INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

GABRIEL RESOURCES

AND GABRIEL RESOURCES (JERSEY) LTD.

Claimants

VS.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

RESPONDENT'S REJOINDER TO CLAIMANTS' SECOND REQUEST FOR PROVISIONAL MEASURES

31 August 2016

Before:

Ms Teresa Cheng (President)
Dr Horacio A. Grigera Naón
Professor Zachary Douglas

Secretary of the Tribunal
Ms Sara Marzal Yetano

LALIVE LEAUA & ASOCIATII

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

Term	**Definition**
ANAF	National Agency for Fiscal Administration ("*Agenţia Naţională de Administrare Fiscală*")
CAD	Canadian dollars
DGAF	Fiscal Antifraud Directorate General of ANAF ("*Direcţia Generală Antifraudă Fiscală*")
Kadok Group	Kadok Interprest SRL
MFO	Municipality Fiscal Office ("*Serviciul Fiscal Orășenesc*")
PPPO	Ploieşti 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 (**Exhibit R-39**)
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 (**Exhibit R-33**) (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 (**Exhibit C-42**)
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Tax Code dated 22 December 2003 enacted by Law No. 571/22 December 2003, entering into force on 1 January 2004, repealed through Article 502 (1) of the Fiscal Code of 2016 (**Exhibit R-34**)
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 submits its Rejoinder to Claimants' Second Request for Provisional Measures dated 28 July 2016 ("**Claimants' Second Request**").

2 This submission follows (i) Respondent's Observations on Claimants' Second Request For Provisional Measures dated 17 August 2016 ("**Respondent's Observations**") and (ii) responds to Claimants' Reply to Respondent's Observations on Claimants' Second Request dated 24 August 2016 ("**Claimants' Reply**").

3 The Claimants' Second Request relates to two groups of events, which are referred to as the "**Taxation Measures**:" (i) the VAT Assessment, rendered by ANAF in July 2016, which found RMGC liable to pay VAT in the amount of roughly RON 27 million (roughly USD 6.7 million) in connection with the time period between July 2011 and December 2015; and (ii) the DGAF's anti-fraud investigations into RMGC's activities, which commenced in the autumn of 2015 and are ongoing.[1]

4 With respect to the VAT Assessment, the Claimants primarily request that the Tribunal recommend that the Respondent essentially cease and desist.[2] More specifically, they request that Respondent not seek to enforce the VAT Assessment, pending the resolution of RMGC's challenge thereof before the Romanian courts or RMGC's posting of a bank guarantee – a guarantee which the Claimants recognize that they are able to post.

5 With respect to the anti-fraud investigations, the Claimants mainly request that the Tribunal recommend that the Respondent ensure that no

[1] *See* Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 3 (para. 6).

[2] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 67 (para. 166(c)).

documents coming into ANAF's possession or knowledge be made available to any person involved in Romania's defence in this arbitration.

6 Significantly, the Claimants have withdrawn their request that the Tribunal recommend that Romania explain the basis for the requests for information from RMGC, made in the context of the anti-fraud investigations.[3] The Claimants undoubtedly realized that the answer to their question might not be one that they wished the Tribunal to hear.

7 [redacted]

8 Not only are the Claimants' requests for provisional relief unwarranted, but also they are highly improper.

9 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.[5] Nor have they demonstrated that the Taxation Measures are anything other than measures legitimately applied in the ordinary course of ANAF's business and in accordance with Romanian law.

10 The Claimants contend that they do not need to prove that the Respondent's conduct is abusive and unlawful in order to obtain the provisional

[3] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 39 (para. 90(a)).
[4] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 11 *et seq.* (paras. 35 *et seq.*).
[5] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 4 *et seq.* (para. 9).

relief they seek.[6] This contention is, however, misplaced. In fact, the Claimants' insistence that the Respondent's actions are "unlawful" – repeated twenty times in their Reply – belies their contention.

11 A sovereign State cannot be instructed to cease and desist from seeking to collect a tax debt, which results from a tax audit conducted in the ordinary course of business and in accordance with Romanian law, in circumstances where the taxpayer, together with its majority shareholder (Gabriel), are able to suspend the enforcement by posting a guarantee. Conversely, the Claimants' initiation of these arbitration proceedings does not render them – or related entities, such as RMGC – immune from measures legitimately taken by Romanian authorities.[7]

12 The Claimants' request must be dismissed on a *prima facie* basis unless they can prove – which they have not – that the VAT Assessment is unlawful. (In any event, the VAT Assessment, as a Taxation Measure, is outside of this Tribunal's jurisdiction, as discussed below).

13 The Claimants protest that the Respondent's remark that the Claimants are seeking an exemption from Romanian tax laws "beggars belief [since] [t]he evidence establishes beyond peradventure that the VAT Assessment is *prima facie* abusive and unlawful."[8] Notably, the Claimants use the expression "*prima facie*" 25 times in their Reply.[9]

14 The expression "*prima facie*" generally conveys the notion that factual evidence establishes a particular point so clearly that the point is obvious from a first glance of that evidence. It is thus generally used to note that something is patently clear – from the evidence.

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[6] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 8 (para. 23).

[7] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 6 (para. 13).

[8] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 6 (para. 14).

[9] *See e.g.* paras. 2, 14, 27, 32, 33, 37, 45, 60, 157 and 159.

15 The Claimants, however, seem to use this expression for dramatic effect and despite the total absence of evidence to support their arguments. Thus, while they claim that, at first glance, the Respondent's actions are "unlawful" and "retaliatory," they provide no evidence thereof. Although the Claimants pound their fists repeatedly, their arguments should be seen for what they are: hollow statements without any factual support.

16 In any event, the impugned actions on the part of the Respondent were lawful. Furthermore, the Respondent formally denies any suggestion that any of the impugned actions, including the anti-fraud investigations, were in any way designed to "retaliate" against the Claimants for having filed this arbitration.

17 [redacted]

18 [redacted]

[10] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 3 (para. 7).

[11] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 4 (para. 9).

19 The Claimants insist that the Respondent has "rushed zealously to arrange for the seizure of RMGC assets."[12] However, the Respondent has done nothing more than apply its tax laws, as it would vis-à-vis any other taxpayer, including its laws and procedures for the collection and enforcement of unpaid tax liabilities. It has not "rushed" anything – let alone "zealously." The Claimants and RMGC have been aware for months of these tax investigations and the concerns and findings of the investigators, on which they have had ample opportunity to comment. The [redacted] are anything but surprising or out of the ordinary. [redacted] There has thus been nothing unusual or improper about Romania's [redacted], including the timeframes followed.

20 The Claimants' argument that the Respondent is after RMGC, planning to seize and sell its assets and provoke the company's insolvency is nothing short of preposterous – not to mention, again, entirely unsupported.[14] The Claimants evoke these dire and dramatic consequences, driven by purportedly sinister motives of the worst kind, as grounds for their request for provisional relief.

21 However, these dire and dramatic consequences that Claimants purportedly fear are speculative and remote. Their argument rests on a series of unfounded assumptions, which would need to materialize before RMGC could face insolvency and lose its mining licenses. And, most important-

[12] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 2 (para. 2) and p. 3 (para. 5); *see* also *ibid.* at p. 4 (para. 11) and p. 6 (para. 14).

[13] [redacted] Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 1, p. 38, and p. 44.

[14] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 5 (para. 12).

ly, the Claimants can easily prevent the seizure of RMGC's assets by simply assisting RMGC in providing a guarantee, as they recognize they are able to do. This fact in and of itself warrants the Tribunal's dismissal of their request for provisional relief.

22 The Claimants' arguments with respect to the **anti-fraud investigations** into RMGC's activities are equally without merit. In this regard, their Second Request is premised on nothing short of a conspiracy theory. They contend that the anti-fraud investigations are "manifestly designed to develop Respondent's arbitration defense contrary to the obligation to participate in this arbitration in good faith."[15] However, the Claimants' argument that the Respondent is investigating RMGC so as to obtain information and documents that it can in turn use in the arbitration is wholly unsupported.

23 The Claimants dismiss the explanations provided for these anti-fraud investigations – [redacted] – as "suspect."[16] However, as noted above, the explanations provided in the Respondent's Observations prompted the Claimants to withdraw their request that the Respondents justify the basis for these investigations.[17] Thus, while the Claimants assert that these explanations are "suspect," they do not wish for the Tribunal to hear further detail.

24 The Claimants go as far as alleging that "[t]he evidence only confirms that the motivation for the investigation is a bad faith attempt … to obtain evidence to use in this arbitration."[18] However, the Claimants provide no evidence in support of this outlandish allegation. While they point selec-

[15] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 2 (para. 2).

[16] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 6 (para. 16).

[17] *See supra* para. 6.

[18] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 6 (para. 16).

tively to a recent ANAF request for information, the example selected in no way supports their argument.[19]

25 For added dramatic effect, the Claimants contend that, via the anti-fraud investigations, ANAF have taken and "evidently are reviewing and using the Classified and Confidential Documents…"[20] Later on in their Reply, the Claimants add that "ANAF **and presumably now other agents** of Respondent are using the Classified and Confidential Documents".[21]

26 The Claimants' fear-mongering tactics and plethora of presumptions cannot give rise to an order of provisional relief. They provide no evidence that ANAF has obtained access to the Confidential and Classified Documents and no evidence that they or others are using these documents for purposes of this arbitration. In any event, these allegations are formally denied by Mr Petre Dragos Voinescu, the General Inspector of the ANAF Anti-Fraud Group, who has submitted a Witness Statement in support of this submission.[22]

27 In any event, the Claimants' Second Request should be denied because they have not fulfilled the requirements for granting provisional relief in accordance with the ICSID Convention and Rules.

[19] The Claimants furthermore point to this request for information, which refers to an addendum to the Rosia Montana License, as (the sole) evidence that ANAF purportedly has classified documents in its possession. Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 7 (para. 18). However, that addendum in question, like the Rosia Montana License, is publicly available on the internet. *See* *http://www.riseproject.ro/articol/documentele-confidentiale-ale-afacerii-rosia-montana/*.

[20] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 6 *et seq*. (paras. 17-19).

[21] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 38 (para. 101) and p. 62 (para. 153) (emphasis added).

[22] *See* Witness Statement of Petre Dragoș Voinescu, p. 1 (para. 5) and p. 2 (para. 9).

28 The Claimants' request for provisional relief is outside of this Tribunal's jurisdiction.[23] 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.[24] Article XII(1) of that BIT specifies that "nothing in this Agreement shall apply to taxation measures;" "nothing" necessarily includes interim relief. Although the Claimants throw everything but the kitchen sink at the Respondent to try to dispute these hard facts, their arguments are unavailing.[25]

29 The Claimants' newly-found interest in and reliance on the UK-Romania BIT to try to salvage their claims for provisional relief are without merit.[26] They cannot rely on that BIT in order to circumvent the limitations contained in the Canada-Romania BIT.

30 This submission demonstrates that the VAT Assessment and resulting enforcement measures are measures taken by ANAF in the ordinary course of their business and in accordance with Romanian law (**Sections 2 and 3**). The current anti-fraud investigations are also in accordance with Romanian law and the Claimants' allegation that ANAF has access, through those investigations, to the Confidential and Classified Documents is without merit (**Section 4**). Accordingly, the requirements for provisional measures under the ICSID Convention and ICSID Rules are not met (**Section 5**).

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[23] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 6 *et seq.* (para. 14); Respondent's Comments on the Request for Emergency Relief, p. 26 *et seq.* (Section 5.1).

[24] *See* Canada-Romania BIT, at **Exhibit C-1**, p. 13 (Art. XII(1)); *see* also Respondent's Letter to the Tribunal dated 14 August 2016.

[25] *See* Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 8 *et seq.* (para. 24).

[26] *See* also Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 7 (para. 15).

2 THE VAT ASSESSMENT WAS IN ACCORDANCE WITH ROMANIAN LAW

31 The crux of the Claimants' argument is that the VAT Assessment is at odds with the Romanian authorities' prior treatment of RMGC and its VAT declarations and returns. They contend that the VAT Assessment is "contrary to [redacted] 18 prior audits [redacted] …"[27]

32 Although the Claimants repeat this argument throughout their pleadings, nowhere do they provide any evidence to support it. They have not provided analyses of these 18 prior audits, nor have they detailed when these audits took place, what time periods they covered, what VAT RMGC had sought to claim or what the Romanian authorities concluded at the time. The Claimants have thus not met their burden of proof that the VAT Assessment represents a treatment different from prior treatment of RMGC and its VAT returns, let alone a treatment that is improper or illegal.

33 The Claimants contend that the Tribunal is not called upon to assess or determine the merits of the VAT Assessment and that it need only decide – essentially in the abstract – whether provisional measures are necessary in the present case.[28] This contention is, however, wrong. The Claimants are in part requesting that the Tribunal recommend that the Respondent effectively suspend its enforcement of the VAT Assessment.[29] This request is without basis insofar as the VAT Assessment was in accordance with Romanian law. Stated differently, such a request for provisional relief is improper insofar as it would entail recommending that the Respondent cease enforcement of a decision rendered in accordance with Romanian law, notwithstanding the fact that RMGC has recourse under

[27] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 10 (para. 28); *see* also p. 12 (para. 33).

[28] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 11 (para. 31).

[29] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 67 (para. 166(c)).

domestic law to challenge that decision and the underlying report and is exercising that right.

34 The Claimants contradict themselves with respect to the question of whether the Tribunal need consider the merits of the VAT Assessment. Notably, in response to the Respondent's prior submission that the Claimants are effectively seeking preferential treatment of RMGC, the Claimants submit that that they "do not seek preferential or exculpatory treatment" but rather "redress for the deleterious effects of Respondent's *prima facie* retaliatory and **unlawful** conduct…"[30] Thus, the Claimants recognize that they seek redress in connection with purportedly unlawful conduct and yet, they utterly fail to demonstrate that Romanian authorities have acted unlawfully. There is not one discernible reference to the applicable rules of Romanian law throughout the Claimants' pleadings or even an attempt to indicate in what way which provision was incorrectly applied.

35 Furthermore, although the Claimants contend that the Tribunal can grant the requested provisional relief without considering the merits of the VAT Assessment, they discuss the contents of that report (albeit selectively).[31]

36 [redacted]

[30] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 11 (para. 32) (emphasis added).

[31] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 12 *et seq.* (para. 34 *et seq.*).

[32] Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 29 *et seq.*

[redacted]

37 The Claimants argue that the VAT Assessment was "made in manifest disregard of Romanian and EU law, which require the tax authority to act in accordance with the principles of legal certainty and legitimate expectations…"[34] The Respondent does not dispute these principles. However, these principles are not without their own limits.

38 In *Salomie and Oltean v. the Cluj Public Finances General Directorate*, the Cluj Court of Appeal sought guidance from the ECJ in the form of a preliminary ruling regarding similar issues.[35] In that case, the applicants had constructed and sold several buildings in Romania and had not declared VAT on the sales. Subsequently, tax authorities held that VAT should have been paid on some of the sales and requested payment.[36]

39 The applicants challenged the demands for payment before the Romanian courts.[37] The Cluj Court of Appeal was uncertain whether the demands for payment were consistent with the principles of legal certainty and protection of legitimate expectations in part because the tax authority's practice up to that date had been not to make that type of transaction subject to VAT.[38] Also, the Court of Appeal observed that sufficient information had been available to the tax authorities for them previously to conclude the applicants had the status of "taxable person[s]."[39] Faced

[33] Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 32; *see also* High Court of Cassation, Decision dated 12 March 2013, at **Exhibit R-47**.

[34] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 13 (para. 35).

[35] *Radu Florin Salomie and Nicolae Vasile Oltean v. Direcția Generală a Finanțelor Publice Cluj,* Judgment, ECJ Case C-183/14, 9 July 2015, at **Exhibit RLA-29**, p. 2 (para. 1) and p. 5 *et seq.* (paras. 19-25).

[36] **Exhibit RLA-29**, p. 5 *et seq.* (paras. 21-22).

[37] **Exhibit RLA-29**, p. 6 (para. 24).

[38] **Exhibit RLA-29**, p. 6 (para. 25).

[39] **Exhibit RLA-29**, p. 6 (para. 25).

with this uncertainty, the Court of Appeal referred these questions to the ECJ.

40 With respect to the principle of legal certainty, the ECJ noted that it had "already held that the principle of legal certainty does not preclude a practice of the national tax authorities whereby, within a limitation period, they revoke a decision by which they granted the taxable person the right to deduct VAT and subsequently, following a fresh investigation, order him to pay that tax together with default interest…"[40] It concluded that it "cannot validly be argued that the principle of legal certainty precludes … the tax authority from taking the view, following a tax audit, that the property transactions at issue in this case ought to have been subject to VAT."[41]

41 The ECJ similarly held that the principle of protecting a taxpayer's legitimate expectations is not without limits:

> "… the fact that, until 2010, the national tax authorities had not made property transactions such as those at issue in the main proceedings subject to VAT in a systematic manner does not in principle suffice, except in very specific circumstances, to give rise, in the mind of a prudent and well-informed trader, to a reasonable expectation that that tax would not be levied on such transactions, taking into account not only the clarity and foreseeability of the applicable national law, but also the fact that the present case appears to involve professionals from the property sector.
>
> Such a practice, however regrettable it may be, is not in principle such as to provide the taxpayers concerned with precise assuranc-

[40] **Exhibit RLA-29**, p. 8 *et seq.* (para. 41).

[41] **Exhibit RLA-29**, p. 9 (para. 43).

es that VAT will not be levied on property transactions such as those at issue in the main proceedings."[42]

42 [redacted]

43 [redacted]

[42] **Exhibit RLA-29**, p. 9 (paras. 47-48); *see* also *ibid.* at p. 10 (para. 53) ("Accordingly, the answer to the first two questions is that the principles of legal certainty and of the protection of legitimate expectations do not preclude, in circumstances such as those of the dispute in the main proceedings, a national tax authority from deciding, following a tax audit, to subject transactions to VAT and to impose the payment of surcharges, provided that that decision is based on clear and precise rules and that that authority's practice has not been such as to give rise, in the mind of a prudent and well-informed trader, to a reasonable expectation that that tax would not be levied on such transactions, this being a matter for the referring court to determine. The surcharges applied in such circumstances must comply with the principle of proportionality.")

[43] [redacted]

[44] [redacted]

[redacted]

44 [redacted]

[redacted]

[redacted]

45 [redacted]

46 Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 12 (para. 34).

47 Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 34.

[redacted]

46 [redacted]

[redacted]

47 [redacted]

[48] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 15 (para. 41).

[49] [redacted]

48 [redacted]

49 [redacted]

[50] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 16 (para. 43).

[51] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 35 *et seq.* (paras. 100-101).

3 THE ENFORCEMENT MEASURES IN CONNECTION WITH THE VAT ASSESSMENT ARE IN ACCORDANCE WITH ROMANIAN LAW

50 The Claimants reproach the Respondent for taking enforcement measures against RMGC in connection with the VAT Assessment. They contend that, "unless [they] post a guarantee on RMGC's behalf in the full amount of the VAT Assessment plus the forthcoming interest and penalties…, ANAF surely will proceed with dispatch to enforce the VAT Assessment against RMGC's bank accounts and fixed assets which will render RMGC insolvent…"[52]

51 The Claimants quote the ANAF summons and writ of execution, indicating that RMGC is required to pay its tax liability by 26 August.[53] The Claimants do not contend that this deadline for payment is in any way surprising or contrary to Romanian law.[54] Nor can they, since the enforcement measures that Romanian authorities have taken in connection with the VAT Assessment are in accordance with Romanian law.

52 The Claimants contend that, within 48 hours of their submission, they "expect that, without a guarantee in place…, Respondent intends to seize RMGC's bank accounts and begin selling its assets through a public tender."[55] However, the Claimants concede that they have the funds to provide the guarantee on RMGC's behalf, and have provided no reasons as

[52] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 17 (para. 45).

[53] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 18 (para. 46); [redacted]

[54] ANAF Notice of Summons and Writ of Execution dated 8 August 2016, at **Exhibit R-23**: "In accordance with art. 145 of the Government Ordinance no. 92/2003 on the Tax Procedure Code"; "You may challenge this document before the competent court of law, within 15 days since communication or taking notice, as per the provisions of art. 172-173 of the Government Ordinance no. 92/2003 on the Tax Procedure Code."

[55] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 18 (para. 46).

to why this could not be done in time to prevent a seizure.[56] Furthermore, the Claimants fail to explain why RMGC did not undertake the necessary steps to provide a bank guarantee itself, for example by obtaining a loan secured by its fixed assets. Therefore, if any seizure were to happen, which has not been established, it would be as a result of RMGC's and the Claimants' refusal to avail themselves of all the options at their disposal. In light of this fact, the Claimants' allegation that the Respondent seek to dismantle "RMGC as quickly as possible based on the *prima facie* unlawful VAT Assessment" is ludicrous, especially given the Claimants' and RMGC's obvious and apparent ability to forestall enforcement by providing a bank guarantee.[57]

53 And yet, the Respondent's alleged intent to dismantle RMGC also serves as the cornerstone to the speculative house of cards that the Claimants have constructed in order to allege that RMGC faces bankruptcy and liquidation, but for the granting of provisional measures.[58] The Claimants assert, based solely on conjecture, that, should RMGC be considered insolvent due to an inability to pay its debts, the Respondent as a creditor would refuse to agree to any judicial reorganization plan, which would in turn lead RMGC to bankruptcy and liquidation.[59]

54 As discussed further in Section 5.2.2 below, even if the Claimants could establish that the Respondent seeks to dismantle RMGC, they have not shown that the Respondent would be in a position to oppose the reorgani-

[56] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 64 (para. 159).
[57] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 17 (para. 45).
[58] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 18 (para. 47).
[59] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 18 *et seq.* (paras. 47-49).

zation plan pursuant to the terms of Article 138 of the Insolvency Code.[60] Aside from their misguided speculation regarding the motives of the Respondent, the Claimants have failed to provide any reason for why RMGC's creditors would prefer bankruptcy and liquidation to judicial reorganization. Nor have the Claimants provided any support for their contention that the Respondent would retain full access to RMGC's documents in the event of bankruptcy and liquidation, as there is no evidence that the judicial administrator would be put place by, and would answer to, the Respondent.[61]

55 Below, Romania explains that ANAF has properly challenged RMGC's request to suspend the enforcement proceedings (**Section 3.1**), and RMGC can post a guarantee in connection with the VAT Assessment or apply to pay in instalments (**Section 3.2**). In any event, the Claimants do not risk losing access to RMGC documents (**Section 3.3**).

3.1 ANAF has properly challenged RMGC's request to suspend the enforcement proceedings

56 The Claimants complain of Romania's recent challenge, on 22 August 2016, of RMGC's request for a suspension of the enforcement proceedings of the VAT Assessment.[62] Again though, the Claimants do not and cannot argue that Romania's challenge is in any way improper or illegal. Romania's challenge explains, with reference to applicable laws, that [redacted].[63]

[60] Law No. 85/2014 on Insolvency Prevention Measures and Insolvency, published in the Official Gazette Part I, No. 466, as last consolidated on July 14, 2016 dated 14 July 2016, at **Exhibit C-45**, p. 3.

[61] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 19 (para. 50).

[62] [redacted]

[63] [redacted] Excerpts from Law 554 of 2 December 2004 on contentious administrative matters, at **Exhibit R-41**; [redacted]

57 The Claimants assert that that it "could take several months" for the Romanian courts to decide their request for a suspension of the enforcement proceedings.[64] However, in practice, the Alba Court usually renders such decisions within three weeks.[65] Thus, RMGC, which filed its application on 5 August, may expect a decision very soon. This practice is in line with Article 14(2) of Law No. 544, which requires courts to decide such motions with celerity.[66]

58 The Claimants complain of ANAF's recent challenge of RMGC's request to suspend the enforcement proceedings in connection with the VAT Assessment.[67] However, ANAF is required to collect duties and taxes, which represent State income,[68] and to take, through its competent bodies, enforcement measures.[69] It is also required to ensure that tax laws, including enforcement measures, are applied in a non-discriminatory and fair manner.[70]

[64] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 20 (para. 52).

[65] *See* print-outs from Alba Court website regarding similar requests for suspension of enforcement measures in connection with tax decisions, showing that such decisions were rendered between 6 and 25 days following the application: Print-out regarding decision 1009/2015, Alba Tribunal dated 23 December 2015, at **Exhibit R-48**; Print-out regarding decision 82/2016, Alba Tribunal dated 2 February 2016, at **Exhibit R-49**; Print-out regarding decision 456/2016, Alba Tribunal dated 27 June 2016, at **Exhibit R-50**; Print-out regarding decision 478/2016, Alba tribunal dated 16 August 2016, at **Exhibit R-51**.

[66] Excerpts from Law 554 of 2 December 2004 on contentious administrative matters, at **Exhibit R-41**, p. 1 (Art. 14(2)).

[67] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 5 (para. 13).

[68] Tax Procedure Code, at **Exhibit R-33**, p. 7 (Art. 4(2)), p. 1 *et seq.* (Arts. 1(1) and 2(1)); Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, p. 1 *et seq.* (Art. 6(d)).

[69] Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, p. 2 *et seq.* (Art. 7 (A)(13) and Art. 7(B)(6)).

[70] Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, p. 1 *et seq.* (Art. 5(c), Art. 7 (A)(12), B(28)).

59 The Claimants go so far as now requesting that Romania "withdraw its opposition to RMGC's request for a judicial suspension of enforcement."[71] However, there is no legal mechanism, under the Romanian Tax Procedure Code, Civil Procedure Code, or otherwise, for the withdrawal of a challenge by the State to a request to suspend enforcement proceedings.[72] ANAF has the obligation to manage and collect taxes and to pursue enforcement proceedings where necessary and to exercise its rights in this regard before the Romanian courts.[73]

60 Romanian civil servants are obliged to carry out their work duties in a professional, impartial and lawful manner and may be held liable for failing to fulfil their work duties, including the duties to enforce laws and collect State income.[74] The failure of the civil servant to fulfil his or her work duties may trigger disciplinary actions and civil or criminal liability.[75] A civil servant may be indicted for negligence in exercising a public service and faces imprisonment from 3 months to 3 years or a fine.[76] Thus, because there were grounds to challenge RMGC's request to stay the enforcement proceedings, ANAF civil servants were required to do so; failure to do so on the part of the responsible civil servants could render them civilly and criminally liable.

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[71] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 26 (para. 66) and p. 67 (para. 166(c)).

[72] *See* Excerpts from the Civil Procedure Code, at **Exhibit R-52**, p. 1 (Art.201 (1) and (5)) and p. 2 (Art. 292(6)).

[73] Even if ANAF could withdraw its challenge (*quod non*), the court could still reject RMGC's motion to suspend the enforcement proceedings since the court rules based on the provisions of the law and even in the absence of a defence presented by ANAF. *See* Excerpts from the Civil Procedure Code, at **Exhibit R-52** (Art. 7).

[74] Excerpts from Law No. 188 on the statute of civil servants dated 8 December 1999, at **Exhibit R-53** (Art. 43 and Art. 2(3)(a) and (f)).

[75] Excerpts from Law No. 188 on the statute of civil servants dated 8 December 1999, at **Exhibit R-53** (Art. 75).

[76] Excerpts from the Criminal Code dated 17 September 2009, at **Exhibit R-54** (Arts. 297 and 298).

61 ANAF cannot be prevented from filing a challenge to RMGC's request to suspend the enforcement proceedings. Article 21 of the Romanian Constitution guarantees the free access to justice to any natural or legal person in order to protect its legitimate rights, liberties and interests.[77] Thus, ANAF cannot be prevented from filing its defence in order to protect its rights and the deeds issued in accordance with the law and to ensure the collection of State income.

62 Notably, the bond filed by RMGC to the Court in connection with its motion to suspend the enforcement proceedings is a relatively small amount: [redacted][78] The purpose of the bond is to cover additional damages for delaying the enforcement as a result of a request to suspend enforcement.

3.2 RMGC can post a guarantee or seek to pay in instalments

63 The Claimants' Second Request should be denied for one reason alone: they have not explained why RMGC, with their assistance, cannot post a guarantee in the amount owed in connection with the VAT Assessment.

64 The Claimants' witness, Mr Vaughan, contends that Gabriel would need to provide [redacted][79] Even if true, the Claimants have not explained why they, with RMGC, could not pay this amount. The simple reality is that Gabriel has the money; their not wanting to pay the guarantee is not a valid ground to bring this request for provisional relief.

65 On the contrary, the Claimants expressly recognize their ability to post the full guarantee. They contend that "the impact on Gabriel of obtaining

[77] Romanian Constitution as amended in 2003, at **Exhibit R-55**, p. 10 (Art. 21).

[78] [redacted]

[79] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 23 (para. 57) (referring to Statement of Max Vaughan dated 24 August 2016, p. 5 (para. 12)).

a guarantee in the principal amount at issue in the VAT Assessment, let alone any interest and penalties, would be material."[80] In other words, the Claimants can but do not wish to pay the guarantee. The Claimants recognize though that Gabriel Canada recently raised proceeds of CAD 60.625 million (or USD 46.8 million) which, in and of themselves, more than amply cover the amount of the guarantee in question.[81]

66 The Claimants argue that "it is not for Respondent to decide what level of funds Claimants need to fund their ongoing operations or their arbitration claims…"[82] and that the Respondent may not compromise their "ability to run their business or to present their claims by diverting and rendering unavailable millions of dollars of their limited resources…."[83]

67 These allegations are a smokescreen. As discussed further below, the Claimants' ability to post a guarantee for RMGC in and of itself renders their request for provisional relief improper.[84] Furthermore, the Claimants have simply not even remotely demonstrated that posting a guarantee for RMGC would hamper their "ability to run their business or to present their claims" in this arbitration.

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[80] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 24 (para. 61).

[81] Gabriel Resources, "Management's discussion and analysis - Second Quarter 2016", at **Exhibit R-20**, p. 3; Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 24 (para. 61).

[82] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 23 (para. 60).

[83] In support of their argument, the Claimants refer to the award in the UNCITRAL arbitration *Paushok v Mongolia*. Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 24 (para. 62). However, in that case, the tribunal concluded that, at the time of the request for provisional relief, "no financial institution would consider lending such an amount of money to GEM," the Claimant's subsidiary. *Sergei Paushok, qsc Golden East Company, qsc Vostokneftegaz Company v. The Government of Mongolia*, Order on Interim Measures, UNCITRAL, 2 September 2008, at **Exhibit CLA-31**, p. 10 (para. 61). By contrast, here, the Claimants recognize that [redacted] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 25 (para. 65).

[84] *See infra* section 5.2.

68 Nor have they demonstrated that they are required to [redacted] in connection with a guarantee.[85] [redacted]

69 Options other than posting a guarantee remain available to RMGC. As previously explained, RMGC is seeking to stay the enforcement proceedings in connection with the VAT Assessment and a decision may be expected imminently, contrary to the Respondent's allegation that the "decision could take several months."[87]

70 RMGC could [redacted] pay the amount owed in connection with the VAT Assessment in instalments.[88] The Claimants wrongly deny the availability of this option.[89] [redacted] Furthermore, the Claimants could pay part or all of these instalments for RMGC. Filing such a request would not affect RMGC's ability to challenge the VAT Assessment before the Romanian courts and to obtain subsequent reimbursement, should its challenge be validated.

3.3 The Claimants do not risk losing access to RMGC documents (including the Confidential and Classified Documents)

71 The Claimants contend that, in the event of RMGC's bankruptcy and liquidation, they would lose access to RMGC's books and records, in-

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[85] *See* Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 54 (paras. 160 *et seq.*).

[86] [redacted] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 2 (para. 4, n. 2); *ibid.* at p. 25 (para. 65).

[87] *See supra* para. 57.

[88] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 42 (para. 122).

[89] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 22 (para. 56).

cluding in particular the Confidential and Classified Documents, which are the subject of their First Request. They go so far as to assert that the Respondent have already accessed those documents, in the context of the anti-fraud investigations discussed further below, and is "using such documents as part of its investigation."[90]

72 The Claimants' alarmist cry that they do not have independent access to the Confidential and Classified Documents and that they risk losing access to such documents is a bluff and should be disregarded for two reasons.

73 **First**, the Respondent does not have independent access to the Confidential and Classified Documents any more than the Claimants, so this purported risk applies equally to both Parties.

74 **Second**, the risk of these documents essentially disappearing before the Claimants access them is virtually non-existent. As explained in the Respondent's Further Observations to the Claimants' First Request for Provisional Measures dated 31 August 2016, the vast majority of the Confidential and Classified Documents have already been declassified and the remaining documents are in the course of being considered for declassification; separately, the Parties agree that it will be necessary to establish a confidentiality regime to govern the access and use of the documents that are subject to statutory or contractual confidentiality restrictions.

75 The Claimants' baseless allegation that the Respondent, via the anti-fraud investigations, has already accessed and may further access the Confidential and Classified Documents for purposes of this arbitration is addressed in **Section 4** below.

[90] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 18 *et seq.* (para. 47).

4 THE ANTI-FRAUD INVESTIGATIONS ARE IN ACCORDANCE WITH ROMANIAN LAW AND THE CLAIMANTS' ALLEGATION THAT ANAF HAS ACCESS TO THE CONFIDENTIAL AND CLASSIFIED DOCUMENTS IS WITHOUT MERIT

76 The Claimants complain of anti-fraud investigations directed against RMGC, which started in late 2015. These investigations are, along with the VAT Assessment, the basis for their request for provisional relief.

77 The Claimants' allegations abound in speculation as to a sinister purpose, which would be driving these anti-fraud investigations. It is undisputed that ANAF commenced these investigations in October 2015, [redacted]

78 [redacted]

[91] [redacted] *See* Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 13 (para. 41).

[92] Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**, [redacted] Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, [redacted]

[93] Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**, [redacted]; Government Decision no. 520 on organization and functioning of ANAF dated 24 July 2013, at **Exhibit R-40**, [redacted]

[94] RMGC Trade Registry History dated 12 February 2016, at **Exhibit R-28**, p. 2 *et seq.*

79 The Claimants highlight that the anti-fraud investigations commenced "soon after the filing of the Request for Arbitration in July 2015," in apparent support of their argument that these investigations are somehow "retaliatory" against RMGC and the Claimants.[95] However, the Claimants have provided no evidence that these anti-fraud investigations are in any way related to – let alone result from – their initiation of this arbitration. [redacted]

80 In connection with such inspections, ANAF has the right to request and examine documents from the taxpayer, to verify and investigate the taxpayer's activities, and to request explanations relating thereto, and the taxpayer is required to provide requested documentation.[97]

81 The insinuation that ANAF has seized RMGC documents and may in the future seize further documents (following the company's possible insolvency), including the Confidential and Classified Documents, to use them in this arbitration is not only unsupported, but also absurd.

82 **First**, ANAF has strict procedures with regard to the obtention and use of documents from an entity subject to an anti-fraud investigation. Documents are taken based on a hand-over protocol and stored within ANAF's offices. Only the ANAF inspectors in charge of a particular inspection have access to the documents taken from the company under investiga-

[95] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 26 *et seq.* (para. 68).

[96] *See* Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 11 (para. 35).

[97] Tax Procedure Code, at **Exhibit R-33**, p. 10 (Art. 10), p. 50 (Art. 64(1)) and p. 179 (Art. 213(2)); Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**, p. 4 (Art 6(2)(d)).

tion.[98] Other employees or agents of the Romanian government, including of the Ministry of Public Finance, do not have access to these documents.[99] After the anti-fraud inspection ends, the documents are either submitted to the DGAF together with the assessment made by the inspectors, if the case continues, or they are returned to the taxpayer.[100]

83 The hard-copy documentation that was taken from RMGC is currently being held at the [redacted] DGAF offices in secure and confidential conditions.[101] Only the DGAF inspectors involved in the RMGC investigations have access to those documents.

84 In addition, tax (including anti-fraud) inspectors have the obligation of keeping secret "all information they have found out through the exercise of their job duties;" furthermore, they may only transmit such information to public authorities in circumstances prescribed by law.[102]

85 **Second**, the Claimants have not proven that ANAF has requested access or obtained access to any of the Confidential and Classified Documents. In any event, this contention is formally denied.[103]

86 **Third**, there would be nothing improper or illegal if ANAF had in fact requested or obtained access to the Confidential and Classified Documents. In the framework of its investigations, ANAF has the right to request any documents from the taxpayer, which is in turn required to provide requested documentation.[104]

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[98] Witness Statement of Petre Dragoș Voinescu, p. 2 (para. 7).

[99] Witness Statement of Petre Dragoș Voinescu, p. 1 (para. 4) and p. 2 (para. 7).

[100] Witness Statement of Petre Dragoș Voinescu, p. 2 (para. 8).

[101] Witness Statement of Petre Dragoș Voinescu, p. 1 *et seq.* (para. 6).

[102] Tax Procedure Code, at **Exhibit R-33**, p. 11 (Art. 11 (1) and (3)(a)).

[103] Witness Statement of Petre Dragoș Voinescu, p. 2 (para. 9).

[104] Tax Procedure Code, at **Exhibit R-33**, p. 10 (Art. 10), p. 50 (Art. 64(1)) and p. 179 (Art. 213(2)); Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**, p. 4 (Art 6(2)(d)).

87 Furthermore, ANAF inspectors may, under certain conditions, review documents classified as work secret. As the Claimants are well aware and as they explain themselves, access to work secret documents is limited.[105] ANAF inspectors would thus need to obtain the appropriate clearances required by law.[106] Having clearance to review such documents does not, however, automatically entitle a government representative to access such documents. Such access will only be granted in limited circumstances prescribed by law.[107]

88 The same rules and restrictions apply to Respondent's counsel, who cannot, without obtaining the appropriate clearances and authorizations, review classified documents. For the avoidance of doubt, the Respondent reiterates that neither it (with the exception of NAMR), nor its counsel, has had access to date to the Confidential and Classified Documents.

89 **Fourth**, RMGC, as custodian of the Confidential and Classified Documents, must inform ANAF if ANAF requests (unknowingly) documentation or information that is classified. RMGC has not, however, alerted ANAF that any of its requests covered classified documents.

90 **Fifth,** RMGC may not allow access to Confidential and Classified Documents to unauthorized individuals. Thus, insofar as RMGC employees may have provided such access to unknowing ANAF agents, those employees would have violated Romanian law.[108]

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[105] Claimants' First Request, p. 11 (para. 24).

[106] *See* Government Decision No. 585/2002 for the Approval of the National Standards for the Protection of Classified Information in Romania, published in Official Gazette Part I, No. 485, dated July 5, 2002, as last consolidated on 24 March 2005, at **Exhibit C-14**, p. 6 (Arts. 7 and 8).

[107] *See* National Standards for the Protection of Classified Information, at **Exhibit C-14**, p. 11 (Art. 33).

[108] *See* Government Decision No. 585/2002 for the Approval of the National Standards for the Protection of Classified Information in Romania, published in Official Gazette Part I, No. 485, dated July 5, 2002, as last consolidated on 24 March 2005, at **Exhibit C-14**, p. 9 (Art. 26).

91 When the DGAF concludes the anti-fraud investigations, it shall present its findings to RMGC and provide it with an opportunity to comment thereon.[109] [redacted]

92 Although the Claimants complain of these anti-fraud investigations, they do not request that the Tribunal recommend that Romania cease these investigations. Rather, they request that Romania's legal counsel in this arbitration effectively be walled off from seeing documents obtained during these investigations: that "no information… coming to the knowledge … of ANAF as a result of its investigations or audits undertaken in relation to RMGC … be made available to any person having any role in Respondent's defense in this arbitration" and that "Respondent not proffer any evidence gained through ANAF's … 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."[111]

93 There is simply no basis for such a request in the absence of any showing that the investigations are improper. [redacted] But this is not an issue before the Tribunal at this stage of the proceedings, and may never be, but it cannot be excluded, and the Tribunal should not exclude it by carving out even the possibility of presenting such evidence at this early stage, and in the absence of any evidence that the investigations are in any way improper.

[109] *See* Tax Procedure Code, at **Exhibit R-33**, p. 102 (Art. 135).

[110] Excerpt from Criminal Procedure Code, at **Exhibit R-56**, (Art. 285(2)); Emergency ordinance no. 74 regarding ANAF dated 26 June 2013, at **Exhibit R-29**, p. 6 (Art. 8(4)).

[111] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 67 (para. 166(a) and (b)).

5 THE REQUIREMENTS FOR PROVISIONAL MEASURES ARE NOT MET

94 As noted above, the Claimants have amended their Prayer for Relief and now essentially seek measures in relation to three types of alleged rights to procedural integrity. The first concerns the ANAF anti-fraud investigations and is phrased as follows:

> "a. With respect to the purported 'anti-fraud' investigation undertaken following Claimants' initiation of this arbitration by the Ministry of Finance through ANAF, 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;
>
> b. That, in any event, 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;"[112]

95 The second relates to the VAT Assessment:

> "c. With respect to the VAT Assessment and any associated decision as to interest and penalties, that Respondent withdraw its opposition to RMGC's 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 or, if possible, the posting by RMGC of a guarantee in the amount nec-

[112] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 67 (para. 166).

essary, [redacted] whichever comes first;"[113]

96 The third type of measure is an unspecified and all-encompassing request relating to all Taxation Measures:

> "d. 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."[114]

97 Despite these amendments, the Claimants have failed to prove that the measures sought fall within the Tribunal's jurisdiction (**Section 5.1**), nor have they proven that they have a right in peril and that the measures are necessary, urgent and proportional (**Section 5.2**).

5.1 No *prima facie* jurisdiction to order the provisional relief sought

98 Although it is undisputed that a tribunal must have *prima facie* jurisdiction to order provisional measures,[115] the Claimants have not and cannot make such a showing in relation to their Second Request. On this basis alone, the Claimants' Second Request should be dismissed:

- **First**, the measures sought do not relate to this dispute;[116]
- **Second**, the protections afforded to foreign investors under the Canada-Romania BIT do not extend to Taxation Measures;[117]

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[113] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 67 (para. 166).

[114] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 67 (para. 166).

[115] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 48 (para. 127); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 42 (para. 125).

[116] Respondent's Comments on the Request for Emergency Relief, p. 10 (Section 3.1); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 6 (para. 13).

- **Third**, the Claimants' Second Request runs against the Canada-Romania BIT's prohibition of a tribunal enjoining a State from applying a measure which an applicant for interim relief contends amounts to a breach of the BIT. If the provisional relief sought does not relate to the claims in this arbitration, the exclusion contained in Article XIII(8) applies *a fortiori* to measures unrelated to the dispute. The Claimants' characterization of the provisional measures as also linked to the procedural integrity of the arbitration cannot circumvent the application of Article XIII(8);[118]
- **Fourth**, the Claimants are both bound by the procedural limitations of the Canada-Romania BIT as Gabriel Canada cannot abuse this arbitration to seek relief though consolidation of claims that is unavailable to it under the BIT governing its claims.[119]

99 The Claimants allege that "even if the Respondent had jurisdictional objections in relation to such claims, that would not be an obstacle to the issuance of provisional measures."[120] This is not correct as establishing *prima facie* jurisdiction requires that an applicant convinces the tribunal that the applicant's position on jurisdiction is more likely than not to be correct.[121] Thus in *Feldman v Mexico* and *Pope and Talbot v Canada*, the tribunal concluded that the Respondent's jurisdictional objections to the

[117] Respondent's Comments on the Request for Emergency Relief, p. 12 *et seq.* (paras. 36 *et seq.*); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 6 *et seq.* (para. 14).

[118] Respondent's Comments on the Request for Emergency Relief, p. 23 (para. 60); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 6 *et seq.* (para. 14).

[119] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 7 *et seq.* (paras. 15-16).

[120] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 60 (para. 147).

[121] *Millicom International Operations B.V. & Sentel GSM S.A. v. Republic of Senegal*, Decision on the Application of Provisional Measures, ICSID Case No. ARB/08/20, 9 December 2009, at **Exhibit CLA-45**, p. 13 (para. 42).

provisional relief sought were grounded and the Claimants had failed to establish the tribunal's *prima facie* jurisdiction over the provisional relief sought.[122]

100 Similarly, in *Legality of Use of Force* (Yugoslavia v Italy), the ICJ rejected Yugoslavia's application for provisional measures because Yugoslavia was unable to persuade the Court, even *prima facie*, that the acts imputed to the respondent were capable of coming within the provisions of the Genocide Convention.[123] Also in *Armed Activities on the Territory of the Congo*, the ICJ rejected a request for provisional measures because Congo had failed to demonstrate that the Court had *prima facie* jurisdiction under any of the conventions or treaties that had allegedly been breached.[124]

101 As developed below, the Claimants have similarly failed to establish the Tribunal's *prima facie* jurisdiction over the provisional measures sought.

5.1.1 The measures sought do not relate to this dispute

102 A request for provisional measures must relate to an applicant's claims in the arbitration.[125] As the ICJ recently recalled in the *Timor Leste* case, in international law one of the fundamental requirements for granting a request for provisional measures is that

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[122] *Martin Roy Fedlman Karpa v. United Mexican States*, Procedural Order No. 2, ICSID Case No. ARB(AF)/99/1, 3 May 2000, at **Exhibit RLA-17**, p. 2 (para. 5); *Pope & Talbot, Inc. (U.S.) v. Canada*, Ruling by Tribunal on Claimant's Motion for Interim Measures, UNCITRAL, 7 January 2000, at **Exhibit RLA-18**, p. 1 (para. 1).

[123] *Legality of Use of Force (Yugoslavia v. Italy)*, Order of 2 June 1999 (on Provisional Measures), 1999 ICJ Reports 481, at **Exhibit RLA-27**, p. 490 (para. 25).

[124] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Order of 10 July 2002 (on Provisional Measures), 2002 ICJ Reports 219, at **Exhibit RLA-28**, p. 241 (para. 58).

[125] Respondent's Comments on the Request for Emergency Relief, p. 10 (para. 31); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 44 *et seq.* (para. 129).

> "a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought."[126]

103 Thus, in the absence of an allegation of breach in relation to the Taxation Measures, the measures currently sought are entirely unrelated to the present dispute and fall outside of the jurisdiction of the Tribunal, irrespective of which of the two BITs applies.[127] The Claimants' confirmation that they "have not claimed that the VAT Assessment or its prospective enforcement constitutes a breach of the Canada BIT (…)",[128] coupled with the lack of any allegation that that the tax audits and [redacted] breach either of the two BITs, suffices to dismiss the Claimants' Second Request.

104 The Claimants attempt to obfuscate the clear jurisprudence requiring a link between the provisional measures sought and the subject-matter of the dispute.[129] They argue that "non-aggravation of the dispute are self-standing rights that may warrant provisional measures to prevent the aggravation, extension, or enlargement of the dispute".[130] This argument is wrong: the Claimants were required but failed to prove that the Taxation

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

[127] Respondent's Comments on the Request for Emergency Relief, p. 12 (para. 36); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 37 (para. 104).

[128] Claimants' Letter to the Tribunal dated 12 August 2016, p. 1; *see* also Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 42 (para. 113).

[129] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 49 (para. 130).

[130] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 49 (para. 130).

Measures relate to the present dispute such that the dispute could be aggravated.[131]

105 The Claimants' reliance[132] on *City Oriente*[133] and *Quiborax v Bolivia*[134] is misleading since both tribunals confirmed that provisional measures require the protection of action that affects the disputed rights, aggravates the dispute or frustrates the effectiveness of the award or entails having either party take justice into their own hands.[135]

106 The Claimants cite the *Plama v Bulgaria* decision,[136] which held that the prayers for relief as presented before a tribunal at the time of filing for provisional measures define whether or not the interim measures sought are related to the dispute:

> "the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief only in the sense that those general rights **must be related to the**

[131] Respondent's Comments on the Request for Emergency Relief, p. 14 (para. 40); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 45 (para. 130).

[132] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 49 *et seq.* (paras. 129-132).

[133] *City Oriente v. Ecuador*, Decision on Revocation of Provisional Measures, ICSID Case No. ARB/06/21, 13 May 2008, at **Exhibit CLA-26**.

[134] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Decision on Provisional Measures, ICSID Case No. ARB/06/2, 26 February 2010, at **Exhibit CLA-11**.

[135] *City Oriente v. Ecuador*, Decision on Revocation of Provisional Measures, ICSID Case No. ARB/06/21, 13 May 2008, at **Exhibit CLA-26**, p. 15 (para. 71); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Decision on Provisional Measures, ICSID Case No. ARB/06/2, 26 February 2010, at **Exhibit CLA-11**, p. 33 (para. 118).

[136] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 49 (para. 129).

> **specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date**."[137]

107 Here, there are no rights in dispute relating to the Taxation Measures.[138] As the Claimants noted in the Request for Arbitration, "(…) Gabriel Canada confirms that this matter **does not involve taxation**."[139]

108 The Claimants argue that the "immediate enforcement of the VAT Assessment directly impacts Claimants' ability to present their claims in this arbitration and obtain relief for Romania's violations of the Canada BIT and the UK BIT".[140] Apart from there being no peril (immediate or otherwise) to the Claimants' ability to present their claims in this arbitration,[141] the applicable test requires a showing that **the Tribunal's task** of resolving the dispute would be made more difficult by the Respondent's actions; it is not relevant that the Claimants' pursuit of its claims is allegedly more difficult. As noted in *Plama v Bulgaria*:

> "Provisional measures are extraordinary measures which should not be recommended lightly. (…) They are also appropriate to prevent parties from **taking measures capable of having a prejudicial effect on the rendering or implementation of an even-**

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

[138] Respondent's Comments on the Request for Emergency Relief, p. 14 (para. 40); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 45 (para. 130).

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

[140] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 49 *et seq.* (para. 130).

[141] *See infra* Section 5.2. *See* also Respondent's Comments on the Request for Emergency Relief, p. 27 *et seq.* (Section 5.2); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 49 *et seq.* (Section 5.2.1).

> **tual award** or which might aggravate or extend the dispute or render **its resolution more difficult**."[142]

109 This much appears to be acknowledged by the Claimants when they state in relation to the limitation to provisional measures in the BIT that "the parties may be ordered to refrain from taking action that could render resolution of the dispute more difficult. Indeed, provisional measures may be needed precisely **to prevent a matter from deteriorating to a point where the tribunal cannot fashion an effective remedy**."[143] This principle is uncontested and is the reason why measures unrelated to a dispute cannot be the subject of provisional measures as there is no problem of a tribunal being prevented from "fashion[ining] an effective remedy", when the tribunal lacks jurisdiction to order any such remedy in the first place.

110 Finally, the Claimants argue that they may still bring claims relating to the Taxation Measures since "the ICSID Convention and the ICSID Arbitration Rules contemplate the possibility of presenting additional claims".[144] However, the Canada-Romania BIT precludes such claims.

111 Furthermore, the Claimants' claims must be notified to the Respondent in the Notice of Arbitration and equally must be preceded by a waiver of claims as per the express terms of Article XIII of the Canada-Romania BIT (not to mention that the BIT excludes any claims to Taxation Measures).[145] Whatever distinction there may be between claims under

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[142] *Plama Consortium Limited v. Republic of Bulgaria*, Order, ICSID Case No. ARB/03/24, 6 September 2005, at **Exhibit CLA-10**, p. 12 (para. 38) (emphasis added); *see* also e.g. *Tokios Tokelés v. Ukraine*, Procedural Order No. 1, ICSID Case No. ARB/02/18, 1 July 2003, at **Exhibit CLA-12**, p. 2 (para. 2a)).

[143] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 42 (para. 113) (emphasis added).

[144] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 59 (para. 147).

[145] Respondent's Comments on the Request for Emergency Relief, p. 16 *et seq.* (para. 43).

Article XIII(3) and Article XIII(12),[146] the waiver mechanism agreed by Canada and Romania cannot have been that the Claimants are effectively entitled to seek relief before Romanian courts through RMGC and simultaneously seek identical relief before the Tribunal for the same measures.

112 In conclusion, the Tribunal lacks jurisdiction to decide any such claims irrespective of whether the Claimants claims falls under Article XIII(3) or instead Article XIII(12). Notably, the Claimants themselves observe that applies the tribunal "may not order as a provisional remedy what it may not order as a remedy in its award."[147]

113 The Second Request should be dismissed as the measures sought are entirely unrelated to the dispute before the Tribunal and do not relate to any measures that can become subject of this arbitration in the future.

5.1.2 The protections afforded to foreign investors under the Canada-Romania BIT do not extend to Taxation Measures

114 The Claimants' insistence that the present dispute risks being aggravated by the Taxation Measures[148] wrongly assumes that the subject matter of this dispute can include the Taxation Measures. The Canada-Romania BIT carves taxation measures out of its protective scope;[149] "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 dis-

[146] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 60 (para. 147).

[147] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 41 (para. 109).

[148] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 2 (para. 4).

[149] Respondent's Comments on the Request for Emergency Relief, p. 12 (para. 36); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 45 (para. 130).

pute and cannot become part of this dispute under the Canada-Romania BIT, as explained above.[150]

115 The Claimants cite *Rosinvest v Russia*[151] and *Renta4/Quasar de Valores v Russia*[152] in support of their view that the Taxation Measures are not encompassed by the carve-out in the Canada-Romania BIT.[153]

116 The first award was set aside in September 2013.[154] The same fate befell the *Rosinvest* award, which was annulled in January 2016.[155] As previously recalled,[156] the *Yukos* award was similarly set aside in April 2016.[157] All three tribunals have been found to have improperly exercised jurisdiction to decide any claims raised by the investors in those cases.[158]

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[150] Respondent's Comments on the Request for Emergency Relief, p. 10 *et seq.* (paras. 31-46); Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 44 (para. 129).

[151] *RosInvestCo UK Ltd. v. Russian Federation*, Final Award, SCC, 12 September 2010, at **Exhibit CLA-51**.

[152] *Renta 4 S.V.S.A. v. Russian Federation*, Award on Preliminary Objections, SCC Case No. 24/2007, 20 March 2009, at **Exhibit CLA-50**.

[153] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 58 *et seq.* (para. 149).

[154] *Russian Federation v. RosInvest Co UK Ltd*, Judgment, Svea Court of Appeal Case No. T 10060-10, 5 September 2013, at **Exhibit RLA-30**.

[155] *Russian Federation v. Quasar de Valors et al.*, Judgment, Svea Court of Appeal Case No. T 15045-09, 18 January 2016, at **Exhibit RLA-31**.

[156] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 45 (para. 132).

[157] *Russian Federation v. Yukos Universal Limited*, Judgment, The Hague District Court, 20 April 2016, at **Exhibit RLA-22**.

[158] *Russian Federation v. RosInvest Co UK Ltd*, Judgment, Svea Court of Appeal Case No. T 10060-10, 5 September 2013, at **Exhibit RLA-30**, p. 5; *Russian Federation v. Quasar de Valors et al.*, Judgment, Svea Court of Appeal Case No. T 15045-09, 18 January 2016, at **Exhibit RLA-31**, p. 13; *Russian Federation v. Yukos Universal Limited*, Judgment, The Hague District Court, 20 April 2016, at **Exhibit RLA-22**, p. 62 (para. 5.96).

117 As already explained, the investment treaty in the *Yukos* case, i.e. the ECT (Article 21),[159] is materially different from the Canada-Romania BIT, in that the former contains exceptions for *mala fide* use of taxation powers, where the second does not.[160] In response, the Claimants state that this difference "does not detract the basic principle at issue, as several other tribunals interpreting tax carve-outs that do not contain such express provisions likewise recognized the principle that such taxation carve outs do not operate to foreclose claims regarding abusive use of its tax authority."[161] The "basic legal principle" that the Claimants are attempting to establish remains, however, entirely unproven.

118 The Claimants rely on the *Renta4/Quasar de Valores v Russia* case but omit to mention that there was no issue of interim relief in that case[162] and **no taxation carve-out** in the Spain-Russia BIT.[163] Equally noteworthy is the Claimants' failure to cite the tribunal's holding in the same decision which contradicts its position:

> "The preceding observations are not meant to suggest that international tribunals should quickly reach the conclusion that ostensible tax measures are in fact compensable takings. **To the contrary, the presumption must be that measures are *bona fide***, unless there is convincing evidence that, upon a true characterisation, they constitute a taking."[164]

[159] Energy Charter Treaty and Related Documents, at **Exhibit RLA-23**, p. 70 *et seq.* (Art. 21).

[160] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 45 *et seq.* (paras. 132-133).

[161] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 58 (para. 144).

[162] *Renta 4 S.V.S.A. v. Russian Federation*, Award on Preliminary Objections, SCC Case No. 24/2007, 20 March 2009, at **Exhibit CLA-50**.

[163] Agreement for the reciprocal development and protection of investments between Spain and the Union of Soviet Socialist Republics, at **Exhibit RLA-32**.

[164] *Quasar de Valores SICAV S.A. v. Russian Federation*, Award, SCC No. 24/2007, 20 July 2012, at **Exhibit CLA-49**, p. 77 (para. 181) (emphasis added).

119 The tribunal dismissed the application of Article 11(3) of the Denmark-Russia BIT,[165] noting however that a jurisdictional defence based on this provision "**was not pursued with great insistence**".[166] The tribunal also explained that "ten words appearing in a miscellany of incidental provisions near the end of the Danish BIT" could not be invoked against the claimants' serious allegations of abuse of the State tax machinery to destroy the taxpayer.[167]

120 By contrast, the Canada-Romania BIT contains a specific jurisdictional carve-out also restated in the arbitration agreement (Article XIII(3)(c)).[168] Unlike the Denmark-Russia BIT, the Canada-Romania BIT does not contain merely "ten words appearing in a miscellany of incidental provisions near the end".[169]

121 As the *Encana v Ecuador* tribunal noted, with regard to identical provisions, the notion of taxation measure encompasses any measure relating to tax assessment (like the ANAF audits) or liability (like the VAT Assessment and its enforcement):

> "There is no reason to limit the term 'taxation' to direct taxation, nor did the Claimant suggest it should be so limited. Thus indirect taxes such as VAT are included.
>
> Having regard to the breadth of the defined term 'measure', there is no reason to limit Article XII(1) to the actual provisions of the law which impose a tax. **All those aspects of the tax regime which go to determine how much tax is payable or refundable**

[165] Denmark-Russia BIT dated 4 December 1997, at **Exhibit C-85**, p. 8 (Art. 11(3)).

[166] *Renta 4 S.V.S.A. v. Russian Federation*, Award on Preliminary Objections, SCC Case No. 24/2007, 20 March 2009, at **Exhibit CLA-50**, p. 32 (para. 74).

[167] *Renta 4 S.V.S.A. v. Russian Federation*, Award on Preliminary Objections, SCC Case No. 24/2007, 20 March 2009, at **Exhibit CLA-50**, p. 32 (para. 74).

[168] Canada-Romania BIT, at **Exhibit C-1**, p. 15 (Art. XIII(3)(c)).

[169] Canada-Romania BIT, at **Exhibit C-1**, p. 13 *et seq.* (Art. XII); *see* Respondent's Comments on the Request for Emergency Relief, p. 10 *et seq.* (paras. 31-46) and Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 45 (para. 130).

> **are part of the notion of 'taxation measures.'** Thus tax deductions, allowances or rebates are caught by the term.
>
> The question whether something is a tax measure is primarily a question of its legal operation, not its economic effect. A taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes. The economic impacts or effects of tax measures may be unclear and debatable; nonetheless **a measure is a taxation measure if it is part of the regime for the imposition of a tax. A measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place.** In the case of VAT, the Tribunal does not accept that the system of collection and recovery of VAT, even if it may be revenue–neutral for the intermediate manufacturer or producer, is any less a taxation measure at each stage of the process. A law imposing an obligation on a supplier to charge VAT is a taxation measure; likewise **a law imposing an obligation to account for VAT received, a law entitling the supplier to offset VAT paid to those from whom it has purchased goods and services, as well as a law regulating the availability of refunds of VAT resulting from an imbalance between an individual's input and output VAT**."[170]

122 Finally, unlike Russia in the *Renta4/Quasar de Valores v Russia* case, here Romania vigorously challenges the Claimants' jurisdictional arguments.

123 The Claimants similarly cite *Encana v Ecuador*, but ignore all of the critical findings above,[171] and instead highlight the *dicta* of the tribunal that "an arbitrary demand unsupported by any provision of the law of the

[170] *EnCana Corporation v. Ecuador*, Award and Partial Dissenting Opinion, LCIA Case No UN3481, 3 February 2006, at **Exhibit RLA-13**, p. 31 (para. 142) (emphasis added).
[171] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 59 (para. 145).

host State would not qualify for exemption."[172] However, first, the Claimants do not prove that Romania has acted unlawfully.[173] Second, they omit to include the following critical passage:

> "On the other hand, as the Respondent stressed, **the Tribunal is not a court of appeal in Ecuadorian tax matters**, and provided a matter is sufficiently clearly connected to a taxation law or regulation (or to a procedure, requirement or practice of the taxation authorities in apparent reliance on such a law or regulation), **then its legality is a matter for the courts of the host State**."[174]

124 The test set by the *Encana* tribunal is therefore clear: domestic courts are the proper forum to address violations of Romanian tax law. The taxation measures carve-out applies unless a claimant can prove that the taxation measures in dispute are entirely unsupported by the applicable domestic rules and aimed at interfering with the pending arbitration proceedings.

125 The Claimants cite two commentators to the effect that the "abusive use of [a State's] tax authority" are not covered by the taxation measures carve-out.[175] However, these authorities rather support Romania's position. Romania had already stated[176] that it accepted the position of principle (also confirmed by the *Encana* tribunal) that *mala fide* taxation

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[172] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 59 (para. 145), referring to *EnCana Corporation v. Ecuador*, Award and Partial Dissenting Opinion, LCIA Case No UN3481, 3 February 2006, at **Exhibit RLA-13**, p. 31 (para. 142).

[173] *See supra* Section 3.

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

[175] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 59 (para. 146), referring to A. Kolo, "Expropriatory Taxation in the Latin American experience", in A. Tanzi *et al*. (eds.), *International Investment Law in Latin America*, (Leiden, 2016) 400, at **Exhibit CLA-57**, p. 409 and J. Chaisse, *International investment law and taxation: From Coexistence to Cooperation* (2006), at **Exhibit CLA-55**, p. 13.

[176] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 45 *et seq.* (para. 132).

measures are not covered by the carve-out, if a claimant can show that the Taxation Measures were "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.[177]

126 The Claimants state that "the anti-fraud investigation is not a 'taxation measure' within the meaning of the Canada BIT because it is not a decision as to the tax policy of the State, because it is an abuse and because [redacted][178] As the *Encana* tribunal confirmed, however, "[a]ll those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of 'taxation measures",[179] and that necessarily include tax audits. Furthermore, consistent with the well-established principle that State action cannot be presumed to be wrongful,[180] abuse of taxation powers must be proven with "convincing evidence", as "the presumption must be that measures are *bona fide*".[181]

127 The issue here is that the Claimants have not even begun to make a showing of abuse, building its entire case on allegations, inflammatory rhetoric, suggestions, assumptions and innuendo. That is argument, not evidence, *prima facie* or otherwise. [redacted]

[177] *Yukos Universal Limited v. Russian Federation*, Final Award, PCA Case No AA 227, 18 July 2014, at **Exhibit RLA-21**, p. 172 (para. 1407).

[178] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 62 *et seq.* (para. 154).

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

[180] A. Marossi, "Shifting the Burden of Proof in the Practice of the Iran–United States Claims Tribunal", (2011) 28(5) *Journal of International Arbitration* 427, at **Exhibit RLA-8**, p. 8.

[181] *Quasar de Valores SICAV S.A. v. Russian Federation*, Award, SCC No. 24/2007, 20 July 2012, at **Exhibit CLA-49**, p. 77 (para. 181).

[redacted]

128 As the Claimants fail to prove that the Taxation Measures are *mala fide*, they cannot exclude the application of Articles XII(1) and XIII(3)(c) of the Romania-Canada BIT to the Taxation Measures and the Tribunal lacks jurisdiction to order provisional measures in relation thereto.

5.1.3 Under the Canada-Romania BIT a tribunal cannot enjoin the State from applying a measure which an applicant for interim relief contends amounts to a breach of the BIT

129 Under Article XIII(8) of the Canada-Romania BIT, interim measures can only be ordered if there is a risk of harm to a right of a disputing party.

> "A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction (…)."

130 The right to the "non-aggravation of the dispute" or the right to "procedural integrity" of the arbitration equally fall under Article XIII(8), in that the provision encompasses substantive (rights "of a disputing party") and procedural rights of a party (right "to ensure that the tribunal's jurisdiction is made fully effective").[183] However, irrespective of the right in peril, that right cannot be enforced by means of an order for interim relief:

> "(…) **A tribunal may not** (…) **enjoin the application of the measure alleged to constitute a breach of this Agreement**."

[182] *See supra* Section 4.

[183] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 23 (paras. 59-60).

131 A similarly worded provision in NAFTA[184] has been consistently interpreted as preventing a tribunal from ordering a "standstill" of the respondent's actions alleged to affect a claimant pending the arbitration.[185] Accordingly, *Feldman v Mexico* and *Pope & Talbot v Canada* are relevant at least in relation to Claimants' Prayer for Relief (c) and (d). There is no practical difference between requesting that a State "immediately cease and desist for the duration of this arbitration from any interference with Claimant or his property or with [the investor's local company's] assets or revenues, whether by embargo or by any other means",[186] and requesting that a State refrain from taking any action in connection with the VAT Assessment, ANAF audits or ANAF investigations that may aggravate and extend the dispute. This request therefore stands to be summarily dismissed.

132 The Claimants argue that Article XIII(8) provides that a tribunal "may not order as a provisional remedy what it may not order as a remedy in its award."[187] The Respondent agrees and also accepts that "Article XIII(9) of the Canada BIT limits the Tribunal's authority as to the remedies that it may award to (a) monetary damages and/or (b) restitution of property, the latter only with the option of paying monetary damages in lieu there-

[184] North American Free Trade Agreement, Chapter 11, at **Exhibit RLA-16**, p. 10; Art. 1134 of NAFTA regarding "Interim Measures of Protection" provides as follows: "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation."

[185] Respondent's Comments on the Request for Emergency Relief, p. 23 *et seq.* (paras. 61-62).

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

[187] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 41 (para. 109).

of."[188] Furthermore, the Respondent concurs that "[c]onsistent with the limitation as to what may be awarded on the merits, during the course of the arbitration the Tribunal analogously may not provisionally order an attachment or enjoin a measure alleged to constitute a breach of the BIT."[189]

133 However, the Tribunal would manifestly lack jurisdiction to order any of the provisional measures currently sought if they were sought as final relief. Under Article XIII(9), a tribunal cannot order Romania to "refrain from taking any action" relating to the Taxation Measures as final relief, nor can it order Romania to "withdraw its opposition to RMGC's request for a judicial suspension of enforcement and otherwise not take steps to enforce the VAT Assessment". Both are effectively requests for restitution under Article XIII(9):

> "The term 'juridical restitution' is sometimes used where restitution requires or involves **the modification of a legal situation** either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the **revocation, annulment or amendment** of a constitutional or legislative provision enacted in violation of a rule of international law, **the rescinding or reconsideration of an administrative or judicial measure** unlawfully adopted in respect of the person or property of a foreigner".[190]

134 Consequently, according to the Claimants' own reasoning, Prayers for Relief (c) and (d) fall outside of the Tribunal's jurisdiction. The only is-

[188] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 41 (para. 109).

[189] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 41 (para. 109).

[190] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,* 2001, at **Exhibit RLA-33**, p. 97 (Art. 35, para. (5)) (emphasis added).

sue left to be decided is whether Prayers for Relief (a) and (b) follow the same fate.

135 With respect to the latter, the Claimants argue that "[c]alling upon the Respondent to refrain from using its compulsory police powers to gather information and evidence to use in the arbitration is neither an order of attachment nor an order enjoining the application of a measure alleged to constitute a breach of the BIT. The second sentence of Article XIII(8) of the Canada BIT therefore does not apply."[191] They add that "[t]he second sentence of Article XIII(8) is not aimed at the procedural rights of the parties, but at the substantive rights in dispute."[192]

136 First, it is entirely false as a factual matter that the Respondent has been gathering "information and evidence to use in the arbitration" through the ANAF audits as explained above.[193] Second, there is nothing in Article XIII(8) supporting the Claimants' interpretation that the gathering of information and evidence to use in the arbitration is subject to any special regime under Article XIII(8) and it is not for the Claimants to create a distinction where the State Parties did not make that distinction. Third, that interpretation would be contrary to the principle of interpretation that the *raison d'être* should apply similarly to similar situations.

137 The concern underlying the prohibition of enjoining the application of the measure alleged to constitute a breach of the BIT, applies both to breaches of substantive provisions of the BIT or of the arbitration agreement, including the obligation to arbitrate good faith (as alleged by the Claimants). What the State Parties agreed was that it was not legitimate for an applicant for interim relief to use an arbitration under the BIT as a mechanism to block the normal operation of the State pending the resolution of

[191] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 41 (para. 110).
[192] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 41 (para. 109).
[193] *See supra* Section 4.

the dispute. This expresses an entirely reasonable interest of the State Parties.

138 The Claimants also contend that "[n]othing in Article XIII(8) limits the Tribunal's ability to control what evidence may be admitted in the arbitration. Indeed, the Tribunal's authority to do so is confirmed by the first sentence of Article XIII(8) which permits the Tribunal to order measures to preserve the integrity of the proceeding".[194] However, this provision merely clarifies that interim relief orders may include "an order to preserve evidence in the possession or control of a disputing party **or** to protect the tribunal's jurisdiction". It does not state that **any** "measures to preserve the integrity of the proceeding" are admissible. Such a broad construction would deprive the exclusion of interim restitution relief in the same provision of any meaning. It cannot have been the State Parties' intention to allow applications for provisional relief which simply purport to affect the "procedural integrity" of the arbitration.

139 In conclusion, however Article XIII(8) of the Canada-Romania BIT is interpreted, the provisional measures sought in the Claimants' Second Request fall outside of the Tribunal's jurisdiction.

5.1.4 Both Claimants are bound by the procedural limitations of the Canada-Romania BIT

140 As previously explained, Gabriel Canada cannot seek relief that it could not obtain under the Canada-Romania BIT just because it purports to seek relief on behalf of Gabriel UK as well (but in fact does not, as shown below).[195] Consolidation of claims is not a mechanism for co-claimants to override inconvenient provisions of a BIT. It is a procedural device to hear, jointly, separate claims in the same arbitration proceedings as long as the instruments of consent are compatible regarding procedural

[194] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 40 (para. 108).

[195] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 7 *et seq.* (para. 16); Respondent's Letter to the Tribunal dated 14 August 2016.

issues. By contrast, if the instruments of consent are incompatible, there cannot be consolidation of claims.[196]

141 In this case, the Romania-UK BIT is silent on all critical aspects of provisional measures that the Canada-Romania BIT addresses in detail. The same is true with respect to disclosure of information implicating national security and of classified information, and transparency of the proceedings. Those differences do not mean that the claims must now be deconsolidated, but simply that where a procedural provision of the Canada-Romania BIT addresses an issue and the UK-Romania BIT does not, the first must apply to both Claimants. The alternative solution would mean that a claimant could pick and choose the procedural provisions applicable to it at will by filing claims jointly with a co-claimant under a more favourable BIT.[197]

142 Accordingly, just as the Claimants agree that the provisions on third-party intervention and, in general, on transparency established in the Romania-Canada BIT apply to Gabriel Jersey in these consolidated proceedings, they must concede that Gabriel Canada cannot avoid the application of the restrictions on disclosure of information protected by national security and classified information or those restricting the availability of provisional measures and in particular the limitations flowing from Articles XII and XIII of the Canada-Romania BIT, as discussed above.[198]

143 This is as much an issue of law as it is an issue of common sense. It is therefore not surprising that the sole tribunal faced with this issue has confirmed the Respondent's position. The *Eurogas v Slovakia* tribunal was faced with a request by Slovakia that various provisions of the Canada-Slovakia be incorporated in procedural order no. 1 and become appli-

[196] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 47 *et seq.* (paras. 138-139), Respondent's Letter to the Tribunal dated 14 August 2016.
[197] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 48 (para. 140); Respondent's Letter to the Tribunal dated 14 August 2016.
[198] *See supra* para. 141; Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 48 (para. 141).

cable to both co-claimants, the Canadian claimant (Belmont) and the United States claimant (EuroGas). The relevant provisions related to transparency and other issues, including disclosure of classified information, disclosure of confidential information and third-party intervention.[199]

144 The claimants objected to the application of an identical procedural regime to both parties, making the same arguments that the Claimants make presently.[200] The *Eurogas* tribunal rejected those arguments and explained that, if the United States co-claimant did not wish to be impacted by the Canadian BIT, its only option was not to file joint claims with the 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'."[201]

145 Similarly here, the Claimants having chosen to consolidate the claims 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 pick and choose between what they consider to be the more favourable provisions under the two BITs.[202] 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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[199] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Annex to Procedural Order No. 2, ICSID Case No ARB/14/14, 16 April 2015, at **Exhibit RLA-34**.

[200] *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).

[201] *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).

[202] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 47 (para. 138); Respondent's Letter to the Tribunal dated 14 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** (…)"[203]

146 It is therefore misleading for the Claimants to continue insisting that the *Eurogas* decision is not on point,[204] when the issues of principle and the applicable rules identical.

147 The Claimants allege that "[t]he fact that the Canada BIT and the UK BIT might permit different provisional remedies does not present a procedural incompatibility as Respondent claims."[205] This is shadowboxing as the Respondent never argued that the there is any incompatibility between the two BITs.[206] Because the UK-Romania BIT is silent on all relevant issues (transparency, provisional measures, confidential information), it is **not incompatible** with the Canada-Romania BIT and the claims under both BIT can be heard jointly.[207]

148 The Claimants also contend that "[a]t most, the variations in the treaties may lead to differences in the claims presented and differences in the

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[203] *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.)

[204] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 45 (para. 121).

[205] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 48 (para. 126).

[206] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 48 (paras. 139-140); Respondent's Letter to the Tribunal dated 14 August 2016.

[207] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 48 (para. 140); Respondent's Letter to the Tribunal dated 14 August 2016.

relief that may be awarded."[208] While that assertion could be theoretically accurate with respect to final relief, it is irrelevant with respect to the present request for provisional measures because the Claimants seek the same provisional measures for **both Claimants**, without any distinction. In these circumstances, the Claimants' quote of *Noble v Ecuador* merely undermines their argument:

> "For the avoidance of doubt, the Tribunal specifies that resolving different disputes in a single proceeding does not mean merging disputes, or applicable laws, or remedies. In the further course of this arbitration, the parties and the Tribunal **will have to distinguish each dispute under its own applicable rules**, even though facts, evidence and arguments may be common to all or some of them. In particular, **the Claimants will have to specify which relief is sought with respect to which Respondent and on which basis** (….) Indeed, each Respondent is entitled to know which claims it faces (…)"[209]

149 The above is especially relevant since the Claimants do not refer to **any measure affecting Gabriel Jersey, directly or indirectly**. The Claimants' half-hearted discovery that Gabriel Jersey is after all also seeking provisional relief under the UK-Romania BIT,[210] denotes a desperate attempt to rescue its Second Request.

150 The Claimants allege that "[t]he scope of available provisional measures, (…) is not accurately characterized as merely a procedural issue, rather the limitation in the Canada BIT relates to the availability of substantive

[208] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 48 (para. 126).

[209] *Noble Energy & MachalaPower CIA. LTDA v. Ecuador & Consejo Nacional de Electricidad*, Decision on Jurisdiction, ICSID Case No. ARB/05/12, 5 March 2008, at **Exhibit CLA-46**, p. 60 (para. 206) (emphasis added).

[210] Claimants' Letter to the Tribunal dated 11 August 2016, p. 1.

relief".[211] As discussed above, the Respondent accepts, that the limitations on provisional relief stemming from Article XIII(8) of the Canada-Romania BIT are consistent with the restrictions relating to main substantive relief set forth in Article XIII(9); this is one of the reasons why the Claimants' Second Request stands to be rejected: the Claimants cannot seek interim relief that the Tribunal could not order as main relief.[212] There is however a leap of faith between showing the consistency between Articles XIII(8) and XIII(9) of the Canada-Romania BIT and establishing that provisional measures are a matter of substantive relief. They are clearly not.[213]

151 The Claimants rely on *Guaracachi v Bolivia*[214] in support of their position that Gabriel Canada can usurp the UK-Romania BIT to rid itself of the constraints of the Canada-Romania BIT.[215] That case, however, has no bearing on any issue in dispute here.

152 In *Guaracachi v Bolivia*, the tribunal was confronted with Bolivia's objection to the consolidation of claims under two different BITs (the U.S.-Bolivia and UK-Bolivia BITs). Bolivia argued that it had not consented to the consolidation and that:

> "… the dispute settlement provisions in the Treaties [are] incompatible, as under the US-Bolivia BIT only the national or company who is a party to a dispute against the State may commence arbitration, while the UK-Bolivia BIT allows either party to do so.

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[211] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 60 (para. 148).

[212] *See supra* Section 5.1.1.

[213] "Chapter 23: Interim and Conservatory Measures" in J. Lew, A. Mistelis *et al, Comparative International Commercial Arbitration,* (Kluwer International, 2003) 585, at **Exhibit RLA-35**, p. 2 (para. 23-9).

[214] *Guaracachi America, Inc. & Rurelec Plc v. Bolivia*, Award, UNCITRAL, 31 January 2014, at **Exhibit CLA-42**.

[215] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 46 (para. 124).

> This means that Bolivia may file a counterclaim against investors under the UK-Bolivia BIT, but lacks such power under the US-Bolivia BIT."[216]

153 The tribunal held that there was no obstacle to consolidation of claims under the two BITs in light of their silence on whether consolidation was possible, and that no specific consent of Bolivia was required in the circumstances.[217] The decision noted the absence of a "fundamental incompatibility between the consents to arbitration in the two BITs that would result in one or the other consent being violated by the mere fact of the claims being heard together".[218]

154 The *Guaracachi v Bolivia* decision shows that a (genuine) fundamental incompatibility between consent to arbitration in the two BITs would preclude consolidation of the claims. As a result, the tribunal's reasoning supports the Respondent's conclusion that there is no incompatibility between the Canada-Romania BIT and the UK-Romania BIT preventing consolidation.[219] To the extent that the proceedings are consolidated, however, as noted in the *Eurogas* decision, both claimants must be bound by any procedural limits imposed by the more restrictive BIT.

155 The Claimants quote the *Guaracachi v Bolivia* tribunal's dicta to the effect that "(…) the Respondent's assertion that differences exist between both BITs is irrelevant, given that the Tribunal is prepared to analyse each Claimant's claims – which are in essence one and the same claim – in

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[216] *Guaracachi America, Inc. & Rurelec Plc v. Bolivia*, Award, UNCITRAL, 31 January 2014, at **Exhibit CLA-42**, p. 60 (para. 166).

[217] *Guaracachi America, Inc. & Rurelec Plc v. Bolivia*, Award, UNCITRAL, 31 January 2014, at **Exhibit CLA-42**, p. 134 (para. 341).

[218] *Guaracachi America, Inc. & Rurelec Plc v. Bolivia*, Award, UNCITRAL, 31 January 2014, at **Exhibit CLA-42**, p. 134 *et seq.* (para. 345).

[219] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 48 (paras. 139-140); Respondent's Letter to the Tribunal dated 14 August 2016.

accordance with the applicable BIT invoked by each Claimant."[220] This is an entirely correct restatement of the relevant principle, in line with the Respondent's position here.[221] The tribunal explained, as the *Noble v Ecuador* tribunal had also confirmed,[222] that each of the Claimants' claims **on the merits** will be assessed by reference to the respective instrument of consent.

156 The Claimants reliance[223] on *Flughafen v Venezuela*[224] is similarly inapposite since also in that case, the tribunal found that there was no incompatibility between the two applicable instruments of consent and that it would decide each of the claimant's claims **on the merits**, considering the different provisions of each BIT. In that case Venezuela had invoked an artificial conflict between the Switzerland-Venezuela BIT and the Chile-Venezuela BIT, in support of the argument that the two BITs contained incompatible arbitration agreements, such that consolidation was not possible.[225] The alleged conflict consisted of Switzerland-Venezuela BIT not specifying the applicable law whereas the Chile-Venezuela BIT did specify the applicable law.[226] The decision does not support the Claimants' position with respect to interim measures sought simultaneously by two claimants, when one of the BITs excludes a certain type of provisional measures and the second does not.

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[220] *Guaracachi America, Inc. & Rurelec Plc v. Bolivia*, Award, UNCITRAL, 31 January 2014, at **Exhibit CLA-42**, p. 134 *et seq.* (para. 345).

[221] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 48 (para. 141); Respondent's Letter to the Tribunal dated 14 August 2016.

[222] *Noble Energy & MachalaPower CIA. LTDA v. Ecuador & Consejo Nacional de Electricidad*, Decision on Jurisdiction, ICSID Case No. ARB/05/12, 5 March 2008, at **Exhibit CLA-46**, p. 60 (para. 206).

[223] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 46 (para. 123, note 184) and p. 47 (para. 125).

[224] *Flughafen Zürich A.G. & Gestión e Ingeniería IDC S.A. v. Venezuela*, Award, ICSID Case No. ARB/10/19, 18 November 2014, at **Exhibit CLA-41**.

[225] *Flughafen Zürich A.G. & Gestión e Ingeniería IDC S.A. v. Venezuela*, Award, ICSID Case No. ARB/10/19, 18 November 2014, at **Exhibit CLA-41**, (para. 411).

[226] *Flughafen Zürich A.G. & Gestión e Ingeniería IDC S.A. v. Venezuela*, Award, ICSID Case No. ARB/10/19, 18 November 2014, at **Exhibit CLA-41**, (para. 410).

157 In conclusion, the Claimants' attempt to use Gabriel Jersey as a figurehead applicant for provisional measures does not and cannot allow Gabriel Canada to avoid the application to it of the provisions of Article XII and XIII of the Canada-Romania BIT that restrict the availability of the provisional measure sought. Those measures are still outside the Tribunal's jurisdiction and stand to be dismissed.

5.2 No right in peril, no necessity, no urgency and no proportionality

158 With respect to the substantive requirements for provisional measures, the Claimants' Second Request remains entirely unfounded in that the Claimants' due process rights are not in peril, the measures sought are not necessary, or urgent or proportional, as shown below.

5.2.1 No right in peril

159 The Claimants alleged that they have a right to procedural integrity, relying on *Cementownia v. Turkey*, *Methanex v. USA*, *EDF v. Romania*, *Libananco v. Turkey*, *Fraport v. Philippines* (annulment decision), *Quiborax v. Bolivia*, *Churchill Mining v. Indonesia*.[227] The Respondent agree with the principles distilled in those cases, in particular the notion that both Parties have an obligation to arbitrate fairly and in good faith.[228] However, Romania had also shown that these cases do not have any connection to the issues raised in the Claimants' Second Request and therefore do not support it.[229]

160 The Claimants now argue that these cases "demonstrate that the introduction of evidence may be restricted when doing so contravenes the basic principles of good faith and fair dealing required in international arbitra-

[227] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 18 *et seq.* (paras. 45-56).
[228] Respondent's Comments on the Request for Emergency Relief, p. 22 (para. 56).
[229] Respondent's Comments on the Request for Emergency Relief, p. 18 *et seq.* (Section 3.2).

tion".[230] None of the cases cited stands in support of the alleged principle. In particular, what *Methanex v. USA* and *EDF v. Romania* show is that evidence **obtained unlawfully** cannot be used by a claimant.[231] The remaining cases do not contain any discussion of evidence "contraven[ing] the principles of good faith and fair dealing". Those cases are inapposite when, as noted in their previous submissions, the Claimants fail to allege (let alone establish) that the Respondent would be breaching any applicable law by producing evidence in this arbitration.

161 The Claimants invoke[232] the *Libananco v Turkey* decision[233] which confirmed that "that a sovereign State does indeed have a right and duty to pursue the commission of serious crime, and that that right and duty cannot be affected by the existence of an ICSID arbitration against it".[234] The Respondent agrees with this general statement. However the Claimants also cite the same decision in the part where the tribunal held that "[t]he right and duty to investigate crime … cannot mean that the investigative power may be exercised without regard to other rights and duties, or that, by starting a criminal investigation, a State may baulk an ICSID arbitration".[235] The second passage cited by the Claimants is irrelevant in that Romania is not "baulk[ing] an ICSID arbitration" and there is no

[230] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 53 (para. 135).

[231] *Methanex v. USA*, Final Award on Jurisdiction and Merits, UNCITRAL, 3 August 2005, at **Exhibit CLA-30**, p. 154 (para. 54).

[232] Claimants' Second Request for Provisional Measures, p. 23 (para. 55) and p. 35 (para. 83).

[233] *Libananco v. Turkey*, Decision on Preliminary Issues, ICSID Case No. ARB/06/8, 23 June 2008, at **Exhibit CLA-29**.

[234] *Libananco v. Turkey*, Decision on Preliminary Issues, ICSID Case No. ARB/06/8, 23 June 2008, at **Exhibit CLA-29**, p. 37 (para. 79).

[235] *Libananco v. Turkey*, Decision on Preliminary Issues, ICSID Case No. ARB/06/8, 23 June 2008, at **Exhibit CLA-29**, p. 38 (para. 79).

issue [redacted] affecting Claimants' counsel work during the arbitration.[236]

162 The Claimants allege that in *Lao Holdings v. Laos* the tribunal denied the State's request to continue certain criminal investigations because it was "satisfied on the evidence that the primary purpose for which the Respondent intends to use the powers of criminal investigation, at least in the first instance, is to collect evidence for use at the arbitration, which, in the result, will undermine the integrity of the arbitral process."[237] That both true and irrelevant here. As noted by the tribunal in that case:

> "The Tribunal considers that through these statements, **Laos has admitted that at least one of the objectives of the threatened criminal proceeding is to enable it to develop evidence that will serve as part of its defense in the present arbitration proceedings**. As a consequence, there is no doubt that the criminal investigation intended by the Respondent is directed at precisely the conduct in respect of which it requires evidence to defend its claim in the arbitration and support its Counterclaim."[238]

163 The tribunal limited the respondent's right to pursue criminal investigations upon its admission that the criminal proceedings were part of the respondent's attempt to prove an illegality defence and linked counterclaim against the claimant. The case is therefore entirely inapposite.

164 As the Respondent had demonstrated in its previous submissions, there is no threat to the procedural integrity of this arbitration as a result of the

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[236] Claimants' Second Request for Provisional Measures, p. 23 (para. 55); *Libananco v. Turkey*, Decision on Preliminary Issues, ICSID Case No. ARB/06/8, 23 June 2008, at **Exhibit CLA-29**, p. 16 *et seq.* (paras. 42-44).

[237] *Lao Holdings N.V. v. The Lao People's Democratic Republic*, Ruling on Motion to Amend the Provisional Measures Order, ICSID Case No. ARB(AF)/12/6, 30 May 2014, at **Exhibit CLA-44**, p. 13 (para. 26).

[238] *Lao Holdings N.V. v. The Lao People's Democratic Republic*, Ruling on Motion to Amend the Provisional Measures Order, ICSID Case No. ARB(AF)/12/6, 30 May 2014, at **Exhibit CLA-44**, p. 14 (para. 28) (emphasis added).

Taxation Measures,[239] and that there is no link between the provisional measures sought and the alleged due process rights in peril.[240]

165 The Claimants now appear to have largely abandoned the allegation that the Taxation Measures have caused Gabriel to divert attention away from preparing to present its case as well as the allegation that the Taxation Measures may seriously impair Claimants' ability to proffer witnesses in support of their claims.[241]

166 As a result, the Claimants case seems to now rest only the allegation that the Taxation Measures will force Gabriel Canada to divert part of its resources to RMGC and thereby impair Gabriel Canada's ability to present its case and will also deprive the Claimants of the ability to access core documents that are centrally relevant to the dispute. A third aspect of procedural integrity of the arbitration, appears to be the possible use of documents obtained by Romanian tax authorities by Romania in this arbitration. The Claimants allege that "[a]busing investigative powers to gather evidence for use in the arbitration outside the ordinary procedure for requesting and exchanging documents in the arbitration undermines the equality of arms between the parties and impairs Claimants' right to a fair proceeding."[242]

167 As shown below by reference to each of the Prayer for Relief formulated in the Claimants' Reply, the Claimants have failed to show any threat to the procedural integrity of the arbitration and accordingly have failed to prove that any of their rights is in peril.

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[239] Respondent's Comments on the Request for Emergency Relief, p. 18 (Section 3.2) and p. 27 (Section 5.2).

[240] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 49 *et seq.* (Section 5.2.1).

[241] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures. *See* Claimants' Second Request for Provisional Measures, p. 19 (para. 46) and p. 21 (para. 51).

[242] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 61 (para. 150).

5.2.1.1 Prayers for Relief (a) and (b)

168 As explained above, the Claimants request that the Tribunal order the Respondent to 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 be made available to any person having any role in Respondent's defence in this arbitration. They also request an order enjoining Romania from proffering "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.

169 None of the measures sought relates to a right in peril.

170 First, the measures sought do not address any plausible peril to a right of due process in the arbitration since only the ANAF inspectors in charge of a particular inspection have access to the documents taken from a company under investigation.[243] Other employees or agents of the Romanian government, including of the Ministry of Public Finance, do not have access to these documents. [244] The allegation that the Respondent's defence team is reviewing documents that the Claimants' defence team cannot access is wholly unfounded.

171 Second, the measures sought cannot be ordered without affecting the core of the Respondent's right of defence when the Claimants seek provisional measures in relation to the Taxation Measures[245] and go as far as suggest-

[243] Witness Statement of Petre Dragoș Voinescu, p. 2 (para. 7)

[244] Witness Statement of Petre Dragoș Voinescu, p. 1 (para. 4) and p. 2 (para. 7).

[245] The only reason why the Respondent's defence team has now become acquainted with the investigations and audits into RMGC is that the Respondent had to contact ANAF to respond to the plethora of outlandish allegations raised by the Claimants in their Second Request. The Claimants cannot be seeking to establish a Chinese wall between ANAF and the Respondent's defence team in these circumstances. The Respondent is also constrained to proffer evidence regarding ANAF's audits and investigations into RMGC through the Witness Statement of Mr Voinescu since the Claimants' repeated unfounded allegations regarding access to documents

ing that they can still raise claims in the arbitration in relation to the Taxation Measures.[246] Where the Claimants are responsible for the alleged risk of which they complain, they cannot ask this Tribunal to remove that risk by ordering provisional measures.

172 Third, the Respondent is not currently preparing any submission (other than the present rejoinders to the Claimants' two unfounded application for provisional measures) and is not therefore seeking any evidence to rebut the Claimants claims on the merits since the Claimants have not filed their Memorial. There is no right in peril at this early stage of the proceedings where neither party has been called upon to produce any evidence in relation to any issue in dispute. Romania will be in a position to determine what agencies of the state will be requested to assist in the Respondent's defence only upon reviewing the Claimants' claims in the Memorial.

173 To the extent that any evidence in the possession of ANAF may be necessary to respond to the Claimants' claims, any request to ANAF will be made and responded to in compliance with the existing limitations on access to documents and confidentiality of investigations under Romanian law. Insofar as the Taxation Measures are entirely unrelated to this arbitration, the only conceivable explanation for the Claimants' suspicion that any document that are in ANAF's possession may be used by the Respondent's defence team is the Claimants' grand conspiracy theory.

174 Fourth, the Claimants allege that "tribunals have enjoined States from using their police and investigative powers to gain advantage in the arbitration, such as by obtaining evidence outside the ordinary procedure for

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cannot be left without response. Whether or not this is to the Claimants' liking, due process in international arbitration is not a one-way street.

[246] Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 59 *et seq.* (para. 147).

requesting and exchanging documents".[247] In reality, **not one** tribunal to date has prevented a State from relying on documents legitimately gathered through tax investigations and the Claimants' allegation to the contrary remains unsubstantiated.

175 Moreover, the Claimants' allegation that there would be anything abusive in Romania possibly requesting documents from ANAF ignores the fact that Romania is a co-shareholder in RMGC and retains all rights to seek the same documents directly from RMGC, in accordance with Romanian corporate law. In any event, the Claimants have access to RMGC's copies of the same documents which ANAF has compiled through the tax investigations. Should disclosure of any such documents to the Respondent's defence team be available under the applicable law (and become necessary to rebut any allegation made by the Claimants in their Memorial), there would be no procedural "advantage" to the Respondent.

176 Finally, the requirement that the Respondent would have to seek leave from the Tribunal before proffering evidence gained through ANAF's audits and investigations is nowhere explained, not to mention justified. It is also unclear how such a requirement would remove any right in peril. The same applies to the Claimants' further proposed requirement that it be allowed to comment on evidence prior to it being produced.

177 The two requests stand to be dismissed without further consideration.

5.2.1.2 Prayer for Relief (c)

178 The Claimants' Prayer for Relief (c) seeks two measures. First with respect to the "VAT Assessment and any associated decision as to interest and penalties", the Claimants request that the Respondent be forced to "withdraw its opposition to RMGC's request for a judicial suspension of enforcement". Second, the Claimants request an order that Romania "not take steps to enforce the VAT Assessment against RMGC".

[247] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 50 (para. 131).

179 The Claimants have not articulated any right in peril that would be safeguarded by an order that the Romanian tax authorities breach the applicable law and create a preferential treatment for RMGC in the context of its challenge of the VAT assessment. Whether or not the Romanian tax authorities oppose RMGC's request for a judicial suspension of enforcement would be of no bearing to the outcome of that request before Romanian courts. Even if the tax enforcement measures created any risk or threat to the procedural integrity of the arbitration (which they do not), the request stands to be dismissed insofar as unrelated to the alleged right in peril.

180 The Claimants also request that Romanian authorities not take steps to enforce the VAT Assessment against RMGC, which is effectively the same request made by RMGC that is currently pending before Romanian tax courts. The Claimants have no right in peril unless that request is dismissed and even then, the enforcement measures would not have any impact on the procedural integrity of this arbitration.

5.2.1.3 Prayer for Relief (d)

181 The Claimants' Prayer for Relief (d) seeks to block or at the very least keep under a cloud of uncertainty for the indefinite future any measure relating to the "VAT Assessment, ANAF audits or ANAF investigations". There is no right of procedural integrity alleged in support of such broad relief, the order of which would effectively put Romania in the position of granting the Claimants' a free-pass card as regards Romanian law for the indefinite future in relation to any current or future tax dispute. That relief stands to be summarily dismissed as too vague and unrelated to any alleged right in peril. Due process and procedural integrity of an arbitration do not mean preferential tax treatment for tax liability.

5.2.2 No necessity

182 Just as the Claimants have failed to demonstrate the existence of a right in peril, they have also failed to establish that the requested measures are necessary to avoid harm, that could not be addressed in the proper domestic forum.[248] Therefore since, ANAF's obtention of documents through its anti-fraud investigation does not imperil the Claimants' right or the procedural integrity of these proceedings, the Claimants are unable to establish that the requested provisional measures are necessary.

183 As to the requests made in sup-paragraphs (b) and (c) of the Claimants' amended Prayer for Relief, the Claimants are similarly unable to demonstrate the existence of a right in peril, and are unable to show that the dispute will be aggravated by the Respondent's enforcement of its tax laws. Furthermore, even assuming that the Claimants do have rights in peril, and that the dispute would be aggravated, the Claimants fail to establish why provisional measures are necessary in light of the options available to the Claimants to suspend the enforcement.

184 The alleged threats to the integrity of the proceedings that serve as the bases for the Claimants' request for these provisional measures, specifically the alleged dismantling of RMGC at the hands of the state, and the alleged material risks to the Claimants' ability to operate their business and prosecute their claims in these proceedings, are both unproven and speculative in the extreme.

185 **First**, the Claimants conspicuously avoid explaining why RMGC could not secure a bank guarantee [redacted].[249]

[redacted]

[248] Respondent's Comments on the Request for Emergency Relief, p. 30 (para. 80).

[249] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 54 (paras. 163-165).

[redacted] The Claimants' failure to address these options no doubt stems from the fact that RMGC's obtention of a guarantee or loan would effectively eliminate any alleged risk of RMGC's insolvency, as well as any alleged risk to the Claimants' ability to concurrently operate their business and prosecute their claims in these proceedings. The very basis for the Claimants' request for provisional measures would therefore only arise as a result of RMGC's refusal to pursue a viable and available option.

186 **Second**, despite erroneously complaining that the Respondent is requiring the Claimants "to lose access for an extended period of time to material amounts of its available funds",[251] the Claimants concede that they are able to fund the guarantee on RMGC's behalf.[252] On this basis alone, the Claimants cannot establish the necessity of the requested provisional measures, as the Respondent has shown (and the Claimants have not denied) that Gabriel Canada has sufficient liquidity to cover both the amount of the guarantee and the costs of this arbitration.[253]

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[250] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 25 (para. 65) [redacted] in the *Paushok v. Mongolia* case, [redacted] it was "established to the satisfaction of the Tribunal that, in the current fiscal conditions, no financial institution would consider lending such an amount of money to GEM." *Sergei Paushok, qsc Golden East Company, qsc Vostokneftegaz Company v. The Government of Mongolia*, Order on Interim Measures, UNCITRAL, 2 September 2008, at **Exhibit CLA-31**, p. 10 *et seq*. (para. 61). The Claimants have made no such showing here.

[251] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 5 (para. 13).

[252] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 64 (para. 159). The Claimants' allegation that the Respondent seek to dismantle "RMGC as quickly as possible based on the *prima facie* unlawful VAT Assessment" is nonsensical given the Claimants' obvious and apparent ability to provide this guarantee. Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 17 (para. 45).

[253] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 55 (para. 166).

187 Unable to demonstrate that providing the guarantee would compromise their ability to pursue their claims in this arbitration, the Claimants resort to the speculative musings of Mr Vaughan that

[redacted][254]

188 This highly conditional language relies on unsupported assumptions regarding the outcome of RMGC's legal challenges. The Claimants' provide no basis to assume that the resolution of RMGC's tax dispute with the Respondent would take "a number of years", other than further speculation from Mr Vaughan.[255] [redacted] By the Claimants' own admission, there is therefore no reason to assume that their funding of a bank guarantee would result in any aggravation of the dispute. As such, the Claimants are unable to establish the necessity of their requested provisional measures.

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[254] Statement of Max Vaughan dated 24 August 2016, p. 6 (para. 16) (emphasis added).

[255] Statement of Max Vaughan dated 24 August 2016, p. 5 (para. 13).

[256] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 2 (fn. 2).

[257] [redacted]. Claimants' Reply to the Respondent's Observations on Claimants' Second request for Provisional Measures, p. 24 (fn. 99). [redacted]

189 **Third**, the Claimants' arguments regarding the potential "dismantling" of RMGC are all premised on (i) RMGC's refusal to obtain a loan and the Claimants' further refusal to provide a bank guarantee, and (ii) erroneous assumptions regarding the Respondent's refusal to approve a judicial reorganization plan, if RMGC ever became insolvent.[258]

190 Even assuming that the Respondent's enforcement of the VAT Assessment would result in RMGC's bankruptcy and liquidation (which is denied), this outcome would stem from the Claimants' refusal to avail themselves of the legal options at their disposal. As such, the provisional measures requested by the Claimants are not necessary to forestall the alleged harm.

191 In any event, the Claimants have failed to establish any serious likelihood that the enforcement of the VAT Assessment would result in RMGC's bankruptcy and liquidation.[259] The Claimants' entire argument is premised on the assumption that "there is no basis to believe that Respondent as a creditor of RMGC would approve a judicial reorganization plan for RMGC."[260] The Respondent pointed out that there is no reason to suggest that RMGC's creditors (presumably the Claimants and the Respondent), would refuse a reorganization plan and prefer to collect the assessed VAT by liquidation through RMGC's bankruptcy procedure.[261] In any event, the Claimants have not proven that the Respondent would even be in a position to oppose a judicial reorganization plan pursuant to Arti-

[258] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 18 (para. 47).

[259] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 51 (paras. 152-154).

[260] Claimants' Reply to Respondents' Observations on Claimants' First Request for Provisional Measures, p. 18 (para. 47). *See* also Claimants' Second Request for Provisional Measures, p. 12 (fn. 38) ("Given its treatment of RMGC over the last few years leading to this arbitration, it is not reasonable to expect that the Ministry of Finance would approve a judicial reorganization plan for RMGC, meaning that insolvency for RMGC most likely would lead to bankruptcy and liquidation.").

[261] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 51 (paras. 152-154).

cle 138 of the Insolvency Code.[262] The Claimants' only response is further speculation, alleging that "there is little doubt that Respondent's true motive is to wind up RMGC" because the Respondent has "refused to forbear on enforcement" and "has proceeded full-tilt with its excessive and abusive investigation of RMGC throughout what Respondent has referred to as Europe's summer vacation period."[263]

192 However, and as explained above, the Respondent has done nothing more than apply its tax laws, as it would vis-à-vis any other taxpayer, including its laws and procedures for the collection and enforcement of unpaid tax liabilities. The Claimants have provided no evidence whatsoever that this legitimate enforcement activity is "full-tilt" let alone excessive or abusive. Nor have the Claimants provided any evidence that the measures in turn to enforce the VAT Assessment are out of the ordinary. [redacted] There has thus been nothing unusual or improper about Romania's recent efforts to enforce the VAT Assessment, including the timeframes followed. There is therefore no reason to assume that the Respondent is actively pursuing the bankruptcy and liquidation of RMGC (which it is not), nor, even if the Respondent had the ability to do so, that it would refuse any reasonable reorganization plan.

193 With this main contention set aside, the Claimants' chain of assumptions collapses. Since there is no reason to assume that the Respondent, if it had the ability to do so, would oppose a judicial reorganization plan,

[262] Law No. 85/2014 on Insolvency Prevention Measures and Insolvency, published in the Official Gazette Part I, No. 466, as last consolidated on July 14, 2016 dated 14 July 2016, at **Exhibit C-45**, p. 3.

[263] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 19 (para. 49).

[264] [redacted] Excerpts from ANAF Fiscal Inspection Report and Assessment Decision dated 7 July 2016, at **Exhibit C-42**, p. 1, p. 38, and p. 44.

there is no reason to assume that RMGC would be liquidated, and therefore no reason to assume that the Claimants would lose access to RMGC's documents. Accordingly, there is no necessity for the provisional measures requested by the Claimants.

5.2.3 No urgency

194 Even assuming that the harm alleged by the Claimants were likely to occur, and that the requested provisional measures were necessary to prevent it, the Claimants must prove that the requested provisional measures are urgently required.

195 The Claimants have failed to prove that ANAF has accessed or obtained the Confidential and Classified Documents and are using them in this arbitration.[265] Leaving aside the fact that ANAF has never requested any of the Confidential and Classified Documents,[266] ANAF's strict procedures with regard to the obtention and use of documents from an entity subject to an anti-fraud investigation restrict the access to these documents to the DGAF inspectors in charge of the inspection.[267] The provisional measures requested by the Claimants are thus not urgently required to prevent the alleged harm.

196 Nor are provisional measures urgently required to prevent an alleged harm in connection with the VAT Assessment. The Claimants admit that they have sufficient funds to provide a bank guarantee on behalf of RMGC[268] and only allege that the loss of these funds "for an extended period of time"[269] would compromise their ability to run their business or

[265] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 7 (para. 19).
[266] *See supra* paras. 82-91; Witness Statement of Petre Dragoş Voinescu, p. 2 (para. 9).
[267] *See supra* paras. 82-91.
[268] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 18 (para. 47).
[269] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 5 (para. 13).

pursue their arbitration claims.[270] Given that their ability to operate their business or pursue their arbitration claims is not imminently threatened, there is no basis to assert that the requested provisional measures are urgently required.

197 Finally, even if the Claimants had established any serious likelihood of the alleged dismantling of RMGC, they have failed to show why provisional measures are urgently required to prevent this alleged harm. As discussed above, the Claimants' arguments are premised on the Respondent's alleged unwillingness to agree to a judicial reorganization plan. However, at this stage RMGC has not been declared insolvent, and there is no judicial reorganization plan for the Respondent to reject. In addition to being speculative, these forecasted events are not imminent. There is therefore no basis for the Claimants to argue that provisional measures are urgently required.

5.2.4 No proportionality

198 Even assuming that the requested provisional measures are both necessary and urgently required to prevent the alleged harm, the Claimants have failed to prove that these measures are proportional.

199 As demonstrated in the Respondent's Observations, an order prohibiting Romania from enforcing the VAT Assessment against RMGC would amount to ordering the Romanian tax authorities not to comply with Ro-

[270] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 24 (para. 62). The Claimants' allegation that they would need to furnish [redacted] in order to provide a bank guarantee on RMGC's behalf is solely based on the unsupported statement of Mr Vaughan, that [redacted] Statement of Max Vaughan dated 24 August 2016, p. 5 (para. 12). [redacted]

manian law (and risk the application of the relevant statute of limitations to tax claims, i.e. 5 years)[271] and provide RMGC with preferential tax treatment over any other individual or company in Romania.[272] This discriminatory treatment would also be inconsistent with Romania's international obligations, including the prohibition of State aid. Consequently, the Claimants' request is disproportional as their interests cannot be made to prevail over Romania's interest in applying its laws equally to all of its taxpayers.

200 The Claimants have failed to show in their Reply that the requested relief is proportional, as they have been unable to demonstrate that the harm that would be suffered by Romania, the preferential non-application of its tax laws, is balanced by the alleged harm that the Claimants seek to avoid.

201 The Claimants' claim that "there is no prejudice whatsoever to the Respondent"[273] and that they "do not seek preferential or exculpatory treatment"[274] They cannot, however, credibly deny that they are seeking, wholly outside of the procedures available to RMGC under Romanian law, a stay of the enforcement of the applicable tax laws. Such recourse is not available to other Romanian persons, and indisputably constitutes preferential treatment, which results in a prejudice to the Respondent.

202 With respect to the documents collected by ANAF pursuant to the anti-fraud investigation, the Claimants allege that the requested measures reflect an appropriate balancing of interests, because if the Respondent "is permitted to use the information and documents that it is gathering through its ANAF investigations in the arbitration, the serious risk to the

[271] Tax Procedure Code, at **Exhibit R-33**, p. 182 (Art. 215) and p. 183 (Art. 218).
[272] Respondent's Observations on the Claimants' Second Request for Provisional Measures, p. 53 (para. 157).
[273] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 66 (para. 165).
[274] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 11 (para. 32).

integrity of the arbitration that would follow is evident."[275] The Claimants further allege that "there is no prejudice whatsoever to Respondent that would flow from the requested measure" and "the measures would in no way interfere with Romania's interest in law enforcement." However, the Claimants significantly understate the harm this provisional measure would inflict upon the Respondent. The Respondent's arbitration counsel is entitled to request the collaboration of any Romanian State entities. It cannot be excluded that the Respondent's counsel may request, in a manner consistent with ANAF's regulations governing the handling of documents collected from persons under investigation, information regarding RMGC after the Claimants have filed their Memorial. The Respondent's right of due process would be compromised by permitting the Claimants to impose artificial limits on which entities Romanian state can be asked to provide information to be used in the State's defence. If there is information that is relevant to the Respondent's defence, the Respondent's counsel must be able to review and produce that evidence.

[275] Claimants' Reply to Respondent's Observations on Claimants' Second Request for Provisional Measures, p. 63 (para. 155).

6 PRAYER FOR RELIEF

203 The Respondent hereby respectfully reiterates its 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 their Second Request and compensate the Respondent for all costs it incurred in relation thereto, including costs of legal representation.

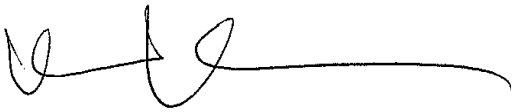
Respectfully submitted,

31 August 2016

For and on behalf of

Romania

LALIVE



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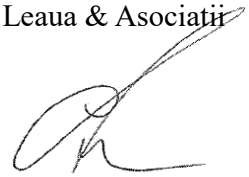

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