

International Centre for Settlement of Investment Disputes
Washington, D.C.

In the proceedings between

Noble Ventures, Inc.
(Claimant)

and

Romania
(Respondent)

ICSID Case No. ARB/01/11

Award

Members of the Tribunal:

Professor Karl-Heinz Böckstiegel, President
Sir Jeremy Lever, KCMG, QC, Arbitrator
Professor Pierre-Marie Dupuy, Arbitrator

Secretary of the Tribunal:

Mr. Gonzalo Flores

Date of dispatch to the parties: October 12, 2005

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Abbreviations

For the many references made in this Award to the file of the Case, for convenience and shortness the Tribunal will use the following abbreviations:

APAPS	Authority for Privatization and Management of the State Ownership
Art.	Article
BCR	Romanian Commercial Bank
BIT	US-Romanian Bilateral Investment Treaty of May 28, 1992 (entered into force January 15, 1994)
C 0	Investor's Request for Arbitration Proceedings of August 21, 2001
C I	Investor's (Claimant's) Memorial of July 10, 2003
C II	Investor's (Claimant's) Reply of May 7, 2004
C-PHB I	Investor's First Post-hearing Brief
C-PHB II	Investor's Second Post-hearing Brief
CSR	Combinatul Siderurgic Resita
GD	Government Decision
ICSID <i>or</i> the Centre	International Centre for the Settlement of Investment Disputes
Metal Grup	Metal Grup SA
No.	Number
p	Page
para	Paragraph
PO	Procedural Order
pp	Pages
Privatization Law	Romanian Government Emergency Ordinance No. 88/97 as amended by, in particular, Romanian Law 99/1999

R I	Respondent's Counter-Memorial of January 23, 2004
R II	Respondent's Rejoinder of August 30, 2004
R-PHB I	Respondent's First Post-hearing Brief
R-PHB II	Respondent's Second Post-hearing Brief
SOF	State Ownership Fund
SPA	Share Purchase Agreement dated June 5, 2000.

A. The Parties

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C. Short Identification of the Case

1. In what follows, the Tribunal gives a short summary of the principal facts of this case insofar as is appropriate in the context of the decision given in this award. Further details are to be found in the voluminous written briefs and documents submitted by the Parties as well as in the oral presentations by the Parties and in the evidence of the witnesses, as recorded in the transcript of the final hearing and the documents submitted with those oral presentations.

C.I. Introduction

2. The present case concerns a dispute between, on the one hand, an American company, Noble Ventures, Inc. (**Noble Ventures**), a juridical entity incorporated under the laws of the State of Maryland, USA in 1992, and, on the other hand, Romania. Noble Ventures' field of business activity consisted primarily of business consulting services for steel companies in Eastern Europe. The dispute arises out of a privatization agreement concerning the acquisition, management, operation and disposition of a substantial steel mill with associated and other assets, Combinatul Siderurgic Resita (**CSR**), located in Resita, Romania. The agreement was made between Noble Ventures and the Romanian State Ownership Fund (**SOF**). SOF was a Romanian "institution of public interest" which had been created in 1992 and had as a function the privatization of Romanian State-owned enterprises. The privatization agreement included a collateral agreements and a Share Purchase Agreement dated June 5, 2000 (**SPA**) which entered into force on June 8, 2000 and which, in what follows, are collectively referred to as the "**Privatization Agreement**". Completion of the agreement took place on August 16, 2000 when Noble Ventures paid SOF the initial installment of the purchase price and SOF transferred to Noble Ventures its shareholding in CSR which comprised almost CSR's entire equity share capital.

3. CSR is a company with a rich history of steel operations. Founded in 1771, the company was one of the premier integrated steel enterprises in Europe during the 19th and 20th centuries. It was nationalized in 1948 and operated by the Romanian government throughout the Communist period. After the fall of the Communist regime in Romania, the company's status reverted to that of a joint-stock company, named Combinatul Siderurgic Resita S.A. Before the privatization of CSR in 2000, the Romanian Government controlled approximately 95% of CSR's shares. As far as the economic situation of CSR was concerned, decades of State ownership and control had resulted in not only a need for substantial investment in new plant and equipment but also heavy financial liabilities. In particular, at the time of its acquisition by Noble Ventures, CSR had a significant amount of debt owing to other governmental entities. Some of the creditors possessed liens on accounts of CSR.
4. The dispute arises against the background of a bilateral investment treaty (**BIT**) between Romania and the USA of May 28, 1992, which entered into force on January 15, 1994. The Treaty provides in particular for the promotion and protection of investments of nationals or companies of one Party in the territory of the other Party. The relevant provisions of the BIT are set out at paragraph 27 below.
5. At the time of the privatization, more than ten years had elapsed since the end of the Communist régime in Romania. Being still in a period of transition at the time of the conclusion of the Privatization Agreement, Romania and the Government of Prime Minister Isarescu, at that time in power in Romania, strongly supported the privatization process of State-owned enterprises. For this purpose there existed the SOF, a public institution with legal personality, subordinated to the Government, which was in charge of negotiating privatization agreements with investors. It was SOF that concluded the Privatization Agreement concerning CSR with Noble Ventures.

6. Six months after the privatization took place political control changed to an opposition party, led by Prime Minister Nastase. The change of government was reflected by the replacement of SOF by the Authority for the Privatization and Management of the State Ownership (APAPS).
7. After the acquisition of CSR by Noble Ventures a number of problems arose.

C.II. The Positions of the Parties

8. The next two Sections of this Award (“The Claimant’s perspective” and “The Respondent’s perspective”) set out, in the Parties’ own words their stated positions with regard to certain essential issues in this arbitration at the commencement of the arbitration. The citations do not imply acceptance of the correctness of the stated positions, whether by the other party or by the Tribunal.

1. The Claimant’s perspective

9. The following quotation from the Claimant’s Memorial summarizes the main aspects of its case as follows (C I, paras. 11-19, 22- 25 and 28-29):

“10. There are four obligations under the US-Romania Bilateral Investment Treaty (“BIT”) which apply to this Claim:

- a) *Romania is required to provide Noble Ventures with **treatment in accordance with international law**. This obligation required Romania to act in good faith, accord fair treatment and avoid arbitrary and discriminatory measures in regulating the investments of Noble Ventures in Romania.*

- b) *Romania is required to provide Noble Ventures with **full protection and security** which requires Romania to enforce its own laws and to provide police protection to protect the investments of foreign investors located in Romania.*

- c) *Romania is required to provide immediate **compensation to investor whose property has been expropriated**. The BIT broadly protects investments and property rights and an expropriation will occur whenever a government acts to prevent an investor from substantially enjoying its investment.*

- d) *Romania is required to fully **meet its obligations in good faith** undertaken towards investors regarding investments.*

11. *Romania failed to act in a manner consistent with these BIT obligations. These breaches are summarized below and are set out with greater detail within this memorial.*

iii) *Misrepresentations about key assets*

12. *Romania violated Article II(2) of the BIT in that Romania's actions and omissions constituted a failure to provide international law standards of treatment, such as good faith, fair and equitable treatment and full protection and security as required by the Bilateral Investment Treaty and international law. In addition, Romania violated Article II(2)(b) of the BIT in that Romania's actions and omissions were an arbitrary and discriminatory*

measure which prevented Noble Ventures from exercising its rights to manage and control the Romanian investment.

13. Romania engaged in misrepresentation regarding Association Agreements in the Tender Book. While the Tender Book prepared for the 1999 Privatization of CSR states that there were no assets subject to Association Agreements, there was in fact an important and highly material Association Agreement in place dealing with the extraction of resources from the slag piles at the CSR facility by a third party.

14. Noble Ventures management discussed the status of the slag piles with SOF and CSR officials during the privatization process before the SPA was executed. At no time did Romania ever disclose the validity of these Association Agreements with third parties. In fact, documents addressed to SOF and issued by the third party to this Association Agreement indicate that Romania knew about the existence of this contract before the privatization was completed. In light of Romania's knowledge, the contents of the Privatization Tender Book contained fraudulent misrepresentations made by Romania with respect to this highly sensitive asset.

iv) Failure to provide Full Protection and Security

15. Romania failed to provide full protection and security to Noble Ventures during a period of extreme labor unrest in the spring and summer of 2001. The existence of this unrest was well known to Romania. During this period of unrest, Noble Ventures made ongoing reports to the local Prefect, Minister Musetescu [the new Minister of Privatization] personally and to the Office of the Prime Minister.

16. *On January 8, 2001, the local union initiated a demonstration with the goal of forcing the government to cancel the privatization contract due to Noble Ventures' failure to make an increase in capital at the CSR facility: an increase that could not be made until Romania rescheduled the state budgetary debts. In Resita, the counselor to the Prime Minister, Ovidiu Grecia, made a statement to the press that the sale of CSR was dishonorable and that SOF officials should be investigated over their role in the sale of CSR. His actions encouraged local citizens of Resita to engage in labor unrest at CSR while Noble Ventures was in control. The local police refused to exercise adequate measures to protect Noble Ventures and CSR in Resita from unlawful activity on its premises.*

17. *Romania did not provide reasonable nor adequate protection and security for Noble Ventures in Resita. As a result of unlawful strikes and occupations, Noble Ventures' premises were repeatedly occupied, its files and cash accounts were pilfered, facilities and equipment were sabotaged and members of its management were confined and, in some cases, beaten.*

v) *Failure to comply with Obligations in Good Faith*

18. *Romania violated Article II(2) of the BIT in that Romania's actions and omissions constituted a failure to observe its contractual obligations with the Investor as required by the Bilateral Investment Treaty and international law.*

19. *Romania failed to carry out its obligation to negotiate debt rescheduling with state budgetary creditors in good faith. The failure to engage in these negotiations resulted in a serious financial crisis for the Investment [Noble Ventures' acquisition, management, operation and disposition of a major steel mill facility, CSR] as it could not meet its ordinary payments when due. In addition, the failure to obtain rescheduling also*

resulted in the maintenance of liens held by state budgetary creditors on the CSR bank accounts and on assets of the company. The existence of these liens further damaged the ability of CSR to carry out its ordinary business.

(...)

22. Romania failed to meet the terms of the Accord [Appendix A to the SPA, which set out an agreement governing the transitional period between the signing of the SPA and Noble Ventures' assumption of control of CSR], which formed an integral part of the SPA. During the Accord Period, Romania negotiated a new Collective Agreement between CSR and the local Vatra union which was highly unfavorable to CSR and to Noble Ventures. Under the terms of the Accord, Romania could not make major decisions for CSR without Noble Ventures' consent. The New Collective Agreement was a major decision for CSR that was not approved by Noble Ventures. Romania structured the new Collective Agreement's execution so as to give Noble Ventures no effective opportunity to remedy the situation upon its taking control of CSR.

23. Finally, Romania failed to honor the terms of a settlement agreement entered into between it and Noble Ventures in 2002 as a result of Romania's failure to assist with the establishment of the final credit facility for Noble Ventures.

vi) Expropriation

24. Romania violated Article III of the BIT in that Romania's actions and omissions constituted a taking of Noble Ventures' interests in property without just compensation and in violation of the international law standards of

treatment required by Article II(2) of the BIT. Romania undertook a course of action intended to deprive the Investor of the effective use of its Investment through the colorable use of bankruptcy laws. Romania undertook this measure in an unfair and discriminatory manner with the intent to prevent the Investment from being able to carry out its business functions. The evidence indicates that Romania's action displayed an absence of bona fide intent and that it was not taken for any actual bona fide purpose.

25. *Romania's actions were motivated by a desire to revoke the effect of the Privatization Agreement between Romania and Noble Ventures, as a means of evading its liability arising from the Agreement.*

(...)

28. *Romania's abuse of process, designed to deprive Noble Ventures of its investment in CSR, was an internationally wrongful and unlawful response to the political situation caused by the unlawful union strikes in Resita. Romania's decision to violate international law standards of behaviour with respect to fair and equitable treatment, full protection and security and expropriation cannot be excused on account of the government's desire to deal with seemingly pressing political concerns. Romania was obligated to develop solutions that were consistent with its international law obligations.*

29. *Since the judicial reorganization of CSR, the facility has not operated in a profitable fashion and many thousands of formerly-employed workers have been unemployed."*

2. The Respondent's perspective

10. The Respondent sees the cause of Noble Ventures' problems with CSR quite differently, describing its position concerning the whole of the claim as follows in its Counter-Memorial (R I, paras. 3-13, footnote omitted):

“3. Whether out of arrogance or ignorance, Claimant refused to accept and respect the limits of the deal it struck with the State Ownership Fund (“SOF”) to purchase CSR as set forth in the Share Purchase Agreement (“SPA”). It is common ground that, when CSR was privatized, CSR was saddled with budgetary debt. Understandably, Claimant wanted SOF to forgive this debt. Under Romanian law, however, SOF did not have that authority, and it so advised Claimant during the negotiations leading to SPA. As SOF explained to Claimant, the best SOF could do was to assist Claimant's efforts to negotiate debt relief with the budgetary creditors, namely, ministries of the Romanian Government.

4. Neither the budgetary creditors nor the Romanian Government as a whole were parties to the SPA. For this reason, the SPA did not guarantee that CSR's debts would be restructured. Indeed, under the SPA, Claimant agreed to pay US\$2 million more to SOF after the deal closed if Claimant succeeded in restructuring CSR's budgetary debt with SOF's assistance. The SPA did not include a timeframe within which debt restructuring negotiations were to occur, and it did not make Claimant's obligation to invest in CSR contingent on CSR obtaining debt relief and restructuring. Although Claimant might have wanted a different or even a better deal, Claimant agreed to the above terms in the SPA.

5. SOF fully complied with its obligations to assist Claimant's efforts to obtain debt restructuring. Through no fault of SOF's, Claimant failed to obtain the debt restructuring it wanted. Thereafter, Claimant simply stopped

paying the workers' wages and refused to invest the capital in CSR that Claimant knew was vital to turning CSR into a profitable venture. The results, predictably, were disastrous. CSR effectively shut down. The workers blamed Claimant and the Government in equal measure. Claimant fanned the flames of discontent by blaming the Government in the hope that union pressure would force Romania to restructure CSR's budgetary debt regardless of the provisions of the SPA. While CSR workers suffered, Claimant's agents lived well, drawing lavish salaries for questionable services rendered and taking foreign vacations at company expense. The Government could not stand idly by.

6. *Although not required to do so, the Government authorized substantial debt restructuring for CSR in May 2001. Claimant rejected the restructuring package, thereby further exacerbating the situation in Resita. Confronted with a financial and social meltdown in Resita, the Government was wholly justified in supporting the filing of a judicial reorganization petition by CSR's budgetary creditors in July 2001 as a temporary measure to stabilize CSR and calm the crisis that Claimant had created.*

7. *Claimant's primary claim in this case centers on the judicial reorganization. According to Claimant, "Romania" breached its obligation under the SPA to restructure CSR's budgetary debt, and then used this debt as the basis to initiate the judicial reorganization proceedings, which Claimant asserts was part of a scheme "to rescind the Privatization Agreement and allow Romania to take back control of CSR." Claimant argues that the judicial reorganization was arbitrary, discriminatory, unfair, and expropriatory. This claim is groundless as a matter of fact and a matter of law.*

8. *First, SOF fully complied with its obligations under the SPA. Second, the judicial reorganization was conducted entirely in accordance with the Romanian law, and Claimant does not contend otherwise. Third, the*

reorganization did not and could not “take” CSR from the Claimant. During the approximately six-month reorganization period, Claimant retained its majority share ownership in CSR. A court-appointed, private administrator managed the company. Far from using the organization to seize control of the company, Romania facilitated the early termination of the judicial reorganization proceedings to allow Claimant to reassert management control of CSR, which it did in January 2002. The temporary loss of management control occasioned by a lawfully instituted and conducted judicial reorganization under municipal law simply does not constitute a violation of Romania’s obligations under the US-Romanian bilateral investment treaty (the “BIT”).

9. *Because Claimant asserts that its property was expropriated in July 2001, acts complained of thereafter are legally irrelevant under Claimant’s own theory of the case. Claimant’s assertion that Romania breached a settlement agreement is noteworthy, however, to demonstrate Claimant’s chronic inability to acknowledge and accept the plain terms of the documents it signed. Far from being a binding settlement, the document that Claimant drafted states clearly that it is merely a proposal. The record in this case shows that, despite further negotiations, neither Claimant nor Romania ever fully agreed to or implemented Claimant’s proposal. Claimant nonetheless tries to recast reality for this Tribunal and treat the agreement as a binding obligation that Romania breached. Claimant is simply wrong.*

10. *Claimant raises two additional claims that also are entirely without merit. First, Claimant alleges that SOF failed to “disclose the validity” of the joint venture contract between CSR and a company called Metal Grup related to CSR’s slag piles before Claimant signed the SPA. Claimant contends that access to the slag piles was critical to its success in Resita, and that its inability to exploit the slag piles doomed it to failure. Claimant’s allegations are not credible.*

11. *Not only did Claimant learn about the Metal Grup contract during its extensive pre-privatization due diligence of CSR, but SOF specifically advised Claimant of the contract before Claimant signed the SPA. Claimant was represented at all times by Romanian counsel. To the extent Claimant considered the legal status of the Metal Grup contract significant, it could have and indeed should have sought a proper legal opinion. Moreover, although Claimant complains loudly now about the slag pile issue, Claimant apparently forgot about this purportedly crucial claim when it filed its Request for Arbitration in this case (which nowhere mentions the slag pile issue as a basis for recovery). In any event, even if one were to assume contrary to the facts that SOF negligently failed to advise Claimant about the Metal Grup contract, such conduct does not rise to the level of a BIT violation.*

12. *Finally, Claimant alleges that Romania failed to provide it with “full protection and security” by not preventing alleged isolated acts of violence against Claimant’s agents. Contrary to Claimant’s exaggerated allegations, however, Romanian authorities reacted reasonably and exercised appropriate due diligence in response to the two complaints lodged by Claimant’s agent. Claimant does not and plausibly cannot contend that these incidents, or the remaining handful of other alleged incidents, which Claimant did not report to the authorities, caused it to abandon Romania and its investment in CSR. In this regard, Claimant does not even attempt to tie this alleged conduct to any damages at all.*

13. *Romania unquestionably complied with its obligations under the BIT and Claimant has not shown otherwise.”*

11. Against this background, the Respondent summarizes its overall position as follows in its Rejoinder (R II, para. 2, footnote omitted):

“2. Claimant Noble Ventures, Inc., took a calculated risk as the sole bidder for Combinatul Siderurgic Resita S.A. (“CSR”), an aging, bankrupt steel mill in the emerging market economy of Romania that Claimant alone believed was a “diamond in the rough.” Unwilling to invest any of its own funds in CSR, Claimant quickly failed to meet its initial investment obligations under the Share Purchase Agreement (“SPA”) or its steel production goals. Labor strife ensued because of Claimant’s failure to pay wages. Within months of taking over CSR, Claimant realized that CSR was much more “rough” than “diamond.” Claimant had underestimated significantly the difficulty in turning CSR around and had overestimated its ability to attract investment capital to do so.”

D. Procedural History

12. Arbitral Proceedings against the Respondent commenced with the Request for Arbitration sent by the Claimant to ICSID on August 21, 2001 (C 0). In the request, the Claimant invoked Romania’s consent to ICSID arbitration provided in the 1992 Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment.
13. On August 27, 2001, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt and transmitted a copy of the Request to Romania and to the Romanian Embassy in Washington D.C.
14. The Request was registered by the Secretary-General of ICSID on October 17, 2001, in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID

Convention”). On that same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

15. The parties did not agree on the number of arbitrators to comprise the arbitral tribunal in this case nor on the method for their appointment. Accordingly, by letter of April 16, 2002, the Claimant requested the Tribunal to be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; i.e. one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties. The Claimant appointed Sir Jeremy Lever, KCMG, QC, a national of the United Kingdom as an arbitrator. Romania in turn appointed as arbitrator Professor Vincenzo Porcasi, a national of Italy. Professor Porcasi accepted his appointment but, for personal reasons, would shortly after resign. Romania then appointed Professor Pierre-Marie Dupuy, a national of France as an arbitrator.
16. By letters of January 9 and 10, 2003, the Claimant and Romania, respectively, informed the Centre that they had agreed to appoint Professor Karl-Heinz Böckstiegel, a national of Germany, as the President of the Tribunal.
17. On January 16 2003, the Acting Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

18. The First Session of the Tribunal was held in Washington, D.C. at the seat of the Centre on March 10, 2003. The results of the meeting were recorded in Minutes of the First Session as follows:

“Present at the session were:

Members of the Tribunal

Professor Karl-Heinz Böckstiegel, President

Sir Jeremy Lever, Arbitrator

Professor Pierre-Marie Dupuy, Arbitrator

ICSID Secretariat

Mr. Gonzalo Flores, Secretary of the Tribunal

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Mr. Lee A. Steven, White & Case LLP

Mr. Florentin Tuca, Musat & Asociatii

Mr. Cornel Popa, Musat & Asociatii

Also attending on behalf of the Respondent

Mr. Claudio Seucan, Vice President, Authority for Privatization and Management of State Ownership

After welcoming the parties, the President of the Tribunal referred to a joint letter from the parties, dated March 7, 2003, comprising procedural agreements reached by the parties prior to the session. The President noted that the Tribunal had only received a copy of such letter moments before the session. The President accordingly suggested to follow the Agenda previously circulated by the Secretary, referring to the joint letter when appropriate. The parties agreed to this procedure. The parties provided the Secretary of the Tribunal with an additional copy of their joint letter for the file. A copy of the Agenda is attached to these minutes as Annex 1. A copy of the parties' joint letter is attached to these minutes as Annex 2.

I. Procedural Matters

1. Constitution of the Tribunal and the Tribunal Members' Declarations

The President noted that the Tribunal had been constituted on January 16, 2003 and that it had been properly constituted in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties expressed their agreement that the Tribunal had been properly constituted and that they had no objection to the appointment of any of the members of the Tribunal. Prior to the commencement of the session, the Secretary distributed copies of the declarations signed by the three arbitrators pursuant to Article 6 of the ICSID Arbitration Rules. During the session, the Secretary of the Tribunal distributed additional copies of these declarations to the parties.

2. Fees and Expenses of Tribunal Members (Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees)

The President noted that the parties have considered adopting a different schedule of fees than the one established by the Centre. It was also noted that the parties had not yet agreed on such alternative schedule of fees. The point was accordingly left open, being agreed that the parties would revert to the Tribunal in this regard soon. It was also agreed that all the communications in this connection would be jointly made by counsel for both parties to the President on behalf of the Tribunal.

3. Representation of the Parties

It was noted that the Claimant is represented in this case by:

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4. Applicable Arbitration Rules

The President of the Tribunal noted that on January 1, 2003, the Centre's amended Arbitration Rules entered into force. The President also noted that, pursuant to Article 44 of the ICSID Convention, these proceedings would be conducted in accordance with the ICSID Arbitration Rules in force since September 26, 1984 unless the parties otherwise agree. The parties agreed to conduct the proceeding under the ICSID Arbitration Rules of September 26, 1984.

Counsel for the Claimant proposed to amend Arbitration Rule 48(4), allowing the publication of the Award without the need of previous consent by both parties. Counsel for the Respondent disagreed, stating that the matter should be discussed at a more appropriate stage of the proceeding. The matter was left open for further discussion in the future.

5. Apportionment of Costs and Advance Payments to the Centre

It was agreed that, in accordance with Article 61 of the ICSID Convention and Rule 14 of the ICSID Administrative and Financial Rules, the parties would defray the expenses of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to costs.

6. Records of Hearings

It was noted that complete sound recordings had been arranged for this session. It was agreed that complete sound recordings would be made of subsequent sessions. It was further agreed that the Secretary would keep minutes of meetings in summary form.

The parties had agreed that stenographic transcripts of the hearings would be made by court reporters agreed upon by the parties. After some discussions, the parties agreed to use the services of the court reporters usually used by the Centre. The use of "real time" or "same-day" transcripts was left open for future discussion.

7-8. Means of Communication and Copies of Instruments

It was agreed that all communications and written instruments in this proceeding were to be addressed to the Centre. It was further agreed that written instruments were to be submitted to the Centre in an original and six copies, two of which would be for delivery to the other party. Brief communications that were not substantive applications or submissions would be

transmitted by facsimile. It was also agreed that an additional electronic copy of the written instruments will be sent to the Secretary of the Tribunal by the parties. The Centre would arrange for the appropriate distribution of copies.

It was agreed that the date of filing of an official instrument or of receipt of a communication shall be the date of receipt by the Centre of all the documentation in hard copy. It was also agreed that the deadlines for the submissions will start upon the day that the parties receive the pertinent documents. The President of the Tribunal noted that, in exceptional circumstances, time extension requests would be considered.

In connection with the authenticity of documents, it was agreed that simple copies of a document would suffice, unless the other party challenges such document. In such case the Tribunal will ask that the original document to be submitted.

9. Quorum

It was agreed that the sittings of the Tribunal would require the presence of all its members.

10. Decisions of the Tribunal

It was confirmed that in accordance with Arbitration Rule 16(2), the Tribunal could take decisions by correspondence among its members, or by any other appropriate means of communication, provided that all members were consulted. The members of the Tribunal and the parties agreed that the President shall have the power to determine procedural matters after consultation as far as possible with the other members of the Tribunal.

11. Procedural Languages

It was decided pursuant to Arbitration Rule 22 that the language of the proceedings would be English. It was confirmed that if a party were to submit a document in a language other than English, that party would simultaneously provide a translation of the document into English.

The parties also agreed that, during oral hearings, witnesses and expert witnesses would be allowed to testify in English, Romanian or any other language, and that simultaneous interpretation services would be arranged by the Secretariat. The parties agreed to announce the need for simultaneous interpretation in fair advance for the Secretary to make the necessary arrangements.

12. Pre-Hearing Conference

It was agreed that the possibility of holding a pre-hearing conference under Arbitration Rule

21 could be addressed at a later stage in the proceeding. The possibility of holding such conference through videoconference was also left open for later consideration.

13. Place of Arbitration

It was agreed that the place of the proceedings would be the seat of the Centre in Washington, D.C., without prejudice to holding sessions with the parties at any other place with their agreement, and after consulting the Secretary-General of the Centre if appropriate. In addition, the Tribunal may meet without the parties at any other place as convenient.

14. Written and Oral Procedures

It was confirmed that the proceeding would comprise a written phase followed by an oral one.

15. Pleadings: Number, Sequence, Time Limits

Counsel for the Claimant proposed a bifurcation of liability and quantum of damages. Counsel for the Claimant stated that his party would be prepared to fully present to the Tribunal the merits of the dispute in short time. The quantum of damages, however, would be a matter of extensive discovery of documents and, therefore, would require longer time limits. Counsel for Romania opposed said bifurcation arguing that the Claimant has the burden of presenting its case and that in the present case, it has had plenty of time to do so. Counsel for Romania also announced the possible filing of counterclaims.

After consultation with the parties and due deliberation by the Tribunal, the President announced that the Tribunal has decided to continue the proceeding without bifurcation, and that the pleadings shall be submitted within the following time limits:

- The Claimant shall file its memorial within four months, counting from March 10, 2003;
- The Respondent shall file its counter-memorial within four months from its receipt of the Claimant's memorial;
- The Claimant shall file its reply within two months from its receipt of the Respondent's counter-memorial;
- The Respondent shall file its rejoinder within two months from its receipt of the Claimant's reply.

In the event the Respondent files a counterclaim, the Claimant will have the possibility of an additional filing, by way of rejoinder to the counter claim, to be filed within one month from the date of receipt of the Respondent's rejoinder.

In the event a time limit expires on a holiday observed at the place of delivery (i.e. the Centre), it would be automatically extended to the next business day.

The issue of production of documents was also addressed. Counsel for the Claimant handed to the Tribunal and Counsel for Romania a documents called "Investor's Proposal on Document Production." A copy of this documents was also handed to the Secretary for the file. This document was prepared by Counsel for the Claimant assuming a bifurcation of liability and quantum of damages.

The Tribunal asked counsel for the Respondent to comment on the Claimant's proposal. Counsel for Romania expressed reservations to the Claimant's proposal, stating that the issue of production of document should be addresses to the Tribunal. After hearing extensively from counsel for both parties, the President of the Tribunal suggested to use the Claimant's Proposal only as a guideline for the production of documents between the parties. The Tribunal then urged the parties to deal with any disagreements they may have on this matter, leaving for the Tribunal only those issues they could not resolve. The parties agreed on this procedure.

It was agreed that all the accompanying documentation will be identified with the letter "C" for that presented by the Claimant and with the letter "R" for that submitted by the Respondent, and numbered in a consecutive manner throughout the proceedings (e.g., C-0001, C-0002, etc./ R-0001, R-0002, etc.). The Tribunal urged the parties to be selective in the production of documents, limiting their submissions to relevant documentation.

16. Delegation of Power to Fix Time Limits

The Tribunal informed the Parties that it had delegated to the President the power to fix time limits, pursuant to Arbitration Rule 26(1) as well as the power to decide other minor procedural matters or other procedural matters in cases of urgency if he cannot reach his co-arbitrators.

It was also agreed that in case of short extensions of time needed by either party, the requesting party will directly seek the other party's consent and, if granted, will communicate their agreement to the Tribunal. This communication to the Tribunal could be made jointly or separately by counsel for the parties.

17. Dates of Subsequent Sessions

It was agreed that a hearing shall be held tentatively the week of May 24-28, 2004.

18. Production of Evidence

The parties agreed that they shall include with their written submissions (i.e. memorials, counter-memorials, replies and rejoinders) not only their legal arguments, but also all of the evidence on which they intend to rely for the legal arguments advanced therein, including written witness testimony, expert opinion testimony, documents and all other evidence in whatever form. It was also agreed that the parties may include with their second written submission only additional witness testimony, expert opinion testimony, and documents or other evidence responding or rebutting the matters raised by the other party's previous written submission or by new evidence obtained by one party from the other party. It was

further agreed that only in exceptional circumstances, the Tribunal would allow the introduction of new evidence at a later stage of the proceeding.

It was agreed that before any oral hearing and within time limits to be announced by the Tribunal, a party may be called upon by the Tribunal or the other party to produce at the hearing for examination and cross-examination any witness whose written testimony had been advanced with the written submissions. It was also agreed that, in order to make most efficient use of time at the hearing, written witness statements would generally be used in lieu of direct oral examination, though exceptions may be admitted by the Tribunal.

19. *Time Limit for the Preparation of the Award*

The Tribunal noted that while it is ready to prepare the award within the time limits prescribed by Arbitration Rule 46, the matter will be dealt with in due time.

II. Other Matters

Counsel for Romania explained to the Tribunal that they might need to file a preliminary counterclaim to prevent being affected by statutes of limitation applicable under Romanian law. Counsel for the Claimant expressed its reservations to this procedure, indicating that this may raise issues in connection with the Tribunal's jurisdiction. The President indicated that, in this connection, Romania will be allowed to file a preliminary brief counterclaim, after the Claimant has filed its memorial, and then will be allowed to file a full counterclaim, within the time limits agreed before.

There being no further business, the President adjourned the meeting at 1 p.m. of March 10, 2003.

Sound recordings were made of the session and deposited in the archives of the Centre”.

19. On April 14, 2003, the Claimant submitted a Motion for Production of Documents, requesting the Tribunal to issue a procedural order directing the Respondent to produce a number of documents after the Respondent, by letter dated April 7, 2003, refused to comply with a corresponding request from the Claimant dated March 25, 2003 and also a second request on April 9, 2004.
20. After several further submissions by the Parties, in its Procedural Order No. 1 (**PO No. 1**), dated June 3, 2003, the Tribunal stated as follows:

The Tribunal has considered:

1.1. the various submissions by the Parties regarding the production by Romania of documents at the present stage of the proceedings;

1.2. Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2)(a) both of which do not provide a basis for the application of national rules of discovery such as those of the United States Federal Rules of Civil Procedure or those for the District of Columbia;

1.3. the discussion at the Procedural Hearing in Washington, D.C. on March 10, 2003; and

1.4. the Minutes of that Hearing, particularly Sections 15 and 18.

2. The “IBA Rules on the Taking of Evidence in International Commercial Arbitration,” though not directly applicable in this case and primarily provided for use in the field of commercial arbitrations, can be considered (particularly in Articles 3 and 9) as giving indications of what may be relevant criteria for what documents may be requested and ordered to be produced, in ICSID procedures between investors and host States.

3. The Tribunal recognises that, on one hand, requests and orders regarding the production of documents are today a regular feature of international arbitration, and that Romania has throughout expressed its willingness to produce documents provided that certain conditions, which it has specified, are satisfied, but, on the other hand, the present arbitration is a case between a Government of a Civil Law country where production of

documents is used far less than in Common Law countries from where the investor comes.

4. *The Tribunal further recognises that, on one hand, ordering the production of documents can be helpful in the Tribunal's task of establishing the facts of the case relevant for the issues to be decided, but, on the other hand, (1) the process of discovery and disclosure may be time-consuming, excessively burdensome and even oppressive and that unless carefully limited, the burden may be disproportionate to the value of the result, and (2) Parties may have a legitimate interest of confidentiality.*

5. *Finally the Tribunal notes that, insofar as a Party has the burden of proof, it is sufficient for the other Party to deny what the respective Party has alleged and then, later in the procedure, respond to and rebut the evidence provided by that respective Party to comply with its burden of proof.*

6. *At paragraph 3 of Romania's Response to Claimant's Motion for Production of Documents ("Romania's Response"), Romania -*

"ask[ed] the Tribunal to order Claimant to re-formulate its requests for documents...so that production of documents can proceed apace".

7. ***Conclusion of the Tribunal***

Taking into account the above considerations, the Tribunal finds that at a time when only the short Request for Arbitration Proceeding submitted by Claimant on 21 August 2001 and the submissions on the production request itself are available to identify the relief sought and the factual allegations and legal arguments on which Claimant intends to rely in this regard for the alleged

breaches of the BIT Article II Sections 1 and 2 and Article III Sections 1 and 2, failing agreement of the Parties, the Tribunal is not in a position to identify, within the many and broad requests submitted by Claimant, which documents must be considered relevant and material for the Tribunal to decide on the relief sought.

8. Ruling

8.1. The Parties are invited to try to agree as soon as possible on a disclosure of documents taking into account the considerations and criteria referred to above.

8.2. To assist the Parties in their effort to agree, attached to this Order is a Tribunal Draft Order indicating, subject to further comments received from the Parties, criteria which the Tribunal is inclined to use should it be required to rule in so far as the Parties fail to agree.

8.3. In so far as no such agreement can be reached, the Parties may, if they consider it necessary, submit new requests for the production of documents together with their first memorials presenting their factual allegations and legal arguments supporting their claims and counter-claims respectively according to the 2nd paragraph of Section 15 of the Minutes of the First Session. If a Party wishes to make use of that option, the same procedure shall apply as identified in Section 15 of the minutes of the First Session regarding the production of documents.

9. Note on Submission of Documents

9.1. The Tribunal draws the attention of the Parties to the last paragraph of Section 15 of the Minutes of the First Session regarding the identification of documents and notes that the exhibits enclosed to the submissions regarding the production of documents do not fulfil these requirements.

9.2. In addition, the Tribunal clarifies that, for the convenience of using them, all documents shall be submitted separate from the respective briefs to be collected in 2-ring binders accompanied by updated lists of all documents submitted by the respective Party.”

21. In accordance with the timetable established in the Minutes of the First Session of the Tribunal, the Claimant submitted its Memorial (C I) on July 10, 2003.
22. By way of a letter dated September 5, 2003 the Respondent requested an extension of time for filing its Counter-Memorial. After further submissions from both parties, by ICSID letter of September 24, 2003, the Tribunal granted an extension and set a new timetable.
23. On January 10, 2004 the Respondent submitted its Counter-Memorial (R I) regarding the Claimant's Memorial of July 10, 2003.
24. The Claimant filed its Reply to the Respondent's Counter-Memorial on May 7, 2004 (C II).
25. The Respondent submitted its Rejoinder (R II) on August 30, 2004.

26. By Procedural Order No. 2 of September 3, 2004 (**PO No. 2**), the Tribunal provided for rules concerning the preparation, scheduling, form and length of a hearing to be held in Washington, D.C. on October 6, 2004 as follows:

“1. Introduction

1.1. *This Order takes into account the submissions by the Parties and, particularly, the recent rulings regarding the further procedure.*

1.2. *Furthermore, the Parties are invited to carefully take into account all **earlier rulings** in the Minutes of the First Session on March 10, 2003, and letters of ICSID on behalf of the Tribunal, unless they have been changed by later rulings or rulings in this Order.*

2. Changes or Additions to the Agreed Procedure and Timetable

2.1 **By September 10, 2004**, the Parties shall indicate, whether and which witnesses or experts originally designated they withdraw from their list for oral examination, and which witnesses and experts of the other Party they request to examine at the Hearing.

2.2 **By September 17, 2004**, the Parties shall try to agree on the order in which the witnesses and experts shall be examined and notify the Tribunal of the agreed order. If no such agreement can be reached, Claimant’s witnesses and experts will be heard first and the Party which presented the witnesses or experts shall decide on the order in which they shall be examined.

2.3. The Tribunal recalls from Section 6 of the Minutes that a **transcript** shall be made of the Hearing by the court reporters usually used by the Centre. Should the Parties request “real time” or “same day” transcripts, they shall inform the Centre not later than **September 17, 2004**.

2.4. **By September 17, 2004**, the Parties shall inform the Centre according to Section 11 of the Minutes for which witnesses and experts **simultaneous interpretation** is required.

2.5. The Tribunal has taken note of the many and voluminous exhibits submitted by the Parties together with their briefs. As only a limited number of these exhibits will be used in the time available at the Hearings, to avoid that all exhibits have to be transported to Washington, the members of the Tribunal intend to bring to the Hearings all of the statements of witnesses and experts (without exhibits) as well as the major contractual documents, but invite the Parties to prepare and provide at the Hearings to each member of the Tribunal and to the other Party "**Hearing Binders**" containing copies of those further exhibits or parts of exhibits to which they intend to refer in their oral presentations and witness examination at the Hearings.

3. Time and Place of Hearings

3.1. The Hearings shall be held at the Centre in Washington D.C.

Starting October 6, 2004, at 9:00 a.m.

Ending, at the latest, in the afternoon of October 10, 2004.

3.2. To give sufficient time to the Parties and the Arbitrators to prepare for and evaluate each part of the Hearings, the daily sessions shall not go beyond the period between 9:00 a.m. and 5:00 p.m. However, the Tribunal, in consultation with the Parties, may change the timing during the course of the Hearings

4. Intention and Scope of the Hearings

4.1. In view of the many and voluminous submissions and documents filed by

the Parties before the Hearing, there is no need to repeat their contents at the Hearing.

4.2. *To make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, after a short introduction of the witness by the presenting Party of up to 10 minutes, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.*

4.3. *If a witness whose statement has been submitted by a Party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, his statement will not be taken into account by the Tribunal. A Party may apply with reasons for an exception from that rule.*

4.4. *Should the Parties request oral examination of an expert, the same rules and procedure would apply as for witnesses.*

4.5. *The Parties are invited to present short opening statements of not more than one hour each.*

4.6. *No new documents may be presented at the Hearing unless agreed by the Parties or authorized by the Tribunal. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.*

5. *Agenda and Timing of the Hearing*

5.1. *The following Agenda is established for the Hearing:*

1. *Introduction by the Chairman of the Tribunal.*
2. *Opening Statements by the Parties of not more than 60 minutes each for the Claimant and the Respondent.*
3. *Unless otherwise agreed by the Parties: Examination of witnesses and experts presented by Claimant. For each:*

- a) *Affirmation of witness or expert to tell the truth.*
 - b) *Short introduction by Claimant (This may include a short direct examination on new developments after the last written statement of the witness or expert.).*
 - c) *Cross examination by Respondent.*
 - d) *Re-direct examination by Claimant, but only on issues raised in cross-examination.*
 - e) *Remaining questions by members of the Tribunal, but they may raise questions at any time.*
4. *Examination of witnesses and experts presented by Respondent. For each: vice versa as under a) to e) above.*
 5. *Any witness or expert may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.*
 6. *Remaining questions by the members of the Tribunal, if any.*

5.2. *Examination of witnesses and experts shall take place in the order agreed by the Parties. If no such agreement has been reached, unless the Tribunal decides otherwise, Claimant's witnesses and experts shall be heard first in the order decided by the Claimant, and then Respondent's witnesses and experts shall be heard in the order decided by the Respondent.*

5.3. *Unless otherwise agreed between the Parties or ruled by the Tribunal, witnesses and experts may be present in the Hearing room during the testimony of other witnesses and experts.*

5.4. *Taking into account the time available during the period provided for the Hearing, the Tribunal establishes equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available for examination and cross-examination of all witnesses and experts. Taking into account the calculation of hearing time attached to this Order, the total maximum time available for the Parties (including their introductory statements) shall be as follows:*

10 hours for Claimant

10 hours for Respondent

It is left to the Parties how much of their allotted total time they want to spend on Agenda items 3. and 4. b, c, and d

5.5. *The Parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established in this Procedural Order.*

6. *Other Matters*

6.1. *The Parties shall coordinate with the Centre, the court reporting service and the simultaneous interpretation service in advance of the Hearing to assure that the services are available and ready to start at the beginning of the Hearing. This shall include that microphones are set up for all those speaking in the Hearing room to assure easy understanding over a loud speaker.*

6.2. *To give the Parties an opportunity to evaluate and comment on the results of the Hearing, the Tribunal intends to invite the Parties to submit **Post Hearing Briefs** (no new documents). The details will be decided after consultation with the Parties before the end of the Hearing.*

6.3. *The Tribunal may change any of the rulings in this order, after consultation with the Parties, if considered appropriate under the circumstances.”*

27. Concerning the Hearing, the parties were informed by way of ICSID letter dated September 14, 2004 that the President of the Tribunal ruled as follows:

“1. *In view of the large number of statements submitted, to facilitate the Hearing, in addition to the Hearing binders referred to in Section 2.5 of Procedural Order No. 2, the parties are invited to provide at the Hearing to*

each member of the Tribunal and the other party a further Hearing Binder with all statements of witnesses and experts submitted by the Party;

2. *The Tribunal has decided to already start the Hearing on Tuesday, October 5, 2004;*

3. *The Hearing will commence on the above date at 9 a.m. and will be held in Room MC 13-121, located on the thirteenth floor of the “MC” Building of the World Bank, at 1818 H Street, N.W., 20433.*

4. *The Tribunal recommends to the parties to further reduce the number of witnesses and experts they invite to the Hearing. In this context, the Tribunal points out that a party, even if it does not invite a witness for oral cross-examination at the Hearing, may object to the correctness or credibility of the written witness statement in its briefs;*

5. *By the date set in Section 2.1 of Procedural Order No. 2 (i.e. September 17, 2004), the parties are invited to agree on and inform the Tribunal of the number, names and order of witnesses and experts to be examined at the Hearing, taking into account the recent submissions and the above recommendation of the Tribunal;*

6. *The Tribunal clarifies that it does not consider necessary that the Parties allot time at the Hearing to closing arguments or other pleadings, as the Post Hearing Briefs will give opportunity to do so.”*

28. In accordance with ICSID letter of September 14, 2004, the Hearing was held and recorded in a transcript and audio recording. It took place from October 5, 2004 through October 9, 2004. It was attended by:

On behalf of the Claimant/Investor:

Mr. Barry Appleton

Mr. Robert Wisner

Mr. Ali Ghiassi

Mr. Hernando Otero

Ms. Barnali Choudhury

Mr. Nick Gallus

Appleton & Associates

International Lawyers

1140 Bay Street

Suite 300

Toronto, Ontario M5S 2B4

and

Mr. Florin Dutu

Stefanica, Dutu & Partners

Bucharest, Romania

On behalf of the Respondent/Party:

Mr. Darryl S. Lew

Mr. Francis A. Vasquez, Jr.

Mr. Lee A. Steven

White & Case, L.L.P.

601 13th Street, N.W.

Washington, D.C., 20005

(202) 626-3600

and

Mr. Florentin Tuca

Mr. Cornell Popa

Ms. Levana Zigmund

Ms. Cristina Meta

Musat & Asociatii

43 Aviatorilor Blvd.,

First District

Bucharest, 011853

Romania

29. Following the Hearing, the Tribunal issued Procedural Order No. 3 (**PO No. 3**) dated October 13, 2004, which reads as follows:

“1. Taking into account the discussion with the Parties during the Hearing in Washington, the Tribunal rules as follows:

*2. The Parties shall try to agree on any corrigenda regarding the transcript of the Hearing and, by **October 22, 2005**, shall submit the corrigenda agreed or otherwise their two versions of the corrigenda to the Tribunal.*

*3. By **November 24, 2004**, the Parties shall file **Post Hearing Briefs** of up to 50 pages containing the following sections:*

A. An exact identification of the Relief Requested

a) *Declaratory Relief*

b) *Monetary Award*

B. *A short identification of the legal basis in the BIT for each Relief Requested*

C. *Only in so far as relevant for the Relief Requested*

a) *conclusions from the Hearing*

b) *references to related evidence already in the file*

D. *Without prejudice to what the Tribunal finally considers as relevant for its decisions, the Tribunal invites the Parties to include comments on the following questions and issues:*

1.

a. *Relevance of other ICSID decisions, particularly the Award in SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No.ARB/02/6) to the application of an “umbrella clause” in a BIT.*

b. *Was SOF the Romanian State for this purpose or was it, by reason of its separate incorporation, a constituent sub-division or agency?*

c. *The purpose and effect of Article 25 of the ICSID Convention and their relevance, if any, to (a) and (b) above.*

2. *If,*

(i) *by reason of the BIT, Romania is liable for breaches of contract by SOF;*

and if,

(ii) *Article 15² enabled SOF (and subsequently APAPS) to force budgetary creditors to negotiate or potentially have rescheduling etc. forced on them by the Government under Article 15²,*

is characterization of SOF's obligation under Article 7.4.2. of the SPA as an obligation of means affected by the existence of Article 15² of the Privatization Law?

3. *If by reason of the BIT, Romania is not liable for breaches of contract by SOF, and if Article 15² is capable of being applied post-privatization, how, if at all, is Article 15² relevant to found liability on the part of Romania as a matter of international law?*

4. *What is the evidence to lead one to conclude that, if by the end of 2000 CSR's debts had been rescheduled etc., Noble Ventures would or would not have secured such further additional financial resources as would have enabled it*
 - a. *to avoid the problems that beset CSR in 2001; and*
 - b. *to fund the investment program described in its Business Plan?*

5.
 - a. *On what specific acts or omissions does Noble Ventures rely as showing that SOF/APAPS did not comply with its obligation to negotiate as required by Article 7.4.2. of the SPA.?*

 - b. *On what specific acts or omissions does Romania rely as showing that SOF/APAPS did comply with that obligation?*

4. ***By December 17, 2004, the Parties shall submit Reply Post Hearing Briefs of up to 20 pages only dealing with issues raised in the Post Hearing Brief of the other Party.***

5. *By **January 14, 2005**, the Parties shall submit their **Cost Claims**.*

6. *By **January 28, 2005**, the Parties may submit comments on the **Cost Claim of the other Party**".*

30. On November 24, 2004, the Claimant and the Respondent each submitted its first Post-hearing Brief (**C-PHB I** and **R-PHB I**). On December 21, 2004 both parties submitted their second Post-hearing Briefs (**C-PHB II** and **R-PHB II**).

31. ICSID Arbitration Rule 38 (1) requires that when the presentation of the case by the Parties is complete, the proceeding shall be declared closed. Having reviewed all of the presentations by the parties, the Tribunal, came to the conclusion that there is no request by a Party or any reason to reopen the proceeding, as is possible under ICSID Arbitration Rule 38(2). Accordingly, by letter dated August 15, 2005, the Tribunal declared the proceedings closed.

E. The Principal Relevant Legal Provisions

32. The principal relevant provisions of the US-Romanian BIT are as follows:

ARTICLE I

1. *For the purposes of this Treaty,*

(a) *"investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*

(i) *movable and immovable, property and tangible and intangible property, including rights such as mortgages, liens and pledges;*

(ii) *a company or shares of stock or other interests in a company or interests in the assets thereof;*

(iii) *a claim to money or a claim to performance having economic value, and associated with an investment;*

(iv)...

(v) *any right conferred by law or contract, including concessions to search for, extract, or exploit natural resources, and any licenses and permits pursuant to law.*

“ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

2. (a) *Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.*

(b) *Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.*

(c) *Each Party shall observe any obligation it may have entered into with regard to investments.*

3. *Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.*

4. *Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.*

5. *Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods*

or services must be purchased locally, or which impose any other similar requirements.

6. *Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.*

7. *Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.*

8. *The treatment accorded by the Government of the United States of America to investments and associated activities of nationals and companies of Romania under the provisions of this Article shall in any State, Territory, or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.*

9. *The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:*

(a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or

(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.

"ARTICLE III

1. *Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in any freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.*

2. *A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law.*

3. *Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses."*

"ARTICLE VI [which provides for arbitration of investment disputes"]

1. *For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.*

2. ...

....

8. ..."

"ARTICLE XII

This Treaty shall apply to the political subdivisions of the Parties."

33. So far as the provisions of the SPA are concerned, since the Agreement was drawn up in the Romanian language and since the Parties do not agree on the correct translation of a number of provisions of the Agreement into the English language, to the Tribunal sets out below both parties' translations of the relevant provisions.

"7.4.1(3) and 7.4.2 [Claimant's translation]

7.4.1 (3) *The Seller states that it requested the Ministry of Finance, the Ministry of Labor and Social Welfare and the Ministry of Health to remit certificates regarding the company's fiscal burden, and undertakes to employ all due efforts in order to obtain as soon as possible such certificates,*

necessary for a fair evaluation of the company's current debts towards the budgetary creditors.

7.4.2 *The Seller undertakes to submit to all the company's budget creditors' applications requesting monetary inducement for the repayment of the company's debts and to negotiate, together with the Buyer and the Company, the availability of the following monetary inducement:*

- rescheduling over a period of 5 years, of the payments due to the budget creditors with a negotiable interest rate, the first due date being December 31, 2001;*
- exemption from the payment of penalties and surcharges for payments in arrears of the amounts due to budget creditors;*
- non-inclusion of debts, other than those set forth in the fiscal certificates issued by the budget creditors, consequently to the best efforts employed by the Seller during the negotiations."*

"7.4.1(3) and 7.4.2 [Respondent's translation]

7.4.1(3) *The Seller states that it requested the Ministry of Finance, the Ministry of Labor and Social Welfare and the Ministry of Health to remit certificates of fiscal debts, and undertakes to employ all due efforts in order to obtain as soon as possible such certificates, in order to allow an evaluation of the Company's current debts towards the budgetary creditors.*

7.4.2 *The Seller undertakes to submit to each budgetary creditor an application requesting the granting of facilities for the Company and to*

negotiate, together with the Buyer and the Company, the possibility of granting the following facilities:

- rescheduling, over a period of 5 years, of the payments due to the budgetary creditors with a negotiable interest rate, the first due date being December 31, 2001;*
- exemption from the payment of penalties and increases for delay in paying the accounts due to budgetary creditors;*
- non-inclusion of new debts, other than those set forth in the fiscal certificates issued by the budgetary creditors, consequently to the efforts employed by the Seller during the negotiations.*

"9.4 and 9.5 [Claimant's translation]

9.4 The Buyer undertakes to pay the Seller the [additional] amount of US\$ 2,000,000 if, due to the best efforts employed by the Seller, the company is granted the following cumulated incentives (advantageous conditions):

- rescheduling of the payments due to budget creditors over a period of five years, with a negotiable interest rate, the due date for the first payment being: December 31, 2001;*
- exemption of the payment of penalties and surcharges for payments in arrears of the amounts due to budget creditors;*
- non-inclusion of other debts of the company besides those set forth in the fiscal certificates issued by the budget creditors, due to the best efforts employed by the Seller.*

9.5 *The Buyer shall pay the amount of US\$2,000,000 within 30 days as of the receipt by the company of the notification regarding the granting of the incentives set forth under 7.4.2 herein above.*”

"9.4 and 9.5 [Respondent's translation]

9.4 *The Buyer undertakes to pay to the Seller the [additional] amount of USD 2,000,000 if, due to the efforts employed by the Seller, the Company is granted the following cumulated facilities:*

- *rescheduling of the payments due to budgetary creditors over a period of five years, with a negotiable interest rate, the due date for the first payment to be December 31, 2001;*
- *exemption of the payment of penalties and increases for delay in paying the amounts due to budgetary creditors;*
- *non-inclusion of new debts, others than those set forth in the fiscal certificates issued by the budgetary creditors, consequently to the efforts employed by the Seller during the negotiations.*

9.5 *The Buyer shall pay the amount of USD 2,000,000 within 30 days as of the receipt by the Company of the notification regarding the granting of the facilities set forth under 7.4.2 herein above.*

F. Relief Sought by the Parties

34. The final relief sought by the parties is identified in their first Post-hearing Briefs as follows:

35. The Claimant asks the Tribunal (C-PHB I, para.1) to:

“a) declare that Romania breached Articles II(2) and III of the United States Romania Bilateral Investment Treaty (“BIT”); and to

b) order Romania to pay compensation to Noble Ventures of US\$143,531,000 plus applicable tax gross-up, interest compounded from July 31, 2001, attorney’s fees, expenses and costs of this arbitration”.

36. The Respondent requests the Tribunal to award as follows (R-PHB I, para. 2):

“a. Declaratory Relief:

1) That Romania has not violated Claimant’s rights or acted inconsistently with any of Romania’s obligations under the US-Romania Bilateral Investment Treaty (the “BIT”).

2) That Claimant’s claims accordingly are dismissed in their entirety.

b. Monetary Award:

That Romania is awarded compensation for all fees, expenses and costs it incurred with this proceeding, as set forth in its Claims for Costs due on January 14, 2005.”

G. Short Summary of Contentions of the Parties

37. The following Sections of this Award set out the final contentions of the Parties, as contained in their respective first Post-hearing Briefs. Later

subsections of this Award deal individually in greater detail with the various contentions.

G.I. Short Summary of Contentions of the Claimant

38. The Claimant summarizes its contentions as follows (C-PHB I paras. 2 *et seq.*):

“2. Romania’s actions were inconsistent with its obligations under Articles II(2) and III of the BIT. Articles II(2)(a) and (b) require that Romania provide Noble Ventures with fair and equitable treatment, provide full protection and security and that it act in a manner free from arbitrary or discriminatory conduct. Article II(2)(c) requires that Romania observe its obligations with regard to investments. Article III requires Romania to compensate Noble Ventures for the expropriation of CSR.

3. Romania has failed to meet its Article II(2)(a) and (b) obligations through:

a) actions contrary to Noble Ventures’ legitimate expectations that Romania would exercise its sovereign powers under the Privatization Law to reschedule CSR’s budgetary debts;

b) its arbitrary and inequitable initiation of the judicial reorganization of CSR based on debts that should have been restructured; and

c) its failure to provide full protection and security to management and employees of Noble Ventures during the period of labor unrest.

4. Romania failed to meet its obligations under Article II(2)(c) by breaching the SPA and a binding settlement agreement. With respect to the SPA, Romania failed to use “best efforts” to obtain debt restructuring for CSR pursuant to Article 7.4.2 of the SPA and misled Noble Ventures about the status of Metal Grup’s claim over the slag pile. Romania breached the

settlement agreement by failing to assist Noble Ventures with respect to the issuance of a \$15 million line of credit and by denying Noble Ventures' preemption rights to the newly issued shares of CSR.

5. In addition, Romania failed to meet its obligations under Article III through its refusal to pay compensation to Noble Ventures following its initiation of the judicial reorganization proceedings, which actions were tantamount to indirect expropriation of Noble Ventures' investment in CSR."

G.II. Short Summary of Contentions of the Respondent

39. Against the background of the relief sought by the Respondent (paragraph 36 above), the Respondent contends as follows (R-PHB I, paras. 3 *et seq*, footnotes omitted):

"3. Claimant bears the burden of proving its allegations and claims. Claimant has failed to carry its burden of proving the facts necessary to sustain any of the alleged breaches of the BIT and, in addition, has failed to carry its burden to prove that any of its alleged losses were caused by the conduct of which it complains. Accordingly, Claimant's claims must be dismissed.

4. Romania has been put to considerable expense and inconvenience in defending against Claimant's shifting, unsustainable claims. Claimant should be ordered to bear the costs of this arbitration and to compensate Romania's costs of presenting its case, including compensation for the fees and expenses of its legal representatives, expert witnesses, and its own internal work on the case. Romania shall set forth its Claims for Costs in accordance with Procedural Order No.3."

H. Considerations and Conclusions of the Tribunal

40. The Tribunal has carefully examined all of the many and voluminous arguments of the parties. What follows deals with those aspects that the Tribunal considers to be the most relevant in their respective context.

H.I. Preliminary Considerations

41. There are two general questions of law which are disputed between the parties and which raise preliminary questions that are relevant to many of the more specific claims. The first concerns the question of whether it is possible to address contract claims under the US-Romanian BIT and the second concerns whether the acts of SOF and APAPS are attributable to the Respondent State.

1. Arguments of the Parties Concerning Contract Claims / The Umbrella Clause Problem

Arguments by the Claimant

42. Regarding the first question the Claimant argues that, with respect to all of its following contentions, the US-Romanian BIT applies because the BIT was incorporated in the applicable Romanian law (C I, paras. 321 *et seq.*). It regards the BIT as incorporating also international law into Romanian law (C I, para. 323). The contract claims can therefore, according to the Claimant, be examined to see whether they involve conduct by the Respondent that fails to comply with the BIT standards.

43. Apart from this, breaches of contractual obligations become a breach of the BIT by way of Art. II(2)(c) (C II, paras. 372 and 386 *et seq.*), which has to be regarded as an “umbrella clause”. The Claimant refers to other ICSID decisions in which the Tribunals found that an umbrella clause means what it

says, namely that the clause makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments (C-PHB I, paras. 101 *et seq.*).

Arguments by the Respondent

44. In this respect the Respondent contends that the BIT applies to the claims directly, and not only by way of Romanian law which incorporated the BIT (R I, paras. 247 *et seq.*). Nevertheless, it does not accept that the BIT affects the claims that are based on alleged breaches of contract since such claims are not subject to the BIT but are subject to Romanian law (R I, paras. 253 – 255, R II, paras. 397, and esp. 454-473 and 474 *et seq.*). Therefore, alleged breaches of the SPA cannot in themselves constitute a violation of the BIT (R I, para. 328).

45. Regarding specifically Art. II(2)(c), the Respondent contends that the provision does not elevate breaches of contract to BIT violations (R I, paras. 340 *et seq.*, paras. 350 *et seq.*, R II, paras. 474-577; R-PHB I, paras. 64 *et seq.*). There is nothing to suggest that the BIT created obligations other than those that exist by virtue of customary international law (R I, paras. 337 *et seq.*; see also R II, paras. 548-571, R-PHB I, paras. 64 *et seq.*). Umbrella clauses are only intended to create a treaty obligation on States to protect against the exercise of sovereign powers in a manner that interferes with contractual commitments and other legal obligations entered into with respect to investments (R-PHB I, para. 65; R-PHB II, para. 38).

The Tribunal

46. Considering that the Claimant's case comprises some claims which concern alleged breaches of contractual relationships purportedly concluded with the

Respondent, the question for the Tribunal is whether Art. II (2)(c) BIT is an “umbrella clause” that transforms contractual undertakings into international law obligations and accordingly makes it a breach of the BIT by the Respondent if it breaches a contractual obligation that it has entered into with the Claimant. Art. II (2)(c) reads as follows: “*Each Party shall observe any obligation it may have entered into with regard to investments.*”

47. As indicated by the parties, a similar question arose in other recent ICSID cases. Thus an important case to address the problem was *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13; *SGS v. Pakistan*), which was heavily relied on by the Respondent in the present case. The Tribunal was there concerned with Article 11 of an Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments (*Swiss-Pakistan BIT*) which reads as follows: “*Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party*”. The Tribunal found that “*(T)he text itself of Art. 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically “elevated” to the level of breaches of international treaty law. Considering the widely accepted principle with which we started, namely, that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Art. 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT. We do not find such evidence in the text itself of Article 11. We have not been pointed to any other evidence of the*

putative common intent of the Contracting Parties by the Claimant” (see paras. 166 and 167 of the Decision). Consequently, the Tribunal declined to regard Art. 11 as an umbrella clause.

48. Another important case to address the “umbrella clause” problem was *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6; *SGS v. Philippines*). That case was referred to by the Claimant in the present case in support of its position. The relevant clause in that case (Art. X (2) of the Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments) reads as follows: “*Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party*”. The Tribunal interpreted the clause by reference to its wording and the object and purpose of the bilateral investment treaty so as to apply it to *inter alia* contractual obligations (paras. 115 and 116) and accordingly found that the contractual commitment was incorporated and brought within the framework of the bilateral investment treaty by Article X (2): “*To summarize, for present purposes Article X(2) includes commitments or obligations arising under contracts entered into by the host State*” (para. 127).

49. A third case concerned with a clause regarded by one of the parties to the dispute as an umbrella clause is *Salini Costruttori S.p.A. v. The Hashemite Kingdom of Jordan* (No. ARB/02/13; *Salini v. Jordan*). The case was decided only shortly before the end of the written proceedings in this case. In *Salini v. Jordan* the Tribunal was concerned with a clause in the bilateral investment treaty between Italy and Jordan which read as follows (Art. 2(4)): “*Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including compliance, in good faith, of all undertakings assumed with regard to each specific investor*”. Regarding the terms of Art. 2(4) to be appreciably different from the provisions in *SGS v. Pakistan* and *SGS v. Philippines* the Tribunal found that “*(U)nder Art. 2(4), each contracting Party committed itself to*

create and maintain in its territory a “legal framework” favorable to investments. This legal framework must be apt to guarantee to investors the continuity of legal treatment. It must in particular be such as to ensure compliance of all undertakings assumed under relevant contracts with respect to each specific investor. But under Article 2(4), each contracting Party did not commit itself to “observe” any “obligation” it had previously assumed with regard to specific investments of the investor of the other party as did the Philippines. It did not even guarantee the observance of commitments it had entered into with respect to investments of the investors of the other Contracting Party as did Pakistan. It only committed itself to create and maintain a legal framework apt to guarantee the compliance of all undertakings assumed with regard to each specific investor”.

50. With regard to Art. II (2)(c) of the bilateral investment treaty which is of relevance in the present case, it has to be observed that there are differences between the wording of the clause and the clauses in the other cases. Therefore, it is necessary, first, to interpret Art. II (2)(c) regardless of the other cases. In doing so, reference has to be made to Arts. 31 *et seq.* of the Vienna Convention on the Law of Treaties which reflect the customary international law concerning treaty interpretation. Accordingly, treaties have to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Treaty, while recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, only in order to confirm the meaning resulting from the application of the aforementioned methods of interpretation. Reference should also be made to the principle of effectiveness (*effet utile*), which, too plays an important role in interpreting treaties.

51. Considering that Art. II (2)(c) BIT uses the term “shall” and that it forms part of the Article which provides for the major substantial obligations undertaken by the parties, there can be no doubt that the Article was intended to create

obligations, and obviously obligations beyond those specified in other provisions of the BIT itself. Since States usually do not conclude, with reference to specific investments, special international agreements in addition to existing bilateral investment treaties, it is difficult to understand the notion “obligation” as referring to obligations undertaken under other “international” agreements. And given that such agreements, if concluded, would also be subject to the general principle of *pacta sunt servanda*, there would certainly be no need for a clause of that kind. By contrast, in addition to the BIT, what are often concluded concerning investments are so-called investment contracts between investors and the host State. Such agreements describe specific rights and duties of the parties concerning a specific investment. Against this background, and considering the wording of Art. II (2)(c) which speaks of “any obligation [a party] may have *entered into* with regard to *investments*”, it is difficult not to regard this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been “entered into” by a host State with regard to an investment. The employment of the notion “entered into” indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II (2)(c) would be very much an empty base unless understood as referring to contracts. Accordingly, the wording of Article II(2)(c) provides substantial support for an interpretation of Art. II (2)(c) as a real umbrella clause.

52. The object and purpose rule also supports such an interpretation. While it is not *permissible, as is* too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified. Considering, as pointed out above, that any other interpretation would deprive Art. II (2)(c) of practical content, reference has necessarily to be made to the principle of effectiveness, also applied by other Tribunals in interpreting BIT provisions (see *SGS v. Philippines*, para. 116 and *Salini v. Jordan*, para. 95). An interpretation to the contrary would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host State. While it is not the purpose of investment

treaties *per se* to remedy such problems, a clause that is readily capable of being interpreted in this way and which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors also with regard to contracts with the host State generally in so far as the contract was entered into with regard to an investment.

53. An umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law. The Tribunal recalls the well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts, as is reflected in *inter alia* Article Three of the International Law Commission's Articles on State Responsibility adopted in 2001. As stated by Judge Schwebel, former President of the International Court of Justice, "it is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach... but involves an obviously arbitrary or tortious element..." (in *International Arbitration : Three Salient Problems* (1987), at 111). It may be further added that, inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems (municipal and international) each one with regard to the other.

54. That being said, none of the above mentioned general rules is peremptory in nature. This means that, when negotiating a bilateral investment treaty, two States may create within the scope of their mutual agreement an exception to the rules deriving from the autonomy of municipal law, on the one hand and public international law, on the other hand. In other words, two States may include in a bilateral investment treaty a provision to the effect that, in the interest of achieving the objects and goals of the treaty, the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus “internationalized”, i.e. assimilated to a breach of the treaty. In such a case, an international tribunal will be bound to seek to give useful effect to the provision that the parties have adopted.

55. Thus, an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under municipal and under international law. In consequence, as with any other exception to established general rules of law, the identification of a provision as an “umbrella clause” can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms and, more generally, in accordance with the well known customary rules codified under Article 31 of the Vienna Convention of the Law of Treaties (1969). As was stated by the International Court of Justice in the *ELSI* Case:

“an important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so” : *Elettronica Sicula Spa –ELSI – United States v. Italy*, 1989, ICJ 15 at 42).

56. In the present case, in order to identify the intention of the United States and Romania when they negotiated Art. II(2)(c) of the BIT, a key element is provided by the exact formulation of that provision. Indeed, it is the

differences in the wording of Art. II(2)(c) of the BIT and of provisions in other bilateral investment treaties that have been relied on as umbrella clauses in other ICSID cases that go far to explain the different positions taken by different ICSID tribunals that have in recent times had to consider such clauses.

57. In *Salini v. Jordan, supra*, it is evident that the obligation laid down at Art. 2(4) of the bilateral investment treaty between Italy and Jordan plainly justifies the conclusion reached by the Tribunal. A provision creating and maintaining a “legal framework” favourable to investment deals only with the setting of norms and establishment of institutions aimed at facilitating investment by investors of the other Party; it does not entail that each Party becomes responsible under international law for the breach of any of its contractual obligations *vis-à-vis* the private investors of the other Party.

58. In *SGS v. Pakistan, supra*, the relevant provision of the bilateral investment treaty (Art. 11) does not simply speak of a “legal framework”; and the provision could be interpreted as laying down a kind of general obligation for the host State as a public authority to facilitate foreign investment, namely an obligation to “guarantee” the observance of the commitments that the host State has entered into towards investors of the other Party, being an obligation to be implemented by, in particular, the adoption of steps and measures under its own municipal law to safeguard the guarantee. In other words, the formulation of Art. 11 of the bilateral investment treaty in *SGS v. Pakistan, supra*, may be interpreted as implicitly setting an international obligation of result for each Party to be fulfilled through appropriate means at the municipal level but without necessarily elevating municipal law obligations to international ones.

59. By contrast, in *SGS v. Philippines, supra*, the treaty clause was formulated so as to assimilate the host State’s contractual obligations to its treaty obligations

under the bilateral investment treaty by saying that each Party “shall observe any obligation it has assumed” with regard to investments made by the investors of the other Party. It is then understandable that, without necessarily having recourse to completely different reasoning, the Tribunal in that case reached a position different from that adopted in *SGS v. Pakistan, supra*.

60. In the present case, the formulation adopted at Art. II(2)(c), which is even more general and straightforward than that in the bilateral investment treaty that fell to be considered in *SGS v. Philippines*, clearly falls into the category of the most general and direct formulations tending to an assimilation of contractual obligations to treaty ones; not only does it use the term “shall observe” but it refers in the most general terms to “any” obligations that either Party may have entered into “with regard to investments”.
61. However, it is unnecessary for the Tribunal to express any definitive conclusion as to whether therefore, despite the consequences of the exceptional nature of umbrella clauses, referred to at paragraph 55 above, Art. II(2)(c) of the BIT perfectly assimilates to breach of the BIT *any* breach by the host State of *any* contractual obligation as determined by its municipal law *or* whether the expression “any obligation”, despite its apparent breadth, must be understood to be subject to some limitation in the light of the nature and objects of the BIT. Since, on the facts of the present case, as will appear from what follows, the Tribunal’s ultimate conclusions would not be affected one way or the other by the resolution of that question, the Tribunal proceeds on the basis that, in including Art. II(2)(c) in the BIT, the Parties had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT.
62. By reason therefore of the inclusion of Art. II(2)(c) in the BIT, the Tribunal therefore considers the Claimant’s claims of breach of contract on the basis that any such breach constitutes a breach of the BIT.

2. Arguments of the Parties concerning the Question of Attribution

Arguments by the Claimant

63. With regard to the question of attribution, the Claimant contends that, in so far as the purported violations have been committed by SOF or APAPS, Romania is responsible because both entities acted as organs of the Romanian State. Their acts are accordingly attributable to Romania (C II, paras. 263 and 269 *et seq.*, esp. paras. 272 and 278).
64. The relevant features that a Tribunal should consider in determining whether an entity is a State organ are the structure and the function of the entity (C-PHB II, para. 38). Against this background it is contended that “*SOF/APAPS has the structure and function of a state organ. SOF was owned by the government, the Prime Minister appointed the board of directors and SOF/APAPS’ Chairman was the Minister of Privatization. SOF’s mandate included “accomplishing the entire privatization process” – clearly a governmental function*” (C-PHB II, para. 38, footnote omitted).¹ Consequently, SOF was no mere commercial enterprise, but a State agency subordinated directly to the Prime Minister and tasked with the critical public function of transforming Romania’s economy (C-PHB II, para. 3).
65. With regard to attribution and SOF’s contractual obligations, the Claimant contends that: “*Just as SOF’s actions are attributable to Romania, so too its contractual obligations are also obligations of Romania for the purpose of determining Romania’s liability under international law*” (C-PHB I, para. 114).

¹ Although the President of APAPS was also Minister of Privatization (and initially a member of the Cabinet), the Chairman of SOF in 2000 did not hold Ministerial office.

Argument by the Respondent

66. With regard to claims under the SPA, the Respondent contends that Romanian law applies. Under Romanian law SOF has to be distinguished from Romania because it is a separate legal body (R I, paras. 256 *et seq.*, R-PHB I, para. 80 and in more general terms R II, paras. 391-396); the SPA is a private law instrument governed by the provisions of civil law (R-PHB I, para. 80). A State does not assume the contractual obligations of its subordinates (R I, para. 258). This is so even where a contract is approved or ratified by the State (R I, para. 259). Contrary to what the Claimant argues, the concept of attribution does not apply: “...*the principle of attribution cannot transform or otherwise expand obligations that are defined by reference to a municipal law. The principle of attribution is only concerned with identifying whether the conduct may be considered as a possible basis for the State’s international responsibility, but it is not a basis to alter the nature of primary obligations undertaken by a State organ*” (R I, para. 261, see also paras. 260 and 262). Consequently, since SOF and Romania are, as a matter of Romanian law, different legal entities, Romania is not a party to the SPA and accordingly cannot be held liable (R I, paras. 268 and 332).
67. Even if the Tribunal were to conclude that SOF was charged with certain governmental functions, the Respondent contends that a distinction has to be drawn between governmental and commercial conduct, the latter not being attributable (R-PHB I, para. 82). By reason of the commercial character of the SPA, any failure to fulfil the obligations imposed by it, being commercial in nature, would not be attributable to Romania (R-PHB I, para. 82).

The Tribunal

68. The question of attribution is of relevance in the present case in two respects. First, there is the question whether the acts of SOF and later APAPS which are alleged to have constituted violations of the BIT can be attributed to the

Respondent. And secondly, as already indicated above, there is the more specific question as to whether one can regard the Respondent as having entered into the SPA (as well as other contractual agreements which have allegedly been breached), breach of which could consequently, by reason of the umbrella clause, be regarded as a violation of the BIT. (In the present case no claim is, or could have been, brought against either SOF or APAPS and Art. 25(1) and (3) of the ICSID Convention are therefore of no relevance in these proceedings).

69. As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in this respect. Regarding general international law on international responsibility, reference can be made to the Draft Articles on State Responsibility as adopted on second reading 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Res. 56/83 of 12 December 2001 (the Draft Articles will hereafter be referred to as **2001 ILC Draft**). While those Draft Articles are not binding, they are widely regarded as a codification of customary international law. The 2001 ILC Draft provides a whole set of rules concerning attribution. Art. 4 2001 ILC Draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law. This rule concerns attribution of acts of so-called *de jure* organs which have been expressly entitled to act for the State within the limits of their competence. Since SOF and APAPS were legal entities separate from the Respondent, it is not possible to regard them as *de jure* organs.

70. The 2001 Draft Articles go on to attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that

State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by Art. 5 2001 ILC Draft. While not being *de jure* organs, SOF as well as APAPS were at all relevant times acting on the basis of Romanian law which defined their competence.

71. The relevant provisions can be found in Government Ordinance 88/1997 (GO 88/1997) as amended by Law 99/1999. In what here follows we refer to GO 88/1997, thus amended, as the Privatization Law (using the Article numbers introduced by Law 99/1999 where that Law made changes); the amendments effected by Law 99/1999 came into operation in August 1999.

72. Chapter II of the Privatization Law defined the relevant competence and powers of the Government, the Romanian Development Agency (with which the Tribunal is not concerned) and the empowered public institutions. Article 3(g) of the Privatization Law included SOF in the definition of “empowered public institution.”

73. Article 4 provided that:

“The privatization process falls within the competence and power of Government, the Romanian Development Agency and the empowered public institutions.”

74. Article 4¹(1) provided that:-

“The Government provides the implementation of the privatization policy, coordinates and controls the activity of ministries and public institutions that have competencies and powers in the carrying out of privatization, takes mandatory measures to expedite and complete privatization and is answerable before Parliament for the fulfillment of such obligations.”

75. Article 4³ provided that:-

“(1) The empowered public body shall accomplish privatization.

“(2) To such an end, the empowered public institution shall:

“A. exercise all the rights, which the State has in its capacity as shareholder, or those pertaining to the local public administration authorities, having the capacity to empower its representatives in the General Meeting of shareholders to act for:

“ ...

“ ...

“ granting of advantageous conditions for the payment of budgetary obligations and negotiations of proposals in this regard, which shall be submitted for approval, as required by law;

“ ...

“B. undertake all the necessary measures for the privatization of corporate business entities, such as:

“ ...

“(d) sell the shares issued by corporate business entities at the market price;

“ ...

“(3) Any litigation related to contracts, conventions, protocols and any other acts or understandings, concluded by empowered public institutions in order to prepare, perform or complete the privatization of corporate business entities or groups of such entities, fall within the competence of the commercial sections of law courts.”

76. Article 5(1) provided that:-

“The State Ownership Fund is an institution of public interest, a legal person, subordinated to Government, acting for a diminished involvement of the State and the local public administration authorities in the economy, by selling their shares.....”

77. Article 6(1),(3) and (4) provided that:-

“(1) The State Ownership Fund is managed by an Administration Board formed of Chairman, Vice-Chairman and 9 members appointed by the Prime Minister, being trained and experienced in the commercial, financial, legal or technical areas; one of these members is President of the Romanian Development Agency.

...

“(3) The members of the Board of Administration may be revoked by the authority who appointed them.

“(4) *The organizational and operational regulation of the State Ownership Fund shall be approved under Government Resolution.*”

78. Article 14 laid down the procedure to be followed in selling shares of “companies under privatization” as such companies were called in the Privatization Law.
79. The Tribunal deduces from the foregoing that it was not only within the competence of SOF – and APAPS which replaced SOF at the end of 2000 – when acting as the empowered public institution under the Privatization Law, to conclude agreements with investors but also, acting as a *governmental agency*, to manage the whole legal relationship with them, including all acts concerned with the implementation of a specific investment. In the judgment of the Tribunal, no relevant legal distinction is to be drawn between SOF/APAPS, on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law.
80. All the acts allegedly committed by SOF/APAPS were related to the investment of the Claimant. There is no indication from the parties, and there is no reason to believe, that any act by these institutions was outside the scope of their mandate. Consequently, the Tribunal concludes that SOF and APAPS were entitled by law to represent the Respondent and did so in all of their actions as well as omissions. The acts allegedly in violation of the BIT are therefore attributable to the Respondent for the purposes of assessment under the BIT.

81. Even if one were to regard some of the acts of SOF or APAPS as being *ultra vires*, the result would be the same. This is because of the generally recognized rule recorded in Art. 7 2001 ILC Draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown.

82. With regard to the argument of the Respondent that a distinction has to be drawn between attribution of governmental and commercial conduct, the latter not being attributable, the following has to be said. The distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so called *acta iure imperii*, should be attributable. The ILC-Draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its Draft Articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.

83. Accordingly, the Tribunal concludes that the acts of SOF and APAPS which were of relevance in the present case are attributable to the Respondent for the purposes of assessment under the BIT.

84. The Tribunal has not overlooked the fact that international law prescribes restrictive rules with regard to representation when one is concerned with arrangements between States if they are to produce effects in international law. However, in the judgment of the Tribunal the Respondent rightly has not contended that such rules are applicable in considering whether, by reason of the attribution to the State of the acts of a governmental agency in a case such as the present, a State is to be treated as having entered into an obligation with regard to an investment.

85. The Tribunal is willing to assume that the Respondent is correct in contending that the principle of international law that *pacta sunt servanda* does not entail the consequence that a breach by a State of a contract that the State has entered into with an investor is in itself necessarily a breach of international law – and this is so even if the restrictive rules regarding representation of the State referred to in the last preceding paragraph are satisfied, so that indisputably the State is itself the contracting party and has committed a breach of the contract. But that does not mean that breaches of contract cannot, under certain conditions, give rise to liability on the part of a State. On the contrary, where the acts of a governmental agency are to be attributed to the State for the purposes of applying an umbrella clause, such as Art. II(2)(c) of the BIT, breaches of a contract into which the State has entered are capable of constituting a breach of international law *by virtue of the breach of the umbrella clause*.

86. In the judgment of the Tribunal, that is the position here. Both SOF and APAPS were responsible, as a matter of Romanian law, for the transfer of publicly owned assets to private investors. Both entities were clearly charged

with representing the Respondent in the process of privatizing State-owned companies and, for that purpose, entering into privatization agreements and related contracts on behalf of the Respondent. Therefore, this Tribunal cannot do otherwise than conclude that the respective contracts, in particular the SPA, were concluded on behalf of the Respondent and are therefore attributable to the Respondent for the purposes of Art. II(2)(c)BIT.

H.II. Metal Grup's Slag Pile Association Agreement with CSR: The Consequences as between the Claimant and the Respondent

1. Arguments by the Claimant

87. Over a period of probably more than 200 years, the iron and steel works at Resita had accumulated on land occupied by CSR a huge quantity of slag, a by-product of the smelting of ore. It is clear that, by the time with which the Tribunal is concerned, it had become technically possible economically to recover from the slag valuable residues.

88. Art. 1.2.11 of the presentation file (C-13), which is sometimes referred to as the Tender Book, stated that there were no assets of CSR subject to a partnership or association agreement (C1, para. 91). In fact, as was subsequently held by the Romanian courts, an association agreement between CSR and Metal Grup entitled the latter to exploit slag piles belonging to CSR.

89. The Claimant contends that SOF therefore breached the privatization agreement by way of a fraudulent misrepresentation which it regards as a violation of international law standards of treatment (C I, paras. 433 *et seq.*), and as a failure to observe obligations in good faith under Art. II(2) of the BIT (C I, paras. 474 *et seq.*, C II, para. 418, C-PHB I, paras. 2 and 72 *et seq.*).

90. The Claimant argues that the misrepresentation concerned the Tender Book (C I, para. 91) as well as the SPA. It argues that SOF was informed about the validity of the association agreement but did not modify the Tender Book as required under Law 99/1999 (C I, para. 92) and was thereby guilty of misrepresentation because the Claimant had earlier been informed that the agreement with Metal Grup was invalid (see C I, 434 – 440; C-PHB I, para. 72). The Claimant further contends that the SPA contained a serious misrepresentation in that it did not reveal the existence of litigation concerning the Metal Grup agreement (C II, paras. 91 *et seq.*, esp. 97 *et seq.*; C-PHB I, para. 72). The fact that the proceedings were initiated some days after the conclusion of the SPA was only due to the fact that an earlier application to rescind the agreement had failed for formal reasons (C-PHB I, para. 75).
91. The alleged misrepresentation was, according to the Claimant, of major importance for it because the piles were regarded as a key realizable asset and their inclusion in the sale was a determinant of the Claimant's decision to engage in the privatization (see C I, paras. 4, 13-14, 91-92, 108-112, 161-171 and esp. 434-440 and C II, paras. 3 IV and 292-297), something for which support is gained from the references to the slag pile contained in the Claimant's Technical Offer for CSR dated April 10, 2000 (C-22). The Claimant contends that the significance of the slag piles is further evidenced by the fact that Annex 8 to the SPA identified them, along with "Degassing installation" and "Continuous caster installation", as the subject of planned upgrades costing in the aggregated US\$20 million in years, 1, 2 and 3.
92. Regarding the Respondent's reference to a merger clause in the SPA, the Claimant states that the merger clause in the SPA is no defence to the claim for breach of the warranty regarding litigation which is contained in the SPA (C-PHB I, para. 74).

2. Arguments by Respondent

93. The Respondent argues that the claim advanced by the Claimant with regard to the slag pile, as a contract claim, does not fall under the BIT (R I, para. 356 and R II, paras. 454 *et seq.* (breach of contract is not a breach of customary international law) and paras. 474 *et seq.* (breach of contract does not fall under Art. II(2)(c) BIT)). But even if the Tribunal can address the claim, there was no misrepresentation (R II, paras. 43-46, 355-386, 409-419). This is, first, because the Claimant was informed about the agreement with Metal Grup (R I, paras. 10-11, 275, R II, paras. 356, 362 *et seq.*). This was around mid-April (R I, para. 64). SOF updated information about Metal Grup (R I, para. 62). Therefore, the Claimant knew or should have known of the uncertain status of Metal Grup's rights to the slag pile and knowingly assumed the risk when it signed the SPA (R-PHB I, para. 36). Secondly, there was a disclaimer clause in the Tender Book expressly absolving SOF of any such inaccuracies (R I, para. 277, R II, para. 414 and R-PHB I, para. 35). Thirdly, any lack of information in the Tender Book is without relevance by reason of the inclusion in the SPA of a merger clause, viz. Article 15.1: "*this agreement and its Appendices represent the entirety of the agreements between the parties hereto, and supersedes any prior agreement or understanding related to the subject matter hereof*" (R I, para. 272, see also para. 71 and R II, para. 356,). Therefore, according to the Respondent, the Claimant cannot rely on the Tender Book (R I, para. 276).
94. As to the Claimant's contention that the litigation against Metal Grup ought to have been disclosed pursuant to the disclosure obligation contained in Article 7.5 of the SPA (see R II, paras. 357 *et seq.*), the Respondent replies that the litigation in question was filed only after the SPA was signed (R II, paras. 360, 409; R-PHB I, para. 34). In any event, according to the Respondent (RI, paras. 279 *et seq.*), any misrepresentation was not sufficiently serious as to engage legal liability, under Romanian law, on the part of SOF, seriousness being measured in Romanian law –

- in terms of the essential character of the misrepresentation in the context of the transaction as a whole (so that the misrepresentation constitutes a "principal misrepresentation" as opposed to a "marginal misrepresentation") and
- by reference to the character of the misrepresentation as fraudulent ("*dolus malus*" as opposed to, by the standards applied by the Romanian courts, innocent or simple ("*dolus bonus*."))

(The Claimant contends that in both those respects the Respondent is in error).

95. By its Rejoinder the Respondent adds that the slag pile was not identified in CSR's records as an asset of CSR and that there was therefore no requirement under Romanian law to include information about the slag pile in the Presentation File (R II, paras. 377 and 415)
96. The Respondent also relies in this connection on the evidence of the Romanian official who was responsible for negotiating the SPA with Noble Ventures. According to that official, in mid-April 2000 he had a telephone conversation with the Claimant's principal representative in Romania in the course of which the latter informed the official that he already knew about the Metal Grup association agreement and that, like the official, he too believed that the association agreement was invalid. The Claimant denies that any such telephone conversation took place and points to the fact that there is no record of it nor any contemporary reference to it.
97. The Claimant also points to the fact that the Tender Book did in fact identify "Slag dump" as part of CSR's land and that the SPA, read in conjunction with an Annex to it, imposed on the Claimant contractual obligations of an environmental nature in connection with the slag pile, being obligations that

were inconsistent with the continued existence of the association agreement with a third party.

3. Further observations with reference to the facts

98. The Tribunal finds that it would not be safe to rely on the SOF official's uncorroborated and disputed evidence about an alleged telephone conversation with the Claimant's senior representative in Romania in mid-April 2000, referred to at paragraph 96 above. However, this is only one of many aspects of the material placed before the Tribunal with regard to the slag pile that are problematic and the Tribunal finds it impossible to reach definite and reliable conclusions about precisely what either the Claimant or SOF knew about Metal Grup's involvement in the exploitation of the slag piles or the legal position in that regard at different points of time.

99. One thing, however, seems to be reasonably certain, namely that on August 14, 2000, the day before completion of the SPA, the Claimant's senior representative in Romania met an official of SOF (not the same official as the one referred to at paragraphs 96 and 98 above). At the meeting the Claimant's representative requested SOF's assistance in terminating the Metal Grup contract. The official explained that SOF could not assist Claimant because SOF was not a party to the Metal Grup contract. The official also suggested that, if the continued existence of the Metal Grup contract were of great importance to Claimant, it might consider whether it wanted to proceed with the privatization. The Claimant did not thereafter contact the official to explore possible withdrawal from the SPA. In fact, on August 15, CSR's senior representative signed an addendum to the SPA in which SOF agreed to extend the deadline for Claimant's down payment for CSR's shares without mentioning the slag pile or the Metal Grup contract.

4. The Tribunal's conclusions

100. There are two separate aspects to the Claimant's claim with regard to the slag pile. The first depends upon the Claimant establishing that SOF was guilty of fraudulent misrepresentation of the position in relation to the slag pile. On that issue, the burden of proof (i.e., the risk of non-persuasion of the Tribunal) rests on the Claimant.

101. The evidence before the Tribunal does not satisfy it, even on a balance of probabilities, that SOF was guilty of fraudulent misrepresentation of the position in relation to the slag pile. Equally, the Tribunal is not satisfied that the management of CSR was guilty of fraudulent misrepresentation in relation to the slag pile. It follows that the Claimant could not succeed on grounds that included the existence of fraudulent misrepresentation even if, contrary to the Respondent's contention, CSR and SOF were to be treated, for present purposes, as one and the same person because, when the SPA was negotiated and executed, SOF was the controlling shareholder in CSR.

102. It is not necessary to reach any definite conclusion with regard to a second ground on which this aspect of the Claimant's claim with regard to the slag pile should be rejected. The second ground is that any misrepresentation was not a "principal subject" of the SPA. That it was not such is certainly suggested by the fact that, if it were otherwise, the Claimant could have been expected to have taken up SOF's suggestion, referred to at paragraph 93 above, that, since the legal position with regard to the slag pile was evidently problematic, the Claimant should consider agreeing with SOF to cancel the SPA.

103. In this connection, it is also relevant to note that:

- a. so far as appears from the evidence before the Tribunal, the Claimant did not seek independently to verify, by reference to public records, the position with regard to litigation in respect of the slag pile, although the Claimant was aware of Metal Grup's contentious involvement in their exploitation; and
- b. the subject matter of the SPA comprised SOF's *shares in CSR* rather than the *assets of CSR*.

104. On this analysis of the facts, it is unnecessary to determine whether if, counterfactually, fraudulent misrepresentation by SOF, *preceding the execution of the SPA*, had been established, the Claimant's claim with regard to the slag pile here under consideration -

- would have been a claim for breach of contract and, as such, capable of being advanced by virtue of Article II,(2)(c) of the BIT; or
- would have been a claim based on non-contractual liability.

105. In the judgment of the Tribunal, in the absence of proved fraudulent misrepresentation, the aspect of the Claimant's claim here under consideration is not sustainable whether the claim is based on what happened before the execution of the SPA or on the provisions of the SPA itself.

106. Thus, at any rate in the absence of fraudulent misrepresentation, such a claim based on the contents of the Tender Book or anything else said or done before the execution of the SPA cannot be sustained in the light of Article 15(1) of the SPA. Article 15(1) provides that:

“This Agreement and its Appendixes represent the entirety of the agreements between the Parties hereto and supersedes any prior agreement or covenant related to the subject matter hereof.”

107. Alternatively, for there to be a basis for the relevant contractual liability in the SPA itself, one would have to find in the SPA a warranty to the effect that CSR’s assets included the slag pile, unencumbered by any association agreement. Although the SPA may perhaps have tacitly assumed the existence of slag pile that could be exploited by CSR subject only to environmental constraints, it is impossible even to imply a warranty with regard to the existence of the slag pile as such.
108. That leads to a consideration of the second basis on which the Claimant’s claim with regard to the slag piles is advanced. The Claimant here relies on Article 7.5 of the SPA.
109. Article 7.5 provides that:-

“According to the management’s declaration, as at the date of the execution of the Share Purchase Agreement, the company has no commercial or ownership litigation other than those set forth under Appendix 4” (Claimant’s translation);

“According to the Company’s management’s declaration, on the date of execution of the Share Sale Purchase Agreement, the Company is not involved in any commercial or pecuniary litigation except for those set forth under Appendix 4” (Respondent’s translation).

110. The arguments advanced by the parties to the Tribunal proceeded on the basis that Appendix 4 to the SPA did not mention any litigation with Metal Grup about the slag pile or at all.
111. There are two grounds on which the Respondent resists the claim against it based on Article 7.5 of the SPA if, contrary to the Respondent's contention but as the Tribunal has concluded, breaches of the SPA by SOF are to be attributed to the Respondent for the purposes of engaging the Respondent's liability under Article II.(2)(c) of the BIT.
112. The first ground on which the Respondent here relies is that, although resumption by CSR of litigation against Metal Grup was in CSR's contemplation when the SPA was signed, the litigation was not in fact resumed until June 14, 2000, i.e. after the SPA had been signed, and that therefore the declaration by CSR's management was technically correct.
113. Although that plea is at first sight rather unattractive, it should be noted that the legal proceedings that were commenced by CSR on June 14 2000 had, so far as the Tribunal is able to ascertain, the object of, in effect, reversing an earlier judgment given in favour of Metal Grup with reference to the Association Agreement (R-64). The Claimant was aware of at least a potential problem for CSR in relation to Metal Grup's interest in the slag pile and a due diligence investigation of CSR by the Claimant should have disclosed the existence of the pre-existing judgment (it has not been suggested that the existence of the judgment was denied or concealed by CSR or SOF: in this connection the Tribunal has not been enlightened by either party as to the significance, if any, of the inclusion in Appendix 4 to the SPA ("Litigation") of an entry, under the heading "Claimant – CSR", that reads as follows: "Metal Grup Deva – Annulment of Association Agreement : Pending"); a due diligence exercise should perhaps also have disclosed the fact that an earlier attempt had been made by CSR in effect to reverse the judgment, being an

attempt that had failed because CSR had not lodged at the court the required court fee. It is the pre-existing judgment, the effect of which never was reversed, rather than the fact that on June 14, 2000 CSR made its second, unsuccessful, attempt to get it reversed, that was damaging from the Claimant's point of view.

114. The second ground on which the Respondent relies to defeat the claim based on Article 7.5 of the SPA was very clearly explained by Professor Corneliu Bîrsan of Bucharest University who gave expert evidence on Romanian law for the Respondent. Professor Bîrsan testified (C-73, footnote omitted) that:-

“105 ... the language of Article 7.5 of SPA absolved the SOF of any responsibility under that provision. Article 7.5 states expressly that the litigation disclosed in Annex 4 was “*According to the Company's Management Declaration.*” Under Article 7.5, therefore, the SOF is only warranting that ... the information in Annex 4 was prepared by the managers of CSR, for whom the SOF is not responsible under Romanian law. By comparison, Article 7.1 of SPA states: “*The Seller [i.e. the SOF] declares and warrants that it holds all the authorizations and legal competence necessary for the conclusion of the present Agreement and the performance of the obligations flowing hereof*” (emphasis added). The difference in the language between these two provisions is significant. The SOF could not (and did not) undertake promises concerning areas in which it was not directly involved and did not control. Thus, under Article 7.5, the SOF did not take responsibility for any inaccuracies that might have been included in Annex 4.

“106. I disagree with Prof. Oancea [who provided an expert opinion on Romanian law for the Claimant] when he suggests that the SOF and CSR were essentially one and the same simply because, before the privatization, the SOF was the majority shareholder and had representatives in the Board and the General Shareholders Meeting. This statement ignores the indisputable fact

that the SOF and CSR were separate juridical entities and the fact that CSR was led by its own management team. Moreover, the SOF oversaw literally thousands of companies in the process of being privatized and, accordingly, could not be expected to collect and review the minutiae of any one company's business records. That is precisely the reason why share sale-purchase contracts concluded by SOF typically distinguished between the undertakings of the SOF and statements or representations made by the representatives of the company being privatized. By identifying the statements of the officers of CSR as the source of particular information provided in the SPA, the SOF thereby disclosed to Noble Ventures that it was not responsible for any inaccuracies that might be contained in such statements. The language of Article 7.5, therefore, absolved the SOF of responsibility and put the burden on Noble Ventures to verify with CSR the accuracy of CSR's statement concerning pending litigation.”

115. Professor Bîrsan's semantic argument, based on a comparison of Article 7.5 of the SPA with Article 7.1, is reinforced by a comparison of Article 7.5 also with Articles 7.2.1 and 7.6, both of which are, like Article 7.1, in dispositive terms rather than the declaratory terms of Article 7.5. Moreover, Article 7.5 (like Article 7.3) simply records a declaration by the management of CSR and is not even, like Article 7.2.2, a declaration by SOF itself of the substantive position.

116. In the judgment of the Tribunal and on the basis of the considerations set out above, while the Tribunal recognizes that the legal position with regard to the slag pile may be unsatisfactory, the Claimant has failed in the present proceedings to establish that the existence, as found by the Romanian courts, of an association agreement for the exploitation of the slag pile by Metal Grup gives rise to any breach by the Respondent of the BIT, whether one looks at the obligations of the Respondent as specifically imposed upon it by the BIT, including Art. II(2)(c), or as imposed upon it by customary international law on which, by reason of the BIT, the Claimant is entitled to rely.

H.III. The Question of Compliance with SPA Obligations Concerning Rescheduling of CSR's Debts and Related Obligations

1. A Preliminary question as to the character of Article 7.4.2 of the SPA.

117 In its Memorial (CI, para. 443) the Claimant contended that the obligation to “negotiate” imposed by the second part of Article 7.4.2 of the SPA was tantamount to an obligation of result since Romania, through SOF, was obliged to negotiate the restructuring of CSR’s budgetary debts with Romania’s own instrumentalities (i.e. the State budgetary creditors) which, according to the Claimant, was equivalent to an agreement by Romania that the budgetary debts would be restructured.

118. In its Counter-Memorial Romania (RI, paras. 81-85) relied upon the inclusion in the SPA of Articles 9.4 and 9.5 as negating any idea that Article 7.4.2 created an obligation of result: if there had been an obligation of result, there would have been no call for a “success fee” payable to SOF if the result were achieved. Romania also relied upon the fact that, on its translation of the SPA, Article 7.4.2 refers to only “the *possibility* of granting the [enumerated] facilities” (a respect in which Romania’s translation of the SPA differs from the Claimant’s translation, which refers to “the *availability* of the [enumerated] monetary inducement” (emphasis added): see paragraph 33 above.

119. The evidence of SOF officials that was adduced by Romania, was that in the negotiations leading to the signing of the SPA, they had explained to the Claimant that SOF could not guarantee restructuring of CSR’s budgetary debts. Because SOF could not do so, it conceived the idea of including in the SPA Articles 9.4 and 9.5. Since most of the “success fee” of US\$ 2 million was to go to the budgetary creditors, rather than being retained by SOF, the

success fee would provide an incentive to the budgetary creditors to agree to the proposed restructuring.

120. In the course of the Arbitration the Claimant accepted that SOF's obligation to negotiate, imposed by Article 7.4.2, was an obligation of means – a “best efforts” or “due diligence” obligation – and not an obligation of result (C-PHB I, para. 117 and R-PHB I, para. 98). Indeed, in the course of cross-examination, Mr. Charles Franges, the Claimant's chief executive, accepted that there was no “guarantee” that CSR's budgetary debts would be restructured and there was a “risk” that they would not be restructured.

121. Both parties' Post-hearing Briefs characterized the obligation to negotiate imposed by Article 7.4.2 of the SPA as an obligation of means and not of result. However, for reasons explained below, the Claimant contended that, if SOF had used its best efforts or due diligence the budgetary debts would in fact have been restructured and the Claimant had a legitimate expectation that that result would be achieved.

2. Arguments by the Claimant

122. Treating SOF's obligation under the second part of Article 7.4.2 of the SPA as an obligation of means (see paragraph 120 above), the Claimant argues that the Respondent failed to comply with the obligation. In Romanian law the obligation must be understood as an obligation to exercise “best efforts” (C II, para. 50.). That understanding of Art. 7.4.2 SPA is confirmed by the negotiating history (C-PHB I, paras. 13-16), the context of the obligation (C-PHB I, paras. 17-19) and SOF's practices (C-PHB I, paras. 20-24). Moreover, SOF was empowered, by Art. 15² of the Privatization Law (see paragraph 123 below), to obtain a government decision (C-PHB I, paras. 25 *et seq.*). The same was true for SOF's successor, APAPS (C II, paras. 85 *et seq.*). In fact, Art. 15² is regarded as defining the scope of the contractual obligation under

Art. 7.4.2 SPA (C-PHB I, paras. 117-118). The attempts undertaken by the Respondent fell short of the requirements under Romanian law (C II, paras. 47-61).

123. Accordingly the Claimant relies in this connection in particular upon Article 15² of the Privatization Law. Article 15² is in the following terms:-

“(1) When discharging its prerogatives, as provided for under Art. 4² (2)A, a, the empowered public institution shall remit to each budgetary creditor a form application for the granting of advantageous conditions as exemptions, reductions, deferment and staggering of the payment of the dues of the companies under privatization to the budget administered by the respective budgetary creditor.

“(2) Each budgetary creditor shall negotiate with the empowered public institution the possibility for the granting of the above mentioned advantageous conditions. In case such granting is beyond the competence of the budgetary creditor, such creditor is obliged to submit [to] the Government, within a 30 days' period as of the date of the registration of such request, the result of the negotiations and to notify the empowered public institution the fulfillment of the respective obligation.

“(3) The empowered public institution is authorized in law to submit for approval by the Government the result of the negotiations in case the budgetary creditor does not observe the term provided for under (2), for the fulfillment of such obligation.

“(4) The Government shall decide regarding the granting of the advantageous conditions requested within a period of 20 days as of the date the result of the negotiations has been received.”

124. As already noted (paragraph 72 above), for present purposes SOF was the empowered public institution.

125. In the Claimant’s view neither SOF nor APAPS met their obligation (C-PHB 1, paras. 44-60. Claimant contends that SOF’s failure at the end of June 2000 to take a number of specific actions under Article 15² of the Privatization Law establishes SOF’s breach of its obligations under the second part of Article 7.4.2 of the SPA. The actions identified by the Claimant in this connection (CPHB I, para. 137) were that at the end of June 2000 SOF failed to take the following specific actions pursuant to Article 15²:

- a) instruct CSR to provide to the Ministries of Health and Labor the information requested in their letters;
- b) if necessary, confirm that the Ministries of Health and Labor would still not provide the requested rescheduling voluntarily;
- c) obtain a response from Resita City Hall to its application and instruct CSR to comply with any conditions to that response;
- d) upon receipt of confirmation that the budgetary creditors would not grant the application, or in any case no later than 30 days after registration of SOF’s application with the budgetary

creditors (i.e. by mid-July 2000), submit the results of the negotiations to the Government for a decision; and

- e) include in those submissions to the Government, a Substantiation Note and draft Government Decision for the Government's approval.

126. SOF's failure to act, it is argued, extended until the elections and thereafter (CI, paras. 188-231, see also C II, paras. 47-90). The Claimant does not regard Government Decision 490 (**GD 490**) of May 29, 2001 as fulfilment of the obligations under the SPA as it came too late and did not meet the requirements of the privatization agreement (C I, paras. 453 *et seq.*, see also C I, paras. 217-231 and C-PHB I, paras. 53-60; C-PHB II, paras. 16-21).

127. According to the Claimant, the subsequent financial crisis of CSR was caused by this failure (C-PHB I, paras. 61 *et seq.*), while the Claimant made every effort to obtain debt restructuring (C-PHB II, paras. 15 *et seq.*). According to the Claimant, if SOF had taken the steps identified above, the Isarescu Government *would* have taken a legally and economically effective decision regarding the restructuring of CSR's budgetary debts (see paragraph 5 above). In support of that contention the Claimant relies on a "Nota", in fact dated September 14, 2000 (RI, para. 92), sent by the Prime Minister's Office to SOF on October 3, 2000, which stated that the Isarescu Government had approved SOF's request for the restructuring of, amongst other companies, CSR. The Claimant further here relies on the facts that the budgetary debts were a key threat to CSR's survival and the preservation of jobs of some 4,000 workers at Resita and that experience showed that the Government did grant requests for such restructuring when requests to it were made by SOF (and, subsequently, APAPS).

128. These alleged violations of the SPA are regarded by the Claimant as a failure to comply with Art. II(2)(a)and(b) (C II, paras. 260, 335-339; C I, para. 441) and with Art. II(2)(c) (C II, para. 261 and C I, para. 473) of the BIT.
129. The Claimant also argues in this connection that, because budgetary debts that prejudiced the economic viability of companies under privatization were, as the Claimant alleges, routinely restructured, the Claimant had a legitimate expectation “*that SOF’s request to the budgetary creditors and its “due efforts” in negotiating the rescheduling of CSR’s budgetary debts would produce the desired result*” (C II, paras. 33 *et seq.*, esp. 36-37, see also 3 I-II). The same is true regarding Art. 15² of GEO 88/1997 (C-PHB I, paras. 119-121 and C-PHB II, paras. 6 *et seq.*; see also C-PHB II, para. 44 where the Claimant suggests that Romania’s failure to fulfil the Claimant’s legitimate expectations created by Art. 15² also amounts to a breach of the international standard of treatment.

3. Arguments by the Respondent

130. The Respondent first contends that the claim here made is for simple breach of contract and, as such, does not fall under the BIT (R I, paras. 356 and 332 and R II, paras. 454 *et seq.* (breach of contract is not a breach of customary international law) and paras. 474 *et seq.* (breach of contract does not fall under Art. II(2)(c) BIT, see also R II, para. 574)). The Respondent further contends that the SPA did not create obligations on the part of Romania but bound only SOF as a legal entity separate from Romania (R I, paras. 253 *et seq.* and R II, para. 630).
131. But even if the Tribunal regarded the Respondent as a party to the contract, no breach of it was in fact committed (generally R II, paras. 6-20, 64-199, 402-408, 629-658) because SOF complied with its obligations under Articles 7.4.1

and 7.4.2 and indeed went beyond what those Articles obliged it to do (R I, paras. 86 *et seq.*, 285 and R II, paras. 89-161, 402-408).

132. In the first place, SOF accepted no obligation to restructure CSR's budgetary debts because SOF did not have the power to do so (R I, paras. 68, 85) and accordingly it refused to accept an obligation to succeed and accepted only an obligation to try to achieve the desired result (R I, para. 81). Art. 15² of the Privatization Law does not change that obligation of means into one of result (R-PHB I, paras. 89 *et seq.*). This is confirmed by the inclusion in the SPA of Article 9.4, which provides for an additional payment to be made in case of successful restructuring (R I, paras. 68, 82-83, 292). But even assuming that Art.15² applied, the Claimant had no legitimate expectation that it would receive budgetary debt restructuring (R-PHB II, para. 6 and paras. 10 *et seq.*) nor indeed any legitimate expectation on which it could rely (R II, paras. 69-88, 633 *et seq.*).
133. Secondly, SOF complied with the obligation of means that it accepted under the second part of Article 7.4.2 of the SPA. Indeed, SOF and later APAPS exceeded their obligations under Article 7.4.2 of the SPA in at least three ways: (i) by asking the budgetary creditors not to exercise any liens that they may have had on CSR's assets; (ii) by seeking and obtaining the Nota from Prime Minister Isarescu's Office referred to at paragraph 127 above; and (iii) by seeking and obtaining, despite an alleged lack of cooperation on the part of the Claimant, Government Decision 490 just four months after the Claimant first asked APAPS to assist the Claimant by obtaining a Government decision (R I, paras. 291, 293; see also R-PHB I, paras. 136 *et seq.*). GD 490 provided for re-scheduling of CSR's budgetary debts over a five-year period with a six-month grace period and an exemption from late payment penalties (R1, para. 162). GD 490 was, according to the Respondent, baselessly rejected by the Claimant (R-PHB I, paras. 7 *et seq.*; R-PHB II, para. 3). GD 490 did not provide CSR with too little budgetary debt restructuring, nor did it come too late (R-PHB I, paras. 10-11.) It was the Claimant's fault that the budgetary

debt was not then restructured (R I, para. 294, R II, paras. 162-199, 642-645; R-PHB II, para. 3).

134. Thirdly, Article 15² of the Privatization Law cannot be invoked by the Claimant to found liability on the part of the Respondent under international law (R-PHB I, paras. 102 *et seq.*).² It is significant that Article 15² played no part in the Claimant's case as that case was originally formulated.
135. Consequently, the Respondent regards the Claimant's reliance on Article 15² of the Privatization Law as irrelevant for the case and emphasizes that the Respondent authorized budgetary debt restructuring for CSR that met and exceeded the possible restructuring envisaged in the SPA, and did so in a timeframe that did not prejudice the Claimant (R-PHB I, para. 22).

4. The Tribunal

136. For reasons already stated, a breach of the SPA is, as a matter of law, capable of constituting a breach, attributable to the Respondent, of the BIT by reason of the inclusion in the BIT of Article II(2)(c), and, in the judgment of the Tribunal, whatever, if any, limitation is to be placed on the meaning of "obligation" where that expression is used in Article II(2)(c) of the BIT (*cf.* paragraph 61 above), a breach that is attributable to the Respondent of Article 7.4.2 of the SPA would constitute a breach by the Respondent of Article II(2)(c) of the BIT.
137. In connection with the Claimant's claim here under consideration, it should be stressed at the outset that neither party is without blame for the failure of the Claimant's investment in CSR.

² In its Rejoinder and at the hearing the Respondent contended, contrary to the Claimant's position, that Article 15² was applicable only prior to, and not after, privatization and, if only for that reason, was irrelevant in the present case.

138. Largely because of CSR's budgetary debts, the company was bankrupt and had a large negative value, a fact known to both the Claimant and SOF. The company almost certainly *required* massive capital investment and the Claimant's proclaimed plans for CSR certainly *necessitated* massive capital investment.
139. Nevertheless, as the Claimant disclosed in writing to SOF in April 2000 (C-22), if the Claimant acquired CSR:-
- (a) "funding for all company strategic planning" would come from a combination of sources, namely internally generated funds (CSR profit), traditional debt investments and proceeds from sale of equity in the market" (i.e. the Claimant did not include any capital of its own as a source of funds);
 - (b) currently the Claimant's "acquisition financial planning" allowed only for funding the purchase of the stock, the installation of certain new equipment and the working capital needed to reach planned levels of business (i.e., there was no mention of funding any of the "cost of the past" even after the budgetary debts had been reduced by elimination of accrued interest and penalties, with repayment of the residue spread over a number of years)
140. It was a precondition for authorization of restructuring of budgetary debts of a company under privatization that the company should demonstrate that it could be expected to be economically viable after the restructuring. Given the fact that the Claimant did not plan to make any capital investment from its own funds, if any, there was, therefore, at least *prima facie*, a "chicken and egg" situation: unless and until the restructuring of CSR had been effected

there could be no assurance that the funds needed to enable the conditions for restructuring to be satisfied would be forthcoming.

141. Thus, Mr. Alan Novak, a financially experienced Director of the Claimant company testified that third parties would not spend time even investigating the possibility of investing in CSR until there was “overwhelming evidence” that the budgetary debts would be rescheduled or the debts had actually been rescheduled; that was subject to the qualification that third parties whose business had a “synergy” with CSR’s business might be an exception to that general proposition (Transcript, pp. 578-580).
142. The Claimant’s senior representative in Romania, Mr. Charles Franges, accepted under cross-examination, that there was no “guarantee” that budgetary debt restructuring, as envisaged in the SPA or at all, would take place and that there was a “risk” that it would not do so (see paragraph 120 above). Although the Claimant’s Memorial (paragraph 146) stated, on this critically important issue, that “Noble Ventures expected that CSR’s budgetary debts would be restructured by the closing of the SPA”, i.e. within at most two-and-a-half months from the signing of the SPA, Mr. Franges testified orally that he expected it to take place within “about three months” or alternatively “three or four months” from the signing of the SPA on June 5, 2000 and that he was comfortable with four months for planning purposes.
143. There were a number of reasons why in the case of CSR even Mr. Franges’ expectation of restructuring within four months appears to have been optimistic.
144. In the first place, as was public knowledge in Romania, on April 5, 2000 the Minister of Finance had announced that new requests for budgetary debt

restructuring were to be put on hold pending completion of a review by government.

145. Secondly, there were a number of budgetary creditors to whom CSR owed money, each of whom had to be dealt with separately and, despite the “success fee” of US\$2 million (most of which SOF was to distribute to the budgetary creditors in the event of the hoped-for restructuring), they showed no enthusiasm about writing off substantial amounts shown in their books as assets (in the form of debts owed by CSR). The Claimant included amongst the documents that it filed with its Memorial a paper, “*A decade of privatization in Romania*” (C-137), written in 2000 by Dragos Negrescu, Delegation of European Commission, Bucharest, Romania. The paper noted that SOF lacked Cabinet rank and that the Privatization Law, by increasing the powers of the “line ministries” (in the present case, the budgetary creditors”) actually marked a step backwards. Specifically with regard to budgetary debts, the paper commented that the “arbitrage” by the Cabinet was “time-consuming” and that “the progress recorded in the last year with respect to the treatment of debts incurred by privatizeable companies does not augur work for the future.”
146. There was the further complication that a general election was due to be held, and was in fact held, on November 26, 2000 so that it would not be surprising if, as the election approached, Ministers were preoccupied with matters of more immediate concern to themselves than the rescheduling of CSR’s budgetary debts. In fact the election resulted in the defeat of the incumbent government party and a new President was elected to office on December 10, and a government headed by Prime Minister Nastase replaced the old government on December 28, 2000.
147. There is nothing to suggest that, in entering into the SPA, the Claimant relied on the existence of Article 15² of the Privatization Law as something that

would strengthen the hand of SOF in fulfilling its obligation to use due diligence to procure a restructuring of CSR's budgetary debts, albeit without empowering SOF itself to impose such a restructuring. But whether or not a company as lacking in resources, capital and prudence as the Claimant could have made a success of the privatization of CSR even if CSR's budgetary debts had been restructured within four months, it was as plain as a pikestaff that if they were not very speedily restructured, the consequences would be disastrous for CSR, its workforce and indeed the town of Resita. If, as the Respondent contends, once CSR had been privatized SOF lost its power under Article 15² of the Privatization Law even to propose the imposition of restructuring of CSR's budgetary debts, the imprudence of SOF, quite apart from the imprudence of the Claimant, in entering into the SPA was all the greater. This very fact probably led the Claimant to assume that, with SOF's support, the restructuring of CSR's budgetary debts would be little more than a formality. If so, the Claimant's assumption was fundamentally flawed.

148. In fairness to SOF, it should be recalled that on a date unknown to the Tribunal it sought from the office of Prime Minister Isarescu a decision approving in principle the restructuring of CSR's budgetary debts. Such a decision was taken on September 14, 2000 although it was not communicated to SOF until October 3, 2000. However the decision, recorded in a *Nota*, had no legal effect. Whether because of a dragging of feet by the "line ministries" (see paragraph 145 above) or because of the approach of the Romanian general election or because of a lack of urgency, such as typifies bureaucracies not only in Romania, or for some other reason, there is no evidence of SOF exerting itself vigorously, as it ought to have done, or indeed at all, to secure implementation of the September 14, 2000 political decision of the Prime Minister's Office. However the Tribunal is not persuaded that, even if SOF had exercised due diligence in this regard, it would have succeeded in finalizing the restructuring before the ruling party's defeat in November and the resulting change of government.

149. Moreover, even if rescheduling of CSR's budgetary debts had been effected or legally guaranteed at the end of Mr. Franges' four months, any interested third party who then commenced a due diligence investigation of the Claimant and CSR would have been likely to have ascertained at least some of the following facts:-
- 149.1 that the Claimant had borrowed and had not yet repaid the initial instalment of the purchase price of CSR;
 - 149.2 that the Claimant and CSR had defaulted on the repayment of the instalment of the Spanish banks consortium's loan to CSR that had fallen due on September 14, 2000;
 - 149.3 that CSR still had outstanding debts from the past which it owed to the utilities and that those debts had not been rescheduled;
 - 149.4 that the legal position with regard to CSR's freedom to exploit the slag pile, to which the Claimant attached great weight in the present arbitration, was problematic;
 - 149.5 that Article 8.5 of the SPA prohibited the Claimant from declaring any of CSR's workforce redundant, even though further reductions in the size of the workforce were probably necessary (R-239, Section 4.3, paragraph 11 and Paul Cretan, R-5, paragraph 7), at any rate unless the Claimant succeeded in rapidly expanding CSR's production and sales (into an already competitive market); and

149.6 that, in breach of Article II.5 of the BIT, Article 8.8.1 of the SPA obliged the Claimant to export a substantial quantity of CSR's production.

One therefore cannot assume that, following on completion of the restructuring of CSR's budgetary debts, third party investors would have injected new capital into CSR without at any rate some delay.

150. If, as seems very possible, further investment by third parties of at least US\$5 million (plus the amount required to pay the outstanding instalment on the Spanish bank consortium's loan to CSR) had not been realized by December 31, 2000, any potential investor would have further noted that, as a result:-

150.1 the Claimant was in further default of its obligations under the SPA; and

150.2 CSR was in arrears in paying the wages of its workforce, with mounting labour problems in consequence.

151. In view of the conflicting statements about precisely what were the Claimant's expectations as to the time that it would take to get CSR's budgetary debts rescheduled, the Tribunal cannot be sure what the Claimant's "business plan" presupposed in that connection. But the evidence of Mr. Novak (see paragraph 141 above) was to the effect that the Claimant's "business plan" was bound to "collapse" if budgetary debt restructuring was not effected within the time schedule premised in the plan or even if there was "uncertainty that interrupts that schedule" (Transcript, pages 577-578).

152. In the Tribunal's judgment, precisely such a collapse was all too readily foreseeable.

153. Although APAPS inherited SOF's obligation under Article 7.4.2 of the SPA to use due diligence to secure a restructuring of CSR's budgetary debts, it inherited from SOF a highly problematic situation so far as CSR was concerned. In particular, by the beginning of 2001, when APAPS became the responsible agency, the Claimant was in breach of the SPA both by reason of its failure to pay the September 2000 instalment of the Spanish banks consortium's loan to CSR and by reason of the Claimant's failure to inject US\$5 million of capital into CSR on December 31, 2000. Associated with the second of those defaults was the fact that from early January 2001 onwards CSR was in serious delay in meeting the wages of the workforce, and in recurrent breach of its promises to the workforce to remedy that situation, with serious consequences for not only the workers and their families but also the Resita locality. In other words the Claimant was in serious obligee's default so far as APAPS was concerned.

154. The Claimant contends that its default was attributable to the non-restructuring of CSR's budgetary debts. For reasons that have already been explained, the Tribunal is far from satisfied that, even if CSR's budgetary debts had been restructured by the end of Mr. Franges' four month period, the necessary investments of over US\$5 million would have been secured by the end of 2000 after which the mounting labour problems at CSR might have been expected to deter even the most speculative investor. Be that as it may, the SPA did not make the Claimant's obligations under the SPA contingent upon CSR's budgetary debts having been satisfactorily restructured even though the US\$2 million "success fee" payable by the Claimant to SOF was expressed to be subject to that condition.

155. In the judgment of the Tribunal, APAPS did not commit a breach of Article 7.4.2 of the SPA either by reason of the time that it took to procure a legally binding right for CSR to get restructuring of its budgetary debts or by reason of the terms of GD 490 which created that right. The Tribunal finds that whether or not GD 490 was more or less advantageous to the Claimant than a restructuring in the terms outlined in Article 7.4.2 is not the critical issue, which *is* whether APAPS failed to use due diligence to have those terms timeously implemented. The burden of proof on that issue lies on the Claimant and, in the judgment of the Tribunal, the Claimant has not discharged that burden.
156. Even though in early 2001 the President of APAPS was a Cabinet Minister, he did not have the power unilaterally to impose a restructuring plan on the budgetary creditors, which were also government Ministries or agencies. Given the pre-condition for restructuring of budgetary debts that, after restructuring, the debtor would be economically viable, it may be thought surprising not that it took until May 2001 to achieve GD 490 but rather that GD 490 was achieved at all despite the Claimant's serious contractual defaults, its lack of resources and its evident willingness to make promises (to amongst others, CSR's workforce) that it had no means of fulfilling and that it failed to fulfil. The President of APAPS far from being an ideologically motivated enemy of the Claimant, as the Claimant has sought to portray him, was the prime promoter, albeit a reluctant promoter, of arrangements that would allow the Claimant to remain in control of CSR, if only *faute de mieux*.
157. Moreover, the fact that GD 490 did not include CSR's debts to its utilities suppliers would probably have led the Claimant to reject GD 490 irrespective of the other respects in which the Claimant criticized, and criticizes, GD 490 and irrespective of the fact that it was enacted in May 2001 and not earlier. Yet, as the Claimant ultimately recognized in the course of the present arbitration, the debts owed to utilities suppliers were not "budgetary debts" and therefore fell outside the scope of Article 7.4.2 of the SPA.

158. In conclusion with regard to the issue of alleged breach of Article 7.4.2 of the SPA, the Claimant's claim fails not because a proved breach would not have constituted a breach of the BIT, i.e. Article II(2)(c) of the BIT, but because -

- although SOF failed to use due diligence, the Tribunal is not satisfied that even if SOF had used due diligence it would have achieved legally binding arrangements for the contemplated restructuring before SOF itself was dissolved; and
- it has not been established that the efforts made by APAPS which resulted in GD 490 fell short of the due diligence that APAPS was required to exercise.

159. Therefore, the Tribunal concludes that this claim has to be dismissed.

H.IV. Compliance with the Obligation to Provide Full Protection and Security to the Investment

1. Arguments by the Claimant

160. The Claimant contends that from January 2001 onwards demonstrations and protests by CSR's employees occurred frequently and on a large scale and that they were accompanied by unlawful acts for which the Respondent is responsible by reason of its failure to provide full protection and security as provided for under the BIT.

161. The Claimant regards SOF's failure to obtain a timely Government Decision restructuring CSR's debts as one of the main causes for the labour unrest (C-PHB I, para. 76). The Claimant contends, in particular, that the protests were

accompanied by unlawful acts such as theft, occupations of the CSR facilities, acts of intimidation, the seizure of the facilities from Romanian workers and the forcible detention and beatings of its management (C I, paras. 7 and 232-248). According to the Claimant, Romanian officials, although informed about these events, refused to exercise adequate measures to protect the Claimant, its staff and CSR from unlawful activities (C I, paras. 15-17): “Police attended and observed the protests, but Romania has not shown that a single charge was laid for this lawless behavior” (C II, para. 166). The Claimant contends that, after what is claimed to have been a serious assault on a US employee of the Claimant and of CSR, the Romanian Government “effectively condoned this act of violence” (C II, para. 167).

162. The Claimant regards this as a failure by the Respondent to comply with international law standards of treatment (C I, para. 468) and as a violation of Art. II(2)(a) and (b) of the BIT (C II, paras. 260 and 335; C-PHB I, para. 2). It is argued that “Romania did not provide the reasonable measures of protection which a well-administered government would be expected to exercise under similar circumstances” (C II, para. 353). This failure allegedly also led to a significant impairment of CSR’s steel production in the first half of 2001 (C I, para. 471; C-PHB I, para. 77).

2. Arguments by the Respondent

163. The Respondent argues that there was no failure to provide full protection and security (R I, para. 391 and R II, paras. 50-52, 688-695). That obligation is not to be understood as an absolute standard providing for strict liability but as a due diligence standard (R I, paras. 381 *et seq.*). That standard was complied with. (R II, paras. 255-261) Requests for protection were never directly addressed to the Respondent. The Claimant also failed to provide sufficient evidence that acts occurred which could give rise to an obligation to protect (R II, para. 692). The workers’ demonstrations, which were caused by the Claimant’s failure to pay their wages, were conducted in an orderly manner

and after notice had been given to the Prefect's office: "*The Romanian authorities went to great lengths in their efforts to stabilize the situation caused by the Claimant*" (R I, para. 391, R. II, paras. 255-256; R-PHB I, para. 54). There were only two complaints, one concerning personal injury and one concerning damage to property (R I, paras. 157 and 391), the first of which was not substantiated in accordance with standard police procedures (R-PHB I, para. 55). The alleged acts of violence did not prevent the Claimant from carrying out its activities at CSR (R-PHB I, para. 55). The authorities reacted reasonably and exercised appropriate due diligence (R I, para 12, R II. para. 694). Finally, the Claimant has not demonstrated how the alleged failure caused it damage (R I, para. 12).

3. The Tribunal

164. With regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the "*Investment shall ... enjoy full protection and security*", the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State. Questions concerning the content of the standards of protection have already been discussed to some extent by *inter alia* ICSID Tribunals in *Asian Agricultural Products Limited v. Republic of Sri Lanka* (Case No. ARB/87/3, Award of 27 June 1990, ICSID Reports IV, p. 250 and at pp. 278 *et seq.*) and in *American Manufacturing & Trading, Inc. v. Republic of Zaire* (Case No. ARB/93/1, Award of 21 February 1997, ICSID Reports V, p. 14, at p. 30) although the facts in those cases were quite different from those in the present case.

165. However, in its *ELSI* judgment (ICJ Reports 1989, p. 15 *et seq.*), the ICJ had to deal with a situation not so different from that in the present case. In *ELSI* the Court was concerned with the occupation of a plant by its employees and with an alleged breach of a protection standard provided for in a Treaty of

Friendship, Commerce and Navigation concluded between the United States and Italy in 1948. The Court found that the protection provided by Italy could not be regarded as falling below the full protection and security required by international law which, considering the facts of that case, indicates that violations of protection standards are not easily to be established. Comparing the facts of the *ELSI* case with the situation in the present case, it is difficult to see in what respect the conduct of the Respondent in the present case was more harmful than that of Italy in the *ELSI* case, so as to justify a different result.

166. However, it does not seem to be necessary to enter into a detailed examination with regard to the claimed violation of Art. II (2)(a) of the BIT. Even assuming the correctness of the Claimant's factual allegations, it is difficult to identify any specific failure by the Respondent to exercise due diligence in protecting the Claimant. And even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree. The Claimant has failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard, nor has it established any specific value of the losses.

167. Accordingly the claim has to be dismissed.

H.V. The Legality of the Initiation of Judicial Reorganization

1. Arguments by the Claimant

168. On July 3, 2001 proceedings for the judicial reorganization of CSR were initiated by budgetary creditors, amongst others the Ministry of Labour, through its local Employment and Pension and Social Security agencies, the

Ministry of Health, through its local Health Insurance Agency, and Resita City Hall (C I, 262). On July 18, 2001 the Court declared that CSR was insolvent and appointed the company Ferm Consult SRL as Judicial Administrator of CSR (C I, para. 264, R I, para. 187). The Claimant accordingly lost all control over CSR until the end of the proceedings on January 9, 2002 (C I, para. 271).

169. The Claimant regards the initiation of the proceedings as a failure to meet international law standards by an abuse of process contrary to the BIT (Art. II(2)(a)) (C I, paras. 458-467 and C II, paras. 260, 335), as an arbitrary and discriminatory measure prohibited under Art. II(2)(b) of the BIT (C I, para. 484) and as a breach of Art. II(2)(c) (C II, paras. 387 and 418) as well as the international law principle *pacta sunt servanda* (C II, paras. 372 *et seq.*), though the two claims concerning Art. II(2)(c) and *pacta sunt servanda* no longer appear in C-PHB I).

170. The Claimant contends that there were intentions behind the initiation of judicial reorganization other than the ordinary commercial purpose (C-PHB I, paras. 78-85). The Claimant states that the *“the true purpose of the judicial reorganization proceedings was to rescind the Privatization Agreement and allow Romania to take back control of CSR. Since the time of privatization, CSR had become effectively insolvent due to Romania’s failure to meet its obligations under the BIT and the Privatization Agreement. Now, as a result of the directive from the Minister of Privatization, CSR’s budgetary creditors would apply for judicial reorganization based on the very debts that were to be restructured under the SPA”* (C I, para. 257, see also C II, para. 3 VI). By way of the judicial reorganization the Respondent sought to cancel the SPA in an indirect manner (C II, paras. 172 *et seq.*; C-PHB II, paras. 23-27) because the Respondent was not entitled to do so under the SPA (see C II, paras. 298 *et seq.*; C-PHB I, paras. 79 *et seq.*)

171. The Claimant further contends that the Respondent took the decision to go for judicial reorganization of CSR for the further reason of bringing to an end the disruptive public demonstrations by the union in Resita (see C I, 463). In this respect it was a “*step in order to accommodate political pressure from the local Vatra union (...)*” (C I, para. 459).
172. Apart from these alleged intentions behind the initiation of the proceedings, the Claimant emphasizes that “*Romania’s petitioning of CSR into judicial reorganization was unprecedented. In nearly all privatizations, companies slated for privatization have substantial debts to the state resulting from a history of implicit subsidization. It is common for companies with large debts to be technically insolvent and, for this reason restructuring of debts to the state is a key component of many privatizations*” (C I, para. 270) and that “*Romania singled out Noble Ventures’ investment for special arbitrary and discriminatory treatment. Romania did not treat other investors and investments operating in Romania in similar circumstances as CSR*” (C I, para. 484, see also C II, paras. 343 *et seq.*).

2. Arguments by the Respondent

173. The Respondent argues that the judicial reorganization proceedings were not a violation of the BIT (see generally R II, paras. 30-34, 230-291, 659-687). The proceedings were initiated and carried out in accordance with Romanian law (R II, paras. 660, 271 *et seq.*) which applies indiscriminatorily to companies subject to such proceedings; the budgetary creditors, the judge and the judicial administrator fulfilled their role (R I, para. 307). It was not the purpose of the proceedings to cancel the SPA nor did the proceedings have that effect (R-PHB I, para. 30). They were meant to promote the financial rehabilitation of the debtor (R I, para. 183), to maintain the integrity of CSR (R-PHB I, para. 30) and to solve the crisis of CSR’s workforce (R I, paras. 174, 177-179, R II, 662). They were necessitated by the crisis caused by the Claimant (R II, paras. 230-254). The creditors were justified in initiating the proceedings (R

II, para. 679). The record shows that the judicial reorganization was a necessary, proper, temporary and proportionate means to stabilize CSR and to get it back into production (R-PHB I, para. 32). The Government never gained control of CSR (R I, para. 183, R II, para. 274). Regarding the Claimant's contention that the proceedings were another way to cancel SPA, the Respondent argues that the proceedings could not and did not affect the ownership of CSR (R I, para. 379, R II, paras. 271 *et seq.* and 662). The reorganization clearly did not violate international standards of treatment (R-PHB I, para. 32).

174. With regard to the application of international law in this connection, the Respondent is of the opinion that a violation of the minimum standard of treatment is established only when the act is severely wrongful, amounts to bad faith, is a wilful neglect of duty or is taken without a basis in law or without reasonable justification (R I, para. 358, see also R II, 659). None of those conditions is met here, as the proceedings were justified, the Claimant could participate and the Claimant retained ownership (R I, paras. 377-379).

3. The Tribunal

175. The question for the Tribunal is whether Art. II(2)(a) and/or (b) have been breached. Art. II (2)(a) requires from the Parties to the BIT to accord "*fair and equitable treatment*" and Art. II(2)(b) that "*Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment ... of investments.*"
176. The Tribunal will first turn to the question of a breach of Art. II(2)(b) BIT by way of arbitrary and discriminatory measures. The BIT gives no definition of either the notion "arbitrary" or "discriminatory." Regarding arbitrariness, reference can again be made to the decision of the ICJ in the *ELSI* case. The Court defined it as "*not so much something opposed to a rule of law, as*

something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of “arbitrary action” being “substituted for the rule of law” (Asylum, Judgment, ICJ Reports 1950, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety” (ELSI, ICJ Reports 1989, para. 128).

177. Considering the facts of the present case, it is difficult to regard either the initiation or the conduct of the judicial proceedings as arbitrary. The parties disagree on the reasons for the grave economic situation of CSR at the time of the initiation of the judicial proceedings, but not on the factual insolvency of CSR at the time. Nor is the difficult situation of the approximately 4,000 employees denied. Considering that there was neither a prospect of the budgetary creditors rescheduling debts on a short time basis, nor that of the Claimant making further investments in CSR and that the situation for the employees as well as for the whole region was desperate, there are sufficient grounds not to regard the proceedings as arbitrary. Their initiation can neither be regarded as shocking nor surprising in the sense understood by the ICJ in *ELSI*. On the contrary, one may well conclude that the proceedings were at that time the only short term solution of the “social crisis” that had engulfed Resita as a result of the Claimant’s inability to pay CSR’s workforce and therefore equally reasonable as well-founded.

178. Such proceedings are provided for in all legal systems and for much the same reasons. One therefore can not say that they were “opposed to the rule of law.” Moreover, they were initiated and conducted according to the law and not against it. CSR was in a situation that would have justified the initiation of comparable proceedings in most other countries. Arbitrariness is therefore excluded.

179. In this context it is obviously of major importance that this Tribunal – as discussed above – did not conclude that the situation of CSR at the time of initiation of the proceedings was caused by violation by SOF/APAPS of their obligations under the SPA with regard to debt rescheduling or failure to provide protection and security. Obviously, the answer to the question of arbitrariness might have been different had the Tribunal concluded that the Respondent was responsible under international law for the economic situation of CSR. Since that is not the case the Tribunal concludes that neither the initiation nor the conduct of the judicial proceedings was arbitrary.
180. The Tribunal now turns to the question of whether the proceedings were discriminatory. The parties have not provided the Tribunal with any information that comparable proceedings have been initiated against investors from other countries or in particular against US investors. But that in itself does not exclude the possibility that the proceedings constituted a discriminatory measure because it is possible for a single measure to be discriminatory if proof to that effect is given. As one cannot rely on objective criteria in such situations, the Claimant has to demonstrate that a certain measure was directed specifically against a certain investor by reason of his, her or its nationality. As demonstrated above, the judicial proceedings against CSR were in no way arbitrary but on the contrary were well founded. And there was no indication whatsoever that the measure was specifically directed against the Claimant as a U.S. company. Furthermore, the Claimant failed to prove that other investors with debt problems not being subjected to judicial proceedings were in fact in a situation as grave as that of CSR. Equally the Claimant did not demonstrate that other investors were left unaffected by judicial proceedings although they were in similar situations. The Tribunal accordingly concludes that the measure was not discriminatory and that therefore no violation of Art. II(2)(b) has been established.
181. The Tribunal will now address the question whether the Respondent complied with the duty to accord fair and equitable treatment to the Claimant. Here the

Tribunal is confronted with two notions which are particularly difficult to define. Although in this respect Art. II(2)(a) mirrors standard clauses in BITs and other international instruments and courts and tribunals have been concerned with violations of fair and equitable treatment standards, the question whether those standards have been violated has to be considered in the light of the circumstances of each case.

182. Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2), one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor. As demonstrated above, none of those obligations or standards has been breached. While this in itself cannot lead to the conclusion that the more general fair and equitable treatment standard has not been breached, it remains difficult to see how the judicial proceedings can be regarded as a violation of Art. II(2)(a) of the BIT. As described above with regard to alleged arbitrariness, the situation of the Claimant, CSR and its employees was such that the judicial proceedings seemed to be the only solution to an otherwise insoluble situation. Bearing in mind the interests of the approximately 4,000 employees who depended on CSR and their prospects at that time, the initiation of the proceedings was neither unfair nor inequitable. This conclusion is reinforced by the consideration that the Respondent is not to be blamed for having violated any obligations under international law in connection with the indisputably dramatic economic situation at that time. Therefore, no violation of Art. II(2)(a) and its fair and equitable treatment standard has occurred.

183. Consequently, the Tribunal regards the judicial proceedings as a violation of neither Art. II(2)(a) nor Art. II(2)(b) BIT.

H.VI The Conclusion of the Collective Agreement

184. As a preliminary remark, the Tribunal notes that it is not clear whether the Claimant continues to advance this claim. Rather, it seems that in its Reply the Claimant dropped the claim: “*Although Noble Ventures does not allege that the breach of the accord led to CSR’s subsequent financial difficulties, it demonstrates lack of due diligence*” (C II, para. 109, see also paras. 105 –108). There is no (at least no explicit) mention of this aspect where the Claimant applies the facts to the applicable law (C II, page 86 onward) nor does the claim appear in C-PHB I. The Respondent regarded the Claimant’s initial position concerning the collective agreement to be a separate claim (see list of claims identified in R I, para. 247). But in its Rejoinder the Respondent regarded the claim as abandoned (R II, para. 399). Nevertheless, as a precaution, the claim is now addressed by the Tribunal.

1. Arguments by the Claimant

185. The Claimant contends that the conclusion of the Collective Employment Agreement constituted a failure, imputable to the Respondent, to observe contractual agreements in good faith as required by Art. II(2)(c) BIT, because according to Annex A of the SPA, SOF was to use its best efforts to ensure that CSR’s management did not take any major decision without the Claimant’s consent (C I, para. 476 and C I, paras. 22 and 175-180).

2. Arguments by the Respondent

186. The Respondent contends that this is a claim for a simple breach of contract that is not affected by the BIT (R I, para. 356 and R II, paras. 454 *et seq.* (breach of contract is not a breach of customary international law) and paras. 474 *et seq.* (breach of contract does not fall under Art. II(2)(c) BIT)). In any event the Respondent contends that no violation has been established (R I, paras. 296-300, see also paras. 94 *et seq.*).

3. The Tribunal

187. Annex A to the SPA provided that, during the period between the execution of the SPA, on the one hand, and payment by the Claimant of the initial instalment of the purchase price and the transfer to it by SOF of its shares in CSR, on the other hand, CSR would not take “major decisions” without the prior consent of the Claimant’s representative – in fact Mr Charles Franges – who might appoint Mr Victor Manolescu to exercise control over major decisions taken by the management of CSR regarding CSR’s day-to-day operations. Annex A enumerated what constituted “major decisions”. The list did not include the making of labour agreements.
188. However, in Annex 1 to the SPA, CSR’s then General Manager, Mr. Teodor Gavris, not only undertook that, during the interval before the Claimant gained control of CSR, he would not do a number of things that might prejudice CSR’s economic position but also specifically declared that: “The collective labor agreement and the individual labor agreement remain the same as of this date” – i.e. they had not been changed since the Claimant’s due diligence exercise was completed.
189. Towards the end of June 2000 – i.e. during the interval between the execution and completion of the SPA – the VATRA trade union requested CSR to start negotiations for a new Collective Employment Agreement on July 3, 2000. Mr. Gavris, very prudently, annotated (in Romanian) VATRA’s letter as follows:

“Yes – if the representative of the company NV agrees and countersigns: 30.06.2000.”

Mr. Charles Franges then added a further annotation (in the English language):

“We agree to meet at the specified time to listen to your point of view concerning contract negotiation.”

190. Mr. Franges himself signed the first Negotiation Minutes of the consequential meetings which recorded that the Claimant would be free to be represented at subsequent meetings.
191. There is uncontested evidence that thereafter Mr. Manolescu, as the Claimant's delegated representative, was kept fully informed of the negotiations with VATRA and concurred in the signing of a new collective labour agreement, which was officially registered on August 18, 2000.
192. A complaint that the making of the new collective labour agreement contravened the Accord annexed to the SPA was first made by Mr McNutt on behalf of the Claimant as one of a number of alleged grievances, though Mr McNutt was not on the scene when the new labour agreement was negotiated and signed. In its Reply the Claimant continued to contend that the signing of the new agreement constituted a breach of the Accord and that the alleged breach demonstrated SOF's lack of diligence in fulfilling its obligations under the SPA (CII, paras. 105-109). However no reference was made to that contention in the Arbitration thereafter.
193. The Tribunal finds, on the basis of the facts set out above, that, even if the conclusion of a new collective labour agreement by CSR during the interim period before completion of the SPA constituted a major decision that required the Claimant's consent, its consent was sought and given and there is therefore no question of any lack of diligence or other fault in this regard on the part of SOF and therefore no question of any such default being attributable to the Respondent.

H.VII. Conclusion of, and Compliance with, the Settlement Agreement

1. Arguments by the Claimant

194. The Claimant contends that, following negotiations starting on September 11, 2001, a settlement agreement was concluded with the Respondent on October 19, 2001, the so-called “Novak-Dijmarescu Protocol” (C I, para. 283, C II, paras. 214 *et seq.* and C II, paras. 214 *et seq.*). Mr. Alan Novak was a director of the Claimant company who had extensive experience in international project finance and had earlier practised law in two major US law firms. Approval of the Protocol on the side of the Respondent was purportedly expressed by way of the signature of Counselor Dijmarescu (an experienced and senior Romanian diplomat and government functionary). Approval of the Protocol was subsequently communicated to the Claimant (C II, paras. 214 *et seq.*):

“After Noble Ventures’ proposal was circulated to various Ministries, Counselor Dijmarescu gave a briefing to the Cabinet on October 18, 2001. Romania has not produced the minutes to this Cabinet meeting. However, following this Cabinet meeting, Mr. Dijmarescu wrote to Noble Ventures stating: At the request of the Prime Minister, I have emphasized the political, legal and economic implications of the case and I have endorsed the proposal that a solution can and should be based on negotiations within the framework of discussed proposals embodied in your letter of September 13, 2001.

At the end of discussions, the Prime Minister has asked APAPS as a legal part[sic] in the contract to send to Noble Ventures a formal invitation for negotiations of an addendum to the privatization contract, based on the package discussed in Washington (C II, para. 216).

The same day, Minister Musetescu sent the formal invitation as follows: I have the pleasure in informing you that the Government of Romania, in the last Cabinet meeting, has mandated [APAPS] to lead the negotiations for an addendum to the privatization contract. The bases [sic] of our mandate is the framework for a settlement resulted during the exchange of views and understanding reached in Washington and presented at length in your letter of September 13, 2001 (C II, para. 217).

Mr. Novak immediately responded to this letter by stating: Thank you for your letter dated October 19, 2001 accepting, on behalf of the Government of Romania, the framework for a settlement as presented in my letter of 13 September 2001 ... (C II, para. 218).

Thus, by October 19, 2001, an agreement had been reached based on the terms of the Novak-Dijmarescu Protocol which were also set out in Mr. Novak's proposal of September 13, 2001. This agreement was to be implemented by further negotiations of the details of an addendum to the SPA and other matters. However, the essential terms of the addendum were already included in the Novak-Dijmarescu Protocol (C II, para. 219).

195. According to the Claimant, the Respondent agreed within the settlement to assist the Claimant in obtaining a one year revolving US\$ 15 million line of credit to be provided by the State-owned Romanian Commercial Bank (BCR), (C I, paras. 290 *et seq.* and C II, paras. 220-242). The negotiations with BCR were unproductive and the Claimant contends that the Government of Romania did not provide the allegedly promised assistance with respect to the line of credit (C I, para. 301, C II, paras. 238 *et seq.*). The Claimant argues that this was a violation of the general principle of international law of *pacta sunt servanda* (C II, para. 372 though this claim no longer appears in C-PHB I) and of Art. II(2)(c) of the BIT (C I, paras. 478 *et seq.* and C II, paras. 261, 387 and 418 III; C-PHB I, para. 4).

2. Arguments by the Respondent

196. The Respondent takes the view first that this claim is a mere contract claim which falls outside the scope of the application of the BIT (R I, para. 356 and R II, paras. 454 *et seq.* (breach of contract is not a breach of customary international law) and paras. 474 *et seq.* (breach of contract does not fall under Art. II(2)(c) of the BIT)).

197. Secondly the Respondent argues that at no time was an agreement concluded (R I, paras. 9, 200-214, 309 *et seq.*; R-PHB I, paras. 41 - 44; see also in more general terms R II paras. 47-49, 292-311, 312-354, 420-435). But even if the Tribunal found that the parties agreed on a settlement, the Respondent did not breach the settlement since there was no obligation to grant a loan (R I, paras. 313 *et seq.*, R II, paras. 312-316) but only to support the Claimant and assist it in obtaining a loan: thus the wording in the disputed agreement (at paragraph (i)4) was: “*The Government of Romania supports and will assist in CSR obtaining a one-year revolving \$15 million line of credit*” (R I, para. 228; R-PHB I, para. 45). This the Respondent did (R I, paras. 230 *et seq.*, R II, paras. 430-435; R-PHB I, para. 45). The only reason why the Claimant did not receive a loan from BCR was that mutually acceptable commercial terms could not be agreed (R-PHB I, para. 46) and because the Claimant refused to comply with Romanian banking laws (R I, paras. 230 *et seq.*, 317, R II, paras. 317-324). The Respondent adds that, were one to regard a “settlement” as being concluded, claims that arose before the time of the settlement would be precluded by the terms of the settlement itself (R II, paras. 426-429).

3. The Tribunal

198. If a settlement was indeed concluded, a claim for breach of the settlement would be included under the umbrella clause contained in Art. II(2)(c) of the BIT because the text of the alleged settlement provided *inter alia* for modifications of the SPA. However, the primary question for the Tribunal in this context is whether one can really regard a settlement agreement as having

been concluded by, or in consequence of, the so-called Novak- Dijmarescu Protocol.

199. The Tribunal cannot accept the Claimant's argument in this respect. First, the text of the Novak-Dijmarescu Protocol was entitled "proposed settlement" for the return of Noble Ventures to CSR S.A. which *prima facie* indicates that it was not a concluded settlement. But apart from that, the text of the Protocol contains a clause stating "*Both parties agree that this document is in furtherance of settlement negotiations and both parties agree that it is not to be used in any subsequent legal proceedings. In the event the proposed settlement is agreed to by both parties, the Claimant agrees to withdraw its claim in ICSID*". That further wording clearly shows that, at the time when the proposed settlement was signed, neither party regarded any of its parts as binding. Consequently the Novak-Dijmarescu Protocol had no binding force and could therefore not give rise to any obligations.

200. Did it become binding later? The Claimant failed to provide any convincing proof that a binding settlement was concluded on the basis of the proposed settlement. The Claimant provided the Tribunal with documents which indicate a general willingness to proceed with negotiations such as the letter from the Chairman of APAPS, Minister Musetescu, to Mr. Novak dated October 19, 2001 the relevant part of which was cited by the Claimant at CII, para. 217 (see para. 175 above).

201. Minister Musetescu's statement can at best be understood as a positive attitude on the side of the Respondent with regard to reaching a final settlement along the lines set out in the "Protocol." Even if one regarded the proposed settlement as an agreed framework, it would be impossible to derive from it specific obligations as the Claimant appears to seek to do.

202. Accordingly, this claim has to be dismissed for lack of an existing binding obligation.

H.VIII. The Question of Expropriation

1. Arguments by the Claimant

203. The Claimant contends that the Respondent expropriated the Claimant's investment in CSR, first, by taking *de facto* control of CSR through the initiation and carrying out of the judicial reorganization proceedings (C-PHB I, para. 5) and, secondly, by taking *de jure* control through the Respondent's subsequent dilution of the Claimant's majority interest (C II, paras. 262, 358). According to the Claimant, the Respondent thereby violated Article III of the BIT and is liable to pay compensation to the Claimant in consequence.

204. As far as the judicial reorganization is concerned, the Claimant contends that, starting with the initiation of the judicial reorganization, the Respondent engaged in a permanent expropriation of the Claimant without compensation (C II, paras. 360-366). Concerning the judicial reorganization the Claimant argues (C I, paras. 24-29):

“24. Romania violated Article III of the BIT in that Romania's actions and omissions constituted a taking of Noble Ventures' interests in property without just compensation and in violation of the international law standards of treatment required by Article II(2) of the BIT. Romania undertook a course of action intended to deprive the Investor of the effective use of its Investment through the colorable use of bankruptcy laws. Romania undertook this measure in an unfair and discriminatory manner with the intent to prevent the Investor from being able to carry out its business functions. The evidence indicates that Romania's action displayed an absence of bona fide intent and that it was not taken for any actual bona fide purpose.

“25. Romania’s actions were motivated by a desire to revoke the effect of the Privatization Agreement between Romania and Noble Ventures, as a means of evading its liability arising from the Agreement.

“26. If Romania wanted to legitimately have some form of judicial review of the Privatization Agreement, it was entitled to go to court in Romania to seek cancellation of the Agreement. Romania avoided this route as the Investor had strong grounds to resist such an unfair application by Romania.

“27. Under the terms of the Privatization Agreement, there were specific financial obligations and pledges which would enable Romania to obtain liquidated damages in the event of a breach of contract by Noble Ventures. Noble Ventures was required to pledge 11.5% of its shares in CSR with respect to security for its covenants under the Privatization Agreement. This was the only recourse that Romania would have had with respect to any breach of contract made by Noble Ventures. Cancellation of the Privatization Agreement was not an available remedy until after December 31, 2002. Apparently Romania was unprepared to wait until 2003 to deprive Noble Ventures of the benefit of its Privatization Agreement as Romania acted precipitously and colorably against Noble Ventures. By abusing the otherwise legitimate process of bankruptcy law, Romania was guaranteed a method to remove the control of CSR from Noble Ventures quickly, which would result in political benefit for the government with the local union.

“28. Romania’s abuse of process, designed to deprive Noble Ventures of its investment in CSR, was an internationally wrongful and unlawful response to the political situation caused by the unlawful union strikes in Resita. Romania’s decision to violate international law standards of behaviour with respect to fair and equitable treatment, full protection and security and expropriation cannot be excused on account of the government’s desire to deal

with seemingly pressing political concerns. Romania was obligated to develop solutions that were consistent with its international law obligations.

“29. Since the judicial reorganization of CSR, the facility has not operated in a profitable fashion and many thousands of formerly employed workers have been unemployed.”

205. The Claimant further contends that after the judicial reorganization the Respondent continued to deprive the Claimant substantially of its operation, control and management of CSR (C II, paras. 367 *et seq.*): *“Romania’s de facto taking of CSR continued after the end of the judicial reorganization. Noble Ventures did not regain control of CSR after the termination of the proceedings. Noble Ventures’ employees only returned to Romania to implement the Novak-Dijmarescu Protocol and not to re-exercise control over CSR. CSR shareholder meeting minutes from February 22, 2002 and April 30, 2002, record that Noble Ventures was only present to pursue the Protocol”* (C II, para. 367) ... *“following the termination of the judicial reorganization in January 2002, Noble Ventures were not free to continue to operate CSR. The company was inoperable without a line of credit and the debt restructuring that Noble Ventures pursued through the Novak-Dijmarescu Protocol”* (C II, para. 369).

206. As far as the dilution of its majority interest is concerned, the Claimant contends that the Respondent secured majority ownership of CSR on July 5, 2002 (C II, para. 3 VIII, see also C I, paras. 303-312 and C II, paras. 243-251); and at CII, para. 371:

“Romania’s de facto taking of CSR became de jure on July 5, 2002. In unilaterally registering the shareholder decision to issue new shares to the budgetary and utility creditors, APAPS reduced Noble

Ventures' shareholding in CSR to 14%. With no longer even de jure control over CSR, Noble Ventures' employees returned to the United States."

207. In its Reply (CII) the Claimant explains the background to that action as follows:

"243. While Noble Ventures was negotiating with BCR for the line of credit, it also took steps to implement other aspects of the Novak-Dijmarescu Protocol. One of the key terms of the Protocol was the restructuring of CSR's budgetary and utility debts. The mechanism for this restructuring was contained in GEO 172 and GD 1280.

"244. Under GEO 172 and GD 1280, CSR's budgetary and utility debts would be eliminated by means of debt for equity swap. The budgetary and utility creditors would receive shares from CSR in exchange for their budgetary debts. These shares were then to be transferred to APAPS. In order to ensure that Noble Ventures would retain control of CSR, Noble Ventures could exercise a preemption right that would require APAPS to sell the shares to it at a steep discount.

"245. In order to implement this debt for equity swap, Noble Ventures called a shareholders meeting on April 30, 2002. As with the previous shareholders meeting, Noble Ventures recorded in the Minutes of the meeting that it was participating for the purpose of implementing the Novak-Dijmarescu Protocol. At the meeting, new shares were issued from CSR's treasury to the budgetary and utility creditors, effective upon the registration of the shareholders' decision.

“246. However, due to the size of the budgetary and utility debts, the immediate effect of the registration of this decision would have been to render Noble Ventures a minority shareholder in CSR holding less than 14% of the shares. Although APAPS was required to transfer these shares to Noble Ventures upon the registration of Noble Ventures’ preemption right, APAPS could not transfer shares that it did not own.

“247. By this point, Noble Ventures had witnessed SOF/APAPS excuse itself from both its obligations under the SPA and under the Novak-Dijmarescu Protocol on the grounds that it had limited legal competence and could only exercise “due efforts”. In these circumstances, Noble Ventures wanted to make sure that CSR’s budgetary and utility creditors had signed “transfer protocols” that committed them to transferring their shares to APAPS before it allowed itself to be diluted to a minority shareholder in CSR.

“248. Although Noble Ventures did not immediately register the shareholders’ decision, it indicated its commitment to pursuing the debt equity swap by registering its preemption right on May 23, 2002. The registration of this right created a binding obligation on APAPS to transfer the swapped shares of CSR to Noble Ventures once it had received them from the budgetary creditors.

“249. APAPS, however, still did not have the shares nor did[it] have the transfer protocols executed. Indeed, documents produced by Romania indicate that the shares were not transferred to APAPS until January 2003. Noble Ventures’ caution was fully justified. This

was not “a classic ‘stick up’ of Romania” but a prudent move designed to preserve Noble Ventures’ control of CSR.

“250. Later events demonstrated that APAPS had no intention of transferring the newly issued shares to Noble Ventures. Rather than obtain the transfer protocols, on July 5, 2002, APAPS moved to register the shareholders’ decision unilaterally. Upon doing so, control of CSR was transferred to the budgetary and utility creditors. Mr. Franges and Mr. McNutt no longer had any mandate to act on behalf of CSR as they no longer represented the majority shareholder and were only authorized to act for the purposes of implementing the Novak-Dijmarescu Protocol. As a result, they returned to the United States.

“251. From July 5, 2002 onwards, CSR was controlled by the budgetary creditors and state-owned utilities. Only Romania is to blame for the property loss to CSR in the second half of 2002 and the continued suffering of its workers. Despite having control of CSR from July 5, 2002 onwards, Romania could not start production until March 2003.”

208. Regarding the question of the application of Art. III of the BIT and the preconditions of an alleged expropriation in this case, the Claimant contends that Romania controlled the act of expropriation (C I, paras. 486-489), that the judicial reorganization was an act of expropriation for a discriminatory purpose and without the required compensation (C I, paras. 490-497) and that in this context the Respondent also failed to meet its obligations under the international law standards of treatment (C I, paras. 498-501).

2. Arguments by the Respondent

209. The Respondent argues that no expropriation took place (R II, paras. 29-42, 696-717). It contends that the judicial reorganization was properly conducted in accordance with Romanian law and did not lead to a taking of CSR since the Claimant retained its majority shares and exercised its shareholder's rights during the proceedings (R I, paras. 7 *et seq.*, 410-411, R II, paras. 696 *et seq.*). The proceedings were not intended to cancel and did not cancel the SPA (R II, paras. 271-272; R-PHB I, para. 24). The Respondent further emphasizes that the loss of control was only temporary and therefore cannot amount to an expropriation (R I, paras. 183, 401, 405 *et seq.*, 410, R II, paras. 706-714; R-PHB I, para. 24), since the Claimant reacquired control at the end of the proceedings (R I, paras. 219 *et seq.*; R II, paras. 287-291; R-PHB I, para. 25). Nor can there be expropriation if a degree of control is retained and where, as here, the investor participates in the proceedings (R I, para. 413, R II, paras. 702-705, R-PHB I, para. 24). The Respondent also argues that it never acquired control or replaced the shareholders (R I, para. 183).
210. With regard to the dilution of the Claimant's interest in CSR on which the Claimant relies, the Respondent contends that the Claimant divested itself of its majority interest in CSR (R II, paras. 715-717) and that, even after so doing, it exercised control (R II, paras. 350-354).

3. The Tribunal

211. The Tribunal will first consider whether the judicial proceedings can be regarded as a violation of Art. III(1) of the BIT which reads as follows:

“Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except: for public purpose; in a non discriminatory manner; upon payment of prompt, adequate and effective compensation; and

in accordance with due process of law and the general principles of treatment provided for in Article II(2). ...”.

212. The question for the Tribunal is whether judicial proceedings initiated by reason of a company’s insolvency can be regarded as an expropriation at all. The ICJ, in the above-mentioned *ELSI* case, was faced with a situation which was similar to that in the present case. The Court was concerned with the requisitioning of a company the situation of which it described as follows: “... *given an under-capitalized, consistently loss-making company, crippled by the need to service large loans, which company its stockholders had themselves decided not to finance further but to close and sell off because, as they were anxious to make clear to everybody concerned, the money was running out fast, it cannot be a matter of surprise if, several days after the date at which the management itself had predicted the money would run out, the company should be considered to have been actually or virtually in a state of insolvency for the purpose of Italian bankruptcy law*” (ICJ Reports 1989, p. 62, para. 100).
213. CSR’s economic situation was no better. The Claimant, effectively its sole shareholder, evidently had no funds of its own (indeed, as the Tribunal knows, it still owed Edw. C. Levy Co. the money that the latter had lent to the Claimant to enable the Claimant to make the down payment on the purchase price of CSR). Moreover when the petitions for CSR’s judicial reorganization were filed, neither the creditors nor the Respondent had any reason to be confident that, if and when GD 490 was implemented, the Claimant would be able at once to end, as had become imperative, the social crisis at Resita by clearing the arrears of wages and from then on paying the wages as they fell due. The purpose of the judicial reorganization was indeed to preserve, rather than to destroy, the possibility of the Claimant reviving CSR as an economic steel producer, which the Respondent still saw as being at least the “best of a bad job” despite the risks and problems associated with the solution.

214. Regarding the question whether the requisitioning of the company in *ELSI* by the Mayor of Palermo constituted an expropriation or taking of property, the Court, for a number of reasons, denied such an effect. It held in particular: “*Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation*” (ICJ Reports 1989, p. 71, para. 119.).
215. As far as the present case is concerned, CSR was – as pointed out above – *de facto* insolvent, being unable to honour its obligations in particular toward its workforce. It is of no relevance in this context that the Claimant, contrary to the owners in *ELSI*, still had the intention to run the company in such a situation, albeit without the intention itself to invest.
216. The judicial proceedings, therefore, did not concern a viable company or valuable assets to be expropriated. Consequently, one cannot regard the proceedings to be a violation of Art. III(1) of the BIT.

H.IX. Violation of the Claimant’s preemption rights

1. Arguments by the Claimant

217. The Claimant contends that “*Romania failed to meet its obligation under Art. II(2)(c) by breaching a binding settlement agreement. Romania breached the settlement agreement by denying Noble Ventures’ preemption rights to the newly issued shares of CSR*” (C-PHB I, para. 4).

218. While this question has been addressed in a previous quotation concerning expropriation (see C II, para. 246), the position of the Claimant is best summarized in the following passage of its Reply (C II):

“313. Contrary to Romania’s allegations, Noble Ventures did not refuse to implement the debt-equity swap provided for in GD 1280 and GEO 172. Noble Ventures held a shareholders meeting on April 30, 2001 and agreed to issue shares to the budgetary creditors. Noble Ventures also filed its pre-emption right with APAPS. Under the terms of GD 1280 and GEO 172, APAPS was then required to transfer the newly issued shares to Noble Ventures once it received them from the budgetary creditors.

“314. The number of shares to be issued to the budgetary creditors was far greater than those controlled by Noble Ventures. Noble Ventures sought to ensure that the budgetary creditors had committed to transferring the shares to APAPS before allowing its control to be diluted. By unilaterally registering the April 30 shareholders’ meeting decision, APAPS diluted Noble Ventures’ control to 14% of CSR’s shares without transferring to Noble Ventures any of the newly issued shares.

“315. APAPS’ cancellation of the SPA only affects the 14% of CSR’s shares that were transferred to Noble Ventures under the SPA. This cancellation did not affect Noble Ventures’ rights under GD 1280 and GEO 172 to the additional shares representing in excess of 80% of CSR’s share capital. Once APAPS received these shares from the budgetary creditors, it was required to transfer them to Noble Ventures.

“316. In January 2003, the budgetary and utility creditors of CSR ultimately transferred the shares they received for the debt-equity swap to APAPS. APAPS was then required to transfer these shares to Noble Ventures. It

refused to do so, choosing instead to resell them to another bidder. This action represented yet another breach of APAPS' obligations”.

Against this background it is contended that the Respondent acted in violation of Art. II(2)(c) BIT (C II, paras. 418 IV-419).

2. Arguments by Respondent

219. The Tribunal notes that the Respondent's Counter-Memorial (RI) does not address this claim directly since it was not presented as a proper claim in the Claimant's Memorial (CI). This is also the reason why this claim does not feature in the list of claims identified in R I, para. 247. However, there is a reference to this issue in R I, paras. 225 *et seq.*, esp. para. 226.
220. With regard to this claim, the Respondent argues that it was by reason of the Claimant's own failure that it lost the right to the newly issued shares (R II, paras. 436-453). In its First Post-hearing Brief the Respondent argues that Romania is not liable for any alleged failure to transfer the newly issued shares to the Claimant (R-PHB I, paras. 48-53):

“48. Claimant asserted in its Reply that Romania's registration of, and failure to transfer, the newly issued shares approved by Claimant at the April 30, 2002 shareholders meeting violated Claimant's preemption rights and contributed to the expropriation of its investment. These allegations are without merit.

“49. As explained in Romania's Rejoinder and in the expert opinion of Professor Tănăsescu, Claimant divested itself of its majority interest at the shareholders meeting held on April 30, 2002 when it approved the issuance of new shares and vested ownership rights in those shares in CSR's budgetary

and utility creditors as of that date. Claimant has not offered any testimony, or made any other attempt, to rebut this fact of Romanian law.

“50. It also is an un rebutted fact of Romanian law that CSR was required to register the minutes of the April 30, 2002 shareholders meeting and the new shareholding structure with the Trade Register before the newly issued shares could be transferred to Claimant. Claimant admits that it refused to complete the registration requirements. APAPS accordingly did so on July 5, 2002 pursuant to its legal rights as a CSR shareholder.

“51. APAPS thereafter moved immediately to complete the sale of the shares to Claimant, inviting Claimant to sign the necessary legal documents in conjunction with the addendum to the SPA that the parties had been negotiating. When the parties met on July 29-30, 2002, however, Claimant presented an entirely new set of demands as a pre-condition to its purchase of the shares and completion of the pending settlement negotiations. Romania could not accept these new conditions, which violated Romanian law. Minister Muşetescu nonetheless invited Claimant to APAPS and informed Claimant that APAPS remained willing to complete the sale of shares and the other settlement documents in accordance with the parties’ previous negotiations.

“52. Claimant never responded to Minister Muşetescu’s invitation. Claimant instead abandoned CSR and the country, and failed to pay the second installment under the SPA that was due on December 31, 2002. As a result of that failure, the SPA terminated automatically under its terms and any rights that Claimant may have had to the shares also lapsed.

“53. Claimant accordingly bears full responsibility for its decisions to divest itself of its majority ownership of CSR by approving the issuance of new shares and to reject APAPS’s subsequent offers to sell those shares.”

3. The Tribunal

221. The Tribunal takes note that the Claimant regards the violation of its preemption rights as being contrary to Art. II(2)(c) of the BIT. This presupposes that there was an obligation that the Respondent had “entered into” with regard to the Claimant’s investment in respect of the preemption rights. In this context, the Claimant refers to obligations flowing from GD 1280 and GEO 172. That legislation is mentioned by the Claimant in the context of the settlement agreement as a confirmation that a settlement agreement had been concluded (C II, para. 224). However, as the Tribunal has concluded above, no such settlement had been concluded.

222. There remains the question whether GD 1280 and GEO 172 can be regarded as creating obligations under Art. II(2)(c) of the BIT. In the judgment of the Tribunal, the legislation did not do so since it was enacted for the purpose of implementing a settlement agreement if and when such an agreement was concluded. If only for that reason, since no settlement agreement was concluded, the legislation created no obligations on the part of the Respondent on which the Claimant was entitled to rely by virtue of Article II.2(c) of the BIT or at all.

223. Accordingly this claim has to be dismissed.

H.X. Considerations Concerning Damages

224. The parties have argued extensively regarding the issue of damages and the Tribunal considers that, in order to put on record the economic relevance of the case for the parties, this should be reflected in this Award in spite of the conclusions of the Tribunal regarding liability.

1. Arguments by the Claimant

225. The Claimant proposes the following methods of calculation of losses (C-PHB I, paras. 86-100):

“i) A DCF Valuation Is Appropriate

“86. Prior to this arbitration, both SOF and Noble Ventures valued CSR using a Discounted Cash Flow (“DCF”) methodology. The SOF valuation performed by Coopers & Lybrand in 1998 forecast cash flows for the relevant period that were higher than those used in the initial years of Mr. Rosen’s valuation. These cash flows implied a value for CSR of US\$67 million before adjusting for historical debts. Only after these debts were factored in did the value of CSR become zero.

“87. On cross-examination, Mr. Kaczmarek of Navigant admitted that he had relied on the valuation by Coopers & Lybrand in rejecting the application of a DCF methodology. However, Mr. Kaczmarek admitted that he did not know the extent to which the budgetary debts resulted in the low valuation. The dramatic effect of these budgetary debts is illustrated by the flaws in Mr. Kaczmarek’s calculation of the net replacement value of CSR’s assets. Mr. Kaczmarek estimated that this value was also less than zero by June 30, 2000. However, once Mr. Kaczmarek’s own calculations are revised to account for the rescheduling of these debts and cancellation of penalties, the net replacement value is US\$17,156,000. Mr. Kaczmarek’s analysis only confirms Noble Ventures’ thesis that, without the rescheduling of CSR’s budgetary debts, the company was insolvent.

“88. A DCF valuation is simply the calculation of projected revenues less projected costs and the application of a discount rate to reflect the value of

those future cash flows at a present date. When asked about the projected revenues in Mr. Rosen's calculations, Mr. Kaczmarek declined to describe them as "speculative". Instead, he said this was a matter to be left to the respective industry experts. Yet the Atkins report offers no projections of revenues for this Tribunal to choose from and is based on a fundamental misunderstanding of the products to be produced by Noble Ventures.

"89. Mr. Trendell, by contrast, was intimately familiar with these products. Based on his own track record of obtaining 38,000 MT of orders even before quality certifications were completed and his experience as a seller of a complementary line of products, Mr. Trendell provides a highly reliable forecast of future sales volumes. The capacity of CSR to produce these volumes is confirmed by the evidence of Mr. Ciurel of IPROLAM and Mr. Perian, a former CSR director. The prices at which these volumes would be sold is a matter of public record, as steel is a traded commodity.

"90. Given CSR's long track record of production, the forecast of its costs is simply an exercise of cost accounting. Mr. Roy Steel, a former Ernst & Young consultant with extensive steel industry experience, performed such a calculation for Noble Ventures using historical production records for CSR. The authors of the Atkins Report do not have any training in accounting, did not understand the CSR product mix and make erroneous criticisms. For example, the Atkins Rejoinder stresses later increases in worldwide scrap metal prices while ignoring evidence that CSR's scrap prices were below world prices due to export restraints and other advantages.

"91. Instead of adopting a DCF methodology, Mr. Kaczmarek proposed that the price paid for CSR's shares reflected its true value. Mr. Kaczmarek's theory, however, has a number of serious flaws. First, Mr. Kaczmarek's theory is inconsistent with notions of fair market value requiring a sale that is free of compulsion. On cross-examination, Mr. Predoiu claimed that he had no choice

but to sell to Noble Ventures. CSR was sold to the only bidder just as the deadline for its privatization was to expire.

“92. Second, in his calculation of fair market value, Mr. Kaczmarek ignored all elements of consideration other than the fixed cash price. SOF’s own documents, however, demonstrate that it considered the variable cash consideration, the proposed investments, the environmental and social obligations as part of the value received from the sale to Noble Ventures. Similarly, when APAPS resold CSR in 2004, its press release described the purchaser’s commitments of 14 million Euros in investments and assumption of debts of 10 million Euros as key benefits of the transaction, even though the cash consideration was 1 Euro.

“93. This additional consideration in the SPA undermines Mr. Kaczmarek’s calculations of supposedly unrealistic rates of return. While the Navigant Rejoinder described the calculation of these rates of return as a “simple” calculation of value over price paid, Mr. Kaczmarek resisted such a simple comparison on cross-examination.

“94. The examinations of Mr. Franges, Mr. Rosen and Mr. Kaczmarek revealed that a number of technical criticisms of Mr. Rosen’s DCF calculation are also unfounded. Thus, Mr. Rosen properly accounted for investments that were to be made in the first year of operations. Mr. Kaczmarek, who is not a Chartered Public Accountant, did not understand how investments, such as the one in the oxygen plant, were included in the calculations. He confused the Linde joint venture contract with a loan, when in fact it was at most a contingent liability. The Atkins Rejoinder also incorrectly assumed an investment in the blooming mill was necessary in the first year of operations. In any event, should the Tribunal choose to accept any of the criticisms of Mr. Rosen’s DCF calculations, these criticisms can be accounted for in the

electronic model submitted by Mr. Rosen on CD ROM. They do not require a complete rejection of the DCF methodology.

“95. In applying a DCF valuation, Mr. Rosen properly considered the later rise in steel prices and the continued devaluation of the Romanian Lei. As Mr. Rosen explained in his cross-examination, he considered other post-valuation date events identified in the Navigant Rejoinder but these only confirmed his calculations.

“96. The use of hindsight is a legal issue and not one to be determined by the valuation experts. The legal issue was settled in the Chorzow Factory case which held that compensation must “wipe out the consequences” of Romania’s illegal acts. In that case, the majority referred the valuation of Germany’s damages to a team of experts and directed them to use hindsight.

ii) Alternative Methods of Compensation

“97. Although they were both prepared at a time when Noble Ventures was a seller under duress, two potential transactions provide an alternate, albeit less reliable basis on which the Tribunal can value CSR. First, the March 2001 Investment Presentation valued CSR’s shares at approximately US\$24 million. Second, Middlesex valued CSR at US\$20 million in its first offer made in a December 20, 2000 e-mail, suggesting a value of Noble Ventures’ interest of at least US\$15 million.

“98. Navigant dismissed the evidence in the Middlesex e-mail on the grounds that a formal offer would only be made after receiving legal advice and completion of due diligence. However, these standard conditions were mere formalities. At the time that Middlesex sent its e-mail, Mr. Trendell had been working at CSR for several months. Mr. Trendell was part of the Middlesex

team that participated in the financing negotiations with Noble Ventures and would therefore have completed most due diligence on their behalf. The unreasonable nature of Navigant's position was demonstrated in Mr. Kaczmarek's cross-examination when he claimed that an offer to purchase a house, conditional upon an inspection, would provide no information regarding the value of the house.

"99. The Tribunal should not adopt an amounts invested approach in this case as such an approach does not provide any compensation for lost profits. However, if the Tribunal were to adopt such an approach, the calculations prepared by Mr. Rosen are to be preferred. Navigant places no value on the services performed for CSR by Mr. Franges, Mr. McNutt, Mr. Adams, Mr. McLean and others. Noble Ventures' representatives devoted time and effort throughout the period of its management of CSR and should be compensated based on the amounts set out in a Management Agreement prepared before this dispute occurred. As Noble Ventures was the owner of nearly all of CSR's shares, this Agreement forms a reliable indication of the value of the services Noble Ventures provided.

"100. Navigant also makes other errors. For example, it credits Romania the amount of US \$361,483 for interest charged on the remaining US\$4 million purchase price pursuant to Article 5.2.1 of the SPA despite the fact that, under the amounts invested approach, the parties are placed in the same position as if the SPA had never been performed. In that event, Romania would not be entitled to the interest payment. In addition, Navigant incorrectly claims that the \$100,000 deposit by Sametal under its option contract with Noble Ventures was a liability of CSR even though Sametal's claim for this amount was dismissed during CSR's judicial reorganization proceedings. Navigant also fails to include Noble Ventures' payment of the \$71,177 delay penalty charged by SOF on the grounds that the penalty was justified. Even if this were true (which it is not), this amount was still invested by Noble Ventures in order to acquire CSR".

2. Arguments by the Respondent

226. Regarding the question of damages the Respondent contends first that the Claimant has failed to establish any right to compensation (R-PHB I, paras. 56-62):

“56. Throughout these proceedings Claimant has failed to meet its burden of proving that there is any direct causal connection between any of Romania’s alleged violations of the BIT and the claimed loss of its investment in CSR.

“57. First, Claimant has not proven that the alleged delay in restructuring CSR’s budgetary debt caused Claimant to lose its opportunity in CSR. Regardless of whether the budgetary debts were restructured, Claimant has not shown that it would have turned CSR into a profitable enterprise because, as the evidence does show, Claimant lacked experience, financial backing, and a viable business plan.

“58. Second, Claimant has not shown that the alleged misrepresentations regarding the slag pile led to the loss of its shares in CSR. Third, there is no relationship between Romania’s alleged failure to provide Claimant with full protection and security and the compensation that Claimant seeks.

“59. Fourth, even if the judicial reorganization constituted an expropriation, which it did not, Claimant’s calculation of its alleged losses does not match Claimant’s liability theory because Claimant did not value its investment as of the date of the judicial reorganization. Fifth, Claimant has not shown how the alleged breach of the Proposed Settlement led to the total loss of its interest in CSR, and has not connected these acts to its compensation claim.

“60. Claimant’s failure to establish any causal link between these alleged BIT violations and the harm that it says it suffered logically leads to the conclusion that Claimant has not met its burden of proving that it suffered harm in the amount of the compensation it claims. All of Claimant’s compensation models, including the third and latest one submitted at the hearing, purport to calculate the value of Claimant’s total investment in CSR – that is, they quantify only the alleged loss of the entire investment. Claimant’s case thus apparently is “all or nothing.” Romania, however, has demonstrated that none of Claimant’s allegations of wrongful conduct is the proximate cause of Claimant’s losses. Viewing them together does nothing to address the lack of cause-and-effect in Claimant’s case.

“61. As the tribunal in GAMI Investments v. Mexico observed in an award dated November 15, 2004, it is necessary that a Claimant provide a detailed “cause-and-effect” analysis between the alleged acts of the Respondent and the harm the Claimant allegedly suffered: “the prejudice must be particularized and quantified.” In GAMI, as in this case, the Claimant took an “all or nothing” approach to compensation, claiming a complete expropriation for acts that were not shown to have caused such an injury. The tribunal noted that the Claimant’s failure to quantify the harm it suffered from each of the Respondent’s alleged violations of international law made it impossible for the tribunal to calculate appropriate compensation, even if liability were proven.

“62. The same conclusion applies here. Because Claimant has not met its burden to show any cause-and-effect relationship between its claims and the injury it alleges to have suffered, and has not quantified such injuries separately and specifically (i.e., it has taken the “all or nothing” approach), Claimant cannot be awarded any compensation, even if it could prove liability as to some of its claims.”

227. With regard to the compensation model presented by the Claimant in C-PHB I for the calculation of damages, the Respondent made the following further submission (R-PHB I, para. 63): *“Additionally, Romania objects to Claimant’s new compensation model. Consistent with the Tribunal’s direction at the hearing, Romania’s objections to this most recent model are contained in the Addendum attached hereto”* (see also R-PHB II, paras. 28-37).

228. The Addendum referred to reads as follows:

“1... The new model contains three methods of calculating compensation: a Discounted Cash Flow (“DCF”) methodology, a transaction-based methodology, and an amounts invested approach. As with Claimant’s previous models, the new model contains baseless assumptions and is otherwise plagued with methodological and technical problems that make it unreliable and unusable. The amounts invested approach, as calculated by Romania, provides the only proper, non-speculative basis for measuring compensation (assuming that liability were to be established).

“I. It is improper to use a DCF analysis in this case

“A. Claimant’s Model Ignores the Threshold Findings the Tribunal Must Make to Determine Whether a DCF Calculation Is Proper

“2. The first question in the model is whether the Tribunal believes that a DCF methodology should be used. This lone yes or no question is an improper starting point. The Tribunal instead must first determine several threshold issues, including: (1) whether CSR was a going concern; (2) whether Noble Ventures could have successfully implemented its entire business plan; and (3) whether Claimant has proven what CSR’s financial performance would have been from the privatization to the alleged expropriation had CSR’s debts been

restructured as Claimant allegedly expected. Claimant's CD-ROM model does not allow the Tribunal to consider any of these threshold issues. As summarized below, the answer to these questions is negative, rendering Claimant's DCF methodology speculative and unreliable.

"1. CSR Was Not A Going Concern

"3. Under international law, an enterprise may be considered a going concern only if it has a recent history of profitability from which to project future profits with a reasonable degree of certainty. Thus, in deciding whether CSR was a going concern, the Tribunal must consider its actual performance in the years just prior to the alleged expropriation.

"4. Claimant relies on the 1998 Coopers & Lybrand Report and CSR's 200-year existence to show CSR was a going concern. Neither basis supports Claimant. The Coopers & Lybrand report effectively concluded that CSR was bankrupt in 1998, and CSR's financial condition only worsened thereafter.

"5. Furthermore, even if CSR had been a going concern when Claimant acquired it, CSR was not a going concern as it was to be operated by Claimant under its business plan. Claimant's financial expert admitted at the hearing his DCF calculations were not based on CSR's historical operating results, and that under Noble Ventures' business plan CSR "was very different from what it was historically." Projections not based on historical results are speculative by their very nature.

"6. Moreover, it is clear that Claimant itself was never a going concern; Claimant did not have any history of operating or reviving steel mills under plans similar to the one it prepared for CSR. As Mr. Franges testified,

Claimant has never purchased or operated a steel mill, and never made a profit in any of the years it existed as a legal entity. Claimant similarly had never obtained any sources of financing for such ventures. This, again, reconfirms the speculative nature of Claimant's plans.

“2. Noble Ventures Could Not Have Successfully Implemented Its Business Plan

“7. Claimant's entire damages model is based upon the fundamental assumption that its business plan would succeed. To so conclude requires numerous subsidiary determinations not identified in Claimant's DCF model.

“8. First, although Mr. Franges admitted that budgetary debt restructuring was not guaranteed, Claimant's business plan assumed unreasonably that all of CSR's debts would be restructured immediately. Claimant's compensation model perpetuates this error.

“9. Second, Claimant's business plan assumed an immediate refinancing of all of CSR's un-restructured ROL denominated debt into USD denominated debt. Claimant's CD-ROM model does not consider the likelihood that Claimant would not achieve this. The model also does not show how each debt would be refinanced over time, or the effect of such relief.

“10. Third, Claimant's business plan contemplates that CSR would sell immediately new products in new markets. Claimant's CD-ROM fails to address the likelihood that CSR would not succeed at all, let alone immediately. CSR had never competed as a worldwide exporter of modern steel products, and Claimant has produced no evidence that it could have funded its investment program even if CSR's debts had been restructured.

“3. Claimant’s Model Does Not Explain How CSR Would Have Performed Under Claimant’s Ownership Had CSR’s Debts Been Restructured

“11. Claimant must explain specifically how CSR would have generated profits (if any) from the privatization to the date of the alleged expropriation had CSR’s budgetary debts been restructured. An analysis of this time period is critical to determine whether a DCF analysis with a valuation date of July 31, 2001 is appropriate, but the CD-ROM DCF model fails to do so. Instead, Claimant begins its DCF analysis on the date of the alleged expropriation, July 31, 2001, and simply assumes that the projections in its business plan would have come to pass. There is no evidence, however, to support the proposition on which the DCF rests: that Claimant’s CSR shares worth US \$4,515,780 on June 5, 2000, were worth between US \$145 million and US \$186 million on July 31, 2001.

“12. Claimant’s DCF model does not address any of the seven questions posed by Navigant in its Rejoinder Report. Claimant must answer at least those seven questions in order for it to be anything other than pure conjecture. Indeed, all of the questions must be answered just to address the very first question on Claimant’s CD-Rom – “Is a Discounted Cash Flow the appropriate methodology to assess damages?” Because these questions are not even included in the tool, it is incomplete and inaccurate. In these circumstances, any use of the Claimant’s DCF model – or any other DCF model – is inherently speculative.

“B. Claimant’s Model Is Rife with Technical Errors

“13. Even if the Tribunal were to find that the DCF method was appropriate, Claimant’s model contains numerous other technical flaws that render it inaccurate and useless. At the hearing, Navigant identified a number of other

criticisms that are still not addressed in Claimant's model, including: (1) Claimant's model improperly over values its management agreement by US \$1,375,000; (2) Claimant's model assumes erroneously that it would have funded all of the required capital investments itself despite Claimant's admission that it would not provide any funding itself; (3) Claimant's model contradicts the capital investment requirements of the SPA; (4) Claimant's model fails to incorporate accurate information regarding the production and pricing of raw materials and steel; and (5) Claimant's model double counts the tax benefit of capital costs.

“II. There is no basis to conduct a transaction-based analysis for determining compensation in this case

“14. Claimant's “transaction-based” analysis purports to value CSR's shares using documents that supposedly price those shares. This approach is fatally flawed because as both Navigant and Mr. Rosen have observed, the documents on which it is based – Claimant's own investment presentation for CSR's shares and an email from Middlesex Holdings – are neither “transactions,” nor an otherwise reliable measure of CSR's share value. Claimant's “transaction-based” method of valuing CSR's shares must be rejected.

“III. The Amounts Invested Method as calculated by Romania is the only proper measure of compensation

“15. For the reasons previously stated, Romania considers the “amounts invested” approach as calculated by Navigant to be the only proper, non-speculative measure of compensation in this case should liability and causation be established. On a net basis, this approach yields a maximum potential award of US \$143,970 as of July 31, 2001, plus simple interest at the 3-month U.S. Treasury Bill rate”.

3. The Tribunal

229. In view of the Tribunal's determination with regard to liability, the question of damages and the numerous issues that would need to be addressed in connection with their quantification do not arise.

H.XI. Considerations Regarding Costs

230. Sections 5 and 6 of Procedural Order No.3 invited the Parties to submit their respective cost claims by January 14, 2005 and comments on the other Party's cost claim by January 28, 2005.

1. The Claimant

231. By these submissions, taking into account a correction in its second submission, the Claimant requested that it be awarded a total of US\$3,145,210.27.

2. The Respondent

232. The Respondent, by its submissions, requested that it be awarded a total of US\$ 8,930,868.05.

3. The Tribunal

233. Provisions regarding the Tribunal's decision in the matter of costs are to be found in Art. 61(2) of the ICSID Convention and Arts. 28 and 47 (j) of the ICSID Arbitration Rules. Noting that none of these provisions mentions specific criteria for the decision on costs, the Tribunal takes into account the following particular considerations:

234. On one hand, it is a principle common to both national laws and international law that a party injured by a breach must be compensated for its losses and damages, which include arbitration costs. On the other hand, the “loser pays” principle is not common to all national laws or international law, and in particular is stated in neither the ICSID Convention nor the ICSID Arbitration Rules.
235. On the issue of costs the Tribunal has taken into consideration all the circumstances of this case. In particular, it notes that, although all the claims ultimately failed, the Claimant succeeded on certain issues, notably the fundamental legal issue of the umbrella clause contained in Article II(2)(c) of the BIT as a basis for liability under the BIT in this case and the factual issue with regard to the diligence exercised by SOF after the execution of the SPA, albeit without causal significance. The Tribunal also has in mind that the basic flaws in the SPA are to be attributed to both SOF and the Claimant.
236. Therefore, using the discretion that it has under the ICSID Convention and the ICSID Arbitration Rules, the Arbitral Tribunal deems it fair and reasonable that the cost burden be shared equally between the parties, each bearing its own legal and other expenses and 50 % of the arbitration costs.

I. Decisions

For the foregoing reasons, the Tribunal renders the following award:

1. The claims raised by the Claimant are dismissed.
2. Each party shall bear the expenses incurred by it in connection with the present arbitration. The arbitration costs, including the fees of the members of the Tribunal, shall be borne by the parties in equal shares.

[signed]

Sir Jeremy Lever

Arbitrator

[date: October 3, 2005]

[signed]

Prof. Pierre-Marie Dupuy

Arbitrator

[date: September 21, 2005]

[signed]

Prof. Karl-Heinz Böckstiegel

President of the Tribunal

[date: October 5, 2005]