

**International Centre for
Settlement of Investment Disputes
(ICSID)**

ICSID Case No. ARB/06/1

SPYRIDON ROUSSALIS

v.

ROMANIA

AWARD

Rendered by an Arbitral Tribunal composed of:

Andrea Giardina, Arbitrator
Michael Reisman, Arbitrator
Bernard Hanotiau, President

Date of Dispatch to the Parties: December 7, 2011

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CHAPTER I. THE PARTIES AND THE BACKGROUND OF THE DISPUTE

1. The Claimant in this arbitration is Spyridon Roussalis (hereinafter “Claimant” or “Roussalis”), a Greek citizen. Claimant’s address is Mavrokordatou Street, 11, Pireu, Greece. Claimant is represented in this arbitration by Ms. Nina Hall of Global Arbitration Litigation Services Ltd., Mr. Doru Costea of Doru Costea Law Office and Mr. Doru Băjan.
2. The Respondent in this arbitration is the State of Romania (hereinafter “Respondent,” “Romania” or the “State”). It is represented in this arbitration by Mr. Mark N. Bravin of Morgan Lewis & Bockius LLP and Messrs. Gabriel Sidere and John Fitzpatrick of CMS Cameron McKenna SCA.
3. The Authority for State Assets Recovery (“AVAS” or the “State Property Fund”) is a government agency created to, *inter alia*, manage the privatization of state-owned enterprises.
4. S.C. CONTINENT MARINE ENTERPRISE IMPORT EXPORT S.R.L. (“Continent SRL”) is a Romanian legal entity, 100 percent owned by Claimant, having its registered office in Bucharest, 82 Timișoara Av., sector 6, registered to O.R.C.M.B. with n°J 40/4719/1997.
5. Until 1998, S.C. Malimp S.A. was a State-owned company. It had been partly privatized in 1991. Thirty percent of its shares were being held privately. AVAS owned the remaining 70 percent.
6. On September 4, 1998, AVAS issued an invitation to tender for its shares in S.C. Malimp S.A. Continent SRL won the tender process with an offer of ROL 32,591 per share and a proposed capital contribution of USD 1.4 million.
7. On October 23, 1998, Claimant entered into a Share Purchase Agreement n°732/23.10.1998 (the “Privatization Agreement” or the “SPA”) with AVAS to purchase, through Continent SRL, AVAS’s 70 percent interest in S.C. Malimp S.A., consisting of 372,523 shares. Following the acquisition, the company name was changed to S.C. CONTINENT MARINE ENTERPRISE S.A. (“Continent SA”).
8. Continent SRL agreed to make an additional post-purchase investment of USD 1.4 million from its own funds over a two-year period starting on January 1, 1999 and ending on December 31, 2000. As security for this post-purchase investment, Continent SRL agreed to grant and register a pledge of the 372,523 shares in Continent SA in favor of AVAS.
9. Claimant contends that Continent SRL complied with its post-purchase investment obligation. The shareholders of Continent SA approved a resolution declaring a share capital increase. This share capital increase was the basis for issuing 1,418,648 new shares in Continent SA to Continent SRL. The shareholders’ decision to issue the shares was duly approved by Romania’s Trade Registry. However, Respondent disputes that Continent SRL made the post-purchase investment.

10. Claimant asserts that his investments were subject to a series of malicious and unjustifiable acts taken by various agencies of the Romanian government. He alleges, *inter alia*, that the State agents' actions taken collectively or individually amount to an indirect expropriation, or at least substantial impairment, of his investments, in violation of the Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, which entered into force on May 23, 1997 (the "Treaty" or the "BIT"); that they also constitute violations of the fair and equitable treatment, the full protection and security and the non-impairment standards of the Treaty as well as of Article 6 of the European Convention on Human Rights and of Article 1 of the First Additional Protocol to the European Convention.
11. Claimant's allegations are strongly denied and disputed by Respondent.

CHAPTER II. THE PROCEDURE

I. INSTITUTION OF THE PROCEEDINGS AND THE TRIBUNAL

12. On May 13, 2004, ICSID received a Request from Roussalis for the institution of arbitration proceedings under the ICSID Convention (the "Request"), with accompanying documentation comprising 16 annexes.
13. On June 9, 2004, the ICSID Secretariat (the "Secretariat") transmitted copies of the Request and of its accompanying documentation to Romania in accordance with Rule 5(2) of the ICSID Institution Rules.
14. After a prolonged period during which Claimant supplemented his Request, on January 10, 2006, the Request was registered pursuant to Article 36(3) of the ICSID Convention.
15. On March 14, 2007, an Arbitral Tribunal was constituted in accordance with Articles 37(2)(b) and 38 of the ICSID Convention. The Tribunal consisted of Dr. Robert Briner (President, appointed by ICSID), Prof. Andrea Giardina (also appointed by ICSID), and Prof. W. Michael Reisman (appointed by Respondent). The ICSID Secretariat informed the Parties on the same date that Ms. Martina Polasek (Senior Counsel, ICSID), would serve as Secretary of the Tribunal (the "Secretary").
16. On July 29, 2009, Dr. Briner resigned as arbitrator from this case. Consequently, the Chairman of the ICSID Administrative Council appointed Prof. Bernard Hanotiau in order to fill the vacancy in accordance with Articles 38 and 40(1) of the ICSID Convention and Arbitration Rule 11(1). On September 3, 2009, Prof. Hanotiau accepted the appointment as President of the Tribunal and the Tribunal was thus reconstituted and the proceedings resumed on that date.
17. On January 18, 2010, the Parties approved the appointment of Ms. Erica Stein, associate of the President's firm, as assistant to the Tribunal in this case. Subsequently, on February 4, 2011, Ms. Stein was replaced by Ms. Alexandra De Roose, also associate of the President's firm.

II. PROCEDURAL RULES AND AGENDA: MINUTES OF THE FIRST SESSION

18. By agreement of the Parties, the first session of the Arbitral Tribunal concerning the procedural rules and the agenda of the arbitration was held at the World Bank offices in Paris on May 4, 2007.
19. This first session addressed various procedural matters listed on the agenda circulated to the Parties by the Secretary on April 9, 2007 (attached to the Minutes as Annex 1). It also addressed matters contained in the Parties' Joint Proposal of May 3, 2007 (attached to the Minutes as Annex 2), which enumerated various points of agreement between the Parties regarding the procedure to be followed. The minutes of the first session, signed by the arbitrators and the Secretary of the Tribunal, were transmitted to the Parties on July 11, 2007.
20. Among other matters, it was agreed that the applicable arbitration rules would be the ICSID Arbitration Rules in force as of April 10, 2006, that the place of proceedings would be Paris and that the procedural language would be English. It was further agreed that substantive Romanian law would govern the arbitration, and that the BIT would be treated as part of Romanian law.

III. RESPONDENT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

21. On March 7, 2008, Respondent submitted its Request for an Order Compelling the Production of Certain Documents by Claimant, comprising twenty-six Requests and two Supplemental Requests. Claimant submitted his reply on March 17, 2008.
22. On March 27, 2008, the Tribunal took note of Claimant's commitment to produce certain specified documents by March 31, 2008. The Tribunal also expressed its satisfaction regarding the explanations given by Claimant regarding the other Requests, noting that this would be sufficient for Respondent to draft its Counter-Memorial.

IV. RESPONDENT'S FIRST REQUEST FOR PROVISIONAL MEASURES

23. On May 28, 2008, Respondent submitted a First Request for Provisional Measures requesting that Claimant refrain from selling certain properties until the conclusion of the arbitration proceedings. Pursuant to the Tribunal's invitation in accordance with ICSID Arbitration Rule 39(4), Claimant submitted his observations on the Request on June 13, 2008. Respondent filed its Reply on June 23, 2008, and Claimant filed his Rejoinder on June 30, 2008. On July 8, 2008, Respondent sent a letter to the Tribunal challenging a new allegation raised by Claimant in his Rejoinder. By letter dated July 10, 2008, Claimant replied to Respondent's letter of July 8, 2008.
24. On July 22, 2008, the Tribunal rendered its Decision on Provisional Measures, directing that Claimant does not sell or alienate any property belonging to Continent SA, without prejudice to all substantive issues in dispute.

V. RESPONDENT'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS

25. On March 27, 2009, Respondent submitted a "Request for Documents" to Claimant. On April 27, 2009, Claimant objected to Respondent's Request.
26. On April 29, 2009, Respondent filed a Request for an order compelling Claimant to produce documents and preserve evidence for later production. Claimant submitted his Response to the request on May 19, 2009. Respondent submitted its Reply on July 24, 2009 and Claimant submitted his Response on October 7, 2009.
27. On October 14, 2009, the Tribunal issued its Decision on Document Production and Preservation of Evidence, rejecting Respondent's Request for Production and Preservation in its entirety.

VI. RESPONDENT'S SECOND REQUEST FOR PROVISIONAL MEASURES

28. On May 12, 2009, Respondent submitted a Request for provisional measures seeking an order requiring the parties to refrain from pursuing non-ICSID remedies, namely a stay of pending Romanian court proceedings until such time as the Tribunal would issue an award. Claimant submitted his observations on May 19, 2009. Respondent then submitted its Reply on May 29, 2009 and Claimant a Rejoinder on June 23, 2009.
29. On July 2, 2009, the Tribunal issued a Decision on Provisional Measures ordering that Roussalis cause Continent SRL and Continent SA to take all necessary actions to seek, together with Romania and AVAS, a stay of two pending Romanian court proceedings until the rendering of this Award.

VII. PROCEDURAL RULES AND AGENDA: PRE-HEARING TELEPHONE CONFERENCE AND ADDITIONAL REQUESTS

30. On January 27, 2010, a pre-hearing telephone conference was held between the Parties and the Tribunal in order to determine various procedural matters. Prior to the telephone conference, the Parties had submitted a written statement enumerating various points of agreement. On January 28, 2010, the Tribunal confirmed that it had no objection to the agreed points, and communicated its decisions regarding various outstanding issues. These included: (i) the availability of witnesses for examination and cross-examination at the hearing; (ii) the oral presentation of opening and closing statements; (iii) the order in which the various heads of claim were to be heard at the hearing; and (iv) the submission of post-hearing briefs. The Tribunal invited the Parties to submit a detailed schedule for the five-day hearing by mid-February.
31. On March 1, 2011, Claimant made a request to: (i) submit evidence from two witnesses at the hearing who had not previously submitted a witness statement or expert report; (ii) submit new rebuttal evidence; (iii) file certain new authorities relating to Romanian law; and (iv) amend the procedural schedule of the hearing. By letter of March 4, 2011,

Respondent stated its objections to the request. On March 8, 2011, the Tribunal rendered its directions in respect of Claimant's requests, by which it: (i) denied the Claimant's first request in accordance with the Parties' agreement set out in the Minutes of the First Session; (ii) allowed the submission of late rebuttal evidence in respect of one exhibit, but denied it in respect of five others, inviting limited rebuttal evidence from Respondent; (iii) approved the third request regarding the filing of the authorities relating to Romanian law; (iv) confirmed the sequence of arguments set out in its directions of January 28, 2010, but approved the Parties' agreement to hear the Ozias Tax Claim jointly with the Fiscal Claim.

VIII. EXCHANGE OF WRITTEN PLEADINGS

32. The time limits contained in the Minutes of the first session of the Arbitral Tribunal were extended several times by the Tribunal upon the Parties' requests. Each party filed its written submissions pursuant to the Tribunal's amended directions.
33. On October 2, 2007, Claimant filed his Memorial on the merits together with exhibits and legal authorities.
34. On June 2, 2008, Respondent filed its Counter-Memorial, including objections to jurisdiction and a Counterclaim, together with supporting documentation and five witness statements.
35. Claimant filed his Reply on jurisdiction and the merits on December 21, 2008, together with exhibits and legal authorities. On the same date, Claimant also submitted his Counter-Memorial to Respondent's Counterclaim.
36. On March 31, 2009, having considered the Parties' respective submissions on the issue, the Tribunal granted Respondent's request for bifurcation of the proceedings, directing that any damages concerning Respondent's Counterclaim be assessed in a second stage of the proceedings, should the Tribunal find for Respondent with respect to jurisdiction and liability.
37. On July 13, 2009, Respondent filed its Rejoinder on jurisdiction and the merits, including a Reply on the Counterclaim.
38. On November 13, 2009, the Claimant filed a Rejoinder on the Counterclaim.

IX. ORAL PLEADINGS

39. An oral Hearing on Jurisdiction and the Merits was held between March 14, 2011 and March 18, 2011 at the World Bank's offices, 66 Avenue d'Iéna, Paris. The hearing was audio recorded and transcribed by a court reporter, Ms. Emma White.
40. During the Hearing, the following witnesses of fact were heard in accordance with the agreed method (namely – direct, cross and re-direct examination, and questions from the Tribunal):

- Ms. Mariana Predescu (regarding the Investment Claim);
- Ms. Ana Lucia Chivu (regarding the Fiscal Claim and Ozias Claim);
- Ms. Oana Scrobota (regarding the Fiscal Claim and Ozias Claim);
- Mrs. Alexandra Stocia (regarding the Food Safety Claim);
- Mrs. Maria Dulgheriu (regarding the Food Safety Claim).

X. POST HEARING SUBMISSIONS

41. The Parties submitted their Post-Hearing Briefs on June 7, 2011. On the same date, the Parties submitted their Statements of Costs. On June 21, 2011, Claimant submitted a supplementary submission on Costs.
42. On September 7, 2011, Respondent requested the admission of an additional exhibit. Following the Tribunal's invitation, on September 22, 2011, Claimant objected to Respondent's request, submitting a witness statement of Roussalis with approximately 90 pages of appendices in support of his objection. On September 28, 2011, the Arbitral Tribunal rejected the admissibility of the new documentary evidence.

CHAPTER III. JURISDICTION

SECTION I. CLAIMANT'S POSITION ON JURISDICTION

43. Claimant submits that the Arbitral Tribunal has jurisdiction over this case in accordance with the Treaty. Article 9 of the Treaty provides :

Settlement of Disputes between an Investor and a Contracting Party

1. *Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.*
2. *If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.*

Each Contracting Party hereby consents to the submission of such dispute to international arbitration.

3. *Where the dispute is referred to international arbitration the investor concerned may submit the dispute either to:*
 - a) *the International Centre for the Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes*

between States and Nationals of Other States, opened for signature at Washington D.C. on 18 March 1965, for arbitration or conciliation, or

b) an ad hoc arbitral tribunal to be established under the arbitration rules of the United Nations Commission on International Trade Law (U.N.C.I.T.R.A.L).

4. *The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law. The awards of arbitration shall be final and binding on both parties to the dispute. Each Contracting Party shall carry out without delay any such award and such award shall be enforced in accordance with domestic law.*

44. Article 1(3) of the Treaty provides that: “‘Investor’ shall comprise, in respect of either Contracting Party, nationals and legal persons or other legal entities constituted or otherwise duly organised in accordance with the laws of that Contracting Party and having their effective economic activities in the territory of that same Contracting Party.”

45. Article 1(4) of the Treaty provides that: “‘national’ means: b) In respect of the Hellenic Republic, any natural person having or acquiring Greek nationality in accordance with the Greek nationality code”.

46. Spyridon Roussalis is a Greek citizen with Passport series „O” n°3107555. Greece signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) on March 16, 1966 and became an ICSID Member State on May 21, 1969.

47. Respondent, Romania, signed the ICSID Convention on September 6, 1974 and became an ICSID Member State on October 12, 1975.

48. Claimant made an investment in Romania when Roussalis entered, through Continent SRL, into the Privatization Agreement with AVAS and purchased a 70 percent interest in S.C. Malimp SA (now Continent SA).

49. In light of the foregoing, Spyridon Roussalis, a Greek citizen and the sole shareholder of Continent SRL, is an investor within the meaning of Article 1(3) of the Treaty.

50. Claimant further states that he fulfilled the “amicable settlement” preliminary procedure. Indeed, by registered letter dated December 9, 2003 (Claimant Exhibit n°3), he wrote to Romania’s Government seeking amicable settlement of the dispute. Romania’s Government did not reply.

51. Therefore, in accordance with Article 9 of the Treaty, Claimant, after the expiry of the six-month “amicable settlement term,” submitted the dispute to arbitration under the auspices of ICSID.

SECTION II. RESPONDENT'S POSITION ON JURISDICTION

52. In its written pleadings, Respondent submitted that the Arbitral Tribunal does not have jurisdiction to hear this case since Claimant did not make an investment within the meaning of Article 9(1) of the Treaty.
53. Respondent argued that bilateral investment treaties do not offer protection to investments, such as Claimant's, that are fraudulent or otherwise illegal. Recognizing the existence of rights under BITs arising from illegal acts would violate "respect for the law," a fundamental principle of such treaties (*Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26). Moreover, in the case at hand, Article 2(1) of the Treaty expressly provides that each Contracting Party admits investments by investors of the other Contracting Party *in accordance with its legislation*. Consequently, Claimant cannot rely on the Treaty as a basis for a claim that is premised on purported financial transactions which, under Romanian law, are void.
54. Respondent further submitted that Roussalis bears the burden of proving that his claimed investment was made, and that it was made in accordance with Romanian law; that he has proved neither and that accordingly, the Treaty provides no basis for Claimant's Investment Claim.
55. However, in its oral pleadings, counsel for Respondent amended their position and stated that: "*The only dispute is on the facts. So, for the purposes of jurisdiction, we believe that once you decide, as I think you must, because there is no dispute here, that you have jurisdiction to decide the investment claim, that will a fair and appropriate application of the convention, and the limited amount of case law that is out there, and the limited amount of commentary that is available to you*" (Transcript, Day 4, p.132, line 5).
56. Counsel for Respondent indicated that their contention as regards Claimant's unfulfilled post-purchase obligations under the SPA was on the merits, *inter alia* in support of Respondent's Counterclaim. Professor Reisman asked Respondent: "*So reference has been made from the first day to the investment not being made, I am to understand that that means [that] the post-investment portion?*" Counsel for Respondent answered: "*Yes, and I apologize, it is sloppiness on our side, but all of those references, if I can correct them by a global correction, are all meant to say, "The post-privatisation investment of US\$1.4 million was not made."*

SECTION III. DECISION OF THE ARBITRAL TRIBUNAL

57. The Tribunal's jurisdiction is contingent upon the provisions of the BIT and the ICSID Convention.
58. The relevant provision of the ICSID Convention is Article 25(1), which reads as follows:
"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the

Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

59. The relevant provision of the BIT is its Article 9 (see above ¶43).
60. An analysis of the arguments raised by the Parties in connection with the jurisdiction of the Tribunal over the claims indicates that it is not disputed that Claimant made an investment in Romania when Roussalis entered, through Continent SRL, into the Privatization Agreement with AVAS and purchased a 70 percent interest in S.C. Malimp SA.
61. Respondent’s counsel recognised during the hearing that *“The Investor put in the money necessary to have the shares transferred into his possession, but then the Investor did not comply with the second half of the investment, so yes, there was an investment, you do have jurisdiction to decide the investment claim”* (Transcript, Day 3, p.129, line 12 *et seq.*). In particular, upon Professor Reisman’s question: *“(…) if I may restate it, it is the position of Respondent that the Claimant did make an investment and that investment comes under the protection of the BIT?”* Respondent’s counsel answered: *“Correct”* (Transcript, Day 3, p.131, line 23 *et seq.*). The following day, the Respondent confirmed once again its position: *“Obviously, there was an investment. This investor put up an initial 1-2 million dollars, more or less to acquire the shares and they were transferred to him.”* (Transcript, Day 4, page 128, lines 7 and 8).
62. In light of the foregoing, the Tribunal decides that the present dispute constitutes an investment within the jurisdiction of the tribunal. The other objections to the subject matter jurisdiction of four of the five claims will be addressed hereafter in the discussion of each of those respective claims.

CHAPTER IV. THE CLAIMANT’S CLAIMS

63. Claimant invokes the violation by Respondent of the of the BIT, of the European Convention on Human Rights and of the First Additional Protocol to the European Convention in relation to five claims:
 - The Investment Claim
 - The Fiscal Claim
 - The Interdiction Claim
 - The Food and Safety Claim
 - The Ozias Claim.
64. Claimant submits that a series of measures taken by the Romanian authorities in relation to Roussalis’s investment amount to a violation of Articles 2(2) and 4(4) of the Treaty, of Article 6 of the European Convention on Human Rights and of Article 1 of the First Additional Protocol to the European Convention.
65. The five claims are analyzed below. They are strongly disputed by Respondent.

66. In a nutshell, Claimant submits that in breach of the BIT – and of the European Convention on Human Rights and of its Additional Protocol – Romania failed to create a safe environment for the investor and the investment; it failed to protect the investor and his investment from arbitrary State measures and failed to treat the investor and the investment equitably and fairly. In particular, the lack of recognition given to the Claimant’s contractual rights and legitimate expectations to sell and/or dispose of his assets amounted to an expropriation.

SECTION I. THE INVESTMENT CLAIM

SUB-SECTION I. CLAIMANT’S POSITION ON THE INVESTMENT CLAIM

§1. THE FACTS

I. AVAS’S JUDICIAL PROCEEDINGS FOR THE ENFORCEMENT OF THE SHARE PLEDGE

A. Claimant fulfilled his Contractual Obligations

67. In accordance with the Privatization Agreement, Continent SRL agreed to make an additional post-purchase investment of USD 1.4 million over a two-year period from January 1, 1999 to December 31, 2000. Annex 4 to the Privatization Agreement specified that a capital contribution of USD 1.1 million must be made in 1999, with the remainder (USD 300,000) to be contributed in 2000.
68. This investment had to be carried out by the buyer “*from personal sources or sources attracted on its behalf*” (Claimant’s Memorial, ¶24).
69. The Privatization Agreement and Annex 4 thereto did not further stipulate the method by which the post purchase investments should be made. That decision was left to the buyer. The sole obligation was the financial result, namely that the investments should amount to USD 1,400,000.
70. As security for the post-purchase investment, Continent SRL also agreed to pledge in favor of AVAS the 372,523 shares that it had purchased.
71. Article 8.10.2 of the Privatization Agreement states that the capital contribution “is deemed to be performed on the date of the registration at the Trade Registry of the increase of [Continent SA’s] capital by the subscribed contribution and fully paid by [Continent SRL]”. In other words, in order for the capital investment to be “*deemed to be performed,*” Continent SRL had to demonstrate that Continent SA’s capital increase had been registered at the Trade Registry.
72. Claimant contends that Continent SRL complied with its post-purchase investment obligation by means of (i) undertaking construction works; (ii) making installations in buildings; and (iii) purchasing fixed assets.

73. An extraordinary general meeting of the shareholders of Continent SA was held on October 27, 2000. The items on the agenda included both the share capital increase by way of contribution in kind for a value of USD 1,400,000, and the appointment of an expert to draft the assessment report on the contribution in kind. The meeting also provided an opportunity for other shareholders, where applicable, to exercise their rights of pre-emption.
74. Claimant hired SC Expert Proiect L.B. S.R.L. (“Expert Proiect”) as the consulting firm to draft a technical expertise and an expert report assessing the value of the investment made under the Privatization Agreement. In particular, Expert Proiect had to determine (a) the value of the in kind contribution, as it has physically been presented to it, (b) the assets purchased and the manual labor for which invoices had been submitted, and (c) the updating of the amounts. The expert was not asked to establish the financing sources of the post-purchase investment.
75. Claimant points out that, contrary to Respondent’s contention, Expert Proiect’s registered office was not located in the same building as Continent SRL’s registered office. Its registered office is at 5, N. Balcescu Av., the Dunarea Block, staircase B, flat No. 42, Bucharest – 1st District.
76. Expert Proiect used legal assessment methods and confirmed that an investment was made amounting to lei 35,571,648,325, representing the equivalent amount of USD 1,404,162. The report concludes as follows (see Claimant’s Memorial, p. 19):
- “- lei 27,690,960,312– USD 1,093,079– investment realized for constructions and installations;*
- lei 4,370,272,799– USD 172,513– investment engaged for works in process [sic] on constructions and installations;*
- lei 3,510,415,214– USD 138,571– purchased fixed assets.*
-
- lei 35,571,648,325 = USD 1,404,162 – the value effectively ascertained as invested by the Claimant so as to fulfill the obligation undertaken with respect to AVAS (former FPS)”.*
77. Claimant contests Respondent’s allegations that Expert Proiect had previously performed a preliminary valuation of the post-purchase investment and that it had not reached the value of USD 1,400,000. Claimant further denies that, subsequently, in order to reach this value, Claimant requested his personnel to forge invoices and other documents that would serve as basis for the issuing of the final valuation report. He submits that Respondent does not offer any proof of these serious allegations.
78. Moreover, Respondent’s allegations are based on a written statement given to the police in April 2001 by Continent SA and Continent SRL’s chief accountant, Ms. Angela Doanta. Claimant argues that Ms. Doanta’s statement should be excluded from the record as unreliable on the ground that, following a complaint made by Roussalis, Ms. Doanta was investigated, convicted, and sentenced to five years’ imprisonment for embezzlement

(Claimant's Reply Exhibit n°1). According to Claimant, Ms. Doanta's statement is obviously tendentious, untrue and motivated by revenge.

79. Claimant submits that the invoices on which Expert Proiect based its report show the material (physical) reality of the invoiced services and assets purchased. Respondent's allegation that some irregularities have been discovered in the invoice forms is not relevant as long as the invoiced assets and services have been effectively provided to Continent SA.
80. On November 29, 2000, Continent SA sent a notice to the Official Gazette announcing that a shareholders' meeting would be convened to approve the Expert Proiect report and to pass a resolution increasing Continent SA's share capital by USD 1,404,162.
81. On December 15, 2000, during an extraordinary general meeting, Continent SA's shareholders approved the Expert Proiect report. The share capital increase was also approved, increasing the number of shares by 1.418.648, with a face value amounting to ROL¹ 25,000 for each share and a total value amounting to ROL 35,466,200,000 (Claimant's Exhibit n°16).
82. The additional Act n°4933/15.12.2000, issued by the Mircea Elena Public Notary's Office, modified the company's Deed of Incorporation and mentioned the share capital increase by way of the buyer's contribution in kind.
83. The amendment of the company's Deed of Incorporation was registered with the National Trade Register Office ("O.R.C." or the "Trade Registry")² of the Bucharest Municipality (the "O.R.C.M.B") under n°146699/15.12.2000 (Claimant's Exhibit n°5). The shareholders' resolution and the expert report were presented to the judge at the Trade Registry. Claimant obtained approval for the increase in Continent SA's share capital by a judgment handed down by the designated Trade Registry judge (see Conclusion n°6962/20.12.2000, Claimant's Exhibit n°5).
84. On December 21, 2000, the day after the Trade Registry judge rendered a decision, Continent SRL informed AVAS that it had fulfilled its post-purchase investment obligation, in accordance with Article 8.10.1 of the Privatization Agreement, by way of a contribution in kind for a value of USD 1,400,000.
85. According to Article 6 of Law 26/1990 on the Trade Register Office, the Trade Registry approval of the capital increase could only be appealed within 15 days of the decision being rendered. Neither AVAS nor any state authority had any objection to the Trade Registry approval decision since they did not challenge it within the applicable time limit.

¹ ROL is the currency abbreviation for the Old Romanian lei, the official Romanian currency until July 1, 2005.

² The Trade Registry is the Government agency tasked with registering and managing incorporations and modifications to a commercial entity's status. It is part of the Justice Ministry, with each of its 42 territorial offices attached to a tribunal whose judges take turns in reviewing registrations.

Therefore, the Trade Registry judge's decision became irrevocable. Even if the Tribunal would accept Respondent's contention that the 15-day period began to run upon publication of the approval of the capital increase in the Official Gazette, it remains that Article 5(2) of Law n°26/1990 provides that: "(2) *The person whose responsibility is to request a registration cannot oppose to third parties the not-registered acts or facts, unless he has fulfilled the burden of proof that they were familiar with these ones*" (sic., Claimant's Reply Memorial, ¶182). Therefore, since Claimant immediately informed AVAS that the registration had taken place, AVAS could have challenged the decision within the required time limit.

86. Claimant denies Respondent's allegation that Continent SA's letter of May 21, 2001 contradicts the allegation that Continent SRL had fulfilled its investment obligation by stating that "*a part of the investment has been made by Continent SA and not by Continent SRL*" (Respondent's Exhibit n°12). Indeed, the portion of the letter quoted by Respondent actually indicates that, due to chaotic keeping of accounts and aberrant economic management (by Ms. Doanta), regularization needed to be made. Such regularization was made, and as a consequence, "*all the amounts that were used to achieve the investment belong to [Continent SRL] or have been attracted by this one*" (Claimant's Reply, ¶140).
87. Claimant refutes Respondent's allegation that Continent SA's accounts were manipulated to make Continent SA's capital expenditures appear as if they should be credited to Continent SRL as qualifying investments. It denies that Roussalis used two companies that he owned, SC Continent Marine Trading SRL and SC Continent Construction SRL, to that end. Indeed, the assignment agreements entered into in June 2001 by these two companies (as assignors) and Continent SRL (as assignees) have actually been recorded in the accounting registers of the respective companies. These agreements have extinguished the debt for construction works that Continent SA had towards the two companies. The debt was transferred to Continent SRL and Continent SA never paid the invoices for construction works that the two companies had issued.
88. According to Claimant, it is only several months after the Trade Registry judge's decision became irrevocable that AVAS began to request the submission of supporting documents concerning the fulfillment of the obligations stipulated in the Privatization Agreement. AVAS was obviously trying to find reasons to pretend that Claimant had not fulfilled his contractual obligations.
89. Claimant asserts that, at the date it purchased S.C. Malimp SA, the price it paid for the shares was "sensibly lower" than the actual value of the acquired assets. Indeed, during the privatization process in Romania, acquisitions of marginally profitable state-owned companies were customarily made undervalue. For Claimant, the value of Continent SA's assets is the reason underlying the long history of aggression and application of abusive measures by the Government towards Claimant's investment. Such aggression began when the new government took office after the November 2000 election. The new Romanian government tried to recover land, covering as much as 40,000 sq. m., where the assets were located (warehouses, refrigerating warehouses, including 5 floored

buildings, platforms, etc) because the value of these assets, and more specifically of the land, had exponentially increased in Romania.

90. The existence of the post-purchase investment has been confirmed in the decision of 8 October 2007 of the 6th Commercial Section of the Bucharest Court of Appeal which Claimant reproduces *in extenso* in its Reply Memorial (§174), and which states that: “As it resulted from the technical expertise and from the accounting one that have been carried out on the occasion of the trial of the cause in the first instance court, real investments have been made at the privatized company, investments that consisted in construction and installation works, as well as in the acquisition of fixed assets, investments whose total value amounted to 1,400,000 USD, and the Annex contains the estimations of the works to be done and the list with the invoices that have been checked by the accounting expert, invoices that certify the achievement of the investment.

As concerns the nominal share capital increase, at the Trade Register, there has been written down the notification related to it that was subsequent to the ruling no. 6962 /20.12.2000 that has been rendered by the mandatory judge from the Court of Law from Bucharest at O.R.C.T.B. Given the above mentioned, it is considered that there have been observed and fulfilled the conditions from Art. 8.10.12 from the privatization contract, that there have been observed and fulfilled the registration conditions at the Trade Register, as capital increase, of the investment made by [Continent SA].

The decision of the Shareholders’ Extraordinary General Meeting (AGEA) no. 6 / 2000 reflects the reality as concerns the effective increase of the nominal share capital by the amount of 1,400,000 USD; (...).

(...), as concerns the investment financing sources, these ones comply with the issues stipulated in the Shares Sale – Purchase Contract, and in the own sources / attracted sources contract, respectively, on the name of [Continent SRL].

(...), the own sources to achieve the investments were transformed into re-investing the profit obtained by [Continent SA] during the years of 1998, 1999 and 2000. The re-investing of the profit was possible as a consequence of the decision, reached to this purpose, by [Continent SRL], the controlling shareholder, who has, thus, given up the idea of cashing dividends for the respective years, his target being to make investments into the privatized company.

At the same time, there have also been amounts that have been attracted on the name of [Continent SRL]. The above refers to the acquisition of some fixed assets and to the carrying out of construction works for [Continent SA] by S.C. CONTINENT MARINE CONSTRUCTION S.R.L. and by S.C. CONTINENT MARINE TRADING S.R.L. These companies have assigned, subsequently to having made the investments, their debts amounting to 9,250,087,000 LEI (ROL) and 3,985,471,852 LEI (ROL), respectively, in favor of the assignee [Continent SRL] by means of transfer of debts contracts signed and concluded on the 15-th of June 2001 and on the 30-th of June 2001.

At the same time, Roussalis Spyridon, who is the representative of [Continent SRL], has credited, on his own name [Continent SA] with the amount of 3,237,146,146 LEI (ROL) in view of purchasing fixed assets. After this acquisition, a contract called “novation contract” was signed and concluded on the 30-th of June 2001, which stands for a

perfect deputation. This way, Roussalis Spyridon, the creditor, has agreed to the replacement of the initial debtor, [Continent SA] by the new debtor, [Continent SRL]. As previously indicated by the accounting expert, both the transfer of debts contracts, and the novation contract have been registered in accounting (...).

Based on the analysis made to the previously presented facts in the accounting expertise minutes, there results that the financing sources of the investment are either own sources, or sources attracted on the name of the controlling shareholder [Continent SRL] (...).

The irregularities that have been found by the Financial Guard's representatives (...) cannot annul the reality of the achieved investments, reality that has been noticed by the technical experts who have concretely valued these investments, and, more than that, they can represent only civil penalties with reference to the way in which the accounting registration are made, as, the Financial Guard has stipulated, as a matter of fact.

Given the above stipulated, it is contended the reality of the effective achievement, out of own or attracted sources, on the name of [Continent SRL], of the investments brought as contribution to the nominal share capital of the privatized company, and, therefore, the achievement, by the plaintiff in appeal – defendant, of the liability assumed at Art. 8.10.1 and at Art. 8.10.2 from the Shares Sale – Purchase Contract. As the investment that represents a contribution to the share nominal capital of [Continent SA] has been integrally achieved at the end of 2000, and as Art. 8.10.3 from the Shares Sale – Purchase Contract stipulates that “the shares that represent a collateral shall be withdrawn from the collateral within 30 days since the date of the integral achievement of the capital investment /contribution by the Purchaser, under the conditions stipulated at Art. 8.10.1 and Art. 8.10.2 from the present Contract” (sic., Claimant's Reply Exhibit n°3).

B. Despite Claimant's fulfilment of his contractual obligations, AVAS filed judicial proceedings for the enforcement of the pledge

91. Claimant submits that despite the fulfilment of Continent SRL's contractual obligations, on April 23, 2001, AVAS filed a breach of contract claim in the Bucharest Commercial Court (Claimant's Exhibit n°7). AVAS also sought to enforce its rights under Article 8.10 of the Privatization Agreement with respect to the share pledge as security for the investment obligation. It requested the *registration* of the pledge, as well as the payment of “comminatory damages” (*i.e. per diem* delay penalties) if the execution of the court's decision was delayed.
92. On June 22, 2001, AVAS amended the claim to seek *enforcement* of the share pledge and requested to have the property of the pledged asset, *i.e.* the 372,532 shares, returned to the State.
93. AVAS contended during the proceedings that Continent SRL had not fulfilled its obligations arising out of Article 8 of the Privatization Agreement and had not made the investments under the contract to the value of 1.4 million USD. It mainly based its allegation on the fact that:

- the documentation submitted by Continent SRL contained estimates of the investments that were based on works managed and executed by Continent SA and on invoices pertaining to fixed assets purchased by Continent SA; that
- accordingly, the financing sources of the investments were not the buyer's (Continent SRL) or "attracted on its behalf."

94. The first instance court and the appeal court ruled in favor of Continent SRL and rejected AVAS's requests as groundless (See Claimant's Exhibits n° 9 to 11). According to Claimant, the civil judge's decision n°7886/19.10.2001 in favor of Continent SRL became therefore irrevocable.

C. Despite the existence of an irrevocable judgment, AVAS requested that the General Prosecutor take steps to seek supervisory review by the Supreme Court and an order vacating the judgment

95. Notwithstanding the above, AVAS requested that the General Prosecutor take steps to seek supervisory review by the Romanian Supreme Court (the "Supreme Court") and an order vacating the judgment. On November 21, 2002, AVAS requested the General Prosecutor to file a motion to vacate the judgments rendered by the lower courts.

96. On March 11, 2002, the Public Ministry, through the General Prosecutor, filed a motion to vacate the lower court judgments (Claimant's Exhibit n°12). On July 9, 2003, the Supreme Court accepted the motion, cancelled the two judgments and remanded the case to the Bucharest Commercial Court for a full re-trial (Judgment n°3397/09.07.2003, Claimant's Exhibit n°13).

97. Claimant submits that this procedure of submitting motions to vacate irrevocable judgments is a reminiscence of the communist procedural system, which was subsequently abrogated. Indeed, such procedure does not compare to regular "annulment" proceedings since the right to file a motion to vacate a final judgment is left to the discretion of the General Prosecutor, an instrument of the State. According to Claimant, it infringes the principle of legal certainty.

98. The Supreme Court's decision reads as follows: "[r]egarding the criticism brought by the General Prosecutor to the mode how the debt concession contracts were signed and also the novation contract, they will be examined by the main instance after it would be established if the material contribution was real or fictive, in the conditions presented above and after checking the operations performed between the companies belonging to the same group" (*sic.*, Claimant's Exhibit n°13). The Supreme Court remanded the case to the trial court for further proceedings without any substantiated reasons. The decision led to an unreasonable new delay in the final settlement of the case. Indeed, it ordered a full retrial more than four years after the execution of the SPA.

D. Subsequent Decisions

99. On remand, the 6th Commercial Department within the Bucharest Court ruled on 5 May 2006 in favor of Continent SRL, deciding that it had fulfilled its investment obligations (Claimant's Exhibit n°14).
100. AVAS, once again, filed an appeal against the judgment. Following a further full trial, the Court of Appeal ruled in favour of Continent SRL on August 10, 2007 (Judgment no. 430/08.10.2007, Claimant's Exhibit n°3, C. Reply).
101. AVAS appealed the Court of Appeal's decision. On June 30, 2009, the Supreme Court ruled in favour of Continent SRL (Judgment no. 2090, Claimant's Exhibit n°1, C. Rejoinder).
102. It results from the above that for nearly ten years, the ownership of the shares has been challenged by the State on grounds which were ultimately found to be without merit.

II. AVAS'S JUDICIAL PROCEEDINGS FOR THE ANNULMENT OF THE SHAREHOLDERS' RESOLUTION DATED DECEMBER 15, 2000

103. Claimant asserts that notwithstanding the Supreme Court's decision, AVAS resorted to a new subterfuge lacking any legal ground. On August 17, 2007, it filed a request for:
 - the annulment of the shareholders' resolution dated December 15, 2000 approving the share capital increase (Claimant's Exhibits n°15 and 16), and
 - the registration of the annulment decision with the Trade Registry and thereby the deletion of the registration of Continent SA's share capital increase.
104. AVAS's aim was to establish that Continent SRL had not fulfilled its investment obligations.
105. Claimant argues that AVAS was not entitled to a set aside ruling declaring the Continent SA shareholders' resolution null. Indeed, the "absolute nullity sanction" was introduced in Romanian law in 2005, *i.e.* after the extraordinary general shareholders' meeting took place. Therefore it was not in force when the general meeting approved the capital increase.
106. Prior to 2005, the "absolute nullity sanction" was a remedy provided exclusively to shareholders who had not attended the meeting or who voted against the resolution. The shareholders had the right to contest the general meeting resolution within 15 days following the decision's publication in the Romanian Official Gazette.
107. In any case, the legal grounds that Respondent invoked to justify the filing of its "absolute nullity" claim were spurious. *First*, Article 966 of the Civil Code, invoked by Respondent, which provides that "[a]n obligation without cause or grounded on a false or illicit cause, cannot have any [legally-enforceable] effect", only applies to contracts, not to shareholder resolutions. Therefore it cannot be called upon to justify the filing of

the nullity claim. *Second*, there was no violation of mandatory provisions of the Company Law concerning decisions made with the vote of directors. Indeed, Claimant asserts that he participated in the meeting as the sole shareholder and representative of the controlling shareholder, not as Continent SA's director. The report shows that the directors participated only as guests in the extraordinary general meeting.

108. According to Claimant, Respondent's actions amount to a "*permanent juridical procedural harassment creating a state of juridical insecurity over the ownership (the investment)*." It led to deprive the investor of the exercise of its right of ownership over the investment (Claimant's Memorial, ¶48).
109. The Commercial Court ruled against AVAS and refused to nullify the shareholders' resolution (Claimant's Exhibit n°2, C. Rejoinder). The Court declared that the meeting had been convened and conducted with due process of law and without any conflict because of Roussalis's status as majority shareholder/owner and director of Continent SA.

III. CONFIRMATION BY DOMESTIC COURTS OF THE PROPER PERFORMANCE OF THE PRIVATIZATION AGREEMENT

110. In light of the foregoing, it is clear that the Romanian courts, where AVAS was adequately represented, have always ruled in favour of Claimant concerning the proper performance of the SPA. Their rulings are binding upon both Continent SA and Continent SRL. They confirm that the post purchase investment was duly made and that the SPA was duly and lawfully performed.

§ 2. THE LAW

I. VIOLATION OF ARTICLE 4, PARAGRAPH 1 OF THE TREATY AND OF ARTICLE 1 OF THE FIRST ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. Introduction

111. Claimant submits that the facts summarized above demonstrate that:
 - he made the initially required investment, and subsequently performed the SPA in accordance with Romanian law.
 - Romania, from 2001 to date, attempted to reclaim the privatized company's shares via lengthy and unjustified court proceedings.
112. It is Claimant's position that AVAS has acted in a manner that is inconsistent with its international obligations, without due regard to its own legal process and in breach of the BIT and the First Additional Protocol to the European Convention on Human Rights (the "European Convention").
113. This persistent refusal to recognize the valid performance of the investment obligations has, *inter alia*, caused Roussalis to be deprived of his right to sell and/or dispose of the

assets forming part of its investment and forced him to manage the investment in a *sub optimum* way. Indeed, even where a potential buyer agreed to a price and/or the fair market value of the assets, as occurred at a point during this arbitration, it would not go ahead with the deal upon completion of its due diligence, in light of Romania's extant claims.

114. Claimant notes the irrelevance of Respondent's observation that Roussalis withdrew funds from Continent SA over the years. He points out that: (i) Continent SA consisted predominantly of tangible assets when it was privatized, the cash that was allegedly made available later would therefore necessarily have come about due to Continent SA's activities or Claimant's investment in Continent SA through Continent SRL; (ii) Continent SA's income could be diverted by its owner in any direction, including reinvestments back into the company; (iii) the domestic courts admitted that such reinvestment of funds took place (Judgment no. 2090, para. 2, page 4, Claimant's Exhibit n°1, C. Rejoinder). Moreover, in light of his near 100% ownership of Continent SA, the manner in which Roussalis withdrew funds was within his business discretion.

B. AVAS's attempt to enforce the share pledge is a measure equivalent to expropriation

115. Claimant contends that AVAS's attempt to enforce the share pledge through the Romanian courts is groundless and illegal and amounts to a seizure of Continent SRL's shares in Continent and, together with the other lawsuit filed by AVAS, is tantamount to an expropriation in violation of Article 4(1) of the Treaty and Article 1 of the First Additional Protocol to the European Convention.
116. Article 4(1) of the Treaty provides that :

“Investments by investors of either Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as “ expropriation ”), except under the following conditions:

a) the measures are taken in the public interest and under due process of law;

b) the measures are clear and on a non discriminatory basis;

c) the measures are taken against payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment affected immediately before the measures referred to above in this paragraph were taken or became public knowledge, whichever is the earlier, it shall include interest from the date of expropriation until the date of payment at a normal commercial rate and shall be freely transferable, without delay, in a freely convertible currency. The amount of the compensation shall be subject to review by due process of law, within the framework of the legislation of the Contracting Party, in the territory of which the investment has been made,”

117. In this regard, Article 10 of the Treaty provides that “[i]f the provisions of law of either Contracting Party or obligations under international law existing at present or

established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable, prevail over this Agreement.” Since Article 1 of the First Additional Protocol to the European Convention creates far better treatment than Article 4 of the Treaty, Article 1 of the First Additional Protocol comes within the jurisdiction of the Tribunal.

118. Article 1 of the First Additional Protocol to the European Convention provides that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

1. The lawsuit filed by AVAS is groundless since Claimant had fulfilled his contractual obligations

119. According to Article 8.10.2 of the Privatization Agreement, in order for the capital investment to be “*deemed to be performed*,” Continent SRL had to carry out Continent SA’s capital increase and such capital increase had to be registered at the Trade Registry. Claimant submits that it took all the necessary steps to register the capital increase. It obtained the Trade Registry approval and the Trade Registry judge’s decision became irrevocable.
120. Moreover, all of the numerous other experts who submitted reports in connection with the AVAS litigation confirmed that Continent SRL had fulfilled its contractual obligations and invested the amount it had undertaken to invest.
121. Within the commercial litigation, during the proceedings initiated on remand before the 6th Commercial Department of the Bucharest Court, Popescu Silvia drafted a technical expertise report (Claimant’s Exhibit n°18). The report stated that the technical expertise and the assessment report drafted by Expert Proiect were correct and valid. Beside the technical expertise report, a judiciary accounting expertise report was drafted by Nicolae Gheorghe (Claimant’s Exhibit n°21). This latter report also confirms the financial description of the investment contained in the Expert Proiect report.
122. In addition to the commercial litigation initiated by AVAS for the enforcement of the pledge on the 372,523 shares, the Financial Guard, Romania’s fiscal control agency, allegedly discovered illegalities which resulted in the filing of a criminal case against Roussalis. During the criminal investigation, technical expertise was also carried out. The expert report drafted by Isuf Eliade and by Mihăilă Dumitru (Claimant’s Exhibit n°19) stated that an investment had been made by December 31st 2000, amounting to USD 1,454,443. This report therefore also confirmed the fulfillment of the investor’s obligation.
123. As a supplement to the aforementioned technical expertise, Velicu Viorel also drafted a judiciary technical expert report (Claimant’s Exhibit n°20). This report establishes that the value of the investment performed by December 31st 2000 amounted to USD

2,062,143. It further states that, together with the additional investments performed by October 3, 2002, the total value of the investment amounted to USD 2,338,928.

124. Claimant submits that, since the reality of the post-purchase investment and the fact that it exceeds USD 1,400,000 have been established by numerous expertise reports, the only issue that remains concerns the financial means used for the performance of Continent SRL's contractual obligation.
125. In this respect, the Privatization Agreement stipulated the obligation for the seller to perform the investment, using "*private or attracted financial means*" (Claimant's Memorial, para. 67). Both the Nicolae Gheorghe judiciary accounting expertise and the Glăvan Maria report (prepared to assist Claimant in defending criminal charges brought against him and Ms. Doanta (Claimant's Exhibit n°22) confirm that the investment was made through the personal financial resources of Roussalis. In particular, the Gheorghe expert report concludes that the re-valuation methods were accurate and that the three assignment agreements were confirmed as financing sources.

2. The lawsuit filed by AVAS is illegal because the Trade Registry decision has *res judicata* effect

126. Claimant submits that the decision rendered by the Trade Registry judge, who approved the resolution passed at the December 15, 2000 extraordinary general meeting of the shareholders of Continent SA, has, according to Romanian law, the nature of a court decision ascertaining the fulfillment of the obligation. Accordingly, since this court decision was not challenged within the 15 days time limit (see above, ¶85), it became irrevocable in January 2001. It is *res judicata*.
127. Accordingly, the lawsuit filed by AVAS to enforce the Privatization Agreement is "illegal" under Romanian Law. The Trade Registry decision barred AVAS from bringing the action.

C. The "absolute nullity" claim filed by AVAS in August 2007 to annul the increase in share capital is groundless and illegal, and has effects equivalent to an expropriation

128. Claimant submits that the purpose of the "absolute nullity" claim filed by AVAS in August 2007 was the cancellation of the effective investment realized by the company, and implicitly, the denial of the investor's right of ownership over such investment as a result of the cancellation of the issued 1,418,648 shares. AVAS filed this claim to create new "arguments", *inter alia*, to support the proceedings regarding the enforcement of the share pledge.
129. Moreover, Claimant points out that the present proceedings initially referred only to the 372,521 shares initially purchased. Through the subsequent filing of the internal "absolute nullity" procedure, Romania ensured that the 1,418,648 shares held by Continent SA, be cancelled, without any kind of compensation. This action is obviously an abusive interference with the investor's right of ownership over such investment.

130. Such course of action amounts to expropriation as established in *Metalclad v. United Mexican States* (ICSID Case No. ARB AF/97/1): “Expropriation can take various forms. Direct expropriation involves the seizure of the investor's property. But expropriation may also be indirect, as where, without the taking of property, the measures of which complaint is made substantially deprive the investment of economic value. Moreover, it is not necessary to show a single act or group of acts committed at one time. As stated earlier, there may be "creeping" expropriation involving a series of acts over a period of time none of which is itself of sufficient gravity to constitute an expropriatory act but all of which taken together produce the effects of expropriation”.

D. The proceedings initiated by Romania, through the intervention of the General Prosecutor and the Decision of the Supreme Court, have effects equivalent to an expropriation

131. Claimant rather submits that the proceedings initiated by Respondent's institutions, namely through the intervention of the General Prosecutor and the decision of the Supreme Court to quash the previous courts' decisions in favor of AVAS are also a violation of Article 4(1)(a) of the Treaty which provides that no investor may be deprived of his property unless the measures are taken in the public interest and in accordance with due process of law.
132. Claimant alleges in the first place that the General Prosecutor's intervention, the Supreme Court's acceptance of the motion to vacate the lower courts judgments and the remanding of the case to the Commercial Court represent “an unwarranted interference with the right of ownership of [Continent] S.R.L., the decision having the same value as the depriving of the investor company of its good” (Claimant's Memorial, ¶78).
133. Claimant further submits that the proceedings initiated by Respondent have deprived the investor of the use of his ownership by creating juridical insecurity through a breach of the principle of legal certainty. The principle of legal certainty means, *inter alia*, that a final judgment delivered by a court may not be put on trial again.
134. Indeed, the European Court of Human Rights (“ECHR”) decided on December 1, 2005, in the *Maşinexportimport Industrial Group S.A. v. Romania* case (Case n°22.687/ 03-ECHR) that: “32. (...). *En vertu de ce principe [de sécurité des rapports juridiques], aucune partie n'est habilitée à solliciter la supervision d'un jugement définitif et exécutoire à la seule fin d'obtenir un réexamen de l'affaire et une nouvelle décision à son sujet. Les juridictions supérieures ne doivent utiliser leur pouvoir de supervision que pour corriger les erreurs de fait ou de droit et les erreurs judiciaires et non pour procéder à un nouvel examen. La supervision ne doit pas devenir un appel déguisé et le simple fait qu'il puisse exister deux points de vue sur le sujet n'est pas un motif suffisant pour rejeter une affaire*³.”

³ Free translation: “By virtue of this principle, no party shall be entitled to request the supervision of a final and enforceable decision, with the sole purpose of obtaining a re-examination of the case and a new decision. The Supreme Courts should only use their power to review errors of fact or law and miscarriages of justices, and they should not use it to re-examine the entire case. The supervision should not be treated

135. In the *Riabykh v. Russia* case (n°52854/99, § 52, CEDH 2003-IX, §52), the ECHR also decided that “[l]egal certainty presupposes respect of the principle of *res judicata* (...), that is the principle of finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case. Higher courts' power of review should be exercised for correction of judicial mistakes, miscarriages of justice, and not to substitute a review. The review cannot be treated as an appeal in disguise, and the mere possibility of two views on the subject is not a ground for re-examination.”
136. The principle of legal certainty has therefore been clearly breached. The “error of law,” invoked by the Supreme Court in order to justify its decision to hinder Continent SRL’s right to ownership, is not sufficient to legitimately deprive Claimant of his legally acquired property.
137. And even if it could be proven that the above actions were taken in the public interest, Claimant asserts that, by vacating the lower court judgment, the Supreme Court’s decision interfered with Claimant’s rights of ownership. Such interference was not justified as being disproportionate.

II. VIOLATION OF ARTICLE 2, PARAGRAPH 2 OF THE TREATY: FAIR AND EQUITABLE TREATMENT

138. Claimant also alleges that through its conduct, Respondent has violated the fair and equitable treatment provision embodied in Article 2(2) of the Treaty.
139. Article 2(2) provides that “[i]nvestments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other Contracting Party, is not in any ways impaired by unjustifiable or discriminatory measures”.
140. When the Supreme Court rendered its decision vacating the judgment and remanding the case to the Bucharest Commercial Court, Claimant sought protection of his investment by referring the case to an ICSID Tribunal.
141. He first contacted Romania in order to try to reach an amicable settlement (Claimant’s Exhibit n°3). However, Respondent did not respond.
142. According to Claimant, by ignoring his offer to negotiate an amicable settlement, Respondent has violated the Fair and Equitable Treatment Clause of Article 2(2).
143. Moreover, the Romanian institutions were uncooperative:

as an appeal in disguise, and the mere possibility of there being two views on the subject does not justify the review of the entire case.”

- AVAS (Claimant's Exhibit n°23) and the Ministry of Public Finances (Claimant's Exhibit n°24) both stated that the disputes at stake were civil commercial litigation matters, which concerned the breach of a commercial agreement and did not implicate a breach of the Treaty. Both institutions refused to dismiss or stay AVAS's litigation to enforce the share pledge. The General Secretariat of the Romanian Government acknowledged AVAS and the Ministry of Public Finances' positions and adopted the same view in its letter of April 26, 2004 (Claimant's Exhibit n°25).
 - After these arbitral proceedings were instituted, on August 17, 2007, Respondent filed a new request before a domestic court (Claimant's Exhibit n°15: absolute nullity of the resolution n°6 of the ordinary general meeting of shareholders of Continent SA). According to Claimant, Respondent knew that the nullification of resolution n°6 dated December 15, 2000 would have allowed AVAS to have the Trade Registry delete the registration of the share capital increase (Clause 8.10.2 of the SPA; *see* Transcript, Day 1, page 164, lines 11-25).
144. Claimant submits that, even if Respondent later asked for the stay of certain proceedings that were pending before domestic courts, a mere stay of proceedings would not have fulfilled the requirements of Article 26 of the ICSID Convention, which provides that "*consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.*" Respondent should have dropped the domestic litigation. It did not. It ostensibly wished to maintain a backup option in the event of an unfavorable arbitral award.
145. Romania has constantly failed both to recognize the rights of the investor and to protect its legitimate expectations, as granted by and crystallized in the SPA. The numerous court proceedings and challenges brought by AVAS were not in the public interest, but were instead aimed at harassing Claimant and regaining Continent SA's shares and assets. The two sets of proceedings were highly disruptive, their ultimate aim being the return of the Claimant's property to the State.
146. Respondent's repeated refutation of its own courts' rulings must be seen by the Tribunal as an unjustifiable measure, having the effect of depriving the foreign investor of its right to sell Continent SA's assets and causing a loss in value of those assets. It violates Claimant's Treaty right to fair and equitable treatment in the administration of his investment.

III. VIOLATION OF ARTICLE 2, PARAGRAPH 2 OF THE TREATY: FULL PROTECTION AND SECURITY

147. Article 2(2) of the Treaty also provides that "[i]nvestments by investors, of a Contracting Party shall, at all times ... enjoy full protection and security in the territory of the other Contracting Party".
148. Article 6 of the European Convention, ratified by Romanian Law n°30/1994, further provides that: "[i]n the determination of his civil rights and obligations or of any criminal

charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)”

149. Claimant invokes a violation by Respondent of the Full Protection and Security Clause of Article 2(2) and of Article 6 of the European Convention. It alleges that Romania’s General Prosecutor violated the principles of legal certainty and *res judicata* when he intervened, at AVAS’ request, in the AVAS share pledge enforcement litigation and asked the Supreme Court to set aside a lower court decision which was in favor of Continent SRL.
150. It further alleges that the Supreme Court also violated the principle of legal certainty when it vacated the judgment and sent the case back to the court of first instance for further consideration of the facts.
151. Moreover, Claimant submits that the Supreme Court lacked independence and impartiality in contravention of Article 6(1) of the European Convention.
152. More specifically, Claimant points out that he had opposed a defense of inadmissibility before the Bucharest Commercial Court to which the case was remanded in 2001. Indeed, whereas the Privatization Agreement had been concluded on October 22, 1998, AVAS founded its request before the Commercial Court on a law which had been modified by Law n°99/1999, which only came into force on July 24, 1999. This new law cancelled the provisions from the Commercial Code regarding the pledge on which AVAS had grounded its request.
153. Claimant alleges that, subsequently, in order to be able to vacate and remand the case, the Supreme Court modified, on its own initiative, the legal grounds on which AVAS had founded its action, by including a new legal basis as ground for AVAS’ request, namely Law n°99/1999. According to Claimant, the Supreme Court thus showed a lack of independence and impartiality.
154. In light of the foregoing, Claimant submits that the Supreme Court exceeded the boundaries of objectivity and decided to subscribe to the abusive position of the Romanian State.
155. Claimant states that this malicious attitude of the Supreme Court is not an isolated case in Romania. Indeed, the ECHR has heard dozens of cases against the Romanian State and has frequently identified serious and essential violations of ownership rights, by the Romanian courts.
156. For example, in the *Brumarescu vs. Romania* case (n°28342/95, ECHR 1999-VII, §§61 *et seq.*), the ECHR decided that: “*the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires inter alia that where the courts have finally determined an issue, their ruling should not be called into question. In the present case the Court notes that at the material time the Procurator-General of*

Romania – who was not a party to the proceedings – had a power under Article 330 of the Code of Civil Procedure to apply for a final judgment to be quashed. The Court notes that the exercise of that power by the Procurator-General was not subject to any time-limit, so that judgments were liable to challenge indefinitely. The Court observes that, by allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in – to use the Supreme Court of Justice’s words – a judicial decision that was “irreversible” and thus res judicata – and which had, moreover, been executed. In applying the provisions of Article 330 in that manner, the Supreme Court of Justice infringed the principle of legal certainty. On the facts of the present case, that action breached the applicant’s right to a fair hearing under Article 6 § 1 of the Convention. There has thus been a violation of that Article.”

157. Claimant contends that in the *Brumarescu* case the ECHR “*established as a principle, that the annulment appeal in the hands of the general prosecutor as official representative was a breach of the principle of the security of legal relationships*” (Claimant’s Reply, ¶252).

§3. DAMAGES

158. Claimant submits that where a government has taken action which is contrary to and damages the economic interests of a foreign investor, the investor is entitled to full reparation of the harm suffered.
159. Roussalis further contends that the permanent non-recognition by AVAS of his investment and the related rights deprived him from selling Continent SA’s assets at fair market value.
160. In *Chorzow Factory* [1927 PCIJ series A no. 17, p.47] the tribunal decided that “*reparation must as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*”
161. Claimant submits that “*the gravity of the facts*” has to be “*acknowledged pro-rata with the values they affected and with their negative consequences, either caused or potential, with the used means, with the author of the fact and last, but not least, with its subjective attitude, with the purpose for which it had committed the fact*” (Claimant’s Memorial, §99). Claimant refers in this respect to the fact that the Respondent’s actions prevented the functioning of the trade company. They denied or restrained the investor’s rights, or had similar effects.
162. Claimant determines the amount of his damages by reference to the official exchange rate on July 3, 2007, of lei/USD 2.3920, or of lei/EUR 3.2627, the EUR/USD exchange rate being 1.3640.

163. Continent SA held share capital amounting to ROL 13,304,400,000, divided into 532,176 shares of face value ROL 25,000 per share, out of which 464,199 shares (representing 87.227%) belonged to Continent SRL, and 67,977 shares (representing 12.773%) belonged to other shareholders.
164. When the post-purchase investment was performed, the share capital increased by 1,418,648 nominative shares, of face value ROL 25,000 per share, the new value of the share capital rising to ROL 48,770,600,000.
165. Claimant points out that Continent SA's assets included real estate located in Bucharest, 82, Timișoara Boulevard, 6th District, comprising land of surface area 36,003.75 sq. m. and a construction with a total built surface of 29,260 sq. m. (Claimant's exhibit n°30). The constructions were functional, being used as ice plants, refrigerating warehouses, food outlets, warehouses for non-commercial goods, and sections for riping bananas. They were equipped with all necessary machinery. According to market prices, the total current value of the real estate amounts to EUR 65,263,750.
166. In light of the above, Claimant requests that the Tribunal order the cessation of the two Romanian legal proceedings to enforce the share pledge and nullify the share capital increase. It further seeks USD 25 million in moral damages for the violation of his Treaty rights.
167. Claimant also asserts a contingent claim: if, at the time of the Tribunal's decision, Continent SRL has lost its majority ownership in Continent SA as a result of adverse rulings by the Romanian courts, Claimant requests USD 85,252,032.34 as compensatory damages for the expropriation of his *pro rata* ownership interest based on his original share purchase, the additional shares he acquired as a result of the share capital increase and those shares that he acquired from minority shareholders. In this case, Claimant also seeks USD 25 million in moral damages for the violation of his Treaty rights.
168. Claimant refutes Respondent's argument that Roussalis has not proved his loss because no expert report was submitted. According to Claimant, no expert report is needed since: (i) at the Hearing, Respondent repeatedly asserted that the property was very valuable (see: Transcript, Day 1, page 90, lines 56); (ii) Respondent never contested the amount put forward by Claimant and equally never produced any expert report(s) to rebut such amount; (iii) Respondent relied on the amount of EUR 65 million or USD 89 million as the fair market value of Continent SA's assets in its application to stop the sale of the assets (see: page 6 of Respondent's Reply to Claimant's Observations on Respondent's Request for Provisional Measures dated 23 June 2008); (iv) Respondent made an interim application to prevent the sale of the assets for EUR 40 million, which it agreed in its application before the Tribunal was an undervaluation.
169. On the basis of the above, Claimant formulates the following request (Claimant's Memorial ¶¶107-108):

"Mainly

1. *The cease of the judiciary actions [sic] carried out by AVAS, Romanian State institution, actions having as object the execution of the pledge formed by the 372,523 shares and the cancellation of the decision made by the Extraordinary General Shareholders' Meeting on 15.12.2000, of increasing the investment by another 1,418,648 shares.*

and

2. *To oblige the Respondent - Romanian State to pay 25,000,000 USD as moral damages.*

In subsidiary,

1. *We hereby request to oblige the Romanian State to pay compensations [sic] amounting to USD 81,168,212.60, for a number of 1,791,171 shares and a compensation amounting to USD 4,083,819.74, corresponding to the balance for a number of 91.586 shares.*

The amount of compensations was calculated corresponding to a patrimony amounting to USD 89,019,755.

Compensations are requested if, upon the termination of the arbitration litigation [sic], the judicial actions performed by AVAS, representing unjustified measures whose effects are the equivalent of an expropriation, which took place despite the existence of the arbitration litigation [sic], had been completed and the investor had been dispossessed of the 1,791,171 shares and the balance of 91,586 shares has a decreased value by the transformation from a majority shareholder, to a minority shareholder.

and

2. *To oblige the Romanian State to pay 25,000,000. USD as moral damages.*

SUB-SECTION II. RESPONDENT'S POSITION ON THE INVESTMENT CLAIM

§ 1. THE FACTS

A. The Privatization Agreement

170. On October 23, 1998, Claimant entered into a Privatization Agreement with AVAS to purchase, through Continent SRL, the AVAS 70 percent interest in S.C. Malimp SA for ROL 12,140,897,000.
171. Article 8.10.1 of the Privatization Agreement provided that Continent SRL also agreed "*to contribute to [Continent SA] from its own sources or sources gained over its name, over a period of 2 years, starting with the date 1.01.1999, an investment/capital contribution for the total amount of 1.4 million (USD), according to Annex no. 4*" (emphasis added).
172. Annex 4 specified that USD 1.1 million of the capital contribution was to be provided in 1999, with the remainder (USD 300,000) to be provided in 2000. Article 8.10.2 of the

Privatization Agreement confirmed that the capital contribution “*is deemed to be performed on the date of the registration at the Trade Registry of the increase of [Malimp SA’s] capital by the subscribed contribution and fully paid by [Continent SRL]*”. Claimant asserts that it is clear from the inclusion of the words “*and fully paid by [Continent SRL]*” that, in order for the capital investment to be “*deemed to be performed*”, Continent SRL had to demonstrate not only that Continent SA’s capital increase had been registered at the Trade Registry, but also that the capital investment (a) had in fact been fully paid at the date of the registration of the capital increase at the Trade Registry and (b) had been contributed by Continent SRL (as specified in Article 8.10.1).

173. As security for the performance of the post-privatization capital contribution obligation, Continent SRL agreed at Article 8.10.3 of the Privatization Agreement (a) to grant and register a pledge of the 372,523 shares purchased under the Privatization Agreement and (b) that, “*in case [Continent SRL] does not fulfill its obligations stipulated at Article 8.10.1 and 8.10.2, then [AVAS] will execute the pledge over the shares*” (emphasis added).

B. Continent SRL failed to perform its capital contribution obligation

1. Claimant’s fraudulent scheme

174. Respondent submits that Continent SRL did not fulfill its obligation to make capital contributions of USD 1.4 million to Continent SA. Respondent asserts that: (a) the value of the claimed investment was fraudulently inflated; and (b) the claimed investment was not made by Continent SRL’s “own sources”, as required under the terms of the Privatization Agreement.
175. Angela Doanta gave a written statement to the police in April 2001 during a criminal investigation against her and Claimant for fraud. Claimant asserts that Ms. Doanta’s testimony is accurate and informative. Her statements are corroborated by the statements of Mr. Herisanu, the former General Manager of Continent Marine Construction SRL, of Ms. Tencu, Assistant Manager of Continent Marine Construction SRL (Respondent’s Exhibit n°28-30), and of Ms. Mina Cornaciu’s expert report. According to Respondent, the Tribunal should consider Ms. Doanta’s Statement in light of the evidentiary record as a whole and decide what weight to give it.
176. According to Ms. Doanta’s statement, on September 30, 2000 – three months prior to the deadline for completing the USD 1.4 million capital contribution – she told Claimant that only ROL 14 billion (approx. USD 553,000) had been invested in Continent SA. However, this “investment” related primarily to converting some of Continent SA’s premises into a personal residence for Roussalis, a swimming pool, and private apartments for sale to third parties. Moreover, the source of this investment was Continent SA (A. Doanta’s statement of 19 April 2001 given to the criminal investigative authorities, Respondent’s Exhibit n°4).

177. After Ms. Doanta informed Claimant of the insufficient investment, Claimant hired Expert Proiect, a company whose office was in the same building as Continent SRL, to value the in-kind investment allegedly made in Continent SA. Expert Proiect conducted a preliminary review of the capital investments and informed Claimant, in October 2000, of its preliminary finding that the value of the works performed at Continent SA was substantially less than USD 1.4 million (Doanta's Statement, Respondent's Exhibit n°4).
178. Claimant then presented false invoices to Expert Proiect. Without conducting an independent review of Continent SA's records or any review of Continent SRL's accounting books, Expert Proiect issued a report dated "December 2000" in which it concluded that an investment of USD 1,404,162 had been accomplished – not by Continent SRL but by Continent SA (Respondent's Exhibit n°5).
179. Claimant published a notice in the Official Gazette on November 29, 2000, *i.e.* before Expert Proiect had even completed the valuation report, announcing that a shareholders' meeting would be convened to approve the Expert Proiect report and to pass a resolution increasing Continent SA's share capital by USD 1,404,162.
180. On December 15, 2000, the shareholders' meeting gathered at Continent SA and a resolution was passed, approving the Expert Proiect report and the capital increase (Respondent's Exhibit n°8).
181. Respondent contends that the shareholders' resolution was invalid as a matter of Romanian law, and, therefore, the share capital increase was a nullity.
182. First, Claimant participated in the shareholder's meeting both as a shareholder (*i.e.*, representing Continent SRL) and as a member of Continent SA's Board of Directors. However, Article 124(5) of the Company Law provides that the directors and officers of the company may not represent shareholders in shareholders' meetings and that any resolution passed in violation of this prohibition will be null and void if, without their votes, the requisite majority would not have been attained. According to Respondent, it is irrelevant that Claimant is mentioned in the Minutes as a director with no right to vote. Indeed, directors are prohibited not only from voting, but also from attending meetings as representatives of other shareholders, in order to avoid the fraudulent formation of a quorum (St. D. Carpenaru et al., *Legea societatilor comerciale - Comentariu pe articole*, 3rd Edition, C.H.Beck Publisher, 2006, 379). Claimant's lack of impartiality, overlapping capacities, and decisive influence on the deliberations of the meeting are revealed in the official Minutes of the shareholders' meeting (Respondent's Exhibit n°3) and render the resolution invalid as a matter of law.
183. Second, none of the minority shareholders attended the meeting or consented to the resolution. There is no list of shareholders in attendance attached to the minutes of the shareholders' meeting as required by Article 130(2) of the Company Law n°31/19903 and the resolution is signed only by Continent SA's Board of Directors. Respondent alleges that Claimant created an invalid paper record of a share capital increase to give a veneer of legitimacy to an investment that Continent SRL in fact never made.

184. Subsequently, on December 15, 2000, Claimant presented to a judge at the Trade Registry a submission consisting of the invalid shareholders' resolution together with the deficient report from Expert Proiect. Solely on the basis of this fraudulent evidence, Claimant obtained approval for the increase in Continent SA's share capital. The process before the Trade Registry judge was *ex parte* and AVAS had no opportunity to bring these obvious shortcomings to the judge's attention before judgment was handed down.
185. Claimant reported to AVAS on December 19, 2000 that Continent SRL had fulfilled its investment obligation. This was contradicted by a letter to AVAS, dated May 10, 2001, in which Continent SA admitted that "*a part of the investment has been made by Continent SA and not by Continent SRL*" (Respondent's Exhibit n°12, see below ¶211).
186. Respondent puts forward that Continent SA's accounts were manipulated to make Continent SA's capital expenditures appear as if they should be credited to Continent SRL as qualifying investments (*see* Judicial Accounting Expert's Report by Floarea Patrusca, Respondent's Exhibit n°13).
187. In June 2001, Claimant used two other companies that he owned, SC Continent Marine Trading SRL and SC Continent Construction SRL, to enter into bogus assignment agreements:
- SC Continent Marine Trading SRL, as assignor, and Continent SRL as assignee, entered into an assignment agreement concerning a receivable of ROL 3.98 Billion (approx. USD 157,000) purportedly owed by Continent SA for refrigeration equipment, a refrigeration chamber, a vacuum packaging machine, and meat chamber refurbishment (Respondent's Exhibit n°15);
 - SC Continent Construction SRL, as assignor, and Continent SRL as assignee, entered into an assignment agreement concerning a receivable of ROL 9.25 billion ROL (approx. USD 365,000) purportedly owed by Continent SA for aluminum kiosks, the refurbishment of aluminum furniture, the refurbishment of Berth 8 in Constanta Harbor, the PVC production line, and the refurbishment of the administrative offices (Respondent's Exhibit n°16); and
 - Continent SA as original debtor, Continent SRL as new debtor, and Claimant, as creditor, entered into a novation agreement concerning receivables amounting to ROL 3.2 Billion (approx. USD 126,000), purportedly for goods acquired by Continent SA and for works performed as part of the investment supposedly financed by Claimant. (Respondent's Exhibit n°17).
188. These agreements created the false impression that expenditures made by Continent SA were investments made by Continent SRL. However, the accounting documentation for these assignment agreements "*is not supported by documents evidencing that those payments would have been effectively made. Therefore, the assignment agreements ... in amount of ROL 13,235,504,852 do not have a real basis*" (Vladimir Popovici's Accounting Expert Report, January 29, 2002, Respondent's Exhibit n°18). Moreover, the

invoice Continent SA issued to Continent SRL, presumably to create the appearance of a reimbursement by Continent SRL, was never paid and was cancelled at the end of 2001.

2. The Expert Project Report does not establish that the investment was made in compliance with the Privatization Agreement

a) The valuation is baseless and not reliable according to Romanian law

189. Respondent asserts that almost half of the purported USD 1,404,162 investment reported by Expert Project is based on false invoices. In particular, Expert Project included in its calculation of the value of the capital investment: (i) invoices for goods and services allegedly supplied by companies that do not exist; (ii) invoices issued by a Claimant-owned company that falsely claimed to be the manufacturer of the invoiced goods but, in fact, had no legitimate role in the purchase or sale of the goods; (iii) invoices for services that were never performed and assets that were never acquired by Continent SRL; (iv) invoices recorded as having been paid personally by Claimant but for which there is no legitimate evidence of payment; and (v) invoices for goods and services, the value of which was fraudulently inflated based on illegitimate and unauthorized adjustments (see Accounting Expertise Report by Mina Cornaciu and Lidia Balanescu, Respondent's Exhibit n°24; technical expertise report by Isuf and Mihaila Respondent's Exhibit n°33; A. Doanta Statement, Respondent's Exhibit n°4; Statements of Continent Marine Construction's executive manager, Bogdan Herisanu, Respondent's Exhibits n°28 and 29; Statement of Continent Marine Construction assistant manager, Raluca Tencu, Respondent's Exhibit n°30).
190. Moreover, Expert Project further inflated the value of the alleged capital investment by adjusting the resulting values for inflation. Respondent alleges that such an adjustment contradicts the clear intention of the parties that Continent SRL should contribute USD 1.1 million in 1999 and USD 300,000 in 2000 (Articles 8.10.1 and Annex 4 of the Privatization Agreement). Adjusting such investments *a posteriori* for inflation would eviscerate this obligation by enabling Continent SRL to invest a few hundred thousand dollars in early 1999 and then rely on inflation to argue that the value of that sum has increased to USD 1.4 million as at the end of 2000.
191. Respondent points out that the reliability of the Expert Project report was first challenged on February 13, 2001 by the findings of the Financial Guard, which concluded that certain invoices relied on were false. The subsequent criminal proceedings against Claimant likewise confirmed that "*the conclusions of the technical accounting expert show that by the registration in the accounting of primary accounting documents that were not based upon real operations [...] the income and the expenses of SC Continent Marine Enterprise SA were distorted which provoked a prejudice to the state budget of RON 1,410,997 profit tax and RON 1,828,190 VAT*" (Respondent's Exhibit n°42).

b) The required capital contribution was not made by Continent SRL

192. Expert Project proceeded to value a contribution that they concluded was made by Continent SA (Respondent's Exhibit n°5, p.7). Respondent points out in this regard that

Expert Proiect failed to review any of Continent SRL's accounting documentation to verify that any of the alleged capital contributions were made by Continent SRL.

193. Moreover, the valuation of Continent SA's expenditure is inflated. The Expert Proiect report cites, as part of Continent SA's investment, ROL 5.29 billion (approximately USD 209,000) in respect of labor costs (and related social security obligations) arising out of various construction and plumbing works. Ms. Doanta explains in her statement given to the criminal investigative authorities that none of these labor works were performed and that no related social security obligations were ever paid.

3. Claimant's criminal conviction for tax evasion

194. The false invoices were uncovered during an inspection carried out in January 2001 by the Financial Guard. Subsequently, on May 18, 2001, the police initiated a prosecution against Claimant for fraud, tax evasion, use of false documents, and instigation to commit forgery. On May 14, 2003, the Public Prosecutor filed an indictment against Claimant.
195. Respondent points out that in the ensuing criminal proceedings, Claimant did not deny that he had committed the offense of tax evasion, choosing instead to rely exclusively on a statute of limitations defense (see Continent SA's written submission to the District Court of Sector 6 in Bucharest, dated April 23, 2007, which was "*formulate[d]*" by "[t]he undersigned attorney, Doru Costea, representative of defendant Spyridon Roussalis ..", Respondent's Exhibit n°46).
196. The expert evidence before the criminal court demonstrated that "*the financing was not raised and paid integrally by [Continent SRL]. Therefore, the agreement cannot be deemed as fulfilled*" and "*the investment was not made and supported by financing from [Continent SRL] (only in proportion of approximately 5 percent)*" (Respondent's Exhibit n°48).
197. Claimant refused to appear for trial on the criminal charges, avoiding service of process for more than three years, although he was summoned nine times in Romania and nine times in Greece. Eventually, service of process was made, and Claimant was tried *in absentia*. On May 28, 2007, he was sentenced to a two-year prison term for tax evasion based on forgery and the use of false documents. Respondent points out that the court found that: "*the purpose of these registrations [i.e. the registration of the fake invoices in Continent SA's accounts] being that of reporting the performance of [falsely] reporting the investment stipulated in the [Privatization Agreement]*" (Respondent's Exhibit n° 42).
198. Respondent points out that although Claimant correctly notes that his criminal conviction was subsequently overturned on appeal and remanded for re-trial, the decision was based on purely procedural grounds regarding summoning. None of the conclusions of the first instance court on the merits were contradicted by the findings of the Bucharest Tribunal.

4. Claimant's misuse of Continent SA's funds

199. On July 15, 1998, Continent SRL concluded a Services Agreement with Continent SA (Respondent's Exhibit n°47). Under that agreement, Continent SA agreed to provide food handling and storage services to Continent SRL in consideration for a monthly rent.
200. After execution of the Privatization Agreement, Continent SRL and Continent SA amended the Services Agreement by executing an *Addendum* purportedly dated November 19, 1998 (Respondent's Exhibit n°49). Continent SA agreed to provide food handling and cold storage services to Continent SRL free of charge until the end of 1999.
201. Respondent submits that both Continent SRL and Expert Project failed to take this net outflow of resources from Continent SA into account when calculating the value of Continent SRL's purported capital investment in Continent SA.
202. The 6th District Tax Administration estimated that Continent SA lost income of over USD 900,000 during the period from November 1998 through December 1999.
203. According to Respondent, this should be considered as having increased Continent SRL's investment obligation by the amount of the rent abatement. Therefore, even if the Expert Project report had documented a USD 1.4 million post-privatization investment by Continent SRL, approximately USD 900,000 of that investment was financed using funds that Continent SRL was legally obliged to pay to Continent SA.

C. AVAS reasonably investigated Continent SRL's failure to fulfill its investment obligation and thereafter sought enforcement of the pledge

204. As mentioned above (see ¶173), Continent SRL was required to register a pledge in favor of AVAS over the shares purchased pursuant to the Privatization Agreement as security for its obligation to make a post-purchase investment.
205. By letters dated July 6, 1999, December 10, 1999, March 6, 2000, and June 9, 2000 (Respondent's Exhibit n°2), AVAS sought confirmation from Continent SRL that the share pledge had been registered. Continent SRL did not answer. Respondent points out that Claimant never presented any evidence to show that Continent SRL ever registered the share pledge or that it should be released from the pledge.
206. In light of Continent SRL's failure to confirm its compliance with the obligations stipulated in the Privatization Agreement and its repeated failures even to respond to requests for information, AVAS issued a Notice of Default on September 20, 2000 recording (i) Continent SRL's failure to make the USD 1.1 million capital contribution by December 31, 1999; (ii) Continent SRL's failure to register the pledge; and (iii) AVAS's intention to commence legal proceedings if Continent SRL did not provide documents proving compliance with its contractual obligations.
207. On December 19, 2000, Claimant responded in a letter attaching the Expert Project report and falsely stating that Continent SRL had fulfilled its USD 1.4 million investment obligation (Claimant's Exhibit n°6).

208. After reviewing the Expert Project report, AVAS ascertained that Continent SRL had failed to prove the company's compliance with its investment obligations. Moreover, on February 13, 2001, AVAS received a letter from the Financial Guard highlighting various accounting and financial irregularities in the documentation on which the Expert Project report was based.
209. AVAS wrote several times to Continent SRL to request additional documents that might enable AVAS to independently assess the facts surrounding the irregularities reported by the Financial Guard. Continent SRL repeatedly delayed its answer and never fully complied with the request.
210. Respondent submits that, in light of the many concerns that had come to light, AVAS commenced legal action against Continent SRL on April 23, 2001 (Claimant's Exhibit n°7). AVAS requested the court to order Continent SRL to register the share pledge as required by Article 8.10.3(a) of the Privatization Agreement and pay *per diem* delay penalties until the pledge was registered.
211. On May 10, 2001, the General Manager of both Continent SRL and Continent SA, together with Continent SA's Economic Director, sent a letter to AVAS, on behalf of Continent SA, admitting that 90 percent of the investment constituted routine expenditures and "*has been made by Continent SA and not by Continent SRL*" (Respondent's Exhibit n°12). He promised that "*Continent SRL will transfer to the account of Continent SA the owed amounts*". Respondent sets forth that the letter constitutes an admission that the previous claim that Continent SRL had fulfilled the capital investment obligation – on the basis of which it had obtained the Trade Registry judge's approval for the share capital increase – was false. AVAS received no further correspondence stating that the promised "transfer" ever took place.
212. Consequently, on June 22, 2001, AVAS amended its share pledge claim in the pending court proceedings to request enforcement of the share pledge (Claimant's Exhibit n°8).

D. The General Prosecutor's intervention and the Supreme Court's Decision quashing previous court decisions were necessary

213. As regard the AVAS share pledge claim, the first instance court and the appeal court ruled in favor of Continent SRL, but solely on the basis of a narrow and flawed interpretation of the requirements in Article 8.10.2 of the Privatization Agreement. The first instance and appeal courts held that the mere fact of the registration at the Trade Registry of the alleged capital increase was sufficient to show that the investment obligation had been fulfilled.
214. Respondent points out that the courts failed to establish that the capital contribution had, in fact, been "fully paid" and that the source of the capital contribution was Continent SRL. In addition, no attempt was made by either court to examine the numerous shortcomings of the Expert Project report or the serious allegations of fraud for which Claimant was being investigated.

215. In light of the above, on November 21, 2002, AVAS requested the General Prosecutor to submit a motion to vacate the judgments rendered by the lower courts, because the lower courts had (a) misconstrued the terms of the Privatization Agreement, (b) denied the request of AVAS to commission a judicial accounting expert report, and (c) ignored evidence showing Continent SRL's breach of the investment obligation through perpetration of a fraud (Respondent's Exhibit n°55).
216. At the time, the General Prosecutor was permitted under Article 330 of the Romanian Code of Civil Procedure to challenge final and irrevocable judgments within one year of their date of entry. The purpose of such a motion was to avoid a miscarriage of justice arising either from a fundamental error of law that prevented a valid finding on the merits, or from a judgment that was manifestly groundless.
217. On March 11, 2002, after considering the request by AVAS, the General Prosecutor filed a motion to vacate the lower court judgments (Claimant's Exhibit n°12). On July 9, 2003, the Supreme Court accepted the motion and remanded the case to the Bucharest Commercial Court with instructions to (a) investigate the challenged transactions, (b) commission a judicial expert report to determine whether the investment complied with the terms of the Privatization Agreement, and (c) consider the criminal charges that had been brought against Claimant and Ms. Doanta (Respondent's Exhibit n°43). The Supreme Court ordered that a new technical and evaluation report be completed to determine the source and value of the investment made by Continent SRL.
218. Respondent points out that the motion to vacate is heard by the Supreme Court in an adversarial hearing. In this case, Claimant's counsel was present when the Supreme Court heard AVAS's motion to vacate.
219. Inexplicably, on remand, the first instance court ignored these instructions of the Supreme Court and, among other things, failed to verify the source of the investment alleged to have been made by Continent SRL. There was no investigation into the accounting and financial documentation of Continent SRL to determine the source of the investment. Moreover, the court failed to appoint a valuation expert to determine the value of the alleged investment. The first instance court neglected to investigate the deficiencies of the Expert Project report and failed to take account of the findings of the Financial Guard. Furthermore, like the prior vacated court rulings, the first instance court held that Continent SRL had complied with the procedure for obtaining approval from the Trade Registry judge for a share capital increase and deemed that to be sufficient to prove Continent SRL's fulfillment of the investment obligation (Claimant's Exhibit n°14).
220. In the subsequent appeal initiated by AVAS, the court-appointed accounting expert reported that she "*ha[d] not found documents which would show the payment of [the capital contribution] by [Continent SRL]*" (Respondent's Exhibit n°13). According to the expert, the use by Continent SA of retained earnings to purchase goods and services did not constitute an 'in-kind' contribution that could justify the capital increase reported to AVAS. On October 8, 2007, a divided Court of Appeal nevertheless affirmed the decision of the lower court.

221. Respondent points out that the chair of the court issued a vigorous dissenting opinion. The chair concluded that the secured investment obligation had not been performed and that AVAS was therefore entitled to enforce its lien over the shares.
222. AVAS appealed the decision but the Supreme Court affirmed the Bucharest Tribunal's decision (Respondent's Exhibit n°193).

E. AVAS's proceedings to annul the shareholders' resolution dated December 15, 2000 seek to redress serious improprieties committed by Claimant

223. On August 17, 2007, AVAS filed an action against Continent SA asking the court (i) to rule that the resolution passed by Continent SA's shareholders on December 15, 2000, approving the capital increase, was null and void, and (ii) to register its decision with the Trade Registry and thereby delete the registration of Continent SA's share capital increase.
224. In addition to raising the fraud established at Claimant's criminal trial, AVAS contends that the shareholders' resolution should be declared null and void because it was only passed because Claimant voted in its favor despite being ineligible to do so, and because there is no indication that any of the minority shareholders of Continent SA participated in the vote (see above, ¶180).
225. AVAS submits that it is entitled to having the Continent SA shareholders' resolution set aside as being an absolute nullity. According to Article 2 of Decree 167/1958, in such cases, the exercise of the right to challenge the resolution is not subject to any statute of limitations.

F. Claimant continues to be the majority owner and continues to exercise control over Continent SA

226. Claimant, through his wholly owned company Continent SRL, is currently the registered owner of 1,882,847 shares in Continent SA representing 96.52 percent of the company's total share capital. This includes the 372,523 shares purchased from AVAS pursuant to the Privatization Agreement, 91,676 additional shares acquired by Continent SRL from minority shareholders, and the 1,418,648 shares issued to Continent SRL as a result of the fraudulent share capital increase. Claimant is and has been the sole shareholder of Continent SRL since April 13, 1998.
227. For most of the past ten years, Continent SA's principal assets have included real estate consisting of the properties at 82 Timisoara Blvd, Bucharest and at 1 Razoare Street, Bucharest. On May 15, 2006, Continent SA sold the latter property to SC Spavin Invest SRL for EUR 1,000,000 (Respondent's Exhibit n°60). In addition, Claimant has agreed to sell a plot of 350 sq. m. at Continent SA's warehouse facility at 82 Timisoara Blvd. to a company called SC Stefran International SRL pursuant to a Sale-Purchase Pre-Contract, dated October 10, 2007 (Respondent's Exhibit n°64).
228. Respondent asserts that Continent SA has continued to own and manage its assets without any interference from Respondent. Aside from Continent SA's ability to dispose

of its real estate, Continent SA has enjoyed significant earnings from the exploitation of its commercial assets. The annual turnover of Continent SA increased significantly over the decade of Claimant's ownership (Net Financial Results at Continent SA for years 1998-2007, Respondent's Exhibit n°62). Recently, Claimant arranged with his son Stavros Roussalis to sell Continent SA's commercial assets for EUR 40million. The listing for the property (Respondent's Exhibit n°63) states that Continent SA is earning EUR 120,000 – 150,000 per month through the operation of its refrigerated foods warehouse. In this regard, Respondent points out that it was after Roussalis's claims and Romania's counterclaim were submitted to the exclusive jurisdiction of the Tribunal that Claimant attempted to enlarge the dispute by selling Continent SA surreptitiously. That led to the Tribunal's first decision on provisional measures to halt Claimant's actions.

G. Conclusion

229. Respondent submits that, in light of the facts stated above, Continent SRL did not make the required post-purchase investment in accordance with Article 8.10.1.
230. Respondent contests Claimant's allegation that other experts than Expert Proiect submitted reports in connection with the AVAS litigation, and that all of them confirmed that Continent SRL made the required investment.
231. The Popescu Report: Popescu, like Expert Proiect, accepted the documentation provided by Continent SA without verifying the validity of the invoices that had been challenged. Ms. Popescu undertook no investigation into the "physical reality" or value of the construction and installation works that allegedly constituted the investment. Moreover, her report (Respondent's Exhibit n°66) does not say a word about the source of any investment; indeed, the scope of the assignment was limited to verifying the "actualized value" calculations made by Expert Proiect for construction and installation projects.
232. The Isuf and Mihaila Report (Claimant's Exhibit n°19), for the period from January through December 1999, identifies a total "investment" of USD 285,995, a small fraction of the USD 1,100,000 called for under the Privatization Agreement. For the period from January through December 2000, the authors report an "investment" of USD 649,614. These amounts do not confirm compliance with a USD 1.4 million investment obligation. Moreover, the Isuf and Mihaila Report criticizes the Expert Proiect report for overvaluing the claimed investments and says nothing about the source of the funds for the expenditures they tallied.
233. The Viorel Velicu Report (Claimant's Exhibit n°20) does not address the source of any investments and gives no opinion regarding the amount, if any, contributed, by Continent SRL. Velicu's task was to conduct a technical review of the Expert Proiect and the Isuf/Mihaila reports. Moreover, that report is tainted by an artificial increase in the value of the installations and construction works, and by the inclusion of assets whose value was also artificially inflated or could not be verified.
234. The Nicolae Report (Claimant's Exhibit n°21) was prepared at the request of the court in connection with the determination on remand of whether Continent SRL made the

required investment. Nicolae failed to carry out an important part of his assignment to determine whether the investments were “real or fictional.” Instead, he concluded that the “reality of the investment” was confirmed by “the registration of the joint stock increase” at the Trade Registry and the approval by the Trade Registry Judge. Nicolae repeated the conclusion reached in the first court decision, which was criticized and vacated by the Supreme Court. Nicolae merely relied on the Expert Proiect and Popescu reports, without independent verification. His summary conclusion – that the investment “*comes from [Continent SRL’s] own source or attracted sources*” is unexplained and undocumented.

235. The Maria Glavan Report (Claimant’s Exhibit n°22) was prepared to assist Claimant in defending criminal charges brought against him and Ms. Doanta. Ms. Glavan concludes that “[Continent SRL] ... *performed a capital contribution in value of USD \$1,400,000 for [Continent SA] from [its] own sources or attracted sources, investments which was [sic] registered at the Trading Registry as ... the basis of the increase of the joint stock of [Continent SA].*” According to Respondent, no discussion, no analysis, and no data are presented in support of this summary assertion.
236. The Vladimir Popovici Report was prepared as part of the criminal investigation and was the first to scrutinize the source of the claimed investment. It presents a harsh critique of the evidence presented by Roussalis to support the alleged investment. Among other things, Popovici demonstrates that, of the total claimed expenditures identified by Expert Proiect, only about 5 percent could be traced to Continent SRL and the “*financing was not raised and paid integrally by [Continent SRL].*” It goes on to state that “[t]herefore, the privatization agreement can not be deemed as fulfilled” (Respondent’s Exhibit n°18). Furthermore, Popovici reported that financing supposedly provided by Roussalis himself (or other Roussalis-controlled companies) was “*not supported by documents proving that he had actually made these payments.*” As a result, the financing from the supposed assignment agreements, in particular, “*have no real basis.*”
237. Respondent submits that there is no documentary proof in any of the foregoing reports to show that Continent SRL, “from its own sources” or sources it procured, invested USD 1.4 million in Continent SA. However, Claimant bears the burden of proof to establish his claim. Claimant has not met that burden.
238. In light of the foregoing, Respondent submits that Claimant has no basis to complain about AVAS’s efforts to enforce its rights under the Privatization Agreement.

§ 2. THE LAW

A. On the facts, there is no basis for claiming that Claimant’s shareholding interest was expropriated, either directly or indirectly

239. Respondent contests Claimant’s allegation that the acts by Romania, taken alone or together, are tantamount to expropriation of his investment under the above-cited provisions.
240. Even under Claimant’s incorrect version of the facts, his claims of expropriation must fail for two essential reasons. *First*, Respondent’s actions have not deprived Claimant of any

fundamental property rights as he retains full ownership rights in Continent SA: (a) he is still a director of Continent SA; (b) his wholly-owned firm, Continent SRL, remains the controlling shareholder of Continent SA; (c) Continent SA remains a going concern; and (d) there has been no interference with Claimant's management or control of the company's day-to-day operations. *Second*, Claimant's expropriation claims are inconsistent with accepted definitions of expropriation.

1. The law on indirect or creeping expropriation does not support the claim

241. Respondent contends that allegations of indirect expropriation require a “*high level of analytical rigor and precision*” (*Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9). To prove “creeping expropriation,” the plea must state with particularity which acts, attributable to the state, have already eroded the investor's rights to the investment to the extent that an expropriation in violation of international norms has clearly occurred. According to Respondent, Claimant's vague statements alleging expropriation as a result of his right to dispose of his shares in Continent SA being “likely” to be affected, or AVAS “attempting” to execute its lien on the original shares, do not provide sufficient factual support to meet the applicable standard for indirect expropriation under the Treaty and international law.

2. The alleged interference with Claimant's management and control of his investment cannot amount to an expropriation

242. Respondent submits that the most commonly used test of indirect or regulatory expropriation is the following: “*even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them*” (G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 311). Respondent alleges that Claimant's rights in Continent SA have not been rendered useless.
243. For example, in *Starrett Housing v. Islamic Republic of Iran* (No. 32-24-1, Award of December 19, 1983, Iran-U.S. C.T.R. 122, 1983), Iran appointed its own “temporary manager” of an Iranian firm in which the claimant owned a majority interest. The tribunal found that this interfered with the investor's ability to manage the company, thus rendering the claimant's rights “useless” and constituting indirect expropriation. According to Respondent, Claimant's allegations in this case, however, would not – even if proven – establish that Respondent has interfered with his property rights to such an extent.
244. In *Marvin Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1), Feldman, a U.S. citizen, operated an export business in Mexico. When he started exporting cigarettes from Mexico in 1990, Mexico rebated production and sales taxes to cigarette resellers upon export. Two years later, Mexico changed the law to permit export rebates only for cigarette producers. The ICSID panel found no expropriation because Mexico had not interfered with the management or control of Feldman's business.

245. In *Waste Management v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), the tribunal rejected Waste Management’s claim that its investment rights under the concession agreement were taken by “creeping expropriation.” Because the claimant at all times retained the control and use of its property – when the company ceased the business, assets were sold off in an orderly way – the tribunal concluded that, although Mexican authorities may have breached the concession contract, “*absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise,*” this did not amount to an expropriation.
246. Following the tribunals’ reasoning in these cases, Claimant’s allegations of expropriation must be rejected. Claimant retains control of more than 96 percent of Continent SA through his 100 percent ownership of Continent SRL and remains a director of Continent SA. No government entity has interfered in the management of the company. In sum, even if Claimant’s ability to sell his shares has been allegedly diminished through the ongoing litigation, those shares have not been rendered “useless.”
247. Respondent points out that Claimant’s reliance on the *Metalclad* decision is unavailing (see above, ¶130). The ICSID tribunal in that case held that a measure needs to “*substantially deprive the investment of economic value*” to constitute indirect expropriation. However, as explained above, Roussalis has not been deprived of the economic value of his investment as a result of the Romanian government’s actions.

3. There is no permanent and irreversible interference with Claimant’s property rights

248. Respondent submits that a measure needs to be permanent and irreversible, as opposed to temporary, to constitute a compensable taking under international law (see *International Technical Products Corporation*, No. 196-302-3, Award of October 28, 1985, 9 Iran-U.S. C.T.R. 206 at 240-41). Similarly, under European Convention case law, it is clear that if the investor’s rights have not been extinguished, but have only been substantially reduced, and the situation is not “irreversible,” there is no “deprivation” – and hence no expropriation – for the purposes of the second sentence of Article 1 of Protocol 1 of the European Convention (see *e.g., Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser A) at 29, 1976).
249. In light of the above, there is no basis for Claimant’s claim that the mere attempt by AVAS to nullify the shareholders’ resolution and execute the share pledge amounts to expropriation. Indeed, Claimant’s concern about his right to dispose of shares has not become permanent or irreversible.

4. Claimant’s allegations demonstrate that the complained-of actions by AVAS and the Supreme Court have not ripened into an expropriation

250. Claimant states that the measures ordered on behalf of the Romanian State by its public authorities are *likely to affect* the investor’s right to use the investment (Claimant’s Memorial, ¶160). Respondent submits that this argument cannot support a claim of expropriation. A classic example of a case where the arbitrators found state actions had not ripened into an expropriation by the tribunal’s jurisdictional cutoff date is *Foremost*

Tehran, Inc. v. Iran (No. 220-37/231-1, Award of April 11, 1986, 10 Iran-U.S. C.T.R. 228). Here, Foremost claimed that the Iranian Government had expropriated its minority share in Pak Dairy through a number of actions. Despite these actions, the tribunal ruled that, at the cutoff date for the Iran-U.S. Claims Tribunal's jurisdiction, Iran had not expropriated Foremost's investment in Pak Dairy. As of the cutoff date, Foremost retained incidents of ownership (shares, two directors on the board, and limited shareholder rights). Despite the significant deprivation of property rights, the key factor in the decision was that the deprivation was not irreversible because Foremost retained its minority ownership. As noted above, Claimant still retains all incidents of ownership in Continent SA, including all of the shares owned through Continent SRL.

5. There is no basis for bringing this claim under Article 4(1) of the Treaty

251. In *International Systems & Controls v. Iran* (No. 256-439-2, Award of September 26, 1986, 10 Iran-U.S. C.T.R. 223), the tribunal rejected the claim for indirect expropriation, reasoning as follows: *“it is to be noted that the owner must at least be deprived of some fundamental rights of ownership and that the deprivation must be not merely ephemeral. The claim for destruction of a business must go beyond a showing of a classical breach of contract... The Respondents' failure to renew a contract or their failure to pay a debt cannot be said to amount to expropriation as in any event the Respondents have rights under the contracts to terminate them for cause or without cause upon making stipulated payments.”*
252. Respondent considers that, similarly, AVAS had the right under the Privatization Agreement to enforce the pledge based on Continent SRL's failure to make the USD 1.4 million investment. Accordingly, AVAS's refusal to accept Continent SRL's unsupported contention that it met this obligation, and AVAS's ensuing litigation to enforce its contractual lien on the shares pledged by Continent SRL, cannot be said to amount to expropriation.

B. The failure to negotiate and the denial of a stay of litigation do not support claims under Article 2(2) of the Treaty

253. Respondent refutes Claimant's allegation that Respondent's failure to negotiate with him, and the Romanian court's denial of his request to stay proceedings in the AVAS enforcement action, violated the “fair and equitable treatment” clause under Article 2(2) of the Treaty.
254. The Treaty neither imposes a legal duty on the state nor creates a legal right for the investor to negotiate a settlement. The so-called “cooling-off” provision of the Treaty, Article 9(2), provides that: *“[i]f such disputes cannot be settled within six months after the date either party requested amicable settlement, the investor concerned may submit the dispute to [the host state courts] or to international arbitration.”* This clause merely sets aside a period during which settlement discussions may be conducted but does not obligate either party to conduct such discussions.

255. Claimant's complaint that the Romanian courts rejected his argument under Article 26 of the ICSID Convention and refused to decline jurisdiction over the AVAS litigation is now moot. Indeed, Respondent has agreed to a suspension of the pending litigation in the Romanian courts, and Claimant has refused to join in applying for a suspension. Further, Respondent submits that it is fanciful for Claimant to demand USD 25 million on the ground that the courts did not stay the AVAS litigation - especially given that Claimant objects to the Counterclaim.
256. More generally, Claimant's contention that AVAS's maintaining of the Romanian court proceedings evidences a failure by Respondent to accept the exclusive jurisdiction of the Tribunal over the Investment Claim is untrue.
257. First, AVAS initiated the share pledge litigation in Romanian courts before the ICSID case was initiated. Claimant refused to seek a postponement. The Supreme Court conducted a hearing and handed down a final and irrevocable decision on the same day, dismissing AVAS's appeal (see above, ¶222).
258. Second, AVAS commenced the proceedings aiming at annulling the share issuance in August 2007, more than one year before Respondent filed its Counterclaim in this arbitration. AVAS initiated the case after its share pledge enforcement claim was dismissed by the first instance Romanian court on the basis that the shareholders' resolution of December 15, 2000 was valid and had not been challenged. AVAS reasonably concluded that the commencement of the suit to annul the share issuance was the best approach to ensure that it would not be foreclosed from arguing that the shareholders' resolution must not be treated as final for the purposes of deciding AVAS's share pledge claim. AVAS's commencement of the share nullification case was the best way to preserve its right to pursue its long-standing share pledge enforcement claim in the event that the Tribunal later decided that it lacked jurisdiction over the Counterclaim. Shortly after the case was filed, AVAS requested Claimant's voluntary cooperation in seeking a stay of both domestic court cases. Claimant did not agree to seek a stay in either case. AVAS attempted to obtain a stay on its own motion but was unsuccessful. It was at that point that Respondent filed its request for provisional measures in these proceedings.

C. There is no basis under the Treaty for the "Full Protection and Safety" claims

1. The Supreme Court's decision to vacate the AVAS judgment was appropriate under Romanian law and international law

a) The General Prosecutor's motion to vacate was a settled procedure under Romanian law at the time it was filed and granted in this case

259. Article 330 of the Romanian Civil Procedure Code authorized the Supreme Court to vacate final and irrevocable judgments in certain circumstances (see above, ¶216). That article was in force for decades before the Privatization Agreement was executed, subsequently amended over the years, and eventually repealed in 2003 after the Supreme Court rendered its decision in the litigation between AVAS and Claimant's companies.

260. Respondent points out that the Article 330 procedure was the subject of challenges in Romania's Constitutional Court, and was upheld as an important "*protection of the human rights and freedoms against any abuse, including those having the origin in a judicial ruling*" (Decision of June 4, 1996, Official Gazette n°255 of October 22, 1996).
261. Accordingly, given that, at the time the proceedings were commenced, all final and enforceable judgments in Romania remained subject to the set-aside provisions for one year after entry of the judgment, it is clear that the principle of legal certainty was not violated under the circumstances of this case since the parties to the judgment were fully aware that Article 330 could be invoked during that one-year period.

b) No violation of the principle of legal certainty arises from the Supreme Court's decision

262. Respondent denies that the Supreme Court's decision to vacate the judgment violates the "full protection and safety" clause of Article 2(2) because it infringes the principle of legal certainty.
263. Respondent argues that the principle of legal certainty does not absolutely prohibit reopening final judgments. Judicial systems generally provide grounds upon which a final judgment may be vacated, such as in cases where a final judgment was procured on the basis of a fraud committed upon the court. Statutes of limitations are often established to protect against misuse of such procedures.
264. In the United States, for example, federal court judgments may be set aside for the following reasons: (i) mistake, inadvertence, surprise, or excusable neglect; (ii) newly discovered evidence that, with reasonable diligence, could not have been discovered; and (iii) fraud, misrepresentation, or misconduct by an opposing party. This procedural remedy is available within one year of judgment, even after the judgment has become final and all direct appeals are exhausted (Fed. R. Civ. P. 60(b), 2008).
265. In this case, the procedure was in accordance with Article 330 of the Romanian Civil Procedure Code (see above, ¶¶216 and 259-261) when it was invoked by AVAS. It was used in this case because the lower court denied AVAS's request for the commissioning of a judicial expert report and failed to examine serious allegations of fraud regarding Continent SRL's claims that investments were performed and that invoices for goods and services were authentic. The lower court declined even to consider AVAS's allegations because the court incorrectly determined that the Trade Registry approval was binding on AVAS. However, that ruling was in conflict with a 1995 decision of the Romanian Supreme Court, in which the court held that the 15-day period commences upon publication in the Official Gazette, not when the decision was rendered (Supreme Court Decision n°701 of October 19, 1995, Respondent's Exhibit n°74). Under that decision, the 15-day rule would not be applicable to AVAS because the Trade Registry decision was not published in the Official Gazette. Thus, Respondent submits that the Trade Registry's approval did not preclude a full evaluation of the merits of the AVAS claims, which had not been examined by any judge.

c) The reasons stated for the Supreme Court’s decision are reasonable, justify the relief granted, and do not interfere with Claimant’s right of ownership

266. In this case, as explained in the Supreme Court’s decision (Claimant’s Exhibit n°13), the General Prosecutor moved to vacate the judgment against AVAS under Article 330 on, *inter alia*, the following grounds: (a) the documents on which the share increase was based reveal that “*the defendant [Continent SRL] did not achieve the investments from its own sources or from others gained over its name*”; (b) there were multiple transactions involving Claimant’s group of companies, causing concern that “*there is no certainty for the reality of the prices*” charged; (c) there were highly suspicious irregularities in the documentation supporting the investment; and (d) there was an “*obvious conflict of interests between the privatized company [Continent SA] and the buyer of the shares [Continent SRL]*”.
267. The Court agreed that the Expert Project report failed to show how the capital increase was made and thus did not resolve the objections raised by AVAS in the lower court. It instructed the lower court on remand to appoint a new expert that would put this issue to rest. The Supreme Court also found that third parties were not bound by the increase in share capital because the decision approving it was not published in the Official Gazette. The Court also recognized the pendency of criminal charges against Claimant and instructed the lower court on remand to take into consideration the proceedings in the criminal case. Finally, the court acknowledged that the General Prosecutor had found defects in various contracts cited by Claimant as support for the claimed investments that involved transactions between companies controlled by Claimant. The court directed the lower court to address those defects (see above, ¶217).
268. Based on the ruling of the Supreme Court, the lower court judgment was vacated. The Supreme Court set aside the judgment so that serious challenges to the integrity of the vacated judgment could be examined for the first time by the lower court. This is an entirely proper and reasonable rationale under the circumstances.
269. Respondent submits that Claimant’s reliance on decisions of the European Court asserting violation of legal certainty is misplaced.
270. Indeed, in *Brumarescu v. Romania*, the claimant had obtained a final judgment in 1993 from a Romanian court, awarding him title to his parents’ home, which had been taken in an unlawful nationalization in 1950. The judgment was later set aside by the Supreme Court in 1995, under Article 330 of the Civil Procedure Code. The court reasoned that the 1950 nationalization was carried out pursuant to a legislative act that precluded judicial review. The ECHR held that a law barring judicial review (the basis of the set-aside order) was itself a violation of the right to a fair hearing guaranteed by the Convention. The ECHR also found fault with the challenged decision because, at the time, Article 330 of the Civil Procedure Code had no temporal restriction, a defect later corrected by the Romanian legislature. The ECHR eventually noted that no justification, such as “public interest”, was given for the Supreme Court’s ruling.

271. None of the *Brumarescu* circumstances are present here. Claimant continues to own all of his shares without interruption, he controls Continent SA, and the Supreme Court's decision was amply justified and in the public interest given the unresolved allegations of fraud. Significantly, in *Brumarescu*, there was no allegation that the initial judgment was tainted by fraud. Moreover, in Claimant's case, the Supreme Court merely remanded for a full and fair consideration of the relevant facts, which is not at all comparable to what occurred in *Brumarescu*. As a result, *Brumarescu* has no application under the facts and circumstances of this case.
272. Similarly in *Ryabykh v. Russia*, a lower court judgment that was favorable to the applicant was quashed as a result of a "supervisory review." The ECHR drew a comparison to *Brumarescu* and observed that the exercise of the "supervisory review" in that case was not subject to any time limit. As in *Brumarescu*, there was no allegation of fraud or criminal misconduct on the part of the complainant or any suggestion that the lower court had failed to inquire into the merits of complainant's case.
273. In *SC Maşinexportimport Industrial Group SA c. Roumanie*, the applicant obtained a favorable decision from the Bucharest Tribunal in a dispute with AVAS, which entitled the applicant to receive ROL 22.28 billion. After the decision became final and no longer subject to appeal, AVAS paid the sum in question. Subsequently, the Supreme Court quashed the Bucharest Tribunal's decision. The applicant was ordered to return the monies he had received. He claimed before the ECHR that the General Prosecutor's intervention at the Supreme Court was a violation of article 6(1) and Article 1 of Protocol 1 of the European Convention. The case is similar to *Brumarescu* in that the original decision had conferred title to a certain sum of money and the complainant was deprived of his property as a consequence of the Supreme Court's exercise of supervisory review.
274. It is notable that, in *Maşinexportimport*, the court partially based its finding that Romania was in breach of the European Convention upon the fact that AVAS had failed to appeal the original court decision through the normal judicial channels and had invoked the supervisory jurisdiction of the Supreme Court in an attempt to escape the consequences of that failure. In the present case, by contrast, AVAS exercised its rights of appeal within good time and invoked the supervisory jurisdiction of the Supreme Court for *bona fide* reasons, namely to avoid a miscarriage of justice arising from alleged fraud.
275. Finally, Respondent submits that ICSID's jurisdiction is limited by the ICSID Convention to deciding investment disputes. Claimant's "legal certainty" claim is not an investment dispute. Whether Romania's Supreme Court applied Romanian civil procedure law in a manner consistent with the European Convention is not an issue that Romania agreed to arbitrate under the Treaty.

d) The principle of proportionality is not violated by the Supreme Court's order vacating the judgment

276. Respondent refutes Claimant's allegation that, by vacating the lower court judgment, the Supreme Court's decision interferes with Claimant's rights of ownership and that such interference is not justified because it fails to pass the test of proportionality.

277. According to Respondent, the question of proportionality does not even come into play based on the Supreme Court’s decision, because the admission of the motion to vacate did not amount to an interference with Claimant’s ownership rights. The Supreme Court made no determination as to whether the investment was made or whether AVAS is entitled to execute the pledge and repossess the shares. Those issues remained open for decision by the lower court.
278. On remand, the court of first instance ruled in favor of Continent SRL. On appeal, a divided court ruled for Continental SRL. That judgment was appealed and is pending before the Supreme Court, subject to a request to suspend proceedings. Now the matter is before the Tribunal on the counterclaim of Respondent against Continental SRL and Claimant.

2. Claimant’s other arguments under Romanian law are equally unavailing

a) Claimant’s argument – that the Trade Registry decision has *res judicata* effect – is contrary to Romanian law

279. Respondent refutes Claimant’s allegation that the AVAS lawsuit to enforce its rights under the Privatization Agreement, with respect to the pledge of shares as security for the investment obligation, is “illegal” under Romanian Law because approval by the Trade Registry judge had become irrevocable in January 2001, given that no one appealed that decision within 15 days. Respondent denies Claimant’s argument that the Trade Registry decision is *res judicata* and bars AVAS from bringing an enforcement action in 2001.
280. Indeed, the Trade Registry judge’s issuance of a decision to approve or deny an increase in share capital is not an adversarial proceeding. As such, it does not enjoy *res judicata* effect under Romanian law. Articles 331 and 337 of the Civil Procedure Code provide as follows: “Article 331. The applications in respect of which the intervention of the court is necessary, but without pursuing the determination of an adversarial right towards another person, such as those regarding the granting of judicial authorizations, or the granting of legal supervision, safeguards or conservatory measures, are subject to the procedural provisions set out below. [...]”; “Article 337. The decisions do not have the power of *res judicata*.” Respondent sets forth that approval of resolutions by a Trade Registry judge to authorize a company’s share capital increase is a “judicial authorization” under Article 331 and, pursuant to Article 337, is not *res judicata*.
281. Furthermore, according to Article 1201 of the Romanian Civil Code: “[t]here exists *res judicata* when the second claim before the court has the same subject-matter, is grounded as the same cause and is between the same parties initiated by them and against them in the same capacity.” Respondent submits that these requirements are not met. Indeed, neither AVAS nor Continent SRL – the two parties to the AVAS enforcement litigation – was a party before the Trade Registry judge. Nor is the subject-matter and cause the same. The AVAS litigation seeks to enforce the Privatization Agreement against Continent SRL and to obtain relief specified in that contract, because Continent SRL failed to make the required investment. The matter before the Trade Registry was a resolution by the shareholders of Continent SA approving an increase in share capital

based on purported investments made in Continent SA. The Privatization Agreement expressly stipulated that the investment would only be “*deemed to be performed*” once it had been “*fully paid by* [Continent SRL].” The Trade Registry judge made no finding as to whether Continent SRL complied with the investment requirements of the Privatization Agreement and is not competent to make such a finding.

b) Claimant’s argument that AVAS had 15 days to challenge the Trade Registry ruling is incorrect

282. Respondent denies Claimant’s assertion that AVAS had 15 days from the date of the Trade Registry decision to lodge an appeal and, because it failed to do so, the April 2001 enforcement action is untimely.
283. Indeed, the relevant legal provision at the material time was Article 60 of the Company Law, which provided that: “*the final appeal term is 15 days and commences upon the rendering of the decision.*” However, based on Decision 701/1995 of the Supreme Court (Respondent’s Exhibit n°74), for third parties the 15-day period begins to run from the date of publication of the Trade Registry decision (or of the amended articles of association) in the Official Gazette (that procedure has since been incorporated into an amendment to Article 60 of the Company Law). Respondent points out in this regard that the decision of the Trade Registry was never published in the Official Gazette.
284. Furthermore, AVAS’s enforcement action is not an appeal of a decision made by the Trade Registry judge concerning the registration of the capital increase. It is a separate action for an alleged breach of the Privatization Agreement by Continent SRL. As such, it is subject to the general prescription period of three years under Romanian law.
285. Respondent notes that Claimant cites Article 6 of Law 26/1990 for the proposition that AVAS had 15 days to dispute the Trade Registry decision. However, the 15-day rule in Article 6 of that law was not even enacted until 2003 (Law 161/2003), three years after AVAS filed its action to enforce the share pledge. Moreover, even under the current version of Article 6, the 15-day period for third parties such as AVAS to challenge a corporate act starts only upon publication of the act in the Official Gazette. Accordingly, a challenge by a third party of an *unpublished* decision would be dismissed as premature.

c) Romanian law authorized AVAS to file an “absolute nullity” claim against Continent SA to set aside the shareholders’ resolution

286. Article 131 of the Romanian Company Law provides an express right for any interested party to challenge a shareholders’ resolution as an “absolute nullity.” Although Article 131 of the Company Law was included in the 2003 amendments, interested third parties have for many years enjoyed the right to challenge shareholders’ resolutions on “absolute nullity” grounds under other provisions (St. D. Carpenaru, S. David, C. Predoiu, Gh. Piperea, *The Law of Commercial Companies, Commentary on Articles 400-01*, 3d ed. 2006). Such generally applicable provisions of law include Article 966 of the Romanian Civil Code, which provides that “[a]n obligation without cause or grounded on a false or illicit cause, cannot have any [legally-enforceable] effect.” The right to nullify a legal act,

based on the fundamental principle *fraus omnia corrumpit*, is drawn from Article 5 of the Civil Code: “It is not allowed to derogate by agreement or unilateral act from laws that concern public order or good morals,” and Article 968 of the Civil Code, which provides that an “illicit cause is one that is prohibited by law or is contrary to good morals and public order”.. Respondent submits that the actions of Continent SA, in submitting to its shareholders for a vote, and to the Trade Registry for approval, a resolution premised on investments that never were made by Continent SRL provide valid grounds for a claim of absolute nullity under Article 966 of the Civil Code.

287. Respondent denies Claimant’s allegation that Article 966 of the Romanian Civil Code does not apply to shareholder resolutions because they are non-contractual acts. Indeed, the shareholders’ resolution which records the common intention of the shareholders to approve a share capital increase, and thereby amends Continent SA’s articles of incorporation, is contractual in nature.
288. Contrary to Claimant’s assertion, any interested party in Romania has the right to bring an “absolute nullity” claim; it is not a right exclusive to shareholders. Further, a transaction based on fraudulent conduct can be nullified at any time. There is no prescription period for “absolute nullity” claims under Romanian law. The 2007 claim by AVAS was, therefore, timely.
289. In addition, the violation of various mandatory provisions of the Company Law is sanctionable by absolute nullity, *e.g.* decisions made with the vote of directors where such vote was prohibited by the Company Law (see Article 125(5) and Article 145 of the Company Law). In this regard, Claimant’s approval of the share capital increase in his fiduciary capacity as a director of Continent SA was in conflict with his personal interest as the sole shareholder, director, and representative of Continent SRL. These interests conflict for obvious reasons: Claimant and his wholly-owned company Continent SRL arranged for approval of the share capital increase because it created the appearance that Continent SRL had fulfilled the investment obligation of the Privatization Agreement. Continent SA and its minority shareholders, on the other hand, would not want to approve the share capital increase if they knew the investment had not been made by Continental SRL.

§3. DAMAGES

290. If the AVAS litigation causes him to lose any shares, Claimant demands the full value of his entire shareholding interest in Continent SA, *i.e.* over USD 85 million, in addition to USD 25 million for moral damages. If the Romanian litigation is suspended, Claimant demands USD 25 million for moral damages. However, Respondent sought suspension of the AVAS claims in local courts and is bringing its counterclaims before the Tribunal so that the factual disputes surrounding the performance of the investment obligation can be decided before this Tribunal. As a result, Respondent submits that Claimant’s secondary claim is moot.

1. There is no basis for the award of Claimant's primary demand for moral damages

291. The first issue regarding the primary relief sought in this claim is whether the evidence establishes that Continent SRL invested the USD 1.4 million from its own resources. If the Tribunal finds that Continent SRL failed to meet its burden of proof, then it must deny this claim. Indeed, Claimant is not entitled to recover damages if AVAS acted reasonably in pursuing its contractual rights under the Privatization Agreement.
292. The next issue is whether AVAS had legitimate reasons for challenging the validity of the Expert Project report in Romanian courts, in light of the serious issues raised. If the Tribunal finds that it was appropriate for AVAS to raise these issues, then it must deny this claim.
293. If the Tribunal concludes that the USD 1.4 million investment was made by Continent SRL, *and* that the court challenges brought by AVAS were unwarranted, then the Tribunal has reasons to consider the question of damages. In that scenario, there is no basis whatsoever for the USD 25 million moral damages award demanded by Claimant.
294. Claimant cannot request moral damages for himself in his individual capacity because the Tribunal can award damages only for the investment. Indeed, Article 2(2) of the Treaty, the provision under which this claim is asserted, protects "Investments by investors of a Contracting Party."
295. Previous decisions of ICSID tribunals can offer valuable guidance to the Tribunal (*Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction). According to Respondent, only two ICSID tribunals have awarded moral damages for serious impairment of an investment, and the circumstances of those cases are not comparable to those present here.
296. In *S.A.R.L. Benvenuti and Bonfant v. People's Republic of Congo* (ICSID Case No. ARB/77/2), an ICSID tribunal awarded moral damages to an Italian corporation for the loss of commercial opportunities in its home country under extreme conditions involving harm to its employees and credit sources. The Congolese military occupied the Claimant's property, its employees were forced to leave Congo, and it lost the opportunity to do business in Italy because its banks and suppliers refused to provide credit. Claimant was unable to prove material damages, but the tribunal awarded a token amount equivalent to approximately USD 15,000. Respondent contends that even such a minimal amount would not have been awarded but for the circumstance that the parties jointly authorized the tribunal to decide the moral damages claim *ex aequo et bono*, pursuant to Article 42(3) of the ICSID Convention. Moreover, because such an award is not rendered on the basis of applicable law, it cannot serve as precedent in this case.
297. The only other case in which moral damages were awarded to a claimant by an ICSID tribunal was *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17. The tribunal explained that "*investment treaties primarily aim at protecting property and economic values,*" but "*they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages.*" The tribunal

emphasized that “a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances only.” In that case, the claimant’s corporate executives were threatened and detained by the respondent and intimidated in connection with the contracts representing the investment. The claimant’s request for payment for completed works was answered with armed forces. Furthermore, the tribunal explained that it awarded moral damages based on evidence that “*the physical duress exerted on executives of the Claimant was malicious and because “it affected the physical health of the Claimant’s executives”* as well as Desert Line’s credit and reputation. Respondent submits that there are no similarities between the extraordinary circumstances of that case and the allegations and claims asserted by Claimant in this case.

298. Claimant’s claim for moral damages also fails under Romanian law. Pursuant to Articles 998 and 999 of the Civil Code, the following prerequisites must be met to admit a civil liability claim: (a) an unlawful deed; (b) certain and unrepaired damage; (c) a causal link between the unlawful deed and the claimed damage; and (d) culpability of the party accused of committing the unlawful act.
299. Respondent sets forth that Claimant’s damages claim falls short of proving any unlawful character of AVAS’s deeds. Respondent submits that AVAS acted in accordance with its contractual and legal rights and statutory duties in attempting to enforce the share pledge against Continent SRL and exercised its constitutional right of free access to justice when it filed the action for the annulment of the shareholders’ resolution approving the capital increase.
300. Respondent further submits that, where the injury alleged is an uncompensated expropriation, the appropriate measure of damages is the value of the expropriated company (Article 4 of the Treaty).
301. Respondent points out that even if the Tribunal were to find that Claimant was entitled to an award of moral damages, such damages would need to be compensatory in nature, and commensurate with any discernible loss or harm that Claimant has established. However, Claimant has failed to prove any discernible loss or harm in this case.
302. Finally, Claimant’s demand for USD 25 million, without regard for the purported value of Continent SA, runs afoul of the oft-cited standard for damages under international law: “[t]he fundamental concept of “damages” is . . . reparation for a loss suffered, a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole” (*The Lusitania Cases*, US-Germany Mixed Claims Commission, VII R.I.A.A., 32, 1923, at 39, emphasis in original). However, Claimant has failed to show that the USD 25 million moral damages he seeks for this claim represents compensation for any discernible loss. Respondent alleges that it is a completely arbitrary and fanciful figure unsupported by law or fact.
303. For clarity’s sake, Respondent sets forth that its submissions responding to Claimant’s moral damages claims apply to all such claims.

2. Claimant has a heavy burden of proof, which he has failed to meet

304. According to Respondent, Claimant bears the burden to establish the alleged injury, its extent, and its cause. However, Claimant has failed to make out a claim for indirect expropriation given that he continues to own the shares he acquired and enjoys full decision-making authority over his investment. With regard to the claimed damages in particular, Claimant has not proved any specific harm to the business of Continent SA nor quantified his damages on the basis of any accepted valuation principles or methods.
305. Respondent refutes Claimant's assertion that the value of Continent SA was established by Respondent's own evidence. Indeed, Claimant misinterpreted Respondent's arguments from the Interim Measures application dated May 28, 2008. Respondent merely argued that the EUR 40,000,000 listed sale price was "*substantially below the EUR 65,263,750 market value asserted by Claimant in this arbitration. Cl. Mem. ¶ 104.*" (Respondent's Request for provisional measures dated May 28, 2008, page 3, para. 2.) Respondent never contended that the EUR 65,263,750 or EUR 40,000,000 numbers were the correct market value of the property; it just noted that the advertised sale price was below the alleged market value claimed by the Claimant. Also, there is no evidence in the record that the EUR 40,000,000 asking price was ever offered by a buyer or that the self-made evaluation of EUR 65,263,750 was ever documented under any applicable evaluation standard.

SUB-SECTION III. DECISION OF THE ARBITRAL TRIBUNAL

§1. THE LEGAL FRAMEWORK APPLICABLE TO THE MERITS

I. The Applicable Law

306. At the first session of the Arbitral Tribunal held on May 4, 2007, the Parties agreed that Romanian law would govern the substantive merits of the dispute and that the BIT would be treated as part of Romanian law (see Minutes First Session, ¶19).
307. Article 9(4) of the BIT provides that:
- "The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law (...)."*
308. The Parties agree that Claimant's investment is protected by the BIT, more specifically its articles 2(2) and 4(1).
309. According to Claimant, in view of Article 10 of the BIT, the international obligations that Respondent has assumed in Article 6 of the European Convention on Human Rights and Article 1 of the First Additional Protocol to the European Convention are also to be taken into consideration in the instant case. This is disputed by Respondent.
310. Article 10 of the BIT provides that:

“[i]f the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable, prevail over this Agreement”.

311. In accordance with the interpretation rules of Article 31 of the Vienna Convention⁴, the Tribunal considers that the references made in the text of that Article 10 to “*either Contracting Party*,” “*between the Contracting Parties*,” and “*investors of the other Contracting Party*” refer to the Contracting Parties of the Romania-Greece BIT. The reference to international obligations established between the parties therefore only encompasses international obligations between these two countries.
312. The Tribunal does not exclude the possibility that the international obligations of the Contracting States mentioned at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No.1. But the issue is moot in the present case and does not require decision by the Tribunal, given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above. Consequently Article 10 of the BIT cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT.

II. The Fair and Equitable Treatment Standard

313. Article 2(2) provides in its relevant part that: “*Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment (...)*”
314. The Tribunal considers that the Fair and Equitable Treatment standard encompasses *inter alia* the following concrete principles (*Rumeli and Telsim v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, ¶605) :
- *“the State must act in a transparent manner;*
 - *the State is obliged to act in good faith;*
 - *the State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;*
 - *the State must respect procedural propriety and due process.”*
315. Denial of justice - that is, a failure of due process - constitutes a violation of the Fair and Equitable Treatment standard. On the other hand, an “erroneous judgment” by a court would not violate the treaty in the absence of a denial of justice, that is, a violation of the due process principle (*Parkerings-Compagniet AS v. Lithuania*, ICSID Case No.

⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 31 (the “Vienna Convention”).

ARB/05/8, Award, September 11, 2007, ¶317). According to the ICSID tribunal in *Azinian v. United Mexican States*, “denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. . . . There is a fourth type of denial of justice, namely, the clear and malicious application of the law.” (ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, 39 I.L.M., ¶¶102-103).

316. The case law also confirms that to comply with the FET standard, the State must respect the investor’s reasonable and legitimate expectations. This view, reflected in the *Tecmed* decision, has been adopted by a succession of tribunals:

“The Arbitral Tribunal considers that this provision of the [BIT], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.” (*Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award, May 29, 2003, ¶154; cited in e.g., *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶127; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 Award, May 12, 2005, ¶279; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467 Final Award, July 1, 2004, ¶185; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 Award, May 25, 2004, ¶114).

317. On the other hand, the Arbitral Tribunal in *Saluka* has pointed out that “no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. As the *S.D. Myers* tribunal has stated, the determination of a breach of the obligation of “fair and equitable treatment” by the host State must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders” (*Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, ¶305, relying on *S.D. Myers, Inc.*, 40 ILM 1408, ¶263).

318. Beyond these general principles, the scope of the standard is not precisely defined. “It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interest. It is therefore a concept that depends on the interpretation of specific facts for its content” (P. Muchlinski, *Multinational enterprises and the law*, 1995, 625). The precise scope of the standard is therefore left to the determination of the

Tribunal which “will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable” (F.A. Mann, “British Treaties for the Promotion and Protection of Investments”, 52 *British Y.B. Int’l L.* 1981, 241-244).

III. The Full Protection and Security Standard

319. Article 2(2) provides in its relevant part that: “Investments by investors, (...) shall enjoy full protection and security in the territory of the other Contracting Party (...)”
320. As to the scope of the measure, the Tribunal in *Saluka* decided that “the “full security and protection” clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force” (*Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, ¶305, relying on *S.D. Myers, Inc.*, 40 ILM 1408, ¶483). This seems to see the prevailing approach (see also for example *Rumeli v. Kazakhstan*, *supra*, *Eastern Sugar v. Czech Republic*, Partial Award, March 27, 2007, ¶203; *Wena Hotels v. Egypt*, Award, December 8, 2000 (2002) 41 ILM 896; *AAPL v. Sri Lanka*, Award, June 21, 1990, 4 ICSID Rep. 246).
321. There is also authority indicating that the principle of full protection and security reaches beyond safeguard from physical violence and requires legal protection for the investor. For example, the tribunal in *Biwater* held that when the terms “protection and security” are qualified by “full”, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal (*Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, ¶729; see also for example *Azurix v. Argentina*, Award, July 14, 2006; *Siemens v. Argentina*, Award, February 6, 2007; *Vivendi v. Argentina*, Award, August 20, 2007, ¶7.4.14). But to this extent, the standard is also covered by Fair and Equitable Treatment.
322. As to the standard of liability, it is generally accepted that the obligation to provide protection and security does not create absolute liability (*Elettronica Sicula Spa (ELSI)* (1989) ICJ Rep 15; *AAPL v. Sri Lanka*, *supra*; *Tecmed v. Mexico*, *supra*; *Noble Ventures v. Romania*, Award, 12 October 2005). The tribunal in *Rumeli* considered that “[i]t obliges the State to provide a certain level of protection and security to foreign investment from physical damage.” (*Rumeli v. Republic of Kazakhstan*, *supra*, ¶663). In *AMT v. Zaire*, the tribunal has confirmed that in international law, the full protection and security obligation is one of “due diligence” and no more (*American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award of February 21, 1997, 36 ILM 1534).

IV. The Non-Impairment Standard: Unjustifiable or Discriminatory Measures

323. Article 2(2) provides in its relevant part that: “(...) Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other Contracting Party, is not in any ways impaired by unjustifiable or discriminatory measures.”

324. In the case law, the standard is closely associated with “Fair and Equitable Treatment.” In order for the State’s conduct to be justifiable or reasonable, it requires that the conduct “*bears a reasonable relationship to some rational policy, whereas the standard of “non-discrimination” requires a rational justification of any differential treatment of a foreign investor*” (see *Saluka*, ¶460, *Rumeli*, ¶674).
325. Similarly, the Arbitral Tribunal in *CMS* stated that the standard of protection against discrimination “*is related to that of fair and equitable treatment. Any measure that might involve ... discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment*” (¶290). A measure is discriminatory when it provides “*the foreign investment with a treatment less favorable than domestic investment*” (*Biwater*, ¶695).

V. The Expropriation Standard

326. Article 4(1) of the Treaty provides that:

“Investments by investors of either Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as “ expropriation”), except under the following conditions:

- a) the measures are taken in the public interest and under due process of law;*
- b) the measures are clear and on a non discriminatory basis;*
- c) the measures are taken against payment of prompt, adequate and effective compensation (...)*”

327. Expropriation can be direct, that is, resulting from a deliberate formal act of taking, or indirect. Indirect expropriation may occur when measures “*result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor*” (UNCTAD Series on issues in international investment agreements, Taking of Property, 2000, p.2).
328. On the other hand, in order to determine whether an indirect expropriation has taken place, the determination of the effect of the measure is the key question. Acts that create impediments to business do not by themselves constitute expropriation. In order to qualify as indirect expropriation, the measure must constitute a deprivation of the economic use and enjoyment, as if the rights related thereto, such as the income or benefits, had ceased to exist (*Tecmed v. Mexico*, Award, May 29, 2003, 43 ILM (2004) 133, para. 115). In *Telenor*, the Tribunal decided that: “[t]he conduct complained of must be such as to have a major adverse impact on the economic value of the investment,” as “*substantially to deprive the investor of the economic value, use or enjoyment of its investment*” (*Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006, ¶¶64-65).
329. Expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a

deprivation of property rights. This is frequently characterized as a “creeping” or “constructive” expropriation. In the *Biloune* case the arbitration panel found that a series of governmental acts and omissions which “*effectively prevented*” an investor from pursuing his investment project constituted a “*constructive expropriation.*” Each of these actions, viewed in isolation, may not have constituted expropriation. But the sum of them caused an “*irreparable cessation of work on the project*” (*Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction and Liability of October 27, 1989, 95 ILR 183, 209).

330. The intention or purpose of the State is relevant but is not decisive of the question whether there has been an expropriation. In *Phillips Petroleum Co Iran v The Islamic Republic of Iran* (CLA 61, ¶97), the arbitral tribunal decided that “[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact... Therefore, the Tribunal need not determine the intent of the Government of Iran...”

§2. APPLICATION OF THE STANDARDS TO THE FACTS OF THIS CASE

I. Claimant’s allegations

331. In his “Investment Claim,” Claimant alleges that:

- Romania’s refusal to amicably settle the dispute breaches the fair and equitable clause included in Article 2(2) of the BIT;
- AVAS’ attempt to execute the Share Pledge Agreement against his shares in Continent SA amounts to an expropriation in violation of Article 4(1) of the BIT and Article 1 of the First Additional Protocol to the European Convention and also breaches Article 2(2) of the BIT;
- The Prosecutor General’s application to the Supreme Court requesting that it reverse and remand for further development of the facts the Appellate Court decision in the Share Pledge enforcement litigation, the motion by AVAS to set aside the decision of the Court of Appeal in that case and the Supreme Court decision amount to a violation of Article 2(2) of the BIT (fair and equitable treatment and full protection and security), Article 4(1) of the BIT and Article 6 of the European Convention;
- The absolute nullity claim filed by AVAS to annul the increase in share capital has effects equivalent to an abusive expropriation and also violates Article 2(2) of the BIT (fair and equitable treatment).

332. The Tribunal will examine each of these allegations separately.

II. Refusal to negotiate an amicable settlement

333. The Tribunal notes that Claimant does not elaborate on the reasons why the Respondent's absence of answer to Claimant's letter requesting a negotiation to reach an amicable settlement of the case would amount to an unfair and inequitable treatment.
334. Article 9 of the BIT regulates the "settlement of disputes between an Investor and a Contracting Party" in the following terms:
- 1. Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.*
 - 2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.*
335. The Tribunal agrees with Respondent that, in accordance with the interpretation rules of Article 31 of the Vienna Convention, the Treaty neither imposes a legal duty nor creates a legal right for the Parties to negotiate a settlement. Article 9 does not refer to "negotiations." It only refers to an amicable settlement "*if possible.*"
336. The Tribunal considers that in view of the numerous procedures which had taken place or were still ongoing before the courts of Romania, Respondent may have believed reasonably and in good faith that an amicable settlement was not "*possible*" and that it should not engage in negotiations.
337. The Tribunal therefore decides that Romania's conduct was reasonable and adequate and did not breach the Fair and Equitable Treatment requirement.

III. AVAS's attempt to execute the Share Pledge Agreement, the proceedings initiated by the General Prosecutor and the subsequent Supreme Court decision

338. The Arbitral Tribunal considers, on the basis of the evidence, that Respondent's conduct was reasonable, appropriate and justified.
339. According to the Privatization Agreement, Continent SRL had to make an additional post-purchase investment of USD 1.4 million over a period of two years from January 1, 1999 to December 31, 2000. This investment had to be carried out by the buyer "*from personal sources or sources attracted on its behalf.*" USD 1.1 million had to be provided in 1999, with the remainder (USD 300,000) to be provided in 2000.
340. The evidence confirms that when AVAS decided to start proceedings against Claimant, there were objective reasons to suspect that Claimant had not fulfilled its post-purchase investment. AVAS acted in accordance with its contractual and legal rights and statutory duties.

341. Mrs. Mariana Pedescu, Director of the Post-Privatization Monitoring Department at AVAS, who managed the verification of Continent SRL's compliance with its post-investment obligations, explained at the hearing the reasons why she took steps to recommend enforcement of the Share Pledge to AVAS's Board of Directors.
342. Documents provided by the investor himself to prove compliance with its obligations showed that contrary to what he had told AVAS, the alleged investment did not come from the investor, but from Continent SA's own funds. This included the report from the expert appointed by Claimant – Expert Proiect – according to which the alleged in-kind investment consisted of various expenditures by Continent SA from its own funds. Mrs. Pedescu's doubts were also confirmed by the report submitted in May 2001 by Continent SA management admitting that 90% of the alleged investment consisted of routine operating expenses and capital expenditures made by Continent SA from its own funds and that Continent SRL “*was obliged to transfer the due sum to Continent SA.*”
343. Mrs. Pedescu further testified that AVAS made repeated requests to Continent SRL for additional documents to clear up the inconsistencies in the information provided by Claimant and his company but they were never provided. She concluded that AVAS was never provided with evidence proving that the additional investment had been made by Continent SRL.
344. AVAS's decision to start proceedings for the enforcement of the pledge may therefore be considered justified and reasonable. Contrary to Claimant's allegation, the trade registry decision was not *res judicata*. It could be challenged in subsequent court proceedings.
345. The Tribunal also finds that there were reasons for AVAS not to be satisfied with the first instance and the appellate court decisions. While these decisions were indeed based on the fact that the share capital increase had been registered, the trade registry decision was a non-adversarial procedure and the full facts were not before the judge. The Trade Registry judge did not make an independent assessment of the reality of the investment. He simply relied on the Expert Proiect report without taking into consideration the fact that the report stated that the investment was made by Continent SA and not Continent SRL.
346. Furthermore, in the appellate procedure, the President of the Court expressed a dissenting opinion in which she concluded that “*the modifications operated in the accounting, subsequent to the invalidation by the Financial Guard of the expert report by which the contribution in kind was evaluated cannot be validated by the Court*”.
347. It must further be noted that in his expert report dated January 29, 2002, Mr. Popivici, an expert appointed in the criminal investigation concluded that the alleged repayment by SRL of the 90% of the additional investment made by Continent SA on its own funds by way of a so-called restatement of accounts that would have transferred a USD 1.294 million debt from Continent SA to Continent SRL, by way of two agreements for the assignment of receivables, was in fact a sham. In addition, the accounting expert Popescu Elena, in her report of October 2002, established that about 50% of the value of restatement of accounts was cancelled by the end of 2001.

348. AVAS had therefore good reasons to suspect that the Court's decisions were incorrect. They relied exclusively on a narrow interpretation of Article 8.10.2 of the Privatization Agreement that established the date when the post-privatization investment obligation was considered to be fulfilled: the date of the registration of the share capital increase with the Trade Registry. The Court did not analyse the contradictions of the Expert Project report or the serious allegations of fraud for which Claimant was investigated criminally. Therefore, the decision of AVAS to resort to the last available legal option, *i.e.*, the recourse to the General Prosecutor to submit a motion to vacate the judgements of the lower court, may be considered justified and reasonable.
349. At the relevant time, the General Prosecutor was permitted under the Romanian Code of Civil Procedure to challenge final and irrevocable judgments within one year of their date of entry in order to avoid a miscarriage of justice and he often used such prerogative. The General Prosecutor indeed filed such a motion to vacate the judgment on the share pledge issue.
350. The General Prosecutor's motion was motivated. It indicated among others that on the basis of the available documents, it appeared that Continent SRL did not achieve the investments from its own sources or from others gained over its name, that there were highly suspicious irregularities in the documentation supporting the investments, that there were multiple transactions involving Claimant's group of companies, causing concern that there was no certainty for the reality of the prices charged. Moreover, Continent SA received notice of the intended application and had an opportunity to challenge it before an impartial tribunal. The motion to vacate was heard before the Supreme Court in an adversarial hearing where Claimant was represented and could present its defense.
351. There is no evidence before us that the Supreme Court did not act in an impartial way. Its decision vacating the Appellate Court decision and remanding the case was duly motivated. It noted in particular that the Expert Project did not show how the capital increase was made and therefore did not answer the objections raised by AVAS in the lower court; that third parties were not bound by the increase in share capital since the decision approving it was not published in the Official Gazette; that criminal charges were pending against Claimant; that the Prosecutor had found defects in the Debt Assignment Agreement entered into between various companies of the Claimant's group and that therefore it was necessary to determine whether these agreements were real or fictitious.
352. The fact that the decision which was later rendered on remand was again in favour of Continent SA does not mean that the Supreme Court decision was arbitrary.
353. In conclusion, the Arbitral Tribunal considers that AVAS had reasonable suspicions and good reasons to start proceedings for the enforcement of the Share Pledge. At all levels, Claimant was duly summoned, was represented and could present its defence. Given the limited ground on which the Court of First Instance and the Court of Appeal based their decision, and the contradictory evidence in the possession of AVAS, it was reasonable for the latter to use all possible available legal means to try to prevail in accordance with

its deep conviction that the additional investment had not been made. The Arbitral Tribunal does not see anything reprehensible in AVAS's decision to pursue its claim until the end and not to drop the proceedings, in the General Prosecutor's decision to challenge the judgements or in the Supreme Court's decision to remand the case for a new trial. Respondent's conduct did not amount to a breach of the fair and equitable treatment standard.

354. Respondent's conduct also does not amount to an expropriation. The evidence does not demonstrate that Respondent interfered with Claimant's management and control of his investment. Claimant continues to be the sole director of Continent SRL and Continent SA. Between 2004 and 2008, Continent SA transferred assets in excess of USD 2.8 million to Claimant personally. Continent SA transferred to Claimant's company, Ozias, USD 1.5 million for alleged consultancy services and USD 1.37 million for the purchase of equipment (that was never delivered) and Continent SA sold in 2006 a valuable real estate property for EUR 1 million, although it was subject to a sequestration order.
355. Respondent's behaviour did not deprive the investor from its right to use or enjoy its investment. The companies still function and Claimant continues to profit from their operations. Claimant's Counsel recognised in their oral pleadings that: "[the investment at the moment] *is still functioning, it is still a going concern*" (transcript, day 2, p. 112, line 16 at seq.); "[Continent SA] *is operating, and it is still filing accounts, there is still an accountant. The Claimant has been taking management fees continuously out of the business, there is no dispute about that (...)*" (transcript, day 2, p. 113, line 18 at seq.).
356. Claimant has also acknowledged that the value of the investment's asset base, and more specifically of the land, has exponentially increased in Romania since the date it purchased SC Malimp SA.
357. The additional burden that Claimant may have had to assume in consideration of the legal proceedings instituted against him may not be considered equivalent to expropriation.
358. In light of the evidence as restated above, the Arbitral Tribunal also considers that the management, maintenance, use, enjoyment or disposal of the investment by Claimant was not in any way impaired by unjustifiable or discriminatory measures and that Respondent's conduct did not infringe the principles of legal certainty and proportionality in violation of the full protection and safety clause contained in Article 2(2) of the BIT.
359. In particular, the Tribunal considers that the procedure permitting the General Prosecutor to challenge a final and irrevocable judgement does not breach the principle of legal certainty. During the relevant time, all final and enforceable judgements in Romania remained subject to the set aside provisions for one year (and no longer indefinitely) after entry of the judgement and the parties to the procedure were fully aware that such provision could be invoked during that one year period. The procedure was initiated without delay, was fully transparent and legitimate and cannot be considered to amount to a violation of the principle of *res judicata*. Moreover, we are not in a situation like in the *Bumarescu* case (above, n°156) where the procedure was initiated after the enforcement of the judgement had taken place.

IV. Filing of the request to annul the increase in share capital

360. Faced with contradictory evidence as to the issue whether Claimant has fulfilled his obligation to make the additional investment, AVAS started the share nullification litigation in August 2007. AVAS's request was reasonable and fully motivated. Continent SA received notice of the intended application and had an opportunity to dispute it before an impartial tribunal. And indeed, the Commercial Court ruled against AVAS and refused to nullify the shareholders' resolution.
361. The Arbitral Tribunal therefore considers that Continent SA was granted due process. It accepts Respondent's justification that AVAS filed the suit to preserve its right to pursue its share pledge enforceable claim in the event that this tribunal would later decide that it lacked jurisdiction over the counterclaims.
362. The Tribunal therefore considers that Respondent's decision to file and pursue the share nullification litigation was legitimate, did not violate the fair and equitable treatment standard, the full protection and security requirements and did not constitute an unjustifiable or discriminatory measure. It certainly did not amount to expropriation for the reasons enunciated above.

V. The cumulative effect of the various court proceedings

363. Claimant has not been able to prove how the various court proceedings referred to above, taken collectively, could amount to a violation of Article 2(2) or 4(1) of the Treaty when it was unable to show that, individually, these actions were wrongful.
364. Finally, the Arbitral Tribunal also refers to paragraph 312 above in which it has decided that the application to the present case of Article 6 of the European Convention and of Article 1 of the First Additional Protocol to the latter is denied.

SECTION II. THE FISCAL CLAIM

SUB-SECTION I. CLAIMANT'S POSITION ON THE FISCAL CLAIM

§ 1. THE FACTS

I. The Financial Guard Minutes n°11238 and the DGFPMB Minutes n°191624

365. Continent SA's Board of Directors, during its meeting of November 12, 1998, decided to provide a storage space to Continent SRL, free of charge, as set-off against the investment of USD 1.4 million to be made by Continent SRL (Claimant's Exhibit n°33). As a consequence of this decision, an *Addendum* to a Services Agreement n°1854/15.07.1998 was concluded on November 19, 1998 between Continent SA and Continent SRL. The *Addendum* confirmed Continent SA's Board of Directors' decision (Claimant's Exhibit n°34). The Board of Directors' decision and the *Addendum* were validated by Continent SA's General Shareholders' Meeting on April 8, 1999 (Claimant's Exhibit n°35).

366. On the occasion of an audit performed by the Financial Guard⁵, tax inspectors alleged that Continent SA had to register in its books of account the rent that Continent SRL should have been paying for the use of the storage space. The conclusions of this audit were issued in minute n°11238 dated September 2, 1999 (Claimant's Exhibit n° 36).
367. Claimant alleges that the Financial Guard decided to substitute its own decision for that of Continent SA. The Financial Guard forced Continent SA to claim rent for the storage spaces to continent SRL, according to certain imposed tariffs.
368. Based on such tariffs, the Financial Guard calculated certain alleged unrealized incomes, a VAT for such incomes, together with the corresponding delay penalties. Accordingly, Continent SA owed the following to the Romanian State:
- lei 2,318,028,182 representing uncalculated, unrecorded and non-transferred profit tax as of 30 June 1999;
 - lei 662,640,884 representing delay penalties related to the profit tax;
 - lei 2,428,028,705 representing uncalculated and non-transferred VAT for November 1998 to July 1999;
 - lei 109,261,292 representing delay penalties for the VAT.
369. Claimant formulated objections against the Financial Guard minutes. However, the Bucharest Financial Guard rejected these objections in Decision n°86/24.09.1999.
370. Continent SA then challenged the Decision n°86/24.09.1999 before the DGFPMB⁶. The DGFPMB accepted the challenge and cancelled the Decision n°86/24.09.1999 and the minutes n°11238/02.09.1999 (Disposition n°78/14.04.2000, Claimant's Exhibit n°37).
371. Pursuant to this decision, a new audit was conducted by the tax authorities of the 6th District Financial Administration of Bucharest in December 2000. The 6th District Financial Administration carried out the control and ignored the DGFPMB Disposition. On December 22, 2000, new control minutes n°191624 were issued by the 6th District Financial Administration.
372. On January 17, 2001, Continent SA filed a challenge against the control minutes n°191624 before the 5th Civil and Administrative Petitions Department within the Bucharest Court. The Court accepted the challenge and cancelled the minutes on October 18, 2001 (Claimant's Exhibit n°39). This decision became irrevocable.

⁵ The Financial Guard is a government agency tasked with preventing, discovering and combating tax evasion. It is part of the Ministry of Economy and Finance and overseen by the National Authority for Tax Administration (the "ANAF") which is a government agency, part of the Ministry of Economy and Finance.

⁶ The Bucharest General Department of Public Finance is a department within ANAF responsible for conducting tax inspections and audits with jurisdiction over the municipality of Bucharest.

373. Claimant points out that an “accounting expertise” was carried out during these proceedings by the expert Virgiliu State (Claimant’s Exhibit n°40). This expertise stated that the control authority made a mistake by recalculating the company’s fiscal obligations, and that Continent SA had not made any fiscal evasion.
374. Notwithstanding the above, the Financial Guard minutes n°11238, together with two ascertaining notes, constituted the bases for certain charges brought against Claimant in a criminal file n°4/PA/2000.
375. Moreover, although the payment obligations established in minutes n°191624 were cancelled by the irrevocable judgment of October 18, 2001, the amounts that were fixed in these minutes were stipulated as certain and due debts in the DGFPMB control minutes dated December 17, 2003 (Claimant’s Exhibit n°42).
376. Finally, Claimant submits that final and irrevocable decisions were rendered concerning the dispute relating to the warehouse, Respondent should not be permitted to bring the issue again within the scope of this arbitration.

II. The Financial Guard - Bucharest Department Minutes n°11275/297/13.02.2001

377. The Bucharest Financial Guard conducted another audit at Continent SRL for the period between January and December 2000. It established additional tax liabilities (Profit Taxes and VAT) and delay penalties for failure to pay these taxes on time. The results of the audit were included in minutes n°11275/297/13.02.2001.
378. Continent SRL challenged the determination of the tax liability in proceedings before the Administrative Petition Department of the Bucharest Court of Appeal.
379. An accounting expertise report was drafted in this context by Ionescu Dumitru (Claimant’s Exhibit n°43). The expertise report mentions that the fiscal obligations at stake were based on inadequate accounting records kept by Doanta Angela. Ms. Doanta distorted the records in order to hide the money stolen by her, for which she was criminally convicted. Therefore, the accounting records could not be relied upon before being corrected (the correction process was ongoing when the expertise report was being prepared). Consequently, the documents mentioned in the appendices to the control minutes were not documents by which the company’s fiscal obligations could be established. However, Continent SRL’s challenge was rejected as lacking legal basis.
380. Continent SRL challenged this decision before the Administrative Petitions Department within the Supreme Court of Justice. Continent SRL submitted, in support of its appeal, that the fiscal obligations of the company could not be established on the basis of inadequate accounting.
381. In light of a pending criminal investigation of Roussalis, Continent SRL’s appeal against Decision n°48/17.01.2002 was suspended.

III. The DGFPMB Minutes of December 17, 2003

382. On December 19, 2003, Continent SA received the minutes dated December 17, 2003, prepared by the DGFPMB inspectors, covering the period from November 1998 to June 2003 (Claimant's Exhibit n°42).
383. The control was carried out pursuant to the General Juridical Directorate of the Ministry of Public Finance ("MFP")'s request n°101511/25.04.2003. The request was issued after the civil judgment n°351/08.03.2003 had rejected AVAS's appeal to obtain the enforcement of the share pledge and after the General Prosecutor had filed a motion to vacate the lower court judgments (see above, ¶¶95 *et seq.*).
384. Claimant points out that the minutes were intentionally finalized and communicated before the Christmas and New Year holidays in order to prevent Continent SA from presenting an elaborate defense within the 15 days time limit provided by the law to challenge the minutes.
385. The control determined 11 taxes and duties owed to the state budget and to the social state insurances budget: tax on salaries; a 2% fund for supporting state education; a risk, accidents and solidarity with handicapped persons fund; additional contribution to the solidarity with handicapped persons fund; value added tax; profit tax; withholding tax; state social insurance contributions; a fund for labor accidents and professional diseases; contribution to unemployment insurances; and contribution to the social health insurance fund.
386. The minutes identify unpaid tax liabilities and related penalties amounting to ROL 75.7 billion.
387. Claimant points out that these control minutes started by establishing, as an existing current debt, the fiscal obligations established by the DGFPMB minutes n°191624/22.12.2000. However, these minutes had been cancelled by the judgment n°343/F/18.10.2001, delivered by the Bucharest Court in file n°17/CA/2001, which is final and irrevocable.
388. On January 8, 2004, Continent SA challenged the 2003 tax audit before the Bucharest Court.
389. At the court hearing of March 1, 2004, the court approved Continent SA's application for cancellation of the 2003 tax audit. Moreover, the court considered the application for the suspension of the execution of the audit and stated that "[w]ithholding, on one hand, the fact that the creditor of the amounts in litigation has taken guaranteeing measures necessary for their future achievement, being no risk of its prejudice by evading the goods from the forced execution by the debtor, and having in view, on the other hand, the considerable value of the debt for execution and, at the same time, contested by the petitioner, the risk of bringing the company in incapacity of payment and of current activity unrolling, the Court appreciates that in the case there have been proved the circumstances referred to in art.9 from law 29/1990. As a consequence, the Court shall approve the petitioner's application and shall dispose the annulment of the attacked

administrative document, namely the report from 17.12.2003 until the settlement of the present cause” (sic., Claimant’s Exhibit n°46).

390. During these Proceedings, Continent SA requested that the court appoint a judicial accounting expert to review the tax liabilities set out in the tax audit. Mr. Iuliu Anchescu was accordingly appointed. The Anchescu expert report (Claimant’s Exhibit n°48) stated that the tax liabilities set out in the tax audit were illegal.
391. Since the DGFPMB representatives considered that the expertise and the Continent SA’s arguments were not favorable to them, they invoked the pending criminal proceedings against Roussalis and requested the suspension of the trial. Continent SA’s challenge to the tax audit was consequently suspended by the court on September 12, 2005.
392. Claimant further submits that, although the court ordered the suspension of the execution of the 2003 tax audit, DGFPMB started the enforcement of the payment obligations contained in the December 17, 2003 minutes. Accordingly, the Tax Agency sought to obtain tax liens to sequester assets, including Continent SA’s movable goods and bank account, to recover the alleged tax liabilities identified in the audit report.
393. In the indictment dated March 17, 2003 (Claimant’s Exhibit n°51), the Prosecutor stated that “[d]uring the prosecution, according to the ordinances enclosed at [sic] the case file, there have been taken insuring measures [sic] upon movables and non-movables of defendant SPYRIDON ROUSSALIS and of the person civilly responsible [Continent SA], in order to cover the damage caused to the state budget” (sic., Claimant’s Exhibit n°51). Claimant considers that such measures are obviously disproportionate since the value of the assets referred to in the statement is out of proportion with Continent SA’s alleged liability. Claimant argues that this “*emphasizes the aggressiveness and the permanent character of the administrative-financial harassments to which the company was subjected*” (Claimant’s Memorial, ¶136).
394. Moreover, whereas Respondent alleged that Roussalis was able to withdraw at least 5 million dollars from Continent SA, it does not explain why instead of freezing only the cash equivalent to the claimed tax amount, Romania chose, through its fiscal authorities, to sequester all Continent SA’s assets, all Continent SRL’s assets and bank accounts, and all of Roussalis’s assets located in Romania. This decision impaired Claimant’s right to dispose of its investment and was taken in breach of the principles of due process, proportionality and reasonableness.
395. Finally, the sequestration of Claimant’s assets, against the background of a continuous an exponential increase of the due amounts of tax because of penalties, led to a further deprivation of the foreign investor’s rights and legitimate expectations as to the sale and disposal of Continent SA’s assets. According to Claimant, the sequestration is ongoing.
396. In light of the above, Claimant considers that the measures taken by Romania were in breach of both its international obligations and the Treaty.

IV. The Ministry of Public Finances' civil action within criminal proceedings: claim for a prejudice not related to the criminal litigation

397. By the indictment dated March 17, 2003, the Prosecutor instituted criminal proceedings against Roussalis. The latter was sued together with Ms. Doanta. The indictment designates Continent SA as “*party civilly responsible*” (Claimant’s Exhibit n°51).
398. The Prosecutor’s charges refer to prejudice allegedly caused to the state budget by Continent SRL amounting to lei 2,326,101,317 (lei 898,125,354 as VAT and lei 1,427,975,963 as profit tax).
399. The Ministry of Finance elected to intervene in the criminal proceedings as civil party on September 25, 2003. It claimed civil damages for the principal amount of the tax liabilities set out in the December 17, 2003 audit (DGFPMB minutes n°35143), i.e. RON⁷ 7,167,136,408.
400. According to Claimant, the December 17, 2003 tax audit did not constitute a relevant basis to claim damages in the criminal proceedings since there is no “*link of causality between the alleged criminal facts and the amounts mentioned in the respective minutes*” (Claimant’s Memorial, ¶141). A criminal prejudice may only be established in relation to facts of which the appropriate criminal investigatory bodies have been notified, and which have been effectively investigated.
401. Moreover, the fact that the tax liabilities set out in the December 2003 tax audit became part of the criminal case entail as a consequence the denial of the suspension of the tax audit decided by the Bucharest Court on March 1, 2004. Since civil courts are bound by criminal judgments, any decision of the criminal court would have as a “*consequence the automate [sic] rejection of the challenge in the fiscal administrative court, with the consequence of affecting the patrimony.*” This amounts, according to Claimant, to an unjustified measure that is equivalent to expropriation (Claimant’s Reply, ¶27).
402. Claimant also points out to further irregularities that occurred during the criminal proceedings: the 6th District Criminal Court changed the trial date without legally summoning the parties. Roussalis was summoned to appear at the 6th District “City Hall” and the civilly liable party, Continent SA, was summoned to appear on June 25, 2007 (i.e. after the judgment had already been delivered on May 28, 2007).
403. The criminal court eventually awarded the Romanian State ROL 3.2 million, plus penalties and interest.

⁷ RON is the currency abbreviation for the New Romanian lei, as of July 1, 2005, pursuant to Law no. 348/2004 regarding the denomination of the national currency. ROL is converted to RON by cutting four units: e.g. 10,000 ROL = 1 RON.

§ 2. THE LAW

404. Claimant does not dispute the right of the Romanian authorities to carry out control actions and to set tax liabilities as long they offer the opportunity to challenge such tax liabilities. Claimant has challenged the authorities control actions and decisions in Romania. Claimant does not ask the Arbitral Tribunal to solve the tax litigations on the merits. However, he submits that he has been prevented from having the tax litigation solved, since his challenge was suspended. This prevention was worsened by the modification of the nature of his tax liabilities when they were included in the criminal case. These measures affected the investment and represent a serious breach of the Treaty, of Article 6 of the European Convention and of Article 1 of the First Additional Protocol.
405. Claimant submits in the first place that Respondent violated Article 4(1) of the Treaty and Article 1 of the First Additional Protocol to the European Convention. He alleges that the tax liabilities set forth in the December 17, 2003 tax audit are illegal and unfounded and that this is supported by the accounting expertise report carried out by Anchescu Iuliu (Claimant's Exhibit n°48). Claimant further notes that such tax liabilities were never subject to criminal investigation. Therefore, the MFP's abusive election to join the criminal proceedings as a civil party and the subsequent procedure before the Bucharest criminal Court amount to violations of both Article 1 of the First Additional Protocol to the European Convention and of Article 4(1) of the Treaty. According to Claimant, the MFP's actions and their validation by the Romanian courts, specifically by the criminal judgment n°447/28.05.2007, constitute an unjustified measure equivalent to an expropriation.
406. Claimant points out that he is directly affected by the damage suffered by Continent SA, in which he owns 96.51% of the shares.
407. Claimant submits in the second place that Respondent has violated Article 6 of the European Convention (see above, ¶148). He argues that, according to Romanian law, a civil court is bound by a criminal judgement. In this regard, administrative and fiscal bodies are considered civil courts. Therefore, the above mechanism by which pure tax liabilities were awarded in a criminal court's decision without investigation deprived Roussalis, as majority investor, of his rights under Article 6 of the European Convention. Continent SA was deprived of its right to challenge the tax obligations assessed against it in the December 17, 2003 tax audit and, therefore, was denied an equitable and public judgment of its cause under Article 6 of the European Convention. Such an infringement of his right to a fair trial also violates the investor's right to protect its investment.
408. The foregoing is all the more true since the criminal judgment n°447/28 of May 28, 2007 was quashed by the September 22, 2008 decision of the Bucharest Tribunal because Respondent was deprived of a chance to present its defense in the criminal lawsuit (Claimant's Reply Exhibit n°2).
409. Claimant also submits that Respondent violated Article 2(2) of the Treaty.

410. Claimant further objects to the sequestration of Continent SRL's interest in Continent SA as security for the purported tax liabilities identified in the December 17, 2003 tax audit, contending that sequestration was disproportionate and violated the unjustifiable measures clause of Article 2(2) of the Treaty. Claimant alleges that the sequestration is unjustifiable because it interferes with Claimant's right to dispose of, to valorize and use the assets.

§ 3. DAMAGES

411. Claimant seeks USD 5,622,911.34 in compensatory damages, representing the civil damages claimed in the criminal prosecution, USD 1,354,175.16, plus accrued interest and delay penalties (pursuant to the Fiscal Procedure Code) until December 31, 2010, Claimant's estimated completion date of this arbitration.
412. Claimant formulates the following request (Claimant's Memorial, ¶161): *“that the Respondent Romanian State be obliged to pay the amount of USD 5,622,911.34, amount which includes the main debits and interests and delay penalties calculated until 31.12.2010 (ANNEX 53), date on which we estimate that the arbitration litigation is over, this being the influence over the patrimony of the company where I own the shares.”*

SUB-SECTION II. RESPONDENT'S POSITION ON THE FISCAL CLAIM

§ 1. THE FACTS

I. Continent SA was subject to a Tax Audit during 2003

413. In 2001, the Department of the Economic-Financial Police, part of the 6th District Police in Bucharest, started a criminal investigation against Claimant and Ms. Doanta. It addressed issues of tax evasion, fraud, forgery, and the use of false documents at Continent SA, Continent SRL, Continent Marine Trading SRL, and Continent Marine Construction SRL (Respondent's Exhibit n°78). The accounting expert reports produced for the purposes of the criminal investigation revealed that the State had lost tax revenues as a result of the alleged criminal activity.
414. On October 23, 2002, the police notified the Ministry of Finance of the existence of the criminal investigation and asked the Ministry of Finance to confirm whether it intended to join the criminal proceedings as a civil party (Respondent's Exhibit n°79).
415. Following these developments, the Financial Guard (a unit subordinate to the Ministry of Finance) advised the police to ask the Tax Agency for a determination of the appropriate civil damages figure to be claimed (Respondent's Exhibit n°80). Accordingly, the Tax Agency began a tax audit of Continent SA in May 2003 (Declaration of Ana Chivu, hereinafter “Chivu Decl.”, ¶5.2.2, Respondent's Exhibit n°81).
416. On December 17, 2003, the Tax Agency issued minutes n°35143, identifying unpaid tax liabilities and related penalties in the sum of ROL 75.7 billion.

417. Respondent points out that during the period from December 15, 2003 to December 31, 2003, the Tax Agency finalized thirty other tax audits in Bucharest District 6, where Continent SA is located (Chivu Decl., ¶5.3.1.). Contrary to Claimant's allegations, the timing for completion of the audit and notification thereof was the result of normal case scheduling within the Tax Agency.
418. On January 8, 2004, Continent SA registered a challenge to the tax audit before the Bucharest Court (Respondent's Exhibit n°82). The court appointed a judicial accounting expert, Iuliu Anchescu. Although Anchescu criticized the tax liabilities set out in the tax audit, it did not dispute all the tax liabilities assessed by the Tax Agency (Respondent's Exhibit n°83). No court adopted the report's findings. Furthermore, Respondent questions Anchescu's impartiality in light of the fact that Continent SRL retained him in 2005 as its expert in a litigation concerning the pledge enforcement proceedings initiated by AVAS, and he was serving Continent SRL in that capacity at the time he prepared his judicial accounting report for the court (Respondent's Exhibit n°69).
419. Continent SA's challenge to the tax audit was suspended by the court on September 12, 2005, pending resolution of the criminal proceedings against Claimant and Ms. Doanta.

II. Rights and obligations of taxpayers and Tax Authorities during a Tax Audit

420. At all relevant times, tax audits were regulated by Government Ordinance n°70/1997. To protect their interests and to promote clear communication of relevant information to the authorities, taxpayers subject to an audit are entitled to (i) prior notice of the intended audit; (ii) an opportunity to provide information clarifying their activities; (iii) assistance by professionals during the audit; (iv) fair and equitable treatment by the fiscal authorities including respect for confidentiality; and (v) the right to challenge the findings of the fiscal authorities. Continent SA enjoyed all of the above-mentioned rights during the 2003 tax audit (Chivu Decl., ¶5.1) and throughout the administrative and judicial challenges to the tax audit it never claimed otherwise. Indeed, Continent SA has challenged only the amount of the tax liabilities assessed by the tax authorities. (Respondent's Exhibits n° 82 and 84).
421. Continent SA litigated its challenge to the 2003 tax audit in Romanian courts and it lost before the court of appeals (Respondent's Exhibits n°211, 209). Claimant did not assert any error in the final judgment. It is furthermore undisputed that those liabilities remain unpaid.

III. Continent SA failed to cooperate with the Tax Authorities during the 2003 Audit

422. From the outset of the tax audit in May 2003, Continent SA failed to provide the tax authorities with requested accounting documents. The progress of the tax audit was interrupted several times when the tax authorities formally requested (on June 13 and September 18, 2003) essential accounting documents which Continent SA had failed to produce (Respondent's Exhibit n°85; Chivu Decl., ¶5.3.3). In those requests for documents, as well as prior requests dated June 6, 2003, June 12, 2003, and July 8, 2003,

the tax authorities asked Continent SA to submit the following tax documentation: (i) documents evidencing the works performed by its employees in the period from 1999 to 2003 (with work schedules, technical estimates, and construction authorizations); (ii) the calculation note for the amortization of fixed assets; (iii) documents justifying the accounting registrations of payments to and from Claimant or Continent SRL; and (iv) the services agreements and estimates justifying the invoices issued to Continent SA by suppliers (Respondent's Exhibit n°85, p.32; Chivu Decl., ¶5.3.3).

IV. The tax liabilities covered numerous Tax Code violations

423. The December 17, 2003 tax audit report established additional tax liabilities owed by Continent SA: collectable VAT, deductible VAT, profit tax, salary tax, education fund, risk and accident fund, solidarity fund, nonresident income tax, social security, accident and occupational disease fund, employer-owned unemployment fund, employee-owned unemployment fund and employer/employee health fund (Respondent's Exhibit n°85).

V. The Tax Audit report reassessed penalties for unpaid taxes owed by Continent SA for free storage provided to Continent SRL

424. In September 1999, the Financial Guard had conducted a tax audit of Continent SA and concluded that the rent forgiveness granted by Continent SA to Continent SRL after the conclusion of the Privatization Agreement constituted an evasion of Continent SA's income tax and VAT obligations (Minute n°11238 dated September 2, 1999, Claimant's Exhibit n°36). The liabilities were subsequently cancelled on procedural grounds in Decision n°78, dated April 14, 2000. Pursuant to this decision, a new audit addressing the merits of additional liabilities was conducted by the tax authorities of the 6th District of Bucharest in December 2000 (Claimant's Exhibit n°37). This is contrary to Claimant's allegation that the December 2000 audit was required by the decision.
425. In the December 2000 audit results, the auditor again concluded that Continent SA owed tax arising out of its provision of free storage services to Continent SRL and re-computed the amount owed (Minutes n°191624, Respondent's Exhibit n°51).
426. Continent SA filed an *administrative* challenge to the new assessment before the Ministry of Finance. These proceedings were suspended on July 6, 2001, pending resolution of the criminal proceedings against Claimant and Ms. Doanta (Respondent's Exhibit n°85).
427. Unbeknownst to the tax auditors, Continent SA had commenced a *court* challenge of minute n°191624 on January 17, 2001, which resulted in cancellation of the minute on October 18, 2001 (Respondent's Exhibit n°88.)
428. In accordance with Article 6(n) of Government Ordinance n°70/1997, the tax auditors who performed the December 2003 tax audit reviewed Continent SA's compliance with previous tax audits. Therefore, unaware that the liabilities established in minute n°191624 had been cancelled, the tax auditors again included them in the December 17, 2003 audit report, plus additional penalties, in the sum of ROL 12.6 billion.

VI. The Tax Authorities ordered sequestration of certain assets of Continent SA as security for the additional tax liabilities, but enforcement of the tax audit report was suspended (The Tax Agency's 2004 sequestration order)

429. Continent SA failed to pay the tax liabilities included in the December 17, 2003 tax audit within the time period required (Government Ordinance n°61/2002, Art. 10 (1): "... *if the date of the communication is between 16-31 of the month, the payment term is by the 20th of the following month*"). Upon the expiration of the relevant period, the tax audit minute n°35143 became automatically enforceable (Article 130(2) of the Romanian Code of fiscal procedure). On February 6, 2004, the tax authorities took steps to enforce the liabilities identified in the audit by issuing enforcement titles in accordance with Article 126 of the Romanian code of fiscal procedure (Claimant's Exhibit n°52).
430. On February 16, 2004, the tax authorities issued a sequestration report (Claimant's Exhibit n°49), that (a) required Continent SA to pay assessed taxes within 15 days to avoid any restrictions on the sale of the sequestered assets, and (b) prevented Continent SA from selling the sequestered assets until it paid its taxes. This sequestration report covered Continent SA's improved real estate located at 82 Timisoara Boulevard and 1 Razoare Street, as well as a car.
431. According to Continent SA's balance sheet for 2003, the value of the real estate properties that were the subject of the sequestration report amounted to approximately half of the value of the tax liabilities established by the December 17, 2003 tax audit (ROL 38.9 Billion compared to ROL 75.7 billion, *see* Balance Sheet, Respondent's Exhibit n°91). The value of the assets that were subject to sequestration were therefore not disproportionate.
432. On March 1, 2004, the Bucharest Tribunal suspended enforcement of the tax audit report pending resolution of the challenge to the December 17, 2003 audit (Claimant's Exhibit n° 46).
433. Respondent refutes Claimant's argument that Respondent was responsible for delaying resolution of the challenge to the December 2003 tax audit, causing a denial of justice. The facts are otherwise. Proceedings were suspended in 2005, pending the resolution of the criminal file. Claimant evaded service in the criminal case until the statute of limitations on the enforcement of criminal sanctions had expired. Only then, in November 2009, did Claimant request the reopening of his tax challenge (Respondent Exhibit n°209). The record shows that the Claimant's request was granted promptly and the dispute was resolved expeditiously in 2010. Thus, the delay in resolution of the court challenge of the audit was due to Claimant's own legal strategy.

VII. The criminal authorities issued proper orders restraining Claimant and Continent SA from disposing of their assets

434. Based on evidence collected by the Financial Guard (Respondent's Exhibit n°86), the police investigated Claimant and Continent SA for alleged tax fraud. Pending resolution of the criminal investigation, on June 12, 2000, the police issued their sequestration order

directing the company not to sell its real estate pending resolution of the criminal proceedings (Respondent's Exhibit n°93). It was a standard procedure pursuant to the Romanian Criminal Procedure Code. Claimant has neither alleged nor proved that the 2000 order was discriminatory, disproportionate or otherwise improper under the applicable Romanian law. In addition, Claimant never took advantage of the opportunities provided by Romanian law to challenge the sequestration order.

435. In his sworn declaration to the police dated August 8, 2001 (Claimant Rebuttal Exhibit n°27), Claimant admitted that he owed taxes and penalties totaling ROL 23.32 billion (approximately USD 780,000). He agreed to pay that amount. To secure that admitted tax debt, the police ordered Roussalis to maintain Continent SRL's share capital at the minimum level of USD 360,000 until the payment obligation was met (Respondent's Exhibits n°95 and n°115.) Claimant never disputed the fact that he never paid any of the USD 780,000 in admitted tax liabilities. Further, Claimant failed to establish that the sequestration was unlawful or unjustified.
436. There is also no evidence that the police sequestration had any actual effect on Claimant's investment. The November 13, 2001 police minute merely records Claimant's declaration that the subscribed capital was deposited at Alpha Bank. The best evidence of funds on deposit - copies of Claimant's bank records from Alpha Bank - was uniquely in Claimant's control. Claimant presented no such evidence. This gives rise to a negative inference that no funds were actually sequestered at Alpha Bank. The 2001 sequestration was just a paper order without any adverse consequence for Continent SRL.
437. The Public Finances Department of the 6th District Municipality of Bucharest also issued an order prohibiting Continent SA from selling its assets (Respondent's Exhibit n°96). Finally, in criminal decision n°447/28.05.2007, the 6th District Criminal Court granted a conservatory sequestration order over the movable and immovable assets of Claimant, Ms. Doanta and Continent SA up to the amount of the civil damages ordered by the court, *i.e.*, RON 3.2 billion (Respondent's Exhibit n°42).
438. All of the above orders were issued as standard procedure pursuant to Article 163 of the Romanian Code of Criminal Procedure. Despite these orders, Continent SA sold its real estate property at 1 Razoare Street on May 15, 2006 (Respondent's Exhibit n°60). In addition, Claimant recently tried to sell the entirety of the improved real property owned by Continent SA at 82 Timisoara Blvd. Indeed, it appears that Claimant has already entered into a Sale-Purchase Pre-Contract dated October 10, 2007 to sell part of said property (Respondent's Exhibit n°64).

VIII. ANAF claimed civil damages in the criminal prosecution

A. Victims of criminal offenses may join their civil damages claim to the criminal prosecution of the indicted persons

439. Article 15 of the Romanian Criminal Procedure Code provides that a victim may claim civil damages during a criminal investigation or criminal prosecution as long as such claim is lodged prior to the reading of the indictment before the criminal court. The

Ministry of Finance elected to join the criminal proceedings as civil party on September 25, 2003.

B. ANAF claimed civil damages liabilities identified in the December 17, 2003 tax audit

440. Through ANAF, the Ministry stated the quantum of its civil damages claim on April 26, 2004, and subsequently amended the amount on January 12, 2007 (Letter from Valeria Nistor, General Director, General Legal Department, ANAF, dated May 27, 2008, (“Nistor Letter”), ¶2.6 & Att. M).
441. In essence, ANAF claimed civil damages for the principal amount of the tax liabilities set out in the December 17, 2003 tax audit (minute n°35143, *i.e.*, RON 3.4 million, plus related penalties and interest). Therefore, those tax liabilities became part of the case to be decided by the criminal court.
442. Respondent denies that the 2003 tax audit came before the criminal court without any *“link of causality between the alleged criminal facts and the amounts mentioned in the respective minutes”* (Claimant’s Memorial, ¶141). Respondent submits that ANAF has an unrestricted right to assess the full amount of outstanding tax deficiencies as damages, and the criminal court has the duty to determine whether the amounts claimed should be awarded as damages. According to Article 346(1) of the Romanian Criminal Procedure Code, *“[i]n the event of a conviction, acquittal or closure of the criminal proceedings, the court will give judgment on the civil claim in the same decision”*.
443. The criminal court, after reviewing the case, awarded the Romanian State RON 3.2 million, plus penalties and interest (Ex. 42).

C. Claimant did not deny committing tax evasion, and Continent SA had the opportunity to challenge the damages claimed

444. Continent SA participated as civil party in the criminal prosecution of Claimant and Ms. Doanta from the date of the registration of the criminal case. During the four-year duration of the criminal proceedings, not once did Continent SA contest the Ministry’s right to participate as a civil party. Nor did Continent SA ever present a defense to the civil damages claimed by ANAF (Nistor Letter, ¶¶2.5-2.7 and 3.1).
445. On April 20, 2007, Claimant and Continent SA jointly submitted written closing arguments in the criminal prosecution. Claimant did not deny tax evasion (see above, ¶195). In addition, despite having had numerous previous opportunities, Claimant and Continent SA disputed *for the first time* the civil damages claimed by ANAF (Respondent’s Exhibit n°46). The 6th District Court rejected the arguments raised by Claimant and Continent SA, sentenced Claimant to prison for two years and ordered Claimant, Continent SA, and Ms. Doanta jointly to pay the profit tax and VAT liabilities identified in the December 2003 tax audit (Nistor Letter, ¶2.11). However, the conviction was overturned on appeal, the civil damages award was vacated, and the case was remanded for a new trial. The criminal prosecutor offered to drop the case in 2009, once the statute of limitations on criminal penalties had run. But Roussalis requested that the case proceed.

D. The Financial Guard imposed additional tax liabilities and penalties against Continent SRL based on a February 13, 2001 audit for the year 2000

446. During January and February 2001, the Bucharest Financial Guard conducted an audit at Continent SRL and established (i) additional tax liabilities due to the registration in the books of Continent SRL of forged invoices; (ii) delay penalties for failure to pay its taxes on time; and (iii) unpaid tax liabilities. The results of the audit were included in the minute n°11275/297/13.02.2001 (Respondent's Exhibit n°103). Continent SRL challenged the tax liabilities in proceedings before the Bucharest Court of Appeal.
447. In Decision 48/17.01.2002, the Bucharest Court of Appeal rejected Continent SRL's challenge, holding that "*the examination minutes and the decision issued by the Ministry of Public Finances are legal and, consequently the legal action brought by the plaintiff [...] shall be rejected as having no legal grounds*" (Claimant's Exhibit n°44). In light of the pending criminal investigation of Claimant, the final appeal taken by Continent SRL against Decision n°48/17.01.2002 was suspended.
448. Given that Continent SA was designated as the party civilly liable in the criminal proceedings, ANAF did not include Continent SRL's outstanding liabilities in the civil damages requested on January 12, 2007. Respondent denies Claimant's allegation to the contrary.

IX. The taxes and penalties were assessed against Continent SA and included in the criminal judgment.

449. In judgment n°447/28.05.2007 (Respondent's Exhibit n°42), the 6th District Court of Bucharest found Claimant guilty of tax evasion and ordered him, together with Continent SA and Ms. Doanta, to pay RON 1.8 million (representing VAT) and RON 1.4 million (representing profit tax plus additional delay penalties).

X. The criminal court's judgment requiring Continent SA to pay damages has not been enforced

450. On June 6, 2007, Continent SA and Claimant appealed the decision of the 6th District Court, requesting the Bucharest Tribunal to vacate decision n°447/28.05.2007 (Respondent's Exhibits n°105 and 106). Pursuant to Article 370 of the Romanian Code of Criminal Procedure, the filing of this appeal suspended the enforcement of both the civil and criminal elements of the first decision. Eventually, the Criminal Court's decision was vacated on procedural grounds, and the retrial on these issues remains pending. Accordingly there is no obligation to pay the judgment at this time. The damages award is not yet final and has not been paid.
451. Claimant failed to appear at six consecutive hearings, causing further delay in the criminal proceedings (Public Hearing Minutes, Respondent's Exhibits n°109 to 114). However, Claimant was represented by counsel at five of the hearings.
452. If Claimant had come before the Romanian criminal court to defend against the charges of criminal tax fraud, the entire case – including ANAF's civil damages claim – could

have been resolved long ago. There is no merit to Claimant's argument that Romania is pursuing a double recovery through ANAF of tax liabilities from Continent SA. Indeed, the 2010 final judgment in the litigation over the December 2003 tax audit (Respondent's Exhibit n°211) allows the Tax Agency to enforce against Continent SA the established tax liabilities. If ANAF were to prevail on its civil damages claim, it would have the right to recover from Claimant and/or Continent SA any amount still to be owed at that time. As long as the 2010 judgment remains unsatisfied, it may be included in the civil damages claim of ANAF. If the 2010 judgment is paid by Continent SA, ANAF's claim would be reduced accordingly. That is not double recovery.

XI. The criminal case was not a pretense

453. Respondent contends that, even on the assumption that the Court did fail to comply with the strict summoning procedures, it would lack all credibility for Claimant to suggest that he was not in fact aware of the criminal proceedings. Therefore, if Claimant wanted to present evidence directly to the Criminal Court during the first instance criminal proceedings, he could have done so. He should not now be allowed to invoke his failure to participate in the proceedings as a reason for impugning the legitimacy of the proceedings.
454. Second, Claimant adduces no evidence in support of the suggestion that Respondent corrupted the first instance judge in the criminal proceedings in order to change the date of the final hearing.
455. Third, Respondent denies that Respondent exerted administrative pressure over the first instance judge, in order to obtain a "decision that could be used in the arbitration". Indeed, Respondent's first written submission in the arbitration proceedings was not at that time due until March 5, 2008 so it is clear that Respondent gained no material advantage as a result of the change in the final hearing date in the criminal proceedings from June 26, 2007 to May 28, 2007.
456. Finally, the Bucharest Tribunal did *not* find that Claimant is innocent of the charges of tax evasion brought against him. The Bucharest Tribunal overturned the decision of the first instance court on purely procedural grounds.

§ 2. THE LAW

I. ICSID tribunals have no jurisdiction to resolve tax disputes

457. Respondent submits that the Tribunal does not have jurisdiction over the tax disputes between Continent SA and the Romanian Tax Agency. Indeed, it is a "*universally accepted rule that public law cannot be extraterritorially enforced*" (F.A. Mann, "Conflict of Laws and Public Law", 132, *Recueil des Cours*, 1971). Nothing in the Treaty suggests that tax disputes come within the jurisdictional scope intended by the Contracting Parties, particularly where, as here, Claimant has not alleged that the tax laws applicable to Continent SA were somehow different from those applicable to similarly-situated companies or that the State took discriminatory measures of any kind against Continent SA.

458. The principle that tax laws are enforceable only in the place where they are imposed has led tribunals to decline jurisdiction over tax-related disputes.
459. In *Computer Sciences Corp. v. The Islamic Republic of Iran* (N°221-65-1, Award of April 16, 1986, 10 Iran-U.S. C.T.R. 269), the Iran-U.S. Claims Tribunal concluded that the tax claim fell beyond its jurisdiction because tax laws were not enforceable except by organs of the taxing State: “*Tax laws are manifestations of the jus imperii which may be exercised only within the borders of a state. In addition, revenue laws are typically enormously complex, so much so that their enforcement is frequently assigned to specialized courts or administrative agencies. For these reasons, actions to enforce tax laws are universally limited to their domestic forum*”.
460. The Iran-U.S. Claims Tribunal went on to hold that, any exception to the above customary rule must “*presuppose the clearest possible expression*” of the parties’ intentions, which was nowhere to be found in the Claims Settlement Declaration on which its jurisdiction was premised. Here, because the Treaty likewise provides no such clear expression, the same conclusion is warranted.
461. The ICSID tribunal in *AMCO Asia v. Indonesia* (*op.cit.*) was faced with a counterclaim for alleged tax fraud on the part of the claimant. The claimant argued that tax fraud was not “*a legal dispute arising directly out of an investment,*” as required by Article 25(1) of the ICSID Convention, but was “*related only in the most indirect way to the investment.*” The tribunal denied the tax claim on jurisdictional grounds, stating its reasons as follows: “*126. The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment.*” The rationale of *AMCO* is applicable here because, as in that case, no claim is actionable within the scope of the ICSID Convention unless it arises “*directly out of an investment.*”
462. Respondent denies that these jurisdictional defects can be overcome with the allegation that the fiscal measures claim also arises under Article 1 of the First Additional Protocol to the European Convention.
463. First, Respondent submits that this article is not applicable to “investments” and, even assuming it is, the European Convention does not provide a jurisdictional platform for the work of the Tribunal. According to Respondent, the right to no deprivation of property granted under Article 1 of the First Additional Protocol is coextensive with the same rights accorded under Article 4(1) of the Treaty. Consequently, Article 1 of the First Additional Protocol does not create any additional obligations and therefore does not come within the jurisdiction of the Tribunal under Articles 2(6) or 10 of the Treaty, which commit the Contracting Parties to honor certain obligations they have made beyond the Treaty. In addition, the European Court of Human Rights was established to enforce Convention rights, and thus the Contracting Parties to the Treaty did not intend for ICSID tribunals to exercise jurisdiction over such claims.
464. Furthermore, Article 1 of the First Additional Protocol seems to indicate that it does not apply under the circumstances alleged here: “[P]rovisions do not impair the right of

States to adopt the laws they consider necessary ... in order to ensure the payment of taxes and other contributions, or of fines”.

465. Finally, even if the Tribunal finds that it has subject matter jurisdiction to adjudge European Convention issues, previous decisions of the European Convention suggest that companies’ shareholders do not have standing to bring claims as an indirect victim of losses sustained by the company as a result of alleged violations of Article 1 of the First Additional Protocol (*Agrotexim and Others v. Greece*, n°14807/89, 24 October 1995).
466. According to Respondent, Claimant’s reliance on Article 6 of the European Convention is equally misplaced. That article protects persons with respect to judicial determinations regarding their civil rights and criminal charges brought against them. Continent SA’s civil rights were not implicated by this tax claim, nor was Continent SA charged with criminal wrongdoing. Roussalis was criminally charged, but, as noted above, he did not deny that he was guilty of tax evasion. In any event, Claimant’s personal rights do not arise “directly out of an investment” within the meaning of Article 25(1) of the ICSID Convention and fall outside the provisions of the Treaty, which protect “investments” not “investors.”
467. For the foregoing reasons, Respondent submits that the Tribunal does not have jurisdiction over this tax claim.

II. Claimant failed to establish that the Fiscal Claim has merit

A. The expropriation claim has not been proved

468. Respondent refers to its previous developments to the effect that, Claimant has established no right of expropriation. Further, Continent SA has not paid any of the tax liabilities assessed against it and is challenging them in the Romanian courts. No international wrong can be made out against Respondent while the tax liabilities remain subject to review and have not been reduced to a final and irrevocable judgment. Indeed, “[i]t would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law” (*United States of America v. Italy*, Judgment of 20 July 1989, 1989 ICJ LEXIS 3, ¶124, “ELSI”).
469. Moreover, Claimant presented no evidence that any of the fiscal measures had any adverse impact on Claimant’s or Continent SA’s ability to freely use the assets and manage the business. The record shows that the sequestration orders did not, in fact, prevent Claimant from transferring ownership or divesting assets from Continent SA. The sequestration order was breached in 2006 by the sale for EURO 1 million of real estate owned by Continent SA (Claimant’s Exhibit n°60). Further, Claimant continued to transfer millions of dollars of assets from Continent SA to his other companies. Since April 2006, all receivables of Continent SA were collected by Continent Frise Delicatesen, a company controlled by Claimant (Claimant’s Exhibits n°215, 218). According to Respondent, millions of additional dollars were paid by Continent SA to Claimant’s company Ozias, and to Claimant directly (*See* Claimant’s Exhibit n°169).

B. Continent SA has not been deprived of any right to an equitable judgment by an independent and fair court

470. The award of civil damages against Continent SA as a civil party liable for taxes in the course of the criminal case against Claimant for tax evasion is a routine procedure under Romanian law. No violation of Continent SA's rights under international law or Romanian law arises from the use of this procedure.
471. According to *Mondev International Ltd. v. United States of America*, the applicable standard for a denial of justice is whether there was a "willful disregard of due process of law ... which shocks, or at least surprises, a sense of judicial propriety" (ICSID Case No. ARB, AF/99/2). Respondent asserts that no such defects can be ascribed to the Romanian court proceedings in this case. Indeed, Continent SA has prevailed in several tax disputes and has been accorded every right granted to taxpayers under Romanian law. Furthermore, the judgment is on appeal, tax liabilities are at issue in the appeal, and neither Claimant nor Continent SA has complained about improprieties in the appellate proceedings.
472. What is more, even assuming that Claimant had established such improprieties: "[I]nternational law attaches state responsibility for juridical action only if it is shown that there was no reasonably available mechanism to correct the challenged action... States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct" (J. Paulsson, Denial of Justice in International Law, 2005, 100).

C. No "unjustifiable measures" result from the sequestration orders

473. Respondent denies Claimant's allegation that the Tax Agency's imposition of tax liens and initiation of enforcement proceedings were disproportionate and likely to affect his interest in Continent SA. Respondent submits that these assertions do not make out a claim under Article 2(2) of the Treaty.
474. Article 2(2) does not protect against potential *future* injury of the kind alleged by Claimant here. Rather, that article ensures that an investment "is not in any way *impaired* by unjustifiable . . . measures". The mere possibility that an act could "likely affect" the disposal of property at some indefinite time in the future is not sufficient.
475. By way of Ordinance 01123/18.10.2001 (Respondent's Exhibit n°115), the criminal investigatory body instituted a conservatory measure over Claimant's movable and immovable assets up to the value of ROL 24 Billion (approximately USD 780,000). This Ordinance was implemented by attaching the share capital of Continent SRL subscribed and paid by the Claimant in the amount of USD 360,000 (Respondent's Exhibit n°95). A comparison between the value stated to be guaranteed under the conservatory measure (USD 780,000) and the stated value of the share capital (USD 360,000) reveals that the measure was not disproportionate.
476. Respondent further denies Claimant's argument that the enforcement measures instituted by the tax authorities were disproportionate in relation to the value of the attached goods.

The accounting value of the sequestered assets amounted to ROL 38.9 billion (Respondent's Exhibit n°91), while the additional tax liabilities amounted to ROL 75.7 billion.

477. Furthermore, Claimant has, in fact, disposed of valuable assets of Continent SA, notwithstanding the conservatory measures (see above, ¶438).
478. Finally, Claimant admits that execution proceedings were suspended. Moreover, no bank accounts were seized and no other assets of Continent SA were taken.

D. Respondent did not prevent Continent SA from either challenging the Tax Assessment or from enjoying or disposing of his investment

479. Respondent denies Claimant's allegation that the Tax Court's decision to stay its tax enforcement case against Continent SA pending resolution of the criminal case – coupled with ANAF's inclusion of the assessed taxes in its claim for civil damages in the criminal prosecution – prevented Continent SA from challenging the tax liabilities before the *fiscal* courts for an undetermined period of time and thereby prevented Claimant from enjoying or disposing of his investment.
480. Respondent submits that, even after the suspension of the tax proceedings, Romanian law permitted Continent SA to challenge its tax liabilities before the Tax Court by appealing the suspension order and thereby reopening the Tax Court proceedings (Article 244 of the Romanian Civil Procedure Code). Continent SA chose not to do that. That was Claimant's decision and does not engage Romania's responsibilities under the Treaty or Article 6 of the European Convention.
481. Furthermore, Claimant has failed to provide any proof to support his claim that the alleged denial of Continent SA's right to challenge the tax liabilities before the Tax Court prevented him from enjoying or disposing of his investment in breach of Article 4 of the Treaty and Article 1 of Protocol 1 of the European Convention. In fact, Claimant's right to enjoy and dispose of his investment continues to be respected by Respondent. Claimant's has ongoing control of Continent SA and his ability to dispose of its assets at will. The tax liabilities in question are not the subject of any final judgment. Claimant has never been ordered to pay the taxes assessed against Continent SA. His Fiscal Claim is entirely speculative.

§3. DAMAGES

482. Respondent submits that Claimant's quantification of the damages evidences the baseless nature of this claim. First, he assumes that the Tax Agency will ultimately prevail and that Continent SA will have to pay the full amount of the tax liabilities assessed in the December 17, 2003 tax audit. Then, he assumes payment of the tax liability will be made on December 31, 2010. Next, he adds interest and penalties that will accumulate to December 31, 2010, assuming interest at .06 percent daily and penalties of .5 percent monthly, until paid. Finally, although he assumes he will prevail before the Tribunal on this claim (otherwise he would not be entitled to any damages), he also assumes that

Continent SA will pay the accrued tax bill on that date, which purportedly will correspond with the amount awarded to Claimant (Claimant's Exhibit n°53).

483. Respondent submits that such calculation is speculative. Speculative damages of this kind are not compensable in international arbitration: "*One of the best settled rules of the law of international responsibility of states is that no reparation for speculative damages or uncertain damages can be awarded*" (*Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran*, Award No. 310-56-3, July 14, 1987, 15 Iran-U.S. C.T.R. 189, 1989). Any relief granted by the Tribunal for this claim should be awarded solely to reimburse tax payments actually made by Continent SA.
484. In any event, even if the claimed damages were recoverable, it is evident that any resulting loss would in reality be suffered by Continent SA. There is no legal basis upon which Claimant could legitimately seek to recover for a tax loss allegedly suffered by a nonparty to the arbitration proceedings.
485. Accordingly, no damages should be awarded for this claim in the unlikely event the Tribunal decides in favor of Claimant.

SUB-SECTION III. DECISION OF THE ARBITRAL TRIBUNAL

§1. JURISDICTION OVER THE FISCAL CLAIM

486. According to Respondent, ICSID tribunals have no jurisdiction to resolve tax disputes between Continent SA and the Romanian Tax Agency. These disputes do not come within the jurisdictional scope of the BIT, particularly where Claimant has not alleged that the tax laws applicable to Continent SA were discriminatory measures. The Fiscal Measure Claim is not actionable within the scope of the ICSID Convention because it does not arise "*directly out of an investment.*"
487. The Claimant's Counsel declared during the hearings that: "*we agree with the Respondent in that some issues are non-arbitrable before this Tribunal. Though (...), there are current debates as to the arbitrability [sic.] of tax before International Tribunals. (...) We are not asking this Tribunal to adjudicate the tax matters, to provide remedies to, to delve into the sovereign right to -- in terms of tax. Similarly, for the other alleged breaches of the Investment Treaty. We have to be clear, I think, at this stage, before the Tribunal; we are not expecting a remedy such as, "We agree that X tax was available on the principles of fiscal law". (...) There is jurisdiction under Article 25 of the ICSID Convention.*" (Transcript, Day 1, p.81, line 12 *et seq.*). And further: "*there are measures taken by the Romanian State by measures of its public institutions which affect the investment and the Investor. These are measures that in our opinion are violations, as many violations of the Bilateral Agreement. (...) The allegation of a violation of the Bilateral Agreement is prerequisite of the jurisdiction of the Arbitral Tribunal, and the claims that are formulated by the Claimant fulfil, or comply with this request. Because in relation to all the claims there are violations of the agreement by way of the administrative measures taken by the Romanian authority, our opinion is that the Tribunal is -- has got jurisdiction (...)*" (Transcript, Day 3, p.62, line 8 *et seq.*).

488. Claimant alleges that the controls carried out and the decisions taken by the Romanian Tax authorities were *inter alia* unfounded, illegal, abusive and tendentious; that the measures taken to enforce these decisions were disproportionate; that the inclusion of the tax issues in a criminal proceeding were abusive; and that he has been prevented from having his tax issues properly resolved. Claimant further submits that the sequestration of his assets against the background of an abusive taxation interfered with his right to dispose and reap the benefits of his investment. Accordingly, Claimant submits that the action of the tax authorities resulted in breaches of Articles 2(2) and 4(1) BIT.
489. Article 25(1) of the ICSID Convention requires a dispute to arise “*directly out of an investment*” to fall under ICSID jurisdiction. It follows that general measures of tax or economic policy not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, will normally fall outside the jurisdiction of the Centre.
490. On the other hand, previous arbitral awards have considered that: “[i]t may well be, however, that in the context of the commitments assumed by the host State, “general” measures have a ‘specific’ effect in that they violate specific commitments. The expression “a dispute arising directly out of an investment” (Article 25 (1) of the ICSID Convention) cannot, therefore, be interpreted as meaning that the dispute can only result from a measure “directed to” the investment. The adverb “directly” is not related to the link between the measure and the investment but to that between the dispute and the investment” (*El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, §97, *see also*, *GAMI v. Mexico*, UNCITRAL arbitration. ILM, Vol. 44, 2005, p. 545).
491. In the same vein, in its Decision on Objections to Jurisdiction of 17 July 2003 in *CMS Gas Transmission Co. v. Argentina* (ICSID case No. ARB/01/8, ILM, Vol. 42, 2003, §33), the arbitral tribunal found that it was competent “*to examine whether specific measures affecting the Claimant’s investment or general measures of economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor.*”
492. In this context, the nature of tax laws as public law that cannot be extraterritorially enforced is not relevant to determine if Claimant’s Fiscal Measure Claim comes within the jurisdictional scope of the Tribunal. Indeed, in light of the claims presented by Claimant, the Tribunal will not have to make decisions applying general tax policies. The Tribunal will confine itself to establish in connection with the merits of the case whether the controls carried out and the decisions taken by the Romanian Tax Authorities violate the rights accorded to foreign investors under treaties.
493. In light of the above, the Tribunal considers that, among the matters falling within the scope of its jurisdiction are general measures taken by the host State in the exercise of its public powers, including decisions taken by tax authorities and courts, and actions taken by the State’s authorities to enforce such decisions, which allegedly affect the investment in violation of the BIT.

494. The Tribunal therefore decides that it has jurisdiction to rule on the Claimant's Fiscal Claim.
495. The Arbitral Tribunal refers to paragraph 312 above in which it has decided that the application to the present case of Article 6 of the European Convention and of Article 1 of the First Additional Protocol to the latter is denied.

§2. MERITS

I. WAS THERE A BREACH OF THE FAIR AND EQUITABLE TREATMENT REQUIREMENT?

496. In its "Fiscal Claim," Claimant contends that Romania has violated the "Fair and Equitable Treatment" standard in Article 2(2) of the Treaty in a number of ways. The Claimant principally contends that:

- The control actions carried out by the tax authorities and the tax liabilities that were assessed by these tax authorities were harassing and deprived Claimant of its legitimate expectations as to the sale and disposal of Continent SA;
- He was prevented from having the tax litigation resolved because his challenge was suspended in light of the pending criminal investigation and because they were wrongfully integrated into criminal proceedings;
- He faced disproportionate sequestration orders.

497. The Tribunal will examine each of these claims separately.

1. The control actions carried out by the Tax Authorities and the tax liabilities

498. At the hearing, Mrs. Luciana Chivu, the senior auditor who handled the Tax Agency's 2003 audit of Continent SA, testified in relation to the procedure she followed and the basis for the conclusion in her report that the company owed USD 2.3 million in taxes and penalties. She confirmed that the audit was conducted in consultation with representatives of the company who were informed of her findings as she proceeded. Questions arose during the audit about undocumented tax deductions and the company was asked to provide supporting evidence. It failed to do so. In the course of the cross-examination, Claimant's Counsel failed to establish any procedural or substantive error in Mrs. Chivu's tax audit.
499. Claimant's Counsel also admitted at the hearing that the fiscal measures taken by Romania were lawful. He submitted that "*the facts that are measures of the Ministry are 3 such concrete facts, or deeds, but we are not going to analyze them, or we do not claim, we do not emit claims as to the fiscal obligations that derive from them. Some of them have been settled by the courts, by the law courts. For us, they are out of the question from the fiscal point of view*" (transcript, day 3, p. 65, lines 12-18).

500. Furthermore, Claimant did not dispute at the hearing the fact that the USD 780,000 tax liability he admitted in 2001 his company owed (Claimant's Rebuttal, Exhibit 27) remains unpaid.
501. Finally, the Tribunal notes that Continent SA litigated its challenge to the 2003 tax audit in Romanian courts and it lost at the Court of Appeals. Claimant did not assert any error in the final judgment at the hearing. It is also undisputed that those liabilities remain unpaid.
502. On the basis of the evidence, the Arbitral Tribunal is of the view that the controls and decisions of the Tax Authorities were consistent with common tax accounting principles, and consequently that none of them was arbitrary.
503. Each of the tax authorities' decisions was motivated. The tax authorities had legitimate concerns about the fulfillment of Claimant's tax obligations. Claimant did not present any convincing evidence that the control actions and the subsequent decisions of the tax authorities were aimed at harassing Claimant.
504. Romania's tax treatment appears to have been consistent with existing law. The tax authorities' decisions were taken in the proper exercise of the tax authorities' responsibilities. Claimant received notice of the decisions and had the opportunity to challenge the findings of the tax authorities before administrative bodies and eventually before impartial judicial courts.
505. The Tribunal considers that the State authorities acted in transparency and in a manner that cannot be considered arbitrary, unfair, unjust, discriminatory or lacking due process.
506. The Tribunal also considers that, under the circumstances, Claimant's argument that the tax authorities' behavior in conducting too numerous tax controls and assessing too severe and too many tax liabilities would amount to a failure to protect his legitimate expectations, is not justified. The tax regulations which led to the incriminated decisions existed and were enforceable by law at the time of the investment. Each of the controls and decisions was based on Romanian legal provisions. Moreover, Claimant could not reasonably have expected that the Romanian authorities would refrain from resolving reasonable concerns they might have concerning Claimant's fulfillment of its tax obligations.
507. The Tribunal therefore decides that the tax authorities' conduct was reasonable and adequate and did not breach the Fair and Equitable Treatment standard.

2. Prevention from having the tax litigation resolved because of the criminal proceedings

508. The Romanian Code of Criminal Procedure provides that a victim may claim civil damages during a criminal investigation or criminal prosecution. Therefore, the Ministry, through ANAF, elected to join the criminal proceedings in accordance with Romanian law.

509. In the Tribunal's view, Claimant has not submitted any convincing argument to support his claim that ANAF did not have the right to claim the full amount of the outstanding tax deficiencies as damages. The Romanian Procedural Code provides that the criminal court should render a judgment on the civil claim in the same decision as the one deciding on the criminal deeds. Claimant does not demonstrate that a decision of the criminal court granting ANAF's damage claim would lead to double recovery. Respondent has stated in this regard that if the judgment is paid by Continent SA, ANAF's claim would be reduced accordingly.
510. Moreover, Continent SA received notice of the indictment and had an opportunity to challenge it before the criminal court. The civil damages claim remains unresolved because Claimant abused the summons procedure and caused the delay of the criminal case in order to evade criminal jurisdiction. If he had come before the Romanian criminal court to defend against the charges of criminal tax fraud, the entire case, including ANAF's civil damages claim, could have been resolved long ago.
511. At the hearing, Ms. Scrobota, the former Deputy Legal Director of ANAF, appeared as a witness to answer questions about the May 2008 letter that she helped draft for ANAF's former Legal Director. As Ms. Scrobota comprehensively explained, this was a normal part of Romanian criminal procedure to recover unpaid taxes and penalties. Ms. Scrobota reported that Continent SA and Mr. Roussalis did not object to ANAF's claims and did not submit evidence or present a defense on the merits. She explained that Mr. Roussalis was convicted and sentenced to prison, and he and Continent SA were ordered to pay civil damages to ANAF. But the conviction was overturned on appeal, the civil damages award was vacated, and the case was remanded for a new trial. The criminal prosecutor offered to drop the case in 2009, once the statute of limitations on criminal penalties had run. But Mr. Roussalis requested that the case proceed (Transcripts, Day 3, p.148 *et seq.*).
512. Claimant's allegation that Respondent corrupted the first instance judge or exerted administrative pressure has been disputed by Respondent and is not supported by the record.
513. In conclusion, the Tribunal notes that Romanian courts and administrative procedures have been open to Claimant at all relevant times, Claimant has been successful in his efforts to have the first decision overturned and he had the opportunity to have the case heard on remand. Consequently, there appears to have been no denial of due process or denial of justice that would rise to the level of a violation of international law.
514. In light of the foregoing, the Tribunal decides that AVAS's decisions to join the criminal proceedings and the consequent effect of having the tax litigation becoming part of the latter did not breach the Fair and Equitable Treatment standard.

3. The allegedly disproportionate sequestration orders

515. On June 12, 2000, the police issued a sequestration order ordering "*the institution of sequestration of real goods/some goods up to the concurrence ...*" belonging to Continent SA concerning the fixed charges related to the company following an investigation for

tax fraud (Annex 6, Respondent's Rebuttal Documents). The company was ordered not to sell its real estate pending resolution of the criminal proceedings. It was standard procedure pursuant to the Romanian Code of Criminal Procedure. Claimant has not proved that this sequestration order was discriminatory, disproportionate or otherwise improper under Romanian law. In addition, Claimant never challenged the order as he could have done under Romanian law.

516. In a sworn declaration to the police dated August 8, 2001 (Claimant's Rebuttal, Exhibit n°27), Claimant admitted that he owed taxes and penalties totaling RON 23.32 billion (about USD 780,000). He agreed to pay that amount. In order to secure that tax debt, the police ordered Roussalis to maintain Continent SRL's share capital at the minimum level of USD 360,000 until the payment obligation was met (Respondent's Exhibit n°95 and 115). At the hearing, Claimant did not dispute the fact that he never paid any of the above amounts. He also failed to establish that the sequestration was unlawful or unjustified. Moreover, contrary to what Claimant alleged at the hearing, the record contains no evidence whatsoever of any order of seizure of Claimant's shares in SRL or his personal assets or any other property of Claimant's investment.
517. There is also no evidence that the above sequestration order had any effect on Claimant's investment. The November 30, 2001 police minutes record Claimant's declaration that the subscribed capital was deposited at Alpha Bank. Claimant presented no evidence that the USD 360,000 of share capital was on deposit when the sequestration order was issued. It would be justified to believe that as any other business, once Continent SRL's registered share capital was subscribed, it would have been transformed into working capital and used for the activities of the company, with the consequence that the 2001 sequestration did not have any adverse consequence on Continent SRL.
518. Finally, Claimant identified no defect in the 2003 tax audit by which the tax agency established that Continent SA owed additional taxes and penalties of about RON 7.5 million (over USD 2.3 million). The tax agency issued an order in 2004 to sequester certain real estate owned by Continent SA until those tax liabilities were paid (Respondent's Exh. 90). The value of the property sequestered was one half of the tax liability. Continent SA did not challenge the sequestration order. It only challenged the merits of the December 2003 tax audit.
519. Having reviewed the evidence and reasons which the Romanian authorities invoked in support of their sequestration orders, the Tribunal is of the view that these decisions were standard procedures pursuant to Article 163 of the Romanian Code of Criminal Procedure.
520. The sequestration orders were legitimate and not disproportionate. The Tribunal finds no breach of the Fair and Equitable Treatment requirement in Respondent's treatment of the investment in this regard.

II. WAS THERE A BREACH OF THE NON-IMPAIRMENT REQUIREMENT?

521. The Arbitral Tribunal considers that the controls carried out and the decisions taken by Respondent, including the sequestration orders, were not in any way discriminatory, for the reasons invoked above, and consequently did not violate the non-impairment standard of Article 2(2) of the BIT.

III. WAS THERE AN EXPROPRIATION OR A MEASURE THE EFFECTS OF WHICH WOULD BE TANTAMOUNT TO EXPROPRIATION?

522. Claimant articulates its expropriation claim as one of indirect expropriation. He argues that the illegal tax decision, the subsequent judicial proceedings and the enforcement procedures constitute an indirect expropriation of the investments because it deprived Claimant of his right to sell and/or dispose of the assets forming part of its investment. Claimant also suggests that these actions deprived the investment of its economic value.
523. The Tribunal has already dealt with this question above and came to the conclusion that Claimant was not deprived of the ownership of its investment, nor from its right to manage, control, use or enjoy its investment. Reference is therefore made to the Tribunal's decision at ¶354 and following.
524. In relation to the Fiscal Claim, it is undisputed that Continent SA has not paid the tax liabilities assessed against him. He is challenging the tax liabilities in the Romanian courts; they remain subject to review and have not been reduced to a final and irrevocable judgment yet. Therefore, Claimant has not proven an actual impairment of the economic value of his investment or that he would have been deprived of its enjoyment.
525. Moreover, the sequestration orders were all conservatory measures. No bank accounts were seized and no other assets of Continent SA were actually taken.
526. In light of the foregoing, the Tribunal decides that the State's actions invoked by Claimant under the "Fiscal Claim" - taken separately or altogether - did not breach Article 4(1) of the Treaty.

SECTION III. THE INTERDICTION CLAIM

SUB-SECTION I. CLAIMANT'S POSITION ON THE INTERDICTION CLAIM

§ 1. THE FACTS

A. The criminal proceedings

527. On May 18, 2001, the police initiated criminal proceedings against Spyridon Roussalis, the director of Continent SRL, and against Angela Doanta, for fraud, tax evasion, use of false documents, and instigation to commit forgery.

528. Claimant disputes Respondent’s allegation that the criminal case was delayed because Claimant, having indicated a wrong address in Greece, could not be summoned. Indeed, Claimant was summoned at the same address for the criminal appeal.
529. As far as the findings in the criminal proceedings are concerned, Claimant points out that the criminal judgment n°447/28 of May 28, 2007 was quashed by the September 22, 2008 decision of the Bucharest Tribunal. Consequently, all the allegations and references made by Respondent on the basis of this judgment are groundless. The Bucharest Tribunal overturned the decision of the first instance court and sent the case back to the first instance court for retrial. The case is still pending. Claimant submits that it is unreasonable that a criminal case that started in 1999 and concerns the compliance of nine invoices should still be pending today. Claimant also refutes Respondent’s allegation that Roussalis did not deny having committed tax evasion:
- First, a defendant is not obliged, under Romanian law, to confess or deny the charges brought against him in criminal proceedings, and even if a defendant confesses such charges, this should not be taken into account by the court.
 - Second, Respondent’s allegation is based on the written notes submitted by Continent SA. Claimant submits that Continent SA could not admit that the offenses had been perpetrated by another person, *i.e.* Roussalis.
 - Third, Claimant did not choose to “merely” rely on a statute of limitations without also expressly denying the charges. Instead, Claimant alleged that the summons procedure was not properly complied with. According to Claimant, the procedure was conducted in violation of fundamental principles of Romanian Law such as the adversarial principle, the right to be heard and the non-mediation principle (see Article 289 of the Criminal Procedure Code). The breach of the above principles renders the decision an “absolute nullity”.
530. Claimant further asserts that “*the entire criminal ... case was a pretense trial*” (Claimant’s Reply Memorial, ¶298).
531. First, the evidence was presented indirectly through lawyers rather than directly by Claimant.
532. Second, Respondent exerted “administrative pressure” over the first instance judge handling the criminal case. The Bucharest Tribunal which quashed the first decision expressly stated that “*By examining the appealed sentence, the Court finds it to be null due to breach of the legal provisions regarding the summoning of the parties, (...), although the defendant Spyridon Roussalis has mentioned his residence address in Greece, the court did not summon him at this address for each hearing term, delivering the evidences alone – the hearing of five witnesses – at a hearing term when there was a lack of procedure with the defendant (...), there were breached the principles of verbal proceedings, nonmediation and contradictory principle, as well as the provisions regarding the hearing of the defendant (...). By all these breaches of norms of criminal procedures there were breached the right to a fair trial as mentioned also in art. 6 of the*

European Convention of Human Rights (...)” (sic., Claimant’s Reply Exhibit n°2). According to Claimant, “*Roussalis was subjected to legal and administrative harassment (...) which had as a result the fact that the normal usage of the attributes of the ownership rights over the investment cannot be enforced*” (sic., Claimant’s Reply Memorial, ¶299).

533. Third, Respondent’s motive in exerting such administrative pressure over the first instance judge was to obtain a decision that could be used by Respondent in the arbitration. Claimant points out that the court issued its decision on May 28, 2007, immediately after the Arbitral Tribunal held its first hearing on May 4, 2007.
534. Finally, no expert reports were presented during these proceedings. The only expert report that was taken into consideration by the court was the one which was submitted by the Prosecutor, without being discussed at the hearing or checked by the court.

B. The prohibition on leaving the country

535. On July 31, 2001, the 6th District Police Department in Bucharest - Economic Financial Police Service requested the General Customs Police Inspectorate (both institutions being subordinate at that time to the Ministry of Internal Affairs) to order that the Border Police prohibit Claimant from leaving Romania until the criminal investigation was complete (Claimant’s Exhibit n°54).
536. Claimant filed an objection to the 6th District Police Department’s interdiction order with the Prosecutor’s Office at the 6th District Court, under whose jurisdiction the criminal investigation was being conducted. The 6th District Prosecutor’s Office granted Claimant’s challenge and declared the order illegal.
537. On August 9, 2001, responsibility for the criminal investigation was transferred to the General Department of the Bucharest Police (“Bucharest Police”) under the direction of the Prosecutor’s Office at the Bucharest Court of Appeal (Claimant’s Exhibit n° 56). According to Claimant, the administrative re-location of the file triggered the impossibility of enforcing the 6th District Prosecutor’s Office ordinance which declared the administrative measure unlawful.
538. The Prosecutor’s Office at the Bucharest Court of Appeal issued a new order prohibiting Roussalis from leaving the locality of Bucharest during the 30-day period from September 21, 2001 to October 20, 2001 (Claimant’s Exhibit n° 57). This was done without the Prosecutor’s approval.
539. On October 4, 2001, the Bucharest Police rejected Claimant’s subsequent request that the interdiction order preventing him from leaving Romania be lifted on the ground that the September 21, 2001 order forbidding Claimant from leaving Bucharest until October 20, 2001 was still in place (Claimant’s Exhibit n° 58).
540. Article 29(1) of Law 123/2001 provides that an alien may be forbidden from leaving the *country* only if it is established that the alien both has been accused of criminal wrongdoing and is subject to an order preventing him from leaving the *locality*.

541. On October 17, 2001, the Bucharest Police requested that the interdiction order remain in force, after October 20, 2001, until the completion of the criminal investigation.
542. On April 23, 2002, Claimant requested that the Ministry of Internal Affairs lift the interdiction order (Claimant's Exhibit n°59).
543. On April 30, 2002, Claimant argued that the interdiction order was illegal; he directed these arguments to the Administrative Court attached to the Court of Appeal in Bucharest (Claimant's Exhibit n° 60). On June 24, 2002, the Administrative Court cancelled the interdiction order preventing Claimant from leaving Romania (Claimant's Exhibit n°61).
544. Following that ruling, the Ministry of Internal Affairs informed Claimant that it would appeal this decision to the Supreme Court and that the interdiction order would remain in effect until the Supreme Court issued a final, irrevocable decision on the matter (Claimant's Exhibit n° 62). The Ministry of Internal Affairs thus challenged the decision before the Supreme Court. On February 11, 2003, the Supreme Court upheld the lower court's ruling that the interdiction order was illegal. The interdiction order was lifted, and Claimant was free to leave Romania as from February 12, 2003.
545. Claimant submits that the interdiction order, deemed unlawful by both the Court of Appeal in Bucharest and by the Supreme Court of Justice, violated Law 123/2001, the Romanian Constitution and Article 2(2) of Protocol 4 to the European Convention.
546. Claimant disputes Respondent's allegation that forbidden measures, declared illegal by the Romanian courts, may be justified by the fact that the police bodies acted on the basis of a routine. According to the Claimant, such an argument is contrary to the rule of law.

§ 2. THE LAW

547. In light of the foregoing, Claimant submits that Respondent has violated Article 2(2) of the Treaty.
548. According to Claimant, Continent SRL is a trade company established in Romania since 1997. Its main income is derived from import activities. However, since the State unlawfully barred Roussalis from leaving Romania for a period of almost two years, the import activity was blocked, affecting Claimant's right to administer his investment. Indeed, it prevented Continent SRL from obtaining income, the sole shareholder and managing director being Roussalis.
549. Claimant further submits that the Romanian authorities did act in breach of due process. The severity of the interdiction measures, the unnecessary length of the criminal proceedings and their obvious link to the SPA can only be understood as an attempt to regain Continent SA's assets and shares.

§ 3. DAMAGES

550. Claimant claims moral damages. He formulates the following request (Claimant's Memorial, ¶181): "*The requested compensation amounts as material and moral damages to be payed [sic] by the Respondent – the Romanian State is 25,000,000. USD*".

SUB-SECTION II. RESPONDENT'S POSITION ON THE INTERDICTION CLAIM

§ 1. THE FACTS

551. On May 18, 2001, when criminal proceedings were formally commenced against Claimant, the 6th District Police reported that the Financial Guard had observed fraudulent conduct in Continent SA's accounting practices, *inter alia* in relation to the post-purchase investment, and the fraudulent avoidance of fiscal duties (Respondent's Exhibit n°78).
552. Law 123/2001 was adopted in April 2001 and became effective on May 3, 2001. Article 29(1) of Law 123/2001 provides that an "*alien shall not be permitted to leave the country*" under certain circumstances. Under part (b) of that article, for example, such an order may be issued if it can be established that the alien both has been accused of criminal wrongdoing and is subject to an order (issued by a magistrate) preventing him from leaving the locality.
553. On July 31, 2001, with the criminal investigation under way, the 6th District Police asked the Border Police to prevent Claimant from leaving Romania until the end of the criminal investigation (Claimant's Exhibit n°54).
554. Claimant filed an objection to the interdiction order with the Prosecutor's Office at the 6th District Court. Claimant complained that no order restricting him from leaving the locality had been issued, as Article 29(1)(b) required. On August 6, 2001, the Prosecutor's Office granted Claimant's challenge and informed both the Border Police and Claimant accordingly.
555. On August 9, 2001, responsibility for the criminal investigation was transferred to the General Department of the Bucharest Police ("Bucharest Police"). Claimant was notified of the transfer and, on August 21, 2001, he renewed his prior objection to the July 31, 2001 interdiction order with the Prosecutor's Office at the Bucharest Court of Appeal, informing the latter that the Prosecutor's Office at the 6th District Court had quashed the July 31, 2001 interdiction order (Respondent's Exhibit n°122).
556. On September 21, 2001, the Bucharest Police requested that the Prosecutor's Office prevent Claimant from leaving Bucharest in order to ensure the proper conduct of the criminal investigation (Respondent's Exhibit n°123).
557. The Prosecutor's Office at the Court of Appeal issued an order prohibiting Claimant from leaving the locality during the 30-day period from September 21, 2001 to October 20,

- 2001 (Claimant's Exhibit n°57). That office was authorized to issue such an order pursuant to Article 136(2) of the Criminal Procedure Code.
558. Claimant again requested that the July 31, 2001 interdiction order preventing him from leaving Romania be lifted, and, on October 4, 2001, the Bucharest Police rejected that request on the ground that the September 21, 2001 order forbidding Claimant from leaving Bucharest was still in place (Claimant's Exhibit n°58).
559. On October 17, 2001, the Bucharest Police requested that the interdiction order remain in force until the completion of the criminal investigation (Respondent's Exhibit n°126). The Border Police and the Prosecutor's Office at the Court of Appeal concluded that the interdiction order met the requirements of Law 123/2001 and could remain in effect until the conclusion of the criminal case (Respondent's Exhibits n°127 and 128).
560. Between February 2002 and April 2002, the Bucharest Police responded to three requests by Claimant to revoke the interdiction order. Each time, the Bucharest Police determined, after a review of the evidence obtained in the criminal investigation, that the interdiction order would remain in place until the conclusion of the criminal proceedings, in accordance with Law 123/2001 (Respondent's Exhibits n°129, 130, 131). In its February 6, 2002 response, the Bucharest Police advised Claimant to address further objections to the supervising case prosecutor or to the competent court (Respondent's Exhibit n°129).
561. On April 23, 2002, Claimant requested that the Ministry of Internal Affairs lift the interdiction order, claiming that it was excessive and unconstitutional, and had caused Claimant serious moral and material damage (Claimant's Exhibit n°59). One week later, Claimant argued that the interdiction order violated: (i) the Romanian Constitution; (ii) his right to free movement under Article 2 of Protocol 4 to the European Convention; and (iii) his right to perform contractual obligations under Article 1 of Protocol 4 to the European Convention. Claimant directed these arguments to the Administrative Court attached to the Court of Appeal in Bucharest (Claimant's Exhibit n°60, pp. 3-4).
562. On June 24, 2002, the Administrative Court cancelled the interdiction order preventing Claimant from leaving Romania on the ground that it did not satisfy the procedural requirements of Article 29(1)(b) of Law 123/2001 (Claimant's Exhibit n°61). Following that ruling, the Ministry of Internal Affairs appealed the decision. On February 11, 2003, the Supreme Court upheld the lower court's ruling that the interdiction order did not meet the requirements of Article 29(1)(b) of Law 123/2001. The interdiction order was lifted. Roussalis left the country around a month later, on March 9, 2003.
563. On May 14, 2003, Claimant was indicted for instigation to commit forgery, use of false documents in fraudulently substantiating Continent SRL's post-privatization obligation in Continent SA, and tax evasion (Claimant's Exhibit n°51). The criminal trial was delayed repeatedly because Claimant gave an erroneous address for his residence in Greece, as a result of which he could not be served with process in Greece. The criminal trial eventually started on November 20, 2006 (Nistor Letter at Att. K).

564. Claimant never appeared in person. On May 28, 2007, Claimant was convicted *in absentia* for tax evasion committed in conjunction with the fraudulent substantiation of Continent SRL's post-privatization investment obligation. The Criminal Court noted that Claimant "*eluded the legal search, tried to mislead the legal bodies [...] during the criminal prosecution [by saying] that he did not know about the [...] accounting records, [and caused] a high quantum of [...] damage [which] he did not try to remedy [...] [instead,] he left Romania.*" Accordingly, the court imposed a sentence of two years in prison because it considered Claimant to be dangerous (Respondent's Exhibit n°42). Claimant appealed the conviction and the appellate court overturned the decision on procedural grounds.

§ 2. THE LAW

I. The Treaty does not confer subject matter jurisdiction for this claim

565. The Treaty provision on which Claimant relies only applies to "*investments by investors,*" not to the investors themselves (Treaty, Article 2(2)).

566. Moreover, Respondent submits that there is no jurisdiction under the Treaty if a dispute is not "*in relation to an investment*" and not somehow tangentially connected to the investment (Treaty, Article 9(1)). This requirement is reinforced by Article 25(1) of the ICSID Convention, which further limits the jurisdiction of the Tribunal to disputes that arise "*directly out of an investment.*" Because this claim does not satisfy these jurisdictional requirements, it should be dismissed for lack of subject matter jurisdiction.

567. The linkage between the subject matter of the alleged fraud and the investment is not sufficient to establish jurisdiction for the Interdiction Claim. The ICSID Convention requires that disputes within the jurisdiction of the Centre must arise *directly* out of an investment. The facts that the underlying crimes of tax fraud and forgery for which Claimant initially was convicted were committed at the premises of Continent SA, and relate to his operation of the business, are not sufficient to meet that test. The interdiction order and Claimant's "interdiction claim" arise directly out of the application of Romanian criminal procedure law to him as an accused criminal; they do not arise directly out of his investment.

568. Respondent notes that the State imposed no restrictions on Claimant's activities in Romania and did not confine Claimant to the custody of the State. Rather, Claimant was free to do as he wished – on the sole exception that he could not leave the country and, for one month could not leave the locality of Bucharest, without permission. He was otherwise free to travel within Romania, conduct his business, and pursue personal interests.

569. In *Biloune v. Ghana Investments Centre* (Award of 27 October 1989 and 30 June 1990, XIX Yearbook Commercial Arbitration 11, 1994), the claimant, after being arrested and deported from Ghana, made a demand for arbitration, alleging that these actions interfered with his investment (a Ghanaian corporation in which the claimant was the principal shareholder). The claimant contended that because the deprivation of his human

rights, by detention and deportation, interfered with his investment, the dispute fell within the tribunal's jurisdiction. Rejecting this argument, the tribunal made clear that more is required than an act that merely touches the investment in some indirect way and decided that it "lack[ed] jurisdiction to address, as an independent cause of action, a claim of violation of human rights." This reasoning applies with equal force here.

570. According to Respondent, the interdiction claim arises out of domestic law and is not arbitrable before an ICSID tribunal. Indeed, in *Loewen v. United States of America*, ICSID Case No. ARB, AF/98/3, the ICSID tribunal dealt with a claimed denial of justice by a United States court. It distinguished between a right of action brought into existence by domestic law and enforceable through a domestic tribunal and a NAFTA treaty claim, which stems from public international law. The tribunal emphasized that "[t]here is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what [are] in origin the rights of Party states". Similarly, in this case there is nothing in Claimant's allegations that would justify the enforcement of his domestic law claim through ICSID.

II. The alleged wrongful conduct does not violate the "unjustifiable measures" clause

A. The burden of proof

571. Respondent submits that Claimant has the burden of demonstrating that his claim states a legally cognizable violation of the Treaty, and that claimant has failed to meet his burden.
572. Respondent points out that the standard of arbitrariness in the Romania-United States BIT was defined by another ICSID tribunal as "*something opposed to the rule of law ... [and] a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.*" (*Noble Ventures v. Romania*, ICSID Case No. ARB/01/11).
573. The standard also must accord with general principles of customary international law giving rise to state responsibility. Under those principles, mere violations of domestic law, without more, do not trigger state responsibility, as the United Nations codification of international law on this subject makes clear: "*Conduct, attributable to a state and causing injury to an alien, that violates the law of the state does not depart from the international standard of justice specified in section 165 merely by reason of such violation. Such conduct departs from the international standard only if it would depart therefrom in the absence of the state law*" (R. Ago, First Report on State Responsibility, *Yearbook of the Int.l Law Comm'n*, 1971, Vol. 2, 193-194).

B. The interdiction order does not constitute an "unjustifiable measure"

1. Preventing flight to avoid criminal prosecution promotes a rational public policy

574. Respondent submits that Claimant was under investigation for serious crimes. Because he was a citizen of Greece, there was a legitimate risk that Claimant might flee Romania and seek to avoid prosecution for these crimes. The interdiction order was issued to minimize that risk. Indeed, the concern that Claimant would avoid the criminal proceedings proved

to be well founded. After the interdiction order was lifted, Claimant left Romania and refused to participate further in the criminal proceedings.

575. Procedures for restricting persons suspected of serious crimes from fleeing the jurisdiction promote the public interest by helping to ensure that the criminal laws are enforced and that those accused of crimes remain subject to the jurisdiction of the courts so they can stand trial and, if convicted, serve their sentences.

576. Against this backdrop, the measure used in this case is not particularly intrusive and allowed Claimant to conduct his business and personal affairs, provided that he remained in the country. The interdiction order represented a reasonable balance between Claimant's risk of flight, on the one hand, and avoiding undue interference in his life, on the other.

2. The measure does not shock the conscience; it is defensible and can be justified in view of the unsettled and confusing state of the law at the time it was issued

577. Claimant complained that no order restricting him from leaving the *locality* had been issued, which in his view was required by Article 29(1)(b) of Law 123/2001 (see above, ¶554). The authorities later obtained such an order, and it remained in effect for 30 days (until October 20, 2001). Claimant then argued that the interdiction order against leaving the *country* also expired on October 20, 2001.

578. Romanian authorities objected that such a reading conflicted with the express terms of Article 30(b) of Law 123/2001, which permit aliens under an interdiction order to leave Romania only if they eventually are not charged with criminal wrongdoing, are acquitted, or the criminal investigation or trial is otherwise discontinued. Accordingly, the requirement of a pre-existing interdiction order restraining the individual from leaving the locality was a pre-condition only to the issuance of an interdiction order to leave the country. Respondent submits that this position was a reasonable attempt to harmonize the various ambiguous legal provisions involved.

579. In the end, the latter interpretation was not adopted by the Supreme Court. The Supreme Court held that the interdiction order was effective only when a valid order restricting Claimant's travel outside the locality was in force (Claimant's Exhibit n°61, p. 5). The Court thus interpreted the new law as having the effect of revoking the authority of magistrates to issue indefinite interdiction orders during the pendency of criminal investigations, a practice that was followed before the enactment of Law 123/2001.

580. Under these circumstances, the actions of the Romanian authorities cannot be said to "shock the conscience" on the ground that they are "indefensible or "incapable of being justified." It does not follow that the authorities acted unjustifiably merely because the courts reached a contrary decision. The issues raised by Claimant were unsettled under a statutory scheme that was new and susceptible to different reasonable interpretations.

3. There is no violation of any international standards of justice that would trigger state responsibility

581. A violation of domestic law does not trigger state responsibility unless the international standard of justice is violated as well. Respondent submits that Claimant identifies no principles of international law entitling him to relief for the alleged violation of Romanian law at issue.
582. Respondent further asserts that the interdiction order does not violate the international standard of justice. When the order was issued, Claimant had complete access to the Romanian courts, the order was quashed, and Claimant was allowed to leave the country. There can be no state responsibility under these circumstances. Indeed, “*it would be absurd if measures later quashed by higher authority or a superior court could ... be said to have been arbitrary in the sense of international law*” (*ELSI, op.cit*, at 133).

§ 3. DAMAGES

I. Claimant has failed to prove both the existence and quantum of material damages

583. Respondent contests Claimant’s argument that having fulfilled the USD 1.4 million investment obligations, Continent SRL would have resumed its import operations and thereby recouped the cost of its investment in Continent SA. Respondent further denies that the interdiction order prevented Continent SRL (of which he is the sole shareholder and director) from conducting income-earning activities.
584. Claimant presents no evidence to support the above assertions. Therefore, Respondent alleges that such plan to resume allegedly profitable import is fabricated by Claimant to drive up his damage demand. Respondent submits that the Tribunal may not award damages based on an undocumented, speculative, and unproven business venture.
585. Claimant similarly fails to establish that the supposed impairment to Continent SRL’s business ventures was caused by the restriction on Claimant’s travel outside Romania. Claimant neither identifies any negative impact, nor explains why it could not be mitigated or avoided altogether by Claimant conducting business from Romania or by using agents to conduct business outside Romania.
586. Respondent points out that the consensus of European legal systems is that proof of certain loss and causation is required before an award of damages will be made. However, the amount of material damages claimed has not been proven and Claimant has cited no accepted method of determining the quantum of damages.

II. Moral damages are not appropriate for this claim

587. Claimant also demands an unspecified amount of moral damages for this claim. Respondent submits that such a demand reveals the true purpose of this claim: to reward the investor for the personal deprivation Claimant attributes to the restriction on his travel, rather than to compensate for any damages allegedly sustained by the investment.

588. Because Claimant is not entitled to recover for any personal deprivation under the Treaty, he claims that Continent SRL was impaired so that he can recover moral damages on behalf of his investment. However, a corporation is not entitled to recover moral damages for business opportunities it supposedly lost as a consequence of restrictions imposed by the State. According to Respondent, the fact that Claimant seeks moral damages is a tacit admission that the business income allegedly lost by Continent SRL is purely speculative and cannot be quantified as compensable material damages, such as lost profits or lost business opportunities.
589. Respondent submits that the Tribunal should dismiss Claimant's speculative moral damages.
590. In any case, should the Tribunal conclude that Claimant is entitled to damages in his personal capacity for the restrictions imposed by the interdiction order, Respondent points out that moral damages are reserved for cases of extreme infliction of distress, often involving severe physical abuse of some kind. However, no such instances of physical violation of the investment or of its personnel and assets are implicated in this case. As explained above, Claimant was not held in custody.
591. Finally, under Romanian law, damages against the State arising out of errors such as those alleged by Claimant are governed by Article 504 of the Code of Criminal Procedure which provides as follows: "*Any person who was finally convicted is entitled to obtain compensation from the state, if after the case's retrial, the final decision provides that the action was not perpetrated by that person or the action does not exist.*" Accordingly, under Article 504 of the Criminal Procedure Code, as in force at the time, damages were available only if defendant was acquitted or the criminal investigation was closed without charges being brought. Claimant, of course, was charged and ultimately convicted. In this regard, Respondent points out that Claimant's first instance conviction for tax evasion provides *prima facie* evidence that the measures impugned by Claimant in his Fiscal Claim were in fact fully justified. On September 22, 2008, the Bucharest Tribunal quashed Claimant's and Continent SA's criminal convictions on purely procedural grounds without directly challenging any of the conclusions reached by the first instance court. Accordingly, Claimant is not entitled to damages under Article 504 of the Criminal Code for the Border Police's enforcement of the interdiction order.
592. In light of the foregoing, Claimant's claim based on the interdiction order should be denied.

SUB-SECTION III. DECISION OF THE TRIBUNAL

§1. JURISDICTION OVER THE INTERDICTION CLAIM

593. According to Respondent, the tribunal has no jurisdiction over the Interdiction Claim because the Treaty violation on which Claimant relies only applies to "*investments by investors,*" not to the investors themselves (Treaty, Article 2(2)).
594. The Interdiction Claim is actually based on a violation by the State of its Treaty obligations who arguably harmed its investment. The Tribunal considers that it is

therefore irrelevant that the conduct which allegedly harmed the investment in violation of the Treaty was directed against the director of the business, which is also the investor.

595. Respondent further submits that there is no jurisdiction under the Treaty if a dispute is not “*in relation to an investment*” (Treaty, Article 9(1)) and does not arise “*directly out of an investment*” (Article 25(1) of the ICSID Convention). Respondent argues that the measures alleged by Claimant are not specifically related to his investment. They are measures arising out of the application of the Romanian procedure law generally applicable to those who are convicted of tax fraud or forgery crimes.
596. According to Claimant, on the other hand, the illegal interdiction orders forbid Roussalis, who was running the business, to leave the country and travel for about two years, preventing the investment to be properly managed. This allegedly adversely impacted on the investment in violation of Article 2(2) of the Treaty.
597. The Tribunal considers, in light of the foregoing, that what is at stake in Roussalis’ Interdiction Claim is the specific negative impact of the measure on the investment, in violation of the BIT.
598. Respondent also submits that Claimant, in his Interdiction Claim, is asking for the enforcement of a domestic law claim through ICSID. However, a claim arising out of domestic law is not arbitrable before an ICSID tribunal.
599. In this regard, the Tribunal agrees with the ICSID tribunal’s finding in *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, February 22, 2006, ¶68): “*alleged violation of domestic laws [by the host State] would not give rise per se to an international claim cognizable by the present ICSID Tribunal in the absence of an allegation that the BIT has been thereby breached [by the host State]. It will be of course for the merits to determine whether such breaches have indeed taken place to the prejudice of the protection to which the Claimant, as a U.S. investor, is entitled under the treaty. In the Tribunal’s view, these indications set forth in detail by the Claimant allow the Tribunal to conclude that the Claimant has made legal claims against [the host State], so that the Tribunal is presented with a legal dispute within its jurisdiction.*”
600. Claimant is indeed alleging that Respondent’s illegal decisions to prohibit Roussalis from leaving the municipality or country have breached the BIT. Therefore, the Tribunal considers that the Claimant has made legal claims against the host State, so that the Tribunal is presented with a legal dispute within its jurisdiction.
601. In light of the foregoing, the Tribunal decides that it has jurisdiction to rule on the Claimant’s Interdiction Claim.

§2. MERITS

I. Length of the criminal proceedings

602. The criminal proceedings lasted for more than ten years. The Tribunal acknowledges that undue delay to rule on a dispute may amount to a denial of justice. Ten years is a significant period, but a long delay does not automatically result in a breach of due process. The Tribunal must also consider evidence regarding the reasons for the delay to determine whether it was undue.
603. In light of the evidence, the Tribunal notes that:
- The whole situation, and the criminal case in particular, were rather complex;
 - The significance of the interests at stake in the case was large,
 - The criminal court noted that Claimant was not cooperative, he “*eluded the legal search, tried to mislead the legal bodies [...] during the criminal prosecution [by saying] that he did not know about the [...] accounting records, [and caused] a high quantum of [...] damage [which] he did not try to remedy [...] [instead,] he left Romania* (Respondent’s Exhibit n°42, p. 6).
 - The ten years proceedings include the court’s first judgment which was rendered in April 2007, the decision vacating the civil damages award on appeal, and the conduct of a new trial on remand. The criminal prosecutor offered to drop the case in 2009, once the statute of limitations on criminal penalties had run. But Claimant requested that the case proceed.
604. In light of all such circumstances, the Tribunal comes to the conclusion that the delay in issuing a final ruling did not exceed the threshold of reasonableness.
605. The Tribunal is further convinced that the criminal proceedings were not a “pretense trial.” The record shows that they concerned alleged fraudulent conduct in Continent SA’s accounting practices, *inter alia* in relation to the post-purchase investment and the fraudulent avoidance of fiscal duties.

II. Severity of the interdiction measures

606. Regarding the underlying policy permitting the issuance of the interdiction orders, the Tribunal notes that such policies are commonplace in many countries and promote the rational public policy of preventing the accused of fleeing the country in avoidance of criminal prosecution.
607. The interdiction orders were motivated. The record shows that the orders were communicated to Claimant and he had an opportunity to contest them. Indeed, the orders were challenged and were ultimately lifted. And Claimant finally left the country.

608. The Tribunal considers that the fact that the interdiction order was lifted does not mean that the orders were arbitrary or not reasonable. In any case, an “erroneous judgment” by a court would not violate the Treaty in the absence of a denial of justice, that is, a violation of due process.
609. In light of the above, the tribunal considers that the temporary restriction order did not amount to a denial of due process or to unfair, inequitable, unjustifiable or discriminatory treatment in violation of Article 2(2) of the Treaty; or to a breach of the full protection and security standard, as there has been no allegation that the temporary interdiction order compromised the physical integrity of Claimant’s investment against interference by use of force.
610. In light of the foregoing, the Tribunal decides that the State’s behavior actions invoked by Claimant under the “Interdiction Claim” did not breach Article 2(2) of the Treaty.

SECTION IV. THE FOOD AND SAFETY CLAIM

SUB-SECTION I. CLAIMANT’S POSITION ON THE FOOD AND SAFETY CLAIM

§ 1. THE FACTS

I. The FSD Order regarding the interdiction to carry out the activities, n°57/06.05.2005

611. According to Claimant, Romania became obliged to implement Regulation n°852/2004/CE, concerning foodstuff hygiene, only after having joined the European Union in 2007. Accordingly, contrary to Respondent’s submission, food and safety regulations were not introduced in Romania in order to transpose EU Directives for public health purposes. Rather, such regulations were introduced in order to impose tariffs and levy taxes.
612. Continent SA is the owner of food outlets and a refrigerated food warehouse in Bucharest, which it rents to retail and wholesale sellers of food products.
613. On December 10, 2003, Continent SA obtained a permit (A.S.V n°71832/10.12.2003) from the FSD⁸, to operate its refrigerated food warehouse.
614. On May 6, 2005, FSD issued Order n°57/06.05.2005 prohibiting Continent SA from operating its refrigerated warehouse until Continent SA obtained a new operating permit. Continent SA was prohibited from carrying out its reception, storage and delivery activities in relation to frozen and refrigerated products (Claimant’s Exhibit n°63).
615. Continent SA objected to the suspension of its permit and filed an administrative challenge seeking cancellation of the FSD order. FSD answered that: “*Ordinance no.*

⁸ “FSD” (or “DSVSAB”) is the Sanitary-Veterinary and Food Safety Directorate of Bucharest – Food Safety Department sub-unit with jurisdiction over the city of Bucharest. Its tasks include inspections of commercial operators in the food industry and sanitary-veterinary and food safety assistance.

57/06.05.2005 on forbidding carrying the activities of taking-over, warehousing and delivery of frozen and refrigerated products does not refer as an administrative deed in terms of administrative contentious” (Claimant’s Exhibit n°64).

616. In parallel with the above challenge, Claimant sought a re-authorization and obtained a new operating permit from FSD (A.S.V. n°103/29.06.2005).
617. On February 1, 2006, the Bucharest Court cancelled the FSD’s May 6, 2005 order n°57/06.05.2005. Claimant submits that the court, by cancelling the Order, confirmed the fact that it was abusive and that Continent SA had fulfilled the sanitary and veterinary conditions to carry out its activity.
618. Claimant contends that the measure ordered by FSD in its order n°57/06.05.2005 was meant to deliberately block the economic activity of the company. Indeed, CSVSA⁹ issued an “informative note” n°4042/17.06.2005 to this effect (Claimant’s Exhibit n°66). This notified economic agents about the measure and forbid them to accept products of animal origin coming from Continent SA and 34 other trade companies.
619. Claimant asserts that the impact of this informative note was huge. It “*gave a direct blow to the commercial relationships, by an administrative, abusive and tendentious measure, (Ordinance 57/2005), which was cancelled by a court order (judgment 572/01.02.2006)*” (Claimant’s Memorial, ¶187). Indeed, more than 95% of income realized by Continent SA came from activities carried out at the refrigerating warehouses and food outlets.

II. The FSD Order regarding the provisional cancellation of activity n°45/06.03.2006

620. Claimant submits that the MAPDR¹⁰ and the ANSVSA¹¹ are competent to issue normative acts in relation to the organization of the sanitary veterinary activity and to the food safety activity. However, there is no regulation establishing the technical conditions for the functioning of refrigerating warehouses. Therefore, there is no objective criterion for the assessment of an authorization.
621. On its own initiative, Continent SA decided to restructure, re-arrange and modernize the space dedicated to the wholesale and retail trade of animal food products, before December 2006. This program was approved by the FSD.
622. In good faith, Continent SA notified its intention to terminate the works in December 2007. Continent SA explained that the delay was due to a shortage of funds preventing

⁹ CSVSA is the Local Food Safety Department office, with jurisdiction over a particular administrative area of Bucharest.

¹⁰ The MAPDR is the Ministry of Agriculture, Forests and Rural Development: the central public authority having competences in the sanitary veterinary domain and in the food safety domain.

¹¹ The ANSVSA is the National Sanitary-Veterinary and Food Safety Authority (“Food Safety Department”), a government agency, part of the Ministry of Agriculture. Its tasks include promulgation of sanitary-veterinary and food safety regulations.

the investments being made, as well as adverse climatic conditions preventing the performance of construction works (Claimant's Exhibit n°67).

623. Following the notification, the FSD conducted an inspection on March 3, 2006. The inspectors confirmed Continent SA's failure to execute the modernization works in accordance with the initial schedule (minutes n°745/03.03.2006, Claimant's Exhibit n°68). Consequently, for the second time, the FSD suspended Continent SA's operating permit pending completion of the modernization works stipulated in the modernization program. FSD issued order n°45/06.03.2006 regarding the "provisional cancellation of activity." All the reception, storage and delivery activities involving frozen and/or refrigerated products were provisionally prohibited.
624. Continent SA challenged the suspension of its permit by filing an administrative action before the Bucharest Court of Law on June 5, 2006. The court did not issue a decision on the merits but ruled against Continent SA on procedural grounds (Claimant's Exhibit n°70). Continent SA appealed that decision.
625. Claimant contends that, whereas Continent SA was not in breach of any special regulation, it was severely sanctioned for its partial failure to make an investment. The provisional cancellation pending fulfillment of the investment schedule was an unjustified measure, aimed at prejudicing the company by depriving it of its primary income. Indeed, such measure deprived Claimant of its right to use its investment.
626. Claimant further points out that a number of privately owned enterprises were allowed to operate in the same building as Continent SA, while Continent SA's permit was suspended. The witness evidence confirms that Continent SA received discriminatory treatment in relation to other traders on the same premises (Transcript, Day 4, pp. 116-117).
627. The witnesses at the hearing confirmed that Continent SA had not been trading illegally without a license:

"Mr. Bajan: In the numerous Inspections that were performed ever since 2006, by verification of the traders, of the trade companies which operate by verifying the origin and the quality of products that are sold within the precinct have you ever found commodities, or goods, belonging to Continent SA that Continent SA should have been trading in their own name?"

Mrs Dulgheria [head of the veterinary service for hygiene and public health for Bucharest]: No." (Transcript, Day 4, pp. 116-117).

628. Claimant disputes the testimony given by representatives of the food safety department to the effect that they did not encounter any company except Continent SA that did not comply with the alleged regulations (Transcript, Day 4, page 107). According to Claimant, this is due to the fact that Romania's agents specifically targeted Roussalis's investment in order to eventually force him to abandon it.

III. Continent SA did not require a permit in order to operate its refrigerated warehouse facility after the abrogation of Order 139/2004

629. Claimant asserts that Continent SA did not require a permit to operate its cold storage warehouse after the abrogation of Order 139/2004. Therefore, Continent SA legally operated its refrigerated food warehouse without a valid operating permit.
630. Indeed, Orders 276/2006 and 301/2006 – which replaced the abrogated Order 139/2004 beginning December 29, 2006 – only required *producers* of foodstuffs of animal origin to obtain a permit. Since Continent SA is not a foodstuff producer, the FSD measures were illegal, unjustified and impaired Claimant’s right to use his investment.

§ 2. THE LAW

631. Claimant submits that Respondent violated Article 2(2) of the Treaty. According to Claimant, the series of measures and orders taken by FSD, including banning activities in the premises and the refrigeration warehouses, triggered the closure of the warehouses and consequently blocked the company’s economic activity. Such unjustified measures affected the functioning of Continent SA and impaired the Claimant’s right to use the investment. The removal of the license to perform the trade activity also deprived Claimant of its rights and legitimate expectations as to the sale and disposal of Continent SA’s assets.
632. Moreover, permits and licenses held by foreign investors are considered protected investments. Therefore, measures taken against such investments such as Government controls, indirect seizure of licenses or cessation of permits or licenses, whether or not of direct benefit to the State, is a matter for referral to an international tribunal in case there is evidence that the removal was somehow unjustifiable and/or discriminatory.

§3. DAMAGES

633. Claimant submits that *“for the investor, sources of the moral prejudice are the elements affecting the company’s reputation, bringing uncertainty upon the planning of its decisions, producing anomalies in the company’s administration, producing a state of distress and unpleasant situations to the company’s administrators”* (Claimant’s Memorial, §197).
634. The uncertain status of Continent SA’s investments led to anomalies in the planning of its decisions regarding its economic activities, and “unpleasant situations” in relation to other companies. Claimant also alleges that the reputation of Continent SA was affected.
635. Claimant formulates the following request: *“Moral damage is quantified as amounting to USD 5,000,000 and we request to be payed [sic] by the Respondent – Romanian State”* (Claimant’s Memorial, ¶198).

SUB-SECTION II. RESPONDENT'S POSITION ON THE FOOD SAFETY CLAIM

§1. THE FACTS

I. Prior to Romania's accession to the EU (January 1, 2007), Romania's Food Safety Regulations were updated to conform to EU standards

636. Romanian law requires that all businesses connected to the food industry in Romania (including operators of refrigerated food warehouses, such as Continent SA) comply with the food safety regulations, including those promulgated by the National Sanitary Veterinary and Food Safety Authority ("NSVFSA"), the public authority entitled to transpose into national legislation EU Directives on food safety. This legislation is intended to protect public health (Declaration of Alexandrina Stoica, "Stoica Decl.", ¶3.2, Respondent's Exhibit n°139).
637. On December 10, 2003, Continent SA obtained a permit (n°71832) from the FSD, a subsection of the NSVFSA, to operate its refrigerated food warehouse in compliance with the food safety regulations in force at that time.
638. With Romania's impending accession to the European Union, Romania's food safety regulations were updated to comply with EU standards (*see* EU Accession Partnership with Romania that required Romania to bring its regulations, including those dealing with Food Safety, in line with EU standards before accession, Council Decision 98/261/EC of March 30, 1998, Official Journal of the European Communities, L 121 of April 23, 1998; this Accession Partnership was subsequently amended in December 1999, January 2002 and May 2003).
639. In their 2003 Regular Report, the EU Commission stated that: "*[a]s regards food safety and foodstuffs legislation the majority of the transposed vertical foodstuff directives entered into force in September 2002 ... In the area of food safety, Romania has transposed legislation setting the general principles for official control of foodstuffs, foodstuff hygiene, including the introduction of HACCP (hazard analysis and critical control points), and good laboratory practices.*" Accordingly, Claimant's contention that that neither EU law nor Romanian law established technical standards regarding the building and functioning of refrigerated warehouse facilities, and that conformity of such facilities was determined at the whim of the NSVFSA, does not stand.
640. In 2004, the NSVFSA issued Order n°139/2004 providing that, by June 30, 2006, it would inspect all permit holders and re-authorize only those that were in compliance with the new regulations. A noncompliant operator could, however, avoid having its permit revoked if it had obtained – prior to the inspection – the approval of the local subsection of the NSVFSA for a modernization plan that ensured full compliance with the regulations by December 31, 2006.
641. Article 7, paragraph 5 of Order n°139/2004 required permit holders to comply with certain general hygiene requirements even if they were in the process of implementing a modernization plan. Failure to so comply was sufficient reason to shut down an operator.

Operators of refrigerated food warehouses that did not bring their facilities into full compliance with the new regulations were shut down.

II. Continent SA did not comply with Romania's updated food safety standards and its permit to operate a refrigerated warehouse was revoked

642. The FSD inspected Continent SA's facilities on March 29, 2005. The inspectors found that Continent SA's refrigerated warehouse was not in compliance with the food safety regulations. Continent SA's General Director, Mr. Horia Cornaciu, signed and stamped the report adding the handwritten words "*with objections*" and "*immediate action shall be taken to remedy the deficiencies*" (Minutes n°1325/29.03.2005, Respondent's Exhibit n°142; see also, Declaration of Maria Dulgheriu, "Dulgheriu Decl.," Respondent's Exhibit n°140). The inspection report details approximately eighteen specific deficiencies in Continent SA's facility including: no hot water; broken taps; missing temperature control devices; moldy walls; cracked and dirty floors; meat deposited on rotten wooden pallets; frozen meat displayed out of its packaging; and no locker rooms for specialized personnel.
643. On March 30, 2005, as a result of the inspectors' findings, the FSD temporary suspended Continent SA's permit (Ordinance n°36).
644. On March 30, 2005, one day after the first inspection, Continent SA requested that the FSD re-inspect its facilities (Respondent's Exhibit n°143). On April 5, 2005, FSD inspectors conducted the re-inspection and found that the refrigerated warehouse still was not in compliance with the regulations (Respondent's Exhibit n°139). The inspectors recorded the remaining deficiencies in their re-inspection report, which was signed by Continent SA's General Director, who added a handwritten note agreeing that Continent SA would "*ensure [that] compliance with the hygiene rules shall be continued and finalized*" (Respondent's Exhibits n°139 and 141).
645. On April 18, 2005, upon receiving from Continent SA another re-inspection request, FSD inspectors re-inspected Continent SA. They found that Continent SA still was not in compliance with regulations regarding the handling of products of animal origin or regulations concerning storage temperature restrictions. The inspection report n°2651, dated April 18, 2005, was again signed and stamped by Mr. Cornaciu (Respondent's Exhibit n°139). The FSD decided to maintain the temporary suspension in place, but Continent SA was given another opportunity to cure the deficiencies.
646. After receiving a further re-inspection request from Continent SA on April, 20 2005, FSD inspectors performed a re-inspection on May 6, 2005. They concluded that Continent SA's refrigerated facilities again failed to meet regulatory standards (Minutes n°2062, Respondent's Exhibit n°140). The company inexplicably refused to participate in the inspection or sign the report.
647. Based on Continent SA's repeated failure to bring its facilities into compliance with the food safety regulations, the FSD issued Order n°57/06.05.2005 on May 6, 2005,

prohibiting Continent SA from operating its refrigerated warehouse effective May 11, 2005, until Continent SA obtained a new operating permit (Respondent's Exhibit n°140).

648. On June 22, 2005, Continent SA objected to the suspension of its permit. It filed an administrative challenge seeking cancellation of the order (petition n°164/2005, Respondent's Exhibit n°144). Under the requirements of the NSVFSA Order n°139/2004, noncompliant permit holders, such as Continent SA, were not entitled to continue their operations until June 30, 2006 without an FSD approved modernization and restructuring program in place.
649. On June 13, 2005, Continent SA submitted a petition to the FSD seeking renewal of its operating permit based on the submission of modernization plan n°19997/13.06.2005. Continent SA's modernization plan recognized the existence of the deficiencies identified by the FSD and detailed how Continent SA would bring its refrigerated warehouse into compliance by December 31, 2006 (Dulgheriu Decl., Att. G). The modernization plan set out certain key items for each deficiency previously reported by the FSD. Respondent points out that the modernization plan included references to the legal source of each technical requirement. This contradicts Claimant's unsupported and baseless assertions that: (i) the regulations failed to make clear the technical requirements to be met by operators of refrigerated food warehouses; and (ii) no objective criteria clearly established how FSD would assess the conditions at Continent SA.
650. The modernization plan was approved by a commission of four inspectors, including Ms. Dulgheriu and Ms. Stoica, on June 27, 2005 (Dulgheriu Decl. ¶4.2 and Att. G; Stoica Decl. §5.2). The FSD's approval official report covered all of the elements of the modernization plan, including FSD's expectation that the interim deadlines (to cure the deficiencies) in the modernization plan would be met.
651. Following approval of the modernization plan, the FSD issued a new operating permit to Continent SA (A.S.V. n°103/29.06.2005), which was subject to the same requirements as the modernization plan approved several days earlier (Dulgheriu Decl. §4.3).
652. On February 1, 2006, eight months after Continent SA had obtained a new operating permit based on the modernization plan, the Bucharest Court of Law cancelled the FSD's order of May 6, 2005 (which had not been in force since June 29, 2005 when a new permit was issued to Continent SA). The court did not find that Continent SA was in compliance with the regulations. It held that the approval of the modernization plan in June 2005 constituted a change in circumstances after the revocation of the May 6, 2005 permit, entitling Continent SA to continue its operations (Respondent's Exhibit n°145).
653. On February 2, 2006, one day after the court cancelled the superseded order, Continent SA wrote to the FSD seeking relief from the interim deadlines in the modernization plan asking that all the interim deadlines be extended to the final completion date of December 31, 2006. Continent SA based its request on alleged financial constraints, which were neither explained nor substantiated, and on "*winter weather*" (Respondent's Exhibit n°148). Respondent submits that this explanation for failure to timely perform its obligations is at odds with the minutes of Continent SA shareholders' meeting April 29,

2005 (Respondent's Exhibit n°149). The minutes stress the urgency of implementing the plan, and the approved estimated budgets denote the availability of funds for completion of the modernization plan in advance of the plan's submission. Moreover, the alleged financial constraints are also at odds with two management reports (Respondent's Exhibits n°150 and 151) indicating that RON 1.3 million, in 2005, and RON 1.7 million, in 2006, was available for the company's modernization plan.

654. In the light of the interim deadline of February 28, 2006 set out in Continent SA's modernization plan, FSD inspectors conducted a follow-up inspection. This revealed that none of the planned improvements scheduled for completion prior to that date had been implemented (Dulgheriu Decl. §5.1). Mr. Horia Cornaciu signed a copy of the inspection report (Dulgheriu Decl., Att. I).
655. On March 6, 2006, the FSD suspended Continent SA's operating permit A.S.V. n° 103/20.06.2005 for failure to meet the implementation milestones set out in the approved modernization plan. The suspension order provided that Continent SA's permit could be restored if and when the improvements required under the modernization plan were completed.
656. Respondent points out that Continent SA has continued to operate its refrigerated food warehouse despite the FSD's suspension order. Moreover, Continent SA defied the FSD order by renting out space at its refrigerated warehouse to other commercial entities in the period after the suspension of its permit (Dulgheriu Decl., Att. J).
657. Although Claimant filed this arbitration with ICSID in January 2006, Continent SA challenged the March 6, 2006 suspension of its permit by filing an administrative action in the Bucharest Court of Law on June 5, 2006. The court ruled against Continent SA on procedural grounds. Continent SA appealed the decision. On January 31, 2008, the appellate court granted Continent SA's request to remand the case for a trial on the merits. On January 23, 2009, the Bucharest Tribunal dismissed Continent SA's challenge to the order dated March 6, 2006 on the following grounds: (1) Continent SA admitted that it had not complied with the interim deadlines or with its other obligations under the modernization plan; (2) Continent SA's permit to operate the refrigerated warehouse was subject to the observance and completion of the modernization plan; (3) Continent SA failed to comply with the modernization plan despite numerous inspections and written notices from FSD; (4) the alleged financial constraints invoked by Continent SA have not been proven, and the winter weather could not possibly have prevented Continent SA from executing the works because the modernization plan required mainly indoor works; (5) Continent SA's purported good faith has not been proven, since it has done nothing at any stage to remedy the deficiencies identified in the modernization plan.
658. Indeed, inspections performed by the FSD on February 7, 2008 and April 25, 2008 confirmed that Continent SA had still not completed the work required under the modernization plan, and food safety conditions in the warehouse had deteriorated (Respondent's Exhibits n°154-159). Further, Continent SA continued to operate its refrigerated warehouse illegally, without a permit, and it failed even to apply for a new permit by the deadline established by FSD in an updated food safety regulation, Order n°

276/2006. In this regard, Respondent denies Claimant's assertion that Continent SA did not require a permit after the abrogation of Order 139/2004. Claimant's position is based on the incorrect assumption that Order 276/2006 – which replaced the abrogated Order 139/2004 beginning December 29, 2006 – only required *producers* of foodstuffs of animal origin to obtain a permit. It is clear from the order itself that it required businesses such as Continent SA, operating refrigerated food warehouses, to carry out their activities only after obtaining a permit. Indeed, Article 3(1) of Order 276/2006 provides that: "*Business units shall carry out the activities specified in Annex 1 only after obtaining the authorization issued by the competent sanitary-veterinary authority*". Annex 1 A(1) of Order 276/2006 lists: "*Refrigerated warehouse: unit having adequate premises and low temperature installations for the reception, storage and delivery activities of deep-frozen and/or refrigerated animal origin products*".

659. Respondent emphasizes in its Post Hearing Brief that, when Mrs. Dulgheriu and Mrs. Stoica were shown short segments from the video survey of the premises and operations of Continent SA during the Hearing, the witnesses pointed out numerous health and safety violations (Transcript, Day 3, pages 101-105): a decrepit building, moldy walls, improper ceilings, meat stored out of packaging and without refrigeration which allows bacteria to breed, floor in disrepair allowing bacteria to breed, dogs roaming on the access ramp where food is loaded, unsanitary garbage removal. Mrs. Dulgheriu testified that the images in the video were consistent with what she had seen during her regulatory inspections at Continent SA, but in some instances what she found during the inspections was "*even worse than you can see in the images.*" Therefore, Respondent submits that Claimant obviously operated his company with total disdain for the health and safety rules applicable to the type of business he purchased.

§2. THE LAW

I. The Tribunal lacks subject matter jurisdiction to decide this claim, as matters of purely domestic law fall outside ICSID's jurisdiction

660. Claimant's Food Safety Claim arises from matters of general domestic law in Romania. Continent SA's obligation not to violate the food safety regulations applicable to its refrigerated foods warehouse was not specifically contracted for in the Privatization Agreement and does not arise directly out of Claimant's investment. Accordingly, this claim does not fall within Article 25(1) of the Convention. Rather, it is to be decided under Romanian law by the Bucharest Court of Law, before which Claimant filed an administrative action on June 5, 2006 challenging the FSD's March 2006 order.
661. Respondent submits that Claimant provides no justification for transforming these issues of purely domestic law into matters involving State responsibility for alleged violations of international norms, or for asking the Tribunal to sit as an appellate body in review of domestic administrative decisions. The Tribunal should thus decline to exercise jurisdiction over this claim.

II. The claim does not assert any Treaty violation

A. Romania did not take any “unjustifiable or discriminatory measures” against Claimant

662. Respondent points out that Claimant presents no evidence to support its assertion that the revocation of the operating permit for Continent SA’s refrigerated food facilities was unjustifiable or discriminatory.
663. Claimant does not allege that the FSD’s regulatory measures somehow discriminated against Continent SA. Indeed, in practice, all operators of refrigerated facilities (domestic and foreign) were under identical obligations. In this regard, it is a principle of customary international law that compensation is not required where economic injury results from a *bona fide*, non-discriminatory regulation that falls within the police power of the State (R. Ago, *First Report on State Responsibility, op.cit.* at 197). Respondent asserts that the FSD measures taken against Continent SA are not discriminatory and they constitute an appropriate exercise of the police power of the Romanian State, especially given Continent SA’s admission that it was not in compliance with food safety regulations.
664. Given the absence of any discriminatory conduct, Claimant’s sole basis for this claim is the contention that the orders suspending Continent SA’s operations were unjustifiable. The FSD’s regulatory measures, however, were justified by an important public safety purpose, namely, serious public health and safety considerations.
665. Respondent notes that Claimant does not allege that Continent SA’s refrigerated warehouse facilities complied with the food safety regulations applicable when its operating permit was suspended and eventually revoked. On the contrary, on March 29, 2005, Continent SA’s General Manager promised the FSD inspectors, in writing, that “*immediate action shall be taken to remedy the deficiencies.*” Moreover, Continent SA admitted in its modernization plan that it was not in compliance with a number of requirements. Therefore, in light of the acknowledged deficiencies and the company’s repeated failure to remedy those deficiencies, the FSD’s actions were not only justified, but also necessary.
666. Faced with Continent SA’s inspection record, its disregard of its Managing Director’s commitment to take “immediate action” to correct the deficiencies, and its lack of meaningful progress toward the commitments made in the modernization plan, it is not surprising that the FSD gave short shrift to the company’s 2006 proposal to relax the deadlines under the modernization plan. By failing to comply with food safety regulations for at least a year, Continent SA destroyed any credibility it may have had. Therefore, suspension of Continent SA’s permit was justified under the circumstances.
667. The inspections were not excessive in frequency or scope and were carried out with a team of inspectors whose number was appropriate for a facility of this size. Claimant, over a period of years, failed to come into compliance with sanitary and veterinary regulations governing the operation of a refrigerated food warehouse. Nevertheless, Continent SA has continued unlawfully to operate an unsanitary and substandard facility,

even after its operating permit was suspended and eventually revoked (*See Dulgheriu Testimony, Transcripts, Day 3, pp. 95, 96, 100, 101*).

B. The Bucharest Court's decision does not establish that the FSD's actions violate the Treaty

668. The Bucharest Court of Law issued a decision on February 1, 2006, cancelling the May 6, 2005 order. Respondent denies Claimant's allegation that the decision confirmed that the May 2005 order was "abusive" and that Continent SA was in compliance with the food safety regulations. Rather, the court observed that, since Continent SA had submitted a modernization report and the FSD had accepted that plan and issued a new operating permit, the FSD could have imposed a less severe sanction than suspension of the permit to achieve the purposes of Order n°139/2004.
669. The court stated that some unspecified, less burdensome sanction might have been imposed. However, Respondent submits that the mere availability of less onerous remedies fails to establish that the May 2005 order was "abusive." The May 2005 order was appropriate in view of Continent SA's failed inspections from March to May 2005 and its failure to submit a modernization plan to the FSD at that time.

§ 3. DAMAGES

670. Respondent submits that Claimant bears the burden to establish his claim but has put forth no evidence to support any of his contentions.

I. Claimant has demonstrated no compensable damages incurred by Continent SA as a result of the May 2005 order

671. Respondent denies Claimant's allegation that the "informative note" issued to a company named S.C. Teonel Impex SRL in June 2005 had a huge impact (see above, ¶¶618-619).
672. There is no evidence that this notice caused Continent SA to experience any compensable loss under the Treaty. The notice lists Continent SA and three dozen other companies whose refrigerated food warehouse operations were suspended (presumably due to violations of food safety regulations), and notifies Teonel Impex that "*the receipt of animal origin products from this company is hereby forbidden*" (Claimant's Exhibit n°66). This notice demonstrates that numerous other companies were subjected to measures similar to those applied to Continent SA and that Continent SA was not singled out for disparate treatment.
673. Such notes are common practice and serve to inform retailers about the suspension or revocation of an operator's permit for noncompliance with food safety regulations. The purpose of such notes is to protect public health. Moreover, given that the notice purportedly was issued on June 17, 2005 and Continent SA's operating permit was restored twelve days later, on June 29, 2005, any adverse impact would have been minimal. Claimant offers no evidence that Continent SA was harmed as a consequence of either the informative note or the enforcement actions of the FSD.

II. Claimant's allegations of damages caused by the March 2006 order are unproven

674. Respondent denies Claimant's assertions that the May 2005 permit revocation had a "huge" impact on Continent SA, that the latter's reputation was affected, that there were uncertainties and unspecified "anomalies" in administering the company, and that unnamed company directors have experienced "distress and unpleasant situations." (Claimant's Memorial, ¶197). The complete failure of proof of these vague assertions requires that the claim be denied.
675. Furthermore, Respondent submits that Continent SA failed to mitigate any damage it may have suffered after the order suspending its operating permit in March 2006. Continent SA would have been able to resume operations under a restored permit if it had completed the improvements called for under its own modernization plan.

III. The alleged damages fall short of what is required for compensable moral damages

676. Respondent reiterates that moral damages are not available for alleged investment treaty violations except in the most extreme circumstances, which are not present here (see above, ¶¶294 *et seq.*, in particular ¶¶296-297). Claimant's allegation of reputational harm caused to Continent SA by the FSD's regulatory actions does not meet this standard.
677. Respondent points out that Claimant caused his company, Continent SA, to continue to operate its refrigerated foods warehouse in violation of the FSD shut down order and in contravention of Romania's food safety regulations.
678. In light of the foregoing, Respondent submits that the claim for damages is unsupported by any evidence, baseless and should be dismissed.

SUB-SECTION III. DECISION OF THE TRIBUNAL

§1. JURISDICTION OVER THE FOOD SAFETY CLAIM

679. Respondent submits that because Claimant's Food Safety Claim arises from matters of general domestic law in Romania, the Tribunal should decline to exercise jurisdiction over this claim.
680. The Claimant objects submitting *inter alia* that the orders banning activities in the premises and the refrigerating warehouse, blocked Continent SA's activity, thus impairing the investment. Claimant further submits that those measures which have been taken by FSD, a State authority, have affected its legal rights stemming from the BIT.
681. The Tribunal agrees with the arbitral tribunal's finding in *Continental Casualty Company v. Argentine Republic* referred to in ¶599 above (ICSID Case No. ARB/03/9, Decision on Jurisdiction, February 22, 2006, ¶68).
682. Here, Claimant alleges that Respondent's *illegal* decisions to suspend or prohibit the operation permits of its investments have breached the BIT. The Claimant is therefore

making legal claims against the host State, with the consequence that the Tribunal is presented with a legal dispute within its jurisdiction.

683. Consequently, the Tribunal decides that it has jurisdiction to rule on the Claimant's Food Safety Claim.

§2. MERITS

684. In its Food Safety Claim, Claimant argues that Romania has violated Article 2(2) of the Treaty. Claimant principally contends that the measures taken were unjustifiable, disproportionate, discriminatory, and deprived Claimant of its rights and legitimate expectations.
685. Having reviewed the evidence and the reasons which the State authorities have invoked in support of their several control minutes and decisions, the Tribunal is of the view that these decisions were not "unjustifiable measures."
686. Indeed, food and safety policies are commonplace in many countries and promote an important public safety purpose, namely public health. Each of the State authorities' decisions was motivated in regard to these food and safety regulations. The Tribunal is therefore not convinced at all that the control actions and the subsequent decisions of the tax authorities were aimed at blocking the activity of the company.
687. Moreover, suspending or revoking operating permits may be regarded as a reasonable and appropriate measure to penalize serious irregularities to the food and safety regulations.
688. The record shows that the State authorities had legitimate concerns about the fulfillment of Claimant's obligations in regard to the food and safety regulations. Moreover, as Mrs. Maria Dulgheria and Mrs. Alexandrina Stoica – veterinary doctors specialising in food hygiene and employed by Romania's Food Safety Department – pointed out in their testimony, the inspections were carried out in accordance with Romania's National Strategic Plan, developed in consultation with the European Union. Their frequency was not excessive, based on objective criteria, such as the level of risk, and they were carried out with a team of inspectors whose number was appropriate for a facility of that size. The witnesses explained their observations and their determinations that the company, over a period of years, failed to come into compliance with sanitary and veterinary regulations governing the operation of a refrigerated fueled warehouse; and that, nevertheless, Continent SA has continued unlawfully to operate the facility, even after its operating permit was suspended and eventually revoked. They also pointed to Claimant's persistent refusal to address the deficiencies that were identified in the inspections. During the cross-examination Claimant did not establish any procedural or substantive irregularities in the inspections conducted by the Food Safety department.
689. The Tribunal does not agree with Claimant's allegation that on the basis of the evidence, Continent SA received discriminatory treatment in relation to other traders on the same premises. Indeed, Ms Dulgheria stated in this regard: "*There was just one licence for Continent SA and all the tenants operate on the basis of such a licence*" (Transcript, Day

4, p.114, line 14). In the Tribunal's view, this is consistent with Respondent's explanation that, according to the lease agreements between Continent SA and the tenants who operated food sales concessions at Continent SA's premises, compliance with the food safety regulations was Continent SA's responsibility; that is why the "other traders on the same premises" were not directly subject to the regulations. Accordingly, Claimant has not proven that the measures targeted Claimant's investment specifically.

690. The Tribunal therefore considers that Claimant did not prove that the measures of which he here complains were unjustifiable, disproportionate and discriminatory.
691. Moreover, Claimant's argument that the State authorities' behavior in conducting too many inspections and imposing too severe penalties, namely suspensions or revocations of operating permits, would amount to a failure to protect its legitimate expectations is not justified. The regulations which lead to the incriminated decisions were taken by FSD in the course of exercising its obligations to implement the food and safety regulations. Such regulations by a state reflect a clear and legitimate public purpose. In the Tribunal's view, Claimant may not have expected that the State would refrain from adopting regulations in the public interest, nor may Claimant have expected that the Romanian authorities would refrain from implementing those regulations.
692. In light of the foregoing, the Tribunal decides that the State's actions invoked by Claimant under the "Food and Safety Claim" did not breach Article 2(2) of the Treaty.

SECTION V. THE OZIAS TAX CLAIM

SUB-SECTION I. CLAIMANT'S POSITION ON THE OZIAS TAX CLAIM

§ 1. THE FACTS

693. In 2001, Continent SA and Ozias Marine Company ("Ozias") entered into consulting contracts pursuant to which Ozias was to provide Continent SA with management and technical consulting services to help Continent SA improve its performance, satisfy its existing customers, and attract new customers (Claimant's Exhibit n°71). On October 26, 2001, Continent SA declared and registered the contracts with the 6th District Administration of Public Finance in Bucharest.
694. Claimant submits that Continent SA's income increased during the period when the consulting contracts were in force (Claimant's Exhibits n°42 and 72). Such a spectacular and continuous rise in income evidences the effectiveness of the consulting services. Claimant denies Respondent's allegation that Ozias was dissolved in February 2005. In any case, Claimant points out that the relevant time for considering Ozias's work is 2002-2003, as mentioned in the December 17, 2003 tax audit report at issue.
695. Indeed, the Tax Agency audited Continent SA and, in its December 17, 2003 tax audit report, refused tax deductions for the Ozias consulting fees and held Continent SA liable for unpaid profit tax, VAT, interest and penalties.

696. Whereas the Tax Agency did not recognize the consulting services as having been rendered, the Tax Agency also held Continent SA liable for VAT on the cost of Ozias's fees. Because Continent SA did not pay the required VAT, the Tax Agency assessed additional VAT liabilities, interest, and penalties.

§ 2. THE LAW

697. Claimant contends that the measures taken by the Tax Agency impaired the company's management and discouraged good management. According to Claimant, the Romanian institutions abusively sanctioned Claimant and prevented him from optimizing his business relating to the investment.

698. Claimant submits that the denial of deductions and the imposition of additional taxes were unjustified, and therefore in violation of Article 2(2) of the Treaty, for the following three reasons.

699. First, Claimant asserts that the higher profit tax liability was an unjustified measure since the increase in Continent SA's income proved the efficiency of the consulting services. Indeed, the Tax Agency, when auditing Continent SA's accounts and evaluating the services rendered by Ozias under the consultancy contracts, adopted a formalistic approach and ignored substantive evidence, such as the fiscal results obtained by Continent SA which proved the provision of consultancy services by Ozias.

700. Second, the Romanian State, through its Tax Agency, had a contradictory attitude:

- one the one hand, the effects of the consulting contracts were not acknowledged, resulting in the recalculation of the profit tax and VAT;
- on the other hand, the consulting contracts were invoked in order to claim VAT.

701. Third, the law regarding taxable profits, in force on the date of the tax audit (*i.e.*, December 17, 2003), did not entitle the Tax Agency to deny profit tax deductions on the basis of the economic purpose of a commercial operation. The Tax Agency only became entitled to deny profit tax deductions on the above ground after the enactment of Law 571/2003 (in particular, Article 11), which entered into force on January 1, 2004.

§ 3. DAMAGES

702. Claimant alleges "moral prejudice" and bases his claim for moral damages on the grounds that the denial of tax deductions and imposition of additional taxes affected Continent SA's reputation, brought uncertainty to the company's business planning, and caused distress among Continent SA's directors.

703. In this regard, Claimant formulates the following request: "*Moral damage is quantified as amounting to USD 1.000.000 and we request to be payed [sic] by the Respondent-Romanian State*" (Claimant's Memorial, ¶198).

SUB-SECTION II. RESPONDENT’S POSITION ON THE OZIAS TAX CLAIM

§ 1. THE FACTS

I. Continent SA allegedly contracted with Ozias for Consulting Services

704. On July 1, 2001, Continent SA and Ozias entered into three contracts for consulting services to be provided to Continent SA (Respondent’s Exhibits n°161, 162 and 163).
705. The first two contracts purport to provide Continent SA with the services of “Commercial Managers.” These required Ozias to provide advice to Continent SA on the following issues: (1) the development of Continent SA’s business; (2) the identification of potential clients in Greece; and (3) any other commercial issues Continent SA might face. The third contract made available the services of a “Technical Manager.” The latter’s role was to provide technical assistance to develop Continent SA’s business. He was required to help with the modernization, reparation and exploitation of the refrigerated warehouse. The contract also required him to identify potential clients in Greece and provide Continent SA with useful information related to business strategy.
706. Each contract: (i) had an indefinite term; (ii) called for a monthly consulting fee of USD 3,500 to be paid to Ozias; and (iii) required Continent SA to pay any additional expenses incurred by the individual consultants for transportation, accommodation, or meals when traveling to Romania. On July 5, 2002, after the contracts had been in force for one year, each contract was amended to increase the monthly consulting fee to USD 5,500, beginning with the July 2002 payment (Respondent’s Exhibits n°164, 165, and 166). In November 2005, the monthly consulting fee apparently increased to USD 7,500 per contract (*See, e.g.*, Ozias’s Invoice N°147 for services performed under all three Consultancy Agreements, Respondent’s Exhibit n°167). The monthly consulting fee increased again to EUR 12,000 per contract for the period from May to November of 2006. (*See, e.g.*, Ozias’s Invoice N°48 for services performed under all three Consultancy Agreements, Respondent’s Exhibit n°168). In total, Ozias billed Continent SA for consulting fees from July 2001 through November 2006 (*See* Respondent’s Exhibit n°169).

II. Ozias was formed to be a shipping company

707. Respondent points out that Ozias’s corporate records show that Ozias was formed in Greece in 1995 to operate as a shipping company. According to its articles of incorporation, “*the company’s exclusive object of activities [was] to own, operate and manage Greek merchant and fishing ships*” (Respondent’s Exhibit n°170). Claimant was the majority shareholder of Ozias with 70 percent ownership; his son, Stavros Roussalis, owned the remaining 30 percent of the company’s shares.
708. On February 9, 2005, at a general meeting, the Ozias’s shareholders decided to dissolve the company (Respondent’s Exhibit n°171). The fact that Ozias was dissolved in February 2005 is further confirmed by a letter dated November 21, 2006 from the Greek Ministry of Commercial Shipping (Respondent’s Exhibit n°201). Claimant was responsible for liquidating the assets and winding up the business affairs of the company.

However, in February 2005, Ozias continued to send monthly invoices to Continent SA and raised its fee rates under the contracts until at least November 2006.

III. Continent SA has not substantiated Ozias's work product

709. According to Respondent, there is no evidence that Ozias actually provided any services to Continent SA. The invoices sent by Ozias to Continent SA contain no description of the services supposedly provided.
710. Respondent refutes Claimant's assertion that Continent SA's increased revenue during the period in which the Ozias contracts were in force is sufficient to prove that Ozias rendered the services as claimed.

IV. Claimant took tax deductions on payments made to Ozias

A. The Tax Agency disallowed Continent SA's profit tax deductions for the Ozias fees

711. Law 414/2002 sets forth the supporting documentation that Continent SA was required to provide in order to obtain a tax deduction for the consulting fees paid to Ozias. Article 9(7) of Law 414/2002 requires both a written contract and proof that services were rendered with a view to generating income for the company. The Tax Agency informed Continent SA that its documentation was inadequate because Ozias's invoices did not "*detail [...] the service performed*" and failed to show "*the number of consultancy hours*" (Respondent's Exhibit n°85, p. 16). Because Continent SA's expenses, supposedly for consulting fees, were not properly documented in accordance with the Romanian tax legislation, the Tax Agency denied Continent SA tax deductions for payments made to Ozias and assessed additional profit taxes (Chivu Decl., ¶5.4.2).
712. The Tax Agency's decision in December 2003 to deny profit tax deductions was taken absent any documentary proof of Ozias having provided any services whatsoever to Continent SA. Indeed, Article 27(1) of Law n°414/2002 enables the Tax Agency to verify and recalculate the taxable profit of a company, stating that "*the expenses related to management services, consultancy, assistance or the supply of services are not considered deductible expenses if written agreements are not concluded and if the beneficiary cannot evidence the supply of such services.*"

B. The Tax Agency also assessed VAT liabilities that Continent SA had failed to pay

713. The Tax Agency also held Continent SA liable for VAT on the cost of Ozias's fees. Romanian tax law in effect before June 2002 required Continent SA to pay the VAT for Ozias's services within seven days after Continent SA received an invoice from Ozias, and immediately upon receipt of the invoice after June 2002 (Respondent's Exhibit n°85, p. 6). Because Continent SA did not pay the required VAT, the Tax Agency assessed additional VAT liabilities, interest, and penalties.

C. Continent SA objected to the profit tax and VAT assessments

714. Continent SA objected to the assessment of additional profit taxes and VAT in the Tax Agency's December 17, 2003 tax audit by filing an administrative challenge on January 5, 2004 (Respondent's Exhibit n°84). Continent SA argued that its revenue growth during the period when Ozias allegedly provided services was sufficient to prove that Ozias had provided services to Continent SA. Continent SA also contested that it owed VAT, arguing that consulting services provided by foreign entities did not incur VAT liability.
715. Continent SA registered a formal challenge to the Tax Agency's tax audit before the Bucharest Court of Law. Continent SA's dispute with the Tax Agency is pending and the company has not paid the Ozias-related tax liabilities assessed by the Tax Agency.

§ 2. THE LAW

I. The Tribunal lacks subject matter jurisdiction over the Ozias Tax Claim

716. Respondent points out that Claimant does not allege that Continent SA was somehow treated differently from other similarly-situated corporate taxpayers with respect to the application of the relevant tax laws. Nor does Claimant allege that the Tax Agency took any discriminatory action against Continent SA with respect to the application of the taxes in this claim.
717. Respondent further submits that the Treaty does not extend its jurisdiction to garden-variety tax disputes of the kind Claimant raises here. The Tribunal should thus decline to exercise jurisdiction over Claimant's claim alleging unjustified tax assessments for the same reasons set out regarding the Fiscal Claim (see above, ¶¶457 *et seq.*).

II. Claimant has neither alleged nor proved a Treaty violation

A. Claimant was not subjected to any "unjustifiable or discriminatory measures"

718. Respondent points out that Claimant does not allege that the Tax Agency's assessment of additional taxes discriminated against Continent SA. Absent any allegedly discriminatory conduct, Claimant's sole basis for this claim is the contention that the additional tax liabilities relating to the Ozias payments were not justified.
719. State responsibility is not triggered, and thus no compensation is required, where economic injury results from a *bona fide* non-discriminatory regulation that falls within the police power of the State (see above, ¶663). Thus, Romania is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation.
720. Moreover, Respondent denies Claimant's allegation that this tax dispute "*impair[ed] the company's management, by discouraging the use of good management*" and prevented him from trying "*to optimize the course of [the company's] business related to the investment*" (Claimant's Memorial, ¶202). Indeed, Claimant bears the burden to establish the alleged injury, its extent, and its cause. He has failed to do so.

721. Indeed, Respondent submits that the premise of Claimant's argument is seriously flawed as a matter of basic logic. An increase in the income of Continent SA during 2002 and 2003 could have resulted from any number of factors having nothing to do with any services allegedly provided by Ozias.

B. There are reasonable grounds to question the legitimacy of the claimed consulting fees

722. Respondent points out that the Tax Agency specifically requested documentation that Ozias did, in fact, render services to Continent SA, and the company provided none. That failure raises a reasonable doubt as to whether such work was ever performed. Claimant similarly provides no such documentation in support of his claim here.

1. The absence of an arm's-length agreement raises reasonable doubts as to whether any services were ever provided

723. Respondent points out that Claimant used his control as majority owner of both Continent SA and Ozias to commit one Roussalis company to pay another Roussalis company substantial sums for alleged consulting services under circumstances where neither entity has provided any evidence that such services were, in fact, rendered. Respondent submits that the contracts were a scam designed to repatriate a portion of Continent SA's profits as purported consulting fees, whilst claiming a bogus tax deduction for doing so.

2. The contracts raise serious questions that have not been answered

724. First, Ozias's articles of incorporation state that its "*exclusive object*" was to "*own, operate and manage Greek merchant and fishing ships.*" This raises a reasonable question about Ozias's qualifications to render consulting services.

725. Second, Ozias is a company in dissolution, which raises questions as to the *bona fide* purpose of the Ozias contracts and the tax deductibility of payments made under them.

726. Finally, Respondent notes the dubious potential benefit of management consultancy services to Continent SA's *refrigerated warehouse*. Whilst the contracts contemplated that the consultants would travel to Romania at Continent SA's expense, in order "to provide information" and "facilitate new agreements," Ozias never invoiced Continent SA for a single trip. These anomalies give rise to reasonable doubts as to whether the services were rendered.

727. Similarly, the fact that the FSD suspended Continent SA's permit for operating a refrigerated warehouse for failing to implement the modernization plan submitted by the company raises reasonable doubts over whether Ozias ever provided services under the contract for technical services. From May 2006 to November 2006, Continent SA paid Ozias EUR 36,000 per month, a total of EUR 216,000 (Respondent's Exhibit n°169). During that same period, it failed to complete a single improvement required by the modernization plan.

728. To prevail on this claim, Claimant has the burden of producing sufficient evidence for the Tribunal to find that the Tax Agency's denial of Continent SA's tax deduction for lack of documentation is impossible to excuse or justify under any circumstances. Claimant has come nowhere close to meeting this burden.
729. Respondent submits that there were several grounds for questioning the propriety of the tax deductions (see above, ¶¶723 to 727). Moreover, the failure to produce any documentation evidencing that services were rendered by Ozias would itself justify denial of the tax deduction under the documentation requirement of Article 9(7) of Law 414/2002. Indeed, the Romanian Supreme Court gave a definitive ruling on the documentation required to obtain a profit tax deduction for consulting services. In a decision denying profit tax deductions for consulting services, the Supreme Court required proof that consulting services were actually rendered (Decision 248/2006).

C. Claimant's complaint about the Tax Agency's inconsistent positions is baseless

730. The profit tax and VAT are governed by different provisions of Romanian tax legislation.
731. VAT is incurred by a company headquartered in Romania that engages consulting services from companies headquartered outside Romania (Chivu Decl. ¶5.4.3.). The applicable law required Continent SA to pay the VAT on those fees within seven days of receiving the invoice from Ozias for the period up until June 2002, and immediately upon receipt of the invoice for the period beginning June 2002. Because the company failed to pay the required VAT, the Tax Agency thus assessed liability for the unpaid VAT and related interest and penalties.
732. Respondent points out that the deductibility of the consulting fees for profit tax depends upon the required documentation. A failure to document the expenses merely disqualifies the taxpayer from claiming a profit tax deduction.
733. Accordingly, contrary to Claimant's allegations, there is no inconsistency in the Tax Agency's position. Continent SA had every opportunity to present documentation that consulting services were rendered by Ozias. Moreover, by receiving Ozias invoices, Continent SA itself showed that it was liable for the VAT. The position of the Tax Agency is grounded in the relevant provisions of the tax legislation and is entirely reasonable.

§ 3. DAMAGES

734. Claimant bears the burden of establishing the alleged injury, its extent, and its cause. It has failed to meet this burden.

A. Continent SA has not paid the assessed tax liability and there is no evidence to prove that this issue affected Continent SA’s reputation, business planning, management, or employee morale

735. Respondent denies Claimant’s allegation that it should be awarded moral damages because the reputation of Continent SA was affected and because there was uncertainty and unspecified “anomalies” in administering the company (Claimant’s Memorial, ¶207).
736. Claimant boasts that Continent SA enjoyed a “spectacular increase in income” during the very period when this dispute arose (Claimant’s Memorial ¶204). Moreover, as of this date, Continent SA has not paid any part of the tax liability for Continent SA’s payments to Ozias. Until Continent SA is required to pay the assessed tax liability, it has not suffered any injury. Furthermore, Continent SA and Claimant have appealed the ruling of the Criminal Court which held Continent SA liable for the tax liabilities related to the Ozias contracts. The appeal remains pending. It is thus premature to put these issues before the Tribunal.

B. The USD 1 million sought by Claimant does not qualify as compensable moral damages

Respondent reiterates that moral damages are not available for alleged investment treaty violations except in the most extreme circumstances, which are not present here (see above, ¶¶294 *et seq.*). Claimant’s allegation of reputational harm certainly does not rise to such a level. Moreover, Claimant failed to offer any proof in support of the amount of moral damages he claims. Indeed, the moral damages claim is duplicative of Claimant’s Fiscal Claim, in which he seeks damages based on the amount of the tax liabilities assessed, including the liabilities related to the Ozias payments.

SUB-SECTION III. DECISION OF THE TRIBUNAL

§1. JURISDICTION OVER THE OZIAS TAX CLAIM

737. Respondent argues that ICSID tribunals have no jurisdiction to resolve tax disputes between Continent SA and the Romanian Tax Agency. It submits that tax disputes do not come within the jurisdictional scope of the BIT, particularly where Claimant has not alleged that Continent SA was somehow treated discriminatorily or differently from other similarly-situated corporate taxpayers with respect to the application of the relevant tax laws.
738. On the other hand, Claimant submits that the Tax Agency’s decisions were abusive and unjustified and prevented a good management of Continent SA, therefore arguably having an adverse impact on the investment in violation of Article 2(2) of the Treaty.
739. In line with the reasoning set out above regarding the Fiscal Measures Claim (see above, ¶¶489 to 492), the Tribunal considers that, among the matters falling within the scope of its jurisdiction are general measures taken by the host State in the exercise of its public powers, including decisions taken by tax authorities which allegedly affected the investment in violation of the BIT.

740. On the basis of the foregoing reasoning, the Tribunal decides that it has jurisdiction to rule on Claimant's Ozias Tax Claim.

§2. MERITS

741. In its Ozias Tax Claim, Claimant contends that Romania has violated Article 2(2) of the Treaty, by taking unjustified measures.

742. Having reviewed the evidence and reasons that the Tax Agency invoked in support of its decision regarding the Ozias issue in its December 17, 2003 tax audit report, the Tribunal is of the view that the Tax Agency had legitimate concerns about the fulfillment of Claimant's tax obligations. The initiation and the conduct of the audit were plainly justified and consistent with the existing law.

743. Claimant did not rebut Respondent's submissions that Continent SA advanced to Ozias approximately USD 1.37 million for the purchase of various refrigeration and construction products which were never delivered to Continent SA or proved to be purchased, that Continent SA made payment to Ozias in excess of USD 1.5 million for alleged consultancy services, that Continent SA never substantiated that any consulting services were provided by Ozias, that Ozias exclusive function was to operate merchant and fishing ships, not to provide management consulting services and finally that Ozias was dissolved in 2005, as proven by the certificate presented during the hearing.

744. Claimant did not prove its allegations that "*the Greek family employed Greek people pursuant to those management consultants to perform management services up until the time that the Claimant was forced to leave the country*" (Transcript, day 3, p. 79, lines 11-16), that the contracts were concluded because "*the foreign workers that are all named in there wanted to be paid in their own country*" (idem, p. 87, lines 23-25) and that under these contracts, "*the foreign workers were installing the marble and the flooring*" (idem, p. 86, lines 16-17). Respondent has also rightly observed that if the Ozias' "consultants" were merely foreign workers who were paid in Greece for installing marble at Continent SA, that would support the Tax Agency's denial of tax deductions for alleged management consulting services and although the record shows that Claimant left Romania of his own initiative on March 9, 2003, the transfer of money from Continent SA to Ozias for alleged consulting services continued for many years after Claimant left Romania.

745. In light of the foregoing, the Tribunal decides that the State's actions invoked by Claimant under the Ozias Tax Claim did not breach Article 2(2) of the Treaty.

OVERALL CONCLUSION

746. After its analysis of each individual claim made by Claimant, the Arbitral Tribunal has reached the conclusion that they were unfounded. The Tribunal further considers that even taken collectively, the actions of Respondent do not amount to violations of Articles 4(1) and 2(2) of the BIT. Claimant's claims are therefore dismissed.

CHAPTER V. THE RESPONDENT'S COUNTERCLAIM

SECTION I. RESPONDENT'S POSITION ON ITS COUNTERCLAIM

I. THE COUNTERCLAIM

747. Respondent, on behalf of AVAS, asserts counterclaims against Claimant and his companies, Continent SRL and Continent SA, arising out of the failure of Claimant and Continent SRL to make the USD 1.4 million investment on which Claimant bases his Investment Claim.

A. Counterclaim against Claimant

748. Claimant controls Continent SRL directly, as its sole shareholder and director, and Continent SA indirectly, through Continent SRL's majority shareholding interest in Continent SA. The claims made by Roussalis, who purportedly seeks compensation for damages sustained by these two corporations, thus stem from his controlling shareholding interest in both companies. By asserting claims as investor for these companies, Claimant implicitly admits that he is the *alter ego* of Continent SRL and Continent SA.

749. Accordingly, Respondent seeks an order directing him, as *alter ego* and controlling shareholder, to take such steps as may be necessary for Continent SRL to transfer the shares of Continent SA to AVAS pursuant to the contractual pledge of those shares. The counterclaim also seeks to hold Roussalis jointly and severally liable with Continent SRL for any damages awarded to Respondent by the Tribunal for his looting of funds from Continent SA.

750. In this regard, Respondent contests Claimant's arguments that he was not himself a party to the Privatization Agreement and therefore cannot be held accountable for the breach of that agreement by Continent SRL. Indeed, Claimant's complete control over the day-to-day operations of Continent SA and Continent SRL warrant treating Claimant and his two companies as one and the same for the purposes of Respondent's counterclaims. Respondent points out that Claimant is the sole shareholder and director of Continent SRL, the majority shareholder (96.52 percent) of Continent SA. He signed the Privatization Agreement on behalf of Continent SRL and is the ultimate beneficiary of the privatization transaction. He is also the sole authorized signatory for the companies. Roussalis also abused the corporate form, and used more than USD 5 million of the company's assets as his own personal assets. Accordingly, those companies are his *alter ego*.

751. Claimant's control over Continent SRL and Continent SA is extensive enough to permit Romanian courts to pierce the corporate veil and hold Claimant accountable for the misappropriation of their assets. According to Romanian legal doctrine, a director or shareholder is deemed the *alter ego* of his company when "*there is confusion between the patrimonies of the company and its owner ... resulting from the use of the company's assets for the owner's personal benefit*" (Florentin Tuca, *Revista de Drept Comercial*, Volume 6, No. 10, 112, 1996, at 115).

B. Counterclaim against Continent SRL

752. The counterclaim against Continent SRL seeks to enforce the contractual pledge over the 372,523 shares acquired by Continent SRL pursuant to the Privatization Agreement. In its Rejoinder, Respondent amended its counterclaims to assert alternative claims for monetary damages in lieu of obtaining the original shares sold by AVAS to Continent SRL, and in connection with the additional shares issued by Continent SA to Continent SRL.
753. The central factual issue related to this counterclaim is whether Continent SRL failed to invest USD 1.4 million in Continent SA.
754. In addition, Respondent seeks an order from the Tribunal requiring Continent SRL to pay damages in a sum representing the value of all funds and assets of Continent SA that were misappropriated by Continent SRL and/or Claimant after privatization. Respondent seeks to hold Continent SRL jointly and severally liable for such damages with Claimant.

C. Counterclaim against Continent SA

755. Respondent's next counterclaim seeks to obtain a declaration that the resolution to increase the share capital that was approved by Continent SA's shareholders in December 2000 was groundless.
756. AVAS filed an "absolute nullity" claim in the Romanian courts in August 2007 to annul the increase in share capital. The share capital increase was based on the purported investment of over USD 1.4 million by Continent SRL in Continent SA. However, that investment was not made and the December 2000 resolution to increase share capital by the shareholders of Continent SA was based on unreliable and intentionally misleading information. AVAS's pending claim against Continent SA in the Romanian courts is premised in significant part on this factual contention.
757. Given that its annulment claim is inextricably intertwined with Claimant's Investment Claim, AVAS has agreed to seek a suspension of proceedings before the Romanian court. This counterclaim is intended to avoid inconsistent rulings on common issues of fact raised by Claimant and by AVAS in these parallel proceedings.

II. JURISDICTION

A. The Tribunal has jurisdiction to decide Respondent's Counterclaim

1. In General

758. Article 46 of the ICSID Convention states: "[e]xcept as the parties otherwise agree, the Tribunal **shall, if requested by a party, determine any ... counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre**" (emphasis added). According to Respondent, the Convention thus guarantees Romania's right to arbitrate a closely related counterclaim. Indeed, once an investment dispute is submitted

to ICSID, Article 9(4) of the BIT requires that all aspects of the dispute be decided in accordance “*with the provisions of this Agreement [BIT] and the applicable rules and principles of international law.*” The applicable rules and principles of international law necessarily include the Convention in its entirety, including Article 46, which governs relations between Romania and Greece and their respective nationals with respect to BIT arbitrations.

759. Under Rule 40(1) of the ICSID Arbitration Rules, “*a party may present... [a] counter-claim arising directly out of the subject matter of the dispute, provided [it] is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.*” Because there is no explicit exclusion of counterclaims in the Treaty, Claimant has failed to establish that Respondent is precluded from asserting a counterclaim. Indeed, contrary to Claimant’s argument, there is no ICSID precedent requiring an explicit *authorization* in the BIT as a precondition for asserting a counterclaim.
760. The Tribunal has *subject matter jurisdiction* over Respondent’s counterclaims. Indeed, each counterclaim is a dispute that centers on whether Claimant, as investor acting through Continent SRL, made a USD 1.4 million investment in Continent SA in accordance with the Privatization Agreement. Because that investment was not made, the counterclaims are presented here to protect and enforce the State’s rights under the Privatization Agreement to enforce its lien and recover the shares pledged by Continent SRL to secure performance of its investment obligation. Moreover, presenting these counterclaims here advances the goals of economy and efficiency in international dispute resolution because they will resolve disputes that need not be relitigated in the Romanian courts.
761. Under Article 25(1) of the ICSID Convention, the Tribunal has jurisdiction over “*any legal dispute arising directly out of an investment*” between an investor and a signatory State. These counterclaims satisfy this jurisdictional prerequisite. Indeed, the claims and counterclaims turn on the same factual question and arise out of the investment obligation of the privatization contract.
762. Furthermore, the counterclaims are arbitrable under Article 9(1) of the Treaty, which authorizes arbitration of disputes “*in relation to an investment.*” The factual dispute concerning the investment obligation is the focal point of Claimant’s Investment Claim and Romania’s counterclaims. Indeed, the term “investment” is defined expressly in the Treaty as including, among other things, “*shares in and stock and debentures of a company and any other form of participation in a company*” (Treaty, Art. 1(b)). That definition covers the shares acquired by Claimant through Continent SRL in the Privatization Agreement and the additional shares created as a result of the shareholders’ resolution approved on December 15, 2000.
763. Under Rule 40(2) of the ICSID Arbitration Rules, counterclaims are timely if they are filed no later than the filing of the counter-memorial. Respondent duly filed its counterclaims as part of its Counter-Memorial.

764. The Tribunal also has jurisdiction *ratione personae* under the Treaty to adjudicate counterclaims against Continent SRL and Continent SA.
765. Respondent submits that Article 9 of the Treaty encompasses disputes “*in relation to an investment*” which includes Claimant’s locally incorporated companies. For that reason, and regardless of the Romanian nationality of Continent SRL and Continent SA, claims against these entities fall within the scope of disputes contemplated in Article 9 of the Treaty and are therefore subject to the Tribunal’s jurisdiction.
766. Indeed, first, these two companies together comprise the “investment” Claimant has made and his claims seek compensation for alleged damages to his investment. In that sense, the corporate entities are interested parties in this case because the actions Claimant complains about were, with the exception of the Interdiction Claim, allegedly taken against these companies alone. Under these circumstances, it is entirely reasonable to expect that Continent SRL and Continent SA should answer for any unlawful actions they took with respect to the investment obligation. Respondent contends that the companies took such action at the direction of Roussalis.
767. Second, there would neither be any added burden on the Tribunal nor any inequity to the parties for the Tribunal to render an award enforcing the share pledge and declaring the shareholders resolution to be ungrounded if it were to conclude that the required investment was not made by Continent SRL.
768. If the companies are not impleaded, an award in favor of Respondent on counterclaims brought against Roussalis alone, as *alter ego*, could prove extremely difficult, if not impossible, to enforce. He could interfere with enforcement of any award against him alone by using his control over Continent SRL and Continent SA to ignore or refuse to carry out any directives issued by the Tribunal. It would force Respondent to bring enforcement proceedings against Roussalis in Greece or wherever he may be found.
769. Furthermore, such enforcement would be far more complicated and more costly than executing a money award. Impleading these corporations will greatly simplify enforcement of the Tribunal’s award, as they are Romanian companies subject to the jurisdiction of the Romanian courts.
770. Respondent points out that, in *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, an ICSID tribunal was faced with a similar request to implead a corporation through which the investor made an investment. Noting that Cameroon had negotiated the investment agreement with the foreign investor, but had formally signed the agreement only with the local subsidiary, the tribunal concluded that the case presented “*an indivisible whole*” and thus that it had jurisdiction *ratione personae* to rule on the counterclaim against both the investor and its local subsidiary.
771. In sum, Respondent’s counterclaims against Continent SRL and Continent SA are within the Tribunal’s jurisdiction. Claimant used Continent SRL and Continent SA as local investment vehicles. His dominant share ownership and actual control of those companies

constitute investment under Article 1(1) of the Treaty. These investments thus fall within the dispute resolution provisions of the Treaty and the Tribunal's jurisdiction.

772. In addition, the fact that Continent SRL and Continent SA are Claimant's *alter egos* provides an additional basis for asserting jurisdiction over the counterclaims against the companies. Since the Tribunal clearly has jurisdiction over the counterclaims asserted against Mr. Roussalis, it also has jurisdiction over the counterclaims against his corporate *alter egos*.

2. The Counterclaim's contractual basis does not negate the Tribunal's jurisdiction to decide this closely related counterclaim

773. Romania's counterclaim arises directly out of the subject matter of the dispute addressed in Claimant's claim. This condition means that "*the factual connection between the original and ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all grounds of dispute arising out of the same subject matter*" (Note B(a) to ICSID Rule 40, 1 ICSID Reports 100).

774. As the tribunal held in *Klöckner v. Cameroon (op.cit.)*, this jurisdictional requirement is met, and a counterclaim is admissible, where it forms "*an indivisible whole*" with the primary claim asserted by the claimant, invoking substantive obligations undertaken for "*the accomplishment of a single goal, [so as to be] interdependent.*" That is the case here. Claimant's Investment Claim and Romania's counterclaim both arise out of Claimant's post-privatization obligations under the Share Purchase Agreement. Both require the Tribunal to answer the same questions: did AVAS properly conclude that Claimant failed to make the post-privatization investment? Is Romania entitled to enforce the share pledge against Claimant and Continent SRL? That close factual connection gives rise to a presumption of admissibility of Romania's counterclaim.

B. Claimant consented to arbitrate Respondent's Counterclaim

775. Contrary to Claimant's contention, he has consented to the arbitration of Romania's counterclaims in this case. When Claimant resorted to ICSID arbitration for the settlement of his claims, he agreed to settle *all disputes* relating to Claimant's investment, including Respondent's counterclaims. Indeed, by submitting his claim to ICSID he accepted Romania's offer to arbitrate contained in the BIT in accordance with the ICSID Convention and Rules, which carries with it the possibility that he would be required to arbitrate the closely related counterclaims.

776. Claimant's written consent to arbitrate the share pledge claim initially was manifested in the "cooling off" letter he sent to Romania on December 9, 2003 as a predicate to commencing this arbitration. The letter states: "*Furthermore, the assertion of a counterclaim pursuant to Article 46 is fully consistent with Romania's BIT obligations. APAPS' [AVAS's] actions for the execution of the security [...] motivated by the nonaccomplishment by the undersigned's assumed obligations as a foreign investor [...] represented a dispute in relation to the investment, as it is stipulated by the [...] [BIT].*"

The undersigned, taking into consideration the provisions of the Agreement, I don't understand to submit the dispute towards settlement to the Romanian legal courts and [...] I consider that the provisions of art. 9(1) from the Agreement have not been observed by APAPS" (sic., Claimant's Exhibit n°3). Shortly before ICSID registered his Request for Arbitration, Claimant represented to the Romanian court in the share pledge litigation that Article 9 of the Treaty required AVAS's share pledge enforcement action to be decided at ICSID (Claimant's Exhibit n°26). These submissions should be deemed as Claimant's consent to arbitrate Respondent's counterclaims.

777. Similarly, Claimant's Request for Arbitration states: *"The dispute between the undersigned, as the sole associate of SC Continent Marine Enterprise Import Export SRL and the Romanian State, having as scope APAPS [AVAS]'s action to execute the security formed by those 372,523 shares, owned by SC Continent Marine Enterprise SA [...] belongs to the settlement competence, by arbitration, to the International Centre for Settlement of Investments Disputes"* (Claimant's request, p. 8).
778. According to Respondent, Claimant's assertions to the Romanian courts that they should dismiss the State's share pledge enforcement action in favor of resolving that claim before ICSID constitute unambiguous consent to arbitrate the State's claim for relief in this arbitration. Indeed, in 2004, Claimant submitted to the Romanian court in which the share pledge enforcement action was pending a statement contesting the court's jurisdiction on the ground that the dispute must be resolved in arbitration at ICSID (Respondent's Exhibit n°207).
779. Moreover, after urging that Respondent terminate the two cases pending before the Romanian court and rely instead on ICSID to resolve the share pledge and nullification disputes, Claimant cannot dispute that he has consented to arbitration of the disputes in question.
780. As the tribunal in *SGS v. Pakistan (op.cit.)* concluded: *"[i]t would be inequitable if, by reason of the invocation of ICSID jurisdiction, the Claimant could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the Respondent from pursuing its own claim for damages by obtaining a stay of those proceedings for the pendency of international proceedings, if such international proceedings could not encompass the Respondent's claim."*

C. The Tribunal has jurisdiction over Respondent's Counterclaim by virtue of the umbrella clause in Article 2(6) of the Treaty

781. Applying the umbrella clause in Article 2(6) of the Treaty, the Tribunal has jurisdiction over Claimant's Investment Claim, as well as Respondent's counterclaims, without regard for the dispute resolution clause in the Privatization Agreement. Article 2(6) of the Treaty provides that *"[e]ach Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the Contracting Party"*. Thus, the contractual obligations under the Privatization Agreement become arbitrable before ICSID by operation of the umbrella clause.

782. In *Noble Ventures, Inc. v. Romania* (*op.cit*), the tribunal interpreted a virtually identical umbrella clause in the U.S.-Romania BIT. The issue was whether the tribunal had jurisdiction over a dispute arising under a very similar Privatization Agreement. The tribunal decided that the claimant's breach of contract claim "*constitutes a [claim of] breach of the BIT.*" Similarly, the tribunal in *Eureko v. Poland* (*Ad Hoc Partial Award*, August 19, 2005) interpreted the Netherlands-Poland BIT with an almost identical umbrella clause, and extended its jurisdiction over a contractual claim.

D. Romania is under no obligation to exhaust local remedies before submitting its Counterclaim

783. Article 26 clearly states that "[a] *Contracting State may* require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention" (emphasis added). The fact is that under Article 26 Romania *may* require exhaustion of local remedies. A Contracting State must actually include in its BIT an explicit provision requiring exhaustion of local remedies in order for exhaustion to become a condition precedent to the exercise of ICSID jurisdiction over investor-state claims. Romania has not done so.
784. Respondent further contends that, since Article 26(2) does not require Roussalis to exhaust local remedies, he has no basis for insisting that Romania exhaust its local remedies before asserting its counterclaims.

E. Romania's claim for losses incurred in the period from November 1998 to December 1999 is not time-barred

785. During the period from November 1998 to December 1999, Continent SRL used warehouse space rent-free, which resulted in an estimated USD 900,000 in lost revenues for Continent SA. Respondent's damages claim includes that USD 900,000.
786. Respondent denies Claimant's allegation that Romanian Decree n°167/1958 bars Romania's claim for the above losses incurred in the period from November 1998 to December 1999. According to Respondent, the Tribunal is not constrained by municipal statutes of limitations.
787. In *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/94/4), the ICSID tribunal held that: "*municipal statutes of limitation do not necessarily bind a claim for a violation of an international treaty before an international tribunal.*" Indeed, international tribunals may consider equitable principles of prescription. Applying equitable principles of prescription to the facts of the *Wena* case, the tribunal concluded that there was no reason to deny a claim on limitations grounds where Egypt had ample notice of *Wena's* claims and where neither party appeared to be substantially harmed in its ability to bring its case at ICSID.
788. According to Respondent, equitable principles militate in favor of rejecting Claimant's statute of limitations defense. By invoking the Tribunal's jurisdiction to evaluate the relevant facts from the period 1999-2001 for his Investment Claim, Claimant cannot fairly rely on a domestic statute of limitations to avoid the adjudication of a counterclaim

based on the same or related facts from the same time period. Claimant has had ample opportunity to respond to the counterclaims and has pointed to no prejudice he has suffered as a result of the counterclaims being asserted against him. Moreover, Claimant has been litigating with AVAS over the same issues in the share pledge litigation since AVAS commenced suit in 2001. By commencing this arbitration, Claimant accepted the Tribunal's authority to resolve all claims and counterclaims involving the same underlying facts, whether or not they would be time-barred in a Romanian court.

789. Moreover, Article 41(2) of the Romanian Criminal Code provides that “*an offence is continuing when a person commits such offence at different times, but on the basis of the same resolution, acts or omissions, each of them presenting the content of the same criminal offence.*” Accordingly, even if the 3-years statute of limitations were applicable, Claimant's misappropriation of funds from Continent SA is a continuing act that began in 1998 and continues to the present day. Therefore, the three-year statute of limitations has not even started to run.

F. Romania was not required to annul the Ozias contracts before filing its Counterclaim

790. Finally, Respondent refutes Claimant's contention that Romania's counterclaim for damages arising out of the consulting contracts concluded between Continent SA and Ozias Marine is inadmissible because Romania failed to seek the prior annulment of those contracts.
791. Romania's counterclaim for damages is a tort claim. There is no requirement under the ICSID Convention or Romanian law that would require Romania to nullify the consultancy contracts (to which Romania is not even a party) as a precondition to advancing a tort claim flowing from the sham nature of those consultancy contracts.

III. BASIS OF COUNTERCLAIMS

A. Enforcement of Share pledge against Continent SRL and damages for misappropriated funds

792. As demonstrated above (see ¶¶174-203), Continent SRL failed to invest USD 1.4 million in Continent SA during the period from January 1, 1999 to December 31, 2000.
793. Under Article 8.10.3 of the Privatization Agreement, Continent SRL agreed (a) to grant and register a pledge of the 372,523 shares acquired by Continent SRL, and (b) that “*in case [Continent SRL] does not fulfill its obligations stipulated at Article 8.10.1 and 8.10.2, then [AVAS] will execute the pledge over the shares*” (emphasis added). Therefore, if the Tribunal finds that the required investment was not made by Continent SRL in accordance with the Privatization Agreement, it should enforce the share pledge and order Claimant and Continent SRL to cause the 372,523 shares obtained pursuant to the contract to be pledged and transferred to AVAS, as contemplated by Article 8.10.3(e).
794. This counterclaim also seeks damages against Continent SRL for funds misappropriated from Continent SA after privatization:

- Continent SRL exerted control over Continent SA by allowing Continent SRL to use a space rent-free, costing Continent SA an estimated USD 900,000 in lost revenues from November 1998 through December 1999 (see above, ¶¶199 *et seq.*).
- Continent SRL caused Continent SA to expend considerable resources to convert buildings located at 1 Razoare Street into a personal residence for Roussalis (see above, ¶174). Roussalis did not reimburse Continent SA for these personal expenses.
- Roussalis, through his group of companies, inflated the cost of various capital items allegedly purchased as part of the investment obligation by directing his companies to issue invoices to Continent SA for the items with a substantial mark-up in price (see above, ¶¶189 *et seq.*).
- Payments of USD 696,000 and EUR 216,000 were made by Continent SA to a Roussalis-owned company (Ozias), for purported consulting services that were, in fact, never rendered. This represents a significant drain of resources from Continent SA directly to Roussalis and his son, the co-owners of Ozias (see above, ¶704 *et seq.*).

795. In this regard, Respondent requested that the Tribunal bifurcate proceedings on this claim, so that the quantum of damages can be determined in separate proceedings to be conducted after liability for misappropriation of funds has been established.

796. Respondent's counterclaim for damages owed as a result of the misappropriated funds is grounded in Articles 998-999 of the Romanian Civil Code, which lay down the principle of civil tort liability:

- Art. 998: *"Any deed of a person, which causes to another person a loss, obliges the person due to whose fault the loss was occasioned to repair such loss"*.
- Art. 999: *"The person is liable not only for the loss caused by his own deed, but also for the loss caused by his negligence or imprudence" ..*

797. Respondent asserts that Romania has standing to submit its Counterclaim under Articles 998 and 999 because the Romanian state has been harmed by Roussalis's failure to honor his obligations under the Privatization Agreement. If the Tribunal holds that it has jurisdiction to decide the Counterclaim, and that Roussalis, and his two companies, are liable, then the Tribunal should award an appropriate remedy to Romania, which may be entitled to receive an award of monetary damages.

798. Moreover, Article 272 of Romania's Law 31/1990 on commercial companies provides that: *"[i]t is punished with imprisonment from one to three years the shareholder, director, officer or legal representative of the company who: [...] 2. uses, with bad faith, the assets or the credit standing of the company for a purpose contrary to the company's interests or to its own benefit or to favor another company in which he holds directly or indirectly a stake."*

799. Finally, pursuant to Article 1003 of the Romanian Civil Code, “*when the civil delict [...] is imputable to more than one person, such persons are jointly and severally liable for damages*”. Consequently, Claimant and Continent SRL must be held jointly and severally liable for the damages incurred by AVAS, acting on behalf of Romania, due to the misappropriation of the corporate funds following the privatization of Continent SA.
800. Under the relevant provisions of Romanian law, AVAS has a duty to conduct privatization processes in accordance with sound commercial principles and to take reasonable steps to enhance the value of companies being privatized. This duty is central to the mission of AVAS to make former state enterprises attractive to private investors and thus achieve the highest market prices for privatized companies, in accordance with Article 43 of the Government Ordinance 88/1997 regarding the privatization of commercial companies. Respondent submits that the market value for Continent SA has been adversely affected by misappropriation and self-dealing on the part of Claimant and Continent SRL. Therefore Romania is entitled to recover as damages all amounts they improperly took from Continent SA following the privatization sale.

B. Declaration that the shareholders’ resolution is not properly grounded

801. Respondent submits that the Expert Project report is unreliable and failed to establish that Continent SRL made the investment required under the Privatization Agreement. Therefore, Respondent asks the Tribunal to declare, as part of the Award, that the shareholders’ resolution was groundless.

C. Counterclaim against Claimant for each of these foregoing claims

802. The claims against Roussalis are the same as set forth above against Continent SRL for damages and enforcement of the share pledge, and against Continent SA for a declaration concerning the ungrounded resolution of the shareholders in approving the share capital increase. Respondent requests that the Tribunal direct Claimant to pay any damages that may be awarded and to cause Continent SRL to transfer the shares acquired pursuant to the Privatization Agreement to AVAS, thereby enforcing the share pledge, as the contract contemplates, for the breach of the investment obligation.
803. If the Tribunal grants any relief sought in the counterclaims against Continent SRL and Continent SA, the same relief should be granted, jointly and severally, against Roussalis. According to Respondent, he was the mastermind of the unlawful schemes and should therefore be held accountable by the Tribunal.

D. Amendment of Respondent’s Counterclaim

804. In its Rejoinder, Respondent amended its Counterclaim. The amendment is based on the same facts as those alleged in support of the Counterclaim as originally filed. The amendment revises the Request For Relief to include, as additional and/or alternative relief, a request (1) that the Tribunal hold Roussalis and Continent SRL jointly and severally liable to pay money damages for the value of the 372,523 shares in Continent SA, originally sold by AVAS to Roussalis in 1999; and (2) that the Tribunal hold Roussalis and Continent SRL jointly and severally liable to pay money damages to the

value of the additional 1,414,648 shares issued to Continent SRL resulting from the share capital increase, but provide that the award of such damages will be deemed satisfied by cancellation of the registration of those shares with the Trade Registry immediately following the Tribunal's final Award; and (3) that the Tribunal hold that Respondent is entitled to an award of compound interest on all the damages awarded to Romania, to be calculated in accordance with applicable ICSID precedent, which will be addressed by the parties during the damages phase of the case.

805. Respondent submits that the amendment to the Counterclaim was not untimely and should be allowed because Claimant had sufficient opportunity to respond to the proposed amendment in his Rejoinder, and will again have it again during the damages phase of the proceedings. In *Atlantic Triton v. Guinea* (Award of April 21, 1986, 3 ICSID Rep. 18), Guinea added additional elements to its counterclaims in its rejoinder. Since Guinea's Rejoinder was the last scheduled submission in the written procedure, the ICSID tribunal in that case permitted Atlantic Triton to file its own rejoinder on the counterclaims to address Guinea's added points.

IV. Request for Relief

806. In its Counter-Memorial, Respondent requested that the Tribunal:
- (1) *declare that Continent SRL failed to fulfill its investment obligation and is therefore in breach of the Privatization Agreement;*
 - (2) *order Continent SRL to transfer, and Claimant to cause Continent SRL to transfer, to AVAS the shares in Continent SA purchased under the Privatization Agreement (372,523 shares numbered from 1 to 372,523);*
 - (3) *order Claimant and Continent SRL, jointly and severally, to pay damages, to be assessed after liability is determined, in a sum representing the value of all funds misappropriated from Continent SA after privatization; and*
 - (4) *declare that the resolution of the Continent SA shareholders on December 15, 2000 to increase the share capital was ungrounded.*
807. In its Rejoinder, Respondent has requested that the Tribunal:
- (1) *declare that Claimant Roussalis and/or Continent SRL failed to fulfill the postprivatization obligation to invest USD \$1.4 million in Continent SA and that they are therefore in breach of the Privatization Agreement;*
 - (2) *order Claimant Roussalis and Continent SRL, jointly and severally, to pay money damages to Romania equal to the value of the 372,523 shares in Continent SA numbered from 1 to 372,523 as of a date determined by the Tribunal in accordance with evidence to be presented during the damages phase of the proceedings on the Counter-Claim; PROVIDED HOWEVER that said award of money damages will be deemed fully satisfied if Claimant Roussalis, immediately upon issuance of the Tribunal's final Award, delivers to Respondent the 372,523 shares in Continent SA numbered from 1 to 372,523 and causes the cancellation of the registration with the*

Trade Registry of the additional 1,414,648 shares in Continent SA issued to Continent SRL in relation to the shareholders' resolution approving a share capital increase;

- (3) order Claimant Roussalis and Continent SRL, jointly and severally, to pay damages equal to the amount of all funds determined during the damages phase of the Counter-Claim proceedings to have been misappropriated from Continent SA after the date of Privatization Agreement by Claimant Roussalis and/or Continent SRL and/or other companies owned and controlled by Claimant Roussalis;*
- (4) declare that the resolution of the Continent SA shareholders on December 15, 2000 to increase its share capital was ungrounded and shall be deemed to have no legal effect;*
- (5) order Claimant Roussalis and Continent SRL, jointly and severally, to pay additional money damages to Romania equal to the value of the additional 1,414,648 shares issued to Continent SRL pursuant to the resolution of the Continent SA shareholders on December 15, 2000; PROVIDED HOWEVER that said award of money damages will be deemed fully satisfied if Claimant Roussalis delivers to Romania all of the aforementioned additional shares in Continent SA immediately upon issuance of the Tribunal's final Award;*
- (6) order Claimant Roussalis and Continent SRL, jointly and severally, to pay damages to Respondent Romania for the diminution in the value of the 372,523 shares that are the subject of item 2, above, as a result of misappropriation of assets of Continent SA, or as a result of the dilution of Continent SA's shares by issuing 1,414,648 additional shares to Continent SRL based on fraudulent or insufficient evidence of a corresponding capital contribution;*
- (7) order Claimant Roussalis and Continent SRL, jointly and severally, to pay compound interest on the amounts awarded to Respondent Romania as provided in subparagraphs 2 and 5, above, to be calculated in accordance with recent ICSID decisions.*

808. In its Post Hearing Brief, Respondent formulates its prayer for relief as follows:

Romania asks that the Tribunal enter an interim award that includes the following elements:

From Spyridon Roussalis and Continent SRL:

- A declaration that Claimant and/or Continent SRL failed to fulfill the obligation to invest USD \$1.4 million in Continent SA and that they are therefore in breach of the Privatization Agreement. Resp. Rej. para. 230(1).*
- An order that Claimant and Continent SRL tender to Romania the privatized shares or pay damages to Romania equal to the value of the originally privatized shares, Resp. Rej. para. 230(2).*
- An order that Claimant and Continent SRL tender the shares issued in connection with the fraudulent share capital increase or pay damages to Romania equal to the value of those shares plus any uncompensated diminution in value to the privatized shares. Resp. Rej. para. 230(5).*

- *An order that Claimant and Continent SRL pay damages to Romania equal to the value of the funds misappropriated by him or on his behalf from Continent SA since the date of the Privatization Agreement. Resp. Rej. para. 230(3).*
- *Pre- and post-award compound interest on the above money damages in accordance with recent ICSID decisions. Resp. Rej. para. 230(7).*

From Continent SA:

- *declare that the resolution of the Continent SA shareholders on December 15, 2000 to increase its share capital was ungrounded and shall be deemed to have no legal effect.*

809. Finally, Respondent submits that the Tribunal has discretion pursuant to Article 61(2) of the ICSID Convention to direct the losing party to reimburse the prevailing party for its attorneys' fees and costs. Claimant's institution of this arbitral proceeding has required Romania to incur significant fees and costs to defend claims that are wholly without merit and exceed the jurisdiction of the Tribunal. In particular, Claimant's contention that Continent SRL met its post-privatization investment obligation is not only incorrect, but Claimant also knew it to be incorrect at the time he submitted his claims to ICSID. Further, Claimant knew or should have known at the time he submitted his claims to ICSID that his Food Safety, Interdiction, Fiscal and Ozias claims do not arise out of his investments in Continent SRL and Continent SA and are clearly not within the Tribunal's jurisdiction. Further, he surely knew or should have known, that those claims were utterly without merit.
810. Respondent alleges that Claimant's conduct in this proceeding has exemplified bad faith. Claimant's misconduct has necessitated two requests for provisional measures – both of which were granted by the Tribunal – to stop the sale of Continent SA's assets during the pendency of these proceedings, and to require Respondent to take appropriate steps to obtain a suspension of the parallel proceedings in Romanian courts. In addition, Claimant failed to comply with Respondent's reasonable discovery requests by the agreed deadline.
811. Accordingly, the Tribunal should follow the principle that "costs follow the event," making the losing party bear the costs of the proceeding and reimburse Respondent for its attorneys' fees and expenses related to this case.
812. In conclusion, Respondent requests that *"the Tribunal deny Claimant's claims, rule that it has jurisdiction over Respondent's counter-claims, and hold Claimant, together with its two companies, liable for the counter-claims."*

SECTION II. CLAIMANT'S POSITION ON RESPONDENT'S COUNTERCLAIM

I. THE INADMISSIBILITY OF THE COUNTERCLAIM ON JURISDICTIONAL AND PROCEDURAL GROUNDS

A. In general

813. Claimant points out that, in order to assert the Tribunal's jurisdiction over the counterclaims, Respondent employed a subterfuge and redefined the investment by breaking it down into two different investments. Respondent admitted that the first one, the purchase of Continent SA's shares, was made but alleged, at the hearing, that the second one, the post purchase investment, was not performed in accordance with the SPA (Transcript, Day 4, pages 124 *et seq.*).
814. According to Claimant, on the one hand, if Respondent chose to contest the investment through the non-performance of the SPA, it should have challenged the overall jurisdiction of the Tribunal and would not therefore have been able to bring a counterclaim. In this regard, the absence of a challenge on jurisdiction by Respondent in this context is an implicit admission that the SPA was duly performed.
815. On the other hand, if Respondent chose to contest only the post purchase investment and not the purchase of Continent SA's shares, then, if Respondent were successful, the Tribunal would only have had jurisdiction over the investment that was not contested. Therefore Respondent's counterclaims should be dismissed. Accordingly, the Tribunal does not have jurisdiction over Respondent's Counterclaim, in any of the above schemes.
816. Claimant refutes Respondent's allegations that its Counterclaim has the same object as the issues raised in Claimant's Request. Indeed, Claimant has brought his case before the Tribunal to address Respondent's breach of Article 4(1) of the Treaty, Article 2(2) part 1 of the Treaty, Article 2(2) part 2 of the Treaty, Article 1 of the First Additional Protocol to the European Convention, and Article 6 of the European Convention. Each of Claimant's subsequent submissions was confined to the analysis of these breaches and the facts that represent these breaches.
817. Claimant submits that ICSID tribunals only have jurisdiction over disputes concerning breaches of bilateral investment treaties. Therefore, Respondent's Counterclaim is made up of claims that must be brought before national courts since they do not relate to Treaty breaches. According to Claimant, Respondent should wait until the Arbitral Tribunal issues an award on Claimant's requests, and subsequently, if Romania is awarded a favorable decision, turn to the national courts.
818. Moreover, Claimant denies that application of the umbrella clause in Article 2(6) of the Treaty defeats Claimant's argument that since the Counterclaim is contractual and arise under the Privatization Agreement, they can only be submitted to national courts. Article 2(6) of the Treaty provides that "[e]ach Contracting Party shall observe any other **obligation** it may have entered into **with regard to investments of investors of the Contracting Party**" (emphasis added). Claimant points out that Article 2(6) "*refers to the liabilities the contracting parties have in relationship with the investors, and it does NOT*

refer to the rights the contracting parties have in relationship with the investors [sic]". Accordingly, the umbrella clause can only apply to Claimant's obligations, not to Respondent's rights.

819. *Noble Ventures, Inc. v. Romania*, ICSID Case N°ARB/01/11, involved interpretation of a similar umbrella clause in the U.S.-Romania BIT. The tribunal considered Claimant's contractual obligations and admitted that their breach may constitute a breach of the BIT. Similarly, the tribunal in *Eureko v. Poland (Ad Hoc Partial Award, August 19, 2005)* interpreted the umbrella clause in the Netherlands-Poland BIT, and asserted jurisdiction over a contractual claim, although not over a counterclaim.

B. Lack of Claimant's consent

820. Article 46 of the ICSID Convention provides that: "[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre". Similarly, Rule 40 of the ICSID Arbitration Rules provides: "[e]xcept as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre."
821. In light of the above, Claimant submits that the respondent in an investment dispute is permitted to submit counterclaims only with the claimant's agreement. However, Claimant did not consent to the arbitration of Romania's Counterclaim in this case, having expressly objected thereto in his Counter-Memorial (*see* Claimant's Counter-Memorial, ¶11).
822. Moreover, Claimant's representation to the Romanian court in the share pledge litigation that AVAS's share pledge enforcement action should be decided at ICSID cannot be construed as an agreement that Respondent may submit counterclaims. Claimant has consistently requested the termination of the domestic litigation, since this dispute, under its investment aspects, was indeed to be settled by the Arbitral Tribunal.
823. In the same vein, Claimant's argumentation developed in its Submission on the Request for Provisional Measures should not be read as an agreement that Respondent submit counterclaims. According to Claimant, Respondent's request that Claimant agree to stay the domestic litigation amounted to a request to forego the application of Article 26 of the ICSID Convention. Indeed, the registration of the ICSID case should have resulted in the termination of the internal procedures and the withdrawal of Respondent's requests before the national courts.
824. In this regard, Respondent cannot rely on the findings of the tribunal in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, which states that it is equitable that a respondent be allowed to submit

counterclaims. Indeed, in *SGS v. Pakistan*, the disputed counterclaim could be settled on the basis of the provisions of the relevant bilateral investment treaty.

825. Claimant denies Respondent's allegation that the Tribunal should decide on the counterclaims because it would not make sense to have half of the dispute decided before the Tribunal and half of the dispute decided before the Romanian courts (Transcript, Day 4, p.134 *et seq.*). According to Claimant, there is no general principle of international law that allows a State to appeal against its own courts' rulings under the protection of an investment treaty. The Tribunal lacks the competence to do so under the operation of Article 9 of the Treaty.
826. Moreover, Article 41 of the ICSID Convention compels the Tribunal to determine the extent of its own competence. The determinations of Romanian law that are the object of the counterclaims do not fall within the subject matter jurisdiction of the Tribunal. The Tribunal is not competent to allow a further appeal against the Romanian courts' findings on behalf of the State.

C. The Tribunal has no jurisdiction to decide counterclaims against Roussalis

827. Claimant points out that the Treaty concerns the protection of investments. The Treaty provides obligations owed by its Contracting States to investors and not vice versa. Indeed, the Treaty restricts the possibility of the State to file counterclaims.
828. Under Article 9(1), the jurisdiction of an ICSID tribunal is strictly limited to disputes "*between an investor of a contracting party and **the other** contracting party **concerning an obligation of the latter** under this agreement...*" (emphasis added). Accordingly, the jurisdiction of ICSID tribunals is limited to disputes concerning obligations owed to the investor by the State party.
829. Claimant contends that Romania is not permitted to assert claims against Roussalis because Article 9(2) of the Treaty provides that "*the investor concerned may submit the dispute (...) to international arbitration.*" Accordingly, investment disputes can only be heard by an ICSID tribunal when it is the investor, not the State, who has submitted the dispute. Article 9(3) further provides that only the investor has the power to submit disputes and "*may submit*" them to either an *ad hoc* tribunal established pursuant to the UNCITRAL Rules or to a tribunal established under the auspices of ICSID.
830. Claimant points out that the meaning of "*the dispute*" for the purposes of Article 9 is related to the issue of compliance with the Treaty.
831. According to Claimant, the purpose of the Treaty was clear. Both in the text and the preamble, the aim of the Treaty obligations entered into by the State was set out as to promote and protect in accordance with its terms, the investment of the foreign investor.
832. According to the above provisions, Respondent *can only be sued* before arbitral tribunals for breaches of the obligations it assumes under the Treaty. It *cannot be a claimant* for this kind of claim; otherwise it would "*deny its own sovereignty*" (Claimant's Rejoinder, p.14).

833. Moreover, Claimant submits that Romania is not permitted to assert claims against Roussalis based on actions of Continent SA and Continent SRL. Indeed, Respondent's Counterclaim is related to obligations contained in the Privatization Agreement. However, Claimant is not a party to that contract, only Continent SRL is a party to it.
834. According to Claimant, since Respondent's Counterclaim relates to breaches of Continent SRL's obligations under the Privatization Agreement, they should be resolved before the Romanian courts.

D. The Tribunal has no jurisdiction to decide counterclaims against Continent SRL and Continent SA

835. Article 25 of the ICSID Convention provides that : “(1) *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, (...)* (2) “*National of another Contracting State*” means: (a) *any natural person who had the nationality of a Contracting State other than the State party to the dispute*” (emphasis added).
836. Accordingly, the Tribunal has no jurisdiction over Continent SRL and Continent SA, as locally incorporated entities. As Romanian companies, they cannot become parties to this arbitration.
837. In this regard, Claimant denies Respondent's contention that jurisdiction over Continent SA and Continent SRL is triggered by the fact that Roussalis must be considered an *alter ego* of the two companies. Indeed, according to Article 1(3) and 1(4) of the Treaty (see above, ¶¶44-45), in this case, the investor must be a Greek person.
838. In addition, Claimant submits that the *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, where the tribunal decided that it had jurisdiction to rule on the counterclaim against both the investor and its local subsidiary, cannot presently be invoked since it runs counter the provisions of the Treaty.
839. Moreover, Continent SRL and Continent SA are not claimants in this arbitration. Therefore, counterclaims cannot be submitted against them.

E. Romania failed to exhaust local remedies before submitting its Counterclaim

840. Article 26 of the ICSID Convention provides as follows: “*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*”
841. Accordingly, Claimant contends that Romania was obliged to exhaust local remedies before submitting its Counterclaim to ICSID arbitration, which it did not do.

842. Claimant refutes Respondent's theory that a Contracting State must include in its BIT an explicit provision requiring exhaustion of local remedies in order for this to be a precondition to ICSID jurisdiction. Claimant's contention is based on the ICSID Convention, ratified by Romania prior to conclusion of the Treaty, without reservation to Article 26.
843. Moreover, Romania's contention that, since Article 26(2) does not require Claimant to exhaust his local remedies as a precondition to ICSID arbitration, he has no basis for insisting that Romania exhaust its local remedies before asserting its Counterclaim, is misconceived. This arbitration was filed because of the unjustified local measures taken by AVAS, not by Claimant. Furthermore, Claimant is not a party and therefore not subject to the ICSID Convention.

F. The Counterclaim is time barred under the Romanian statute of limitations

844. During the period from November 1998 to December 1999, Continent SRL used warehouse space rent-free, resulting in an estimated USD 900,000 in lost revenues for Continent SA, which Respondent claims as damages.
845. Romanian Decree n°167/1958 provides for a 3-year general prescription for material claims. Accordingly, Claimant contends that Romania's claim for losses incurred in the period from November 1998 to December 1999 is time-barred.
846. Claimant denies that Respondent can rely on Claimant's alleged misappropriation being continuous and ongoing as ground that the limitation period has not started running. Indeed, the Counterclaim at stake is of a civil nature, the criminal argument invoked by Respondent has therefore no relevance. Moreover, Roussalis is not subjected to any criminal investigation in relation to this Counterclaim.

G. Romania lacks standing to bring a Counterclaim for damages

847. Claimant challenges Respondent's standing to assert its Counterclaim under Articles 998 and 999 of the Romanian Civil Code regarding civil tort liability. Articles 998 and 999 enable one who has sustained a loss to recover that loss from the person who caused it. Claimant argues that Respondent does not have standing to assert counterclaims based on these statutes because Respondent did not sustain a *direct* loss as a result of Continent SRL's non-fulfillment of the required investment. Claimant alleges that the loss was sustained by Continent SA and that Respondent would have needed to be a majority shareholder of Continent SA at the time in order to recover under these provisions.
848. Claimant further submits that Respondent lacks standing to assert its Counterclaim against Claimant and Continent SRL based on Article 272 of Romania's Law 31/1990 on commercial companies. This article is not applicable between legal entities.

H. The Counterclaim for damages arising out of the Ozias contracts is inadmissible because Romania must seek the annulment of those contracts as a condition precedent to bringing a damages claim

849. Claimant states that the Arbitral Tribunal “*has not been requested to sentence the annulment of these contracts, with the sentence it will pronounce, which is inadmissible*” (Claimant’s Reply, ¶92).

II. THE AMENDMENT OF THE COUNTERCLAIM IS INADMISSIBLE

850. Claimant further submits that Article 40(2) of the ICSID Arbitration Rules sets the deadline for the filing of a Counterclaim. It provides that “*An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the countermemorial...*” Accordingly, Respondent may not, as it has sought, present a Counterclaim in its Rejoinder.

III. THE COUNTERCLAIM IS MERITLESS

851. As established above, Claimant has fulfilled its post-purchase investment obligations. Respondent’s claim relating to this issue should therefore be dismissed.
852. As regards the AVAS share pledge dispute, the Supreme Court affirmed the lower courts’ decisions and ruled in favor of Continent SRL. The June 30, 2009 decision of the Romanian Supreme Court held that the investment obligation had been fulfilled (Claimant’s Rejoinder Exhibit n°1). This decision is final and irrevocable. Therefore, AVAS’s lien execution request related to the 372,523 shares should be denied.
853. As far as the “absolute nullity” issue is concerned, Claimant contends that the Commercial Court decision of July 8, 2009 dismissed Respondent’s claims as groundless (Claimant’s Rejoinder Exhibit n°2). Therefore, Respondent’s arguments that are derived from the purported nullity of the shareholders’ resolutions should be rejected.
854. In particular, in light of the irrevocable determination that Claimant’s investment obligations were properly fulfilled, Respondent’s claims requesting delivery to Respondent, cancellation of the Continent SA shares, or payment of money damages for the value of the shares, should be dismissed.
855. In any case, since the Romanian courts determined that no funds were misappropriated by Continent SA after the date of the Privatization Agreement, Respondent’s claim in this respect should be dismissed.
856. The Romanian authorities’ decisions imposing tax, VAT and penalties have been declared illegal by Romanian courts. Accordingly, Respondent should not be permitted to bring the issue again within the scope of this arbitration and claims related to this issue should be dismissed.
857. Respondent’s claim concerning the Ozias dispute is meritless.

858. Finally, Respondent's claim concerning the arbitration expenses should be dismissed. Indeed, Claimant's claim is mainly based on Respondent's abusive measures, the main request being that Respondent put an end to such abusive remedies. In this regard, the Romanian courts have rendered judgments by means of which AVAS's proceedings have been rejected. Consequently, Respondent's Counterclaim is without merit. Claimant submits that since Respondent incurred significant fees and costs to submit counterclaims that are wholly without merit, "*the Respondent shall integrally bear the payment of these expenses, and no compensation right shall be granted*" (Claimant's Rejoinder, p. 25).

SECTION III. DECISION OF THE TRIBUNAL

859. Respondent presents several counterclaims which have been outlined above.

860. Being the party asserting that the Tribunal has jurisdiction to hear and determine the counterclaims which it seeks to bring before the Tribunal, the Respondent carries the burden of establishing that jurisdiction exists.

861. Article 46 of the ICSID Convention provides that:

"Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

862. Similarly, Rule 40 of the ICSID Arbitration Rules provides:

"Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre."

863. Under these rules, the Tribunal shall determine any counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the Parties and are otherwise within the jurisdiction of the Centre.

864. Therefore, the first issue which the Tribunal has to determine is whether – and irrespective of the particular counterclaims advanced in these proceedings by the Respondent – the Parties *consented* to have the State's counterclaims arbitrated.

865. Under the system created by the ICSID Convention, consent by both parties is an indispensable condition for the exercise of the Centre's jurisdiction. The Convention only requires that consent be in writing, leaving the parties otherwise free to choose the manner in which to express their consent.

866. It is not disputed that Respondent expressed its consent to arbitration in the BIT and that Claimant accepted Romania's offer to arbitrate. Contrary to Claimant however, Respondent considers that such consent included consent to arbitrate counterclaims.

Whether it is so must be determined in the first place by reference to the dispute resolution clause contained in the BIT. The investor's consent to the BIT's arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host State as expressed in the BIT.

867. In determining how to interpret agreements to arbitrate under the ICSID Convention, the Tribunal is guided by an ICSID decision which held that:

"[A] convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties.... Moreover, ...any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged" (*Amco Asia et al. v. Indonesia*, Decision on Jurisdiction of September 25, 1983, 23 I.L.M. 359 (1984).

868. In this respect, Article 9 of the BIT provides in its relevant parts that:

"Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way..."

*If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned **may submit** the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration"*(emphasis added).

869. Pursuant to the interpretation rules of Article 31 of the Vienna Convention and the above quoted ICSID decision, the Tribunal in its majority considers that the references made in the text of Article 9(1) of the BIT to "*disputes ... concerning an obligation of the latter*" undoubtedly limit jurisdiction to claims brought by investors about obligations of the host State. Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor. The meaning of the "dispute" is the issue of compliance by the State with the BIT.

870. Article 9(4) of the BIT further provides, in respect of the applicable law, that:

"The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement [the BIT] and the applicable rules and principles of international law..."

871. As mentioned above, the BIT imposes no obligations on investors, only on contracting States. Therefore, where the BIT does specify that the applicable law is the BIT itself, counterclaims fall outside the tribunal's jurisdiction. Indeed, in order to extend the competence of a tribunal to a State counterclaim, "*the arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction*" (P. Lalive and L. Halonen, "On the availability of

Counterclaims in Investment treaty Arbitration,” *Czech yearbook of international law*, 2011, p.141, n°7.19).

872. In light of the foregoing, the Tribunal considers that the Parties did not consent to have Respondent’s Counterclaim arbitrated.
873. Contrary to the Respondent’s position, this absence of consent to have the State’s counterclaim arbitrated cannot be overcome by the application of the umbrella clause in Article 2(6) of the Treaty.
874. Article 2(6) of the BIT provides that:
- “Each Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the Contracting Party”* (emphasis added).
875. Pursuant to the interpretation rules of Article 31 of the Vienna Convention, the reference in the text of Article 2(6) of the BIT to *“any other obligation ... with regard to investments of investors”* confirms that the host State commits itself to comply with obligations it has entered into with regard to investments of investors. It does not permit that claims be brought about obligations of the investor.
876. For all these reasons, by a majority opinion, the Tribunal finds that the Counterclaim is beyond its jurisdiction in the present proceedings.
877. The Tribunal therefore declares the proceeding closed and issues the present award.

CHAPTER VI. COSTS

878. Article 61 of the ICSID Convention addresses three types of costs which are to be assessed and allocated by the Arbitral Tribunal, namely (a) the expenses incurred by the Parties in connection with the proceedings; (b) the fees and expenses of the members of the Tribunal, and (c) the fees and expenses of ICSID itself.
879. Items (b) and (c) above are referred to collectively below as the “costs of the arbitration.”
880. Each party in this case has claimed the costs it has incurred in relation to these proceedings, and detailed submissions have been made in this regard. The Parties do not dispute that the Tribunal has the discretion to allocate costs.
881. In the Arbitral Tribunal’s view, the following matters are of key significance in relation to the allocation of costs in this case:
- (a) Roussalis has not demonstrated that Romania acted in violation of the BIT, all his claims were rejected, and to this extent Romania has been successful;
 - (b) On the other hand, Romania has submitted a lengthy Counterclaim and failed to demonstrate that the Tribunal had jurisdiction over the Counterclaim.

882. Therefore, although Romania has prevailed on the substance of the dispute, it has failed on its allegations regarding the Counterclaim. On this basis, using its discretion, the Tribunal considers fair that Claimant be ordered to pay 60% of the costs of the arbitration and of Respondent's legal costs and fees as detailed in Romania's submission in support of its claim for an award of costs of June 7, 2011 (with appendices under tab 1 to 5). Accordingly, the Tribunal orders Claimant to pay to the Respondent the sum of USD 217,290, representing 60% of the estimated expended portion of the Respondent's advance on the costs of the arbitration (USD 362,150),¹² as well as EUR 6,053,443.78, representing 60% of the Respondent's legal fees and expenses (EUR 10,089,072.98).

AWARD

For the foregoing reasons, the Arbitral Tribunal decides and declares as follows:

- (a) That the Arbitral Tribunal has jurisdiction over this dispute, in so far as it concerns alleged claims of violations of the BIT put forward by Claimant; but that it has no jurisdiction over the Respondent's Counterclaim;
- (b) That Claimant's claims are unfounded and are therefore dismissed;
- (c) That Claimant shall pay to the Respondent USD 217,290 in reimbursement of 60% of the expended portion of the Respondent's advance on the costs of the arbitration and EUR 6,053,443.78 representing 60% of the Respondent's legal fees and expenses;
- (d) This award puts an end to the provisional measures adopted by the Arbitral Tribunal on July 22, 2008 and July 2, 2009.

¹² The ICSID Secretariat will in due course provide the Parties with a financial statement of the case account and the Parties will be reimbursed the remaining balance proportionally to the amount which was paid by each Party.



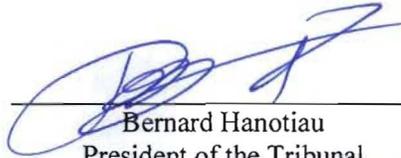
Andrea Giardina
Arbitrator

Date: 23 November 2011



W. Michael Reisman
Arbitrator

Date: 28/11/2011



Bernard Hanotiau
President of the Tribunal

Date: 24 November 2011