

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd.

vs

Romania

(ICSID Case No. ARB/15/31)

PROCEDURAL ORDER NO. 12

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

2 July 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 *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 2018, the Parties filed their *objections to the other Party’s document production requests* and produced documents in respect of which there was no objection, 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.
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.
10. On 8 June 2018, Claimants submitted their comments in response to Respondent’s letter of 4 June 2018, concerning Respondent’s Requests nos 49 to 52.
11. On 8 June 2018, the Tribunal issued *Procedural Order No. 10* (hereinafter “PO 10”) together with Annexes A and B, ruling on the Parties’ document production requests and ordering the following:
 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.*

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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' Request 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).*
12. On 12 June 2018, PO 10 was revised to correct a typographical mistake.
 13. On 14 June 2018, the Parties informed the Tribunal that they have agreed to extend the deadlines set out at paragraphs 55(3) and 55(4) of PO 10.
 14. Also on 14 June 2018, Respondent submitted its clarifications regarding its objections to Claimants' Request no. 13, pursuant to paragraph 55(5) of PO 10.

Respondent confirmed that it does not have any documents responsive to this request in its custody, possession or control. It noted that it cannot therefore at this stage further substantiate its objection under Article 9(2)(f) of the 2010 IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), but reserved the right to do so, should any responsive documents come within its custody, possession, or control, if and as appropriate. In any event, Respondent maintained its objections to production based on the absence of relevance and materiality of the requested documents.

15. On 22 June 2018, Respondent submitted Claimants' *Privilege* and *Redaction Logs* containing Respondent's comments thereto, pursuant to paragraphs 55(3) and (4) of PO 10.
16. Also on 22 June 2018, Respondent Claimants submitted Respondent's *Privilege Log* containing Claimants' comments thereto, pursuant to paragraph 55(3) of PO 10.
17. On 28 June 2018, and after considering Respondent's clarifications of 14 June 2018 (see above para. 14), the Tribunal rejected Claimants' Request no. 13.
18. On the same date, Claimants sent a letter to the Tribunal referring to the latter's decision rejecting Claimants' Request no. 13. Claimants requested that the Tribunal clarifies that (a) Claimants' Request no. 13 is not rejected and (b) Respondent's statement that it has not located any responsive documents is noted.
19. On 2 July 2018, the Tribunal provided its clarifications in relation to its decision of 28 June 2018 concerning Claimants' Request no. 13 (see above para. 17). It noted, among other things, that it "*does indeed take note of all of Respondent's comments in its letter of 14 June 2018*" and that "[n]either Party is therefore prevented from resubmitting a document production request, if circumstances so necessitate".

II. THE TRIBUNAL'S CONSIDERATIONS

20. The decisions of the Tribunal on *Claimants' Privilege* and *Redaction Logs* and on *Respondent's Privilege Log* are stated in *Annexes A, B and C* which are enclosed to and form an integral part of the present *Procedural Order No. 12*.
21. The Tribunal considers that it is in any event important to make the following brief general comments:
 - a. *The Parties' Privilege Logs*
22. It is recalled that, 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".
23. It is also recalled that Article 9(2) of the IBA Rules provides the following in relevant part:

"The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: [...]

 - (b) *legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;*

[...]

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling”.

24. In the present case, the Parties have agreed that the Tribunal may be guided by the IBA Rules and the Tribunal considers that it can follow them in that regard absent any objection from the Parties.
25. Therefore, where a document contains statements subject to legal privilege, such document should be disclosed but with the relevant statements redacted (Article 9(2)(b) of the IBA Rules). In the present case, the Tribunal considers that there is no disagreement as to the proposed redacted text on which legal privilege is asserted.
26. Furthermore, where a document contains statements in respect of which the Tribunal considers there are “compelling” grounds of commercial or technical confidentiality, such statements may also be redacted (Article 9(2)(e) of the IBA Rules). In the present case, the Tribunal considers that there are no compelling reasons to order redaction of statements of such nature.
27. This issue is independent from the question of whether this information should be communicated to the public. Such decision has to be made in accordance with PO 3.

b. Claimants’ Redaction Log

28. The Tribunal takes note of Respondent’s agreement to have redacted the personal information of certain individuals mentioned in the requested documents covered by the Log.
29. With respect to other proposed redacted information, the Tribunal refers to its consideration in paragraph 26 above and considers further that there are no compelling confidential commercial or technical grounds to refuse the disclosure of information relating to the compensation of certain individuals.
30. Again, the question of whether any such proposed redacted information is communicated to the public is reserved and is to be made in accordance with PO 3.

III. THE TRIBUNAL’S DECISIONS

31. Having considered the Parties’ positions (see above paras 14-16), the Tribunal hereby decides as follows:
 1. ***The Parties shall produce documents pursuant to the decisions set out in Annexes A, B and C enclosed herein, which form an integral part of the present Procedural Order No. 12 (see also paragraphs 55(3) and (4) of Procedural Order No. 10) by Monday, 9 July 2018.***

2. ***Concerning paragraph 55(2) of Procedural Order No. 10, and in the absence of any communication to the Tribunal, the Tribunal understands that Claimants have either made full production of documents or confirmed to Respondent that they have already done so, in the cases that they have agreed to produce certain documents.***

On behalf of the Tribunal,

_____[Signed]_____
Prof. Pierre Tercier
President of the Tribunal
Date: 2 July 2018