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INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES

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

*Claimants*

v.

**ROMANIA**

*Respondent*

ICSID CASE No. ARB/15/31

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**CLAIMANTS' REPLY TO RESPONDENT'S OBSERVATIONS  
ON CLAIMANTS' FIRST REQUEST FOR PROVISIONAL MEASURES**

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August 17, 2016

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**I. INTRODUCTION**

1. In accordance with the schedule established by the Tribunal in the letter to the Parties dated July 20, 2016, Claimants hereby submit their response to Respondent's observations dated August 3, 2016 ("Respondent's Observations") on Claimants' Request for Provisional Measures dated June 16, 2016 ("First Request for Provisional Measures").<sup>1</sup>

2. As explained in Claimants' initial submission and further below, the Classified and Confidential Documents subject to this request are by their nature *prima facie* relevant to this proceeding as they relate to the core rights, obligations, and communications with the mining authority concerning the Roşia Montană and Bucium Licenses and the development of the Roşia Montană mining project at issue in this arbitration. For this reason, Claimants' Request for Arbitration filed on July 21, 2015 squarely presented to Respondent the need to promptly address

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<sup>1</sup> Capitalized terms used but not defined herein have the meaning assigned to them in Claimants' First Request for Provisional Measures.

and facilitate access to and use of these documents for purposes of this arbitration. Given that Respondent and its counsel also would require access to these materials Claimants expected that Respondent and its counsel would engage promptly and meaningfully on this issue. Claimants were wrong.

3. In the almost one year between the filing of the Request for Arbitration and the filing of the instant request for provisional measures on June 16, 2016, Claimants were met with silence and, more recently, with obfuscation and patent attempts at delay. Only after Claimants filed the instant request for provisional measures did Respondent through NAMR answer the October 2015 letters from Gabriel and RMGC requesting declassification of the subject documents. Overtures to Respondent's counsel were similarly unavailing and resulted in nothing more than statements that they were looking at the issue and otherwise were not prepared to discuss it. Respondent never engaged with Claimants on the issue and never acknowledged any intention to cooperate or to find a reasonable solution.

4. Finally forced to respond as a result of the Claimants' request before this Tribunal, Respondent's submission shows that while it feigns cooperation, it is determined to delay and extend for as long as possible the procedural calendar in this case. Its strategy was made abundantly clear with respect to Procedural Order No. 1 where Respondent sought to avoid or condition any dates for pleadings, document production, or amicus participation, on the prior resolution of issues regarding the access to and use of the Classified and Confidential Documents which it claims will take more than six months to address.

5. The process needed to declassify the "work secret" classified documents (which is the only classification level at issue), contrary to Respondent's assertions, is not complex and can be accomplished promptly. Similarly, the Parties working in good faith should be able to reach agreement on the terms of access and use subject to a confidentiality agreement without the Tribunal's intervention. All these steps should be taken within 30 days from the date of the Tribunal's order addressing this request.

6. As the record on this issue reflects, Claimants' request for a recommendation of provisional measures is warranted. The measures are needed to preserve the integrity of the arbitration and Claimants' rights to a reasonably prompt and orderly procedure for the

adjudication of its treaty claims. Respondent's obstruction in relation to the Classified and Confidential Documents threatens to prevent the arbitration from commencing in an orderly and reasonably prompt manner and makes the Tribunal's intervention both necessary and urgent. The requested measures are entirely proportional in view of the fact that there is no question of Respondent obtaining access to and the right to use the documents at issue.

7. Respondent seeks to undermine the urgency of the matter by arguing, *inter alia*, that the "arbitration has only just begun." In fact, however, the lack of co-operation for more than a year leading up to the request, and the languid minimum six-month pace proposed by Respondent going forward simply to make declassification decisions is clearly designed to block putting in place a reasonable time frame for the arbitration to proceed. Indeed, it is unclear how long Respondent suggests it would then expect to have to implement its declassification decisions (assuming it agrees to declassification) or how much time it expects will be needed to reach agreement between the parties on terms of access to the documents at issue. During the extended and apparently undefined period of time contemplated by Respondent for addressing these matters, Claimants would not be able to prepare or present their Memorial. In these circumstances, the Tribunal's intervention is urgently needed to impose a reasonable order on this process.

8. Finally, the requested measures are entirely proportional in view of the fact that there is no dispute of the right of Respondent to obtain access to and to use the documents at issue, which is among the reasons why Claimants had expected Respondent to work cooperatively and on a reasonable timetable to address this issue without the need for the Tribunal's intervention

## **II. THE SUBJECT OF THIS REQUEST**

9. The documents that are the subject of this request, the Confidential and Classified Documents, are documents that are maintained by RMGC, as titleholder of the Roșia Montană and Bucium Licenses, and that contain data and information relating to mineral resources.<sup>2</sup> The data and information contained in the documents is the property of the State.<sup>3</sup> As license holder,

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<sup>2</sup> See First Request for Provisional Measures ¶¶ 17-18.

<sup>3</sup> See First Request for Provisional Measures ¶ 18.

RMGC has the right to use the data and information during the term of the respective license, and maintains the documents pursuant to a custody agreement concluded with NAMR.<sup>4</sup>

10. All documents containing data and information relating to mineral resources are covered by obligations of confidentiality that are set forth in (a) Article 5 of the Mining Law, (b) the terms of individual mining licenses, and (c) the terms of the custody agreements concluded between NAMR and the license holders.<sup>5</sup>

11. In addition to the obligations of confidentiality that thus bind NAMR and RMGC (as license holder) in relation to the documents at issue, all of which relate to the Roșia Montană and Bucium Licenses, NAMR issued orders to classify as “work secret” certain sub-categories of the confidential documents.<sup>6</sup> NAMR has amended its orders from time to time, changing which of the confidential documents had to be maintained as classified as well.<sup>7</sup>

12. Entities maintaining documents in categories designated as classified by NAMR must treat them as classified by, *e.g.*, assigning classification numbering to them, maintaining them in a security structure, maintaining a registry of the classified documents in their possession, etc.<sup>8</sup> Similarly, entities that issue documents in categories designated as classified by NAMR, such as engineering firms preparing technical reports based on data and information

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<sup>4</sup> First Request for Provisional Measures ¶ 21. *See also infra* ¶ 29 (regarding declassification of custody agreement).

<sup>5</sup> *See* First Request for Provisional Measures ¶¶ 19-20; Mining Law (Exh. C-11) Art. 5. *See also* Norms to the Mining Law (Exh. C-12) Arts. 2-15; NAMR Letter No. 2010 dated Sept. 14, 2007 to President of Romanian Parliament (Exh. C-54) (submitted also as Exh. R-1) (describing statutory and contractual obligations of confidentiality relating to documentation relating to mineral resources set forth in Article 5 of the Mining Law, the terms of mining licenses, and the terms of custody agreements concluded between NAMR and license holders).

<sup>6</sup> First Request for Provisional Measures ¶ 26; NAMR Order No. 202/2003 (Exh. C-13); NAMR Order No. 2/2013 (Exh. C-18).

<sup>7</sup> *E.g.*, compare NAMR Order No. 202/2003 (Exh. C-13) and NAMR Order No. 2/2013 (Exh. C-18).

<sup>8</sup> *See* First Request for Provisional Measures ¶ 24. *See also* Norms to the Mining Law (Exh. C-12) Art. 9; National Standards for the Protection of Classified Information (Exh. C-14) Art. 10.

relating to mineral resources, also must treat the documents as classified and maintain them accordingly.<sup>9</sup>

13. RMGC thus maintains a registry of classified documents that is appended to its custody agreement with NAMR.<sup>10</sup> The registry is updated from time to time, as was done recently at NAMR's request.<sup>11</sup> The classified documents on RMGC's registry include only documents relating to the Roșia Montană and Bucium Licenses;<sup>12</sup> as NAMR knows, RMGC does not have any other mining licenses. RMGC's compliance with the laws on the classification of information is subject to periodic control and inspection by the Romanian Intelligence Service.<sup>13</sup> For the most part, the classified documents include documents issued by NAMR, documents issued by RMGC, documents issued by the State through Mininvest, and documents issued by a small number of engineering firms.<sup>14</sup>

14. Gabriel and its representatives do not have access to any of the classified documents for purposes of this arbitration.<sup>15</sup>

15. RMGC also maintains documents subject to its custody agreement with NAMR subject to confidentiality obligations that contain data and information relating to mineral

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<sup>9</sup> *E.g.* Cepromin prepared certain technical documentation in relation to the resources within the perimeter of the Roșia Montană License and Ipromin prepared feasibility studies and other technical documents in relation to the same. *See infra* ¶ 35. *See also* National Standards for the Protection of Classified Information (Exh. C-14) Art. 10.

<sup>10</sup> *See* NAMR Letter No. 6471 dated June 23, 2016 to RMGC (requesting that RMGC send an updated list of classified documents held by RMGC that is an annex to Contract No. 27 for the preservation, storage and protection of data and information included in the National Geologic Fund and/or the National Fund of Mineral Resources and Reserves); RMGC Letter No. 56623 dated July 21, 2016 to NAMR (Exh. C -62) (submitted also as Exh. R-6) (submitting the updated list of classified documents held by RMGC that is an annex to Contract No. 27 for the preservation, storage and protection of data and information included in the National Geologic Fund and/or the National Fund of Mineral Resources and Reserves). *See also* RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh. C-20).

<sup>11</sup> *See* NAMR Letter No. 6471 dated June 23, 2016 to RMGC (Exh. C-60) (received by RMGC on July 6, 2016); RMGC Letter No. 56623 dated July 21, 2016 to NAMR (Exh. C-62) (submitted also as Exh. R-6); RMGC Classified Information Registry as of Mar. 2015 (Exh. C-20); RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh. C-20).

<sup>12</sup> *See infra* n. 58 (regarding one document that RMGC returned to NAMR).

<sup>13</sup> *See infra* n. 97. *See* RMGC Letter No. 55653 dated Mar. 8, 2016 (Exh. C-58).

<sup>14</sup> The classified documents are described further below. *See infra* ¶ 34 *et seq.*

<sup>15</sup> First Request for Provisional Measures ¶¶ 3, 9-10.

resources concerning the Roșia Montană and Bucium Licenses that are not classified. Such documents include, *e.g.*, preliminary technical studies. Gabriel and its representatives do not have access to any of those confidential documents for purposes of this arbitration NAMR's consent would be required to provide Gabriel such access and rights of use.<sup>16</sup>

16. In order to prepare its claims in this case, Gabriel requires access to the documents at issue, all of which *prima facie* are relevant as they relate to the development of mining activity pursuant to the Roșia Montană and Bucium Licenses.<sup>17</sup> There is no dispute that Respondent's counsel requires access as well.

17. While declassification of the documents under Romanian law is not the only means for the State to allow access to and use of the classified documents for purposes of this ICSID arbitration (Romania could specially permit their use for this purpose),<sup>18</sup> declassification should be the most direct means of accomplishing this objective. Respondent seems to agree in principle to declassify the documents relating to the Roșia Montană and Bucium Licenses.<sup>19</sup>

18. Once the classified documents are declassified, like all the documents that RMGC maintains subject to its custody agreement with NAMR, they will remain subject to confidentiality obligations as described above. NAMR and RMGC then will need to give their consent to their use for purposes of these proceedings subject to the Parties' agreement to

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<sup>16</sup> First Request for Provisional Measures ¶¶ 27-28, 32-33.

<sup>17</sup> First Request for Provisional Measures ¶ 29.

<sup>18</sup> The Romanian Government could have issued a decision to apply a special regime of access subject to confidentiality for the classified documents at issue, as treaties including the ICSID Convention and the BITs are part of Romanian law and the Government may take decisions regarding the application of the law. *See* Excerpts of Romanian Constitution (Exh. C-51), Art. 11 (“(1) The Romanian State undertakes to accurately and in good faith fulfill its obligations under the treaties to which it is a party. (2) Treaties ratified by the parliament in compliance with the law become part of the internal law”), Art. 108 (the Government takes decisions in view of applying the law).

<sup>19</sup> Respondent's Observations ¶ 30; NAMR Letter No. 7610 dated July 22, 2016 to RMGC (Exh. C-63) (submitted also as Exh. R-9) (directing RMGC to hand over the classified documents that it maintains “regarding Exploitation Concession License no. 47/1999 for Rosia Montana perimeter, as well as the Exploration Concession License no. 218/1999 for Bucium perimeter with a view to declassify them”); NAMR Letter No. 7783 dated July 28, 2016 to Cepromin (Exh. C-66) (submitted also as Exh. R-13) (noting that “declassification of certain documents closely related to the Rosia Montana and Bucium mining projects is required).



maintain their confidentiality.<sup>20</sup> The Parties should be able to reach an agreement that will cover all the documents in issue, *i.e.*, those presently in RMGC's possession subject to RMGC's custody agreement with NAMR. All of these documents are presumptively relevant to the issues in dispute as they by definition relate to the development of mining activity pursuant to the Roșia Montană and Bucium Licenses.

### **III. STEPS TAKEN REGARDING THE CONFIDENTIAL AND CLASSIFIED DOCUMENTS**

19. On January 20, 2015 – more than eighteen months ago – Romania was put on notice of this dispute and of Gabriel's intention to submit claims under the Canada BIT and the UK BIT.<sup>21</sup> The issue of the classified documents is well known to the Government and it has thus known since January 2015 that access to the classified documents relating to Roșia Montană would have to be addressed in any arbitration with Gabriel.

20. Gabriel's Request for Arbitration was filed more than one year ago on July 21, 2015. In that request Claimants plainly stated as follows:

As a matter of Romanian law, many of the core documents relating to the Project and Gabriel's investments in Romania, including the License itself and related information, studies, and correspondence, are subject to a strict, State-imposed, confidentiality/secretcy regime that restricts access to and use of those documents as well as their contents and subjects violators to civil and criminal sanctions. Those restrictions are fundamentally incompatible both with Gabriel's rights to present claims in regard to its investments under the Canada BIT and the UK BIT, as well as with the conduct of these proceedings as, among other things, they prohibit reference to and use of documentary evidence of central relevance to Gabriel's claims.

Because these restrictions apply not only to Gabriel, but also to Romania as Respondent, Gabriel trusts that Romania will agree to address this matter promptly upon commencement of this arbitration so that the parties, their representatives and counsel can fully and freely access, copy, translate, review, and exhibit in this arbitration documents currently subject to this restrictive confidentiality/secretcy regime as may be relevant

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<sup>20</sup> See First Request for Provisional Measures ¶ 3, 9, 33.

<sup>21</sup> See Letter from Gabriel addressed to the President of Romania and to the Prime Minister of Romania dated and delivered on Jan. 20, 2015 (Exh. C-8).

and necessary. If not, Gabriel urgently will seek an order of provisional measures from the Tribunal enabling and allowing such access, which is critical to protect Gabriel's most basic due process rights to prepare and present its claims in this arbitration.<sup>22</sup>

21. As noted above, while declassification under Romanian law of the classified documents is not necessary for purposes of this ICSID arbitration given that access and use of the documents indisputably is required as a matter of Romania's treaty obligations,<sup>23</sup> there is no question that declassification is the most direct approach to permit use of the documents for the present proceeding.

22. For that reason, in October 2015, after months had passed since the Request for Arbitration without any acknowledgement or response to this issue from Respondent, Gabriel wrote to NAMR to request NAMR to declassify the Roşia Montană Project documents;<sup>24</sup> and for the avoidance of doubt, RMGC wrote to express its consent to the declassification.<sup>25</sup> NAMR did not respond for months, until evidently prodded to do so by Claimants' instant request.<sup>26</sup>

23. Claimants' counsel raised the issue several times in discussions with Respondent's counsel, asking if Respondent was prepared to discuss possible solutions to the issue of document access. The extent of Respondent's self-proclaimed "engagement"<sup>27</sup> on the issue was to say they were looking into the matter and otherwise were not prepared to discuss it. Respondent never engaged with Claimants on the issue and never acknowledged any intention to cooperate or to find a reasonable solution.

24. As of the date Claimants filed the first request for provisional measures on June 16, 2016 – nearly one year after filing the Request for Arbitration and eight months after

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<sup>22</sup> Request for Arbitration ¶¶ 62-63.

<sup>23</sup> Romania's arguments relating to the Canada BIT are addressed in § IV.D *infra*.

<sup>24</sup> First Request for Provisional Measures ¶ 60; Letter from Gabriel Resources Ltd. to NAMR dated Oct. 2, 2015 (Exh. C-22).

<sup>25</sup> RMGC Letter No. 54308 to NAMR dated Oct. 30, 2015 (Exh. C-23).

<sup>26</sup> See NAMR Letter No. 7283 dated July 14, 2016 to RMGC (Exh. C-61) (submitted also as Exh. R-5).

<sup>27</sup> Respondent's Observations ¶ 27 n. 26.

Respondent's counsel was appointed<sup>28</sup> – Respondent had failed to engage with Claimants on this topic in any way and NAMR had not responded to Gabriel and RMGC's letters on the subject.

25. Respondent still did not engage constructively even after Claimants filed their request for provisional measures on June 16, 2016. Rather than confirm to Claimants at that time that there was no need for the Tribunal's intervention and that Respondent was prepared to deal with the issues cooperatively, Respondent waited silently for *more than six weeks* and only then filed a response after being directed by the Tribunal, on August 3, 2016, and opposed Claimants' requests. Only in that response were the Claimants advised that Respondent's counsel allegedly met with NAMR, purportedly in an effort to address this matter.<sup>29</sup>

26. Apparently prompted by Claimants' request for provisional measures, on July 6, 2016, RMGC received a request from NAMR to provide an update of its registry of classified documents maintained pursuant to RMGC's custody agreement with NAMR as well as a separate list of those classified documents on the registry relating to the Roșia Montană License.<sup>30</sup> As requested, RMGC provided the updated registry and the separate list of those classified documents from that registry that relate to the Roșia Montană License. The updated registry reflected that since the last registry was prepared, certain documents had been declassified or recategorized by other State entities and RMGC had returned certain documents relating to another license to NAMR.<sup>31</sup>

27. On July 14, 2016, NAMR wrote to RMGC, only then responding to the requests sent in October 2015,<sup>32</sup> to advise that having analyzed Gabriel's requests for declassification, it

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<sup>28</sup> Respondent's Letter dated October 25, 2015 to ICSID.

<sup>29</sup> Many of the meetings that Respondent lists post-date Claimants' First Request for Provisional Measures and some relate to meetings with the Ministry of Culture, which Ministry has nothing to do with the Confidential and Classified Documents. See Respondent's Observations ¶ 28.

<sup>30</sup> NAMR Letter No. 6471 dated June 23, 2016 to RMGC (Exh. R-4) (received by RMGC on July 6, 2016).

<sup>31</sup> RMGC Letter No. 56623 dated July 21, 2016 to NAMR (Exh. C-62) (submitted also as Exh. R-6) (enclosing the updated registry of documents and the list of classified documents relating to the Roșia Montană License as requested).

<sup>32</sup> See *supra* ¶ 22.

“will consider declassifying the documents classified by NAMR with respect to the mining project from Roșia Montană and Bucium, respectively.”<sup>33</sup>

28. On July 22, 2016, NAMR requested RMGC to deliver to NAMR by July 27, 2016 the originals of all the classified documents held by RMGC relating to the Roșia Montană and Bucium Licenses.<sup>34</sup> As discussed further below, RMGC considered this request (i) to be entirely unnecessary for purposes of ordering the declassification of the documents at issue, (ii) was without legal basis, and (iii) posed undue risks to RMGC.<sup>35</sup>

29. Also on July 22, 2016, NAMR wrote to RMGC seeking to clarify the basis on which the custody agreement pursuant to which RMGC maintains custody of the Confidential and Classified Documents<sup>36</sup> had itself been classified, observing that the custody agreement was not listed in NAMR’s classification orders.<sup>37</sup> RMGC replied on July 26, 2016 (i) noting that the custody contract was classified work secret on the basis of the Norms to the Mining Law and that NAMR earlier had accepted that classification; and (ii) agreeing to its immediate declassification.<sup>38</sup> NAMR confirmed its agreement to declassify the custody agreement.<sup>39</sup> On August 4, 2016, RMGC confirmed that in view of NAMR’s agreement to declassify the custody contract, RMGC declassified it.<sup>40</sup> On August 11, 2016 RMGC asked NAMR to confirm that the

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<sup>33</sup> NAMR Letter No. 7283 dated July 14, 2016 to RMGC (Exh. C-61) (submitted also as Exh. R-5).

<sup>34</sup> NAMR Letter No. 7610 dated July 22, 2016 to RMGC (Exh. C-63) (submitted also as Exh. R-9).

<sup>35</sup> See *infra* ¶ 51 *et seq.*

<sup>36</sup> See First Request for Provisional Measures ¶ 28 n. 50.

<sup>37</sup> NAMR Letter No. 7611 dated July 22, 2016 to RMGC (Exh. C-64) (submitted also as Exh. R-8).

<sup>38</sup> RMGC Letter No. 56646 dated July 26, 2016 to NAMR (Exh. C-65) (submitted also as Exh. R-11) (referring to Norms to the Mining Law, Art. 12(1) (“Where the data and information are classified, the contracts for keeping, storing and safeguarding will also observe the provisions of the normative acts referring to such documents.”)).

<sup>39</sup> See also NAMR Letter No. 7808 dated July 29, 2016 to RMGC (Exh. C-67) (submitted also as Exh. R-12) (referring to RMGC’s Letter No. 56646 dated July 26, 2016 and stating that NAMR agrees with the declassification of the RMGC custody contract and forwarded to RMGC on August 1, 2016).

<sup>40</sup> RMGC Letter No. 56732 dated Aug. 4, 2016 to NAMR (Exh. C-69) (confirming that *Contract no. 27/2005 for the preservation, storage and safety of data and information part of the National Geologic Fund and/or National Fund of Mineral Resources/Reserves* was declassified).

custody agreement is not subject to any legal obligation of confidentiality and so may be disclosed to Gabriel,<sup>41</sup> NAMR has not responded.<sup>42</sup>

30. On July 28, 2016, NAMR sent a letter to Cepromin SA Deva,<sup>43</sup> an entity that prepared in 1998 a number of the early technical reports relating to the Roşia Montană Project that are maintained by RMGC, stating that in view of this arbitration, it is necessary to declassify the documents relating to the Roşia Montană and Bucium mining projects and requesting Cepromin promptly to declassify the several documents it issued. Cepromin did so promptly.<sup>44</sup>

31. On July 29, 2016, NAMR issued an order declassifying the Roşia Montană License and certain of its annexes and addenda.<sup>45</sup> This order related only to the license itself, did not include all of the annexes to the Roşia Montană License, did not include the Bucium License, and did not include many other related documents. NAMR sent the order to RMGC and directed RMGC to implement the declassification of those license documents,<sup>46</sup> which RMGC promptly did.<sup>47</sup>

32. On August 4, 2016, NAMR sent letters to RMCG, Minvest, and Ipromin S.A., referencing its order declassifying the Roşia Montană License documents noted above and directed each of those companies to declassify those documents each company had issued in relation to the Roşia Montană License.<sup>48</sup> Following NAMR's direction, RMGC thus declassified the documents that it previously had classified in accordance with NAMR's orders, including

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<sup>41</sup> RMGC Letter No. 56779 dated Aug. 11, 2016 to NAMR (Exh. C-78).

<sup>42</sup> Claimants' counsel therefore still does not have access to the terms of RMGC's custody agreement with NAMR, which will be necessary to review in order to agree to appropriate terms of access and use for this arbitration of the subject documents.

<sup>43</sup> NAMR Letter No. 7783 dated July 28, 2016 to Cepromin (submitted also as Exh. R-13).

<sup>44</sup> Cepromin Letter No. 354 dated Aug. 2, 2016 to NAMR (Exh. R-14).

<sup>45</sup> NAMR Order No. 155 of July 29, 2016 with cover letter NAMR Letter No. 7864 (Exh. C-68) (submitted also as Exh. R-15).

<sup>46</sup> NAMR Order No. 155 of July 29, 2016 with cover letter NAMR Letter No. 7864 (Exh. C-68) (submitted also as Exh. R-15).

<sup>47</sup> RMGC Letter No. 56733 dated August 4, 2016 to NAMR (Exh. C-70) (confirming the declassification).

<sup>48</sup> NAMR Letter No. 8003 dated Aug. 4, 2016 to RMGC (Exh. C-73); NAMR Letter No. 8001 dated Aug. 4, 2016 to Minvest (Exh. C-71); NAMR Letter No. 8002 dated Aug. 4, 2016 to Ipromin (Exh. C-72).

those that RMGC itself had prepared over the years.<sup>49</sup> RMGC also requested Minvest's consent to declassify certain agreements concluded between RMGC and Minvest.<sup>50</sup> Because RMGC maintained copies of classified documents relating to the Roşia Montană License that had been issued by Cepromin, Minvest, and Ipromin, RMGC asked NAMR to advise once Cepromin, Minvest, and Ipromin had declassified the documents they had issued and maintained as classified pursuant to NAMR Orders so that RMGC also could declassify the copies of those documents in its possession.<sup>51</sup>

33. These recent developments show that the process of declassifying the subject documents can be completed fairly promptly. What remains to be declassified, as described below, can and should be done similarly promptly.

34. Claimants included as Exhibit C-20 to their First Request for Provisional Measures a copy of RMGC's Classified Information Registry, which listed the work secret classified documents that RMGC maintained as of March 25, 2015 subject to RMGC's custody agreement with NAMR.<sup>52</sup> That registry listed 785 classified documents. As noted above,<sup>53</sup> at NAMR's request, RMGC provided an updated registry on July 21, 2016. The updated registry lists 491 documents, reflecting the fact that since the last registry was prepared, certain documents had been declassified or recategorized by other State entities and RMGC had returned certain documents relating to another license to NAMR.<sup>54</sup> Claimants submitted the updated registry to the Tribunal on August 1<sup>55</sup> and, for convenience, resubmits it with this submission.<sup>56</sup>

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<sup>49</sup> RMGC Decision No. 56742 dated Aug. 5, 2016 (Exh. C-74) (declassifying documents on attached list in accordance with NAMR Letter No. 8003 dated Aug. 4 2016 requesting the declassification); RMGC Letter No. 56777 dated Aug. 11, 2016 to NAMR (Exh. C-76) (including list of documents declassified).

<sup>50</sup> RMGC Letter No. 56758 dated Aug. 9, 2016 to Minvest (Exh. C-75).

<sup>51</sup> RMGC Letter No. 56778 dated Aug. 11, 2016 to NAMR (Exh. C-77).

<sup>52</sup> RMGC Classified Information Registry as of Mar. 25, 2015 (Exh. C-20).

<sup>53</sup> *See supra* ¶ 26.

<sup>54</sup> RMGC Letter No. 56623 to NAMR dated July 21, 2016 (Exh. C-62) (submitted also as Exh. R-6).

<sup>55</sup> *See* Letter dated Aug. 1, 2016 from Claimants to Tribunal (with annexes).

<sup>56</sup> RMGC Registry of Classified Documents as of July 2016 (updated and resubmitted Exh. C-20).

35. In view of the declassification decisions recently taken as described above in relation to the 491 classified documents listed on RMGC's updated classified registry, 242 documents have been declassified,<sup>57</sup> leaving 248 documents remaining to be declassified.<sup>58</sup> For 98 of the remaining 248,<sup>59</sup> NAMR recently directed the relevant issuer (*i.e.*, the entity that prepared the document) to declassify; this constituted requests to Cepromin,<sup>60</sup> Minvest,<sup>61</sup> and Ipromin.<sup>62</sup> Those 98 documents therefore should be declassified shortly.

36. There are, therefore, only 150 documents remaining for which a declassification decision must be taken. Of those documents, as listed on RMGC's registry, 83 are documents that NAMR itself issued. These 83 documents include:

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<sup>57</sup> See NAMR Letter No. 7808 dated July 29, 2016 to RMGC (Exh. C-67) (submitted also as Exh. R-12) (ordering the declassification of 1 document); NAMR Order No.155 of July 29, 2016 with cover letter NAMR Letter No. 7864 dated Aug. 1, 2016 (Exh. C-68) (submitted also as Exhs. R-15 and R-16) (ordering declassification of 8 documents); NAMR Letter No. 8003 dated Aug. 4, 2016 to RMGC (ordering declassification of 233 documents). See also RMGC Letter No. 56732 dated Aug. 4, 2016 to NAMR (Exh. C-69) (confirming declassification of 1 document); Letter No. 56733 from RMGC to NAMR dated Aug. 4, 2016 (Exh. C-70) (confirming the declassification of 8 documents); RMGC Letter No. 56777 dated Aug. 11, 2016 to NAMR (Exh. C-76) (confirming declassification of 233 documents).

<sup>58</sup> There is one document included in the RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) that relates to the Bolcana Perimeter "Statistical Comparison from Bolcana Diamond drill (Document under Registration No. S-693)," which RMGC has returned to NAMR via military post. See RMGC Letter No. 56805 dated Aug. 17, 2016 to NAMR (Exh. C-79).

<sup>59</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-17, S-20, S-22, S-23, S-28, S-33, S-34, S-35, S-36, S-37, S-38, S-39, S-46, S-72, S-74, S-75, S-76, S-77, S-78, S-81, S-82, S-83, S-84, S-85, S-86, S-89, S-90, S-99, S-100, S-101, S-102, S-103, S-104, S-107, S-108, S-109, S-110, S-111, S-120, S-121, S-122, S-123, S-127, S-128, S-183, S-463, S-464, S-465, S-466, S-467, S-468, S-469, S-470, S-471, S-472, S-473, S-474, S-475, S-476, S-477, S-478, S-479, S-480, S-481, S-482, S-483, S-484, S-485, S-486, S-487, S-488, S-489, S-490, S-491, S-492, S-493, S-494, S-495, S-496, S-497, S-498, S-499, S-500, S-501, S-502, S-503, S-696, S-697, S-698, S-699, S-700, S-701, S-737, S-738, S-739, S-740, S-5/2013, S-3/2015).

<sup>60</sup> NAMR Letter No. 7783 dated July 28, 2016 to Cepromin (Exh. C-66) (submitted also as Exh. R-13) (directing Cepromin to declassify the documents in holds in connection with the Roşia Montană License); Cepromin Letter No. 354 dated Aug 2, 2016 to NAMR (Exh. R-14) (confirming documents were declassified but without reference to the document numbers listed in RMGC's Classified Information Registry documents, RMGC is currently waiting on NAMR to provide clarifications in this regard as requested by RMGC Letter No. 56778 dated Aug. 11, 2016 to NAMR); RMGC Letter No. 56778 dated Aug. 11, 2016 to NAMR (Exh. C-77) (requesting NAMR to advise on the declassification status of the documentation issued by Cepromin, Minvest and Ipromin).

<sup>61</sup> Letter No. 8001 from NAMR dated Aug. 4, 2016 to Minvest (Exh. C-71).

<sup>62</sup> Letter No. 8002 from NAMR dated Aug. 4, 2016 to Ipromin (Exh. C-72)

- Exploration License for Bucium and its addenda (7 documents);<sup>63</sup>
- Decisions on reduction of Bucium exploration perimeter (2 documents);<sup>64</sup>
- Resolution on homologation of reserves from Tarnița Deposit relating to Bucium approving reserves (1 document);<sup>65</sup>
- Finding notes regarding geological research activity, estimate reserves, feasibility studies and environmental rehabilitation works (12 documents relating to Roșia Montană and 4 documents relating to Bucium);<sup>66</sup>
- Inspection deeds regarding geological research works and 1 related report on the measures ordered further to those inspections (14 documents relating to Roșia Montană and 5 documents relating to Bucium);<sup>67</sup>
- Endorsements for the preliminary annual programs and general exploitation/exploration program (22 documents relating to Roșia Montană and 10 documents relating to Bucium);<sup>68</sup>
- Resolutions on the assessment and recording of mineral resources/reserves approving reserves, and related cover letter (3 documents relating to Roșia Montană);<sup>69</sup> and

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<sup>63</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-24, S-41, S-42, S-129, S-146, S-147, S-148).

<sup>64</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-135, S-137).

<sup>65</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Document under Registration No. S-695).

<sup>66</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-25, S-43, S-80, S-93, S-94, S-95, S-114, S-118, S-141, S-160, S-175, S-184, S-190, S-594, S-710, S-6/2015).

<sup>67</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-26, S-44, S-45, S-50, S-79, S-91, S-105, S-106, S-116, S-142, S-159, S-161, S-162, S-711, S-727, S-752, S-764, S-6/2012, S-10/2014).

<sup>68</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-47, S-48, S-73, S-87, S-88, S-92, S-97, S-98, S-117, S-119, S-126, S-130, S-131, S-132, S-133, S-134, S-136, S-138, S-139, S-140, S-144, S-149, S-156, S-157, S-178, S-181, S-716, S-731, S-755, S-767, S-8/2012, S-12/2014).



- Confidentiality agreements concluded with RMGC and letter on the regime of classified documents (3 documents).<sup>70</sup>

There is no evident reason why NAMR cannot take a decision promptly to declassify these documents.

37. Of the remaining 67 documents, 54 relate to Bucium and are awaiting action by NAMR similar to that already taken regarding such documents that relate to the Roșia Montană License, directing RMGC, Minvest, and two private companies, Ipromin and Minexor S.A. (formerly IPEG H Deva) to declassify:

- For RMGC: Annual works programs and budget, quarter and annual reports, study on the copper-gold porphyry deposits (36 documents);<sup>71</sup>
- For Minvest: Geological project concerning the exploration program (2 documents);<sup>72</sup>
- For Minexfor S.A. (formerly IPEG H Deva): Calculation of reserves in Bucium / Tarnița Deposit (1 document);<sup>73</sup> and
- For Ipromin: Documentation on the assessment of gold and silver resources, environmental impact study, social impact study, environmental rehabilitation plan and feasibility study relating to Bucium Rodu Frasin and Bucium Tarnița (15 documents).<sup>74</sup>

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<sup>69</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-61, S-62, S-4/2013).

<sup>70</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-19, S-49, S-115).

<sup>71</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-565, S-566, S-567, S-568, S-569, S-570, S-571, S-572, S-573, S-574, S-575, S-576, S-577, S-578, S-579, S-592, S-593, S-595, S-596, S-597, S-598, S-599, S-600, S-601, S-602, S-603, S-604, S-605, S-606, S-607, S-608, S-609, S-610, S-611, S-612, S-692).

<sup>72</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-505, S-506).

<sup>73</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration No. S-694).

<sup>74</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-163, S-164, S-165, S-166, S-167, S-168, S-169, S-170, S-171, S-172, S-173, S-174, S-504, S-507, S-508).

38. Finally, the remaining 13 documents consist of Maps and orthoimages issued by the Military Topographic Division of the Ministry of National Defense (DTM) relating to the Project area.<sup>75</sup> Notably, as reflected in RMGC's updated classified registry, a significant number of other plans and maps of the project area were recently declassified by Order of the General Director of the National Agency for Cadastre and Land Registration.<sup>76</sup> The maps and orthoimages issued by the DTM therefore are not urgently required. In Claimants' view, therefore, a decision regarding the declassification of these 13 documents could be deferred until decisions regarding the other documents have been taken. Put differently, access to and use of all of the other subject documents should not be delayed in any way by decisions related to these 13 documents.<sup>77</sup>

39. The current status of the documents awaiting declassification is shown on a color-coded version of Exhibit C-20, submitted herewith.<sup>78</sup>

40. From the above, it is clear that Respondent is well positioned to ensure that the declassification process is completed promptly and certainly within 30 days from the date of the Tribunal's order addressing this request. The parties should also be able within the same 30-days' time to reach agreement upon and put in place the arrangements necessary to address the access to and use of the documents subject to appropriate confidentiality undertakings.

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<sup>75</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh-C-20) (Documents under Registration Nos. S-236, S-237, S-238, S-239, S-240, S-241, S-242, S-243, S-244, S-245, S-246, S-262, S-264).

<sup>76</sup> See RMGC Letter No. 56623 dated July 21, 2016 to NAMR (Exh. C-62) (submitted also as Exh. R-6).

<sup>77</sup> Claimants reserve the right to request access to the DTM maps and orthoimages at a later time if they become relevant, as although they are issued by the DTM, they are not classified as "state secret," but only as "work secret," and thus necessarily do not implicate national security issues. Classified Information Law (Exh. C-24) Art. 15(d) (defining "state secret information" as information "related to the national security"). and Art. 15(e) (defining "work secret information" as information "whose disclosure could be detrimental to a public or private legal entity").

<sup>78</sup> See RMGC Classified Information Registry as of July 2016 color-coded to show declassification status as of Aug. 17, 2016 (Exh C-80).

#### IV. OBSTACLES CLAIMED BY RESPONDENT TO PROMPT RESOLUTION

##### A. The Scope of Claimants' Request

41. Respondent contends<sup>79</sup> that it is unclear whether Claimants request access to and use of documents other than those that were classified (as listed on Exhibit C-20 (updated and resubmitted)). In short, the answer is yes, as confidential documents required by the Claimants include a subset of documents that also are classified. As set forth in Claimants' request,<sup>80</sup> Claimants request access to and use of the documents that contain data and information relating to mineral resources that are maintained by RMGC as titleholder of the Roșia Montană and Bucium Licenses. These documents are maintained by RMGC subject to a custody agreement with NAMR. *All of the documents* are subject to obligations of confidentiality set forth in the Mining Law, the terms of RMGC's mining licenses, and the terms of the custody agreement with NAMR. *Some of the documents* are classified, and as such are listed on RMGC's registry of classified information, which registry has been reported periodically to NAMR, and has been updated and submitted herewith as Exhibit C-20.

42. These are all documents that contain data and information that belongs to the State and to which the State has "free and unhindered access"<sup>81</sup> and so would be entitled to obtain copies (and for those that are classified, without restrictions once declassified).<sup>82</sup> Gabriel has had access to these documents to the extent needed for project development. For all of the documents, and for those that are currently classified, once they are declassified, the Parties

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<sup>79</sup> Respondent's Observations ¶ 49.

<sup>80</sup> First Request for Provisional Measures ¶ 31.

<sup>81</sup> See Norms to the Mining Law (Exh. C-12) Art. 14.

<sup>82</sup> See NAMR Letter No. 7783 dated July 28, 2016 to Cepromin (Exh. C-66) (submitted also as Exh. R-13), NAMR Letter No. 8001 dated Aug. 4, 2016 to Minvest (Exh. C-71) NAMR Letter No. 8002 dated Aug. 4, 2016 to Ipromin (Exh. C-72) and NAMR Letter No. 8003 dated Aug. 4, 2016 to RMGC (Exh. C-73) (requesting from Cepromin, Minvest, Ipromin and RMGC respectively "[p]lease send us a copy of the documents you issued, after you declassify them."). See also RMGC Letter No. 56647 dated July 26, 2016 to NAMR (Exh. C-81) (also submitted as Exh. R-10) (noting, "[o]nce the special legal regime imposed by classification is removed, the parties will be able to regulate the access to the Documentation under less restrictive conditions, including as regards copying, should that be necessary.").

would need to agree to the terms of access and use for purposes of the arbitration in view of the confidentiality obligations imposed in relation to the documents on NAMR and RMGC.<sup>83</sup>

43. There should be no particular difficulty in reaching such agreement, as all of the documents have been available at all times to the State through NAMR, to RMGC, and to RMGC's shareholders Gabriel and the State through Minvest as needed in relation to project development. The only issue is now making those same documents available for use in this arbitration.

44. Respondent contends<sup>84</sup> that Claimants' request is potentially over broad because it might include documents not relevant to the case because RMGC maintains in its possession classified documents other than those relating to the Roșia Montană and Bucium Licenses. That is not correct. The documents at issue are those that RMGC maintains subject to the custody agreement with NAMR. Those documents all relate to the Roșia Montană and Bucium Licenses and the classified documents at issue (those set forth in Exhibit C-20 (as updated and resubmitted)) likewise relate only to the Roșia Montană and Bucium Licenses.<sup>85</sup> Referring to the registry of classified document submitted as Exhibit C-20 prior to the update, Respondent argues that there were documents listed that related to the Băișoara License.<sup>86</sup> Although RMGC had maintained documents relating to the Băișoara License, those documents were returned to NAMR in February 2016, and so were removed from the registry when NAMR asked RMGC to submit an updated registry).<sup>87</sup>

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<sup>83</sup> See Mining Law (Exh. C-11) Art. 5. See also Norms to the Mining Law (Exh. C-12) Arts. 2-15; NAMR Letter No. 2010 dated Sept. 14, 2007 to President of Romanian Parliament (Exh. C-54) (submitted also as Exh. R-1) (describing statutory and contractual obligations of confidentiality relating to documentation relating to mineral resources set forth in Article 5 of the Mining Law, the terms of mining licenses, and the terms of custody agreements concluded between NAMR and license holders).

<sup>84</sup> Respondent's Observations ¶ 51. See also *id.* ¶ 105 (arguing that the registry "potentially includes documents not relevant").

<sup>85</sup> See *supra* n. 58.

<sup>86</sup> Respondent's Observations ¶ 51 n. 55 (citing to documents listed on the RMGC registry submitted as Exh. C-20 prior to the update).

<sup>87</sup> RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh. C-20). See also Annex B to Claimants' Letter to Tribunal dated Aug. 1, 2016 (RMGC Letter No. 56623 to NAMR dated July 21, 2016 providing, in response to NAMR's request, an updated registry of classified documents and

45. Respondent also contends that it is not clear whether the updated registry (Exhibit C-20 (as updated and resubmitted)) includes documents relating to yet other licenses.<sup>88</sup> Respondent's assertion is misleading. Respondent refers to the fact that NAMR asked RMGC to provide two lists: one an updated registry of all the classified documents that it maintains in accordance with RMGC's custody agreement with NAMR; and the other, a separate list of the classified documents relating to the Roșia Montană License,<sup>89</sup> which Respondent observes includes 407 documents.<sup>90</sup> The difference between the two lists, as Respondent knows, is that the full list also includes documents relating to the Bucium License.<sup>91</sup> As NAMR, and thus Respondent, knows, RMGC does not maintain documents relating to any other license.<sup>92</sup> Thus, the classified documents that are on the registry, as well as those confidential documents that RMGC retains subject to its custody agreement with NAMR, all by definition relate to the Roșia Montană and Bucium Licenses and are thus *prima facie* relevant to this arbitration.<sup>93</sup> There is no good faith basis to suggest otherwise.

46. Respondent contends<sup>94</sup> that although the registry identifies the "issuer" of each document, it remains unclear whether the entity identified as the issuer is the one that classified the document, which is important as only the entity that classified the document is competent to declassify it. Here Respondent's argument is misleading because in fact all the classified

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confirming that all documents relating to the Băișoara Exploration License were returned to NAMR in February 2016 and therefore are not included in the updated registry (updated and resubmitted Exh. C-20)).

<sup>88</sup> Respondent's Observations ¶ 52 n. 56.

<sup>89</sup> NAMR Letter no. 6471 dated July 6, 2016 to RMGC (Exh. C-60) (submitted also as Exh. R-4) (requesting the two lists of documents); RMCG Letter No. 56623 to NAMR dated July 21, 2016 (Exh. C-62) (submitted also as Exh. R-6) (providing two lists as requested). *See also* Claimants' Letter dated Aug. 1, 2016 to Tribunal (attaching this correspondence as Annexes A and B and resubmitting as updated and resubmitted Exh. C-20) the updated list of documents maintained in RMGC's registry pursuant to its custody agreement with NAMR). *See also* Respondent's Exhibit R-6 (exhibiting RMCG Letter No. 56623 dated July 21, 2016 to NAMR without attachments) *and* Respondent's Exhibit R-7 (exhibiting the other attachments to that letter, *i.e.* the list of classified documents relating only to the Roșia Montană License and thus excluding the documents relating to the Bucium License).

<sup>90</sup> Respondent's Observations ¶ 52 n. 56.

<sup>91</sup> Respondent's Observations ¶ 52 n. 56. *See supra* n. 58.

<sup>92</sup> *See supra* n. 58.

<sup>93</sup> *See* Request for Arbitration ¶¶ 18-26, 40.

<sup>94</sup> Respondent's Observations ¶ 53.

documents at issue, the ones listed on RMGC's updated registry, have been classified pursuant to NAMR's orders and NAMR can issue an order to declassify those documents for which it is the issuer and can direct the other few issuers to declassify the various remaining documents, as NAMR already has done with many of the documents relating to the Roșia Montană License. In any event, there is no basis to question who is the issuer as indicated on RMGC's registry – this alleged obstacle has not prevented NAMR from directing the various issuers of the classified documents in RMGC's registry to declassify them.<sup>95</sup>

47. Respondent's excuse that it cannot determine whether RMGC's Registry includes documents classified as "state secret" cannot be countenanced given (i) it is not correct and (ii) Respondent is in control over that classification process.<sup>96</sup> RMGC's Registry, which has been subject to regular inspection by the Romanian Intelligence Service precisely to ensure that appropriate classification levels and corresponding security structures are maintained,<sup>97</sup> does not contain any documents with classification numbers commencing with "0" or "00" contrary to Respondent's allegations.<sup>98</sup> Moreover, the Respondent must be well aware of what documents

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<sup>95</sup> See RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh. C-20). See, e.g., NAMR Letter No. 8003 dated Aug. 4, 2016 to RMGC (Exh. C-73) (directing declassification of documents); NAMR Letter No. 8001 dated Aug. 4, 2016 to Minvest (Exh. C-71) (directing declassification of documents); NAMR Letter No. 8002 dated Aug. 4, 2016 to Ipromin (Exh. C-72) (directing declassification of documents). See also Standards for the Protection of Classified Information (Exh. C-14) Art. 191 (RMGC maintains classified documents subject to regular inspections by the Romanian Intelligence Service). See also RMGC Letter No. 55653 dated Mar. 8, 2016 to NAMR (Exh. C-58) (seeking clarification from NAMR on the classification status of certain documents following instruction from Romanian Intelligence Service inspection).

<sup>96</sup> Respondent's Observations ¶ 54 n. 61 and n. 62 (citing RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh. C-20), documents numbered 13-15, 18, 47-50, 52, 81-82).

<sup>97</sup> First Request for Provisional Measures ¶ 23; Standards for the Protection of Classified Information (Exh. C-14) Art. 191.

<sup>98</sup> First Request for Provisional Measures ¶ 55; RMGC Classified Information Registry as of Mar. 2015 (Exh. C-20) and RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh. C-20). Copies of some of the classified documents maintained by RMGC also are maintained by other entities, e.g., where another entity originally prepared the document. Those other entities may have maintained classification numbers that contain an "0" or "00" to which Respondent perhaps refers. See NAMR Letter No. 7783 dated July 28, 2016 to Cepromin (Exh. C-66) (referring to Cepromin's registry of classified documents and requesting Cepromin to declassify documents numbered as S00931, S00934, S0931, as reflected on Cepromin's list); Cepromin Letter No. 354 dated Aug. 2, 2016 (Exh. R-14) (confirming declassification of documents numbered as S00931, S00934, S0931). Notably, however, both NAMR and Cepromin state unequivocally in their letters that the documents at issue were classified as "work secret," despite the "0" and "00" markings indicating state secret classification. It is possible that the documents might have been classified as state secret at one time, but were later reclassified as "work secret," with the "S" added

Respondent itself has classified as “state secret.”<sup>99</sup> Respondent’s arguments to the effect that “state secret” declassifications are complicated,<sup>100</sup> therefore, are inapplicable and therefore irrelevant.

**B. Request Made in 2007 to Declassify the Roșia Montană License**

48. In its Observations, Respondent wrongly asserts that Claimants “are themselves responsible for this situation.”<sup>101</sup> Respondent refers to correspondence from 2007 relating to a letter from the then President of the Romanian Parliament to NAMR requesting NAMR to make information relating to the Roșia Montană License public.<sup>102</sup> NAMR responded by observing that due to confidentiality provisions in both the mining license and the law, NAMR could not make that information public without RMGC’s consent. That observation, however, is distinct from the issue of classification in accordance with NAMR’s orders.

49. Indeed, NAMR stated that “in the next period [NAMR] will take all the necessary diligences in order to declassify the concession deeds in the mining field.”<sup>103</sup> Although it was fully within NAMR’s power to decide to declassify all mining licenses, as NAMR indicated it

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subsequently. Nevertheless, there is no basis to doubt the indication that these documents are work secret, as evidently clear to NAMR. In any event, the classification of the documents is a fact easily confirmed by Respondent. *See also* RMGC Letter No. 54042 dated Oct. 6, 2015 to Minvest (Exh. C-55) (requesting clarification as to the level of classification of several documents following an inspection by the Romanian Intelligence Service in which the inspecting officer directed that such clarification should be obtained); Minvest Letter No. 2642 dated Oct. 8, 2015 to Minvest subsidiary Rosiamin SA (Exh. C-56) (directing Rosiamin to respond to RMGC’s letter); Rosiamin S.A. Letter No. 346 dated Oct. 9, 2015 (Exh. C-57) (confirming that the documents at issue had been reclassified as “work secret” in compliance with agreements with the “relevant Ministry”).

<sup>99</sup> *See, e.g.,* RMGC Letter No. 55653 dated Mar. 8, 2016 to NAMR (Exh. C-58) (requesting clarification as to the level of classification of two documents following an inspection by the Romanian Intelligence Service in which the inspecting officer directed that such clarification should be obtained); NAMR Letter No. 3500 dated Mar. 31, 2016 to RMGC (Exh. C-59) (responding to the request and confirming that the two documents in question were reclassified by NAMR from “state secret” to work secret by NAMR orders issued respectively in 2004 and 2014). *See also* NAMR Order No. 80 dated Apr. 29, 2004 (Exh. C-53) (changing the classification of a number of categories of documents from state secret to work secret).

<sup>100</sup> Respondent’s Observations ¶¶ 54, 76-81.

<sup>101</sup> Respondent’s Observations ¶¶ 20, 102.

<sup>102</sup> *See* NAMR Letter No. 2010 dated Sept. 14, 2007 to President of Romanian Parliament (Exh. C-54) (submitted also as Exh. R-1).

<sup>103</sup> NAMR Letter No. 2010 dated Sept. 14, 2007 to President of Romanian Parliament (Exh. C-54) (submitted also as Exh. R-1).

would do “in the next period,” by updating or amending its orders listing the documents that it classifies,<sup>104</sup> NAMR did not do so. The fact that RMGC, when asked in 2007, did not agree with the declassification is irrelevant because NAMR’s orders classifying or declassifying certain categories of documents are not based on the decisions of private parties but on its own determinations as to what should be classified.<sup>105</sup>

50. The correspondence referenced by Respondent also refers to the fact that “all concession licenses” contain an obligation to maintain information acquired or received based on the license confidential and that this obligation is in implementation of Article 5 of the Mining Law.<sup>106</sup> The fact that RMGC did not agree at that time “to remove” the confidentiality provisions in its mining licenses<sup>107</sup> also has no relevance to the question presented here, which is whether appropriate provisions now may be agreed or ordered within a reasonably prompt time frame to permit use of documents subject to such confidentiality restrictions for purposes of this arbitration. Respondent itself observes that the documents at issue, even once declassified, remain subject to confidentiality obligations.<sup>108</sup>

### **C. Respondent’s Demand that RMGC Hand Over All the Classified Documents**

51. Respondent also contends incorrectly and disingenuously that RMGC is blocking Respondent’s efforts to declassify the documents at issue.<sup>109</sup> Respondent argues that RMGC “refused to comply” with NAMR’s request that RMGC hand over, within three business days, all of the classified documents in their original form.<sup>110</sup> NAMR’s request purportedly was based on Article 13 of the Norms to the Mining Law.<sup>111</sup> RMGC replied that while it was willing to

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<sup>104</sup> See NAMR Order No. 202/2003 (Exh. C-13); NAMR Order No. 2/2013 (Exh. C-18).

<sup>105</sup> First Request for Provisional Measures ¶ 22 n. 33.

<sup>106</sup> NAMR Letter No. 2010 dated Sept. 14, 2007 to President of Romanian Parliament (Exh. C-54) (submitted also as Exh. R-1). See also First Request for Provisional Measures ¶ 19.

<sup>107</sup> NAMR Letter No. 2042 dated Sept. 18, 2007 to RMGC (Exh. R-2); Gabriel Letter No. 1917 dated Nov. 27, 2007 to NAMR (Exh. R-3).

<sup>108</sup> Respondent Observations ¶ 82.

<sup>109</sup> Respondent’s Observations ¶¶ 25, 60.

<sup>110</sup> NAMR Letter No. 7610 dated July 22, 2016 to RMGC (Exh. C-63) (submitted also as Exh. R-9) (requesting RMGC to provide by July 27, 2016 “all documents in the original form” relating to both the Roșia Montană and Bucium Licenses and citing Article 13 of the Norms to the Mining Law).

<sup>111</sup> Respondent’s Observations ¶ 24; See also Norms to the Mining Law (Exh. C-12) Art. 13.



cooperate with NAMR, NAMR's request was without legal basis, imposed undue burdens given, *inter alia*, the nature of the military transport that would need to be organized to effect any such handover, imposed risks to RMGC, and was not necessary.<sup>112</sup>

52. NAMR does not have a legal basis to request that RMGC provide to it all the Classified Documents in their original form. Article 38(f) of the Mining Law<sup>113</sup> expressly provides that RMGC, as the license holder, has the right to keep the documents relating to the license in its possession throughout the term of the license.<sup>114</sup> During the term of the license, NAMR has the right of "free and unhindered access" to the documentation and data,<sup>115</sup> and thus may inspect the documents held by the license holder at any time. NAMR does not have the discretionary right under Article 13 of the Norms to the Mining Law to require the license holder to turn over all of the documents during the pendency of the license term, as such an interpretation of the implementing norm would be in conflict with the law itself.<sup>116</sup> Rather Article 13 of the Norms regulates the circumstances when the license holder must turn over the data and documents, such as at the end of the license term.

53. The request is burdensome because due to the legal restrictions on the storage, maintenance and transport of classified documents, the only permissible means of transporting the numerous boxes of documents from RMGC's security structure in the area of the project at

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<sup>112</sup> RMGC Letter No. 56646 dated July 26, 2016 to NAMR (Exh. C-65) (submitted also as Exh. R-11) (noting that "the Company is willing to cooperate with NAMR .... Once the special legal regime imposed by classification is removed, the parties will be able to regulate the access to the Documentation under less restrictive conditions, including as regards copying, should that be necessary").

<sup>113</sup> Mining Law (Exh. C-11) Art. 38(f).

<sup>114</sup> The Roşia Montană License itself appears to include an identical provision giving RMGC the right to keep the documents relating to the license in its possession throughout the term of the license. *See* Copy of a portion Roşia Montană License no. 47/1999, available at <http://www.riseproject.ro/articol/documentele-confidentiale-ale-afacerii-rosia-montana/>, Art. 8.1.6.

<sup>115</sup> Norms to the Mining Law (Exh. C-12) Art. 14.

<sup>116</sup> As Articles 4(3) and 13 of Law No. 24/2000 on the Rules of Legislative Drafting (Exh. C-52) provide, implementing provisions such as norms must be consistent with their superior enactments; *i.e.*, a norm implementing a law cannot contradict that law. Article 13 of the Norms to the Mining Law therefore cannot operate to remove the right established in Article 38(f) of the Mining Law.

Roșia Montană the 430 kilometers to NAMR's offices in Bucharest is via a specialized military unit of the Romanian Intelligence Service.<sup>117</sup>

54. The request is unreasonable because it risks that the original<sup>118</sup> documents may become lost, damaged or disorganized, or returned only following unwarranted and unreasonable delays. Moreover, as described above, the only declassification decisions that remain are with regard to documents that (a) NAMR itself issued and of which it must have its own copies; (b) are the same types of documents created by third parties in relation to Bucium that NAMR already has directed be declassified in relation to Roșia Montană without the need to physically examine copies; and (c) 13 maps the need for which is not as pressing as the other documents and whose declassification should not be permitted to be raised as an excuse to slow access to and use of the remainder of the Classified and Confidential Documents.

55. The request also is not necessary. Citing a number of legal provisions, Respondent argues that NAMR can only make declassification decisions upon a “physical review” of the documents.<sup>119</sup> There is nothing in the legal provisions cited or otherwise to support such a position. Indeed, NAMR already decided and issued directions to other entities to declassify many of the documents at issue without physically reviewing all of the documents maintained by RMGC in its security structure.<sup>120</sup> Moreover, as noted above, other than the 13 maps, all of the remaining documents about which NAMR must make declassification decisions, were either issued by NAMR itself (copies of which NAMR must have),<sup>121</sup> or are the same kind

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<sup>117</sup> See Standards for the Protection of Classified Information (Exh. C-14), Art. 81.

<sup>118</sup> There are significant restrictions on copying documents that have a classified status that make it burdensome and impracticable to copy the entire set of classified documents as a precaution and particularly in a tight time frame. See First Request for Provisional Measures ¶ 24; Standards for the Protection of Classified Information (Exh. C-14), 41, 56, 66-69, 71-72.

<sup>119</sup> Respondent's Observations ¶ 40 n.43, ¶ 72 (citing Standards for the Protection of Classified Information (Exh. C-14) Arts. 20, 24 and 203(d) and Classified Information Law (Exh. C-24) Art. 24(10)). See also Respondent's Observations ¶ 60.

<sup>120</sup> See NAMR Letter No. 7808 dated July 29, 2016 to RMGC (Exh. C-67) (submitted also as Exh. R-12); NAMR Order No.155 of July 29, 2016 with cover letter NAMR Letter No. 7864 dated Aug. 1, 2016 (Exh. C-68) (submitted also as Exhs. R-15 and R-16); NAMR Letter No. 8003 dated Aug. 4, 2016 to RMGC (Exh. C-73); NAMR Letter No. 8001 dated Aug. 4, 2016 to Minvest (Exh. C-71); NAMR Letter No. 8002 dated Aug. 4, 2016 to Ipromin (Exh. C-72); NAMR Letter No. 7783 dated July 28, 2016 to Cepromin (Exh. C-66) (submitted also as Exh. R-13).

<sup>121</sup> See *supra* ¶ 36 *et seq.*

of third-party created documents for Bucium that NAMR has directed be declassified with respect to Roșia Montană without physical inspection; there is no rational reason NAMR cannot do the same for the documents relating to Bucium. As noted, access to the 13 maps is not as urgent and while such decisions also should be made reasonably promptly (Respondent has made no contrary showing), the declassification of the maps should not hold up progress on the rest.

#### **D. Provisions of the Canada BIT**

56. Respondent argues that it “cannot be required to produce or allow access to classified documents for purposes of this arbitration.”<sup>122</sup> Respondent acknowledges that it cannot rely on its own domestic law to avoid compliance with its international obligations, including the obligation to permit arbitration of claims arising under the Canada BIT and the UK BIT.<sup>123</sup> It argues, however, that restrictions contained in the Canada BIT provide that it cannot be ordered to make any of the classified documents available for this arbitration, and that in the face of the restriction contained in the Canada BIT, the UK BIT is not relevant. Respondent’s position is without merit.

57. Respondent relies on the provisions in the Canada BIT that state that nothing in the Canada BIT shall be construed to require a Contracting Party to “allow access to any information the disclosure of which it determines to be contrary to its essential security interests”<sup>124</sup> or “to allow access to information the disclosure of which ... would be contrary to the Contracting Party’s law protecting Cabinet confidences.”<sup>125</sup> As to “Cabinet confidences” in the English version of the BIT, Romania also observes that the equally authentic Romanian version refers to “*infomații clasificate*,” which it states means information “of interest for the national security.”<sup>126</sup> On that basis Respondent argues that Claimants have “no right to access

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<sup>122</sup> Respondent’s Observations ¶ 5, 62 *et seq.*

<sup>123</sup> Respondent’s Observations ¶¶ 6-7, 62 *et seq.*

<sup>124</sup> Canada BIT (Exh. C-1) Art. XVII(6)(a).

<sup>125</sup> Canada BIT (Exh. C-1) Art. XVII(7), Annex C ¶ I.7.

<sup>126</sup> Respondent’s Observations ¶ 7 n. 6. *See also* Classified Information Law (Exh. C-24) Art. 15(b) (defining “classified information” as information “of interest for the national security”).

and to adduce evidence relevant to the Claimants' claims in the arbitration" as long as such information is "protected" under those provisions of the Canada BIT.<sup>127</sup>

58. Respondent is wrong for two reasons: first, because the cited provisions of the Canada BIT do not apply to the documents at issue; and second, because even if such restrictions did apply, which they do not, Romania cannot rely upon provisions of the Canada BIT to deny access to documents relevant to Gabriel Jersey's claim when there are no such prohibitions in the UK BIT.

59. As to the Canada BIT restrictions, they do not apply to the classified documents at issue in this case because, among other reasons, all the documents at issue are classified as "work secret" and none is classified as "state secret," *i.e.*, none of the documents classified as work secret contains information "of interest for the national security."<sup>128</sup> That is evident from the legal definition relating to those terms; *i.e.*, the law defines "state secret information" as information "related to the national security,"<sup>129</sup> in contrast to "work secret information," which is defined as information "whose disclosure could be detrimental to a public or private legal entity."<sup>130</sup> Nor could any of the documents classified as work secret be considered documents relating to "Cabinet confidences."<sup>131</sup>

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<sup>127</sup> Respondent's Observations ¶ 67.

<sup>128</sup> *See supra* ¶ 47 (no state secret documents). First Request for Provisional Measures ¶¶ 22, 56 n. 88.

<sup>129</sup> Classified Information Law (Exh. C-24) Art. 15(d) (defining "state secret information" as information "related to the national security").

<sup>130</sup> Classified Information Law (Exh. C-24) Art. 15(e) (defining "work secret information" as information "whose disclosure could be detrimental to a public or private legal entity").

<sup>131</sup> As defined by Canada's Department of Justice, "Cabinet confidences" refers to "the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public." *See* Strengthening the Access to Information Act on the website of the Canadian Department of Justice at <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-ai/prp/atia-lai/p4.html> (CL-39) (discussing Cabinet confidences). *See also, e.g., UPS v. Canada*, UNCITRAL, Decision of the Tribunal Relating to Canada's Claim of Cabinet Privilege dated Oct. 8, 2004 (CL-37) (observing that documents are considered to be covered by Cabinet confidence when they contain "evidence of Ministers' discussions and deliberative process"); *Vito G. Gallo v. Canada*, UNCITRAL, Procedural Order No. 3 dated Apr. 8, 2009 (CL-38) (where Canada claimed certain documents were covered by Cabinet confidence, the tribunal stated that it was "inclined to support the protection of information exchanged during deliberative and policy making processes except when the competing public interest in disclosure for the purposes of the arbitration outweighs such protection"); *Merrill & Ring Forestry v. Canada*, UNCITRAL, Decision of the Tribunal on Production of Documents of which Cabinet Privilege Has Been Invoked dated

60. Moreover, interpreting the relevant provisions of the Canada BIT in accordance with the principles set forth in Articles 31-33 of the Vienna Convention on the Law of Treaties,<sup>132</sup> taking into account the several authentic treaty languages, does not support Respondent's conclusion that it could not be ordered to provide access to the documents at issue in this case, which include many of the core documents establishing the legal rights relating to Claimants' investment and none of which by their very nature include anything even remotely reflecting sensitive ministerial level deliberations or matters relating to Romania's national security.

61. Respondent asserts that the documents at issue were classified "based on Romania's intent to protect any information from disclosure that could endanger national security and defense, public order or the interests of private or public legal entities holding it."<sup>133</sup> That statement, however, is overbroad. All the classified documents at issue in this case are classified as "work secret,"<sup>134</sup> meaning that there is no information in those documents the disclosure of which could endanger national security and defense or public order; rather the documents at issue were classified solely in view of the interests of the private and public legal entities holding it.<sup>135</sup>

62. Respondent's observations also disregard the fact that this arbitration also relates to claims presented under the UK BIT, which does not contain any such restriction. Even if one

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Sept. 3, 2008 . (CL-36) (considering the nature of the documents for which the privilege was asserted, finding none of them concerned actual discussions or deliberations of the Cabinet, noting that the tribunal had to consider the extent to which the availability of the documents might be crucial for the adequate preparation of the investor's memorial and the presentation of its case, and so concluding that "at least *prima facie* the production of these documents...will weigh in favour of the interest in the administration of justice").

<sup>132</sup> Vienna Convention on the Law of Treaties (RL-1) Arts. 31-33.

<sup>133</sup> Respondent's Observations ¶ 66 (*citing* National Standards for the Protection of Classified Information (Exh. C-14) Art. 20). Respondent also observes that Romanian law establishes classification levels in accordance with NATO criteria (Respondent's Observations ¶ 56) although that observation is an entirely irrelevant. To the extent it is intended to convey the impression that issues of national security are at stake, it is wrong and misleading. *See supra* ¶ 47.

<sup>134</sup> *See e.g.*, NAMR Orders No. 202/203 (as amended from time to time) (Exhs. C-13 and C-18); RMGC Classified Information Registry as of July 2016 (updated and resubmitted Exh. C-20) (listing classified documents all numbered with "S" indicating "work secret" classification).

<sup>135</sup> Classified Information Law (Exh. C-24) Art. 15(e) (defining work secret information as information the disclosure of which could be detrimental to a public or private entity). *See also* Claimant's First Request for Provisional Measures ¶ 22.

were to consider for the sake of argument that Romania could not be required to make the documents at issue available for this arbitration by virtue of its agreement to arbitrate under the Canada BIT, nothing in the UK BIT precludes such a requirement.

63. Respondent evidently takes the position that Gabriel Jersey, having consented to submit its claims under the UK BIT to arbitration in a single proceeding together with Gabriel Canada's claims under the Canada BIT, must accept limitations as to Romania's obligations contained in the Canada BIT. There is, however, no support for that position.

64. The decision of the Tribunal in the *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic*<sup>136</sup> does not assist Respondent on the issues presented here. In that case *EuroGas*, a US national, brought a claim against the Slovak Republic under the US-Slovakia BIT together in the same arbitration with *Belmont Resources*, a Canadian national with claims under the Canada-Slovakia BIT. The Canada-Slovakia BIT has a number of provisions similar to the Canada BIT at issue in this case. The Claimants objected to the application of the transparency provisions of the Canada-Slovakia BIT on the basis that;

- the Canada-Slovakia BIT did not apply to the US claimant; and
- the Canadian claimant was not bound to "open hearings" as provided in the Canada-Slovakia BIT.<sup>137</sup>

The tribunal ruled that it was "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

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<sup>136</sup> *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 2 dated Apr. 16, 2015 (CL-35).

<sup>137</sup> Claimants argued that the Canada-Slovakia BIT provided that when a matter is covered by both the provisions of the BIT and another treaty to which both Contracting Parties are bound, the covered investor would be able to benefit from the "most favourable regime," both Contracting Parties were parties to the ICSID Convention, and the ICSID Arbitration Rules Article 32(2) provides that hearings may be open "unless either party objects," which the Canadian claimant argued was a "more favorable regime." *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 2 dated Apr. 16, 2015 (CL-35) ¶ 3.

Belmont jointly as claimants,” and it rejected the argument that the Canada BIT effectively gave an option to the Canadian claimant.<sup>138</sup>

65. The “impact” at issue in that case was acceptance of the transparency regime relating to open hearings. A requirement of open hearings, however, does not affect any rights or obligations of either party; and as to the US national that consented to submit its claims in an arbitration together with a Canadian claimant whose arbitration agreement contained a requirement of open hearings, that consent arguably constituted the agreement under Article 32(2) of the ICSID Arbitration Rules, which also expressly contemplates open hearings unless the parties agree otherwise. Thus, the *EuroGas* tribunal’s agreement with Respondent’s observation that the US claimant consented to participate in an arbitration that would be subject to transparency did not take away any right from the US claimant nor did it limit any obligation of the Slovak Republic under the US-Slovakia BIT.

66. The decision in *EuroGas*, therefore, is not analogous to the issue in this case, in which Romania has an obligation to allow access to evidence relevant to the dispute under the UK BIT and the ICSID Arbitration. Even if it were accepted that Romania’s obligation to allow access to evidence is in some instances more limited under the Canada BIT, Romania also agreed to the arbitration of the two Claimants’ claims together in a single proceeding. The *EuroGas* decision provides no basis for Romania to avoid its obligations under the UK BIT and the ICSID Convention to permit Gabriel Jersey’s claims to proceed in arbitration with access to necessary evidence.

67. Ultimately, this entire point is moot because Respondent has agreed to declassify the classified documents and Claimants agree to that process as well. The only issue for the Tribunal to resolve is whether Respondent’s arguments regarding the time and process it claims are necessary are justified, which patently they are not.

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<sup>138</sup> *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 2 dated Apr. 16, 2015 (CL-35) ¶ 5. The tribunal held that the provisions of the Canada-Slovakia BIT could not reasonably be interpreted as making open hearings optional any time that a claimant elected to submit to ICSID arbitration and that, in any event, the ICSID Arbitration Rules did not necessarily create a more favorable regime. *Id.* ¶ 6.

## V. PROVISIONAL MEASURES ARE REQUIRED TO PRESERVE THE INTEGRITY OF THIS ARBITRATION

68. The requirements for an order of provisional measures in relation to the documents at issue are met.

69. Respondent does not dispute that a tribunal may rule on an application for provisional measures where there is a *prima facie* basis for its jurisdiction,<sup>139</sup> although it argues that the Secretary-General's registration decision is irrelevant in that regard.<sup>140</sup> As Claimants observed, however, some tribunals and distinguished commentators have concluded that the requirement to establish a *prima facie* basis for jurisdiction is met by virtue of the Secretary-General's registration of the request for arbitration pursuant to Article 36(3) of the ICSID Convention.<sup>141</sup> In response, Respondent points to a commentator who observed that the Secretary-General's registration decision, being based solely on the information contained in the request, cannot take into account the respondent's possible objections to jurisdiction, however strong they may be.<sup>142</sup> Thus, where a determination must take into account potential objections to jurisdiction, one cannot rely on the Secretary-General's registration decision. An assessment as to whether a *prima facie* basis for jurisdiction is established, however, need not take into account any potential objections that may be raised, but rather may be made on the basis of the information presented by the claimants.

70. In any event, Respondent's observation ultimately is irrelevant because, as Claimants observed,<sup>143</sup> the *prima facie* basis for the Tribunal's jurisdiction is as set forth in the

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<sup>139</sup> First Request for Provisional Measures ¶ 14; Respondent's Observations ¶ 85.

<sup>140</sup> Respondent's Observations ¶ 87.

<sup>141</sup> First Request for Provisional Measures ¶ 14 n. 9.

<sup>142</sup> Respondent's Observations ¶ 86 n. 104 (citing Martina Polasek, *The Threshold for Registration of a Request for Arbitration under the ICSID Convention*, 5(2) DISP. RES. INT'L 177, 180 (2011) (RLA-5) ("[T]he Secretary-General must only reach her decision 'on the basis of the information contained in the request [for arbitration]'. This means that ICSID is precluded from considering any objections to jurisdiction that may be filed by the respondent during the screening of the request for arbitration. As a result, a tribunal's reliance on the decision to register a case would mean that it would not take into account the respondent's possible arguments on jurisdiction, however strong they may be.")).

<sup>143</sup> First Request for Provisional Measures ¶ 15



Request for Arbitration.<sup>144</sup> Other ICSID tribunals have found a *prima facie* basis for jurisdiction based on a claimant's request for arbitration.<sup>145</sup> In this case Respondent does not offer any observations whatsoever on the basis for jurisdiction that is set forth in the Request for Arbitration<sup>146</sup> and thus does not dispute that a *prima facie* basis for the Tribunal's jurisdiction is thereby established.<sup>147</sup>

71. The measures are necessary to protect the integrity of this arbitration, including an orderly and reasonably prompt procedure. The documents at issue are centrally relevant to Claimants' claims. The integrity of this arbitration depends upon Claimants obtaining access to them for purposes of preparing and presenting their case.<sup>148</sup> Provisional measures are needed to protect Claimants' right to prepare and present their case in accordance within a reasonable time frame, not one blocked by a lack of good faith cooperation from Respondent.

72. The measures are necessary because Respondent for tactical reasons has elected to pursue an obstructionist posture intended to delay resolution of the document access issues as long as possible and then to use the extended period of time it claims (falsely) is necessary to

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<sup>144</sup> Request for Arbitration dated July 21, 2015 § VI.

<sup>145</sup> See, e.g., *Occidental Petroleum Corp. & Occidental Exploration & Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures dated Aug. 17, 2007 (CL-9) ¶ 55 (observing *prima facie* basis for jurisdiction established in request for arbitration); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 dated June 29, 2009 (CL-23) ¶ 50 (same).

<sup>146</sup> Respondent's Observations ¶ 87 ("Respondent cannot comment on the allegations made in the Request for Arbitration with respect to jurisdiction ....").

<sup>147</sup> Respondent purports to "reserve[s] its right to raise jurisdictional objections once the Claimants have further developed and substantiated their claims." Respondent's Observations ¶ 87. Respondent, however, has an obligation to raise any such objection "as early as possible." ICSID Arbitration Rules, Art. 41(1). That obligation relates to the requirement that the Tribunal determine whether an objection to jurisdiction when raised should be dealt with as a preliminary question or joined to the merits of the dispute. ICSID Convention, Art. 41(2) (providing that the Tribunal shall determine whether to deal with any objection to jurisdiction as a preliminary question or to join it to the merits of the dispute). Respondent, therefore, does not have the right to sit back and wait for Claimants' Memorial before deciding to raise an objection to jurisdiction where the information upon which the objection is based is known earlier. Respondent's artful phrasing of its position relative to the jurisdiction of this Tribunal in which it asserts that it "cannot comment" on allegations with respect to jurisdiction, notably not stating plainly that based on the information known to it at this time that it is not aware of any basis for a jurisdictional objection, coupled with Respondent's attempts to delay establishing a procedural calendar, should not be overlooked. Claimants therefore reserve the right to object to any late-articulated objection to jurisdiction, particularly if accompanied by a request to address the issue as a preliminary matter.

<sup>148</sup> First Request for Provisional Measures § III.B.

resolve those issues as a basis to avoid or extend determination of the procedural calendar in this case.

73. To this end, despite being on notice for over a year of the need to provide access to the Classified and Confidential Documents for purposes of this arbitration, Respondent failed to engage at all on this issue until after Claimants filed their request for provisional measures. Then, rather than simply agree to a reasonable process to facilitate such access, it has instead raised specious legal arguments designed to frustrate prompt access to documents, e.g., demanding without basis that RMGC physically turn over all of the classified documents to NAMR,<sup>149</sup> and insisting that Respondent requires more than *six months* merely to make a declassification decision without giving any assurance that it will in fact declassify the document identified. Respondent's approach to declassification before this Tribunal calls into serious question whether it has any intention of engaging with Claimants in good faith to reach agreement promptly on the terms of a confidentiality agreement to address terms of access to cover the documents that are confidential but not classified. This exercise should not be time consuming as parties routinely agree on such matters.

74. Respondent seeks to elide the urgency of the matter by arguing that Claimants' right to access and adduce evidence is not in peril, that the "arbitration has only just begun," and that Respondent "does not wish to deprive" the Claimants of their right to present their case.<sup>150</sup> In fact, however, as noted above, the lack of cooperation in over a year and the languid minimum six-month pace proposed by Respondent simply to make declassification decisions is clearly designed to block putting in place a reasonable time frame for the arbitration to proceed. Indeed, Respondent is not even suggesting that six months would be sufficient to resolve all issues of document access. Rather, its position is that it requires six months to make a decision as to whether it agrees to declassify the documents, without any assurance that it will do so. It is unclear how long Respondent suggests it would then expect to have to implement its declassification decisions (assuming it agrees to declassification) or how much time it expects will be needed to reach agreement between the parties on terms of access to the documents at

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<sup>149</sup> No doubt Respondent has its own reasons why it demands to confiscate all of RMGC's classified documents as a condition of addressing issues so fundamental to Claimants' ability to present their case.

<sup>150</sup> Respondent's Observations ¶ 95.

issue. Respondent, for example, suggests that some sort of document-by-document review will be necessary to determine what terms of access should be permitted, urging that “[o]nce declassified, the applicable confidentiality regime must [be] established for each document if necessary by way of a decision of the Tribunal.”<sup>151</sup> There is no basis in law or common sense to suggest that different terms will be needed for different documents. Meanwhile, during the extended and apparently undefined period of time contemplated by Respondent for addressing these matters, Claimants would not be able to prepare or present their Memorial. In these circumstances, the Tribunal’s intervention is urgently needed to impose a reasonable order on this process.

75. Finally, the request is proportional. Respondent’s arguments to the effect that Claimants’ request for access does not address Respondent’s counsel’s need for access are disingenuous. Respondent is in control on the decisions regarding declassification. Its organ, NAMR, by law has “free and unhindered access” to the documents at issue.<sup>152</sup> There is no question, therefore, that it can request copies of any of the documents to the extent needed.<sup>153</sup> Respondent’s argument that Claimants’ request is “an impermissible attempt to threaten the procedural equality of the Parties by allowing only one of the Parties to access documents and information that are unavailable to the other”<sup>154</sup> is simply perverse. There is no question of Respondent obtaining access to and the right to use the documents at issue.

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<sup>151</sup> Respondent’s Observations ¶ 99.

<sup>152</sup> Norms to the Mining Law (Exh. C-12) Art. 14.

<sup>153</sup> See NAMR Letter No. 7783 dated July 28, 2016 to Cepromin (Exh. C-66) (submitted also as Exh. R-13), NAMR Letter No. 8001 dated Aug. 4, 2016 to Minvest (Exh. C-71), NAMR Letter No. 8002 dated Aug. 4, 2016 to Ipromin (Exh. C-72) and NAMR Letter No. 8003 dated Aug. 4, 2016 to RMGC (Exh. C-73) (similarly requesting from Cepromin, Minvest, Ipromin and RMGC respectively “[p]lease send us a copy of the documents you issued, after you declassify them.”). See also RMGC Letter No. 56647 dated July 26, 2016 to NAMR (also submitted as Exh. R-10) (Exh. C-81) (noting, “[o]nce the special legal regime imposed by classification is removed, the parties will be able to regulate the access to the Documentation under less restrictive conditions, including as regards copying, should that be necessary.”).

<sup>154</sup> Respondent’s Observations ¶ 102.

## VI. AMENDED REQUEST FOR RELIEF

76. For all of the reasons set forth in the First Request for Provisional Measures and above, Claimants respectfully request that the Tribunal recommend as provisional measures pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules:

- a. That Respondent grant Claimants, including Claimants' representatives, counsel, experts, witnesses, and consultants, unrestricted access to and use of the Confidential and Classified Documents for purposes of this arbitration;
- b. That each element of Respondent's prayer for relief be denied;
- c. That Respondent be ordered to complete the process for declassifying the remainder of the classified documents among the Classified and Confidential Documents within 30 days from the date of the order granting Claimant's First Request for Provisional Measures,<sup>155</sup>
- d. That within this 30-day period the Parties cause to be taken all steps necessary to allow for the access to and use of the Classified and Confidential Documents for purposes of this arbitration, including agreeing to the terms of a confidentiality agreement to govern such access and use;
- e. That the terms of such access and use shall be without regard to the restrictions regarding access and use that may apply to the Confidential and Classified Documents as a matter of Romanian law and the confidentiality agreements between RMGC and NAMR regarding those documents, so as to ensure as appropriate and necessary for the orderly and fair conduct of this arbitration, *inter alia*, that the Confidential and Classified Documents may be accessed, used, stored, copied, transmitted, transported, reviewed, and submitted as evidence in this arbitration, including without undue restrictions on access and use by the members of the Tribunal and the ICSID Secretariat, any Tribunal assistants, and

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<sup>155</sup> A decision regarding the declassification of the 13 maps and orthoimages classified as "work secret" and issued by the Military Topographic Division of the Ministry of National Defense could be deferred until decisions have been taken with respect to the other documents at issue, but at all events should not delay access to and use of those documents.

external service providers retained by the ICSID Secretariat subject to reasonable undertakings to maintain confidentiality as may be warranted; and

- f. That if the Parties do not agree on the terms of a confidentiality agreement within this 30-day time period any Party may present a proposed confidentiality agreement to the Tribunal that provides the necessary access and rights of use of the documents in question and request the Tribunal to so order it.

77. In the alternative, if the Tribunal were to conclude that Claimants are entitled to access and use the Classified and Confidential documents in the manner outlined above to prepare and present their case (recognizing that Respondent likewise would have the ability to access and use the documents), but that the requirements for provisional measures have not been met or the Tribunal prefers to grant such relief in the form of a procedural order, that the relief sought in paragraph 76 above be granted in such a procedural order.

78. Claimants request such further relief as the Tribunal may conclude is warranted and permitted by the ICSID Convention and the ICSID Arbitration Rules, including that Respondent bear the costs relating to this request for provisional measures and compensate Claimants for all costs they have incurred in relation thereto, including costs of legal representation.

Respectfully submitted,

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