

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. 5

Members of the Tribunal

Ms. Teresa Cheng SC, President of the Tribunal

Prof. Horacio A. Grigera Naón, Arbitrator

Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal Yetano

June 16, 2017

Introduction

1. The Tribunal refers to:

- The letter received on March 14, 2017 on behalf of Alburnos Maior, Greenpeace CEE Romania and Independent Centre for the Development of Environmental Resources (the “**Prospective Amici**”), in which they request the Tribunal to provide, *inter alia*, “*information detailing under what circumstances expert reports and witness statements may at all be released to the general public or to prospective Amici alone.*”
- The observations submitted by both Parties on April 5, 2017 on the said letter of March 14, 2017.

2. The Tribunal notes that:

- Under Section I.3 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**”), “[a]ll documents submitted to, or issued by, the tribunal shall be publicly available, **unless the disputing parties otherwise agree, subject to the deletion of confidential information.**” [emphasis added]
- Pursuant to Section III.8 of Annex C of the Canada-Romania BIT and Section 24.2 of Procedural Order No.1, access to documents by non-disputing parties will be governed by the same rules applicable to the public in general, that is, Section I.3 cited above.
- According to the second paragraph of of Procedural Order No. 3 (the “**Confidentiality Order**”), the ICSID Secretariat will publish all of the principal submissions, **but not** the supporting witness statements, expert reports, exhibits or legal authorities. This is also provided in Section 2.8, second sentence, under which “[t]he ICSID Secretariat **shall not publish supporting witness statements, expert reports, and exhibits, even if they have been reclassified as not constituting or containing confidential information.**” [emphasis added].
- Sections 3.13 and 3.14 of the Confidentiality Order provide that the Order shall be effective and binding upon both Parties upon its signature by the Tribunal and may only be amended or derogated by the Tribunal at the request of one of the Parties “*if compelling circumstances so require.*”

3. Having considered the provisions of the Canada-Romania BIT and the agreements reached by the Parties as materialized in Procedural Order No. 1 and the Confidentiality Order mentioned above, as well as the observations made by both Parties in their April 5, 2017 submissions, and having deliberated, the Tribunal concludes that the general public and non-disputing parties (prospective or not) may not have access to witness statements or expert reports, unless:
 - i. both Parties agree otherwise, or
 - ii. the Tribunal decides to amend or derogate from Section 2.8 of the Confidentiality Order in accordance with its Section 3.14 (*i.e.*, at the request of one of the Parties and if the Tribunal decides that “*compelling circumstances so require*”).

4. In light of the above, the Tribunal ORDERS:

Order

5. The general public and non-disputing parties (prospective or not) may not have access to witness statements or expert reports, unless:
 - i. both Parties agree otherwise, or
 - ii. the Tribunal decides to amend or derogate from Section 2.8 of the Confidentiality Order in accordance with its Section 3.14.

On behalf of the Tribunal,

Ms. Teresa Cheng SC
President of the Tribunal
Date: June 16, 2017