

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Romania

(ICSID Case No. ARB/15/31)

PROCEDURAL ORDER No. 19

Members of the Tribunal

Prof. Pierre Tercier, President of the Tribunal

Prof. Horacio A. Grigera Naón, Arbitrator

Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal Yetano

Assistant to the Tribunal

Ms. Maria Athanasiou

7 December 2018

I. PROCEDURE

1. On 21 July 2015, the ICSID received a *Request for Arbitration* filed by the Claimants against Respondent. The Request for Arbitration concerned the alleged expropriation and other violations by the Respondent of the *Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments* (the “Canada-Romania BIT” or the “BIT”) and the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments* (the “UK-Romania BIT”), in relation to Claimants’ alleged investment in a mining project (the “Roşia Montană Project” or the “Project”) in Romania through their Romanian subsidiary *Rosia Montana Gold Corporation S.A.* (“RMGC”).
2. On 21 June 2016, the Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention. Its members were: Ms Teresa Cheng, President, appointed by the Secretary-General pursuant to the Parties’ agreement, Prof. Horacio Grigera Naón, appointed by Claimants, and Prof. Zachary Douglas, appointed by the Respondent.
3. On 26 August 2016, the Tribunal issued *Procedural Order No. 1* (“PO 1”) on the procedure of the present arbitration.
4. On 10 January 2017, the Tribunal adopted the Procedural Calendar, issued as Annex A to *Procedural Order No. 4* (“PO 4”).

This Procedural Calendar has been amended twice by the Parties: First, by their respective letters of 7 and 13 of February 2018, and more recently, by their 11 April 2018 communications.

5. On 7 February 2018, Ms Teresa Cheng (the then President of the Tribunal) resigned.
6. On 5 April 2018, Prof. Pierre Tercier was appointed as President of the Tribunal.
7. On 29 May 2018, the Tribunal and the Parties held a conference call, during which they discussed several items, including the confirmation of the amendments to the Procedural Calendar as proposed on 27 April 2018 by the Parties.
8. On 5 June 2018, the Tribunal issued *Procedural Order No. 9* (“PO 9”) adopting the amended Procedural Calendar of the present arbitration.
9. On 18 and 19 October 2018, the Parties communicated an agreed amendment to the Procedural Calendar to the Tribunal.
10. On 23 October 2018, the Tribunal issued *Procedural Order No. 18*, adopting the amended Procedural Calendar (“PO 18”), which was issued as Annex A to PO No. 18.
11. On 2 November 2018, the ICSID received from Alburnus Maior, Greenpeace CEE, Romania and Independent Centre for the Development of Environmental Resources

(ICDER) (the “Applicants”) a *Petition for Non-Disputing Parties* (the “Application” or the “Petition”) and an *Amicus Submission* (the “Submission”). The Petition and Submission were forwarded to the Tribunal on the next day and to the Parties on 10 November 2018.

12. On 23 November 2018, Claimants submitted their *Comments on the Non-Disputing Parties’ Application* (“Claimants’ Comments” or “C-Comments”), together with factual exhibits C-2865 to C-2891 and legal authorities CL-274 to CL-293. On the same date, Respondent submitted its *Comments on the Non-Disputing Parties’ Applications* (“Respondent’s Comments” or “R-Comments”).
13. On 29 November 2018, Respondent sent a letter together with an attachment to the Tribunal, replying to Claimants’ allegations in their Comments insofar as they concern the conduct of counsel for Respondent.
14. On 30 November 2018, and after being afforded an opportunity by the Tribunal to do so, Claimants provided their comments to Respondent’s letter of 29 November 2018, denying Respondent’s allegations made therein.

II. THE DISPUTE

15. It is recalled that the present dispute concerns Romania’s alleged conduct and breaches of its bilateral investment obligations in relation to Claimants’ alleged investment through its Romanian subsidiary RMGC, concerning the Roşia Montană Project; a Project which was not implemented. As relief, Claimants seek a declaration of breach of such obligations by Romania, and an award of compensation for losses and damages allegedly suffered. Claimants are not requesting specific performance of the Project.

III. THE APPLICATION

A. *The Applicants*

16. The Application and Submission have been presented and filed by the three Applicants. They are specifically identified in the Application as the following:
 - a) *Alburnus Maior* is a non-profit, not governmental organization based in Roşia Montană. It was incorporated as an association in Romania on 8 September 2000 and represents the interests of its members – inhabitants and property owners of the Roşia Montană, Corna and Bucium villages – who oppose the mining development as proposed by Gabriel Resources and RMGC. Petitioner has been involved in organizing demonstrations, lobbying, writing petitions, taking action in court, holding informational seminars for the local population, and the other mobilizations related to the Roşia Montană gold mining project. Alburnus Maior’s principal objective is the environmental and cultural preservation of the

Roşia Montană and Bucium regions, as well as preventing the forced relocation of the regions' inhabitants.

- b) ***Greenpeace Romania*** is part of Green Peace Central and Eastern Europe (CEE). The organization has been active in the country since 2007. From the beginning of Greenpeace's presence in Romania, already *via* informal volunteer groups in the early 2000's, the organization has been closely involved in following the legal, political and on-site developments concerning the cyanide mining permit in Roşia Montană. Throughout the years, Greenpeace Romania was involved in thirteen legal litigations related to the gold mining project, contesting both the denial of the public's access to information in relation to the project, as well as several of the environmental permits given to the RMGC.
- c) The ***Independent Center for the Development of Environmental Resources (ICDER)*** is a non-profit, non-governmental organization based in the town of Cluj-Napoca. It was incorporated as an association in Romania on 29 June 2006. It represents the interests of its members – citizens who believe in environmental justice to defend their constitutional right to a clean and ecologically-balanced environment. Since 2013, ICDER has been the hub and hosted the secretariat of the Mining Watch Romania network. Since its inception in 2006, ICDER intervened in support of its partner Alburnus Maior at various stages of the official procedures related to permitting/assessing the mining development as proposed by Gabriel Resources and the Romanian Government. These interventions formed a considerable part of its activities with subsequent strategic litigation activities carried out either on its own or alongside Alburnus Maior.

B. The reasons

- 17. The Applicants summarize the reasons for their Application as follows:
- 18. *First*, the “*proposed development of an open-pit gold mine using cyanide in a populated area of Romania*”, i.e., the Project to which the present arbitration relates, would endanger the cultural heritage of Roşia Montană, as it requires the demolition of industrial and archaeological heritage. The tourism value related to the landscape would be destroyed for many decades due to the deviation of the Corna River and the irreversible transformation of the Roşia Montană and Cornu valleys.
- 19. *Second*, widespread concerns exist about whether the Project will lead to the sustainable development of the local area and benefit the local community. The Project would create only limited and short-term economic benefits.
- 20. *Third*, the Project envisaged using large quantities of cyanide, which led to fear of a similar or larger spill than the disastrous Baia Mare cyanide spill in 2000.

21. *Fourth*, there are serious environmental and health risks, particularly for local communities living adjacent to cyanide mining.
22. *Finally*, opposition to the Project is largely due to social concerns, especially the trauma caused by displacement of entire communities including their homes, public spaces, churches, cemeteries and forests. The social fabric of Roşia Montană as well as other villages and small towns within the perimeter of the Project would be entirely destroyed.
23. The above concerns present matters of public interest not only to the local but also to the national population of Romania and neighbouring countries.

C. The conditions

24. The Applicants refer and discuss Annex C, Part III(4) of the BIT as setting forth the conditions the Tribunal should apply in determining whether to accept the Submission. The Applicants submit that the relevant conditions are met as follows:
25. *First*, the Applicants can provide a unique perspective to the Tribunal given that they, *inter alia*, are and have been closely connected to the local population and participated in several events concerning the development of the Project, as well as in litigations against both Parties in the arbitration.
26. *Second*, the Applicants will address directly relevant matters related to the judicial and administrative processes associated with the proposed Project and present information on the Project's threat of massive environmental contamination and loss of historical monuments.
27. *Third*, the Applicants have a significant interest in this arbitration. Specifically:
 - a) Alburnus Maior represents the interests of over 350 families who would have been displaced by the Project, and whose interests will continue to be affected by any decision of the Tribunal. It is also the foremost local organisation committed to protecting the natural resources of Roşia Montană and to maintaining its historical importance.
 - b) Greenpeace Romania has participated in licensing processes and works to protect the Romanian environment, including in Roşia Montană.
 - c) ICDEF has worked alongside Alburnus Maior in its efforts to protect the people, environment, and cultural value of Roşia Montană.
28. Thus, all three organisations have close ties with the local community. Even if that were not the case, other tribunals have noted that, having knowledge of a situation even without a direct connection, is sufficient for filing an *amicus brief*.

29. *Fourth*, the proposed Project has, *inter alia*, the potential to impact not only the local residents of Roșia Montană and the surrounding areas, but also other populations, for example, if there is a cyanide spill. Moreover, any potential damages that may be awarded to the company is also of broad interest as they would come from the Romanian government's reserves and it would mean less money for other functions or services.
30. *Fifth*, this intervention will not be an undue burden or have a disruptive effect on these proceedings. The Submission seeks to assist the Tribunal in its decision-making by providing greater detail about the potential impacts of the Project, and about the domestic legal challenges that have shown the Project to be non-compliant with EU and domestic law.
31. *Finally*, the Applicants have no relationship, direct or indirect, with any party or any third party to this dispute and have not received any financial or other support from any of the contending parties in relation to the elaboration of this Application and Submission.

D. The request

32. The Applicants request the Tribunal ***to accept their Application to submit their Submission, and to permit them to attend and participate in any oral hearing held in this proceeding and respond to any questions of the Tribunal.***

IV. THE PARTIES' POSITIONS

33. At the outset, it is noted that the Parties had an opportunity to file their comments on the Application pursuant to Part III, Annex C of the BIT and Section 24 of PO 1. Claimants set out their comments in a 45-page submission, and Respondent set out its comments in a two-page letter on 23 November 2018.

A. Claimants

34. The Submission fails to meet the standards applicable to submissions of non-disputing parties under the BIT and the ICSID Arbitration Rule 37(2). It should, therefore, be rejected (C-Comments, paras 2, 26).
35. *First*, the Application and Submission are made by parties not eligible to be non-disputing parties pursuant to Annex C of the BIT. None of them is a "*person of a Contracting Party, or has a significant presence in the territory of a Contracting Party*". It is rather presented by the Center for International Environmental Law (CIEL), Client Earth, and the European Center for Constitutional and Human Rights (ECCHR), purportedly "*on behalf of*" the three-named prospective non-disputing parties (C-Comments, paras 3, 12-17).

36. *Second*, the Application and Submission are defective in other respects as well. The Application only partially meets the requirements of Annex C of the BIT as it does not contain any address or contact details for the purported prospective non-disputing parties. The Submission is defective as it is neither dated nor signed by anyone. Further, contrary to the BIT requirements, Alburnus Maior misrepresents its membership insofar as it claims, without any basis and contrary to established facts, to represent “*over 350 families*”. Neither Greenpeace Romania nor ICDEF describe their membership at all (C-Comments, paras 12, 18-20).
37. *Third*, the Applicants have failed to demonstrate that the Submission would assist the Tribunal in determining a factual or legal issue related to arbitration (C-Comments, para. 29). It would not assist it because:
- a) it is biased, as the Applicants present the submission openly seeking to assist Respondent, State representatives have sought to assist in the preparation of the Submission and the Applicants are openly hostile to the system of investor-State dispute resolution (C-Comments, paras 5, 30-41);
 - b) it purports to address issues beyond any possible expertise or particular knowledge or perspective different from the Parties (C-Comments, paras 6, 42-49);
 - c) it addresses issues that are already thoroughly addressed by the Parties (C-Comments, 6, 50-62);
 - d) it has unreliable, misleading and outright false statements based on, *inter alia*, various “witness testimonies” prepared for purposes of the Submission that are not given under oath and are not subject to cross-examination and that are thus unreliable and incapable of assisting the Tribunal to arrive at a correct decision (C-Comments, paras 7, 8, 63-67).
38. *Fourth*, the Submission addresses matters that are outside the scope of the dispute (C-Comments, paras 68-72).
39. *Fifth*, the Applicants have not demonstrated a significant interest in the arbitration and do not even claim to satisfy such criterion. Moreover, they do not have standing under the BIT to make a non-disputing party submission (C-Comments, paras 4, 15, 73-99).
40. *Sixth*, there is not a demonstrated public interest in the subject-matter of the arbitration. In this case, no individuals or entities other than the disputing Parties will be affected by the arbitration. The Tribunal does not have any authority to decide whether the Project should be or will be implemented (C-Comments, paras 100-107).
41. *Seventh*, even if the Tribunal were to conclude that the prospective non-disputing parties satisfied the criteria of Section III(4), Annex C of the BIT, the Submission should nevertheless be rejected because its acceptance would unduly burden

- Claimants (C-Comments, paras 9, 110-116) and unfairly prejudice them; as such, it would undermine the integrity of this arbitration (C-Comments, paras 8, 117-124). Indeed, the Tribunal's obligation to safeguard the integrity of the proceedings, including by ensuring equal treatment of the Parties requires the Tribunal to reject the Application and thus not to accept the Submission (C-Comments, paras 10, 125-126).
42. *Eighth*, the Applicants' request to participate in the Hearing is excluded by the BIT and Section 24.5 of PO 1 (paras 11, 128-134).
43. Therefore, the Tribunal must reject the Application in accordance with Section 24.4 of PO 1 and not admit the Submission, as well as the Applicant's request to participate in any oral hearing (C-Comments, paras 11, 134).

B. Respondent

44. The Application and Submission meet the criteria set out in Section III(4), Annex C of the BIT for submissions by non-disputing parties: (i) the Submission will "*assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties*"; (ii) the Submission addresses matters within the scope of the dispute; (iii) the Applicants have demonstrated a significant interest in the arbitration; and (iv) as the Applicants have recalled, there is significant public interest in the subject matter of the arbitration (R-Comments, p. 1).
45. Respondent therefore respectfully requests that the Application be granted and that the Submission be admitted onto the record (R-Comments, p. 2).
46. The Applicants have the right to attend the hearing in accordance with Section I(1) of Annex C to the BIT and Section 20.6 of PO No. 1 (R-Comments, p. 2).

V. THE TRIBUNAL'S CONSIDERATIONS

A. In general

(i) The basis

47. The Tribunal's power to decide on the Application derives from both the BIT and the ICSID Arbitration Rules.
48. Pursuant to Part III(4), Annex C of the BIT, "*in determining whether to grant leave to file a non-disputing party submission, the tribunal shall consider, among other things, the extent to which*" certain conditions should be met. These conditions will be mentioned below.

49. Similarly, pursuant to Rule 37(2) of the ICSID Arbitration Rules, “*the Tribunal may allow a person or entity that is not a party to the dispute [...] to file a written submission with the Tribunal*” and in doing so, it “*shall consider, among other things, the extent to which*” certain conditions – similar to those of the BIT – are satisfied.
50. The above language confirms that the Tribunal, in determining the Application from the prospective *amici*, enjoys a degree of *discretion*. This is the case even in the face of, as the Applicants correctly submit, an objection by one of the Parties.
- (ii) The conditions
51. The conditions that the Tribunal should consider in assessing the Application can be set out as follows:
- ***Assisting the Tribunal***: That the prospective *amicus* “*assist[s] the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties*” (Part III(4)(a), Annex C of the BIT; see also Rule 37(2)(a) of the ICSID Arbitration Rules);
 - ***Addressing a matter within the scope of the dispute***: That the Submission “*would address a matter within the scope of the dispute*” (Part III(4)(b), Annex C of the BIT; see also Rule 37(2)(b) of the ICSID Arbitration Rules);
 - ***Significant interest in the arbitration***: That the prospective *amicus* “*has a significant interest in the arbitration*” (Part III(4)(c), Annex C of the BIT; see also Rule 37(2)(b) of the ICSID Arbitration Rules);
 - ***Public interest in the arbitration***: That “*there is a public interest in the subject-matter of the arbitration*” (Part III(4)(d), Annex C of the BIT);
 - ***The integrity of the proceedings***: That the Submission “*avoids disrupting the proceedings*” (Part III(5)(a), Annex C of the BIT; see also Rule 37(2) of the ICSID Arbitration Rules); and that “*neither disputing party is unduly burdened or unfairly prejudiced by such submissions*” (Part III(5)(b), Annex C of the BIT; see also Rule 37(2)(a) of the ICSID Arbitration Rules).
52. Furthermore, Claimants bring forth two further ***formal*** conditions which are, according to them, not met in the present case, warranting the dismissal of the Application. These are the following:
- That the prospective *amicus* “*is a person of a Contracting Party, or has a significant presence in the territory of a Contracting Party*” (Part III(4), Annex C of the BIT); and

- That the Application satisfies certain formal requirements set out in Part IV(1) and (2), Annex C of the BIT (Part III(1), Annex C of the BIT).
53. With the above conditions set out, the Tribunal considers the following:
54. *First*, the conditions mentioned in paragraph 51 above are not exhaustive, a fact which confirms the discretion of the Tribunal in deciding the Application. This is because of the language of the BIT which provides that “[i]n *determining whether to grant leave to file a non-disputing party submission, the tribunal shall consider, among other things, the extent to which [...]*” (emphasis added, Part III(4), Annex C of the BIT).
55. *Second*, while the Tribunal shall address the conditions set out in paragraphs 51 and 52 above, the most important factor for it to permit the participation of *amici* is the preservation of a public interest, if any. In this connection, the Tribunal may limit the scope of a non-party submission to ensure that it does not exceed the appropriate purpose or the purpose which is important for the Tribunal.
56. *Third*, in its assessment, the Tribunal shall bear in mind the fact that the proceedings are already in the public sphere, due to the transparency requirements of the BIT which are implemented by both the Tribunal and the Parties.
57. Accordingly, the Tribunal shall proceed and assess the Application with the aforementioned considerations in mind.

B. In specific

(i) The “formal” requirements

58. It is true that the Application and Submission appear to have some inadequacies with respect to the “formal” aspects required by the BIT. Specifically, the Application (a) is submitted by representatives of CIEL, Client Earth and ECCHR on behalf of the Applicants and not the Applicants themselves (see Part III(2), Annex C of the BIT); and (b) does not contain any contact details of the Applicants (see Part IV(1)(a), Annex C of the BIT). In addition, the Submission itself is not signed by the Applicants, as required by Part IV(2)(a), Annex C of the BIT.
59. The Tribunal will not dwell on the lack of signature in the Submission or the lack of contact details of the Applicants, although it considers that these should have been provided. Further, it will take no issue with the fact that other entities – which the Applicants refer to as their legal counsels – have submitted their Application on their behalf. There are indeed certain facts presented by Claimants which may be of concern as to the true role of the Applicants’ legal assistants in the present arbitration. However, for the purposes of the aforementioned requirements of the BIT (see above para. 58) and in the spirit of good faith, the Tribunal does not consider these formal problems to be fatal to the Application at this stage. However, in the event that the

Tribunal considers that the Application should be granted, these must be promptly rectified before the Submission could be admitted.

(ii) Assisting the Tribunal

60. At least in relation to the legal issues, the Tribunal has serious doubts as to whether the Applicants will assist the Tribunal “*by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties*” (Part III(4)(a), Annex C of the BIT; Rule 37(2)(a) of the ICSID Arbitration Rules). Specifically:

- The Tribunal will not address Claimants’ arguments that the Applicants seek to assist Respondent or that State Representatives have been involved in the preparation of the Submission. Whilst these are serious allegations, the Tribunal will assume the *bona fides* of the Applicants in making their Application.
- The Tribunal agrees with Claimants that the Applicants have failed to show that they have particular expertise on the legal matters that they wish to address or that, more generally, they would offer expertise that is not already available to Respondent on these issues.
- The Tribunal is, however, prepared to accept the possibility that the Applicants do have a particular knowledge of factual issues relevant to this dispute that may assist the Tribunal.
- Further, it considers that, if the Submission is admitted, the testimonies referred to or relied on therein or any such documents themselves as they appear to be publicly available cannot be considered or admitted to the present proceedings. This is because such testimonies cannot be considered or evaluated as “witness statements”, which would require, as Claimants correctly submit, their testing *via* the possibility for cross-examination. Therefore, if the Application is granted, they cannot form part of the evidence or facts of the arbitration.

61. The Tribunal notes that, although having an opportunity to do so, Respondent has not offered any comments on whether the Submission would assist the Tribunal.

(iii) Addressing a matter within the scope of the dispute

62. The Tribunal accepts that the Application and the Submission show that the Applicants seek to address in most parts “*a matter within the scope of the dispute*” (Part III(4)(b), Annex C of the BIT). To the extent that the Application and the Submission address legal issues, the Tribunal reiterates its considerations above (see above para. 60), that such matters are already addressed by the Parties themselves or are within the Parties’ expertise.

(iv) Significant interest in the arbitration

63. With respect to the question of whether the Applicants have “*a significant interest in the arbitration*” (Part III(4)(c), Annex C of the BIT; Rule 37(2)(b) of the ICSID Arbitration Rules), the Tribunal considers the following:

- It is recalled that in the present case, Claimants are not requesting the implementation of the Project but damages for the alleged interference with their investment.
- The Applicants are correct that the fact that the outcome of the present arbitration will not decide on whether the Project will be implemented or not is not relevant when there is a possibility that such outcome will impact upon wider interests.
- Having said that, the Tribunal with reference to its considerations in paragraphs 60 to 62 above is of the opinion that the specific Applicants have not proven a “*more than ‘a general’ interest in the proceeding*” (see *Apotex v. USA (III)* (ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as Non-Disputing Party, para. 38)), let alone a significant interest in representing or protecting those they claim to be representing. The Tribunal’s opinion is especially reinforced by the Applicants’ own statement that “*unconscionable investor behaviour should be reprimanded instead of being protected, and the Tribunal’s decision is not only important for the particular case at hand but also as a signal for future investors attempting to abuse the protection offered by BITs*”.

64. Therefore, there may be concerns as to whether the Applicants have a significant interest in the proceedings.

(v) The public interest

65. Concerning the question of whether “*there is a public interest in the subject-matter of the arbitration*” (Part III(4)(d), Annex C of the BIT), the Tribunal considers the following:

- It is again recalled that in the present case, Claimants are not requesting the implementation of the Project but damages for the alleged interference with their investment.
- Similar to its considerations above (see above para. 63), the fact that the outcome of the present arbitration will not impact upon whether the Project will be implemented or not is not entirely relevant to the assessment of a possible public interest in the case.

- At the same time, the Tribunal agrees with Claimants’ reference to the *Apotex v. USA* case which stated that “*the subject-matter of an arbitration is to be considered of public interest whether the decisions to be issued in that arbitration are likely to affect individuals or entities beyond the Disputing Parties*” (ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as Non-Disputing Party, para. 42). Accordingly, the Tribunal must ask itself whether it is possible that its decision will affect *inter alia* the individuals or entities mentioned in the Application.
 - In the present case, the existence of “a public interest” is certainly not disputed. The nature of the disputed Project, as well as the oppositions to it as far as they concern the people, the environment, the culture and the history, necessarily implicate a “public interest” and the outcome of these proceedings may impact upon it.
 - The Tribunal therefore finds that ***there is a public interest in the subject-matter of the arbitration.***
 - The Tribunal clarifies that this public interest does not arise simply because an award of damages against the Respondent would be paid from the Romanian Government’s reserves (as was suggested by the Applications). If this were the case then there would be a sufficient public interest for the admissibility of *amici* briefs in all investor state arbitrations. That is not, therefore, an acceptable criterion.
66. Accordingly, the Tribunal grants the Application but only with respect to the parts of the Submission that do not deal with legal matters and matters outside the competence of the Applicants ***and*** that do not refer to or rely on testimonies:
- Section I (*Introduction*), Section II (*The claimant failed to comply with investor responsibilities under both international investment and international human rights law*) and Section III (*The company failed to comply with domestic and EU Laws*) are admitted, but only to the extent that they refer to factual issues within the specific knowledge of the Applicants and in relation to the interests the Applicants claim should be protected. Arguments on the law, as well as references to or reliances on testimonies are excluded.
 - Section IV (*Legal implications of the Amici’s perspective for the present arbitration*) of the Application is not admitted.
- (vi) The integrity of the proceedings
67. The Tribunal considers that its decision above “*avoids disrupting the proceedings*” (Part III(5)(a), Annex C of the BIT; Rule 37(2) of the ICSID Arbitration Rules) and that “*neither disputing party is unduly burdened or unfairly prejudiced by such*

submissions” (Part III(5)(b), Annex C of the BIT; Rule 37(2)(a) of the ICSID Arbitration Rules).

68. *First*, the Procedural Calendar adopted by the Parties is rather generous in terms of time with a Final Hearing scheduled in approximately eight months from now, and therefore permits a briefing schedule on the Submission as admitted by the Tribunal.
69. *Second*, the Tribunal considers that the restrictions imposed on the scope of the Submission will ensure that neither Party is burdened or unfairly prejudiced by it.

C. Access to Hearing

70. Concerning the Applicants’ request to attend and participate in any oral hearing held in this proceeding, and to respond to any questions of the Tribunal, the following provisions of Part III, Annex C of the BIT are relevant.

“7. A tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.

8. Access to hearings and documents by non-disputing parties that file applications under these procedures will be governed by the provisions of Part I of this Annex (Public Access to Hearings and Documents).”

71. Similarly, Section 24.5 of PO 1 provides in relevant part that “[t]he non-disputing party or amicus curiae shall not be permitted to make any further submissions”.
72. Part I of Annex C provides in relevant part that “*Hearings [...] shall be open to the public*”. Similarly, Section 20.6 of PO 1 specifies:

“In accordance with Section I.1 of Annex C of the [Canada-Romania BIT], the hearings shall be open to the public.

20.6.1. The hearing shall be broadcast on closed-circuit television at facilities made available by the ICSID Secretariat for such purposes.

20.6.2. To ensure the protection of confidential information, the Tribunal may hold portions of hearings in camera and establish such other procedures for the protection of confidential information as may be appropriate.”

73. During the Hearing on Provisional Measures of 23 September 2016, the Tribunal decided that the broadcasting of said hearing would not be in real time, but delayed by a few hours to allow for its interruption during those sections of the hearing that would address confidential information.

74. In light of the above, the Tribunal considers that the non-disputing parties shall not participate in the Hearing. They may however observe the Hearing through the broadcasting facilities to be arranged at the ICSID, subject to appropriate measures taken by the Tribunal pursuant to Section 20.6.2 of PO 1.

VI. ORDER

75. The Tribunal hereby orders as follows:

1. ***The Application is granted and the Submission is admitted with the following limitations:***
 - (a) ***The Applicants shall rectify immediately the formal defects identified in paragraph 58 above in their Application and Submission within 10 days of this Procedural Order. A failure to do so will result in the non-admittance of the Submission.***
 - (b) ***Section I (Introduction), Section II (The claimant failed to comply with investor responsibilities under both international investment and international human rights law) and Section III (The company failed to comply with domestic and EU Laws) are admitted, but only to the extent that they refer to factual issues within the specific knowledge of the Applicants and in relation to the interests the Applicants claim should be protected. Arguments on the law, as well as references to or reliances on testimonies are excluded.***
 - (c) ***Section IV (Legal implications of the Amici's perspective for the present arbitration) of the Application is not admitted.***
2. ***The non-disputing parties shall not participate in the Hearing. They may however observe the Hearing through the broadcasting facilities to be arranged at the ICSID, subject to appropriate measures taken by the Tribunal pursuant to Section 20.6.2 of PO 1.***

On behalf of the Tribunal,

Prof. Pierre Tercier
President of the Tribunal