

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. 26

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

12 November 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.
14. On 29 October 2019, the Tribunal issued ***Procedural Order No. 25***, setting out the items agreed to between the Parties concerning the organization of the Hearing of December 2019, as well as its considerations and decisions on the items on which there was a disagreement ("PO 25").

The Tribunal decided among other things 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.

(PO 25, para. 29).

15. On 4 November 2019, Claimants sent a letter to the Tribunal, requesting a reconsideration of para. 28 of PO 25, regarding (i) the time that may be allocated to argument by counsel during the two hearings and (ii) the subjects of argument that may be addressed during the second hearing.

Specifically, Claimants request to be permitted to allocate up to six hours during the first hearing and up to two hours during the second hearing for opening statements.

Claimants also request the Tribunal to clarify that the Parties are not limited as to the subjects of argument that may be made in opening statements during the second hearing.

16. On 6 November 2019, the Secretary of the Tribunal transmitted the Parties' communications concerning the order of presentation of their witnesses and experts.
17. On 7 November 2019, Respondent provided its comments to Claimants' request for reconsideration of PO 25.

Specifically, Respondent noted that it agrees to Claimants' request for an opening statement of up to six hours, provided that (i) Respondent commences its opening statement on the morning of the second day of the hearing (i.e., Tuesday 3 December 2019), (ii) the Tribunal also reserves up to six hours for Respondent; and (iii) if either party uses less than the six hours reserved, the saved time can be used for the examination of witnesses.

Further, Respondent noted with respect to the scope of the opening statements of the second hearing that it does not accept Claimants' request to remove all subject matter limitations.

18. On the same date, Respondent sent a letter to the Tribunal requesting that the Tribunal direct Claimants to present Prof. Henisz – Claimants’ social license witness – for examination together with the other fact witnesses before the experts.
19. On 08 November 2019, Claimants submitted their observations on Respondent’s letter of 7 November 2019, regarding the order of examination of Prof. Henisz.

II. THE TRIBUNAL’S CONSIDERATIONS

20. The Tribunal notes that the issues are:
 - Claimants’ request for reconsideration of PO 25, as it relates to the opening statements of the first and the second hearings (see below Section A);
 - Respondent’s request concerning the presentation of Prof. Henisz (see below Section B).

Based on the decisions it will take on these issues, it will invite the Parties to indicate the time that they estimate for the examination of the witnesses and the experts (see below Section C).

21. The Tribunal has duly considered the Parties’ positions in relation to the abovementioned requests and decides the following.

A. Reconsideration of PO 25

(1) Time allocated for opening statements during the first hearing

22. In light of the Parties’ agreement, the Tribunal confirms that the time allocated to each Party for opening statements during the first hearing shall be a maximum of six hours.
23. The Tribunal also decides that, in such case and as requested by Respondent, Respondent shall be able to begin its opening statement on the second day of the first hearing.

Further, the Tribunal confirms that, if either Party uses less than the six hours reserved, the remaining time can be used for the examination of witnesses. Indeed, this is in line with the Tribunal’s decision in paragraph 19 of PO 25 that “[t]he time shall be allocated equally between the Parties” and that “[i]t shall, nevertheless be managed with flexibility by the Tribunal in order to ensure that no inequality is resulted in the treatment of a Party”. This is also in line with the Tribunal’s first consideration in paragraph 28 of PO 25 that “[i]n principle each Party shall be able to use their equally allocated time as they see fit”.

(2) Scope of opening statements during the second hearing

24. It is recalled that, in its request for reconsideration of PO 25, *Claimants* specifically note that:
- *“Opening statements during the second hearing should be seen as a continuation of opening statements made during the first hearing without limitation as to subject matter or potential overlap of topics.” “There is an overlap and it is unavoidable.”*
 - *“Claimants do not seek an opportunity in the second hearing to summarize the documentary and testimonial evidence presented during the first hearing.”*
 - *“The ability to make additional written submissions, [...] is not a substitute for the ability of the Parties’ counsel to present oral argument to the Tribunal.”*
25. In its comments to *Claimants’* request, *Respondent* notes that *“there is no reason to depart from or reconsider from the Tribunal’s decision in this respect”* but that *“[t]he Parties and Tribunal may and should implement that ruling with some common sense and flexibility since, as the Claimants note, certain issues will be addressed by witnesses in both hearings”*. *Respondent* added that *“[n]evertheless, the purpose of the opening statements at the second hearing should be to present the Parties’ arguments insofar as they pertain and are relevant to the witnesses to be heard at that hearing”*. It therefore does not accept *“to remove all subject matter limitations”*.
26. The Tribunal recalls that in paragraph 28 of PO 25, the Tribunal considered that *“each Party should have an opportunity to present an opening statement at the beginning of the second hearing of a maximum of two hours”* and that *“[t]his 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”*.
27. It is also recalled that in paragraph 29 of PO 25, the Tribunal therefore decided that *“[e]ach 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”*.
28. The Tribunal appreciates that there may be indeed overlap of the issues to be discussed during the first and second hearings. Further, the Tribunal never intended to limit the scope of the Parties’ opening statements of the second hearing in that respect. What the Tribunal intended to prevent are oral submissions to develop either Party’s case based upon the factual and expert testimony heard during the first hearing.
29. In this respect, the Tribunal takes note of both Parties’ agreement that there is a need for flexibility, as well as *Claimants’* confirmation that they *“do not seek an opportunity in the second hearing to summarize the documentary and testimonial evidence present during the first hearing”*.
30. Therefore, the opening statements of the second hearing shall in principle be focused on matters to be presented during the second hearing; that said, a Party’s freedom to present its case in the manner that it deems appropriate and reasonable is not limited so long as

that broad principle is respected. In order to avoid any incidents, the Tribunal might invite the Parties to consider submitting to the other Party and the Tribunal at a reasonable time before the second hearing a short skeleton of their opening presentations. This will be discussed with the Parties during the first hearing.

B. The order of presentation of Prof. Henisz

31. It is recalled that *Claimants* notified their intent to present Prof Henisz together with their expert on social license issues and following the presentation of fact witnesses and legal experts. *Respondent* objected and requested that the Tribunal direct Claimants to present Prof. Henisz for examination together with the other fact witness before the experts.
32. Claimants in reply referred to their 22 October 2019 letter in which they noted specifically:

[A]lthough he presented a witness statement in this arbitration rather than an expert report, Prof. Henisz, who is an expert on social license who studied the social license issues relating to the project contemporaneously, should be examined in a grouping with those who have presented an expert report on social license issues.

Claimants also referred to, among other things, the Tribunal's decision in PO 25 in relation to the grouping of examinations on social license issues and noted that the Hearing schedule must take into account the fact that Prof. Henisz is not available to provide testimony on 4, 5, 6 or 10 December 2019.

33. The Tribunal recalls that, in PO 25, it has indeed decided that the examination of witnesses and experts on social license issues shall follow that of the Parties' fact witnesses and legal experts (see PO 25, para. 26(a)). This was also in line with the Parties' intention to group certain examinations by topic, i.e., for example quantum witnesses and experts.
34. In any event, the Tribunal considers that the unavailability of Prof. Henisz for the most part of the first week of the December Hearing renders this issue moot.
35. Accordingly, the grouping of the examinations as confirmed by the Tribunal in PO 25 and the order of examination as presented by the Parties in their letters of 6 November 2019 remains.

C. The allocation of time

36. In light of the Tribunal's decisions above and in order for it and the Parties to have a view of how each Party intends to use its time during the hearing, the Tribunal invites the Parties to complete and submit to the Tribunal ***Annex A to the present Procedural Order***, which may serve as a reference point for time allocation during the first hearing. In this connection, the Tribunal recalls that each Party has a total of 34.75 hours

(including time for opening statements; this total results from a calculation of nine hours per hearing day for a ten-day hearing (90 hours), minus 10 hours of lunch breaks, minus 10 hours of breaks and Tribunal time, minus 30 minutes of Tribunal opening remarks).

37. The Parties shall complete Annex A **by 18 November 2019**.

III. ORDER

1. *The Parties shall have a maximum of six hours for their opening statements during the first hearing.*
2. *The opening statements of the second hearing shall in principle be focused on matters to be presented during the second hearing; that said, a Party's freedom to present its case in the manner that it deems appropriate and reasonable is not limited so long as that broad principle is respected.*
3. *The order of examination of Prof. Henisz is maintained.*
4. *The Parties shall complete Annex A to the present Procedural order **by 18 November 2019**.*

On behalf of the Tribunal,

Prof. Pierre Tercier
President of the Tribunal