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. 23

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

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6 September 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 30 June 2017, Claimants filed their ***Opening Memorial***, together with factual exhibits, legal authorities witness statements, expert reports and legal opinions.

3. On 22 February 2018, Respondent filed its ***Counter-Memorial***, together with factual exhibits, legal authorities, witness statements and expert reports.

4. On 2 November 2018, Claimants filed their ***Reply and Counter-Memorial on Jurisdiction*** together with factual exhibits, legal authorities, witness statements, expert reports and legal opinions.

5. On 7 December 2018, the Tribunal issued ***Procedural Order No. 19***, concerning a petition from non-disputing parties ("PO 19").

6. On 24 May 2019, Respondent filed its ***Rejoinder***, together with factual exhibits, legal authorities, witness statements, expert reports, legal opinions and a "declaration" from Mr. Victor Ponta.

7. On 28 June 2019, Claimants filed their ***Surrejoinder on the New Jurisdictional Objection***, together with legal authorities.

8. On 19 July 2019, Claimants sent ***a letter to the Tribunal,*** requesting to (a) exclude from the record testimony that they have no opportunity to confront through cross examination and (b) submit focused rebuttal evidence in response to the new evidence first submitted by Respondent with its Rejoinder ("Cl. 19.07.19" or "Application").

9. On 9 August 2019, Respondent sent a letter providing its ***comments to Claimant's Application*** ("Resp. 09.08.19").

10. After being afforded an opportunity for another round of submissions by the Tribunal, on 20 August 2019, Claimants filed their ***comments to Respondent's comments of 9 August 2019*** ("Cl. 20.08.19") and on 27 August 2019, Respondent filed its ***comments to Claimants' comments of 20 August 2019*** ("Resp. 27.08.19").

II. THE PRAYERS FOR RELIEF

A. Claimants

11. Claimants request that the Tribunal:

"*(a) exclude from the record the 'declaration'" of Mr. Ponta and all cross-references thereto;*

(b) exclude from the record the expert report of Ms. Reichardt and all cross-references thereto in Respondent's Counter-Memorial, Rejoinder, and other expert reports;

(c) exclude from the record the letters submitted with the Rejoinder as Exhibits CMA-122 and CMA-123 and all cross-references thereto;

(d) order Respondent to resubmit its Counter-Memorial, Rejoinder, and any accompanying statements, reports, or opinions without any references to Mr. Ponta's 'declaration', Ms. Reichardt's expert report, or Exhibits CMA-122 and CMA-123;

(e) allow Claimants to submit rebuttal documents in response to the new issues presented in Respondent's Rejoinder witness statements and expert reports at a date in advance of the Hearing, pursuant to paragraph 16.3 of PO 1; and

(f) confirm that witnesses and experts may provide rebuttal testimony in direct examination at the Hearing (of up to 30 minutes for fact witnesses and for experts as part of the direct examination or presentation of up to 1 hour permitted by PO 1 paragraph 18.5.3) to address the new issues presented in Respondent's Rejoinder, witness statements and expert reports, pursuant to paragraph 17.2 of PO1."

(Cl. 19.07.19, para. 82; Cl. 20.08.19, paras 139-140)

12. Claimants object to Respondent's proposal contained in its letter of 9 August 2019 for a limited rebuttal testimony in writing in advance of the Hearing (Cl. 20.08.19, para. 133). Further, it will not be reasonable or fair to require Claimants to make additional document production to support their requests (Cl. 20.08.19, para. 137).

13. Claimants therefore suggest that they submit any rebuttal documents no later than 14 October 2019 (i.e., seven weeks prior to the Hearing), and Respondent submits any further rebuttal documents no later than 11 November 2019 (i.e., three weeks prior to the Hearing) (Cl. 20.08.19, para. 138).

14. Finally, there is no basis to reject Claimants' reservation of rights to propound additional document requests as may be warranted and Claimants reserve all rights to request that the Tribunal draw adverse inferences in accordance with paragraph 18.6 of PO 1.

15. Claimants reserve all rights in relation to their claim for costs associated with their Application (Cl. 19.07.19, para. 81; Cl. 20.08.19, para. 141).

B. Respondent

16. Respondent requests that "(*i) none of the Respondent's evidence should be stricken from the record and (ii) the Claimants should not be provided an opportunity to submit any new evidence, whether documentary or in the form of direct testimony at the hearing*" (Resp. 09.08.19, para. 126; Resp. 27.08.19, para. 90).

17. In the alternative, Claimants should file "*a request as outlined in paragraph 57*" of Respondent's letter of 9 August 2019 and in the Annex to said letter by 1 September 2019.[1] Respondent would have until 8 September 2019 to provide observations and the Tribunal would have until 15 September 2019 to rule on Claimants' requests (Resp. 09.08.19, para. 127).

18. Respondent furthermore requests that the following safeguards be ordered to protect Respondent's right to due process and to ensure the fairness and integrity of these proceedings:

"*i)* ***Scope of the rebuttal evidence*** *– The Claimants will only be allowed to produce new evidence which is 'strictly responsive to new evidence presented in the Rejoinder;'*

ii) ***Timing of filing of the rebuttal evidence by both parties*** *– Any new evidence must be produced at the latest on 30 September 2019 to allow the Respondent to file responsive documentary evidence, if required, at the latest by 4 November 2019 (i.e. four weeks in advance of the hearing).*

iii) ***Measures relating to the hearing*** *– The Claimants' request to present new evidence on direct examination at the hearing should be denied without any hesitation. Should the Tribunal allow new witness or expert testimony, such*

[1] Paragraph 57 reads: "*An application for leave to file new evidence under paragraph 16.3 must be conducted, not on a general basis, but on a case-by-case basis. The Claimants must submit an application to file new evidence that is 'reasoned,' i.e. that identifies the number of new documents that they seek to submit, the date and description of that document, the exceptional circumstances justifying the request to product that specific document, and the purpose for which they seek to submit the document. Pursuant to paragraph 16.3, the Respondent would then have the opportunity to provide 'observations.' The Tribunal would in turn decide, for each request, whether 'exceptional circumstances' justify the request and, if so, whether in the Tribunal's discretion it deems fit to grant or deny the application. In annex to this letter, the Respondent submits a model table that could serve as a basis for any such application and for the Tribunal's determination.*"

> *evidence should be strictly limited to written rebuttals of the Respondent's witnesses and experts evidence submitted with the Rejoinder, and should be filed at the latest on 30 September 2019 to allow sufficient time for the Respondent to file responsive witness or expert evidence, if required, by 4 November 2019 (i.e. four weeks in advance of the hearing). Considering these rebuttal statements would be 'limited in scope' (as recognized by the Claimants), there is sufficient time before the hearing for such an exchange to take place without requiring to move the hearing.*" (Resp. 09.08.19, para. 128; Resp. 27.08.19, paras 91-92).

19. Claimants' timing proposal (see above para. 13) is prejudicial to Respondent and is not acceptable (Resp. 27.08.19, para. 93).

20. Finally, Claimants' reservation of right to "*propound further document requests as may be warranted*" should be rejected (Resp. 09.08.19, para. 129).

21. Respondent reserves all its rights in relation to its claim for costs associated with Claimants' Application (Resp. 09.08.19, para. 130).

III. THE ISSUES

22. The issues that arise from Claimants' Application concern the admissibility of certain documents filed with Respondent's Rejoinder and the possibility for Claimants to address any new material / issues submitted with such Rejoinder.

23. Claimants make two general requests in this connection.

- *First*, the exclusion from the record of testimony that Claimants have no opportunity to confront through cross-examination (hereinafter the "First Request").

- *Second*, the opportunity to submit focused rebuttal evidence in response to the new evidence first submitted by Respondent with its Rejoinder (hereinafter the "Second Request").

24. In deciding these two Requests, the Tribunal shall first set out the Parties' relevant positions and second its considerations. It notes that, while it has carefully examined and considered all detailed arguments presented by the Parties in connection with these Requests (over 100 pages), it does not consider necessary to set out in the present Procedural Order all such arguments. Instead, it shall set out the Parties' arguments in a very brief form.

IV. THE FIRST REQUEST

A. In general

(1) The Parties' positions

(i) Claimants

25. Claimants request to exclude from the record testimony that they have no opportunity to confront through cross-examination, specifically:

(i) a witness statement submitted by Respondent with its Rejoinder from former Romanian Prime Minister, Mr. Ponta, styled as a "Declaration";

(ii) the expert opinion submitted by Respondent with its Counter-Memorial from Ms. Cathy Reichardt of Chris Morgan Associates ("CMA");

(iii) a letter from Dr. Amalia Şerban, an official from Romania's Ministry of Health, responding to various questions posed by Respondent's counsel for purposes of this arbitration, submitted with the Rejoinder as Exhibit CMA-122; and

(iv) a letter from Romania's Deputy Prime Minister and Minister of Environment Ms. Graţiela Leocadia Gavrilescu, responding to various questions posed by Respondent's counsel for the purposes of this arbitration, submitted with the Rejoinder as Exhibit CMA-123.

26. According to Claimants, fundamental *principles of fairness, equality of the parties, and due process* require that both Parties have a full and equal opportunity to challenge the evidence submitted against them by the other Party (Cl. 19.07.19, para. 2). Indeed, the procedural orders in this case establish that the testimony of witnesses or experts who fail without reason to make themselves available from cross-examination may be excluded and the Tribunal may draw adverse inferences (Cl. 19.07.19, paras 3-4; Cl. 20.08.19, para. 2). These principles were reaffirmed in the *IBA Rules on the Taking of Evidence in International Arbitration* (Cl. 19.07.19, para. 5) and by numerous other tribunals (Cl. 19.07.19, para. 9; Cl. 20.08.19, para. 7).

27. While the Tribunal must judge the admissibility and weight of evidence, it must exercise its judgment in a manner that maintains the integrity of the proceeding and respects principles of fairness and due process (Cl. 20.08.19, para. 4). Admitting and relying on written testimony of a fact or expert witness who failed without a valid reason to appear at the Hearing, would so seriously violate a fundamental rule of procedure that any resulting award would be annullable (Cl. 20.08.19, para. 5).

28. Contrary to Respondent's argument, each of the testimonies falls within the scope of paragraph 18.6 of PO 1 (Cl. 20.08.19, para. 8).

(ii) Respondent

29. Respondent submits that the Tribunal should deny Claimants' requests (Resp. 09.08.19, para. 2). Claimants' Application is seeking to undermine the integrity of these proceedings by imposing unjustified limits on Respondent's right of defense (Resp. 27.08.19, para. 2).

30. The present case does not involve a witness or an expert who fail "*without a valid reason to appear at the hearing*" although duly called, which is the premise of paragraph 18.6 of PO 1; in any event it would not justify a finding of inadmissibility (Resp. 09.08.19, para. 10; Resp. 27.08.19, paras 20-21). This paragraph is in line with ICSID Rule 34 (Resp. 09.08.19, para. 12). Further, admitting the evidence would not give Respondent an undue advantage or harm the integrity of this arbitration. Excluding it, however, would give undue advantage to Claimants and also undermine the integrity of the arbitration by denying Respondent's right to due process (Resp. 27.08.19, para. 22)

31. Respondent has transparently indicated that the individuals in question would not participate at the Hearing. The Tribunal thus has the power and should assess the evidentiary weight of the statements provided; there is no basis, nor would it be appropriate, to strike them off the record or to draw adverse inferences (Resp. 09.08.19, para. 11). The exclusion of evidence is a sanction reserved for situations in which the admission of a particular piece of evidence would give a party an undue advantage or harm the integrity of the arbitration. Claimants have failed to justify the necessity for the extreme remedy sought (Resp. 27.08.19, para. 4)

(2) The Tribunal's analysis

32. It is recalled that the present proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006 (hereinafter "ICSID Rules") (PO 1, para. 1), as well as the procedure adopted by the Tribunal, with the agreement of the Parties, in PO 1. The relevant provisions are, as also presented by the Parties, the following:

- ICSID Rule 34(1): "*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value*".

- ICSID Rule 34(2)(a): "*The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts*".

- ICSID Rule 34(3): "*The parties shall cooperate with the Tribunal in the production of the evidence and in other measures provided for in paragraph (2).*"

- ICSID Rule 35(1): "*Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Question may also be put to them by a member of the Tribunal*".

- Paragraph 18.6, PO 1: "*Witnesses and experts shall be made available for examination during the oral hearing. If a witness or expert whose appearance has been requested pursuant to §18.2 fails without a valid reason to appear at the hearing, the Tribunal may exclude any statement(s) or report(s) of such witness or expert from the record, and/or accord such weight, if any, to the witness testimony as it deems appropriate.*"

33. It follows from the above that, in relation to Claimants' First Request, the Tribunal considers that it enjoys a wide discretion in deciding the admissibility and probative value of evidence in the present proceeding. Its discretion must be exercised with a view of ensuring that the fundamental principles of due process, equality and fairness are protected. At the same time, the Tribunal's discretion must take into account the need to preserve the integrity of the proceedings.

34. Further, the Parties' rights in relation to the admissibility of evidence include the right to test, where possible, opposing evidence in the form of witness or expert testimony.

35. It is with these principles in mind that the Tribunal shall determine the admissibility of Mr. Ponta's "declaration", Ms. Reichardt's expert report and Exhibits CMA-122 and CMA-123 below.

B. The "Declaration" of Mr. Ponta

(1) The Parties' positions

(i) Claimants

36. Respondent has submitted with its Rejoinder written testimony from Mr. Ponta, which it has styled as a "declaration" rather than as a "witness statement", because Mr. Ponta states that he will not testify at the Hearing, due to "*personal reasons*" that he is unable to disclose (Cl. 19.07.19, para. 11; Cl. 20.08.19, para. 10).

37. Styling the testimony as a "declaration" does not exempt it from the requirements of paragraph 18.6 of PO 1. Nor can undisclosed alleged personal reasons constitute a "valid reason" to exclude or justify Mr. Ponta's absence from the Hearing. In the circumstances of this case the Tribunal must exclude his testimony – which goes to the heart of the disputed facts – from the record to safeguard the fairness and integrity of these proceedings (Cl. 19.07.19, paras 12-13; Cl. 20.08.19, para. 9). Otherwise, it would be materially prejudicial to Claimants to allow Mr. Ponta's "declaration" to be considered in this arbitration without Claimants having the opportunity to cross-examine him (Cl. 19.07.19, para. 14). Further, such declaration lacks reliability and

authenticity and thus cannot provide any assistance to the Tribunal. Respondent's bad faith in connection with this is a further ground for excluding Mr. Ponta's declaration from the record (Cl. 20.08.19, paras 15-16).

38. For the same reasons, the cross-references in the Rejoinder to the declaration also must be excluded from the record (Cl. 19.07.19, para. 10; Cl. 20.08.19, para. 17).

(ii) Respondent

39. Mr. Ponta indicated from the start that, while he was willing to provide evidence, he would not be available to participate at the Hearing. That is why his statement was labeled as a "declaration" rather than as a "witness statement." The Tribunal should therefore accord the weight it deems appropriate to Mr. Ponta's evidence, in light of the record as a whole (Resp. 09.08.19, para. 6; Resp. 09.08.19, para. 15).

40. Further, the situation is understandable given the former and current position of Mr. Ponta (Resp. 09.08.19, para. 14). This situation is entirely different, and must be distinguished, from the situation where a witness who, after being called to testify, fails to appear without explanation (Resp. 09.08.19, para. 16; Resp. 27.08.19, paras 25-27).

41. For these reasons, the Tribunal should not exclude Mr. Ponta's evidence from the record, but, pursuant to paragraph 18.6 of PO 1, accord the weight it deems appropriate to his declaration in light of the record as a whole (Resp. 09.08.19, para. 17).

(2) The Tribunal's analysis

42. It is recalled that, pursuant to paragraph 18.6 of PO 1 (see above para. 32), a witness shall be made available for examination. If such witness fails without a valid reason to appear at the hearing, his or her testimony may be excluded and/or accorded such weight as it is deemed by the Tribunal appropriate. This is in line with ICSID Rule 34(1) set out above (see also above para. 32).

43. In the present case, it appears that the only reason why Mr. Ponta's statement was styled as a "declaration" was his inability to make himself available for testimony at the Hearing. There is no indication from Respondent's side that Mr. Ponta's statement should not be treated in substance as a "witness statement". In fact, Respondent points to the application to paragraph 18.6 of PO 1 which governs witness testimony.

44. Accordingly, the Tribunal considers that Mr. Ponta's declaration shall be re-submitted as a "witness statement" and form part of the evidentiary record. In this case, Claimants shall have the right to call Mr. Ponta for cross-examination and/or test his testimony during the Hearing and subsequent written submissions. To the extent that Mr. Ponta is still unable to testify by that time, Respondent shall inform the Tribunal and Claimants. The Tribunal shall only then determine the admissibility and probative value of Mr. Ponta's statement, if any.

45. To the extent that Respondent submits that Mr. Ponta's statement shall remain a "Declaration" and not governed by the rules on witness testimony, such "declaration" will not be considered or admitted into the present proceedings. This is indeed in line with the Tribunal's considerations in PO 19 in connection with a petition from Non-Disputing Parties. The Tribunal considered that testimonies referred to or relied on in the Non-Disputing Parties' Submission cannot be considered or admitted to the present proceedings, because such testimonies cannot be considered or evaluated as "witness statements" which would require their testing via cross-examination (see para. 61 of PO 19):

46. Therefore, Respondent may resubmit Mr. Ponta's statement as a "witness statement" **by 20 September 2019** and such statement, including any references thereto, shall form part of the record and the procedure set out in paragraph 43 above shall apply. Otherwise, Mr. Ponta's "declaration" [and any reference thereto shall be stricken from the record altogether.

C. The Expert Report of Ms. Reichardt of CMA

(1) The Parties' positions

(i) Claimants

47. Respondent submitted Ms. Reichardt's expert report with the Counter-Memorial. Ms. Reichardt did not submit a second report to accompany the Rejoinder. Respondent states in its Rejoinder that Ms. Reichardt "is no longer available for personal reasons". Not being available to participate in the arbitration for undisclosed alleged personal reasons cannot be considered a valid reason to exclude or justify Ms. Reichardt's absence under paragraph 18.6 of PO 1. In fact, Ms. Reichardt appears still to be employed by CMA and soliciting work as an expert. Ms. Reichardt's report therefore should be excluded (Cl. 19.07.19, para. 16). While Respondent asserts that Ms. Reichardt "*is not, and has never been, an employee of CMA*", she was listed as a "Senior Environmental Scientist" on CMA's webpage of "Our Team" of "Staff & associates", until her biographical information was removed from CMA's website in the days before Respondent filed its reply to Claimants' Application (Cl. 20.08.19, paras 19-20).

48. It is highly prejudicial and improper for Respondent to be permitted to rely upon expert evidence of a technical nature without providing Claimants the opportunity to address that evidence through cross-examination. For the same reasons, the numerous references in Respondent's pleadings to her Report must be excluded. The fact that Claimants may cross-examine Ms. Blackmore, Ms. Wilde, and Mr. Claffey – who rely on Ms. Reichardt's expert report – as to their reports is not a substitute for being able to cross-examine Ms. Reichardt on her foundational report. (Cl. 19.07.19, paras 15, 17; Cl. 20.08.19, paras 18, 22-23 and 25).

49. Excluding the expert report of an expert who has withdrawn from the arbitration in no way violates any of Respondent's rights (Cl. 20.08.19, para. 24).

(ii) Respondent

50. Ms. Reichardt (of the CMA team) is no longer an expert witness in that she has been compelled to withdraw from these proceedings for personal reasons. However, Ms. Christine Blackmore (also of the CMA team) has endorsed Ms. Reichardt's evidence and will be available for cross-examination, including on the evidence she has endorsed. Contrary to Claimants' assertions, Ms. Reichardt is not an employee of CMA and is not currently collaborating therewith (Resp. 09.08.19, paras 7, 19; Resp. 27.08.19, paras 32-35).

51. Further, this is not a situation where a Respondent expert filed a report with the Rejoinder and is not appearing at the Hearing. The report at issue was filed with the Counter-Memorial and Claimants have had ample opportunity to respond to it (Resp. 09.08.19, para. 22).

52. Excluding Ms. Reichardt's expert report from the record, or excluding reference to her report from the first expert reports of Ms. Wilde and Mr. Claffey would not only be unwarranted, but also be wholly inappropriate and violate Respondent's right to be heard (Resp. 09.08.19, para. 23).

53. Claimants' request must therefore be rejected (Resp. 09.08.19, para. 21).

(2) The Tribunal's analysis

54. The Tribunal reiterates its considerations in paragraph 41 above concerning the availability of a witness or expert for testimony at the hearing. It notes that its power to exclude testimony of a witness or expert who does not appear at the Hearing is discretionary even in the absence of a valid reason.

55. In the present case, Ms. Reichardt, who filed an expert report together with Respondent's Counter-Memorial, excuses her appearance at the Hearing for personal reasons. The Tribunal considers that, while Respondent and/or Ms. Reichardt could have offered more explanation behind her advance confirmation of non-availability at the Hearing, there is no proof of bad faith behind such non-availability. It is therefore appropriate for the Tribunal to, in the exercise of its discretion, keep Ms. Reichardt's report in the record of this case and accord it the weight it deems appropriate, in light of the remaining written and oral evidentiary record. To the extent that it appears that there is no reason at all behind Ms. Reichardt's absence from the Hearing, the Tribunal may revisit its decision.

56. Therefore, Ms. Reichardt's expert report, including any references thereto, shall remain part of the record.

D. Letter from Dr. Amalia Şerban (Exh. CMA-122) and letter from Minister of Environment Graţiela Leocadia Gavrilescu (Exh. CMA-123)

(1) The Parties' positions

(i) Claimants

57. *Exhibit CMA-122*, which is a letter from Dr. Amalia Şerban, official from the Ministry of Health, purporting to respond to an inquiry (not in the record) from Respondent's arbitration counsel, should be excluded from the record in accordance with paragraph 18.6 of PO 1; the cross-references to it in Respondent's pleading and expert reports should also be excluded (Cl. 19.07.19, para. 18). This exhibit is effectively witness testimony solicited by Respondent's arbitration counsel for purposes of this arbitration on the subject of Project emergency preparedness. As presented, it is not subject to cross-examination. Nevertheless, Respondent's experts rely on assertions made in Dr. Şerban's letter as purported statements of fact (Cl. 19.07.19, para. 19).

58. Moreover, the fact that Respondent chose to solicit this testimony in support only of its Rejoinder notwithstanding that its experts purported to address this topic in the Counter-Memorial round aggravates the prejudice to Claimants in not being able to respond. The letter obviously is not a contemporaneous document and, as testimony, which it is, it cannot be admissible. Therefore, Exhibit CMA-122, together with references to it, must be excluded from the record (Cl. 19.07.19, para. 20; Cl. 20.08.19, paras 26-27).

59. The same applies for *Exhibit CMA-123*, which is a letter from Minister of Environment Graţiela Leocadia Gavrilescu, purporting to respond to an inquiry (not in the record) from Respondent's arbitration counsel (Cl. 19.07.19, para. 21). This is not a document, but rather is witness testimony solicited by Respondent's arbitration counsel for purposes of this arbitration, here on the subject of alleged requirements relating to cyanide transport and storage. As presented, the proffered testimony is not subject to cross-examination (Cl. 19.07.19, para. 22). It cannot be admissible and must, together with the references to it, be excluded (Cl. 19.07.19, para. 23).

60. Claimants dispute Respondent's contention that Dr. Şerban and Ms. Gavrilescu are not witnesses and that the letters do not represent witness evidence (Cl. 20.08.19, paras 28-29).

61. It should be obvious that contemporaneous documents or documents prepared for other purposes are to be distinguished from documents containing statements prepared in coordination with and at the request of arbitration counsel for use in the arbitration (Cl. 20.08.19, para. 31). Further, cross-examination of Ms. Blackmore and Ms. Wilde as to the content of those letters provides no remedy for Claimants. Neither Ms. Blackmore nor Ms. Wilde has any knowledge of the issues addressed in those letters and they both merely assume the truth of their contents (Cl. 20.08.19, para. 32).

(ii) Respondent

62. The authors of *Exhibits CMA-122* and *CMA-123* were never purporting to give witness testimony. In any event, the content of those letters can be challenged in ways other than through cross-examination of their authors. By taking issue with these letters, Claimants seem to suggest that any author of any document on record should be a witness, which is obviously not the case (Resp. 09.08.19, para. 8). Because these individuals are not (or no longer) witnesses, the cases cited by Claimants in the Application involving witnesses who failed to appear at hearings are not relevant (Resp. 09.08.19, para. 9). For this reason, Claimants' reference to paragraph 18.6 of PO 1 is inapposite (Resp. 09.08.19, paras 27, 33; Resp. 27.08.19, para. 36).

63. Further, contrary to Claimants' assertion, Exhibits CMA-122 and CMA-123 were responsive to the Reply submission (Resp. 09.08.19, paras 28-29, 35).

64. Finally, Claimants will have the opportunity to cross-examine Ms. Blackmore regarding Exhibit CMA-122 and Ms. Wilde regarding Exhibit CMA-123 and, in so doing, will be free to challenge the evidentiary weight of the document and her reliance thereon (Resp. 09.08.19, paras 30, 36).

65. The Tribunal should therefore reject Claimants' request to exclude Exhibits CMA-122 and CMA-123 from the record (Resp. 09.08.19, paras 26, 31).

(2) The Tribunal's analysis

66. The Tribunal notes that Respondent is clear that Exhibits CMA-122 and CMA-123 are not purported to be witness statements in any manner. It follows, that the provisions of the ICSID Rules and PO 1 concerning witness testimony are not applicable.

67. This being said, the Tribunal remains the "*judge of the admissibility of any evidence adduced and of its probative valu*e" (ICSID Rule 34(1); see also above, para. 32). In this case, the two letters respond to requests made by Respondent's counsel in view of information provided by Counsel in May 2019.

68. Specifically, Exhibit CMA-122 begins by stating:

> "*We are writing to you following your request by which you required us to communicate to you what would be the nearest hospital to Roșia Montană that could ensure medical interventions to the victims of accidents (which involve cyanide) in case of a major incident with a large number of causalities:*
>
> *i. either from a failure of the tailings management facility (which would contain cyanide) which would lead to a mudslide towards Abrud town;*

> *ii. or, there could be an inadvertent release of cyanide which would most likely affect workers.*
>
> *In view of drafting our institution's response we took into account the information concerning the Roșia Montană mining project communicated by your firm reiterated below*."

69. Similarly, Exhibit CMA-122 provides in its first page:

> "*We are writing to you further to the questions that your firm has asked in connection to the following matters, more specifically whether:*
>
> *a) the provisions of Directive 2012/18/EU on the control of major accident hazards involving dangerous substances ("Seveso III Directive") are applicable in the case of the consolidated unloading and storage hub which Roșia Montană Gold Corporation S.A. ("RMGC") planned to build in the Ampellum industrial area of the city of Zlatna. More specifically, you requested from us to tell you whether this consolidated hub may be qualified as an "establishment" as per Article 3 (1) of Seveso III Directive. For that purpose, you sent us a copy of the C-0943 exhibit and you specified inter alia that: (i) RMGC's "Roșia Montană" project provided for two daily truck deliveries (from this consolidated hub in Zlatna to Roșia Montană), and every truck should have carried 20 tons of cyanide, and (ii) the cyanide should have been stored in Zlatna awaiting the truck delivery, therefore at least 20 tons of cyanide would have been stored anytime, especially in winter time, when the weather conditions would prevent road deliveries;*
>
> *b) building the consolidated hub in question would also involve an environmental impact assessment (EIA procedure) in order to get the environmental permit for the authorisation of the construction works.*
>
> *Regarding your questions, please be advised of the following:* […]."

70. There is therefore no doubt that the two documents are not contemporaneous documents; there is also no doubt that, while they are a not a "report" or "statement" or "pleading" by Respondent's Counsel in the framework of PO 1 and the ICSID Rules, they seek to offer some form of testimony in support of Respondent's case. In these circumstances, such documents cannot form part of the record unless they are resubmitted as testimony in the form envisioned by the ICSID Rules and PO 1.

71. Accordingly, as in the case of the "declaration" of Mr. Ponta (see above paras 43-45), Respondent may, if it wishes, resubmit these exhibits as "witness statements" or "expert reports" **by 20 September 2019** and such statements or reports, including any references thereto, shall form part of the record. In this case, the procedure set out in paragraph 43 above shall apply. Otherwise, Exhibits CMA-122 and CMA-123 and any references thereto shall be stricken from the record altogether.

V. THE SECOND REQUEST

A. In General

(1) The Parties' positions

(i) Claimants

72. Claimants request to submit focused rebuttal evidence in response to the new evidence first submitted by Respondent with its Rejoinder. This request is made pursuant to paragraphs 16.3 and 17.2 of PO 1 in view of the extraordinary amount of new evidence first submitted by Respondent with its Rejoinder, constituting "exceptional circumstances" (Cl. 19.07.19, paras 24, 34, 70). Such evidence should have been submitted with Respondent's Counter-Memorial so that Claimants could respond in the Reply (Cl. 20.08.19, paras 67-68). Specifically:

(i) Respondent's Counter-Memorial was accompanied by two witness statements: one from Mr. Sori Găman (official from the Ministry of Economy and member of RMGV's Board) consisting of seven pages, half of which address his personal background, and one from Ms. Dorina Mocanu (official from the Ministry of Environment) consisting of 116 pages, three of which address her personal background.

(ii) Respondent's Rejoinder in contrast was accompanied by 13 witness statements, 11 of them from new witnesses.

(iii) Mr. Găman's second statement is 78 pages long (with 247 footnotes referring to record evidence) and Ms. Mocanu's second statement is 83 pages long (with 323 footnotes referring to record evidence).

(iv) Entirely new witness statements are submitted by two former Prime Ministers, Mr. Emil Boc (15 pages) and Mr. Ponta (24 pages); former Minister of Economy Mr. Ion Ariton (38 pages); former Minister of Economy Mr. Lucian Bode (eight pages); local community activist and Project opponent, Mr. Ioan Jurca (54 pages plus a 19-page annex); members of the local community, Mr. Constantin Camarasan (three pages), Mr. Eugen Cornea (seven pages), Mr. Petru Devian (three pages), Mr. Augustin Golgoţ (three pages), Mr. Niculina Jeflea (three pages), and Ioan Petri (five pages).

(v) The Rejoinder also is accompanied by six entirely new expert reports, from: Ms. Christine Blackmore, Mr. Karr McCurdy, Prof. Dana Tofan, Profs Irina Sferdian and Lucian Bojin, Dr. Augustin Stoica, and Dr. Alina Pop.

(vi) This is in addition to second expert reports from each of Behre Dolbear, Dr. James Burrows, Mr. Dermot Claffey, Dr. Peter Claughton, Dr. Mark Dodds-

Smith, Larraine Wilde, Prof. Dracian Dragoş, and Dr. Ian Thomspon, several of which present significant new expert analyses that should have been presented in the Counter-Memorial round (Cl. 19.07.19, para. 28).

73. Waiting until the Rejoinder to submit witness and expert evidence that responds to the Memorial is contrary to both paragraphs 16.1 and 17.1 of PO 1 and ICSID Arbitration Rule 31(3) (Cl. 19.07.19, para. 32; Cl. 20.08.19, paras 41, 43).

74. Where applicable pleadings rules are not followed, tribunals may decide to exclude from the record evidence that should have been submitted earlier (Cl. 20.08.19, para. 53), or permit the opposing party to submit direct testimony at the hearing to respond to evidence that the witnesses or experts have not previously had an opportunity to address (Cl. 19.07.19, paras 28-31; Cl. 20.08.19, paras 54-58).

75. Claimants request that the Tribunal take certain measures that will be a necessary albeit modest accommodation to ensure the equal treatment of the parties and the fairness of the proceeding (Cl. 19.07.19, para. 71). The most appropriate remedy is for the Tribunal to allow the introduction of rebuttal documents (strictly responsive to new evidence presented in the Rejoinder) and simply to clarify that witnesses and experts may include in their direct Hearing testimony new points in rebuttal (Cl. 19.07.19, paras 72-76). Respondent would not be prejudiced who would always retain the right to respond finally on all merits issues both through cross-examination of Claimants' witnesses and experts as well as through the direct Hearing testimony of its own witnesses and experts (Cl. 19.07.19, para. 78).

76. If proceeding in this manner is not acceptable to the Tribunal, then Claimants request the opportunity to submit appropriately focused written rebuttal statements and expert opinions, together with any supporting documentation in advance of the Hearing. That approach however inevitably would delay the Hearing and should be avoided as it is indeed unnecessary (Cl. 19.07.19, paras 77, 79).

77. Claimants reject Respondent's arguments. They submit *inter alia* that a fair proceeding requires that both Parties are given the opportunity to rebut the other side's evidence without having to guess what that evidence will be. (Cl. 20.08.19, para. 62). Nor did they fail to address issues in the Memorial or present issues for the first time in their Reply (Cl. 20.08.19, paras 63-66).

(ii) <u>Respondent</u>

78. Respondent did not withhold any evidence and all of the disputed evidence at issue was properly filed in support of the Rejoinder in the ordinary course of business in these arbitration proceedings and in response to Claimants' allegations (Resp. 09.08.19, para. 38; Resp. 27.08.19, para. 46).

79. There are no "exceptional circumstances" justifying Claimants' request to produce new evidence (Resp. 09.08.19, paras 39, 42). First, Respondent's submission of new

evidence with its Rejoinder was proper and necessary to respond to Claimants' Reply. Claimants actually made their full case in their Reply, not the Memorial (Resp. 09.08.19, paras 44-48). Second, even assuming Respondent submitted in support of its Rejoinder evidence that could have been, in part, submitted earlier (which is denied), nothing in the ICSID Rules restricts the Parties' ability to submit new evidence during the written phase of arbitration proceedings. The question whether a particular Respondent witness statement or expert report is responsive to the Memorial or to the Reply is not envisaged by paragraph 16.1 of PO 1 (Resp. 09.08.19, paras 49-50). Indeed, paragraphs 16.1 of 17.1 of PO 1 and ICSID Rule 31(3) do not limit a respondent's right to submit with the Rejoinder witness and expert evidence that is also responsive to the Memorial (Resp. 27.08.19, paras 39-45).

80. Further, Claimants would not be unfairly prejudiced if their Application were denied. Claimants will have the opportunity to address Respondent's arguments developed in the Rejoinder by cross-examining Respondent's witnesses and experts at the Hearing and in closing arguments and/or in a post-Hearing submission (Resp. 09.08.19, para. 52). Granting Claimants' Application would deprive Respondent of the right to be heard (Resp. 09.08.19, paras 53-54). It would also be particularly prejudicial to Respondent given the scope of issues raised by Claimants in their Application (Resp. 09.08.19, para. 56).

81. An application for leave to file new evidence under paragraph 16.3 must be conducted, on a case-by-case basis. Claimants must submit an application to file new evidence that is "reasoned" and Respondent would then have the opportunity to provide "observations." The Tribunal would in turn decide, for each request, whether "exceptional circumstances" justify the request and, if so, whether in the Tribunal's discretion it deems fit to grant or deny the application. Respondent submits a model table that could serve as a basis for any such application and for the Tribunal's determination (Resp. 09.08.19, para. 57).

82. Claimants' request for the opportunity to present further witness testimony on direct examination at the Hearing would also violate Respondent's due process rights and must be rejected. Even if the Tribunal were to conclude that exceptional circumstances justified any portion of the Application and warranted Claimants' production of additional evidence, Respondent must have an appropriate amount of time to review that additional evidence and must have the right to respond thereto (Resp. 09.08.19, para. 58). Accordingly, even assuming new witness evidence were allowed, this evidence must be written and, pursuant to paragraph 17.2 of PO 1, can be permitted only following a "reasoned" request and a demonstration that the specific testimony in question is necessary in light of "exceptional circumstances" and only after Respondent has had an opportunity to provide observations. Furthermore, Respondent must be granted the opportunity to produce written rebuttal evidence in response to any new witness evidence (Resp. 09.08.19, paras 41, 59).

83. Regarding potentially new rebuttal evidence (documentary and/or oral witness evidence), neither paragraph 16.3 nor paragraph 17.2 of PO 1 can be used to inverse the Parties' roles in the arbitration. Respondent, not Claimants, is entitled to go last. Granting the Application would run afoul of this fundamental principle and agreement between the Parties. Further, Claimants' suggestion that the Hearing may need to be postponed is completely misguided as they will have had around seven months from the submission of the Rejoinder until the Hearing to prepare the cross-examination and to challenge alleged new testimony or reliance on new exhibits (Resp. 09.08.19, para. 60).

(2) The Tribunal's analysis

84. The relevant provisions of the ICSID Rules and PO 1 in relation to Claimants' Second Request are the following:

- ICSID Rule 31(3): "*A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.*"

- Paragraph 16.1, PO 1: "*The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities (hereinafter 'documents'). Further documents relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder.*"

- Paragraph 16.3, PO 1: "*Either party may submit an application to present additional evidence after the filing of its respective last submission should it consider that exceptional circumstances exist, based on a reasoned written request followed by observations from the other party. The Tribunal shall decide, in its discretion, on any such application.*"

- Paragraph 17.1, PO 1: "*The Memorial and Counter-memorial shall be accompanied by the witness statements and/or expert reports relied upon by the parties. Further witness statements and/or expert reports relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder.*"

- Paragraph 17.2, PO 1: "*Neither party shall be permitted to submit any testimony beyond what is contemplated in §18 below that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party.*"

85. It follows from the above that, while indeed the second round of submissions should in principle be limited to the arguments or facts developed in the last previous

submission, it could be the case that additional facts may be required to be developed. This is because a party may often not have appreciated or become privy to facts, documents or arguments until the further study of the file and with the filing of its opponent party's rebuttal submission. This is indeed contemplated by paragraph 16.3 of PO 1, which permits an application for further documents following the last submission.

86. This being said, a party should not take the other party by surprise and, in bad faith, hold back, to the latter's detriment, the most important evidence until a late stage of the proceedings.

87. In light of the above, the Tribunal considers the following.

88. *First*, Claimants request the opportunity to submit rebuttal documents in response to alleged new issues presented in Respondent's witness statements and expert reports filed with the latter's Rejoinder.

89. Specifically, Claimants' letter of 19 July 2019 constitutes an application to present additional evidence based on a reasoned written request and Respondent's letter of 9 August 2019 constitutes observations to such application, both within the scope of paragraph 16.3 of PO 1. Separate to Claimants' application and Respondent's observations, the Tribunal has afforded both Parties the opportunity for further comments (see Claimants' letter of 20 August 2019 and Respondent's letter of 27 August 2019). No additional applications in the form advocated by Respondent are required.

90. *Second*, the Tribunal enjoys a degree of discretion in deciding Claimants' application based on the aforementioned letters. This exercise does not indeed require a document-to-document examination to determine whether Respondent's witness statements and expert reports do respond to arguments raised in the Reply or the Memorial. This is because, as stated in paragraph 84 above, a party's rebuttal might not always respond to the last submission.

91. Instead, paragraph 16.3 requires the existence of "exceptional circumstances", such that this request should not be granted lightly. Exceptional, nevertheless, does not imply "extraordinary". It means circumstances that justify another round of submissions.

92. *Third*, in the present case, there is a genuine dispute between the Parties as to whether the scope of Respondent's Rejoinder submission was the result of Claimants' Reply or whether it is such that entitles Claimants to submit rebuttal documents to the following:

(i) The Witness Statement of Mr. Boc (for Claimants see: Cl. 19.07.19, paras 37-38-39; Cl. 20.08.19, paras 69-74; for Respondent see: Resp. 09.08.19, paras 61-64; Resp. 27.08.19, para. 48).

(ii) The "Declaration" of Mr. Ponta (for Claimants see: Cl. 19.07.19, paras 40-43; Cl. 20.08.19, para. 9; for Respondent see: Resp. 09.08.19, para. 70; Resp. 27.08.19, para. 49).

(iii) The Witness Statements of Mr. Arito and Mr. Bode (for Claimants see: Cl. 19.07.19, paras 44-46; Cl. 20.08.19, paras 82, 84, 86-87; for Respondent see: Resp. 09.08.19, paras 66-68; Resp. 27.08.19, para. 48).

(iv) The Witness Statements of seven local residents: (for Claimants see: Cl. 19.07.19, paras 47-48; Cl. 20.08.19, paras 88-94; for Respondent see: Resp. 09.08.19, paras 73-83; Resp. 27.08.19, paras 60-65).

(v) The Second Statements of Mr. Găman and Ms. Mocanu (for Claimants see: Cl. 19.07.19, para. 49; Cl. 20.08.19, paras 50-51, 95-97; for Respondent see: Resp. 09.08.19, paras 87-92; Resp. 27.08.19, paras 67-68).

(vi) The Expert Report of Mr. McCurdy (for Claimants see: Cl. 19.07.19, paras 52-53; Cl. 20.08.19, paras 109-112; for Respondent see: Resp. 09.08.19, para. 93; Resp. 27.08.19, paras 69-72).

(vii) Expert Reports on Romanian law (for Claimants see: Cl. 19.07.19, paras 54, 58-61; Cl. 20.08.19, paras 99-107; for Respondent see: Resp. 09.08.19, paras 95-97; Resp. 27.08.19, paras 73-76).

(viii) Experts on Social License (for Claimants see: Cl. 19.07.19, paras 59-61; Cl. 20.08.19, paras 105-107; for Respondent see: Resp. 08.08.19, paras 100-104; Resp. 27.08.19, paras 54-58).

(ix) Other Expert Reports (for Claimants see: Cl. 19.07.19, paras 62-67; Cl. 20.08.19, paras 108-124; for Respondent see: Resp. 09.08.19, paras 98-125; Resp. 27.08.19, paras 77-89).

93. *Fourth*, and therefore, the Tribunal considers that, without adhering to the position of either Party, Claimants should have an opportunity to respond to the new witness statements and expert reports submitted by Respondent in its Rejoinder.

94. *Fifth* and nevertheless, this opportunity must take into consideration the following competing interests:

- The right of a party to plead last;

- The right of the Parties to meaningfully participate in the Hearing by having presented their entire case (and rebuttals); and

- The need to preserve the integrity of the proceedings and to prevent the disruption to either Party's preparation for the Hearing.

95. The Tribunal therefore considers that the most appropriate, in the circumstances, solution is to permit a limited and focused opportunity of rebuttal as follows:

(i) Claimants shall submit limited rebuttal documents in response to the new issues presented in Respondent's Rejoinder witness statements and expert reports (50 pages maximum) **by 4 October 2019**.

(ii) Respondent shall submit any rebuttal documents (50 pages maximum) **by 1 November 2019**.

(iii) The timing and scope of the direct examination of both Parties' witnesses and experts shall be handled by the Tribunal with flexibility. The general timing of the Hearing will be decided, after consulting with the Parties, during the Pre-Hearing Organization Meeting. In case the Parties wish to extend the scope of the direct examinations, they should indicate the subject-matters by the dates on which their rebuttal documents are due.

(iv) Both Parties shall have, if necessary, a further opportunity for rebuttal of these documents, during the Hearing and during post-Hearing submissions.

VI. COSTS IN RELATION TO THE APPLICATION

96. The Parties reserve all of their rights in relation to their claim for costs associated with Claimants' Application (Claimants: Cl. 19.07.19, para. 81; Cl. 20.08.19, para. 141; Respondent: Resp. 09.08.19, para. 130).

97. In light of the Parties' reservations, the Tribunal shall defer any determination in this respect to a later stage in the proceedings.

VII. ORDER

1. Respondent may resubmit Mr. Ponta's statement as a "witness statement" by 20 September 2019 and such statement, including any references thereto, shall form part of the record and the procedure set out in paragraph 43 of the present Procedural Order shall apply. Otherwise, Mr. Ponta's "declaration" and any reference thereto shall be stricken from the record altogether.

2. Ms. Reichardt's expert report, including any references thereto, shall remain part of the record.

3. ***Respondent may resubmit Exhibits CMA-122 and CMA-123 as "witness statements" or "expert reports" by 20 September 2019 and such statements or reports, including any references thereto, shall form part of the record. In this case, the procedure set out in paragraph 43 of the present Procedural Order shall apply. Otherwise, Exhibits CMA-122 and CMA-123 and any references thereto shall be stricken from the record altogether.***

4. ***A limited and focused opportunity of rebuttal shall take place as follows:***

(i) ***Claimants shall submit limited rebuttal documents in response to the new issues presented in Respondent's Rejoinder witness statements and expert reports (50 pages maximum) by 4 October 2019.***

(ii) ***Respondent shall submit any rebuttal documents testimony (50 pages maximum) by 1 November 2019.***

(iii) ***The timing and scope of the direct examination of both Parties' witnesses and experts shall be handled by the Tribunal with flexibility. The general timing of the Hearing will be decided, after consulting with the Parties, during the Pre-Hearing Organization Meeting. In case the Parties wish to extend the scope of the direct examinations, they should indicate the subject-matters by the dates on which their rebuttal documents are due.***

(iv) ***Both Parties shall have, if necessary, a further opportunity for rebuttal of these documents, during the Hearing and during post-Hearing submissions.***

5. ***All other requests are rejected.***

6. ***The costs associated with Claimants' application shall be referred to a later stage in the proceedings.***

On behalf of the Tribunal,

[*Signed*]

Prof. Pierre Tercier
President of the Tribunal
6 September 2019