

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. 20

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

17 December 2018

I. THE RELEVANT PROCEDURE

1. On 26 August 2016, the Tribunal issued *Procedural Order No. 1* (“PO 1”) on the procedure of the present arbitration.
2. On 14 November 2016, the Tribunal issued *Procedural Order No. 3* (“PO 3”), governing issues of confidentiality in the present arbitration.
3. On 30 June 2017, Claimants filed their *Memorial*, together with witness statements, expert reports and exhibits.
4. On 16 January 2018, the Tribunal issued *Procedural Order No. 7* (“PO 7”), ruling on the proposed confidentiality designations made by Claimants in their *Memorial*.
5. On 30 January 2018, the Tribunal issued *Procedural Order No. 8* (“PO 8”), ruling on Respondent’s proposal to reclassify certain exhibits as non-confidential and leaving Respondent’s request to reclassify certain portions of witness statements and expert reports as non-confidential for a subsequent Procedural Order.
6. On 22 February 2018, Respondent filed its *Counter-Memorial*, together with witness statements, expert reports and exhibits.
7. On 14 June 2018, the Tribunal issued *Procedural Order No. 11* (“PO 11”), ruling on several outstanding issues in relation to confidentiality, including deciding to reject Respondent’s requests to reclassify those portions of Claimants’ expert reports and witness statements – submitted with the *Memorial* – which are not confidential.
8. On 15 August 2018, the Tribunal issued *Procedural Order No. 14* (“PO 14”), 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*.
9. On 18 September 2018, and following an exchange of correspondence between the Parties, the Tribunal issued *Procedural Order No. 15* (“PO 15”) and its Annex A, deciding on the confidentiality of PO 14.
10. On 2 November 2018, Claimants filed their *Reply and Counter-Memorial on Jurisdiction* (“Reply”), together with witness statements, expert reports and exhibits.
11. On 4 December 2018, Claimants sent a letter to the Tribunal requesting that it “confirm[s] that its ruling in PO 11 in relation to the witness statements and expert reports accompanying the *Memorial* should be applied equally to those accompanying the *Reply* so that the witness statements and expert reports should not be reclassified as non-confidential and that the Parties may proceed with the *Reply* redaction procedure accordingly”. Claimants also enclosed relevant correspondence on the issue exchanged between the Parties.

12. On 12 December 2018, and following an opportunity provided by the Tribunal, Respondent sent a letter to the Tribunal commenting on Claimants' letter of 4 December 2018 and requesting that "*the Tribunal adopt the process first proposed by Respondent in its email of 13 November 2018 to the Claimants, as adjusted*".

II. THE PARTIES' POSITIONS

A. Claimants

13. In their letter of 4 December 2018, Claimants submit that the Parties have been unable to reach agreement concerning the procedure for redacting confidential information contained in the Reply.
14. For Claimants, all of the same considerations that applied in the Memorial round in relation to witness statements and expert reports continue to apply in the Reply round. They consider that these issues should not have to be debated again in view of the Tribunal's decision in PO 11. As the Tribunal already recognised in relation to the Memorial round, seeking to reclassify the witness statements and expert reports submitted with the Reply would be unduly burdensome and costly, would serve no legitimate purpose, and would undermine Claimants' fundamental right to present their case in view of the concerns of their witnesses about participating in this arbitration if their witness statements were permitted to be disclosed publicly.
15. In the Reply round, the burden on the Parties and the Tribunal would be even greater, as the statements and reports are more extensive, and the scope of likely disagreement is no less substantial. Respondent has not identified any compelling need to seek the declassification of the statements and reports; and the considerations for Claimants' witnesses have not changed.
16. Claimants already have advised Respondent which exhibits Claimants consider must be treated confidential and have informed Respondent that they would be in a position to send the proposed redactions of the Reply.
17. For these reasons, Claimants respectfully request the Tribunal to confirm that its ruling in PO 11 in relation to the witness statements and expert reports accompanying the Memorial should be applied equally to those accompanying the Reply, so that the witness statements and expert reports should not be reclassified as non-confidential and that the Parties may proceed with the Reply redaction procedure accordingly.

B. Respondent

18. In its letter of 12 December 2018, Respondent submits that there is no good reason to depart from the practice agreed between the Parties for the redaction of the Counter-Memorial. The reclassification of the Claimants' witness statements and expert reports

will not lead to their publication but will instead simplify the process of redaction for the Reply and the Parties' subsequent pleadings.

19. In PO 11 the Tribunal foresaw the need to decide on the confidentiality of witness statements and expert reports in future submissions. This decision is perfectly in line with the ultimate purpose of the reclassification process, which is to declare which references to the witness statements and expert reports should be redacted from the Parties' submissions.
20. Respondent merely requests that Claimants identify which portions of their witness statements and expert reports they consider to be sensitive, so that the Parties may proceed on a more efficient basis with the redaction of the Reply and the Parties' subsequent pleadings.
21. Furthermore, and contrary to Claimants' arguments, the benefits of the process adopted by the Parties for the redaction of the Counter-Memorial are now well-established. Nor will such procedure result in any substantial burden to the Parties. In fact, the only source of disagreement between the Parties throughout the redaction process for the Counter-Memorial pertained to eleven headings and statements contained in the expert report of Dr. Burrows.
22. Given the public nature of the proceedings, Respondent is entitled to know which references to Claimants' witness statements and expert reports will need to be redacted from its own Rejoinder. Only deciding on the confidentiality of the citations and references that appear in the Reply, as Claimants suggest, would not enable Respondent at this stage to determine the extent to which its own pleadings will require redaction.
23. Respondent therefore requests that the Tribunal adopt the process first proposed by the Respondent in its email of 13 November 2018 to Claimants as adjusted in its letter to the Tribunal of 12 December 2018 for the passage of time.

III. THE TRIBUNAL'S CONSIDERATIONS

A. The issue

24. The general issue before this Tribunal is the possible reclassification as non-confidential of the witness statements and expert reports submitted by Claimants with their Reply and the redaction process in relation thereto.
25. ***For Claimants***, (i) in line with PO 11, there should not be a reclassification of such witness statements and expert reports, and instead (ii) the Parties should proceed with the treatment of exhibits, followed by (iii) the proposed redactions to the Reply and any disagreements in relation to both.

26. ***For Respondent***, the following should take place: (i) the reclassification of such witness statements and expert reports as non-confidential, followed by (ii) Claimants' identification of the portions of the witness statements and expert reports that are sensitive, followed by (iii) the necessary redaction of related sensitive references in the Reply.
27. ***The Tribunal*** considers that the following sub-issues are at play in relation to the general issue of reclassification of the witness statements and expert reports accompanying the Reply:
- *The Parties' right to make the relevant request;*
 - *The timing of the request and of the decision thereon;*
 - *The considerations for the decision on reclassification; and*
 - *Claimants' reservation to oppose reclassification and the relevance of the Parties' previous practice.*
28. Accordingly, to reach its decision, it will deal with each sub-issue separately below.

B. The Parties' right to make the relevant request

29. It is recalled that the applicable framework concerning confidentiality of witness statements and expert reports specifically, is to be found in Annex C of the Canada-Romania BIT, in PO 1 and in PO 3. This framework was analysed by the Tribunal in paragraphs 39 to 51 of PO 11, in the context of deciding on Respondent's request to reclassify as non-confidential certain portions of Claimants' witness statements and expert reports accompanied with the Memorial.
30. Specifically, the Tribunal considered that "*the Parties agreed in Section 2.6 of PO 3 to bestow upon themselves the right to propose a reclassification as non-confidential, documents that they have already agreed in PO 1 should be treated confidentially, i.e., the witness statements, expert reports and exhibits, if such documents do not constitute or contain confidential information*" (PO 11, para. 44).
31. Accordingly, it is undisputed that the Parties have the right to request the reclassification as non-confidential of the witness statements and expert reports accompanying the Reply.

C. The timing of the request and of the decision thereon

32. It is also recalled that the Parties had agreed, and the Tribunal had confirmed in PO 11, that the Tribunal would first decide on any requests for reclassification of exhibits, witness statements and expert reports accompanying a submission, prior to deciding on the proposed redaction to the main submission (or simultaneously with the

decision) (see PO 11, para. 93). This decision was aimed, as Claimant correctly submits, at avoiding inconsistent rulings.

33. The Tribunal reiterates that this is the appropriate process in relation to such requests and decisions thereon in general and, therefore, in this instance as well.

D. The considerations for the decision on reclassification

34. The Tribunal had also examined the relevant criteria that need to be satisfied to grant a request for reclassification in PO 11 (see PO 11, para. 45). Specifically, it referred to “*the three categories of information and documents of Section 1.1 of PO 3*” that would be subject to obligations of confidentiality (PO 11, para. 48) and considered that it in any case “*enjoys a degree of discretion, which must be exercised by having the competing interests at play in mind*” (PO 11, para. 54). Those interests are “*(a) the safeguarding of the proceedings including the participants and the right of a Party to present its case; (b) ensuring procedural economy; and (c) the right to transparency*” (*id.*). These considerations apply equally in the present situation.
35. *First*, the Tribunal clarifies that, while the aforementioned considerations apply equally in the present situation, its specific decision on Respondent’s request to reclassify witness statements and expert reports accompanying the Memorial does not. This is because each time a separate assessment should be performed to decide on a specific request for reclassification.
36. *Second*, and nonetheless, following a review of the Parties’ relevant positions, the Tribunal does not consider that Respondent has brought forth any new arguments that would lead it to decide differently on this occasion. Specifically, the categories of information and documents of Section 1.1 of PO 3 do not apply, but there is nothing to rebut, in the present situation, the following considerations:

- “[T]here is a genuine concern that, with the publication of the witness statements in particular, witnesses may not be willing to participate, therefore undermining Claimants’ right to adequately present their case” and “[i]n contrast, the non-publication of witness statements will not undermine Respondent’s right to present its case given that it already has access to all documents submitted in this arbitration and in an unredacted form” (PO 11, para. 55).
- “[S]ubjecting more documents to this procedure will extend further the disputes between the Parties, delay the proceedings even more and cause significant expense to be incurred by both Parties” (PO 11, para. 56).
- The right to transparency “*is not seriously undermined with the non-publication of witness statements and expert reports. Indeed, such right is sufficiently preserved through the publication of the main submissions, orders and decisions of the Tribunal*” (PO 11, para. 57).

37. The Tribunal, therefore, decides to reject Respondent's request to reclassify as non-confidential the witness statements and expert reports accompanying Claimants' Reply. Consequently, any reference to such statements and reports in the Reply shall be redacted.

E. Claimants' reservation to oppose reclassification and the relevance of the Parties' previous practice

38. It is true that, in relation to the Memorial round, the Tribunal rejected Respondent's request for the reclassification of witness statements and expert reports. But it attached importance to the fact that "*Claimants [were] not requesting that the identity of the witnesses or that all references to their testimony in the Memorial be treated as confidential*" and that "[t]hey [had] *instead identified references that they consider as sensitive and of concern to their witnesses and to Claimants' right to plead their case*" (PO 11, para. 74). The relevant redactions to the Memorial, therefore, reflected, inter alia, Claimants' proposed redactions of references to Claimants' witness testimony (PO 11, para. 75).
39. It is also true that, in relation to the Counter-Memorial round, Claimants did not object generally to Respondent's requests to reclassify portions of its own witness statements and expert reports as non-confidential, but expressly "*reserve[d] their right to object to requests to reclassify as non-confidential further witness statements and expert reports, including those that may be filed in support in future submissions*".
40. The Tribunal considers that the Parties' previous practice does not deprive either Party of the right to oppose reclassification, especially when one Party reserves its right to do so in subsequent rounds. It further does not affect the Tribunal's decision to accept or reject reclassification and the consequences that follow.
41. Therefore, while the Parties may have on this occasion also cooperated in good faith, the Tribunal cannot, considering its decision to reject Respondent's request for reclassification, require Claimants to indicate which references in their witness statements and expert reports are not sensitive information for the purposes of making the necessary redactions in the Reply.

F. The decision

42. In light of the above, the Tribunal decides to reject Respondent's request for reclassification of the witness statements and expert reports accompanying Claimants' Reply. Consequently, any references to such statements and reports in the Reply shall be redacted.
43. Further, the Parties shall liaise and proceed with the redaction process in relation to the exhibits and the subsequent redactions to the Reply in accordance with PO 3.

44. Finally, the Parties are invited to cooperate in good faith and to agree to the extent possible on any issues of confidentiality in the future.

IV. ORDER

45. The Tribunal hereby orders as follows:

1. *Respondent's request for reclassification of the witness statements and expert reports accompanying Claimants' Reply is rejected. Any references to such statements and reports in the Reply shall therefore be redacted.*
2. *The Parties shall liaise and proceed with the redaction process in relation to the exhibits and the subsequent redactions to the Reply in accordance with PO 3.*

On behalf of the Tribunal,

Prof. Pierre Tercier
President of the Tribunal