

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. 24

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

22 October 2019

I. PROCEDURE

1. On 26 August 2016, the Tribunal issued ***Procedural Order No. 1*** on the procedure of the present arbitration (“PO 1”).
2. On 30 June 2017, Claimants filed their ***Opening Memorial***, together with factual exhibits, legal authorities witness statements, expert reports and legal opinions.
3. On 22 February 2018, Respondent filed its ***Counter-Memorial***, together with factual exhibits, legal authorities, witness statements and expert reports.
4. On 2 November 2018, Claimants filed their ***Reply and Counter-Memorial on Jurisdiction***, together with factual exhibits, legal authorities, witness statements, expert reports and legal opinions.
5. On 7 December 2018, the Tribunal issued ***Procedural Order No. 19***, concerning a petition from non-disputing parties (“PO 19”).
6. On 24 May 2019, Respondent filed its ***Rejoinder***, together with factual exhibits, legal authorities, witness statements, expert reports, legal opinions and a “declaration” from Mr. Victor Ponta.
7. On 28 June 2019, Claimants filed their ***Surrejoinder on the New Jurisdictional Objection***, together with legal authorities.
8. On 19 July 2019, Claimants sent a letter to the Tribunal, requesting to (a) exclude from the record testimony that they have no opportunity to confront through cross examination and (b) submit focused rebuttal evidence in response to the new evidence first submitted by Respondent with its Rejoinder (“Claimants’ Application”).
9. On 9 August 2019, Respondent sent a letter providing its comments to Claimants’ Application.
10. After being afforded an opportunity for another round of submissions by the Tribunal, on 20 August 2019, Claimants filed their comments to Respondent’s comments of 9 August 2019 (“Cl. 20.08.19”) and on 27 August 2019, Respondent filed its comments to Claimants’ comments of 20 August 2019.
11. On 6 September 2019, the Tribunal issued ***Procedural Order No. 23***, deciding on Claimants’ request to exclude from the record testimony that they had no opportunity to confront through cross examination and on their request for an opportunity to submit focused rebuttal evidence in response to the new evidence first submitted by Respondent with its Rejoinder (“PO 23”). The Tribunal specifically decided as follows:

1. *Respondent may resubmit Mr. Ponta's statement as a "witness statement" by 20 September 2019 and such statement, including any references thereto, shall form part of the record and the procedure set out in paragraph 43 of the present Procedural Order shall apply. Otherwise, Mr. Ponta's "declaration" and any reference thereto shall be stricken from the record altogether.*
2. *Ms. Reichardt's expert report, including any references thereto, shall remain part of the record.*
3. *Respondent may resubmit Exhibits CMA-122 and CMA-123 as "witness statements" or "expert reports" by 20 September 2019 and such statements or reports, including any references thereto, shall form part of the record. In this case, the procedure set out in paragraph 43 of the present Procedural Order shall apply. Otherwise, Exhibits CMA-122 and CMA-123 and any references thereto shall be stricken from the record altogether.*
4. *A limited and focused opportunity of rebuttal shall take place as follows:*
 - (i) *Claimants shall submit limited rebuttal documents in response to the new issues presented in Respondent's Rejoinder witness statements and expert reports (50 pages maximum) by 4 October 2019.*
 - (ii) *Respondent shall submit any rebuttal documents testimony (50 pages maximum) by 1 November 2019.*
 - (iii) *The timing and scope of the direct examination of both Parties' witnesses and experts shall be handled by the Tribunal with flexibility. The general timing of the Hearing will be decided, after consulting with the Parties, during the Pre-Hearing Organization Meeting. In case the Parties wish to extend the scope of the direct examinations, they should indicate the subject-matters by the dates on which their rebuttal documents are due.*
 - (iv) *Both Parties shall have, if necessary, a further opportunity for rebuttal of these documents, during the Hearing and during post-Hearing submissions.*
5. *All other requests are rejected.*
6. *The costs associated with Claimants' application shall be referred to a later stage in the proceedings.*

12. On 26 September 2019, Respondent sent a letter to the Tribunal, requesting the bifurcation of the Hearing of December 2019, so as to ensure that the Parties have sufficient time to conduct a proper examination of witnesses and experts.
13. On 30 September 2019, Claimants sent to the Tribunal their response to Respondent's request to bifurcate the Hearing of December 2019. Claimants objected to such request.
14. On 1 October 2019, the Tribunal sent a message to the Parties, inviting them to submit their separate proposals on the schedule of the Hearing of December 2019 as originally contemplated, before deciding on Respondent's request for bifurcation of such Hearing.
15. On 8 October 2019, the Parties communicated their separate proposals for a schedule of the hearing of December 2019 in accordance with the Tribunal's direction of 1 October 2019.
16. On 11 October 2019, and following an agreed extension by the Parties, Claimants filed their rebuttal documents and notification of the anticipated subject matter of rebuttal testimony.

Claimants noted that they could not fairly respond within the 50-page limitation set out in PO No. 23 to the amount of new evidence Respondent saved for its Rejoinder. Claimants therefore asked the Tribunal to accept the exhibits as proposed ("Cl. 11.10.19").

17. On 15 October 2019, the Tribunal sent a letter to the Parties by which it decided on Respondent's request for bifurcation of the Hearing.

The Tribunal proposed to bifurcate the Hearing into (i) two weeks as originally scheduled from 2 to 13 December 2019 (without Saturdays); and (ii) one additional week as soon as possible. It therefore invited the Parties to liaise and agree if possible on the criteria that should be followed for the bifurcation.

18. On 16 October 2019, and following an invitation from the Tribunal, Respondent sent its comments to Claimants' rebuttal submission of 11 October 2019.

Respondent requested, *inter alia*, that the Tribunal order Claimants to comply with PO 23 in relation to the 50-page limit, that Claimants' resubmitted exhibits be rejected and that Claimants summarize the new, rebuttal evidence that their witnesses intend to provide on direct examination ("Resp. 16.10.19").

19. On 18 October 2019, and following an invitation from the Tribunal, Claimants filed their comments to Respondent's objections to Claimants' rebuttal evidence ("Cl. 18.10.19").

II. THE PRAYERS FOR RELIEF

A. Respondent

20. Respondent requests that the Tribunal to “*enforce its [PO 23] and order the Claimants to comply with its directions as set out therein*”. Specifically:

In relation to Claimants’ rebuttal documents, to:

- “*order the Claimants to resubmit their rebuttal evidence in a manner that complies with the Tribunal’s direction, including the page limit set in [PO 23]*”.
- “[i]nsofar as the Claimants wish to submit video evidence [...] file transcripts of those videos that count towards the 50-page limit”.
- [i]nsofar as [Claimants] wish to include Excel files [...] prepare the Excel sheets also in printable format in a manner that the number of pages may be assessed against the page limit”.

In relation to Claimants’ envisaged rebuttal evidence during direct examination of Claimants’ witnesses, to:

- “*direct the Claimants to summarize the new, rebuttal evidence that their witnesses intend to provide on direct examination such that the Respondent and its witnesses are able to prepare their rebuttal*” and “[i]n doing so, the Claimants should also indicate the specific paragraph(s) of the Rejoinder witness statements, expert reports, and/or exhibits to which they intend to provide new, rebuttal evidence on direct examination (as they have done with respect to the rebuttal exhibits)”.

In relation to Claimants’ “resubmitted” exhibits, to:

- “*reject the Claimants’ resubmitted exhibits in their entirety*” (Resp. 16.10.19).

B. Claimants

21. Claimants request that the Tribunal to:

- “*accept the exhibits as proposed*” in their filing of 11 October 2019 (Cl. 11.10.19); (Cl. 22.10.19).
- “*reject Respondent’s request for the Tribunal to reconsider its decision in PO23 as it relates to rebuttal testimony*”.

- “rule on the instant matters urgently as they go to the heart of Claimants’ ability to prepare to present, and in fact to present, their case”.

III. THE ISSUE

22. The issue is whether Claimants’ rebuttal direct testimony filing of 11 October 2019 is proper and made pursuant to the Tribunal’s direction in PO 23 specifically in relation to:
- The number and form of the rebuttal documents (Section IV below);
 - The indicated subject matter of the rebuttal direct testimony (Section V below); and
 - The appropriateness of resubmitting documents to be used in such rebuttal direct testimony (Section VI below).

IV. REBUTTAL DOCUMENTS

A. The Parties’ positions

(1) Respondent

23. Respondent submits that Claimants have disregarded the page limit set by the Tribunal. Claimants have submitted 41 rebuttal exhibits, which are comprised of 38 documents, two videos and two Excel files. The 38 documents total 189 pages. Even assuming that the English translation and the Romanian original page should be counted as one, the documents submitted by Claimants amount to 119 pages. In addition, Claimants have submitted two Excel files and two videos, which total over one hour and 15 minutes. Claimants have not submitted transcripts for these videos (Resp. 16.10.19).
24. Claimants have therefore manifestly failed to comply with the 50-page limit established by the Tribunal in PO 23 (Resp. 16.10.19).
25. Respondent also reserved all of its rights, including the right to request for an extension to its 8 November 2019 deadline to submit its own rebuttal documents, the right to file substantially more than 50 pages of rebuttal evidence, and the right to call on direct examination witnesses not called for cross-examination by Claimants (Resp. 16.10.19).

(2) Claimants

26. Claimants submit that for all the reasons set forth in their application to submit rebuttal evidence, maintaining a 50-page limit on their rebuttal documents in the circumstances would seriously undermine the fair conduct of this arbitration and deny Claimants due process (Cl. 11.10.19).
27. The limited universe of rebuttal evidence submitted by Claimants is necessary to present their case in response to the unrestricted, massive amount of new evidence and argument that Respondent should have submitted with its Counter-Memorial but tactically chose to save for its Rejoinder. Accepting this evidence would neither disrupt the proceedings nor prejudice Respondent. Respondent's descriptions of the amount of alleged new material is very significantly exaggerated. Although Respondent purports to count pages, it does not claim prejudice, nor could it reasonably or credibly do so. In the circumstances Claimants urge the Tribunal to accept their proffered rebuttal evidence. Not doing so would render this arbitration proceeding fundamentally unfair and would deny Claimants due process (Cl. 18.10.19).
28. Claimants strongly oppose Respondent's purported reservation of rights to extend or enlarge its right to submit rebuttal documents and to identify subject matters of envisioned rebuttal testimony beyond the opportunity provided to Claimants. There is no legitimate justification to provide Respondent more time to present rebuttal documents, which would prejudice Claimants by being too close to the hearings, or to expand the scope of allowable further rebuttal by Respondent, which must be proportionate to the rebuttal evidence submitted by Claimants (Cl. 18.10.19).

B. The Tribunal's analysis

29. In their submission of 11 October 2019, Claimants enclosed a list of 41 rebuttal documents to be submitted as exhibits to the record. Specifically:
- Exhibits C-2911 to C-2927: Rebuttal to the new testimony of Messrs. Boc, Ariton, Bode, and Găman
 - Exhibits C-2928 and C-2929: Rebuttal to the new testimony of Respondent's local witness (Ms. Jeflea)
 - Exhibits C-2930 to C-2935: Rebuttal to the new testimony of Respondent's social license expert Dr. Pop and Dr. Stoica
 - Exhibits C-2936 to C-2940: Rebuttal to the new arguments on Romanian law

- Exhibit C-2941: Rebuttal to the new testimony of Respondent’s experts Ms. Blackmore and Ms. Wilde
 - Exhibits C-2942 to C-2944: Rebuttal to the new testimony of Respondent’s mining expert Behre Dolbear
 - Exhibits C-2945 and C-2946: Rebuttal to the new testimony of Respondent’s experts Mr. McCurdy
 - Exhibits C-2947 to C-2951: Rebuttal to the new testimony of Respondent’s quantum expert Dr. Burrows
30. The Parties are in dispute as to whether Claimants should resubmit their rebuttal documents, such that they comply with the 50-page limit imposed by the Tribunal in PO 23. Respondent also raises issues in relation to the form of submission of certain exhibits.
31. It is recalled that, in PO 23, the Tribunal decided that Claimants should have an opportunity to respond to the new witness statements and expert reports submitted by Respondent in its Rejoinder (PO 23, para. 93). It considered that such opportunity must take into consideration the right of a party to plead last, the right of the Parties to meaningfully participate in the Hearing by having presented their entire case (and rebuttals) and the need to preserve the integrity of the proceedings and to prevent the disruption to either Party’s preparation of the Hearing (PO 23, para. 94).
32. Each Party was, therefore, permitted a limited and focused opportunity of rebuttal of 50 pages. Further, it was decided that the timing and scope of the direct examination of both Parties’ witnesses and experts would be handled by the Tribunal with flexibility, that if the Parties wish to extend the scope of the direct examinations they should indicate the subject-matters by the dates on which their rebuttal documents are due and that if necessary, both Parties shall have a further opportunity for rebuttal of these documents during the Hearing and during post-Hearing submissions (PO 23, para. 95).
33. The Tribunal therefore attempted to find an appropriate solution that preserves the Parties’ due process rights and that results in the minimum possible disruption of the proceedings in light of the circumstances. It is in accordance with these principles that the Tribunal will decide on the Parties’ present dispute on the admissibility of Claimants’ rebuttal documents.
34. *First*, there is no dispute that Claimants’ rebuttal documents are beyond the 50-page limit set forth in PO 23. The Tribunal, nevertheless, does not consider that Claimants’ longer submission was made in bad faith. Indeed it appears that the number of Claimants’ documents is reasonable in relation to the purported rebuttals they wish to make.

35. In these circumstances, the Tribunal does not consider it appropriate to exclude Claimants' submission and to require it to limit it to the number of pages set out in PO 23. This is particularly the case as:
- The Tribunal could not envision the appropriate length of rebuttal documents at the time of issuing PO 23; as such, the limit of pages was, while important, only indicative in its number.
 - Claimants' documents each comprise an average of three pages (excluding the Romanian originals).
 - The Tribunal's direction that it will handle the timing and scope of the direct examination with flexibility in any event and without this implying that a direct rebuttal examination will result a long cross examination.
 - To require Claimants to resubmit their exhibits at this stage of the proceedings and approximately one month before the proceedings, will only impact further the Parties' anticipated preparations for the Hearing and result in additional requests possibly during and after the Hearing.
 - The Tribunal has already accepted Respondent's request to bifurcate the Hearing in order to ensure that the Parties have ample time to be heard on their respective cases.
36. Accordingly, the Tribunal considers that Claimants' rebuttal documents are admissible. Respondent shall have an equal opportunity (in terms of length) to respond to Claimants' submission and with a slight extension in time, i.e., **by 14 November 2019**. Such equal opportunity shall not be interpreted as an unlimited freedom in relation to the length and scope of its submission.
37. *Second* and nevertheless, the Tribunal agrees with Respondent that Claimants shall resubmit: (a) the transcripts of the exact minutes of the videos which they purport to file in rebuttal (as these are indicated in the list of Claimants' letter of 18 October 2019); (b) the excel files in a readable format. Claimants shall do so **by 25 November 2019**.

V. SUBJECT-MATTER OF REBUTTAL TESTIMONY

A. The Parties' positions

(1) Respondent

38. Respondent submits that, by providing overly vague descriptions of the “subject matters” that their witnesses and experts will address during their direct examinations, Claimants have not respected the Tribunal’s direction in PO 23 (Resp. 16.10.19).
39. It is not sufficient for Claimants to indicate the “topic” of the oral evidence to be presented; as directed by the Tribunal, they must “indicate the subject-matters” of the new evidence by summarizing the evidence, to allow Respondent to produce rebuttal evidence, which is due to present on 8 November 2019. It is not possible for Respondent to rebut a “topic”; there must be an indication, and at least a summary, of the evidence to be presented (Resp. 16.10.19).
40. By merely identifying but not summarizing the subject matter of the intended testimony, Claimants are holding back potentially important evidence and thus seek to take Respondent by surprise with the new evidence at the hearing (Resp. 16.10.19).
41. Because Claimants have not summarized the evidence to be provided, Respondent cannot comply with the Tribunal’s direction at paragraph 95 of PO 23 that Respondent indicate, by the deadline for the submission of rebuttal evidence, (i) whether it “*wish[es] to extend the scope of the direct examinations*” of its witnesses and, if so, (ii) that it in turn indicate “the subject-matters” (i.e., to summarize the evidence) of that direct examination (Resp. 16.10.19).
42. See also paragraph 24 above.

(2) Claimants

43. Claimants argue that they followed PO 23, describing in their 11 October 2019 letter the subject-matters of the anticipated rebuttal testimony from several of Claimants’ witnesses and experts. The Tribunal did not order that the Parties must indicate the subject matters “by summarizing the evidence” proposed to be presented. It was not workable to require the Parties to submit what in effect would be a third round of written statements or synopses of the testimony to address the several topics in rebuttal by the dates provided and still maintain the December hearing date, which is what Respondent now seeks. Claimants cannot both be ready for the hearings, even as now bifurcated, and prepare written summaries of anticipated rebuttal testimonies. Nor are the descriptions of the subject-matters of rebuttal testimony provided by Claimants too vague to put Respondent and its witnesses well on notice as to the topics that will

be addressed and on which Respondent's witnesses may wish to offer further testimony in rebuttal. Thus, Respondent's request for the Tribunal to reconsider PO 23 and direct Claimants to "*summarize the new, rebuttal evidence*" must be rejected.

44. See also paragraphs 26 and 27 above.

(3) The Tribunal's analysis

45. In their submission of 11 October 2019, Claimants enclosed a list of the subject-matter of rebuttal testimony that they expect may be presented during the direct examination of several of Claimants' witnesses and experts, specifically of:

- Jonathan Henry
- Dragos Tănase
- Elena Lorincz
- Horea Avram
- Professor Lucian Mihai
- Professor Corneliu Bîrsan
- Professor Ovidiu Podaru
- Robert Boutilier
- Charles Jeannes, former CEO of Goldcorp
- SRK Consulting
- Compass Lexecon

46. The Parties are in dispute as to whether the indicated "subject matters" should comprise a summary of the evidence such that Respondent is in a position to appropriately produce its own rebuttal evidence.

47. The Tribunal takes note that, in their letter of 18 October 2019, Claimants have set out in a table listing the new rebuttal documents (Exhibits C-2911 to C-2951) "comments" with respect to each document, noting the summary of the document and the references it seeks to rebut, including references.

48. Accordingly, the Tribunal considers that Claimants' rebuttal submission, as supplemented in their letter of 18 October 2019, sufficiently presents the subject-matter of the new evidence as required by PO 23.

VI. RESUBMITTED EXHIBITS

A. The Parties' positions

(1) Respondent

49. Respondent argues that Claimants have also sought to circumvent the Tribunal's directions by submitting a number of additional documents which they mischaracterize as a "resubmission" of already existing evidence. These documents, which consist of sixteen exhibits, of which six are documents (totaling over 600 pages), seven are videos and three are Excel files, also indisputably constitute new evidence. This is abusive (Resp. 16.10.19).
50. Claimants did not seek leave from the Tribunal to produce these exhibits and Respondent did not request these documents to be resubmitted. Such "resubmission" of evidence was envisaged neither by PO 23 nor PO 1 (Resp. 16.10.19).
51. For each of the sixteen exhibits, Claimants recognize that they are produced "in rebuttal" to Respondent's Rejoinder expert reports or witness statements. Furthermore, although Claimants try to portray these exhibits as not being "new", these exhibits are just that. Claimants are not seeking to resubmit these documents because they contain a technical flaw; rather, in each case, Claimants are adding substantive content to an exhibit. These resubmitted exhibits thus *de facto* comprise new, rebuttal evidence (Resp. 16.10.19).
52. The volume of the resubmitted exhibits is significant. The documents total 666 pages. The seven new videos total just over one hour and 14 minutes. The three Excel files contain 1.646 kilobytes (Resp. 16.10.19).
53. See also paragraph 24 above.

(2) Claimants

54. See paragraphs 26 and 27 above.

B. The Tribunal's analysis

55. In their submission of 11 October 2019, Claimants have also resubmitted certain exhibits that are already in the record, namely:
- C-460 resubmitted as C-460.01, 5 September 2013 (video)
 - C-628 resubmitted as C-628.01, 18 August 2011 (video)
 - C-791 resubmitted as 791.01, 19 August 2011 (video)
 - C-791 resubmitted as C-791.02, 26 August 2011 (video)
 - C-1516 resubmitted as C-1516.01, 15 September 2013 (video)
 - C-2044 resubmitted, survey questionnaires, 2011
 - C-2053 resubmitted, survey questionnaires, 2013
 - C-2063 resubmitted, survey questionnaires, 2001
 - C-2407 resubmitted, Waters Law No. 107/1996, 7 December 1996
 - C-2632 resubmitted as C-2632.03, 29 August 2011 (video)
 - C-2692 resubmitted as C-2692.01, 22 October 2013 (video)
 - Stoica-19 resubmitted as C-2952, World Values Survey, 2010-2014
 - CMA-76 resubmitted as C-2953
 - C-1853-C (e-only)
 - C-1876-C (e-only)
 - C-2860 (e-only)
56. The Parties are in dispute as to whether Claimants' "resubmitted" documents, which span over 600 pages long, comprise new documents not envisaged by PO 23 or PO 1 which should be rejected.
57. *First*, the Tribunal notes that, in their letter of 18 October 2019, Claimants also enclosed a table indicating the length and comments of each "resubmitted" exhibit. Specifically, Claimants note the length of the documents and videos relied on and the

- purported changes to each document, as well as to their relevance in relation to the rebuttals.
58. *Second*, the Tribunal considers that these documents are intended to form part of Claimants' rebuttal documents in the context of the Tribunal's directions of PO 23. Accordingly, their admissibility is to be assessed by the same principles set out in paragraphs 32 to 34 above.
59. In this respect, the Tribunal decides the following:
- The exact shortened versions of the videos specifically relied on in rebuttal, as well as their relevant transcripts and subtitles, and the exact texts or pages of documents of the purported 16 "resubmitted exhibits" shall be filed as new exhibits for rebuttal purposes pursuant to PO 23.
 - These exhibits shall be accompanied by a list with comments in relation to the manner in which they will be relied on during the direct rebuttal testimonies (i.e., such as in Claimants' letter of 18 October 2019).
 - The Tribunal reserves the right to reject the admissibility of any such exhibit that is longer than for the required purpose of direct rebuttal testimony.
 - Claimants shall submit these new documents, as soon as possible and in any event no later than **25 October 2019**.
60. As in the case above (see para. 35), Respondent shall have an equal opportunity (in terms of length) to respond to Claimants' new documents **by 14 November 2019**. Such equal opportunity shall not be interpreted as an unlimited freedom in relation to the length and scope of its submission.

VII. ORDER

1. *Claimants' rebuttal documents are admissible. Respondent shall have an equal opportunity (in terms of length) to respond to Claimants' submission **by 14 November 2019**. Such equal opportunity shall not be interpreted as an unlimited freedom in relation to the length and scope of its submission.*
2. *Claimants shall resubmit: (a) the transcripts of the exact minutes of the videos which they purport to file in rebuttal (as these are indicated in the list of Claimants' letter of 18 October 2019); (b) the excel files in a readable format. Claimants shall do so **by 25 November 2019**.*

3. ***Claimants' rebuttal submission, as supplemented in their letter of 18 October 2019, sufficiently presents the subject-matter of the new evidence as required by PO 23.***

4. ***Claimants shall file their purported resubmitted documents as new documents and in the manner set out in paragraph 58 of the present Procedural Order by 25 October 2019. Respondent shall have an equal opportunity (in terms of length) to respond to Claimants' new documents by 14 November 2019. Such equal opportunity shall not be interpreted as an unlimited freedom in relation to the length and scope of its submission.***

On behalf of the Tribunal,

[*Signed*]

Prof. Pierre Tercier
President of the Tribunal