

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. 36

Members of the Tribunal

Prof. Pierre Tercier, President of the Tribunal

Prof. Horacio A. Grigera Naón, Arbitrator

Prof. Zachary Douglas KC, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal Yetano

Assistant to the Tribunal

Ms. Maria Athanasiou

27 June 2023

I. PROCEDURE

1. On 26 August 2016, the Tribunal issued *Procedural Order No. 1* on the procedure of the present arbitration (“PO No. 1”).
2. On 7 December 2018, the Tribunal issued *Procedural Order No. 19*, granting and application by non-disputing parties (*i.e.*, Alburnus Maior, Greenpeace CEE, Romania and Independent Centre for the Development of Environmental Resources (ICDER)) and admitting their Submission (“PO No. 19”).
3. On 30 September 2022, the Parties simultaneously filed their comments on the admissibility of another submission by non-disputing parties (*i.e.*, Centrul Independent pentru Dezvoltarea and Greenpeace Romania), agreeing to its admission. The Tribunal confirmed the Parties’ agreement on 3 October 2022.
4. On 30 May 2023, Centrul Independent pentru Dezvoltarea and Greenpeace Romania petitioned for a non-disputing party status, attaching their Amicus Curiae Submission of the same date. The submission was corrected by the same on 3 June 2023.
5. Following instructions from the Tribunal, the Parties filed their simultaneous comments and reply comments to the petition on 13 June 2023 and 19 June 2023 respectively.

II. THE DISPUTE

6. It is recalled that the present dispute concerns Romania’s alleged conduct and breaches of its bilateral investment obligations in relation to Claimants’ alleged investment through its Romanian subsidiary RMGC, concerning the Roşia Montană Project; a Project which was not implemented. As relief, Claimants seek a declaration of breach of such obligations by Romania, and an award of compensation for losses and damages allegedly suffered. Claimants are not requesting specific performance of the Project.

III. THE APPLICATION

A. The Applicants

7. The Application and Submission have been filed by two Applicants, who have previously filed *amicus curiae* briefs in these proceedings. They are:
 - a) ***Greenpeace Romania***, and
 - b) The ***Independent Center for the Development of Environmental Resources (ICDER)*** or ***Centrul Independent pentru Dezvoltarea***.
8. The identity and activities of the Applicants has already been described in a previous procedural order (see paragraph 16 of PO No. 19).

B. The conditions

9. The Applicants file their Application pursuant to Section IV.1 and IV.2 of Annex C of the Canada-Romania BIT. A summary of the conditions in support of their Application is as follows:
10. *First*, the Applicants would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.
11. *Second*, the Applicant Submission would address a matter within the scope of the dispute. Specifically:

Prospective amici respectfully submit this petition and amicus brief with understanding of the scope of the dispute and direct knowledge of judicial and administrative processes (and underlying legal arguments) undertaken by them and other NGOs in Romania that resulted in the annulment of permits, archaeological discharge certificates, and other acts required for the mine proposal.

On 30 September 2021 the Arbitral Tribunal issued Procedural Order No. 35 concerning the admissibility of new evidence. Subsequently both parties to the present litigation submitted new evidence (Oct./Nov 2021) and their observations on a non-disputing parties' submission (October 2022). It is directly in relation the Claimant's Response dated October 18, 2022 that the prospective amici would like to offer factual information. It aims at completing the Tribunal's record when it prepares its decision.

12. *Third*, the Applicants have a significant interest in the arbitration.
13. *Fourth*, there is a public interest in the subject matter of the arbitration.
14. *Fifth*, there is no undue burden or disruptive effect on the proceedings.

C. The request

15. The Applicants request the Tribunal ***to accept their petition to submit the amicus curiae brief.***

IV. THE PARTIES' POSITIONS

16. The Parties had an opportunity to file their comments on the Application pursuant to Part III, Annex C of the BIT and Section 24 of PO No. 1. The Tribunal provided the Parties with an opportunity of two rounds of simultaneous comments.

A. Claimants

17. Claimants argue that the Submission (which they call the "Amici Reply") is inadmissible.

18. *First*, Annex C, Part III of the Canada BIT and the Tribunal's PO No. 1 and PO No. 19 expressly exclude reply submissions by non-disputing parties.
19. *Second*, the *Amici* Reply consists entirely of legal argument and contentions outside the scope of the *Amici*'s knowledge or expertise.
20. *Third*, admitting the *Amici* Reply at this late stage of the proceeding would be unduly burdensome.
21. *Finally*, transparency is ensured through the publication of the submissions and decisions in this case together with open hearings and permitting the *Amici* Reply is not relevant to transparency.

B. Respondent

22. Respondent submits that the application and brief meet the criteria set out in Section III(4) of Annex C of the Canada-Romania BIT for submissions by non-disputing parties.
23. The BIT does not prohibit non-disputing parties from making more than one submission but does not entitle them to do so as a matter of right; the Tribunal nonetheless may allow them to do so. Similarly, PO No. 1 does not prohibit them from making new applications to make submissions but prohibits them from making a further submission in relation to a pending application. Here, the *Amici* have made a fresh application to make a new submission. Further, ICSID Arbitration Rule 37 to which paragraph 24.5 of PO No. 1 refers, does not rule out multiple applications from non-disputing parties.
24. Further, their intervention will neither cause an undue burden nor disrupt the proceedings and granting the application will not unfairly prejudice any party to the arbitration.
25. Despite the late stage of the proceedings, Respondent is in favour of the admission of the Application consistent with its policy to ensure the promotion of transparency in these proceedings.

V. THE TRIBUNAL'S CONSIDERATIONS

A. In general

(i) The basis

26. As stated in paragraph 47 of PO No. 19, the Tribunal's authority to rule on the Application derives from both the BIT and the ICSID Arbitration Rules.

The BIT

27. According to Part III(4), Annex C of the BIT, “[i]n determining whether to grant leave to file a non-disputing party submission, the tribunal shall consider, among other things, the extent to which” certain conditions should be satisfied. These conditions are identified below.
28. According to Part III(7), Annex C, “[a] tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.”

The ICSID Rules

29. In addition, under Rule 37(2) of the ICSID Arbitration Rules, “the Tribunal may allow a person or entity that is not a party to the dispute [...] to file a written submission with the Tribunal” and in doing so, it “shall consider, among other things, the extent to which” certain conditions – similar to those of the BIT – are satisfied.

PO No. 1

30. Furthermore, Section 24.5 of PO No. 1 reads as follows:

If the Tribunal were to admit any written submission by a non-disputing party or prospective amicus curiae, the parties shall be permitted to respond in writing to the submission on the date set out in Annex A. The non-disputing party or amicus curiae shall not be permitted to make any further submissions.

31. In light of the foregoing, the Tribunal reiterates its finding in PO No. 19 that, in ruling on the Application from the prospective *amici*, it must consider the conditions set forth in the applicable instruments, but that, at the same time, it enjoys a certain degree of discretion (see paragraph 50 of PO No. 19).
32. As to the admissibility of “further” or “reply” submissions by non-disputing parties, the Tribunal considers that, while there is no unconditional right to such further submissions, it may nevertheless allow further submissions if the relevant conditions are met and there are valid reasons for doing so.
33. Accordingly, and in accordance with the principle that it has a certain degree of discretion in its decision, the Tribunal will treat the present application not as an application to file a reply, but as a new application to file a new *amicus curiae* brief.

(ii) The conditions

34. As also indicated in PO No. 19, the Tribunal should consider the following conditions when evaluating the Application (see paragraph 51 of PO No. 19):

- ***Assisting the Tribunal*** (Part III(4)(a), Annex C of the BIT; see also Rule 37(2)(a) of the ICSID Arbitration Rules);
 - ***Addressing a matter within the scope of the dispute*** (Part III(4)(b), Annex C of the BIT; see also Rule 37(2)(b) of the ICSID Arbitration Rules);
 - ***Significant interest in the arbitration*** (Part III(4)(c), Annex C of the BIT; see also Rule 37(2)(b) of the ICSID Arbitration Rules);
 - ***Public interest in the arbitration*** (Part III(4)(d), Annex C of the BIT);
 - ***The integrity of the proceedings, i.e., no disrupting of proceedings, undue burden or unfair prejudice*** (Part III(5)(a) and (b), Annex C of the BIT; see also Rule 37(2) of the ICSID Arbitration Rules).
35. These conditions are not exhaustive, which confirms the Tribunal’s discretion in deciding the Application (Part III(4), Annex C of the BIT; see also paragraph 54 of PO No. 19).
36. Moreover, the most important factor for the admission of the Application is the preservation of any public interest. Further, in its assessment, the Tribunal has to take into account that the proceedings are already public, due to the transparency requirements of the BIT (see paragraph 55 of PO No. 19).
37. Finally, any other conditions identified to in the Applicants’ petition (for example, the Applicants’ relationship to the Parties, etc.) will not be addressed because they are not discussed or disputed by the Parties themselves.
38. Accordingly, the Tribunal will evaluate the Application in light of the foregoing.

B. In specific

(i) Assisting the Tribunal

39. The Applicants clarify that the purpose of the Submission is to assist the Tribunal in its decision-making by providing factual information regarding the claims presented by Claimants in their submission of 18 October 2022, and does not purport to provide testimony or legal argument.
40. The Tribunal has considered this issue in detail and has concluded that the facts relied on by Claimants in this regard are already in the record and have been addressed by the Parties. Accordingly, it does not believe that further argument or information on these issues will assist the Tribunal in its decision-making at this stage, which is almost complete.

41. At this juncture, the Tribunal notes that Respondent did not comment on whether the Submission will be helpful to the Tribunal, although it had the opportunity to do so.

(ii) Addressing a matter within the scope of the dispute

42. The Tribunal recognizes that the Application and the Submission show that the Applicants seek to address “*a matter within the scope of the dispute*”.

(iii) Significant interest in the arbitration

43. With respect to whether the Applicants have “*a significant interest in the arbitration*”, the Tribunal refers to its reasoning in paragraph 64 of PO No. 19. Although the Tribunal recognizes the role of the Applicants, there may indeed be concerns as to whether they have a significant interest in the proceedings.

(iv) The public interest

44. With regard to the question of whether “*there is a public interest in the subject-matter of the arbitration*”, the Tribunal reiterates its reasoning in PO No. 19 and finds that there is indeed a public interest in the subject-matter of the arbitration (see paragraph 65 of PO No. 19).

(v) The integrity of the proceedings

45. As far as the integrity of the proceedings is concerned, the Application comes at a very late stage of the proceedings and should, in principle, be rejected for that reason alone to avoid disrupting the conclusion of this arbitration. However, the Tribunal does not consider that dealing with the Application would unduly burden in the remaining schedule of these proceedings.

C. The conclusion

46. In light of the foregoing, it is undisputed that most of the conditions set forth in the BIT and the ICSID Arbitration Rules are met. However, the most important condition, which is to “assist the Tribunal” in deciding the issues before it, is not met. Therefore, the Tribunal decides to deny the Application and consequently the admission of the Submission in the record of this case.

47. The Tribunal’s decision is not inconsistent with the obvious public interest in the case at hand or the requirement for transparency. Both the Applicants and the Parties have had opportunities to present their views and arguments to the Tribunal. Moreover, there is no question that transparency is present and respected in this case under the applicable regime.

VI. ORDER

48. The Tribunal hereby orders as follows:

The Application is rejected.

On behalf of the Tribunal,

[signed]

Prof. Pierre Tercier
President of the Tribunal