

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. 17

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

11 October 2018

I. THE RELEVANT PROCEDURAL STEPS

1. On 26 August 2016, the Tribunal issued *Procedural Order No. 1* (“PO 1”) on the procedure of the present arbitration, together with the Procedural Timetable.
2. On 30 June 2017, Claimants filed their *Memorial*, together with witness statements, expert reports and exhibits.
3. On 22 February 2018, Respondent filed its *Counter-Memorial*, together with witness statements, expert reports and exhibits.
4. On 22 March 2018, the Parties filed their *document production requests* in the form of Redfern Schedules, in conformity with the Procedural Timetable as amended.
5. On 19 April 2018, the Parties filed their *objections to the other Party’s document production requests* and produced documents the request of which they did not object, again in conformity with the Procedural Timetable.
6. On 10 May 2018, the Parties filed their *replies to the objections to the other Party’s document production requests*. With their replies in the form of Redfern Schedules, the Parties filed also their general comments on the other Party’s document production requests and objections.
7. On 28 May 2018, Claimants filed certain observations in relation to Respondent’s Requests nos 49 to 52.
8. On 4 June 2018, Respondent submitted its comments to Claimants’ observations in relation to Respondent’s Requests nos 49 to 52.
9. On 8 June 2018, Claimants filed further comments in relation to Respondent’s Requests nos 49 to 52.
10. On the same date, the Tribunal issued *Procedural Order No. 10* (“PO No. 10”) with Annexes A and B, deciding on the Parties’ requests for document production.

The Parties were ordered to produce documents pursuant to the decisions set out in Annexes A and B of PO No. 10. Unless a specific date was specified in PO No. 10, the Parties were to produce such documents by 21 June 2018, the deadline contemplated in the Procedural Timetable as amended.

11. On 18 September 2018, Claimants sent a letter to the Tribunal requesting it to order Respondent to produce, or to make a clear statement confirming it does not have possession, custody, or control of three categories of documents. Claimants enclosed to their letter the Parties’ exchange of letters of 10 and 14 September 2018 concerning the Parties’ disagreement on this issue.

12. On 26 September 2018 and following an invitation from the Tribunal, Respondent provided its comments to Claimants' letter of 18 September 2018 and requested that Claimants' request therein be dismissed.

II. THE PARTIES' POSITIONS

A. Claimants

13. Claimants request the production of certain documents – which they identified from documents produced by Respondent during document production – pursuant to Section 15.10 of PO No. 1. Neither the Parties nor the Tribunal are limited from ordering the production of further documents, which remains within the Tribunal's authority pursuant to ICSID Arbitration Rule 34(2). The exercise of such authority is particularly appropriate where, as here, the existence of such documents was not known to the requesting party until review of the documents produced by the counter-party.
14. The requested documents are relevant and material and go to the heart of Claimants' allegations "*about the Government's illegal blocking of Project permitting to demand economic renegotiations*". Further, they are responsive to requests already made by Claimants, i.e., Requests nos 11 and 14. In addition, they arise directly out of information revealed through document production and are not new requests.
15. Claimants therefore request that the Tribunal order Respondent to produce, or to make a clear statement confirming it does not have possession, custody, or control of: (i) all mandates, direction, or communications from the Government to the Negotiation Commission in 2011-2012; (ii) all minutes or resolutions of the Negotiation Commission's meetings in 2011-2012; and (iii) all reports or communications from the Negotiation Commission to the Government in 2011-2012.

B. Respondent

16. Respondent submits that Claimants' request is improper.
17. Concerning the second category of requested documents (see item (ii) in para. 15 above), Respondent does not have in its possession, custody or control documents responsive to this request. There is thus no issue for the Tribunal to decide.
18. Concerning the first and third categories of requested documents (see items (i) and (iii) in para. 15 above), the requested documents are not responsive to requests that Claimants already made. They are therefore new requests and as such out of time.
19. Nothing prevented Claimants from making these requests previously. It is too late now to make supplemental requests that Claimants omitted to make at the time foreseen for document production.

20. Separately, neither PO No. 1, nor the ICSID Arbitration Rules specifically empower a party to make supplemental document production requests. Indeed, at the time of drafting PO No. 1, the Tribunal rejected Claimants' request to include language permitting a party to make supplemental document production requests.
21. Respondent therefore submits that Claimants' request must be dismissed.

III. THE TRIBUNAL'S CONSIDERATIONS

A. Generally

1. The issue

22. The issue before this Tribunal is whether Claimants' request for the production of three categories of documents (see above para. 15) should be granted.
23. *Claimants* submit that the requested documents are relevant and material and are responsive to requests already made by them. *Respondent* submits that Claimants' request is improper and should be rejected.

2. The Tribunal's power to order further production of documents

24. It is recalled that, in PO No. 1, the Parties have agreed and the Tribunal has confirmed that each Party shall be permitted to make document production requests following the first round of submissions in accordance with the Procedural Timetable (see Section 15.1 of PO No. 1).
25. Although silent, the procedure set out in PO No. 1 and the Procedural Timetable does not specifically exclude the possibility for the Parties to make additional and/or supplemental document production requests at another stage when circumstances so require. In fact, it is undisputed that, both under PO No. 1 and ICSID Arbitration Rule 34(2), the Tribunal has the power, at its discretion, to call upon the Parties to produce documents at any stage of the proceedings (see also Article 43(a) of the ICSID Convention). This power and discretion does not appear to be limited to the Tribunal's own motion, i.e., absent a request from a Party.
26. The fact that during the drafting of PO No. 1, language permitting supplemental document production requests was removed does not limit the possibility for such requests when there are good reasons to do so. Instead, the omission of such language from the adopted PO No. 1 was likely intended to prevent a situation of numerous unsolicited and unfounded document production requests throughout all stages of the proceedings.
27. The Tribunal may, therefore, entertain an additional/supplemental document production requests in appropriate circumstances and always with due process and efficiency requirements in mind.

3. The relevant requests, decisions and information

28. In the present case, the Parties filed their document production requests on 22 March 2018, following their submission of the Opening Memorial and Counter-Memorial. The relevant requests to the present issue are Claimants' Requests nos 11 and 14, which state the following:

- Request no. 11: “*The Government’s instructions to Minister of Economy Ion Arition with regard to ‘renegotiating’ the Project’s financial terms in 2011-2012, including, but not limited to: i. the mandate provided by the Government or by Prime Minister Boc to Minister Arition in or about September 2011 (and any subsequent mandates or amendments thereto, including but not limited to the new mandate provided to him in or about November 2011); and ii. the minutes and resolutions of any Government meetings in 2011-2012 discussing or analyzing the economic terms of the Project.*”
- Request no. 14: “*All documents reflecting the Government’s: i. analysis of Gabriel’s financial forecasts presented by Gabriel and RMGC during the negotiations; ii. analysis of the offers made by Gabriel to try to accommodate the State’s demands; and iii. reasons, if any, for not accepting Gabriel’s offers.*”

29. The Tribunal decided on, among other things, Claimants' Requests nos 11 and 14 in its PO No. 10 on 8 June 2018 as follows:

- Request no. 11: “*Granted only with respect to Request no. 11(i). Respondent’s statement that it does not have any documents in its possession, custody or control responsive to Request no. 11(ii) is noted.*”
- Request no. 14: “*Granted subject to limiting the request in terms of time and in terms of specific government agencies*”.

30. Pursuant to the Procedural Timetable as amended, the Parties complied with the ordered production of documents on 21 June 2018. In relation to Claimants' Requests nos 11 and 14, the following is relevant:

- Request no. 11: According to **Claimants**, Respondent did not produce any documents (note that only Request no. 11(i) was granted by the Tribunal).
- Request no. 14: Pursuant to the Tribunal’s directions (see above para. 29), Claimants limited their request in terms of time and in terms of specific government agencies. Respondent produced the relevant documents, including Documents 14.E and 14.F which are Government memoranda dated 26 October and 11 November 2011.

These memoranda state that (i) the Government mandated the Ministry of Economy “*to start the renegotiation of the contract with Gabriel Resources / RMGC*”, (ii)

that the then Minister of Economy, Ion Ariton, “*issued an order mandating the establishment of a Negotiation Commission*” and (iii) that the Negotiation Commission evaluated proposals made by RMGC in response to the Government’s demand for an increased financial stake in the Project and made recommendations to the Government about those proposals.

31. Claimants filed their request for the production of the three categories of documents, initially with Respondent on 10 September 2018 and with the Tribunal on 18 September 2018. In both instances, **Claimants** submit that this request arises out of information from Documents 14.E and 14.F and that the requested documents are responsive to Claimants’ Requests nos 11 and/or 14. They also noted that they were not previously aware that a Negotiation Commission was established in 2011. According to **Respondent**, even if Claimants were not aware of the appointment of such Commission, they could have made these requests at the time of their initial requests for document production. It is now late to make supplemental requests that they omitted to make at the time foreseen for document production.
32. The **Tribunal** considers that, contrary to Respondent’s argument, Claimants have provided sufficient justification that they could not have requested the relevant documents – all of which relate to the Negotiation Commission – earlier in the proceedings. It considers, therefore, that there are good reasons to assess the merits of Claimants’ request.

4. Interim conclusion

33. In light of these circumstances, the Tribunal finds that Claimants’ document production requests of 18 September 2018 are admissible at this stage of the proceedings.

B. Specifically

34. It is recalled that Claimants request the production the following three categories of documents, namely:
 - “*all mandates, direction, or communications from the Government to the Negotiation Commission in 2011-2012*”;
 - “*all minutes or resolutions of the Negotiation Commission’s meetings in 2011-2012*”; and
 - “*all reports or communications from the Negotiation Commission to the Government in 2011-2012*”.
35. According to **Claimants**, Respondent has not produced any of the mandates issued to Minister Ariton ordered by the Tribunal to be produced in Request no. 11(i) or Minister Ariton’s order mandating the establishment of a Negotiation Commission or any

documents in relation to the Negotiation Commission's activities which appear to be responsive to Requests nos 11(ii) and 14.

36. According to **Respondent**, the second category of requested documents falls within the ambit of Claimants' Request no. 11(ii), in relation to which Respondent has already explained to Claimants that it does not have in its possession, custody or control documents responsive to this request. There is, therefore, no issue for the Tribunal to decide. The first and third categories of documents are responsive to requests that Claimants already made and are therefore new and out of time.
37. Specifically, the first category of documents for "*all mandates, direction, or communications from the Government to the Negotiation Commission in 2011-2012*" is substantially broader than Claimants' Request no. 11 for "*the Government's instructions to Minister of Economy Ion Ariton with regard to 'renegotiating' the Project's financial terms in 2011-2012*". It is also entirely separate from Claimants' Request no. 14 which refers to Government analyses – not instructions – in relation to the negotiations. The third category of documents for "*all reports or communications from the Negotiation Commission to the Government in 2011-2012*" is different from and broader than Claimants' Request no. 11(ii) (referring to Government meetings discussing or analysing the economic terms of the Project) and also different from Claimants' Request no. 14.
38. The **Tribunal** considers the following:
- (a) Its decisions on document production requests are without prejudice to the merits of the dispute (see PO No. 10, para. 22) or its continuing right to order production of documents at any stage of the proceedings (see PO No. 10, para. 23).
 - (b) Each Party bears the burden to prove its own case, however a Party should also have access to documents that will permit it to develop such case (see PO No. 10, para. 28).
 - (c) For a document production request to be granted, it must be relevant and material to the outcome of the case (see PO No. 10, para. 32) and the requested document must not be in the possession, custody or control of the requesting Party but in that of the requested Party (see PO No. 10, para. 37). In relation to the latter, there is no reason to doubt either Party's confirmation that a requested document is not in its possession, custody or control (see PO No. 10, para. 38).
39. With these principles and the Parties' positions in mind, the Tribunal further considers that:
- (a) With respect to the first category of the requested documents, while such category may appear at first sight slightly broader than Claimants' Request no. 11(i) (which was granted by the Tribunal but for which no documents were

produced by Respondent), the fact remains that the two are different: the first category seeks documents directed to the Negotiation Commission and not to Minister Arton, who appears to have been mandated to set up such Commission. Both remain nonetheless relevant.

The fact that the first category is separate from Claimants' Request no. 14, in that it refers to instructions and not analyses from the Government, does not change its relevance.

The Tribunal, therefore, upholds the first category of the requested documents. Respondent will either produce the requested documents or specifically confirm that it has no possession, custody, or control of such documents.

(b) *With respect to the second category of the requested documents, "minutes and resolutions of the Negotiation Commission's meetings in 2011-2012" may fall under the broader Claimants' Request no. 11(ii), which refers to minutes and resolutions of "any Government meetings" and for which Respondent affirmed that it is in no possession, custody or control of any responsive documents. This being said, the Tribunal considers it important for Respondent to either produce the requested documents or specifically confirm that it does not have possession, custody, or control of the exact requested documents, i.e., as those may relate to the Negotiation Commission itself.*

(c) *With respect to the third category of the requested documents, the Tribunal does not find such category broader than Claimants' Request no. 11(ii) as "minutes and resolutions of any Government meetings" (Request 11(ii) may not necessarily capture "all reports or communications from the Negotiation Commission" itself (third category of the requested documents)). The two are therefore relevant but different.*

Similar to the first category of the requested documents, the fact that such third category may be different from Claimants' Request no. 14 does not change the third category's relevance.

Therefore, Respondent will either produce the third category of the requested documents or specifically confirm that it has no possession, custody or control of such requested documents.

40. Accordingly, the Tribunal decides that Respondent shall either produce or specifically confirm that it has no possession, custody or control of the requested documents of categories one, two and three **by 19 October 2018**.

IV. THE TRIBUNAL'S DECISIONS

41. The Arbitral Tribunal hereby orders as follows:

Respondent shall either produce or specifically confirm that it has no possession, custody or control of the requested documents of categories one, two and three by 19 October 2018.

On behalf of the Tribunal,

[signed]

Prof. Pierre Tercier
President of the Tribunal