that it may not order as a provisional remedy what it may not order as a remedy in its award. Article XIII(9) of the Canada BIT limits the Tribunal’s authority as to the remedies that it may award to (a) monetary damages and/or (b) restitution of property, the latter only with the option of paying monetary damages in lieu thereof.¹⁶⁹ Consistent with the limitation as to what may be awarded on the merits, during the course of the arbitration the Tribunal analogously may not provisionally order an attachment or enjoin a measure alleged to constitute a breach of the BIT.

110. Calling upon the Respondent to refrain from using its compulsory police powers to gather information and evidence to use in the arbitration is neither an order of attachment nor an order enjoining the application of a measure alleged to constitute a breach of the BIT. The second sentence of Article XIII(8) of the Canada BIT therefore does not apply.¹⁷⁰

111. Claimants’ requests also include that the Tribunal recommend that Respondent join RMGC in its request for a judicial suspension of enforcement and otherwise not take steps to enforce the VAT Assessment against RMGC pending resolution of RMGC’s challenge of the

¹⁶⁹ Canada BIT (Exh. C-1) Art. XIII(9).

¹⁷⁰ Nor is it relevant that Respondent claims it is collecting information and documents in furtherance of its efforts allegedly to enforce tax laws. The so-called “tax carve out” of the Canada BIT is irrelevant to the question whether information and documents in a certain category may be used in this arbitration without leave from the Tribunal. In any event, the abusive use of investigations [REDACTED] does not constitute “tax measures” within the meaning of Article XII of the Canada BIT. *See infra* § IV.C.



VAT Assessment, and otherwise to refrain from taking actions that may aggravate and extend the dispute.¹⁷¹

112. Without the requested measures, enforcement of the VAT Assessment places the Claimants in the position of having to divert [REDACTED] to prevent the destruction of RMGC and the loss of access to RMGC's books and records. Having to divert so many millions of dollars at the outset of the arbitration impairs Claimants' ability to pursue its claims and requiring Claimants do so threatens the integrity of these proceedings.¹⁷²

113. While plainly abusive, Claimants have not claimed that the VAT Assessment or its prospective enforcement constitutes a breach of either BIT, but rather that the VAT Assessment and its prospective enforcement threaten the integrity of these proceedings and risk aggravation and extension of the dispute. Article XIII(8) of the Canada BIT expressly provides that the Tribunal may order provisional measures "to ensure that the tribunal's jurisdiction is made fully effective," which includes the notion that the parties may be ordered to refrain from taking action that could render resolution of the dispute more difficult.¹⁷³ Indeed, provisional measures may be needed precisely to prevent a matter from deteriorating to a point where the tribunal cannot fashion an effective remedy.¹⁷⁴

¹⁷¹ Second Request for Provisional Measures ¶ 90(d), (e).

¹⁷² Second Request for Provisional Measures ¶ 76. *See also supra* § II.A.2; *infra* § V.B.

¹⁷³ Second Request for Provisional Measures ¶¶ 57-59. *Cf. also id.* ¶ 87.

¹⁷⁴ The fact that the Tribunal is empowered under Article XIII(9) of the BIT to order restitution of property, even though the State must be given the option to pay monetary damages in lieu thereof, means that it may be reasonable and necessary for the Tribunal to order a provisional measure that permits the full range of remedies to remain available. *See also* Second Request for Provisional Measures ¶ 78 n. 104.

B. The Parties' Agreement to Submit Gabriel Jersey's Claims under and the UK BIT to Arbitration in the Same Proceeding with Gabriel Canada's Claims under the Canada BIT Does Not Lead to the Conclusion Urged by Respondent

114. There are no restrictions relating to the Tribunal's authority to issue provisional measures in the UK BIT and there cannot be any dispute that this Tribunal's jurisdiction in relation to Gabriel Jersey's dispute with Romania arises solely and exclusively from the UK BIT.

115. Respondent contends that the effect of the parties' agreement to submit the claims of the two Claimants under the two different BITs in the same proceeding means that "the treaty that contains the more restrictive procedural provisions" applies when the other treaty is "silent on that issue," and that if Gabriel Jersey obtained a provisional remedy that was not available to Gabriel Canada under the provisions of the Canada BIT, Gabriel Canada would be able to obtain an impermissible "free ride."¹⁷⁵ Respondent's position is without merit.

116. Respondent relies on *EuroGas Inc. & Belmont Resources Inc. v. Slovak Republic*, but that case does not support Respondent's position.¹⁷⁶

117. In that case, EuroGas, a US national, brought a claim against the Slovak Republic under the US-Slovakia BIT together in the same arbitration with Belmont Resources, a Canadian national with claims under the Canada-Slovakia BIT. The claimants objected to the application of the transparency provisions of the Canada-Slovakia BIT on the basis that: (1) the Canada-Slovakia BIT did not apply to EuroGas, the US claimant; and (2) Belmont, the Canadian claimant, also was not bound to "open hearings" as provided in the Canada-Slovakia BIT.

118. Belmont, the Canadian claimant, argued that the Canada-Slovakia BIT did not require open hearings where the claimant selects ICSID Convention arbitration because the Canada-Slovakia BIT provides that where the BIT Contracting State Parties also are parties to another treaty that provides a "more favorable regime," the investor may obtain the benefit of the

¹⁷⁵ See Respondent's Observations on Second Request ¶¶ 139-140.

¹⁷⁶ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 2 dated Apr. 16, 2015 (CL-35).

more favorable regime, and the ICSID Convention's provisions as to optional open hearings were more favorable.¹⁷⁷

119. On that point, the tribunal observed that the Canada-Slovakia BIT's provisions, which contemplated both ICSID Convention arbitration and open hearings, "[could] not be understood as having the effect of setting aside, whenever such a choice is made by claimants, its own express provisions."¹⁷⁸ It is clear from the *EuroGas* tribunal's procedural order that the "choice ... made by claimants" referenced here is the choice of Canadian claimant to submit their claims to ICSID Convention arbitration. Respondent misleadingly cites to this passage as if it supports its point about the impacts of presenting claims under two BITs in one arbitration proceeding,¹⁷⁹ which it does not. The statement of the *EuroGas* tribunal cited by Respondent was simply a statement that the tribunal does not interpret the provision of the Canada-Slovakia BIT relating to a "more favorable regime" in another treaty as encompassing optional open hearings as contemplated for ICSID Convention arbitration.

120. As regards the US claimant, *EuroGas*, the tribunal ruled that it was "convinced by Respondent's arguments that 'if Eurogas did not wish to be impacted by the Canada BIT, then it should not have filed this arbitration with Belmont jointly as claimants.'"¹⁸⁰ The "impact" at issue was acceptance of the transparency regime relating to open hearings, a requirement that does not affect any rights or obligations of either party. Moreover, EuroGas (the US national)'s arbitration agreement under the US-Slovakia BIT, which included Article 32(2) of the ICSID Arbitration Rules, also expressly contemplated open hearings, unless the parties agreed otherwise. Thus, EuroGas and Slovakia's agreement to submit their dispute under the US-Slovakia BIT to arbitration in the same proceeding with the dispute under the Canada-Slovakia

¹⁷⁷ Claimants referred here to ICSID Arbitration Rules Article 32(2), which provides that hearings may be open "[u]nless either party objects," and which Belmont, the Canadian claimant, argued was a "more favorable regime." *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 2 dated Apr. 16, 2015 (CL-35) ¶ 3.

¹⁷⁸ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 2 dated Apr. 16, 2015 (CL-35) ¶ 6.

¹⁷⁹ Respondent's Observations on Second Request ¶ 138.

¹⁸⁰ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 2 dated Apr. 16, 2015 (CL-35) ¶ 5.

BIT constituted agreement under Article 32(2) of the ICSID Arbitration Rules on the issue of open hearings.

121. The decisions in *EuroGas* thus are not analogous to the issue in this case, in which the question presented is whether the fact that the Tribunal is limited in certain contexts under the Canada BIT from providing provisional relief for the Canadian claimant operates to limit the Tribunal's authority under the UK BIT to provide provisional relief to the UK claimant. Nothing in the *EuroGas* decision supports such a conclusion. The fact that the Tribunal acts simultaneously, empowered at once to adjudicate the Canadian investor's claims under the Canada BIT and the UK investor's claims under the UK BIT, does not operate to add to or subtract from any rights or obligations arising under the respective treaties.

122. In this respect, Respondent's argument that Gabriel Canada should not be permitted a "free ride" on the UK BIT¹⁸¹ is misguided. If Gabriel Jersey obtains relief under the UK BIT that is not available to and so not awarded to Gabriel Canada under the Canada BIT, Gabriel Canada does not benefit as a co-claimant in the arbitration. If it benefits, it is as Gabriel Jersey's shareholder. Indeed, the situation would be no different than if Gabriel Jersey brought its claims alone. In any event, one cannot overlook that Romania also consented to the arbitration of the claims under the two BITs in one proceeding.¹⁸²

123. Respondent argues that the fact the parties agreed to submit the claims of both Claimants to arbitration in a single proceeding is a "consolidation" which can only occur when the treaties are not "contradictory with respect to procedural issues."¹⁸³ The scope of available provisional measures, however, as discussed above, is not accurately characterized as merely a procedural issue, rather the limitation in the Canada BIT relates to the availability of substantive

¹⁸¹ Respondent's Observations on Second Request ¶ 141.

¹⁸² As the Request for Arbitration was filed on July 21, 2015 and Romania has not raised any jurisdictional or other preliminary objection, whether as to the constitution of the tribunal, to conducting the proceedings together, or otherwise, Romania must be deemed as having consented to the adjudication of the claims under the two BITs in one proceeding. *See* ICSID Convention Art. 25(1) ("When the parties have given their consent, no party may withdraw its consent unilaterally."); ICSID Arbitration Rule 41(1) ("Any objection that the dispute ... 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.").

¹⁸³ Respondent's Observations on Second Request ¶ 17.

remedies. In any event, even if it was considered procedural, it is not “contradictory.” Also as noted above, there is no contradiction in giving one Claimant relief that the other may not claim. Moreover, it is not correct to refer to the joint submission of claims as a “consolidation.”¹⁸⁴

124. 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 Claimant. As the tribunal in *Noble Energy and Machala Power v. Ecuador and Consejo Nacional de Electricidad* observed:

For the avoidance of doubt, the Tribunal specifies that resolving different disputes in a single proceeding does not mean merging disputes, or applicable laws, or remedies. In the further course of this arbitration, the parties and the Tribunal will have to distinguish each dispute under its own applicable rules, even though facts, evidence and arguments may be common to all or some of them. In particular, the Claimants will have to specify which relief is sought with respect to which Respondent and on which basis Indeed, each Respondent is entitled to know which claims it faces, and which damages it has allegedly caused to each Claimant.¹⁸⁵

The tribunal in *Guaracachi America, Inc. & Rurelec Plc v. Bolivia*¹⁸⁶ held similarly:

The Tribunal ... agrees with [the *Noble Energy*] tribunal’s statement that ‘[i]n the further course of this arbitration, the parties and the Tribunal will have to distinguish each dispute under its own applicable rules, even though facts, evidence and arguments may be common to all or some of them.’ Hence, the Respondent’s assertion that differences exist between both BITs is irrelevant, given that the Tribunal is prepared to analyse each

¹⁸⁴ See *Flughafen Zürich A.G. & Gestión e Ingeniería IDC S.A. v. República Bolivariana de Venezuela*, ICSID Case No. ARB/10/19, Award dated Nov. 18, 2014 (CL-41) ¶¶ 398-400 (where Respondent objected that two claimants presenting claims under two BITs was a consolidation to which Respondent did not consent, the tribunal held: “Respondent repeatedly has alleged that in the present arbitration a consolidation has been made, that cannot be carried out without its consent. In reality, there is not any type of consolidation; what has been made is a joint claim by two Claimants ... and which allege that a same set of facts, imputable to Venezuela, has caused damages to their investment. The two Claimants agreed to act jointly in this arbitration, under the direction of the same legal representation. Consolidation in international arbitration consists of joining in one single arbitration two or more proceedings initiated separately In this arbitration from the beginning there only was one dispute that two Claimants brought jointly against one Respondent – we are faced with a multiplicity of claimants, not a consolidation of proceedings.”) (translation by counsel).

¹⁸⁵ *Noble Energy, Inc. and MachalaPower CIA. Ltd. v. The Republic of Ecuador & Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction dated Mar. 5, 2008 (CL-46) ¶ 206.

¹⁸⁶ *Guaracachi America, Inc. & Rurelec Plc v. Bolivia*, UNCITRAL, Award dated Jan. 31, 2014 (CL-42).

Claimant's claims – which are in essence one and the same claim – in accordance with the applicable BIT invoked by each Claimant. The same rationale would also apply to any possible counter-claims brought by the Respondent. There is no fundamental incompatibility between the consents to arbitration in the two BITs that would result in one or the other consent being violated by the mere fact of the claims being heard together.¹⁸⁷

125. In *Flughafen Zürich A.G. v. Venezuela*,¹⁸⁸ where two claimants brought claims under two BITs, Venezuela objected on the ground that the two BITs contained incompatible arbitration agreements, arguing *inter alia* that two treaties contained different provisions regarding governing law, the tribunal held:

It is true that a different BIT applies to each of the Claimants. Nevertheless, those Treaties are not radically different, much less incompatible. The scope of protection that they offer foreign investors is analogous. The differences that exist are easily identifiable, like for example with respect to the clause to choose one option [for the submission of a claim], that affects IDC but not Flughafen Zürich. The Tribunal will consider these differences when it adjudicates the merits of the dispute.¹⁸⁹

Also notable is the arbitration of the claims presented by *Suez, Sociedad General, et al. v. Argentina* and by *AWG Group Ltd. v. Argentina* which proceeded by agreement in one proceeding with some claims addressed distinctly under the procedures established under the UNCITRAL Arbitration Rules and others under the procedures established under the ICSID Arbitration Rules.¹⁹⁰

¹⁸⁷ *Guaracachi America, Inc. & Rurelec Plc v. Bolivia*, UNCITRAL, Award dated Jan. 31, 2014 (CL-42) ¶ 345.

¹⁸⁸ *Flughafen Zürich A.G. & Gestión e Ingeniería IDC S.A. v. República Bolivariana de Venezuela*, ICSID Case No. ARB/10/19, Award of Nov. 18, 2014 (CL-41).

¹⁸⁹ *Flughafen Zürich A.G. & Gestión e Ingeniería IDC S.A. v. República Bolivariana de Venezuela*, ICSID Case No. ARB/10/19, Award dated Nov. 18, 2014 (CL-41) ¶ 411 (translation by counsel). Other authorities are to similar effect. *See, e.g., OKO Pankki OYJ, VTB Bank (Deutschland) AG, Sampo Bank Plc v. Estonia*, ICSID Case No. ARB/04/6, Award dated Nov. 19, 2007 (CL-47) ¶¶ 191-196 (addressing different temporal jurisdiction in two different BITs).

¹⁹⁰ *See Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendia Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction of Aug. 3, 2006 (CL-52) ¶ 69 (affirming jurisdiction and ordering to continue a case involving multiple claimants pursuant to both the ICSID Arbitration Rules and the UNCITRAL Rules).

126. The fact that the Canada BIT and the UK BIT might permit different provisional remedies does not present a procedural incompatibility as Respondent claims. At most, the variations in the treaties may lead to differences in the claims presented and differences in the relief that may be awarded. In short, there is no basis to conclude that whatever restriction may limit the Tribunal's authority in relation to Gabriel Canada's requests has any effects on the Tribunal's authority in relation to Gabriel Jersey's requests.

IV. STANDARD FOR RECOMMENDING PROVISIONAL MEASURES

A. Respondent Mischaracterizes the Showing Needed to Justify an Recommendation of Provisional Measures

127. As detailed in Claimants' submissions in support of their First Request for Provisional Measures, to which the Tribunal respectfully is referred, it is well established that a tribunal may rule on an application for provisional measures as long as there is a *prima facie* basis for its jurisdiction.¹⁹¹ Respondent does not appear to dispute that principle.¹⁹²

128. As Claimants have observed, international tribunals repeatedly have confirmed that provisional measures are available when necessary to preserve procedural rights relating to the integrity of the arbitration,¹⁹³ or to protect the parties' rights to the *status quo* and the non-aggravation or extension of the dispute.¹⁹⁴ Respondent seeks to distinguish the authorities cited by Claimant by arguing that "an international court or arbitral tribunal may only grant provisional measures requested by a party if they relate to the rights at stake in the underlying dispute."¹⁹⁵ Respondent vastly overstates this distinction. In fact, the two International Court of Justice ("ICJ") cases on which Respondent relies do not indicate that provisional measures are limited to preserving rights in dispute, but rather that there must be "a link" between the

¹⁹¹ See First Request for Provisional Measures ¶ 14; Claimants' Reply to Respondent's Observations on First Request ¶¶ 68-70.

¹⁹² See Respondent's Comments on Second Request ¶¶ 12, 65, 67; Respondent's Observations on Request for Emergency Temporary Provisional Measures ¶¶ 14, 125.

¹⁹³ See Second Request for Provisional Measures ¶¶ 45-56.

¹⁹⁴ See Second Request for Provisional Measures ¶¶ 57-61.

¹⁹⁵ Respondent's Comments on Request for Emergency Temporary Provisional Measures ¶ 31. See also Respondent's Observations on Second Request ¶¶ 129-130.

requested measures and the merits of the case.¹⁹⁶ Similarly, both ICJ cases cited by Respondent confirm that provisional measures may be indicated if the rights asserted “are at least plausible.”¹⁹⁷

129. The authorities relied upon by Respondent thus are consistent with the *Quiborax v. Bolivia* tribunal’s holding that “the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute,” but rather, “the applicable criterion is that the right to be preserved bears a relation with the dispute.”¹⁹⁸ Respondent’s suggestion that the *Plama v. Bulgaria* tribunal articulated a different standard is without merit.¹⁹⁹ In fact, the *Plama* tribunal stated that “the rights to be preserved by provisional measures are circumscribed by the requesting party’s claims and requests for relief” only in the sense that “those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant’s claims and requests for relief to date.”²⁰⁰

130. Moreover, as Claimants demonstrated, numerous tribunals have recognized that the right to the *status quo* and the non-aggravation of the dispute are self-standing rights that may warrant provisional measures to prevent the aggravation, extension, or enlargement of the dispute.²⁰¹ The *City Oriente v. Ecuador* tribunal explained the concept more fully when it stated that “Article 47 of the [ICSID] Convention provides authorization for the passing of provisional measures prohibiting any action that affects the disputed rights, aggravates the dispute, frustrates

¹⁹⁶ See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 147 (RL-10) ¶ 23; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, p. 6 (RL-11) ¶ 54.

¹⁹⁷ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 147 (RL-10) ¶ 22; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, p. 6 (RL-11) ¶ 53.

¹⁹⁸ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶¶ 117-118. See also Second Request for Provisional Measures ¶¶ 58-59.

¹⁹⁹ See Respondent’s Comments on Request for Emergency Temporary Provisional Measures ¶ 34.

²⁰⁰ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order dated Sept. 6, 2005 (CL-10) ¶ 40.

²⁰¹ See Second Request for Provisional Measures ¶¶ 57-61.

the effectiveness of the award or entails having either party take justice into their own hands.”²⁰² Given that immediate enforcement of the VAT Assessment directly impacts Claimants’ ability to present their claims in this arbitration and obtain relief for Romania’s violations of the Canada BIT and the UK BIT, and in turn threatens to seriously aggravate and extend the dispute, Claimants’ request for provisional measures are warranted under any of the above formulations.

131. Claimants also refer to a number of cases in which ICSID tribunals have recognized that the right to expect good faith participation in the arbitration process, due process and equal treatment of the parties may justify provisional relief.²⁰³ As demonstrated, those cases involve situations in which tribunals have enjoined States from using their police and investigative powers to gain advantage in the arbitration, such as by obtaining evidence outside the ordinary procedure for requesting and exchanging documents. Respondent seeks to distinguish the provisional measures decision in *Quiborax v. Bolivia* on the basis that “the tribunal found that the ‘criminal proceedings appear to be part of a defense strategy adopted by Bolivia with respect to the ICSID arbitration’”,²⁰⁴ but that “[t]he Claimants have made no such showing in this case, nor could they.”²⁰⁵ In fact, Claimants *have* shown that the timing, harassing nature and boundless scope of ANAF’s investigations cannot credibly be explained by anything other than bad faith motivations relating to this arbitration and that Romania is using its police powers in support of a massive fishing expedition for evidence to support its case.²⁰⁶ In these circumstances, the narrow measures requested by Claimants, which do not seek to enjoin the ANAF investigations, but merely to restrict Respondent’s use of information and documents relating thereto in this arbitration, are entirely appropriate.

²⁰² *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures dated Nov. 19, 2007 (CL-5) ¶ 55.

²⁰³ See Second Request for Provisional Measures ¶¶ 52, 55-56.

²⁰⁴ Respondent’s Comments on Request for Emergency Temporary Provisional Measures ¶ 53 (quoting *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶ 122).

²⁰⁵ Respondent’s Comments on Request for Emergency Temporary Provisional Measures ¶ 53.

²⁰⁶ See Second Request for Provisional Measures ¶¶ 3-7, 34-44, 51, 75, 82-83; Tănase ¶¶ 9-21. See also *supra* § II.B.

132. Respondent further highlights the *Quiborax* tribunal’s observation that “Bolivia has the sovereign prerogative to prosecute crimes on its territory, and such prerogative is not barred by the BIT or ICSID Convention.”²⁰⁷ That principle is not disputed. What is disputed is that a State cannot abuse its sovereign powers to seek to gain advantage in the arbitration, as Respondent seeks to do here. This is evident in *Libananco v. Turkey*, which Claimants also discussed,²⁰⁸ but which Respondent ignores, where the tribunal recognized “as a given ... that a sovereign State does indeed have a right and duty to pursue the commission of serious crime, and that that right and duty cannot be affected by the existence of an ICSID arbitration against it,” but also explained that “[t]he right and duty to investigate crime ... cannot mean that the investigative power may be exercised without regard to other rights and duties, or that, by starting a criminal investigation, a State may baulk an ICSID arbitration.”²⁰⁹

133. Commentators similarly have observed that sovereign rights to exercise police powers must not be used to impair procedural rights in an investment arbitration:

Tribunals faced with such challenges have to weigh the legitimate exercise of State powers against the equally imperative requirement (sanctioned under Art. 52 of the ICSID Convention by annulment) to maintain and proactively restore the equality of arms. This means, first, that a clear abuse of State powers against opponents in order to undermine the arbitration cannot be tolerated, and second, that a government’s legitimate and good-faith exercise of its public responsibilities, without discrimination, arbitrariness or abuse, will rarely be of concern to the tribunal – provided that effective safeguards are in place to ensure the government action is not motivated by the investment dispute and that the findings from the prosecution are not used by it as international litigant.²¹⁰

²⁰⁷ See Respondent’s Comments on Request for Emergency Temporary Provisional Measures ¶ 54 (quoting *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award dated Sept. 16, 2015 (RL-15) ¶ 114 [sic, ¶ 594]).

²⁰⁸ See Second Request for Provisional Measures ¶ 55.

²⁰⁹ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues dated June 23, 2008 (CL-29) ¶ 79. See also Second Request for Provisional Measures ¶ 55.

²¹⁰ Thomas Wälde, ‘Equality of Arms’ in *Investment Arbitration: Procedural Challenges*, 161, 176, in KATIA YANNACA-SMALL (ED.), *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2010) (CL-60). See also Ruslan Mirzayev, *International Investment Protection Regime and Criminal Investigations*, 29 J. INT’L ARB. 71, 71-72 (2012) (CL-59) (“States have a right to regulate their internal affairs and to investigate crimes within their territories. It is an undisputed sovereign right of states. However, when a state initiates criminal proceedings against a foreign investor, various concerns may arise. A

134. Similarly, the ICSID tribunal in *Lao Holdings v. Lao People's Democratic Republic* recognized that “Laos has the sovereign power to prosecute conduct that may constitute a crime on its own territory if it has sufficient evidence to justify prosecution”, but that “such prosecutorial powers of course must be exercised in good faith and with due respect for [the claimant’s] rights.”²¹¹ In that case, the tribunal denied the State’s request to continue certain criminal investigations where “the Tribunal [was] satisfied on the evidence that the primary purpose for which the Respondent intends to use the powers of criminal investigation, at least in the first instance, is to collect evidence for use at the arbitration, which, in the result, will undermine the integrity of the arbitral process.”²¹² The tribunal also observed, among other things, that the proposed criminal investigation “would be disruptive” to the preparation of the claimant’s case,²¹³ and noted the claimant’s contention that “the ‘chilling effect’ of a concurrent criminal investigation will be a powerful deterrent to Laotian witnesses to give evidence contrary to the Respondent’s position.”²¹⁴ As described in the Second Request for Provisional Measures and above, the same considerations justify an order of provisional measures in this case.²¹⁵ Moreover, Respondent’s suggestion that the fact that “RMGC is not a party to this arbitration” means that “[t]he Claimants’ rights in this arbitration are not and will not be affected by the proceedings against RMGC” is without basis.²¹⁶ Claimants have shown that they are seriously prejudiced by both the ANAF investigations and the immediate enforcement of the VAT

state, as a sovereign and regulator, has inherent regulatory powers, but if these powers are employed inappropriately a state could be accountable to the foreign investor under international law. Even when these inherent powers are utilized appropriately, it may still damage the foreign investor’s procedural rights in arbitration proceedings that the investor may be entitled to bring against the state under international law.”).

²¹¹ *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order dated May 30, 2014 (CL-44) ¶ 25.

²¹² *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order dated May 30, 2014 (CL-44) ¶ 26.

²¹³ *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order dated May 30, 2014 (CL-44) ¶ 40.

²¹⁴ *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order dated May 30, 2014 (CL-44) ¶ 41.

²¹⁵ See Second Request for Provisional Measures ¶¶ 3-7, 34-44.

²¹⁶ See Second Request for Provisional Measures ¶¶ 3-7, 34-44, 51, 75, 82-83. See also *supra* § II.B.

Assessment, which threaten to undermine the integrity of these proceedings and to aggravate and extend the dispute.²¹⁷

135. Finally, Claimants referred to a number of cases that confirm that parties to an arbitration have a general legal duty to the opposing party and to the Tribunal to act in good faith in relation to the arbitration and to respect the equality of arms between the parties in this context, which is a fundamental element of the right to a fair proceeding.²¹⁸ Respondent identifies minor factual differences between the cited cases and the instant circumstances, arguing for instance that “in *Methanex v. USA* and *EDF v. Romania*, the issue was whether evidence unlawfully obtained by a claimant could be relied on in the arbitration” while “[i]n the present case, the Claimants do not allege that Romania obtained documents in breach of its laws”.²¹⁹ Those observations, however, do not detract from the fact the decisions cited demonstrate that the introduction of evidence may be restricted when doing so contravenes the basic principles of good faith and fair dealing required in international arbitration,²²⁰ which is a consideration that also applies here. In any event, Respondent notes that it “agrees with the general principles distilled in those cases, in particular the notion that both Parties have an obligation to arbitrate fairly and in good faith.”²²¹

²¹⁷ See Second Request for Provisional Measures ¶¶ 3-13, 25-44, 49-51, 61, 75-76, 82-83, 87. See also *supra* § II.

²¹⁸ See Second Request for Provisional Measures ¶¶ 53-54. See also *id.* ¶ 52, n.68.

²¹⁹ See Respondent’s Comments on Request for Emergency Temporary Provisional Measures ¶ 51.

²²⁰ See Second Request for Provisional Measures ¶ 53 (citing *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) ¶ 59 (concluding “that it would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that Methanex’s conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration”); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3 dated Aug. 29, 2008 (CL-27) ¶ 38 (“shar[ing] the position of the *Methanex Award*” and refusing to admit evidence where it “would be contrary to the principles of good faith and fair dealing required in international arbitration”)).

²²¹ Respondent’s Comments on Request for Emergency Temporary Provisional Measures ¶ 56.

B. Claimants Do Not Need to Prove the Merits of Its Claims to Justify an Recommendation of Provisional Measures

136. As discussed above,²²² Respondent contends that Claimants are not entitled to an order of provisional measures because, according to Respondent, the VAT Assessment is “unrelated to this arbitration”,²²³ and because “[t]he Claimants have not demonstrated that the Taxation Measures are anything other than ordinary measures legitimately applied in the ordinary course of ANAF’s business and in accordance with Romanian law.”²²⁴ Respondent grossly mischaracterizes the facts and circumstances of Claimants’ request.²²⁵ Even if one were to accept Respondent’s account, however, Claimants still would be entitled to an order of provisional measures. That is because Respondent misrepresents the showing needed to support a recommendation of provisional measures.

137. Respondent questions “whether the applicable standard of evidence is *prima facie* (or a heightened standard in light of the serious allegations of abuse of Romania’s power such as those raised in the Claimants’ Second Request)...”²²⁶ Respondent overstates the showing needed to justify provisional measures. As one expert comment explains: “Showing a *prima facie* case is not an express requirement [for provisional measures] under the ICSID Convention, in line with the ICJ’s practice.”²²⁷ Rather, “depending on the nature of the request, an ICSID tribunal examines the *prima facie* merits of the case to a certain extent, when it appreciates the rights for which interim protection is requested.”²²⁸

²²² See *supra* § II.A.

²²³ Respondent’s Observations on Second Request ¶ 13.

²²⁴ Respondent’s Observations on Second Request ¶ 9. See also *id.* ¶¶ 102-106.

²²⁵ See *supra* § II.A.

²²⁶ Respondent’s Observations on Second Request ¶ 106.

²²⁷ See Gabrielle Kaufmann-Kohler and Aurélia Antonietti, *Interim Relief in International Investment Agreements*, 507, 534, in KATIA YANNACA-SMALL (ED.), *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2010) (CL-56).

²²⁸ Gabrielle Kaufmann-Kohler and Aurélia Antonietti, *Interim Relief in International Investment Agreements*, 507, 534, in KATIA YANNACA-SMALL (ED.), *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2010) (CL-56). See also Sam Luttrell, *ICSID Provisional Measures ‘In the Round’*, 31 *ARB. INT’L* 393, 400 (2015) (CL-58) (“The question as to whether the applicant has a *prima facie* case on the merits is sometimes linked with the assessment of the rights in need of protection. This is logical because, for Article 47 of the ICSID Convention to be brought into operation, there

138. As decisions of investment treaty tribunals show, one need not prove the merits of one's claim in order to support a request for provisional measures. For example, the tribunal in *Occidental Petroleum v. Ecuador* explained that, in order to justify a recommendation of provisional measures, "the right to be preserved only has to be asserted as a theoretically existing right, as opposed to proven to exist in fact. The Tribunal, at the provisional measures stage, will only deal with the nature of the right claimed, not with its existence or the merits of the allegations of its violation."²²⁹

139. Similarly, in *Tethyan Copper v. Pakistan*, the tribunal explained that "[t]he question of whether the right to be preserved exists goes to the merits of the case which will not be decided at this preliminary stage of the proceedings. It therefore suffices that the party requesting the provisional measure establishes a *prima facie* case that it owns a legally protected interest."²³⁰ Likewise, the *Paushok v. Mongolia* tribunal observed:

At this stage, the Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the Tribunal needs to decide only that the claims are not, on their face, frivolous or obviously outside the competence of the Tribunal. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.²³¹

must first be at least *an arguable case for the existence of the right* the subject of the request.") (emphasis added).

²²⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures dated Aug. 17, 2007 (CL-9) ¶ 64.

²³⁰ *Tethyan Copper Company Pty Ltd. v. The Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Claimant's Request for Provisional Measures dated Dec. 13, 2012 (CL-54) ¶ 117. *See also Burlington Resources, Inc., and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Provisional Measures dated June 29, 2009 (CL-23) ¶ 53 (noting "the Parties' concurrent view that the Tribunal must examine the existence of rights under a *prima facie* standard" which meant that "[i]t cannot require actual proof, but must be satisfied that the rights exist *prima facie*.").

²³¹ *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures dated Sept. 2, 2008 (CL-31) ¶ 55. *See also* Gabrielle Kaufmann-Kohler and Aurélie Antonietti, *Interim Relief in International Investment Agreements*, 507, 534, in KATIA YANNACA-SMALL (ED.), *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2010) (CL-56) ("[O]ne can ponder whether the test for asserting a theoretically existing right or

140. The decisions of the ICJ are similar, as reflected in the two cases on which Respondent relies.²³² For example, in *Timor-Leste v. Australia*, the Court described the standard as follows:

At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which Timor-Leste wishes to see protected exist; it need only decide whether the rights claimed by Timor-Leste on the merits, and for which it is seeking protection, are plausible.²³³

In *Costa Rica v. Nicaragua*, the Court explained similarly:

Whereas, at this stage of the proceedings, the Court cannot settle the Parties' claims to sovereignty over the disputed territory and is not called upon to determine once and for all whether the rights which Costa Rica wishes to see respected exist, or whether those which Nicaragua considers itself to possess exist; whereas, for the purposes of considering the Request for the indication of provisional measures, the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible.²³⁴

141. Thus contrary to issue as framed by Respondent's pleading,²³⁵ Claimants are not required to show, for example, that the VAT Assessment is a breach of either BIT in order to

showing the appearance of a right as mentioned above, is fundamentally different from a showing of a *prima facie* case on the merits. It is submitted that it is not, provided the *prima facie* test is understood as a demonstration that the applicant's case is not entirely without merit, in other words, not devoid of any chance of prevailing.”).

²³² See Respondent's Comments on Request for Emergency Temporary Provisional Measures ¶ 31 (citing *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014 (RL-10); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (RL-11)).

²³³ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 147 (RL-10) ¶ 26. See also *id.* ¶ 22 (“[T]he court may exercise [the power to indicate provisional measures] only if it is satisfied that the rights asserted by the requesting party are at least plausible.”).

²³⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, p. 6 (RL-11) ¶ 57. See also *id.* ¶ 53 (“Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending its decision; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong to either party; whereas, therefore, the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible.”).

²³⁵ See Respondent's Observations on Second Request ¶¶ 9 n. 9 106, 133.

support a justified request for provisional measures. Rather, Claimants need only establish that without the requested measures there is a serious risk of harm to the integrity of these arbitration proceedings and of an aggravation and extension of the dispute.²³⁶

C. Respondent’s Argument that ANAF’s Conduct May Not Be the Subject of a Claim under the Canada BIT Is Incorrect and Irrelevant

142. Respondent refers to the limitations on “taxation measures” set forth in Article XII of the Canada BIT to argue the VAT Assessment and ANAF’s conduct generally may not be the subject of any claim under the Canada BIT.²³⁷ That argument is incorrect and irrelevant.

143. Article XII of the Canada BIT does not bar Gabriel Canada from presenting a claim in relation to the abusive VAT Assessment. As several other tribunals have observed, a tax carve-out provision does not bar claims regarding a State’s abuse of authority. For example, in *Yukos v. Russia*, the tribunal held in the Energy Charter Treaty:

[T]he carve-out of Article 21(1) can apply only to *bona fide* taxation actions, *i.e.*, actions that are motivated by the purpose of raising general revenue for the State. By contrast, actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent) cannot qualify for exemption from the protection standards of the ECT.

To find otherwise would mean that the mere labelling of a measure as “taxation” would be sufficient to bring such measure within the ambit of Article 21(1) of the ECT, and produce a loophole in the protective scope of the ECT.²³⁸

²³⁶ See Gabrielle Kaufmann-Kohler and Aurélie Antonietti, *Interim Relief in International Investment Agreements*, 507, 534, in KATIA YANNACA-SMALL (ED.), *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2010) (CL-56) (noting that the *prima facie* “question appears to be limited to cases where the relief aims at protecting a specific right, such as specific performance. In other cases, such as cases aiming at the preservation of evidence or the protection of the tribunal’s jurisdiction, there seems to be no requirement to establish a *prima facie* case on the merits.”).

²³⁷ Respondent’s Observations on Second Request ¶¶ 14, 130-135; Respondent’s Comments on Request for Emergency Provisional Measures, ¶¶ 37-44.

²³⁸ *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Final Award dated July 18, 2014 (RL-21) ¶¶ 1407, 1433. See also *id.* ¶¶ 1430 *et seq.*

144. Respondent attempts to distinguish the *Yukos* tribunal’s holding on the basis that the award was set aside and that Article 21 of the ECT contains exceptions relating to “*mala fide* taxation.”²³⁹ The Dutch court set aside, however, was not based on the issue of Article 21 of the ECT, but on the ground that the ECT did not provisionally apply to Russia.²⁴⁰ And, the fact that Article 21 of the ECT contains exceptions relating to “*mala fide* taxation” does not detract the basic principle at issue, as several other tribunals interpreting tax carve-outs that do not contain such express provisions likewise recognized the principle that such taxation carve outs do not operate to foreclose claims regarding abusive use of its tax authority.

145. In *Renta 4 v. Russia*, the tribunal held that it would be “absurd” to find that the tax carve-out in the Denmark-Russia BIT – which categorically states that “[t]he provisions of this Agreement shall not apply to taxation”²⁴¹ – “provide[s] a loophole to escape the central undertakings of investor protection.”²⁴² The tribunal distinguished between “[c]omplaints about types and levels of taxation” and “[c]omplaints about abuse of the power to tax,” observing that “[a]buse and pretext are at the heart of the Claimants’ allegations.”²⁴³ Similarly, the *Quasar de Valores* tribunal elaborated:

It is no answer for a state to say that its courts have used the word “taxation” ... in describing judgments by which they effect the dispossession of foreign investors. If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation. When agreeing to the jurisdiction of international tribunals, states perforce accept

²³⁹ Respondent’s Observations on Second Request ¶ 132.

²⁴⁰ *Russian Federation v. Yukos Universal Ltd.*, The Hague District Court, Judgment dated Apr. 20, 2016 (RL-22) ¶¶ 5.95-5.96.

²⁴¹ Denmark-Russia BIT (Exh. C-85) Art. 11(3).

²⁴² *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A. & GBI 9000 SICAV S.A. v. Russian Federation*, SCC Case No. V (024/2007), Award on Preliminary Objections dated Mar. 20, 2009 (CL-50) ¶ 74.

²⁴³ *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A. & GBI 9000 SICAV S.A. v. Russian Federation*, SCC Case No. V (024/2007), Award on Preliminary Objections dated Mar. 20, 2009 (CL-50) ¶ 74.

that those jurisdictions will exercise their judgment, and not be stumped by the use of labels.²⁴⁴

The *RosInvestCo v. Russia* tribunal also endorsed the approach taken by the *Renta 4* tribunal, and concluded that “RosInvestCo’s claims [that tax assessments were a pretext for an unlawful expropriation] should still be heard on the merits.”²⁴⁵ And, in *EnCana v. Ecuador*, the tribunal ruled in relation to the tax carve out in the similar Canada-Ecuador BIT that “an arbitrary demand unsupported by any provision of the law of the host State would not qualify for exemption.”²⁴⁶

146. Commentators also have recognized that investment treaty tax carve-outs may not be seen as a bar to claims arising from a State’s abusive use of its tax authority.²⁴⁷

147. Respondent’s argument that it would be too late in the arbitration for Gabriel Canada to bring an ancillary claim regarding the VAT Assessment also is wrong.²⁴⁸ Both the ICSID Convention and the ICSID Arbitration Rules contemplate the possibility of presenting additional claims,²⁴⁹ and there would not be any jurisdictional impediment to doing so here. Respondent’s argument that any new claim would fall afoul of the notice requirements of the

²⁴⁴ *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. & ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award dated July 20, 2012 (CL-49) ¶ 179.

²⁴⁵ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V (079/2005), Final Award dated Sept. 12, 2010 (CL-51) ¶ 264.

²⁴⁶ *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award dated Feb. 3, 2006 (RL-13) ¶ 142(1).

²⁴⁷ See, e.g., ABBA KOLO, EXPROPRIATORY TAXATION IN THE LATIN AMERICAN EXPERIENCE, in ATTILA TANZI ET. AL (EDS.), INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA: PROBLEMS AND PROSPECTS (2016) (CL-57) at 409 (“[W]hen the disputed taxation measures have not been adopted in good faith but rather were arbitrary or abusive regulatory measures dressed up as taxes, the tax carve-out under the applicable treaty may not be relied upon by the host State to escape responsibility under international law. In order for the host State to rely on the tax-out or tax veto by the States parties under the treaty, the measures must have been adopted in good faith.”); JULIEN CHAISSE, INTERNATIONAL INVESTMENT LAW AND TAXATION: FROM COEXISTENCE TO COOPERATION (2016) (CL-55) at 13 (“The carve-out clause does not mean carving out everything related to tax measures . . . if it is a matter affecting policy setting as a sovereign right, it should be carved out. However, if the tax measures are outside that scope, they should not be carved out. Also, one vital point of carving-out is that it should be done in *bona fide* taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the state. If the actions taken are only under the guise of taxation, it should not be carved out.”).

²⁴⁸ Respondent’s Comments on Request for Emergency Provisional Measures ¶ 43. See also Respondent’s Observations on Second Request ¶ 130.

²⁴⁹ Second Request for Provisional Measures ¶ 78 n. 103; ICSID Convention Art. 46; ICSID Arbitration Rule 40.

BIT²⁵⁰ is wrong as numerous tribunals have rejected such arguments in admitting ancillary claims.²⁵¹ Similarly, Respondent's argument that Gabriel Canada would be barred from presenting a claim in relation to the VAT Assessment and/or ANAF's conduct generally due to the waiver provisions of the Canada BIT also is incorrect.²⁵² The waiver provisions in the Canada BIT relate to Gabriel Canada's rights to continue or initiate proceedings in Romania relating to the challenged measure, those provisions do not extend to RMGC when claims are not being presented on behalf of RMGC.²⁵³ In any event, even if the Respondent had jurisdictional objections in relation to such claims, that would not be an obstacle to the issuance of provisional measures.²⁵⁴

148. In any event, none of these alleged obstacles apply to Gabriel Jersey's ability to present claims under the UK BIT regarding the VAT Assessment and/or ANAF's conduct.

²⁵⁰ Respondent's Comments on Request for Emergency Provisional Measures ¶ 43. *See also* Respondent's Observations on Second Request ¶ 130.

²⁵¹ *See, e.g., CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction dated July 17, 2003 (CL-40) ¶ 123 ("It is clear from [Article 40(2) of] the ICSID Arbitration Rules that such [incidental or additional] claims do not require either a new request for arbitration or a new six-month period for consultation or negotiation, before the submission of the dispute to arbitration under the Treaty."); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction dated July 2, 2013 (CL-48) ¶¶ 221-222, 225, 227, 235 (admitting a claim raised by the claimants in the counter-memorial on jurisdiction as an ancillary claim without requiring the claimants to attempt to settle the dispute with respondent for six months and litigate that claim in domestic courts for 18 months pursuant to the applicable BIT); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated July 6, 2012 (CL-53) ¶¶ 133, 136, 138 (admitting claims raised by the claimant for the first time in its memorial as ancillary claims and holding that such claims "may be presented without requiring further consultations between the Parties" pursuant to the applicable BIT).

²⁵² Respondent's Comments on Request for Emergency Provisional Measures ¶ 43 n. 40. *See also* Respondent's Observations on Second Request ¶ 130.

²⁵³ *See* Canada BIT (Exh. C-1), Arts. XIII(3)(b), XIII(12)(a)(iii). *See also* Request for Arbitration ¶ 47.

²⁵⁴ *See, e.g., Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Claimant's Request for Provisional Measures dated May 17, 2006 (CL-43) ¶ 27 (issuing provisional measures notwithstanding pending jurisdictional objections as such "objections are not an obstacle to the recommendation by the Arbitral Tribunal of Provisional Measures"); *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures dated Dec. 9, 2009 (CL-45) ¶ 42 ("It is accepted jurisprudence for the tribunals that have issued rulings based on the Washington Convention that the mere fact that a party contests the jurisdiction of an arbitral tribunal to which the case is referred is insufficient to deprive that tribunal of the jurisdiction to order provisional measures. If the contrary were to be accepted, it would be easy for a party to raise any jurisdictional objection in order to deprive in practice a large part of the institution's competence.").

V. CIRCUMSTANCES REQUIRING MEASURES TO PRESERVE INTEGRITY OF THE ARBITRATION AND TO PREVENT AGGRAVATION AND EXTENSION OF DISPUTE

A. In Order to Preserve the Integrity of the Proceedings the Respondent Should Be Directed Not to Use Information and Documents from Its Investigations in the Arbitration without Leave from the Tribunal

149. ICSID tribunals have consistently recognized that the need to ensure the procedural integrity of the arbitration may justify a recommendation of provisional measures.²⁵⁵ This includes measures to ensure that the right to expect good faith participation in the arbitration process, due process and equal treatment of the parties are respected.²⁵⁶

150. Abusing investigative powers to gather evidence for use in the arbitration outside the ordinary procedure for requesting and exchanging documents in the arbitration undermines the equality of arms between the parties and impairs Claimants' right to a fair proceeding.²⁵⁷

151. Respondent claims that the ANAF anti-fraud investigation is justified [REDACTED]

[REDACTED] As set forth above,²⁵⁸ those issues on their face cannot credibly or reasonably justify the extraordinarily sweeping investigation of RMGC that is on-going, the timing, harassing nature, and scope of which strongly indicates rather a motivation to discredit RMGC and improperly to seek some advantage in this proceeding.

152. [REDACTED]

²⁵⁵ Second Request for Provisional Measures ¶ 45.

²⁵⁶ Second Request for Provisional Measures ¶¶ 52-56. *See also supra* §§ IV.A.

²⁵⁷ *See 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 Dec. 22, 2014 (CL-25) ¶¶ 81-82.

²⁵⁸ *See supra* § II.

[REDACTED] These topics are obviously aimed at this arbitration. [REDACTED]

[REDACTED] It is not credible to contend that this request has anything to do with [REDACTED], but is clearly aimed at information gathering for use in the State's defense.

153. Moreover, as noted above, the fact that ANAF and presumably now other agents of Respondent are using the Classified and Confidential Documents, including the referenced Roșia Montană License and its addenda, to undertake discovery on Claimants' investment relevant to the arbitration while Claimants' counsel still do not have access to such documents underscores that Claimants' First Request for Provisional Measures should be granted promptly. It also demonstrates the need for the relief requested here, namely that Respondent's arbitration team must be walled off from the information and documents being collected by Romania's enforcement authorities to avoid serious harm to the integrity of these proceedings.

154. Respondent's argument that ANAF's investigations are "taxation measures" and therefore cannot be the subject of a request for provisional measures is without merit.²⁶¹ That is because 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,²⁶² and because [REDACTED]

²⁵⁹ [REDACTED]

²⁶⁰ [REDACTED]

²⁶¹ See *supra* §§ III, IV.C.

²⁶² See *supra* § IV.C. See also *supra* § IV.B.

██████████²⁶³ Respondent's further arguments that the provisions of the UK BIT and Gabriel Jersey's requests are irrelevant are mistaken. The parties' agreement to submit the claims of the two Claimants in one arbitration proceeding does not have the effects Respondent urges, and there is nothing in the UK BIT that would limit an order of provisional measures here.²⁶⁴

155. Finally, the requested measures reflect an appropriate balancing of interests.²⁶⁵ If Respondent is permitted to use the information and documents that it is gathering through its ANAF investigations in the arbitration, the serious risk to the integrity of the arbitration that would follow is evident; at the same time, there is no prejudice whatsoever to Respondent that would flow from the requested measure. If, as Respondent claims, 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. In any event, the measures would in no way interfere with Romania's interest in law enforcement.

B. Immediate Enforcement of the VAT Assessment Threatens the Integrity of the Arbitration and Aggravates and Extends the Dispute

156. In addition to safeguarding the procedural integrity of the proceedings, provisional measures are warranted to prevent the aggravation and extension of the dispute.²⁶⁶ Respondent misstates the standard when it argues that provisional measures are only available in relation to the rights that form the subject matter of the dispute, as they also may be available in relation to the rights that bear a relation to the dispute.²⁶⁷ That is particularly so when the concern is to avoid the aggravation and extension of the dispute.

157. As Claimants demonstrate, the VAT Assessment *prima facie* is abusive as is Respondent's rush to enforce it against RMGC properties and its opposition to RMGC's

²⁶³ See *supra* § II.B.

²⁶⁴ See *supra* § III.B.

²⁶⁵ See Second Request for Provisional Measures § III.C.5.

²⁶⁶ Second Request for Provisional Measures § III.C.2.

²⁶⁷ See *supra* § IV.A.

application for a judicial stay secured by a bond as contemplated by Romanian law.²⁶⁸ At this stage, however, Claimants need not prove that the VAT Assessment and its enforcement is a treaty violation,²⁶⁹ particularly as no such claim has been presented.

158. Respondent's argument that Claimants could not still bring such a claim in the arbitration in relation to ANAF's conduct due to the so-called tax carve out of the Canadian BIT is incorrect. That is because an abuse by a State of its fiscal authority in order to harm an investment is not precluded by the so-called tax carve out,²⁷⁰ and other purported jurisdictional obstacles identified by Respondent are without merit.²⁷¹ Moreover, Gabriel Jersey is not barred by the provisions of the Canada BIT.²⁷² In any event, an order of provisional measures does not depend upon a showing that conduct at issue is or could be a breach of either BIT, only that the conduct presents a risk of harm to the integrity of the proceedings or of an aggravation and extension of the dispute.²⁷³

159. Provisional measures are warranted here because Romania is rushing to enforce a *prima facie* abusive and unlawful VAT Assessment to seize RMGC assets and push it into insolvency. The only practically available option at this time for Gabriel to avoid the loss of RMGC, its properties and its license is to fund a guarantee in the full amount of the Assessment.²⁷⁴ Doing so, however, requires Gabriel to divert up to ██████████ of its funds, potentially for a number of years.²⁷⁵ While Gabriel Canada has just recently raised funds to support the long-term working capital obligations of Gabriel Canada and its affiliates, including Gabriel Jersey and RMGC, as well as to support the Claimants' ability to present their claims in this forum, having to use such a material amount of those funds instead to fund a guarantee in

²⁶⁸ See *supra* § II.A; Vaughan ¶¶ 6-7; Second Request for Provisional Measures §III.A. See also generally Tănase.

²⁶⁹ See *supra* § IV.B.

²⁷⁰ See *supra* § IV.C.

²⁷¹ See *supra* § III.C.

²⁷² See *supra* § III.B.

²⁷³ See *supra* § IV.B.

²⁷⁴ See *supra* § II.A.3.

²⁷⁵ See Vaughan ¶ 12.

relation to the VAT Assessment places Claimants' ability to fund their operations and to present their claims in this forum at risk.²⁷⁶

160. Permitting Respondent to abuse its fiscal authority so as to put Gabriel in the position of having to place its own financial position and its ability to present its claims in this forum at risk or suffer the destruction of RMGC threatens the integrity of the proceedings and aggravates and extends the dispute.²⁷⁷ This is a risk of harm equally to Gabriel Jersey as well as to Gabriel Canada, as Gabriel Jersey does not have any source of funding other than Gabriel Canada.²⁷⁸

161. Without the requested provisional measures, as Claimants have shown,²⁷⁹ the only realistic possibility at present to avoid enforcement against RMGC is for Gabriel to fund the guarantee in the full amount of the VAT Assessment, plus the expected interest and penalties.

[REDACTED]

162. [REDACTED]

[REDACTED]

[REDACTED] At present, however, Gabriel remains the only

²⁷⁶ See Vaughan ¶¶ 15-16. Nor would it be reasonable to assume Gabriel could raise more funds. See Vaughan ¶ 5. See also, e.g., *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures dated Sept. 2, 2008 (CL-31) ¶ 61 (“Respondent claims that over US\$41 million is currently owed by GEM, under the WPT Law. It appears from the financial statements and taxation reports submitted to the Tribunal that GEM could not proceed to the immediate payment of this total sum out of its own Resources. The only alternatives would be either loans from financial institutions or a large equity infusion by shareholders. It has been established to the satisfaction of the Tribunal that, in the current fiscal conditions, no financial institution would consider lending such an amount of money to GEM. And, assuming that Respondent is right in stating that GEM’s net book value assets are worth less than 50% of the amount of WPT owing and the possibility that the Mongolian Parliament would again refuse to amend the WPT Law, it would be very presumptuous for any investor to make additional equity investment in that company.”).

²⁷⁷ See *supra* § II.A; Vaughan ¶¶ 15-16.

²⁷⁸ See generally Vaughan.

²⁷⁹ See *supra* § II.A.3; Vaughan ¶ 8.

²⁸⁰ See Vaughan ¶ 9.

source of funding for a guarantee the implementation of which would expose it to the risks identified above. Moreover, even if RMGC were able to secure and fund its own guarantee, the written permission of ANAF would be required to substitute an RMGC-funded guarantee for any Gabriel-funded guarantee.²⁸¹

163. For these reasons and in order to avoid either the dismantling of RMGC at the hands of the state, or material risks to the ability of Claimants to operate their business and prosecute their claims in this proceeding, provisional measures remain urgently needed.

164. While Respondent argues that the provisions of the Canada BIT preclude issuance of the requested measures, that is not correct,²⁸² because the Canada BIT does not preclude the issuance of provisional measures necessary to ensure the integrity of the proceedings and to ensure the tribunal's jurisdiction is made fully effective.²⁸³ Respondent's argument here again regarding the Tribunal's authority under the UK BIT in relation to Gabriel Jersey and its argument that Gabriel Canada should not get a "free ride" are wrong and misguided.²⁸⁴

165. The measures requested moreover are reasonable and balanced. Gabriel should not have to choose as a result of Respondent's abusive treatment between compromising its own financing and seeing the destruction of its investment. In contrast, there is no prejudice whatsoever to the Respondent. RMGC clearly has sufficient [REDACTED] to satisfy the VAT Assessment should it survive challenge.²⁸⁵ The issue presented is only one of timing: whether RMGC can be given the benefit of a stay of enforcement pending challenge. Such a stay moreover is fully consistent with and indeed expressly contemplated as a possibility under Romanian law.

²⁸¹ See Vaughan ¶¶ 10-16.

²⁸² See *supra* § III.A.

²⁸³ See *supra* § III.A.

²⁸⁴ See *supra* § III.B.

²⁸⁵ See *supra* § II.A.4.

VI. AMENDED REQUEST FOR RELIEF

166. For all the reasons set forth above and in Claimant's Second Request for Provisional Measures, Claimants respectfully request 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;
- c. With respect to the VAT Assessment and any associated decision as to interest and penalties, that Respondent withdraw its opposition to RMGC's request for a judicial suspension of enforcement and otherwise not take steps to enforce the VAT Assessment against RMGC pending the resolution of RMGC's administrative (and if necessary judicial) challenge of the VAT Assessment or, if possible, the posting by RMGC of a guarantee in the amount necessary, [REDACTED] [REDACTED] whichever comes first; and
- d. That Respondent shall refrain from taking any action in connection with the VAT Assessment, ANAF audits or ANAF investigations that may aggravate and extend the dispute.

167. Claimants further request that Respondent bear the costs relating to this request for provisional measures and compensate Claimants for all costs that they have incurred in relation thereto, including costs of legal representation.

168. Claimants reserve the right to amend this request for provisional measures to take account of any subsequent developments and to request such further relief as may be warranted and permitted by the ICSID Convention and the ICSID Arbitration Rules.

Respectfully submitted,



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