

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. 35

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

30 September 2021

I. PROCEDURE

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. Between 2 and 13 December 2019, a Hearing on jurisdiction and merits was held at the premises of the ICSID in Washington DC.
3. On 10 March 2020, the Tribunal issued Procedural Order No. 27 deciding on the list of questions that it invited the Parties to reply.
4. On 11 May 2020, Claimants filed their responses to the Tribunal’s questions set out in PO 27, together with legal authorities.
5. On 13 July 2020, Respondent filed its responses to the Tribunal’s questions set out in PO 27, together with legal authorities.
6. Between 28 September 2020 and 4 October 2020, a Virtual Hearing on technical and quantum aspects of the case took place.
7. On 18 February 2021, the Parties simultaneously filed their Post-Hearing Briefs.
8. On 23 April 2021, the Parties simultaneously filed their Second Post-Hearing Briefs.
9. On 1 June 2021, the Tribunal informed the Parties that it does not exclude the possibility of asking additional questions, or even organizing a one-day hearing in relation to such questions if necessary.
10. On 5 August 2021, Claimants sent a letter to the Tribunal requesting to submit new evidence into the record, pursuant to Section 16.3 of PO1 (“Claim. 05.08.21” or “Application”). Claimants request to submit the following documents:
 - a. *the two Ministry of Culture press releases dated 31 January and 5 February 2020, evidencing Romania’s “reactivation” of its UNESCO nomination, as described in and attached as Annexes 1 and 3 to Claimants’ letter to the Tribunal dated 5 February 2020;*
 - b. *a copy of the decision of the Buzău Tribunal dated 10 December 2020 rejecting the challenge to the second Cârnic ADC, notified to the Alba culture authority with the court’s reasoning and confirmation of its finality on 3 June 2021;*
 - c. *the two 27 July 2021 announcements of the inscription of the “Roşia Montană Mining Landscape” on the UNESCO World Heritage List and the List of World Heritage in Danger; and*
 - d. *four press statements of Romania’s government officials leading up to and following the UNESCO inscription, namely*
 - i. *an interview of Romania’s Minister of Culture, Bogdan Gheorghiu, on 8 July 2021, which is available to be submitted in subtitled video form with a corresponding transcript;*

ii. *statements of Romania's President, Klaus Iohannis, and of Romania's Deputy Prime Minister, Dan Barna, on their respective Facebook pages on 27 July 2021; and*

iii. *an interview of Romania's Prime Minister, Florin Cîțu, on Digi24 TV on 27 July 2021.*

11. On 26 August 2021, Respondent submitted a letter providing its comments to Claimants' Application ("Resp. 26.08.21").
12. On 7 September 2021, Claimants filed their comments to Respondent's comments of 26 August 2021 ("Claim. 07.09.21").
13. On 14 September 2021, Respondent submitted a letter providing its comments to the Claimants' comments to the Respondent's comments from 26 August 2021 ("Resp. 14.09.21").

II. THE PARTIES' POSITIONS

A. Claimants

14. *First*, Claimants argue that Section 16.3 of PO 1 is not limited to requests to submit additional evidence made prior to the main hearing. Section 16.3 of PO 1 does not refer to the hearing, and nothing in its text or context limits its scope to requests made before the hearing.
15. In any event, the Tribunal has powers to call upon the Parties to produce documents or other evidence it deems necessary at any stage of the proceedings (ICSID Convention Article 43(a) and ICSID Arbitration Rule 34(2)(a)) and the power to exceptionally admit new evidence, even after closing the proceedings (ICSID Rule 38(2)) (Claim. 07.09.21).
16. *Second*, Claimants argue that exceptional circumstances support their application to submit additional evidence.
17. With respect to the documents related to the UNESCO's inscription, Claimants submitted their request immediately after UNESCO inscribed the Roșia Montană mining landscape on its World Heritage List and its List of World Heritage in Danger on 27 July 2021 (Claim. 07.09.21).
18. With respect to the decision of the Buzău Tribunal rejecting the challenge to the second Cârnic ADC, the final reasoned decision in the case was issued only after the Parties had completed their evidentiary submissions and became final due to the lack of appeal only after the filing of the Post-Hearing Briefs (Claim. 05.08.21).
19. *Third*, Claimants argue that the documents are relevant to the case and material to the outcome.

On the documents related to the UNESCO's inscription:

20. Contrary to Respondent's argument, the Tribunal has jurisdiction over the claims related to the UNESCO inscription. In any event, a disputed objection to jurisdiction does not provide grounds for excluding evidence that is relevant and material to the merits (Claim. 07.09.21).
21. The principal claim before the Tribunal is best characterized as concerned with the conduct that began in August 2011 and that ripened into a political repudiation and *de facto* expropriation of the Project Rights on 9 September 2013 in breach of the BITs (Claim. 07.09.21). The fact of the UNESCO's inscription as well as the rationale expressed by the Government's leaders for its nomination are relevant to the claims presented to the Tribunal as subsequent confirmation of the political repudiation and *de facto* expropriation (Claim. 07.09.21).
22. Alternatively, should the Tribunal find that the evidence in hindsight does not establish a complete and permanent frustration of the Project Rights as of September 2013, the steps taken by Romania to obtain the inscription of Roșia Montană as a UNESCO World Heritage site notwithstanding the Project Rights, along with other post-parliamentary acts and omissions designed to prohibit mining in the area, have effectively taken the Project Rights and otherwise subjected them to treatment in breach of the BITs (Claim. 07.09.21).
23. Contrary to Respondent's argument, the fact that Claimants commented extensively on the implications of Roșia Montană's listing as a UNESCO World Heritage Site and the challenge of the second Cărnic ADC demonstrates the relevance of the evidence and supports granting of the request (Claim. 07.09.21).

On the decision of the Buzău Tribunal rejecting the challenge to the second Cărnic ADC:

24. The legal challenge to the second Cărnic ADC is significant to the Parties' arguments, including the arguments in relation to Romania's UNESCO nomination despite the valid and existing ADCs (Claim. 05.08.21).
25. Contrary to Respondent's argument, the fact that Claimants commented extensively on the implications of Roșia Montană's listing as a UNESCO World Heritage Site and the challenge of the second Cărnic ADC demonstrates the relevance of the evidence and supports granting of the request (Claim. 07.09.21).
26. *Fourth*, Claimants dismiss Respondent's due process objections. The request is not vague or open ended and the new evidence is specifically identified (Claim. 07.09.21). Further, Respondent would not be deprived of the right to be heard if the request is granted. Respondent fails to explain why it needs to test official Government announcements or statements of its own Government officials for which there is an indisputable public record. Finally, Respondent's wish to address the substance of the evidence once admitted can be dealt with by an invitation by the Tribunal to submit comments on the evidence (Claim. 07.09.21).

B. Respondent

27. *First*, Respondent argues that Section 16.3 of PO 1 only allows requests for presentation of additional evidence that are made prior to the main hearing. Evidence submitted after the main hearing can no longer be tested in an oral hearing and therefore cannot be relied upon by the Tribunal (Resp. 26.08.21).
28. Respondent further submits that Claimants' reliance on Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2)(a) is misguided. The provisions allow the Tribunal to order the Parties to produce evidence, while in this instance, Claimants are requesting to submit documents. Neither does ICSID Rule 38(2) support Claimants' request. It applies only in the exceptional and very narrow circumstances where the new evidence relates to a "decisive factor," or where the arbitral tribunal itself determines that there is a "vital need" to clarify a certain point. Claimants fail to demonstrate that this is the case (Resp. 14.09.21).
29. *Second*, Respondent argues that Claimants failed to demonstrate the existence of exceptional circumstances. Claimants' request comes nearly one year after the second of two main hearings and five months after the third of three rounds of post hearings submissions. Claimants had ample opportunity to present their case and have commented extensively on the implications of Roşia Montană's listing as a UNESCO World Heritage Site and the challenge of the second Cărnic ADC (Resp. 26.08.21).
30. *Third*, Respondent argues that the evidence is not relevant to the case or material to the outcome.
31. The complaints relating to the UNESCO listing fall outside the jurisdiction of the Tribunal. Romania's UNESCO application was filed in February 2016, after the filing of the Request for Arbitration and therefore the notification requirements of the two BITs and the waiver requirement of the Canada-Romania BIT have not been complied with (Resp. 26.08.21).
32. Further, the claims before the Tribunal are that the Project was expropriated or otherwise impaired in September 2013. The fact of the recent UNESCO inscription as well as the rationale expressed by the Government's leaders for its nomination are not relevant to these claims (Resp. 26.08.21). The UNESCO listing does not change or eliminate the procedure to declassify a historical monument, which is required even after the issuance of an archaeological discharge. Neither can events that occurred in 2021 have a bearing on whether a BIT breach occurred in 2011 or 2013 (Resp. 14.09.21).
33. *Fourth*, Respondent argues that granting the application would undermine its right to due process. Respondent could not reasonably respond to the Claimants' request as Claimants' description of an unquantified number of "press statements of Romania's officials leading up to and following the UNESCO inscription" is too vague, open-ended and unparticularized (Resp. 26.08.21). Further, Respondent would be deprived of an opportunity to test the evidence at an oral hearing, and thus of its right to be heard. The opportunity to comment suggested by Claimants would be insufficient. This would amount to a departure from a fundamental rule of procedure, within the meaning of Article 52(1)(d) of the ICSID Convention (Resp. 26.08.21; Resp. 14.09.21).

III. THE TRIBUNAL'S ANALYSIS

A. The issue

34. The *issue* before the Tribunal is (i) whether Claimants are permitted to request the filing of new documents at this stage of the proceedings, and if so, (ii) whether there are exceptional circumstances that would justify such filing, (iii) whether such documents are relevant to the case and material to its outcome, and in any event (iv) whether permitting Claimants to file such documents would violate Respondent's due process rights.

B. Possibility of filing new documents

35. *First*, the possibility of filing new documents is provided for in Section 16.3 of PO 1, which reads as follows:

*Either party may submit an application to present additional **evidence after the filing of its respective last written 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.* (emphasis added)

36. A "*respective last written submission*" for the purposes of Section 16.3 refers to the Reply and the Rejoinder. This follows from Section 16.1 of PO 1, which reads as follows:

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.

37. This also follows from Section 16.6 of PO 1, which prohibits reliance on new evidence at a hearing and reads in relevant part:

"Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence."

38. However, the right to request the filing of new documents following the Reply or Rejoinder and the prohibition on doing so at the hearing, does not mean that the period within which such a request may be made ends at the final hearing. Indeed, nothing in the provision itself suggests such an assumption, and the Tribunal finds no plausible reason to prohibit the request to file new documents at any time until the official closing of the proceedings.

39. *Second*, the Tribunal's finding is supported by ICSID Rule 34(2)(a), which provides that "[t]he Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts". Nothing in the language of Rule 34 suggests that the request to produce such evidence can only be made at the

tribunal's own motion and not at the request of a party. The same is true of Article 43(1) of the ICSID Convention, which provides that "[e]xcept as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence" [...]. Since the Tribunal has not declared the present proceedings closed, it is not necessary to refer to ICSID Rule 38, which applies only in such circumstances.

40. In light of the above, the Tribunal considers that Claimants may request the filing of new documents at this stage of the proceedings *if exceptional circumstances exist*.

C. Existence of exceptional circumstances and relevance and materiality of the new documents

41. The Parties disagree as to whether there are "exceptional circumstances" that justify granting of Claimants' application to file new documents at this stage of the proceedings.
42. The Tribunal considers that the "exceptional circumstances" standard set out in Section 16.3 of PO 1 is a high threshold. Indeed, the admission of evidence, even evidence that may have some potential relevance to a disputed issue, is not unlimited. This condition is inevitably linked to the relevance and materiality of the documents to the outcome of the case itself.
43. In the present case, the documents which Claimants seek to produce could not have been introduced at an earlier stage in the proceedings. Moreover, they are undeniably relevant to issues raised by the Parties' claims. The question of whether those claims may be jurisdictionally barred is not relevant to the decision whether to admit the documents. This is particularly so as the Tribunal has not decided jurisdiction yet. Moreover, how those documents will be used to assess the conduct of the Parties during the period at issue is also not pertinent to the Tribunal's decision on whether to allow such documents into the record in these proceedings. Rather, what is important is that the Tribunal, which has already begun its deliberations, has a complete record when it prepares and delivers its decision. This is true whether or not these new documents may prove important to the case.
44. Accordingly, the Tribunal finds that the requirements of exceptional circumstances and relevance and materiality are satisfied in this case.

D. Respect of Respondent's due process rights

45. As to Respondent's due process rights, the Tribunal finds that those rights will not be affected by the admission of the new documents. Indeed, Respondent will be given ample opportunity to present its case in this regard through written and/or oral submissions and examinations. The Tribunal recalls that it has held out the prospect of a further procedural step in the form of an additional oral hearing or a written phase with questions that may arise after the filing of the Parties' Post-Hearing Briefs (see above para. 9).
46. In light of the foregoing, the Tribunal decides that the new documents sought to be introduced by Claimants are admitted.

E. Next Steps

47. The Tribunal urges both Parties to confer and agree on a clear procedure for dealing with these new documents, in particular, the manner in which the Parties intend to present their respective arguments in relation to them and the relevant timetable. The Parties shall do so **by [xx]**. In the event of disagreement, the Tribunal shall decide.

III. ORDER

48. In light of the above, the Tribunal *grants Claimants' request and invites both Parties to confer and agree on a clear procedure for dealing with these new documents, in particular, the manner in which the Parties intend to present their respective arguments in relation to them and the relevant timetable, by Thursday 14 October 2021. In the event of disagreement, the Tribunal shall decide.*

On behalf of the Tribunal,

[signed]

Prof. Pierre Tercier
President of the Tribunal