

**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. 25**

***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

---

29 October 2019

**I. PROCEDURE**

1. On 26 August 2016, the Tribunal issued ***Procedural Order No. 1*** on the procedure of the present arbitration (“PO 1”).
2. On 14 November 2016, the Tribunal issued ***Procedural Order No. 3***, governing issues of confidentiality in the present arbitration (“PO 3”).
3. On 6 September 2019, the Tribunal issued ***Procedural Order No. 23***, deciding on Claimants’ request to exclude from the record testimony that they had no opportunity to confront through cross examination and on their request for an opportunity to submit focused rebuttal evidence in response to the new evidence first submitted by Respondent with its Rejoinder (“PO 23”).
4. On 26 September 2019, Respondent sent a letter to the Tribunal, ***requesting the bifurcation of the Hearing of December 2019***, so as to ensure that the Parties have sufficient time to conduct a proper examination of witnesses and experts.
5. On 30 September 2019, Claimants sent to the Tribunal their ***response and objection to Respondent’s request to bifurcate the Hearing of December 2019***.
6. On 1 October 2019, the Tribunal sent a message to the Parties, inviting them to submit their separate proposals on the schedule of the Hearing of December 2019 as originally contemplated, before deciding on Respondent’s request for bifurcation of such Hearing.
7. Also on 8 October 2019, the Tribunal Secretary communicated to the Parties the ***agenda for the Pre-Hearing Conference Call***, inviting them to provide their joint proposals and/or separate respective positions.
8. Also on the same date, the Parties communicated their separate proposals for a schedule of the Hearing of December 2019 in accordance with the Tribunal’s direction of 1 October 2019.
9. On 15 October 2019, the Tribunal sent a letter to the Parties by which it ***decided to bifurcate the Hearing*** into (i) two weeks as originally scheduled from 2 to 13 December 2019 (without Saturdays); and (ii) one additional week as soon as possible. It therefore invited the Parties to liaise and agree if possible on the criteria that should be followed for the bifurcation.
10. On 18 October 2019, the Parties communicated their separate positions and proposals on the agenda items for the Pre-Hearing Conference Call of 25 October 2019.
11. On 22 October 2019, the Tribunal issued ***Procedural Order No. 24***, deciding on the appropriateness of Claimants’ rebuttal testimony filing of 11 October 2019 (“PO 24”).
12. On the same date, the Parties communicated their separate positions criteria that should be followed for the bifurcation of the Hearing pursuant to the Tribunal’s directions of 15 October 2019.

13. On 25 October 2019, the Parties and the Tribunal held a ***Pre-Hearing Conference Call***, during which they discussed the items of the agenda circulated on 8 October 2019 concerning the organization of the Hearing. The Tribunal confirmed the Parties' agreement on several items therein and noted that it would decide on the points on which the Parties were in disagreement.

## II. THE TRIBUNAL'S CONSIDERATIONS

14. The Tribunal has duly considered the Parties' positions and proposals on the items of the agenda of the Pre-Hearing Conference Call, filed on 18 October 2019 (see above para. 10) and discussed during such call on 25 October 2019. It has done so in light of, *inter alia*, the ICSID Arbitration Rules, its considerations and decisions in PO 1, PO 3 and PO 23, as well as in the exercise of its discretion.
15. The Tribunal, therefore, sets out below the items agreed to between the Parties, as well as its considerations and decisions on the items on which there is a disagreement.

### A. Hearing Schedule and Allocation of Time

#### (1) Total time reserved for the Hearing (item 1.1)

16. The Parties agree that:

*The total time for the Hearing of December shall be ten days, comprising nine hours per day.*

#### (2) Allocation of time between Parties (item 1.2)

17. The Parties disagree on the allocation of time between them.
- *Claimants* submit that the time should be allocated equally between the Parties.
  - *Respondent* proposes that the overall hearing time should be divided by the number of witnesses and experts and allocated accordingly.
18. *The Arbitral Tribunal* considers that:
- The general practice is to have an equal time for each Party to present its case.
  - This practice is indeed in line with the principle of equal treatment absent exceptional circumstances.
  - An allocation per number of witnesses and experts is not appropriate in the present case where the duration of the examination of a witness could differ from one to another.

- Further, in the present case there is not a significant difference in the number of witnesses and experts to be examined by each Party.
- In any case, the Tribunal will manage the allocation with flexibility in order to ensure that no inequality is resulted in the treatment of a Party.

19. The Tribunal, therefore, decides that:

***The time shall be allocated equally between the Parties. It shall, nevertheless be managed with flexibility by the Tribunal in order to ensure that no inequality is resulted in the treatment of a Party.***

**(3) Allocation of time to the Tribunal (item 1.3)**

20. The Parties agree that:

***A total of five hours is allocated for the Tribunal's questions to counsel, witnesses, and experts.***

The time for responding to the Tribunal's questions, including responses of the Parties' witnesses and experts to such questions, will be considered as the Tribunal's time and will not be deducted from the time allotted to the Parties.

**(4) Manner of time keeping (chess-clock or other), including method of accounting for time incurred by the Tribunal's questions (item 1.4)**

21. The Parties agree that:

***The time will be kept with the chess-clock system by the Secretary of the Arbitral Tribunal and that the time used will be communicated at the end of each day.***

In this connection, the Parties clarify that if a Party objects or otherwise intervenes during the other Party's speaking time, that time will be counted as part of the objecting Party's time.

**(5) Sequence of Hearing (order of presentations, order of witnesses and experts, etc.) (item 1.5)**

22. The Parties disagree on the ***allocation of witnesses and experts in the first and second hearings.***

23. *Claimants* submit that all fact witnesses, including Adrian Gligor, legal experts and social license witnesses and experts should be heard during the first hearing, whereas

all the remaining experts, as well as quantum witnesses and experts should be heard during the second hearing.

According to Claimants, this division would ensure that the witness and expert testimony most relevant to liability would be heard during the first hearing and that the witness and expert testimony most relevant to quantum would be heard during the second hearing. Hearing Romanian law and social license issues together with the witnesses who address the facts of the case will be essential to appropriately frame facts and corresponding issues within the context of those subjects. It will also be most efficient and cost effective to arrange to hear all of the witnesses requiring Romanian language interpretation during the first hearing. Adrian Gligor, who is a Romanian speaker and an employee of RMGC should be called for examination grouped together with the other employees of RMGC who should be heard during the December Hearing.

24. *Respondent* submits that all fact witnesses, save from Adrian Gligor, social license witnesses and experts as well as technical experts whose evidence primarily relates to the Environmental Impact Assessment process should be heard during the first hearing, whereas all legal experts, other remaining experts and quantum witnesses and experts should be heard during the second hearing.

According to Respondent, fact witnesses and experts whose evidence primarily pertains to issues of liability should be examined first and fact witnesses and experts whose evidence primarily pertains to issues of causation and quantum should be examined second. It will be more useful for the Tribunal to hear the environmental and social license experts during the same hearing as the fact witnesses who speak to these issues. It would be logical to examine the legal experts during the second hearing, after the evidence on facts, including from experts relying on these facts, is completed. As the evidence of Adrian Gligor relates to the cultural management programme and its effects on the feasibility of the Project and delays in its implementation, it is more useful for the Tribunal and more efficient to consider his evidence together with that of other experts testifying on feasibility during the second hearing. His evidence on cultural issues also overlaps with that of several legal experts who should be heard during the second hearing.

25. *The Tribunal* considers the following:

- The Tribunal shall duly and rigorously consider and assess all evidence and witness and expert testimony presented by the Parties.
- The fact that the Hearing has been bifurcated does not change this principle or affect the ability of this Tribunal to decide on the Parties' dispute in the fairest possible way.
- Both Parties' proposals on allocation of their witnesses and experts in each hearing appear reasonable.
- Nevertheless, to decide in favour of one, based on the merits of the Parties' arguments as those may relate to the substance of the dispute may lead a Party to

assume that the Tribunal has already decided on the content and relevance of a particular group of evidence.

- Accordingly, what is proper in these circumstances is to follow the “customary” approach and hear all factual witnesses first, followed by all legal experts, followed by all other technical experts, finally followed by all quantum witnesses and experts.

26. The Tribunal therefore decides that:

- a. The first hearing shall comprise the examination of the Parties’ fact witnesses, including Adrian Gligor, the Parties’ legal experts and the Parties’ social licenses witnesses and experts (as agreed to between the Parties).*
- b. The second hearing shall comprise the remaining technical experts and quantum witnesses and experts.*
- c. The Parties are invited to liaise and present, based on the Tribunal’s decision, a joint proposal for the schedule of each hearing. They shall do so by 5 November 2019.*

27. The Parties also disagree on the time for their *opening statements*, as well as whether there shall be additional opening statements during the second hearing.

- *Claimants* envision six hours opening for the first hearing and two hours for the second hearing.
- *Respondent*, envisions approximately three and a half hours for each Party for the first hearing and no opening for the second hearing.

28. *The Arbitral Tribunal* considers that:

- In principle each Party shall be able to use their equally allocated time as they see fit.
- This being said, the time used for opening statements should not be excessive.
- Therefore each Party shall have an opportunity for an opening statement in the first hearing of a maximum of four hours. This may require a longer sitting during Day 1 of the first hearing.
- Further, each Party should have an opportunity to present an opening statement at the beginning of the second hearing of a maximum of two hours. This opening statement should be only devoted to the questions that will be heard at the second hearing and should not comprise any closing arguments in respect of the first hearing.

29. Accordingly, the Tribunal decides that:

- a. Each Party shall have an opportunity for an opening statement in the first hearing of a maximum of four hours.*

- b. Each Party shall have an opportunity for an opening statement in the second hearing of a maximum of two hours, focused only on the questions that will be heard during the second hearing.*

**(6) Daily schedule (start and end times, number and length of breaks) (item 1.6)**

30. The Parties agree that:

*The Hearing times shall be 9:00 am to 6:00 pm each day. There will be a morning break of 15 minutes, an hour lunch break and an afternoon break of 15 minutes.*

**B. Witness and Expert Examination [PO 1, Section 18]**

**(1) Scope and manner of witness and expert examination (item 2.1)**

31. The Parties require a clarification on the scope of examination of witnesses and experts.

- *Claimants* submit that Section 18 of PO 1 governs this matter.
- *Respondent* submits that cross-examination should focus on areas addressed by the witness/expert in the witness statement/expert report, with the exception that the adverse Party may ask the witness about any documentary evidence in the record of which the witness could reasonably be expected to have personal knowledge.

32. *The Tribunal* considers and decides that:

- a. Cross-examination will be limited to matters arising out of the direct testimony or statement or report of the witness or expert that is being cross-examined; and*
- b. Any questions beyond that scope may be made in relation to matters that such expert or witness had direct knowledge of, although not covered in their statement or report, subject to the control of the Tribunal.*

**(2) Length and format for direct-, cross- and redirect examination of witnesses/experts; possibility of re-cross (item 2.2)**

33. The Parties disagree on the length of direct examination of witnesses and presentation of experts.

- *Claimants* submit that Section 18 of PO 1 governs this matter, as modified by PO 23.

- *Respondent* submits that (i) under Section 18.5.2 of PO 1, fact witnesses may be examined in direct examination for no longer than fifteen minutes; and (ii) under Section 18.5.3 of PO 1, the expert witnesses may give a presentation of the key points of their report directly and/or through direct examination for no longer than one hour.

34. *The Tribunal* confirms that:

*Section 18 shall govern the direct examinations and presentations of witnesses and experts, but with respect to witnesses and/or experts providing rebuttal or sur-rebuttal testimony, the Tribunal confirms its decision in PO 23, that the timing and scope of the direct examination of both Parties' witnesses and experts shall be handled by the Tribunal with flexibility.*

**(3) Witness and expert sequestration (item 2.3)**

35. The Parties agree that:

*Section 18.4 of PO 1 on witness and expert sequestration applies, except during the direct examination of fact witnesses which will include rebuttal or sur-rebuttal testimony.*

36. The Parties disagree on whether Patrick G. Corser and Dr. Christian Kunze (Claimants' experts) shall be treated as fact witnesses for the purposes of witness sequestration.

37. *The Tribunal* considers that, without prejudice to the independence of their expert testimonies, Patrick G. Corser and Dr. Christian Kunze shall be sequestered pursuant to Section 18.4 of PO 1, in order to avoid any dispute concerning their oral testimony.

38. The Tribunal therefore decides that:

*Patrick G. Corser and Dr. Christian Kunze shall be sequestered pursuant to Section 18.4 of PO 1.*

**C. Hearing Materials**

**(1) Rules on the use and distribution of visual aids, including demonstrative exhibits and PowerPoint presentations, during hearing [PO 1, Section 16.6] (item 3.1)**

39. The Parties disagree on the time to submit demonstrative exhibits as well as on the scope of such exhibits.

40. *Claimants* submit that Section 16.6 of PO 1 governs this matter. Demonstratives are limited to presentations of information in a new way such that it requires some analysis

to confirm consistency with the record evidence (e.g., a new tabulation of numerical data). A Party submitting any demonstratives shall provide them by email to the other Party no later than 48 hours prior to the commencement of the Hearing. Presentations in aid of argument and expert presentations shall be provided to the Tribunal and the other Party in hard copy at the time of such presentation and by email within 24 hours thereafter. If such presentations include any demonstratives, that portion of the presentation will be submitted in advance accordingly.

41. *Respondent* submits that demonstrative exhibits should be exchanged 24 hours before the start of the Hearing. A “demonstrative exhibit” should be understood as any visual or graphic representation of evidence on the record that is presented differently as compared to the original exhibit. Opening Statements and expert presentations should be exchanged at the start of the presentation.

42. The Tribunal considers and decides that:

*a. Pursuant to Section 16.6 of PO 1, demonstrative exhibits must not contain any new evidence. Separate to that, their form and manner of presentation shall be determined by each Party as they see fit (and as usual in international arbitration practice). In case of objections, the Tribunal will decide before the use of the demonstrative exhibits.*

*b. Demonstrative exhibits shall be provided to the other party no later than 48 hours prior to the presentation of the relevant exhibit.*

**(2) Rules on the submission of new evidence/exhibits into the record during Hearing [PO 1, Section 16.3] (item 3.2)**

43. The Parties agree that:

*Section 16.3 of PO 1 governs the submission of new evidence/exhibits into the record during the Hearing.*

**(3) Hearing bundles: joint or separate; scope and format; timing of production (before or at Hearing) (item 3.3)**

44. The Parties agree that:

*They will not provide joint hearing bundle.*

45. They however make different proposals on the form availability of the case record during the Hearing for the benefit of the Tribunal members, witnesses and experts in examination and Tribunal Secretary and Tribunal Assistant.

46. *Claimants* propose the entire record in this arbitration will be placed on iPads purchased by the Parties for this arbitration. The Parties will share equally the cost of six iPads:

three for the Members of the Tribunal, one for the Secretary of the Tribunal, one for the Assistant to the Tribunal, and one to be used for examination of witnesses and experts. The iPads will be distributed to the Tribunal, the Arbitral Secretary, and the Assistant to the Tribunal, as requested in Washington DC and shall be returned to the Parties at the end of the Hearing.

47. *Respondent* proposes each Party shall provide any Hearing materials to the Tribunal separately. Respondent invites the Tribunal members to inform the Parties whether they wish to receive a supplemental copy of the record (hard and/or electronic copies) and in what form. For its part, Respondent insists that the witnesses and experts should be presented hard copies of documents during their examination.

48. The Tribunal decides that:

*a. The Tribunal members, the Tribunal Secretary and the Tribunal Assistant shall be provided a USB key with the entire case file.*

*b. Each Party shall provide a hard copy file of any witness or expert bundle that it will use for cross-examination only to the specific witness or expert.*

**(4) USB drives with hyperlinked indices to all briefs, exhibits and authorities: to be produced jointly; timing (item 3.4)**

49. The Parties agree that:

*They shall provide the Tribunal with a USB key, including hyperlinked indices to all briefs, exhibits and authorities), 10 days before the first hearing (see also para. 48 above).*

**D. Transparency / confidentiality [PO 1, Section 20.6 and PO 3, Section 4]**

**(1) Hearing to be broadcast on closed-circuit television at an overflow room (item 4.1)**

50. The Parties agree that:

*The Hearing will be broadcasted on closed-circuit television at an overflow room, pursuant to Section 20.6 of PO 1, Section 4 of PO 3 and the Protocol of Confidentiality communicated by the Tribunal Secretary on 8 October 2019.*

**(2) Rules on cameras and other recording devices (including phones and laptops) at the overflow room (item 4.2)**

51. The Parties agree that:

*The rules on cameras and other recording devices at the overflow room shall apply.*

**(3) 60-minute delay of the broadcast to protect potential confidential information (item 4.3)**

52. The Parties agree that:

*There will be a 60-minute delay of the broadcast in order to protect potential confidential information.*

**(4) ICSID to announce the Hearing at the Centre's website two weeks before the Hearing. Please see draft announcement attached as Annex A. (item 4.4)**

53. The Parties agree that:

*The ICSID will announce the Hearing at the Centre's website two weeks before the Hearing pursuant to the draft public announcement communicated by the Tribunal Secretary on 8 October 2019.*

**(5) Rules on the suspension of the broadcast to protect confidential information. A detailed protocol (item 4.5)**

54. The Parties agree:

*On the Protocol of Confidentiality communicated by the Tribunal Secretary on 8 October 2019 concerning the suspension of the broadcast to protect confidential information.*

**(6) List of confidential documents: Parties to submit a joint list of all exhibits submitted so far in this arbitration proceeding, identifying those that are confidential pursuant to the Parties' agreement or the Tribunal's orders in accordance with Procedural Order No. 3. (item 4.6)**

55. *Respondent* enclosed a consolidated list of exhibits (including its designation of confidential exhibits) for the Claimants' review and agreement with its letter of 18 October.
56. *Claimants* noted that they will provide their comments to *Respondent's* consolidated list of exhibits and, in the meantime, provided their own updated list of consolidated exhibits with their letter of 25 October 2019.
57. *The Tribunal* invites both Parties to ***make all necessary efforts to come to an agreed consolidated list.***

**E. Agreed Chronology of Relevant Facts**

**(1) Parties to submit an agreed chronology of relevant facts (item 5.1)**

58. *Respondent* submits that the Parties will not provide a joint chronology of facts, but reserves the right to provide its own chronology of facts.
59. *Claimants* agree that no joint chronology of facts will be submitted but object to *Respondent's* proposal to submit a unilateral chronology of facts.
60. *The Tribunal* considers and decides that:

***No chronology as proposed by Respondent will be accepted.***

**F. Post-Hearing Briefs and Statements of Costs/Submissions on Costs [PO 1, Section 22] (item 6)**

61. The Parties agree that:

***The Tribunal shall determine the schedule for the filing of any post-hearing briefs and statements of costs, at a later stage of the proceedings.***

**G. Language [PO 1, Sections 11-6 to 11-8] (item 7)**

62. *Respondent* identified its witnesses that will require interpretation during the Hearing in their letter of 18 October 2019.
63. *Claimants* identified their witnesses and experts that will require interpretation during the Hearing in their letter of 25 October 2019.
64. *The Tribunal* takes note that the Parties shall consider the Tribunal Secretary's ***proposed Romanian translators*** (of 21 October 2019).

**H. Transcripts and Sound Recordings [PO 1, Section 21] (item 8)**

65. The Parties agree that:

*Section 21 of PO 1 applies to transcript and sound recordings.*

**I. Other Logistics Items**

(1) **Venue: Hearing Room located on the 8th or 1st floor of the C Building of the World Bank, in Washington DC (1225 Connecticut Ave. N.W.) (item 9.1)**

(2) **Set-up details: on Monday November 25, 2019. See ICSID's logistics email for details (item 9.2)**

(3) **Technical requirements for use of visual aids, if any (item 9.3)**

66. The Parties noted that they require *screens with audio* for displaying slides and video and that this will be arranged by ICSID.

67. The Parties disagree on the *room in which the Hearing will be held*.

68. *The Tribunal* takes note that the Tribunal Secretary will provide further details to the Parties concerning the *Hearing room*. The Parties are invited to *make all necessary efforts to come to an agreed solution*.

**J. Other Matters (item 10)**

69. The Parties shall provide a joint schedule for the first hearing by **5 November 2019** (see above para. 26).

70. The Tribunal shall shortly revert to the Parties with date proposals for the second hearing.

71. The Parties shall communicate their lists of participants to the first hearing **by 15 November 2019**. Based on those lists, ICSID will prepare the name plates for the Hearing room.

**III. ORDER**

*The Parties shall comply with the Tribunal's decisions set out in the Present Procedural Order No. 25 concerning the organisation of the first hearing.*

On behalf of the Tribunal,

*[Signed]*

---

Prof. Pierre Tercier  
President of the Tribunal