

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. 29

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

8 April 2020

I. THE RELEVANT PROCEDURAL STEPS

1. On 26 August 2016, the Tribunal issued *Procedural Order No. 1* (“PO 1”) on the procedure of the present arbitration, together with the Procedural Timetable.
2. On 14 November 2016, the Tribunal issued *Procedural Order No. 3* (“PO 3”), governing issues of confidentiality in the present arbitration.
3. On 8 October 2019, the Tribunal Secretary circulated a Protocol on Confidentiality for the purposes of the hearing, which was to be held at the premises of the ICSID in Washington D.C.
4. 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; and (ii) one additional week. It therefore invited the Parties to liaise and agree if possible on the criteria that should be followed for the bifurcation.
5. On 29 October 2019, the Tribunal issued *Procedural Order No. 25* (“PO 25”) on the organization of the first hearing.
6. Between 2 and 13 December 2019, the first hearing was held at the premises of the ICSID in Washington D.C. During the hearing, the Parties and the Tribunal discussed the possibility of holding the second hearing at the World Bank premises in Paris.

The non-confidential parts of this hearing were broadcasted on closed-circuit television at an overflow room of the World Bank premises in Washington D.C., pursuant to Section 20.6 of PO 1, Section 4 of PO 3, the Protocol of Confidentiality communicated by the Tribunal Secretary on 8 October 2019 and Section D of PO 25. The hearing was broadcasted with a 60-minute delay to protect potential information. Further, rules on cameras and other recording devices were applied (see paras 51-52, PO 25).

7. On 6 January 2020, and after consulting the Parties, the Tribunal set the second hearing for the week of 28 September 2020 at the World Bank offices in Paris.
8. On 16 March 2020, the Secretary of the Tribunal sent an email to the Parties concerning the organization of the second hearing of the week of 28 September 2020 in Paris. The Secretary noted that the World Bank office in Paris does not offer the option to broadcast the hearing in an overflow room. She therefore invited the Parties to consider the following alternative options:
 - Option 1: broadcasting the hearing with a 2-3 day delay in an overflow room in the World Bank facilities in Washington D.C.
 - Option 2: streaming the hearing on the ICSID website with a 2-3 day delay.
 - Option 3: broadcasting the hearing in real time in another location in Paris (hotel or another private facility) to be agreed upon by the Parties. In this case ex-post moderation of the video feed would not be available.

9. On 31 March 2020, Claimants sent their comments to the Tribunal Secretary's email of 16 March 2020 and noted their preference for Option 1. According to Claimants, this option, which is consistent with PO 1, would offer the same public access and conditions as those in Washington D.C. (i.e., no phones etc. in the room). Further, Claimants noted that Option 2 was contrary to PO 1 and would be impossible for ICSID to prevent recording and publication of the broadcast on another website, which would aggravate the dispute between the Parties. Further, Option 3 was not acceptable as it would not permit the safeguard of confidential information that would be discussed and would entail additional expenses in renting another space.
10. On 2 April 2020, Respondent sent its comments to the Tribunal Secretary's email of 16 March 2020 and noted its preference for Option 2. According to Respondent, this option is in line with Section 20.6 of PO 1 and Annex C of the Canada – Romania BIT. It noted that since the first hearing served those based in North America, the second should allow those based in Europe to follow the proceedings. Further, opting for Option 1 would be a mockery of the transparency provisions of PO 1 and the BIT. Respondent added that, given the safeguards put in place by the Tribunal on the protection of confidential information, Claimants' position on the real time broadcast was misguided. In fact, there was no evidence of risk of aggravation.

II. THE TRIBUNAL'S CONSIDERATIONS

11. The Tribunal has thoroughly considered the Parties' positions set out in their correspondence described above.
12. *First*, the Tribunal recalls the following principles in connection with the transparency of the proceedings and, in particular, the hearings in the present case:
 - *Section I.1 and 2 of Annex C of the Canada-Romania BIT* provides that “[h]earings [...] shall be open to the public” and “[t]o the extent necessary to ensure the protection of confidential information, the tribunal may hold portions of hearings in camera”. Further, that “[t]he tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.”
 - *Section 20.6 of PO 1* provides that, “[i]n accordance with Section I.1 of Annex C of the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, done at Bucharest on May 8, 2009 (the “Canada – Romania BIT”), the hearings shall be open to the public.” Further, that “[t]he hearing shall be broadcast on closed-circuit television at facilities made available by the ICSID Secretariat for such purpose” (Section 20.6.1, PO 1) and that “[t]o ensure the protection of confidential information, the Tribunal may hold portions of hearings in camera and establish such other procedures for the protection of confidential information as may be appropriate”.
 - The same aforementioned principles were produced in *Sections 4.1 to 4.3 of PO 3*.

13. *Second*, the first hearing in Washington D.C. took place pursuant to the aforementioned principles, i.e., it was open to the public and broadcasted in closed-circuit.
14. *Third*, the Parties have agreed for the second hearing to take place at the World Bank premises in Paris (see above para. 7), which does not provide the same broadcasting facilities as those provided in Washington D.C. Nevertheless, they disagreed on which of the three Options proposed by the Tribunal Secretary should apply in these circumstances (see above paras 8-10).
15. *Fourth*, and therefore, the Tribunal considers the following:
 - The principle to hold the proceedings and, in particular the hearings, open to the public is not negated by the agreement to broadcast such hearings in closed-circuit. This is because the latter does not prevent a person from the public to personally observe the hearing if she or he is interested in doing so. At the same time, it ensures that the integrity of the proceedings is preserved, at least during the conduct of the hearings. What is important is for the procedure established for the protection of the confidential aspects of the proceedings to be safeguarded at all times.
 - *Option 2*, which provides for streaming the hearing on the ICSID website with a 2-3-day delay, would contradict the agreed upon principle to “broadcast” the hearing in closed circuit.
 - *Option 3*, which provides for broadcasting the hearing in real time in another location in Paris to be agreed upon by the Parties, would be appropriate only if the safeguarding the confidentiality parts of the hearing was ensured. It appears that this is not possible, given the Tribunal Secretary’s confirmation that “*ex-post moderation of the video feed would not be available*”.
 - *Option 1*, which provides for broadcasting the hearing with a 2-3-day delay in an overflow room in the World Bank facilities in Washington D.C., seems to be the only option that ensures that all applicable principles are complied with in the present circumstances. The fact that the public from a specific region may not benefit from the possibility to observe the hearing does not affect (i) the transparency principles that are in place, (ii) the integrity of the proceedings and, more importantly, (iii) the rights of the Parties to fully present their case.
16. The Tribunal has discussed thoroughly with the ICSID in an attempt to find an alternative option that would address both Parties’ concerns. Unfortunately, such option is not available.
17. In these circumstances, the Tribunal considers that Option 1 shall apply for the hearing of the week of 28 September 2020 in Paris.

III. ORDER

Option 1 shall apply for the hearing of the week of 28 September 2020 in Paris.

On behalf of the Tribunal,

Prof. Pierre Tercier
President of the Tribunal