



Pierre Tercier,  
President of the Tribunal

November 2, 2018

**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)***

Dear President Tercier,

Prospective *amici* respectfully request leave from the 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.<sup>1</sup> Prospective *amici* submit this request in a significant time prior to the hearing on the merits and after having acquired knowledge of the written submissions of the contending parties, so as to not disrupt the ongoing proceedings. We commend the Tribunal for its practice in accordance with Annex C, I(3) of the Romania-Canada BIT and in favor of transparency in this arbitration by disclosing to the public the relevant documents submitted, including the briefs of the parties. Prospective *amici* request that this practice continue, that they are granted leave to file the attached *amicus curiae* brief, and that they are permitted to attend and participate in any oral hearing held in this proceeding in accordance with Annex C, I(1) of the Romania-Canada BIT stating that all hearings shall be open to the public.

Prospective *amici* are well-established Romanian non-governmental organizations (NGOs), who collectively work to protect the interests of local families in the Roșia Montană and Bucium regions, as well as to protect the region’s environmental resources and historical monuments.

Prospective *amicus* **Alburnus Maior** is a non-profit, non-governmental organization based in Roșia Montană. It was incorporated as an association in Romania on September 8, 2000 and represents the interests of its members - inhabitants and property owners of the Roșia Montană, Corna, and Bucium villages - who oppose the mining development as proposed by Gabriel Resources and the Romanian Government in a joint venture called *Roșia Montană Gold Corporation (RMGC)*. Petitioner has been involved in organizing demonstrations, lobbying, writing petitions, taking action in court, holding informational seminars for the local population, and other mobilizations related to the Roșia Montană gold mining project. Alburnus Maior’s principal objective is the environmental and cultural preservation of the Roșia Montană and Bucium regions, as well as preventing the forced relocation of the regions’ inhabitants.

Prospective *amicus* **Greenpeace Romania** is part of Greenpeace Central and Eastern Europe (CEE). The organization has been active in the country since 2007. From the beginning of Greenpeace’s presence in Romania, already via informal volunteer groups in the early 2000’s, the organization has been closely involved in following the legal, political, and on-site developments concerning the cyanide mining permit in Roșia Montană. Throughout the years, Greenpeace Romania was involved in thirteen legal litigations related to the gold mining project, 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.

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<sup>1</sup> 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).

Prospective *amicus* the **Independent Center 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 in support of its partner Alburnus Maior at various stages of the official procedures related to permitting/assessing the mining development as proposed by Gabriel Resources and the Romanian Government in a joint venture called RMGC. These interventions formed a considerable part of its activities with subsequent strategic litigation activities carried out either on its own or alongside Alburnus Maior.

The present arbitration involves a dispute related to the proposed development of an open-pit gold mine using cyanide in a populated area of Romania (the Project) about which groups, including *amici*, have raised serious concerns from the time it was proposed. First, the Project would endanger the cultural heritage of Roșia Montană as it requires the demolition of industrial and archaeological heritage such as 18th and 19th century houses and churches as well as the 2000-year-old gold mining galleries from the Roman Empire, which are unique in the world and of great cultural and historical value. Furthermore, the tourism value related to the beautiful landscape would be destroyed for many decades due to the deviation of the Corna River and the irreversible transformation of the Roșia Montană and Cornu valleys. Secondly, widespread concerns exist about whether the Project will lead to the sustainable development of the local area and benefit the local community. The identified reserves are of low grade and thus would require very large-scale operations to be economically viable. The Project would create only limited and short-term economic benefits, mainly for the company, since it offered primarily unskilled and low-paid jobs that would only last for a short period of time while also discouraging other economic activities. Consequently, the area's economic and social problems would reemerge in the near future and would be aggravated by the negative impacts on the local economy, the environment, and the social dynamics produced by the Project. Thirdly, the Roșia Montană project envisaged using large quantities of cyanide, which led to fear of a similar or larger spill than the disastrous Baia Mare cyanide spill in 2000.

Furthermore, there are serious environmental and health risks. The Project likely would contaminate water sources, cause air pollution, and devastate wildlife, specifically birdlife, through the freely accessible tailings pond containing the cyanide waste. In addition, local communities living adjacent to cyanide mining would face a higher risk of health problems. Finally, and most importantly, opposition to the Project is largely due to social concerns, especially the trauma caused by displacement of entire communities including their homes, public spaces, churches, cemeteries, and forests. The scale of the proposed relocation and resettlement of the local people from the houses and lands where their families have lived and were buried for generations has caused deep resentment with a significant number of families living in the area. The social fabric of Roșia Montană as well as other villages and small towns within the perimeter of the Project would be entirely destroyed. In fact, the methods and tactics employed by the company already have caused families to break apart and neighbors not to speak to each other, and have left parts of Roșia Montană a ghost town, haunted only by the omnipresent display of the company's promises.

Separately and jointly these concerns present matters of public interest not only to the local but also to the national population of Romania and neighboring countries. As such, the Tribunal should accept the request to submit the attached *amicus curiae* brief. Tribunals have accepted *amicus curiae* briefs even when parties have opposed it<sup>2</sup> and as a matter of law neither Annex C, III of the Romania-Canada BIT<sup>3</sup> 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 previously 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:

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<sup>2</sup> *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).

<sup>3</sup> See Canada-Romania BIT, Annex C, III(6).

[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 general 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 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.<sup>4</sup>

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.”<sup>5</sup>

In light of the significant policy concerns in this case and the direct impact the underlying proposed Project would have on the local communities and environment, it is of utmost importance that the Tribunal hear from prospective *amici*, who possess direct knowledge and bear a direct connection to these issues. Prospective *amici* possess evidence that may not be provided by either the Claimant or the Respondent, especially regarding prior judicial decisions in which prospective *amici* directly participated. Given the combination of environmental, human rights, and cultural issues that bear directly on this arbitration, the arbitral process should be transparent and civil society groups from the affected area should be given a full opportunity to participate in the process. Further the arbitral process would benefit from being perceived as transparent and legitimate given the significant national interest in the potential forced relocation of a population, loss of historical monuments, and environmental degradation. Granting *amicus* status to the undersigned organizations and access to the hearing will achieve these objectives and it is entirely appropriate for the Tribunal to hear from such prominent and leading national NGOs regarding important public issues.

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;*<sup>6</sup>

The NGOs seeking leave to file this *amicus* brief can provide a unique perspective to the Tribunal given that they are and have been closely connected to the local population. Additionally, they have participated in several events related to the development of the mining project organized by government and company (public consultations/ hearing/ debates) and international organizations (the World Bank).

Further, given their work, they have particular insights on both the facts and the law. The prospective *amici* have participated in numerous litigations against both parties to the present arbitration. In *Infinito Gold Limited v. Republic of Costa Rica*, the Tribunal gave an environmental NGO leave to intervene in a similar mining dispute because the NGO had both relevant knowledge and a direct

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<sup>4</sup> *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).

<sup>5</sup> *Biwater Gauff (Tanzania Ltd., supra note 2, at ¶ 53.*

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

connection to the proceedings, having been a party in legal action against the mining company.<sup>7</sup> The same applies to the present case where submitting organizations have initiated legal proceedings against the granting of the archeological discharge certificate, the urbanism certificate, and many other interim decisions the company had to obtain to realize its planned project, as is explained in detail in the attached *amicus curiae* brief. In addition, during the environmental permitting procedure, RMGC submitted an environmental impact statement that independent experts described as poorly organized, confusing, not comprehensive, and misleading. All submitting organizations have provided information on the shortcomings of this impact assessment. Their perspective includes not only details about the project's potential negative impacts for the environment, biodiversity, or the archeological and touristic value of the area but also for the local population who was and is most severely affected by the planned project. The Romanian government ultimately did not grant the environmental permit to RMGC and the company never obtained the necessary property of local residents. They also have information on collusion of both parties to the detriment of the public interests at stake as well as information on the relationship between the company, the government, and the members of society who have tried to defend the public interest, including instances of harassment, libel cases, and criminal accusations.

*b) the non-disputing party submission would address a matter within the scope of the dispute;*<sup>8</sup>

Prospective *amici* respectfully submit this petition and *amicus* brief with understanding of the scope of the dispute and will address directly relevant matters related to the judicial and administrative processes associated with the proposed Project. They have direct knowledge and are, therefore, well qualified to present the Tribunal with extensive information with respect to different judicial and administrative processes (and underlying legal arguments) undertaken by them and other NGOs in Romania that resulted in legal delays and withdrawals or annulments of permits, certificates, and other necessary documents for the Project.

Prospective *amici* can also present relevant information on the Project's threat of massive environmental contamination and loss of historical monuments, which justify the Romanian government to take necessary protective measures under the BIT. These facts and arguments seem critical to the assessment the Tribunal will have to make in order to come to an informed decision in the current dispute and only can be fully presented by the prospective *amici*.

*c) The non-disputing party has a significant interest in the arbitration;*<sup>9</sup>

As Romanian NGOs concerned with the environment as well as with the community in Roșia Montană, prospective *amici* have a significant interest in this arbitration. Alburnus Maior represents the interests of over 350 families who would have been displaced by the Project, and whose interests will continue to be affected by any decision of the Tribunal. It is also the foremost local organization committed to protecting the natural resources of Roșia Montană and to maintaining its historical and cultural importance. Greenpeace Romania has participated in licensing processes and works to protect the Romanian environment, including in Roșia Montană. ICDEF has worked alongside Alburnus Maior in its efforts to protect the people, environment, and cultural value of Roșia Montană. Thus, all three organizations have close ties with the local community. Yet, even if this were not the case, other

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<sup>7</sup> 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.”).

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

<sup>9</sup> Canada-Romania BIT, *supra* note 1, at Annex C, (III)(4)(c).

tribunals have noted that having knowledge of a situation even without a direct connection is sufficient for filing an *amicus* brief.<sup>10</sup>

d) *There is a public interest in the subject matter of the arbitration*<sup>11</sup>

The proposed Project has the potential to impact not only the local residents of Roșia Montană and the surrounding areas, but also other populations, for example, if there is a cyanide spill. Additionally, the environmental destruction, including water contamination, air pollution, and destruction of habitat, among others, could have far-reaching impacts on biodiversity and wildlife, as well as people. Lastly, Roșia Montană has significant cultural and historical significance with its Roman mining galleries dating back 2000 years. The Project would also negatively impact the tourism value of the area. As such there is a significant public interest in this arbitration because of the potential impacts of the Project on the Romanian people. Additionally, any potential damages that may be awarded to the company is also of broad public interest as it would be from the Romanian government's coffers and that would mean less money for other functions or services.

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.<sup>12</sup> The attached *amicus curiae* submission seeks to assist the Tribunal in its decision-making by providing greater detail about the potential impacts of the Project, and about the domestic legal challenges that have shown the Project to be non-compliant with EU and domestic law.

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* have received assistance in the preparation of this Petition and *amicus* submission only from their legal counsels at ClientEarth, the Center for International Environmental Law (CIEL), and the European Center for Constitutional and Human Rights (ECCHR). ClientEarth, CIEL, and ECCHR have a long history of supporting communities in various legal forums, including in supporting groups submitting *amicus* briefs in similar arbitration proceedings. Prospective *amici* respectfully request that the Tribunal accept their petition to submit the attached *amicus curiae* brief and permit them to attend and participate in any oral hearings held in this proceeding, and respond to any questions of the Tribunal.

Respectfully submitted by,

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<sup>10</sup> *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.”).

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

<sup>12</sup> *See id.* at Annex C, (III)(5)(a)(b).