

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. 14

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

15 August 2018

I. THE RELEVANT PROCEDURAL STEPS

1. On 14 November 2016, the Tribunal issued Procedural Order No. 3 (“PO 3”), governing issues of confidentiality in the present arbitration.
2. On 14 June 2018, the Tribunal issued Procedural Order No. 11 (“PO No. 11”), ruling on several outstanding issues in relation to confidentiality. Specifically, it confirmed “*the Parties’ agreement to make any proposed redactions and confidentiality designations in connection with the Counter-Memorial following the issuance of [] Procedural Order No. 11*” (PO No. 11, Decision No. 10).
3. On 28 June 2018, Respondent sent an email to ICSID, noting the Parties’ agreement on the redaction process for the Counter-Memorial. The Parties’ agreement is the following:

*1. The Respondent will identify, no later than **Thursday, 12 July 2018**, the exhibits and the portions of the relevant witness statements and expert reports that it proposes to reclassify as non-confidential.*

*2. The Claimants will provide their comments on the Respondent’s proposals no later than **Thursday, 26 July 2018**, which they will submit to the Tribunal on the same day.*

*3. The Tribunal will rule on any disagreements between the Parties regarding the non-confidentiality of the exhibits, witness statements and expert reports by **Friday, 10 August 2018**.*

*4. The Respondent will identify, no later than **10 business days** from receipt of the Tribunal’s ruling referred to in step 3 above (in principle **Friday, 24 August 2018**), the portions of the Counter-Memorial that it proposes to redact.*

*5. The Claimants will provide their comments on the Respondent’s proposed redactions, and will identify any additional portions of the Counter-Memorial that they propose to redact, no later than **10 business days** from receipt of the Respondent’s proposed redactions (in principle **Friday, 7 September 2018**). Should the Claimants have no additional proposed redactions, they will submit their comments to the Tribunal on the same day.*

*6. In the event the Claimants have identified additional portions of the Counter-Memorial for redaction, the Respondent will provide its comments thereon no later than **5 business days** from receipt of the Claimants’ proposed additional redactions (in principle **Friday, 14 September 2018**), which it will submit to the Tribunal on the same day.*

*7. The Tribunal will rule on any disagreements between the Parties regarding the redaction of the Counter-Memorial within **10 business days** of the receipt of the Parties' comments. (emphasis as in the original)*

Claimants confirmed their agreement via an email to the ICSID of the same date.

4. On 12 July 2018, Respondent provided the portions of the supporting documentation of the Counter-Memorial that it proposed to classify as non-confidential.
5. On 26 July 2018, Claimants provided their comments on Respondent's proposals regarding the non-confidentiality of the Counter-Memorial witness statements, expert reports and exhibits (Claim. 26.07.18).

Claimants enclosed the Parties' agreed redactions to the list of exhibits and to the witness statements of (i) Ms. Dorina Simona Mocanu and (ii) Mr. Sorin Mihai Găman and to the expert reports of (iii) Mr. Bernard J. Guarnera, Mr. Mark K. Jurgensen and Dr. Robert E. Cameron (Behre Dolbear & Company (USA) Inc.), (iv) Dr. Dacian Cosmin Dragoş and (v) Dr. Ian Thomson and Ms. Lorraine Wilde (CMA Partners LLP), including the accompanying appendices.

They also enclosed a Log concerning their disagreement on the redactions to the expert report of Dr. James C. Burrows of Charles Rivers Associates ("CRA Report"), as well as [REDACTED] in support of their objection to Respondent's proposed reclassification.

6. On 30 July 2018, Respondent sought leave to respond to Claimants' letter of 26 July 2018 concerning the redactions to the CRA Report, arguing that Claimants are seeking redactions on an entirely new basis not envisaged under PO No. 3 (Resp. 30.07.18)
7. On the same date, Claimants objected to Respondent's request to comment further on Claimants' proposed redactions to the CRA Report set forth in the Log submitted by Claimants on 26 July 2018.

Claimants enclosed two email correspondences between the Parties on the issue (Claim. 30.07.18)

8. On 31 July 2018, the Tribunal afforded both Parties a final opportunity to submit their comments in relation to the proposed redactions to the supporting documentation of the Counter-Memorial. It noted that it will render its decision by the agreed-upon deadline of 10 August 2018 or with a few days of delay.
9. On 3 August 2018, Respondent responded to Claimant's comments in the Log of disputed redactions to the CRA Report and to Claimants' letter of 30 July 2018 (Resp. 03.07.18).

10. On 8 August 2018, Claimants submitted their response to Respondent’s letter of 3 August 2018, regarding Respondent’s request to reclassify as non-confidential passages in the CRA Report (Claim. 08.08.18).

II. THE PARTIES’ POSITIONS

a. Respondent

11. Respondent submits that the disputed redactions in the CRA Report would not only be baseless but also highly improper. The appropriateness of the redaction or the possibility that CRA’s analysis, if disclosed, [REDACTED] do not constitute grounds for redaction (Resp. 03.08.18).
12. The standard for determining the confidentiality of information was set out by the Tribunal in paragraph 1.1 of PO No. 3. The disputed statements in the CRA Report are not confidential. They are passages in which Dr. Burrows [REDACTED] The [REDACTED] are in the public domain, [REDACTED], such that Dr. Burrows does not refer to confidential exhibits or witness evidence in the Disputed Statements. [REDACTED] they remain largely based on publicly available information (Resp. 03.08.18).
13. Claimants’ subjective concerns [REDACTED] cannot transform otherwise non-confidential information into “*information that is otherwise protected from disclosure*” (Resp. 03.08.18).
14. Claimants have failed to show (i) [REDACTED] (ii) [REDACTED] and (iii) [REDACTED] (Resp. 03.08.18).
15. Specifically, [REDACTED] is not a basis for redaction under either the Canada-Romania BIT or PO No. 3. If it were otherwise, then the transparency of these proceedings is reduced to a mockery of the requirements of the Canada-Romania BIT (Resp. 03.08.18).
16. In addition, there is no way to predict [REDACTED] [REDACTED] (Resp. 03.08.18).

b. Claimants

17. Claimants' position is that certain passages in the CRA Report should continue to be treated as confidential or otherwise protected from disclosure in accordance with Section 1.1(iii) of PO No. 3. This is because of the following:
- Those passages [REDACTED] if made public during the course of the arbitration, would pose [REDACTED] that may aggravate this dispute and interfere with Claimants' ability to present their case (Claim. 08.08.18).
 - As the Tribunal has recognized, information may warrant protection from disclosure in accordance with Section 1.1(iii) of PO No. 3 in the interest of "safeguarding of the proceedings and the right of a Party to present its case" (Claim. 08.08.18).
 - The possibility of [REDACTED] is not merely a subjective concern, [REDACTED] (Claim. 08.08.18).
 - The [REDACTED] would bring cannot be dismissed as inconsequential (Claim. 08.08.18).
 - It is uncertain whether disclosure of [REDACTED] will result in such burdensome consequences for Claimants. Nevertheless, the duty to protect the integrity of the proceedings includes "attempting to reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties" (Claim. 08.08.18).
 - The passages in dispute are relatively brief (Claim. 08.08.18).

III. THE TRIBUNAL'S CONSIDERATIONS

18. The issue before this Tribunal is whether certain statements made in the CRA Report submitted by Respondent with its Counter-Memorial and identified in the Log submitted by Claimant on 12 July 2018 (see above para. 5), should be reclassified as non-confidential.
19. *First*, in order to avoid any misunderstanding, "confidentiality" means in this context that the document or the passage of the document that is deemed confidential should not be published and made available to the public. It does not mean that the other Party shall not receive it or have access to it in a full unredacted form. In the present case,

there is no dispute that all facts in question and presented before this Tribunal are known by both Claimants and Respondent.

20. *Second*, it is recalled that:

- The Parties agreed on the process to deal with the redactions to the Counter-Memorial and the supporting documentation (see above para. 3).
- The Parties followed such process and agreed on the confidentiality designations to the list of exhibits to the Counter-Memorial and on the scope of redactions to the witness statements of (i) Ms. Dorina Simona Mocanu and (ii) Mr. Sorin Mihai Găman and to the expert reports of (iii) Mr. Bernard J. Guarnera, Mr. Mark K. Jurgensen and Dr. Robert E. Cameron (Behre Dolbear & Company (USA) Inc.), (iv) Dr. Dacian Cosmin Dragoș and (iii) Dr. Ian Thomson and Ms. Lorraine Wilde (CMA Partners LLP), including the accompanying appendices (Claim. 26.07.18).
- Claimants reserved their right to object to a request by Respondent to reclassify as non-confidential further witness statements and expert reports, including those that may be filed in support in future submissions (Claim. 26.07.18).
- The Parties agreed in significant respect with regard to the CRA Report although, with a few items left for decision by this Tribunal. Specifically, Claimants oppose the reclassification as non-confidential of 11 headings and statements in the CRA Report that discuss [REDACTED]

21. *Third*, it appears that the Parties are in dispute as to whether Respondent already had an opportunity to comment on the bases of Claimants' objections to reclassifications as non-confidential of the 11 headings and statements in the CRA Report (evident in the Log communicated by Claimant on 12 July 2018). As the Tribunal granted both Parties a further opportunity to submit their comments in this respect (see above para. 8), it will not deal with whether Respondent had or did not have an opportunity to comment.

22. *Fourth*, it is further undisputed that the standard governing confidentiality is set out in Section 1.1 of PO No. 3 which reads as follows:

“The Parties shall treat as confidential in accordance with the terms of this Order the following categories of information and documents: (i) confidential business information; (ii) information that it is privileged; or (iii) information that is otherwise protected from disclosure”.

23. The Tribunal finds that the 11 headings and statements in the CRA Report do not qualify as confidential pursuant to Section 1.1(i) and (ii) of PO No. 3. With respect to the application of Section 1.1(iii), the Tribunal refers to its considerations set out in para. 54 of PO No. 11 which read as follows:

“Although the Tribunal finds the text of Section 1.1(iii) rather broad, it is not clear, based on a textual interpretation or by looking at the Parties’ submissions at this point, whether it is relevant to assessing Respondent’s request for reclassification. This being said and without dismissing the provision’s relevance, the Tribunal considers that, in the present situation, it enjoys a degree of discretion, which must be exercised by having the competing interests at play in mind. These are the following: (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. In the present case, no single interest should override the others.”

24. Accordingly, without dismissing the relevance of Section 1.1(iii), the Tribunal considers that in the present case it must determine whether there are reasons that permit it to exercise its discretion and decide that certain text in the documentation filed before it shall nonetheless be treated as confidential. In this respect, it considers the following:
- It appears that the Parties are in dispute as to whether information in relation to the 11 headings and statements has been publicly disseminated.
 - Whether the risk of [REDACTED] [REDACTED] during the pendency of this arbitration through the publication of the 11 headings and statements is a subjective one or not, is of no relevance; also of no relevance is the fact that [REDACTED]. The fact remains that Claimants consider it as a risk, which if materialised, may end up disrupting the present arbitral proceedings, including Claimants’ right to present their case.
 - Instead, Respondent bears no risk or detriment to its right to present its case if these 11 headings and statements are not made public. In fact, Respondent was and is free to present its case as it sees fit and in reliance of statements that are considered and should remain confidential.
25. Accordingly, the Tribunal considers that it is appropriate in the present case that the 11 headings and statements in the CRA Report and as noted in the Log enclosed in Annex A of the present Procedural Order shall not be made public.
26. *Finally*, the Tribunal’s decision to treat these headings and statements as confidential does not disregard in any manner the transparency requirements of the Canada-Romania BIT. Indeed Annex C to such BIT contemplates an agreement by the Parties to exclude certain documents from publication; and in case of dispute in this respect, the Parties themselves agreed that the Tribunal would ultimately decide (see PO No. 3).
27. In light of the above, the Tribunal decides that the 11 headings and statements in the CRA Report and as noted in the Log enclosed in the present Procedural Order No. 14 as Annex A shall not be made public.

28. The Parties are invited to go further with the procedure on the redactions to the Counter-Memorial as agreed on 28 June 2018 (see above para. 3).

IV. ORDER

29. Having reviewed and considered the Parties' positions, the Tribunal hereby orders as follows:

1. *The 11 headings and statements in the CRA Report and as noted in the Log enclosed in the present Procedural Order No. 14 as Annex A shall not be made public.*
2. *The Parties are invited to go further with the procedure on the redactions to the Counter-Memorial as agreed on 28 June 2018.*

On behalf of the Tribunal,

__[Signed]_____
Prof. Pierre Tercier
President of the Tribunal