

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

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

Claimants

VS.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

**RESPONDENT'S COMMENTS ON CLAIMANTS'
REQUEST FOR EMERGENCY TEMPORARY
PROVISIONAL MEASURES**

10 August 2016

Before:

Ms Teresa Cheng (President)

Dr Horacio A. Grigera Naón

Professor Zachary Douglas

Secretary of the Tribunal

Ms Sara Marzal Yetano

LALIVE

LEAUA & ASOCIATII

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1 INTRODUCTION

- 1 In accordance with the letter of the Tribunal dated 3 August 2016, Romania hereby submits its comments regarding the Claimants' request for emergency temporary provisional measures (the "**Emergency Measures**"), included in their submission dated 28 July 2016 entitled the "Claimants' Second Request for Provisional Measures and Request for Emergency Temporary Provisional Measures" (the "**Claimants' Second Request**").¹
- 2 Romania will provide its full observations to the Claimants' Second Request, including its request for provisional measures,² by 17 August 2016, as directed by the Tribunal.
- 3 In their Second Request, the Claimants seek both (i) an order of provisional measures and (ii) an order of emergency temporary provisional measures pending determination of the request for provisional measures.³ With regard to the latter, the Claimants request:

“...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.”⁴
- 4 The basis for the Claimants' Second Request is the so-called “VAT Assessment,” which they describe as a decision by Romania's National Agency for Fiscal Administration (the “ANAF”) [REDACTED]

¹ The defined terms in this submission have the same meaning as put forward in the Respondents' Observations to the Claimants' First Request for Provisional Measures.

² The notions of “interim” and “provisional” relief are used interchangeably in this submission.

³ [Claimants' Second Request for Provisional Measures](#), p. 1 (para. 1).

⁴ [Claimants' Second Request for Provisional Measures](#), p. 39 (para. 89).

██████████ and “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).”⁵ This report allegedly followed an “extensive audit” carried out by ANAF.⁶

- 5 The Claimants' request for Emergency Measures relates directly to their request for provisional measures, which are also primarily directed against the VAT Assessment. More specifically, in terms of provisional measures, the Claimants request in relevant part that the Respondent be ordered (i) not to take steps to enforce the VAT Assessment against RMGC pending the resolution of RMGC's challenge of that assessment; and (ii) to refrain from taking any action in connection with the VAT Assessment that may aggravate and extend the dispute.
- 6 The Claimants' request for provisional measures also relates to an anti-fraud investigation allegedly carried out by ANAF with regard to RMGC.⁷ These alleged investigations as well as the tax audit and resulting VAT Assessment are together referred to in this submission as the “**Taxation Measures.**”
- 7 The Claimants' request for Emergency Measures should be rejected for two overarching reasons.
- 8 **First**, neither the ICSID Convention, nor the ICSID Rules provides a basis for the issuance of emergency relief. Nor do the Canada-Romania BIT and the UK-Romania BIT provide any basis for such measures. Ac-

⁵ [Claimants' Second Request for Provisional Measures](#), p. 3 (para. 8).

⁶ [Claimants' Second Request for Provisional Measures](#), p. 2 (para. 3).

⁷ The Claimants request that the Respondent be ordered (i) to explain and justify the basis for requesting from RMGC documents in connection with an anti-fraud investigation; (ii) to ensure that no such documents be “made available to any person having any role” in Romania's defense in the arbitration; (iii) not to proffer evidence gained through ANAF's audits without leave from the Tribunal. [Claimants' Second Request for Provisional Measures](#), p. 39 (para. 90); see also [Claimants' Second Request for Provisional Measures](#), p. 1 (para. 3).

cordingly, the Tribunal does not have a legal basis to order the Emergency Measures requested by the Claimants.

- 9 **Second**, the Claimants' contentions that the measures sought are "retaliatory" and amount to an "arbitration tax" are entirely unsupported.⁸ The Claimants have not made even a *prima facie* showing that the measures allegedly called for in the VAT Assessment are in any way connected to this arbitration, let alone measures taken to retaliate against the Claimants for filing this arbitration.
- 10 Conversely, the Claimants have not demonstrated that Romanian authorities rendered the VAT Assessment in violation of the applicable Romanian law or that the conclusions contained therein are contrary to the applicable Romanian law. The 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.
- 11 More generally, the Claimants cannot use this arbitration as a pretext or excuse to avoid compliance with decisions taken by competent Romanian authorities taken in accordance with the applicable Romanian law pending the completion of the arbitration. The Claimants' initiation of these arbitration proceedings does not entitle them to a "free pass card," by which they acquire immunity from measures legitimately taken by Romanian authorities in accordance with the applicable law. They *a fortiori* do not acquire any immunity vis-à-vis such measures not rendered against them directly – but rather against a related entity (RMGC) – and vis-à-vis measures unrelated to the underlying arbitration. Effectively granting a foreign investor immunity from legitimate measures taken by governmental authorities in accordance with the host State's law in such circumstances would be fundamentally at odds with the very spirit and rationale of international investment law. If obtaining immunity in these

⁸ [Claimants' Second Request for Provisional Measures](#), p. 2 (para. 6), p. 4 (para. 10) and p. 13 (para. 29).

circumstances were possible, making requests for provisional relief (to the effect of seeking to enjoin the host State from taking any measures directed against the claimant) would become rampant and automatic when initiating any investment arbitration.

- 12 Significantly, the provisional relief (including the emergency relief) sought is manifestly outside of this Tribunal's jurisdiction. The relief sought arises out of the alleged Taxation Measures and yet the protections afforded to foreign investors under the Canada-Romania BIT do not extend to such measures; stated differently, taxation measures are expressly excluded from the scope of the BIT.⁹ Although it is undisputed that a tribunal must have *prima facie* jurisdiction to order provisional measures,¹⁰ the Claimants have not even attempted to show and indeed cannot make such a showing in relation to their Second Request. On this basis alone, the Claimants' Second Request is patently without merit and should be summarily dismissed.
- 13 It is therefore regrettably evident that the Claimants have filed their Second Request merely as a tactical manoeuvre, in an attempt to tarnish the Respondent's very image in and at the start of these proceedings, and knowing that the Romanian authorities would have difficulty in promptly responding 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. The Tribunal should not entertain such a regrettable attempt to derail this arbitration.
- 14 This submission is divided into four main sections.
- 15 Following this first introductory section, the second section describes how an order for emergency temporary provisional measures pending determination of a request for provisional measures is an unknown concept under the ICSID Convention and ICSID Arbitration Rules. Alt-

⁹ See *infra* Section 3.

¹⁰ [Claimants' First Request](#), p. 6 (para. 14).

though the Claimants invoke three investment cases in which emergency provisional measures were granted,¹¹ as explained below, those cases are distinguishable from the case at hand, not least because of the differing terms of the applicable BITs. Furthermore and more generally, ICSID tribunals have been careful when addressing applications for provisional relief seeking to enjoin a State from applying its law and only, in extraordinary circumstances of abuse, interfere with a Sovereign's regulatory powers pending the dispute (**Section 2**).

- 16 The third section demonstrates that the Taxation Measures, even if enforced against RMGC, would not “aggravate” the present dispute or threaten the procedural integrity of this arbitration. The Taxation Measures are, as noted above, in substance entirely unrelated to the claims in this arbitration and therefore cannot aggravate the dispute. The Claimants indeed made clear in their Request for Arbitration that “this matter **does not involve taxation**.”¹² Nor could this matter easily evolve in such a manner so as to involve tax matters in light of the broad carve-out, similar to that contained in NAFTA, which excludes tax matters from the scope of its protections.
- 17 The Claimants also fail to show that the Taxation Measures would affect the procedural integrity of this arbitration. Although they argue that the Taxation Measures have affected or may affect their due process rights with respect to their presentation of witnesses and evidence, these arguments are without merit and certainly fail to justify an order of “emergency measures” (**Section 3**).
- 18 The fourth section examines the provisions of the Canada-Romania BIT regarding a tribunal's power to grant interim relief and the limitations thereto. It explains how the State parties to the Canada-Romania BIT specifically agreed that the interest in non-aggravation of a dispute under the treaty could not prevail over a State's interest in enforcing its laws

¹¹ [Claimants' Second Request for Provisional Measures](#), p. 5 (para. 15).

¹² [Claimants' Request for Arbitration](#), p. 21 (para. 48) (emphasis added).

pending the resolution of that dispute. Accordingly, Article XIII(8) of the BIT expressly excludes interim enforcement of alleged rights under the BIT. This exclusion necessarily also encompasses emergency relief, such as that presently sought by the Claimants (**Section 4**).

- 19 The fifth section explains that, insofar as the ICSID Convention and the ICSID Rules do not provide for or even refer to emergency temporary provisional measures, the test for granting such relief necessarily entails a demonstration that the test for granting ordinary provisional measures is met, with the additional burden of making a heightened showing of urgency, such that the relief requested cannot await the Tribunal's decision with regard to the ordinary provisional measures sought.
- 20 The Claimants' request for emergency relief does not meet that test primarily because the Tribunal lacks jurisdiction to issue the relief sought and because the Claimants' rights are not in peril. In particular, on their own case, a number of events would need to occur before they "potentially would lose control of RMGC and its books and records."¹³ Furthermore, although the Claimants invoke their right not to divert funds to RMGC for the purposes of paying these taxes, they recognize that they would only need to post a guarantee equivalent to [REDACTED] [REDACTED] Even if the Claimants were required to transfer such funds, that amount is not significant as compared to the Claimants' financial resources (**Section 5**).
- 21 For all of these reasons and as demonstrated below, the Claimants' request for Emergency Measures should be rejected.

¹³ [Claimants' Second Request for Provisional Measures](#), p. 13 (para. 32).

2 THE ICSID CONVENTION AND THE ICSID ARBITRATION RULES DO NOT PROVIDE A BASIS FOR EMERGENCY MEASURES

- 22 The Claimants request the Tribunal to order Romania to “refrain from taking any measures of enforcement of the VAT Assessment and any associated interest and penalties” pending a decision on their Second Request.¹⁴ The **sole basis** for the request is that, according to the Claimants, three tribunals – *Paushok v Mongolia*, *Perenco v Ecuador* and *City Oriente v Ecuador* – ordered emergency temporary measures pending a decision on provisional measures.¹⁵ As discussed below, the circumstances and applicable law in those cases were different from those presently before the Tribunal and thus, the Claimants’ reliance on those decisions is misplaced.
- 23 An “emergency temporary provisional measure,” as the Claimants describe it,¹⁶ pending determination of a request for provisional measures is an unknown concept under the ICSID Convention and the ICSID Arbitration Rules (the “**ICSID Rules**”). Indeed, neither the ICSID Convention nor the ICSID Rules provide for such “temporary” provisional measures. The Claimants’ request for Emergency Measures thus has no basis in either text.
- 24 Moreover, the very notion of an emergency temporary provisional measure is at odds with the ICSID Convention and the ICSID Rules for at least three reasons.
- 25 **First**, the notion that a tribunal can issue temporary emergency relief before fully considering both parties’ positions on the interim relief sought is difficult to reconcile with the cornerstone principle of due process under ICSID Rule 39(4), according to which a tribunal shall only

¹⁴ [Claimants' Second Request for Provisional Measures](#), p. 39 (para. 89).

¹⁵ [Claimants' Second Request for Provisional Measures](#), p. 5 (para. 15) and p. 29 (para. 69).

¹⁶ [Claimants' Second Request for Provisional Measures](#), p. 1 (para. 1), p. 3 (para. 8), p. 5 (para. 13), p. 5 (para. 15), p. 30 (para. 70), p. 36 (para. 84) and p. 39 (para. 89).

issue interim measures “after giving each party an opportunity of presenting its observations.” This requirement applies to the entirety of the requested interim measures and cannot be considered satisfied if the other party is merely given an opportunity to present observations on the alleged “emergency” nature of the requested measures.

- 26 **Second**, ICSID Rule 39(2) requires the tribunal to “give priority” to a request for interim relief: it does not provide it with an authority to order measures pending a determination of the interim relief sought.¹⁷
- 27 **Third**, the silence of the ICSID Convention and the ICSID Rules with respect to the notion of emergency temporary provisional measures is understandable given the well-established principle of international law that State action cannot be **presumed** to be illegal, which is effectively what a temporary predetermination of a request for provisional measures entails:

“However, **the international responsibility of a state or, for that matter, of an international organization, is not to be presumed. This means that the presumption of non-responsibility of the state in international law and the presumption of legality of conduct should apply with even greater force to the acts of a government than those of a private person.** This explains the general reluctance detected in the jurisprudence of international tribunals to presume that an international person has acted at variance with its international obligation. It has even been claimed that in international law, there is a presumption in favor of the state corresponding closely to the presumption of innocence in domestic law.”¹⁸

¹⁷ ICSID Rule 39(2): “The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).”

¹⁸ A. Marossi, “Shifting the Burden of Proof in the Practice of the Iran–United States Claims Tribunal”, (2011) 28(5) *Journal of International Arbitration* 427, at **Exhibit RLA-8**, p. 8 (emphasis added).

- 28 The Claimants invoke three arbitral orders in support of their request for Emergency Measures: *Paushok v Mongolia*, *Perenco v Ecuador* and *City Oriente v Ecuador*.¹⁹ However, these orders are inapposite as the interim relief sought in those cases was directly linked to the claims and requests for relief which the Tribunal had to decide.²⁰
- 29 Furthermore, the three emergency orders issued in *Paushok v Mongolia*, *Perenco v Ecuador* and *City Oriente v Ecuador* differ substantially from the present case in that they related to either a contract or a BIT that did not contain a provision similar to Article XIII(8) of the Canada-Romania BIT which, as discussed below, expressly precludes orders of interim performance of obligations under the treaty.²¹ Although an ICSID Tribunal has inherent jurisdiction to decide any procedural issue in its discretion, pursuant to Article 44 of the ICSID Convention,²² the Tribunal cannot, in reliance thereon, render a decision contrary to the Canada-Romania BIT.

¹⁹ Claimants' Second Request for Provisional Measures, p. 5 (para. 15) and p. 29 (para. 69).

²⁰ See *Sergei Paushok, qsc Golden East Company, qsc Vostokneftegaz Company v. The Government of Mongolia*, Order on Interim Measures, UNCITRAL, 2 September 2008, at **Exhibit CLA-31**, p. 1 (para. 4) and p. 2 (paras. 12-13); *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on Provisional Measures ICSID Case No. ARB/06/21, 18 November 2007, at **Exhibit CLA-5**; *Perenco v. Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/08/6, 8 May 2009, at **Exhibit CLA-32**, p. 6 (para. 17) and 8 *et seq.* (paras. 23-24).

²¹ In *Perenco v. Ecuador* the applicable Bilateral Investment Treaty was the [Treaty between the Republic of France and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment](#), at **Exhibit RLA-9**, which contained no provisions on interim relief. The same is true for the Russia-Mongolia BIT, applicable in *Sergei Paushok, qsc Golden East Company, qsc Vostokneftegaz Company v. The Government of Mongolia*. In *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, the case was based on a contract, which similarly did not contain any provision on interim relief.

²² Article 44 of the ICSID Convention provides: "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

3 THE TAXATION MEASURES AT ISSUE DO NOT AGGRAVATE THE DISPUTE OR THREATEN THE PROCEDURAL INTEGRITY OF THIS ARBITRATION

30 Contrary to the Claimants' allegations,²³ there is no "aggravation" of the dispute because the Taxation Measures are unrelated to the dispute before the Tribunal, and because the Canada-Romania BIT specifically excludes any claims, including requests for interim relief, arising out of taxation measures (**Section 4.1**). Second, the Taxation Measures do not threaten the procedural integrity of the arbitration (**Section 4.2**).

3.1 The Taxation Measures are unrelated to the dispute before the Tribunal

31 It is well established 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. As succinctly stated by the International Court of Justice in the *Timor Leste* case, one of the fundamental requirements for granting a request for provisional measures is that "a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought."²⁴ This requirement has been confirmed by the ICJ and the Permanent Court of International Justice in a series of earlier decisions.²⁵

32 In this case, the provisional relief (including the emergency relief) requested by the Claimants does not relate to the rights at stake in the underlying arbitration. While the provisional relief sought relates to the

²³ Claimants' Second Request for Provisional Measures, p. 18 (para. 45) *et seq.*

²⁴ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order of 3 March 2014 (on Provisional Measures), 2014 ICJ Reports, at **Exhibit RLA-10**, p. 9 (para. 23).

²⁵ See e.g. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Order of 8 March 2011 (on Provisional Measures), 2011 ICJ Reports, at **Exhibit RLA-11**, p. 16 (para. 54).

purported Taxation Measures, the claims in the arbitration do not relate to tax issues at all. As the Claimants stressed in the Request for Arbitration, “(...) Gabriel Canada confirms that this matter **does not involve taxation.**”²⁶

- 33 While the Claimants assert that various tribunals have recognized the authority to recommend provisional measures to avoid the “aggravation” of the dispute,²⁷ those cases are not apposite because, by contrast to the matter before this Tribunal, they involved requests for provisional measures relating to the subject matter of the dispute before the Tribunal.
- 34 The Claimants assert that the tribunal in *Quiborax v. Bolivia* concluded that, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute and that “the applicable criterion is that the right to be preserved bears a relation with the dispute.”²⁸ Whether or not one accepts the *Quiborax* test, ICSID tribunals are not courts of general jurisdiction and an ICSID tribunal’s jurisdiction to order provisional measures is linked to its jurisdiction to award final relief. Thus, the *Plama v. Bulgaria* tribunal explained the necessary link between the measures that fall to be decided by an ICSID tribunal and the right to non-aggravation of the dispute:

“The rights to be preserved must relate to the requesting party’s ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus **the rights to be preserved by provisional measures are circumscribed by the requesting party’s claims and requests for relief.** They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be re-

²⁶ [Claimants' Request for Arbitration](#), p. 21 (para. 48) (emphasis added).

²⁷ [Claimants' Second Request for Provisional Measures](#), p. 24 *et seq.* (paras. 57-59).

²⁸ [Claimants' Second Request for Provisional Measures](#), p. 24 (para. 58).

lated to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date."²⁹

35 The *Plama* tribunal added:

“(...) the right to non-aggravation of the dispute refers to actions which would **make resolution of the dispute by the Tribunal more difficult**. It is a right to maintenance of the status quo, when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief.”³⁰

36 Accordingly, interim relief is only available when an applicant can show that there is a right (procedural or substantive) in peril as a result of a measure over which the tribunal can assert jurisdiction.³¹ The Claimants do not and cannot make that showing. Indeed, they do not and cannot demonstrate that they have a right which is in peril as a result of a measure taken by Romania over which the Tribunal has jurisdiction. Pursuant to the clear terms of the Canada-Romania BIT, the Tribunal does not have jurisdiction over tax claims. Under Article XIII(1) of the BIT, the Tribunal has jurisdiction *ratione materiae* only in relation to disputes

“relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of or arising out of that breach.”

²⁹ *Plama Consortium Limited v. Republic of Bulgaria*, Order, ICSID Case No. ARB/03/24, 6 September 2005, at **Exhibit CLA-10**, p. 13 (para. 40) (emphasis added).

³⁰ *Plama Consortium Limited v. Republic of Bulgaria*, Order, ICSID Case No. ARB/03/24, 6 September 2005, at **Exhibit CLA-10**, p. 15 (para. 45).

³¹ See e.g. *Emilio Agustín Maffezini v. Kingdom of Spain*, Procedural Order No.2, ICSID Case No. ARB/97/7, 28 October 1999, at **Exhibit CLA-6**, p. 4 (paras. 23-24); *Churchill Mining PLC v Republic of Indonesia*, Procedural Order No 3, ICSID Case No ARB/12/14, 4 March 2013, at **Exhibit RLA-12**, p. 14 *et seq.* (paras. 47-50).

- 37 Here, the Claimants cannot bring tax claims because the Canada-Romania BIT expressly excludes such claims. Article XII(1) of the BIT provides that, “[e]xcept as set out in this Article, **nothing in this Agreement shall apply to taxation measures.**” “Nothing” here means nothing – including requests for interim relief based on taxation measures.
- 38 In *Encana v. Ecuador*, the tribunal interpreted an identical provision in the Canada-Ecuador BIT.³² It held that a “taxation measure” included measures pertaining to indirect taxes such as VAT and that, accordingly, they were also excluded from the scope of the BIT:

“There is no reason to limit the term ‘taxation’ to direct taxation, nor did the Claimant suggest it should be so limited. Thus **indirect taxes such as VAT are included.**”

Having regard to the breadth of the defined term ‘measure’, there is no reason to limit Article XII(1) to the actual provisions of the law which impose a tax. **All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of ‘taxation measures.’** Thus tax deductions, allowances or rebates are caught by the term.

The question whether something is a tax measure is primarily a question of its legal operation, not its economic effect. A taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes. The economic impacts or effects of tax measures may be unclear and debatable; nonetheless **a measure is a taxation measure if it is part of the regime for the imposition of a tax. A measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place.** In the case of VAT, the Tribunal does

³² *EnCana Corporation v. Ecuador*, Award and Partial Dissenting Opinion, LCIA Case No UN3481, 3 February 2006, at **Exhibit RLA-13**, p. 24 (para. 108).

not accept that the system of collection and recovery of VAT, even if it may be revenue-neutral for the intermediate manufacturer or producer, is any less a taxation measure at each stage of the process. A law imposing an obligation on a supplier to charge VAT is a taxation measure; likewise **a law imposing an obligation to account for VAT received, a law entitling the supplier to offset VAT paid to those from whom it has purchased goods and services, as well as a law regulating the availability of refunds of VAT resulting from an imbalance between an individual's input and output VAT.**³³

- 39 Thus, in the light of the *Encana v. Ecuador* decision, which as noted above is based on an identical provision in the Canada-Ecuador BIT, insofar as the provisional relief sought by the Claimants relates specifically to measures ordering the payment of VAT (versus ordinary or direct taxes), such claims may not be brought under the Canada-Romania BIT.
- 40 If the Claimants cannot show the Tribunal's *prima facie* jurisdiction to order relief in relation to the measures that are alleged to aggravate the dispute, those measures cannot have a bearing on a tribunal's assessment of whether or not the dispute is being aggravated or extended. As the Taxation Measures cannot become part of the present "dispute" under the Canada-Romania BIT (as the Tribunal has no jurisdiction over them), the same measures cannot "aggravate" the present dispute.
- 41 Article XII of the Canada-Romania BIT provides limited exceptions to the principle of exclusion of taxation measures from its scope. First, if the investor concluded a tax agreement with the tax administration of a contracting Party, a claim for breach of that tax agreement can be brought under the treaty unless there is a joint determination by Romania and Canada that the measure is not in breach of the tax agreement (Article XII(3)). Second, a claim for expropriation under the BIT is possible in

³³ *EnCana Corporation v. Ecuador*, Award and Partial Dissenting Opinion, LCIA Case No UN3481, 3 February 2006, at [Exhibit RLA-13](#), p. 31 (para. 142) (emphasis added).

relation to tax measures only if the taxation authorities of Romania and Canada are notified that the investor disputes the taxation measure within 6 months and both authorities do not jointly determine that the measure is not an expropriation (Article XII(4)). To bring claims relating to taxation measures in these exceptional circumstances, an investor must meet the conditions set out in Article XII(5).³⁴ Article XIII(3)(c) expressly precludes claims that do not comply with the requirements set out in Article XII(5):

“An investor may submit a dispute as referred to in paragraph I to arbitration in accordance with paragraph 4 only if (...) if the matter involves taxation, the conditions specified in paragraph 5 of Article XII (Taxation Measures) have been fulfilled.”

- 42 Here, the exceptions in Article XII do not apply and the Claimants have certainly not met the conditions of Article XII(5) for bringing such claims.³⁵ The Claimants have never raised any claim against Romania in relation to the Taxation Measures and any such claim would be barred under Articles XII and XIII(3)(c) of the Canada-Romania BIT. The Taxation Measures cannot *per se* aggravate the existing dispute – they form a **new and separate dispute**, if any, which falls to be decided by Romanian courts only, as the *Encana* tribunal confirmed in similar circumstances:

“On the other hand, as the Respondent stressed, **the Tribunal is not a court of appeal in Ecuadorian tax matters**, and provided a matter is sufficiently clearly connected to a taxation law or regulation (or to a procedure, requirement or practice of the taxation

³⁴ [Canada-Romania BIT](#), at [Exhibit C-1](#), p. 14, Art. XII(5): “If the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in paragraphs 3 and 4 within six months after being notified, the investor may submit its claim for resolution under Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party).”

³⁵ See *EnCana Corporation v. Ecuador*, Award and Partial Dissenting Opinion, LCIA Case No UN3481, 3 February 2006, at [Exhibit RLA-13](#), p. 24 (para. 110).

authorities in apparent reliance on such a law or regulation), **then its legality is a matter for the courts of the host State.**³⁶

- 43 Accordingly, the Claimants' allegation that the Taxation Measures will "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"³⁷ is incorrect in that there cannot be any such "taking" based on taxation measures, the Tribunal having no jurisdiction under Articles XII(1), (4) and (5) as well as Article XIII(3)(c) of the Canada-Romania BIT to decide any such claim. Furthermore, the Claimants' allegation that they "still may assert additional claims" (presumably relating to the Taxation Measures) is unfounded.³⁸ Any measure not notified to Romania prior to or in the Notice of Dispute³⁹ or otherwise covered by the waiver of claims required under Articles XIII(3)(b) and XIII(12)(a)(iii)⁴⁰ are not part of the claims falling

³⁶ *EnCana Corporation v. Ecuador, Award and Partial Dissenting Opinion*, LCIA Case No UN3481, 3 February 2006, at **Exhibit RLA-13**, p. 31 (para. 142).

³⁷ *Claimants' Second Request for Provisional Measures*, p. 26 (para. 61).

³⁸ *Claimants' Second Request for Provisional Measures*, p. 26 (para. 61) and p. 33 (para. 78).

³⁹ *Letter from Gabriel addressed to the President of Romania and to the Prime Minister of Romania dated and delivered on Jan. 20, 2015 dated 20 January 2015*, at **Exhibit C-8**; *Gabriel Canada's Waiver in Support of Its Request for Arbitration dated 17 July 2015*, at **Exhibit C-6**.

⁴⁰ *Canada-Romania BIT*, at **Exhibit C-1**, p. 15, Art. XIII(3)(b): "An investor may submit a dispute as referred to in paragraph I to arbitration in accordance with paragraph 4 only if (...) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind"; *Canada-Romania BIT*, at **Exhibit C-1**, p. 17, Art. XIII(12)(a)(iii): "A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person constituted or duly organized under the applicable laws of that Contracting Party' has incurred loss or damage by reason of, or arising out of, that breach, may be brought by an investor of the other Contracting Party acting on behalf of an enterprise which the investor owns or controls directly or indirectly. In such a case (...) both the investor and enterprise must waive any right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind (...)"

to be decided in this arbitration.⁴¹ Moreover, under Article XII(1) of the Canada-Romania BIT, the Tribunal would in any event have no jurisdiction over any claims based on taxation measures.

- 44 That a claimant cannot bring new claims without the required waivers is particularly relevant where relief is available under domestic law against the “new” disputed measure, and where a claimant has confirmed that it intends to pursue those rights **in parallel with** its application for interim relief, which is the case here:

“RMGC intends to challenge vigorously the VAT assessment in Romania through appropriate administrative and legal means. (...) Gabriel and RMGC intend to pursue options to seek a stay of such enforcement pending RMGC’s challenge to the underlying VAT assessment, including through the above-mentioned provisional measures”⁴²

- 45 In effect, RMGC filed on 5 August 2016 an administrative challenge before Romanian tax authorities against the tax assessment.
- 46 In conclusion, there is no “aggravation” of the dispute as the Taxation Measures are unrelated to the dispute before the Tribunal and will be decided by the competent Romanian administrative authorities and courts. As to the request for provisional (including the emergency) relief sought, it must be dismissed on a *prima facie* basis as there is no nexus whatsoever between the relief sought by the Claimants and the claims that they have advanced in this arbitration.

⁴¹ See *EnCana Corporation v. Ecuador*, Partial Award on Jurisdiction, LCIA Case No UN3481, 27 February 2004, at **Exhibit RLA-14**, p. 11 (paras. 17-18).

⁴² Gabriel Resources, "Management's discussion and analysis - Second Quarter 2016", at **Exhibit R-20**, p. 3.

3.2 The Taxation Measures cannot threaten the procedural integrity of the arbitration

47 As the Claimants cannot show a substantive legal basis for the provisional (including emergency) relief they seek, they present their provisional relief claims as motivated by an alleged threat to the procedural integrity of the arbitration. Although the link between the Claimants' alleged right to procedural integrity of this arbitration and the Taxation Measures is less than clearly explained in the Claimants' Second Request, there would appear to be four main contentions in support of the allegation of jeopardy of procedural integrity:

- That the Taxation Measures will “deprive RMGC of the ability to access core documents that are centrally relevant to the dispute (...) [and] would seriously impair Claimants' access to documentary evidence and would profoundly prejudice Claimants' ability to present their claims in this case”;⁴³
- That the Taxation Measures will force Gabriel to divert part of its limited resources to thereby “impairing Gabriel's ability to present its case in this forum.”;⁴⁴
- That the Taxation Measures “may seriously impair Claimants' ability to proffer witnesses in support of their claims”;⁴⁵ and,
- That the Taxation Measures “have caused Gabriel to divert attention away from preparing to present its case to responding to Respondent's investigations”.⁴⁶

⁴³ [Claimants' Second Request for Provisional Measures](#), p. 20 (para. 49).

⁴⁴ [Claimants' Second Request for Provisional Measures](#), p. 21 (para. 50).

⁴⁵ [Claimants' Second Request for Provisional Measures](#), p. 21 (para. 51).

⁴⁶ [Claimants' Second Request for Provisional Measures](#), p. 21 (para. 51).

- 48 As shown in Section 5 below, even if taken at face value, none of these allegations jeopardizes the procedural integrity of this arbitration, whether they are considered individually or in the aggregate.
- 49 As for the alleged rights in peril, the Claimants attempt to draw a parallel between the Taxation Measures and the circumstances discussed in other ICSID cases. They allege that “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 warrant an order of provisional measures.⁴⁷ They rely on the arbitral decisions in *Cementownia v. Turkey*, *Methanex v. USA*, *EDF v. Romania*, *Libananco v. Turkey*, *Fraport v. Philippines* (annulment decision), *Quiborax v. Bolivia*, *Churchill Mining v. Indonesia* in support of their argument.⁴⁸
- 50 However, these cases do not support the Claimants’ argument in their Second Request.
- 51 In *Cementownia v. Turkey*, the obligation to arbitrate in good faith was discussed in the context of a fraudulent claim filed by the foreign investor against Turkey.⁴⁹ In addition, this discussion did not arise in the context of a request for provisional measures and thus has no bearing on the present matter. Similarly, 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.⁵⁰ In the present case, the Claimants do not allege that Romania obtained documents in breach of its laws, let alone that it will try to rely on an illegally obtained document during the arbitration.

⁴⁷ Claimants' Second Request for Provisional Measures, p. 21 (para. 52).

⁴⁸ Claimants' Second Request for Provisional Measures, p. 21 *et seq.* (paras. 52-56).

⁴⁹ *Cementownia v. Turkey*, Award, ICSID Case No. ARB(AF)/06/2, 17 September 2009, at **Exhibit CLA-24**, p. 45 (paras. 156-157).

⁵⁰ *Methanex v. USA*, Final Award on Jurisdiction and Merits, UNCITRAL, 3 August 2005, at **Exhibit CLA-30**, Part II, Chapter I, p. 26 *et seq.* (paras. 54-55); *EDF v. Romania*, Procedural Order No. 3, ICSID Case No. ARB/05/13, 29 August 2008, at **Exhibit CLA-27**, p. 21 (paras. 38-39).

- 52 In *Fraport v Philippines*, the *ad hoc* committee confirmed that the right to present one's case requires both equality of arms and the proper participation of the contending parties in the procedure.⁵¹ The *ad hoc* committee went on to confirm that a tribunal is required to "afford both parties the opportunity to make submissions where new evidence is received and considered by the tribunal to be relevant to its final deliberations."⁵² This holding is not relevant in this case because, first, the Claimants' Second Request does not allege that the Claimants have been or will be prevented by Romania from commenting on any evidence. Second, the question of equality of arms is not at stake as the Claimants have not even begun to allege how the equality of arms would be undermined or put at risk by the Romanian authorities taking decisions in accordance with Romanian law in their ordinary course of business.
- 53 In *Quiborax v Bolivia*, the tribunal recommended that Bolivia suspend criminal proceedings against a number of named individuals and any other criminal proceedings directly related to the arbitration.⁵³ When deciding the application for provisional measures, the tribunal found that the "criminal proceedings appear to be part of a defense strategy adopted by Bolivia with respect to the ICSID arbitration".⁵⁴ The Claimants have made no such showing in this case, nor could they.
- 54 Furthermore, in that case unlike in the present arbitration, the tribunal was seized with a claim for breach of the relevant BIT based on the crim-

⁵¹ *Fraport Airport v. the Philippines*, Decision on the Application for Annulment, ICSID Case No. ARB/03/25, 23 December 2010, at **Exhibit CLA-28**, p. 75 (para. 202).

⁵² *Fraport Airport v. the Philippines*, Decision on the Application for Annulment, ICSID Case No. ARB/03/25, 23 December 2010, at **Exhibit CLA-28**, p. 75 (para. 202).

⁵³ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Decision on Provisional Measures, ICSID Case No. ARB/06/2, 26 February 2010, at **Exhibit CLA-11**, p. 46 (para. 1).

⁵⁴ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Decision on Provisional Measures, ICSID Case No. ARB/06/2, 26 February 2010, at **Exhibit CLA-11**, p. 35 (para. 122).

inal investigations undertaken by Bolivia.⁵⁵ The tribunal eventually dismissed that claim and also confirmed that the assumptions underlying its earlier order for provisional measures proved to be unwarranted:

“Under the circumstances, the Tribunal is not convinced that it should issue a declaration of breach of the duty to arbitrate in good faith. First, the Tribunal does not find that the Respondent breached its duty to arbitrate in good faith by initiating or failing to suspend the criminal proceedings. As the Tribunal has emphasized on several occasions, **Bolivia has the sovereign prerogative to prosecute crimes on its territory, and such prerogative is not barred by the BIT or ICSID Convention.** Given the existence of discrepancies in NMM’s corporate records, **the Tribunal cannot conclude that Bolivia’s sole purpose in initiating the criminal proceedings was to frustrate the Claimants’ rights in this arbitration. More importantly, the criminal proceedings did not cause actual harm to the Claimants’ procedural rights.**”⁵⁶

- 55 In *Churchill Mining v. Indonesia*, the claimant requested the tribunal to order provisionally that Indonesia refrain from threatening or commencing any criminal investigation or prosecution against the claimants, their witnesses or any person associated with the claimants’ operations in Indonesia, and that Indonesia suspend or stay any pending criminal investigation against the claimants’ and their associates.⁵⁷ The tribunal refused the request for provisional measures because, *inter alia*, the urgency and necessity requirements were not met since the claimants’ rights were not

⁵⁵ *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, Award, ICSID Case No ARB/06/2, 16 September 2015, at **Exhibit RLA-15**, p. 64 (paras. 305-306).

⁵⁶ *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, Award, ICSID Case No ARB/06/2, 16 September 2015, at **Exhibit RLA-15**, p. 114 (paras. 594).

⁵⁷ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, Procedural Order No. 14, ICSID Case No. ARB/12/14 and 12/40, 22 December 2014, at **Exhibit CLA-25**, p. 1 (para. 1).

affected by the proceedings against the claimants' local partners.⁵⁸ Similarly, here, the Claimants seek provisional relief with regard to RMGC, which is not a party to this arbitration. The Claimants' rights in this arbitration are not and will not be affected by the proceedings against RMGC.

- 56 In conclusion, Romania 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. Both Parties should enjoy equality of arms and have the right to proper participation in the procedure. None of those rights is threatened by the Taxation Measures, as shown below.

4 ALTHOUGH THE CANADA-ROMANIA BIT EMPOWERS A TRIBUNAL TO RECOMMEND INTERIM RELIEF, IT EXCLUDES INTERIM ENJOINMENT OF MEASURES

- 57 The Claimants allege that the Taxation Measures are contrary to the BIT, including Romania's obligation to arbitrate this dispute in good faith.⁵⁹ They allege that their substantive right to the non-aggravation of the dispute is in peril and that their right under the arbitration agreement to the procedural integrity of the arbitration is "threaten[ed]."⁶⁰
- 58 As explained in the Respondent's Observations to the Claimants' First Request, the Canada-Romania BIT empowers a tribunal to order interim measures.⁶¹ It also expressly addresses the issue of whether Romania can be enjoined from taking measures alleged to constitute a breach of the BIT. Under Article XIII(8) of the Canada-Romania BIT, interim

⁵⁸ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, Procedural Order No. 14, ICSID Case No. ARB/12/14 and 12/40, 22 December 2014, at **Exhibit CLA-25**, p. 26 (para. 89).

⁵⁹ *Claimants' Second Request for Provisional Measures*, p. 18 (para. 42).

⁶⁰ *Claimants' Second Request for Provisional Measures*, p. 18 (para. 43).

⁶¹ *Respondent's Observations to Claimants' Request for Provisional Measures dated 3 August 2016*, p. 30 (para. 91).

measures can only be ordered if there is a risk of harm to a right of a disputing party.

“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 (...).”

- 59 The right to the “non-aggravation of the dispute” or the right to “procedural integrity” of the arbitration equally fall under Article XIII(8), in that the provision encompasses substantive (rights “of a disputing party”) and procedural rights of a party (right “to ensure that the tribunal’s jurisdiction is made fully effective”). However, irrespective of the right in peril, that right cannot be enforced by means of an order for interim relief:

“(...) A tribunal may not (...) enjoin the application of the measure alleged to constitute a breach of this Agreement.”

- 60 Stated differently, a tribunal may not enjoin the State from applying a measure which an applicant for interim relief contends amounts to a breach of the BIT. If the provisional relief sought (including the Emergency Measures) does not relate to the claims in this arbitration, the exclusion contained in Article XIII(8) applies *a fortiori* to measures unrelated to the dispute. In other words, a tribunal may recommend measures to be taken by the State, but it cannot enjoin the application of any measure that is allegedly in breach of the BIT.

- 61 When interpreting the equivalent NAFTA provision from which Article XIII(8) derives,⁶² the *Feldman v Mexico* tribunal confirmed that an

⁶² [North American Free Trade Agreement, Chapter 11, at Exhibit RLA-16](#), p. 10 ; Art. 1134 of NAFTA regarding “Interim Measures of Protection” provides 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 of the measure alleged to consti-

ICSID tribunal is barred from enforcing rights through interim relief. In that case, the claimant had requested the tribunal to order the respondent to “immediately cease and desist for the duration of this arbitration from any interference with Claimant or his property or with [the investor’s local company’s] assets or revenues, whether by embargo or by any other means”.⁶³ The tribunal confirmed that NAFTA did not permit granting such relief:

“The Tribunal has deliberated on the Claimant’s request for provisional measures and finds unanimously that an order for such measures in the terms requested by the Claimant (i.e., for the Respondent to refrain from any interference by any means with Claimant or his property) **would not be consistent with the limitations imposed by NAFTA Article 1134, since such an order would entail an injunction of the application of the measures** which in this case are alleged to constitute a breach (...)”⁶⁴

- 62 With regard to the same NAFTA provision, the *Pope & Talbot* tribunal reached a similar conclusion:

“Article 1134 of NAFTA does not confer jurisdiction on the Tribunal to enjoin the application of a measure. Since the relief requested is, in the view of the Tribunal, to enjoin the application of the measure which is the quota regime and its implementation, **the Tribunal takes the view that it lacks the power to grant such relief.**”⁶⁵

tute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.”

⁶³ *Martin Roy Fedlman Karpa v. United Mexican States*, Procedural Order No. 2, ICSID Case No. ARB(AF)/99/1, 3 May 2000, at **Exhibit RLA-17**, p. 1 (para. 3).

⁶⁴ *Martin Roy Fedlman Karpa v. United Mexican States*, Procedural Order No. 2, ICSID Case No. ARB(AF)/99/1, 3 May 2000, at **Exhibit RLA-17**, p. 2 (para. 5) (emphasis added).

⁶⁵ *Pope & Talbot, Inc. (U.S.) v. Canada*, Ruling by Tribunal on Claimant’s Motion for Interim Measures, UNCITRAL, 7 January 2000, at **Exhibit RLA-18**, p. 1 (para. 1).

63 The Claimants contend that the measures sought in the Second Request aim to prevent a “taking” of their alleged investment (i.e. RMGC) by Romania: “(...) the effective taking of RMGC by the State and the liquidation of Gabriel’s investment in Romania.”⁶⁶ Thus, on the Claimants’ own case, the provisional relief sought (including the Emergency Measures) entails an injunction vis-à-vis measures which purportedly constitute a breach under the BIT. In this case, the provisional relief sought by the Claimants (including the Emergency Measures) is excluded by Article XIII(8) of the Canada-Romania BIT. The Claimants’ characterization of the provisional measures (including the Emergency Measures) as also linked to the procedural integrity of the arbitration cannot circumvent the application of Article XIII(8).

5 THE REQUIREMENTS FOR PROVISIONAL MEASURES (INCLUDING EMERGENCY MEASURES) ARE NOT MET

64 As explained above, the ICSID Convention and ICSID Rules do not provide for **emergency temporary** provisional measures. Neither do either of the two BITs in this case.

65 With respect to ordinary provisional measures, as noted in the Respondent’s Observations to the First Request, under the ICSID Convention and the ICSID Rules, an applicant must make a *prima facie* showing that the Tribunal has jurisdiction as well as demonstrate that the measures sought (i) seek to protect a right and are (ii) necessary, (iii) urgent, and (iv) proportional.⁶⁷

66 In order to obtain emergency temporary provisional measures, an applicant must necessarily also show that these requirements are met. Indeed, the same requirements apply *a fortiori* to a request for emergency

⁶⁶ Claimants' Second Request for Provisional Measures, p. 26 (para. 61).

⁶⁷ Respondent's Observations to Claimants' Request for Provisional Measures dated 3 August 2016, p. 27 *et seq.* (para. 85).

relief, for which the applicant has the additional burden of making a heightened showing of urgency, such that the relief requested cannot await the Tribunal's decision on the Claimants' Second Request.⁶⁸ While the Respondent will respond in full to the Claimants' request for provisional measures by 17 August 2016, it addresses these requirements briefly below as applicable to the Claimants' request for Emergency Measures. As demonstrated below, the Claimants have failed to make the requisite showing with respect to their request for Emergency Measures.

5.1 The Tribunal does not have jurisdiction to issue the provisional measures (including the emergency measures) sought

- 67 An applicant seeking provisional measures must demonstrate that the tribunal has *prima facie* jurisdiction to issue the measures sought. As explained in the Respondent's Observations to the Claimants' First Request, in ICSID arbitration, there is no presumption of jurisdiction and the Claimants have the burden of proving all the facts upon which jurisdiction depends.⁶⁹
- 68 Notably, in their Second Request, the Claimants do not even attempt to explain on what basis the Tribunal could assert jurisdiction so as to render the provisional relief (including the emergency relief) sought. In fact, it is *prima facie* clear that the Tribunal does not have jurisdiction *ratione materiae*, under the Canada-Romania BIT, over tax measures, as explained above.⁷⁰ Accordingly, on this basis alone, the entirety of the Claimants' request for provisional relief (including emergency relief) should be rejected.

⁶⁸ [Ceskoslovenska Obchodni Banka AS v Slovakia](#), Procedural Order No 2, ICSID Case No. ARB/97/4, 9 September 1998, at [Exhibit RLA-19](#), p. 5 (paras. 9-10) (denying request for emergency interim restraining measures on the grounds that it "ha[d] no reason to assume" that a domestic court would fail to suspend a hearing prior to the tribunal's decision on the request for provisional measures).

⁶⁹ [Respondent's Observations to Claimants' Request for Provisional Measures dated 3 August 2016](#), p. 27 *et seq.* (para. 85).

⁷⁰ *See supra* paras. 36 and 37.

5.2 The Claimants' rights are not in peril and there is no threat to the procedural integrity of the arbitration

5.2.1 The ability to access RMGC's documents

69 The Claimants contend that, absent the provisional relief sought, the Taxation Measures will “deprive RMGC of the ability to access core documents that are centrally relevant to the dispute.” This contention is, however, based on a series of assumptions that remain entirely unexplained and unjustified, namely:

- i) That the tax enforcement measures will not be stayed by Romanian authorities further to RMGC appeal of 5 August 2016;
- ii) That the enforcement measures will prompt RMGC's insolvency;
- iii) That RMGC's creditors would not approve a reorganization plan;
- iv) That RMGC would enter into bankruptcy; and
- v) That a judicial administrator would be appointed for RMGC.⁷¹

70 It is only if all of the parts of this chain of events occur that, on the Claimants' own case, “Gabriel would lose control of RMGC and its books and records.”⁷² As this complex “but for” interim measures scenario is not alleged to materialize immediately, let alone pending the resolution of the Second Request, it is clear that there is no peril to the Claimants' ability to access documents held by RMGC or any threat to the procedural integrity of the arbitration.

5.2.2 The need to divert financial resources

71 The second “right” of the Claimants which is allegedly in peril is their alleged right not to divert part of their “limited” resources to avoid the tax enforcement measures. In reality, the “limited resources” to which the

⁷¹ [Claimants' Second Request for Provisional Measures](#), p. 19 *et seq.* (paras. 48-49).

⁷² [Claimants' Second Request for Provisional Measures](#), p. 20 (para. 49).

Claimants refer are the following, based on the Gabriel Canada's Management Discussion and Analysis Report issued a few days ago and available on its website:

“In order to strengthen and improve the financial position of the Company and to provide funding to pursue the ICSID Arbitration, and for general working capital purposes, the Company closed the following transactions during the course of 2016, **raising aggregate gross proceeds of \$60.625 million (...)**”⁷³

- 72 The Claimants do not claim that RMGC would need to **pay** now the amount of USD 6,658,000 (plus interest and penalties); they merely state that they would need to **post a guarantee** [REDACTED].⁷⁴ That in itself undermines the argument that RMGC (or the Claimants) need to immediately “divert” any funds as a result of the Tax Measures.
- 73 Even if RMGC needed to make a payment, the Claimants' funding would not necessarily be required – a number of other regular corporate financing options could be envisaged by RMGC, including a bank loan or an increase in the share capital. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- 74 In any event, even assuming that the Claimants were called upon to lend funds to RMGC to cover the possible tax liability, that amount is not significant considering the aggregate amount of funds of which the Claimants currently dispose. Finally, the Claimants do not explain how a loan to RMGC to cover the USD 6,658,000 (plus interest and penalties) would immediately impact their pursuit of the claims in the arbitration.

⁷³ Gabriel Resources, "Management's discussion and analysis - Second Quarter 2016", at **Exhibit R-20**, p. 3. The amount of CAD 60,625,000 corresponds to USD 46,077,800 at today's relevant currency exchange rates.

⁷⁴ Claimants' Second Request for Provisional Measures, p. 4 (para. 9).

⁷⁵ Claimants' Second Request for Provisional Measures, p. 38 (para. 88).

- 75 Consequently, there is no peril whatsoever to the Claimants' ability to fund the pursuit of their claims in the arbitration, nor is there any demonstrated threat to the procedural integrity of the arbitration.

5.2.3 The ability to proffer witnesses

- 76 The Claimants allege that, absent the provisional relief sought, the Taxation Measures "may seriously impair Claimants' ability to proffer witnesses in support of their claims".⁷⁶ They refer in this regard to the allegedly [REDACTED]

[REDACTED] which has purportedly [REDACTED]

- 77 Insofar as the Claimants complain about **past** conduct of the Romanian tax authorities, there is no correlation between the provisional measures sought and the alleged right still in peril. Furthermore, there is no need at this stage of the proceedings to "proffer witnesses" and it is unclear why the alleged [REDACTED] would not affect both parties similarly insofar as Romania is also a shareholder in RMGC and may similarly need to proffer witnesses in the arbitration that are RMGC's employees.

- 78 Consequently, there is no threat to the Claimants' ability to proffer witnesses in the arbitration, nor is there any threat to the procedural integrity of the arbitration.

5.2.4 The need to divert attention away from preparing their case

- 79 The Claimants allege that "the nature and intensity of Respondent's investigations have caused Gabriel to divert attention away from preparing to present its case to responding to Respondent's investigations, in-

⁷⁶ [Claimants' Second Request for Provisional Measures](#), p. 21 (para. 51).

⁷⁷ [Claimants' Second Request for Provisional Measures](#), p. 21 (para. 51).

cluding by filing this Request.”⁷⁸ The Claimants do not explain, however, how any past investigations can threaten the procedural integrity of the arbitration in the future or how the provisional relief sought would neutralize that threat.

5.3 No necessity, urgency or proportionality of the provisional relief sought

80 Insofar as the Claimants cannot demonstrate the existence of a right in peril, they equally fail to establish the occurrence of harm absent the provisional measures, let alone an irreparable harm, that could not be addressed in the proper domestic forum and remedied insofar as it were contrary to Romanian law.

81 The absence of urgency is also evident insofar as the Claimants are seeking the same relief before Romanian administrative authorities in parallel with the Second Request. In addition, none of the facts forming the calamitous compound of assumptions alleged in the Claimants' Second Request has been proven to be imminent or even likely to occur.

82 As for proportionality, there can be no weighing of the balance of harm when the Claimants fail to show any right in peril requiring interim measures, as happens here.

6 PRAYER FOR RELIEF

83 The Respondent hereby respectfully requests that the Tribunal:

- a) dismiss the Claimants' request for emergency temporary provisional measures; and
- b) order that the Claimants bear the costs of this phase relating to its Second Request and compensate the Respondent for all costs it

⁷⁸ [Claimants' Second Request for Provisional Measures](#), p. 21 (para. 51).

incurred in relation thereto, including costs of legal representation.

Respectfully submitted,

10 August 2016

For and on behalf of

Romania

LALIVE



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Matthias Scherer
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