

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

**HASSAN AWDI, ENTERPRISE BUSINESS CONSULTANTS, INC. AND ALFA EL
CORPORATION**
Claimants

and

ROMANIA
Respondent

ICSID Case No. ARB/10/13

AWARD

Members of the Tribunal

Professor Piero Bernardini, President
Professor Dr. Rudolf Dolzer
Dr. Hamid G. Gharavi

Secretary of the Tribunal

Ms. Aïssatou Diop

Representing Claimants

Dr. Raëd M. Fathallah
Mr. Tim Portwood
Bredin Prat

Mr. Dany Khayat
Mr. Jeffrey W. Sarles (until January 2014)
Dr. José Caicedo
Mayer Brown

Representing Respondent

Dr. Veijo Heiskanen
Mr. Matthias Scherer
Ms. Laura Halonen
Lalive

Dr. Crenguta Leaua
Mr. Marius Grigorescu
Ms. Mihaela Maravela
Leaua & Asociatii

Date of dispatch to the Parties: March 2, 2015

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DRAMATIS PERSONAE

Hassan Awdi – one of the Claimants; owner of EBI and Alfa El Corporation

Hussein Awdi – twin brother of Claimant Hassan Awdi

Mehdi Awdi – brother of Claimant Hassan Awdi

Wafa Awdi – wife of Claimant Hassan Awdi

Dorin Cojanu – former financial expert and auditor at AVAS

Cornel Virgil Florea – administrator of Consulta 99 SRL; which is the judicial administrator of Rodipet

Liliana Hărșan – supervisor advisor at the National Agency of Fiscal Administration (ANAF)

Giorgiana Hosu – DIICOT Chief Prosecutor

Grigore Jean – shareholder in SC Restaurant Bucur J&P SRL

Florin Lungaci – general manager of Rodipet

Luciana Mott – daughter and heir of Dumitru Soare

Cătălin Nițu – appointed on 16 July 2009 by AVAS as provisional administrator of Rodipet

Luculescu Petre – shareholder in SC Restaurant Bucur J&P SRL

Mariana Predescu – director of Post-Privatization Department of AVAS

Dumitru Soare – first heir to Casa Soare, deceased; began restitution claim

Stefan Soare – son and heir of Dumitru Soare

Vasile Uifalean – appointed on 8 February 2010 by AVAS to be Special Administrator of Rodipet to represent shareholders in the insolvency proceedings

Mircea Ursache – former President of AVAS

GLOSSARY OF LEGAL PERSONS

Enterprise Business Consultants, Inc. (“EBC”) – one of the Claimants; US company wholly owned by Hassan Awdi

Alfa El Bucur Srl – company incorporated in Romania to transfer ownership of the Casa Bucur Estate to it

Alfa El Corporation (“Alfa”) – one of the Claimants; US company wholly owned by Hassan Awdi; sole shareholder of Alfa El Bucur Srl

ANAF – National Agency for Tax Administration

Authority for State Assets Recovery (“AVAS”) – created on 1 May 2004 by Government Emergency Ordinance 23/2004 through merger of two other government agencies APAPS and FPS, respectively Authority for Privatisation and Management of the State’s Shares, and State Property Fund

Awdi Group

- S.C. Everyday Business Impex Srl
- S.C. Street Corner Srl : Street Corner is wholly owned by EBC; Street Corner 99.99% of Mona Lisa Investments Srl
- S.C. Westland Investment Srl

Casa Bucur or Casa Soare – historic property in Romania; one of the Claimants’ investments

Consulta 99 SPRL – the judicial administrator of Rodipet when it became insolvent

Bueno Corporation – became Supremo Media

DIICOT – Directorate for the Investigation of Organised Crime and Terrorism

Miami Group – created by Hassan Awdi upon arriving in Romania in 1992

- Bueno Café – became Bueno Supermarket
- Miami Electronics – retail stores and consumer electronics similar to Radio Shack in the United States
- S.C. Mona Lisa Investment Srl – active in real estate; owned by Street Corner; formerly S.C. Mona Lisa Investments SA, S.C. Mona Lisa Trading Co.
- S.C. Supremo Media Srl (“Supremo”) – formerly S.C. Bueno Corporation Srl, S.C. Supremo Corporation 2002

Rodipet Group – group of companies set up by Claimants to create an integrated press network; consists of the following companies.

- S.C. Balbec Retail – chain of convenience stores, formerly S.C. Rodipet Retail
- S.C. IntelBiz Solutions Srl – provided software, hardware, and human resources services; formerly S.C. Rodipet Business Solutions Srl
- Mobile Affiche – provided truck advertising services
- S.C. Rodipet S.A. (“Rodipet”) – provided press distribution and retail services
- S.C. Rodipet Courier Srl – provided transportation and courier services; filed for voluntary liquidation in December 2009
- S.C. Supremo Corporation Srl – provided outdoor advertising and financial services; filed for voluntary liquidation in October 2009

S.C. Alfa El Romania Srl – Romanian incorporated company which later changed its name to S.C. Alfa El Bucur Srl; entered into a Sale Purchase Agreement with Casa Bucur Srl

S.C. Alunis S.A. – former socialist enterprise which operated a restaurant in the Casa Bucur Estate

S.C. Magnar Systems Com Srl (“Magnar”) – company wholly owned and controlled by Claimants; signed the Privatization with AVAS for the sale-purchase of Rodipet shares; became S.C. Magnar Two Srl

S.C. Network Press Concept – formerly S.C. Rodipet SA

S.C. Restaurant Bucur J&P Spic – former name of Casa Bucur, the company that purchased the Restaurant and Summer Kitchen (which constitute the Casa Soare estate) from Alunis

GLOSSARY OF MAIN LEGAL INSTRUMENTS

Privatization Contract – signed on 23 December 2003; main contract between AVAS and Magnar for the sale-purchase of Rodipet shares

Addendum No. 1 to the Privatization Contract – signed on 23 March 2004; added a two month extension of the deadline of 31 March 2004 by which the conditions stipulated under Article 3 of the Privatization Contract were to be fulfilled

Addendum No. 2 to the Privatization Contract – signed on 30 April 2004; amended Article 3.1 by deleting paragraph III and adding a “best efforts clause” regarding the granting of land concessions

Addendum No. 3 to the Privatization Contract – signed on 20 March 2007; amended Article (2)(b) regarding Additional Shares

First Share Pledge Agreement – signed on 23 December 2003; established a Pledge in AVAS’ favor over a block of 90,574 shares to guarantee the performance of the investment of EUR 3.750.000

Second Share Pledge Agreement – signed on 24 June 2004; established a Pledge in AVAS favor over a block of 1,279,908 shares subsequently transferred by AVAS to Magnar

The Romanian nationalization regime

- Decree 92/1950: provided for the nationalization of certain real estate assets (CLA-162)

The Romanian concession regime

- Government Emergency Order No. 88/1997 (“GEO 88/1997”): of 29 December 1997 on special rules on land concessions granted to privatized companies; amended by Law 99/1999 (CLA-4)
- Law No. 219/1998: of 25 November 1998 on a general regime for land concessions (Ex. R-129)
- Government Decision No. 577/2002: of 21 June 2002 on methodological norms for the implementation of GEO 88/1997 (CLA-5)
- Law 442/2004: of 28 October 2004 on a specific law on Rodipet of (Ex. C-10)
- Ordinance No. 45/2004: of 29 January 2004 on the conversion of Rodipet’s debt into shares (Ex. C-11)

The Romanian privatization regime

- Law 15/1990: of 8 August 1990 on the restructuring of State-owned enterprises into commercial companies (CLA-169)

- Law 31/1990: of 17 November 1990 on trading companies (CLA-123)
- GEO 88/1997: see above
- Government Decision 55/1998: of 12 February 1998 approving methodological norms regarding the privatization of companies and the sale of assets (CLA-176)
- Law 99/1999: of 26 May 1999 amending and supplementing GEO 88/1997 on the privatization of commercial companies (CLA-177)

The Romanian restitution regime

- Law 112/1995: of 29 November 1995 regulating the legal status of certain residential real estate that passed into State property (CLA-184)
- Law 213/1998: of 14 November 1998 on public property and its juridical regime (CLA-183)
- Law 10/2001: of 8 February 2001, on the legal regime of certain properties abusively taken between 6 March 1945 and 22 December 1989 (CLA-188)

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 14 October 1966
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Request	Request for Arbitration, 31 May 2010
BIT	Treaty of 28 May 1992 between the Government of the United States of America and the Government of Romania concerning the reciprocal encouragement and protection of investment, and protocols of 28 May 1992 and 22 September 2003
Cl. Mem.	Claimants' Memorial on the Merits, 20 October 2012
Resp. C-Mem.	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction and Admissibility, 15 March 2013
Cl. Rep.	Claimants' Reply on the Merits, 14 June 2013
Cl. C-Mem. Jur.	Claimants' Counter-Memorial on Jurisdiction and Admissibility, 9 August 2013
Resp. Rej.	Respondent's Rejoinder on the Merits and Reply on Jurisdiction and Admissibility, 4 October 2013
Cl. Rej. Jur.	Claimants' Rejoinder on Jurisdiction and Admissibility, 15 October 2013
CPHB	Claimants' Post-Hearing Brief, 19 March 2014
RPHB	Respondent's Post-Hearing Brief, 19 March 2014
C-[#]	Claimants' Exhibit
R-[#]	Respondent's Exhibit

CLA-[#]	Claimants' Legal Authority
RLA-[#]	Respondent's Legal Authority
CPM	Claimants' Exhibits produced with Request for Provisional Measures
DCF	Discounted Cash Flow
Motion	Claimants' Motion for a Summary Decision on the Admissibility of Respondent's Jurisdictional Objection dated 1 May 2013
FMV	Fair Market Value
Tr. J. Merits	Transcript of the hearing on jurisdiction and the merits
Tr. Q.	Transcript of the hearing on quantum

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for the Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Treaty of 28 May 1992 between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment, which entered into force on 15 January 1994, and Protocols of 28 May 1992 and 22 September 2003 (the “BIT” or “Treaty”). The dispute was also submitted on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force 14 October 1966 (the “ICSID Convention”).

2. Hassan Awdi, a man involved in international business activities for over two decades, went to Romania in 1992 to pursue opportunities at a time when the Romanian economy was being liberalized after the fall of communism. Both directly or indirectly through his companies, Hassan Awdi invested in various industries in Romania, including press distribution, real estate, leisure, and hospitality.

3. Specifically with respect to this dispute, Hassan Awdi and his co-Claimants acquired a press distribution company called Rodipet, which was a privatized company previously owned by the Romanian State. Claimants also acquired a historic property called Casa Soare, later renamed Casa Bucur from a company owned by a Romanian State agency. Claimants turned Casa Bucur into a luxury boutique hotel and restaurant.

4. Regarding Rodipet, Claimants and the Romanian Authority for State Assets Recovery (“AVAS”) signed a Privatization Contract for the sale-purchase of Rodipet shares. Both sides to the Privatization Contract undertook various commitments. On the one hand, AVAS undertook that Romania would extinguish tax liabilities and other debt owed to it by Rodipet and grant to Rodipet a maximum of a 49-year concession over land housing press distribution points. On the other hand, Claimants undertook to raise EUR 2 million in capital for Rodipet, make technical investments totalling EUR 3.75 million in the company, as well as various other commitments, *e.g.*, relating to labour relations with Rodipet’s employees. The dispute arose when Romania allegedly revoked the law granting the land concession to Rodipet and took control over Claimants’ indirect shareholding in the company.

5. With respect to Casa Bucur, the dispute arose when the Romanian Supreme Court decided that Claimants' acquired property should be returned to the people who had owned it originally before the property came under State ownership.

6. Claimants contend that these actions resulted in a breach by Respondent of various provisions of the United States-Romania BIT, including the requirement of fair and equitable treatment and full protection and security, the prohibition against unreasonable and discriminatory measures, the provisions on expropriation guarantees and observance of obligations.

II. THE PARTIES

7. There are three Claimants: (1) Hassan Awdi, a natural person having the nationality of the United States; (2) Enterprise Business Consultants, Inc. ("EBC"), a company incorporated in Delaware, United States, and wholly owned by Hassan Awdi; and (3) Alfa El Corporation ("Alfa"), also a company incorporated in Delaware, United States, and wholly owned by Hassan Awdi.

8. Claimants are represented by Dr. Raëd M. Fathallah and Mr. Tim Portwood of Bredin Prat, and by Mr. Jeffrey W. Sarles (until January 2014), Mr. Dany Khayat and Dr. José Caicedo of Mayer Brown.

9. Respondent is Romania. It is represented by Dr. Veijo Heiskanen, Mr. Matthias Scherer, and Ms. Laura Halonen of Lalive; and by Dr. Crenguta Leaua, Mr. Marius Grigorescu, and Ms. Mihaela Maravela of Leaua & Asociatii.

10. Claimants and Respondent are hereinafter collectively referred to as the "Parties."

III. PROCEDURAL HISTORY

A. Registration of the Request for Arbitration and Constitution of the Tribunal

11. On 3 June 2010, ICSID received a request for arbitration dated 31 May 2010 from Hassan Awdi, EBC, and Alfa against Romania (the "Request").

12. On 16 June 2010, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the

Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

13. In the Request, Claimants proposed a Tribunal consisting of three arbitrators, with one arbitrator appointed by Claimants, one arbitrator appointed by Respondent, and the presiding arbitrator appointed by agreement of the two co-arbitrators. Claimants reiterated their proposal by letter of 18 June 2010. By letter of 25 June 2010, Claimants requested a prompt constitution of the Tribunal and informed ICSID that they were appointing Dr. Hamid Gharavi, a national of France and Iran, as arbitrator. On 1 July 2010, the Centre notified the Parties that if they failed to agree on a method of constituting the Tribunal within 60 days after the registration of the Request, either party could invoke Article 37(2)(b) of the ICSID Convention as a default method.

14. On 16 August 2010, Claimants invoked Article 37(2)(b). The next day, the Centre advised Respondent that the Tribunal was to be constituted according to Article 37(2)(b) and invited the parties to make appointments accordingly. On 31 August 2010, Claimants confirmed their appointment of Dr. Gharavi. On 16 September 2010, Respondent appointed Professor Rudolf Dolzer, a national of Germany, as arbitrator.

15. Subsequently, the parties agreed that the two co-arbitrators would attempt to agree on a presiding arbitrator. This process did not, however, yield any results. On 30 November 2010, Claimants requested that the Chairman of the ICSID Administrative Council appoint a presiding arbitrator under Article 38 of the ICSID Convention. Before the appointment was made, Claimants and Respondent informed ICSID, by their respective letters of 17 and 18 January 2011, that they had agreed to appoint Professor Piero Bernardini, a national of Italy, as presiding arbitrator.

16. On 19 January 2011, the Secretary-General, 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 have been constituted on that date. Ms. Aïssatou Diop, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

B. First Session and Provisional Measures

17. On 23 December 2010, before the Tribunal was constituted, Claimants had filed a Request for Provisional Measures, essentially asking the Tribunal to order Romania to:

- refrain from engaging in conduct that may aggravate the dispute or change the *status quo* prior to the initiation of a criminal investigation that Romania had instituted against Hassan Awdi, his associates, and members of the Awdi family;
- discontinue immediately or stay immediately the criminal proceedings in relation to Rodipet (DIICOT case No. 390/D/P/2006) and any other criminal case concerning the subject matter of this arbitration;
- lift immediately measures taken in the context of its criminal proceedings affecting Claimants, their associates, and members of the Awdi family;
- immediately allow and ensure unrestricted freedom of movement in, out, and within Romania to Hassan Awdi at all times free of any pressure, threats, or harassment of any type by Romanian authorities;
- return to Claimants unrestricted and immediate possession of all documents sequestered in the course of the criminal proceedings in DIICOT case No. 390/D/P/2006, or, in the alternative, a full, accurate, complete and unedited copy of the same;
- immediately refrain from taking any action directly or indirectly through or with the media operating in Romania or elsewhere the effect of which may be to aggravate the dispute which is the subject of this arbitration;
- refrain immediately from any action to intercept, listen to, interfere with and/or record by any means whatsoever of communications of any nature whatsoever and using any means whatsoever between Claimants' legal counsel on the one hand and Claimants or their representatives;
- immediately permit Claimants' legal counsel to have access, free from surveillance of any type, to any person physically present on Romanian territory for the purposes of investigating, preparing, and/or conducting Claimants' case in this arbitration;

- refrain immediately from any action the effect of which may be the harassment of the employees, former employees, directors, former directors and/or owners of Rodipet;
- produce to Claimants full, complete, accurate and unedited copies of the videos taken by DIICOT during the raids of premises of Claimants conducted on 22 June 2010 and thereafter.¹

18. On 29 December 2010, the ICSID Secretary-General set a schedule for Respondent to file its observations on Claimants' Request for Provisional Measures, and for each party to file a rebuttal. The schedule was amended on 7 January 2011 at Respondent's request.

19. On 25 January 2011, after the constitution of the Tribunal, Claimants filed a Request for a Temporary Restraining Order ("TRO") with immediate effect. The TRO requested the Tribunal to order, pending a decision on provisional measures, Romania to 1) refrain from ordering the appearance of Hassan Awdi, members of his family, and his associates before judicial and/or administrative authorities in the context of criminal investigations; 2) allow and ensure unrestricted freedom of movement in, out, and within Romania of Hassan Awdi, members of his family, and his associates; and, 3) refrain from communicating to persons involved with the criminal investigations documents produced or prepared in the context of this arbitration.² On 28 January 2011, Respondent filed its Response on Provisional Measures which addressed Claimants' requests of 23 December 2010 and 25 January 2011. On 1 February 2011, the Tribunal denied Claimants' request for a TRO, finding that the circumstances of the case and the evidence proffered by Claimants did not convincingly support their request for a TRO.³

20. On 14 February 2011, Claimants filed their Reply on Provisional Measures, and on 3 March 2011, Respondent filed its Rejoinder on Provisional Measures.

21. On 10 March 2011, the Tribunal held a first session and hearing on provisional measures in Paris.

22. On 29 March 2011, the Tribunal issued its Decision on Provisional Measures in Procedural Order No. 1, dismissing Claimants' request. The Tribunal found that "Claimants,

¹ Cl. Request for Provisional Measures, ¶ 256.

² Cl. letter addressed to Tribunal, 25 Jan. 2011, ¶ 34.

³ ICSID letter addressed to the Parties, 1 Feb. 2011.

at this juncture of the proceedings, have failed to demonstrate that an order for provisional measures is justified in the circumstances.”⁴ With respect to Claimants’ substantive rights, the Tribunal concluded that “Claimants have not met their burden of proof to establish that the due process or fundamental rights of the investigated persons have been violated by Respondent. Namely, Claimants have not demonstrated that the criminal investigations and more generally the proceedings have been conducted in violation of Romanian law nor that the rights of the investigated persons have been violated.”⁵ With respect to Claimants’ procedural rights, the Tribunal concluded that it “agrees with Romania that the pending criminal proceedings against Mr. Awdi will not prevent the decision of the legal issues brought before it.”⁶ According to the Tribunal, “[o]ne aspect of this procedural right deserves particular attention, access to documents that have been seized in the context of the criminal investigations.... [However,] [a]ccess to Mr. Awdi’s and Rodipet’s seized and retained documents having so been regulated, there is no need for provisional measures meant to avoid irreparable harm to Claimants’ interests.”⁷

23. At the first session, the Parties disagreed on the schedule of pleadings. The Tribunal decided that there would be a Memorial and a Counter-Memorial, four months each; and a Reply and Rejoinder, three months each. Respondent reserved the right to raise preliminary objections and request bifurcation after Claimants’ filing of their Memorial. The schedule of pleadings would start to run from the end of an interim period, during which Respondent would provide to Claimants access to documents previously seized by Romanian authorities and required by Claimants to prepare their case. These documents included hard copies of documents seized from Hassan Awdi, electronic documents seized from Hassan Awdi, electronic data and documents seized from Rodipet. The length of the interim period would be determined after Respondent had consulted with the Romanian competent authorities regarding the amount of time required to make the seized documents available to Claimants and informed the Tribunal.

24. The Respondent so informed the Tribunal by letter of 16 March 2011. On 29 March 2011, the Tribunal issued its decision on the schedule of written pleadings, setting the length of the interim period at two months. Reiterating its previous decision on the schedule,

⁴ Procedural Order No. 1, ¶ 95.

⁵ Procedural Order No. 1, ¶ 56.

⁶ Procedural Order No. 1, ¶ 75.

⁷ Procedural Order No. 1, ¶ 93.

Claimants' Memorial was due four months after the interim period, and Respondent's Counter-Memorial four months thereafter. Claimants' Reply and the Respondent's Rejoinder were each due two months after receipt of the precedent pleading. Furthermore, the hearing was to take place no later than three months after the exchange of written pleadings, with the precise hearing date to be determined subsequently.

25. On 8 April 2011, the Tribunal issued the Minutes of the First Session embodying the agreement of the parties and the remaining decisions of the Tribunal partly as follows: the Tribunal had been properly constituted, the applicable Arbitration Rules would be those in effect from 10 April 2006, English would be the procedural language, and Paris, France, would be the place of proceedings.

26. On 27 June 2012, the Parties submitted an agreed procedural calendar for the remainder of the proceeding. On the basis of the procedural calendar, as approved by the Tribunal, Claimants filed a Memorial on the Merits on 20 October 2012, and Respondent filed a Counter-Memorial on 15 March 2013.

27. On 1 May 2013, Claimants filed a Motion for a Summary Decision on the Admissibility of Respondent's Jurisdictional Objection (the "Motion"). The Motion was directed to Respondent's third objection to jurisdiction in the Counter-Memorial that Claimants' actions were not in good faith and their claims were inadmissible due to the looting and mismanagement of Rodipet and allegations of human trafficking of Honduran nationals.⁸ The Motion claimed that Respondent's objection to jurisdiction was based on facts and information that were the subject of ongoing criminal investigations or proceedings which Respondent was estopped from using as the basis for an objection in the arbitration proceeding, having repeatedly given assurances as to the separateness of the criminal proceedings from this arbitration proceeding.⁹

28. Claimants also requested a modification of the procedural calendar that was originally set on 27 June 2012, as modified on 11 February 2013. By letter of 3 May 2013, Respondent contended that there was no procedural basis for the Tribunal to deal with the Motion, to which Claimants replied by letter of 8 May 2013. On 10 May 2013, the Tribunal informed the Parties of its decision to admit the Motion. On 24 May 2013, the Tribunal set a procedural calendar

⁸ Resp. C-Mem., ¶¶ 425 *et seq.*

⁹ Motion, ¶¶ 14 *et seq.*

for the Motion to be addressed. Based on this calendar, Respondent filed a Reply on the Motion on 17 June 2013. The Tribunal held a hearing on the Motion on 9 and 10 July 2013 in Paris. In addition to the Members of the Tribunal, the following persons attended the hearing.

- For Claimants: Hassan Awdi, Claimant; Raéd Fathallah, Hollis Dufour, and Liliane Djahangir of Bredin Prat; Dany Khayat, José Caicedo, Joy Kreidi, and William Ahern of Mayer Brown; Violeta Oancea, Adrain Bendeac, and Andrei Oancea as Hassan Awdi's local counsel.
- For Respondent: Veijo Heiskanen, Matthias Scherer, and Laura Hanolen of Lalive; Crenguta Leaua, Marius Grigorescu, and Stefan Dudas of Leaua & Asociatti.

29. On 26 July 2013, the Tribunal issued its Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimants' Claim ("Decision on the Motion"), dismissing Claimants' Motion. The Tribunal found in part:

(70) Evidence relied upon by the Respondent may be freely tested by the Claimants. The latter may call on their own motion or, if needed, with the Tribunal's assistance, each person having signed witness statements or expert reports to appear at the October 2013 hearing to be cross-examined, regardless of whether the statements or reports were prepared for the purpose of this arbitration if not subject to confidentiality under the criminal proceedings. They may likewise dispute any part of the documentary evidence proffered by the Respondent. The Claimants' right to challenge evidence is a sufficient reason for the dismissal of the Motion since the latter requests that the entirety of the Respondent's admissibility objection be declared inadmissible even when that objection is founded on evidence unrelated to or not emanating from criminal proceedings.

[...]

(83) Regarding evidence related to criminal proceedings that the Respondent invites the Tribunal to consider, what matters for the issue before the Tribunal is not that the facts and information relied upon by the Respondent for its admissibility objection are all subjected to the on-going investigations or criminal proceedings in Romania, as contended by the Motion (para. 2). What matters is the Claimants' right to challenge in this arbitration the evidence regarding such facts and information to the extent that it is proffered by the Respondent not to prove criminal guilt but to prove the illegality of the Claimants' activities under public international law. There is therefore

reason to dismiss the Motion also regarding evidence relating to criminal proceedings.

(84) In conclusion, the issue raised by the Motion is not the admissibility of the evidence related to criminal proceedings. The issue is rather the probative value of such evidence for the purposes of this arbitration, which the Tribunal is empowered to weigh and determine. In assessing this value, the Tribunal shall be guided, among other things, by consideration of the presumption of innocence as a rule of public international law (internal citations omitted).¹⁰

30. On 31 May 2013, the Parties agreed to modify the procedural calendar of 11 February 2013. The Tribunal approved it on 4 June 2013. Thus, Claimants filed their Reply on the Merits on 15 June 2013, in parallel with the procedural steps relating to the Claimants' Motion, and their Response to Respondent's Inadmissibility Objection on 9 August 2013. Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction and Admissibility on 4 October 2013, and Claimants filed their Rejoinder to the Respondent's Inadmissibility Objection on 15 October 2013.

31. Claimants filed their request for production of documents on 1 May 2013, Respondent submitted comments on the request on 17 May 2013, and Claimants answered on 10 June 2013. The Tribunal issued its decision on the request on 18 June 2013. Respondent filed its request for production of documents on 25 April 2013. Subsequently, the Parties had an exchange of communications leading to the Tribunal's decision on the request of 19 August 2013.

32. On 12 September 2013, Respondent filed a Request for a Consent Order regarding an expert report to be filed in DIICOT Case No. 390/D/P/2006 which was responded to by Claimants on 20 September 2013. The Tribunal decided on 27 September 2013 that Respondent's request would be considered once the expert report shall become available.

C. Hearing on Jurisdiction and Merits

33. The President of the Tribunal held a pre-hearing organizational meeting with the Parties on 22 October 2013 to discuss certain outstanding procedural issues. The Parties agreed, and

¹⁰ Decision, 26 July 2013, ¶¶ 70, 83-84.

the Tribunal concurred, that the period reserved for the hearing would not be sufficient and that additional days would be required and set.

34. The Tribunal held a hearing on jurisdiction and merits in Paris from 28 October to 1 November 2013. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

- For Claimants: Hassan Awdi, Claimant; Dany Khayat, José Caicedo, William Ahern, and Joy Kreidi of the law firm of Mayer Brown; Tim Portwood, Raëd Fathallah, Hollis Dufour, Liliane Djahangir, Shane Daly, and Laura Fadhallah of the law firm of Bredin Prat; Violeta Oancea, Adrain Bendeac, Andrei Oancea, and Raluca Petrescu as Hassan Awdi's local counsel in Romania; and Alexandra Niculae of the law firm of Popovici Nitu & Asociatii.
- For Respondent: Veijo Heiskanen, Matthias Scherer, Laura Hanolen, Sam Moss, and Emilie McConaughy of the law firm of Lalive; Crenguta Leaua, Marius Grigorescu, Stefan Deaconu, Andra Filatov, and Mihaela Maravela of the law firm of Leaua & Asociatii.

35. The following witnesses and experts were examined:

- On behalf of Claimants: Jean Grigore (by videolink), Ana Calenic, Florin Lungaci, Mehdi Awdi, Hassan Awdi, Georgeta Popescu, and Bazil Oglinda (expert).
- On behalf of Respondent: Mariana Predescu, Mircea Ursache, Dorin Cojanu, Iulia Nistor, Cornel Florea, Gheorghe Piperea (expert), and Lucian Mihai (expert).
- An additional witness, Vasile Uifalean, was examined by Claimants, however, not in the capacity of witness for Respondent.

36. On 4 November 2013, the Tribunal submitted post-hearing questions to the Parties, and the Parties filed their respective Answers on 17 January 2014. Regarding the Parties' agreement to postpone part of the hearing until a later time,¹¹ the Tribunal decided to retain the dates of 4 and 5 February 2014 for the examination of quantum experts and closing arguments.

¹¹ See ¶ 32 above.

D. Hearing on Quantum

37. The Tribunal held a hearing on quantum in Paris as scheduled. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

- For Claimants: Hassan Awdi, Claimant; Dany Khayat, José Caicedo, William Ahern, and Joy Kreidi of the law firm of Mayer Brown; Raéd Fathallah, Hollis Dufour, Liliane Djahangir, Shane Daly, and Laura Fadhallah of the law firm of Bredin Prat; Rosie Barnes, and Matthew McDevitt of BDO International.
- For Respondent: Veijo Heiskanen, Matthias Scherer, Laura Hanolen, Emilie McConaughy, and David Bonifacio of the law firm of Lalive; Crenguta Leaua, Marius Grigorescu, Stefan Deaconu, and Mihaela Maravela of the law firm of Leaua & Asociatti.

38. The following experts were examined:

- On behalf of Claimants: Gervase MacGregor of BDO International.
- On behalf of Respondent: Andrew Grantham of AlixPartners.

39. On 7 February 2014, the Tribunal issued a ruling which laid down the conduct of the remainder of the procedure and addressed questions to the parties to be answered in their respective post-hearing submissions.

40. Based on the Tribunal's ruling, the Parties filed one round of simultaneous post-hearing briefs ("PHBs") on 19 March 2014.

41. Further to the Tribunal's letter of 12 May 2014, Claimants produced additional evidence on 28 May 2014, which was commented upon by Respondent on 13 June 2014, Claimants providing their comments on 30 June 2014.

42. The Parties filed their submissions on costs on 19 November 2014 and their reply cost statements on 1 December 2014.

43. The proceeding was declared closed pursuant to Arbitration Rule 38 on January 13, 2015.

IV. FACTUAL BACKGROUND

44. The Tribunal needs to set out the factual matrix of this case as it arises from the evidence, written and oral, presented by the Parties. To do so, it will adopt a chronological timeline when possible, taking into consideration that the Parties are in disagreement over all important facts, such disagreement being more than often manifested in an acrimonious manner. To the extent relevant or useful, some facts will be discussed in more detail in the Tribunal’s analysis of the disputed issues. The Tribunal cannot fail to note at the outset the manner by which the Parties, without sparing time and efforts, have pleaded their claims and defences by providing extensive written submissions, repeatedly filing requests for procedural measures and accumulating an extraordinary amount of factual and legal evidence in support of the respective positions, much beyond what the legitimate protection of their respective positions would have demanded. This has required inordinate, time-consuming engagement by the Tribunal, mostly concerned with ensuring equality of the Parties and establishing what out of Parties’ production is really relevant for its decision.

A. Rodipet

45. Claimants invested in outdoor advertising by creating the media and advertising company Supremo Media (formerly, Bueno Corporation). Supremo Media was part of a larger group of companies, called the Miami Group, which were owned by Claimants and specialized in the distribution and sale of consumer electronics.¹²

46. In 1997, Supremo Media signed two contracts with Rodipet S.A. Bucuresti (“Rodipet,” later “S.C. Network Press Concept”) for the rental of the top of kiosks and the distribution of merchandise. In the context of this collaboration, Rodipet accumulated debt toward Supremo worth approximately EUR 61.359.400. Due to the size of the debt and to Hassan Awdi’s recognition of the financial potential of Rodipet, he decided to acquire Rodipet¹³ and to request the Government to transform the debt to Supremo into shares of the company.

¹² Cl. Mem., ¶¶ 31-32.

¹³ Cl. Mem., ¶¶ 32-34; Resp. C-Mem., ¶ 49.

47. Rodipet was a state-owned company under the management of AVAS. It owned a network of 1.400 kiosks, over 200 cars, employed 3.032 people, and had a significant number of real estate properties.¹⁴

48. In November 2003, AVAS started the privatization process of Rodipet. S.C. Magnar Systems Com Srl (“**Magnar**”), a company owned and controlled by Claimants (“**Magnar**”), was finally selected based on an initial bid that had been improved during the negotiation sessions.¹⁵

49. According to Respondent, the presentation file of Rodipet noted as a “weak point” the fact that kiosks were located on lands rented from local bodies for limited periods of time. Magnar initially sought a 49-year lease over these lands. AVAS notified Magnar of AVAS’ lack of authority to issue any orders in connection with the lands. Magnar responded by requesting a concession of the lands by Government Resolution or Order of Minister or the like. AVAS retained its initial position.¹⁶ Respondent notes that “[i]t is unclear what occurred between the last meeting at which this requirement was discussed and the signature of the Privatization Contract.”¹⁷

1. The Privatization Contract

50. On 23 December 2003, AVAS and Magnar signed Contract of Shares Sale-Purchase No. 62 of 23/12/2003 (the “Privatization Contract”) for the sale to Magnar of 90.574 shares representing 100% of Rodipet’s share capital.¹⁸ The purchase price was ROL 2.266.614.350 (equivalent to EUR 54.600 according to Claimants or EUR 54.599,70 and USD 70.494,60 according to Respondent¹⁹) which, Claimants add, “reflected the financial situation of Rodipet as well as the heavy debt it owed to the Awdi Group.”²⁰ The new owner and the new board members were registered with the Chamber of Trade on 10 May 2004.

51. The Privatization Contract had a certain number of obligations for both parties. As well, it carried “[a] strict sanction regime . . . to encourage Magnar to comply with its

¹⁴ Resp. C-Mem., ¶¶ 47-48.

¹⁵ Resp. C-Mem., ¶¶ 51-52.

¹⁶ Resp. C-Mem., ¶¶ 67-70.

¹⁷ Resp. C-Mem., ¶ 71.

¹⁸ Cl. Mem., ¶ 72.

¹⁹ Resp. C- Mem., ¶ 54.

²⁰ Cl. Mem., ¶ 47.

obligations.”²¹ The sanction regime was based on AVAS model contract and was familiar to bidders.²² The most relevant obligations (and sanction) for the purposes of this dispute and related performance of each party are set out below.

2. Claimants’ Main Obligations Under the Privatization Contract

a. The business obligations

52. Under Article 10.5 of the Privatization Contract, Magnar had to maintain the main activity of the company for five years following the transfer of ownership of the shares. Under Article 10.6 of the Privatization Contract, Magnar undertook to achieve for five years a turnover out of which a minimum of 70% would be obtained from the company’s main activity.²³ Non-compliance with the obligations under Article 10.5 was subject to the payment of penalties under Article 10.7 of the Privatization Contract. In addition, under Article 10.12, Magnar undertook for five years “not to decide and/or not to arrange for the voluntary dissolution and liquidation of the Company” under penalty of payment of a fine.

53. Furthermore, under Articles 11.1 and 11.2 of the Privatization Contract, Magnar undertook not to alienate in any form assets owned by Rodipet under penalty of paying an amount equal to the market value of the asset.

b. The social obligations

54. Magnar had two main social obligations. Under Article 10.8 of the Privatization Contract, Magnar would assume all existing rights and liabilities regarding Rodipet’s collective labour agreements with trade unions, individual employment contracts, and applicable legislation. Under Article 10.9, Magnar had to maintain for at least five years employees holding a Labour Contract of indefinite duration at the time it acquired Rodipet’s shares.²⁴ Breach of Article 10.9 carried the sanction of termination of the Privatization Contract under Article 10.10 without notice or formality.²⁵

²¹ Resp. C-Mem., ¶ 66.

²² Resp. C-Mem., ¶ 66.

²³ Resp. C-Mem., ¶ 55.

²⁴ Resp. C-Mem., ¶¶ 60-61.

²⁵ Resp. C-Mem., ¶ 66.

c. *The investment and reporting obligations*

55. Respondent writes that “[t]he investment obligation and accompanying pledge included in the final version of the Privatization Contract are explained fairly by the Claimants in the Memorial.”²⁶

56. First, under Article 13.1 of the Privatization Contract, Magnar had to make two infusions of working capital amounting to USD 1 million each into Rodipet, the first infusion being due 30 days after the date of transfer of ownership of the share and the second one year after the same date. Ten days after each due period, Magnar would provide an audited Certificate verifying fulfillment of the obligation. To guarantee performance of the obligation, Magnar provided a Letter of Bank Guarantee to AVAS which, under Article 13.5 of the Privatization Contract, AVAS could execute in case Magnar failed to provide proof of timely performance of its obligation under Article 13.1. Under Article 13.6, if Magnar failed to present certificates or if the certificates presented failed to prove compliance with the Article 13.1 obligations, AVAS could cancel the Privatization Contract without prior formality.

57. Second, under Article 14.1 of the Privatization Contract, Magnar had the obligation to follow a program of technical investments of EUR 3.750.000 over five years from the date of transfer of ownership of the shares. Under Appendix No. 6, this investment was aimed at upgrading the vehicle fleet, information technology, and the kiosks. Magnar was required to provide an audited Certificate for each yearly instalment that had been made. A delayed submission of the Certificates would be subject to the payment of a fine.²⁷

58. Each phase of the investment was backed by Magnar signing a Share Pledge Agreement (the “First Share Pledge Agreement”) and ultimately by a Letter of Bank Guarantee.²⁸ In case of non-compliance, AVAS could simply call on the Pledge on shares.²⁹ Magnar agreed that for each investment phase, the number of shares of Rodipet encumbered in favor of AVAS would be at least 51%.³⁰ Article 15.4 of the Privatization Agreement provided:

in case of Magnar’s failure to observe its obligations set out in Article 14.1 (the 5-year investment program) at any stage of the investment... AVAS shall be entitled to entirely execute the Pledge on the shares and the bank guarantee letter issued for the

²⁶ Resp. C-Mem., ¶ 62.

²⁷ Cl. Mem., ¶¶ 51-54.

²⁸ Cl. Mem., ¶ 56.

²⁹ Resp. C-Mem., ¶ 66.

³⁰ Cl. Mem., ¶ 57.

relevant stage of the investment. In the event of enforcement of the Pledges, such measure does not exempt Magnar from the continued performance of the Privatization Contract, save for the case that following such enforcement Magnar is no longer Rodipet's shareholder.

59. Appendix No. 6 provided the following schedule of the technological investments (in EUR)³¹:

	1 st year	2 nd Year	3 rd Year	4 th Year	5 th Year	Total
Upgrading of vehicles	420.000	166.000	250.000	-	250.000	1.086.000
Upgrading of IT system	420.000	250.000	-	250.000	250.000	1.170.000
Upgrading/replacement of a number of kiosks	-	-	582.000	582.000	330.000	1.494.000
Total	840.000	416.000	832.000	832.000	830.000	3.750.000

Article 14.4 of the Privatization Contract allowed for the possibility of an untimely production of the Certificates, subject to penalties to be paid by Magnar to AVAS in case of such untimely production.

60. Additionally, in order to ensure the proper performance of Magnar's financial obligations, the Privatization Contract provided for a Pledge over Rodipet's Additional Shares subsequently transferred to Magnar in order to guarantee the performance of the second phase of the investment under a Pledge Agreement dated 24 June 2004 (the "**Second Share Pledge Agreement**").³²

d. Rodipet's Restructuring Plan

61. The Privatization Contract provided that Magnar had to notify the Competition Council ("CC") regarding the transaction covered thereby (Article 7.1) and that the CC had to issue a Decision approving the transaction (Article 7.2). Should the CC fail to approve the transaction, the Privatization Contract would cease to have effect ("will be disbanded": Article 7.3). There is no evidence in the file of these proceedings of the CC's approval of the Privatization Contract. However, on 29 May 2006 the CC issued a Decision (the "CC Decision") regulating

³¹ Cl. Mem., ¶ 52.

³² See ¶ 72 below for the Additional Shares.

the granting of State aids to Rodipet based on the latter's undertaking a restructuring plan to restore its viability.³³

62. The CC Decision followed the association of Romania with the European Communities and their Member States of 1993 and the Regulation on "State aid for rescue and restructuring of firms in difficulty" of 17 December 2004. The CC Decision recognized that the financial support measures granted to Rodipet at privatization for a total of RON 48.415.858 and notified by AVAS, consisting in the State renouncing to collect certain revenues, represented State aid,³⁴ that Rodipet was a "firm in difficulty,"³⁵ and that the restructuring plan proposed by Rodipet would lead to the restoration of the long term viability of Rodipet.³⁶

63. Rodipet's restructuring plan required a financial effort for a total cost of RON 143,716.8 of which RON 76.283,8 (EUR 18.524.271)³⁷ were committed by the Buyer [*i.e.* Magnar System], RON 18.967,0 (EUR 4.666.800) were committed by Rodipet, and RON 48.466,00 were contributed by the State aid.³⁸ The major part of the restructuring plan was represented by measures regarding the technological restructuring of Rodipet (RON 88.042,5).³⁹ The deadline for implementing the measures was 2008 (at the end of the restructuring period).⁴⁰

64. It is unclear whether there is a relationship between the restructuring plan of Rodipet and the "investment for growth" committed by Magnar under the Privatization Contract over the period of 5 years from May 2004 (date of share transfer in Rodipet), for a total of EUR 3.750.000. Since Magnar's contribution under the restructuring plan was equal to RON 76.283,8 (equivalent to EUR 18.757.471), the amount of investment for growth under the Privatization Contract (EUR 3.750.000) and the one charged to Magnar under the restructuring plan do not coincide.

65. Also the time of investment in the restructuring plan is not the same as the one for investments for growth. Further, the restructuring plan is also the obligation of Rodipet, not only of Magnar, and failure to fulfil the same will entail the revocation of the State aid but none

³³ Decision of the Competition Council dated 29 May 2006 (C-50); Resp. Rej., ¶¶ 62-78.

³⁴ C-50, ¶ 40.

³⁵ C-50, ¶ 50.

³⁶ C-50, ¶ 59.

³⁷ The conversion of RON into EUR is taken from Claimants' Answer to the Tribunal's Questions dated 17 January 2014 ("Cl. Answers"), ¶ 50.

³⁸ C-50, ¶ 27.

³⁹ C-50, ¶ 30.

⁴⁰ C-50, ¶ 27.

of the sanctions provided under the Privatization Contract for failure to fulfil the investment for growth under Article 14 and Appendix No. 6.⁴¹

66. According to Claimants, amounts invested pursuant to the restructuring program were not in addition to those under the Privatization Contract as they were independent obligations so that “any amounts invested into Rodipet pursuant to the Privatization Contract were also relevant for the purposes of the restructuring obligations . . . [b]oth sets of obligations had the same goal. Fulfilment of one necessarily meant fulfilment, to the extent relevant, of the other”.⁴²

67. There is one document in the file apparently establishing a link between the two sets of investment obligations, Ex. R-222. This document was relied upon by Claimants as “informal” evidence of the fulfilment by Magnar of the 4th year investment obligation.⁴³ The pertinence of this document to Magnar’s investment obligation is challenged by Respondent which refers it to Rodipet’s restructuring obligation and contends that it is a mere collection of data sheets from Rodipet listing invoices.⁴⁴

68. The Tribunal notes that neither Party has raised any claim regarding specifically Rodipet’s restructuring plan.

3. Respondent’s Main Obligations under the Privatization Contract

69. AVAS’ obligations under Article 3 of the Privatization Contract were subject to the issuance of legislation which would extinguish through conversion into shares, annul, or reschedule Rodipet’s pre-existing liabilities that were due to the State at the time of the transfer of Rodipet’s shares to Magnar.⁴⁵ As well, the legislation would provide for the granting of a 49-year concession of the lands on which points of sale were located.⁴⁶ These conditions were to be fulfilled by 31 March 2004, failing which the Privatization Contract would be cancelled.⁴⁷

⁴¹ Witness Statement of Iulia Nistor, ¶ 40; Resp. Rej., ¶ 64.

⁴² Cl. Answers, ¶ 50.

⁴³ Letter to AVAS dated 11/27 March 2009 (C-67, last page).

⁴⁴ Resp. Rej., ¶¶ 89-90, 243-247.

⁴⁵ Cl. Mem., ¶ 72.

⁴⁶ Cl. Mem., ¶ 63.

⁴⁷ Cl. Mem., ¶ 63; Resp. C-Mem., ¶ 74.

a. *Extinction of Rodipet's tax liabilities and other debts to the State*

70. With regard to Rodipet's tax liabilities and other debts to the State, the Privatization Contract provided, in part:

Article 3.1

Publication in the Official Gazette of Romania of a piece of legislation that is to provide the following:

I a) The extinction by conversion into shares of:

– the budgetary liabilities due and unpaid by the Company at the time of the transfer of the ownership right over the Shares. . .as well as those representing the total of their own liabilities and those generated by budgetary loans managed by APAPS,

– the Company's liabilities to the Autonomous Authority of the State Protocol, calculated to the date of transfer of the ownership right of shares.

Government Emergency Order 45/2004 was issued on 29 January 2004. It fulfilled the condition regarding the debts to the State.

b. *The 49-year land concession*

71. With respect to the land concession, the Privatization Contract included two provisions, one relating to the concession of land for existing points of sale, and the other relating to the concession of land for future points of sale. For existing points of sale, Article 3.1, paragraph III provided, in part:

The concession to the Company, by the State and by the administrative territorial units, for 49 years, of the lands owned by them and belonging to the points of sale existing on the Romanian territory at the time of signing the Contract....

72. On 30 April 2004, AVAS and Magnar signed Addendum No. 2 to the Privatization Contract which amended Article 3.1 by adding a "reasonable efforts clause." Thus, AVAS and Magnar now agreed to the following:

The Seller undertakes to make all reasonable efforts for the issuance of a normative document stipulating the granting to the Company, by the State [*sic*] by the administrative-territorial

units and for a period of 49 years, of the lands owned by the latter and relating to the points of sale existing on Romania's territory upon the date of signing the Contract, except for those in Bucharest. . .as well as for the setting-up of new points of sale in order to complete the investment program undertaken on the grounds of the Shares Sale-Purchase Contract.⁴⁸

73. For future points of sale, Article 9.12 of the Privatization Contract already provided:

The **Seller** will make efforts, within the legal competence, for the concession to the Company, for a term of 49 years, of the lands owned by [*sic*] State and by the territorial administrative units, lands that are necessary for the points of sale that will be open, by the Company, in the areas of sale of national and European interest press, during the performance of the investment programmed assumed under this Contract.⁴⁹

c. Transfer of ownership of Rodipet's shares

74. Under Article 4.1 of the Privatization Contract, AVAS' main obligation was to transfer, within five days of AVAS notifying Magnar of the fulfillment of the conditions stipulated at Article 3.1, the ownership of the shares of Rodipet to Magnar, together with all the rights and obligations under Romanian Law and the Privatization Contract.

75. Under Article 4.2 of the Privatization Contract, AVAS would sell Additional Shares to Magnar that would be created through the conversion into shares of Rodipet's tax liabilities and other debts to the State. On 20 March 2007, AVAS and Magnar signed Addendum No. 3 to the Privatization Contract pursuant to which 6,812,705 Additional Shares would be transferred for the price of LEI (RON) 170.317,63 (approximately EUR 50.440) payable in two installments, with 35% of the purchase price already paid on 8 February 2007 and 65% to be paid 10 days after the signature of Addendum No. 3.⁵⁰

4. Claimants' Performance of their Obligations

76. Magnar's obligation under the legal framework in force as of 2002 was to provide certificates of auditors and sworn management statements to demonstrate performance of its contractual obligations. AVAS did not need to check the veracity of the documents submitted, except in instances where suspicions arose in which cases the Post-Privatization Monitoring

⁴⁸ Cl. Mem., ¶ 65; Resp. C-Mem., ¶¶ 78-79.

⁴⁹ Resp. C-Mem., ¶ 73.

⁵⁰ Cl. Mem., ¶ 62; Resp. C-Mem., ¶ 87.

Department of AVAS would request the Control Department to conduct inspections and on-site visits for verification.⁵¹ According to Respondent, “the first three years of post-privatization monitoring were unexceptional.”⁵²

a. The business obligations

77. In August 2006, a dispute arose between AVAS and Magnar further to Magnar’s change of corporate form without AVAS’ prior permission, as required under Article 10.12 of the Privatization Contract. AVAS imposed a fine on Magnar which the latter refused to pay. The matter was finally resolved by arbitration won by AVAS on 5 February 2008.⁵³

78. In February 2008, Magnar sought AVAS’ permission, pursuant to Article 11.1 of the Privatization Contract, to use Rodipet’s real property as collateral for loans. After undertaking an overall study of Magnar’s compliance with the Privatization Contract, AVAS granted such permission on the condition of Magnar providing more information regarding its compliance with its social obligations, “an area where signs of lack of compliance had begun to emerge.”⁵⁴ On 6 May 2008, AVAS and Magnar signed Addendum No. 5 to the Privatization Contract which amended Article 11.1 to say that assets could not be alienated without AVAS’ approval.⁵⁵

b. The social obligations

79. An October 2007 inspection revealed problems with trade unions, unreported layoffs, and a significant decrease in the number of Rodipet’s employees. This caused AVAS to have concerns about Magnar’s compliance with Article 10.8 of the Privatization Contract. Magnar sent to AVAS the documents on Magnar’s performance of its social obligations in March 2008. The matter went no further at this point.⁵⁶

80. Prior to that, in December 2005, Rodipet had informed AVAS that it was transferring some employees to Rodipet Courier, which, according to Respondent, had the effect of bringing those employees outside the scope of protection afforded by the Privatization Contract.⁵⁷ This, according to Respondent, created a gap in Rodipet’s labor force which the

⁵¹ Resp. C-Mem., ¶ 91.

⁵² Resp. C-Mem., ¶ 93.

⁵³ Resp. C-Mem., ¶¶ 95-96.

⁵⁴ Resp. C-Mem., ¶ 98.

⁵⁵ Resp. C-Mem., ¶ 100.

⁵⁶ Resp. C-Mem., ¶ 100.

⁵⁷ Resp. C-Mem., ¶ 197.

company sought to fill by “trafficking humans for the purpose of forced labour.”⁵⁸ Respondent notes other issues such as a decrease overtime of the number of AVAS employees, the fact that Rodipet had stopped providing meal vouchers, paying salaries, providing social and health insurance, and making unemployment contributions.⁵⁹

81. On 3 November 2008, AVAS received a complaint from one of the branches of the Rodipet Free Union relating to breaches of the Collective Labour Agreement and the Social Protocol. AVAS’ Post-Privatization Department requested the Control Department to perform an on-site inspection. During the inspection started on 28 November 2008 the General Manager of Rodipet, Florin Lungaci, refused to provide documents requested by the Control team and, eventually, refused to meet with them. Thus, the Control team drafted a report of failed inspection.⁶⁰

82. Following a complaint by Rodipet Free Union, a meeting was held on 7 April 2009 with AVAS, Rodipet and the Union representatives. Further evidence of breach of social obligations was obtained by AVAS.⁶¹ A memo of AVAS’ legal Department of 7 May 2009 concluded that “without doubt, the social clauses were not complied with,” recommending in a new note to the AVAS’ Board of Directors of 19 May 2009 to terminate the Privatization Contract.⁶² AVAS notified Magnar on 13 July 2009 of the termination of the Privatization Contract, pursuant to its Article 10.10.⁶³

83. Claimants object to Respondent’s interpretation of the Protocol with Free Trade Union of Rodipet and STPF Union regarding Magnar’ social obligations, contending that obligations were to maintain 3.127 jobs as opposed to employees, which were accomplished also by transferring some employees to other companies within the Rodipet Group with full knowledge and approval of AVAS.⁶⁴

84. According to Claimants, AVAS’ termination of the Privatization Contract was unlawful, a façade to justify expropriation of Claimants’ investments as shown by the fact that the alleged reason for the social obligations, *i.e.* to avoid massive unemployment, is

⁵⁸ Resp. C-Mem., ¶ 202.

⁵⁹ Resp. C-Mem., ¶¶ 198-201.

⁶⁰ Resp. C-Mem., ¶¶ 264-69.

⁶¹ Resp. C-Mem., ¶ 286.

⁶² Resp. C-Mem., ¶¶ 291, 293.

⁶³ Resp. C-Mem., ¶¶ 296-97.

⁶⁴ Cl. Rep., ¶¶ 93-96, 101-107.

contradicted by AVAS' firing approximately 3.100 people shortly after the nationalization of Rodipet.⁶⁵

85. The Tribunal notes that no specific claims have been raised by Claimants regarding the termination of the Privatization Contract on 13 July 2009.⁶⁶

86. According to Respondent, while surreptitiously outsourcing Rodipet's business to other Awdi Group companies, Rodipet's employees were progressively dismissed in breach of Article 10.10 of the Privatization Contract, to be replaced by Hondurans trafficked under a plan conceived in 2008, with another company of the Awdi Group, Intelbiz Solutions, acting as intermediary. The victims were promised work permits, health insurance, and a salary of USD 300 per month for the first three months, increasing thereafter to USD 700 per month.⁶⁷

87. Once in Bucharest, their passports were confiscated and they were told by Hassan Awdi personally that they would be paid USD 300 per month for the entire life of the three-year contract. Having not even been paid this miniscule salary, the Honduran victims refused to show up at the kiosks assigned to each of them on 11 October 2008, as a result of which they were paid amounts totalling USD 206, the only salary they ever received, totally insufficient to purchase food and warm clothes. They were finally liberated in an inspection by the police on 31 October 2008, their passports being recovered by the police so that they could return home.⁶⁸

c. The investment and reporting obligations

88. On 2 June 2004, Magnar notified AVAS of the payment of USD 1.050.000 pursuant to Article 13.1 of the Privatization Contract. Magnar also provided, pursuant to Article 13.2 of the Privatization Contract, a Certificate issued on 31 May 2004 by an internal auditor and an external auditor. On 25 June 2004, AVAS acknowledged the payment and Certificate and released the Bank Guarantee Letter for the value of USD 1.000.000.⁶⁹

⁶⁵ Cl. Rep., ¶¶ 109-113.

⁶⁶ Resp. C-Mem., ¶¶ 296-297.

⁶⁷ Motion, ¶ 100.

⁶⁸ Resp. C-Mem, ¶ 212.

⁶⁹ Cl. Mem., ¶¶ 79-80; Resp. C-Mem., ¶ 93; C-59.

89. On 10 May 2005, Magnar notified AVAS of the payment of USD 950.000 and provided a Certificate issued on 28 December 2005 by an internal auditor and an external auditor. AVAS acknowledged the payment and Certificate on 3 June 2008.⁷⁰

90. Claimants report having carried out the five-year investment program of EUR 3.750.000 described under Article 14 of the Privatization Contract as follows:

	Investment	Certification	Verification
<i>1st year</i>	EUR 840.000 Notified on 16 May 2005	Certificate issued by internal and external auditors on 11 May 2005 ⁷¹	AVAS confirmation On 3 June 2008 ⁷²
<i>2nd year</i>	EUR 416.000 Notified on 1 July 2005	Certificate issued by internal and external auditors on 29 May 2005 ⁷³	AVAS confirmation On 3 June 2008 ⁷⁴
<i>3rd year</i>	EUR 832.000 Notified 5 July 2005	Certificate issued by internal auditor on 10 June 2007 ⁷⁵	AVAS confirmation On 3 June 2008 ⁷⁶
<i>4th year</i>	EUR 832.000 Notified 27 March 2009	Certificate issued by external auditor on 9 January 2009 ⁷⁷	---
<i>5th year</i>	EUR 830.000 Notified 27 March 2009	Certificate issued by external auditor on 2 February 2009 ⁷⁸	---

91. Respondent notes that “Magnar submitted auditors’ certificates for the two capital injections of USD one million each under Article 13.1 of the Privatization Contract on 2 June 2004 and 10 May 2005 . . . Magnar also submitted certificates for the fulfillment of the annual technical investment obligations under Article 14.1...for the first three years within the stipulated time limits.”⁷⁹ Respondent explains that the second capital infusion under Article 13 and the first three installments on the technical investment were not confirmed by AVAS until 3 June 2008 due to the pendency of the dispute which arose in August 2006 between

⁷⁰ Cl. Mem., ¶¶ 81-82; Resp. C-Mem., ¶ 93; C-62.

⁷¹ Cl. Mem., ¶¶ 84-85.

⁷² Cl. Mem., ¶ 86; C-62.

⁷³ Cl. Mem., ¶ 87.

⁷⁴ Cl. Mem., ¶ 88; C-62.

⁷⁵ Cl. Mem., ¶ 89.

⁷⁶ Cl. Mem., ¶ 91; C-62.

⁷⁷ Cl. Mem., ¶¶ 92-93.

⁷⁸ Cl. Mem., ¶¶ 92, 94.

⁷⁹ Resp. C-Mem., ¶¶ 93-94.

AVAS and Magnar relating to Magnar's performance of its business obligation under Article 10.12 of the Privatization Contract.⁸⁰

92. Regarding the Certificates for the Fourth and Fifth Year Investments, Claimants claim that "the certificates [were] issued by the external auditor *Contexpert Grup 4 SRL* on 9 January 2009 and 2 February 2009, respectively."⁸¹ Respondent contends that, "AVAS has no record of such certificate, nor have the Claimants produced it in this arbitration."⁸² According to Respondent, "Magnar did not invest the amounts due under the Privatization Contract in the critical Fourth and Fifth Years, but merely performed some magic tricks . . . [t]he truth behind [which] is explained by Rodipet's judicial administrator Mr Florea in his witness statement."⁸³ The "trick," as described by Cornel Florea proceeded as follows. Magnar would make payments to Rodipet's bank account. The same day, the same amounts paid would be transferred to the bank account of Mona Lisa Investments SA under a cooperation agreement signed between Rodipet and Mona Lisa.⁸⁴ According to Respondent, Magnar provided auditors with a "snapshot" of Rodipet's accounts that showed the accounts were in good standing, so that the auditors could issue certificates to be submitted to AVAS.⁸⁵

d. Additional investments

93. The Claimants indicate that they made additional, indirect investments in Rodipet totaling in the first instance EUR 10.568.885,54 via 12 other companies in the Awdi Group and totaling EUR 9.590.000 in the second instance through the negotiation of loans by four companies in the Awdi Group in favor of Rodipet. Overall, Claimants' investments in Rodipet amounted to EUR 25.688.120.⁸⁶

e. Decision to call the Pledge and terminate the Privatization Contract

94. Following the failed inspection of Rodipet, the Post-Privatization Monitoring and Legal Departments of AVAS prepared on 6 February 2009 a study of Magnar's lack of compliance with the Privatization Contract, in particular Magnar's failure to maintain the

⁸⁰ Resp. C-Mem., ¶ 95.

⁸¹ C- Mem., ¶ 92.

⁸² Resp. C-Mem., ¶ 263.

⁸³ Resp. C-Mem., ¶ 151.

⁸⁴ Witness Statement of Cornel Florea, ¶ 34.

⁸⁵ Resp. C-Mem., ¶ 153.

⁸⁶ Cl. Mem., ¶¶ 95-99. A reduced amount of overall investments is indicated in Claimants' letter of 26 May 2014 (approximately, EUR 17 million).

required number of employees under Article 10.9 and to pay all the yearly technical investments under Article 14.1.⁸⁷ The study recommended that AVAS call the Pledge, terminate the Privatization Contract, and order Magnar to pay liquidated damages.⁸⁸ AVAS' Board took the decision to call the Pledge and terminate the Privatization Contract on 17 March 2009, and informed Magnar of its decision on 24 March 2009.⁸⁹

95. Subsequently, on 24 April 2009, Magnar provided additional documents to AVAS. AVAS analyzed the documents in a report of 7 May 2009, finding no reason for the Board of AVAS to change its decision of 17 May 2009. The Post-Privatization and Legal Departments prepared a joint note on 19 May 2009 and recommended maintaining the Board's decision.⁹⁰ On 30 June 2009, a delegate judge ordered that AVAS be registered as shareholder of 51% of the shares of Rodipet. The Claimants appealed the order, but their appeal was rejected. Having become the majority shareholder of Rodipet, AVAS appointed Cătălin Nițu as provisional administrator of the company. According to the Respondent, Claimants refused to collaborate with Cătălin Nițu. As a result, he filed a criminal complaint against Claimants. The financial situation of Rodipet was such that the company was declared insolvent on 16 October 2009. On 16 December 2009, Cornel Florea, of Consulta 99 SPRL, was appointed as judicial administrator of Rodipet. On 8 February 2010, AVAS appointed Vasile Uifalean to be Special Administrator of Rodipet and represent shareholders in the insolvency proceedings.⁹¹

96. Respondent reports that currently Rodipet employs 1.771 people and has a network of 500 kiosks, which represents 35% of its kiosk network.⁹²

97. On 30 June 2009, the date of registration of AVAS' shareholding for 51% of Rodipet's share capital, the remaining 49% was held by Magnar as to 32.99% and Yourhotel as to 15.99%.⁹³ After the declaration of Rodipet's insolvency on 16 October 2009, Magnar was also placed in insolvency on February 2011.⁹⁴ The Tribunal notes the absence of any claims by either Party regarding these developments.

⁸⁷ Resp. C-Mem., ¶ 271.

⁸⁸ Resp. C-Mem., ¶ 272.

⁸⁹ Resp. C-Mem., ¶¶ 275-76.

⁹⁰ Resp. C-Mem., ¶¶ 288, 292-93.

⁹¹ Resp. C-Mem., 299, 301-03.

⁹² Resp. C-Mem., ¶ 312.

⁹³ Cl. Answers, Appendix A. As shown by this Appendix, Yourhotels was on the same date controlled by the Awdi Group Holding (see also Appendices G and H).

⁹⁴ Resp. C-Mem., ¶¶ 301 and 313.

5. Respondent's Performance of its Obligations

98. Under the Privatization Contract, Respondent had three main obligations relating to the extinction of Rodipet's debts and other liabilities, the 49-year land concession, and the transfer of shares and, subsequently, of additional shares. Respondent's performance of its obligations is best examined in a timeline fashion, against the backdrop of the legal framework in place, rather than by category of obligation.

a. The legal framework

99. The relevant legal framework, as reported by Respondent, consists of "three layers of legislation." First is the general regime for concessions found in **Law No. 219/1998**. The law defines the maximum duration of concessions. It provides that assets found in public property of the State, county, city or village are to be allotted directly by concession agreement to the State-owned companies which administered the assets without a tender process, with royalties to be paid in a manner established in the concession agreement.⁹⁵

100. Second are special rules on concessions which concern companies that were passing from State ownership to private ownership. These rules are found in **Government Emergency Ordinance No. 88/1997** and, as implementing legislation, **Government Decision No. 577/2002**. Under Decision No. 577/2002, lands in the public domain of the State or administrative territorial units are granted directly by concession agreement for a period of 49 years with a possible extension of 24 years and 6 months to the privatized companies that hold such lands, if the lands are strictly necessary for the companies to conduct their activity. Lands in the private domain of the State or administrative territorial units that are not granted by concession are leased or sold to the company that holds them by direct negotiation without prior advertising.⁹⁶

101. Third is a specific derogation granted to Rodipet set out in **Law 442/2004**.⁹⁷ The text of Law 442 provides, in part:

Art. 8(1)

By derogations from the provisions of Law no. 219/1998 on the concessions, the lands that are in the State's public or private

⁹⁵ Resp. C-Mem., ¶ 109.

⁹⁶ Cl. Mem., ¶ 122; CLA-5.

⁹⁷ Resp. C-Mem., ¶ 102, C-10.

property, respectively in that of the territorial- administrative units where the sales points of “RODIPET” Plc. Bucharest are located, except for those located in Bucharest, will be given to it, by means of a concession contract, upon the date of this Ordinance’s entry into force.

Art. 8(2)

The concession is made without an Opportunity Study or a Tender Book and without a form of advertising, by direct negotiation between the transferor and the company, except for situations where the General Urbanism Plan, approved by the local authorities, imposes the change of the location with one having an identical footprint and market access.

Art. 8(3)

The Concession contract is concluded for a maximum term of 49 years, with a rightful extension for a period of 24 years and 6 months if “RODIPET” Plc. Bucharest continues the exploitation of the land under concession for the purpose originally intended.

Art. 8(4)

“RODIPET” Plc. Bucharest benefits of direct award, by means of a Concession Contract, of the lands that are in the State’s public or private property, respectively in that of the territorial-administrative units, except for those in Bucharest, where the points of sale will be placed with a view to meet the investment programme assumed by the Contract of Sale-Purchase of Shares.

Art. 8(5)

The concession under this Ordinance, has, as exclusive purpose, the use by “RODIPET” Plc. Bucharest of the lands for the location of the points of sale in order to fulfill the object of activity and cannot be extended to other activities.

b. The performance

102. Respondent notes that **GEO No. 88/1997** and **Decision No. 577/2002** constituted the legal regime which governed Rodipet at the time of entry into force of the Privatization Contract.⁹⁸ Respondent further notes that these legal instruments did not grant concessions but provided the framework within which the owners of the lands in question granted concessions.⁹⁹ Claimants do not dispute this.¹⁰⁰

⁹⁸ Resp. C-Mem., ¶ 115.

⁹⁹ Resp. C-Mem., ¶ 115.

¹⁰⁰ Cl. Mem., ¶ 123.

103. One of the first steps in Respondent’s performance was, pursuant to Article 3.1 of the Privatization Contract, the publication in the Official Gazette of Government Emergency Order No. 45/2004 of 29 January 2004 (“GEO No. 45/2004”) which extinguished the tax liabilities and other debts that Rodipet owed to the State.¹⁰¹

104. On 5 May 2004, AVAS notified Magnar of the fulfillment of the condition specified in Article 3.1.¹⁰² On 10 May 2004, AVAS notified Magnar of the change of ownership of the shares of Rodipet.¹⁰³ Ten business days later, AVAS and Magnar signed an Addendum to the Privatization Contract for the transfer to Magnar of Additional Shares created through the conversion into shares of Rodipet’s debts to the State.¹⁰⁴ This fulfilled AVAS’ obligation to transfer ownership of Rodipet’s shares to Magnar.

105. However, GEO No. 45/2004 was silent on the 49-year concession. Thus, Claimants requested an amendment of the ordinance to reflect the agreement between AVAS and Magnar under Article 3.1 of the Privatization Contract. On 28 October 2004, the Romanian Parliament enacted Law 442. According to Respondent, “the main effect of Law 442 on Rodipet was to insert new Articles 8(1)–(5) into Government Ordinance 45/2004, creating a *sui generis* regime for Rodipet to be granted concessions over the public lands on which its kiosks stood.”¹⁰⁵

106. The Parties disagree on the scope of Law 442. For Claimants, Law 442, *inter alia*, “granted a 49-year concession (plus an additional period of 24 years and 6 months) to Rodipet to use for free the lands owned by the State and the territorial administrative units of the existing and future kiosks.”¹⁰⁶ According to Respondent, Law 442 did not grant any concessions but provided a legal framework for municipalities to grant concessions to Rodipet. Law 442 did not provide for rent-free concessions. The maximum duration was 49 years, implying the possibility of a shorter duration. Use of the lands was limited to the object of Rodipet’s activity, *i.e.* press distribution and trade. Law 442 on Rodipet was self-executing and did not require implementing norms.¹⁰⁷

¹⁰¹ Cl. Mem., ¶¶ 67, 72; Resp. C-Mem., ¶ 85; C-11.

¹⁰² Cl. Mem., ¶ 67.

¹⁰³ Cl. Mem., ¶ 43.

¹⁰⁴ *Supra*, ¶ 75.

¹⁰⁵ Resp. C-Mem., ¶ 116.

¹⁰⁶ Cl. Mem., ¶ 69.

¹⁰⁷ Resp. C-Mem., ¶¶ 119-124.

107. Furthermore, Claimants explain that “the 49-year concession was a *sine qua non* condition requested by Magnar to purchase Rodipet.... In other words, Claimants would have never invested in Rodipet without the concession.”¹⁰⁸ The lands where the kiosks stood were granted by agreements concluded with local authorities. The agreements differed with respect to duration, price, and legal basis. A uniform concession regime applicable nationwide was, according to Claimants, necessary to guarantee a stable and viable legal environment. Otherwise, Rodipet “would have had to negotiate hundreds of contracts (one for each municipality) without the certainty of even being granted the use of the lands by the local mayors (footnote omitted).”¹⁰⁹

108. Respondent agrees that the reaction of the municipalities was varied. Some did not require the payment of a royalty for the concessions, but most did. In all, Rodipet concluded 150 concession contracts with the municipalities. Five municipalities challenged the constitutionality of Law 442. The first two challenges were rejected, the third and fourth challenges were upheld, and the fifth became moot. The third and fourth challenges were successful on the basis of Decision 823/2008 of 7 July 2008 and Decision 884/2008 of 10 July 2008.

B. Casa Bucur

109. There are four intertwined aspects to the storyline of Casa Soare (later on referred to as Casa Bucur): one, the Romanian legal landscape concerning immovable property both during communism and after the revolution; two, the transactions surrounding Casa Soare in terms of its nationalization and subsequent privatization; three, the evolution of the restitution claim brought by the heirs to the Casa Soare estate; and four, the acquisition of Casa Bucur by Claimant EBC.

110. Under its communist regime, which lasted from 1945 to 1989, the government of Romania carried out a large-scale nationalization of privately-owned real estate properties using various measures, including Decree 92/1950 which was the general law on the nationalization of certain real estate properties.¹¹⁰ With respect to Casa Bucur, at the time known as Casa Oprea Soare, it was confiscated in 1950 from a Romanian citizen and placed in

¹⁰⁸ Cl. Mem., ¶ 109.

¹⁰⁹ Cl. Mem., ¶¶ 111-114.

¹¹⁰ Resp. C-Mem., ¶¶ 318, 336.

the patrimony of the State.¹¹¹ According to Respondent, as early as 1955 and again in 1992 and 2000, Casa Bucur was declared a protected national monument.¹¹² The Casa Bucur estate consisted of two buildings, one known as the Restaurant and the other as the Summer Kitchen.¹¹³

111. Following the fall of communism in 1989, Respondent started a privatization process whereby many of the confiscated properties passed to the ownership of State-owned commercial companies.¹¹⁴ In parallel, Respondent started a process of restitution whereby legislation was issued providing for the return of certain lands to their pre-nationalization owners.¹¹⁵ Respondent agrees with Claimants that these two parallel processes, which are described in greater detail in the following paragraphs, resulted in a complex legal regime that underwent multiple changes and generated political divisions in the country throughout the years as well as inconsistent court decisions.¹¹⁶

112. Post-revolution, for an initial period of two years from December 1989 to December 1991, Romania experienced a legal void in relation to its law on property. Law 15/1990 was the first law enacted in the privatization program.¹¹⁷ Later, came Law 31/1990. Essentially, these laws “transformed the communist ‘administration’ right into a capitalist ownership right.”¹¹⁸ The State organ created to manage the privatization process is what eventually became AVAS.¹¹⁹ Under the privatization laws, the government converted a large number of State entities into commercial entities and gave them ownership of previously State-held assets.¹²⁰ Later, the government’s shares in these commercial entities were themselves being offered for sale to investors.¹²¹ However, “[g]iven the unstable legal framework created by restitution claims and special restitution legislation, warranties were granted by the Respondent to the buyers of these commercial companies in case of restitution to a former owner.”¹²² This was the purpose of Law 99/1999 of 26 May 1999.¹²³

¹¹¹ Cl. Mem., ¶¶ 515, 525; Resp. C-Mem., ¶ 318.

¹¹² Resp. C-Mem., ¶ 331.

¹¹³ Cl. Mem., ¶ 524; Resp. C-Mem., ¶ 337.

¹¹⁴ Cl. Mem., ¶ 516.

¹¹⁵ Cl. Mem., ¶ 517.

¹¹⁶ Resp. C-Mem., ¶ 325; Cl. Mem., ¶ 518.

¹¹⁷ Cl. Mem., ¶ 544; CLA-169.

¹¹⁸ Cl. Mem., ¶ 549.

¹¹⁹ Cl. Mem., ¶ 554.

¹²⁰ Cl. Mem., ¶ 543.

¹²¹ Cl. Mem., ¶ 543.

¹²² Cl. Mem., ¶ 543.

¹²³ Cl. Mem., ¶¶ 566-68; CLA-177.

113. In this context, the administration of Casa Soare came to be entrusted to S.C. Alunis S.A.,¹²⁴ a former socialist enterprise that was owned by AVAS. In 1990, Alunis was converted into a commercial company. From 1990 to 1999, Aluniş granted a lease over the estate to Romanian company Casa Bucur SRL (renamed Street Corner), a company bought by Claimant EBC in November 2001, under the management of Jean Grigore.¹²⁵

114. As early as October 1991, Dumitru Soare, whose father had commissioned the construction of Casa Soare, initiated procedures aimed at having Jean Grigore evicted from the estate.¹²⁶ Dumitru Soare passed away during the pendency of his action. His two children Stefan Soare and Luciana Mott (the “Heirs”) were allowed to pursue the claim only following the reversal of a previous decision which had found that they lacked standing. In 1994, the claim was remanded to the lower court for retrial. In September 1995, the lower court dismissed the eviction claim, indicating that the claimants needed first to establish their ownership over the estate in an action against the State.¹²⁷

115. Shortly thereafter, in November 1995, Romania passed its first special enactment on the restitution of properties in the form of Law 112/1995. The Law concerned residential real estate which, like Casa Soare, had passed to State ownership based on title between 6 March 1945 and 22 December 1989.¹²⁸

116. Under Law 112/1995, according to Claimants, if a property had passed into State ownership through title and was still in State ownership, its original owners could receive restitution in kind. If the properties had occupiers other than the State, the original owners had six months to file restitution claims. After six months, the current occupiers of the properties were entitled to purchase them, and the original owners were entitled to financial compensation.¹²⁹ According to Respondent, Law 112/1995 allowed restitution in kind to original owners whose properties were nationalized under Decree 92/1950 through title and who continued to occupy the properties as tenants. If the tenants occupying a property were not the original owners, they were allowed to purchase the property they lived in at an

¹²⁴ Cl. Mem., ¶ 551 for additional background regarding Casa Soare.

¹²⁵ Cl. Mem., ¶ 525 and nn.525, 556; Resp. C-Mem., ¶ 338.

¹²⁶ Cl. Mem., ¶ 521; Resp. C-Mem., ¶ 338.

¹²⁷ Resp. C-Mem., ¶ 339.

¹²⁸ Cl. Mem., ¶ 576; Resp. C-Mem., ¶ 326.

¹²⁹ Cl. Mem., ¶¶ 577-79.

advantageous price, and the original owners were eligible for financial compensation. In addition, seeking judicial relief was always an option.¹³⁰

117. For purposes of what constituted a “title,” Decree 92/1950 in itself was considered one. Therefore, takeovers that had occurred under the Decree were considered to be “based on title.”¹³¹ On 17 November 1998, Law 213/1998 was passed. The law required that takings done between 6 March 1945 and 22 December 1989 had to have been done with a valid title and in observance of the Constitution and applicable laws at the time. Goods taken by the State without a valid title could be claimed by the former owners or their successors, unless they were subject to a special legislation.¹³² Later on, the Supreme Court by Decision of 15 November 2005 (the “Decision”) held that Decree 92/1950 violated the Romanian Constitution of 1948. This meant that takings done under the Decree 92/1950 would be “without title.”

118. With respect to the privatization process, in 1997 and 1998, the government codified the privatization laws in Government Emergency Order (“GEO”) 88/1997 and Government Decision 55/1998, whereby commercial companies were entitled to transfer assets in their patrimony to private companies by means of lease agreements with an irrevocable sales clause, provided a certain investment had been made.¹³³ The Heirs made various unsuccessful attempts using different methods to stop the privatization of Aluniș or transfer of Casa Bucur.¹³⁴

119. On 31 March 1999, Aluniș and Casa Bucur SRL entered into a new five-year lease with an irrevocable sales clause, based on GEO 88/1997 and Government Decision No. 55/1998.¹³⁵ At the end of the lease, Casa Bucur SRL would become the new owner of Casa Soare. However, Casa Bucur SRL purchased the estate before the end of the lease. Thus, on 25 May 1999, Casa Bucur SRL signed a Sale Purchase Agreement with Aluniș to acquire the Summer Kitchen, and on 5 October 2001 a second Sale Purchase Agreement with Aluniș to buy the Restaurant.¹³⁶ According to Respondent, “[d]espite the pending litigation between the Soares, Romania, Aluniș and Street Corner [formerly Casa Bucur SRL] concerning ownership of Casa Soare, Aluniș and Street Corner took the risk of signing an agreement (a lease containing an

¹³⁰ Resp. C-Mem., ¶ 326.

¹³¹ Cl. Mem., ¶ 578.

¹³² Cl. Mem., ¶ 580.

¹³³ Cl. Mem., ¶ 555.

¹³⁴ Cl. Mem., ¶¶ 559-562.

¹³⁵ Cl. Mem., ¶ 558.

¹³⁶ Cl. Mem., ¶ 525 and n.525; Resp. C-Mem., ¶ 342-44.

irrevocable sale clause) on 31 March 1999....”¹³⁷ Respondent continues, “[b]oth parties to the agreement were fully aware that there was, at the very least, a reasonable likelihood that the Romanian courts would confirm the Soares’ ownership claims over Casa Soare.” As a result, they signed the following statement acknowledging the risk:

We are aware that the real estate property located at the above-mentioned address is undergoing litigation, as it is being claimed in restitution by its former owners and we shall conclude a sale-purchase agreement by means of a real estate leasing for the real estate property located at [address of Casa Bucur] **knowing that it is subject to dispute and accepting the risks deriving therefrom.**¹³⁸

120. Before the transfer of the entire Casa Bucur estate from Alunis to Casa Bucur SRL was completed, on 19 April 2000 Mona Lisa Trading Co. SRL acquired 87.095% of the share capital of Alunis by public auction for EUR 146.203.¹³⁹ Mona Lisa Trading Company SRL was another investment vehicle incorporated by Claimants.¹⁴⁰ According to Respondent, Casa Soare figured in the tender documents as “immovable goods claimed by other.”¹⁴¹ At the auction, the chairman of the commission notified bidders that Casa Bucur was subject to restitution litigation, stating, according to Claimants and Respondent “there is a litigation for the revendication of the estate BUCUR RESTAURANT between SC ALUNIS SA and Mr. STEFAN SOARE and Mrs. IOANA MOTT.”¹⁴²

121. To take stock of the circumstances surrounding Casa Soare at this juncture, Mona Lisa (one of the Claimants’ companies) is now the majority shareholder of Alunis and Casa Bucur SRL (operated by Jean Grigore) is now the owner of the Casa Soare estate, which by now had become Casa Bucur.

122. In October 2001, Casa Bucur SRL, which at the time was owned by Jean Grigore and Petre Luculescu, purchased the Restaurant from Mona Lisa for RON 425,110. On 17 October 2001, Claimant EBC acquired Casa Bucur SRL (or Street Corner). On 29 October 2001, Claimants incorporated the company Alfa El Romania SRL, its sole shareholder being Alfa El Corporation, one of the Claimants.¹⁴³ On 21 February 2002, Alfa El Romania SRL entered

¹³⁷ Resp. C-Mem., ¶ 343.

¹³⁸ Resp. C-Mem., ¶ 343.

¹³⁹ Cl. Mem., ¶ 562; Resp. C-Mem., ¶ 345.

¹⁴⁰ Cl. Rep., ¶ 20.

¹⁴¹ Resp. C-Mem., ¶ 348.

¹⁴² Cl. Mem., ¶ 562; Resp. C-Mem., ¶ 349.

¹⁴³ Cl. Mem., ¶¶ 524, 526.

into a Sale Purchase Agreement with Casa Bucur SRL (now owned by EBC) to purchase the Casa Bucur estate from Casa Bucur SRL for approximately EUR 554.800.¹⁴⁴ Alfa El Romania SRL later changed its name to Alfa El Bucur SRL. This series of transactions, according to the Respondent “was supposedly aimed at strengthening the resistance to returning Casa Soare to the Soares.”¹⁴⁵

123. Alfa El Bucur encountered opposition from the Heirs to its registration of the estate with the Land Book Office. The registration occurred on May 14, 2003, after the Bucharest Court of Appeal issued a decision rejecting the opposition.¹⁴⁶

124. Thereafter, Claimants transformed Casa Bucur into a luxury boutique hotel and restaurant.¹⁴⁷

125. Meanwhile, with respect to Romania’s restitution laws, the government, succumbing to international pressure, including pressure from the European Court of Human Rights following Romania’s accession to the European Convention on Human Rights, changed the policy underlying Law 112/1995 by enacting Law 10/2001 on 8 February 2001.¹⁴⁸ Law 10/2001 covered all types of immovable assets that had passed into State ownership with and without a valid title. With some exceptions, restitution in kind became the default under the new law and, when it was impossible, remedies such as financial compensation were provided.¹⁴⁹ Claims had to be filed within six months of the entry into force of the law. Law 10/2001 distinguished between property held by companies where the State or a State entity is the majority shareholder, and property held by already privatized commercial entities. In the first case, the property’s restitution in kind was required. In the second case, where the taking was based on a valid title, no restitution in kind was provided, rather compensation was required.¹⁵⁰

126. Law 10/2001, which later on was declared unconstitutional,¹⁵¹ also covered the transfer of property done under privatization procedures.¹⁵² If the property was taken without a valid title, the transfer was null and void. However, this did not affect properties transferred to

¹⁴⁴ Cl. Mem., ¶ 524; Resp. C-Mem., ¶ 352, C-249.

¹⁴⁵ Resp. C-Mem., ¶ 352.

¹⁴⁶ Cl. Mem., ¶ 528.

¹⁴⁷ Cl. Mem., ¶ 529.

¹⁴⁸ CLA-188.

¹⁴⁹ Resp. C-Mem., ¶ 329.

¹⁵⁰ Cl. Mem., ¶ 584.

¹⁵¹ Cl. Mem., ¶ 599.

¹⁵² Cl. Mem., ¶ 586.

commercial companies subsequently privatized since the ownership did not result from the privatization procedure.¹⁵³ The Heirs' claim having been rejected both by the Bucharest District Court and Court of Appeals, it came to the Supreme Court in 2005.¹⁵⁴

127. On 15 November 2005, the Romanian Supreme Court issued Judgment no. 9227/2005 ordering Alfa El Bucur SRL to return the Casa Bucur estate to the Heirs.¹⁵⁵ The Supreme Court found that the Romanian State never held a valid title to Casa Bucur because the 1950 nationalization did not result in a valid title, confirming the Bucharest Court of Appeals' finding that the taking of Casa Bucur in 1950 was unconstitutional.¹⁵⁶ In addition, the Supreme Court found that there was no evidence that Casa Bucur was properly transferred to the ownership of Alunis.¹⁵⁷ Claimants filed a request to review the Supreme Court's Decision and were rejected on 6 March 2006. They filed a request to annul the Decision and were denied on 20 March 2007.¹⁵⁸

128. On 20 March 2008, Romanian police evicted Claimants from Casa Bucur.¹⁵⁹ Alfa El Bucur SRL received no compensation for its loss of Casa Bucur.¹⁶⁰

V. THE JURISDICTION AND ADMISSIBILITY OBJECTIONS

A. Summary of the Parties' Positions

1. Respondent's Position

129. According to Respondent, Magnar was the majority shareholder of Rodipet from the time of the Privatization Contract in December 2003 and the transfer of shares in May 2004 until the execution of the Pledge in June 2009. At the time of the signature of the Privatization Contract none of the Claimants had any stake in Magnar, the owners being Marwan Georges Matly (30%), Nayef Kamal Abboud (30%) and Bassan Raymond Instambouly (40%).¹⁶¹

130. Hassan Awdi acquired a 1% interest in Magnar in February 2004, 96% in Magnar being at that time transferred to Mona Lisa, a company in which Hassan Awdi held a 10% interest,

¹⁵³ Cl. Mem., ¶ 586.

¹⁵⁴ Cl. Mem., ¶ 599.

¹⁵⁵ Cl. Mem., ¶ 520.

¹⁵⁶ Resp. C-Mem., ¶¶ 366, 368.

¹⁵⁷ Resp. C-Mem., ¶ 371.

¹⁵⁸ Cl. Mem., ¶ 739.

¹⁵⁹ Request, ¶ 56; Cl. Mem., ¶ 521.

¹⁶⁰ Cl. Mem., ¶ 522.

¹⁶¹ Resp. C-Mem., ¶ 398, with reference to the Trade Registry History of Magnar (R-93).

the controlling shareholder with 89% of the share capital being his wife, Wafa Hikmat Awdi.¹⁶² Only on 25 April 2007 did Street Corner, a company owned at that time by Claimant EBC, become the sole shareholder in Magnar.¹⁶³

131. Still according to Respondent, on 30 August 2004, Magnar owned 96% shareholding of Rodipet, the rest being held by Supremo, Mona Lisa, Mehdi Awdi, and Hassan Awdi. Magnar's interest in Rodipet dropped to 54% in early 2005 and to 23% on 25 July 2006, the date on which the Ministry of Public Finance acquired 55% of Rodipet's share capital.¹⁶⁴ On 23 March 2007, Magnar's interest which amounted to 83% of the share capital of Rodipet, dropped to 77% at the time of execution of the Pledge.¹⁶⁵

132. Respondent argues that Claimants' contention that for jurisdictional purposes the only relevant time under the ICSID Convention is the date of consent to arbitration is incorrect. There must be in fact a convergence in time between ownership, breach and damage, as held by other investment treaty cases, such as *Daimler v. Argentina*, *Saluka v. Czech Republic* or *ConocoPhillips v. Venezuela*.¹⁶⁶ Thus, according to Respondent, Claimants' legitimate expectations can only arise at the time the investment was made, in the case of Rodipet in 2007, the date of 2007 being also important when considering the investor's good faith at the time it made its alleged investment.¹⁶⁷

133. For Respondent, Claimants presented a new case on "investment" in their Reply which, being belated, should be ignored by the Tribunal. According to the new case, Claimants' investment would consist in the acquisition of Rodipet, the substantial sums of money invested in accordance with the Privatization Contract and the comprehensive and expensive reorganization program for the renovation, modernization and expansion of Rodipet's infrastructure, logistical and distribution capacities as well as developing the local workforce.

134. No attempt was made by Claimants to explain why these alleged new investments would come within the definition of "investment" in Article 1(1)(a) of the BIT and Article 25(1) of the ICSID Convention. These alleged investments are unsupported by any evidence in terms of financing by Claimants. In relation to the various transactions to which Claimants

¹⁶² Resp. C-Mem., ¶ 398, with reference to the Trade Registry History of Mona Lisa (R-264).

¹⁶³ Resp. C-Mem., ¶ 398, with reference to the Trade Registry History of Magnar (R-93).

¹⁶⁴ Resp. C-Mem., n.740, with reference to the Trade Registry History of Rodipet (R-101).

¹⁶⁵ Resp. C-Mem.

¹⁶⁶ Resp. Rej., ¶ 343.

¹⁶⁷ Resp. Rej., ¶ 344.

were parties, Respondent's request for document production of 19 July 2013 was not met, Claimants alleging not to dispose of any of the requested documents. According to Respondent, this is preposterous, Hassan Awdi being personally a party to some of the transactions and the sole shareholder of corporate Claimants EBC and Alfa El Corporation. The truth is that nothing was paid for in return for an interest in Street Corner or in Magnar, the latter owning a majority stake in Rodipet which in turn was allegedly worth in the region between EUR 97 and 223 million.¹⁶⁸

135. The same applies to investments allegedly made in acquiring Casa Soare and to purchase the shareholding in Street Corner or Alfa El Romania, for which EBC and respectively Alfa El Corporation paid nothing.

136. The obvious inference to be drawn by the Tribunal is that there has been no capital contribution or commitment by Claimants in their so-called investment in Romania, in view also of the requirement that there must be some economic link between a capital contribution and the purported investor enabling the Tribunal to find that a given investment is an investment of that particular investor.¹⁶⁹ Bare shareholding in itself cannot be considered as an investment, what it required is a real active contribution, otherwise no investment will exist.¹⁷⁰ The Tribunal is therefore requested to dismiss jurisdiction in view of Claimants' paper investment without any proven capital contribution to the Romanian companies involved.¹⁷¹

137. Respondent essentially considers that the Awdi Group established a smokescreen behind which it organized a "dizzying carousel of transactions" the aim of which was to strip Rodipet of its business and assets.¹⁷² In Respondent's view, this case is one of divestment rather than investment.¹⁷³ Respondent considers that the various enterprises involved on Claimants' side in the case were organized in the nature of a family affair, but they also point out that Hassan Awdi must not be considered as the "master puppet" who would control all operations.¹⁷⁴

¹⁶⁸ Resp. Rej., ¶ 358 (with reference to Table 1 of the report of Gervase MacGregor, Claimants' *quantum* expert).

¹⁶⁹ Resp. Rej., ¶ 361, with reference to *Malicorp v. Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 113 (RLA-26), and to *Caratube International Oil Company v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶ 355 (CLA-338).

¹⁷⁰ RPHB., ¶ 14.

¹⁷¹ Resp. Rej., ¶ 363.

¹⁷² Resp. C. Mem. ¶¶ 148-212.

¹⁷³ RPHB., ¶ 23.

¹⁷⁴ RPHB., ¶ 29.

138. Claimants have made no “contribution” in the sense that there was no injection of money. No evidence was presented to support the allegation of a comprehensive and expensive reorganization of Rodipet, and the alleged investment pursuant to the Privatization Contract in reality were bogus accounting tricks.¹⁷⁵ No evidence was produced to show that Claimants made any payment for the purchase of Rodipet, for the transfer of Magnar shares to Street Corner, for the purchase of Alfa El Romania or for Casa Bucur.¹⁷⁶ It is true, according to Respondent, that Magnar paid a purchase price to AVAS for the shares in Rodipet and also made capital injections. But Claimants held, at most, a small minority of shares in Magnar, and it cannot be assumed that capital injections came from Claimants. Moreover, the five capital increases to Magnar, cited by Claimants, are not relevant. The auditor’s certificate for the Fourth Year was based on a bogus transaction. In hindsight, even the earlier payments look suspicious, and Respondent does not accept that they were really made.¹⁷⁷

139. With regard to documents made available, Claimants failed to disclose documents related to their “contribution” both as regards Rodipet and Casa Bucur. An adverse inference must therefore be drawn.¹⁷⁸ Also, Respondent argues that Claimants have presented an explanation of their “investment” only in their Reply, and that their claim is therefore inadmissible.¹⁷⁹

140. As to debt forgiveness as “contributions,” Claimants’ assertions are not proven, and it is nonsensical to argue that the Privatization Contract itself was a “contribution.” Claimants were neither Party to the Privatization Contract nor shareholders of Magnar at the relevant time. Personal guarantees, loans, and associated collateral cited by Claimants did not have the character of contributions, but were part of the scheme to loot Rodipet. The same is true for cash investments by Magnar and Balbek Tourism in Rodipet. The circulation of money alone does not prove a capital contribution; the purpose here was to withdraw money and assets from Rodipet.¹⁸⁰ Know-how and managerial skills were used not to make a “contribution” but to strip Rodipet of its assets.

¹⁷⁵ Resp. Rej., ¶¶ 351, 353.

¹⁷⁶ Resp. Answers, ¶ 15.

¹⁷⁷ RPHB., ¶ 17.

¹⁷⁸ Resp. Rej., ¶ 360.

¹⁷⁹ Resp. Rej., ¶ 348.

¹⁸⁰ RPHB, ¶¶ 19-21.

141. Hassan Awdi's claim of measures affecting Rodipet may only be made regarding actions taking place after February 2004 limited to 10.6% of any damages resulting from such measures and perhaps make a claim only as an alternative to EBC for events after 25 April 2007. EBC could perhaps make a claim after 25 April 2007 as an alternative to Hassan Awdi's claim.¹⁸¹

142. Regarding Rodipet, Respondent additionally contends that Claimants' claims, even if the Tribunal had jurisdiction over them, would be inadmissible because of the investors' lack of good faith and because granting them the BIT's protection would be against the civil law maxim of *nemo auditur propriam turpitudinem allegans*.

143. In the present case, Claimants failed to act in good faith in their dealings with Romania and in addition acted against internationally recognized workers' rights and the well-being of Rodipet's employees.

144. Specifically, Claimants never had any intention to fulfil their obligations under the Privatization Contract, their aim being to loot by financially exploiting and misusing Rodipet and, further, by adopting a reprehensive scheme to lure unsuspecting Hondurans to Romania to be used as forced labor in Rodipet's kiosks, while reducing the number of Rodipet's own employees.¹⁸²

145. According to Respondent, good faith is a principle of international law that in some circumstances, like the present ones, prevent rights, and claims based on those rights, that would otherwise exist from arising. As to the value of the reference in the BIT Preamble to the contribution to well-being of workers and promotion of the respect for internationally recognized worker rights, which is disputed by Claimants, preambles matter in the context of good faith and admissibility.¹⁸³ The intention of the States Parties to the BIT was indeed to exclude from its protection investors who invested and operated their investments in bad faith or with the deliberate intent of breaching international workers' rights.

146. The effect of a finding of lack of good faith in the making of the investment or making the same contrary to the aims of the BIT is to deprive the investor of the rights under the treaty. But there is another admissibility issue since Claimants are trying to benefit from their own

¹⁸¹ Resp. C-Mem., ¶ 399.

¹⁸² Resp. C-Mem., ¶¶ 426-428.

¹⁸³ Resp. Rej., ¶ 394.

illegal acts consisting in the looting of Rodipet of its assets and cash, causing it to collapse, through surreptitious transactions by which such assets and parts of the business were transferred to other companies of Hassan Awdi and his associates.

147. The admissibility objections are based on international law, not Romanian law. It is therefore not required that breach of criminal law be found for the claims to be inadmissible. Good faith in business dealings is also required by Romanian law being a core concept of international public policy. It is in fact one of the fundamental mandatory provisions in UNIDROIT principles of international commercial contracts (Article 1.7).

148. Similar was the story with the Hondurans, Magnar having represented during the privatization negotiations that it considered Rodipet's workforce as a strength, accepting to maintain the number of employees at pre-privatization level. Hassan Awdi had no qualms in disclosing his real opinion when stating that Rodipet's employees "*were not necessary or useful to the operation of the business.*"¹⁸⁴ The outcome was the progressive firing or forced transfer of employees to other companies of the Awdi Group.

149. This led to a shortage of manpower at Rodipet which had to be filled by recruiting through Intelbiz, another company of the group, Hondurans to come to Romania with the promise to work in Rodipet kiosks. However, their passports were confiscated and no work permits provided. This, to save money since Hondurans were paid less than local workers while keeping them in a precarious situation since they could not leave or complain. However, they reacted seeking police assistance, which was provided. The fact that the Bucharest Criminal Tribunal did not find this conduct to rise to the level of human trafficking for forced labour means nothing, this conduct being contrary to international law standards in addition to breaching domestic law.¹⁸⁵

150. Contrary to Claimants' allegation, Respondent is not prevented or estopped from raising the illegality of the investment by failure to react to the seriousness of the illegality despite knowledge of the same. This could not be done before Claimants' treaty rights would have arisen, what could only occur once a claim for such rights is made, in other words in the present proceedings.

¹⁸⁴ First Witness Statement of Hassan Awdi, ¶ 25.

¹⁸⁵ Such as GEO No. 56/2007, as found by the Bucharest Tribunal by Decision dated 23 April 2013 (C-509).

151. AVAS could only react when sufficient evidence of breaches of the Privatization Contract had occurred, which could not happen before 2008 when significant action was taken against Magnar by legally calling the Pledge and terminating the Privatization Contract. As to the criminal side, it is difficult to claim that DIICOT did not react to the suspected illegalities.

152. Alfa El Corporation's claim falls outside the Tribunal's jurisdiction having no investment in Rodipet or Magnar. Regarding the alleged investment in Alfa El Romania, the owner of Casa Soare, a distinction is to be made between the period since 21 February 2002¹⁸⁶ when Alfa El Romania, being owned by Alfa El Corporation, acquired Casa Soare and the period when changes were made to its ownership structure with Mona Lisa Trading becoming the majority owner at various stages during 2007-2008 until when, on 21 April 2008, Alfa El Corporation became the owner of nearly the entire share capital of Alfa El Romania, at the time when Casa Soare) had been restituted to the Soare family.

153. As a result, Hassan Awdi could make a claim regarding Casa Soare through either Alfa El Corporation or presumably his 10% interest in Mona Lisa. No such claim has however been articulated. EBC would have a claim for events taking place after November 2001 but none of the actions complained of are alleged to have impacted EBC's investment in Romania, thus falling outside the Tribunal's jurisdiction. Alfa El USA may have a claim in the alternative to Hassan Awdi to the extent it shows ownership at relevant times and the monetary impact this had on its investment.¹⁸⁷ Respondent considers that no claim exists against the State, and that the claim should be raised vis-à-vis Street Corner as the seller of Casa Soare.¹⁸⁸

154. According to Respondent, since Claimants elected to make their complaints regarding restitution of Casa Soare before the Romanian courts they are prevented from bringing the same dispute before this Tribunal by the fork-in-the-road provision under Article VI.2-3(a) of the BIT. No "triple identity test" may be relied upon to exclude the application of this provision since such test, developed in the context of *res iudicata*, is not applicable, as held by other investment treaty tribunals, and considering further that the case was brought before local courts by a subsidiary that Hassan Awdi considers as his *alter ego*.¹⁸⁹

¹⁸⁶ Prior to 21 February 2002 Casa Soare was owned by Street Corner, a company bought by Claimant EBC only in November 2001: Resp. C-Mem., ¶ 401.

¹⁸⁷ Resp. C-Mem., ¶ 402.

¹⁸⁸ Resp. C. Mem., ¶ 668.

¹⁸⁹ Resp. C-Mem., ¶ 412.

155. Claimants' objections to the fork-in-the-road provision is based on their claim that the cause of action in the Romanian proceedings was not the BIT and that the fork was not taken since "the relevant proceedings never commenced" and in any case would have failed. As to the first objection, Respondent notes that Claimants relied on the BIT's expropriation provision to request damages for the alleged expropriation of Casa Soare. As to the second objection, it is sufficient for the test to apply that the dispute be submitted to the local courts by lodging the claim with the court register, as it was the case for the two claims filed by Alfa El Romania.

2. Claimants' Position

156. In reply to Respondent's contentions, Claimants assert that from the time of privatization until the execution of the Pledge, in June 2009, Magnar was owned, directly or indirectly, by Hassan Awdi, and members of his family. One percent interest in Magnar was acquired in February 2004 by each of Hassan and Mehdi Awdi, while 96% interest was held by Mona Lisa, a company also owned by Hassan Awdi and his wife, Wafa Awdi.¹⁹⁰

157. Claimants refute that they have presented their views on the requirements of investment too late.¹⁹¹ It was Respondent who set forth a new case in their Rejoinder, and Claimants only had the opportunity to respond in their Answer to the Tribunal's Question. Claimants' view was consistent starting from the Request of Arbitration.

158. During the performance of the Privatization Contract and before Law 442 was declared unconstitutional and the Pledge enforced, on 25 April 2007, Street Corner, a company wholly owned by Claimant EBC, became sole shareholder of Magnar.¹⁹²

159. All four conditions of Article 25 of the ICSID Convention in order for the Tribunal to have jurisdiction are met since:

- a) The dispute is "legal" since it concerns Romania's multiple violations of its obligations under the BIT and the Privatization Contract and the relief to be granted to Claimants as a result of these violations;
- b) The dispute arises directly out of Claimants' direct and indirect investments in various companies in Romania, including Rodipet, engaged in a

¹⁹⁰ Cl. Rep., ¶ 20. The remaining shares were held by Bassam Raymond Instambouly (1%) and Marian Georges Matly (1%), Trade Registry History of Magnar (R-93).

¹⁹¹ Cl. Answers, ¶ 16.

¹⁹² Cl. Rep., ¶ 20. EBC is and has always been wholly owned by Hassan Awdi: Reply, n.7, with reference to C-4.

- comprehensive reorganization program and invested millions of dollars in acquiring Casa Soare and transforming it into a landmark tourist destination;
- c) The dispute is between two companies, EBC and Alfa El Corporation and one natural person, Hassan Awdi, all of US nationality, and Romania, both US and Romania being contracting States to the ICSID Convention;
 - d) The Parties have consented in writing to ICSID arbitration according to Article VI of the BIT, Romania under paragraph 4 of such Article and Claimants by consenting to ICSID arbitration pursuant to paragraph 3 of Article VI in their letters to Romania of 8 December 2008, 5 January 2010, and 19 January 2010.¹⁹³ Claimants' consent was reiterated in the Request for Arbitration.¹⁹⁴

160. It is well established that for jurisdictional purposes the only relevant time under Article 25 of the ICSID Convention is the date of consent to arbitration which, in the case of a BIT, is the date on which the investor accepted the offer to arbitration made by the host State and on which the proceedings are instituted.¹⁹⁵

161. As to individual Claimants' claims in respect to each investment, Hassan Awdi and EBC, being indirectly owners of Rodipet, invested in Rodipet and have been affected by the actions of Romania while Claimant Alfa El Corporation invested in Casa Soare and has a claim in that regard.¹⁹⁶

162. Claimants state that the requirements of an "investment" are met by its business in Romania, both in regard to the BIT and in regard to Article 25 of the ICSID Convention. Concerning the BIT, Claimants points to the definition of an investment under Article 1(a).¹⁹⁷ As to Article 25 of the ICSID Convention, Claimants refer to the *Salini* criteria which have been accepted by ICSID tribunals as typical characteristics of investments under the Convention. The Tribunal should take into consideration when deciding on the existence of an investment only three *Salini* criteria: duration, contribution and risk. In support of this view,

¹⁹³ Letters from Awdi Group to Romania, C-24, C-25 and C-26, respectively.

¹⁹⁴ Cl. Rep., ¶ 32.

¹⁹⁵ Cl. Rep., ¶ 40.

¹⁹⁶ Cl. Rep., ¶ 42.

¹⁹⁷ Cl. Answers, ¶ 18.

Claimants cite jurisprudence of ICSID Tribunals.¹⁹⁸ As to duration¹⁹⁹ and risk,²⁰⁰ no doubt exists that these are present in Claimants' business operations.

163. Claimants made numerous contributions (monetary and non-monetary) to Rodipet: (i) the initial purchase of Rodipet's shares by Magnar, (ii) the long-term performance of the Privatization Contract, (iii) share capital increases, (iv) further capital injections pursuant to the Privatization Contract, (v) additional investments, (vi) knowhow, management and other immaterial contributions.²⁰¹

164. As regards to investments actually made, Claimants purchased the shares through Magnar, a company he controlled completely and of which he was majority owner, indirectly and together with his wife. The meager price of about EUR 1.6 million reflected the debt forgiven by Magnar to Supremo, owned by Hassan Awdi, a huge economic contribution in itself.²⁰² Had the debt been enforced, Rodipet would almost certainly have fallen into bankruptcy.

165. Hassan Awdi owned and controlled Magnar in 2004. Claimants' vision of Rodipet and its network was that of the pillar of a broader business. Claimant initially invested in Rodipet, but Claimants' business grew over time, and it was carried out by several companies focussing on different aspects of the Rodipet operations.²⁰³ The Rodipet Group companies were all interlinked and dependent on each other, and they were set up to accomplish the same economic activity, even though they were not an accounting group.²⁰⁴ As not disputed by Respondent,²⁰⁵ Hassan Awdi controlled Rodipet well before 2007; even a minority shareholding amounts to an investment.²⁰⁶

166. In this context, Claimants cite *LETCO v. Liberia* stating that there is "effective control" when a minority shareholding "dominated the company decision-making structure."²⁰⁷ The decision in *Sedelmayer v. Russia* also supports the view that Hassan Awdi controlled Magnar

¹⁹⁸ Cl. Answers, ¶ 19.

¹⁹⁹ Cl. Answers, ¶ 20.

²⁰⁰ Cl. Answers, ¶¶ 43-44.

²⁰¹ Cl. Answers, ¶ 21.

²⁰² Cl. Answers, ¶ 22.

²⁰³ CPHB., ¶ 63.

²⁰⁴ CPHB., ¶ 65.

²⁰⁵ CPHB., ¶ 30.

²⁰⁶ CPHB., ¶ 30.

²⁰⁷ CPHB., ¶ 32.

through which he made investments.²⁰⁸ Claimants refer in the same context also to *Caratube v. Kazakhstan*.²⁰⁹

167. Claimants did not apply an accounting trick when it made its payments;²¹⁰ in this context, sequence of payments, legal ground of payments, and the reason for the symmetry of payments must be taken into account. Also, as Claimants controlled all companies involved, any “trick” would have affected all the companies. A second investment was the Privatization Contract itself. Major contributions were to be made under the Privatization Contract which Claimants in fact performed for almost six years.²¹¹

168. *Malicorp v. Egypt* does not support Respondent’s contention that Claimants made no contribution as that decision states that a contract implies an obligation to make a contribution in the future.²¹² Altogether, the capital share increases by Magnar amounted to nearly USD 5 million. Conversion of Rodipet’s debt into Supremo’s shares has to be recognized in this context,²¹³ as this forgiveness had an economic value to Rodipet. ICSID tribunals have agreed that contributions may take many forms as long as they occur in the context of an economic policy.

169. Third, the Claimants contributed by capital share increases, by way of allocating money and by converting debt into shares.²¹⁴ It was irrelevant here that investments in shares were made by an intermediate company as recognized by arbitral jurisprudence.²¹⁵ In 2004, when Magnar paid about EUR 1.6 million, Hassan Awdi was the direct owner of 1% of the shares; together with his wife Wafa Awdi he owned 76,82%, indirectly through the company Mona Lisa. Given the applicable Muslim Shiite matrimonial law, Hassan Awdi was the majority owner.

170. A fourth type of contributions by Claimant consisted of cash investments. Such payments were made by companies owned and controlled by Hassan Awdi.²¹⁶ Fifth,

²⁰⁸ CPHB, ¶ 33.

²⁰⁹ Cl. Answers, ¶ 22, n.97.

²¹⁰ CPHB, ¶¶ 19 *et seq.*

²¹¹ Cl. Answers, ¶ 24.

²¹² Cl. Answers, ¶ 24.

²¹³ Cl. Answers, ¶ 37.

²¹⁴ Cl. Answers, ¶ 25.

²¹⁵ Cl. Answers, ¶ 27.

²¹⁶ Cl. Answers, ¶ 39.

investments in IT, Kiosks, and vehicles were made in Rodipet by companies owned and controlled by Hassan Awdi.²¹⁷

171. Sixth, Hassan Awdi provided personal guarantees for loans of Rodipet, and companies of his group provided their assets as collateral.²¹⁸ Loans amount to investments for purposes of Article 25 of the ICSID Convention, as is recognised by ICSID tribunals. Finally, seventh, Hassan Awdi contributed his knowhow and management skills to Rodipet and related businesses. Personnel and services of other companies of his group did the same, and a plan for the modernisation and expansion of Rodipet arose out of these activities.²¹⁹

172. In general, Claimants' entire investment has to be assessed through the prism of the Rodipet Group as a whole.²²⁰ To make a viable company out of Rodipet, Claimants had no other choice but to involve other companies of their group.

173. The Rodipet Group was a "family business," revolving around Hassan Awdi, as stated by Respondent. Claimants' practice to involve other companies is customary in ventures of this kind and its activities were completely business-oriented. Respondent's persistent effort to cast doubt on the integrity of Claimants' business is baseless.

174. As to Casa Bucur, Claimants refer to Alfa El Bucur's previous claim of USD 500.000 for acquisition and EUR 5.000.000 for works performed on Casa Bucur (alternatively, according to a report by Dr. Eng. Tache Parvelescu USD 3.167.567).²²¹

175. The claims arising from the expropriation of Casa Soare fall within the Tribunal's jurisdiction, the "fork-in-the-road" clause contained in Article VI.2-3 of the BIT, relied upon by Respondent, being not applicable. No parallel may be drawn between the situation in the present case and that which existed in the *Pantechniki* case referred to by Respondent since Claimants assert valid treaty claims before the Tribunal based on the illegal taking of Casa Soare by a decision amounting to a denial of justice and the failure to pay compensation in breach of the BIT.²²²

²¹⁷ Cl. Answers, ¶ 40.

²¹⁸ Cl. Answers, ¶ 41.

²¹⁹ Cl. Answers, ¶ 42.

²²⁰ Cl. Answers, ¶ 4.

²²¹ CPHB., ¶¶ 101 *et seq.*

²²² Cl. Rep., ¶ 627.

176. As held by other investment treaty tribunals, in order for the “fork-in-the-road” clause to preclude claims to be considered by a tribunal, it is to be considered whether the same claim is “on a different road” based on the triple identity test: same object, parties, and cause of action.²²³

177. Applying this test to the facts of this case, the causes of action in this arbitration are the breaches of the BIT obligations by Respondent. Breach of Article III of the BIT was not the cause of action brought by Alfa El Romania before Romanian courts, the action in the Romanian courts being based on Romanian law, the brief mention of Article III being made as mere supporting evidence of the guarantees made by Respondent to investor in general.

178. In any case, there is no identity of the parties in the two proceedings. Respondent’s contention that Alfa El Romania which brought the claims for compensation before the Romanian courts is the same as Alfa El Corporation, its majority shareholders, or as Hassan Awdi as his *alter ego* is rejected by investment treaty cases, the test for identity of the parties being confined to identical legal persons.²²⁴

179. If Respondent relies on an alleged failure to exhaust local remedies to found a jurisdictional objection, suffice it to remember that, pursuant to Article 26 of the ICSID Convention, such requirement has to be explicitly imposed as a condition in the relevant instrument, no such requirement being mentioned in the BIT.

180. Regarding Respondent’s admissibility objections, Claimants assert that in legitimate reliance on the contractual and already pending legislative guarantees, including forgiveness of Rodipet’s debts to public bodies and the granting of a rent-free concession, they invested heavily in Rodipet. Their aim was not to loot Rodipet of its assets, in spite of Respondent’s allegation. The Awdi Group even offered its assets as security to obtain the financing necessary for the expansion of Rodipet in view of the latter’s difficult financial status at the time of privatization.

181. It is not in dispute that while under State ownership Rodipet accumulated significant debt, both to its suppliers and to the State, as well as other liabilities. This situation was caused by decreased cash flow due to its low recovery of receivables and payment of debts that did not ensure sufficient liquidity to carry out its business. At the time of privatization, Rodipet

²²³ Cl. Rep., ¶¶ 629-630 and cases cited therein.

²²⁴ Cl. Rep., ¶ 641.

was incurring monthly losses between three and seven billion Lei, as recognized by the Competition Council's Decision regarding state aid to be granted to Rodipet,²²⁵ and by the Substantiation Report contained in the Project Ordinance for finalizing the privatization of Rodipet by AVAS.²²⁶

182. The Privatization Contract imposed various obligations on Magnar, some of which prevented Magnar from taking measures to turn Rodipet into a profitable company until the end of the five year period from the transfer of shares. A minimum of 70% of the company's turn over had to be derived from the company's main activity, being retail sale of newspapers, books, and stationary product.²²⁷ Modification of the main activity was prohibited within the first five years²²⁸ and a minimum of 3.127 job positions had to be maintained,²²⁹ well in excess of what was actually needed to carry on Rodipet's business. The location of existing kiosks could not be changed and if 5% or more of them were closed, they should have been replaced.²³⁰

183. Against this background, Respondent's theory that Claimants' intent "*from the beginning*" was "*to find cash-rich companies and strip them of their assets*"²³¹ is a flimsy-case construction.²³² According to Respondent, Claimants instituted "*a dizzying carousel of transactions – loans, leases sub-leases, sales, mortgages, service agreements, etc. – the underlying aim of which was to strip Rodipet of its business and assets.*"²³³

184. The reality was much different according to Claimants. Due to its woeful financial situation at the time of Magnar's acquisition, Rodipet could not obtain loans from banks. To increase cost-efficiency and revenue generating potential of Rodipet's different businesses, Claimants implemented a restructuring plan, which was provided to AVAS on 26 April 2006, approved and submitted by the latter to the Competition Council in the context of the latter's approval of state aid to be granted to Rodipet.²³⁴

²²⁵ Decision of the Competition Council dated 29 May 2006, (C-50, ¶ 2.3).

²²⁶ Project Ordinance, page 3 (C-468).

²²⁷ Privatization Contract, Article 10.6 (C-7).

²²⁸ Privatization Contract, Article 10.5 (C-7)

²²⁹ Privatization Contract, Articles 10.9 and 9.8.1 and Appendix N. 4, Article 8 (C-7).

²³⁰ Privatization Contract, Article 17.6 (C-7).

²³¹ Resp. C-Mem., ¶ 426.

²³² Cl. Rep., ¶ 63.

²³³ Resp. C-Mem., ¶ 148.

²³⁴ Decision of the Competition Council dated 29 May 2006, (C-50, ¶ 24).

185. According to Claimants, Respondent’s assertions in support of its objection to the admissibility of Claimants’ claims that the criminal investigations against Hassan Awdi and his associates show the intent “*to plunder [Rodipet’s assets] through a simple criminal scheme*” through the alleged “*systematic looting of Rodipet’s assets and business*”²³⁵ and “*trafficking humans for the purpose of forced labour*”²³⁶ and similar accusations all remain unproven.²³⁷

186. Respondent asks the Tribunal to declare that Claimants’ claims are inadmissible because their investments were “illegal” and made in “bad faith” based on criminal accusations. Respondent’s inadmissibility objections should be decided summarily by the Tribunal by ruling that the same is inadmissible.²³⁸

187. Respondent relies on the criminal proceedings to prove the illegality of Claimants’ investment and render their claims inadmissible. It is a cardinal principle of customary international law that “Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith....”²³⁹ One facet of this good faith obligation in international law is the principle of estoppel, according to which States must not be allowed to change their prior conduct to the detriment of those who have reasonably relied on it.²⁴⁰

188. Applying this requirement to the present case, Respondent’s statement relied upon by Claimants is to be found in Respondent’s Response on Provisional Measures (at para. 44) that “*this arbitration is not about the existence or not of criminal liability by Mr Hassan Awdi or his associates and the investigated persons have the right to the presumption of innocence in the on-going criminal investigations in Romania.*” Claimants have conducted and prepared their entire case, relying on Respondent’s representations.

189. Claimants submit that Respondent’s objection to the admissibility of Claimants’ claim based as it is on the criminal charges pressed against Hassan Awdi would, if met, be against

²³⁵ Resp. C-Mem., ¶¶ 156 *et seq.*

²³⁶ Resp. C-Mem., ¶ 202.

²³⁷ Cl. Rep., ¶ 67, pointing to the “complete acquittals” of the charge of “*human trafficking.*”

²³⁸ Motion, ¶ 12.

²³⁹ Motion, ¶ 20, citing *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, Part II, Chapter I, ¶ 54 (CPM-102).

²⁴⁰ Motion, ¶ 21, citing *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 20.2 (CLA-281).

Respondent's obligation to respect the presumption of innocence to be accorded Hassan Awdi which, according to the ECtHR's jurisprudence, extends to non-criminal proceedings.²⁴¹

B. The Tribunal's Analysis

190. According to Article 25(2) of the ICSID Convention, the date that applies regarding the investor's nationality requirement depends on whether the investor is: (a) a natural person, in which case it must have the nationality of the State other than the State party to the dispute both on the date of consent to submit the dispute to arbitration and on the date the request for arbitration is registered and the proceedings instituted, or (b) a juridical person, in which case the nationality requirement relates only to the date of consent. Likewise, all other jurisdictional requirements under the ICSID Convention and the BIT must be met on the date of institution of the proceedings.²⁴²

191. The Request for Arbitration was registered on 16 June 2010 and the proceedings instituted on the same date,²⁴³ following consent to arbitration by the individual Claimants on 8 December 2009, 5 January 2010, and 19 January 2010.²⁴⁴ Each of the Claimants was a national of the United States of America on all the above dates.²⁴⁵ This has not been disputed by Respondent. ICSID jurisdiction and the Tribunal's competence *ratione personae* are therefore established.

192. Regarding jurisdiction "*ratione materiae*" a distinction is to be made between Claimants' investments in Rodipet and those in Casa Bucur. Regarding Rodipet, according to Claimants, at the time of institution of these proceedings: (a) Claimants Hassan Awdi and EBC had made investments in Rodipet through Magnar,²⁴⁶ a company (i) which had during the relevant time a share participation in Rodipet²⁴⁷ and (ii) in which Hassan Awdi had during the

²⁴¹ Motion, ¶ 53.

²⁴² Rudolf Dolzer and Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 2012, p. 38.

²⁴³ ICSID Letter of 19 January 2011 to the Tribunal and the Parties.

²⁴⁴ Letters from each of the Claimants to Romania, C-24, C-25 and C-26, respectively.

²⁴⁵ Request for Arbitration, ¶¶ 5, 8 and 10.

²⁴⁶ Claimants allege that investments in Rodipet were made by Magnar and in part by Supremo through capital increases for the amounts and on the dates (in 2004 and 2005) indicated in Cl. Answers, for a total of RON 22,449,285 (EUR 5.864.220) (see table in para. 6 of the Cl. Answers). An additional cash investment for RON 10,278,985 (EUR 2.924.774) is alleged by Claimants to have been made by Magnar and Baalbeck Tourism during the period from 27 May 2005 to 9 January 2008 (Cl. Answers, para. 7 and relevant table). Claimants additionally claim to have invested in Rodipet in 2004-2008 through other companies of the Rodipet Group at least EUR 10.927.168 (Cl. Answers, paras 11-15).

²⁴⁷ Appendix A to Cl. Answers. No significant objections to the Appendixes to Cl. Answers have been raised by Respondent: RPHB, ¶ 13 and n.11.

relevant time a share participation directly and/or through Supremo, Mona Lisa, Pyramid and Street Corner,²⁴⁸ the latter being companies in which Hassan Awdi had a share participation, either directly or indirectly.²⁴⁹ Regarding Casa Bucur, Claimant Hassan Awdi had made investments in Alfa El Romania, owner of Casa Bucur (or Casa Soare), through his 100% ownership by Claimant Alfa El Corporation, the latter owning 99.99% shares in Alfa El Romania during the relevant time.²⁵⁰

193. Under Article 1(1)(a) of the BIT, “investment in the territory of one Party may be owned or controlled directly or indirectly by nationals or companies of the other Party.” Since the date of Magnar’s acquisition of 100% of Rodipet’s shares, *i.e.* 26 May 2004, Hassan Awdi controlled indirectly each of the companies that invested in Rodipet through Magnar, although with varied percentage shareholdings depending on the date of each investment.²⁵¹

194. This includes the period from 25 May 2006 to 12 September 2005 and from 15 November 2006 until 25 April 2007 during which shareholding in Magnar was held by large majority through Mona Lisa,²⁵² a company in which Hassan Awdi’s wife, Wafa Awdi, held a share participation ranging from 89.9% to 70.01% and her husband a share participation ranging from 10% to 10.02%.²⁵³ Although these various periods of time are not relevant for jurisdiction purposes, in view of the position expressed by Respondent denying that Hassan Awdi controlled Mona Lisa,²⁵⁴ the Tribunal deems useful to note the following. As correctly mentioned by Claimants and not denied by Respondent,²⁵⁵ majority shareholders, minority shareholders and indirect shareholders can bring investment treaty claims, obviously within the limits of their shareholding. Thus, to the extent it owned a shareholding in Mona Lisa at the time of cancellation of Law 442 and of the enforcement of the Pledge, Hassan Awdi would be entitled, should Respondent’s liability be found, to claim compensation. As held by other investment treaty tribunals, “control” may also be a “*de facto*” control whenever it is clearly shown that a minority shareholder “*dominated the company decision-making structure.*”²⁵⁶

²⁴⁸ Appendix B to Cl. Answers.

²⁴⁹ Appendixes C, F, I and K to Cl. Answers.

²⁵⁰ Appendix J to Cl. Answers.

²⁵¹ Appendix A to Cl. Answers.

²⁵² Appendix B to Cl. Answers.

²⁵³ Appendix J to Cl. Answers.

²⁵⁴ Resp. C.-Mem., ¶398; Resp. Answers, ¶ 18.

²⁵⁵ Cl. Rep., n.24; RPHB, ¶ 9.

²⁵⁶ *Liberian Eastern Timber Corporation [LETCO] v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, p. 4, referred to in CPHB, n.90; *supra*, ¶ 164 (CLA-155).

195. That this was the case of Hassan Awdi “control” of Mona Lisa is, in the Tribunal’s view, beyond doubt. Not only was Hassan Awdi the one that had conceived and promoted the project regarding Rodipet since July 1999²⁵⁷ but throughout the project acquisition and implementation, directly and through the various companies in which he held a share participation, Hassan Awdi was clearly in control of the entire project. Mona Lisa was just one of the companies which, as shown by documents in the file, always intervened for implementing a scheme designed by Hassan Awdi. The fact that, as noted by Respondent,²⁵⁸ Wafa Awdi signed certain documents on behalf of Mona Lisa detracts nothing from this conclusion, the company having in any case to act through whoever represents it formally *vis-à-vis* third parties.

196. One of the “key documents” mentioned by Respondent to refute the *de facto* control by Hassan Awdi of Mona Lisa, the “collaboration contract” with Magnar, shows that Wafa Awdi did what her husband told her to do as Mona Lisa. The “collaboration contract” in question was in fact part of the so-called “money carousel” (or “accounting trick”) by which, according to Respondent, Magnar would have tried to lead AVAS to believe that it had fulfilled the investment obligation for the 4th Year. The “collaboration contract” between Mona Lisa and Magnar dated 15 November 2006 was only a piece of a more complex scheme made of different steps²⁵⁹ in which other companies of the Awdi Group were involved, including Rodipet. The latter had signed on 8 November 2006 with Magnar a “collaboration contract,” the text of which was near-identical to that of the Magnar-Mona Lisa contract signed one week later, Mona Lisa being the final payee of “undue amounts” from Rodipet. According to Respondent, this “money carousel” would have been a way of consummating what it considers an “accounting trick” to defraud AVAS. In the Tribunal’s view, what would have been the corporate interest of Mona Lisa in concluding the “collaboration contract” with Magnar would be hardly found unless this is seen as part and parcel of a wider scheme put in place by Hassan Awdi.

197. The Tribunal has noted the controversies surrounding the term “investment” as used in Article 25 of the ICSID Convention. Absent a definition in Article 25, the Tribunal considers that the principal legal framework to determine the existence of an “investment” must lie in the will of the Parties as set forth in the definition of an “investment” under the BIT as long as such

²⁵⁷ Letter to AVAS signed by Hassan Awdi for Bueno Corporation dated 27 July 1999 (C-32).

²⁵⁸ Reference by Respondent to contracts signed by Wafa Awdi for Mona Lisa (RPHB, ¶ 28) is therefore inapposite.

²⁵⁹ The various steps are described in Respondent’s Answers to the Tribunal Post-hearing Questions dated 17 January 2014 (“Resp. Answers”), ¶¶ 105-110.

will is compatible with Article 25 of the ICSID Convention. The *Salini* criteria may be useful to describe typical characteristics of an investment, but they cannot, as a rule, override the will of the parties, given the undefined and somewhat flexible term used by the drafters of the ICSID Convention.

198. Recent arbitral jurisprudence has, in particular pointed to the normative and conceptual difficulties surrounding the *Salini* criterion being the requirement of a contribution to the development of the host State. The Tribunal agrees with Claimants that such a criterion cannot be read into the term “investment” in Article 25 of the ICSID Convention. First and foremost, the text of Article 25 contains no reference to such a requirement and arbitral tribunals cannot add their own subtext to the ICSID Convention. This is also true, in general, when it comes to interpreting the term “investment” as defined by the parties to a BIT. Such a definition cannot be redefined by a tribunal, but must be accepted on the terms provided in the text of the parties.

199. Thus, the definition of “investment” in a treaty will determine its content in an exclusive way, with no room for additions or subtractions. Only when the definition of “investment” chosen by the parties to the treaty refers to the notion of investment (as is sometimes the case) may the specific components of the definition be supplemented by additional elements deduced from the term “investment” as interpreted under the Vienna Convention on the Law of Treaties. In the BIT applicable to the present dispute, no such “double reference” to investment is found.

200. The Tribunal holds that the term “contribution,” as used sometime by the Parties in the context of investment, concerns the requirement that the investor commits a certain amount of resources, economic or otherwise.

201. The Tribunal is satisfied that Claimants Hassan Awdi and EBC have made indirectly investments covered by the BIT via notably share purchases and monetary injections in Rodipet through Magnar since 12 February 2004 and in Casa Bucur through Claimant Alfa El Corporation’s control of Alfa El Romania since 23 December 2003 until 2 July 2007 and through Hassan Awdi’s control of Mona Lisa since 2 July 2007 until 21 April 2008 and then from 21 April 2008.²⁶⁰ This economic link between Claimants and the investments is sufficient for purposes of jurisdiction, the “investment” requirement under Article 25 of the ICSID

²⁶⁰ Appendices A and J to Cl. Answers, respectively.

Convention and the BIT being thus met. The amount and nature of Claimants' investments shall be described in Sections VI and VII.²⁶¹

202. The matters in dispute are "legal disputes" within the meaning of Article 25(1) since they concern the violation of Claimants' rights under the BIT, international law, and Romanian law.

1. Fork-in-the-Road

203. Regarding Respondent's objection to ICSID's jurisdiction and the Tribunal's competence with respect to the Casa Bucur claim by Alfa El Corporation as owner of 99.99% shares in Alfa El Romania (later renamed Alfa El Bucur²⁶²) by reason of the fork-in-the-road provision under Article VI(2)(a) of the BIT,²⁶³ the following may be noted. The condition for the operation of the fork-in-the-road is that the investor has not "submitted the dispute for resolution" before the court of the State that is a party to the dispute. The provision is meant to avoid that by resorting initially to the State courts and then to arbitration under the BIT, the investor tries its case a second time should it be not satisfied with the outcome of the first attempt before the local courts.

204. This is not what occurred in the present instance considering that following the filing of the claim before the Bucharest Tribunal by Alfa El Bucur the case did not proceed from that very point in time. In fact, as mentioned by Claimants, the Romanian courts "annulled Alfa El Bucur's claims" due to its failure to pay the court fees and judicial stamps applicable to pecuniary relief.²⁶⁴ The Tribunal considers that in view of the circumstance that Alfa El Bucur's claims never proceeded and the cases were never heard before the Romanian courts there is no room for application of the fork-in-the-road provision of the BIT, the purpose of this provision being, as mentioned by Respondent, "to preclude parallel litigation."²⁶⁵ This conclusion dispenses the Tribunal from examining the applicability of the triple identity test,

²⁶¹ Section VI as to Claimants' Investments Regarding Rodipet and Section VII as to Claimants' Investments Regarding Casa Bucur.

²⁶² Cl. Mem., ¶ 524.

²⁶³ *Supra*, ¶ 176, referring to the claim brought by Alfa El Romania against Respondent before the Bucharest Tribunal in December 2006 (C-355) and in May 2007 (C-356).

²⁶⁴ Cl. Mem., ¶ 761(b), referring to the Bucharest District Court's Decisions of 30 January 2007 (C-357) and 26 September 2007 (C-358), respectively.

²⁶⁵ Resp. Rej. ¶ 375.

as contended by Claimants to exclude the operation of the fork-in-the-road provision, or of the “normative source” test, as contended by Respondent to assert the operation of this provision.

205. In view of the foregoing, the Tribunal holds that ICSID has jurisdiction and it has competence regarding all claims raised by Claimants in these proceedings.

2. Admissibility

206. Respondent’s objection to the admissibility of Claimants’ claims concerning Rodipet has regard to the manner by which Rodipet’s business had been run, the Awdi Group companies instituting “a dizzying carousel of transactions – loans, leases, sub-leases, sales, mortgages, service agreements, etc. – the underlying aim of which was to strip Rodipet of its business and assets.”²⁶⁶ Respondent adds that Magnar did not fulfil its obligations towards Rodipet’s employees,²⁶⁷ and Claimants did not fulfil their investment obligations. Respondent admits that there is “nothing wrong with the vision of creating something like the “Rodipet Group” whereby the different aspects of a business are divested to separate companies, each focusing on one specific aspect,”²⁶⁸ provided all companies were owned by Rodipet, with each of them aiming to maximize its own business.²⁶⁹

207. The Tribunal notes that what matters in these proceedings is whether Claimants made investments pursuant to the Privatization Contract in order to be entitled to assert a claim in that regard under the BIT, a subject that shall be examined below. The manner by which Claimants conducted Rodipet’s business would have been more for AVAS to control in the light of Magnar’s undertaking under the Privatization Contract, for a period of five years from the acquisition of shares in Rodipet: (i) “not to propose, support or decide . . . the minimisation or modification of the main activity, as stated in the Company’s Certification of Incorporation” (Article 10.5); (ii) “to maintain . . . the number of employees of the Company that are employed with a labour contract of indefinite duration at the time of transfer of ownership of shares” (Article 10.9), assuming all existing rights and obligations regarding employees listed in Article 10.8.

²⁶⁶ Resp. C. Mem., ¶ 148.

²⁶⁷ Resp. C-Mem.

²⁶⁸ Resp. C-Mem., ¶ 157.

²⁶⁹ Resp. C-Mem., ¶ 157.

208. Failure to respect the social obligations would have entailed the termination of the Privatization Contract with immediate effect (Article 10.10). Termination was notified by AVAS for breach by Magnar of its social obligations on 13 July 2009²⁷⁰ soon after the enforcement of the Pledge. The effect of such termination on Claimants' claims regarding Rodipet shall be examined below, in Section VI.²⁷¹

209. Regarding Magnar's undertaking to maintain Rodipet's main activity and not to minimise or modify the same, AVAS should have been alerted by Magnar's repeated requests for approval of planned transfers of part of Rodipet's business and assets that fulfilment of that undertaking was at stake. A list of activities that had been outsourced by Rodipet to other companies of the Awdi Group, leading to its insolvency, was reported to the insolvency court by Cornel Florea, the judicial administrator of Rodipet in insolvency.²⁷²

210. Regarding some of the activities that were outsourced, Magnar had requested AVAS' approval and had then implemented the same in the absence of a reply by AVAS. The increase of the kiosk network proposed by Hassan Awdi on behalf of Magnar in a letter to AVAS on 14 December 2004²⁷³ is a relevant example. These new kiosks were not to be owned by Rodipet but by Supremo, the latter leasing the kiosks to Rodipet. Later, in September 2008, Supremo purchased the entire network of 1.365 old kiosks. Both transactions were in breach of the Privatization Contract (Article 11.1),²⁷⁴ entailing penalties owed to AVAS (Article 11.2).

211. It is Claimants' position that in order to increase efficiency of operations, reduce costs and improve profitability Rodipet's business had to be transformed into companies specializing in the various activities (courier, contracting and distribution of subscriptions, integrated computing and data services), the whole under the umbrella of the so-called Rodipet Group.²⁷⁵ Claimants add that this restructuring and the ensuing transfer of employees were expressly accepted by both parties at the time of entering into the Privatization Contract,²⁷⁶ which is denied by Respondent.²⁷⁷

²⁷⁰ Notification from AVAS to Magnar dated 13 July 2009 (R- 244).

²⁷¹ *Infra*, ¶ 333.

²⁷² Resp. C-Mem., ¶ 159, referring to the First Witness Statement of Cornel Florea.

²⁷³ Letter dated 14 December 2004 from Magnar to AVAS (C-83).

²⁷⁴ As mentioned by Respondent: Resp. C-Mem., ¶¶ 177-179; Resp. Rej., ¶¶ 187-192.

²⁷⁵ Cl. Rep., ¶ 96.

²⁷⁶ Cl. Rep., ¶ 96.

²⁷⁷ Resp. Rej., ¶¶ 168-169.

212. In the Tribunal's view, in fact, there is no convincing evidence of what Respondent defines as a systematic looting of Rodipet's business and assets and non-compliance by Claimants in relation to the rights of Rodipet's employees, let alone evidence at a level required to meet the threshold of inadmissibility, be it on the ground of misrepresentation and/or the principle of good faith in an investment arbitration. The diverging outcome of criminal investigations and proceedings brought to the Tribunal's attention²⁷⁸ does not permit to draw any final conclusions in that regard. The absence of convincing evidence leads accordingly the Tribunal to dismiss Respondent's inadmissibility objection.

213. Under the Privatization Contract, Claimants accepted specific undertakings, such as those regarding the Protocol with the trade unions or the restructuring plan with the Competition Council. To the extent Claimants' conduct remains confined within the ambit of these contractual undertakings, it will be for the sanctions under the applicable contract to provide a remedy. Enforcement of the Pledge, imposition of penalties and termination of the Privatization Contract were the contractual remedies implemented by AVAS. It will be up to the Tribunal to determine whether AVAS' enforcement of any such remedy was in breach of the BIT or other rules of international law, as claimed by Claimants and denied by Respondent.

VI. CLAIMANTS' INVESTMENTS REGARDING RODIPET

A. Investments in Rodipet

1. Claimants' Position

214. Following a privatization process, on 23 December 2003, AVAS and Magnar entered into the **Privatization Contract** for the sale to Magnar of 100% of the share capital of Rodipet. The new owner and the new board members were registered with the Chamber of Trade on 10 May 2004.

215. Under Article 2(a) of the Privatization Contract, the Purchase Price for Rodipet's shares, representing 100% of the registered capital on the date of signature, was ROL 2.266.614.350 (approximately EUR 54.600) taking into account the heavy debt that Rodipet

²⁷⁸ Such as, on the one side, the acquitting by the Bucharest Tribunal of Hassan Awdi and Alex Sweiss of all charges of human trafficking for labour exploitation (Cl. Rep., ¶ 97), and, on the other side, Respondent's notice of 1 December 2014 regarding the Bucharest Court of Appeal's "final" decision of 27 November 2014 reclassifying the criminal acts perpetrated by Hassan Awdi and Mehdi Awdi in the "CFR-Mesagerie" case, reducing the sentence for each of them from 10 to 8 years and, respectively, 6 years and four months imprisonment.

owed to the Awdi Group.²⁷⁹ As recorded by Addendum No. 3 to the Privatization Contract, on 23 March 2007, Magnar bought additional shares that had been created by the cancellation of Rodipet's debts to State institutions worth RON 170.317,63 (approximately EUR 50.440), representing over 47% of the increased share capital.²⁸⁰

216. Pursuant to Article 3.1 of the Privatization Contract the Official Gazette published Government Emergency Order No. 45/2004 of 29 January 2004 ("GEO 45/2004"), which fulfilled the condition precedent of extinguishing the tax liabilities and other debts that Rodipet owed to the State.²⁸¹ On 5 May 2004, AVAS notified Magnar of the fulfillment of the condition specified in Article 3.1.²⁸² On 10 May 2004, AVAS notified Magnar of the change of ownership of the shares of Rodipet.²⁸³ Ten business days later, AVAS and Magnar signed an Addendum to the Privatization Contract for the transfer to Magnar of Additional Shares created through the conversion into shares of Rodipet's debts to the State.²⁸⁴ This fulfilled AVAS' obligation to transfer ownership of Rodipet's shares to Magnar.

217. However, GEO No. 45/2004 was silent on the 49-year land concession. Thus, Claimants requested an amendment of the ordinance to reflect the agreement between AVAS and Magnar under Article 3.1 of the Privatization Contract. On 28 October 2004, the Romanian Parliament enacted Law 442. For Claimants, Law 442, *inter alia*, "grant[ed] a 49-year concession (plus an additional period of 24 years and 6 months) to Rodipet to use for free the lands owned by the State and the territorial administrative units of the existing and future kiosks."²⁸⁵

218. The Privatization Contract provided for subsequent financial undertakings from Magnar, specifically:

- a. two infusions into Rodipet of USD 1 million each, one within 30 days from the date of transfer of ownership of the shares and the other within one year from said transfer (Article 13.1), both payments to be certified by the company's censors or by a specialized audit company 10 days later, *i.e.* on 19 June 2004 and on 20 May 2005, respectively;

²⁷⁹ Cl. Mem., ¶ 47; the value in Euro of the price paid by Magnar is indicated by Respondent as equivalent to EUR 70.500 (Resp. Answers, ¶ 17(b)).

²⁸⁰ Cl. Mem., ¶ 62.

²⁸¹ Cl. Mem., ¶ 63; Resp. C-Mem., ¶ 87 (indicating an amount of EUR 50.598.80 and USD 66.502,90); C-11; Resp. Answers, ¶ 17(m).

²⁸² Cl. Mem., ¶ 67

²⁸³ Cl. Mem., ¶ 43

²⁸⁴ Cl. Mem., ¶ 47

²⁸⁵ Cl. Mem., ¶ 69.

- b. for a period of 5 years following the date of transfer of ownership of the shares, investments based on a prescribed investment program set forth in Appendix No. 6 of the Privatization Program amounting to EUR 3.750.000 (Article 14.1), to be certified for each year within 30 bank days from the due date under Appendix No. 6 by the company's censors or by a specialized audit company (Article 14.3).

219. Appendix No. 6 provided the following schedule²⁸⁶:

	1 st year	2 nd Year	3 rd Year	4 th Year	5 th Year	Total
Upgrading of vehicles	420.000	166.000	250.000	-	250.000	1.086.000
Upgrading of IT system	420.000	250.000	-	250.000	250.000	1.170.000
Upgrading/replacement of a number of kiosks	-	-	582.000	582.000	330.000	1.494.000
Total	840.000	416.000	832.000	832.000	830.000	3.750.000

Article 14.4 of the Privatization Contract allowed for the possibility of an untimely fulfillment of the investment obligations and/or production of the Certificates, subject to penalties to be paid by Magnar to AVAS in case of such untimely fulfillment.

220. Additionally, in order to ensure the proper performance of Magnar's financial obligations, the Privatization Contract provided for various guarantees in the form of bank guarantees and Pledges, specifically a bank guarantee to AVAS for the infusion of USD 1.000.000 (Article 13.1(a)) and Pledges over all Rodipet's shares dated the same date of the Privatization Contract to secure the performance by Magnar of the development investment (the "**First Share Pledge Agreement**") and a Pledge over Rodipet's Additional Shares subsequently transferred to Magnar in order to guarantee the performance of the second phase of the investment under a Pledge Agreement dated 24 June 2004 (the "**Second Share Pledge Agreement**").

221. Under Article 15.4 of the Privatization Contract, AVAS was entitled to enforce the Pledge on shares and the bank guarantee should Magnar fail to observe its obligations regarding the 5-year investment program.

²⁸⁶ Cl. Mem., ¶ 52.

222. Under Articles 3 of the Privatization Contract the transfer of the ownership of shares was subject to a condition precedent to be fulfilled not later than 31 March 2004 consisting of the conversion of shares of the debts owed by Rodipet to the Romanian State and the grant of a 49-year concession (with possible 24.5-year extension) of the lands on which the points of sale stood. Addendum No. 1 of 30 April 2004 extended by two months said deadline. Under Addendum No. 2 of 30 April 2004, the Parties agreed to add a “Best Efforts Clause” regarding the issuance of a normative act for the granting to Rodipet of a 49-year concession for the points of sale on the Romanian territory, except for those in Bucharest.

223. According to Claimants, since investing in Rodipet in 2005, they had not only fulfilled but exceeded all of their financial obligations pursuant to the Privatization Contract. The obligations included (i) Claimants’ initial payment of ROL 2.264.350.000 (approx. EUR 54.545) for all 90.574 shares of Rodipet and ROL 170.317,63 (approx. EUR 4.103) for the Additional Shares, (ii) the capital contribution to the company of USD 2 million, and (iii) the investment of EUR 3.75 million in Rodipet (in 5 installments over 5 years) as set out below.

224. On 2 June 2004, Magnar notified AVAS of the payment of USD 1.050.000 pursuant to Article 13.1(a) of the Privatization Contract. Pursuant to Article 13.2 of the Privatization Contract, Magnar also provided a Certificate issued on 31 May 2004 by an internal auditor and an external auditor. On 25 June 2004, AVAS acknowledged the payment and Certificate and released the Bank Guarantee Letter for the value of USD 1.000.000.²⁸⁷ On 10 May 2005, Magnar notified AVAS of the payment of USD 950.000 under Article 13.1(b) of the Privatization Contract and provided a Certificate issued on 28 December 2005 by an internal auditor and an external auditor. AVAS acknowledged the payment and Certificate on 3 June 2008.²⁸⁸

225. Claimants report having carried out the five-year investment program of EUR 3.750.000 described under Article 14 of the Privatization Contract as follows.

226. First Investment Year obligation, amounting to EUR 832.000, was fulfilled by investing the amount of EUR 840.000 as of 6 May 2005,²⁸⁹ as evidenced by the certificate issue by both internal and external auditors dated 11 May 2005,²⁹⁰ comprising the amounts of EUR 420.000

²⁸⁷ Cl. Mem., ¶¶ 79-80; Resp. C-Mem., ¶ 93; C-59.

²⁸⁸ Cl. Mem., ¶¶ 81-82; Resp. C-Mem., ¶ 93; C-62.

²⁸⁹ Letter from Magnar to AVAS dated 16 May 2005 (C-63).

²⁹⁰ Certificate dated 11 May 2005 (C-64).

for car parking modernization and EUR 420.000 for informatics system modernization following the “*schedule of investments for growth*” set forth in Appendix No. 6 of the Privatization Contract. Fulfillment of the First Year on the investment program was confirmed by AVAS on 3 June 2008.²⁹¹

227. Second Investment Year obligation, amounting to EUR 416.000, was fulfilled, as evidenced by both internal and external auditors’ certificate of 29 May 2005²⁹² and as confirmed by AVAS on 3 June 2008.²⁹³

228. Third Investment Year obligation, amounting to EUR 832.000, was fulfilled as evidenced by the certificate of 10 June 2007 issued by Rodipet’s internal auditor²⁹⁴ and as confirmed by AVAS on 3 June 2008.²⁹⁵

229. Fourth and Fifth Investment Year obligations were fulfilled, as notified by Magnar to AVAS on 27 March 2009 including the certificates issued by the external auditor *Contexpert Grup 4 SRL* of 9 January 2009 and 2 February 2009,²⁹⁶ respectively.²⁹⁷ The certificate verifies that Rodipet used: (i) the amount of the Fourth Investment Year of the “*schedule of investments for growth*” set forth in Appendix No. 6 of the Privatization Contract as to EUR 250.000 for informatics system modernization and as to EUR 582.000 for kiosks modernization/replacement and (ii) the amount of the Fifth Investment Year as to EUR 250.000 for auto fleet modernization, as to EUR 250.000 for informatics system modernization, and as to EUR 330.000 for kiosks modernization/replacement. The table below provides a summary.

	Investment	Certification	Verification
1 st year	EUR 840.000 Notified on 16 May 2005	Certificate issued by internal and external auditors on 11 May 2005 ²⁹⁸	AVAS confirmation On 3 June 2008 ²⁹⁹
2 nd year	EUR 416.000 Notified on 1 July 2005	Certificate issued by internal and external auditors on 29 May 2005 ³⁰⁰	AVAS confirmation On 3 June 2008 ³⁰¹

²⁹¹ Letter from Avas to Magnar dated 3 June 2008 (C-62).

²⁹² Letter from Magnar to AVAS dated 1 July 2005 (C-65).

²⁹³ Letter from Avas to Magnar dated 3 June 2008 (C-62).

²⁹⁴ Certificate dated 10 June 2007 (C-66).

²⁹⁵ *Supra*, n.244.

²⁹⁶ Certificate dated 9 January 2009 (C-68).

²⁹⁷ Certificate dated 2 February 2009 (C-69).

²⁹⁸ Cl. Mem., ¶¶ 84-85.

²⁹⁹ Cl. Mem., ¶ 86; C-62.

³⁰⁰ Cl. Mem., ¶ 87.

³⁰¹ Cl. Mem., ¶ 88; C-62.

3 rd year	EUR 832.000 Notified 5 July 2005	Certificate issued by internal auditor on 10 June 2007 ³⁰²	AVAS confirmation On 3 June 2008 ³⁰³
4 th year	EUR 832.000 Notified 27 March 2009	Certificate issued by external auditor on 9 January 2009 ³⁰⁴	---
5 th year	EUR 830.000 Notified 27 March 2009	Certificate issued by external auditor on 2 February 2009 ³⁰⁵	---

230. According to Claimants, the total amount invested by Awdi Group companies in Rodipet was over EUR 10.5 million, as certified by the accounting firm *Societatea “Contexpert Grup 4” SRL*, distributed as follows:³⁰⁶

Company	RON	EUR
Balbec Retail	6.517.229,57	1.649.93,53
Piramid Corporation	34.000	8.607,59
Mona Lisa Business Park	957.000,00	242.278,48
Yourhotels	2.077.928,76	526.057,91
Rodikiosk	1.822.920,55	461.498,87
Baalbeck Tourism SARL	2.079.411,80	526.433,36
Alfa El Bucur	15.034.810,00	3.806.281,01
Rodipet Courier	5.452.367,00	1.380.346,07
Intelbiz Solutions	9.282.107,00	2.349.900,50
Supremo Media	3.427.778,00	867.791,89
Bueno Panduri	1.560.040,00	394.946,83
Rodipet Books SRL	18.735,00	4.743,03
Total	48.264.327,68	10.568.885,54

231. According to Claimants’ letter of 26 May 2014 and accompanying documentation,³⁰⁷ the total amount invested from 10 May 2004 to 9 May 2009 in vehicles, IT, and kiosks pursuant

³⁰² Cl. Mem., ¶ 89.

³⁰³ Cl. Mem., ¶ 91; C-62.

³⁰⁴ Cl. Mem., ¶¶ 92-93.

³⁰⁵ Cl. Mem., ¶¶ 92, 94.

³⁰⁶ C-70. The table is in Cl. Mem., ¶ 96.

³⁰⁷ C-677 to C-696.

to Article 14 of the Privatization Contract and its Appendix No. 6 is equal to EUR 9.053.464, as shown by the following table contained in said letter:

	Year 1₁	Year 2₂	Year 3₃	Year 4₄	Year 5₅	Total
Investment in Fleet as per bank statements	-	220.9476	305.508,7	363.880,8	60.125,9	950.460
Investment in IT as per bank statements	-	585.873,10	583.886,11	2.061.595,12	2.635.996,13	5.867.350
Investment in Kiosks as per bank statements	47.14314	62.201,15	762.716,16	1.363.594,17	-	2.235.654

232. According to Claimants' letter of 26 May 2014, this amount is to be added to the total investment in Rodipet's share capital in an amount of EUR 4.913.266 and cash investments spontaneously made by companies of the Rodipet Group that were used as working capital by Rodipet, in an amount of EUR 2.902.940.³⁰⁸

233. In addition, Claimants assert to have indirectly invested in Rodipet by negotiating loans that would ultimately benefit the company by providing personal guarantees due to the banks' refusal to finance the same in view of its extremely precarious financial situation. The loan agreements were as follows:³⁰⁹

Bank	Borrower	Contract Number	Facility Type	Loan Amount	Term
Bancpost	Rodipet SA	13/19.12.2004	Working capital	4.900.000	Dec-08
Egnatia Bank	Supremo Media	FA2788/29.03.2007	Working capital	2.800.000	Jun-09
Egnatia Bank	Your Hotels	FA3021/10.05.2007	Investment Credit	350.000	May-17
Egnatia Bank	Mona Lisa BP	FA2292/05.12.2006	Investment Credit	1.540.000	Dec-08

³⁰⁸ Excerpts of Rodipet's bank statements evidencing cash received from other companies of the Rodipet Group (C- 697).

³⁰⁹ The Table is in Cl. Mem., ¶ 97.

234. Consequently, according to Claimants, the total amount in EUR injected into Rodipet from 2004 through 2007 is as follows:³¹⁰

From Magnar due to USD 2m capital requirement	1.669.375
From Magnar due to EUR 3.75m capital requirement	3.859.859
Capital injected by Awdi Group companies	10.568.886
External working capital facilities	7.700.000
External investment credits	1.890.000
Total	25.688.120

235. According to Claimants' letter of 26 May 2014, the amount injected into Rodipet until 9 May 2009 is equal to EUR 16.869.870 (9.053.464+4.913.226+2.902.140).³¹¹

236. In reply to Respondent's comments of 13 June 2014 on said letter, Claimants contend that the purpose of their submission of 26 May 2014 was not to provide evidence of investment under the ICSID Convention and the BIT but only to give direct evidence of concrete payments. They add that the main purpose of Respondent's comments is to allege again a money carousel between companies of the Rodipet Group.³¹²

237. Contrary to Respondent's critical remarks, payments for the cars were made based on leasing contracts the purpose of which was to purchase cars for the Rodipet Group. Most of the leasing contracts over the fleet of vehicles were paid up by 2009, therefore the vehicles that were object of these contracts were assets of the Rodipet Group.³¹³ Similarly, regarding the investment made in IT, the purpose of the Charisma software was to organize the accounting of the kiosk network due to their location throughout Romania and only payments qualifying as investments in IT were included.³¹⁴ The bank statements were not submitted to AVAS since "underlying documents" were requested by AVAS only in June 2009, well after the calling of the Pledge and requests to be registered on the Share Registry.³¹⁵

³¹⁰ The Table is in Cl. Mem., ¶ 98.

³¹¹ The amount injected into Rodipet shown by Claimants' letter of 26 May 2014 is lower than the amount indicated in Claimants' Memorial (*supra*, ¶ 232). The difference is even larger if one considers the shorter time period to which the higher amount refers.

³¹² Claimants' letter of 30 June 2014, p. 7.

³¹³ Claimants' letter of 30 June 2014, p. 8.

³¹⁴ Claimants' letter of 30 June 2014, pp. 8-9.

³¹⁵ Claimants' letter of 30 June 2014, p. 9, referring to C-220 and C-231. As a matter of fact, these two Exhibits refer to requests made by AVAS to Rodipet earlier than June 2009, in April and May 2009.

238. According to Claimants, irrefutable proof that they invested in kiosks, IT, and vehicles can be found on the ground, Rodipet having, when bankruptcy proceedings were opened, a network of 1.764 kiosks, a fleet of 230 vehicles, and a business organized by a software program ensuring the most efficient distribution.³¹⁶

2. Respondent's Position

239. During the 1990s, the Romanian economy was faced with the main challenge of implementing an extensive privatization program involving over 10.000 companies. This transition was on the whole very successful through the active involvement of AVAS and the adoption of legislation, such as the Privatization Law of 1991. Romania's accession to the European Union in 2007 was the result of the efforts to provide a functioning market economy capable of competing in the European market. In parallel, a fundamental reform was undertaken to establish an independent and effective justice system.

240. Since his arrival in Romania in the 1990s, Hassan Awdi organized a business model based on the establishment and management of various loosely defined "group of companies," controlled not by the same holding and not all of them owned by Hassan Awdi, lack of transparency of the system being no doubt intentional.

241. The Awdi business model consisted of members of the family acquiring a company following its privatization and quickly stripping it of its assets. This is illustrated by the "CFR-Mesagerie" case where, upon its acquisition in 2004, close associates of Hassan Awdi were appointed to all key positions, including his brother Mehdi Awdi. Not even two years had passed since the privatization when insolvency proceedings were opened against CFR-Mesagerie. During the proceedings, a number of suspicious transaction with Awdi Group companies appeared, which were terminated by the Syndic Judge with respective amounts being in part recovered.

242. The history of Rodipet from privatization to insolvency is similar, Rodipet's assets and most desirable aspects of the business having been misappropriated, social obligations to employees being neglected. At the time of privatization, Rodipet was carrying out an important public service, having monopoly over press distribution in Romania. The State was willing to

³¹⁶ Claimants' letter of 30 June 2014, pp. 10-11, referring to the McGregor report of 14 June 2013 (¶¶ 6.10-6.13) and the Uifelean report (R-134, p. 5) for the kiosks and to the Grantham report of 15 March 2013 (¶ 8.2.2) and the Uifelean report (R-134, p. 4) for the car fleet.

privatize it, forgiving debts and granting other forms of State aid to this end but not that its assets and business could be used for something completely different.

243. There is no disagreement with Claimants regarding the negotiations between AVAS and Magnar and the contractual obligations which were fundamental to AVAS to agree to the privatization. However, contrary to what is argued by Claimants,³¹⁷ the obligation relating to Rodipet employees under Article 10.9 of the Privatization Contract was to maintain the number of employees, not of “jobs,” AVAS’ concern being dismissal, unemployment, and possible social unrest.

244. After the privatization was completed, matters proceeded initially as envisaged. The Competition Council authorized State aid to Rodipet in May 2006 with conditions mostly relating to a restructuring plan that Rodipet undertook to implement and that was approved, noting that about 60% of the total costs of the restructuring were covered by Magnar and Rodipet.³¹⁸ Compensatory measures to prevent excessive distortion of competition were set out, mostly relating to selling capacities.³¹⁹

245. As far as Magnar’s investment obligations are concerned, AVAS confirmed on 25 June 2009 the second of the two capital injections of USD 1 million each under Article 13.1 of the Privatization Contract.³²⁰ The first capital injection and the fulfilment of the first three technical investment obligations under Article 14.1 of the Privatization Contract were confirmed by AVAS only on 3 June 2008 due to the pendency of the dispute which arose in August 2006 between AVAS and Magnar relating to Magnar’s performance of its business obligation under Article 10.12 of the Privatization Contract.³²¹

246. In reality, Magnar did not make the necessary investments but instead the Awdi Group instituted a carousel of transactions – loans, leases, subleases, sales, mortgages, service agreements, etc – the aim of which was to strip Rodipet of its business and assets.³²² Contrary to Claimants’ insistence that “*Magnar fulfilled all of its financial obligations under the Privatization Contract,*”³²³ Magnar did not invest the amounts due for the Fourth and Fifth

³¹⁷ Cl. Rep., ¶ 101.

³¹⁸ Decision of the Competition Council (C-50, ¶¶ 26, 28 and 30).

³¹⁹ Decision of the Competition Council (C-50, ¶¶ 63 and 65).

³²⁰ Letter from AVAS to Magnar dated 25 June 2004 (C-59).

³²¹ Letter from AVAS to Magnar dated 3 June 2008 (C-62); Resp. C-Mem., ¶ 95.

³²² Resp. C-Mem., ¶¶ 148-212.

³²³ Cl. Mem., ¶73.

Years and in any case made no money available to Rodipet to make the technical investments it desperately needed, the new assets (IT system, kiosks and car fleet) becoming the property of companies other than Rodipet.³²⁴

247. Magnar made several payments to that effect but the bank statements show that the same day they were transferred as “undue amount” to Mona Lisa bank account under a cooperation agreement signed on 15 November 2006, as shown by Rodipet’s special administrator’s report from January 2011 analysing the account’s entries. Rodipet’s assets were not renewed and upgraded as they should have been under the Privatization Contract.

248. Different aspects of Rodipet’s business were divested to separate companies of the so-called Rodipet Group, each focusing on a particular aspect. However, these companies were not owned by Rodipet but by different companies and individuals of the Awdi Group. Rodipet Courier, Supremo, and Balbec Retail were party to transactions through which kiosks, a car fleet and other real estate assets were dissipated, as explained by Cornel Florea, Rodipet’s judicial administrator.

249. The plan of the Awdi Group was to entirely remove from Rodipet’s assets the valuable kiosk network.

250. Under a franchising contract, Westland and Supremo could run the trade in newspapers under the Rodipet trademark at commercially outrageous conditions. Under another contract, Supremo could use Rodipet’s advertising space in the latter’s kiosks. Further, under an agreement with Supremo, Rodipet agreed to lend the latter approximately EUR 4.5 million and USD 6 million, later increased to EUR 7 million and USD 9.4 million, under a 10-year credit facility, no security for the loan being provided by Supremo.

251. The third company of the Awdi Group, Balbec, obtained properties from Rodipet with EUR 1.4 million in repayment of a loan of EUR 536.538 a mere month after the loan was granted, no permission being obtained from AVAS for these agreements, putting Magnar in breach of Article 11.1 of the Privatization Contract.

252. Specifically, Rodipet Courier was set up to appropriate Rodipet’s logistical work of distributing the press around the country. It appropriated a key part of Rodipet’s core business, the distribution and trade of Romania and foreign press, under a contract leaving the risk of

³²⁴ Resp. Answers, ¶¶ 34-39.

any unpredictable events with Rodipet, Rodipet Courier being entitled to terminate the contract by one day advance notice with no similar right for Rodipet.

253. The main culprit for emptying Rodipet with some role in almost every transaction was Supremo, the company described by DIICOT as the one by which the money movements in and out the various entities were coordinated. The first area of intervention by Supremo was the sale of its fleet of vans to Rodipet under a number of sale contracts, each time for the purchase price originally paid by Supremo with no adjustments for depreciation. Another area was the ownership and use of Rodipet's kiosks sold by Rodipet to Supremo while the right to use the land on which kiosks are placed was subleased to Rodikiosk even if this was prohibited by the 1998 General Law on Concessions.

254. Romanian authorities became aware of the Awdi Group's actions as a result of tax cross-control carried out in April and May 2009 and a full tax audit of Rodipet, completed in October – November 2009, during which numerous failures to report and pay applicable taxes were discovered. ANAF, the tax authority, calculated the total tax liability for unpaid tax and penalties at approximately EUR 52.3 million and filed criminal complaints with DIICOT.

255. Three DIICOT investigations were opened. One (38/D/P/2011) concerned CFR-Messagerie, with Hassan Awdi and others indicted for embezzlement, money laundering, and other crimes. The second one (390/D/P/2006) was to establish whether acts committed in the running of the Awdi Group of companies fulfilled the criteria for the crimes of running a criminal organization, embezzlement, tax evasion and money laundering, focusing on suspicious money transactions by which funds and assets were siphoned from Rodipet. The third one (304/D/P/2008) concerned the human trafficking for forced labor.³²⁵

256. It is in the context of the investigation regarding Rodipet that on 22 June 2010, based on search warrants by the Criminal Chamber of the Bucharest Tribunal, searches were conducted and documents seized. Inventories were made of the materials seized which were completed in February 2011 so that most of the documents (over 90%) could be returned to their owners. Subsequently, DIICOT also searched the electronic devices seized with the help of an expert.

³²⁵ See reference to the outcome of DIICOT first and third investigations, *supra*, n.277.

257. Once Rodipet's financial situation was clarified and the "outsourcing policy" of the Awdi Group was discovered leading to the company's demise, Rodipet's administrators sought to cancel a number of agreements transferring assets to other companies in the Awdi Group and to have debts to Supremo, Balbec, Rodipet Courier and others struck off the list of creditors. Rodipet was left as a bare shell, AVAS being unable to recover the contractual penalties due under the Privatization Contract since Magnar was placed in insolvency on February 2011.

258. According to Respondent's submission of 13 June 2014, Claimants' new evidence provided by their letter of 26 May 2014 fails to show that any of the relevant amounts is an investment under the ICSID Convention and Article 1 of the BIT. There is in fact no evidence of the purpose for which the payment was made, payments made by one company to another company in the ordinary course of business not representing "investments."³²⁶

259. Regarding Investment Years 4 and 5, according to Respondent the new documents contradict the investment certificates for the same years provided to Magnar at the time and filed in this arbitration, no correlation apparently existing between the new documents and the previous investment certificates, as shown by a table provided by Responded.³²⁷ Specifically, as shown by said table, Rodipet was not the beneficiary of any of these payments which were all made to various other companies unrelated to the so-called Rodipet Group.

260. Further, the bank statements that are provided as evidence do not give any details regarding the purpose of the transfer, specifically in Rodipet's vehicle fleet, IT or kiosk network. They contradict Claimants' prior argument that investments for Years 4 and 5 had already been made in 2006 while according to the new evidence, investments were made from 2007 to 2008.³²⁸ No explanation is given, according to Respondent, why such evidence was provided so late despite AVAS' several requests for underlying financial and accounting documents attesting the reality of such investments. The new evidence suggests rather the existence of additional money carousels.³²⁹

³²⁶ Resp. Submission dated 13 June 2014, end of p. 2.

³²⁷ Resp. Submission dated 13 June 2014, pp. 3-4; the table is on p. 4.

³²⁸ Resp. Submission dated 13 June 2014, pp. 5-8.

³²⁹ Resp. Submission dated 13 June 2014, pp. 10-11, referring in particular to AVAS' request to Magnar by letter dated 1 June 2009 (C-235).

261. Regarding Claimants' evidence of excess investments in Rodipet in Years 1-3, as specifically requested by the Tribunal's letter to the Parties dated 12 May 2014, the only exhibit that shows payments made to Rodipet is C-697*bis* for the amount of EUR 2.902.940,00, "used as working capital by Rodipet."³³⁰ However, in Respondent's view this evidence raises problems of form and substance since the relevant bank statements show that the alleged investments made by Magnar to Rodipet for Years 1 and 2 are part of a money carousel from Supremo to Magnar to Rodipet and eventually back to Magnar.³³¹ Further, the new documents contradict the information provided by the certificates delivered to AVAS for Years 1-3, since the funds were used for purposes other than those certified by the auditors, showing in addition several suspicious transfers having taken place on the same day and for similar amounts.³³²

3. The Tribunal's Analysis

262. The Tribunal refers to the previous analysis of the Parties' debate whether contributions stand for investments.³³³ It has taken note of AVAS' confirmation of investments made by Magnar regarding payment of the price for the initial shares of Rodipet,³³⁴ for the Additional Shares³³⁵ and for the first and second capital injections of USD one million each under Article 13.1 of the Privatization Contract³³⁶ as well as the fulfilment of the investment for growth obligations for the first three Years under Article 14.1 of the same Contract.³³⁷

263. It cannot be disputed that Claimants have made investments in Rodipet under the Privatization Contract to the extent of amounts confirmed by AVAS. AVAS had all the time and power to inquire about the effectiveness of investments made indirectly by Claimants through Magnar or other companies controlled by Hassan Awdi before confirming them, or even thereafter, should it have doubts in that regard. Such investments qualify for purposes of the BIT as falling within the definition of "investment" under its Article 1.1(a) thereof.

264. Respondent's position in the last phase of this arbitration contending that Claimants have failed to provide any evidence of having made a "contribution" in Magnar or Rodipet³³⁸

³³⁰ Resp. Submission dated 13 June 2014, p. 13.

³³¹ Resp. Submission dated 13 June 2014, pp. 14-17.

³³² Resp. Submission dated 13 June 2014, pp. 17-22.

³³³ *Supra*, ¶¶ 195-199.

³³⁴ *Supra*, ¶¶ 196-200.

³³⁵ Cl. Mem., ¶ 62, mentioning payment in two instalments, as acknowledged by AVAS (Resp. C-Mem., ¶ 87).

³³⁶ Cl. Mem., ¶¶ 80-81.

³³⁷ Cl. Mem., ¶¶ 86, 88, 91.

³³⁸ Resp. Answers, ¶ 17; RPHB., ¶ 14.

must be rejected as belated and in any case contradicted by AVAS' prior confirmation that investments had been made in accordance with the Privatization Contract.³³⁹ Respondent's reliance on Mehdi Awdi's testimony at the hearing to deny Claimants' investments is misplaced, the part of the transcript referred to by Respondent showing that no specific time period had been indicated to the witness during his examination (when Supremo bought kiosks in lieu of Rodipet), Respondent itself admitting being surprised by "the limited state of his [*i.e.* Mehdi Awdi's] knowledge."³⁴⁰

265. Having thus considered that investments had been made by Magnar or other company controlled by Hassan Awdi regarding Rodipet up to and including amounts corresponding to the fulfilment of the first three Years of investment obligations, it remains to be determined whether: (i) Claimants have complied with the investment obligations for the Fourth and Fifth Year in accordance with the provisions of Article 14 of the Privatization Contract; and (ii) additional investments have been made regarding Rodipet which may be accepted as being proven. This shall be examined below and in the context of Claimants' claim of illegal enforcement of the Pledge by AVAS.³⁴¹

266. Respondent's contention that the new assets (IT system, kiosks and car fleet) became the property of companies of the Awdi Group other than Rodipet, such as Rodipet Courier, Supremo and Intelbiz,³⁴² pertains to the ultimate destination of these assets, specifically whether the sale or leasing of any of them by Rodipet had received AVAS' required approval under the Privatization Contract. This matter has in fact regard to the implementation of the Privatization Contract and AVAS' power of control over Magnar's fulfilment of its obligations thereunder. To the extent any such investment had been made by companies directly or indirectly controlled by Claimants, the so-called Rodipet Group, they may qualify as investments under the BIT, provided evidence is given by Claimants that such investments were actually made for the benefit of Rodipet.³⁴³

³³⁹ Among Claimants' "contributions" to Rodipet is the conversion to shares in Rodipet on 28 December 2004 of the debt owed by the latter to Supremo (Cl. Answers, ¶¶ 37-38), a company then owned by Claimant Alfa El Corporation (Cl. Answers, Appendix C). Respondent's denies that this debt conversion is a "contribution" and that it is proven (Resp. Answers, ¶ 17(e); RPHB, ¶14). On the subject see *infra*, ¶ 265.

³⁴⁰ Resp. Answers, ¶ 36.

³⁴¹ *Infra*, ¶¶ 368-383.

³⁴² Resp. Answers, ¶ 24.

³⁴³ As already mentioned, no convincing evidence has been adduced by Respondent regarding Claimants' plan of divestiture of Rodipet's business and assets so that the relevant investments could not form the basis of Claimants' claim: *supra*, ¶ 212.

267. Claimants assert that Supremo, a company controlled by Hassan Awdi, was owed a huge amount of debt by Rodipet, equal to EUR 1.518.987,81, the majority of which had been agreed should be converted into shares of Rodipet by forgiving the debt.³⁴⁴ Respondent has contended that there is no evidence of this being the case.³⁴⁵ The Tribunal agrees that there is no satisfactory evidence regarding this debt conversion into Rodipet's shares and the relevant amount, let alone that the debt in question was a legitimate and valid one. Accordingly, it shall not consider it when determining the amount of Claimants' investments regarding Rodipet.

268. In their submission of 26 May 2014, Claimants claim to have invested EUR 5.303.464 in excess of their investment obligations. The evidence in that regard is unconvincing,³⁴⁶ the reason being the lack of showing that these "investments" were made for Rodipet and non-duplicative of investments for which investment certificates were granted for Years 1 to 3, as acknowledged by the Tribunal.

269. For Years 4 and 5, there is similarly a lack of evidence that the investments claimed by Claimants for kiosks and fleets were incurred for Rodipet's benefit. Mere pictures of kiosks are offered as evidence³⁴⁷ rather than purchase contracts accompanied by proof of payment and causation with Rodipet. As regards alleged investments in fleets, whereas fiscal invoices identifying Rodipet as buyer have been provided,³⁴⁸ the evidence on record shows that alleged payments were made by Supremo as opposed to Rodipet pursuant to a sub-lease agreement between Rodipet and Supremo where Rodipet is the mere sublessee.³⁴⁹

270. Things are somewhat different regarding IT investment for Years 4 and 5, allegedly for EUR 2.061.595 and 2.635.996, respectively relying on bank statements.³⁵⁰ Respondent has objected to this claim contending that these amounts were paid to third parties without showing any benefit for Rodipet, and argued that none of the payments shown by bank statements may thus be considered as evidence of any investments.³⁵¹

³⁴⁴ Cl. Mem., ¶ 38; Cl. Rep., ¶ 582; Cl. Answers, ¶¶ 22, 36, 38.

³⁴⁵ Resp. Rej., ¶ 46; *see also* RPHB, ¶ 16(a).

³⁴⁶ Exhibits C-677 to C-697.

³⁴⁷ Exhibits C-453, C-455, and C-458.

³⁴⁸ Attachment to R-137.

³⁴⁹ C-681 and C-682.

³⁵⁰ Claimants' Submission dated 26 May 2014, table on p. 2, with reference to C-687, C-688 (for Year 4), C-689 and C-690 (for Year 5).

³⁵¹ Resp. Submission dated 13 June 2014, p. 7.

271. Bank statements of Intelbiz show payments to Totalsoft for EUR 487.198,67 for Year 4 and for EUR 485.234,91 for Year 5,³⁵² while other documents filed by Claimants show Rodipet's connection with Intelbiz-Totalsoft relations.³⁵³ The total amount of such payments is equal to EUR 972.433,58. Due to uncertainty regarding the final beneficiary of the total amount, whether Rodipet or in part third parties, the Tribunal decides that 50% of such amount, equal to EUR 486.216,79, may be considered as Claimants' investment to Rodipet's benefit.

272. In the light also of the foregoing, the following "investments" are accepted by the Tribunal as having been made by Claimants, directly or through other companies controlled by Hassan Awdi, regarding Rodipet:

- (ii) EUR 55.733,80, equivalent to the amount of ROL 2.266.614.350 paid by Magnar on 10 May 2004 as price for the purchase of Rodipet's shares under Art. 5.1. of the Privatization Contract, converted in EUR on that date;³⁵⁴
- (iii) EUR 4.913.226, being the aggregate amount of Rodipet's share capital increases paid by Magnar or by companies controlled by Claimant Hassan Awdi;³⁵⁵
- (iv) EUR 2.088.000, corresponding to investments for years 1 to 3 under Appendix No. 6 to the Privatization Contract;³⁵⁶

³⁵² C- 688, pp. 35 and following and from pp. 22 and following of C-690, respectively.

³⁵³ Schedule of Deliverables – Totalsoft dated 4 September 2008 (C-607); Internal Email from HR Manager Rodipet Business Solutions to HR Manager Rodipet dated 29 October 2007 3.03PM – Rodipet S.A. Organigrama (C-608); Internal Email from HR Manager Rodipet Business Solutions to HR Manager Rodipet dated 29 October 2007 5.53PM – Request for Total Soft (C-609); Email from Commercial Deputy Intelbiz to Total Soft, Intelbiz and Rodipet Managers dated 28 August 2008 – Total Soft Situation up to date (C- 610).

³⁵⁴ Cl. Answers, ¶¶ 22, 45. This payment is confirmed by Respondent (Resp. Answers, ¶ 17(b)). On 10 May 2004 Claimants owned 97% of Magnar (Cl. Answers, Appendix B). Conversion is made based on the web site oanda.com

³⁵⁵ The Trade Register document of the Ministry of Justice (R-101) records the share capital increases regarding Rodipet for the period until December 2008, as shown by Cl. Answers (¶ 5 and table at ¶ 6) for a total amount indicated as being equal to RON 22.449.285, corresponding to EUR 5.844.200 (conversion in Euro being made at the rate prevailing on 10 July 2008, the date of repeal of Law 442, according to Oanda.com. The amount of EUR 5.864.220 was subsequently reduced to EUR 4.913.226 by Claimants' letter of 26 May 2014 (pp. 2-3).

³⁵⁶ As per the following breakdown:

- EUR 840.000 (Investment Certificate for Year 1, C-64)
- EUR 416.000 (Investment Certificate for Year 2, C-240)
- EUR 832.000 (investment Certificate for Year 3, C-66).

These investments were confirmed by AVAS' Letter to Magnar dated 3 June 2008 (C-62). Respondent's more recent statement that it "does not accept that such investments [i.e., the first three year investments] were ever made" cannot be accepted as belated and based only on "certificates [that] begin to look equally suspicious" (RPHB, ¶ 17).

(v) EUR 486.216,79, being 50% of the aggregate amount of IT investments for the Years 4 (EUR 487.198,67) and 5 (EUR 485.234,91).³⁵⁷

273. A total of EUR 7.543.176,59 is therefore accepted as Claimants' investments under the BIT relating to Rodipet.

274. The currency in which investments were made, if other than in Euros, are converted in Euros. The Tribunal notes that under Article 13.1 of the Privatisation Contract, the initial share capital increases are expressed in USD while Appendix No. 6 indicates in EUR the five Year investment obligations. This shows that the Parties did not attach a particular significance to the Romanian currency. Further, when dealing with the amount of compensation due in case of expropriation Article III(1) of the BIT provides for its calculation "in any freely usable currency on the basis of the prevailing market rate of exchange at the time" a provision which may well apply to calculate compensation due also for other breaches of the BIT.³⁵⁸

B. Law 442

1. Claimants' Position

275. According to Claimants, the concession granted to Rodipet by Law 442 is an investment under Article I (1)(a)(v) of the US-Romania BIT, which defines "investment" as including "(v) *any right conferred by law or contract....*"

276. No constitutionality concerns had been expressed by any of Romania's organs during the parliamentary process leading to the approval of Law 442 nor was a similar concern raised by AVAS during the negotiations or in the 2007 arbitration with Magnar before the Romanian Court of International Commercial Arbitration although at the time the constitutionality issue had already been raised by some municipalities.

277. According to Claimants, unfair, arbitrary, and discriminatory treatment of investments is in breach of both Articles II (3)(a) and II (2)(b) of the BIT. There is no need that a measure be "shocking," "outrageous," "egregious" or in bad faith to come within the terms of these

³⁵⁷ *Supra*, ¶ 269.

³⁵⁸ Respondent criticizes the use of Euro as inflating the value of any loss: Resp. C-Mem., ¶ 640; Resp. Rej., ¶ 612. The Tribunal shares the view expressed by the MacGregor's report according to which "It is not necessarily the case that a claim in Euros will result in a higher claim, although of course with hindsight one can work out which currency ultimately gives the higher loss and which the lower" (¶¶ 4.22, 4.23).

Articles. Further, under Article II(1), Romania is required to treat investments no less favorably than investments of its own nationals or of a third country's nationals.

278. By declaring the unconstitutionality of provisions granting land concessions to Claimants and not of the same or similar provisions granting land to other companies, Respondent has breached its obligation not to treat Claimant's investment less favorably or in a discriminatory manner.

279. Decisions No. 823/2008 and 884/2008 of 7 and 10 July 2008 by the Constitutional Court holding the unconstitutionality of Articles 8(1) and 8(5) of Law 442 while holding that said Article 8 was constitutional on two previous occasions based on the same cause of action is a denial of justice. Rodipet relied on Decisions 434/2008 and 706/2008 that the constitutionality of Article 8(1) to 8(5) of Law 442 had been settled and that the Constitutional Court would have relied on such decisions to reject the remaining municipalities' claims. However, the Constitutional Court did exactly the opposite 20 days later in cases with the same cause of action and arguments. This is simply contrary and incompatible with the most basic principle of legal security, as held by ECHRS in two cases against Romania. It is also contrary to the "*conscience juridique des peuples civilisés*" and constitutes *per se* a denial of justice.

280. The principle of legal certainty mandates to prevent a second review when the unconstitutionality pleas are based on similar grounds. In rejecting the unconstitutionality pleas on 20 December 2004³⁵⁹ and 7 May 2009,³⁶⁰ the Constitutional Court relied on its previous decisions regarding direct concessions granted by Article 32 of GEO No. 88/1997.

281. Respondent breached Articles II(6) and II (2)(a) of the BIT by failing to take effective measures in order to remedy the constitutional defaults of Law 442, as requested by Rodipet and Magnar to the Romania Parliament and Government. Both of them refused to intervene arguing that they could not control court decisions. However, Claimants note that the legal effects of the Constitutional Court's decision are suspended for 45 days under Article 147(1) of the Constitution and Article 31 of Law 47/1992 to permit the Parliament and the Government to correct constitutional defaults of the legal provisions reviewed by the Constitutional Court, this being a constitutional obligation as held by the same court. It would have been sufficient to the Parliament to enact an organic law granting 49-year land concessions.

³⁵⁹ Romanian Constitutional Court, Decision No. 566/2004 (CLA-37).

³⁶⁰ Romanian Constitutional Court, Decision No. 720/2009 (CLA-117).

282. However, Law 442 was repealed by the Romanian Constitutional Court in July 2008, thus defeating a key condition to Claimants' investment in Rodipet. Under Law 442, Rodipet was granted a rent-free concession for 49 years, extendable for other 24.5 years, ensuring a uniform concession regime applicable nationwide.

283. According to Claimants, absent that concession, the use of the land where the kiosks were located was granted by concession, rent or association/ cooperation agreements concluded with local authorities, state-owned companies or other public institutions, under agreements differing greatly concerning duration, price paid as a rent or legal basis. A uniform concession regime applicable nationwide was, according to Claimants, necessary to guarantee a stable and viable legal environment. Otherwise, Rodipet "would have had to negotiate hundreds of contracts (one for each municipality) without the certainty of even being granted the use of the lands by the local mayors."³⁶¹

284. AVAS was notified about Rodipet's expectations and reliance on the concession for its success in the following terms: "[t]o conclude, if AVAS and the ROMANIAN GOVERNMENT do not support Rodipet so that it can benefit from the provisions of Law no. 442/2004, the purchaser will be unable to maintain the number of employees (approx. 3300), as well as the other obligations undertaken through the privatization agreement or the ones undertaken towards the Romanian Press Club (Romanian press publishers, etc.)."³⁶² In order to accomplish the investments provided by the Privatization Contract, it was essential to make a viable company out of Rodipet so as to guarantee the employment of over 3000 workers and the legality and longevity of the occupation of the lands where the kiosks were (and the new would be) located. Such kiosks would have ensured a considerable competitive advantage over the new press distribution companies in Romania, as noted in the 2005 Rodipet Business Plan.

285. It is Claimants' position that Law 442 simply applied to Rodipet what was already provided in general terms under Romanian law by Article 32 of Government Emergency Ordinance (GEO) No. 88/1997 and Ordinance No. 577/2002, which provide for the grant of 49-year concession contracts to privatized companies. Rodipet relied on the fact that Law 442 was an application of Ordinance No. 577/2002.

³⁶¹ Cl. Mem., ¶ 113, footnote omitted.

³⁶² Letter of Rodipet to AVAS dated 29 April 2005 (C-56, p. 5).

286. Further, according to Claimants, the 73.5-year rent free and nation-wide concession granted to Rodipet by Law 442 had to act as springboards to allow Claimants a development and growth of their portfolio by expanding their press distribution market from distribution itself to nation-wide delivery of all items beyond mere kiosks to include a convenience store model. The kiosk business was at the core of the Awdi Group of companies by providing the latter with an opportunity to thrive.

287. The perfect example of interdependence and reliance on a 49-year rent-free concession was Supremo Media, the advertising arm of Rodipet before the latter's privatization. Supremo would have had a competitive advantage from such concession, allowing it to prosper.

288. Romania's breaches of the BIT led to the collapse of Rodipet and, as a result, to the progressive downfall of the companies that were dependent on Rodipet.

289. Respondent's failure to enforce Law 442 and to correct its alleged constitutional irregularities breached the BIT obligation to grant a fair and equitable treatment. The municipalities and counties that were to implement Law 442 by granting a 49-year concession failed to do so in an utterly abusive and discriminatory manner, the central Government failing to provide effective means of enforcing Claimants' rights.

290. 25% of the existing kiosks were located on lands belonging to State-owned companies or public institutions. They had been enjoyed by Rodipet thanks to lease agreements. When conversion was requested under a 49-year concession pursuant to Law 442, 24 municipalities did grant the 49-year concession but demanded an annual fee (from EUR 2 to EUR 110 per m²), only one granted a 49-year rent-free contract.

291. Most municipalities raised unsupported interpretations of Law 442 to refrain from granting any concession whatsoever. Some of them, like Brasov, Targoviste and Slatina, even decided that Rodipet's prior occupancy of public space was illegal ordering Rodipet to dismantle the kiosks. Some of these actions were discriminatory and politically motivated, 49-year concessions being granted to Romanian companies based on GEO No. 88 and Ordinance No. 577.

292. Following the municipalities' opposition, Rodipet requested AVAS, the Government and the Parliament "norms of application" to prevent them from avoiding to apply Law 442.

Romania failed to grant Claimants full protection and security under the BIT by failing to take the measures at its disposal to allow Claimants to fully enjoy the concession.

293. Article II(6) of the BIT, which provides that “Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements and investment authorizations,” comes into consideration in view of Rodipet’s request for the enactment of provisions to implement Law 442. However, the organs of the Romanian State refused to intervene, AVAS limiting itself to answer that after the enactment of Law 442, it no longer had any contractual obligations. This shows that Romania gave merely lip-service when it enacted Law 442 but had no intention to protect Claimants’ investment. Romania supported the unconstitutionality objection raised by the local authorities to avoid the implementation of Law 442, thus devaluing the foreign investor’s investment.

294. Between January and August 2007, Rodipet filed no less than 25 lawsuits against municipalities and State-owned companies. A series of decisions were issued regarding the latter amounting to a denial of justice. The judgments delivered regarding 26 files were favorable as to 12 claims, dismissed regarding nine claims in view of the Constitutional Court’s decision that Article 8(1)–8(5) were unconstitutional and not finally settled as to the remaining claims. Some municipalities objecting to the constitutionality of Law 442 had granted 49-year concessions to privatized companies based on a provision of Ordinance No. 577 similar to the one of Law 442.

295. The Constitutional Court’s judgment declaring Law 442 unconstitutional on July 2008³⁶³ followed a prior decision acknowledging the constitutionality of the same Law. The Court considered that the concession unduly restricted the possibility of the municipalities and the State to freely dispose of their property and that such restriction should have been imposed by an organic law, not an ordinary law as Law 442. The *erga omnes* and immediate effect of such decision caused the Romanian tribunals that had so far ordered the granting of a 49-year concession to reject Rodipet’s claims that were then pending, the Court of Appeal to grant the appeals made by the municipalities, and the latter to deny Rodipet’s pending requests or annual concessions already granted.

296. ICSID tribunals have emphasized that there is an expropriation when a court judgment substantially deprives the investor of the ownership, control, or benefits arising from its

³⁶³ Decision No. 823 of 7 July 2008 of the Constitutional Court of Romania (C-15).

investment. ICSID awards are referred to by Claimants in support of this position. Deprivation of Claimants' rights occurred as early as December 2004 when municipalities refused to grant Rodipet the concessions.

297. Claimants suffered from a creeping expropriation, the first step being the revocation of the Concession by reason of the Constitutional Court judgment, culminated when AVAS unilaterally and without legal grounds imposed itself as shareholder holding 51% of Rodipet by enforcing the Pledge under the Privatization Contract, a process intervening from September 2008 to June 2009. These actions had the effect of depriving Claimants of the benefit of their investment, in breach of Article III(1) of the BIT.

298. Under international law, the doctrine of acquired or vested rights is well-established as a customary norm. ICSID tribunals have emphasized that domestic legislation may not take away without equitable compensation under international law accrued rights of foreign investors in application of the principles of good faith, estoppel, and *venire contra factum proprium*. Regardless of the ex post declaration of unconstitutionality of Law 442, Rodipet has vested patrimonial rights under Article 8 of the Ordinance No. 45 introduced by said Law. Reference is made by Claimants in that regard to *Raibl*, *Liamco*, *Aramco*, and other international cases as well as to doctrinal writings.³⁶⁴

299. Law 442 merely applied the possibility to be granted a concession for 49 years provided by Article 32(3) of GEO No. 88/1997 and Articles 130-138 of Ordinance 577. The constitutionality of Article 32(3) of GEO 88/1997 was challenged in 2004 on the same ground of violation of the Constitution because it diminished the municipalities' autonomy by forcing them to grant direct concessions without auctions. The claims were rejected by the Constitutional Court that declared Art. 32(3) of GEO 88/1997 to be constitutional by Decision 566/2004³⁶⁵ dated 20 December 2004. Likewise, by Decision 720/2009 of 7 May 2009, the Constitutional Court declared constitutional Article 32(1)(3) of GEO 88/1997.³⁶⁶

2. Respondent's Position

300. The relevant legal framework, as reported by Respondent, consists of "three layers of legislation." First is the general regime for concessions found in **Law No. 219/1998**. The law

³⁶⁴ Cl. Mem., ¶¶ 252-259.

³⁶⁵ CLA-37.

³⁶⁶ CLA-80.

defines the maximum duration of concessions. It provides that assets found in the public property of the State, county, city, or village are to be allotted directly by concession agreement without a tender process to the State-owned companies which administered the assets, with royalties to be paid in a manner established in the concession agreement.³⁶⁷

301. Second are special rules on concessions which concern companies that were passing from State ownership to private ownership. These rules are found in **Government Emergency Ordinance No. 88/1997** and, as implementing legislation, **Government Decision No. 577/2002**. Under Decision No. 577/2002, lands in the public domain of the State or administrative territorial units are granted directly by concession agreement to the privatized companies that hold such lands for a period of 49 years with a possible extension of 24 years and 6 months, if the lands are strictly necessary for the companies to conduct their activity. Lands in the private domain of the State or administrative territorial units that are not granted by concession are leased or sold to the company that holds them by direct negotiation without prior advertising.³⁶⁸

302. Third is a specific derogation granted to Rodipet set out in **Law 442/2004**.³⁶⁹

303. Respondent notes that **GEO No. 88/1997** and **Decision No. 577/2002** constituted the legal regime which governed Rodipet at the time of entry into force of the Privatization Contract.³⁷⁰

304. Respondent challenges Claimants' misleading allegations regarding their request for a "rent-free" concession. According to Respondent, Law 442 did not itself grant any concessions but provided a legal framework for municipalities to grant concessions to Rodipet.³⁷¹ Respondent agrees that the reaction of the municipalities was varied. Some did not require the payment of a royalty for the concessions, but most did. However, free concessions were never requested by Claimants, the "contractual balance" relied upon by them³⁷² consisting in a company with a dominant market position in an important sector of society, accompanied by a huge amount of State aid.

³⁶⁷ Resp. C-Mem., ¶ 109.

³⁶⁸ Cl. Mem., ¶ 122; CLA-5.

³⁶⁹ Resp. C-Mem., ¶ 102, C-10.

³⁷⁰ Resp. C-Mem., ¶ 115.

³⁷¹ Resp. C-Mem., ¶¶ 119-124.

³⁷² Resp. Rej., ¶ 54.

305. AVAS' original undertaking regarding the enactment of a law granting the 49-year concession was replaced by Addendum No. 2 to the Privatization Contract with a best-efforts clause, leaving Magnar as the owner of Rodipet with full contractual obligations and no new concession should the best efforts fail.

306. According to Respondent, "the first three years of post-privatization monitoring were unexceptional."³⁷³ The Competition Council authorized State aid to Rodipet in May 2006 with conditions mostly relating to a restructuring plan that Rodipet undertook to implement and that was approved noting that about 6% of the total costs of the restructuring were covered by Magnar and Rodipet.³⁷⁴ Compensatory measures to prevent excessive distortion of competition were set out mostly relating to selling capacities.³⁷⁵

307. AVAS proceeded to monitor Magnar's fulfilment of its obligations under the Privatization Contract and Rodipet's fulfilment of its obligation under the restructuring plan, two different departments within AVAS being responsible for these tasks. Law 442 was enacted providing for Rodipet's right to enter into negotiations with municipalities for concession for lands on which its kiosks are located. In all, Rodipet concluded 150 concession contracts with the municipalities.

308. Five municipalities challenged the constitutionality of Law 442. The first two challenges were rejected, the third and fourth challenges were upheld, and the fifth became moot. The third and fourth challenges, which changed the situation, were successful on the basis of Decision 823/2008 of 7 July 2008 and Decision 884/2008 of 10 July 2008, when the Constitutional Court ruled that Law 442 was unconstitutional. Existing concessions continued in force, as Claimants admit.³⁷⁶ The burden is for Claimants to show that prior to Law 442 being struck down there was a request by Rodipet for a concession that was denied and that this was not overturned by Romanian courts.

309. Claimants' complaints regarding the Constitutional Court Decision 823/2008 are misplaced in light of new documents filed by Claimants themselves showing that the concessions were not important to Rodipet. An independent report from mid-2008 states that Rodipet's losses of EUR 700.000 per month were caused by a reduction in selling workstation

³⁷³ Resp. C-Mem., ¶ 93.

³⁷⁴ Decision of the Competition Council dated 29 May 2006, ¶¶ 26, 28 and 30 (C-50).

³⁷⁵ Decision of the Competition Council dated 29 May 2006, ¶¶ 63 and 65.

³⁷⁶ Cl. Rep., ¶ 308.

due to lack of personnel, salary increases, and irregularities found inside the company.³⁷⁷ Even if there had been losses, they would have flowed not to Rodipet but to Rodikiosk to which all rights under the concessions had been leased, even if not permitted.

3. The Tribunal's Analysis

310. According to the new Article 8 introduced by Article 53 of Law 442 to Ordinance N. 45/2004, lands for kiosks “*will be given*” to Rodipet “*by means of a concession contract*” (Article 8(1)) “*without drafting a study of opportunity or a tender book*” “*through direct negotiation between the transferor and the company*” (Article 8(2)), for “*a term of maximum 49 years, with an automatic extension of 24 years and 6 months*” (Article 8(3)).

311. The concession was for lands where kiosks were already installed (with the exclusion of those located in Bucharest) and for lands where kiosks will be placed “*to meet the investment programme assumed by the Contract of Sale-Purchase of Shares*” (Article 8(4)).³⁷⁸

312. Law 442 was enacted on 28 October 2004 by the Romanian Parliament as a result of AVAS’ commitment under Amendment No. 2 of the Privatization Contract “*to make all reasonable efforts for the issuance of a normative document stipulating the granting to the Company . . . for a period of 49 years, of the lands... relating to the points of sale existing on Romanian’s territory*” (Article 3).

313. The Parties dispute whether the original term of concessions under Law 442 would be of 49 years, as contended by Claimants, or “up to” 49 years, as contended by Respondent. According to Claimants, the word “maximum” merely indicates that the initial term could not go beyond a time period of 49 years, as confirmed by the automatic extension for one-half of such term and by courts’ decisions rejecting Rodipet’s request for a 49-year concession for the reason that such long period of time and its extension would mean a deprivation of ownership contrary to the Constitution.³⁷⁹ Respondent asserts that the word “maximum” cannot but mean

³⁷⁷ Accounting expertise report undated (C-470).

³⁷⁸ Shortly after Law 442 entered into force, Magnar notified AVAS of its investment plan regarding the new kiosks, requesting AVAS’ approval of this plan (Letter from Magnar to AVAS dated 14 December 2004, C-83). According to Claimants, by 14 December 2004 the land concession under Law 442 “was fully operational” (Cl. Mem., ¶ 105).

³⁷⁹ Cl. Mem., ¶ 106.

what it says and that this term represented the outcome of AVAS' "all reasonable efforts" commitment.³⁸⁰

314. To the extent the initial term of the concession may have a bearing on the Tribunal's determinations, the reference to a term of 49 years made by some Romanian courts to hold that this long duration contravened the Constitution as representing a "deprivation of ownership," appears to favour Claimants' interpretation.³⁸¹ This was confirmed by the Constitutional Court's holding that the reference to a 49-year duration and its extension "represents a deprivation of ownership as it does not observe the proportionality between the means employed and the aim sought to be realized."³⁸² No doubt, this finding also points to a 49-year initial term rather than to any period between one and forty-nine years.

315. On the contrary, there is no suggestion under Law 442 or by Romanian courts' decisions that the concessions had to be rent-free, as contended by Claimants and denied by Respondent.

316. On 7 July 2008, the Romanian Constitutional Court, by Decision 823/2008, declared Law 442 unconstitutional holding that the concession contravened the right of the municipalities and of the State to freely dispose of their property. This decision caused the Romanian courts to reject Rodipet's pending claims for a concession under Law 442 and the municipalities to deny Rodipet's pending requests for a concession under that law.

317. The repeal of Law 442 is at the root of Claimants' claim that Romania breached the BIT and customary international law, thus triggering their right to compensation. More specifically, it is Claimants' position that the Romanian government and legislator did not protect their investments by failing to enact interpretative norms so as to prevent the municipalities' abusive misinterpretation of Law 442 as a ground for the refusal to grant concessions to Rodipet and, further, by failing to correct the alleged unconstitutionality of Articles 8(1) to 8(5) of Law 442.

318. The first question to be examined is whether AVAS' commitment under Addendum No. 2 to the Privatization Contract to "make all reasonable efforts for the issuance of a normative act" was satisfied by just the issuance of Law 442 or if it implied also a commitment to see to it that the law would be regularly implemented by the municipalities according to its

³⁸⁰ Resp. C-Mem., ¶ 122.

³⁸¹ Cl. Mem., ¶ 106, bullet point "Third", n.81.

³⁸² Decision no. 823 of the Constitutional Court dated 7 July 2008 (C-15, p. 2 of the English text).

terms and that, once repealed by the Constitutional Court, the alleged unconstitutionality be corrected. Requests to that effect had been repeatedly addressed by Claimants to AVAS, the Government and the Parliament to no avail in view of the refusal of these various institutions to intervene. The latter institution had replied that “the legislature is not empowered to exercise control over court decisions and decisions of the Constitutional Court,”³⁸³ while the Government invoked “the constitutional principle of separation of powers”³⁸⁴ to refuse to intervene.

319. In the Tribunal’s view, Respondent’s refusal to further intervene was in breach of AVAS’ commitment under Addendum No. 2 to use “all reasonable efforts,” such commitment demanding further interventions whenever a prospect of positive outcome would have been realistic, as it appears would have been the case.

320. The same Constitutional Court had in fact indicated that an alternative solution would have been available in its decision of 7 July 2008. Having found that Law 442, by restricting the right of disposal of property by public authorities “prejudges the constitutional principle whereby public property is guaranteed and protected by law,” the Court held the following:

*In accordance with the provisions contained in Article 73 of paragraph (3) subparagraph (m) of the Constitution, the general status of property may be regulated by [an] organic law. But the Court holds that Law No. 442 under review is an ordinary law, as adopted by the Romanian Parliament in compliance with Article 76 paragraph (2) of the Constitution....*³⁸⁵

321. In the light of the foregoing, the Tribunal concludes that there is a breach by AVAS of its commitment under Addendum No. 2 “to make all reasonable efforts for the issuance of a normative document stipulating the granting to the Company by the State and the administrative-territorial units... of land owned by the latter and relating to the points of sale

³⁸³ Letter of the President of the Romanian Senate to Rodipet and Magnar dated 6 November 2008 (C-211).

³⁸⁴ Letter by General Secretariat of Government to Rodipet dated 12 November 2008 (C-212). The Government even supported the unconstitutionality of Law 442 by filing submissions to that effect (CPHB, ¶ 45).

³⁸⁵ Cl. Mem, ¶ 217. The Tribunal has noted Professor Mihai’s, Respondent’s legal expert, opinion that an organic law would not have been sufficient to meet the Constitutional requirements in view of the presence, in addition to what he defines an “extrinsic” problem, also of “intrinsic” problems of conformity with the Constitution of any law disposing of public property, so that both Parliament and Government were “virtually precluded to do so” (First Legal Opinion, ¶¶ 161-162). No mention of these other problems had been made by the Constitutional Court when referring to the need of an organic law. As noted by Claimants, further options would have been available if an organic law would not have solved the constitutional defects of Law 442 (CPHB, ¶¶ 60-61), but the Government and the Parliament chose not to act.

existing on Romanian territory.” Whether AVAS’ breach is attributable to Respondent and, if so, what would be the BIT breach by Romania is now to be determined.

322. In the Tribunal’s view, AVAS’ conduct is attributable to Respondent. The Privatization Contract was concluded in the frame of the State’s privatization policy by a state organ, the “Authority for Privatization and Management of State’s Shares” – AVAS. The pursuance by AVAS of the public interest in concluding and implementing the Privatization Contract is underlined by a certain number of contractual provisions. Even if the Purpose of the Contract under Article 2 is the sale by AVAS to Magnar of 100% of the shares in Rodipet, both parties undertook additional obligations which may only be explained by the underlying public interest. Among these obligations are the extinction by conversion into shares of liabilities due by Rodipet to the State for taxes, fees, contributions, and the like (as provided in one of the Suspension Conditions), the assumption by Magnar of technological and upgrading investments for five years for a total of EUR 3.750.000 (under Article 14) as well as the “Other commitments” listed in Article 17 and in the Appendices to the Privatization Contract, including the maintenance for a given period of the current number of employees (Appendix No. 4).

323. When signing the Privatization Contract, AVAS acted therefore as a State organ for the pursuance of the State’s interest in view of the implementation of the Romanian privatization plan, therefore not merely in a private law capacity. As such, AVAS’ acts under the Contract are attributable to the State under international law based on Article 4 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts providing that the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

324. The further question in the process of identifying Respondent’s breach under the BIT is whether the right to obtain concession contracts under Law 442 is an “investment” for purposes of the BIT. Claimants’ answer is in the affirmative, relying in particular on Article I.1 (a)(iv) of the BIT which defines “investment” as including “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.” The State and the municipalities had in fact the obligation to directly assign the land by concluding a concession agreement with no

discretionary power, both for existing and future kiosks.³⁸⁶ According to Respondent, Law 442 did not grant any “concession” but only a legal framework for the negotiations for concession agreements by avoiding tender requirements.³⁸⁷

325. The “investment” in our case is not a “concession” as a regulatory act granting a party the right to use or exploit State property (such as a mining concession). What was granted by Law 442 was the right to conclude concession contracts based on direct negotiation for a maximum period of 49 years, with an automatic extension for 24 years and 6 months, on rates that had to be agreed on a case by case basis. According to Respondent, these were the terms AVAS succeeded to obtain under the “all reasonable efforts” clause. In the Tribunal’s view, the requirements for qualifying Rodipet’s right to conclude concession contracts as an “investment,” as this term is defined by the BIT, are not met. This is sufficient to exclude that the repeal of Law 442 amounted to expropriation, as contended by Claimants.³⁸⁸

326. This does not exclude a BIT breach by Romania, AVAS’ actions being attributable to the State as mentioned above. Which standard of treatment was breached by Respondent in this case? The following may be considered in this regard. The deprivation of Claimants’ right to be granted concessions was due to an act valid under Romanian law, the Constitutional Court’s decision repealing Law 442. The decision was not invalid or so egregiously wrong under international law as to leave room for a finding of a denial of justice or of an arbitrary or discriminatory treatment, as held by some investment treaty cases.³⁸⁹

327. As stated by an investment treaty tribunal, “[a]n ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.”³⁹⁰

³⁸⁶ Cl. Mem., ¶¶ 101-104.

³⁸⁷ Resp. C-Mem., ¶¶ 116-119.

³⁸⁸ Cl. Mem., ¶¶ 237-246.

³⁸⁹ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 99 (CLA-24); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶¶ 453-454 (CLA-413).

³⁹⁰ *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, ¶ 106 (RLA-56).

328. Under Article III(1) of the BIT, “[i]nvestments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization....” Since the right under Law 442 to obtain concession on lands belonging to the State or the municipalities may not be qualified as an “investment” for the reasons mentioned above, the repeal of Law 442 by the Constitutional Court’s decision was not an act of expropriation of Claimants’ investments, as asserted by Claimants.³⁹¹ The Concession granted under Law 442 before its repeal remained in force, Claimants being deprived only of the right to obtain concessions on terms that had to be agreed with the granting authority.

329. The repeal of Law 442 and Respondent’s failure to put in place alternative measures to protect Claimants’ right under the Privatization Contract to obtain concessions, as required by AVAS’ “all reasonable efforts” commitment under Addendum No. 2, gave rise to a situation that frustrated Claimants’ reliance on Law 442 to develop its investment plan within Romania.

330. As acknowledged also by AVAS,³⁹² Claimants relied on the privatization regime provided by the Romanian legislation when planning to invest in Rodipet, as they have contended on numerous occasions before AVAS, Romanian courts and Romanian counties and municipalities.³⁹³

331. Certainly, Claimants’ contention that the granting of concessions was a “*sine qua non* condition” requested by Magnar to purchase Rodipet³⁹⁴ is contradicted by the acceptance of AVAS’ diluted commitment only to exercise “all reasonable efforts” to obtain to that effect a normative act. However, once Law 442 had been enacted, this circumstance founded Claimants’ legitimate expectations to obtain on that basis a concession on lands on which kiosks were located and future kiosks would be located, so that Rodipet’s activities and investment plans could be developed.³⁹⁵

332. The Tribunal finds that Respondent’s failure to remedy the repeal of Law 442 by enacting an organic law or an alternative normative act to the same effect breached the BIT, specifically Articles II(2)(a)(b) and XII under which the State and its political subdivisions had assumed the obligation to accord at all times fair and equitable treatment to Claimants’

³⁹¹ Cl. Mem. ¶¶ 226-227; Cl. Rep., ¶¶ 600-601.

³⁹² AVAS’ Memorandum addressed to the Government on 28 July 2004 (C-55).

³⁹³ Cl. Mem., ¶¶ 126-128.

³⁹⁴ Cl. Mem., ¶ 109.

³⁹⁵ Letter from Magnar to AVAS dated 19 July 2004 (C- 54).

investments and not to impair the maintenance and enjoyment of such investments. At the time of the repeal of Law 442, Claimants had made investments regarding Rodipet, as it has been determined above.³⁹⁶

333. The Tribunal holds that Respondent is liable to compensate Claimants for the breach of fair and equitable treatment under the BIT in relation to the repeal of Law 442, and that compensation should take into consideration that Law 442 was, as Claimants have persuasively argued, at the cornerstone of their investment and legitimate expectations. Respondent has contended that the termination of the Privatization Contract determined the breaking of the causal link with obligations due by it thereunder, including with regard to Law 442.³⁹⁷ The Tribunal notes that a causal link may not be broken concerning a breach of obligations under the BIT that had already intervened when the Privatization Contract was terminated, as it was the case regarding the repeal of Law 442. In other words, Respondent's breach of its fair and equitable treatment obligations in relation to Law 442 occurred, for purposes of legal and economic causation, prior to any breach by Claimants of investment and social obligations.

C. Enforcement of the Pledge

1. Claimants' Position

334. According to Article 15.4 of the Privatization Contract, the enforcement of the Pledge granted by Magnar in favor of AVAS over Rodipet's shares under the Share Pledge Agreement could only occur should Magnar fail to comply with the financial obligations set forth in the five-year investment plan under Article 14.1. Since Claimants had fulfilled all the financial obligations, AVAS could not enforce the Pledge.

335. However, without notifying Magnar in advance of its decision giving it an opportunity to be heard on the matter, on 17 March 2009, AVAS decided to enforce the Pledge. On 27 March 2009, Magnar, upon becoming aware through the media of AVAS' decision, sent a letter to AVAS underlining that the decision was not justified since it had fully complied with its financial obligations, attaching the relevant documentation and advising that the documentation certifying the investment for the Fifth Investment Year would be sent by the

³⁹⁶ *Supra*, ¶ 265.

³⁹⁷ Resp. C-Mem., ¶ 616; Resp. Rej., ¶¶ 577-580.

due date, *i.e.* 10 May 2009.³⁹⁸ Magnar reiterated further to AVAS its compliance with all financial obligations under the Privatization Contract by letter of 3 April 2009.³⁹⁹

336. Instead of responding to Magnar's documentation and objections, AVAS registered on 3 April 2009 a request with Bucharest Trade Registry Office requiring the latter to approve AVAS' reregistration as shareholder of Rodipet for a number of shares representing 51% of the Company's share capital.⁴⁰⁰ At a meeting convened on 7 April 2009 at AVAS' headquarters, Magnar presented again its objections. As indicated by the minutes of the meeting,⁴⁰¹ the parties were in disagreement regarding the interpretation of Article 15.4 of the Privatization Contract, providing for AVAS' entitlement "to entirely execute the pledge on the shares if Magnar does not comply with its obligations under Article 14.1 in any stage of the investment."

337. By letter of 14 April 2009, Magnar reaffirmed that it had complied with its investment obligations.⁴⁰² As anticipated by the minutes of the meeting on 24 April 2009,⁴⁰³ Magnar provided an additional certificate for the Fourth Year dated 9 January 2009⁴⁰⁴ and an additional one dated 2 February 2009 for the Fifth Investment Year.⁴⁰⁵ However, AVAS did not suspend the process of the enforcement of the Pledge nor gave Magnar an opportunity to rectify its concerns. By letters of 16 April 2009⁴⁰⁶ and 7 May 2009,⁴⁰⁷ AVAS requested Rodipet to cooperate to be registered as majority shareholder. Only by letter of 1 June 2009,⁴⁰⁸ did AVAS inform Magnar of its opinion that these documents did not meet certain formalistic requirements. However, the substance the documents attest was not disputed.

338. Magnar requested, on 6 May 2009, the Delegate Judge to deny AVAS' request challenging its jurisdiction. On 2 June 2009, the Delegate Judge rejected Magnar's intervention claim and approved AVAS' request to be registered as majority shareholder.⁴⁰⁹ Magnar's

³⁹⁸ Letter from Magnar to AVAS dated 27 March 2009 (C-19; C-67).

³⁹⁹ Letter from Magnar to AVAS dated 3 April 2009 (C-213).

⁴⁰⁰ Request from AVAS to the Trade Registry Office dated 3 April 2009 (C-214).

⁴⁰¹ Minutes of meeting held between Magnar and AVAS on 7 April 2009 (C-215).

⁴⁰² Letter from Magnar to AVAS dated 14 April 2009 (C-218).

⁴⁰³ Letter from Magnar to AVAS dated 24 April 2009 (C-232).

⁴⁰⁴ Certificate dated 9 January 2009 (C-68).

⁴⁰⁵ Certificate dated 2 February 2009 (C-69).

⁴⁰⁶ Letter from AVAS to SC Network Press dated 16 April 2009 (C-219).

⁴⁰⁷ Letter from AVAS to SC Network Press dated 7 May 2009 (C-220).

⁴⁰⁸ Letter from AVAS to Magnar dated 1 June 2009 (C-235).

⁴⁰⁹ Decision of the Delegate Judge of the Trade Registry in Bucharest dated 2 June 2009 (C-222).

appeal of the Delegate Judge's decisions was rejected by the Bucharest Court of Appeals on 2 December 2009.

339. Under Article 15.4 of the Privatization Contract, enforcement of the Pledge may only be triggered in case of Magnar's failure to comply with the financial investment obligations under Article 14.1 (*i.e.* EUR 3.750.000 invested in five investment years). Claimants assert to have duly and completely fulfilled their obligations in that regard, as shown by payment orders submitted to the Trade Registry,⁴¹⁰ a Partnership Agreement of 8 November 2006 between Magnar and Rodipet⁴¹¹ and the share capital increase registered with the Trade Registry on 12 January 2007.⁴¹²

340. To enforce the Pledge, AVAS relied rather on Article 14.3 which required Magnar to provide AVAS certain certificates attesting that investments had been made. Failure to meet this obligation does not trigger enforcement of the Pledge. It is not true, as stated by AVAS, that Magnar "*did not show any paper regarding the achievement of the fourth investment*" since on 12 September 2008 a certificate was submitted, as referred to in the Minutes of Meeting with AVAS of 7 April 2009.⁴¹³

341. A formalistic requirement such as the one provided by Article 14.3 may not trigger such a radical sanction as the transfer of ownership, considering also that under Article 14.4 the delayed submission of documents under Article 14.3 would trigger a penalty as a sanction. The principle of proportionality is provided by Article 53 of the Romanian Constitution.

342. Procedural propriety was not complied with by either AVAS or the Delegate Judge of the Trade Registry in enforcing the Pledge, AVAS by failing to provide notice of the intent to enforce the Pledge and the Delegate Judge by refusing Magnar's intervention claim.

343. Clearly, AVAS' acts are attributable to Romania under Article 4(1) of the ILC Draft Articles. Accordingly, Romania may be held liable for violations of the BIT committed by AVAS through the enforcement of the Pledge by AVAS.

344. The enforcement of the Pledge by AVAS breached Article II(2) of the BIT providing for fair and equitable treatment (FET) to be accorded to investment. As mentioned by the

⁴¹⁰ Payment orders (C-226).

⁴¹¹ Partnership Agreement No. 6 dated 8 November 2006 (C-227).

⁴¹² Increase in Share Capital registered with Trade Registry Office on 12 January 2007 (C-228).

⁴¹³ *Supra*, n.401 (C-215).

tribunal in *MTD v. Chile* referring to Judge Schwebel's definition, FET is "a broad and widely accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination and proportionality." Other investment treaty cases are referred to by Claimants to identify the content of the FET standard.

345. AVAS failed to act in a consistent manner in the treatment of Claimants' investments in breach of the FET by failing to express concerns or issues regarding certificates relating the first three investment years, to then raise in the 1 June 2009 letter trivial irregularities for the following years as a pretext to enforce the Pledge. As to the fifth year certificate, AVAS should not have concluded that it was invalid since it had been submitted before the maturity date so that Magnar still had an opportunity to rectify it.

346. Romania has consistently failed to protect Claimants' legitimate expectations by failing to act in a transparent and coherent manner with regard to their investment. Instead of supporting their investment, as Claimants expected Romania would do, Romania used its best effort to undermine and eventually destroy their investment.

347. Due process was violated by the State's failure to follow the correct procedures in seeking to enforce the Pledge, first by failing to provide effective notice, then to deprive Claimants of any effective means by which it could defend their rights by disregarding the documents provided by Claimants. AVAS' actions in enforcing the Pledge were not proportional to the minor infractions alleged.

348. AVAS' failure to act in a transparent and consistent manner is a demonstration of the arbitrary treatment of the investment in breach of Article II(2)(b) of the BIT. Arbitrariness is shown also by the ever changing grounds relied upon by AVAS to enforce the Pledge.

349. By the illegitimate execution of the Pledge AVAS deprived the investor of the benefit of its investment placing it in the possession of the Respondent. It is well established that expropriation is unlawful when certain conditions fail to be met. These conditions are reflected by Article III of the BIT. No compensation was provided nor was expropriation in this case made pursuant to a public purpose.

350. The taking of Rodipet's shares was not made for any legitimate public purpose but was an intentional act to deprive Claimants of their investment. Reference is made in this regard to the holding of the ICSID tribunals in *ADC v. Hungary*, *Middle East v. Egypt*, and *Siag & Vecchi*

v. Egypt, holding that inadequacies regarding notice of the State's intention in order for the investor to be able to protect its rights violate due process requirements. The principle of proportionality, as defined in *Occidental v. Ecuador*, was also breached, the sanction imposed upon Claimants having been out of proportion to the alleged wrongdoing.

2. Respondent's Position

351. AVAS proceeded to monitor Magnar's fulfilment of its obligations under the Privatization Contract and Rodipet's fulfilment of its obligation under the restructuring plan, two different departments within AVAS being responsible for these tasks. Law 442 was enacted providing for Rodipet's right to enter into negotiations with municipalities for concessions for lands on which its kiosks were located.

352. The situation changed in 2008 when the Constitutional Court ruled that Law 442 was unconstitutional. Existing concessions continued in force, as Claimants admit.⁴¹⁴ The burden is for Claimants to prove that prior to Law 442 being struck down, there was a request by Rodipet for concessions that was denied and that this was not overturned by Romanian courts.

353. Claimants' complaints regarding the Constitutional Court Decision 823/2008 are misplaced in light of the new documents filed by Claimants themselves showing that the concessions were not important to Rodipet. An independent report from mid-2008 states that Rodipet's losses of EUR 700.000 per month were caused by a reduction in selling workstation due to lack of personnel, salary increases and irregularities found inside the company.⁴¹⁵ Even if there had been losses, they would have flowed not to Rodipet but to Rodikiosk to which all rights under the concessions had been leased even if not permitted.

354. AVAS' decision to enforce the Pledge on 51% of Rodipet's shares was the result of a series of notices given to Magnar starting in mid-2008, at the time when Magnar had to submit the certificate evidencing compliance with the investment obligation for the Fourth Year. Having received no reply from Magnar to a request made on 7 July 2008,⁴¹⁶ on 8 October 2008,⁴¹⁷ AVAS warned Magnar about the sanctions provided by the Privatization Contract in case of failure to observe the clauses on investment performance.

⁴¹⁴ Cl. Rep., ¶ 308.

⁴¹⁵ Accounting expertise report undated (C-470).

⁴¹⁶ Approval from AVAS to Rodipet to sell properties dated 7 July 2008 (CPM-10).

⁴¹⁷ Letter from AVAS to Magnar and Rodipet dated 8 October 2008 (R-221).

355. The certificate provided by Magnar on 12 September 2008, allegedly acknowledging compliance of the Fourth Investment Year,⁴¹⁸ is in fact a letter with tables of invoices relating to Rodipet's Competition Council mandated restructuring, sent to AVAS by Rodipet.⁴¹⁹ It has nothing to do with the periodic auditors' certificate due under Article 14.3 of the Privatization Contract.

356. Despite being made fully aware by not less than 10 letters by AVAS of the way in which Rodipet and Magnar were expected to prove compliance with the restructuring plan, documents were transmitted to AVAS in a chaotic fashion both as to form to be used and as to substance (regarding required information).⁴²⁰ After the transmission by Rodipet of documents that did not comply with the applicable requirements, on 12 September 2008, Rodipet provided a set of invoices accompanied by "datasheet" in order to establish implementation of the restructuring plan.⁴²¹ However, this document and its attachments were entirely insufficient.

357. Following a comprehensive analysis of the situation, including the lack of response to AVAS' letters from July and October 2008 as well as the failed control at Rodipet's office on 26 November 2008 requesting in vain documents that had not been provided to AVAS,⁴²² considering the ample opportunities given to Magnar to demonstrate its compliance with the investment and social obligations under, respectively, Articles 14.1 and 10.9 of the Privatization Contract, AVAS' Board of Directors decided, on 17 March 2009, to call the Pledge.

358. Magnar, informed of AVAS' decision to enforce the Pledge on 24 March 2009,⁴²³ protested by two letters of 27 March 2009, attaching for the first time a purported certificate from its auditors stating fulfilment of the Fourth Investment Year obligation.⁴²⁴

359. In the course of a meeting with AVAS held on 7 April 2009, Magnar undertook to provide evidence and missing documents within 10 days and sent more documents to AVAS

⁴¹⁸ Cl. Mem., ¶¶ 92 and 349.

⁴¹⁹ "Investment Report" No. 92/8335 from Rodipet to AVAS dated 12 September 2008 (R-222).

⁴²⁰ Resp. Rej., ¶¶ 86-87.

⁴²¹ "Investment Report" from Rodipet to AVAS dated 12 September 2008 (R-222). The same document was filed in this arbitration as evidence of Magnar's compliance with its post-privatization investment obligations: Resp. Rej., ¶ 89.

⁴²² AVAS Control Note No. P/7003 on performing verifications at the registered office of Rodipet dated 15 December 2008 (R-225).

⁴²³ Letter from AVAS to Magnar dated 24 March 2009 (C-18).

⁴²⁴ Letter from Magnar to AVAS dated 27 March 2009 (C-19); Letter from Magnar to AVAS dated 27 March 2009 (C-67) (without enclosure) and Letter from Magnar to AVAS dated 27 March 2009 (R-223) (with enclosure).

on 24 April 2009, arguing that they provided certificates by chartered auditors *Contextpert* for the Fourth⁴²⁵ and the Fifth⁴²⁶ Years as well as a cumulative certificate for the entirety of the investment obligations. These documents however did not prove fulfilment of the investment obligation, as concluded by AVAS' legal department on 7 May 2009⁴²⁷ due to their failure to comply with the legal provisions. As testified also by Mariana Predescu, the Director of AVAS's Post-Privatization Department, those certificates raised a number of questions as to the veracity of the investments.⁴²⁸

360. On 30 June 2009, a delegate judge ordered that AVAS be registered as shareholder of 51% of the shares of Rodipet. Claimants appealed the order, but their appeal was rejected.

361. In a meeting with the union representatives and Rodipet on 27 April 2009, AVAS received further evidence of breach of the social obligations. By a letter received one week later, AVAS was informed of Rodipet's and Magnar's failure to pay salaries and meal vouchers, which later proved to be true. Further to the call on the Pledge, AVAS terminated the Privatization Contract under Article 10.10 for Magnar's failure to comply with the obligation to maintain the agreed number of employees, notifying Magnar of this decision on 13 July 2009.⁴²⁹

362. Having become the majority shareholder of Rodipet, AVAS appointed Cătălin Nițu as provisional administrator of the company. According to Respondent, Claimants refused to collaborate with Cătălin Nițu. As a result, he filed a criminal complaint against Claimants. The financial situation of Rodipet was such that the company was declared insolvent by the Court of Bucharest on 16 October 2009. Twelve creditors of Rodipet filed for insolvency. On 16 December 2009, Cornel Florea, of Consulta 99 SPRL, was appointed as judicial administrator of Rodipet (receiver) to oversee the insolvency proceedings and the liquidation of Rodipet. By unanimous decision of Rodipet shareholders, including Magnar, On 8 February 2010, Vasile Uifalean was appointed to be Special Administrator of Rodipet and represent shareholders in the insolvency proceedings.⁴³⁰

⁴²⁵ Certificate dated 9 January 2009 (C-68).

⁴²⁶ Certificate dated 2 February 2009 (C-69).

⁴²⁷ Minutes issued by AVAS – General Legal Department dated 7 May 2009 (C-234).

⁴²⁸ First Witness Statement of Mariana Predescu, ¶ 61, referred to by Resp. Answers, ¶ 56.

⁴²⁹ Notification from AVAS to Magnar dated 13 July 2009 (R-244).

⁴³⁰ Resp. C-Mem., ¶ 303, (R-251).

363. Romanian authorities became aware of the Awdi Group's actions as a result of tax cross-control carried out in April and May 2009 and a full tax audit of Rodipet, completed in October – November 2009, during which numerous failures to report and pay applicable taxes were discovered. ANAF, the tax authority, calculated the total tax liability for unpaid tax and penalties at approximately EUR 52.3 million and filed criminal complaints with DIICOT.

364. Three DIICOT investigations were opened. The first (38/D/P/2011) concerned CFR-Messagerie, with Hassan Awdi and others being indicted for embezzlement, money laundering, and other crimes. The second (390/D/P/2006) was to establish whether acts committed in the running of the Awdi Group of companies fulfil the criteria for the crimes of running a criminal organization, embezzlement, tax evasion, and money laundering, focusing on suspicious money transactions by which funds and assets were siphoned from Rodipet. The third (304/D/P/2008) concerned the human trafficking for forced labor.

365. It is in the context of the investigation regarding Rodipet that on 22 June 2010, based on search warrants issued by the Criminal Chamber of the Bucharest Tribunal, searches were conducted and documents seized. Inventories were made of the materials seized which were completed in February 2011 so that most of the documents (over 90%) could be returned to their owners. Subsequently, DIICOT also searched the electronic devices seized with the help of an expert.

366. Once Rodipet's financial situation was clarified and the "outsourcing policy" of the Awdi Group was discovered leading to the company's demise, Rodipet's administrators sought to cancel a number of agreements transferring assets to other companies in the Awdi Group and to have Supremo, Balbec, Rodipet Courier and others struck off from the list of creditors.

367. Rodipet was left as a bare shell, AVAS being unable to recover the contractual penalties due under the Privatization Contract since Magnar was placed in insolvency on February 2011.

3. The Tribunal's Analysis

368. In the Tribunal's view, the enforcement of the Pledge in 2009 was justified under the circumstances that prevailed at the time the decision was taken by AVAS. It is worth recalling that according to Article 14.3 of the Privatization Contract the investment made for each Investment Year had to be certified by Magnar within 30 bank days from the due date under Appendix No. 6 by a certificate issued by Rodipet's censors or a specialised audit company.

369. For each Investment Year the due date was 10 May, the deadline for the filing by Magnar of the required certificate being therefore (depending on the applicable bank-day period) not later than 21 June.⁴³¹ While the relevant deadline had been complied with for each of the 1st, 2nd, and 3rd Investment Years,⁴³² this was not the case for the 4th and 5th Investment Years.

370. Two notices had been addressed by AVAS to Magnar requesting compliance for the 4th Investment Year. The first notice was sent on 7 July 2008 in the context of AVAS' approval of the sale of properties by Rodipet, requesting documents to prove compliance in the frame of the approval of the sale of the properties.⁴³³ No reply by Magnar followed.

371. The second notice was sent by AVAS to Magnar on 8 October 2008, requesting a number of documents regarding the fulfilment of the 4th year contractual obligations, with a specific warning concerning sanctions under the Privatization Contract in case of failure to perform investments and to provide documents attesting their fulfilment.⁴³⁴ Penalties for delay under both Articles 14.4 and 15.5 and enforcement of the Pledge under Article 15.4 are "sanctions" for purposes of the Privatization Contract. The warning to Magnar was therefore clear and of a certain duration. Also this second notice remained without response by Magnar.

372. Claimants' denial to have received the two notifications is contradicted by Magnar's and Rodipet's signature for receipt of the two letters.⁴³⁵

373. On 12 September 2008, Rodipet provided a certificate allegedly showing compliance with the 4th Investment Year obligation under Appendix No. 6 to the Privatization Contract.⁴³⁶ However, such certificate had nothing to do with investment obligation due during the 4th year since it related to Rodipet's mandatory restructuring obligation to the Competition Council. As a matter of fact, it was addressed to AVAS by Rodipet, not by Magnar, showing amounts and breakdown in a table that did not match the amounts to be invested by Magnar for the 4th year under Appendix No. 6. This document being only a collection of datasheet listing invoices, therefore had nothing to do with the certification due for each Investment Year.

⁴³¹ Cl. Mem., ¶¶ 86, 88, 91.

⁴³² AVAS Internal Note dated 6 February 2009 (C- 53, pp.51-52).

⁴³³ CPM-10, pp. 5-6.

⁴³⁴ Letter from AVAS to Magnar and Rodipet dated 8 October 2008 (R-221).

⁴³⁵ R- 356 and R-357 respectively; Resp. Rej., ¶ 241; Resp. Answers, ¶¶ 51-52.

⁴³⁶ Letter from Rodipet to AVAS dated 12 September 2008 (R-222).

374. Regarding the document in question, Florin Lungaci, Rodipet's General Manager, was subject to cross examination during the hearing of 29 October 2013. He insisted on the relevance of this document as evidence of the fulfilment of the 4th Year Investment obligations⁴³⁷ despite the fact that it had nothing to do with that matter, as it clearly emerged at the hearing. Magnar itself appears to concede this when stating in its letter to AVAS of 27 March 2009 that the document filed with the letter of 12 September 2008 "could be informal."⁴³⁸

375. Whether formal or informal, the fact is that these documents were sent to AVAS three months after the deadline of 21 June 2008 for the 4th Year Investment obligation and were not the certification required by Article 14.3 of the Privatization Contract. Nothing would have prevented Magnar to transmit to AVAS the kind of document provided by the contract had it regularly fulfilled the 4th Year Investment obligation. AVAS was therefore right in recording in the Internal Note of 6 February 2009 that no papers had been received regarding the 4th Investment Year.⁴³⁹

376. In the absence of any documents showing fulfilment of the investment obligation for the 4th Year, starting from 28 November 2008, AVAS' control team performed an inspection at Rodipet's offices. No documents were provided by Florin Lungaci during this control showing compliance of the 4th Year obligations and no documents were provided thereafter, despite Florin Lungaci's promise to present them by 5 December 2008.⁴⁴⁰

377. At that point in time the problem for AVAS was no longer one of delay but rather of failure to comply with the investment obligation regarding the 4th Year under Article 14.1 of the Privatization Contract. In a meeting of 17 March 2009, AVAS' Board of Directors decided to call the Pledge based on a note of 6 February 2009 by the Post-Privatization Monitoring and Legal Department of AVAS,⁴⁴¹ due to the lack of any proof of compliance with the Privatization Contract until that time. Florin Lungaci personally and Magnar had in the meantime been sanctioned to pay a fine for failure to fulfil the contractual provisions.

⁴³⁷ Tr. J. Merits, 29 October 2013, Day 2, p. 15, lines 23-25.

⁴³⁸ Letter from Magnar to AVAS dated 27 March 2009 (C- 19, p. 3).

⁴³⁹ AVAS Internal Note dated 6 February 2009 (C- 53), p. 52.

⁴⁴⁰ AVAS Control Note on performing verifications at Rodipet's office dated 15 December 2008 (R-225).

⁴⁴¹ AVAS Internal Note dated 6 February 2009 (C-53).

378. The decision to call the Pledge for failure to fulfil the investment commitment “due on 10.05.2008”, *i.e.* for the 4th Year, was notified to Magnar on 24 March 2009.⁴⁴² Magnar protested by two letters on 27 March 2009. One of such letters was accompanied by a certificate from Magnar’s auditors certifying compliance with the investment obligation for the 4th Year.⁴⁴³ Since during the December 2008 inspection at Rodipet’s office, no underlying accounting and banking documents had been provided despite the control’s team request, the certificate was considered not credible by AVAS.

379. Respondent had good reason to doubt the evidence of compliance of the 4th and 5th Year Investment obligations by the two certificates sent by Magnar on 24 April 2009, one dated 9 January 2009⁴⁴⁴ and the other 2 February 2009.⁴⁴⁵ As noted by AVAS’s Legal Department in an internal memo dated 7 May 2009, no evidence had been given that their signatory had been appointed and registered as auditor of Rodipet, as required by Article 14.3 of the Privatization Contract. Further, the internal memo noted the reference in the certificates to the fact that investments for the 4th and 5th Years would have been made already in 2006. AVAS had a “suspicion regarding the performance of the investments made” in the absence “of financial accounting documents attesting, with no doubt, the reality of performing the investments.”⁴⁴⁶

380. The Tribunal finds AVAS’ objections to the documents in question justified. Firstly, as shown by their dates, they were available since January-February 2009, more than one month before the decision by AVAS’ Board to enforce the Pledge and over two months before Magnar transmitted them to AVAS. Why they were provided only on 24 April 2009 remains unexplained in view of AVAS’ several warnings and requests for their production. Secondly, they were not certified by the duly appointed and registered auditor of Rodipet, a contractual requirement, not a formalistic one. Finally, if, as stated in those certificates, already in 2006 Magnar had fulfilled the 4th and 5th Year Investment obligations, why were they not provided

⁴⁴² Letter from AVAS to Magnar dated 24 March 2009 (C-18, p. 2).

⁴⁴³ One letter was addressed to AVAS’ Vice-President (C-19) and the other to AVAS’ Chairman (C-67, without enclosures; R-223, with enclosed certification for the 4th year by Contexpert Grup 4 SRL). The certificate issued by the external auditor Contexpert Grup 4 SRL regarding the 4th year investments obligation, indicated by Responded as attached to one of the 27 March 2009 letters and identified as Exhibit C-216 (Resp. C-Mem, ¶ 279 and n.505), does not mention that the 4th year obligation had already been fulfilled in 2006 (Resp. C-Mem., ¶ 279). However, this statement by Respondent has not been denied by Claimants. According to Respondent, the belated “certificates” produced by Magnar for the fourth investment year masked an accounting trick, no genuine investment having been made (Resp. Answers, ¶ 22).

⁴⁴⁴ Certificate dated 9 January 2009 (C-68).

⁴⁴⁵ Certificate dated 2 February 2009 (C-69).

⁴⁴⁶ Note of the AVAS’ General Legal Department dated 7 May 2009 (C-234, pp. 1-2).

by the deadline of 21 June 2008 (for the 4th Year) or following AVAS' requests and the on-site inspection of Rodipet during December 2008?

381. Contrary to Claimants' view,⁴⁴⁷ there is no requirement under the Privatization Contract to impose penalties as a condition to enforce the Pledge on the shares nor have Claimants pointed to any provisions of said Contract imposing such condition. In fact, the warnings given by Respondent and their duration were such that Respondent could have issued penalties before exercising the Pledge. The fact of having warned Claimants and waited without issuing any penalty before exercising the Pledge should not be held against Respondent. According to Article 15.4, "[if] the Buyer does not comply with its obligations under 14.1, in any stage of the investments, according to Appendix No. 6, the Seller shall be entitled to entirely execute the pledge on the shares...."

382. Claimants have contended that AVAS' actions in enforcing the Pledge "were not proportional to the minor infractions alleged."⁴⁴⁸ Respondent has noted in reply that the enforcement of the Pledge had not regard to the entire shareholding owned by Claimants in Rodipet but only to 51% of the share capital of Rodipet.⁴⁴⁹ The Tribunal remarks that proportionality must be considered not merely from an economic point of view but in light of all the circumstances of the case. As described above, contrary to Claimants' behaviour for the first three years of investment obligations, their overall conduct regarding the manner by which they refused initially and then awkwardly attempted to prove fulfilment of investment obligations for years 4 and 5 did not consist in "minor infractions." The serious uncertainties surrounding Magnar's fulfilment of such obligations justified AVAS' decision.

383. Having carefully reviewed the above correspondence, certifications, and AVAS' internal notes, the Tribunal concludes that the enforcement of the Pledge by AVAS was justified under the circumstances.

⁴⁴⁷ Cl. Answers, ¶ 64.

⁴⁴⁸ Cl. Mem., ¶ 467; see also ¶ 387; Cl. Rep., ¶ 514.

⁴⁴⁹ Resp. Answers, ¶ 61.

VII. CLAIMANTS' INVESTMENTS REGARDING CASA BUCUR

A. Summary of the Parties' Position

1. Claimants' Position

384. Claimants contend that in 1950, Respondent committed an injustice by depriving one of its citizens of Casa Bucur and in 2005 committed another injustice by taking Casa Bucur from Claimants without paying compensation.⁴⁵⁰ Claimants had invested heavily in Casa Bucur which they had purchased in 2002 through the vehicle of Alfa El Bucur, transforming it into a luxury boutique hotel and restaurant, extremely successful with the cost of works amounting, according to Gervase MacGregor, Claimants' expert, to RON 8.830.544.⁴⁵¹

385. Restitution of properties nationalized under communist governments is an extremely sore and emotional subject in Romania and a major political issue.⁴⁵² Claimants add that the laws in the field of restitution and the associated jurisprudence lack in consistency and make often the matter a major political issue in Romania.⁴⁵³ One of the Heirs, Luciana Mott, was a member of an organization "*representing the interests of Romanian abusively dispossessed owners*," which mutated into a political lobby pressuring the Romanian State to favour former owners.⁴⁵⁴

386. Respondent had nationalized Casa Bucur in 1950 according to Decree 92/1950 providing for the nationalisation of assets belonging to "class enemies," namely former industrialists and landowners or house exploiters. Some individuals were exempted, such as "intellectuals," the Heirs alleging the misapplication of the Decree since their father was an "intellectual."⁴⁵⁵

387. Following the re-privatization of State assets by Law 15/1990 and the possibility of selling or leasing these assets under GEO 88/1997, several sales contracts were entered into regarding Casa Bucur, including an irrevocable lease agreement between Alunis and Casa Bucur SRL on 31 March 1999 followed by three sales agreements, two between the same parties in August 1999 and October 2001 for the sale, respectively, of the Summer Kitchen and

⁴⁵⁰ Cl. Mem., ¶ 514.

⁴⁵¹ Cl. Rep., ¶ 673.

⁴⁵² Cl. Mem., ¶ 518.

⁴⁵³ Cl. Mem., ¶ 518.

⁴⁵⁴ Cl. Mem., ¶ 519 (italics in the text).

⁴⁵⁵ Cl. Mem., ¶¶ 539-540.

the Restaurant Building, and one on 21 February 2002 between Casa Bucur SRL and Alfa El Bucur for the sale of the entire Casa Bucur.

388. These contracts were concluded in good faith based on Respondent's review of the Heirs' claims, the Romanian courts having rejected their appeal against validation of the land title. Given the unstable legal framework created by restitution claims and special restitution legislation, warranties were given by Respondent to the buyers of commercial companies in case of restitution to former owners.⁴⁵⁶

389. The transformation of the Casa Bucur Estate from a former socialist organization, IAPL Alunis, an entity controlled by the Bucharest Municipality of the Ministry of Domestic Commerce, into the property of a new commercial company, Alunis S.A., was based on Article 20 of Law 15/1990. The State organ created to manage the privatization process, which later became AVAS, stated on various occasions, including the privatization offer to Claimants answered via Mona Lisa Trading, that ownership of Casa Bucur had been transferred to Alunis S.A.⁴⁵⁷

390. Based on the provision of GEO 88/1997, Alunis and Restaurant Bucur SRL, to which a lease had been granted until 1999, sought on 31 March 1999 to transform the lease into a real estate leasing agreement with an irrevocable sale option.⁴⁵⁸ Before such transformation, the Heirs had filed a law suit against the Bucharest Municipality, seeking the restitution of the Casa Bucur Estate and had summoned the majority shareholder of Alunis S.A., F.P.S., to stop the privatization of Alunis or the transfer of the Estate.⁴⁵⁹

391. Despite that, F.P.S. decided to continue the privatization process, explaining to the Parliament that the transformation into a real estate leasing agreement, the leasing contract with Casa Bucur SRL, and the sale of the shares held by it at Alunis S.A. complied with the legal provisions in force.⁴⁶⁰ Accordingly, its stock of shares in Alunis (87%) was put up for public tender by F.P.S. in early 2000. The Heirs addressed an "opposition" to the auction of F.P.S. shares in Alunis on 28 March 2000. Despite that, the auction took place on April 2000 and the tender was won by Mona Lisa Trading Co. SRL. The bidders were simply informed that "there

⁴⁵⁶ Cl. Mem., ¶ 543.

⁴⁵⁷ Cl. Mem., ¶¶ 551-554.

⁴⁵⁸ Cl. Mem., ¶¶ 556-558.

⁴⁵⁹ Cl. Mem., ¶ 559.

⁴⁶⁰ Cl. Mem., ¶ 560.

is a litigation for the revendication of the estate BUCUR RESTAURANT between SC ALUNIS and Mrs IOANA MOTT.”⁴⁶¹

392. By Law 99/1999, foreign investors were guaranteed compensation should a property be returned to former owners as a result of a successful restitution claim in Romanian courts, for an amount equal to the prejudice caused by the in-kind restitution. Claimants relied on such guarantee when deciding to buy the shares of Alunis S.A.⁴⁶²

393. On 15 November 2005, the Romanian Supreme Court ruled that the Casa Bucur Estate should be returned to the Heirs. The Decision came as a surprise to Claimants since until then both the Romanian Government and the courts had systematically rejected the Heirs’ claims, holding that the 1950 nationalization under Decree 92/1950 was rightful. The Decision amounted to expropriation in breach of the BIT, considering also that Claimants’ compensation requests had been rejected by Respondent.⁴⁶³ The Decision breached also fair and equitable treatment, amounting to a denial of justice, and Claimants’ legitimate expectations because they had invested in Casa Bucur Estate in reliance on Respondent’s representations.⁴⁶⁴

394. The Decision amounted to denial of justice because it was in violation of international minimum standard, which includes the proper administration of justice, a “manifestly erroneous decision.”⁴⁶⁵ The Supreme Court’s Decision committed manifest, obvious, and inexcusable misapplications of Romanian law by performing a retroactive constitutional review of Decree 92/1950 which was not allowed under the 1948 Constitution, to then hold that the Decree was inapplicable to the Heirs’ father.⁴⁶⁶ Contrary to Respondent’s view, misapplication of a domestic law that is grossly and inexcusably mistaken amounts to denial of justice. The Supreme Court misinterpreted and misapplied Decree 92/1950.⁴⁶⁷

395. The breach of the principle of non-retroactivity affecting the foreign investors’ rights amounts to a breach of fair and equitable treatment, as held by ICSID tribunals. No power could be granted by a subsequent law, Law 213/1998, for a constitutional review of Decree 92/1950 that was not permitted by the 1948 Constitution.⁴⁶⁸ Claimants mention that the

⁴⁶¹ Cl. Mem., ¶ 562.

⁴⁶² Cl. Mem., ¶¶ 566-568.

⁴⁶³ Cl. Mem., ¶¶ 588-592.

⁴⁶⁴ Cl. Mem., ¶ 600.

⁴⁶⁵ Cl. Rep., ¶¶ 690-697.

⁴⁶⁶ Cl. Mem., ¶¶ 601-619; Cl. Rep., ¶ 683, 687 (referring to “substantive denial of justice”).

⁴⁶⁷ Cl. Rep., ¶¶ 739-740.

⁴⁶⁸ Cl. Mem., ¶¶ 620-625; Cl. Rep., ¶¶ 705-709.

Supreme Court apparently endorsed the Heirs' argument that Decree 92/1950 was unconstitutional because it breached the 1948 Constitution and the U.N. Declaration of Human Rights of 1948 but, if so, the interpretation of the 1948 Constitution was an anachronism while the U.N. Declaration is neither binding nor does it codify any existing rule of international law.⁴⁶⁹

396. In its attempt to justify the retroactivity of the judicial review under Law 213/1998, Respondent refers to pressure by the ECtHR to "allow remedies for victims of property nationalization," citing *Brumareesen v. Romania* to wrongly assert that it held that Romania was in breach of the ECHR since excluding revision of the legality of Decree 92/1950 was equated to excluding the right of access to a tribunal under its Article 6(1).⁴⁷⁰ This is misstating the decision, which made no finding regarding the need to provide a judicial review of Decree 92/1950 to deprive owner of confiscated property.⁴⁷¹

397. The Supreme Court's misinterpretation of Decree 92/1950 is manifestly wrong and proves that it was biased when holding that the nationalization did not comply with Article 1 and 2 of the Decree since the claimed property was not acquired for obtaining revenues not being a production means, and the Heirs' father was not a property developer or a landlord being rather a "professional intellectual," as it results from his work book, the number of apartments owned by him being not referred to by the law.⁴⁷² The evidence produced by the Heirs, that the Supreme Court did not bother to review, showed on the contrary that their father collected rent from leasing his properties between 1941 and 1945 and did not live only from his professional income.⁴⁷³ To be exempted from the application of Decree 92/1950 the professional intellectual must show to have acquired the property through work or labour. This was made explicit by Decree 524/1955.⁴⁷⁴ The refusal to obey the law shows the Supreme Court's arbitrariness and total disregard of the rule of law, a denial of justice under international law.⁴⁷⁵

⁴⁶⁹ Cl. Mem., ¶¶ 629-637; Cl. Rep., ¶ 710, noting the Constitutional Court's holding that "a law can be appreciated only by the Constitutional regime under which it was adopted, including the possibility to control its constitutionality" (emphasis in the text).

⁴⁷⁰ Cl. Rep., ¶ 723.

⁴⁷¹ Cl. Rep., ¶ 724.

⁴⁷² Resp. C-Mem., ¶¶ 642-647.

⁴⁷³ Resp. C-Mem., ¶¶ 648-651.

⁴⁷⁴ Cl. Rep., ¶ 746.

⁴⁷⁵ Cl. Rep., ¶ 742, 751-755.

398. Further, the Supreme Court simply disregarded Article 20 of Law 15/1990 when reasoning that Alunis should have proven an ownership title over Casa Bucur prior to such law. This contradicts other decisions of the Supreme Court. In addition, the Supreme Court acted in an outrageous manner when assessing the probative value of the evidence proffered by the parties by disregarding numerous documents proving transfer of ownership in 1969 to IAPL Central and relying on reports produced by the Heirs without offering the defendants the opportunity to produce counter-expertise.⁴⁷⁶

399. Further, copying word by word the Heirs' submission the Court held that the real estate agreement was "*absolutely null and void*" finding, contrary to the facts, that it had not been authorised by the F.P.S. and that it did not fulfil the condition of the buyer investing 10% of the value of the estate based on an "extra judicial report" commissioned by the Heirs to support their criminal complaints against Alunis' officers in 2002.⁴⁷⁷

400. Contrary to lower courts' findings that, based on the evidence, Casa Bucur entered the patrimony of Alunis, the Supreme Court refuted such factual findings and, based on expert reports, adopted the Heirs' position refuting the effects of Law 15/1990 as neither the land nor the building had been registered in the patrimony of Alunis.⁴⁷⁸

401. The fact that Alunis and Casa Bucur SRL knew that there was an Heirs' claim was not enough to prove that they orchestrated a plan to overcome a mandatory prohibition to sell the Casa Bucur Estate. To deduce a fraudulent intention and to defeat the presumption of good faith, the Heirs had the burden to prove that Alunis and Casa Bucur SRL knew that they were the rightful owners and that the real estate leasing agreement was concluded to avoid restituting the Casa Bucur Estate.⁴⁷⁹ There was no legal obligation at the time the sale contract was concluded to refrain from transferring property subject to a Law 10/2001 restitution claim, such prohibition having been made only in September 2005 by Law No. 247/2005.⁴⁸⁰

402. Regarding the Supreme Court's reasoning concerning historical monuments, its bias in the Heirs' favour is manifest when considering that if, as it held, the Restaurant never ceased to be an historical monument it could not have ordered Alfa El Bucur to leave it to the Heirs in

⁴⁷⁶ Cl. Mem., ¶¶ 652-659.

⁴⁷⁷ Resp. C-Mem., ¶¶ 660-668 (italics in the text).

⁴⁷⁸ Cl. Rep., ¶¶ 757-773.

⁴⁷⁹ Cl. Mem., ¶¶ 669-690.

⁴⁸⁰ Cl. Mem., ¶¶ 685-686.

full property and possession since according to Law 63/1974 historical monuments belong to the State. Both Casa Bucur SRL and Alfa El Bucur in parallel proceedings emphasized that they were neither notified about the classification of the Estate as a historical monument nor were they aware of such status, the latter being disputed at the time.⁴⁸¹

403. The invalidation of the sale contracts based on the alleged breach of the State's pre-emption right given the status of a historical monument of Casa Bucur was manifestly erroneous and arbitrary. Concerning the contract between Alunis and Casa Bucur SRL, the status of historical monument of Casa Bucur had been contested when the Supreme Court made its decision, the historical status being published only in 2004.⁴⁸² The Supreme Court's decision was even for Respondent's expert incomprehensible by its application of Article 10 of Law 112/1995 since the prohibition to sell had been lifted by GEO 228/2000.⁴⁸³ Concerning the other contracts, where the key issue was whether the status of historical monument was still valid, the Supreme Court, without giving any reason, stated that "*the fact that the change of its destination took place in legal conditions*" was irrelevant for establishing whether the State's pre-emption right had been respected.⁴⁸⁴

404. The November 2005 Decision amounted to expropriation without compensation and breached Claimants' guarantee under Law 241/1998 concerning incentives for foreign investments relied upon by them and under law 57/1993 providing for more favourable future legislation to be applicable.⁴⁸⁵ The Supreme Court, instead, failed to apply the most favourable legislation of Law 5/2000 which had lifted the prohibition upon the sale of historical monuments under Law 112/1995.

405. Claimants decided to buy and invest in the Casa Bucur Estate based on the apparent ownership as a recognised general principle requiring that the purchaser was in good faith considering also that when Claimants invested in Casa Bucur the former owner was barred from claiming restitution under Decree 218/1960.

406. At the time of their acquisition of Casa Bucur, Claimants knew that there were ongoing claims by the Heirs but this does not mean that decades of legislation and assurances and not

⁴⁸¹ Cl. Mem., ¶¶ 696-697.

⁴⁸² Cl. Rep., ¶¶ 786-801.

⁴⁸³ Cl. Rep., ¶¶ 779-785.

⁴⁸⁴ Cl. Rep., ¶ 787.

⁴⁸⁵ Cl. Mem., ¶¶ 709-724.

less than 11 Romanian court decisions could alter the honest belief that the acquisition was valid.⁴⁸⁶ Claimants' legitimate expectations when they invested in Casa Bucur were protected by the doctrine of apparent ownership which was disregarded by the Supreme Court Decision in breach of the Treaty.⁴⁸⁷ The subsequent decision of 6 March 2006 rejecting the request to review the judgment was in breach of Article II(6) of the BIT for failure to accord an effective remedy.⁴⁸⁸

407. Claimants are entitled to compensation, as held by the ECHR in similar cases. F.P.S. was obliged to compensate Alunis for the prejudice caused by the restitution, an obligation guaranteed by the State under Law 99/1999.⁴⁸⁹ The right to compensation of companies "privatised or under privatisation" passed to Alfa El Bucur when it purchased the Casa Bucur Estate, as successor of Alunis.⁴⁹⁰

408. Respondent contends that the only person entitled to compensation would have been Alunis since under Article 43(1) of Law 99/1999, as consistently interpreted by the courts, compensation can be granted only to privatized trading company and not to the buyer of the shares.⁴⁹¹ Contrary to this view, Law 99/1999 contained specific guarantees for foreign investments, thereby entering into the realm of public international law and giving rise to an obligation to compensate Claimants for their loss of Casa Bucur. The purpose of the law was to accelerate the privatization process by attracting foreign investment to promote the privatisation of commercial companies. The international obligation to which Law 99/1999 has given rise is protected by Article II 2(c) of the BIT.⁴⁹²

409. Alfa El Bucur sought compensation from the Heirs. Having had no success, it requested compensation directly from Respondent pursuant to the guarantee under Law 99/1999. However, Respondent's courts annulled the proceeding for failure to pay court fees of around USD 111.190 in one case and USD 145.000 in another, despite exemption of court fees provided by Law 10/2001.⁴⁹³

⁴⁸⁶ Cl. Mem., ¶¶ 729-731.

⁴⁸⁷ Cl. Mem., ¶ 737.

⁴⁸⁸ Cl. Mem., ¶ 739.

⁴⁸⁹ Cl. Mem., ¶¶ 742-746.

⁴⁹⁰ Cl. Mem., ¶¶ 748-756.

⁴⁹¹ Resp. C-Mem., ¶¶ 387-388.

⁴⁹² Cl. Rep., ¶¶ 828-844.

⁴⁹³ Cl. Mem., ¶¶ 760-767; Cl. Rep., ¶¶ 853-897.

410. Respondent is also in breach of Article II(2)(a) of the BIT providing for full protection and security which, in Claimants' view and as held by other tribunals, extends beyond physical security.⁴⁹⁴ This standard was violated since Respondent destroyed Claimants' investments in Romania, both regarding Rodipet and Casa Bucur.⁴⁹⁵

2. Respondent's position

411. It is Respondent's view that at the heart of Claimants' claims regarding Casa Soare is the Supreme Court's decision of November 2005 that they never held ownership rights over Casa Soare and their ensuing failure to obtain relief in relation to such decision.⁴⁹⁶

412. Respondent describes initially the background of the complex problems of property restitution in Romania and the legal uncertainties created by an ever-evolving national and international framework regarding restitution of nationalized property in Romania, underlying the widespread legal risk of foreign investors as to property ownership.⁴⁹⁷ An important driving force in the relevant legal regime was Romania's 1994 ratification of the ECHR bringing under international scrutiny Romania's legislative and judicial response to the property restitution problem. Law 213/1998 was passed clarifying that courts had jurisdiction to hear claims for restitution of property nationalized by the State and to determine whether the State had acquired title in accordance with the then in force Constitution.⁴⁹⁸

413. Respondent then analyses the long history of the attempted transfer of ownership of Casa Soare while court litigation was pending upon initiative first of Dimitru Soare and then of his Heirs ("the Soares") to establish ownership of the same property.⁴⁹⁹ It is during the pendency of this litigation that the company Street Corner, which managed Casa Soare under a lease agreement of December 1990 with Alunis, became part of the Awdi Group in February 2002. Also, Alunis became later part of the same group.⁵⁰⁰

414. Respondent further emphasises the additional difficulty posed to the restitution problem regarding Casa Soare by legislation protecting national monuments. Casa Soare was publicly known to be a national monument, a fact that could hardly pass unnoticed and that determined

⁴⁹⁴ Cl. Mem., ¶¶ 773-782.

⁴⁹⁵ Cl. Mem., ¶ 784.

⁴⁹⁶ Resp. C-Mem., ¶ 316.

⁴⁹⁷ Resp. C-Mem., ¶¶ 318-330.

⁴⁹⁸ Resp. Rej., ¶¶ 281-282.

⁴⁹⁹ Resp. C-Mem., ¶¶ 336-341.

⁵⁰⁰ Resp. C-Mem., ¶ 338.

the applicable legal regime in Romania. According to Law 442/2001 on the protection of historical monuments, any sale of Casa Soare as a historical monument occurring after the coming into force of Law 442/2001 in July 2001 would have been subject to the Ministry of Culture's pre-emptive rights under sanction of nullity of the sale. This provision would have applied to the purported acquisition of Casa Soare in October 2001.

415. According to Respondent, despite pending legislation concerning ownership of Casa Soare, Alunis and Street Corner took the risk of signing an agreement on 31 March 1999 for the sale of the property over Casa Soare for ROL 2.4 billion (EUR 144.184 or USD 154.839), fully aware of the reasonable likelihood that the Romanian courts would confirm the Soare's ownership of Casa Bucur. An annex to the agreement warned Street Corner of this risk.⁵⁰¹ The sale referred to in the March 1999 agreement was effected in October 2001.⁵⁰²

416. Before the attempted sale was completed, Mona Lisa acquired 87% of the share capital of Alunis, for half the price at which they had been offered at the auction, presumably for the legal risk regarding the restitution of Casa Soare.⁵⁰³ The tender documents were clear in indicating that "Alunis does not have lands" while regarding the buildings owned by Alunis there is no mention of Casa Soare in the list of properties, the bidders being referred to the status of Casa Soare, as being subject to "a litigation for revendication" between Alunis and the Soares.⁵⁰⁴ This explains, in Respondent's view, why the price paid for Alunis' shares was only USD 155.907 (ROL 2.924.050.000) despite Alunis owning other valuable assets.⁵⁰⁵

417. After Mona Lisa's acquisition of 87% of Alunis, steps were taken by the Awdi Group to strengthen their position by

- purporting to acquire Casa Soare via the irrevocable sale clause between Street Corner and Alunis on 3 October 2001, for USD 138.694 (ROL 4.251.104.794 and EUR 147.532);
- incorporating a new company, Alfa El Romania, on 29 October 2001;
- causing EBC to acquire Street Corner on 17 October 2001; and

⁵⁰¹ Resp. C-Mem., ¶ 343; Resp. Rej., ¶ 297.

⁵⁰² Resp. C-Mem., ¶ 344.

⁵⁰³ Resp. C-Mem., ¶ 345.

⁵⁰⁴ Resp. C-Mem., ¶¶ 347-348; Resp. Rej., ¶ 299.

⁵⁰⁵ Resp. C-Mem., ¶¶ 347-350.

- purporting to transfer Casa Soare from Street Corner to Alfa El Romania on 21 February 2002 for USD 500.000 (ROL 16.150.000.000 or EUR 554.800), payment of which is unproven. In all such transactions not only no proof of valid ownership over Casa Soare was provided,⁵⁰⁶ but Street Corner expressly declared in the context of the agreement of October 2001 that it was aware of the legal and *de facto* situation of the property and accepted the risk.⁵⁰⁷

418. Contrary to Claimants' mention that since 1992 courts had dismissed the Soare's claims 11 times, all decisions of lower and higher courts had been quashed in appeal. Shortly before the first attempts to transfer ownership over Casa Soare in October 2001 – February 2002, two separate appeals by the Soares had been successful on 19 April 2001, the Supreme Court taking issue with lower courts' failure to properly administer evidence. These facts were known to everyone asserting rights regarding Casa Soare.⁵⁰⁸

419. According to Respondent, Claimants make a plethora of serious allegations against the November 2005 Decision of the Supreme Court, which even if right under Romanian law, which they are not, cannot prompt the Tribunal to revise the substantive findings of Romanian courts, as shown by the key legal conclusions of the Supreme Court regarding ownership of Casa Soare.

420. The thrust of the retrial of the Soares' claims as from 2001 concerned the illegality of the 1950 nationalization under the law applicable at the time. Already the Bucharest Court of Appeal had confirmed on 26 June 2003 that the taking of the property based on Decree 92/1950 contravened the 1948 Constitution and was in violation of the international regulations guaranteeing ownership rights, ordering compensation to the Soares for the 1950 taking but erring, according to the Supreme Court, since restitution should instead have been ordered.⁵⁰⁹

421. The November 2005 Decision found that the 1950 nationalisation did not result in a valid title, holding that the State never lawfully owned Casa Soare, thus confirming the Court of Appeal's holding that the taking was unlawful.

⁵⁰⁶ Resp. C-Mem., ¶¶ 352-354.

⁵⁰⁷ Resp. Rej., ¶ 303.

⁵⁰⁸ Resp. Rej., ¶¶ 293-294, 356-359.

⁵⁰⁹ Resp. C-Mem., ¶¶ 364-367; Resp. Rej., ¶ 307.

422. Additional reasons were given by the Supreme Court for the November 2005 decision. Firstly, there was no evidence that Casa Soare had been transferred to Alunis when the latter was transformed into a private company, Casa Soare having been never listed among Alunis' assets. Secondly, the sale contract between Alunis and Street Corner, and the contracts between the latter and Alfa El Romania were void for failure to respect the mandatory pre-emption right of the Ministry of Culture.⁵¹⁰ Further, the Supreme Court ruled that Decree 92/1950 was inapplicable to the owner of Casa Soare, Dimitru Soare, because he was a "professional intellectual" within the meaning of the exception of Article 2.⁵¹¹

423. Two remedies were available to Alfa El Romania against the November 2005 decision: a request of revision, which did not succeed for failure to state reasons, and an appeal for annulment, which was filed on 2 November 2006 but rejected since the material mistakes that were alleged do not warrant annulment. Claimants have not attempted to seek compensation for the harm allegedly suffered according to Article 52(3) of the Romanian Constitution providing for patrimonial liability of the State for prejudice caused by judicial errors. This provision does not remove liability from judges and prosecutors for having exercised their office in bad faith or with serious negligence.⁵¹²

424. Claimants' requests to the Soares for unjust enrichment under Law 10/2001 and civil law were rejected, the first since this cause of action is available only to tenants affected by restitution and the second for refusal to pay court fees. Claimants' claim of compensation against the State failed because no right of compensation is available under Law 99/1999 or GEO 88/1997, as amended, both relied upon by Claimants, to investors acquiring shares in privatised companies or to companies acquiring properties from such companies, such as Claimants, Mona Lisa, Street Corner, or Alfa El Romania, as consistently held in Romania case law.⁵¹³

425. The only one entitled to request compensation from the Soares could have been Alunis but the latter never requested compensation nor did Street Corner and Alfa El Romania seek damages from Alunis.⁵¹⁴ Claims filed sequentially by Alfa El Romania against AVAS, the Ministry of Culture and Religious Affairs and the Ministry of Finance under Law 99/1999 were

⁵¹⁰ Resp. C-Mem. ¶¶ 371-372; Resp. Rej., ¶ 308.

⁵¹¹ Resp. Rej., ¶ 318-324.

⁵¹² Resp. C-Mem., ¶¶ 378-380.

⁵¹³ Resp. C-Mem., ¶¶ 384-387.

⁵¹⁴ Resp. C-Mem., ¶ 388; Resp. Rej., ¶¶ 328-335.

dismissed for failure to pay court fees.⁵¹⁵ Claimants' argument that Law 10/2001 providing for exemption from court fees was discriminatory as it favoured Romanian nationals over foreign investors,⁵¹⁶ fails to consider that Alfa El Romania, the party filing the claim, is a Romanian national.⁵¹⁷ In sum, Claimants cannot allege that Respondent denied them effective remedies under Romanian law.⁵¹⁸

B. The Tribunal's Analysis

426. The Tribunal agrees that at the heart of Claimants' claims regarding Casa Bucur is the Decision of the Romanian Supreme Court of 15 November 2005 ruling that Claimants never held ownership rights over that estate. According to Claimants, the taking of the Casa Bucur property on 20 March 2008 as a result of the Decision is "a text book example of an expropriation" in breach of the BIT, considering that all compensation requests had been rejected by Respondent.⁵¹⁹ In addition, the Supreme Court's Decision breached the fair and equitable treatment standard guarantees by the BIT since it amounted to a flagrant denial of justice by systematically departing from principles of justice recognised by international minimum standards by "manifest, obvious and inexcusable misapplication of Romanian law."⁵²⁰ The Supreme Court's Decision breached at the same time Claimants' legitimate expectations to have legally invested in Casa Bucur based on representations made by Respondent.⁵²¹

427. Respondent concedes that the legal regime was complex, that it underwent multiple changes and inconsistent court decisions throughout the years, more recently under pressure for a change induced by Romania's accession, in June 1994, to the ECHR to ensure that its legal system would allow adequate protection to victims of property nationalisation.⁵²² This brought about a change in the legal regime. While under the previous regulation tenants were allowed to purchase the buildings they lived in and rightful owners were entitled to compensation,⁵²³ Law 10/2001 provided as a rule for restitution in kind of land properties with

⁵¹⁵ Resp. C-Mem., ¶ 389; Resp. Rej., ¶ 327.

⁵¹⁶ Cl. Rep., ¶¶ 853-871.

⁵¹⁷ Resp. Rej., ¶ 588.

⁵¹⁸ Resp. C-Mem., ¶ 392.

⁵¹⁹ Cl. Mem., ¶ 590.

⁵²⁰ Cl. Mem., ¶¶ 603-604.

⁵²¹ CL. Mem., ¶ 600.

⁵²² The ECtHR judgment of 28 October 1999 in *Brumarescu v. Romania* held Romania liable for breach of Article 6 (1) of the ECHR insofar as it deprived owners of unlawfully confiscated property of final judicial relief.

⁵²³ Baias' Opinion, ¶¶ 51-55; Mihai's Opinion, ¶ 623.

or without construction.⁵²⁴ Respondent notes that “this state of constant change prevailed in Romania long before Claimants’ attempted acquisition of rights over Casa Soare.”⁵²⁵ The Tribunal considers this point central to the proper adjudication of Claimants’ claims and shall address it to the necessary extent.

428. In a country profile regarding Romania, a 2001 United Nations report summarises the situation as follows:

*A major problem, however, is to identify the landowner – or, more precisely, to identify him with **any degree of certainty: about 70% of all titles issued since 1990 are being contested in court.** Titles issued up to 1999 do not contain information on precise location and tax payments. Cadastre registering is incomplete, since there is no legal obligation to register land transfers and 50 years ago private land was transferred to the public domain and most of the registers lost. Therefore **new claims to a piece of land cannot be ruled out, and buying land involves risks.***

429. The status of Casa Bucur as an historical monument was an additional problem. This status had been publicly known for a long time due to its inclusion in the List of historical monuments starting from 1955, confirmed in 1992 and 2000.⁵²⁶ By the time of Claimants’ acquisition of Casa Bucur in October 2001, a law in force since 2001, Law 442/2001, provided for the right of pre-emption of the Romanian State in case of sale of historical monuments in the propriety of individuals or legal persons of private law, under sanction of absolute nullity of the sale.⁵²⁷ Claimants’ allegation of being unaware of the status of Casa Bucur⁵²⁸ does not withstand the presumption of knowledge of such status through public records.

430. As mentioned by Respondent and not disputed by Claimants,⁵²⁹ since October 1991, Dimitru Soare, who had inherited Casa Bucur from his father, asserted ownership over the same. Following his death, his two children (the “Soares” or the “Heirs”) continued to assert

⁵²⁴ Mihai’s Opinion, ¶ 725.

⁵²⁵ Resp. C-Mem., ¶ 325. Respondent constantly refers to Casa Soare as the property was initially denominated.

⁵²⁶ Resp. C-Mem., ¶ 331.

⁵²⁷ Resp. C-Mem., ¶ 332.

⁵²⁸ Cl. Mem., ¶ 701.

⁵²⁹ Claimants admit to have been “aware of the Heirs’ restitution claim” when Alfa El Bucur agreed on 21 February 2002 to conclude the sale contract with Casa Bucur SRL “on its own risk” (Cl. Mem., ¶ 691).

and judicially pursue recognition of ownership over Casa Bucur for the following 14 years until the Supreme Court's Decision of November 2005 established their right of ownership.⁵³⁰

431. Respondent adds that the publicity of all relevant legislation and case law, including case law of the ECtHR, regarding the property restitution problem and the wide national debate on the subject could not have escaped the attention of an investor in real estate.⁵³¹

432. When Street Corner executed a lease with Alunis in March 1999 with an irrevocable sale clause for Casa Bucur, it signed a declaration that it concluded the agreement "knowing that it is subject to dispute and accepting the risks deriving therefrom."⁵³² Having later acquired both Alunis and Street Corner, the Awdi Group became aware of the risk inherent to the transfer of property of Casa Bucur.

433. When Mona Lisa acquired at the auction 87% stake of Alunis, it was specifically warned of the risk associated with Casa Bucur, in addition to the fact that in the list of Alunis' properties Casa Bucur was classified as "an immovable good claimed by others," the risk being reflected by the lower price paid with respect to the price Alunis had previously agreed to sell Casa Bucur to Street Corner.⁵³³

434. When Alunis (then controlled by the Awdi Group) and Street Corner (also controlled by the Awdi Group) concluded the Sale and Purchase Agreement in October 2001, the new regime favouring restitution in kind by Law 10/2001 was in force. Street Corner expressly declared that it was "aware of the legal and de facto situation of the real estate property as being the one shown by the seller, at its own risk," and both parties received "the 4th district court of law and... the Notary Public of the investigation of the transcription and inscription registries."⁵³⁴

435. As early as June 2001, the Land Book recorded that the title to the property was disputed. As mentioned by Respondent this was before Street Corner acquired Casa Soare from Alunis on 5 October 2001, EBC acquired Street Corner on 17 October 2001 and Alfa El Romania acquired Casa Soare from Street Corner on 5 February 2002.⁵³⁵ It is clear to the

⁵³⁰ Resp. C-Mem., ¶¶ 336-341.

⁵³¹ Resp. C-Mem., ¶ 330.

⁵³² Resp. Rej., ¶ 297.

⁵³³ Resp. C-Mem., ¶¶ 347-349; Resp. Rej., ¶¶ 299-300.

⁵³⁴ Resp. Rej., ¶ 303 with reference to the text of the two Sales and Purchase Agreements, one of the Restaurant dated 5 October 2001 (C-252) and the other for Casa Soare Estate dated 21 February 2002 (C-249).

⁵³⁵ Resp. Rej., ¶ 305 and nn.607.

Tribunal that given the relatively low price to be paid with respect to the value of Casa Bucur, the Awdi Group felt worthwhile running the risk of losing the property. This risk materialised with the Supreme Court's Decision of November 2005.

436. It is not the Tribunal's task to review the content of the Supreme Court's Decision, except to the extent it may be clearly established that, as contended by Claimants, it violated international minimum standard in so many respects as to result in a denial of justice, in breach of the fair and equitable treatment guaranteed to the investor under Article II(2)(a) of the BIT. The Tribunal has carefully reviewed the Parties' arguments and the legal opinions filed in support of their respective positions. It has concluded that no charge of denial of justice may be raised against the November 2005 Decision of the Supreme Court, the latter having made application of the legal regime then in force favouring restitution in kind to rightful owners.

437. It is beyond doubt that the ownership of Casa Bucur had been disputed since October 1991, when Dimitru Soare first raised claims in that regard. This explains why Street Corner, Alunis, Mona Lisa, and Alfa El Romania had all signed declarations accepting the ensuing risk when concluding the various transactions related to Casa Bucur. It should have come therefore as no surprise to the Awdi Group to learn from the Supreme Court's Decision that the State, and accordingly Alunis, had never been the lawful owner of Casa Bucur, the true owner being the Heirs.

438. The status of Casa Bucur as a historical monument was known through the public records and should not have escaped the Awdi Group's attention as a careful investor, together with the related mandatory pre-emptive right of the Ministry of Culture in case of transfer of its ownership. In view of the legal sanction of the nullity of any transfer of ownership of Casa Bucur in breach of the pre-emptive right in question, it should likewise have come as no surprise to the Awdi Group to learn from the Supreme Court's Decision that the sale of Casa Bucur between Alunis and Street Corner in October 2001 was void for failure to respect the State's mandatory pre-emptive right.

439. When the Awdi Group acquired both Alunis and Street Corner and the latter triggered the irrevocable sales clause in the lease agreement with Alunis, thereby acquiring Casa Soare,⁵³⁶ they had knowledge of the legal risk of restitution. That the risk accepted by Claimants had regard to the restitution of the property to the Heirs is recognised by

⁵³⁶ *Supra*, ¶ 432.

Respondent.⁵³⁷ The risk clearly did not concern the payment of the price by Street Corner for acquiring Casa Soare from Alunis based on the lease contract dated 31 March 1999 when Alunis was still the State's property.⁵³⁸

440. In the Tribunal's view, Claimants had a legitimate expectation that had the risk in question materialised, they should be returned the price agreed for the purchase of Casa Soare. Fair and equitable treatment guaranteed by the BIT to Claimants' investment in Casa Soare demands that the amount of the price paid, equal to EUR 147.532,⁵³⁹ be reimbursed to them.

441. Except for the reimbursement of the price paid for acquiring Casa Soare, as provided above, no further compensation is due to Claimants under this head of claim.

442. In particular, no compensation is due for works done on the property. Aware of the risk of restitution and the impending decision of the Supreme Court in that regard, Claimants should have refrained from investing in Casa Bucur for its renovation.⁵⁴⁰

VIII. DAMAGES

A. Summary of the Parties' Position

1. Claimants' Position

443. Claimants submitted two different expert reports in support of their claims. The first was prepared by Andrew Flower and Greig Taylor of FTI (the "FTI report") and submitted with the Memorial. The FTI report makes calculations for Claimants' principal claim (Rodipet, Rodipet Courier, Supremo Media, and Balbec), alternative claim (the concession and the amounts invested), additional claim (properties lost), and Casa Bucur. The second expert report was prepared by Gervase MacGregor of BDO LLP (the "MacGregor report") and submitted with the Counter-Memorial. The MacGregor report makes calculations for Claimants' principal claim (Rodipet and Rodipet Courier together, Supremo Media, and Balbec), alternative claim (the concession and the amounts invested), and Casa Bucur only. In

⁵³⁷ Resp. Rej., ¶ 306: "The risk posed by the Soare's claim for **restitution** ultimately materialized in the Supreme Court's November 2005 Decision" (emphasis added). *See also*, ¶ 298: "The Awdi group later acquired both Alunis and Street Corner and therefore must have been aware that Street Corner had assumed the risk of **restitution** of Casa Soare to its former owners..." (emphasis added).

⁵³⁸ Resp. Rej., ¶ 300.

⁵³⁹ Resp. C-Mem., ¶ 352(a).

⁵⁴⁰ *Infra*, ¶ 517.

addition to the heads of claims found in these two expert reports, Claimants request moral damages and interest.

444. Claimants submit two alternative dates, which are also reflected in the calculations made by both expert reports. The first date is 6 September 2008, when the Concession was declared unconstitutional by the revocation of Law 442, and the second date is 30 June 2009, when AVAS enforced the Pledge it held over 51% of the shares of Rodipet.⁵⁴¹

445. For the heads of claims for which both expert reports make calculations, they reach different results for reasons explained in the MacGregor report.⁵⁴² The table below provides a summary.

		6 September 2008		30 June 2009	
Heads of claims		FTI report	MacGregor report	FTI report	MacGregor report
Principal claim	Rodipet	223	105.597	216.272	97.021
	Rodipet Courier	3	Included in Rodipet	3	Included in Rodipet
	Supremo Media	77	56.318	77	49.622
	Balbec	1.6 – 4.7	1.484	1.6 – 4.7	1.604
Alternative claim	Concession	79 – 80	16.029.814	79 – 80	13.531.258
	Invested amounts	21.9	4.9	21.9	4.9
Additional claim	Properties	23.9	-	23.9	-
	Moral damages	<i>5% of awarded damages, no less than EUR 10 million</i>		<i>5% of awarded damages, no less than EUR 10 million</i>	
Casa Bucur	Casa Bucur (March 2008)	3.5	11.044	3.5	11.044
	Interest-compounded yearly	12%-13%, alternatively 3-mo Euribor + 4.25%			

Note: all amounts are in millions of euros.

⁵⁴¹ Cl. Rep., ¶¶ 575, 577.

⁵⁴² MacGregor report, ¶¶ 2.4-2.5.

a. *Principal claim*

(i) Rodipet and Rodipet Courier

446. Claimants argue that Respondent expropriated Rodipet on the day that the Concession was revoked on 6 September 2008. According to Claimants, “this Concession was the oxygen of Rodipet and the Claimants based their entire business model on the idea that the company would benefit from a 49 year rent-free concession....”⁵⁴³ Claimants also argue that if the Tribunal were to disagree that Rodipet was expropriated when the Concession was revoked, the enforcement of the Pledge over 51% of Rodipet shares on 30 June 2009 was a “pure direct expropriation of the Claimants’ investment in Rodipet.”⁵⁴⁴

447. Regarding Rodipet Courier, Claimants submit that the company was responsible for the delivery of press and FMCGs to the kiosks and Balbec shops. Rodipet Courier relied on Rodipet for its cash flow and administration and on Supremo Media to rent a car fleet for the conduct of its operations. The expropriation of Rodipet and the slanderous media campaign organized against Claimants led to the downfall of Rodipet Courier.

448. The FTI report values Rodipet at **EUR 223 million** as of 6 September 2008 and at **EUR 216 million** as of 30 June 2009. It values Rodipet Courier separately at **EUR 3 million**.⁵⁴⁵

449. The MacGregor report values Rodipet and Rodipet Courier as a block because “Rodipet Courier was merely a department of Rodipet turned into a company in charge of the distribution of the press and FMCG goods by means of a fleet it rented to [*sic*] Supremo.”⁵⁴⁶ Based on the MacGregor report, the value of Rodipet and Rodipet Courier is at **EUR 105.597.000** as of 6 September 2008 and at **EUR 97.021.000** as of 30 June 2009.⁵⁴⁷ These values are confirmed in Claimants’ PHB.⁵⁴⁸

⁵⁴³ Cl. Rep., ¶ 591.

⁵⁴⁴ Cl. Rep., ¶ 592.

⁵⁴⁵ FTI report, ¶¶ 2.3-2.4.

⁵⁴⁶ Cl. Rep., ¶ 595.

⁵⁴⁷ MacGregor report, ¶ 2.1

⁵⁴⁸ CPHB, ¶ 13.

(ii) Supremo Media

450. Supremo Media rented advertising panels on the Rodipet kiosks. It relied on Rodipet's office space and personnel to carry out its business activity.⁵⁴⁹ "Therefore, Supremo could simply not operate its business once Rodipet was expropriated."⁵⁵⁰

451. The FTI report values Supremo Media at **EUR 77 million** as of 15 October 2012, whereas the MacGregor report values it at **EUR 56.318.000** as of September 2008 and at **EUR 49.622.000** as of 30 June 2009.⁵⁵¹ The values assigned by the MacGregor report are confirmed in Claimants' PHB.⁵⁵²

(iii) Balbec Retail

452. Claimants contend that they had invested in a series of shops throughout the country totalling 12 by mid-2009. The shops were built on the convenience store model. They were larger than kiosks and offered a wider range of goods and services. Rodipet was Balbec Retail's main supplier of press-related products and FMCGs. Balbec Retail also relied on Rodipet Courier to deliver its products.⁵⁵³

453. The FTI report values Balbec between **EUR 1.6** and **4.7 million** as of 6 September 2008 and 30 June 2009. The MacGregor report values Balbec at **EUR 1.484.000** as of September 2008 and at **EUR 1.604.000** as of 30 June 2009.⁵⁵⁴ However, in their PHB, Claimants point out that there were errors in Gervase MacGregor's calculations, and the value of Balbec ought to have been **EUR 350.871** as of 6 September 2008 and **EUR 324.934** as of 30 June 2009.⁵⁵⁵

b. Alternative claim

454. In their Reply, Claimants make claims relating to the Concession and amounts invested in Rodipet that they did not make in their Memorial. Claimants characterize these claims as "purely alternative claims that are presented for the sake of comprehensiveness and information of the Tribunal."⁵⁵⁶

⁵⁴⁹ Cl. Mem., ¶¶ 835-36.

⁵⁵⁰ Cl. Rep., ¶ 596.

⁵⁵¹ Cl. Mem., ¶ 837; Cl. Rep. ¶ 598; FTI report, ¶ 2.8; MacGregor report, ¶¶ 2.1-2.7.

⁵⁵² CPHB, ¶ 13.

⁵⁵³ Cl. Mem., ¶¶ 832-33.

⁵⁵⁴ Cl. Mem., ¶ 834; Cl. Rep. ¶ 598; FTI report, ¶ 2.7; MacGregor report, ¶ 2.10.

⁵⁵⁵ CPHB, ¶ 13 and nn.49.

⁵⁵⁶ Cl. Rep., ¶ 603.

(i) The Concession

455. Claimants assert that “the revocation of Law 442 on 6 September 2008 amounted in an expropriation of [their] Concession.”⁵⁵⁷ The FTI report considered the Concession as rent-free and assigned to it a value between EUR 79 and 80 million.⁵⁵⁸ The MacGregor report calculated the FMV of the Concession as of 6 September 2008 at **EUR 84.188.274** as a rent-free and at **EUR 66.081.094** as not rent-free.⁵⁵⁹

(ii) Invested amounts

456. Claimants also assert that they made substantial investments in Rodipet. The FTI report identified these investments as amounting to **EUR 21.9 million**, and the MacGregor report as **EUR 16.029.814** as of 6 September 2008 and **EUR 13.531.258** as of 30 June 2009.⁵⁶⁰ Claimants’ PHB provides the updated amount of **EUR 18.000.115**, indicating that “the payments and investments made by the Claimants and the other companies of the Group must be taken into account when assessing the amounts invested as, ultimately, these companies were controlled by Hassan Awdi.”⁵⁶¹ Claimants add that this amount represents payments and investments that can be formally documented on bank statements available to Claimants.⁵⁶²

c. *Additional claim*

(i) Lost properties

457. According to Claimants, Rodipet owned commercial properties as well as residential properties. The commercial properties were used in Rodipet’s activities and taken into account in the DCF valuation of the company. The residential properties, which Claimants assert were lost “as a direct result of Romania’s expropriatory measures,” were not taken into account in the DCF valuation.⁵⁶³ These properties, Claimants continue, must be compensated for under the principle of full compensation to wipe out all the consequences of the wrongful act.⁵⁶⁴

458. The residential properties in question were owned by Project Four, Orion SRL, and Project One.⁵⁶⁵ They fall in two categories: (1) properties that served as guarantees for Banc

⁵⁵⁷ Cl. Rep., ¶ 600.

⁵⁵⁸ FTI report, ¶ 2.10.

⁵⁵⁹ Cl. Rep., ¶ 601; MacGregor report, ¶ 11.32, 11.38.

⁵⁶⁰ Cl. Rep., ¶ 602; FTI report, ¶ 2.11; MacGregor report, ¶ 2.13.

⁵⁶¹ CPHB, ¶ 15.

⁵⁶² CPHB, ¶ 16.

⁵⁶³ Cl. Mem., ¶¶ 841-42.

⁵⁶⁴ Cl. Rep., ¶ 605.

⁵⁶⁵ Cl. Mem., ¶ 844.

Post loans and that were subsequently seized and sold when the loans defaulted, and (2) properties that were lost when the alleged expropriation took place.⁵⁶⁶

459. The alleged value of the properties used as loan guarantees is **EUR 21.500.000**. The remaining properties are valued at **EUR 1.987.000**.⁵⁶⁷

(ii) Moral damages

460. Claimants contend that they are entitled to moral damages. Claimants argue that reparation must be “full,” under the Chorzow Factory standard, and that the “formulation of Article 31 [of the ILC’s Draft Articles on State Responsibility] is clearly intended as inclusive, covering moral and material damage in broad terms.”⁵⁶⁸ Claimants cite *Desert Lines v. Yemen*⁵⁶⁹ for the proposition that the recovery of moral damages besides economic damages is generally accepted. They also cite *Benvenuti v. Congo*⁵⁷⁰ and *Lemire v. Ukraine*⁵⁷¹ to argue that moral damages may be recovered for “an injury inflicted resulting in mental suffering, loss of social position or injury to his credit or his reputation.”⁵⁷²

461. According to Claimants, moral damages are fact-driven and depend on the circumstances of a case. In this case, Claimants suffered moral damages in three ways: (1) Hasan Awdi, his family, and Claimants’ executives suffered the stress and anxiety of being harassed, arrested, and held in Romania unlawfully, (2) Claimants suffered prolonged unlawful penal claims, and (3) Claimants suffered injury to their credit and reputation and lost their prestige.⁵⁷³

462. Claimants seek moral damages in an amount corresponding to **5% of awarded damages** and, in any event, no less than **EUR 10 million**.⁵⁷⁴

⁵⁶⁶ Cl. Rep., ¶ 605.

⁵⁶⁷ Cl. Mem., ¶ 845; Cl. Rep., ¶¶ 607, 609-610; FTI report, ¶ 2.14.

⁵⁶⁸ Cl. Mem., ¶¶ 851-52.

⁵⁶⁹ *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 289 (CLA-276).

⁵⁷⁰ *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, ¶ 4.95 (CPM-81).

⁵⁷¹ *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶¶ 310 *et seq* (RLA-81).

⁵⁷² Cl. Mem., ¶ 849.

⁵⁷³ Cl. Mem., ¶¶ 857-59.

⁵⁷⁴ Cl. Mem., ¶ 863; Cl. Rep., ¶ 614.

d. *Casa Bucur*

(i) Denial of effective remedies

463. As an alternative to their claims for denial of justice and breach of legitimate expectations, Claimants contend that they are entitled to be compensated for the entire value of the Casa Bucur estate under (1) International Law and (2) Romanian Law.

464. According to Claimants, international tribunals have recognized that “event if a *bona fides* buyer of an estate did not acquire ownership due to some particularities of the applicable domestic legislation, it shall be compensated for the price he paid and the improvements he made.”⁵⁷⁵ Claimants cite various decisions issued by the European Court of Human Rights as examples in support of its position. For Claimants, the Romanian Supreme Court breached this standard in its November 2005 judgment by failing to decide Aluniş and Alfa El Bucur’s counter-claim for compensation in case of restitution.⁵⁷⁶

465. Claimants argue that they have a right to be compensated under Article 32⁴ of Law 99/1999, which provides:

(1) The public institutions involved ensure the compensation for the prejudices caused to the companies, privatized or under privatization, by the restitution to the former owners of the immovable assets taken over by the State.

(2) The public institutions involved will pay to the companies mentioned under par. (1) a compensation representing the equivalent in money of the prejudice caused by the restitution in kind of the real estates owned by the company to the former owners by effect of a definitive and irrevocable Court decision.

(3) The compensation under par. (2) shall be mutually agreed with the companies and, in case of divergence, shall be settled in Court.

[...]

(4) The State guarantees the completion by the public institutions involved of the compulsions stipulated by this article.

⁵⁷⁵ Cl. Mem., ¶ 743.

⁵⁷⁶ Cl. Mem., ¶ 746.

466. Claimants argue that “[i]n enacting Law 99/1999, the State actively represented to foreign investors that investments in Romania were safe; any risk was eliminated...” The doctrine of legitimate expectations has developed various markers to guide tribunal, among them are two pre-requisites: the host state made certain representations, and the investor was reasonable to have relied on them. Claimants’ expectation that they would receive compensation on the basis of this law was legitimate because (1) they had control over Aluniș at the time of their investment, and (2) Law 99/1999 created a right which attached to the land and such right passed from Casa Bucur to Alfa El Bucur when it purchased the estate.

467. Developing further the last two points, Claimants indicate that they sought compensation as “successors of Aluniș.” According to Claimants, they ensured that they were in a position of control over Casa Bucur throughout the transactions surrounding the ownership of the estate. Mona Lisa, which had purchased Aluniș, is owned by Claimants. EBC, which had acquired Casa Bucur SRL, is also owned by Claimants. Alfa El Bucur, which in the end directly acquired Casa Bucur, is also owned by Claimants.

468. Claimants further argue that while under Law 99/1999 the newly privatised companies would have received any compensation, this law in fact created a right to compensation for the loss of real estate, which right is inextricably linked to the real estate itself and would pass with the real estate in case of transfer of ownership. Claimants contend that this legal doctrine is adopted by civil law countries, including Romania where it is found both in the 1864 Civil Code and the new 2011 Civil Code which provides “the buyer acquires ownership of all rights and claims of accessories that belonged to the seller.” Claimants also argue that “accessories” refer to tangible and intangible rights attached to the transferred object; “[t]herefore, the right for compensation that was created by Law 99/1999, as well as the State guarantee securing such right, would have remained with the companies “privatised or under privatisation” for as long as they owned the relevant real estates, but would have passed with such real estates in the event that these companies sold them on to subsequent purchasers.”

469. Claimants pursued claims against the Soare family. After the Supreme Court’s November 2005 decision was issued, Claimants filed three cases seeking retention of the estate until the payment of compensation. Claimants sought compensation on the basis of Law 10/2001 (which was used by the Supreme Court) for improvements made to the estate. As well, Claimants filed an unjust enrichment claim based on the Civil Code. Both claims were rejected by the Bucharest District Court which found that Alfa El Bucur lacked standing. On

this basis, Claimants dropped their case under Law 10/2001 and pursued only the unjust enrichment claims. However, Claimants indicate that those claims were annulled based on findings that Claimants should have paid court fees and judicial stamps. Finally, Claimants attempted an action of retention right as well as an order of suspension of the eviction, to avoid being evicted from the estate until payment of compensation, but the courts refused to hear the case due to Claimants' failure to pay the required fees.

470. Claimants also pursued claims against Respondent. These claims were unsuccessful for failure to pay court fees. According to Claimants, “[i]n the present case, the expensive fees demanded by the Respondent’s courts effectively amounted to a discriminatory prevention of access to justice and thus breached not only international customary law but also Article II of the Treaty which promised to afford investments fair and equitable treatment, as well as full protection and security and treatment equivalent to that required by international law.” Romania also breached the umbrella clause under Article II(2)(c) of the BIT providing that “Each party shall observe any obligation it may have entered into with regard to investments,” “any obligation” including general undertakings contained in legislation or regulations, such as Law 99/1999.⁵⁷³

471. Claimants initiated a derivative action directly against Respondent based on the following theories: 1) the invalidity of the original title was due to Respondent’s nationalization of Casa Bucur by Decree 92/1950; 2) although Respondent classified Casa Bucur as a historical monument, it then failed to take a series of follow-up action to implement that classification, thereby creating the representation that the estate was not a historical monument; 3) AVAS was directly involved in the lease agreement concluded between Alunis and SC Casa Bucur SRL. These claims failed for non-payment of court fees.⁵⁷⁴

472. Alfa El Bucur sought reimbursement of the price paid for Casa Bucur against the seller Street Corner, former SC Casa Bucur SRL based on Articles 1336 and 1337 of the 1864 Romanian Civil Code. The proceedings were suspended by Respondent’s court for an alleged failure to cooperate with a court-appointed expert.⁵⁷⁵ According to Claimants, “[i]n the present case, the expensive fees demanded by the Respondent’s courts effectively amounted to a discriminatory prevention of access to justice and thus breached not only international

⁵⁷³ Cl. Mem., ¶ 758.

⁵⁷⁴ Cl. Mem., ¶ 761.

⁵⁷⁵ Cl. Mem., ¶ 762.

customary law but also Articles. II of the Treaty which promised to afford investments fair and equitable treatment as well as full protection and security and treatment equivalent to that required by international law.” Claimants cite *Loewen v. United States* for the proposition that where a foreign investor presents enough evidence that prohibitively high court fees affected its right to access to justice and effective remedies, tribunals will find in favour of the foreign investor.⁵⁷⁶

473. According to Claimants, Respondent blocked the Alfa El Bucur’s attempt to claim compensation for its investments in the Casa Bucur estate by supporting criminal allegations levelled by the Heirs. The allegations consist of the following. One, the Heirs contested the legality of the investment, arguing that Alfa El Bucur failed to obtain mandatory authorizations from the Ministry of Culture for works performed on Casa Bucur, in contravention of the legislation on historical monuments. Two, the Heirs filed complaints before several government institutions accusing Alfa El Bucur of defrauding the Romanian Government by stealing and destroying a historical monument. On the basis of these accusations, the Ministry of Culture requested the prosecution of Alfa El Bucur. Three, the Heirs filed a criminal complaint against Hasan Awdi and his associates.⁵⁷⁷ The Bucharest Prosecutor dismissed all charges on 21 June 2010.⁵⁷⁸

474. In their Reply, Claimants contend that in its Decision No. 9227/2005, the Supreme Court explicitly noted the existence of a counter-claim.⁵⁷⁹ However, the Supreme Court failed to address it, leaving the issue undecided.⁵⁷⁹ Claimants explain that “given the Supreme Court’s failure to exercise its statutory judicial function, the Claimants were forced to seek compensation by commencing new proceedings. The following developments are, therefore, made on a subsidiary basis and *ex abundante cautela*.”⁵⁸⁰ These developments consist in the claims discussed above which Alfa El Romania pursued against the Heirs, the Respondent, and the seller of Casa Bucur. Claimants indicate that they “did absolutely everything they could have reasonably done to seek compensation for the loss of the Casa Bucur Estate through domestic law. Yet every single one of the Claimants’ endeavours, every single step they took towards seeking compensation, was simply shot down by the Respondent. Barriers were

⁵⁷⁶ Cl. Mem., ¶ 766, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶¶ 212, 214 (CLA-87).

⁵⁷⁷ Cl. Mem., ¶¶ 769-770.

⁵⁷⁸ Cl. Mem., ¶ 772.

⁵⁷⁹ Cl. Rep., ¶ 845.

⁵⁷⁹ Cl. Rep., ¶ 847.

⁵⁸⁰ Cl. Rep., ¶ 848

erected, court actions dismissed on spurious grounds, and treatment dealt that was so discriminatory it was utterly unfair.”⁵⁸¹

(ii) Request for compensation

475. According to Claimants, “Alfa El Corporation . . . lost its investment in Casa Bucur as a consequence of the Respondent’s breaches of the BIT.”⁵⁸² Both expert reports submitted by Claimants present a valuation of Casa Bucur, taking into account the purchase price and investments made in the estate, as well as alternative valuations. However, Gervase MacGregor states regarding the FTI report, “Mr Grantham does not appear to conclude on an appropriate value of Casa Bucur. However, his report does refer to the purchase price and subsequent investments made to the estate and the alternative valuations set out in the FTI Report.”⁵⁸³

(1) Purchase price and investments made by Claimants

476. Regarding the purchase price, the FTI report considers it to be USD 500.000 including VAT (EUR 466.179 / ROL 16.150.000), based on the Contract for Sale Purchase between Casa Bucur SRL and SC Alfa El Romania SRL of February 21, 2002.⁵⁸⁴ The MacGregor report does not offer its own figure on the purchase price of Casa Bucur. Rather, it looks at the three transactions surrounding the ultimate transfer of Casa Bucur to Claimants: first, Mona Lisa Trading Co SRL’s acquisition of SC Alunis for EUR 146.203 (RON 2.924.000); second, Casa Bucur SRL’s purchase of the restaurant from Mona Lisa Trading for RON 425.110; and, third, Alfa El Romania SRL’s purchase of the Restaurant and Summer Kitchen from Casa Bucur SRL for USD 500.000 (EUR 554.800).⁵⁸⁵

477. Regarding investments made in the Casa Bucur estate, the FTI report indicates that between 2002 and 2005, Alfa El Bucur invested EUR 2.879.472 (RON 10.508.348) including VAT in hotel improvements related to interior and exterior, hotel restaurant, furnishing, and information technology. The FTI report bases these figures on an invoice issued by the contractor who performed the works, Euro Hotels & Suites SRL, and addressed to Yourhotels

⁵⁸¹ Cl. Rep., ¶ 850.

⁵⁸² Cl. Rep., ¶ 898.

⁵⁸³ MacGregor report, ¶ 10.4

⁵⁸⁴ The FTI report also notes a price of RON 1.357.142,86 listed in a memorandum addressed by a law office to the Ministry of Public Finance, ¶ 11.5.

⁵⁸⁵ For a description of the three transactions see *supra*, ¶¶ 119-121.

dated March 2, 2005. The MacGregor report does not, here again, offer its own figure on the investments that Claimants made in Casa Bucur. Rather, it discusses the FTI report's comments that it is unable to rely on a single invoice as the practice of presenting one invoice at the end of works is unusual. Next, the MacGregor report relies on a figure found in a valuation report of Dr. Engineer Tache Parvulescu dated 1 August 2005. The figure is RON 8.830.544. This figure corresponds to the figure presented by the FTI report based on the invoice to Yourhotels.

(2) Alternative valuations

478. Regarding alternative valuations, Claimants look at the value of Casa Bucur at or around March 2008 when the property was taken from Claimants. The FTI report presents three different figures in this regard: EUR 4.5 million, EUR 6.95 million, and EUR 12 million. The figure of EUR 4.5 million is listed in a press article reporting that John Mott (related to the Heirs) had offered the estate for sale and that the City Hall of Bucharest had the right of first refusal. The figure of EUR 6.95 million represents the sale price at which the property was listed on 23 October 2008, about six months after it was taken from Claimants.⁵⁸⁶ EUR 12 million is the figure obtained on 31 August 2012 when Claimants had instructed S.C. DGV Finance Consulting S.R.L. ("DGC") to perform a valuation of the estate for the purposes of this dispute.⁵⁸⁷

479. The FTI report questions the reliability of the EUR 4.5 million, noting that the figure likely understates the value of the estate because the article, which substantially pre-dates the Supreme Court decision, was written at a time when ownership of the property was still unresolved.⁵⁸⁸ The FTI report also questions the reliability of the EUR 6.95 million because it was listed purely as an advertisement and it is not clear whether a transaction had actually taken place. The MacGregor report agrees with the FTI report on these points.⁵⁸⁹

480. As alternative valuations, the MacGregor report offers three figures: the DGC figure of EUR 12 million (also referred to in the FTI report), EUR 11.3 million, which comes from a valuation performed by Constanta Marcu, and 10.78 million, which comes from a valuation

⁵⁸⁶ FTI report, ¶ 11.15.

⁵⁸⁷ FTI report, ¶ 11.16.

⁵⁸⁸ FTI report, ¶ 11.14.

⁵⁸⁹ MacGregor report, ¶ 10.8.

performed by Daniel Fendu.⁵⁹⁰ The MacGregor report concludes by expressing confidence in the reliability of the valuations by Constanta Marcu and Daniel Fendu. Thus, taking the midpoint between the two valuations, the MacGregor report presents the figure of **EUR 11.044.000** as the value of Casa Bucur as of March 2008.⁵⁹¹

481. In their PHB, Claimants clarify that in addition to the acquisition cost of **USD 500.000**, they are claiming **EUR 10 million** which correspond to (1) works performed on the estate between 2002 and November 2005, and (2) the loss of profit on the hotel and restaurant.⁵⁹²

482. Citing *Wena Hotels v. Egypt*,⁵⁹³ *Vivendi v. Argentina*,⁵⁹⁴ and *Azurix v. Argentina*⁵⁹⁵ in support, Claimants argue that “[i]nternational tribunals rely on all the expenditures relating to the investment . . . to determine the market value of the investment to be compensated. As such, the acquisition and sunk costs mentioned above could, most certainly, be used as a ‘proxy.’”⁵⁹⁶ Claimants add that the actual investment approach would, however, lead to under-compensation under Article III of the BIT and the Chorzow factory principle. Therefore, the actual investment should be the floor, and the Tribunal should also take into account lost profits which are estimated to be **EUR 11 million / 10.780.000** in 12 years.⁵⁹⁷

e. Interest

483. Claimants request an award of interest. They submit that “[i]nterest is an essential component of *full* compensation under customary international law. More specifically, ‘interest at a commercially reasonable rate from the date of expropriation’ is envisaged in Article III(1) of the US-Romania BIT.”⁵⁹⁸

484. Claimants request that the rate of interest be **12%-13%**, based on the WACC in the MacGregor report. Claimants argue that “[u]sing the WACC rate is appropriate as it compensates Claimants for the lost opportunity to re-invest the funds of which they have been

⁵⁹⁰ Unlike the FTI report, the MacGregor report provides a copy of the DGV report, MacGregor report, ¶ 10.9.

⁵⁹¹ *Id.*; MacGregor report, ¶ 2.11.

⁵⁹² CPHB, ¶ 102.

⁵⁹³ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, ¶ 125 (RLA-124).

⁵⁹⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case. No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.3.12-8.3.13 (CLA-43).

⁵⁹⁵ *Azurix Corp. v. Argentine Republic*, ICSID Case. No. ARB/01/12, Award, 14 July 2006, ¶¶ 426-29 (CPM-77).

⁵⁹⁶ CPHB, ¶ 106 (internal citation omitted).

⁵⁹⁷ CPHB, ¶¶ 107-108.

⁵⁹⁸ Cl. Mem., ¶ 805 (internal citation omitted).

deprived as a consequence of the breaches of the Treaty.”⁵⁹⁹ Claimants also argue that use of the WACC has been recognized by leading academic commentators and investment treaty tribunals such as the ones that decided *Vivendi v. Argentina*, *Alpha v. Ukraine*, and *Funnekotter v. Zimbabwe*.⁶⁰⁰ As an alternative to the WACC, Claimants suggest that the Tribunal apply the rate of **3-month Euribor + 4.25%**, which was the interest rate on the loans granted by Bancpost to Rodipet.⁶⁰¹

485. Claimants further request that the interest rate be compounded annually, based on the annual calculation of the WACC, “from the date of valuation until the effective date of payment of the award to be issued.”⁶⁰² Citing *Azurix v. Argentina*⁶⁰³ and *Pey Casado v. Chile*,⁶⁰⁴ Claimants contend that the compounding of interest is “standard practice” and “Tribunals have frequently considered that compound interest best gives effect to the rule of full reparation.”⁶⁰⁵

2. Respondent’s Position

486. Respondent condemns the fact that Claimants instructed a different expert for their Reply than they did at first for their Memorial, as well as the fact that the two expert reports produced reach different results based on their respective calculations. According to Respondent, this should be the basis for disregarding the FTI report in these proceedings.⁶⁰⁶

487. Respondent’s position is that Rodipet and all the other companies in the Rodipet Group had minimal, if any, value.⁶⁰⁷ However, Claimants point out that “Respondent’s quantum expert did not provide any alternative valuation to help the Tribunal assess the amount of damages to be awarded to the Claimants should a violation of the Treaty be found.”⁶⁰⁸

⁵⁹⁹ Cl. Mem., ¶ 809.

⁶⁰⁰ Cl. Mem., ¶ 810; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 9.2.8 (CLA-265); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶¶ 514, 518 (CLA-145); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, ¶¶ 143-146 (CLA-266).

⁶⁰¹ Cl. Rep., ¶ 618.

⁶⁰² Cl. Mem. ¶ 813; Cl. Rep., ¶ 620.

⁶⁰³ *Azurix v. Argentina*, ¶ 440.

⁶⁰⁴ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶¶ 709, 712 (CLA-268).

⁶⁰⁵ Cl. Mem., ¶ 813.

⁶⁰⁷ Resp. C-Mem., ¶¶ 652, 656, 658, 659; Grantham report (I), ¶¶ 5.7.12, 7.3.15, 8.3.10, 9.3.12.

⁶⁰⁸ CPHB, ¶ 2.

a. *Principal claim*

(i) Rodipet and Rodipet Courier

488. With respect to Claimants' clustering of Rodipet and Rodipet Courier, Respondent contends that "it is difficult to see how two companies not owned by the same parties can be valued on a 'group' basis, as they could not be sold as such."⁶⁰⁹

489. Respondent notes that the enforcement of the Pledge which made AVAS the owner of 51% of the shares of Rodipet has not prevented Claimants from presenting a calculation of the entire value of Rodipet.⁶¹⁰

490. Regarding Claimants' valuation of Rodipet, Respondent submits that Rodipet has historically been loss making. It only made a profit in 2008 due to non-recurring income which, as such, should be discounted. Once this income is discounted, Rodipet actually made a loss of RON 25 million in 2008. Respondent also submits that the DCF method cannot appropriately be used in this instance, but assuming it could be, the FTI report overvalues Rodipet by EUR 40.7 million because it erroneously adds depreciation to earnings when it should have subtracted it.⁶¹¹ Respondent argues that the MacGregor report undermines the FTI report but it still itself carries the major flaw of erroneously assuming that Rodipet still owned the rights to conduct its core business on the date of the alleged expropriation.⁶¹² In addition, the MacGregor report's forecast of the expansion of the kiosk network and discount rate are unrealistic.⁶¹³

491. Regarding Claimants' alternative valuation of Rodipet, Respondent submits that it is "equally flawed, being based on companies that are not comparable to Rodipet and ignoring the indicative offer made in September 2007 for a stake in Rodipet."⁶¹⁴

492. Specifically with respect to Rodipet Courier, Respondent argues that Rodipet's business was contracted to Rodipet Courier contrary to the terms of the Privatization Agreement and,

⁶⁰⁹ Resp. Rej., ¶ 617.

⁶¹⁰ Resp. C-Mem., ¶ 649; Resp. Rej., ¶ 613.

⁶¹¹ Resp. C-Mem., ¶ 651.

⁶¹² Resp. Rej., ¶ 618.

⁶¹³ Resp. Rej., ¶ 619.

⁶¹⁴ Resp. C-Mem., ¶ 651.

essentially, Claimants are now requesting compensation for their breach of the Privatization Agreement.⁶¹⁵

(ii) Supremo Media

493. Respondent argues that Supremo was stripping Rodipet of its assets before being placed in insolvency. And now “Supremo is requesting compensation for the State allegedly taking away its right to improperly exploit Rodipet.”⁶¹⁶ Respondent further argues that there is nothing that should have prevented Supremo from continuing its business activities with Rodipet and other companies even after the change in Rodipet’s ownership structure. According to Respondent, Claimants have failed to prove that Supremo was expropriated as they have also failed to prove that they even own Supremo.⁶¹⁷

(iii) Balbec Retail

494. Respondent argues the following regarding the business relation between Balbec Retail and Rodipet: if it were based on a mutually beneficial arrangement, it should not be impacted by the change of ownership of Rodipet; if it were based on Balbec’s exploitation of Rodipet, Claimants should not be compensated for their actions; if Balbec had a legitimate convenience store business, the loss of that business should not be blamed on Rodipet or the State.⁶¹⁸

b. Alternative claim

(i) The Concession

495. Respondent accepts that the Concession “can be considered as a separate and alternative claim if the Tribunal takes the view that only the concession, and not Rodipet, were expropriated.”⁶¹⁹ Respondent calls the FTI report’s calculation of the value of the Concession “entirely fictitious” because “there was no ‘rent free element’ to the concession.”⁶²⁰ According to Respondent, Claimants cannot base their claim by projecting the rent that they would save because Claimants did not pay any rent, Rodipet did.⁶²¹

496. Respondent adds that “to the extent that Rodipet is valued (and claimed for) as a going concern, no separate claim can be made for a single asset, which is included in the valuation of

⁶¹⁵ Resp. C-Mem., ¶ 657.

⁶¹⁶ Resp. C-Mem., ¶ 655.

⁶¹⁷ Resp. Rej., ¶ 623.

⁶¹⁸ Resp. C-Mem., ¶ 659.

⁶¹⁹ Resp. Rej., ¶ 625.

⁶²⁰ Resp. C-Mem., ¶ 661.

⁶²¹ Resp. Rej., ¶ 626.

the entire business.”⁶²² Further, “the alleged ‘concession’ could not be legally transferred, it would have no market value as an asset.”⁶²³ Respondent points out that the MacGregor report accepts that the concession has no value as an asset since it cannot be sold.⁶²⁴ The part of the MacGregor report that Respondent refers to is provided in full below:

I agree with Mr Grantham that the Concession cannot be sold or transferred and therefore has no value without Rodipet. [...]

The difference between me and Mr Grantham (and between FTI and Mr Grantham) is essentially this: Mr Grantham believes that the Concession has no value. I think that the Concession does have value. Even if it can only be used by one entity, it has value to that entity and any company investing in that entity. Furthermore, Mr Grantham appears to accept that its value may have been equal to the rent saved.⁶²⁵

497. Respondent notes that Claimants ignore the fact that the value of Law 442 on Rodipet was calculated by Rodipet itself as **RON 1.3 million (USD 444.353 or EUR 365.176)** as of 18 August 2005.⁶²⁶

498. Respondent submits its own calculation of “the expected savings for Rodipet (not the Claimants or anyone else) assuming that Law 442 on Rodipet continued in place, and Rodipet had concessions under it for all its kiosks.” The figure at which Andrew Grantham arrives is **RON 153.468** (about **USD 51.000** or **EUR 36.300**) as of 30 June 2009. According to Respondent, the proportion of **RON 153.468** that can be attributed to Magnar’s shareholding in Rodipet is the “absolute maximum amount” that Claimants could claim as compensation.⁶²⁷

(ii) Invested amounts

499. Respondent addresses the head of claim “invested amounts” neither in its Counter-Memorial nor in its Rejoinder.

⁶²² Resp. C-Mem., ¶ 661.

⁶²³ Resp. C-Mem., ¶ 662.

⁶²⁴ Resp. Rej., ¶ 626.

⁶²⁵ MacGregor report, ¶¶ 11.15-11.16.

⁶²⁶ Resp. Rej., ¶ 628.

⁶²⁷ Resp. Rej., ¶¶ 629-630.

c. *Additional claim*

(i) Lost properties

500. Respondent points out that the residential properties and other properties being claimed for by Claimants are identified as being owned by third parties (Orion, Project Four, and Project One SRL); as such, “[i]t is unclear on what legal basis the Claimants are claiming compensation for losses allegedly suffered by such third parties; none is asserted in the Memorial.”⁶²⁸ Respondent also points out that “Claimants have failed to demonstrate how the loss of these properties by other companies was caused by the change in Rodipet ownership.”⁶²⁹ As far as the forcible sale of some of the properties at nominal value, Respondent notes that Claimants’ evidence shows that there was only one sale of property which was caused by Rodipet’s failure to meet its obligations such as paying taxes and certain employee benefits.⁶³⁰

(ii) Moral damages

501. According to Respondent, the standard for awarding moral damages in investment arbitration is strict. It requires the existence of “exceptional” circumstances and fulfilment of the three cumulative conditions enumerated in *Lemire v. Ukraine*, as follows:

[1] the State’s actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;

[2] the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and

[3] both cause and effect are grave or substantial.⁶³¹

502. Respondent argues that Claimants’ claim for moral damages must fail because Claimants’ circumstances are not “exceptional” and Claimants’ allegations have already been dismissed during the Provisional Measures phase.⁶³² Respondent counters Claimants’ request

⁶²⁸ Resp. C-Mem., ¶ 665.

⁶²⁹ Resp. C-Mem., ¶ 666.

⁶³⁰ Resp. C-Mem., ¶ 667.

⁶³¹ Resp. C-Mem., ¶ 670; *Lemire v. Ukraine*, ¶ 333.

⁶³² Resp. C-Mem., ¶ 672.

that the Tribunal reconsider its ruling in PO No. 1 by arguing that there is no reason to change the ruling since no new arguments have been presented on the issue.⁶³³

503. According to Respondent, *Desert Line v. Yemen* is the only investment arbitration case that has led to an award of moral damages because of the truly exceptional circumstances in that case. Still, that moral damages award was only USD 1 million. Thus, Claimants' request for 5% of awarded damages or no less than EUR 10 million is "preposterous."⁶³⁴

d. Casa Bucur

504. Respondent raises a four-point objection to Claimants' request for compensation for Casa Bucur. First, because Alfa El Romania acquired Casa Bucur from Street Corner, its claim for compensation for the price paid for, and improvements made to, Casa Bucur should be presented to Street Corner.⁶³⁵ Second, Respondent questions the validity of Claimants' method of valuing Casa Bucur, which consists of simply taking the average of two other reports whose independence and reliability Respondent also questions, especially when the authors of these reports were not available to Respondent for cross-examination at the hearing.⁶³⁶ Third, Respondent argues that Claimants' valuation did not take into account the fact that Alfa El Romania had assigned rights to Casa Bucur for 10 years and was receiving in return USD 650 per month, for a total of USD 78,000 for the entire period. Thus, any buyer would have been paid significantly less for the property under those conditions.⁶³⁷ Fourth, Respondent claims that "Claimants have not based their case on Casa Soare as an 'investment' but rather on the shares in the various companies including Alfa El Romania and Street Corner...."⁶³⁸

505. In addition, Respondent addresses the different requests for compensation pursued by Claimants under Laws 10/2001 and 99/1999 and against the Heirs, Romanian State and its various entities.

506. With regard to the claims against the Heirs, the Claimants' first claim of unjust enrichment under Law 10/2001 and the civil code failed because the cause of action was available to tenants affected by restitution, not those with apparent ownership. The second claim of unjust enrichment failed due to unpaid court fees. The Claimants' request for a

⁶³³ Resp. Rej., ¶ 639.

⁶³⁴ Resp. C-Mem., ¶ 676.

⁶³⁵ Resp. C-Mem., ¶ 668.

⁶³⁶ Resp. Rej., ¶¶ 632-33.

⁶³⁷ Resp. Rej., ¶ 634.

⁶³⁸ Resp. Rej., ¶ 635.

declaration of a right of retention failed also due to unpaid court fees. The Claimants' request for interim relief failed because Alfa El Romania did not substantiate the urgency of their request.⁶³⁹

507. According to Respondent, Claimants did not qualify for direct compensation under Law 99/1999 which for them represented "an all-encompassing insurance policy for legal risk in Romania."⁶⁴⁰ Respondent states that Article 32⁴ does not exist in Law 99/1999. Respondent further states:

[i]f reference is being made to Article 43(1) and (2) of Title I of Law 99/1999 (or Article 32⁴ (1) and (2) of Government Emergency Ordinance 88/1997 as amended), these do contain a guarantee of compensation to companies 'privatised or under privatisation' affected by restitution of property to rightful owners; but no such right of compensation is granted directly to investors acquiring shares in privatised companies, or companies acquiring properties from such companies such as the Claimants, Mona Lisa, Street Corner or Alfa El Romania.

...

[...] the Claimants are not universal successors of Alunis, nor is the right to compensation a right which passes to whoever acquires the property affected by restitution.

In the circumstances, if anyone could possibly have had a right to directly claim compensation for the restitution of property to the Soares under Title I of Law 99/1999, that could only have been Alunis. Nonetheless ... Alunis never requested compensation for the restitution and the Claimants only have themselves to blame for this: Street Corner and Alfa El Romania never sought damages from Alunis as a result of the frustrated sales. Consequently, Alunis never suffered any damage that fell to be remedied by way of compensation under Article 43(1) and (2) of Title I of Law 99/1999.⁶⁴¹

508. With regard to the two claims Alfa El Romania filed under Title I of Law 99/1999 against the Romanian State and its entities, both claims failed due to Alfa El Romania's refusal to pay court fees⁶⁴² but would have failed in any event notwithstanding that. According to Respondent, if on the one hand Alfa El Romania was asserting a right in its own name and behalf as successor of Alunis, that would constitute a direct claim which would have failed for

⁶³⁹ Resp. C-Mem., ¶ 382.

⁶⁴⁰ Resp. C-Mem., ¶ 384.

⁶⁴¹ Resp. C-Mem., ¶¶ 384-88.

⁶⁴² Resp. C-Mem., ¶ 389.

the reasons already explained. If, on the other hand, Alfa El Romania was requesting AVAS to pay Alunis through an oblique claim, Alfa El Romania would have had to establish the existence of a claimable debt between Alunis and AVAS under Article 43(1) and (2) of Title I of Law 99/1999. This would have required proving that Alunis suffered damages as a consequence of the restitution of Casa Soare. This, Alfa El Romania would have failed to prove because Alunis' interest in Casa Soare ceased since October 2001.⁶⁴³ For Respondent, “[I]t is hard to understand how Romania can be accused of failing to pay compensation or grant adequate means of redress to the Claimants when in fact not one single claim for compensation was filed in accordance with the conditions set out in the law.”⁶⁴⁴

509. In response to Claimants' assertion that the Supreme Court failed to decide Claimants' counter-claim, Respondent indicates that the Bucharest Tribunal dismissed the counter-claim, as mentioned in Decision No. 9227/2005. The counter-claim was not appealed to the Supreme Court which then had no power to decide it.⁶⁴⁵

510. With respect to Claimants' request for sunk costs in their PHB, Respondent answers by pointing out that Claimants did not make a request for relief for sunk costs, Respondent never had a chance to address such request, and the Tribunal cannot grant the request under the circumstances. Therefore, the issue is irrelevant.⁶⁴⁶

e. Interest

511. Respondent characterizes as inappropriate, novel, and unsupported by legal authority Claimants' request to use the WACC, *i.e.* be compensated for the lost opportunity to re-invest the funds of which Claimants were deprived as a consequence of the Treaty breach. According to Respondent, in neither of the two cases (*Vivendi v. Argentina* and *Alpha v. Ukraine*)⁶⁴⁷ cited by Claimants did the Tribunal award interest at such high rate.⁶⁴⁸ For these reasons, Respondent submits that Claimants misunderstand the function of interest because WACC is focused on the risk of investing in a company, whereas interest is focused on compensating for

⁶⁴³ Resp. C-Mem., ¶¶ 389-91.

⁶⁴⁴ Resp. C-Mem., ¶ 392.

⁶⁴⁵ Resp. Rej., ¶ 326.

⁶⁴⁶ RPHB, ¶ 96.

⁶⁴⁷ *Vivendi v. Argentina*, Award, ¶ 9.2.8; *Alpha v. Ukraine*, ¶¶ 483, 514.

⁶⁴⁸ Resp. C-Mem., ¶¶ 677-79.

not being paid compensation.⁶⁴⁹ Instead of the WACC proposed by Claimants, Respondent proposes using a risk free rate such as US Treasury Bonds.⁶⁵⁰

512. Respondent cites the International Law Commission as authority against compounding any awarded interest. Respondent contends that the award of compound interest has been inconsistent in the jurisprudence and most Tribunal award simple interest. In fact, “there is today no ‘rule in international law on interest’ and . . . simple interest is the norm in international investment law.”⁶⁵¹ Respondent cite a long line of cases in support of its position.⁶⁵²

513. Respondent disputes Claimants’ alternative request for 3-month Euribor + 4.25% corresponding to the rate used in the BancPost loan. According to Respondent, interest has nothing to do with the cost of credit to Rodipet.⁶⁵³

B. The Tribunal’s Analysis

1. Regarding Rodipet

514. As evidenced by the Tribunal’s analysis regarding Law 442 and the enforcement of the Pledge, only the breach of the fair and equitable treatment under Articles II (2)(a)(b) and XII regarding Law 442 entails Respondent’s liability to compensate Claimants.⁶⁵⁴ In assessing the amount of compensation, the Tribunal shall disregard Claimants’ analysis and conclusions based as they are on expropriation, a BIT violation that has been excluded.⁶⁵⁵ In view of the violation of the fair and equitable treatment due to the repeal of Law 442, the Tribunal considers appropriate to base compensation on sunk costs, namely on the amount invested by Claimants regarding Rodipet in the expectation that such amount would have been earned back had Law 442 remained in force. The application of the DCF method relied upon by Claimants as “the most appropriate way to determine the fair market value”⁶⁵⁶ is not justified in the circumstances. This is because Rodipet is not a going concern, it has a history of losses. There

⁶⁴⁹ Resp. Rej., ¶ 641.

⁶⁵⁰ Resp. C-Mem., ¶ 680.

⁶⁵¹ Resp. Rej., ¶ 644.

⁶⁵² Resp. C-Mem., ¶ 681.

⁶⁵³ Resp. Rej., ¶ 643.

⁶⁵⁴ *Supra*, ¶¶ 332-333.

⁶⁵⁵ *Supra*, ¶ 325.

⁶⁵⁶ Memorial, ¶ 810.

are moreover uncertainties regarding future income and costs of an investment in this industry in the Romanian market.

515. As previously determined, the amount of Claimants' investment accepted by the Tribunal is equal to EUR 7.543.176,59 on the date of repeal of Law 442, 10 July 2008.⁶⁵⁷ Respondent is hereby ordered to pay Hassan Awdi and EBC⁶⁵⁸ the above amount as overall compensation regarding claims for Rodipet. No compensation shall be granted with regard to other companies of the so-called Rodipet Group⁶⁵⁹ in the absence of evidence that their involvement had profited Rodipet and had been accepted by AVAS as falling within the scope of the Privatization Contract.

516. Claimants' claim for moral damages is dismissed for the reasons set forth in the provisional measures phase.⁶⁶⁰ No claim for lost property may be considered in the absence of evidence regarding the basis of the claim, including the causation between the breach and the damage, and the ownership of the properties.

2. Regarding Casa Bucur

517. Contrary to Claimants' contention, Alfa El Corporation did not lose its investment in Casa Bucur by reason of Respondent's breaches of the BIT. As previously held by the Tribunal,⁶⁶¹ Respondent breached Claimants' legitimate expectations by failing to return the price paid for the purchase of Casa Soare despite under Law 99/1999 companies "privatized or under privatization" would have been entitled to compensation in case of restitution of immovable assets to the former heirs.⁶⁶² Since Street Corner had accepted the risk of restitution of the property, the only claim that is accepted by the Tribunal is the claim for reimbursement of the price paid for acquiring Casa Bucur on 31 March 1999, based on an arm's length transaction, i.e. a price corresponding to EUR 147,352. Claimants' claim for reimbursement of amounts spent for restoring the property is dismissed for the same reason. Respondent shall pay said amount of EUR 147,352 to Alfa El Corporation as overall compensation for breach

⁶⁵⁷ *Supra*, ¶¶ 273 and 332.

⁶⁵⁸ According to Claimants, these are the Claimants that were affected by Respondent's actions regarding Rodipet: Cl. Rep., ¶42.

⁶⁵⁹ *Supra*, ¶¶ 447-449 (Rodipet Courier), ¶¶ 450-451 (Supremo Media), ¶¶ 452-453 (Balbec Retail).

⁶⁶⁰ Procedural Order No. 1 – Decision on Provisional Measures, ¶¶ 56-60.

⁶⁶¹ *Supra*, ¶ 440.

⁶⁶² *Supra*, ¶ 466.

of the fair and equitable treatment under Article II(2)(a) of the BIT regarding Claimants' claims for Casa Bucur.⁶⁶³

3. Interest

518. The Tribunal notes that Article III(1) of the BIT provides for interest on compensation "at a commercially reasonable rate." Even if this is not a case of expropriation, the commercially reasonable rate is a criterion of general application which will be retained by the Tribunal. EURIBOR +2% being a commercially reasonable rate, it is adopted by the Tribunal.

519. Compound interest is increasingly recognised in the field of investment protection as better reflecting current business and economic reality, therefore actual damages suffered by a party. Interest shall therefore be compounded semi-annually. Interest shall run from 6 September 2008 regarding compensation in the case of Rodipet⁶⁶⁴ and from 20 March 2008 regarding compensation in the case of Casa Bucur,⁶⁶⁵ until full payment in both cases.

IX. RECONSIDERATION OF PARA. 31(C) OF PO 2

520. Respondent has requested reconsideration of the Tribunal's decision under paragraph 31(c) of Procedural Order No. 2 charging Respondent with reimbursing Claimants 50% of costs incurred by them to gain access to documents seized in the frame of criminal investigations in implementation of Procedural Order No. 1.

521. According to Respondent, only a limited number of documents obtained through the access process were filed by Claimants in this arbitration.⁶⁶⁶ Further, in its view access to documents was a technique to interfere with the criminal proceedings, to obtain access to critical evidence and to put pressure on Respondent to suspend investigation.⁶⁶⁷ Claimants have not disputed this request.⁶⁶⁸

522. The Tribunal notes that the limited number of obtained documents that have been produced by Claimants is not a significant element and, further, that still in May 2014 Claimants have complained about the "incomplete and lacunae-filled return of documents to

⁶⁶³ *Supra*, ¶¶ 440-441.

⁶⁶⁴ This being the date indicated in the MacGregor report for the value of the Concession (¶ 2.13), as being the date of revocation of Law 442.

⁶⁶⁵ This being the date on which the Romanian police seized Casa Bucur estate (Cl. Mem., ¶ 17).

⁶⁶⁶ Resp. C-Mem., ¶ 688.

⁶⁶⁷ Resp. C-Mem., ¶ 689.

⁶⁶⁸ Resp. Rej., ¶ 646.

the Claimants.”⁶⁶⁹ Failing convincing reasons for its reconsideration, the decision under Procedural Order No. 2 is maintained.

X. COSTS

A. The Parties’ Positions

523. The Parties filed simultaneous submissions on costs on 19 November 2014, and simultaneous reply submission on costs on 1 December 2014.

524. In their submissions on costs, Claimants argue that Respondent should be held accountable in bearing the total arbitration costs incurred by Claimants, including legal fees and expenses, in the total amount of EUR 2.373.460,89 USD 1.314.073,31 and GBP 4.862,19. Claimants make their claim on the basis of Respondent’s taking advantage of its position as a State to hinder the Claimants’ ability to present their investment case by, *inter alia*, launching multiple criminal proceedings, confiscating and sequestering documents, using the aforementioned criminal proceedings in the ICSID arbitration, etc. The phase of access to documents is but one example of these abusive tactics. It took two Procedural Orders for Respondent to comply with the Tribunal’s decision and, even then, Respondent made sure that Claimants’ situation was as precarious as possible. Respondent does not stop at the challenge of Claimants’ request but goes as far as requesting reimbursement by Claimants of its own costs and expenses albeit Respondent’s costs are completely unreasonable and its procedural behaviour precludes any finding on costs to its benefit. In conclusion, Claimants request the Tribunal to (i) confirm the decision on costs issued in Procedural Order No. 2, (ii) order Respondent to bear all the costs and expenses of these proceedings, including Claimants’ legal fees, and (iii) dismiss all of Respondent’s claim and defences with regard to the costs of these proceedings.

525. In its submission on costs, Respondent requests that Claimants bear all costs incurred by it in this arbitration proceeding, which include a total of USD 660.687,22 as fees and expenses of the Tribunal and ICSID, a total of EUR 4.503.204,67 as legal fees and EUR 341.936,45 as expenses, and a total of EUR 502.356,10 as costs for Respondent’s experts and consultants.

⁶⁶⁹ Letter by Claimants’ Counsel to the Tribunal, copied to Respondent’s counsel, dated 26 May 2014, p. 2.

526. In their reply submission on costs, Claimants opposed Respondent's request for costs and rebutted Respondent's basis for its request that such costs be charged to Claimants.

527. In its reply submission on costs, Respondent requested that the Tribunal reject Claimants' application for "costs and expenses incurred in the period from 29 March 2011 to 15 November 2011" in the amount of EUR 482.336,65 as being clearly excessive considering that during that period the actual proceedings were suspended.

B. The Tribunal's Analysis

528. The Tribunal has the power to order costs under Article 61(2) of the ICSID Convention, which provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

It is recognized that in awarding costs the Tribunal enjoys broad discretion, subject to the exercise of discretion being explained, as required by Article 48(3) providing that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."⁶⁷⁰

529. The Tribunal notes that while the traditional position in investment arbitration has been that the parties bear their own legal costs and share equally the costs of the arbitration, there have been a number of cases which have departed from this principle and have awarded costs on a "loser pays" basis. The Tribunal finds that, in the circumstances of this particular arbitration, the application of the "loser pays" principle is to some extent appropriate. The Tribunal does not believe that either Party's procedural conduct should be an additional basis for awarding costs, the complexity of the case and the sensitivity of many of the issues involved explaining the extraordinary amount of the evidence produced.

⁶⁷⁰ Christoph Schreuer et al., *THE ICSID CONVENTION – A COMMENTARY*, 2nd edition 2009, p. 1235, ¶¶ 41-43.

530. The outcome of the case has been to some extent in Claimants' favour, the Tribunal having rejected Respondent's jurisdictional and admissibility objections. As to the merits, Claimants have been successful regarding Rodipet by reason of Respondent's breach of the FET standard in connection with the repeal of Law 442 and regarding Casa Bucur by reason of Respondent's breach of the FET standard regarding failure to compensate for the price paid for the taking of the property, leading in both cases to a monetary compensation in Claimants' favour.

531. In view of the outcome of the case, the Tribunal considers appropriate that Respondent reimburse Claimants for part of the latter's fees and costs in the amount of USD one million. The Tribunal additionally considers appropriate that each Party bear in full all other legal fees and costs it has incurred and equally share the fees and expenses of the Tribunal and the costs of the ICSID facilities.

XI. TRIBUNAL'S DECISION

532. For the reasons set forth above, the Tribunal decides as follows:

1. The Centre has jurisdiction and the Tribunal competence to hear Claimants' claims, Respondent's jurisdiction and admissibility objections being dismissed.

2. Respondent shall pay Mr Hassan Awdi and EBC the amount of EUR 7.543.176,59 as compensation for breach of FET standard regarding Rodipet, increased by interest at the EURIBOR +2%, compounded semi-annually, as from 6 September 2008 until full payment.

3. Respondent shall pay Alfa El Corporation the amount of EUR 147.352 as compensation for breach of FET standard regarding Casa Bucur, increased by interest at the EURIBOR +2%, compounded semi-annually, as from 20 March 2008 until full payment.

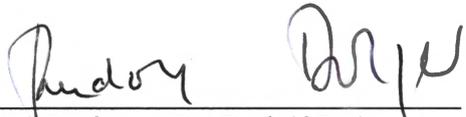
4. Respondent shall pay Claimants the amounts of:

- a) USD one million, as reimbursement of part of Claimants' legal fees and costs;
- b) EUR 482.336,65, as reimbursement of Claimants' 50% of costs incurred for gaining access to documents seized in the frame of criminal investigations, as provided by para. 31(c) of P.O. No. 2.

All amounts due under this paragraph 4 shall bear interest at the EURIBOR +2%, compounded semi-annually, until fully paid.

5. Each Party shall bear in full all other legal fees and costs it has incurred and equally share the fees and expenses of the Tribunal and the costs of the ICSID facilities.

6. All other claims and requests for relief by either Party are dismissed.



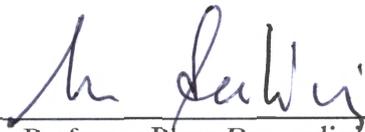
Professor Dr. Rudolf Dolzer
Arbitrator

Date: 20 February 2015



Dr. Hamid G. Gharavi
Arbitrator

Date: 25 February 2015



Professor Piero Bernardini
President of the Tribunal

Date: 2 March 2015