
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' SECOND REQUEST FOR PROVISIONAL MEASURES
AND REQUEST FOR EMERGENCY TEMPORARY PROVISIONAL MEASURES**

July 28, 2016

WHITE & CASE^{LLP}

Counsel for Claimants

**CLAIMANTS' SECOND REQUEST FOR PROVISIONAL MEASURES
AND REQUEST FOR EMERGENCY TEMPORARY PROVISIONAL MEASURES**

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I. INTRODUCTION AND NATURE OF THE REQUEST

1. In accordance with Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, Gabriel Resources Ltd. (“Gabriel Canada”) and Gabriel Resources (Jersey) Ltd. (“Gabriel Jersey”) (together “Gabriel” or the “Claimants”) hereby seek (i) an order of provisional measures and (ii) an order of emergency temporary provisional measures pending determination of this request for provisional measures, as detailed below.

2. This request is supported by a witness statement of Dragoş Tănase, General Manager of Roşia Montană Gold Corporation (“RMGC”), submitted herewith.¹

3. Claimants request an order of provisional measures on two bases. The first is to minimize the risk of serious harm to the procedural integrity of this arbitration caused by

¹ Statement of Dragoş Tănase dated July 28, 2016 (“Tănase”).

investigations of RMGC commenced by Romania’s National Agency for Fiscal Administration (“ANAF”), an agency of the Ministry of Finance (the Ministry charged with Romania’s defense in this case).² Two divisions of ANAF have been investigating RMGC: ANAF’s Antifraud Directorate has been conducting an “anti-fraud” investigation, and ANAF’s Tax Directorate has been conducting Value Added Tax (“VAT”) audits.³

4. Through the course of these investigations, ANAF has required that RMGC (i) respond to numerous requests for detailed information, [REDACTED] and (ii) produce [REDACTED]

5. ANAF began investigating RMGC in October 2015, shortly after Claimants commenced this arbitration, when ANAF’s Antifraud Directorate commenced a purported “anti-fraud” investigation. ANAF’s Tax Directorate began its extensive VAT audit in March 2016. While both the investigation and the audit have been burdensome, the seemingly unbounded anti-fraud investigation, which has no explained purpose or justification, has resulted in [REDACTED] and shows no signs of abating.

6. Given its timing, scope, and manner of implementation, the Ministry of Finance’s investigations seem to be plainly retaliatory and directed at trying to identify some “evidence” to support the State’s defense in this arbitration rather than at any legitimate regulatory or law enforcement purpose.

7. To safeguard the integrity of this arbitration and Claimants’ right to a fair proceeding, Claimants request provisional measures directing Respondent to ensure that no

² See Letter from Respondent’s counsel to ICSID Secretariat dated Oct. 25, 2015 (Exh. C-33) (advising that counsel had “been instructed by the Ministry of Public Finance of Romania to represent it” in this arbitration and annexing power of attorney issued by the Minister of Finance).

³ [REDACTED] See Tănase ¶ 7; [REDACTED]

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. In addition, because the circumstances and/or results of these investigations prima facie call into serious question the bona fides of the State's treatment of RMGC, it would be appropriate for the Tribunal to call upon Respondent to justify and explain the basis for the oppressive anti-fraud investigation ANAF has unleashed on RMGC that has required the company to turn itself inside out and to produce voluminous amounts of documents going back to the inception of the Project.

8. The second basis for Claimants' request for provisional measures follows from an ANAF decision served on RMGC on July 7, 2016, assessing a liability for VAT previously deducted by RMGC on its purchase of goods and services from July 2011 to January 2016, in the principal amount of approximately RON 27 million (approximately USD 6.7 million) (the "VAT Assessment").⁴ This VAT Assessment – the first since the commencement of this arbitration – is contrary to [REDACTED] 18 prior audits [REDACTED] [REDACTED] This stunning departure from ANAF practice and precedent and from RMGC's settled expectations is not reasonably grounded and is plainly intended to punish Gabriel for submitting claims against the State. This fundamentally flawed VAT Assessment will be enforceable against RMGC's assets and property as of August 5, 2016. [REDACTED]

[REDACTED] It is for this reason that Claimants also seek emergency temporary provisional measures as set forth below.

⁴ A separate decision assessing associated interest and penalties is expected shortly.

9. RMGC intends to challenge the VAT Assessment through an administrative appeal and, if necessary, in Romania's administrative courts. Romanian law establishes only two alternatives, however, to avoid immediate enforcement pending such a challenge: (i) Gabriel must fund RMGC to post a guarantee in favor of ANAF in the full amount of the VAT Assessment, as well as any interest and penalties; or (ii) RMGC must obtain a judicial stay of enforcement conditioned on the posting of a bond in a significantly lesser amount. While RMGC is preparing to request a judicial stay of enforcement and would be prepared to post a bond in the amount stipulated by Romanian law, the decision to grant a judicial stay of enforcement is discretionary, and enforcement may proceed even as the court proceedings are pending. To avoid immediate enforcement of the VAT Assessment against RMGC, therefore, without provisional measures, Gabriel (as the only shareholder that has financed RMGC) must fund RMGC to permit it to post a guarantee for the full amount of the VAT Assessment as well as any interest and penalties.

10. Enforcement of the VAT Assessment would have dire consequences for RMGC, including not only the seizure of its assets, but also potentially the annulment of its mining Licenses and the liquidation of the company. To prevent the State from moving in and taking RMGC and its assets, and thus seriously aggravating the dispute, Gabriel must tie up what is likely to be upwards of [REDACTED] (including interest and penalties) in a guarantee to be issued in favor of ANAF to secure payment of what is in effect an extortionist "arbitration tax" on RMGC.

11. In fact, however, [REDACTED]
[REDACTED]
[REDACTED]

Under these circumstances, Respondent should not be permitted effectively to require Gabriel at the outset of the arbitration to divert [REDACTED] to avoid the destruction of RMGC and the taking of its assets.

12. To safeguard the integrity of this arbitration and to prevent the extension and serious aggravation of the dispute, Claimants thus request provisional measures recommending that Respondent join RMGC in its request for a judicial suspension of enforcement of the VAT

Assessment pending RMGC's challenge 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 it.

13. In addition, Claimants seek an order of emergency temporary provisional measures to prohibit Romania from taking any measures of enforcement pending determination of this request for provisional measures. [REDACTED]

[REDACTED]

Claimants' request for at least temporary relief cannot await the full resolution of this request.

II. THE TRIBUNAL'S POWER TO RECOMMEND PROVISIONAL MEASURES

14. The Tribunal's authority to recommend provisional measures as set forth in Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 is described in Claimants' earlier request for provisional measures, to which the Tribunal respectfully is referred.⁵

15. This Tribunal has the authority also to issue emergency temporary provisional measures pending resolution of Claimants' request. For example, in *Perenco v. Ecuador*, where the claimant asked the ICSID tribunal to "issue immediately an order in the nature of a temporary restraint prohibiting Ecuador from undertaking any measures pending determination of the application for provisional measures," the ICSID tribunal "request[ed] the parties to refrain from initiating or continuing any action or adopting any measure which may, directly or indirectly, modify the status quo between the parties vis-à-vis the participation contracts, including any attempt to seize any asset of [Perenco], until it has had an opportunity to further hear from the parties on the question of provisional measures."⁶ Similarly, in *City Oriente v. Ecuador*, the ICSID tribunal decided "to request that, pending a decision by the Tribunal on the provisional measures requested by Claimant ... both parties refrain from engaging in any conduct – including, without limitation, any act, resolution or decision – that may directly or indirectly affect or modify the legal situation existing as of such date," and that "[i]f either party

⁵ See Claimants' Request for Provisional Measures dated June 16, 2016, § II.

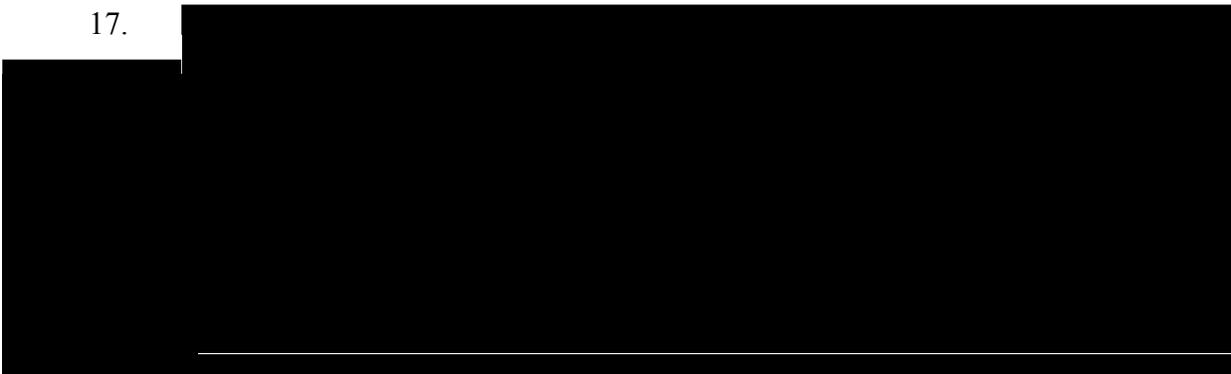
⁶ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 8, 2009 (CL-32) ¶¶ 23, 28.

intends to take any measure that may violate the provisions set forth herein, prior notice must be served to the Tribunal, granting enough time so that the Tribunal may proceed as appropriate.”⁷

III. BACKGROUND TO AND CIRCUMSTANCES JUSTIFYING THIS REQUEST

A. In a Manifest Abuse of Its Fiscal Authority, Romania Has Assessed a Substantial VAT Liability on RMGC That Threatens the Integrity of These Proceedings and Aggravates and Extends the Dispute

16. On July 7, 2016, the Ministry of Finance’s ANAF Tax Inspection Service served RMGC with a final audit report setting out the VAT Assessment in the principal amount of RON 27,016,497 (approximately USD 6,658,000)⁸ relating to the period July 2011 to January 2016. An additional and separate assessment of the amount of associated interest and penalties (anticipated to be in the range of several million dollars more) is expected shortly.⁹

17. 

⁷ *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), ¶ 13; *id.* ¶ 19 (issuing further orders “pending a ruling on the provisional measures requested”). See also *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures dated Sept. 2, 2008 (CL-31), ¶ 16 (UNCITRAL Rules decision issued on analogous basis ordering parties to refrain from taking further action “pending its decision on interim measures”).

⁸ Excerpts of ANAF Fiscal Inspection Report and Assessment Decision dated June 30, 2016, received on July 7, 2016 (“ANAF Fiscal Inspection Report and Assessment Decision”) (Exh. C-42) at 25. The Romanian Leu (RON) to US Dollars (USD) exchange rate is approximately 1 RON ≈ 0.25USD.

⁹ See Law No. 207/2015 on the Tax Procedure Code (“Tax Procedure Code”) (Exh. C-28) Art. 173. See also Tănase ¶¶ 22, 26, n. 32.

¹⁰ 

[REDACTED]

18.

[REDACTED]

19.

[REDACTED]

20.

[REDACTED]

21. The VAT Assessment was made in manifest disregard and violation of Romanian law, which requires the tax authority to act in accordance with the principles of legal certainty

¹¹ ANAF Fiscal Inspection Report and Assessment Decision (Exh. C-42) at 15, 17, 29-31.

¹² ANAF Fiscal Inspection Report and Assessment Decision (Exh. C-42) at 10, 15, 17, 29, 30, 31; [REDACTED]

¹³ ANAF Fiscal Inspection Report and Assessment Decision (Exh. C-42) at 11; [REDACTED]

¹⁴ [REDACTED]

¹⁵ [REDACTED] *See also* Tănase ¶¶ 6, 22.

¹⁶ [REDACTED]

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.¹⁷ Indeed, that well established requirement was recently described by a senior officer within the Ministry of Finance’s Tax Procedure Directorate in an article published in a prominent Romanian tax law journal.¹⁸ The VAT Assessment also conflicts with the mandatorily applicable principles of EU law reflected in the case law of the European Court of Justice (“ECJ”), which require the national tax authorities of EU member states, including Romania, to respect the legitimate expectations of taxpayers in relation to the system of value added tax.¹⁹

22. ANAF’s stunning departure from settled practice and expectations in relation to RMGC in its first VAT audit since the filing of this arbitration demonstrates that the tax authorities operating under the Ministry of Finance are biased against RMGC and motivated in

¹⁷



¹⁸ See 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 (“[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. The 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.”); *id.* at 8 (referring to a situation “where the tax bodies found that the taxpayer applied correctly the VAT legal regime to the operations generating the reimbursable tax (exempted operations with a right to deduction),” and “[i]n the next fiscal period, the fiscal factual situation is maintained, but the tax inspection is carried out by another team, who appreciates that the VAT regime applied by the taxpayer to the operations in question (the same type as verified by the previous inspection) is not correct. This new inspection results in a tax assessment decision and, implicitly, in the rejection of the request for reimbursement. . . . [T]his case is clearly a case of violation of the principle of legal certainty and legitimate expectation, as the taxpayer is caught in the middle between divergent opinions of the tax bodies.”).

¹⁹



their assessment by the fact of this arbitration and Gabriel's claims against the State. [REDACTED]

23. While that most extreme (and equally unsupportable) position was not adopted, ANAF's comments to RMGC with respect to the current VAT Assessment leave little doubt as to the State's true mind-set when it comes to RMGC. [REDACTED]

24. In short, whether motivated by a desire to discredit RMGC because of Gabriel's claims against the State or by an attempt by the Ministry of Finance to use its fiscal authority to extract documents and information from RMGC outside proper arbitration practice and procedure, the VAT Assessment cannot be supported in law. Not only is it an evident bad faith attempt to burden RMGC (and thus Gabriel), and to generate "evidence" for this arbitration, but it also provides the State with a convenient basis to seize RMGC's assets and dismantle the company just as this arbitration is getting underway.

²⁰ [REDACTED]

²¹ [REDACTED] *See also* Tănase ¶ 26.

²² Tănase ¶ 28. [REDACTED]

25. The liability resulting from the VAT Assessment becomes due and payable as of August 5, 2016²³ unless RMGC posts a letter of guarantee with the tax authorities for the full amount of the assessed VAT²⁴ or obtains a discretionary court-ordered stay of enforcement conditioned on posting a bond in an amount significantly less than the full amount of the challenged VAT Assessment.²⁵ Unless enforcement is stayed by virtue of a guarantee or court order, it may be enforced against RMGC's assets.²⁶ Enforcement entails execution against bank accounts and the seizure of the taxpayer's other assets.²⁷ While RMGC has the right to challenge the VAT Assessment through an administrative appeal, and subsequently before the administrative courts,²⁸ which RMGC is preparing to do,²⁹ the assessed VAT remains due and payable pending the challenge absent a stay.³⁰ RMGC is preparing to seek a judicial stay of enforcement, but understands that discretionary determination can take months to issue and in the meantime enforcement of the VAT Assessment can proceed.³¹

26. 

²³ See Tax Procedure Code (Exh. C-28) Art. 156 (providing that “if the date of service falls between the 1st and 15th of the month, the payment term shall be by or on the 5th of the following month” and “if the date of service falls between the 16th and 31st of the month, the payment term shall be by or on the 20th of the following month”).

²⁴ See Tax Procedure Code (Exh. C-28) Art. 235 (providing that “the enforcement shall be stayed or not initiated for the contested tax liabilities if the debtor submits to the competent tax body a letter of guarantee/warranty insurance policy which covers the tax liabilities contested and unpaid at the time the guarantee is submitted”).

²⁵ See Tax Procedure Code (Exh. C-28) Art. 210, 211, 233, 235. A judicial stay of enforcement may be granted pursuant to Art. 278 of the Tax Procedure Code on condition that a bond is posted in an amount established by law, which is an amount that is significantly less than the amount of the assessed tax (*i.e.*, RON 14,500 plus 0.1% of the amount of the tax exceeding RON 1 million). See Tax Procedure Code (Exh. C-28) Art. 278.

²⁶ See Tax Procedure Code Art. 230 (Exh. C-28) (enforcement may be initiated 15 days following notice of enforcement).

²⁷ See Tax Procedure Code (Exh. C-28) Arts. 227, 236, 238, 242.

²⁸ See Tax Procedure Code (Exh. C-28) Arts. 268, 269, 281.

²⁹ Tănase ¶ 30.

³⁰ See Tax Procedure Code (Exh. C-28) Art. 278.

³¹ See Tănase ¶ 30.

[Redacted]

³² [Redacted]

³³ Tănase ¶ 29. [Redacted]

³⁴ Tănase ¶ 29. [Redacted]

³⁵ [Redacted]

27. Since its establishment, RMGC's activities have not yet generated revenue, but rather, as is typical in the mining industry, have been focused on developing the Project in order to be able to generate taxable revenue. Although the Romanian State is a shareholder of RMGC, since RMGC's incorporation Gabriel has been and continues to be the sole source of funding for all of RMGC's operational and development activities.³⁶ After it became clear that Romania would not permit the Project, Gabriel took reasonable steps to minimize its losses, including by reducing RMGC activities to the minimum necessary for RMGC to meet its obligations.³⁷ Therefore, unless Gabriel funds RMGC to address the consequences of this newly imposed VAT liability, RMGC will face the forcible execution of the VAT Assessment against its assets and properties, as well as the threat of insolvency proceedings, bankruptcy, the appointment of a court administrator, and liquidation.³⁸

28. The threat of insolvency for RMGC also is a threat to its eligibility to remain as title holder of its two mining Licenses (one for Roșia Montană and one for Bucium),³⁹ as well as to RMGC's continued existence as a company.⁴⁰

³⁶ See Request for Arbitration dated July 21, 2015 ¶ 3 (RMGC is owned by Gabriel (80.69%) and the Romanian State through Minvest Roșia Montană S.A. (together with its legal predecessors, "Minvest") (19.31%) but since its incorporation in 1997, Gabriel has provided all of the funding for RMGC's activities).

³⁷ See, e.g., RMGC Press Release dated Mar. 31, 2014, *Over 1,000 families lose their source of income following activity reduction at Roșia Montană Gold Corporation*. (Exh. C-27).

³⁸ See Law No. 85/2014 on Insolvency Prevention Measures and Insolvency ("Insolvency Code") (Exh. C-45) Art. 5(1)(29) (insolvency is defined as the insufficiency of available funds for the payment of certain, due and enforceable debts). The commencement of insolvency proceedings requires either that steps be taken towards a judicial reorganization of the company or the commencement of bankruptcy proceedings aimed at liquidating the debtor's assets and paying outstanding debts. *Id.*, Arts. 5(1)(45), 5(1)(46), 5(1)(54), 132, 145. A judicial reorganization requires a reorganization plan approved by the creditors (here including the Ministry of Finance) and confirmed by the court. *See id.*, Arts. 132, 133, 138-139. Given its treatment of RMGC over the last few years leading to this arbitration, it is not reasonable to expect that the Ministry of Finance would approve a judicial reorganization plan for RMGC, meaning that insolvency for RMGC most likely would lead to bankruptcy and liquidation.

³⁹ The Mining Law provides in mandatory terms that, upon finding that a license holder becomes subject to judicial reorganization or bankruptcy, the Romanian National Agency for Mineral Resources ("NAMR") must suspend its license. Mining Law (Exh. C-11), Art. 33. The license holders' obligations, such as those associated with maintenance, safeguarding of documentation, and reporting, which must be completed by authorized employed personnel, and thus carry the need to meet basic payroll obligations, remain in effect during such a suspension. *Id.*, Art. 39. A failure to fulfill any of these obligations, e.g., due to a state of bankruptcy, would lead to annulment of the mining license. *Id.*, Art. 34(h) (providing that NAMR "cancels the license/permit of the titleholder [...] upon finding that [...] the titleholder fails to meet the conditions and the term provided in Article 33 paragraph (2) as regards the suspension of the license/permit"). Claimants

29. Thus, the imposition by ANAF of what amounts to an arbitration-motivated tax on RMGC leaves Gabriel caught between the proverbial rock and a hard place. Gabriel must either (i) immediately fund RMGC in the full amount of the assessed VAT to enable RMGC to post a guarantee in favor of ANAF – and thus to divert [REDACTED] to secure an unlawful “arbitration tax”; or (ii) face the imminent risk of RMGC being placed into insolvency and bankruptcy and liquidation shortly thereafter.

30. Even if the VAT Assessment were eventually overturned on appeal (which given its wrongful basis it should be), the appeals process could last years. Moreover, while Romanian law contemplates the possibility of a judicial stay of enforcement on condition that a bond is posted, which RMGC is prepared to post, the discretionary decision on such a request can take months. To prevent imminent forcible execution against RMGC assets, therefore, RMGC must post a guarantee in the full amount of the assessed principal VAT (including what is expected to be several million dollars in associated interest and penalties).

31. In other words, absent provisional measures, if Gabriel does not fund RMGC sufficiently for RMGC to post a guarantee in favor of ANAF in the full amount of the assessed VAT, interest and penalties, the State in effect will take RMGC. RMGC’s assets and real properties will be sequestered, its Licenses suspended and likely annulled, and the company and its assets liquidated.

32. In the process, Gabriel also potentially would lose access to RMGC’s books and records, with serious prejudice to its ability to present its claim in this arbitration. That is especially so with regard to the Confidential and Classified Documents. As set out in Claimant’s earlier request for provisional measures,⁴¹ those documents are in RMGC’s custody as titleholder of the Roșia Montană and Bucium Licenses, and Gabriel does not have independent access to them for purposes of this arbitration.

submitted a copy of the Mining Law as Exhibit C-11 with their Request for Provisional Measures dated June 16, 2016. Claimants resubmit Exhibit C-11 with an amended translation of the law.

⁴⁰ Insolvency Code (Exh. C-45) Art. 145.

⁴¹ Claimants’ Request for Provisional Measures dated June 16, 2016.

33. Moreover, if Gabriel does not fund RMGC to post a guarantee in the full amount of the VAT Assessment when RMGC's payment obligation becomes due on August 5, [REDACTED]

[REDACTED] Unless the tribunal orders Romania to refrain from taking [REDACTED] measures of enforcement pending resolution of this request for provisional measures, therefore, Gabriel either will have to transfer [REDACTED] to RMGC forthwith or RMGC's bank accounts, assets and properties will be seized.

B. Romania's Aggressive Investigations of RMGC Threaten to Undermine the Integrity of These Proceedings

34. In October 2015, less than three months after Claimants filed their Request for Arbitration on July 21, 2015, the Ministry of Finance mobilized ANAF to commence investigation of RMGC in an evident attempt to acquire massive amounts of company documentation outside of the arbitration process and to hunt for something to use in the State's defense in this case.

35. As described more fully in the witness statement of Dragoș Tănase, General Manager of RMGC, ANAF's Fiscal Antifraud Directorate commenced an investigation of RMGC in October 2015 and, more than nine months later, the investigation shows no signs of abating.⁴² ANAF's Fiscal Antifraud Directorate has undertaken [REDACTED]

[REDACTED]⁴³ No clear basis to justify this extraordinary and sweeping investigation has ever been communicated to RMGC.⁴⁴

36. The unbridled scope of ANAF's investigative document demands during the course of its purported antifraud investigation has called upon RMGC to produce [REDACTED]

⁴² Tănase ¶ 9. [REDACTED]

⁴³ Tănase ¶¶ 5, 9, 20, 33.

⁴⁴ Tănase ¶¶ 10, 21.

[REDACTED]

including, among other things:

- [REDACTED]

[REDACTED]

⁴⁵ Tănase ¶¶ 11, 13, 16, 20. [REDACTED]

Nonetheless, ANAF's investigations have persisted

⁴⁷

37. Separately, in March 2016, ANAF's Tax Inspection Service commenced the audit that led to the VAT Assessment discussed above.⁴⁸

38. During the course of ANAF's VAT audit, the inspectors similarly requested that RMGC produce

⁴⁶ Tănase ¶ 18.

⁴⁷ See Tănase ¶ 19.

⁴⁸ Tănase ¶ 22;

⁴⁹ Tănase ¶¶ 8, 31;

⁵⁰ Tănase ¶¶ 24-25.

See Tănase ¶ 25.

Tănase ¶ 25, n. 36.

[REDACTED]

39. The timing and boundless scope of ANAF's investigative assault, particularly of the antifraud audit, cannot reasonably be explained or justified.⁵² Nothing – other than motivations relating to this arbitration – could explain the sweeping investigation of RMGC [REDACTED]

40. While Romania has the right to conduct lawful investigations and enforce the laws in its own territory, Romania's good faith in this case is seriously in doubt. Nevertheless, RMGC has been responding diligently to each and every document demand made by the authorities and will continue to cooperate to the best of its ability notwithstanding extremely limited resources.⁵³

41. [REDACTED]

⁵¹ See Tănase ¶ 26. [REDACTED]

⁵² Notably, an earlier ANAF report and analysis of detailed RMGC financial information from 2013 was improperly and unlawfully leaked and given to the so-called "RISE Project" which posted it online with a defamatory "investigative" report in an effort in December 2013 to discredit RMGC. See <http://www.riseproject.ro/articol/pe-cine-a-platit-rmgc-in-2013/>; Tănase ¶ 33 (noting that he is not aware of any attempt by ANAF to seek removal of those unlawfully obtained documents from the website).

⁵³ Tănase ¶¶ 8, 26. [REDACTED]

[REDACTED]

42. The facts and circumstances compel the conclusion that Romania is using its police powers in response to and in reprisal for this arbitration and in support of a massive fishing expedition for evidence to support its case in circumvention of proper and orderly arbitral procedures. Such an abusive exercise of investigative power is a violation of the duty of good faith required of all parties to an international arbitration.

43. Respondent's harassing investigations also exacerbate the dispute, which further threatens the procedural integrity of these proceedings. Respondent has compelled RMGC to divert its limited remaining resources [REDACTED]

[REDACTED]

Respondent's disruption of RMGC's operations and [REDACTED] already has impacted Claimants' ability to develop their claims and, if permitted to continue, may impair their ability to present witnesses.⁵⁶

44. In short, an exercise of investigative powers to gain a tactical advantage in the arbitration is abusive, undermines the integrity of the proceedings and must not be permitted.

C. Measures Are Urgently Required to Safeguard the Integrity of This Arbitration and to Prevent Serious Aggravation of the Dispute

1. The rights to be protected: procedural integrity of the arbitration

45. ICSID tribunals have consistently recognized that the need to ensure the procedural integrity of the arbitration may justify a recommendation of provisional measures.⁵⁷

⁵⁴ Tănase ¶ 8, n. 5.

⁵⁵ Tănase ¶ 7.

⁵⁶ See Tănase ¶ 32; *id.* ¶ 19, n. 27 [REDACTED]

⁵⁷ See, e.g., *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues dated June 23, 2008 (CL-29) ¶ 78 ("Nor does the Tribunal doubt for a moment that, like

46. The right to maintain access to the evidence necessary to present one's case is fundamental to the procedural integrity of the arbitration, as set out in Claimants' earlier request.⁵⁸ The measures undertaken by Respondent in respect of the VAT Assessment and the Ministry of Finance's investigations threaten Claimants' continued access to evidence needed to present their case.⁵⁹

47. As explained above, as a practical matter the liability resulting from the VAT Assessment becomes enforceable as of August 5, 2016 unless RMGC posts a letter of guarantee for the full amount of the assessed VAT. A separate decision imposing interest and penalties for additional millions of dollars is expected soon. As noted above, while Romanian law contemplates the possibility of a judicial stay of enforcement on condition that a bond is posted, and while RMGC would be willing to provide such a bond, the discretionary decision on such a request can take months. Moreover, even if the VAT Assessment were eventually overturned on appeal (as it should be), the appeals process could last years.

48. Therefore, unless Gabriel funds RMGC to enable it to post a letter of guarantee in the full amount of the VAT liability, RMGC will face dire consequences, including the certain forcible execution by the Romanian authorities against its assets and properties to collect the amount due.

any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process. . . ."); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶ 141 (tribunal confirming it "has no doubt that it has the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings"); *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) ¶ 85 ("It is common ground that the right to the procedural integrity of the arbitration proceedings may find protection by way of provisional measures.").

⁵⁸ See Claimants' Request for Provisional Measures dated June 16, 2016, § III.B.

⁵⁹ See *supra* § III.A.

[REDACTED]

49. In addition, absent a Gabriel-funded guarantee, RMGC also will face the threat of insolvency, which in turn likely would lead to bankruptcy proceedings.⁶¹ Should RMGC become subject to bankruptcy proceedings, both the Roșia Montană and Bucium Licenses would be subject to mandatory suspension and probable annulment,⁶² and RMGC likely would be liquidated.⁶³ During any such process, a judicial administrator would be appointed by the State for the company and Gabriel would lose control of RMGC and its books and records. In addition, as RMGC retains custody of the Confidential and Classified Documents in its capacity as titleholder of the Roșia Montană and Bucium Licenses,⁶⁴ Romania will likely seek to use the circumstances it has created to try to deprive RMGC of the ability to access core documents that are centrally relevant to the dispute (and to which to date Gabriel has not had any access for purposes of this arbitration). These circumstances would seriously impair Claimants' access to documentary evidence and would profoundly prejudice Claimants' ability to present their claims in this case.

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[REDACTED]

See supra § III.A; Tănase ¶ 29;

⁶¹ *See supra* § III.A; Insolvency Code Art. 5(1)(29) (Exh. C-45) (defining insolvency as the insufficiency of available funds for the payment of certain, due and enforceable debts). If declared insolvent, as RMGC's creditors would include the Ministry of Finance, it is highly unlikely that RMGC's creditors would approve a reorganization plan that would be necessary to avoid commencement of bankruptcy proceedings aimed at liquidating RMGC's assets to pay outstanding debts.

⁶² *See supra* § III.A; Mining Law (Exh. C-11) Arts. 33, 34(h), 39 (requiring NAMR to suspend a license if the license holder is subject to judicial reorganization or bankruptcy, and to annul the license if any of various obligations are not met while the license is suspended).

⁶³ *See supra* § III.A; Insolvency Code (Exh. C-45) Art. 145.

⁶⁴ *See supra* § III.A; Claimants' Request for Provisional Measures dated June 16, 2016.

investigate and enforce laws in its territory, “[b]ut such powers must be exercised in good faith and respecting Claimants’ rights, including their *prima facie* right to pursue this arbitration.”⁶⁹

53. In addition, parties to an arbitration have a general legal duty to the opposing party and to the Tribunal to respect the equality of arms between them, which is a fundamental element of the right to a fair proceeding.⁷⁰ In cases where parties to an international arbitration have acquired evidence in violation of their duty of good faith, tribunals have refused to admit the evidence.⁷¹

54. 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 thereby impairs Claimants’ right to a fair proceeding. As the *Methanex* tribunal observed, “it would be wrong” for Respondent “to misuse

⁶⁹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶ 123. *See also Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues dated June 23, 2008 (CL-29) ¶ 78 (“The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).”).

⁷⁰ *See, e.g., Methanex Corporation v. United States of America*, NAFTA (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits dated Aug. 7, 2002, Part II – Chapter I (CL-30) ¶ 54 (“In the Tribunal’s view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of ‘equal treatment’ and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules.”); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide dated Dec. 23, 2010 (CL-28) ¶¶ 133, 202 (observing that “the equality of arms between the parties” is part of “the right to be heard” and a “fundamental element[] of a fair trial”).

⁷¹ *See, e.g., 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”).

its” investigative powers “and to introduce into evidence the resulting materials into this arbitration. . . .”⁷²

55. To the same effect the tribunal in *Libananco* imposed a “rule of separation” between the State’s investigative activities and its arbitration defense, and ordered the State not to make any documents from its criminal investigation available for use in the arbitration. The tribunal observed that while a State has the right to enforce its laws and exercise its legitimate investigative powers, “[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.”⁷³ In order to protect the claimants’ rights and the procedural integrity of the arbitration in that case, the *Libananco* tribunal ordered preliminary measures to prevent the gathering of evidence and information in Turkey from being used in the arbitration:

The Tribunal recognizes that the Respondent may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities in Turkey. *The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigation authorities shall be made available to any person having any role in the defence of this arbitration.*⁷⁴

56. The tribunal in *Churchill Mining* likewise recognized that the procedural integrity of an ICSID arbitration may be undermined if the State were to gain an unfair advantage by gathering evidence through the use of its police and investigative powers. To avoid the risk that the State “may obtain an unfair advantage in the present proceedings by gathering evidence through investigative techniques applicable under its criminal procedure law, thus circumventing the document production procedure available to the Parties in this arbitration,” the tribunal was “of the view that the Respondent should seek leave from the Tribunal before introducing evidence which it has obtained or will obtain through the criminal investigation

⁷² *Methanex Corporation v. United States of America*, NAFTA (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits dated Aug. 7, 2002, Part II – Chapter I (CL-30) ¶ 54 (describing the “ex hypothesi” circumstance where the Respondent used “intelligence assets to spy on [Claimant] (and its witnesses)”).

⁷³ *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.

⁷⁴ *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 § 1.2 (emphasis added).

conducted”⁷⁵ The tribunal determined that “[t]his recommendation is meant to avoid any unfair advantage and level the playing field between the Parties. It will in particular allow the tribunal to hear any objection the Claimant may have with respect to the evidence at issue. Moreover, if the Tribunal admits the evidence, it will assess its evidentiary value taking all the circumstances into account, including its source.”⁷⁶

2. The rights to be protected: non-aggravation of the dispute

57. Provisional measures may be warranted to preserve not only procedural rights relating to the fair and effective conduct of the arbitration, but also to the parties’ rights to the *status quo* and the non-aggravation of the dispute pending its resolution with the final award. As the ICSID tribunal in *Churchill Mining v. Indonesia* observed, “[i]t is well settled that provisional measures may be recommended to protect the rights to the *status quo* and to the non-aggravation of the dispute, which are self-standing rights vested in any party to the ICSID proceedings.”⁷⁷

58. Investment tribunals have rejected the notion that provisional measures must be limited to preserving rights “in dispute” narrowly understood. As the tribunal in *Quiborax* concluded, “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.”⁷⁸

59. Numerous tribunals have recognized that the right to the *status quo* and the non-aggravation of the dispute means that provisional measures may be warranted to prevent the

⁷⁵ *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.

⁷⁶ *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.

⁷⁷ *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) ¶ 71.

⁷⁸ *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.

aggravation, extension, or enlargement of the dispute.⁷⁹ For example, the *Perenco* tribunal elaborated that:

In its judgment of 5 December 1939 in the *Electricity Company of Sofia* case cited above, the Permanent Court of International Justice referred to

“the principle universally accepted by international tribunals and likewise laid down in many conventions to which Bulgaria has been a party to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken, which might aggravate or extend the dispute”.

This principle was invoked by the International Court of Justice in the *LaGrand* case (*Germany v United States of America* (2001 ICJ 466, 27 June 2001)) at paragraph 103, when it added that

“... measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court”.⁸⁰

The *Quiborax* tribunal emphasized that:

In the Tribunal’s view, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the *status quo* and non-aggravation of the dispute. As stated by the Tribunal in *Burlington v Ecuador*, these latter rights are self-standing rights. The Tribunal in *Biwater Gauff v Tanzania* reached a similar conclusion.⁸¹

In this context, the *Quiborax* tribunal also relied on the decision in *Amco Asia v. Indonesia*, in which the tribunal acknowledged “the good and fair practical rule, according to which both

⁷⁹ See, e.g., *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 8, 2009 (CL-32) ¶¶ 55-57 (citing various examples).

⁸⁰ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 8, 2009 (CL-32) ¶ 55.

⁸¹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶ 117 (internal citations omitted). See also *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶¶ 134-135.

Parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult.”⁸² The *Churchill Mining* tribunal similarly stressed “the Parties’ general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration.”⁸³

60. As set out above, unless Gabriel agrees to fund RMGC to enable it to post a guarantee in the full amount of the VAT Assessment, [REDACTED] and RMGC will be pushed by the State into insolvency, resulting in the suspension and likely annulment of its Licenses, and the likely liquidation of the company.

61. Unless RMGC’s request for a judicial stay of enforcement is granted, therefore, the VAT Assessment will force Gabriel imminently to divert [REDACTED] to secure an arbitration-motivated tax or lead to the effective taking of RMGC by the State and the liquidation of Gabriel’s investment in Romania, which obviously would result in the serious aggravation and extension of the dispute.

3. The requirement of urgency

62. In order to justify a recommendation of provisional measures the circumstances must be such that they cannot await the final award. As the tribunal in *PNG Sustainable v. Papua New Guinea* observed, “[a] request for provisional measures will satisfy the requirement

⁸² *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) ¶ 135 (quoting *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures dated Dec. 9, 1983).

⁸³ *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) ¶ 92. See also *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on the Revocation of Provisional Measures and Other Procedural Matters dated May 13, 2008 (CL-26) ¶ 58 (the claimant “has a right that the *status quo ante* be maintained for as long as these arbitration proceedings are pending ... and to have [Respondent] refrain from adopting any unilateral compulsory or coercive measure impairing contractual balance”); *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) ¶ 62 (affirming “the principle that neither party may aggravate or extend the dispute or take justice into their own hands”).

of urgency where it entails ‘a question [that] cannot await the outcome of the award on the merits.’”⁸⁴ The *Biwater Gauff* tribunal explained the “urgency” analysis is fact dependent:

In the Arbitral Tribunal’s view, the degree of “urgency” which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. [T]he level of urgency required depends on the type of measure which is requested.⁸⁵

63. Where the issue relates to the fair conduct of the proceedings, it is clear that measures cannot wait until the end of the arbitration. As the *Quiborax* tribunal observed, “[i]f measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.”⁸⁶

64. Thus in the *Churchill Mining* case, where the integrity of the proceedings was jeopardized by the potential introduction of evidence obtained through the conduct of criminal investigations of the claimant, the tribunal concluded that “the urgency requirement is fulfilled regarding the risk that Indonesia may gain an unfair advantage in the present proceedings by using evidence obtained in the criminal investigation without seeking prior leave by the Tribunal.”⁸⁷

65. As regards the urgency of addressing the antifraud investigation: Here the Ministry of Finance is conducting through ANAF an antifraud investigation 

⁸⁴ *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures dated Jan. 21, 2015 (CL-33) ¶ 116.

⁸⁵ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 dated Mar. 31, 2006 (CL-2) ¶ 76.

⁸⁶ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures dated Feb. 26, 2010 (CL-11) ¶ 153.

⁸⁷ *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) ¶ 90.

While Romania has the right to conduct legitimate investigations to enforce its laws in its territory, its investigations must not be deployed in a heavy-handed manner to harass and intimidate as appears to be the case. Nor can they be the means by which the State obtains evidence for use in this arbitration, and the documents and information obtained by Romania's investigative authorities must not be made available to anyone having any role in Romania's defense in this arbitration. Provisional measures are urgently required to ensure such boundaries are established and respected from the outset so that the integrity of this arbitration is preserved and not tainted or corrupted by inappropriate or unfair conduct by a party.

66. As regards the urgency of the issues presented by the imminently enforceable VAT Assessment: As the tribunal in *Burlington* observed, "when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition."⁸⁸

67. Here, the tribunal's observations in *Paushok v Mongolia* are particularly instructive with regard to the VAT Assessment. In that case the tribunal concluded that the requirement of urgency was met where the enforcement of a tax during the pendency of the arbitration was likely to place the claimants' local subsidiary into bankruptcy and thus aggravate and extend the dispute:

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 ... [given the circumstances prevailing] it would be very presumptuous for any investor to make additional equity investment in that company. The

⁸⁸ *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 Burlington Oriente's Request for Provisional Measures dated June 29, 2009 (CL-23) ¶ 74.

likelihood of GEM's bankruptcy in such a context therefore becomes very real.⁸⁹

68. Similarly, in the *Perenco* case, the tribunal, referring to the *City Oriente* case, recalled that “[i]n the Tribunal’s opinion (paragraph 69), provisional measures were urgent, ‘precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration’.”⁹⁰

69. In view of the particularly urgent circumstances presented in those cases, the *Paushok*, *Perenco*, and *City Oriente* tribunals also ordered emergency temporary provisional measures pending resolution of the provisional measures requested.⁹¹

70. Here, the VAT Assessment will become enforceable as of August 5, 2016. A decision assessing several million dollars in interest and penalties is expected imminently, which also will become enforceable soon thereafter.⁹² To prevent the immediate forcible execution of the VAT Assessment against RMGC assets [REDACTED] and the related threat to its mining Licenses, RMGC (and thus effectively Gabriel) must post a full guarantee. Provisional measures therefore are urgently needed to call upon Respondent to join RMGC in its request for a judicial suspension of enforcement and otherwise not to take steps to enforce the assessed VAT against RMGC pending the administrative (and if necessary judicial) challenge of the VAT Assessment.

⁸⁹ *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.

⁹⁰ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 8, 2009 (CL-32) ¶ 57.

⁹¹ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 8, 2009 (CL-32) ¶¶ 23, 28; *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), ¶¶ 13, 19. See also *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures dated Sept. 2, 2008 (CL-31), ¶ 16.

⁹² See Tax Procedure Code (Exh. C-28) Art. 156 (providing that “if the date of service [of a tax assessment] falls between the 1st and 15th of the month, the payment term shall be by or on the 5th of the following month” and “if the date of service falls between the 16th and 31st of the month, the payment term shall be by or on the 20th of the following month”).

In addition, emergency temporary provisional measures directing Respondent not to take any further steps to enforce the VAT Assessment are required to ensure that enforcement does not occur before the Tribunal rules on this request.

4. Necessity: nature of harm at risk without provisional measures

71. To justify a recommendation of provisional measures, some decisions focus on whether the rights at issue would suffer “irreparable” harm. Other tribunals, however, have observed that nothing in either Article 47 of the ICSID Convention or Rule 39 of the ICSID Arbitration Rules limits provisional measures to preventing “irreparable” harm, and that the common law principle of requiring irreparable harm to justify injunctive relief is not the applicable test.

72. For example, the tribunal in *City Oriente v. Ecuador* observed that “neither Article 47 of the Convention nor Rule 39 of the Arbitration Rules require that provisional measures be ordered only as a means to prevent irreparable harm.”⁹³ The tribunal explained:

Rule 39 only refers to “circumstances that require such measures”. It is the opinion of the Tribunal that this wording requires only that provisional measures must not be ordered lightly, but only as a last resort, after careful consideration of the interests at stake, weighing the harm spared the petitioner and the damage inflicted on the other party. It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby.⁹⁴

The tribunal in *Perenco v. Ecuador* similarly observed that Article 47 of the Convention “does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction.”⁹⁵

⁹³ *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on the Revocation of Provisional Measures and Other Procedural Matters dated May 13, 2008 (CL-26) ¶ 70.

⁹⁴ *Id.* ¶ 72.

⁹⁵ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 8, 2009 (CL-32) ¶ 43.

73. Likewise, in *PNG Sustainable v. Papua New Guinea* the tribunal explained, “the term ‘irreparable’ harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally ‘irreparable’ in what is sometimes regarded as the narrow common law sense of the term. The degree of ‘gravity’ or ‘seriousness’ of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures.”⁹⁶

74. The *PNG Sustainable v. Papua New Guinea* tribunal also observed that “the requesting party need not prove that ‘serious’ harm is certain to occur. Rather it is generally sufficient to show that there is a material risk that it will occur.”⁹⁷

75. Here, given the nature and conduct of the extensive VAT audits and the still ongoing antifraud investigation [REDACTED] there is, *at a minimum*, a material risk that Respondent is using its police powers to obtain documents and information in circumvention of arbitration procedures to develop an arbitration defense. Doing so materially undermines the procedural integrity of the arbitration in a manner that gives rise to serious violations of fundamental rules of procedure. Provisional measures are necessary to ensure that the investigations will not be the means by which the State obtains evidence for use in this arbitration and the documents and information obtained by the Ministry of Finance’s investigative authorities will not be provided to or in any way made available to any person having any role in Romania’s defense in this arbitration.

76. Also, as described above, without a judicial stay of enforcement of the legally baseless VAT Assessment or other forbearance by Respondent [REDACTED]

⁹⁶ *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant’s Request for Provisional Measures dated Jan. 21, 2015 (CL-33) ¶ 109.

⁹⁷ *Id.* ¶ 111.

⁹⁸ Tănase ¶ 18 [REDACTED]

contention” that provisional measures can only be issued when specific performance is requested in connection with a contractual relationship.¹⁰²

78. In this case, moreover, Claimants’ requested remedies are not limited to an award of compensation. As reflected in the Request for Arbitration, while Claimants’ request for relief includes a request for compensation, Claimants also seek a declaration that Romania has breached the Canada BIT and the UK BIT as well as such further or other relief as may be deemed appropriate, and expressly reserve the right to assert additional claims as may be warranted.¹⁰³ Given the early stage of this arbitration, as circumstances in Romania evolve, Claimants still may assert additional claims.¹⁰⁴

79. Claimants note, in relation to Gabriel Canada, that Article XII of the Canada BIT restricts the nature of claims that may be presented in relation to taxation measures and Article XIII(8) of the Canada BIT limits the tribunal’s authority in regard to provisional measures as follows:

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

¹⁰² *Id.* ¶ 70. While the *Paushok* decision was based on the UNCITRAL Arbitral Rules, the same considerations apply to an arbitration under the ICSID Convention. *See Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures dated Mar. 21, 2007 (CL-34) ¶ 183-185 (where claimant sought monetary compensation as a remedy for alleged breaches of Bangladesh-Italy BIT, provisional measures recommended to prevent a call on a bond).

¹⁰³ *See* Request for Arbitration dated July 21, 2015 ¶ 64. Both the ICSID Convention and ICSID Arbitration Rules contemplate the possibility of presenting additional claims during the course of an arbitration. ICSID Convention, Art. 46 (regarding incidental or additional claims); ICSID Arbitration Rule 40 (regarding same).

¹⁰⁴ Such additional claims for relief other than by way of compensation may be made. Article XIII(9) of the Canada BIT (Exh. C-1) permits the tribunal to order restitution, although it also requires that the award provide that the Respondent may pay monetary damages in lieu of restitution that may be ordered. The UK BIT (Exh. C-3), however, does not include any such limitation. *See also Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures dated Sept. 2, 2008 (CL-31) ¶¶ 68, 75 (regarding the remedies available to the claimant, the tribunal observed that the claimant did not limit its claims to monetary compensation and that in any event “the Treaty does not restrict the available remedies of investors to monetary compensation. The three types of remedies available at public international law (*restitutio in integrum*, compensation and satisfaction) remain available under the Treaty.”).

of the measure alleged to constitute a breach of this Agreement. For purposes of this paragraph, an order includes a recommendation.¹⁰⁵

An order recommending that Romania join RMGC in its request to the competent Romanian court for a judicial suspension of enforcement, however, is fully consistent with Article XIII(8) of the Canada BIT.

80. In any event, there are no such restrictions in the UK BIT¹⁰⁶ and therefore the measures that Gabriel Jersey may request are not so limited.

5. Necessity: balancing of interests

81. Although tribunals must “consider the proportionality of the requested provisional measures,”¹⁰⁷ consistent with the State’s consent to submit investment disputes to ICSID arbitration, a State legitimately may be called upon to restrain exercise of its powers during the pendency of the arbitration. As the *Perenco* tribunal observed, “[i]t is pertinent to recall that in any ICSID arbitration one of the parties will be a sovereign State, and where provisional measures are granted against it the effect is necessarily to restrict the freedom of the State to act as it would wish. Interim measures may thus restrain a State from enforcing a law pending final resolution of the dispute on the merits ... or from enforcing or seeking a local judgment”¹⁰⁸ Thus, for example, in *Quiborax* where a criminal proceeding was interfering with the claimant’s access to evidence to present its case, the Tribunal concluded that a stay of criminal proceedings was warranted, observing there that “a mere stay of the criminal proceedings would not affect

¹⁰⁵ See Canada BIT (Exh. C-1) Arts. XII and XIII(8).

¹⁰⁶ See UK BIT (Exh. C-3).

¹⁰⁷ See, e.g., *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) ¶ 158.

¹⁰⁸ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 8, 2009 (CL-32) ¶ 50 (citing *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, and Decision on the Revocation of Provisional Measures and Other Procedural Matters dated May 13, 2008; *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures dated Sept. 2, 2008; *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Order dated Dec. 5, 1939, 1939 P.C.I.J. (ser. A/B) No. 7; *Československa Obchodní Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 4 dated Jan. 11, 1999; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Request for Provisional Measures dated Sept. 25, 2001).

Respondent's sovereignty nor require conduct in violation of national law," and that "the harm that such a stay would cause to Bolivia is proportionately less than the harm caused to Claimants if the criminal proceedings were to continue their course."¹⁰⁹

82. In this case, it similarly would be appropriate for all of the reasons set out above to order Respondent at a minimum to explain and justify the basis for its repeated, abusive demands [REDACTED] which began almost immediately after Claimants initiated this arbitration. In so doing, Claimants and the Tribunal can assess whether further relief is warranted.

83. Furthermore, in order to protect the procedural integrity of this arbitration, to ensure that the parties are each participating in good faith, respecting due process and the equality of arms, an order that Respondent not permit information or documents obtained through the exercise of its police powers to be made available to any person on its arbitration defense team is necessary and would be a fair and balanced approach to address the risk of serious harm. Such an order would be in line with the approach taken by the tribunal in the *Libananco* arbitration in which the tribunal "recognize[d] that the Respondent may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities," but noted that:

The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigation authorities shall be made available to any person having any role in the defence of this arbitration.¹¹⁰

Here such an order is essential to avoid any unfair tactical advantage Respondent seeks by using documents obtained from RMGC through the exercise of Respondent's police powers in circumvention of the document procedures contemplated by the rules of arbitration. Such an order, which would not direct Respondent to cease its manifestly biased and suspect investigations, would balance any dubious claims Romania might have to a legitimate interest in

¹⁰⁹ *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) ¶ 165.

¹¹⁰ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues dated June 23, 2008 (CL-29) at 42, ¶ 1.2.

respect of its extraordinary investigations (which to date has not been provided) with the need to safeguard the integrity of this arbitration.

84. In addition, there is a serious risk both to the integrity of these proceedings and of a potentially serious and material aggravation and extension of this dispute if a judicial stay of enforcement of the VAT Assessment is not granted or other forbearance on enforcement is not exercised. Provisional measures therefore are warranted on both counts to call upon Respondent to join RMGC in its request for a judicial suspension of enforcement and otherwise not take steps to enforce the assessed VAT liability against RMGC pending the administrative (and if necessary judicial) challenge of the VAT Assessment and any related assessment of associated interest and penalties. Moreover, [REDACTED] warrants emergency temporary measures prohibiting Respondent from taking any such enforcement action before the Tribunal rules on Claimants' request.

85. Such an order would fairly balance the interests of the parties, as it would alleviate the risk of harm to Claimants and to the procedural integrity of this arbitration associated with the VAT Assessment without prejudicing Respondent's interests. An order to this effect in fact would be similar to the one issued in *Paushok*, where the tribunal recommended a stay of enforcement of a disputed tax where enforcement would have generated "very substantial prejudice" to the claimant as "payment of the [tax] allegedly owing to Mongolia would likely lead to the insolvency and bankruptcy of [the locally incorporated project company],"¹¹¹ and non-payment of the disputed tax also threatened the possible suspension of the company's mining license as well as seizure of its assets. On that basis, after first granting temporary relief pending its final ruling on this issue, the *Paushok* tribunal concluded:

While it is true that Claimants would still have a recourse in damages and that other arbitral tribunals have indicated that debt aggravation was not sufficient to award interim measures, the unique circumstances of this case justify a different conclusion. In particular, while not putting in doubt the value of the undertaking of Respondent not to seize or put a lien on

¹¹¹ *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Order on Interim Measures dated Sept. 2, 2008 (CL-31) ¶ 77.

GEM's assets, the Tribunal believes that it is preferable to formalize that commitment into an interim measures order.¹¹²

In that case, the tribunal considered that its order was balanced as it also contemplated that the Claimant would post security in favor of Respondent.¹¹³

86. Here, calling upon Respondent to join RMGC in its request for a judicial suspension of enforcement on condition that RMGC post a bond in the amount specified by Romanian law does not in any way prejudice Romania's interests.¹¹⁴

[REDACTED]

[REDACTED] Thus, Romania has security that it will be able to enforce its VAT Assessment and any related assessment of associated interest and penalties if that VAT liability ultimately were upheld as lawful and valid, which, as explained above, it should not be. For this reason, Respondent also can and should unilaterally forbear from enforcement pending RMGC's administrative (and if necessary) judicial challenge in Romania [REDACTED]

87. There is therefore no need, and it would be highly disproportionate, for Romania to require Gabriel to divert [REDACTED] to secure the liability imposed by the VAT Assessment in order to prevent the State in effect from taking RMGC, its assets, properties, and mining Licenses when in fact no harm would result to Romania from a stay of enforcement. Nor would there be any basis to claim that Claimants no longer have an interest in the preservation of RMGC, its assets, properties, and mining Licenses in good

¹¹² *Id.* ¶ 78.

¹¹³ *Id.* at 16-17.

¹¹⁴ A judicial stay of enforcement may be granted on condition that a bond is posted in the amount indicated by Tax Procedure Code (Exh. C-28) Art. 278 (*i.e.*, RON 14,500 plus 0.1% of the amount of the tax exceeding RON 1 million), which is an amount that is significantly less than the full amount of the assessed tax.

¹¹⁵ Tănase ¶ 29.

IV. REQUEST FOR RELIEF

89. For all of the reasons set forth above, Claimants respectfully request, as an emergency temporary provisional measure, pending determination of this request for provisional measures, that the Tribunal recommend that Romania refrain from taking any measures of enforcement of the VAT Assessment and any associated interest and penalties pending determination by the Tribunal of this request.

90. Claimants also 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 the Respondent explain and justify the legitimate need and basis to have demanded and to continue to demand the extensive production of documents and information from RMGC;
- b. 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;
- c. That 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;
- d. With respect to the VAT Assessment and any associated decision as to interest and penalties, 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 the resolution of RMGC’s administrative (and if necessary judicial) challenge of the VAT Assessment; and

- e. 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.

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

Respectfully submitted,



WHITE & CASE LLP
701 Thirteenth Street NW
Washington, DC 20005
USA

Counsel for Claimants