

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. 15

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

18 September 2018

I. THE RELEVANT PROCEDURAL STEPS

1. On 14 November 2016, the Tribunal issued *Procedural Order No. 3* (“PO No. 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. Claimants confirmed their agreement *via* an email to ICSID of the same date.
4. On 15 August 2018, and following an exchange of correspondence between the Parties, the Tribunal issued *Procedural Order No. 14* (“PO No. 14”) and its Annex A, deciding on the Parties’ dispute in relation to the redaction of 11 headings and statements in the expert report of Dr. James C. Burrows of Charles Rivers Associates (“CRA Report”) – submitted by Respondent with its Counter-Memorial. Specifically, the Tribunal ordered the following:
 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.*
5. On 4 September 2018, Claimants sent an email to ICSID, noting that the Parties agreed in substantial part to the redaction of confidential information from PO No. 14 and its Annex A, but that they disagreed on the treatment of certain short passages in the text of PO No. 14 itself. Claimants, therefore, enclosed a Confidentiality Log in support of the redactions they proposed and on which the Parties disagreed.
6. Upon instructions by the Tribunal, on 12 September 2018, Respondent submitted its comments to Claimants’ proposals for redactions in PO No. 14 in the Confidentiality Log of 4 September 2018.

II. THE PARTIES’ POSITIONS

7. The Parties’ positions in relation to Claimants’ proposed redactions are set out in the Confidentiality Log of 4 September 2018.

A. Claimants

8. Claimants' proposed confidential text falls within the scope of PO No. 14 as information that the Tribunal has already designated as "*otherwise protected from disclosure*" under Section 1.1(iii) of PO No. 3. For all the same reasons that the Parties have agreed to redact Annex A to PO No. 14, this discrete passage in the text of the Procedural Order itself, repeats and describes the very references that the Tribunal held in PO No. 14 warrant redaction.
9. The Tribunal has already ruled, and the Parties have agreed, that references in Procedural Orders to the substance of debates regarding issues subject to redaction themselves should be redacted. The purpose of this practice is to avoid regrettable secondary redaction disputes such as this one that are potentially never-ending. Though typically this arises in the context of Annexes accompanying the Procedural Orders, the same reasoning applies where the substance of a redaction debate is set forth in the order itself.

B. Respondent

10. Respondent argues that PO No. 14 does not designate any portion of PO No. 14 itself as confidential. It merely addresses the confidentiality headings and statements in Dr. Burrows' report. Moreover, the proposed redacted text does not disclose the contents of any of these headings and statements. The Tribunal has not designated such generic information as being protected from disclosure.
11. The proposed redacted text does not fall within the definition of confidential information provided in Section 1.1 of PO No. 3 as subsequently clarified by the Tribunal.
12. Finally, the redaction of such text would leave a reader without any understanding as to the basis of PO No. 14. Given the generic and unspecified description of Dr Burrows' conclusions, the interests of transparency clearly outweigh any (minimal) interest that Claimants may have to classify the information.

III. TRIBUNAL'S CONSIDERATIONS

13. The issue is whether certain short statements made in PO No. 14 should be redacted.
14. *First*, the Tribunal commends the Parties for having reached agreement in substantial part to the redaction of confidential information from PO No. 14.
15. *Second*, it notes that the Parties are in dispute on the confidentiality of certain very short, almost identical text; specifically, three phrases.
16. *Third*, the Tribunal has reviewed the Parties' position in support or against the redaction of such text, as well as the text of PO No. 14 and the redactions made therefrom and considers the following:

- a) Such text, if made public in its standalone basis, would not offer any benefit to the interested public, nor serve the transparency requirements of the Canada-Romania BIT. All the more, as such text could be open for interpretation, causing more confusion than clarity.
 - b) In this connection, Respondent is not correct that the redaction of such text would leave a reader without any understanding as to the basis of PO No. 14. PO No. 14 decides the confidentiality of certain statements in the CRA Report on the basis of PO No. 3 and the Tribunal's discretion.
 - c) Moreover, such text is linked to information that the Parties have already agreed to redact. To this extent, Claimants' concerns underlying the redaction of other information applies to this text as well.
17. Indeed, keeping the text confidential is in line with the Parties' agreed redactions and the need to ensure that the present proceedings are conducted in a fair and uninterrupted manner. On this point it is emphasised that the redaction of such text inflicts no risk on Respondent's right to present its case as a party which has seen and read such text. Therefore, the Tribunal considers that the text as noted in the Confidentiality Log of 4 September 2018 enclosed herein as Annex A shall be kept confidential.
18. Finally, the Tribunal would like to note that it would be to the benefit of both Parties if they make their best efforts to avoid disputes on the confidentiality of confidentiality orders in the future, as this would prevent possible delays and definite costs.

IV. ORDER

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

The text as noted in the Confidentiality Log of 4 September 2018 enclosed herein as Annex A shall be kept confidential.

On behalf of the Tribunal,

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