

**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. 3

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

November 14, 2016

Pursuant to Sections 13.7 and 23 of Procedural Order No. 1 and Article I of Annex C of the Canada - Romania BIT, the following procedures shall govern the designation, protection, and use of confidential information and documents and the preparation of redacted copies of documents for disclosure.

In accordance with Annex C of the Canada-Romania BIT and Section 23.1 of Procedural Order No. 1, and subject to the procedures for the protection of confidential information set out in this Confidentiality Order, the ICSID Secretariat will publish all of the principal submissions (but not the supporting witness statements, expert reports, exhibits, or legal authorities) submitted to, and all Procedural Orders issued by the Tribunal, unless the parties otherwise agree, as part of the Procedural Details on the ICSID website, subject to the deletion of confidential information in accordance with the procedures for the protection of confidential information set out in this Confidentiality Order.

1. Information and Documents Subject to Obligations of Confidentiality

- 1.1. The Parties shall treat as confidential in accordance with the terms of this Order the following categories of information and documents: (i) confidential business information; (ii) information that is privileged; or (iii) information that is otherwise protected from disclosure.

2. Designation of Confidential Information and Documents

- 2.1. Any Party shall have the right to designate any portion of a principal submission or a document produced as an exhibit or pursuant to a document request or order of the Tribunal as confidential if it falls within the categories set out in Section 1.1 above.
- 2.2. Within two weeks (14 days) of the email filing of a principal submission or of the transmission of any document produced as an exhibit or pursuant to a document request or order of the Tribunal, either Party may indicate to the other Party and to the Tribunal which portions of the principal submissions, exhibits, or documents should be designated and treated as confidential information by filing a version of the principal submissions, exhibits, or documents with: (i) the cover pages clearly labeled “Confidential Information – Unauthorized Disclosure Prohibited,” (ii) the top of each particular page that contains allegedly confidential information labeled “Confidential,” and (iii) the allegedly confidential information enclosed in brackets. Equivalent measures should be used with respect to confidential information contained in electronic and similar media.
- 2.3. With respect to materials that have already been submitted or received as of the date of the issuance of this Order, the Parties shall have four weeks (28 days) after the issuance of the Order to propose such designations. A redacted version of the materials shall also be provided to the other Party at that time.

- 2.4. If the receiving Party disagrees with all or part of the proposed designation, it shall communicate the reasons for its disagreement to the submitting Party and the Tribunal within two weeks (14 days) of receiving such proposed designation. The submitting Party shall then either withdraw or explain its justification for the challenged designation within one week (7 days).
- 2.5. Absent disagreement by the other Party, the designated portions of the principal submissions shall be designated and treated as confidential information. Conversely, if the Parties disagree on a proposed designation, any material subject to such disagreement shall be treated as confidential information until and unless the Tribunal rules otherwise, and the Tribunal shall, after reviewing the Parties' respective submissions, decide within two weeks (14 days) of receiving the submitting Party's reply to the other Party's objections described in Section 2.4 above whether all or part of the designated portions of the principal submissions shall be designated and treated as confidential.
- 2.6. Except for legal authorities (which are presumed to be in the public domain), supporting witness statements, expert reports, and exhibits shall be presumed to contain confidential information and be treated accordingly. However, either Party may at any time propose to reclassify their own or the other side's supporting witness statements, expert reports, and exhibits on the grounds that it does not constitute or contain confidential information, and the procedures under Sections 2.4 and 2.5 shall apply.
- 2.7. Within either two weeks (14 days) following the expiration of the two weeks (14 days) described in Section 2.4 or two weeks (14 days) of the Tribunal's ruling described in Section 2.5 above, the submitting Party shall file a version of the written submissions and/or documents with the confidential information redacted, also in accordance with the procedures set out at Section 13.7 of Procedural Order No. 1.
- 2.8. If proposed designations of confidential information are not received within the 14-day period specified in Section 2.2 above, the ICSID Secretariat shall proceed to publish the principal submissions. The 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 pursuant to Section 2.5 above.
- 2.9. If a Party belatedly identifies information that it believes should be designated as confidential, it shall promptly notify the other Party and the Tribunal and follow the process set out in Sections 2.2-2.6 above. Immediately upon such notification and until the propriety of the proposed designation is resolved, the ICSID Secretariat shall remove any principal submissions in question from its website and refrain from further publication thereof.

3. Protection of Confidential Information and Documents

- 3.1. Confidential information may be used only in this arbitration or in any proceeding related to the recognition, enforcement, annulment, interpretation, or rectification of the award issued in this arbitration (“Subsequent Proceeding”), for which purpose confidential information may be disclosed only to:
- 3.1.1. The members of this Tribunal and of any committee constituted by the ICSID Secretariat in any Subsequent Proceeding, and their assistants, if any;
 - 3.1.2. The Secretary of the Tribunal and ICSID Secretariat and persons employed by the ICSID Secretariat, including counsel, secretaries, court reporters, translators, and other support and hearing staff;
 - 3.1.3. The inside counsel, officials, employees, officers, and directors of each Party, provided that such persons are directly involved in this arbitration or any Subsequent Proceeding or the management thereof;
 - 3.1.4. Such former officers, directors, officials, or employees of the Parties as counsel in good faith reasonably deem necessary to assist with respect to this arbitration or any Subsequent Proceeding;
 - 3.1.5. The outside counsel of a Party in connection with this arbitration or any Subsequent Proceeding, including legal assistants and other staff;
 - 3.1.6. Experts and consultants (including associated support staff) retained by a Party or its counsel in connection with this arbitration or any Subsequent Proceeding, whether or not retained to testify in this proceeding;
 - 3.1.7. Individuals providing fact witness statements in this arbitration or any Subsequent Proceeding, or persons whom a Party’s counsel in good faith reasonably expects to offer witness testimony, but only to the extent material to their expected testimony; and
 - 3.1.8. Firms, officers, directors, partners, employees, and agents of firms, or persons that have been engaged by the Parties or their counsel for purposes of translating, document storage, or other similar litigation support activities in connection with this

arbitration or any Subsequent Proceeding.

- 3.2. It shall be the responsibility of the Party wishing to disclose confidential information to persons described in Section 3.1 (other than those indicated in sub-sections 3.1.1 and 3.1.2) to ensure that such persons execute a Confidentiality Undertaking in the form attached as Appendix A before gaining access to such information. Each Party shall maintain copies of such Confidentiality Undertakings and shall make such copies available to the other Party upon request or order of the Tribunal.
- 3.3. Confidential information shall not be disclosed to persons or entities not described in Section 3.1 by a Party whose access to that information arises exclusively as a result of this arbitration for any purpose without the consent of the other Party or authorization by the Tribunal, except as required by law.
- 3.4. Upon learning of the disclosure of confidential information in contravention of the provisions of this Order, the person that made the disclosure promptly shall:
 - (i) give written notice of the disclosure to the Parties, which notice shall include a specific description of the improperly disclosed information as well as the identity of the recipient of the improperly disclosed information (the “Improper Recipient”);
 - (ii) give written notice to the Improper Recipient;
 - (iii) provide the Improper Recipient with a copy of this Order and request that the Improper Recipient sign a copy of the Confidentiality Undertaking in the form attached as Appendix A if the Improper Recipient is entitled to do so;
 - (iv) give written notice of the Improper Recipient’s response to the Parties;
 - (v) make reasonable good faith efforts to retrieve the improperly disclosed information and all copies thereof (including summaries, excerpts, notes and any other information derived therefrom); and
 - (vi) give written notice to the Parties of the result of such efforts.
- 3.5. No Party shall file any confidential material covered by the terms of this Confidentiality Order in any court, tribunal, or other body without first bringing this Confidentiality Order to the attention of said court, tribunal or other body and seeking directions concerning the filing of such material in a manner that protects its confidentiality.
- 3.6. If a Party or any other person receiving confidential information (“Recipient”) (a) is subpoenaed in another proceeding or action, (b) is served with a discovery demand in another proceeding or action, (c) is served with any other legal process by a non-party to this proceeding, or (d) otherwise receives a request from a non-party to this proceeding seeking such information, the Recipient, shall give notice within five business days of receipt of such subpoena, demand, legal process or request, to the Tribunal and the Parties, who may seek a protective order from an appropriate court, tribunal or other body precluding disclosure. Should the person seeking copies of such confidential material take

any action against the Recipient to enforce such subpoena, demand, other legal process or request, the Recipient shall respond by setting forth the existence of this Order. Nothing herein shall be construed as requiring the Recipient or anyone else covered by this Order to challenge or appeal any order requiring production of confidential information or to become subject to any penalties for noncompliance with any legal process or order.

- 3.7. After receiving notice of the entry of an award or other instrument finally disposing of this arbitration, and after conclusion of any and all proceedings seeking to recognize, enforce, annul, interpret, or rectify such award, including all appeals, all persons having received confidential information shall, upon written request of a Party, make a good faith, commercially reasonable effort to either: (a) return all materials containing confidential information and copies thereof (including summaries and excerpts) to counsel for the requesting Party; or (b) destroy all material containing confidential information and certify that fact through a sworn statement, a copy of which shall be forwarded to the requesting Party. Outside counsel for the Parties to this proceeding shall be entitled to retain submissions made to the Tribunal, hearing transcripts and attorney work product containing or incorporating confidential information, provided that such outside counsel, and employees of such outside counsel, shall not disclose such submission, transcripts, or attorney work product to any person except pursuant to order of the Tribunal, request from the ICSID Secretariat, or agreement with the Parties. The ICSID Secretariat and the Tribunal shall be entitled to retain all submissions, transcripts and evidence produced in this arbitration for the purposes of complying with their own obligations concerning the retention of information, but shall not be entitled to use it for any other purpose.
- 3.8. All persons receiving confidential information, whose access to that information arises exclusively as a result of this arbitration, shall be bound by this Order.
- 3.9. The obligations created by this Order shall survive the termination of this arbitration, whether by final award or otherwise.
- 3.10. During the pendency of this arbitration, this Order may be enforced by application to the Tribunal, and any dispute relating to or arising out of this Order shall be resolved by the Tribunal.
- 3.11. If a dispute relating to or arising out of or in connection with this Order should arise following the conclusion of this arbitration, the Parties agree to submit any such dispute for final resolution to a single arbitrator appointed on the application of either Party by the Secretary General of ICSID.
- 3.12. Nothing in this Confidentiality Order shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information on the

basis of a privilege, ground for exemption or non-disclosure or public interest immunity arising under applicable laws.

- 3.13. This Confidentiality Order shall be effective and binding upon a Party upon the signature of the Confidentiality Order by the Tribunal.
- 3.14. A Party may apply for an amendment to, or a derogation from, this Order if compelling circumstances so require.

4. Confidential Information in Hearings

- 4.1. In accordance with Article I.1 of Annex C of the Canada-Romania BIT and Section 20.6 of Procedural Order No. 1, the hearings shall be open to the public.
- 4.2. In accordance with Section 20.6.1 of Procedural Order No. 1, the hearing shall be broadcast on closed-circuit television at facilities made available by the ICSID Secretariat for such purposes.
- 4.3. In accordance with Article I.1 of Annex C of the Canada - Romania BIT and Section 20.6.2 of Procedural Order No. 1, the Parties may request the Tribunal to consider holding portions of hearings in camera, to the extent necessary to ensure the protection of confidential information.
- 4.4. Where confidential information is used or discussed at any hearing, the following rules shall apply:
 - 4.4.1. the Tribunal shall restrict access to that portion of the hearing only to: (i) authorized persons in accordance with Section 3.1 above; and (ii) originators of the confidential information; and,
 - 4.4.2. transcripts of those portions of the hearing in which confidential information is used or discussed shall not be made public.
- 4.5. For transcripts that relate to the part of the hearings which are not confidential, the transcripts shall be made available to the public.

5. Preparation of Redacted Copies of Documents for Disclosure

- 5.1. If an order or decision of the Tribunal or its award refers to or discloses confidential information, the Tribunal shall issue two versions of the order or award:
 - 5.1.1. A private, confidential version of the order, decision or award; and

- 5.1.2. A public, non-confidential version of the order, decision or award, with confidential information redacted.
- 5.2. In order to designate information as confidential in an order, decision or award, a Party must, within twenty (20) days from its receipt of the order, decision or award, either provide the other Party, the Tribunal, and the Secretary of the Tribunal with an electronic copy of the order, decision or award, with the information that it contends is confidential information appropriately identified or confirm that it considers that no redactions are required. Any disagreement between the Parties as to whether the contents of an order, decision or award should be redacted shall be resolved by the Tribunal in its sole discretion.
- 5.3. The portions of the principal submissions, orders, decisions and awards designated as confidential under the procedures specified above shall be redacted prior to publication.
- 5.4. This Confidentiality Order supersedes Section 13.7 of Procedural Order No. 1.
- 5.5. For the avoidance of doubt, the Parties hereby agree that Procedural Order No. 1 may be published without redactions.

On behalf of the Tribunal,

Ms. Teresa Cheng SC
President of the Tribunal
Date: November 14, 2016

APPENDIX A

CONFIDENTIALITY UNDERTAKING

TO: Romania (and its legal counsel) and Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. (and their legal counsel).

FROM: _____

- 1) IN CONSIDERATION of being provided with materials in connection with the arbitration between the Government of Romania, Gabriel Resources Ltd., and Gabriel Resources (Jersey) Ltd., over which claims for confidentiality have been advanced (“confidential information”), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any person who has not signed a Confidentiality Undertaking nor shall material so obtained be used by me for any purposes other than in connection with this proceeding.
- 2) I acknowledge that I am aware of the Confidentiality Order which has been issued by the Tribunal in this arbitration, a copy of which is attached to this Undertaking, and agree to be bound by it.
- 3) I will promptly return any confidential information received by me to the disputing party that provided me with such materials or the information recorded in those materials, at the conclusion of my involvement in these proceedings.
- 4) I acknowledge and agree that either of the disputing parties to this arbitration is entitled to relief to restrain breaches of the Confidentiality Order or to enforce the terms and provisions thereof in addition to any other remedy to which any disputing party to this arbitration may be entitled in law or in equity.

(Print Name)

(Signature)