

June 13, 2023

BY E-MAIL

Members of the Tribunal
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**Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania
(ICSID Case No. ARB/15/31)**

Dear Members of the Tribunal:

In accordance with the timetable agreed by the Parties and approved by the Tribunal, Claimants present below their observations on the admissibility of the NDP submission proffered by ICDER and Greenpeace Romania (the “Amici”) on May 30, 2023 (the “Amici Reply”).

The Amici Reply is inadmissible for three reasons, each one of which independently compels the conclusion: (i) Annex C, Part III of the Canada BIT and the Tribunal’s PO1 and PO19 expressly exclude reply submissions by NDPs; (ii) the Amici Reply consists entirely of legal argument and contentions outside the scope of the Amici’s knowledge or expertise; and (iii) admitting the Amici Reply at this late stage of the proceeding manifestly would be unduly burdensome.

(i) The Amici presented a submission in November 2018¹ that the Tribunal admitted in part,² and that the Parties addressed in February 2019. In September 2022, the Amici applied to make a second submission in order to comment on later events not addressed in the earlier phase of the case.³ In view of its limited scope commenting on later developments, both Parties agreed to admit that submission.⁴ The Tribunal thus admitted the Amici’s second submission by Party agreement,⁵ and both Parties responded to it in October 2022.

¹ Petition for Non-Disputing Party Status dated Nov. 2, 2018, resubmitted on Dec. 20, 2018.

² PO19 ¶¶ 60-69, 75(1).

³ Petition for Non-Disputing Party Status dated Sept. 18, 2022.

⁴ Letter from Claimants to the Tribunal dated Sept. 30, 2022; Letter from Respondent to the Tribunal dated Sept. 30, 2022.

⁵ Letter from Tribunal to Parties dated Oct. 3, 2022 (admitting the Amici’s submission “[i]n light of the Parties’ agreement”).

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The Amici now seek to submit a reply to Claimants' October 2022 comments on the Amici's September 2022 submission,⁶ which as set forth below is inadmissible.

The Amici purport to make their application to submit a reply pursuant to Annex C, Part III of the Canada BIT,⁷ but the Canada BIT expressly excludes non-disputing party reply submissions. Annex C, Part III of the Canada BIT (on "Submissions by a Non-Disputing Party") provides:

7. A tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.⁸

PO1 establishes the procedure for NDP submissions in this case at §§ 24.3 – 24.5. Consistent with the Canada BIT, PO1 provides in § 24.5 that the NDPs shall not be permitted further submissions, clearly excluding responsive reply submissions:

24.5 If the Tribunal were to admit any written submission by a non-disputing party or prospective *amicus curiae*, the parties shall be permitted to respond in writing to the submission on the date set out in Annex A. The non-disputing party or *amicus curiae* shall not be permitted to make any further submissions.⁹

The Tribunal reaffirmed this rule again in PO19, quoting the above provisions excluding the possibility of non-disputing parties making any "further submissions."¹⁰

Thus, the Canada BIT, which is publicly available, and the procedural rules in this case, which have been published on ICSID's website, long ago put prospective *amicus curiae* on notice that while written submissions could be admitted in certain circumstances, the Parties would be permitted to respond, and the non-disputing party would not be permitted a further reply thereafter.

Through this procedure, the BIT Contracting Parties and the Tribunal struck a reasonable balance, allowing for the possibility that *amicus curiae* could bring a different perspective or knowledge to the Tribunal's attention, while avoiding undue intervention or burden on the proceedings.

In this case the Amici's September 2022 submission was accepted as agreed. The Canada BIT and the Tribunal's procedural orders, however, make clear that the Amici Reply is not admissible.

⁶ Petition for Non-Disputing Party Status dated May 30, 2023 at 2 (requesting to make a submission "directly in relation [to] the Claimant's [sic] Response dated October 18, 2022"); *id.* at 3 (requesting to make a submission in response to "claims submitted by the Claimants in its Response dated October 18, 2022").

⁷ Petition for Non-Disputing Party Status dated May 30, 2023 at 1.

⁸ Canada BIT (Exh. C-1) Annex C, Part III § 7 (emphasis added).

⁹ PO1 § 24.5 (emphasis added). *See also id.* § 24.3 (ordering that "[t]he procedure for considering any application by a non-disputing party or prospective *amicus curiae* to file a written submission shall take place on the dates provided in Annex A," *i.e.*, during the written phase between the Reply and the Rejoinder).

¹⁰ PO19 ¶¶ 70-71 (quoting and reaffirming §§ 7-8 of Annex C, Part III of the Canada BIT and § 24.5 of PO1).

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(ii) In PO19 the Tribunal observed that to be admitted a prospective *amicus curiae* must (i) assist the Tribunal by bringing a different perspective, knowledge, or insight than the disputing Parties; (ii) address a matter within the scope of the dispute; (iii) have a significant interest in the arbitration; (iv) show a public interest in the subject-matter of the arbitration; and (v) avoid disrupting the proceedings or unduly burdening or unfairly prejudicing either disputing Party.¹¹

In considering the Amici’s November 2018 submission, the Tribunal accepted “the possibility” that the Amici have “a particular knowledge of factual issues relevant to this dispute that may assist the Tribunal,” but the Tribunal rejected their observations on legal issues as unhelpful.¹²

Being entirely a purported response to Claimants’ October 2022 comments on the Amici’s earlier submission, the Amici Reply does not address any new factual development. Rather, it consists almost entirely of impermissible legal argument. Indeed, as it purports to be a response to Claimants’ comments on the Amici’s earlier submission, it addresses legal argument principally on issues of Romanian law already thoroughly debated between the Parties.¹³

The few assertions that might not be characterized as legal argument purport to address Gabriel’s market capitalization, a subject that is not based on any knowledge or expertise the Amici may have.¹⁴

Thus, by virtue of its subject matter, the Amici Reply does not include any material that could assist the Tribunal as it is limited to legal argument on points already thoroughly debated between the Parties and to contentions about a subject on which the Amici do not have knowledge or expertise. It also is unhelpful to the Tribunal because, as noted below, it purports to refer repeatedly to various documents not in the record and without any record citation.¹⁵

For these reasons, the Amici Reply would not assist the Tribunal and should not be admitted.

¹¹ PO19 ¶ 51. *See also* Canada BIT (Exh. C-1) Annex C, Part III § 4.

¹² PO19 ¶¶ 60-62, 66, 75(1)(b)-(c).

¹³ *See* Amicus Curiae Submission dated June 5, 2023 at 1-2 (arguing about the “legal effects” of the draft 1992 LHM and Romania’s Law 422/2001 on historic monuments); *id.* at 2 (arguing about whether the 2010 LHM was “lacking legal justification”); *id.* at 3 (arguing about the ADC for Cârnic “from a legal point”); *id.* at 3-4 (arguing that “UNESCO status is not definitive” under Romanian regulations on World Heritage sites and historical monuments); *id.* at 4 (arguing about “the legal provisions applicable for the Project” including the Water Framework Directive “transposed into Romanian law”).

¹⁴ *See* Amicus Curiae Submission dated June 5, 2023 at 4 (heading entitled “Gabriel’s stock market capitalization between July 29, 2011, and January 31, 2012 fails to reflect a significant risk”).

¹⁵ *See* PO19 ¶ 60 (noting that documents referenced in the Amici Submission cannot be considered or admitted to the present proceeding).

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(iii) Admitting the Amici Reply at this very late stage of the proceeding manifestly would be unduly burdensome, disruptive, and unfairly prejudicial to Claimants.¹⁶ At this stage, the Parties have completed all of their briefing, including two rounds of costs submissions, and the Tribunal is working to complete its Award.

The Amici Reply touches upon multiple substantive topics and it references multiple documents that are not in the record (or at least fails to provide any record citation).¹⁷ Thus, preparing a response would present a material burden on the Parties and this proceeding. Moreover, the fact that the Amici Reply purports to be a response only to Claimants' prior submission, and not to that of Respondent, means the burden of addressing the Amici Reply would fall disproportionately if not exclusively on Claimants.

The timing of the Amici Reply, coming after all of the Parties' written and oral submissions and after "numerous" rounds of Tribunal deliberations to prepare its Award,¹⁸ is another important factor as it would undoubtedly delay the completion of this arbitration. The impacts of this burden again are one-sided, as the timing of the Award is a material consideration particularly for Claimants.

Admitting the Amici Reply thus would be manifestly burdensome, unfair, and prejudicial to Claimants.

Finally, the fact that these Amici already have made two submissions, despite the Tribunal's "concerns as to whether" they "have a significant interest in the proceedings,"¹⁹ means that the Tribunal already has provided an ample opportunity for the Amici to be heard and for their views to be considered in the context of this arbitration.

For these reasons, Claimants request that the Tribunal reject the Amici's application as inadmissible.

Respectfully submitted,

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¹⁶ See Canada BIT (Exh. C-1) Annex C, Part III § 5 (providing that the Tribunal "shall ensure that: (a) any non-disputing party submission avoids disrupting the proceedings; and (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions"); PO19 ¶¶ 51, 67-69.

¹⁷ See, e.g., Amicus Curiae Submission dated June 5, 2023 fns. 3-9, 11-13, 16-24.

¹⁸ See, e.g., Email from Tribunal to Parties dated Dec. 21, 2021 ("Tribunal is currently deliberating and will render its Award in 2022"); Letter from Tribunal to Parties dated Apr. 12, 2022 (advising that, "since the filing of the Parties' Post-Hearing Briefs, it has held numerous deliberations in order to reach a decision on the claims and defenses in this matter"); Email from Tribunal to Parties dated Nov. 8, 2022 (advising of further deliberations and, to make sure it "has all the necessary elements to render its decision," directing the Parties to agree on a schedule for costs submissions); Email from Tribunal to Parties dated Apr. 6, 2023 (advising of "several" additional deliberations, including in December 2022 and March 2023, and that "the Tribunal is working hard to prepare the Award and deliver it to the Parties in a timely manner").

¹⁹ PO19 ¶ 64; *id.* ¶ 63 (finding that these Amici "have not proven a 'more than "a general" interest in the proceeding").