

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**RTI Rotalin Gas Trading AG**

**and**

**Rotalin Gaz Trading S.R.L.**

**v.**

**The Republic of Moldova**

**(ICSID Case No. ARB(AF)/22/4)**

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**PROCEDURAL ORDER NO. 5**

**ORDER ON DOCUMENT PRODUCTION**

***Members of the Tribunal***

Prof. Dr. Maxi Scherer, President of the Tribunal

Dr. Inka Hanefeld, Arbitrator

Ms. Jean E. Kalicki, Arbitrator

***Secretary of the Tribunal***

Mr. Oladimeji Ojo

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10 May 2024

## I. INTRODUCTION<sup>1</sup>

1. On 22 April 2024, in accordance with the Procedural Timetable in Annex I of Procedural Order No. 1 (as amended), the Parties submitted their respective requests for document production in form of schedules (the “**Schedule**” or “**Schedules**”).
2. The requesting Party’s requests for document production and the underlying reasoning are set out in the respective Schedules, in the columns entitled “Documents or Category of Documents Requested” and “Relevance and Materiality.” The opposing Party set out its objections in the rows/columns entitled “Responses or Objections.” The requesting Party’s comments on the opposing Party’s objections are set out in in the columns entitled “Replies to Objections.” The Tribunal’s decision on the Parties’ requests for document production is set out in last column of the respective Schedules.
3. The Parties’ Schedules are attached to this Procedural Order as **Annexes A and B** and constitute an integral part of this Procedural Order.

## II. TRIBUNAL’S GENERAL CONSIDERATIONS

4. The Tribunal has duly considered the Parties’ reasons for their document production requests, the opposing Party’s objections and the requesting Party’s comments. The Tribunal has done so, in particular, in taking into account the following general considerations.
5. *First*, when deciding on the Parties’ requests for document production, the Tribunal has taken guidance from the International Bar Association Rules on the Taking of Evidence in International Arbitration (2020) (the “**IBA Rules**”) as provided in Procedural Order No. 1, at paragraph 15.1:
  - a. The Tribunal attached particular importance to the requirement of Article 3.3(a) of the IBA Rules, namely that the request for document production is to contain a

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<sup>1</sup> Capitalized terms, unless defined otherwise herein, shall have the meaning as defined in the Tribunal’s prior procedural orders.

description in sufficient detail (including the subject matter) of a narrow and specific category of documents that are reasonably believed to exist. Accordingly, requests seeking overly broad categories of documents with no clear link to the issues in dispute were not granted.

- b. Furthermore, in accordance with Articles 3.7(i), 9.1 and 9.2(a) of the IBA Rules, the Tribunal considered the relevance and materiality of the requested documents on a *prima facie* basis. At this stage of the proceedings, the Tribunal is not in a position to rule on the ultimate relevance and materiality of the requested documents.
  - c. With regard to the *prima facie* relevance and materiality of the requested documents, the Tribunal considers it is for each Party to make out its case. Accordingly, the Tribunal proceeded on the basis that for a Party to succeed in a document production request, that Party has to show that it requires the requested document in order to discharge the burden to prove certain (contested) factual allegations it wishes to rely on or to meet the case actually advanced by the other Party.
  - d. Moreover, when granting a Party's document production request, the Tribunal did so only to the extent the requested documents are in the possession, custody or control of the requested Party, and not in the possession, custody or control of the requesting Party, pursuant to Article 3.3(c)(i) and (ii) of the IBA Rules.
6. **Second**, the Tribunal notes that the Parties raise a number of general qualifications/objections in relation to the other side's Schedule. The Tribunal makes the following comments on some of those qualifications/objections:
- a. *Respondent's objections concerning publicly available documents:*<sup>2</sup> The Respondent argues that the production of certain documents would be "unduly burdensome" as such documents are (or were) accessible to the public via the DSO websites or via the ANRE website. The Claimants dispute this and submit that the

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<sup>2</sup> See e.g. Claimants' requests Nos 1-29, 33-39.

requested documents are not publicly available, and that they have not been able to access them. The Tribunal would, in principle, be inclined not to grant requests for publicly available documents. However, the Tribunal has not seen any evidence that the requested documents are in fact publicly available. The Tribunal notes that the Claimants have not been able to locate them. In light of this, the Tribunal will not dismiss requests on the basis alone that the Respondent alleges that the requested documents are publicly available. However, in relation to those requests (if granted), the Tribunal grants leave to the Respondent to produce documents to the Claimants in form of links to public websites where the documents can be found.

- b. *Claimants' qualification concerning the existence of certain documents:*<sup>3</sup> The Claimants argue that some of the documents requested by the Respondent do not exist. As noted above, Parties are ordered to produce documents only to the extent they are in their possession, custody or control pursuant to Article 3.3(c)(ii) of the IBA Rules. The Tribunal assumes that in making the statement that no responsive documents exist, the Claimants have conducted a reasonable search. The Tribunal invites the Claimants to confirm this *on or before 17 May 2024*, and subject to such confirmation, sees no need to decide on requests for which no responsive documents exist.
- c. *Claimants' objections that certain documents are related to third parties:*<sup>4</sup> The Claimants submit that certain documents are not in their possession or custody because they are related to third parties – e.g., ██████████ ██████████ ██████████. The Respondent requests that the Claimants be ordered to procure the relevant documents because (i) ██████████ is the Claimants' fact witness, and he is therefore under the Claimants' control; and (ii) ██████████, so the Claimants have direct access to, and are in control of information related to these entities. The

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<sup>3</sup> See e.g. Respondent's requests Nos 20-21, 27, 29, 34, 47, 54-55, 61, 67-70, 72-74, 82, 87, 95-96, 99, 100-103, 106, 109, 111.

<sup>4</sup> See e.g. Respondent's requests Nos 19, 22-25, 36-41, 112.

Tribunal cannot order the production of documents that are in the possession, custody or control of a third party. However, the Tribunal may grant requests in relation to documents in the possession, custody or control of the Claimants, even if they *relate* to third parties.

7. **Fourth**, in relation to the requests for which the Tribunal granted the production of documents, the Tribunal notes as follows:
  - a. Article 3.12 of the IBA Rules requires a reasonable search and a process that is efficient and economical. For those requests granted by the Tribunal, the Tribunal does not propose to make orders to produce in respect of either Party that are beyond what is reasonably economical.
  - b. The Tribunal's orders do not require production of privileged documents. Any Party wishing to claim privilege is to do so specifically as to each document by reference to the legal and factual basis for that assertion, in the form of a privilege log.

### **III. TRIBUNAL'S DECISION AND ORDER**

8. Based on these general considerations and as set out in the respective Schedules, the Tribunal decides as follows:
  - a. Denies the Claimants' requests Nos 1-22, 26-36, 38-40, 42-44 and 50;
  - b. Grants (fully or partially) the Claimants' requests Nos 23, 25, 37, 41, 46, 47(a) and (c) and 49;
  - c. Denies the Respondent's requests Nos 1-19, 22-24, 28, 30-33, 36-46, 48-52, 54-66, 68-71, 75-86, 88, 91-94, 97, 98, 100-102, 105, 107, 108, 110, 114-116;
  - d. Grants (fully or partially) the Respondent's requests Nos 25, 26, 35, 89, 90;
  - e. Notes that no decision is needed (or not yet needed) on the other requests; and
  - f. Reserves its decision on costs relating to the present order.

9. Pursuant to the Procedural Timetable (as amended), the documents ordered by the Tribunal pursuant to this Procedural Order shall be produced *on or before 10 June 2024*.

On behalf of the Tribunal,

Signed

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Prof. Dr. Maxi Scherer  
President of the Tribunal  
Date: 10 May 2024