

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

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

Claimants

**VS.**

**ROMANIA**

Respondent

**ICSID CASE NO. ARB/15/31**

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

17 August 2016

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**Before:**

Ms Teresa Cheng (President)

Dr Horacio A. Grigera Naón

Professor Zachary Douglas

Secretary of the Tribunal

Ms Sara Marzal Yetano

**LALIVE**

**LEAUA & ASOCIATII**

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**TABLE OF ABBREVIATIONS AND DEFINED TERMS**

| <b>Term</b>             | <b>Definition</b>   |
|-------------------------|---|
| ANAF                    | National Agency for Fiscal Administration (“ <i>Agenția Națională de Administrare Fiscală</i> ”)  |
| CAD                     | Canadian dollars  |
| DGAF                    | Fiscal Antifraud Directorate General of ANAF (“ <i>Direcția Generală Antifraudă Fiscală</i> ”)  |
| Kadok Group             | Kadok Interpret SRL   |
| MFO                     | Municipality Fiscal Office (“ <i>Serviciul Fiscal Orășenesc</i> ”)  |
| PPPO                    | Ploiești Public Prosecutor's Office   |
| Principal VAT Directive | European Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ( <b>Exhibit R-39</b> )  |
| RON                     | Romanian lei  |
| Tax Procedure Code      | Romanian Tax Procedure Code dated 20 July 2015, enacted by Law no. 207/20 July 2015 and entering into force on 1 January 2016 ( <b>Exhibit R-33</b> ) (and repealing prior Tax Procedure Code dated 24 December 2003, enacted by Ordinance no. 92/24 December 2003 and entering into force on 1 January 2004) |
| Taxation Measures       | Anti-fraud and tax audits of RMGC and the VAT Assessment  |
| VAT Assessment          | ANAF decision dated 30 June 2016 finding RMGC liable for the payment of VAT, which RMGC had deducted on its purchase of goods and services between July 2011 to January 2016, in the amount of approximately RON 27 million ( <b>Exhibit C-42</b> )   |
| 2004 Fiscal Code        | Romanian Tax Code dated 22 December 2003 enacted by Law no. 571/22 December 2003, entering into force on 1 January 2004, repealed through Article 502 (1) of the Fiscal Code of 2016 ( <b>Exhibit R-34</b> )  |
| 2016 Fiscal Code        | Romanian Tax Code dated 8 September 2015 enacted by Law no. 227/8 September 2015, entering into force on 1 January 2016   |

## 1 INTRODUCTION

- 1 In accordance with the letter of the Tribunal dated 3 August 2016, Romania hereby submits its observations on the Claimants' Second Request for Provisional Measures dated 28 July 2016 (the "**Claimants' Second Request**").<sup>1</sup>
- 2 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.<sup>2</sup>
- 3 In accordance with the Tribunal's request, the Respondent submitted its comments on the Claimants' request for an order of emergency temporary provisional measures on 10 August 2016 (the "**Respondent's Comments on the Request for Emergency Relief**"). It now submits its observations regarding the Claimants' request for the following 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

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<sup>1</sup> Unless otherwise specified, the defined terms in this submission have the same meaning as put forward in the Respondent's Comments on the Request for Emergency Relief.

<sup>2</sup> Claimants' Second Request for Provisional Measures, p. 1 (para. 1) and p. 39 (para. 89) (requesting “...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.”).

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."<sup>3</sup>

- 4 As explained in the Respondent's Comments on the Request for Emergency Relief, the basis for the Claimants' Second Request is thus primarily the so-called "VAT Assessment," which they describe as a decision by Romania's National Agency for Fiscal Administration (the "ANAF") served on RMGC on 7 July 2016. That assessment found RMGC liable for the payment of VAT, which RMGC had deducted on its purchase of goods and services between July 2011 to January 2016, in the amount of approximately RON 27 million (approximately USD 6.7 million)."<sup>4</sup> This report was the result of investigations by ANAF between March and June 2016.<sup>5</sup>

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<sup>3</sup> Claimants' Second Request for Provisional Measures, p. 39 (para. 89).

<sup>4</sup> Claimants' Second Request for Provisional Measures, p. 3 (para. 8).

<sup>5</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 7.

- 5 As noted above, the Claimants' request for provisional measures also relates to ANAF anti-fraud investigations into RMGC's activities.<sup>6</sup>
- 6 The Claimants' requests for emergency relief and provisional measures vastly overlap in substance. In terms of emergency relief, they have requested that the Tribunal recommend that Romania "refrain from taking any measures of enforcement of the VAT Assessment,"<sup>7</sup> while, as noted above, in terms of (ordinary) provisional measures, they request that the Tribunal recommend that Romania "refrain from taking any action in connection with the VAT Assessment."<sup>8</sup>
- 7 Given this overlap, the Respondent's present submission necessarily in turn overlaps in substance with its Comments on the Request for Emergency Relief. For the avoidance of doubt, this submission fully incorporates by reference the arguments and evidence proffered in its Comments on the Request for Emergency Relief. The present submission seeks to supplement and expound upon, as appropriate and relevant to a request for ordinary provisional measures, the factual evidence and legal arguments previously put forward, respectively.
- 8 The Claimants' request for provisional measures should be rejected for **two** main reasons.
- 9 **First**, as explained in its Comments on the Request for Emergency Relief, 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

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<sup>6</sup> The fiscal and anti-fraud investigations, together with the VAT Assessment, are referred to as the "**Taxation Measures**."

<sup>7</sup> Claimants' Second Request for Provisional Measures, p. 39 (para. 89).

<sup>8</sup> Claimants' Second Request for Provisional Measures, p. 40 (para. 90(e)).





would need but fail to show any violation of Romanian law by the Respondent. In the absence of such a showing, their request for provisional measures necessarily fails.

- 13 Furthermore, as noted in the Respondent's Comments on the Claimants' Request for Emergency Relief, the Claimants cannot use this arbitration as a pretext to avoid compliance with decisions taken by competent Romanian authorities taken in accordance with the applicable Romanian law pending the completion of the arbitration.<sup>12</sup> The Claimants' initiation of these arbitration proceedings does not render them immune from measures legitimately taken by Romanian authorities in accordance with the applicable law – in particular, measures not rendered against them directly (but rather against a related entity, RMGC) and unrelated to this 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 bilateral investment treaties, including those at issue in this case.
- 14 **Second**, the requirements for granting provisional relief in accordance with the ICSID Convention and Rules are not satisfied. As explained in detail in the Respondent's Comments on the Request for Emergency Relief,<sup>13</sup> the Claimants' request for provisional relief is 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. Indeed, the Canada-Romania BIT expressly specifies that the protections granted thereunder do not extend to issues relating to taxation measures.<sup>14</sup> This carve-out applies to not only substantive claims, but also requests for interim

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<sup>12</sup> See Respondent's Comments on the Request for Emergency Relief, p. 3 *et seq.* (para. 11).

<sup>13</sup> See Respondent's Comments on the Request for Emergency Relief, p. 25 *et seq.* (Section 5).

<sup>14</sup> See Canada-Romania BIT, at **Exhibit C-1**, p. 13 (Art. XII(1)); See also Respondent's Comments on the Request for Emergency Relief, p. 10 *et seq.* (discussing this carve-out).

relief (including emergency relief) relating to taxation measures. Indeed, Article XII(1) of that BIT specifies that “nothing in this Agreement shall apply to taxation measures;” “nothing” necessarily includes any form of interim relief (which is referred to in Article XIII(8) of that BIT).<sup>15</sup> Thus, although it is undisputed that a tribunal must have *prima facie* jurisdiction to order provisional measures,<sup>16</sup> the Claimants have not even attempted to show and indeed cannot make such a showing in relation to their Second Request.

- 15 Since the Respondent's submission of its Comments on the Request for Emergency Relief, the Claimants have sought to salvage their claims for provisional (including emergency) relief by invoking the UK-Romania BIT.<sup>17</sup> This BIT does not contain the carve-out regarding taxation measures that the Canada-Romania BIT contains. Thus, although the Claimants were silent on this issue in their Second Request, they now claim that Gabriel Jersey requests the relief sought and that the limitations contained in the Canada-Romania BIT do not apply to Gabriel Jersey.<sup>18</sup>
- 16 However, as the Respondent has been compelled to since note, the Claimants have chosen to consolidate these proceedings and not to distinguish in their Second Request between the two BITs. They cannot pick and choose which provisions of which BITs they deem more favourable. Just as they accept that the transparency provisions of the Canada-Romania BIT apply to Gabriel Jersey, so too must the carve-out for taxation measures. Otherwise, Gabriel Canada would be able to piggy back off the UK-Romania BIT and the express terms of the Canada-Romania BIT would be rendered meaningless and ineffective. If the Claimants

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<sup>15</sup> See also Claimants' Letter to the Tribunal dated 12 August 2016.

<sup>16</sup> Claimants' First Request, p. 6 (para. 14).

<sup>17</sup> The Claimants' Letter to the Tribunal dated 11 August 2016 contained three enclosures (annexes “A”, “B”, and “C”). These three documents have been refiled by the Respondent as **Exhibit R-21**, **Exhibit R-22**, and **Exhibit R-23**, respectively.

<sup>18</sup> Claimants' Letter to the Tribunal dated 12 August 2016; see also Claimants' Letter to the Tribunal dated 11 August 2016.

wish to rely on the purportedly more favourable provisions in the UK-Romania BIT, they should not have consolidated their claims.

- 17 Consolidation of arbitral proceedings is a procedural mechanism. Consolidation is thus possible where and insofar as the underlying BITs do not prevent such consolidation and are not contradictory with respect to procedural issues. Stated differently, where two BITs differ (or contradict each other) with respect to their **procedural provisions**, proceedings resulting therefrom may not be consolidated.
- 18 This situation must be distinguished from two other situations.
- 19 **First**, the situation of conflicting procedural BIT provisions must be distinguished from cases involving more than one BIT where one of the BITs contains a procedural provision, which the other BIT does not contain and about which it is silent. While consolidation is possible in such cases, it is the more restrictive or narrow provision that must apply.
- 20 Here, the Canada-Romania BIT contains a procedural provision about an issue on which the UK-Romania BIT is silent. The Canada-Romania BIT prohibits the granting of interim relief in connection with taxation measures, whereas the UK-Romania BIT is silent on the issue.<sup>19</sup> Accordingly, because the Canada-Romania BIT is the more restrictive treaty in this regard, its provisions must apply; otherwise the provisions of the treaty containing the more restrictive provisions – the Canada-Romania BIT – would be disregarded. On the other hand, the more restrictive provisions of the Canada-Romania BIT do not contradict any provisions in the UK-Romania BIT and thus are consistent with it.
- 21 **Second**, the situation of conflicting procedural BIT provisions must be distinguished from cases involving differences between **substantive** BIT

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<sup>19</sup> Excerpt from R. Volterra, "Provisional measures (interim Measures) and Investment Treaty Arbitration under ICSID and UNCITRAL: Developments and Trends", in A. K. Bjorklund *et al.* (eds.) *Investment Treaty Law: Current Issues III*, (BIICL, 2009) 17 (excerpt), at **Exhibit RLA-20** (describing provisional measures as "procedural safeguards").

provisions. The fact that one BIT may contain different substantive protections from the other does not preclude consolidation since, as noted above, consolidation is a matter of procedure, not substance. Indeed, substantive claims made by different claimants under different BITs must, and can only, be decided in accordance with the substantive provisions of the applicable BIT.

- 22 Thus, here, Gabriel Jersey's substantive claims must be considered under the UK-Romania BIT and Gabriel Canada's claims must be considered under the Canada BIT. Since the proceedings are, however, consolidated, the same procedural rules must apply to both claimants.
- 23 Accordingly, the Claimants may not invoke and seek to rely solely on the UK-Romania BIT for purposes of their Second Request, which is a procedural request for interim relief. Nor may they circumvent the more restrictive provisions of the Canada-Romania BIT which expressly exclude the procedural relief they seek.
- 24 Thus, for jurisdictional reasons alone, the Claimants' Second Request should be summarily dismissed: the procedural device sought by the Claimants – interim relief against taxation measures – is not available in this consolidated arbitration.
- 25 The Claimants also fail to demonstrate that their rights would be in peril or that there would be a threat to the procedural integrity of this arbitration, absent a grant of the requested provisional measures. They fail to demonstrate that the requested measures are necessary, that the circumstances are urgent or that the requested measures are proportional to the purported threats.
- 26 Pursuant to Romanian fiscal and VAT law which, as described below is in line with EU law,<sup>20</sup> RMGC has been found liable for outstanding VAT and has been notified of this debt. The tax measures at issue here are those applicable to any other taxpayer in Romania. Furthermore, the

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<sup>20</sup> See *infra* Section 3.1.

enforcement measures directed against RMGC are the same as those applicable to any other taxpayer who fails to meet its tax liabilities.

- 27 RMGC must thus pay the amounts owed, as any other taxpayer in the same circumstances would be required to do. The Claimants fail to demonstrate that RMGC is unable to pay the amount owed, nor do they explain why they could not assist RMGC in posting the guarantee (of roughly ██████████ which is an insignificant amount in the light of the Claimants' financial resources. It is undisputed that posting a guarantee would have the effect of suspending the enforcement proceedings of which they complain.
- 28 This submission is divided into four main sections.
- 29 Following this first introductory section, the second section sets out the relevant factual background. This section shows that the VAT Assessment and the anti-fraud investigations are measures taken by competent Romanian authorities in the ordinary course of their business (**Section 2**).
- 30 The third section describes the relevant provisions of Romanian law pertaining to fiscal and anti-fraud investigations and reports. It demonstrates that the investigations of RMGC that have taken place to date as well as the VAT Assessment comply with applicable Romanian law (**Section 3**).
- 31 The fourth section describes the options available to RMGC in respect of a possible challenge to the VAT Assessment and/or suspension of the ensuing enforcement procedures (**Section 4**).
- 32 The fifth section explains that the requirements for granting provisional measures in accordance with the ICSID Convention and the ICSID Rules are not met.<sup>21</sup> Not only does the Tribunal lack jurisdiction to issue the relief sought, but also the Claimants' rights are not in peril. (**Section 5**).

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<sup>21</sup> This section reiterates and expounds upon the explanations provided in section 5 of the Respondent's Comments on the Request for Emergency Relief.

- 33 For all of these reasons and as demonstrated below, the Claimants' Second Request should be rejected.<sup>22</sup>

## **2 RELEVANT FACTUAL BACKGROUND**

- 34 This section sets out the facts relevant to the Tribunal's determination of the Claimants' Second Request. In their Second Request, the Claimants omit to mention certain relevant facts and events, including events that occurred much earlier than the Claimants let on and well before they commenced this arbitration in July 2015.
- 35 In November 2013, RMGC was informed of an investigation by the Ploiești Public Prosecutor's Office (the "**PPPO**")<sup>23</sup> into alleged tax evasion and money laundering on the part of the principals and key shareholder(s) of a group of companies including Kadok Interprest SRL (the "**Kadok Group**"). The PPPO extended its investigation of the Kadok Group to 90 other companies, including RMGC.<sup>24</sup>
- 36 Pending the outcome of the PPPO investigation, in late 2013, RMGC was the subject of a restriction order on CAD 300,000 in one of RMGC's Romanian bank accounts.<sup>25</sup> The amount represented the value of the goods that RMGC procured from the Kadok Group in 2012, all of which were received and paid for in full by RMGC, including related VAT.<sup>26</sup> As

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<sup>22</sup> While the Tribunal has ample grounds to dismiss the Claimants' Second Request on the basis of the present submission, the Respondent notes that, in the limited time available to it, it has not been able to fully develop its position with respect to the Second Request, nor has it been able to obtain all factual evidence relevant thereto. It thus reserves its rights to supplement this submission and the record as well as develop its position, as appropriate.

<sup>23</sup> Ploiești is a city located in southern Romania.

<sup>24</sup> See Gabriel Resources, "Management's discussion and analysis - Second Quarter 2016", at **Exhibit R-20**, p. 5.

<sup>25</sup> See Gabriel Resources, "Management's discussion and analysis - Fourth Quarter 2015", at **Exhibit R-24**, p. 48.

<sup>26</sup> Gabriel Resources, "Management's discussion and analysis - First Quarter 2015", at **Exhibit R-25**.

of late 2015, RMGC was reportedly challenging the legality of the restriction order.<sup>27</sup>

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[REDACTED]

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[REDACTED]

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[REDACTED]

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<sup>27</sup> See Gabriel Resources, "Management's discussion and analysis - Fourth Quarter 2015", at **Exhibit R-24**, p. 48.

<sup>28</sup> [REDACTED]  
*see also* RMGC Trade Registry excerpt dated 16 August 2016, at **Exhibit R-27**, p. 1 (noting that RMGC is currently under criminal investigation); RMGC Trade Registry History dated 12 February 2016, at **Exhibit R-28**, p. 2 *et seq.* (noting the existence of criminal proceedings against RMGC on the following grounds "tax evasion, description: Orders no. 465/P of 18 November 2013 and 20 November 2013, issued by the [PPPO] decreed on the initiation of criminal proceedings on grounds of tax evasion and complicity to money laundering crime, pursuant to article 9, paragraph 1 (c) (2) and (3) of Law no. 241/2005, article 26 of Penal Code in relation to article 29, paragraph 1 (a) of Law no. 656/2002, all under the enforcement of article 33 (a) of the Penal Code and article 41 paragraph 2 of the Penal Code").

<sup>29</sup> [REDACTED]

<sup>30</sup> [REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED] in the fall of 2015, the DGAF carried out an investigation of RMGC [REDACTED]

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[REDACTED]

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31 [REDACTED]

32 [REDACTED]

33 [REDACTED]

34 [REDACTED]

35 As discussed below, these inspections were carried out in accordance with Romanian law. See *infra* section 3; [REDACTED]



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44 Between 14 March 2016 and 30 June 2016, the Alba County Directorate for Public Finances carried out a tax inspection which sought to check the VAT for the period between 1 July 2011 and 31 January 2016.<sup>40</sup>

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<sup>36</sup> See Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 23 and p. 32. [REDACTED]

<sup>37</sup> See Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 44.

<sup>38</sup> Cîmpeni (or « *Câmpeni* ») is a town located roughly 15 kilometers away from Roşia Montană. Cîmpeni is the competent territorial city for the Roşia Montană commune in whose area where RMGC's headquarters are located. Cîmpeni depends upon the Regional General Directorate for Public Finances of Brasov.

<sup>39</sup> [REDACTED]

<sup>40</sup> See Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 7; *see also* *ibid.* p. 38; *see also* [REDACTED]

<sup>41</sup> See Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 28.

[REDACTED]

47 [REDACTED]

48 On 30 June 2016, the Alba County Directorate for Public Finances issued both a fiscal inspection report<sup>45</sup> and an assessment decision,<sup>46</sup> concluding that RMGC owed RON 27,016,497 in VAT.<sup>47</sup> These are the decisions to which the Claimants refer as the “VAT Assessment” and which give rise to the Claimants’ Second Request. As discussed below in **Section 3**, these documents, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The amount owed of RON 27,016,497 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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42 [REDACTED]

43 Tax Procedure Code, at **Exhibit R-33**, p. 86 *et seq.* (Art. 113) and p. 92 (Art. 122).

44 See Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 28 ; [REDACTED]

[REDACTED]

45 See **Exhibit C-42**, p. 2 *et seq.*

46 See **Exhibit C-42**, p. 40 *et seq.*

47 See **Exhibit C-42**, p. 40.

48 The conversion rates used in this submission are those in effect as of 16 August 2016.

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[REDACTED]

[REDACTED]

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[REDACTED]

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<sup>49</sup> See Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 3 *et seq.* (para. 6).

<sup>50</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 10.

<sup>51</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 11. ANAF is “entitled to ... obtain and use all the information and documents necessary for a correct assessment of the taxpayer’s/payer’s tax affairs” and “decides on the type and volume of analyses, according the circumstances of each case...” Tax Procedure Code, at **Exhibit R-33**, p. 8 *et seq.* (Art. 7(3) and 7(4)).

<sup>52</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 10.

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[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED] See generally, 2004 Fiscal Code, at **Exhibit R-34**, [REDACTED] The Respondent provides as **Exhibit R-34** the 2004 Fiscal Code in its original version, which therefore does not contain subsequent amendments. However, the relevant provisions discussed in this submission were not amended.

<sup>54</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 13 *et seq.* (emphasis added).

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

54

[REDACTED]

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<sup>55</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 14 (emphasis added); *See also ibid.* at p. 21 and p. 24.

<sup>56</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 14 *et seq.*

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[REDACTED]

[REDACTED]

[REDACTED]

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<sup>57</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 15.

<sup>58</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 15; *see supra* para. 48.

<sup>59</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 15 *et seq.*; *see also ibid.* at p. 34.

<sup>60</sup> *See* Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 9 *et seq.* and p. 24 *et seq.*

<sup>61</sup> *See* Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 28 *et seq.*; *see supra* para. 48.

<sup>62</sup> *See* Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 28.

<sup>63</sup> *See* Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 29 [REDACTED] and p. 32 [REDACTED]  
[REDACTED]

57 As a result of the findings of the Alba County Directorate for Public Finances, the tax assessment decision, also dated 30 June 2016, concluded that RMGC owed RON 27,016,497 in VAT.<sup>64</sup> Pursuant to Article 156(1) of the Tax Procedure Code, RMGC was required to pay this amount by 5 August 2016.<sup>65</sup>

58 [REDACTED]

59 [REDACTED]

60 [REDACTED]

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<sup>64</sup> See Exhibit C-42, p. 40.

<sup>65</sup> Tax Procedure Code, at Exhibit R-33, p. 117 (Art. 156(1)).

66 [REDACTED]

67 [REDACTED]

68 [REDACTED]

69 [REDACTED]

70 Tax Procedure Code, at Exhibit R-33, [REDACTED]

71 [REDACTED]

72 [REDACTED]

73 Claimants' Letter to the Tribunal dated 11 August 2016, p. 1.

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED] *see also* Tax Procedure Code, at **Exhibit R-33**,  
[REDACTED]

75

[REDACTED]

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[REDACTED]

<sup>77</sup> *See ibid.*

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[REDACTED]

79

[REDACTED]



[REDACTED]

63 [REDACTED]

64 [REDACTED] RMGC was required to pay the amounts owed for unpaid VAT by 5 August, [REDACTED]<sup>83</sup> [REDACTED] RMGC filed that day an administrative appeal with competent fiscal authorities of the 30 June 2016, tax inspection report and assessment notice.<sup>84</sup> [REDACTED]

65 [REDACTED]

66 [REDACTED]

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80 [REDACTED]

81 [REDACTED]

82 [REDACTED]

83 *See supra* para. 57.

84 [REDACTED] *ee* also Claimants' Letter to the Tribunal dated 11 August 2016.

85 [REDACTED]

86 [REDACTED] *see* Tax Procedure Code, at **Exhibit R-33**, [REDACTED]

[REDACTED]

67 On 9 August 2016, RMGC filed a request for a stay of enforcement of the VAT Assessment before the Alba Iulia Court of Appeals.<sup>89</sup>

68 In sum, the anti-fraud and fiscal investigations of RMGC's activities have been conducted in the ordinary course of ANAF's business. Although the Claimants seek to impute these investigations (and the VAT Assessment) to authorities in Bucharest somehow involved in this arbitration and driven by nefarious intentions, [REDACTED]

[REDACTED] Furthermore, the tax investigations have been led by local tax authorities, not central ANAF authorities. There is thus no evidence whatsoever of any improper motives behind these investigations.

### **3 THE TAX INVESTIGATIONS AND REPORTS WERE IN ACCORDANCE WITH ROMANIAN LAW**

69 While Romania strongly objects to the Claimants' misguided attempt to force the Tribunal's hand into becoming a parallel tax court of appeal, Romania is constrained to briefly describe below the relevant Romanian VAT legislation as applicable to RMGC.

70 First, it is to be noted that Romanian VAT law is based on EU law (**Section 3.1**). Next, the relevant provisions of Romanian VAT law are discussed, including those pertaining to possible liability for unpaid VAT (**Section 3.2**), before turning to ANAF's role with respect to tax inspections (**Section 3.3**). [REDACTED]

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87 [REDACTED]

88 [REDACTED]

<sup>89</sup> See Claimants' Letter to the Tribunal dated 11 August 2016, p. 2.

Finally, the Respondent explains that the tax audits were conducted in accordance with the applicable law (**Section 3.5**).

### **3.1 Romanian VAT legislation implements EU law**

- 71 The founding Member States of the European Economic Community (EEC) introduced a common system of VAT in 1967 to harmonize and replace the different domestic systems of taxation of goods and services. As other countries (like Romania) have joined the EU, they have agreed to implement VAT in accordance with the common European system, which was developed in a series of Directives as follows:
- a) Directive 67/227/EEC: the First VAT Directive set out the general principles of the common system, including neutrality, proportionality and the right of deduction;
  - b) Directive 67/228/EEC: the Second VAT Directive set out the details of the system when it was first introduced;
  - c) Directive 77/388/EEC: the Sixth VAT Directive repealed the Second and incorporated some of the First, and set out the detailed rules of VAT to be implemented by the Member States from 1 January 1978 onwards;
  - d) Directive 92/77/EEC: this legislation amended the Sixth Directive and provided for greater harmonization of VAT rates throughout the EU;
  - e) Regulation 1777/2005: the first Implementing Regulation was issued to remove a number of inconsistencies of treatment between Member States;

- f) Directive 2006/112/EC: the “**Principal VAT Directive**”,<sup>90</sup> repealed and replaced the First and Sixth Directives, and now contains the detailed regime which all Member States must follow;
- g) Directive 282/2011: the second Implementing Regulation was issued to update and replace the 2005 version.

72 Although VAT has been levied in Romania since 1993, the laws governing VAT have changed over time, in particular since Romania joined the EU (on 1 January 2007). Since then, it has been required to apply the European Directives on VAT and in particular the Principal VAT Directive. The 2004 Fiscal Code was amended and completed and *inter alia* transposed into Romanian law the Principal VAT Directive.<sup>91</sup> The 2004 Fiscal Code applies to the vast majority of the facts in dispute but was repealed by Law No. 227 of 8 September 2015 (the “**2016 Fiscal Code**”).

73 Under the harmonized EU rules, VAT is a consumption tax which is levied throughout the EU by Member States (including Romania) on the value added to the product/service at each stage of production and distribution. Under the same rules, in principle all supply of goods or services are subject to VAT.<sup>92</sup> On each transaction, VAT is calculated on the price of the goods or services and is chargeable after deduction of the amount of VAT borne directly by the various cost components.<sup>93</sup>

74

[REDACTED]

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<sup>90</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, at **Exhibit R-39**.

<sup>91</sup> 2004 Fiscal Code, at **Exhibit R-34**, p. 217 (Art. 161<sup>^</sup>2).

<sup>92</sup> Principal VAT Directive, at **Exhibit R-39**, p. 9 (Art. 2(1)(a) and (c)).

<sup>93</sup> Principal VAT Directive, at **Exhibit R-39**, p. 9 (Art. 1(2)).

<sup>94</sup> Principal VAT Directive, at **Exhibit R-39**, [REDACTED]

[REDACTED]

### **3.2 Under Romanian law, the taxpayer self-reports VAT relating to supply of goods and services**

75 Consistent with the Principal VAT Directive, under the 2004 Fiscal Code any “transfer of the right to dispose of goods” is a supply of goods.<sup>97</sup> Similarly, all supply of services (which is not a delivery of goods under the law) is subject to VAT.<sup>98</sup>

76 [REDACTED]

77 Moreover, according to the principle of self-assessment, under Article 158(1) of the 2004 Fiscal Code, any person obliged to pay tax bears full responsibility for the accurate calculation and payment in the required term of the tax, as well as for submitting monthly the tax return sheet and the statements with the relevant tax body.<sup>100</sup> It is then for tax authorities to verify the accuracy of that self-assessment.

78 [REDACTED]

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<sup>95</sup> Principal VAT Directive, at **Exhibit R-39**, [REDACTED]

<sup>96</sup> Principal VAT Directive, at **Exhibit R-39**, [REDACTED]

<sup>97</sup> 2004 Fiscal Code, at **Exhibit R-34**, p. 143 (Art. 128(1) and (2)).

<sup>98</sup> 2004 Fiscal Code, at **Exhibit R-34**, p. 146 (Art. 129(1)).

<sup>99</sup> 2004 Fiscal Code, at **Exhibit R-34**, [REDACTED]

<sup>100</sup> 2004 Fiscal Code, at **Exhibit R-34**, p. 207 *et seq.* (Art. 158).

[REDACTED]

### 3.3 ANAF oversees tax inspections [REDACTED]

[REDACTED]

- 79 Created in 2003 in line with IMF recommendations, ANAF is a public body of the Romanian central public administration under the subordination of the Ministry of Public Finances.<sup>101</sup> Government Decision 520/2013 describes the organization, functioning and attributions of ANAF. As an organ of the Romanian State, ANAF adheres to the principles of efficiency, transparency, coherency and equal treatment in the application of tax legislation.<sup>102</sup>
- 80 ANAF is divided into sub-directorates including a Tax Directorate and the DGAF. Eight regional tax directorates perform ANAF's functions throughout the territory of Romania.<sup>103</sup>
- 81 ANAF's functions include the administration of taxes, fiscal inspection and verification,<sup>104</sup> [REDACTED]

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<sup>101</sup> See also Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**, p. 1 (Art. 1).

<sup>102</sup> Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, p. 1 (Art. 5).

<sup>103</sup> Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, p. 12 (Art. 13(1) and (2)) and p. 19 *et seq.* (Annex 2); see also Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**, p. 6 *et seq.* (Arts. 10 and 13).

<sup>104</sup> According to Article 113(1) of the Tax Procedure Code, a tax inspection seeks to verify the lawfulness and conformity of tax returns and of the correctness of assessments of tax liabilities. Articles 113 to 133 of the Tax Procedure Code set out the procedures regarding fiscal inspections. See Tax Procedure Code, at **Exhibit R-33**, p. 86 *et seq.*

It also grants facilities in connection with the payment of outstanding fiscal debts upon the justified request of the taxpayer.<sup>106</sup>

82 In connection with tax inspections, ANAF has the right to request and examine documents from the taxpayer, to verify and investigate the taxpayer's activities, to request explanations relating thereto, and to order precautionary measures in accordance with the law.<sup>107</sup> The taxpayer is then required to comply with any measures ordered as a result of the inspection.<sup>108</sup>

83 Similarly, in connection with anti-fraud investigations, DGAF inspectors have the right, *inter alia*, to conduct controls, verify the legality of activities, take measures in accordance with the fiscal legislation regarding the seizure of goods whose production or storage is illegal, and take measures to prevent a debtor from avoiding enforcement or alienating assets.<sup>109</sup>

### **3.4 The findings of the VAT Assessment are in accordance with Romanian law**

84 While the Claimants suggest that the latest VAT inspections departed from past practice, this is not true. [REDACTED]

85 [REDACTED]

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<sup>105</sup> Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, p. 1 (Art. 4); Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**, p. 1 *et seq.* (Art. 3(1)), p. 7 *et seq.* (Art. 14).

<sup>106</sup> See Tax Procedure Code, at **Exhibit R-33**, p. 146 (Art. 184(1)).

<sup>107</sup> Tax Procedure Code, at **Exhibit R-33**, p. 179 (Art. 213(2)).

<sup>108</sup> Tax Procedure Code, at **Exhibit R-33**, p. 90 *et seq.* (Art. 118(8)).

<sup>109</sup> Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**; see also Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, p. 1 (Art. 15); see generally Tax Procedure Code, p. 103 (Arts. 136 and 137) (relating to anti-fraud audits).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is wholly misguided and unsupported by any evidence.

86 Over the years RMGC has been the subject various tax inspections. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

87 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

88 [REDACTED]

[REDACTED]

[REDACTED]

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110 [REDACTED] Claimants' Second Request for Provisional Measures, p. 5 (para. 8), p. 8 (para. 17) and p. 9 (para. 20).

111 *See supra* paras. 48 and 57.

112 *See supra* paras. 4 and 70.

113 *See infra* para. 89.

114 *See supra* para. 48.



[REDACTED]

**3.4.1** [REDACTED]

89 [REDACTED]

90 [REDACTED]

91 [REDACTED]

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<sup>115</sup> 2004 Fiscal Code, at **Exhibit R-34**, [REDACTED]

<sup>116</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 16.

<sup>117</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 16.

<sup>118</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 15.

[REDACTED]

92

[REDACTED]

93

[REDACTED]

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<sup>119</sup> 2004 Fiscal Code, at **Exhibit R-34**, [REDACTED]

<sup>120</sup> 2004 Fiscal Code, at **Exhibit R-34**, [REDACTED]

<sup>121</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 43 and p. 15.

<sup>122</sup> [REDACTED]

<sup>123</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 15.

[REDACTED]

94

[REDACTED]

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<sup>124</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 15 *et seq.*; [REDACTED]

<sup>125</sup> [REDACTED]

<sup>126</sup> 2004 Fiscal Code, at **Exhibit R-34**, [REDACTED]

<sup>127</sup> 2004 Fiscal Code, at **Exhibit R-34**, [REDACTED]

<sup>128</sup> [REDACTED]

<sup>129</sup> [REDACTED]

<sup>130</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 34.

3.4.2 [REDACTED]

95

[REDACTED]

96

[REDACTED]

97

[REDACTED]

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<sup>131</sup> See *supra* para. 48.

<sup>132</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 15.

<sup>133</sup> [REDACTED]

<sup>134</sup> [REDACTED]

[REDACTED]

[REDACTED]

98

[REDACTED]

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<sup>135</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 13.

<sup>136</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 13.

<sup>137</sup> [REDACTED]

<sup>138</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 33.

[REDACTED]

99

[REDACTED]

[REDACTED] This is on its face a reasonable position and the Claimants have no evidence to argue otherwise. [REDACTED]

[REDACTED]

100 Finally, the Claimants assert in their Second Request that the conclusions of the tax inspection are contradictory with eighteen previous tax inspections of RMGC.<sup>143</sup> [REDACTED]

[REDACTED]

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<sup>139</sup> 2004 Fiscal Code, at **Exhibit R-34**, [REDACTED]

<sup>140</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 13.

<sup>141</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 13.

<sup>142</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 13 *et seq.*

<sup>143</sup> Claimants' Second Request for Provisional Measures, p. 5 (para. 8), p. 8 (para. 17) and p. 9 (para. 20).

[REDACTED]

101

[REDACTED]

### 3.5 The tax audits were conducted in accordance with Romanian law

102

The Claimants have not demonstrated on what basis they complain of the tax audits conducted and do not even attempt to make a *prima facie* showing of irregularity or illegality of any act undertaken by the Romanian tax inspectors.

103

The Claimants Second Request is, however, full of references to [REDACTED]<sup>146</sup>, [REDACTED]<sup>147</sup> audits,<sup>147</sup> as well as allusions to the [REDACTED]<sup>148</sup> or [REDACTED]

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<sup>144</sup> [REDACTED]

<sup>145</sup> [REDACTED]

<sup>146</sup> Claimants' Second Request for Provisional Measures, p. 2 (para. 5).

<sup>147</sup> Claimants' Second Request for Provisional Measures

<sup>148</sup> Claimants' Second Request for Provisional Measures, p. 21 (para. 51).

generally “the nature and intensity of Respondent’s investigations”.<sup>149</sup> They further assert in their letter to the Tribunal dated 11 August 2016 that “[i]n addition to the **serious flaws** in the underlying VAT Assessment, already detailed by Claimants, [REDACTED] [REDACTED]”<sup>150</sup>

104 This language seeks to create the impression that the Romanian tax authorities have done something untoward; however, when the Claimants’ argument is carefully reviewed, there is no concrete allegation that Romanian law has been in any way breached or abused. [REDACTED]  
[REDACTED]  
[REDACTED]

105 While tax inspections and audits may be an unpleasant experience for a taxpayer, under Romanian law the tax authorities have a legal obligation to investigate all relevant facts and review the corresponding documents. In complex and international business operations such as those of RMGC, which may involve cross-border suppliers and foreign shareholders, it is not surprising that tax audits may be burdensome and time-consuming.

106 In conclusion, whether the applicable standard of evidence is *prima facie* (or a heightened standard in light of the serious allegations of abuse of Romania’s power such as those raised in the Claimants’ Second Request),<sup>152</sup> the Claimants have not proven any concrete allegation of violations of any specific provisions of the applicable law. To the contrary, the evidence demonstrates that there is no indication whatsoever of any irregularity committed by Romanian authorities.

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<sup>149</sup> Claimants’ Second Request for Provisional Measures, p. 21 (para. 51).

<sup>150</sup> Claimants’ Letter to the Tribunal dated 11 August 2016, p. 1.

<sup>151</sup> [REDACTED]  
[REDACTED]

<sup>152</sup> Claimants’ Second Request for Provisional Measures, p. 2 (para. 6), p. 4 (para. 10) and p. 13 (para. 29).



#### **4 THE OPTIONS AVAILABLE TO RMGC UNDER ROMANIAN LAW**

107

108 If a Romanian taxpayer fails to pay taxes owed, the tax authorities undertake, as elsewhere and as is hardly surprising, enforcement actions.<sup>154</sup> After a deadline for payment passes, the ANAF commences enforcement procedures through the issuance of a summons.<sup>155</sup> Unless the debt is paid within fifteen days of receipt of the summons, authorities proceed with the enforcement.<sup>156</sup>

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Thus, RMGC is required to pay by 26 August.<sup>159</sup>

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<sup>153</sup> See *supra* para. 57.

<sup>154</sup> Tax Procedure Code, at **Exhibit R-33**, p. 184 (Art. 220(1)).

<sup>155</sup> The enforcement procedure is set out at Articles 220 to 266 of the Tax Procedure Code, at **Exhibit R-33**, p. 84 *et seq.*

<sup>156</sup> Tax Procedure Code, at **Exhibit R-33**, p. 196 *et seq.* (Art. 230(1)).

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159

Claimants' Second Request for Provisional Measures, p. 10 (para. 26) and p. 14 (para 33).

- 110 If a taxpayer fails to timely pay a tax liability, the tax authorities may order a forced execution in one of the following manners:
- Garnishment on the revenue held and/or due, under any title, to the debtor by third parties, after 15 days from the summoning date passes;<sup>160</sup>
  - Garnishment on the liquidity from bank accounts, within 30 days from the summoning date;<sup>161</sup> and
  - Valuating the seized assets for their disposal.<sup>162</sup>

111 As explained below, RMGC may file, and has filed, an administrative challenge to the VAT Assessment (**Section 4.1**). RMGC may file, and has also filed, for a suspension of the enforcement proceedings, pending determination of the administrative challenge (**Section 4.2**).

#### **4.1 Challenging the VAT Assessment**

112 Under Romanian law, RMGC has the right, and indeed has recently exercised the right, to challenge the VAT Assessment.

113 Pursuant to Article 268(1) of the Tax Procedure Code, a party may challenge fiscal administrative deeds by way of an administrative challenge (“*contestație*”).<sup>163</sup> Such challenges must be filed within 45 days of receipt of the disputed deed or act.<sup>164</sup> [REDACTED]

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<sup>160</sup> Tax Procedure Code, at **Exhibit R-33**, p. 196 (Art. 230) and p. 202 (Art. 236 (1)).

<sup>161</sup> Tax Procedure Code, at **Exhibit R-33**, p. 203 (Art. 236 (12)).

<sup>162</sup> Tax Procedure Code, at **Exhibit R-33**, p. 197 (Art. 232), p. 209 (Art. 239 (1)), p. 213 (Art. 242 (5)).

<sup>163</sup> Tax Procedure Code, at **Exhibit R-33**, p. 244 (Art. 268(1)).

<sup>164</sup> Tax Procedure Code, at **Exhibit R-33**, p. 246 (Art. 270(1)).

<sup>165</sup> Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 45 and p. 39.

- 114 RMGC filed on 5 August an administrative challenge of the VAT Assessment before the Alba County Administration of Public Finance.<sup>166</sup>
- 115 Under Romanian law, such challenges are examined and decided within 45 days of their registration<sup>167</sup> and may be appealed before the courts.<sup>168</sup>

## 4.2 Suspension of the Enforcement Proceedings

- 116 Forced execution of a tax liability, [REDACTED] may be suspended in the following cases:

- if the debtor submits to the competent tax body a letter of guarantee (or a guarantee insurance policy) covering the amount of the outstanding tax liabilities (**Section 4.2.1**);<sup>169</sup>
- if a court orders the suspension of the enforcement proceedings (**Section 4.2.2**);<sup>170</sup> or
- if the taxpayer obtains leave from the tax authorities to pay the debt in instalments (**Section 4.2.3**).<sup>171</sup>

- 117 These options available to the taxpayer are discussed below.

### 4.2.1 Posting a Guarantee

- 118 RMGC is entitled to post a guarantee (or guarantee insurance policy) in connection with the amounts owed pursuant to the VAT Assessment.<sup>172</sup>

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<sup>166</sup> [REDACTED]

<sup>167</sup> Tax Procedure Code, at **Exhibit R-33**, p. 251 (Art. 276(7)) corroborated with p. 58 (Art. 77).

<sup>168</sup> See Tax Procedure Code, at **Exhibit R-33**, p. 253 *et seq.* (Arts. 279-281).

<sup>169</sup> Tax Procedure Code, at **Exhibit R-33**, p. 201 (Art. 235(1)).

<sup>170</sup> Tax Procedure Code, at **Exhibit R-33**, p. 253 (Art. 278(2)).

<sup>171</sup> Tax Procedure Code, at **Exhibit R-33**, p. 146 (Art. 184(1)).

<sup>172</sup> Tax Procedure Code, at **Exhibit R-33**, p. 201 (Art. 235(1)).

Posting a guarantee has the effect of suspending the enforcement proceedings.<sup>173</sup>

119 The Claimants recognize the existence of this option. [REDACTED]

120 [REDACTED]

#### 4.2.2 Application for a Suspension before the Courts

121 Under Romanian law, RMGC has the right to file for a stay (or “suspension”) of the enforcement proceedings,<sup>175</sup> which it exercised on 9 August.<sup>176</sup> In such case, the taxpayer must demonstrate that it has paid a bond and that it has good cause in filing for a suspension, so as to avoid imminent losses.<sup>177</sup> The Claimants correctly assert that the VAT remains due and payable pending a possible challenge by RMGC and absent issuance of a stay.<sup>178</sup>

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<sup>173</sup> Tax Procedure Code, at **Exhibit R-33**, p. 201 (Art. 235(1)).

<sup>174</sup> Claimants' Letter to the Tribunal dated 11 August 2016.

<sup>175</sup> Tax Procedure Code, at **Exhibit R-33**, p. 253 (Art. 278(2)).

<sup>176</sup> Claimants' Letter to the Tribunal dated 11 August 2016, p. 2.

<sup>177</sup> Excerpts from Law 554 of 2 December 2004 on contentious administrative matters, at **Exhibit R-41**, p. 1 (Art. 14(1)).

<sup>178</sup> Claimants' Second Request for Provisional Measures, p. 10 (para. 25).

### **4.2.3 Request to Pay in Instalments**

- 122 Under the Tax Procedure Code, and as is common practice in many countries, a Romanian taxpayer has the right to file an application requesting to pay a tax debt in instalments.<sup>179</sup> The requirements for obtaining the possibility to pay in instalments are set out in the Tax Procedure Code and include “making a thoroughly justified request” and demonstrating a “state of distress caused by a temporary lack of funds.”<sup>180</sup> To meet these requirements, the tax authorities may accept, in completing the securities already established by any precautionary measures, assets of the taxpayer itself or assets of third parties, by the conclusion of a mortgage or pledge agreement in favour of the tax body.<sup>181</sup>
- 123 Upon receiving an application to pay in instalments, the tax authorities must issue a decision swiftly, within 60 days.<sup>182</sup> The taxpayer may ultimately obtain leave to pay in instalments for a period of up to five years.<sup>183</sup> Once the taxpayer’s application to pay in instalments has been granted, the forced execution measures are suspended.<sup>184</sup>
- 124 Notably, the Claimants have not argued that RMGC could not apply to pay the VAT debt in instalments.

## **5 THE REQUIREMENTS FOR PROVISIONAL MEASURES ARE NOT MET**

- 125 As noted in both the Respondent’s Observations to the First Request and its Comments on the Claimants’ Request for Emergency Relief, under the ICSID Convention and the ICSID Rules, an applicant for provisional measures must make a *prima facie* showing that the Tribunal has jurisdic-

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<sup>179</sup> Tax Procedure Code, at **Exhibit R-33**, p. 146 (Art. 184(1)).

<sup>180</sup> Tax Procedure Code, at **Exhibit R-33**, p. 148 (Art. 185(1)) and p. 150 (Art. 186(1)).

<sup>181</sup> See Tax Procedure Code, at **Exhibit R-33**, p. 156 (Art. 193(6)(d)).

<sup>182</sup> Tax Procedure Code, at **Exhibit R-33**, p. 151 (Art. 187(1)).

<sup>183</sup> Tax Procedure Code, at **Exhibit R-33**, p. 146 (Art. 184(1)).

<sup>184</sup> See Tax Procedure Code, at **Exhibit R-33**, p. 170 (Art. 203(1)).

tion as well as demonstrate that the measures sought (i) seek to protect a right and are (ii) necessary, (iii) urgent, and (iv) proportional.<sup>185</sup>

126 As discussed below, the Claimants fail to make this showing, with respect to either jurisdiction or the substantive conditions for recommendation of provisional measures.

127 Below the Respondent expounds upon its Comments to the Claimants' Request for Emergency Relief (in particular section 5 thereof).<sup>186</sup>

### **5.1 The Tribunal does not have jurisdiction to issue the provisional measures sought**

128 As with their request for Emergency Measures, the provisional relief sought by the Claimants falls outside of the Tribunal's jurisdiction.<sup>187</sup> The Claimants seek five 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;

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<sup>185</sup> Respondent's Observations to Claimants' Request for Provisional Measures dated 3 August 2016, p. 27 *et seq.* (para. 85); Respondent's Comments on the Request for Emergency Relief, p. 25 (para. 65).

<sup>186</sup> This submission fully incorporates by reference the arguments and evidence proffered in the Respondent's Comments on the Request for Emergency Relief. *See supra* para. 7.

<sup>187</sup> Respondent's Comments on the Request for Emergency Relief, p. 26 (paras. 67-68).

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."<sup>188</sup>

129 In their unsolicited submission of 12 August 2016, the Claimants confirmed that they "have not claimed that the VAT Assessment or its prospective enforcement constitutes a breach of the Canada BIT (...)",<sup>189</sup> although they had suggested the opposite in their Second Request.<sup>190</sup> In any event, this confirmation in and of itself suffices to dismiss the Second Request. As the Respondent explained, a request for provisional measures must be related to the claims underlying the arbitration. Thus, the absence of an allegation of breach in relation to the Taxation Measures is the first reason why the measures sought are entirely unrelat-

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<sup>188</sup> Claimants' Second Request for Provisional Measures, p. 39 *et seq.* (para. 90).

<sup>189</sup> Claimants' Letter to the Tribunal dated 12 August 2016, p. 1.

<sup>190</sup> Claimants' Second Request for Provisional Measures, p. 28 (para. 61) ("the VAT Assessment will force Gabriel imminently to divert ██████████ 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").

ed to the present dispute and fall outside of the jurisdiction of the Tribunal, irrespective of which of the two BITs applies.<sup>191</sup>

- 130 The Claimants' insistence that the present dispute risks being aggravated by the Taxation Measures<sup>192</sup> wrongly assumes that the subject matter of this dispute can include the Taxation Measures, which is incorrect insofar as the Canada-Romania BIT carves taxation measures out of its protective scope.<sup>193</sup> "Nothing" in Article XII(1) of that BIT means **nothing**, including provisional relief in relation to the Taxation Measures. The VAT Assessment, ANAF audits and ANAF investigations do not relate to the subject matter of this dispute and cannot become part of this dispute under the Canada-Romania BIT.<sup>194</sup>
- 131 The Claimants, however, rely on the *Yukos v Russia* award<sup>195</sup> to counter-argue that a State's abusive use of its tax authority to effect an expropriation of an investment or otherwise to harm the investor does not fall within such investment treaty tax carve-outs.<sup>196</sup>
- 132 The Claimants' reliance on the *Yukos* award is, however, wholly misplaced for three reasons. First, the *Yukos* award has been set aside for lack of jurisdiction such that it is unclear what sort of authority the Claimants seek to derive from it.<sup>197</sup> Second, the relevant provision in the Energy Charter Treaty (Article 21) in that case is very different from Article XII in that it contains numerous exceptions to the carve-out relating

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<sup>191</sup> Respondent's Comments on the Request for Emergency Relief, p. 12 (para. 36).

<sup>192</sup> Claimants' Letter to the Tribunal dated 12 August 2016.

<sup>193</sup> Respondent's Comments on the Request for Emergency Relief, p. 12 (para. 36).

<sup>194</sup> Respondent's Comments on the Request for Emergency Relief, p. 10 *et seq.* (paras. 31-46).

<sup>195</sup> *Yukos Universal Limited v. Russian Federation*, Final Award, PCA Case No AA 227, 18 July 2014, at **Exhibit RLA-21**.

<sup>196</sup> Claimants' Letter to the Tribunal dated 12 August 2016, p. 2.

<sup>197</sup> *Russian Federation v. Yukos Universal Limited*, Judgment, The Hague District Court, 20 April 2016, at **Exhibit RLA-22**.



*inter alia* to *mala fide* taxation<sup>198</sup> – exceptions which were not agreed between Romania and Canada in their BIT. Third, the Claimants have not made any showing – *prima facie* or otherwise – that the Taxation Measures were in fact *mala fide*, or “taken only ‘under the guise’ of taxation, but in reality aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent) (...)”, the standard of evidence required by the *Yukos* tribunal.<sup>199</sup>

- 133 Although the Claimants are quick to acknowledge that this Tribunal need not assess whether any of their allegations have merit to decide their Second Request,<sup>200</sup> they effectively attempt to eviscerate their burden of proving *prima facie* jurisdiction by requesting the tribunal to order provisional relief based on innuendo and speculation as to the *mala fide* nature of the Taxation Measures.<sup>201</sup>
- 134 In their letter of 12 August, the Claimants deafly maintained their argument that “the VAT Assessment and its prospective enforcement threatens the integrity of these proceedings”,<sup>202</sup> thereby disregarding the Respondent’s demonstration that this is patently incorrect.<sup>203</sup>
- 135 In any event, even if the Taxation Measures were related to the present arbitration (and thus threatened its procedural integrity), the Canada-

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<sup>198</sup> Energy Charter Treaty and Related Documents, at **Exhibit RLA-23**, p. 70 *et seq.* (Art. 21).

<sup>199</sup> *Yukos Universal Limited v. Russian Federation*, Final Award, PCA Case No AA 227, 18 July 2014, at **Exhibit RLA-21**, p. 172 (para. 1407).

<sup>200</sup> Claimants' Letter to the Tribunal dated 12 August 2016, p. 2 (“The Tribunal need not decide at this stage, however, whether such a claim if pleaded would have merit – only whether it reasonably might have merit.”).

<sup>201</sup> Respondent's Comments on the Request for Emergency Relief, p. 3 *et seq.* (paras. 9).

<sup>202</sup> Claimants' Letter to the Tribunal dated 12 August 2016, p. 1.

<sup>203</sup> Respondent's Comments on the Request for Emergency Relief, p. 18 *et seq.* (paras. 47-56).

Romania BIT would still exclude the Tribunal's power to enjoin Romania from undertaking measures that are alleged to breach the BIT.<sup>204</sup>

136 In their letter of 12 August, the Claimants also made a belated attempt to distinguish between the two applicable BITs; they now deny that not only Gabriel Canada, but also Gabriel Jersey is limited by the restrictions as to claims and remedies set forth in the Romania-Canada BIT.<sup>205</sup> They rely on *Eurogas v Slovakia* in support of their position.<sup>206</sup>

137 The Respondent agrees that the *Eurogas* case is entirely on point. It, however, undermines the Claimants' contention that Gabriel Jersey can circumvent or avoid the Canada-Romania BIT when filing a claim together with a Canadian co-claimant:

“As to EuroGas, the Arbitral Tribunal is convinced by Respondent's arguments that ‘if Eurogas did not wish to be impacted by the Canada BIT, then it should not have filed this arbitration with [Canadian co-claimant] jointly as claimants’.”<sup>207</sup>

138 The Claimants having chosen to consolidate the proceedings under the two BITs (and having chosen not to distinguish between the two BITs in their Second Request), they cannot now be allowed to turn back and try to pick and choose between what they consider to be the more favourable provisions under the two BITs.<sup>208</sup> As the *Eurogas* tribunal confirmed:

“As to Belmont, the Arbitral Tribunal is not convinced by Claimants' arguments. **The basis for the Tribunal's jurisdiction over the dispute between [Canadian co-claimant] and the Slovak**

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<sup>204</sup> Respondent's Comments on the Request for Emergency Relief, p. 22 (paras. 57-63); Respondent's Letter to the Tribunal dated 14 August 2016.

<sup>205</sup> Claimants' Letter to the Tribunal dated 12 August 2016.

<sup>206</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**.

<sup>207</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 4 (para. 5).

<sup>208</sup> Claimants' Letter to the Tribunal dated 12 August 2016.

**Republic lies in the Treaty between Canada and the Slovak Republic. The Treaty's provisions addressing the exercise of such jurisdiction therefore bind the Tribunal.** The possibility offered by the Treaty to investors to bring their claims against one of the Parties before an ICSID Tribunal **cannot be understood as having the effect of setting aside, whenever such a choice is made by claimants, its own express provisions (...)**<sup>209</sup>

- 139 As implicitly acknowledged in the *Eurogas* order, it is the treaty that contains the more restrictive procedural provisions that applies in a scenario where two claimants file consolidated claims before the same tribunal, under different BITs where one BIT contains a restriction on a procedural issue and the other one is silent on that issue. By contrast, if the two applicable BITs were contradictory on procedural issues, consolidation of the claims in the same proceedings would not be possible at all.
- 140 In this case, the tax carve-out and the prohibition of injunctions relating to measures allegedly breaching the BIT (substantive or procedural) is not contrary to the UK-Romania BIT because it is silent on those issues. Just as the Claimants accept that the transparency provisions in the Canada-Romania BIT apply to the claims of Gabriel Jersey, they must also accept that the taxation provisions of the Canada-Romania BIT preclude the granting of provisional measures to both Claimants – otherwise Gabriel Canada would be able to obtain a free ride on the back of the terms of the UK-Romania BIT.<sup>210</sup>
- 141 In the end, Gabriel Canada cannot obtain more rights through a consolidated proceeding than those that it would enjoy had it had filed for arbitration alone.

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<sup>209</sup> *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-24**, p. 4 (para. 6) (Emphasis added.)

<sup>210</sup> Claimants' Letter to the Tribunal dated 12 August 2016, p. 2.

142 In conclusion, the Claimants have failed to establish that this Tribunal has *prima facie* jurisdiction to order the measures sought under Prayers for Relief (a) to (e).

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

143 Romania reviews the provisional measures sought and shows that there is no correlation between the Prayer for Relief a) to c) and the alleged due process in peril (**Section 5.2.1**). It also explains that the overlapping requests under Prayer for Relief d) and e) fail to establish the necessity, urgency and proportionality of the measures sought (**Section 5.2.2**).

**5.2.1 No correlation between the provisional relief sought under Prayers for Relief a) to c) and the alleged due process rights in peril**

144 As noted in the Respondent's Comments on the Request for Emergency Relief, the Claimants formulate abstract observations on good faith, due process, procedural integrity and equality of arms but they do not link those principles with the facts of this case and the very concrete and broad measures which they seek.<sup>211</sup>

145 The fundamental problem of the Claimants' Second Request is that the relief sought is wholly unrelated to the alleged threats to procedural integrity. The table below compares both:

| <b>Relief sought</b>   | <b>Alleged threats to procedural integrity</b>  |
|--|---|
| "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; | <ul style="list-style-type: none"> <li>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</li> </ul> |
| 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  |   |

<sup>211</sup> Section 3.2.

|  |   |
|--|---|
| 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;  | prejudice Claimants' ability to present their claims in this case";<br><ul style="list-style-type: none"> <li>• 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."</li> </ul> |
| 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 | <ul style="list-style-type: none"> <li>• the Taxation Measures "may seriously impair Claimants' ability to proffer witnesses in support of their claims";</li> </ul>  |
| 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.   | <ul style="list-style-type: none"> <li>• the Taxation Measures "have caused Gabriel to divert attention away from preparing to present its case to responding to Respondent's investigations"</li> </ul>  |

- 146 As for a), the Claimants do not explain how the four alleged threats to procedural integrity of this arbitration would be safeguarded by the Respondent being forced to provide "explanations". There is no such link and the measure patently fails to link to any right in peril absent the measure sought such that the request should be summarily dismissed.
- 147 As for b), similarly the Claimants do not explain how an order enjoining the Respondent from making available to its legal team documents obtained by ANAF would protect its right to access core documents that are centrally relevant to the dispute, would prevent the diversion of its resources and attention to the investigations or would safeguard the Claimants' ability to proffer witnesses. Again, there is no link and the request falls to be dismissed without further consideration.
- 148 As for c), once more, no link is alleged between the Respondent potentially proffering evidence in the arbitration obtained by ANAF and the Claimants' right to access core documents that are centrally relevant to the dispute, their ability not to divert resources and attention to the investigations or their ability to proffer witnesses. The request must be summarily dismissed.
- 149 As for d) and e), the Respondent accepts that there could be a link between the measures sought and the alleged rights in peril but, as shown below, these two measures are not necessary, urgent or proportional.

## **5.2.2 No necessity, urgency or proportionality of the provisional relief sought under Prayers for Relief d) and e)**

150 As for item d) of their Prayer for Relief, the Claimants' request that Romania "join RMGC in its request for a judicial suspension of enforcement" of the VAT assessment is not supported by any argument in the Claimants' Second Request and stands to be dismissed for lack of showing of any of the requirements for the recommendation of provisional measures.

151 As for the remaining part of Prayer for Relief d) – a measure ordering Romania "not [to] 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" – it appears to be subsumed under the general Prayer for Relief d), which broadly requests an order that Respondent "refrain from taking any action in connection with the VAT Assessment, ANAF audits or ANAF investigations that may aggravate and extend the dispute". Accordingly, only the latter is addressed below.

### **5.2.2.1 The ability to access RMGC's documents**

152 The Claimants' allegation that, absent this order, RMGC will be deprived of "the ability to access core documents that are centrally relevant to the dispute",<sup>212</sup> is incorrect insofar as the enforcement of the VAT Assessment, ANAF audits or ANAF investigations against RMGC will not lead (immediately or in the near future) to any plausible limitation to access to RMGC's documents. Insofar as the Claimants continue to allege that there will be a chain of events leading to the eventual bankruptcy of RMGC, this is unproven and wrong as noted in the Respondent's Comments on the Request for Emergency Relief.<sup>213</sup>

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<sup>212</sup> Claimants' Second Request for Provisional Measures, p. 20 (para. 49).

<sup>213</sup> Respondent's Comments on the Request for Emergency Relief, p. 20 (paras. 69-70).

- 153 As observed above, this most implausible chain of events starts by ignoring the fact that under Romanian law, a Romanian taxpayer with a tax debt may file an application requesting to pay that debt in instalments.<sup>214</sup> The law also allows for the posting of a guarantee avoiding any immediate payment of funds, pending the resolution of the tax dispute. Finally, RMGC can request a stay of the enforcement proceedings, as it did on 9 August.<sup>215</sup> Accordingly, Romanian tax law is fully equipped to protect legitimate concerns of insolvency by taxpayers pending the resolution of tax disputes with the competent authorities.
- 154 The following assumptions of the chain of events – that RMGC's creditors would not approve a reorganization plan, that RMGC would enter into bankruptcy and that a judicial administrator would be appointed for RMGC,<sup>216</sup> are also not stated to be likely or imminent, and in fact they are neither. It is unclear who would be the principal creditors of RMGC in a scenario of insolvency but presumably, these would be the Claimants and the Romanian tax authorities. There is no reason to suggest that any of these creditors would refuse a reorganization plan and prefer to collect their claims by liquidation through RMGC's bankruptcy procedure. No such reason is indicated in the Claimants' argument.
- 155 In any event, Romania is a co-shareholder in RMGC and would be similarly affected by the appointment of a judicial administrator in the hypothetical bankruptcy of RMGC. It would not be just the Claimants who "would lose control of RMGC and its books and records."<sup>217</sup> This result would be true for both shareholders and thus, the Claimants cannot allege that the equality of the Parties would be affected.
- 156 As for urgency, as the complex "but for" interim measures scenario is not alleged to materialize immediately, it is clear that there is no peril to the

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<sup>214</sup> Tax Procedure Code, at **Exhibit R-33**, p. 146 (Art. 184(1)).

<sup>215</sup> Claimants' Letter to the Tribunal dated 11 August 2016, p. 2; *see supra* para. 121.

<sup>216</sup> Claimants' Second Request for Provisional Measures, p. 20 (paras. 48-49).

<sup>217</sup> Claimants' Second Request for Provisional Measures, p. 20 (para. 49).

Claimants' ability to access documents held by RMGC or any threat to the procedural integrity of the arbitration as a result of the VAT Assessment, ANAF audits or ANAF investigations.

- 157 As for proportionality, an order prohibiting Romania to take steps to enforce the VAT Assessment against RMGC would imply ordering the Romanian tax authorities not to apply Romanian law (and risk the application of the relevant statute of limitations to tax claims, i.e. 5 years)<sup>218</sup> and provide RMGC with preferential tax treatment over any other individual or company in Romania. The same is true for the ANAF audits or ANAF investigations. It is not difficult to see that this patently discriminatory treatment would be inconsistent with Romania's international obligations, including the prohibition of State aid. The request is entirely disproportional; the Claimants' interests cannot be made to prevail over Romania's interest in applying its laws equally to all of its taxpayers.

#### **5.2.2.2 The need to divert financial resources**

- 158 An order to refrain Romanian tax authorities from taking any action in connection with the VAT Assessment, ANAF audits or ANAF investigations is also alleged to be necessary to avoid threatening the Claimants' purported right not to divert part of their resources to avoid the tax enforcement measures. The ANAF audits or ANAF investigations appear to be entirely unrelated to the Claimants' alleged need to divert financial resources such that, again, the measures sought do not relate to the alleged right in peril.
- 159 In any event, as noted in the Respondent's Comments on the Request for Emergency Relief, the Claimants raised during 2016 **CAD 60.625 million**".<sup>219</sup> This amount is additional to the CAD 28 million of cash and

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<sup>218</sup> Tax Procedure Code, at **Exhibit R-33**, p. 182 (Art. 215) and p. 183 (Art. 218).

<sup>219</sup> 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; Respondent's Comments on the Request for Emergency Relief, p. 27 *et seq.* (para. 71).



cash equivalents held by Gabriel Canada as of 30 June 2016.<sup>220</sup> In essence, Gabriel Canada does not want to use these funds to pay [REDACTED]

160 The Claimants claim that RMGC would need to divert funds now in the amount of [REDACTED] as a guarantee purportedly requires full cash collateralization of the amount guaranteed by the guarantor.<sup>221</sup>

161 First, if this were the case, it is difficult to see why RMGC would not simply pay the amount as opposed to providing a guarantee, the practical effect being the same according to the Claimants.

162 Second, as a matter of financial practice, Romania challenges the assertion that a guarantor will necessarily request deposit of a full, cash collateral equivalent to the amount guaranteed – this is a matter of business relationship between the guarantor and RMGC/the Claimants.

163 Third, “collateral” is not a synonym of money, and it is for each financial institution to decide what sort of collateral it accepts – any asset could be used as collateral. [REDACTED]

164 Fourth, the Claimants do not provide any evidence of the allegation that they were (or RMGC was) requested by a guarantor to deposit the full amount of the guarantee to issue the guarantee. Accordingly, the argument that RMGC (or the Claimants) need to immediately “divert” any funds as a result of the Taxation Measures is entirely unproven.

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<sup>220</sup> Gabriel Resources, "Management's discussion and analysis - Second Quarter 2016", at **Exhibit R-20**, p. 6.

<sup>221</sup> Claimants' Letter to the Tribunal dated 11 August 2016, p. 2.

<sup>222</sup> Claimants' Second Request for Provisional Measures, p. 38 (para. 88).

165

[REDACTED]

166 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 [REDACTED] would immediately impact their pursuit of the claims in the arbitration. In effect, in the second quarter of 2016, Gabriel Canada's monthly cash usage in relation to this arbitration amounted to some USD 600,000,<sup>224</sup> leaving available a very significant amount of funds in the next months after the payment of RMGC's tax liability. The CAD 28 million of cash and cash equivalents held by Gabriel Canada as of 30 June 2016 are more than sufficient to cover this liability without using any of the CAD 60.625 million raised to fund the arbitration.

167 Consequently, there is no peril whatsoever to the Claimants' ability to fund the pursuit of their claims in the arbitration, nor is there any threat to the procedural integrity of the arbitration. Apart from failing to show the necessity and urgency of the measures sought, the request also fails on the proportionality prong, for the same reasons indicated above in rela-

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<sup>223</sup> Claimants' Second Request for Provisional Measures, p. 38 (para. 88).

<sup>224</sup> Gabriel Resources, "Management's discussion and analysis - Second Quarter 2016", at **Exhibit R-20**, p. 6 ("The Company's average monthly cash usage during Q2 2016 was \$2.0 million, including legal services in respect of the ICSID Arbitration (Q1 2016 monthly average \$1.5 million, Q4 2015: monthly average \$2.1 million). Excluding legal and other advisory services in respect of the ICSID Arbitration, the average monthly cash usage during Q2 2016 was \$1.4 million (Q1 2016 monthly average: \$1.3 million, Q4 2015 monthly average: \$1.3 million)").

tion to the alleged threat to the Claimants' ability to access RMGC's documents.

### 5.2.2.3 The ability to proffer witnesses

- 168 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”.<sup>225</sup> They refer in this regard to the allegedly “ [REDACTED] ”, which has purportedly [REDACTED].<sup>226</sup> The alleged right in peril appears to be entirely unrelated to the VAT Assessment, and in this sense only supports Prayer for Relief e) and only insofar as related to the ANAF audits or ANAF investigations.
- 169 First, to the extent that the Claimants complain about past conduct of the Romanian tax authorities, the provisional measures sought are unnecessary to remedy any current or future peril to the Claimants right of due process in the arbitration. Insofar as they relate to investigations currently ongoing, whether or not tax audits and investigations are unpleasant for those involved is immaterial, provided that these have been and are being conducted in accordance with Romanian law, as happens here (see above **Section 3.5**). Romania has a legitimate right to undertake those investigations, [REDACTED].<sup>227</sup> The Claimants appear to accept Romania’s right to pursue those investigations, as long as they are legitimate.<sup>228</sup> The right to procedural integrity or equality of arms is not even engaged in these circumstances.

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<sup>225</sup> Claimants' Second Request for Provisional Measures, p. 21 (para. 51).

<sup>226</sup> Claimants' Second Request for Provisional Measures, p. 21 (para. 51).

<sup>227</sup> See *supra* paras. 35-37.

<sup>228</sup> Claimants' Second Request for Provisional Measures, p. 21 (para. 52).

170 Second, the alleged inability to proffer witnesses is an artificial argument where, despite the ongoing tax audits, the Claimants have produced a 15-page witness statement of the General Manager of Dragoş Tănase. Demonstrably, not only there was no [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
<sup>229</sup> In any event, there is no need at this stage of the proceedings to “proffer witnesses” and it is unclear why the ongoing tax inspections and audits do 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.

171 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. As for proportionality, the measures sought also fail on this count for the same reasons indicated above in relation to the alleged threat to the Claimants’ ability to access RMGC’s documents.<sup>230</sup>

#### **5.2.2.4 The need to divert attention away from preparing their case**

172 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, including by filing this Request.”<sup>231</sup>


173 Insofar as the Claimants have been compelled to divert their attention from this case to the ANAF audits and investigations, that outcome is entirely of their own doing. [REDACTED]

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<sup>229</sup> Statement of Dragoş Tănase dated 28 July 2016.

<sup>230</sup> See *supra* para. 152.

<sup>231</sup> Claimants’ Second Request for Provisional Measures, p. 21 (para. 51).

.<sup>232</sup> The Claimants have failed to demonstrate that these investigations and VAT Assessment are not in accordance with Romanian law. Accordingly, the Claimants cannot invoke a right of due process in the arbitration to prevent the legitimate application of Romanian law to a related entity – RMGC.

174 The Claimants have no right to invoke due process in these circumstances and the measures sought are not necessary or urgent for lack of a right in peril. There is no need to weigh the balance of convenience in these circumstances.

## **6 PRAYER FOR RELIEF**

175 The Respondent hereby respectfully requests that the Tribunal:

- a) dismiss the Claimants' Second Request for 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 incurred in relation thereto, including costs of legal representation.

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<sup>232</sup> *See supra* paras. 35-37.

17 August 2016

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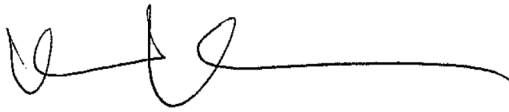
Respectfully submitted,

17 August 2016

For and on behalf of

**Romania**

LALIVE



Veijo Heiskanen  
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