

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. 32

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

26 May 2020

I. PROCEDURE

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 25 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.
3. 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* (“Application”). A series of letters on Claimants’ Application were subsequently exchanged between the Parties on 9, 20 and 27 August 2019.
4. On 6 September 2019, the Tribunal issued *Procedural Order No. 23* (“PO 23”), deciding on Claimants’ Application and for a “*limited and focused*” rebuttal phase to take place. In PO 23, the Tribunal envisioned the possibility for “*a further opportunity for rebuttal of these documents, during the Hearing and during post-hearing submission*”.
5. On 26 September 2019, Respondent requested 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 (“Respondent’s Request for Bifurcating the Hearing”).
6. On 30 September 2019, Claimants communicated their response and objection to Respondent’s Request for Bifurcating the Hearing. Further correspondence on such Request was exchanged between the Parties on 1 and 8 October 2019.
7. On 15 October 2019, the Tribunal decided to *bifurcate the hearing* into (a) two weeks as originally scheduled from 2 to 13 December 2019 and (b) one additional week as soon as possible thereafter.
8. On 11 October 2019, Claimants filed their rebuttal documents. Respondent provided its comments thereon on 16 October 2019. Claimants replied to such comments on 18 October 2019.
9. On 22 October 2019, the Tribunal issued *Procedural Order No. 24* (“PO 24”), deciding that Claimants’ rebuttal documents were admissible and that Respondent would have “*an equal opportunity (in terms of length) to respond to Claimants’ submission*”.
10. On 14 November 2019, Respondent filed its sur-rebuttal documents, comprising also witness statements and expert reports. Claimants objected to Respondent’s submission on 19 November 2019. Claimants noted that they were to proceed on the basis that Dr. Burrows’ third expert report, the supplemental witness statements of Ms. Jeflea and Messrs. Cămărășan, Devian, Golgoț, and Jurca, and Respondent’s proposed rebuttal documents all will be accepted into the record. Claimants however objected to the admissibility of new expert report of Dr. Thomas Brady.

11. On 21 November 2019, the Tribunal sent a letter to the Parties, reconsidering its decisions on PO 23 and PO 24 and ordering the Parties to “*resubmit only their rebuttal documents that will be used/discussed during their Opening Statements and in direct or cross examinations*”. The Tribunal admitted Respondent’s supplemental witnesses and expert reports in light of Claimants’ proposal in their 19 November 2019 letter but rejected the admissibility of the new expert report of Dr. Thomas Brady. The Tribunal again contemplated a discussion with the Parties concerning a possibility to submit additional documents on the rebuttal issues during the phase following the hearing.
12. On 25 November 2019, Claimants resubmitted their rebuttal documents.
13. On 27 November 2019, Respondent resubmitted its sur-rebuttal documents.
14. Between 2 and 13 December 2019, the *first hearing* was held at the premises of the ICSID in Washington DC. During the hearing, the Parties and the Tribunal discussed the possibility for a further submission of rebuttal documents (Tr. 02.12.2019, 26:15-20, Tr. 13.12.2020, 3308:11-20).
15. On 17 December 2019, the Tribunal sent a letter to the Parties, inviting them, if they wish, to file rebuttal documents “*in the form of a simultaneous filing not exceeding fifty pages for each Party*”.
16. On 10 March 2020, the Tribunal issued *Procedural Order No. 27* (“PO 27”) deciding on the list of questions that it invites the Parties to reply.
17. On 10 April 2020, the Parties simultaneously filed their rebuttal documents.
 - *Claimants* incorporated in their 11-page letter an Annex describing rebuttal documents C-2957 to C-2981, such documents totalling 50 pages.
 - *Respondent* submitted two categories of documents to rebut new evidence tendered by Claimants on direct examination: i) a supplemental expert report by Behre Dolbear, authored by Mr. Michael (Mike) McLoughlin and its exhibits BD-24 to BD-30, and ii) the Expert Opinion of Dr. Thomas Brady.
18. On 13 April 2020, each Party requested leave to comment on the other Party’s rebuttal document submission of 10 April 2020. The Tribunal granted the Parties leave to comment.
19. On 24 April 2020, the Parties filed their comments to the other Party’s rebuttal document submission.
 - *Claimants* commented on the Parties’ respective rebuttal submissions and requested the Tribunal to (a) admit Claimants’ 50 pages of rebuttal documents and (b) exclude the two new expert reports by the two new expert witnesses Respondent has proffered.
 - With its comments, *Respondent* filed a nine-page Annex commenting on each of Claimants’ rebuttal documents. Respondent argued that, with one exception, none of the documents filed by Claimants on 10 April 2020 falls within the scope

of admissible evidence. Respondent submitted that allowing these documents into the record would constitute a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.

20. On the same date, Claimants sent an email, objecting to Respondent's nine-page "unauthorized Annex" to their letter submitting further comments on Claimants' list of rebuttal documents and respectfully requesting that such Annex be disregarded.
21. On 25 April 2020, Respondent sent an email, noting that Claimants are in direct breach of the Tribunal's direction that "[t]here shall be no further correspondence on the issue" and that Respondent has complied with the Tribunal's directions.
22. On 28 April 2020, the Tribunal issued *Procedural Order No. 30* ("PO 30"), deciding on the admissibility of the Parties' further rebuttal documents and Claimants' legal authorities in connection with the EC Submission, as follows:
 1. *Claimants' rebuttal documents and Respondent's rebuttal documents filed on 10 April 2020 are inadmissible.*
 2. *The Parties shall resubmit their further rebuttal documents as follows:*
 - (i) *The Parties shall simultaneously address the rebuttal issues addressed in the December hearing in general. This can be done by way of arguments and / or documents but not new expert or witness testimony. To the extent that a Party needs to reply to any such argument and / or document, it can do so in the context of the Post-Hearing Briefs following the September hearing. The Parties shall do so by 12 May 2020 and in a maximum of 25 pages.*
 - (ii) *The Parties shall consecutively address the rebuttal issues to be discussed in the September Hearing. This can be done by way of arguments and / or documents, as well as by new expert or witness testimony. The Parties shall follow the format that was implemented for the December hearing documents (see template in Tribunal's letter dated 21 November 2019). Claimants shall do so by 12 May 2020 and in a maximum of 25 pages. Respondent shall do so by 26 May 2020 and in a maximum of 25 pages.*
 3. *Claimants' legal authorities filed with their observations on the EC's submission are admissible.*
 4. *All other requests are rejected.*
23. On 28 April 2020, Claimants requested a two-week extension to submit their responses to the Tribunal's questions set forth in PO 27. The Tribunal invited Respondent to provide their comments on Claimants' request on 29 April 2020.
24. Also on 29 April 2020, Claimants sent a letter referring to the Tribunal's decision in PO 30 that the Parties' 25 pages of further rebuttal documents relating to the issues to be discussed at the hearing in September 2020 may include new expert or witness testimony.

Claimants, without waiving any objection and reserving all of their rights, requested that the Tribunal “confirm that PO 30 is not intended to, and does not, replace or limit its earlier decisions to allow rebuttal direct testimony, as at the December hearing, for the witnesses and experts scheduled to testify at the upcoming September hearing for whom Claimants already have provided notice” (“Claimants’ Request”).

25. On the same date, Respondent applied for the Tribunal to reconsider certain decisions in PO 30 and to decide anew as follows:
 - First, that “the Parties may only submit rebuttal evidence pertaining to the December 2019 hearing if such evidence may still be examined with the relevant witnesses and experts during the September 2020 hearing”.
 - Second, that “Respondent is allowed to submit the Behre Dolbear supplemental expert report, and its exhibits, in response to the new rebuttal evidence given by Ms. Lorincz at the December 2019 hearing” (“Respondent’s Application for Reconsideration”).
26. On 30 April 2020, the Tribunal sent a letter to the Parties, acknowledging receipt of Claimants’ letter of 29 April 2020, and noting that it would revert on Claimants’ request shortly. The Tribunal also acknowledged receipt of Respondent’s letter of the same date and invited Claimants to submit their comments, if any.
27. Also on 30 April 2020, Respondent sent a letter to the Tribunal, objecting to Claimants’ request for a two-week extension to file its answers to the Tribunal’s questions in PO 27.
28. On 4 May 2020, the Tribunal issued *Procedural Order No. 31* (“PO 31”), deciding to reject Claimants’ request for a further two-week extension to answer the Tribunal’s questions set out in PO 27.
29. On the same date, Claimants sent an email to the Tribunal, urging the latter to reconsider its decision in PO 31 and to allow Claimants until 11 May 2010 to file their responses.
30. In light of the Parties’ disagreements on the schedule, the rebuttal documents and the tight schedule leading up to the September Hearing, the Tribunal sent a letter to the Parties on 5 May 2020, strongly inviting them to confer and to agree on the following:

A. Claimants’ request for an extension of time

- As decided above, Claimants shall file their answers to the Tribunal’s questions in PO 27 **by 11 May 2020**.
- The Parties shall confer and agree on a joint schedule on all pending steps between now and the hearing in September. They shall do so **by 14 May 2020**. In the unfortunate case of disagreement, which will necessarily impact the schedule, each Party shall state its proposal by the same date. In such case, the Tribunal will decide and its decision will be final.

B. Procedural Order No. 30

– It is recalled that the entire rebuttal phase was set up in order to mitigate any imbalance caused by the filing of Respondent’s Rejoinder. It is indeed an ad hoc procedure which gives **ample opportunity and room to both Parties** to plead additionally their case. However, the Tribunal feels that **there is no good will from either Party** behind this difficult process concerning the “rebuttal issues”.

– The Tribunal attempted, again, to ensure that both Parties have adequately pleaded their case in this respect, taking into consideration the fact that the hearing has been bifurcated and the need to go forward. This is why the Tribunal, always in consultation with the Parties, discussed the possibility of “rebuttal documents”, “rebuttal submissions”, “rebuttal evidence” etc. It did so in a one-sided good intended attempt to assist the Parties in this respect.

The Tribunal however finds that the Parties are not amenable to its efforts to address this difficult situation and balance the competing rights in play: i.e., the right to rebut new evidence, the right to plead last and the right to be adequately heard. It therefore strongly invites both Parties to confer and agree on the form and scope of the “rebuttal phase” addressing the December 2019 and the September 2020 issues. The Parties shall do so **by 14 May 2020**.

– In the unfortunate case of disagreement, which will impact the schedule further, Claimants shall provide their comments to Respondent’s Application for Reconsideration of PO 30 (originally due on 7 May 2020) **by 14 May 2020**. The Tribunal shall then decide and its decision shall be final. In this event, there shall be no further discussion or phases on the “rebuttal issues”.

C. September hearing

– Considering the above, as well as the current difficulties caused by Covid-19, the Parties are strongly invited to confer and agree on the way we shall proceed in relation to the September hearing.

– The Tribunal is amenable to holding the hearing virtually. However, the Parties must confer and discuss the possibility of doing so, taking into consideration the fact that it is a one week-hearing comprising of witness and expert examinations. This can be done also in consultation with the Tribunal Secretary.

– The Parties shall come back with a joint proposal in this respect **by 21 May 2020**. (emphasis in the original)

31. On 11 May 2020, Claimants filed their responses to the Tribunal’s questions set out in PO 27, together with legal authorities.

32. On 18 May 2020, Claimants sent a message to the Tribunal, informing it that the Parties had agreed on the schedule and the rebuttal documents and communicating the text of the agreement. Respondent confirmed the Parties' agreement set out in Claimants' message on the same date.
33. On 19 May 2020, the Tribunal took note of the Parties' agreement of 18 May 2020 and stated that its decision in PO 30, concerning the admissibility of the Parties' rebuttal documents was no longer pertinent and that Claimants' request for a confirmation in relation to the Tribunal's decision in PO 30 and Respondent's Application for Reconsideration of PO 30, both dated 29 April 2020, were now moot.
34. On 20 May 2020, Respondent sent a message to Tribunal noting: "*in the interests of providing an accurate public record of the procedural developments in this case, the Respondent would propose that, insofar as Procedural Order No. 30 is indeed published, the Tribunal re-issue its communication of 19 May 2020 in the form of a procedural order that would also be subsequently published on the ICSID website.*"
35. The Tribunal agrees with the joint proposal made by the Parties and integrates it in the present Procedural Order. The text is reproduced in the Tribunal's Order below.

III. ORDER

1. *The Tribunal takes note of and agrees with the Parties' agreement of 18 May 2020 which states as follows:*

"The Parties have conferred and agreed that the Respondent will have an equivalent time to file its responses to the Tribunal's PO27 questions as the Claimants and thus has until 13 July 2020 to do so.

The Parties have also agreed that, in the event that the Tribunal has any follow-up questions on the Parties' submissions regarding the Tribunal's PO27 questions, the timing and modalities of addressing any such questions will be discussed at the September 2020 hearing.

Regarding the rebuttal evidence, the Parties have agreed that the supplemental rebuttal evidence submitted by the Parties on 10 April 2020 will be admitted into the record. They note that no further new evidence is allowed prior to the September hearing, subject to section 16.3 of PO1 which continues to apply.

The Parties agree to follow the same procedure regarding rebuttal evidence as with the December 2019 hearing. Thus, the Claimants will in advance of the hearing say when they will rely on which rebuttal exhibit. Also, pursuant to Section VII.4.iii of PO23, Mr. Jeannes, SRK, and Compass Lexecon may provide rebuttal testimony during the September 2020 hearing on the matters enumerated by the Claimants in their letter dated 11 October 2019. The

Respondent's experts shall also be afforded the opportunity to respond to this new evidence during their own direct testimonies.

Finally, although the Respondent reserves the right to submit surrebuttal evidence in case the Claimants produce new evidence at the hearing, the Claimants do not agree to further unilateral submissions. In any event, the Parties agree that the Tribunal should decide following the September hearing whether there should be any further evidentiary submissions from the Parties."

- 2. The Tribunal's decision in PO 30, concerning the admissibility of the Parties' rebuttal documents is no longer pertinent and Claimants' request for a confirmation in relation to the Tribunal's decision in PO 30 and Respondent's Application for Reconsideration of PO 30, both dated 29 April 2020, are now moot.***

On behalf of the Tribunal,

[signed]

Prof. Pierre Tercier
President of the Tribunal