

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. 10

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 June 2018

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 30 June 2017, Claimants filed their *Opening Memorial*, together with witness statements, expert reports and exhibits.
4. On 22 February 2018, Respondent filed its *Counter-Memorial*, together with witness statements, expert reports and exhibits.
5. On 22 March 2018, the Parties filed their *document production requests* in the form of Redfern Schedules, in conformity with the Procedural Timetable as amended.
6. On 19 April, the Parties filed their *objections to the other Party’s document production requests* and produced documents the request of which they did not object, again in conformity with the Procedural Timetable as amended.
7. On 10 May 2018, the Parties filed their *replies to the objections to the other Party’s document production requests*. With their replies in the form of Redfern Schedules, the Parties filed also their general comments on the other Party’s document production requests and objections.

Specifically, Claimants filed a table annexed to its Redfern Schedule by which they submit their “Preliminary Responses” to “Respondent’s Preliminary Comments”. Respondent filed its comments¹ in the form of a letter to the Tribunal, together with three Annexes.

8. On 28 May 2018, Claimants filed certain observations in relation to Respondent’s Requests nos 49 to 52.
9. On 4 June 2018, Respondent submitted its comments to Claimants’ observations in relation to Respondent’s Requests nos 49 to 52.

¹ The Tribunal notes that these comments are separate to “Respondent’s Preliminary Comments” which are only communicated to the Tribunal by way of reproduction in Claimants’ Redfern Schedule on 10 May 2018.

II. THE PARTIES' POSITIONS

A. Claimants

10. Claimants have used their Redfern Schedule to show how the requested documents are relevant and material to claims presented in this arbitration, to justify an order for their production.
11. Where they deny assertions made by Respondent or challenge their context or their characterisation, Claimants are equally justified in calling for relevant documents as when Claimants call for documents relating to Claimants' own allegations.
12. The IBA Rules do not limit document production to requests for documents that would support the requesting party's allegations. Respondent cannot be permitted to make assertions that it asks the Tribunal to accept and then deny Claimants the opportunity to demonstrate that assertion may be misleading or false as shown by documentary evidence in Respondent's exclusive control.
13. Claimants have not requested transcripts, which are classified under Romanian law, only minutes from certain Government meetings. Respondent does not offer any specific explanation as to why there is a "*special political or institutional sensitivity*" in relation to the requested minutes. Moreover and in accordance with PO 3, Respondent can designate the requested minutes as confidential to ensure that they are not used outside the context of his arbitration. Respondent can also redact confidential information therein.
14. Having consented to ICSID arbitration, Respondent has an obligation to participate in good faith and Claimants should therefore not be required to follow other procedures outside of the arbitration to seek to obtain documents in Respondent's possession, custody or control. In addition, documents that Claimants cannot access themselves from public sources but that might be accessible through an administrative procedure are not documents in the public domain within the meaning of IBA Rules. Further, it is after review of the Counter-Memorial that decisions could be taken regarding what documents are relevant and material to points in dispute.
15. Drafts of documents may be relevant and material, particularly in a case such as the instant one where the State's motivations for decisions taken or not taken is a central element of the claim presented.

B. Respondent

16. Respondent argues that Claimants' objections are without merit and requests the Tribunal to order Claimants to produce the requested documents that they have not already produced.
17. Respondent notes that three issues arise from Claimants' responses that require the Tribunal's special attention.
 - a. In many instances Claimants have objected to Respondent's requests but nevertheless produced certain documents. In these cases and where it appears that there are further documents responsive to the request, the Tribunal is requested to order Claimants to produce all responsive documents in their possession, custody or control or to confirm that they have already done so.

Insofar as Claimants have produced documents responsive to a particular request, Respondents argue that Claimants have waived their right to object to the request.

- b. While the Parties agree that, further to Article 9(2)(b) of the IBA Rules, they are not required to produce legally-privileged documents, they disagree regarding the definition and scope of the legal privilege to be applied in this case. Claimants provide no support for their overly broad and untenable definition of a legally privileged document.
 - c. Claimants have produced redacted documents and simply asserted, without further explanation, that the redactions correspond to allegedly "*confidential and sensitive financial business information*". Claimants have provided no explanations regarding the nature of the allegedly confidential information or the need or justification for the redaction, to which Respondent should respond and the Tribunal should rule. Claimants must produce these documents without redactions.

In any event, these proceedings are already the subject of a strict Confidentiality Undertaking set out at PO 3, such that redactions to documents produced through document production are unnecessary.

III. THE TRIBUNAL'S CONSIDERATIONS

A. In general

18. The present procedure on document production is governed by the ICSID Convention, the ICSID Arbitration Rules and PO 1.
19. Pursuant to Article 43(a) of the ICSID Convention “[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”. This is also set forth in ICSID Arbitration Rule 34(2).
20. In Section 15.11 of PO 1, it was agreed that “[t]he parties and the Tribunal are not bound, but shall be guided as appropriate by Articles 3 and 9 of the IBA Rules on the Taking of Evidence in International Arbitration”. Accordingly, in deciding the Parties’ document production requests, the Tribunal shall be guided by the 2010 IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”).
21. The Tribunal’s decisions on the Parties’ document production requests are set forth in Annexes A and B of Procedural Order No. 10, which form an integral part of the present decision.
22. For the sake of clarity, the decisions contained in the present Procedural Order No. 10 and its two Annexes are without prejudice to the Tribunal’s decisions on the relevance of the documents and the merits of the dispute.
23. These decisions are further made without prejudice to the Tribunal’s right to seek production of certain documents at a later stage of the proceedings in accordance with Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2) (see above para. 19).
24. Finally, the Tribunal notes that pursuant to ICSID Arbitration Rule 34(4) “[e]xpenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention”.

B. Burden of proof

25. There is no dispute that each Party shall have the burden of proving the facts relied on to support his claim or defence.
26. However, in its Preliminary Comments (reproduced by Claimants in the table annexed to Claimants’ Redfern Schedule on 10 May 2018), *Respondent* argues that Claimants

request in certain instances documents that would support allegations made by Respondent.

27. In reply, *Claimants* submit that the IBA Rules do not limit document production to requests for documents that would support the requesting party's allegations as this would allow the non-requesting party to self-select documents it wishes to produce and hide others. In its view, Respondent cannot be permitted to make assertions that it asks the Tribunal to accept and then deny Claimants the opportunity to demonstrate that assertion may be misleading or false as shown by documentary evidence in Respondent's exclusive control.
28. The *Tribunal* considers that while each Party bears the burden to prove its own case, a Party should also have access to documents that will permit it to develop such case, whether that is in the form of a claim or a defence or both.
29. Accordingly, the Tribunal will assess Respondent's objections separately in the enclosed Annexes with the aforementioned principles in mind (see above section III.A.).

C. Relevance and materiality

30. In its Preliminary Comments (reproduced by Claimants in the table annexed to Claimants' Redfern Schedule on 10 May 2018), *Respondent* argues that Claimants have used their Redfern Schedule as a third pleading on the merits, in addition to their Memorial and future Reply.
31. *Claimants* reply that they have used their Redfern Schedule to show how the requested documents are relevant and material to claims presented in this arbitration, as required to justify an order for their production. They argue that describing the issues in the case so as to make clear the reasons for the request is not improper.
32. The *Tribunal* considers that it is undisputed that, for a document production request to be granted, it must first and foremost be relevant and material to the outcome of the case. Indeed, this is set forth in Articles 3(3)(a) and 9(2)(b) of the IBA Rules. Specifically Article 3(3) (a) provides that a request to produce documents shall contain "*a statement as to how the Documents requested are relevant to the case and material to its outcome*". In turn, Article 9(2) (b) of the IBO Rules sets forth that the tribunal shall, at the request of a party or on its own motion, exclude from evidence or production any document for "*lack of sufficient relevance to the case or materiality to its outcome*".
33. To prove that a document production request is relevant or material to the outcome of the case, a party must set out the reasons for such relevance and materiality, which inevitably implies that it will touch upon the merits of the case. A tribunal must then assess such relevance and materiality based on the explanations and merits of the case as presented by the parties. This exercise in no way includes an assessment of the merits

themselves which will be carried out only in relation to the Parties' substantive pleadings as those have been agreed in PO 1 and the Procedural Timetable. Accordingly, to the extent that the Parties have used the opportunity of the document production procedure to plead further their case, this does not concern the Tribunal which will not consider such pleadings when assessing the merits of the case.

34. In this respect, the Tribunal further notes that, in Respondent's Redfern Schedule, Claimants object to the production of certain documents on the ground that "*the legitimacy of an investor's expectations must be based on an objective assessment of the applicable legal framework, not a review of an investor's subjective expectations or understanding of that legal framework*". In line with its considerations above (see para. 33), the Tribunal's assessment of the legitimacy of an investor's expectations, in principle and in fact, is an exercise to be carried out in connection to the assessment of the merits of the case and not in connection with the document production phase. Accordingly, its decision on document production requests depends on the relevance and materiality of the requested document as that is presented by each Party in support of its case, regardless of the Tribunal's decision on this or other issues.
35. For the same reasons the Tribunal does not consider that it is appropriate to generally admit or exclude from the outset documents that are in the form of drafts. Whether a requested document, in draft or final form, is relevant and material to the outcome of the case is for the Tribunal to decide in line with its considerations above (see above paras 33-34).

D. Possession and control

36. The *Parties* are in dispute as to whether Claimant should be required to follow other procedures outside of the arbitration to seek to obtain documents in Respondent's possession, custody or control that are relevant and material to the arbitration.
37. The *Tribunal* considers that it is undisputed that, for a document production request to be granted, the requested document must not be in the possession, custody or control of the requesting Party but in that of the requested Party. Indeed, Article 3(3)(c) of the IBA Rules provides that a request to produce documents shall contain "*(I) a statement as to how the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party*".
38. In line with this principle, the Tribunal considers that there is no reason to doubt either Party's confirmation that a requested document is not in its possession, custody or control. Indeed, in their Redfern Schedules, the Parties have evidenced a sense of cooperation and trust when acknowledging the other Party's affirmation in this respect.

39. Accordingly, the Tribunal considers that the same will apply when a Party submits that it cannot access a document that the other Party believes to be in the public domain (i.e., that it is not in its possession, custody or control) and that both Parties shall cooperate to address any difficulties in this respect.
40. Further, in relation to Respondent's request that Claimants are ordered to make full production of documents or to confirm that they have done so in the instances the latter have agreed to produce certain documents (see above para. 17.a.), the Tribunal trusts that Claimants have produced all requested documents that are in their possession, custody or control. In any event, the Tribunal requests Claimants to make full production to the extent that they have not or to confirm that they have **by 21 June 2018** and as specifically set forth in Annex B of the present Procedural Order No. 10. To the extent that Claimants have submitted objections to requests for which they have produced certain or all documents, whether such objections will be deemed waived or not depends on the nature of the objection itself.

E. Legal privilege

41. While the *Parties* agree that requested documents subject to legal privilege shall be excluded from production, they disagree as to the scope of such privilege.
42. *Claimants* have objected to the production of certain requested documents on the basis of attorney-client privilege. They argue that “[t]he attorney-client privilege and the attorney work product privilege protect from disclosure not only the written work product of counsel and direct communications with counsel, but also documents of the attorney's client that reflect internal deliberations or analysis on the basis of counsel's legal advice”.
43. *Respondent* disagrees with this definition, under which virtually any internal document of RMGC and/or Claimants could be deemed legally-privileged insofar as they were in all likelihood regularly soliciting legal advice throughout the life of the Project. For Respondent, a fundamental distinction must be drawn between the “*written work product of counsel and direct communications with counsel*” – which Respondent agrees are legally privileged – and “*documents of the attorney's client that reflect internal deliberations or analysis on the basis of counsel's legal advice*” – which cannot be deemed privileged. To espouse Claimants' view, would mean that potentially numerous documents that are highly relevant to the case and material to its outcome will be excluded. Moreover, for Respondent it is an impossible standard to apply since it would be difficult to know whether, for instance, certain RMGC's board of directors' deliberations were “based on” legal advice or not, and whether the resulting meeting minutes reflecting those deliberations are privileged.
44. The *Tribunal* notes that it is undisputed that a requested document which is the subject of legal privilege shall be excluded from production. Indeed, pursuant to Article 9(2)(b)

of the IBA Rules, the Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document for “*legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*”.

45. Further, Article 9(3) of the IBA Rules provides:

In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purposes of providing or obtaining legal advice;

(b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purposes of settlement negotiations;

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and

(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

46. The Tribunal further notes that it is undisputed that written work product of counsel and direct communications with counsel are subject to attorney-client privilege. With respect to whether other documents are subject to attorney-client privilege or other legal privilege shall be for the Tribunal to decide in line with the aforementioned principles (see above para. 45).

47. Accordingly, the Parties are requested to produce a log of any documents for which privilege is asserted, as specifically set out in the Annexes of the present Procedural Order No. 10, for the understanding of the other Party and for the Tribunal’s decision **by 14 June 2018**. The relevant Party shall have an opportunity to provide its comments to the Party asserting privilege **by 21 June 2018** and the Tribunal will decide **by 28 June 2018**.

F. Confidential information

48. The *Parties* are in dispute as to the nature of the allegedly confidential information or need for redaction of such information.

49. *Respondent* argues that Claimants have in several instances produced redacted documents and simply asserted without further explanation that the redactions correspond to allegedly “*confidential and sensitive financial business information*” and that they would need to have provided such explanations with the opportunity for Respondent to reply and the Tribunal to decide. In any event, Respondent submits, the proceedings are subject to a Strict Confidentiality Undertaking set out in PO 3 and therefore such redactions are not necessary.
50. In their turn, *Claimants* object to Respondent’s own designations of requested Government meeting minutes as documents of “*special political or institutional sensitivity*”, the production of which is excluded. Claimants submit that, in accordance with PO 3, Respondent can designate the requested meeting minutes as confidential to ensure that they are not used outside the context of his arbitration. They further argue that Respondent can also redact confidential information in the minutes.
51. The *Tribunal* notes that, pursuant to Article 9(2)(f) of the IBA Rules, it shall, at the request of a Party or on its own motion, exclude from evidence or production any Document for “*grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling*”.
52. It further notes that both Parties are in dispute as to whether such grounds of special political or institutional sensitivity exist in relation to some of their document production requests.
53. The Tribunal considers that, while indeed PO 3 serves to protect information of such nature, among others, from the public sphere, it does not restrict the other Party or the Tribunal from full view of such documents, which is the purpose of the principle of Article 9(2)(f) of the IBA Rules. Accordingly, the Parties are requested to produce a log of any documents for which redactions are sought, as specifically set out in the Annexes of the present Procedural Order No. 10, for the understanding of the other Party and for the Tribunal’s decision **by 14 June 2018**. The relevant Party shall have an opportunity to provide its comments to the Party claiming redactions **by 21 June 2018** and the Tribunal will decide **by 28 June 2018**.
54. Concerning Claimants’ Request no. 13, the Tribunal notes that Respondent does not claim for redaction of the requested documents, but objects production on the basis of Article 9(2)(f) of the IBA Rules. Respondent is hereby requested to substantiate its objection based on Article 9(2)(f) of the IBA Rules **by 14 June 2018**. Claimant shall have an opportunity to provide its comments to Respondent’s objection **by 21 June 2018** and the Tribunal will decide **by 28 June 2018**. To the extent that the Tribunal orders production, Respondent may then follow the procedure set out in para. 53 above with a new timetable to be set up by the Tribunal in due time.

IV. THE TRIBUNAL'S DECISIONS

55. The Arbitral Tribunal hereby orders as follows:

- 1. The Parties shall produce documents pursuant to the decisions set out in Annexes A and B enclosed herein, which form an integral part of the present Procedural Order No. 10. The Parties shall liaise and cooperate in good faith to comply with the Tribunal's decisions, particularly in relation to the requests that are granted but subject to the other Party limiting their scope.*
- 2. Claimants are requested to make full production of documents to the extent that they have not or to confirm that they have already done so, in the cases that they have agreed to produce certain documents, by 21 June 2018 (see above para. 40)*
- 3. The Parties are requested to produce a log of any documents for which privilege is asserted, as specifically set out in the Annexes of the present Procedural Order No. 10, for the understanding of the other Party and for the Tribunal's decision by 14 June 2018. The relevant Party shall have an opportunity to provide its comments to the Party asserting privilege by 21 June 2018 and the Tribunal will decide by 28 June 2018 (see above para. 47).*
- 4. The Parties are requested to produce a log of any documents for which redactions are sought, as specifically set out in the Annexes of the present Procedural Order No. 10, for the understanding of the other Party and for the Tribunal's decision by 14 June 2018. The relevant Party shall have an opportunity to provide its comments to the Party claiming by 21 June 2018 and the Tribunal will decide by 28 June 2018 (see above para. 53).*
- 5. Concerning Claimants' Requests no. 13, Respondent is hereby requested to substantiate its objection based on Article 9(2)(f) of the IBA Rules by 14 June 2018. Claimant shall have an opportunity to provide its comments to Respondent's objection by 21 June 2018 and the Tribunal will decide by 28 June 2018. To the extent that the Tribunal orders production, Respondent may then follow the procedure set out in para. 53 above with a new timetable to be set up by the Tribunal in due time (see above para. 54).*
- 6. At any time during the proceedings, the Tribunal may order the production of the requested documents in accordance with Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2).*

On behalf of the Tribunal,

Prof. Pierre Tercier
President of the Tribunal
Date: 8 June 2018