

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

vs

Romania

(ICSID Case No. ARB/15/31)

PROCEDURAL ORDER NO. 16

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

24 September 2018

I. THE RELEVANT PROCEDURAL STEPS

1. On 14 November 2016, the Tribunal issued *Procedural Order No. 3* (“PO 3”), governing issues of confidentiality in the present arbitration.
2. On 14 June 2018, the Tribunal issued *Procedural Order No. 11* (“PO No. 11”), ruling on several outstanding issues in relation to confidentiality. Specifically, it confirmed “*the Parties’ agreement to make any proposed redactions and confidentiality designations in connection with the Counter-Memorial following the issuance of [] Procedural Order No. 11*” (PO No. 11, Decision No. 10).
3. On 28 June 2018, Respondent sent an email to ICSID, noting the Parties’ agreement on the redaction process for the Counter-Memorial. Claimants confirmed their agreement *via* an email to ICSID of the same date.
4. On 15 August 2018, and following an exchange of correspondence between the Parties, the Tribunal issued *Procedural Order No. 14* (“PO No. 14”) and its Annex A, deciding on the Parties’ dispute in relation to the redaction of 11 headings and statements in the expert report of Dr. James C. Burrows of Charles Rivers Associates (“CRA Report”) – submitted by Respondent with its Counter-Memorial.
5. Meanwhile and pursuant to the Parties’ agreement of 28 June 2018 (see above para. 3), the Parties exchanged among themselves correspondence concerning the redactions to the Counter-Memorial. This correspondence ended with Respondent’s comments on Claimants’ identification of additional portions of the Counter-Memorial for redaction set out in a Confidentiality Log, on 14 September 2018.
6. On 18 September 2018, and following an exchange of correspondence between the Parties, the Tribunal issued *Procedural Order No. 15* (“PO No. 15”) and its Annex A, deciding on the confidentiality of PO No. 14.

II. THE PARTIES’ POSITIONS

7. The Parties’ positions in relation to the redactions to the Counter-Memorial are set out in the Confidentiality Log communicated by Respondent to ICSID on 14 September 2018 (see above para. 5).

III. THE TRIBUNAL'S CONSIDERATIONS

8. The issue before this Tribunal is the redaction of certain statements in the Counter-Memorial as identified in the Confidentiality Log of 14 September 2018.
9. As a preliminary matter, the Tribunal recalls the following:
 - a) In PO No. 11, the Tribunal confirmed the Parties' agreement to make any proposed redactions and confidentiality designations in connection with the Counter-Memorial following the issuance of PO No. 11 (see PO No. 11, paras 105-106 and Decision No. 10) (see above para. 2).
 - b) The Parties agreed on the redaction process concerning the Counter-Memorial on 28 June 2018 (see above para. 3).
 - c) Pursuant to the aforementioned agreement, Respondent identified the exhibits and portions of the relevant witness statements and expert reports that it proposed to reclassify as non-confidential. Claimants provided their comments on such proposals which they submitted to the Tribunal. The Tribunal ruled on the disagreements between the Parties in relation thereto by way of PO No. 14 and its Annex A (see above para. 4).
 - d) Also pursuant to the aforementioned agreement, Respondent identified the portions of the Counter-Memorial that it proposed to redact. Claimants provided their comments thereon and identified additional portions of the Counter-Memorial that they proposed to redact. Respondent provided its comments thereon and submitted them to the Tribunal for decision (see above para. 5).
10. *First*, the Tribunal takes note that Respondent agrees with the majority of Claimants' additional proposed redactions as those are set out in the Confidentiality Log of 14 September 2018.
11. *Second*, it takes note that for certain of Claimants' proposals, Respondent notes that, while it disagrees with the reasoning behind such proposals, it nonetheless agrees with the redactions, primarily for the interest of expediting the redaction process (see specifically Items Nos 1, 8, 19 to 22, part of 23, 24 to 40, part of 41 and 42 to 48).
12. *Third*, the Parties are in disagreement with parts of the proposed redactions for Items Nos 23 and 41 of the Confidentiality Log of 14 September 2018.
 - a) With respect to Item No. 23, which concerns the heading of Section III.E. of the CRA Report, Respondent correctly submits that neither Party designated this text as confidential during the redaction process which led to PO No. 14 (see above paras 4 and 9(c)). Indeed, it is the Parties themselves that have insisted on a redaction process that begins first with the reclassification of witness statements,

expert reports and exhibits as non-confidential, followed by the proposals for redactions of the main submission itself.

This being said, the Tribunal notes that the Parties have, in their agreement of 28 June 2018, also contemplated the possibility for Claimants to identify additional portions of the Counter-Memorial which they proposed to redact. This possibility is not limited to any particular text.

The Tribunal therefore considers that the confidentiality of the disputed text should be assessed separately. In this connection, it reiterates its considerations set out in paragraphs 23 to 26 of PO No. 14 which it finds applicable to this case:

“23. The Tribunal finds that the 11 headings and statements in the CRA Report do not qualify as confidential pursuant to Section 1.1(i) and (ii) of PO No. 3. [...]

24. [...] [W]ithout dismissing the relevance of Section 1.1(iii), the Tribunal considers that in the present case it must determine whether there are reasons that permit it to exercise its discretion and decide that certain text in the documentation filed before it shall nonetheless be treated as confidential. In this respect, it considers the following:

- [...]

- [...] The fact remains that Claimants consider it as a risk, which if materialised, may end up disrupting the present arbitral proceedings, including Claimants’ right to present their case.

- Instead, Respondent bears no risk or detriment to its right to present its case if these 11 headings and statements are not made public. In fact, Respondent was and is free to present its case as it sees fit and in reliance of statements that are considered and should remain confidential.

[...]

26. Finally, the Tribunal’s decision to treat these headings and statements as confidential does not disregard in any manner the transparency requirements of the Canada-Romania BIT. Indeed Annex C to such BIT contemplates an agreement by the Parties to exclude certain documents from publication; and in case of dispute in this respect, the Parties themselves agreed that the Tribunal would ultimately decide (see PO No. 3).”

Accordingly, the disputed text in Item No. 23 shall not be made public.

- b) With respect to Item No. 41, which concerns a part of a sentence in paragraph 750 of the Counter-Memorial that is taken from text of Exhibit R-307, the Tribunal

notes that this Exhibit was not part of the list of Exhibits proposed by Respondent to be kept confidential and to which Claimants agreed (see Claimants' letter of 26 July 2018 "*Claimants have no objection to the list of exhibits that Respondent proposes to designate as confidential*").

This being said, the Tribunal notes again the Parties' agreement of 28 June 2018 that Claimants may identify additional portions of the Counter-Memorial which they proposed to redact and which is not limited to any particular text.

The Tribunal therefore again considers that the confidentiality of the disputed text should be assessed separately. It considers that such text does not come under the ambit of Section 1.1 of PO No. 3 which reads as follows: "*The Parties shall treat as confidential in accordance with the terms of this Order the following categories of information and documents: (i) confidential business information; (ii) information that is privileged; or (iii) information that is otherwise protected from disclosure.*"

It further considers that there is no reason (particularly a risk borne by or detriment to the right of Claimants to present their case) for which the Tribunal should exercise its discretion and still treat the disputed text as confidential.

Accordingly, the disputed text in Item No. 41 shall not be treated as confidential.

IV. ORDER

13. Having reviewed and considered the Parties' positions, the Tribunal hereby orders as follows:

The redactions of the disputed items in the Counter-Memorial shall take place pursuant to the Tribunal's decisions enclosed herein as Annex A.

On behalf of the Tribunal,

_____[Signed]_____
_ Prof. Pierre Tercier
President of the Tribunal