

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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

**v.**

**Romania**

**(ICSID Case No. ARB/15/31)**

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**REASONED DECISION ON CLAIMANTS' REQUEST FOR EMERGENCY  
TEMPORARY PROVISIONAL MEASURES**

***Members of the Tribunal***

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

***Secretary of the Tribunal***

Ms. Sara Marzal Yetano

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October 21, 2016

### PROCEDURAL HISTORY

1. On July 21, 2015, the Center received a Request for Arbitration filed by the Claimants against the Respondent (the “**Request for Arbitration**”). The Request for Arbitration concerned the alleged expropriation and other violations by the Respondent of the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the “**Canada – Romania BIT**”) and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the “**UK – Romania BIT**”), in relation to Claimants’ alleged investment in a mining project in Romania through their Romanian Subsidiary Rosia Montana Gold Corporation S.A. (“**RMGC**”).
2. The Request for Arbitration was registered by ICSID’s Secretary-General on July 30, 2016 pursuant to Article 36(3) of the ICSID Convention.
3. On June 16, 2016, Claimants filed a Request for Provisional Measures (the “**First Request for Provisional Measures**”). In their First Request for Provisional Measures the Claimants requested the Tribunal to recommend that Respondent grant Claimants unrestricted access to and use of certain confidential and classified documents for the purposes of this arbitration. In a cover letter of the same date, Claimants also requested that the time limits for the Parties to present observations on the First Request for Provisional Measure be fixed by the Tribunal once constituted, and not by the Secretary-General pursuant to paragraph 5 of ICSID Arbitration Rule 39.
4. On June 21, 2016, the Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention. Its members are: Teresa Cheng (Chinese), President, appointed by the Secretary-General pursuant to the parties’ agreement, Horacio Grigera Naón (Argentine), appointed by the Claimants; and Zachary Douglas (Australian), appointed by the Respondent.
5. On July 18, 2016, the Centre received a letter from the Center for International Environmental Law, Client Earth and the European Center for Constitutional and Human Rights on behalf of the organizations Alburnos Maior, Greenpeace CEE Romania and the Independent Centre for the Development of Environmental Resources (the “**Requesting Organizations**”) (hereinafter, the “**July 18, 2016 letter**”). In the July 18, 2016 letter, the Requesting Organizations expressed their interest in exploring *amicus curiae* participation in the arbitration proceeding pursuant to ICSID Arbitration Rule 37 and requested “*the Tribunal to: (i) make available to the signing organizations the documents submitted to, or issued by, the Tribunal; and (ii) indicate to the signing organizations the opportune time to request leave for amicus curiae intervention*”.
6. On July 20, 2016, the Tribunal invited: (i) the Respondent to file observations on the First Request for Provisional Measures by August 3, 2016; (ii) the Claimants to file their response to Respondent’s observations within the two following weeks; and (iii) the

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

7. On July 22, 2016, the Tribunal invited the Parties to simultaneously file on August 5, 2016 their observations on the two requests made on behalf of the Requesting Organizations in the July 18, 2016 letter.
8. On July 28, 2016, the Claimants submitted a Second Request for Provisional Measures (the "**Second Request for Provisional Measures**") that included a Request for Emergency Temporary Provisional Measures pending the determination of this Second Request for Provisional Measures (the "**Request for Emergency Temporary Provisional Measures**"). In their Second Request for Provisional Measures, Claimants request the Tribunal to recommend Respondent:
  - (a) a series of measures related to the documents and information obtained by two divisions of Romania's National Agency for the Fiscal Administration ("**ANAF**") as a result of two investigations commenced on RMGC; and
  - (b) to refrain from enforcing or taking any action in connection with a VAT assessment served by ANAF on RMGC on July 7, 2016, in the principal amount of approximately USD 6.7 million (the "**VAT Assessment**") pending the resolution of RMGC's administrative and judicial challenge of such VAT Assessment.
9. In their Request for Emergency Temporary Provisional Measures, Claimants also requested the Tribunal to recommend Respondent to refrain from taking any measures of enforcement of the VAT Assessment and any associated interest and penalties pending determination by the Tribunal of the Second Request for Provisional Measures.
10. On August 3, 2016, the Tribunal invited Respondent's comments on the Claimants' Request for Emergency Temporary Provisional Measures by August 10, 2016. The Tribunal also invited: (i) the Respondent to file observations on the Claimants' Second Request for Provisional Measures by April 17, 2011; (ii) the Claimants to file observations in reply by August 24, 2016; and (iii) the Respondent to file observations by way of rejoinder by August 31, 2016.
11. On that same date, the Respondent submitted its observations to Claimants' First Request for Provisional Measures.
12. On August 5, 2016, both Parties submitted their observations to the two requests made by the Requesting Organizations in the July 18, 2016 letter.
13. On August 10, 2016, Respondent submitted its comments on Claimants' Request for Emergency Temporary Provisional Measures requesting that it be dismissed for the reasons stated in that submission.
14. On August 11, 2016, Claimants sent a letter to the Tribunal in which, among other things,

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they informed the Tribunal of recent developments relating to the enforcement of the VAT Assessment and they requested the opportunity to address their Request for Emergency Temporary Provisional Measures during the first session of the Tribunal to be held the next day.

15. On August 12, 2016, the Tribunal held its first session by teleconference. During the first session, the Parties presented their views on (i) the procedural items included in the Tribunal's draft Procedural Order No. 1, which had been circulated by the Tribunal's Secretary on July 27, 2016; (ii) on Claimants' Request for Emergency Temporary Provisional Measures and on (iii) the two requests made by the Requesting Organizations in the July 18, 2016 letter.
16. On that same date and after the first session was finalized, the Claimants submitted a letter with further observations on their Request for Emergency Temporary Provisional Measures.
17. On August 14, 2016 both Parties submitted letters with further observations on the Request for Temporary Provisional Measures.
18. By letter of August 19, 2016, the Tribunal informed the Parties that the Request for Emergency Temporary Provisional Measures was rejected. The Tribunal indicated that they had decided to communicate their Decision to the Parties, with the full reasons for that Decision to follow as soon as possible, in light of Claimants' allegations concerning RMGC's need to post a guarantee by August 25, 2016.
19. The present document includes the reasons of the Decision on the Request for Emergency Temporary Provisional Measures issued by the Tribunal on August 19, 2016, and the Tribunal's decision on costs.

**SUMMARY OF THE PARTIES' POSITIONS**

20. Claimants argue that the VAT Assessment against RMGC is "groundless", contrary to ANAF's previous practice, made "in manifest disregard and violation of Romanian Law" and "motivated by the fact of this arbitration" and Claimants claim against Respondent.<sup>1</sup> The enforcement of the VAT Assessment would allegedly put RMGC in an imminent risk of having its mining license annulled, being placed into insolvency and bankruptcy and liquidation shortly thereafter.<sup>2</sup> Furthermore, in this process, Claimants "also potentially would lose access to RMGC's books and records, with serious prejudice to its ability to present its claim in this arbitration."<sup>3</sup>

21. [REDACTED]

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<sup>1</sup> Claimants' Second Request for Provisional Measures and Request for Emergency Temporary Provisional Measures of July 28, 2016, ¶¶19-22.

<sup>2</sup> Claimants' Second Request for Provisional Measures and Request for Emergency Temporary Provisional Measures of July 28, 2016, ¶¶27-31.

<sup>3</sup> Claimants' Second Request for Provisional Measures and Request for Emergency Temporary Provisional Measures of July 28, 2016, ¶32.



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RMGC, also would not threaten the procedural integrity of the arbitration and would certainly fail to justify an order of “emergency measures”;<sup>11</sup>

- (e) Article XIII(8) of the Canada – Romania BIT expressly excludes interim enforcement of the alleged rights under the BIT, which necessarily also encompasses emergency relief;<sup>12</sup> and
- (f) the Claimants' request for emergency relief does not meet the test for granting ordinary provisional measures, primarily because the Tribunal lacks jurisdiction to issue the relief sought and because the Claimants' rights are not in peril since, among other reasons, even if Claimants are required to transfer the [REDACTED], that amount is not significant as compared to the Claimants' financial resources.<sup>13</sup>

### ANALYSIS

- 24. The Tribunal has issued its decision to dismiss the Request for Emergency Temporary Provisional Measures by the letter dated August 19, 2016 from ICSID.
- 25. The Tribunal sets out the reasons for the decision made below.
- 26. The power to grant provisional measures is set out in Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.
- 27. The Claimants have set out the criteria that have to be met before a provisional measure is to be granted.<sup>14</sup>
- 28. The application the Tribunal is considering is the Claimants' request for an order of emergency temporary provisional measure “prohibiting the Respondent from taking any such enforcement action before the Tribunal rules on the Claimants' request [for the provisional measures set out in paragraph 90 of the Second Request for Provisional Measures]”.<sup>15</sup>
- 29. The Tribunal is preliminarily of the view that it has the power to order emergency temporary provisional measures if the appropriate criteria are met. However for reasons that will be apparent below there is no need to make a decision on this particular issue at this stage.

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<sup>11</sup> Respondent's Comments on Claimants' Request for Emergency Temporary Provisional Measures of August 10, 2016, ¶¶47-56.

<sup>12</sup> Respondent's Comments on Claimants' Request for Emergency Temporary Provisional Measures of August 10, 2016, ¶¶57-63.

<sup>13</sup> Respondent's Comments on Claimants' Request for Emergency Temporary Provisional Measures of August 10, 2016, ¶¶64-79.

<sup>14</sup> Claimants' First Request for Provisional Measures of June 16, 2016, ¶¶13-16.

<sup>15</sup> Claimants' Second Request for Provisional Measures and Request for Emergency Temporary Provisional Measures of July 28, 2016, ¶84.

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30. The basis for the heightened urgency for the emergency temporary provisional measure is that the VAT Assessment would be enforced on or before August 30, 2016<sup>16</sup> and in order for assets of RMGC to be seized, the Claimants will have to post a guarantee [REDACTED]  
[REDACTED]  
[REDACTED]<sup>17</sup> The Tribunal has been informed that the guarantee that may have to be posted is at least in the order [REDACTED]
31. Respondent submitted that the application relating to Gabriel Resources Ltd. should be dismissed in the light of the prohibition in Article XII of the Canada – Romania BIT. If the Respondent is right on this then, Respondent says, the application should be dismissed *vis-à-vis* Gabriel Resources Ltd.
32. Claimants contend that the application is made on behalf of Gabriel Resources (Jersey) Ltd. as well and, as there is no such restriction under the UK – Romania BIT, the order should be granted nonetheless as both Claimants are to be affected by the enforcement of the VAT Assessment. Further there is little prejudice to the Respondent as all that is being sought for is for the enforcement measures to be delayed for a few weeks pending the resolution of the Second Request for Provisional Measures.
33. Respondent points out that there is no evidence that the VAT Assessment is not in accordance with Romania law or inappropriate or that it is related to the claims in this arbitration. Moreover, it has not been shown that the Claimants could not provide a bond or guarantee as alternative to the enforcement measures.
34. After the First Session held on August 12, 2016, Claimants and Respondent have provided further information on this matter by letters dated August 14 and 15, 2016. In particular the Respondent pointed out that Gabriel Resources Ltd. should not be allowed to “obtain a free ride on the back of the terms of the UK-Romania BIT.”<sup>18</sup>
35. At the time of this application, further submissions were to be filed in relation to the request for provisional measure. The Tribunal found that it was not in a position at the time when considering the Request for Emergency Temporary Provisional Measures to come to any view in the absence of the full set of submissions to be filed by the Parties.
36. The real question for the Tribunal at the stage of the Request for Emergency Temporary Provisional Measures is whether the urgency of the matter as explained by the Claimants justify an emergency temporary provisional measure pending the final decision on the Second Request for Provisional Measures. The Tribunal is of the view that the heightened test of urgency is not met.
37. First, there is insufficient evidence for the Tribunal to conclude that the VAT Assessment is not in accordance with Romania law.

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<sup>16</sup> Claimants' Second Request for Provisional Measures and Request for Emergency Temporary Provisional Measures of July 28, 2016, ¶84.

<sup>17</sup> Claimants' letter of August 11, 2016.

<sup>18</sup> Respondent's letter of August 14, 2016.



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38. Secondly, the submissions received as at the date of the decision dated August 19, 2016 are incomplete and are not sufficient for the Tribunal to conclude one way or another as to the intent or purpose of ANAF's actions complained of.
39. Thirdly, there is force in the submission of the Respondent that there is no adequate evidence to show that the Claimants will be in difficulty in putting up the guarantee. Such guarantee once provided would, according to the Claimants' own submission, be able to suspend the enforcement measures that may be taken by ANAF. The Tribunal is of the view that the economic burden does not appear to be insurmountable and that no irreparable harm will be caused to the Claimants in furnishing the guarantee in question.
40. Fourthly, the Tribunal notes that, at the time, there are procedures that are being pursued for the VAT Assessment to be challenged.
41. Lastly, as a matter of discretion, balancing the interests of the Parties as currently pleaded, in particular the prejudice that may be suffered by the respective Parties and the right of the State to enforce its domestic laws, the Tribunal is of the view that the emergency temporary provisional measure requested should not be granted.
42. Having said that, the Tribunal will be assisted if the Parties could continue to update it of the progress of the matter and would expect any new development to be highlighted in the further two rounds of submissions to be made.

**COSTS**

43. The Tribunal is of the view that costs should be reserved for determination at a later date.

**DECISION**

44. As indicated in the Secretariat's letter of August 19, 2016, the Tribunal, after careful consideration, unanimously decides as follows:
  - (a) The Claimants' Request for Emergency Temporary Provisional Measures is denied;
  - (b) Either party may bring to the Tribunal's attention any new, relevant, facts that fundamentally change the current circumstances; and
  - (c) Costs are reserved to be determined at a later date.



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Ms. Teresa Cheng SC  
President of the Tribunal  
Date: October 21, 2016

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Prof. Horacio Grigera Naón  
Arbitrator  
Date: October 21, 2016

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Prof. Zachary Douglas QC  
Arbitrator  
Date: October 21, 2016