

**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. 2

Members of the Tribunal

Ms. Teresa Cheng SC, President of the Tribunal
Prof. Horacio A. Grigera Naón, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal Yetano

October 20, 2016

Introduction

1. This Procedural Order refers to Claimant's Request for Provisional Measures submitted on June 16, 2016 and as amended by Claimants' reply to Respondent's observations of August 17, 2016 (the "**First Request for Provisional Measures**").

Procedural Background

2. On July 21, 2015, the Center received a Request for Arbitration filed by the Claimants against the Respondent (the "**Request for Arbitration**"). 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**") 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 in Romania through their Romanian Subsidiary Rosia Montana Gold Corporation S.A. ("**RMGC**").
3. The Request for Arbitration was registered by ICSID's Secretary-General on July 30, 2016 pursuant to Article 36(3) of the ICSID Convention.
4. On June 16, 2016, Claimants filed the First Request for Provisional Measures requesting the Tribunal to recommend that Respondent grant Claimants unrestricted access to and use of certain confidential and classified documents for the purposes of this arbitration. In a cover letter of the same date, Claimants also requested that the time limits for the Parties to present observations on the First Request for Provisional Measure be fixed by the Tribunal once constituted, and not by the Secretary-General pursuant to paragraph 5 of ICSID Arbitration Rule 39.
5. On June 21, 2016, the Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention. Its members are: Teresa Cheng (Chinese), President, appointed by the Secretary-General pursuant to the parties' agreement, Horacio Grigera Naón (Argentine), appointed by the Claimants; and Zachary Douglas (Australian), appointed by the Respondent.
6. On July 20, 2016, the Tribunal invited: (i) the Respondent to file observations on the First Request for Provisional Measures by August 3, 2016; (ii) the Claimants to file their response to Respondent's observations within the two following weeks; and (iii) the Respondent to file any further observations it may have to the First Request for Provisional Measures within the two following weeks.

7. On July 28, 2016, the Claimants submitted a Second Request for Provisional Measures (the “**Second Request for Provisional Measures**”) that included a Request for Emergency Temporary Provisional Measures pending the determination of this Second Request for Provisional Measures (the “**Request for Emergency Temporary Provisional Measures**”).
8. On August 3, 2016, the Tribunal invited Respondent’s comments on the Claimants’ Request for Emergency Temporary Provisional Measures by August 10, 2016. The Tribunal also invited: (i) the Respondent to file observations on the Claimants’ Second Request for Provisional Measures by April 17, 2011; (ii) the Claimants to file observations in reply by August 24, 2016; and (iii) the Respondent to file observations by way of rejoinder by August 31, 2016.
9. On that same date, the Respondent submitted its observations to Claimants’ First Request for Provisional Measures (“**Respondent’s Observations to Claimants’ First Request for Provisional Measures**”).
10. On August 10, 2016, Respondent submitted its comments on Claimants’ Request for Emergency Temporary Provisional Measures.
11. On August 11, 2016, Claimants sent a letter to the Tribunal in which they informed the Tribunal of recent developments relating to the Second Request of Provisional Measures and Request for Emergency Temporary Provisional Measures.
12. On August 12, 2016, the Tribunal held its first session by teleconference.
13. On that same date and after the first session was finalized, the Claimants submitted a letter with further observations on their Request for Emergency Temporary Provisional Measures.
14. On August 14, 2016 both Parties submitted letters with further observations on the Request for Temporary Provisional Measures.
15. On August 17, 2016, Respondent submitted its observations to the Second Request for Provisional Measures.
16. On that same date, Claimants submitted their reply to the Respondent’s observations to the First Request for Provisional Measures (“**Claimants’ Reply to Respondent’s Observations to the First Request for Provisional Measures**”).
17. On August 19, 2016, the Tribunal informed the Parties that the Request for Emergency Temporary Provisional Measures was rejected. The Tribunal indicated that they had decided to communicate their decision to the Parties, with the full reasons for that decision to follow as soon as possible, in light of

Claimants' allegations concerning RMGC's need to post a guarantee by August 25, 2016.

18. On August 25, Claimants submitted their reply to Respondent's observations on the Second Request for Provisional Measures.
19. On August 26, 2016, the Tribunal issued its Procedural Order No. 1.
20. On August 31, 2016, Respondent submitted further observations on the First Request for Provisional Measures ("**Respondent's Further Observations on the First Request for Provisional Measures**") as well as its Rejoinder on the Second Request for Provisional Measures.
21. On September 16, 2016, Claimants submitted a letter updating the Tribunal on a number of items relating to both requests for provisional measures.
22. On September 22, 2016, Claimants submitted a letter further updating the Tribunal on events related to the First Request for Provisional Measures.
23. That same date, Respondent submitted new evidence and legal authorities relating to both requests for provisional measures. Claimants objected to the introduction of such evidence by letter of the same date.
24. On September 23, 2016, a hearing on both request for provisional measures was held in Washington, DC. The following participated in the hearing:

Members of the Tribunal

Ms. Teresa Cheng SC, President of the Tribunal

Prof. Horacio A. Grigera Naón, Arbitrator

Prof. Zachary Douglas QC, Arbitrator

ICSID Secretariat:

Ms. Sara Marzal Yetano, Secretary of the Tribunal

Participating on behalf of the Claimants:

Ms. Abby Cohen Smutny, White & Case

Mr. Darryl Lew, White & Case

Mr. Brody Greenwald, White & Case

Mr. Michael Roche, White & Case

Mr. Andrei Popovici, White & Case

Ms. Samantha Fernández-Micone, White & Case

Ms. Anca Puyascu, Tuca Zbarcea & Asociatii

Ms. Ruxandra Nita, Tuca Zbarcea & Asociatii

Participating on behalf of the Respondent:

Mr. Veijo Heiskanen, Lalive

Ms. Lorraine de Germiny, Lalive
Mr. Christophe Guibert de Bruet, Lalive
Ms. Crenguta Leaua, Leaua & Asociatii
Ms. Andreea Simulescu, Leaua & Asociatii
Ms. Liliana Deaconescu, Leaua & Asociatii

Summary of the Parties' Positions

25. In their First Request for Provisional Measures, the Claimants requested 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 for purposes of this arbitration Respondent grant Claimants, including Claimants' representatives, counsel, experts, witnesses, and consultants, unrestricted access to and use of the documents and information that are in the custody of the project company RMGC but that are subject to the obligations of confidentiality, including obligations arising from the Romanian laws governing classified information (the "**Confidential and Classified Documents**");
 - b) That the terms of such access and use shall be without regard to the restrictions regarding access and use that apply to the Confidential and Classified Documents as a matter of Romanian law and the confidentiality agreements between RMGC and the National Agency for Mineral Resources ("**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 external service providers retained by the ICSID Secretariat subject to reasonable undertakings to maintain confidentiality as may be warranted.
26. According to the Claimants' First Request for Provisional Measures, at that point RMGC had in its custody 785 documents classified as work secret pursuant to the Romanian laws governing classified information¹.
27. In their Reply to Respondent's Observations to the First Request for Provisional Measures, Claimants explained that due to recent declassifications and recategorization decisions, the list of classified documents had been reduced from 785 to 150 documents. In light of these developments, Claimants' amended their provisional measures relief and also requested, in the alternative, that the relief sought be granted in the form of a procedural order.

¹ According to the registry prepared on March 2015. First Request for Provisional Measures, ¶27.

28. Since then, the Parties have continued to cooperate. Many other documents have been declassified and the Parties have been able to start negotiating the terms of an amendment to the document custody agreement entered into between RMGC and NAMR (the "Custody Agreement"), as well as the terms of a draft confidentiality order that would regulate the way in which the Parties, the Tribunal and other individuals involved in this arbitration would have access and could use confidential documents.
29. In their latest presentations and during the hearing, Claimants acknowledged that the only pending steps in order for them to have the desired access to the Classified and Confidential Documents at issue are the following:
 - a) The declassification of approximately 75 documents that still remain outstanding;
 - b) That the Parties reach an agreement on the terms of access/use of the documents that RMGC maintains subject to the Custody Agreement with NAMR; and
 - c) That the Parties reach an agreement on the terms of a draft confidentiality order.
30. For the purpose of the declassification of the remaining documents, Claimants have accepted to cause RMGC to provide NARM with copies of such documents. Claimants believe that the three remaining steps could be completed within 30 days from the time that Claimants provide such copies.
31. On the other hand, Respondent has reiterated its intention to cooperate and move forward with the declassification of the outstanding documents as soon as NAMR receives the requested copies from RMGC, as well as to continue negotiating the terms of the amendment to the Custody Agreement and draft confidentiality order.
32. Respondent, however, has argued that the declassification of the remaining documents would require a longer period that is two months and requests the Tribunal to grant Respondent with two months from the date NAMR receives the copies.
33. Additionally, Respondent has stressed that once all the documents at issue have been declassified and the terms of access and use have been defined, both Parties should be granted simultaneous access to such documents.
34. Each Party has requested that the other Party pay the costs incurred in relation to the First Request for Provisional Measures, including the respective costs of legal representation.

Order

35. In light of the Parties amended requests for relief, the progress made in the declassification of the remaining classified documents, as well as the Parties' current negotiations regarding the terms of the amended Custody Agreement and draft confidentiality order, the Tribunal hereby orders:
- a) Claimants to cause RMGC to provide NAMR with copies of the documents that remain to be declassified;
 - b) Respondent to declassify such documents and/or cause the relevant third parties to declassify such documents in accordance with the relevant laws;
 - c) Both Parties to continue to apply their best efforts to agree on a draft confidentiality order and amended Custody Agreement;
 - d) Both Parties to report on the status of the previous items within 30 days from the date of this order; the Tribunal may issue further directions upon receipt of the Parties update on the status; and
 - e) Claimants to cause RMGC to grant both Parties simultaneous access to the documents in RMGC's custody once the terms of the amended Custody Agreement and draft confidentiality order have been defined.
36. The Tribunal reserves its decision on the costs incurred in relation to the First Request for Provisional Measures for a later date.

On behalf of the Tribunal,

Ms. Teresa Cheng SC
President of the Tribunal
Date: October 20, 2016