

Pierre Tercier
President of the Arbitral Tribunal
Via email: smarzal@worldbank.org

**Re: Petition for Non-Disputing Party Status
In *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*
(ICSID Case No.ARB/15/31)**

18 September 2022

Dear President Tercier

Prospective *amici* respectfully request leave from the Arbitral Tribunal to submit the attached *amicus curiae* brief, in the above captioned matter, pursuant to Annex C, III of the Agreement between the Government of Romania and the Government of Canada for the Promotion and Reciprocal Protection of Investments (hereinafter “Romania-Canada BIT” or “BIT”), and Article 37(2) of ICSID’s amended Arbitration Rules.¹

Prospective *amici* are well-established Romanian non-governmental organizations (NGOs), who collectively work to defend the rights of the inhabitants of Roşia Montană and beyond and to protect the region’s environmental resources and historical monuments.

Prospective *amicus* the **Independent Centre for the Development of Environmental Resources (ICDER)** is a non-profit, non-governmental organization based in the town of Cluj-Napoca. It was incorporated as an association in Romania on June 29, 2006. It represents the interests of its members - citizens who believe in environmental justice to defend their constitutional right to a clean and ecologically balanced environment. Since 2013, ICDER has been the hub and hosted the secretariat of the Mining Watch Romania network. Since its inception in 2006, ICDER intervened at various stages of the official procedures related to permitting the mine proposal by Gabriel Resources and the Romanian Government in a joint venture called RMGC. These interventions formed a significant part of its activities with subsequent strategic litigation activities carried out either on its own or alongside further Romanian NGOs.

Prospective *amicus* **Greenpeace Romania** is part of Greenpeace Central and Eastern Europe (CEE). The organization has been active in the country since 2007. Since Greenpeace’s presence in Romania the organization has been closely involved the legal, political, and on-site developments concerning the cyanide mining permit in Roşia Montană. Greenpeace Romania was involved in thirteen legal litigations related to the mine proposal, contesting both the denial of the public’s access to information in relation to the project, as well as several of the environmental permits given to the RMGC.

The Arbitral Tribunal should accept the request to submit the attached *amicus curiae* brief even if the parties oppose to it. Tribunals accepted *amicus curiae* briefs even when parties opposed it² and as a matter of law neither Annex C, III of the Romania- Canada BIT³ nor Article 37(2) of the ICSID Arbitration Rules require approval by the parties to allow for the acceptance of non-disputing party submissions. Additionally, Tribunals have allowed *amicus curiae* submissions when, like here, *amici* presented relevant public interest issues. In *Methanex Corporation v. United States of America*, the Tribunal allowed several parties to intervene in proceedings, noting that:

[T]here is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondents and Canada: the ... arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the

¹ Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Rom., Annex C, III, May 8, 2009 [hereinafter Canada-Romania BIT]; ICSID Convention, Regulations and Rules, ICSID/15, art. 37(2) (Apr. 2006).

² *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶¶ 17, 46-61 (Feb. 2, 2007).

³ See Canada-Romania BIT, Annex C, III (6).

Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm.⁴

Further, even if Gabriel Resources may no longer seek to operate a mine in Romania, it does not diminish the importance of these public interest concerns. In allowing an *amicus* intervention in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, the Tribunal stated, "[the fact] that Claimant is no longer seeking to operate in Tanzania... is not determinative of the issue, since any decision by the Arbitral Tribunal still has the potential to impact upon the same wider interests."⁵

Prospective *amici* submit this petition and attached *amicus curiae* brief in accordance with Annex C, III of the Romania-Canada BIT. This provision is consistent with Rule 37(2) of ICSID's Arbitration Rules. Annex C, III (4) of the BIT specifies factors that the Tribunal should consider in determining whether to accept an *amicus curiae* submission. These factors are discussed in turn.

In determining whether to grant leave to file a non-disputing party submission, the tribunal shall consider, among other things, the extent to which:

- a) *The non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties,*⁶

Prospective *amici* have participated in many litigations against the parties to the present arbitration. In *Infito Gold Limited v. Republic of Costa Rica*, the Tribunal gave an environmental NGO leave to intervene in a similar mining dispute because it had both relevant knowledge and a direct connection to the proceedings, having been a party in legal action against the mining company.⁷ The same applies to the present case where submitting organizations have initiated legal proceedings against permits, archeological discharge certificates, and other interim decisions necessary to realize the mine proposal.

- b) *The non-disputing party submission would address a matter within the scope of the dispute,*⁸

Prospective *amici* respectfully submit this petition and *amicus* brief with understanding of the scope of the dispute and direct knowledge of judicial and administrative processes (and underlying legal arguments) undertaken by them and other NGOs in Romania that resulted in the annulment of permits, archaeological discharge certificates, and other necessary documents for the mine proposal.

On 30 September 2021 the Arbitral Tribunal issued Procedural Order No. 35 concerning the admissibility of new evidence. In consequence the Claimants and Respondents submitted new evidence in October 2021 and December 2021, respectively. It is directly in relation to the new evidence submitted by both parties that *amici* like to offer factual information.

- c) *The non-disputing party has a significant interest in the arbitration,*⁹

As Romanian NGOs concerned with the environment, social and heritage values of Roşia Montană, prospective *amici* have a significant interest in this arbitration. Greenpeace Romania participated in licensing procedures and works to protect the Romanian environment, including in Roşia Montană. ICDEF has worked to defend the rights of the inhabitants of Roşia Montană and to protect its environmental resources and historical monuments. Yet, even if this were not the case, other Tribunals noted that having knowledge of a situation even without a direct connection is sufficient for filing an *amicus* brief.¹⁰

⁴ *Methanex Corp. v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, ¶49 (Jan. 19, 2001).

⁵ *Biwater Gauff (Tanzania) Ltd.*, *supra* note 2, at ¶ 53.

⁶ Canada-Romania BIT, *supra* note 1, at Annex C, III(4)(a).

⁷ See *Infito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2, ¶ 31 (June 1, 2016) (stating "[...] the Tribunal considers that APREFLOFAS's input may assist it in better understanding certain factual and legal aspects [...]. APREFLOFAS was the plaintiff in the domestic proceedings that resulted in the cancellation of the Claimant's concession, one of the very measures that the Claimant alleges has breached the BIT. It is true that both Parties have made submissions on these proceedings. However, APREFLOFAS was the successful plaintiff against both the Claimant and Respondent, and therefore APREFLOFAS may provide a perspective different from that of the Parties.").

⁸ Canada-Romania BIT, *supra* note 1, at Annex C, III(4)(b).

⁹ Canada-Romania BIT, *supra* note 1, at Annex C, III(4)(b).

¹⁰ *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 5, ¶¶ 37-44 (July 21, 2016) (stating that "the combination of Dr. López's legal expertise and DHUMA's local knowledge of the facts may add a new perspective that differs from that of the Parties.").

d) *There is a public interest in the subject matter of the arbitration*¹¹

In 1992 Roşia Montană's cultural heritage including 2000 year old Roman galleries and gold mining operations which in return include the Cărnic Massif were classified as monuments of national interest in being added to Romania's List of Historic Monuments (LHM). These monuments are also listed in Annex III of Law 5/2000 regarding the approval of the National Territory Development Plan - Section III - protected areas.¹² According to Art. 5, this annex lists cultural heritage values of national interest. In 2021 the Roşia Montană mining landscape was added to the list of UNESCO World Heritage sites as it is the "most intensive and technically diverse gold mining complex recorded anywhere in the Roman empire."¹³

e) *No undue burden or disruptive effect on the proceedings*

This intervention will not be an undue burden or have a disruptive effect on the proceedings.¹⁴ The attached *amicus curiae* submission seeks to assist the Arbitral Tribunal in its decision-making by providing factual information about a legal domestic challenge and its final ruling that showed the mine proposal to be non-compliant with domestic law.

Prospective *amici* are conscious of the conditions of Article 37 (2) of the ICSID Arbitration Rules, amici do not want to delay the proceedings and therefore in their submission include one factual information they consider relevant to the Arbitral Tribunal's decision.

To not to delay the proceedings and mindful of the Arbitral Tribunal's decision in Procedural Order No. 19 the prospective *amici* do not offer testimonies (not open for cross examination) or legal reasonings.

Prospective *amici* have no relationship, direct or indirect, with any party or any third party to this dispute and have not received any financial or other support from any of the contending parties in relation to the elaboration of this *amicus curiae* submission.

Prospective *amici* respectfully request that the Arbitral Tribunal accept their petition to submit the attached *amicus curiae* brief.

Respectfully submitted on 18 September 2022 by,

3

Dan Mercea
President
Centrul Independent pentru Dezvoltarea
Resurselor de Mediu
contact@miningwatch.ro
+40 364 104 706
Str. Traian No. 69-71 apt 27
Cluj Napoca / Romania

Valentin Salageanu
Executive Director
Greenpeace Romania
valentin.salageanu@greenpeace.org
+40 735 165 472
Louis Blanc No.16
Bucharest / Romania

¹¹ Canada-Romania BIT, *supra* note 1, at Annex C, (III)(4)(d).

¹² <http://www.legex.ro/Legea-5-2000-20165.aspx>

¹³ <https://whc.unesco.org/en/list/1552/>

¹⁴ *See id.* at Annex C, (III)(5)(a)(b).