International Centre for Settlement of Investment Disputes

IOAN MICULA,
VIOREL MICULA,
S.C. EUROPEAN FOOD S.A.,
S.C. STARMILL S.R.L.
AND
S.C. MULTIPACK S.R.L.

CLAIMANTS

v.

ROMANIA

RESPONDENT

ICSID Case No. ARB/05/20

AWARD

Rendered by an Arbitral Tribunal composed of:

Dr. Laurent Lévy, President
Dr. Stanimir A. Alexandrov, Arbitrator
Prof. Georges Abi-Saab, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Assistant to the Tribunal
Ms. Sabina Sacco

Date of Dispatch to the Parties: 11 December 2013

TABLE OF CONTENTS

ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings effective 1 January 2003
BIT	Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments dated April 1, 2003
Claimant 1	Mr. Ioan Micula
Claimant 2	Mr. Viorel Micula
Claimant 3	European Food S.A
Claimant 4	Starmill S.R.L.
Claimant 5	Multipack S.R.L.
Commission	European Commission
C-PHB	Claimants' Post-Hearing Submission dated May 13, 2011
C-Reply	Claimants' Reply dated December 22, 2009
C-SoC	Claimants' Statement of Claim dated March 9, 2007
EC	European Community
EC Treaty	Treaty Establishing the European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
Commission's Written Submission	European Commission's Written Submission dated July 20, 2009
EFDG or EFDC	European Food and Drinks Group (or European Food and Drinks Companies)
EGO	Emergency Government Ordinance
ER	Expert Report
Exh. C	Claimants' Exhibits
Exh. EC	European Commission's Exhibits
Exh. HEC	Exhibits referred to at the Hearing on the merits and quantum
Exh. R	Respondent's Exhibits
Exh. RB	Exhibits filed with the Legal Opinion of F. Baias dated June 11, 2010
Exh. RJ	Exhibits filed with Expert Opinion of F. Jacobs dated June 11, 2010
EU	European Union
GD	Government Decision
GO	Government Ordinance
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for the Settlement of Investment Disputes
ILC Articles	The ILC Articles on State Responsibility
PIC	Permanent Investor Certificate
R-CM	Respondent's Counter-Memorial dated April 6, 2009
RFA	Request for Arbitration dated July 28, 2005
RL or RLA	Respondent's Legal Authorities
R-PHB	Respondent's Post-Hearing Submission dated May 13, 2011

R-SPHB	Respondent's Supplementary Post-Hearing Submission dated May 27, 2011
R-Rejoinder	Respondent's Rejoinder dated June 11, 2010
TIC	Temporary investment certificate
TGIE	Transilvania General Import Export S.R.L.
Tr.	Transcripts of the Hearing on the merits and quantum
Tr. Jur.	Transcripts of the Hearing on jurisdiction
VCLT	Vienna Convention on the Law of Treaties of 1969

I. INTRODUCTION

A. OVERVIEW OF THE DISPUTE

1. The present dispute arises from Romania's introduction and subsequent revocation of certain economic incentives, contained in Emergency Government Ordinance 24/1998 ("EGO 24"), for the development of certain disfavored regions of Romania. The Claimants claim that, in reliance on those incentives, and in reliance on the expectation that these incentives would be maintained during a 10-year period, they made substantial investments in the Ştei-Nucet-Drăgăneşti disfavored region located in Bihor County in northwestern Romania. The Claimants further claim that Romania's premature revocation of these incentives was in breach of its obligations under the Agreement Between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments (the "BIT" or the "Treaty"), which entered into force on 1 April 2003 (Exh. C-1), and caused damages to the Claimants, as described further below.

B. THE PARTIES

1. The Claimants

2. There are five claimants in this case: two individual persons (the "Individual Claimants" or "Messrs. Micula") and three companies (the "Corporate Claimants") owned directly or indirectly by the Individual Claimants.

3. The Individual Claimants are:

   a. **Mr. Ioan Micula**, who is domiciled at Teatrului Street no. 1-2, Oradea, Bihor County, Romania (hereinafter referred to as "Claimant 1"). Mr. Ioan Micula was born in Romania on 8 April 1957. He moved to Sweden in 1987 where he obtained Swedish nationality in 1992 after having renounced his Romanian nationality.

   b. **Mr. Viorel Micula**, who is domiciled at Colinelor Street no. 48, Oradea, Bihor County, Romania (hereinafter referred to as "Claimant 2"). Mr. Viorel Micula is Ioan Micula's twin brother. He left Romania for Sweden in 1989. He obtained Swedish nationality in 1995 after having renounced his Romanian nationality.

4. The Corporate Claimants are:

   a. **European Food S.A.**, with its registered office at 13 Septembrie Street, Ştei, Bihor County, Romania, registered with the trade register under no. J5/892/1999, registration number 12457015 (hereinafter referred to as "Claimant 3" or "European Food"). Claimant 3 specializes in industrial manufacturing of food products.

b. **Starmill S.R.L.**, with its registered office at 41 Drăgăneşti, Pantasesti Village, Bihor County, Romania, registered with the trade register under no. J5/177/2002, registration number 14467201 (hereinafter referred to as "Claimant 4" or "Starmill"). Claimant 4 specializes in the manufacturing of milling products.

c. **Multipack S.R.L.**, with its registered office at 41, Drăgăneşti, Pantasesti Village, Bihor County, Romania, registered with the trade register under no. J5/178/2002, registration number 14467210 (hereinafter referred to as "Claimant 5" or "Multipack"). Claimant 5 specializes in the manufacturing of plastic packaging.

5. In its Decision on Jurisdiction and Admissibility of 24 September 2008 (the "Decision on Jurisdiction and Admissibility"), the Tribunal found that the Individual Claimants and the Corporate Claimants (collectively, the "Claimants") are Swedish nationals for the purposes of this arbitration.

6. Mr. Ioan Micula and the Corporate Claimants are represented in this arbitration by Messrs. Kenneth R. Fleuriet, Reginald R. Smith and Craig S. Miles and Ms. Amy Roebuck Frey of the law firm of King & Spalding, London, Houston and Paris. They were previously represented by Mr. Eric A. Schwartz of the law firm of King & Spalding, as well as by Mr. Gerold Zeiler of the law firm of Schönherr Rechtsanwälte OEG, Vienna, in cooperation with Prof. Christoph Schreuer as Of Counsel, of the University of Vienna.

7. Mr. Viorel Micula is represented in this arbitration by Prof. Emmanuel Gaillard, Dr. Yas Banifatemi and Ms. Veronika Korom of the law firm of Shearman & Sterling LLP, Paris. He was previously represented by Messrs. David Reed and Alex Bevan of Shearman & Sterling LLP, London, Messrs. Eric A. Schwartz and Alain Farhad of the law firm of Dewey & LeBoeuf, Paris, and Messrs. Gheorghe Muşat and Gelu Titus Maravela and Mrs. Luminita Popa of the law firm Muşat & Asociaţii, Bucharest.

2. The Respondent

8. The Respondent is Romania (the "Respondent" or "Romania").

9. The Respondent is represented in this arbitration by H.E. Daniel Chitoiu, Minister of Public Finances and Messrs. Cipriam Badea and Mr. Bogdan Mirghiş, Legal Department of the Ministry of Public Finances; Messrs. D. Brian King, Georgios Petrochilos and Boris Kasolowsky of the law firm of Freshfields Bruckhaus Deringer, New York, Paris and Frankfurt, and Mmes. Adriana I. Gaspar, Ana Diculescu-Sova and Manuela M. Nestor of the law firm of Nestor Nestor Diculescu Kingston Petersen in Bucharest.

II. PROCEDURAL HISTORY

A. INITIAL PHASE

10. On 2 August 2005, the Claimants filed a Request for Arbitration dated 28 July 2005 (the "Request" or "RFA") with the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre"), accompanied by 14 exhibits (Exh. C-1 to C-14).

11. On 3 August 2005, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), acknowledged receipt and transmitted a copy of the Request to Romania.

12. On 21 September 2005, the Request was supplemented by a statement concerning the entry into force of the BIT with accompanying exhibits C-15 to C-19.

13. On 13 October 2005, the Acting Secretary-General of the Centre registered the Request as supplemented, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). On the same date, in accordance with Institution Rule 7, the Acting Secretary-General notified the Parties of the registration of the Request as supplemented and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

14. On 10 January 2006, in the absence of an agreement between the Parties, the Claimants elected to submit the arbitration to a Tribunal constituted of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention. On the same day they appointed Prof. Dr. Stanimir A. Alexandrov, a national of Bulgaria. On 7 February 2006, Romania appointed Dr. Claus-Dieter Ehlermann, a national of Germany. The Parties agreed to appoint Dr. Laurent Lévy, a national of Switzerland and Brazil, as the President of the Tribunal.

15. On 12 September 2006, the Acting Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The Parties were also informed that Mrs. Martina Polasek, ICSID Counsel, would serve as Secretary to the Tribunal.

16. On 10 November 2006, the Tribunal held the first session of the Tribunal in Paris, France. At the outset of the session, the Parties expressed agreement that the Tribunal had been duly constituted (Arbitration Rule 6) and stated that they had no objections in this respect. It was agreed that the applicable ICSID Arbitration Rules were the ones that entered into force on 1 January 2003. The remainder of the procedural issues set forth in the agenda of the session were discussed and agreed upon. In particular, the Tribunal and the Parties agreed upon a timetable for the submissions on the merits and reserved provisional hearing dates. It was agreed that

if Respondent decided to raise any objections to jurisdiction or admissibility before the filing of its Counter-Memorial, the schedule would be revisited. It was also decided that the language of the proceedings would be English, and that the place of arbitration would be Paris, France. The audio recording of the session was later distributed to the Parties. Minutes of the first session were drafted and signed by the President and the Secretary of the Tribunal, and sent to the Parties on 20 December 2006.

B. THE JURISDICTIONAL PHASE

17. The proceedings in respect of the jurisdictional phase are described in detail in the Decision on Jurisdiction and Admissibility, which was notified to the Parties on 25 September 2008 and makes integral part of this Award.

18. The Tribunal dismissed the Respondent's objections on jurisdiction and admissibility and concluded that it had jurisdiction over the claims asserted by the Claimants for breaches of the BIT. Specifically, the dispositive part of the Decision on Jurisdiction and Admissibility stated:

> For the reasons set forth above,
>
> - The objections of Respondent are dismissed.
> - The Tribunal has jurisdiction over the dispute submitted to it in this arbitration and rejects any objections as to the admissibility of the claims.
> - The decision on costs is deferred to the second phase of the arbitration on the merits.
>
> (Decision on Jurisdiction and Admissibility, ¶ 170).

C. THE MERITS PHASE

1. Initial procedural steps

19. By letter of 26 September 2008, the Tribunal invited the Parties to confer and revert to the Tribunal within six weeks from the date of notification of the Decision on Jurisdiction and Admissibility with joint or separate proposals concerning the timetable and other motions and suggestions for the proceedings on the merits.

20. On 29 September 2008, Messrs. Zeiler and Schreuer resigned as counsel for Mr. Ioan Micula and the Corporate Claimants effective 26 September 2008. On 30 September 2008, the Tribunal was advised that Mr. Ioan Micula and the Corporate Claimants would be henceforth represented by Messrs. Kenneth R. Fleuriet, Reginald R. Smith and Craig S. Miles of the law firm of King & Spalding, London and Houston.

21. By letters of 7 November 2008 (Claimants) and 13 November 2008 (Respondent), the Parties presented their proposals for the timetable on the merits. On the basis of the Parties' agreements and after considering their positions on the points in dispute, on

18 November 2008 the Tribunal fixed the procedural schedule for the merits phase. After further correspondence from the Parties, by letter of 2 December 2008 the Secretary confirmed the procedural schedule for the merits phase.

22. By letter of 25 March 2009, the Respondent advised the Tribunal that the Parties had agreed on certain time extensions to the time limits set in the Secretary's letter of 2 December 2008. By letter of the Secretary of 27 March 2009, the Tribunal confirmed the time extensions agreed by the Parties and set out the amended procedural schedule as follows:

Respondent's Counter-Memorial	6 April 2009
Claimants' Reply (including full case on quantum and any accompanying expert reports)	20 August 2009
Respondent's Rejoinder (including any expert reports)	27 November 2009
Pre-hearing Conference	4 January 2010;
Claimants' Rebuttal Expert Reports on Quantum	26 January 2010;
Respondent's Rebuttal Expert Reports on Quantum	5 March 2010;
Hearing	3-7 May 2010;
Hearing reserve days	10-11 May 2010.

23. On 2 April 2009, the European Community ("EC") requested that it be allowed to file a written submission as a non-disputing party in this arbitration. On 7 April 2009, the Tribunal invited the Parties to file their observations on the EC's request by 7 May 2009.

2. The written phase on the merits

24. In accordance with the procedural schedule agreed by the Parties and confirmed in the Secretary's letter of 27 March 2009, the Respondent filed its Counter-Memorial on the merits ("R-CM") on 6 April 2009. The Counter-Memorial was accompanied by:

a. Expert Report of Professor Rudolf Streinz ("First ER of R. Streinz")

b. Exhibits R-59 through R-132

c. Legal authorities RL-177 through RL-273.

25. On 7 May 2009, the Parties submitted their observations on the EC's request to file a written submission as a non-disputing party. The Claimants opposed that request. The Respondent submitted that the EC's request was one that could not be reasonably opposed, but in the event that the Claimants opposed that request, it requested the opportunity to provide a fuller response.

26. Also on 7 May 2009, Mr. Viorel Micula advised that the law firm of Dewey & LeBoeuf would no longer be representing him, although the firm of Muşat & Asociaţii remained as his counsel.

27. By letter of the Secretary of 15 May 2009, having considered the Parties' positions and the applicable procedural rules, the Tribunal decided that it would allow the participation of the EC as a non-disputing party in the present case. The Tribunal noted that:

> In doing so, the Tribunal is particularly sensitive to the fact that the European Community may bring a factual or legal perspective that could assist the Tribunal in the adjudication of the Parties' rights. In granting leave to the European Community to participate as a non-disputing party, the Arbitral Tribunal is mindful of the need to preserve due process and the good order of the proceeding. In particular, the European Community shall act as *amicus curiae* and not as *amicus actoris vel rei*. In other words, the non-disputing party shall remain a friend of the court and not a friend of either Party.

28. In light of this, the Tribunal invited the Parties to confer and agree on a procedure for the participation of the EC as a non-disputing party on or before 22 May 2009, and provided certain guidelines for that procedure. It also requested the Parties' comments on a draft letter to the EC by the same date.

29. On 18 May 2009, Mr. Ioan Micula and the Corporate Claimants submitted a request for a site visit pursuant to Article 43(b) of the ICSID Convention and Rule 37 of the 2003 ICSID Arbitration Rules.

30. On 22 May 2009, all Parties submitted their observations on the Tribunal's draft letter to the EC concerning its *amicus* participation and the proposed procedure for such participation. Mr. Ioan Micula and the Corporate Claimants also expressed a concern at certain communications that had taken place between the Respondent and the EC, and requested an instruction from the Tribunal that Romania, its counsel and its expert refrain from any further communications with the EC about this case until after the hearing and the closure of the proceedings.

31. On 25 May 2009, the Respondent opposed Mr. Ioan Micula's and the Corporate Claimants' request for a site visit. It also argued that this request was being used to present an entirely new case on damages, which was impermissible at that stage of the proceedings.

32. Also on 25 May 2009, Dr. Claus-Dieter Ehlermann submitted his resignation as an arbitrator to the other members of the Tribunal and to the Acting Secretary-General of ICSID and indicated his grounds of personal nature for such resignation. On 26 May 2009, pursuant to Arbitration Rule 8(2), the Tribunal consented to Dr. Ehlermann's resignation and on that day notified the Acting Secretary-General of its decision. On that same day, pursuant to Arbitration Rule 10(1) and (2) and on behalf of the Acting Secretary-General, the Secretary notified the Parties of Dr. Ehlermann's resignation and the Tribunal's consent thereto, and of the resulting vacancy on the Tribunal. In accordance with Arbitration Rule 11(1), the Respondent was invited to promptly

appoint an arbitrator to fill that vacancy. Pursuant to Arbitration Rule 10(2), the arbitration proceedings were suspended until the vacancy created by Dr. Ehlermann's resignation had been filled. The Parties were also invited to inform the Tribunal, as soon as the vacancy had been filled, whether they would agree to maintain the existing procedural timetable.

33. On 4 June 2009, the Respondent advised the Tribunal that it was in the process of identifying a new arbitrator and that it was committed to attempting to preserve the current procedural schedule. Given that the question of the modalities of the EC's participation as an *amicus curiae* was still pending before the Tribunal and would likely impact the procedural schedule, the Respondent invited the Claimants to agree, and the Tribunal to approve, that

> (a) the stay on the proceedings be lifted insofar as the Tribunal's decision on the modalities of the European Community's participation as *amicus curiae* is concerned;
>
> (b) the Tribunal render that decision in its present, provisionally truncated formation, by consent of the parties.

34. At the invitation of the Tribunal, on 16 June 2009 Mr. Ioan Micula and the Corporate Claimants agreed with the Respondent's proposal that the Tribunal should proceed to rule on the modality of the EC's participation as an *amicus curiae*, notwithstanding the stay of the proceedings. The Claimants noted that they were not in a position to communicate their views as to the impact of the stay on the procedural timetable, but would do so once the Tribunal's vacancy was filled.

35. On 19 June 2009, Mr. Viorel Micula advised that he had retained as new counsel Messrs. David Reed, Alex Bevan and Emmanuel Gaillard of the law firm of Shearman & Sterling LLP, London and Paris, and accepted the Respondent's request for a partial lift of the stay of the proceedings.

36. By letter of the Secretary of 25 June 2009, the Tribunal approved the Parties' agreement to partially lift the stay of the proceedings concerning the modalities of the EC's *amicus curiae* participation and issued its decision on those modalities, as set forth below. On that same day, the Tribunal informed the EC that it would be allowed to participate as a non-disputing party in this arbitration, specifying that the purpose of such participation would be to assist the Tribunal in its adjudicatory work. The Tribunal set forth the following procedure for the EC's participation:

> 1. The European Community shall file a written submission on or before July 20, 2009. It shall send an electronic copy of the submission by e-mail to the Secretary of the Tribunal at mpolasek@worldbank.org and 15 (fifteen) hard copies of the submission by courier to the Secretary at ICSID, for transmission to the Tribunal and the Parties.
>
> 2. The European Community's written submission shall not respond or comment upon the Parties' prayers for relief, but shall be focused on assisting the Tribunal in the determination of factual or legal issues at stake in the present dispute. It is expected that the scope of the Community's input will be limited to facts within its own knowledge and to European law rather than to any other facts or legal matters at

issue in this arbitration. The Community may within this scope decide which facts and laws are relevant to the dispute.

3. The European Community's written submission shall be limited in length (40 pages) and written in English.

4. The European Community may file any relevant exhibits with its written submission within the scope described under paragraph 2 above. Any exhibit for which the original language is not English shall be submitted in the original language accompanied by a translation into English. If the document is lengthy and relevant only in part, it is sufficient if only the relevant parts, which must be precisely specified, are translated.

5. The Tribunal may request the European Community to produce any document or evidentiary material that the Tribunal deems useful for the resolution of this dispute, or which has been requested by either Party.

6. The European Community shall have access to the Parties' pleadings in their entirety as existing at this juncture, except for materials that have been designated as commercially confidential or legally privileged. Should a disagreement arise as to whether such materials have been so designated, the Tribunal will resolve such disagreement. The Secretary of the Tribunal will transmit electronic copies of the materials to the European Community at the latest by July 6, 2009.

7. Any person who has participated in the elaboration of the European Community's written submission may be called to provide clarifications on that submission at the hearing, as may be required by the Tribunal of its own initiative or at the request of the Parties. Such clarifications will be given in the form directed by the Tribunal and under its control.

8. The European Community will bear its own costs incurred in connection with its participation in the proceeding, including any costs relating to any appearance by the Community's representative(s) for examination at the hearing.

9. The European Community shall indicate whether it had any direct contact with either Party to this arbitration concerning the subject matter of this arbitration and should as far as possible avoid any future contact in this respect.

37. In its letter to the Parties of 25 June 2009, the Tribunal also invited the Parties to comment on the Commission's Written Submission within two months from the date of receipt of that submission.

38. On 7 July 2009, the Secretary sent the EC two CD-ROMs containing the Parties' pleadings on the merits, including supporting documents, filed as of that date.

39. On 16 July 2009, in accordance with Articles 56(1) and 37(2)(b) of the ICSID Convention and Arbitration Rule 11(1) and (3), the Respondent appointed as its arbitrator Professor Georges Abi-Saab, a national of the Arab Republic of Egypt. The Respondent also agreed to maintain the current procedural timetable.

40. On 20 July 2009, the EC submitted its written submission as a non-disputing party, including 10 exhibits.

41. On 22 July 2009, the Secretary informed the Parties that the Tribunal had been reconstituted and the proceedings resumed. On 24 July 2009, the Tribunal proposed to the Parties that, subject to their reasoned objection by 7 August 2009, the acts accomplished by the Tribunal regarding the modalities of the EC's participation as a non-disputing party while the suspension of the proceeding was partially lifted were validated. In that same letter, the Tribunal also invited the Parties to state their views on the procedural timetable in consideration of the suspension of the proceedings.

42. By letters of 30 and 31 July 2009, all Claimants agreed to the validation of the acts taken by the Tribunal during the suspension of the proceedings with respect to the EC's *amicus curiae* submission and submitted their views on the procedural timetable. Specifically, the Claimants stated that they would require an extension of the time limits set out in the procedural timetable as a result of the suspension of the proceedings. On 7 August 2009, the Respondent submitted its comments on the new procedural timetable suggested by the Claimants.

43. On 7 September 2009 the Respondent informed the Tribunal that the Parties had reached an agreement on the procedural timetable. By letter of 14 September 2009, the Tribunal confirmed the procedural timetable agreed by the Parties, as follows:

Parties' responses to EC amicus brief	16 November 2009
Claimants' Reply	14 December 2009
Respondent's Rejoinder	12 April 2010
Claimants' Rebuttal Expert Reports on Quantum	10 June 2010
Respondent's Rebuttal Expert Reports on Quantum	19 July 2010

44. After consultation between the Parties and the Tribunal, on 19 October 2009 the Tribunal confirmed that the hearing on the merits would take place between 8 and 19 November 2010, excluding the weekend.

45. On 16 November 2009, the Parties submitted their comments to the EC's *amicus curiae* submission. In addition, the Claimants expressed their concern that there may have been improper contact between the EC and the Respondent or its counsel, in violation of the Tribunal's instructions of 25 June 2009, and requested the Tribunal to order the Respondent to produce copies of all records of communications between the Respondent or any of the Respondent's legal counsel and the EC since 1 January 2009 related to the subject matter of this arbitration.

46. On 23 November 2009, the Tribunal invited the Respondent to provide its comments to the Claimants' request for production of documents by 11 December 2009. This deadline was subsequently extended by agreement of the Parties to 16 December 2009.

47. On 4 December 2009, counsel for Mr. Ioan Micula and the Corporate Claimants informed the Tribunal that all Parties had agreed to extend the deadlines for their upcoming briefs. On 14 December 2009, the Secretary confirmed the amended procedural timetable as follows:

Respondent's Reply to the Claimants' request for production of documents	16 December 2009
Claimants' Reply	22 December 2009
Respondent's Rejoinder	28 April 2010
Claimants' Rebuttal Expert Reports on Quantum	25 June 2010
Respondent's Rebuttal Expert Reports on Quantum	4 August 2010
Hearing on the Merits	8-19 November 2010

48. On 16 December 2009, the Respondent submitted its objections to the Claimants' request for the production of communications between the EC and the Respondent or its counsel.

49. On 22 December 2009, the Claimants submitted their Reply on the Merits ("C-Reply"), which was accompanied by the following evidence:

a. Third Witness Statement of Mr. Ioan Micula ("Third WS of I. Micula")

b. Third Witness Statement of Mr. Viorel Micula ("Third WS of V. Micula)

c. Witness Statement of Mr. Sorin Baciu ("First WS of S. Baciu")

d. Witness Statement of Mr. Moisa Ban ("First WS of M. Ban")

e. Witness Statement of Mr. Mircea Halbac ("First WS of M. Halbac")

f. Witness Statement of Mr. Christian Balog ("First WS of C. Balog")

g. Witness Statement of Mr. Neculai-Liviu Marcu ("WS of N. Marcu)

h. Witness Statement of Mr. Nicolae Staiculescu ("WS of N. Staiculescu")

i. Expert Report of Professor Donald L. Lessard ("First ER of D. Lessard")

j. Expert Report of Professor Alan Dashwood ("First ER of A. Dashwood")

k. Expert Report of Professor David Caron ("ER of D. Caron")

l. Expert Report of Professor Lucian Mihai ("ER of L. Mihai")

m. Expert Report of Professor Jan-Benedict Steenkamp ("First ER of J. Steenkamp")

n. Expert Report of Mr. Chris Osborne (FTI) ("First ER of C. Osborne")

o. Expert Report of Dr. James Fry (LMC) ("First ER of J. Fry")

p. Boston Consulting Group Report, originally filed as Exh. C-655 ("First ER of BCG")

q. Claimants' Exhibits and Legal Authorities 271 to 675

50. By means of Procedural Order dated 8 January 2010, the Tribunal rejected the Claimants' request for the production of correspondence between the EC and the Respondent or its counsel. Specifically, the Tribunal found:

> 6. That after deliberating on the arguments advanced by the Parties, the Tribunal is not persuaded that the documents requested by the Claimants are necessary or useful for the determination of the outcome of the dispute in this arbitration;
>
> 7. That even if, for the sake of argument, the Tribunal were to accept the Claimants' allegations and find that the European Community cooperated with the Respondent in preparing its Submission, which the Respondent denies, such finding would not affect the Tribunal's conclusion that the requested documents lack relevance;
>
> 8. That to the extent that the requested documents might be relevant for the purposes of establishing the objectivity of the arguments advanced by the non-disputing party in its Submission and the weight to be given to them by the Tribunal, this matter has already been adequately addressed in the Tribunal's letter of 25 June 2009, which, if necessary, provides the Claimants with the opportunity to examine at the hearing any person who has participated in the preparation of the Submission.

51. On 14 January 2010, the Claimants advised that they had found inadvertent errors and omissions in their Reply submission, and submitted corrected versions of their Reply Memorial, three witness statements and 29 exhibits, together with an errata sheet.

52. By letter of 5 February 2010, the Respondent notified the Tribunal that, in accordance with its obligations under the Treaty of Lisbon, it proposed to make available to the EC the Claimants' Reply and its annexes. The Respondent alleged that the Claimants' Reply represented a fundamentally new case, and that, as an EU Member State, it is obliged under the Treaty of Lisbon to notify the EU of any pending international litigation threatening to jeopardize a state's EU law obligations. By letters of 9 February 2010, the Claimants objected to the proposed disclosure, alleging, *inter alia*, that the *amicus curiae* phase of the arbitration had been concluded, that the Reply did not present a fundamentally new case, that such disclosure would violate the Tribunal's order of 25 June 2009, and that the Reply contained material that was commercially confidential to the Claimants.

53. Considering that the Respondent's proposed disclosure could raise issues of confidentiality and privilege, on 10 February 2011 the Tribunal invited the Parties to

make brief submissions addressing (i) the content and scope of Respondent's legal obligation under the Treaty of Lisbon to notify the EU of any pending international litigation threatening to jeopardize a state's EU law obligations; (ii) whether the disclosure would possibly aggravate the dispute and/or adversely affect the conduct of the proceedings, and (iii) whether the disclosure would violate the Claimants' rights to confidentiality and/or privilege. The Parties filed their submissions on 19 February 2010. An additional submission was made by Mr. Viorel Micula on 22 February 2010.

54. By means of a Procedural Order issued on 3 March 2010 and pursuant to Article 47 of the ICSID Convention and Arbitration Rule 39, the Tribunal recommended that the Respondent refrain from providing the EC with the full text of the Claimants' Reply and its exhibits, inviting it instead to provide the EC with the text of the Claimants' amended request for relief, as set forth in the Reply. In making its decision, the Tribunal took into consideration the role of the EC as an *amicus curiae*, the fact that the Claimants had withdrawn a claim and amended their prayers for relief, and issues of confidentiality, privilege, and possible aggravation of the dispute.

55. On 8 April 2010, following the Tribunal's recommendation, the Respondent notified the EC that the Claimants had withdrawn their request for restitution of the legal framework in force at the time of approval of EGO 24/1998.

56. On 19 March 2010, the Respondent requested an extension of its time limit to file its Rejoinder on the merits, alleging, inter alia, that the Claimants' Reply was incomplete. On 25 March 2010, the Claimants objected to that request. After further correspondence among the Parties and a proposal from the Tribunal, the Parties and the Tribunal finally agreed on the following procedural calendar, as confirmed by the Secretary's letter of 12 April 2010:

Respondent's Rejoinder	11 June 2010
Claimants' Rebuttal Expert Reports on Quantum	30 July 2010
Respondent's Rebuttal Expert Reports on Quantum	10 September 2010
Hearing on the Merits and Quantum	8-19 November 2010

57. On 9 April 2010, the Respondent made an application for production of documents. The Claimants objected to that request by letters of 19 and 26 April 2010. After further comments from the Parties (Respondent's letter of 27 April 2010 and Claimants' submissions of 29 April and 10 May 2010), on 27 May 2010 the Tribunal issued a Procedural Order ruling on the Respondent's request. The Parties further agreed on the timing for the Parties' comments on the documents produced (Respondent's letter of 3 June 2010). The Tribunal approved the Parties' agreement by letter of 7 June 2010 and invited the Parties to report on the production progress (which they did through the Claimants' letter of 10 June 2010).

58. On 13 April 2010, Ioan Micula and the Corporate Claimants renewed their request for a site visit. The Respondent objected to that request on 22 April 2010, and the Claimants submitted further comments on 26 and 28 April 2010. On 5 May 2010,

having considered the Parties' submissions, the Tribunal concluded that a site visit would not enlighten the Tribunal at that stage in the proceedings, as any information gleaned from such visit would be either irrelevant for the resolution of the dispute or unnecessary given that the record supplied sufficient evidence, at least at that juncture. However, the Tribunal invited the Parties to renew the application for a site visit after the hearing on the merits if they continued to wish for one.

59. On 28 May 2010, Mr. Viorel Micula advised that Muşat & Asociaţii no longer represented him as counsel.

60. On 11 June 2010, the Respondent submitted its Rejoinder ("R-Rejoinder"), which was accompanied by the following evidence:

a. Expert Report of Professor Flavius Baias ("ER of F. Baias")

b. Expert Report of Sir Francis Jacobs ("ER of F. Jacobs")

c. Expert Report of Mr. Asger Petersen ("ER of A. Petersen")

d. Rebuttal Expert Report of Professor Dr. Rudolf Streinz ("Second ER of R. Streinz")

e. Expert Report of Agra CEAS Consulting, Mr. Conrad Caspari, in conjunction with F.O. Licht ("ER of C. Caspari")

f. Expert Report of KPMG, Mr. John Ellison ("First ER of J. Ellison")[1]

g. Expert Report of Dr. Bill Robinson ("First ER of B. Robinson")

h. Witness Statements of Mr. Leonard Orban ("WS of L. Orban")

i. Witness Statement of Professor Mihai Berinde ("WS of M. Berinde")

j. Documentary evidence (Exhibits R-134 through R-203)

k. Legal authorities (Exhibits RL-284 through RL-336).

61. On 22 July 2010, the Respondent submitted its comments on the documents produced by the Claimants in response to the Procedural Order of 27 May 2010. The Claimants submitted their comments on 3 September 2010. In the interim, the Parties further corresponded on the production of specific documents.

62. On 21 July 2011, Ioan Micula and the Corporate Claimants requested permission to submit four additional witness statements that would be relied upon by the Claimants' damages experts in their rebuttal expert reports due on 30 July 2010. On 22 July 2010, the Respondent objected to that request. The Parties submitted further comments (Claimants' letters of 23 and 26 July 2010 and Respondent's letter of 26

[1] Mr. Ellison also submitted an expert report during the jurisdictional phase that is not referred to in this Award.

July 2010). After considering the Parties' submissions and in the exercise of the discretion granted to it under paragraphs 14(II)(c) and (e) of the Minutes of the First Session, by letter of 28 July 2010 the Tribunal granted the Claimants permission to submit, by 30 July 2010, new witness statements from the following persons: Messrs. Juan Gamecho, Mircea Halbac, Sorin Baciu and Cristian Balog. The Tribunal specified that these witness statements should be strictly limited to factual allegations that will be relied upon by the Claimants' damages experts in their rebuttal expert reports, and that the Claimants should make these witnesses available for cross-examination at the hearing.

63. On 30 July 2010 (by separate letters sent by counsel to Mr. Ioan Micula and the Corporate Claimants, on one hand, and counsel to Mr. Viorel Micula, on the other), the Claimants submitted the following rebuttal expert reports on quantum and additional witness statements:

   a. Expert Reply Report of Professor Donald R. Lessard ("Second ER of D. Lessard")

   b. Expert Reply Report of Professor Jean-Benedict Steenkamp ("Second ER of J. Steenkamp")

   c. Expert Opinion of Professor Georghe Piperea ("ER of G. Piperea")

   d. Rebuttal Expert Report of Dr. James Fry of LMC International ("Second ER of J. Fry")

   e. Expert Report of Mr. Richard Boulton of LECG ("ER of R. Boulton")

   f. Rebuttal Expert Report of BCG ("Second ER of BCG")

   g. Witness Statement of Mr. Juan Gamecho ("WS of J. Gamecho")

   h. Second Witness Statement of Mr. Mircea Halbac ("Second WS of M. Halbac")

   i. Second Witness Statement of Mr. Sorin Baciu ("Second WS of S. Baciu")

   j. Second Witness Statement of Mr. Christian Balog ("Second WS of C. Balog")

   k. Exhibits and Legal Authorities C-680 to C-1034

64. On 2 August 2010, the Claimants submitted the rebuttal expert report of Mr. Chris Osborne of FTI Consulting.

65. In their letter of 30 July 2010, Mr. Ioan Micula and the Corporate Claimants also noted that the Claimants continued to suffer from acts of the Romanian state, including the initiation of forced execution proceedings against companies of the EFDG, that directly threatened their ability to continue their business activities and reserved their right to request interim relief from the Tribunal. The Claimants also objected to Section VI.G of the Respondent's Rejoinder, entitled "Any Compensation Must Be

Reduced by the Value of Benefits Received as a Result of Romania's EU Accession." The Claimants argued that this defense constituted a new legal theory that had been raised in the Respondent's Counter-Memorial and was thus untimely. In the event that the Tribunal was minded to accept it, the Claimants alleged that it should be rejected on the substantive grounds described in their letter.

66. By letter of 10 August 2010, the Respondent requested the Tribunal to (i) strike certain new evidence (specifically, certain expert reports or relevant parts of them, and new factual exhibits) filed by the Claimants with their rebuttal expert reports submitted on 30 July 2010 and 2 August 2010, as well as certain new legal submissions and allegations made by the Claimants in their letters accompanying such reports; (ii) grant it a four week extension to submit its rebuttal expert reports on quantum; and (iii) grant it the opportunity to comment on the Claimants' new evidence and allegations, to the extent that they are not stricken and, if necessary, to adduce responsive evidence. At the Tribunal's invitation, all Claimants commented on these requests by letters of 19 August 2010. The Respondent submitted further comments on 24 August 2010.

67. By means of a Procedural Order issued on 24 August 2010 and in accordance with ICSID Arbitration Rule 34, the Tribunal declined to strike any evidence filed by the Parties at this stage of the proceeding, stating that it would decide in due time what weight to give to any such evidence. The Tribunal also granted the Respondent a two-week extension (until 24 September 2010) to submit rebuttal expert reports on quantum, and invited the Respondent to produce in advance of the new time limit whatever written evidence they were able to produce without disruption of their work. The Tribunal also ruled that, if the Respondent wished to present new witness statements, it should file a formal application pursuant to Paragraph 14(II)(c) and (e) of the Minutes of the First Session. The scope of any such witness statements would in any event be strictly limited to the factual allegations relied upon by the Respondent's damages experts in their rebuttal expert reports. Finally, the Tribunal ruled that the Respondent should respond to the new documents submitted by the Claimants together with its rebuttal expert reports on damages.

68. By letter of 14 September 2010, the Tribunal asked the Parties if they would be agreeable to the appointment of Ms. Sabina Sacco of the law firm of Lévy Kaufmann-Kohler as Assistant to the Tribunal, which the Parties accepted.

69. On 24 September 2010, the Respondent submitted its Observations on Claimants' Additional Evidence, together with the following evidence and rebuttal expert reports:

a. Factual Exhibits R-210 through R-229

b. Legal Authorities RLA-337 through 346

c. Reply Expert Report of Mr. Conrad Caspari ("Second ER of C. Caspari")

d. Reply Expert Report of Mr. John Ellison ("Second ER of J. Ellison")

e. Reply Expert Report of Dr. Bill Robinson ("Second ER of B. Robinson")

3. Procedural steps predating the hearing on the merits

70. On 30 September 2010, the President of the Tribunal and the Parties held a pre-hearing telephone conference to discuss all outstanding matters with respect to the organization of the hearing on the merits and quantum. During that telephone conference, the Parties reached an agreement with respect to certain issues, but maintained disagreement on others (in particular the sequestration of the Messrs. Micula and the modality for the examination of certain witnesses and experts). In addition, the Respondent requested clarification from the Claimants with respect to their quantum case.

71. On 8 October 2011, all Parties identified the witnesses and experts they would call for cross-examination at the hearing and provided further comments on outstanding issues with respect to the hearing. After further correspondence from the Parties, the Tribunal ruled on these issues by means of a Procedural Order of 13 October 2010.

72. By letters of 15 October 2010, the Parties submitted proposed hearing schedules and discussed the need for oral closing submissions. The Claimants also requested that the Tribunal, of its own initiative, call Professor David Caron, Claimants' international law expert, to appear at the hearing for examination despite the fact that the Respondent did not call him for cross-examination. The Respondent provided further comments on 20 October 2010. The Tribunal ruled on these issues by letter of 22 October 2010. By letter of 28 October 2010, the Respondent expressed concerns with respect to the time allocation during the hearing and reserved its rights. On 1 November 2010, the Tribunal clarified that the ruling of 22 October 2010 contained a clerical error, and issued a corrected time allocation.

73. On 5 October 2010, the Secretary invited the representatives of the EC who had drafted the EC's *amicus* brief to provide clarifications on that submission at the hearing. On 13 October 2010, the relevant EC representatives confirmed they would attend the hearing. On 15 October 2010, the Tribunal informed the Parties of the EC representatives' attendance and invited the Parties to confer in view of reaching an agreement with respect to the timing, scope and form of the EC's testimony. The Parties provided their comments on 22 and 25 October 2010. On 27 October 2010 the Tribunal issued directions with respect to the EC's participation at the hearing, which were communicated to the EC on 28 October 2010. On 3 November 2010, the Claimants [Viorel Micula] advised the Tribunal that due process required that the EC be treated as a hostile witness vis-à-vis the Claimants, and required more time for their cross-examination. After hearing the Respondent's position, the Tribunal ruled on this matter during the hearing.

74. By letter of 1 November 2010, the Claimants alleged that Romanian tax enforcement officials had seized significant assets of the EFDG necessary for the continuation of the Claimants' business (in particular, production equipment and machinery) and were threatening to commence the forced sale of these assets as early as 8

November 2010. The Claimants advised that they would shortly file an application for provisional measures and for a temporary "standstill" order, and requested that their applications be heard during the first day of the hearing. After an invitation from the Tribunal, on 3 November 2010 the Respondent submitted preliminary comments on the Claimants' letter, to which the Claimants responded on the same date.

75. On 3 November 2010, the Claimants submitted an Application for Provisional Measures ("Claimants' Application for Provisional Measures") pursuant to Article 47 of the ICSID Convention and Arbitration Rule 39, together with a request for an emergency temporary order.

76. On 5 November 2010, at the invitation of the Tribunal, the Respondent submitted its comments on the Claimants' request for an emergency temporary order, requesting that it should be dismissed for the reasons stated in that submission. In that same letter, the Respondent proposed that the Claimants' Application for Provisional Measures be addressed following, rather than during, the evidentiary hearing, preferably in December 2010, noting that there was no need to disrupt the hearing due to the Claimants' Application for Provisional Measures.

77. On 5 November 2010, the Tribunal issued a Procedural Order in which it (i) denied the Claimants' request for an emergency temporary order, without prejudice to the Tribunal's authority to issue a different determination at a later stage in the proceedings if the circumstances should change; (ii) determined that it would address the Claimants' Application for Provisional Measures after the hearing on the merits; and (iii) gave instructions with respect to briefing by the Parties.

4. The hearing on the merits and quantum

78. From 8 to 19 November 2010, the Tribunal and the Parties held a hearing on the merits and quantum in Paris, France. During the course of the hearing, the Parties made oral arguments regarding their merits and quantum cases, had the opportunity to examine the witnesses and experts that had been called to testify, and addressed several evidentiary and procedural issues. The EC representatives invited by the Tribunal provided clarifications to their written submission and answered the Parties' questions. The Tribunal was addressed by Messrs. Eric A. Schwartz, Reginald R. Smith and Kenneth R. Fleuriet and Ms. Amy R. Frey on behalf of Mr. Ioan Micula and the Corporate Claimants; by Messrs. Emmanuel Galliard and David Reed on behalf of Mr. Viorel Micula, and by Messrs. D. Brian King, Georgios Petrochilos, Noah Rubins, Boris Kasalowsky and Ben Juratowitch on behalf of the Respondent.

79. The following persons participated in the hearing:

<u>On behalf of Mr. Ioan Micula and the Corporate Claimants</u>:

Mr. Ioan Micula
Mr. Eric Schwartz, King & Spalding
Mr. Reggie Smith, King & Spalding
Mr. Ken Fleuriet, King & Spalding

Mr. Ric Toher, King & Spalding
Mrs. Amy R. Frey, King & Spalding
Ms. Jamie Miller, King & Spalding
Ms. Catalina Constantina, King & Spalding
Mrs. Eva Micula
Ms. Natalie Micula
Ms. Olivia Micula
Mrs. Oana Popa
Mrs. Diana Radu
Mr. Vasile Popa-Bota
Mr. Traian Bulzan

On behalf of Mr. Viorel Micula:

Mr. Viorel Micula
Mr. Emmanuel Gaillard, Shearman & Sterling
Mr. David Reed, Shearman & Sterling
Mr. Robert Williams, Shearman & Sterling
Ms. Veronika Korum, Shearman & Sterling
Mr. Henry Ovens, Shearman & Sterling
Ms. Valerie Ollivier, Shearman & Sterling
Ms. Ioana Aron Blahuta
Ms. Medora Purle
Mr. Cristian Flora
Mr. Calin Vidican
Ms. Eva Fogarassy
Mr. Adrian Rotar
Ms. Alexandra Gheorghe-Duca
Mr. Mihai Clepce

On behalf of the Respondent:

HE Minister Gheorghe Ialomiţianu, Ministry of Public Finance
Ms. Manuela Nestor, Nestor Nestor Diculescu Kingston Petersen
Ms. Georgeta Harapcea, Nestor Nestor Diculescu Kingston Petersen
Mr. D. Brian King, Freshfields Bruckhaus Deringer LLP
Mr. Georgios Petrochilos, Freshfields Bruckhaus Deringer LLP
Mr. Noah Rubins, Freshfields Bruckhaus Deringer LLP
Mr. Boris Kasolowsky, Freshfields Bruckhaus Deringer LLP
Mr. Jonathan J Gass, Freshfields Bruckhaus Deringer LLP
Mr. Ben Juratowitch, Freshfields Bruckhaus Deringer LLP
Mr. Sami Tannous, Freshfields Bruckhaus Deringer LLP
Ms. Evgeniya Rubinina, Freshfields Bruckhaus Deringer LLP
Mr. Moritz Keller, Freshfields Bruckhaus Deringer LLP
Mr. Marcus Benzing, Freshfields Bruckhaus Deringer LLP
Mr. Ignacio Stratta, Freshfields Bruckhaus Deringer LLP

Ms. Victoria Bokelmann, Freshfields Bruckhaus Deringer LLP
Ms. Rebecca Smith, Freshfields Bruckhaus Deringer LLP
Ms. Lauren Henschke, Freshfields Bruckhaus Deringer LLP
Ms. Smaranda Miron, Freshfields Bruckhaus Deringer LLP
Ms. Eleonore Gleitz, Freshfields Bruckhaus Deringer LLP

80. The Tribunal heard oral testimony from the following persons:

Claimants' witnesses and experts

Mr. Ioan Micula	Claimant
Mr. Viorel Micula	Claimant
Professor Lucian Mihai	Expert Witness, University of Bucharest
Professor Alan Dashwood QC	Expert Witness, Henderson Chambers
Professor David Caron	Expert Witness, University of California at Berkeley
Mr. Liviu Marcu	Witness
Mr. Nicolae Staiculescu	Witness
Mr. Mircea Halbac	Witness
Mr. Moisa Ban	Witness
Mr. Sorin Baciu	Witness
Mr. Jaun Gamecho	Witness
Professor Don Lessard	Expert Witness, MIT, The Brattle Group
Mr. Alexis Maniatis	Expert Witness, The Brattle Group
Ms. Natasha Dupont	Expert Witness, The Brattle Group
Mr. Chris Osborne	Expert Witness, FTI Consulting
Mr. Richard Edwards	Expert Witness, FTI Consulting
Mr. Richard Boulton	Expert Witness, LECG
Mr. Ian Clemmence	Expert Witness, LECG
Dr. James Fry	Expert Witness, LMC
Mr. Laszlo Juhasz	Expert Witness, BCG

Respondent's witnesses

Mr. Leonard Orban	Fact Witness, Office of the President of Romania
Professor Mihai Berinde	Witness
Sir Francis Jacobs QC	Expert Witness, Fountain Court Chambers
Mr. Alexander Milner	Expert Witness, Fountain Court Chambers
Professor Flavius Baias	Expert Witness, Bucharest Public University
Professor Dr. Rudolf Streinz	Expert Witness, University of Munich
Professor Dr. Christoph Herrmann	Expert Witness, University of Passau
Mr. John Ellison	Expert Witness, KPMG
Dr. Bill Robinson	Expert Witness, KPMG
Mr. Nishad Morjaria	Expert Witness, KPMG
Mr. Dan Aylward	Expert Witness, KPMG
Mr. Conrad Caspari	Expert Witness, Agra CEAS

Mr. Asger Petersen	Expert Witness, Cleary Gottlieb Steen & Hamilton

Non-disputing Parties (EC)

Mr. Bernd Martenczuk, Legal Representative, European Commission
Mr. Frank Hoffmeister, Legal Representative, European Commission
Mr. Ion Rogalski, Legal Representative, European Commission

81. A transcript of the hearing was distributed among the Parties. An audio recording was made in English and Romanian and also distributed among the Parties.

5. Procedural matters following the hearing

82. By the end of the hearing, the following evidentiary and procedural issues remained outstanding: (i) the Claimants requested that Mr. Mihai Berinde, who had to leave the hearing early, be made available for cross-examination at a later date, whether in person or via videoconference; (ii) the Claimants confirmed that their (or rather Mr. Ioan Micula's) application for a site visit was still in place; (iii) the form and time of the Parties' closing arguments remained outstanding, and (iv) the Respondent requested that the Claimants reformulate their request for relief in such a way that it identified each breach alleged and the specific relief requested on the basis of such breaches.

83. On 25 November 2010, the Tribunal issued a Procedural Order ruling on the evidentiary and procedural matters that remained outstanding. Specifically, the Tribunal (i) decided that Mr. Berinde would not be called for oral examination, but specified that this would not prevent the Parties or the Tribunal from relying on Mr. Berinde's written testimony (and that the same would apply to the other called witnesses/experts that the Parties did not cross-examine at the hearing); (ii) gave instructions on further briefing with respect to the Claimants' application for a site visit; (iii) determined that the Parties should present oral closing arguments and gave instructions for a future hearing in that respect, but also invited the Parties to submit voluntary post-hearing briefs; and (iv) gave directions to the Claimants with respect to the submission of their amended request for relief. The Tribunal also gave further instructions to the Parties with respect to the review of the hearing transcript and audio tapes, and with respect to the Parties' briefs on provisional measures.

84. The Tribunal will address the more relevant procedural matters separately below.

a. The Claimants' Applications for Provisional Measures and the Respondent's Application for Revocation of Provisional Measures

85. As noted in para. 75 above, on 3 November 2010 the Claimants submitted an Application for Provisional Measures, as well as a request for an emergency temporary order. Specifically, the Claimants requested (Claimants' Application for Provisional Measures, ¶ 43):

a. "an Order preserving the *status quo ante* by instructing Respondent to withdraw or otherwise cease and desist from enforcing the above-described seizure orders, or from implementing any new such orders against any of the EFDG companies, prior to the Tribunal's issuance of its final award (and that the award itself deal with the matter as appropriate at that time, such as by maintaining the Order in place until Romania has satisfied the terms of the award in full); and

b. an Order that Respondent refrain from taking any other measure against any of the EFDG companies that would aggravate or extend the existing dispute prior to the Tribunal's issuance of its final award."

86. By Procedural Orders of 5 and 25 November 2010, the Tribunal gave instructions with respect to briefing by the Parties. In accordance with these instructions, on 30 November 2010, the Respondent submitted its observations on the Claimants' Application for Provisional Measures. After further correspondence from the Parties and leave from the Tribunal, on 20 December 2010 the Claimants submitted a reply in support of their Application for Provisional Measures, and the Respondent submitted a rejoinder on 17 January 2011. At the invitation of the Tribunal, the Parties submitted further comments on 9 February 2011.

87. On 2 March 2011, the Tribunal issued a Decision on the Claimants' Application for Provisional Measures (the "Decision on Provisional Measures"). In that Decision, the Tribunal recommended that the Respondent "inform the Claimants, with a copy to the Tribunal, if it intends to proceed with the seal or forced sale of the seized assets or take any other tax collection measure that could have a similar effect, two months prior to the date in which it intends to implement such seal, sale or other measure, until this arbitration is completed or until reconsideration of this Decision." The Tribunal denied at that stage the remaining requests for provisional measures brought by the Claimants, and invited either Party to apply to the Tribunal for a reconsideration of the Decision if it should consider that the circumstances under which the Decision was made had changed (Decision on Provisional Measures, ¶ 98).

88. On 4 March 2011, the Claimants informed the Tribunal that the Romanian government had garnished Starmill's bank accounts to satisfy the payment of overdue taxes and associated penalties, in violation of "the spirit, if not the letter, of the Tribunal's Decision [on Provisional Measures]" (Claimants' letter of 4 March 2011, p. 1, or "Claimants' Second Application for Provisional Measures"). The Claimants requested the Tribunal to order the Respondent to (i) lift the current garnishment of Starmill's accounts; (ii) replenish those accounts with any funds that have been transferred to the Government's accounts; (iii) refrain from garnishing the bank accounts of any of Claimants' companies in relation to the taxes and penalties covered by the Decision on Provisional Measures unless it provides the two months' advance notice required by the Decision, and (iv) clarify its position on the impending sale of Starmill's (and the other companies') seized physical assets (Second Application, pp. 3-4). By letter of 7 March 2011, the Tribunal stated that it understood

this letter to be a new request for provisional measures, and invited the Respondent to comment.

89. By letter of 11 March 2011, the Respondent submitted its comments to the Claimants' letter of 4 March 2011, noting that it also considered the letter to be a new application for provisional measures and requesting that Claimants' request be denied with a full award of costs. The Claimants replied by letter of 17 March 2011, reiterating their first three requests for relief but denying that the 4 March letter constituted a new request for provisional measures. The Parties exchanged further correspondence setting out their positions (Respondent's letters of 23 and 31 March 2011, and Claimants' letters of 28 March and 13 and 22 April 2011).

90. On 27 May 2011, the Tribunal issued a Supplemental Decision on Provisional Measures (the "Supplemental Decision on Provisional Measures") in which it confirmed its Decision on Provisional Measures, with certain amendments. Specifically, the Tribunal recommended that the Respondent inform the Claimants, with a copy to the Tribunal, if it intended to proceed with the seal or forced sale of the seized assets or take any other tax collection measure (including garnishments of bank accounts) that could have a similar effect, two months prior to the date in which it intends to implement such seal, sale or other measure, until this arbitration is completed or until reconsideration of the Supplemental Decision. The Tribunal also recommended that the Parties seek to reach an agreement on a mutually acceptable security or assurance to be provided by the Claimants and that, conditioned upon that agreement, the Respondent should lift the current garnishments over Starmill's accounts. The Tribunal denied the Claimants' request that the garnished accounts be replenished. Once again, the Tribunal invited either Party to apply to the Tribunal for a reconsideration of this Decision if it should consider that the circumstances under which this Decision was made changed (Supplemental Decision on Provisional Measures, ¶ 80).

91. On 5 July 2011, the Claimants informed the Tribunal of further enforcement actions taken by the Respondent with respect to the Claimants' assets, and requested the Tribunal to confirm that the Supplemental Decision on Provisional Measures covered all assets of the EFDG companies seized by the Respondent at any time until the completion of the arbitration. In a letter of 12 July 2011, the Respondent agreed with the Claimants' interpretation. By letter of 22 July 2011, the Tribunal confirmed that the parties' interpretation concerning the scope of the Supplemental Decision was correct.

92. On 13 September 2011, the Respondent notified the Tribunal and the Claimants that it intended to take enforcement measures with respect to three EFDG companies: European Food, European Drinks S.A. ("European Drinks") and Transilvania General Import Export SRL ("TGIE"). The enforcement measures consisted of the seizure of further movable and immovable property of the three companies and the garnishment of their bank accounts for approximately EUR 55 million. The Respondent advised that the seized property would remain in the companies' control, to be used in their

business. The Respondent attached the notices in respect of the enforcement measures to each of the three EFDG companies ("Garnishment Notices").

93. On 12 October 2011, the Respondent notified the Tribunal and the Claimants that, pursuant to Romanian tax law, two EFDG companies had been denied renewal of certain authorisations which enabled the companies to postpone the payment of customs and excise duties for goods imported into or manufactured in the EU if the goods were stored in "fiscal warehouses". The Respondent did not consider that the decisions to repeal and deny renewal of the authorisations were within the scope of the provisional measures recommended by the Tribunal, but advised that it would voluntarily refrain from giving effect to the decisions until two months from the date of their communication.

94. On 14 October 2011, the Claimants submitted an Emergency Supplement to their Application for Provisional Measures ("Claimants' Third Application"), seeking the following emergency interim relief:

a. "preventing the Respondent from proceeding with the garnishments of the bank accounts of European Food, European Drinks and TGIE as set out in the [Garnishment] Notices;

b. ordering the Respondent to refrain from garnishing the accounts of any other EFDC company until the Tribunal issues its Final Award (collectively, the 'Garnishment Application'); and

c. ordering the Respondent to refrain from repealing the fiscal warehouse authorizations of European Food and Scandic Distilleries until the Parties have fully briefed that issue and the Tribunal issues a decision with respect to it ('Fiscal Warehouse Application').

d. Insofar as any further briefing may be required on any of these issues or the Tribunal is not able to take up this application immediately, the Claimants further request that the Tribunal issue a temporary emergency order instructing the Respondent to refrain from the acts cited in the preceding paragraph until such time as the Tribunal is able rule upon this application."

95. The Claimants clarified that they "do not in this application request an order preventing the seizure orders as announced in the [Garnishment] Notices over additional assets up to an aggregate value of €55 million, provided that Romania continues to abide by the existing orders of the Tribunal regarding the seal and forced sale of those assets" (Claimants' Third Application, ¶ 25). The Claimants' Third Application was divided into two applications with separate briefing schedules: the Garnishment Application and the Fiscal Warehouse Application.

96. On 1 November 2011, the Claimants supplemented their Fiscal Warehouse Application, requesting the Tribunal to order the Respondent to refrain from repealing the fiscal warehouse authorizations until the final award.

97. The Parties and the Tribunal exchanged correspondence with respect to the briefing schedule and the timing of the enforcement measures. At the invitation of the Tribunal, the Respondent represented that the garnishments would not take effect before 25 November 2011, and that the decision regarding fiscal warehouse authorizations would not take effect before 12 December 2011 (Respondent's letter of 20 October 2011).

98. On 11 November 2011, in accordance with the agreed briefing schedule, the Respondent submitted its observations on the Claimants' Garnishment Application. On 16 November 2011, the Claimants wrote to rebut certain allegations made by the Respondent with respect to the Garnishment Application, and offered to produce the documentation supporting these allegations at the Tribunal's request. On 18 November 2011, the Tribunal requested the Claimants to produce such supporting documentation and also invited the Respondent to submit any documentation it deemed relevant. The Claimants produced the requested documentation to the Tribunal on 21 November 2011.

99. On 22 November 2011, the Respondent submitted its comments on the Claimants' letter of 16 November 2011, requesting the Tribunal to dismiss the Claimants' Garnishment Application.

100. On 23 November 2011, the Tribunal issued the following temporary order concerning the Claimants' Garnishment Application (the "Temporary Order on Garnishment"):

> 5.1. The Claimants' request for a temporary emergency order is granted, until the Tribunal is able to issue its final recommendation with respect to the Claimants' Third Application in its entirety. Specifically, until the Tribunal is able to hand down its final recommendation,
>
> (i) the Respondent shall refrain from proceeding with the garnishments of the bank accounts of European Food, European Drinks and TGIE;
>
> (ii) the Respondent shall refrain from garnishing the accounts of any other EFDC company.

101. Following a further exchange of correspondence (Respondent's letters of 29 and 30 November and 8 December 2011, and Claimants' letter of 5 December 2011) on the Garnishment and Fiscal Warehouse Applications, on 16 December 2011 the Tribunal issued a Third Decision on Provisional Measures ("Third Decision"). The Tribunal made the following recommendations (Third Decision, ¶ 109):

a. "The Respondent shall refrain from proceeding with the garnishments of the bank accounts of European Food, European Drinks and TGIE as set out in the [Garnishment] Notices.

b. The Respondent shall refrain from repealing the fiscal warehouse authorizations of European Food and Scandic Distilleries until the Tribunal issues its Final Award.

c. The Tribunal otherwise confirms its (First) Decision on Provisional Measures of 2 March 2011. Accordingly, the Respondent shall inform the Claimants, with a copy to the Tribunal, if it intends to proceed with the seal or forced sale of the seized assets or take any other tax collection measure (including garnishments of bank accounts) that could have a similar effect, two months prior to the date in which it intends to implement such seal, sale or other measure, until this arbitration is completed or this Decision is reconsidered.

d. The Parties shall continue to seek to reach an agreement on a mutually acceptable security or assurance to be provided by the Claimants.

e. If either Party considers that the circumstances under which this Decision is made have changed, either Party may apply to the Tribunal for reconsideration of this Decision.

f. The other prayers are dismissed.

g. Costs are reserved for a later decision or award."

102. The Tribunal noted in its Third Decision that no additional security had been provided by the Claimants in respect of the lifting of the garnishment on Starmill's accounts, a condition that was imposed by the Tribunal in its Supplemental Decision. It did, however, note that the Micula brothers made a good faith offer of certain properties to satisfy their debts, and requested that the Claimants submit a formal valuation of these properties as soon as it was finalized. Although the Tribunal granted the Claimants' Garnishment Application, it repeated that it expected the Claimants to supply some form of security and recommended that the Parties continue to seek to reach an agreement on a mutually acceptable security or assurance.

103. On 14 March 2012, the Respondent asked the Claimants to produce the valuation report pursuant to the Tribunal's instructions in the Third Decision. On 30 March 2012, the Respondent repeated its request. Following further exchanges of correspondence (Claimants' letters of 17 April, 7 June and 11 July 2012 and Respondent's letters of 18 May, 21 June, 19 and 20 July 2012), the parties failed to reach a mutual agreement on security to be provided by the Claimants.

104. On 1 August 2012, the Respondent filed an Application to Revoke Provisional Measures ("Respondent's Revocation Application") seeking the revocation of the provisional measures recommended by the Tribunal, or, in the alternative, the suspension of the provisional measures until the Claimants had posted security adequate to protect the Respondent's right to collect taxes owed by the eleven EFDG companies. The Respondent also requested that the Tribunal's Award provide that any amount awarded to any of the Claimants (whether as damages or costs) be subject to set-off against the EFDG companies' tax debts, including lawful interest and penalties. At the Tribunal's invitation, the Parties consulted and agreed on a briefing schedule to submit their comments on the Respondent's Revocation Application. The Parties informed the Tribunal of this briefing schedule on 17 August 2012.

105. On 28 September 2012, the Claimants submitted their observations on Respondent's Revocation Application. The Claimants opposed the Respondent's Application in its entirety and requested that the provisional measures remain in force until the date of the Award. In addition, the Claimants made three requests of their own: (i) that the Award provide that the Respondent be enjoined from any further tax collection measures until full payment of any damages awarded to the Claimants by the Tribunal, (ii) that the Tribunal declare that the Respondent cannot set-off tax debts as requested, and (iii) that the Respondent is ordered to pay all the Claimants' costs in relation to Respondent's Application.

106. On 8 October 2012, the Respondent submitted a request for production of the valuation reports in regard to the properties which the Claimants had offered to the Respondent as payment in kind to extinguish their existing tax debts. On 18 October 2012, the Claimants opposed production of the valuation reports, stating that the arbitral proceedings were not the appropriate forum to negotiate the details of a proposed payment in kind and that they were prepared to make the reports available to the Romanian authorities in direct meetings.

107. On 30 October 2012, the Tribunal issued a Procedural Order in which it ordered the production of the valuation reports, if the Claimants confirmed that the relevant properties were offered as security for their tax debts owed to the Respondent, rather than as payment in kind. The Tribunal found that the reports were relevant and material to its assessment of the Claimants' good faith efforts to provide additional security to meet the requirement of proportionality, so that they were thus necessary for the determination of the Respondent's Revocation Application. On 9 November 2012, the Claimants confirmed that the properties were offered as payment in kind and not as security, but produced the valuation reports nonetheless. They also mentioned additional assets as potential security. Valuation reports concerning these additional assets were submitted on 23 November 2012.

108. On 21 December 2012, the Respondent filed its reply concerning its Revocation Application and, on 15 February 2013, the Claimants filed their rejoinder.

109. On 5 March 2013, the Claimants submitted their Fourth Application for Provisional Measures ("Claimants' Fourth Application"). The Claimants informed the Tribunal that, on 5 March 2013, Romania had seized brewery-related assets belonging to European Food and requested that the Tribunal order provisional relief to stop the seizure and forced execution of assets. The Claimants argued that the seizure violated the existing provisional measures because Romania had given no notice of the measures and planned a forced sale if the Claimants' tax debt was not paid within 15 days.

110. At the invitation of the Tribunal, the Respondent submitted its response to the Claimants' Fourth Application on 8 March 2013. It argued that the seizure of assets belonging to European Food did not constitute a violation of the provisional measures in place because no notice requirement applied to the seizure of assets and Romania did not intend to proceed with a forced sale of the assets. The Respondent

contended that the seizure was justified because of time limitations on debt collection efforts under Romanian law. The Parties filed further comments by letters of 14 March 2013 (Claimants) and 21 March 2013 (Respondent).

111. On 27 March 2013, the Tribunal issued its Fourth Decision on Provisional Measures ("Fourth Decision") concerning the Respondent's Revocation Application. The Tribunal concluded that the Claimants had made good faith attempts to reach an agreement with the Respondent regarding a mutually acceptable security and that the provisional measures preventing garnishment of the bank accounts of European Food, European Drinks and TGIE remained proportional. It further considered that the circumstances surrounding the fiscal warehouse authorizations had not changed to such an extent as to warrant the revocation, suspension or modification of the provisional measures in question. The Tribunal thus confirmed the existing provisional measures and dismissed Romania's request for revocation or suspension of those measures (Fourth Decision, ¶ 119). It further ruled that the Claimants' request for post-award injunctive relief concerning Romania's tax debt collection measures, as well as the Parties' requests with respect to the set-off of tax debts against a pecuniary award in favor of the Claimants, would be deferred for determination in the Award.[2]

112. On 5 April 2013, the Tribunal issued its Fifth Decision on Provisional Measures ("Fifth Decision") concerning Claimants' Fourth Application. The Tribunal found that the mere seizure of assets without providing any notice that did not prevent the Claimants from continuing to use those assets did not, in and of itself, violate the provisional measures recommended by the Tribunal. The Tribunal thus dismissed Claimants' Fourth Application and all other prayers for relief (Fifth Decision, ¶ 39). The Tribunal also urged the parties to continue seeking a mutually acceptable agreement on security, as previously recommended (Fifth Decision, ¶ 38).

b. The Claimants' Renewed Application for a Site Visit

113. On 9 December 2010, the Claimants submitted a renewed application for a site visit, specifying which allegations a site visit would help prove or disprove and commenting on the Tribunal's authority to order it. On 17 December 2010, the Respondent objected to Claimants' application, stating that a site visit was unnecessary and would be procedurally unfair.

114. After careful consideration of each Party's position and a review of the evidence in the record, the Tribunal concluded that a site visit was neither necessary nor useful for the resolution of the dispute. Accordingly, by Procedural Order of 20 January 2011 the Tribunal denied the Claimants' application for a site visit. In that same Procedural Order, the Tribunal gave further directions to the Parties with respect to oral closing arguments.

[2] These matters are addressed in Section IX below.

c. The Claimants' Revised Request for Relief

115. On 20 December 2010, the Claimants submitted a revised request for relief (the "Revised Request for Relief").[3] On 10 January 2011, the Respondent objected to the procedural propriety and content of the Revised Request for Relief and requested that the Tribunal reject specific evidence. The Parties exchanged further submissions on this matter (Claimants' letters of 31 January 2011 and 9 February 2011, and the Respondent's letter of 2 February 2011).

116. The Tribunal ruled on this matter by means of a Procedural Order issued on 6 April 2011. With respect to the procedural propriety of the Revised Request for Relief, the Tribunal declined to reject any evidence submitted by the Claimants, but found that the Claimants' reliance on certain quantum experts was new, and thus invited the Respondent to rebut these testimonies in writing or by further examination of those experts.

117. The Tribunal also found that there had been no prejudice to the Respondent as a result of the reformulation of the Claimants' expropriation case or of their claim for interest. However, it found that the Claimants' request that any damages be awarded to the Individual Claimants on a 50/50 basis, and in the alternative that any damages be awarded to all five Claimants, was a reformulation of the Claimants' case that raised several issues of procedure and merits. The Tribunal also requested the Parties to address the merits of the Claimants' damages case in their post-hearing briefs and gave further directions with respect to briefing. The Tribunal also noted that the Claimants' reformulation of their damages case could affect the procedural schedule for closing arguments. It thus invited the Claimants to confirm if they wished to maintain their request for an award of damages to be distributed to the Individual Claimants on a 50/50 basis. The Claimants provided this confirmation on 15 April 2011.

d. Post-hearing briefs and oral closing arguments

118. The Tribunal's Procedural Order of 25 November 2010 provided that the Parties would present oral closing arguments, setting as a tentative date 1-2 March 2011. It also provided that the Parties could submit voluntary post-hearing briefs.

119. On 25 January 2011, the Respondent informed the Tribunal that its Romanian counsel would not be available for a hearing on 1-2 March 2011. After consulting with the Parties, on 3 February 2011 the Tribunal determined that the hearing for the Parties' closing arguments would take place on 6 and 7 June 2011.

120. As mentioned in paragraph 116 above, on 6 April 2011 the Tribunal issued a Procedural Order that ruled on the Claimants' Revised Request for Relief and gave directions to the Parties with respect to further briefing. Following the Claimants' confirmation that they wished to maintain their reformulated damages case, at the

[3] The Claimants' Revised Request for Relief is addressed in more detail in Sections IV.A and VII.A.1 below.

Tribunal's invitation the Parties consulted on the next procedural steps. On 4 May 2011 they informed the Tribunal that they had reached an agreement with respect to post-hearing briefs, additional submissions on damages, the hearing schedule and cross-examination of experts.

121. On 12 April 2011, the Respondent requested leave to submit three new fact exhibits. After hearing both Parties' positions, on 29 April 2011 the Tribunal determined that the record was sufficiently complete on the subject matters of those documents insofar as such matters were relevant to the outcome of the dispute, and denied the Respondent's request.

122. On 6 May 2011, in accordance with its Procedural Order of 25 November 2010, the Tribunal submitted to the Parties a list of questions to be addressed in their closing arguments.

123. On 13 May 2011, the Parties submitted their written post-hearing briefs. On 27 May 2011, the Respondent submitted an additional submission with respect to the Claimants' Revised Request for Relief in accordance with the Tribunal's Procedural Order of 6 April 2011.

124. On 6 and 7 June 2011, the Parties and the Tribunal held a hearing in Paris. During the course of the hearing, the Parties presented their oral closing arguments and responded to questions from the Tribunal. The Tribunal was addressed by Messrs. Fleuriet, Gaillard, Reed and Schwartz, on behalf of the Claimants, and by Messrs. King, Petrochilos and Rubins, on behalf of the Respondent.

125. The following persons participated in the hearing:

<u>On behalf of Mr. Ioan Micula and the Corporate Claimants</u>:

Mr. Eric Schwartz	King & Spalding
Mr. Ken Fleuriet	King & Spalding
Mr. Ric Toher	King & Spalding
Ms. Amy R. Frey	King & Spalding
Mr. Ioan Micula	Claimant
Ms. Nathalie Micula	Representative for Ioan Micula, European Food, Starmill, and Multipack
Ms. Olivia Micula	Representative for Ioan Micula, European Food, Starmill, and Multipack
Ms. Dorin Floruta	Representative for Ioan Micula, European Food, Starmill, and Multipack
Mr. Vasile Popa-Bota	Representative for Ioan Micula, European Food, Starmill, and Multipack
Mr. Mircea Halbac	Representative for Ioan Micula, European Food, Starmill, and Multipack
Mrs. Oana Popa	Representative for Ioan Micula, European Food, Starmill, and Multipack

Mr. Ciprian Popa	Representative for Ioan Micula, European Food, Starmill, and Multipack

On behalf of Mr. Viorel Micula:

Prof. Emmanuel Gaillard	Shearman & Sterling
Mr. David Reed	Shearman & Sterling
Mr. Robert Williams	Shearman & Sterling
Ms. Veronika Korom	Shearman & Sterling
Mr. Richard Kiveal	Shearman & Sterling
Ms. Gresa Matoshi	Shearman & Sterling
Mr. Viorel Micula	Claimant
Ms. Doina Micula	Representing Mr Viorel Micula
Mr. Victor Micula	Representing Mr Viorel Micula
Ms. Ioana Aron Blahuta	Representing Mr Viorel Micula
Ms. Medora Purle	Representing Mr Viorel Micula
Mr. Calin Vidican	Representing Mr Viorel Micula
Mr. Cristian Flora	Representing Mr Viorel Micula
Ms. Eva Fogarassy	Representing Mr Viorel Micula

On behalf of the Respondent:

Ms. Georgeta Harapcea	Nestor Nestor Diculescu Kingston Petersen
Mr. D. Brian King	Freshfields Bruckhaus Deringer LLP
Mr. Georgios Petrochilos	Freshfields Bruckhaus Deringer LLP
Mr. Boris Kasolowsky	Freshfields Bruckhaus Deringer LLP
Mr. Noah Rubins	Freshfields Bruckhaus Deringer LLP
Mr. Jonathan J. Gass	Freshfields Bruckhaus Deringer LLP
Mr. Ben Juratowitch	Freshfields Bruckhaus Deringer LLP
Mr. Sami Tannous	Freshfields Bruckhaus Deringer LLP
Ms. Evgeniya Rubinina	Freshfields Bruckhaus Deringer LLP
Mr. Moritz Keller	Freshfields Bruckhaus Deringer LLP
Ms. Smaranda Miron	Freshfields Bruckhaus Deringer LLP
Mr. Tunde Oyewole	Freshfields Bruckhaus Deringer LLP
Mr. Ignacio Stratta	Freshfields Bruckhaus Deringer LLP
Ms. Kate Bousfield	Freshfields Bruckhaus Deringer LLP
Mr. Nishad Morjaria	KPMG

126. A transcript of the hearing was distributed among the Parties.

e. Closure of the Proceeding and Submissions on Costs

127. On 14 June 2013, in accordance with ICSID Arbitration Rule 28(2), the Tribunal invited the Parties to file statements of costs by 12 July 2013, and their comments on the other Parties' statements of costs by 2 August 2013. The Parties were given the opportunity to inform the Tribunal if they saw a need for submissions on costs, rather than statements. By the same letter, the Tribunal declared the proceeding closed

pursuant to Rule 38(1) of the ICSID Arbitration Rules. The Parties subsequently agreed that they would file submissions on costs, but that they would not file any reply submissions.

128. On 19 July 2013, the Parties submitted their respective submission of costs, each requesting an award requiring the other party to bear the entirety of the expenses incurred by the parties, the fees and expenses of the members of the Tribunal, and the charges for the use of ICSID's facilities. The Claimants also requested compound interest on a costs award. The Claimants' submission was accompanied by an Annex and Exhibits C-1035 to C-1044. The Respondent's submission was accompanied by two declarations of co-counsel Nestor Nestor Diculescu Kingston Petersen and Freshfields Bruckhaus Deringer LLP, Exhibits R-245 to R-268 and Legal Authorities RL-375 and RL-376.

129. On 7 October 2013, the period of 120 days for the rendering of the award was extended pursuant to Rule 46 of the Arbitration Rules.

III. FACTUAL BACKGROUND

A. OVERVIEW

130. The present dispute arises from Romania's introduction of certain economic incentives for the development of disfavored regions of Romania, and their subsequent revocation in the context of Romania's accession to the European Union ("EU").

131. Specifically, in 1998, Romania enacted Emergency Government Ordinance 24/1998 ("EGO 24/1998" or "EGO 24"), which made available certain tax incentives, including customs duties exemptions (called alternatively by the Parties the "Incentives" or the "Facilities"), to investors in certain disfavored regions who met the requirements set out in EGO 24/1998 and its implementing legislation. The Claimants claim that, in reliance on those incentives, and in reliance on the expectation that they would be maintained for a 10-year period, they made substantial investments in the Ştei-Nucet-Drăgăneşti disfavored region located in Bihor County, northwestern Romania. The Claimants further claim that Romania's revocation of these incentives (effective 22 February 2005) was in breach of its obligations under the BIT and caused damages to the Claimants, as described further below.

132. Romania does not dispute that in 1998 it passed EGO 24, which offered tax incentives to investors investing in disfavored regions, nor does it dispute that, effective 22 February 2005, it repealed most of the tax incentives offered under EGO 24, with the exception of a profit tax incentive. However, it denies that this revocation breached any of its obligations under the BIT. In addition, it argues that this revocation was necessary to comply with EU state aid obligations, which in turn was necessary for Romania to complete its accession to the EU.

133. The Claimants began to invest in Romania in 1991, and continued investing throughout the next two decades. During this time, Romania was undergoing its economic transition from communism to a market economy. As stated by the Respondent, during this time "the factual record [...] portrays a government trying to pursue two policies that came into increasing conflict" (R-Rejoinder, ¶ 103): one directed to the development of its disfavored regions, and another directed to obtaining accession to the EU.

134. There are, therefore, three main areas of factual inquiry for the Tribunal: the evolution of Romania's policy for the development of disfavored areas, the history of the Claimants' investments, and Romania's EU accession process.

135. The Tribunal will first describe the evolution of Romania's policy for the development of disfavored areas, in particular the EGO 24 framework, up to the point at which the Claimants allege that they began investing in reliance on it (Section B). The Tribunal will then describe the Claimants' investments (Section C). It will then describe the main facts surrounding Romania's accession process, together with related events affecting the EGO 24 framework as that process developed (Section D).

136. Sections B, C and D are meant to give a general overview of the facts of the present dispute. They do not include all factual aspects which may be of relevance, particularly as they emerged from the extensive testimony of witnesses and experts at the hearing. The latter, as far as is relevant, will be discussed in the context of the Tribunal's analysis of the disputed issues.

B. LEGAL FRAMEWORK FOR THE DISFAVORED REGIONS

1. Romania's efforts to attract investment in the early 1990s

137. As noted by the European Commission in a 1997 report, "[a]fter the overthrow of the Ceausescu regime in December 1989, Romania found itself in a deep economic and social crisis" (Exh. C-317). This was followed by several years of reforms directed at transforming Romania into a market economy with the ultimate objective of obtaining EU accession.

138. In this context, Romania undertook serious efforts to attract investment, both foreign and domestic. On 14 March 1990, Romania issued Decree Law 96/1990, entitled "on certain measures for the attraction of foreign capital investment in Romania" (Exh. R-134), which contained provisions regulating foreign investment in Romania and granted foreign investors certain tax benefits.

139. This Decree Law was replaced a year later by Law 35/1991 on foreign investment ("Law 35", enacted on 3 April 1991 and effective 10 April 1991, Exh. C-275). To "induce foreign investment in Romania", this law offered the following incentives for new investments made by foreign investors [later amended to include domestic investors] (Arts. 12-15):

a. An exemption from customs duties related to certain types of imported machinery, equipment and means of transportation;

b. A two-year exemption from customs duties on imported raw materials;

c. A profit-tax exemption ranging from 2 to 5 years, depending on the type of investment; and

d. A profit-tax reduction for certain investments following the expiration of the profit-tax exemption.

140. On 5 August 1996, Romania passed Government Ordinance No. 27/1996 ("GO 27/1996", Exh. C-276), which offered certain benefits to individuals domiciled or working in some localities from the Apuseni Mountains and the Biosphere Reserve (also known as "the Danube Delta"). These benefits included a corporate profit tax incentive for investors ranging from 5 to 10 years, depending on the location of the investment.

141. In the following years, Romania began serious efforts to promote regional development, which was identified as "one of the essential elements of the general

strategy reform of Romania" in Romania's Government Program for 1998-2000. One of the objectives of this regional development was "[s]trengthening the ability of Romania to undertake responsibilities as a future member of the European Union." The program also stated that the Government defined a minimum set of priorities, "achievement of which is in full compliance with the criteria and objectives of the National Program on the Accession of Romania to the European Union." (Annex 2 to Government Decision 6 issued 15 April 1998, Exh. C-567).

142. In this context, on 16 July 1998, Romania passed Law 151/1998 on Regional Development (the "Regional Development Law", Exh. C-392). Among its objectives was the "diminution of existing regional imbalances by stimulation of a balanced development, by accelerated recovery of delays in the development of deprived zones as a result of some historical, geographic, economic, social, and political conditions, and prevention of the production of new imbalances." (Art. 1(a)). The methodological norms issued for Law 151 (Exh. C-392) stated that the objective of regional development was the improvement of the economic performance of certain development regions, and that such objective had the support of the Government and the EU (Art. 1).

143. The Regional Development Law divided the country into 8 development regions. The area in which the Claimants invested (the Ştei-Nucet-Drăgăneşti region in Bihor County) is located in the North West Regional Development Area, and was managed by the NW-Regional Development Agency (NW-RDA). A key objective of the NW-RDA was to "increase[e] the living standard and long-lasting social-economic development of the region within a European context", by *inter alia* increasing the attractiveness of the region, establishing a business environment and promoting long-lasting development (Exh. C-393, Section III.2).

144. At the time of these reforms, unemployment levels in Bihor County were high. In its effort to restructure the mining industry, between 1997 and 2005 the Romanian government closed down over 500 uneconomic mines. By the end of 1998, approximately 100,000 miners were out of work. Unemployment was felt strongly in Bihor County, which had been dependent on mining for many years (Exh. C-319, C-320, C-321, C-325, C-566).

2. EGO 24/1998

145. It was in this context that on 30 September 1998 (effective 2 October 1998), Romania adopted Emergency Government Ordinance No. 24/1998 ("EGO 24/1998" or "EGO 24", Exh. R-5 or C-38). EGO 24/1998 established the legislative framework for the granting of certain incentives to investors investing in certain "disfavored" regions.

146. EGO 24/1998 was subsequently approved and amended by Law No. 20/1999 of 15 January 1999 (effective 19 January 1999) (Exh. C-39), and a renumbered version containing the amendments made by Law 20 was republished on 8 November 1999 (Exh. R-68). It is on this republished version that the Claimants claim they relied. As

a result, for the sake of simplicity, henceforth all references to EGO 24/1998 will refer to its reformulated version republished on 8 November 1999 (Exh. R-68).

147. EGO 24/1998 provided that the Government could declare the creation of certain "disadvantaged areas", in response to proposals of the National Council for Regional Development (Art. 3). This declaration would be done by means of a "government decision", which would also approve (a) the period for which a geographical area would be declared a disadvantaged region, (b) the fields of interest for investments, and (c) "the required financing and advantages provided by law, and granted to the investors" (Art. 4). Article 5 provided that "[a] geographical area may be declared a disadvantaged area for a period of at least 3 years, but for not more than 10 years, with possibility for extension, under the conditions of this Emergency Ordinance."

148. Article 6(1) went on to say that investors meeting certain requirements "will be granted the following advantages for their new investments in these regions", and proceeded to list the incentives:

> Art. 6. - (1) Privately held companies, Romanian legal entities, as well as small or family businesses, authorized pursuant to the Decree-Law no. 54/1990 concerning the organization and operation of free initiative-based economic activities that are headquartered and conduct business within the disadvantaged region, will be granted the following advantages for their new investments in these regions:
>
> (a) exemptions from payment of:
>
> - customs duties and value added tax on machinery, tools, installations, equipment, means of transportation, other goods subject to depreciation which are imported for the purpose of making investments in that region;
>
> - value added tax on machinery, tools, installations, equipment, means of transportation, other goods subject to depreciation manufactured domestically with the purpose of making investments in that region;
>
> [the "***Machinery Incentive***" or "***Machinery Facility***"]
>
> (b) refunds of customs duties on raw materials, spare parts and/or components necessary for achieving the investor's own production in that region. The refunds will be made based on the approval by the regional development agencies of the companies' production sales documents. The funds necessary for the refund of the customs duties will be provided to the Agency for Regional Development from the Regional Development Fund. In case [of] unprivileged regions belonging to two or more administrative-territorial units, the funds necessary for the refund of the customs duties will be provided by the National Agency for Regional Development from the National Development Fund [the "***Raw Materials Incentive***" or "***Raw Materials Facility***"];
>
> (c) exemptions from payment of the profit tax during the existence of the disadvantaged region [the "***Profit Tax Incentive***" or "***Profit Tax Facility***"];

(d) exemptions from payment of the taxes collected for the changes of the destination of the land or for the removal from the agricultural use of some plots of land that had been earmarked for the fulfillment of the investment [the "***Agricultural Land Incentive***" or "***Agricultural Land Facility***"][;]

(e) preferred payments from the Special Development Fund of the Romanian Government, which was established pursuant to the Emergency Government Ordinance no. 59/1997 concerning the purpose of the funds collected by the State Property Fund during the privatization process of the companies where the State is a shareholder, with the purpose of:

- encouraging the exports of the final products and/or for the industrial services, as the case may be;

- guaranteeing external credits, within the annual limit set by the Ministry of Finance;

- financing special programs, approved by Government Decision;

- financing investment projects for companies through the state's participation in the share capital.

[the "***Subsidies***"]

2) The advantages and the financing stipulated in paragraph (1) letter e) is established through a Government Decision.

149. Article 8 provided the requirements for investors to qualify for the incentives: "[t]he advantages stipulated in the present Emergency Ordinance are granted to businesses, privately held Romanian legal entities, as well as to small and family businesses, authorized according to Decree-Law No. 54/1990, who have their headquarters and conduct business in this area, if the investment made yields new jobs for the unemployed or for their family members who live in the disadvantaged area."

150. Articles 7 and 9 set out investors' obligation to stay in the disadvantaged area for twice the period they received the incentives, as follows:

> Art. 7. - If an investment which is benefiting from the provisions of the present Emergency Ordinance is ***voluntarily liquidated in a period of time shorter than twice the period of time in which they enjoyed the advantages*** granted through the Government Decision to create the underprivileged area, ***the liquidator(s) is/are obligated first to pay the funds related to the advantages*** granted in accordance with the provisions of the present Emergency Ordinance, to the State Budget, the State Social Insurance Budget and the Special Funds Budgets from the funds resulting from the liquidation procedure.
>
> […]
>
> Art. 9. - Businesses established in a disadvantaged area ***may voluntarily cease to operate in the respective area***, and those opening subsidiaries as legal entities in such an area may ***close them or move the location of their headquarters out of the disadvantaged area in a period shorter than the one provided in Art. 7 only if they pay the funds they owe*** to

> the State Budget, the State Social Insurance Budget and the Special Funds Budgets ***related to the advantages granted*** in accordance with the provisions of the present Emergency Ordinance.

151. Finally, Article 15 provided that "the Government will approve, through a decision, the methodological standards to be used for the implementation of this Emergency Ordinance."

3. Government Decision 194/1999 and the 1999 Methodological Norms

152. By means of Government Decision 194/1999, dated 25 March 1999 (Exh. C-31, also C-280), Romania designated the Ştei-Nucet region as a disfavored region for a period of ten years, starting on 1 April 1999. The Ştei-Nucet region is located in Bihor County in the northwestern part of Romania, and its primary industry at the time was the mining and oil industry. GD 194/1999 also stipulated that all six incentives offered under EGO 24/1998 would be available to investors in the Ştei-Nucet region while that region was designated disfavored, and set out the types of investments that could benefit from the incentives. Specifically, GD 194/1999 provided:

> Art. 1. - The mining area of Ştei-Nucet, Bihor county, is established as a disfavoured region.
>
> Art. 2. - The geographical boundaries of the mining area of Ştei-Nucet, Bihor county are represented by Ştei and Nucet, as administrative-territorial units having a surface of 4,678 ha, according to annex no. 1.
>
> Art. 3. - The mining area referred to in art. 1 will be established as a disfavoured region for a period of 10 years.
>
> Art. 4. - During the existence of the disfavoured region, established according to this decision, the facilities under annex no. 2*) ***will be granted***. ["se acordă" in the Romanian original]

153. In turn, Annex 2 of GD 194/1999 listed all of the incentives provided under Article 6(1) of EGO 24, with slightly amended language. Specifically, it stated:

> Companies the majority of the share capital of which is privately owned, Romanian legal entities, as well as the private investors or family associations authorized pursuant to the "Decree-Law no. 54/1990 on the organization and operation of economic activities based on free initiative" that were set up after the date of establishment of the disfavoured region and have their registered seat and operate in the disfavoured region, will be granted the following facilities for new investments in these regions:
>
> (a) an exemption from payment of:
>
> - custom duties and value added tax on machinery, tools, installations, equipment, means of transportation, other goods subject to depreciation which are imported with a view to performing and conducting investments in that region;
>
> - value added tax on machinery, tools, installations, equipment, means of transportation, other goods subject to depreciation manufactured in the country with a view to performing and conducting investments in that region;

(b) refund of custom duties on raw materials, spare parts and/or components necessary for achieving the investor's own production in that region;

(c) an exemption from payment of profit tax during the existence of the disfavoured region;

(d) an exemption from payment of taxes collected for changes in the nature of land or for conversion of agricultural plots of land into industrial land for the implementation of the investment;

(e) preferred payment of amounts available from the Special Development Fund at the disposal of the Romanian Government that was established pursuant to the "Emergency Government Ordinance no. 59/1997 on the amounts collected by the State Property Fund during the privatization process of the companies in which the State is shareholder" to - encourage the export activities for the final products and/or for the industrial services, as the case may be;

- guarantee the external credits within the annual limit set by the Ministry of Finance;

- finance special programs approved by Government Decision;

- finance investment projects for companies through the state's participation in the share capital.

154. On 29 June 1999, Romania issued Government Decision No. 525/1999, which set out the methodological norms for the application of EGO 24/1998 (the "1999 Methodological Norms", Exh. R-6). (The 1999 Methodological Norms repealed a previous version issued in December 1998 which has not been relied upon in this arbitration).

155. With respect to the requirements for granting the incentives, Article 5 of the 1999 Methodological Norms provided:

(1) The incentives provided by the law ***shall be granted*** [in Romanian, "se acorda"] pursuant to the certificate of investor in a disfavored area, which is issued, upon the business entity's request, by the Regional Development Agency under the jurisdiction of which the head office of such business entity is located.

[…]

(3) Business entities requesting the issuance of the certificate of investor in a disfavored area shall prove they meet the requirements set forth by the [EGO].

(4) Emerging business entities, unable to produce evidence regarding the investment, the commissioning of the operations and the creation of new jobs, may request the issuance of a temporary certificate of investor in a disfavored area, for a maximum of 3 months. In case they do not bring, during this period, evidence of having met the requirements set forth by the [EGO], they shall be compelled to pay and return, respectively the equivalent value of all the incentives they have benefited of.

> (5) The temporary certificate shall be issued pursuant to the business entity's commitment regarding the investment and the creation of new jobs.
>
> […]

C. THE CLAIMANTS' INVESTMENTS

156. The Individual Claimants claim to be the majority shareholders of a group of companies (the European Food and Drinks Group or "EFDG") engaged in food and beverage production in the disfavored region of Ştei-Nucet-Drăgăneşti, Bihor County. The Corporate Claimants (European Food, Starmill and Multipack) are part of the EFDG, and are thus owned directly or indirectly by the Individual Claimants.

157. The evolution of the Claimants' investments can be separated in two phases: their initial investments (principally in the beverage production business), allegedly made in reliance on the incentive programs that predated EGO 24, and their investments (in the food and beverage production business), allegedly made in reliance on the EGO 24 incentives.

1. The Claimants' initial investments in reliance on previous incentive regimes

158. The Individual Claimants allege that their beverage business was initially developed in reliance on the incentive programs established by Law 35 and GO 27, predecessors to EGO 24. (C-Reply, ¶¶ 62-124; Third WS of I. Micula ¶¶ 10-27). Law 35 (C-275) was enacted in 1991 to attract foreign investors to Romania by offering the incentives for new investments, including customs duties and profit tax exemptions (see ¶ 139 above). GO 27/1996 (Exh. C-276) was enacted in 1996 to attract investments in Bihor County and other disadvantaged regions, and provided a corporate profit tax incentive ranging from 5 to 10 years, depending on the location of the investment (see ¶ 140 above).

159. The Claimants claim that these incentives allowed them to produce a wide variety of beverages at a low cost. Law 35's encouragement of additional production activities and the Claimants' knowledge of advanced technologies enabled them to sell their beverages in a variety of different packages, including TetraPak and PET packaging. Capitalizing on this expertise, they began to produce intermediate products related to packaging (C-Reply, ¶¶ 81-96, Third WS of I. Micula, ¶¶ 10-24).

160. After the success of their initial investments, Messrs. Micula expanded their beverage production business, building what would become an integrated system of production companies. All of the core companies, with the exception of the Corporate Claimants and Scandic Distilleries, were established under Law 35 (C-Reply, ¶¶ 77, 81-96; Third WS of I. Micula, ¶ 29).[4]

[4] The record shows the following with respect to the Claimants' incorporation or participation in companies during this period (1991-1997):

161. The Claimants claim that their business model was premised on the existence and specific form of the incentives. Because an investor could benefit from Law 35 incentives each time he created a new company, the Law 35 incentives encouraged the establishment of an expanding group of companies. New companies, and thus the expansion of Claimants' production business, were planned and created to coincide with the expiration of the incentives for older companies. The new companies and investments were integrated into the existing companies and investments, so that all companies functioned cooperatively to create, manufacture, package, and distribute products efficiently (C-Reply, ¶¶ 77-80; Third WS of I. Micula, ¶¶ 26-27; WS of M. Ban, ¶ 27).

162. The Claimants allege that this integration allowed them to realize an increased level of profit. They also state that profits were consistently re-invested to support the expansion of the business and to take advantage of the tax profit exemption under Law 35. Moreover, the raw materials customs duty exemption in Law 35 encouraged production activities, because it only applied to raw materials used to produce new end-products. It thus encouraged a proliferation of businesses that worked together to produce a variety of products, and provided a competitive advantage because the incentives allowed the companies to keep product prices low (C-Reply, ¶¶ 80-81, Third WS of I. Micula, ¶ 25).

163. The Claimants claim that they were able to successfully expand their production activities by using savings from the incentives programs and their profits, which they consistently reinvested in the business. The Claimants claim that they followed this approach throughout the years: using the realized savings during the time in which the incentives were offered to reinvest and build facilities that were functional and profit-producing by the time the incentives expired. (C-Reply, ¶ 96).

---

a. On 19 October 1990, Messrs. Micula allegedly incorporated the Romanian company Transilvania General Import Export S.R.L ("TGIE") (Claimants' "Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25). The Claimants allege that this company was set up to benefit from Law 35/1991, as it was originally set up for the five years for which Law 35 granted corporate profit tax exemptions (C-Reply, Note 102). The Tribunal notes however that Law 35 was enacted after TGIE's stated date of incorporation, so it understands the Claimants to be saying that TGIE was established to benefit from the earlier Decree Law 96/1990, which was later replaced by Law 35. That being said, the Tribunal also notes that, according to the information provided by the Bihor Trade Register Office (Exh. R-60) and TGIE's 1993 Fiscal Report (Exh. C-356), TGIE was assigned its trade register reference number in May 1991. TGIE's date of incorporation is therefore not established with certainty.

b. From June 1993 to April 1995, Messrs. Micula incorporated or acquired an interest in ten Romanian companies, including European Drinks S.A. and Rieni Drinks S.A. (Claimants' "Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25; R-CM, Figure 1, p. 7; Exh. R-60 and R-61).

c. From November 1996 to July 1998, the Claimants incorporated or acquired an interest in three additional Romanian companies (Claimants' "Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25; R-CM, Figure 1, p. 7; Exh. R-60 and R-61.)

d. On 8 July 1997, the Claimants, through their company Edri Trading SRL purchased shares in SC Ipic Bucaresti S.A., a previously state-owned company which owned 88,000 square meters of land in Bucharest (Third WS of I. Micula, ¶¶ 31-36; Tr., Day 2, 211, Day 3, 133,141,145-150 (I.Micula); Exh. C-346; C-439).

164. In turn, the GO 27 incentives motivated the Claimants to relocate certain projects to Drăgăneşti (in the Apuseni region of Bihor County, which was expressly covered by GO 27). In particular, the Miculas relocated the distillery for what would eventually become Scandic Distilleries from the Madaras region to Drăgăneşti (C-Reply, ¶¶ 105-110). Other companies developed new projects in Bihor County to realize GO 27 benefits (C-Reply, ¶¶ 111-118).

165. The Claimants claim that their beverage business was very successful. By 2001, they state that European Drinks held an estimated 55% of the total carbonated drink market in Romania and a 51% share of the bottled mineral water market (C-Reply, ¶ 87).

2. The Claimants' investments in reliance on the EGO 24 incentives

166. After Romania's introduction of the EGO 24 incentives, the Claimants allege that they built a large, highly integrated food production platform in reliance on these incentives, in particular the Raw Materials Incentive. The Respondent disputes this reliance, the Claimants' description of their business plan and the Claimants' intention to build certain parts of the platform.

167. Specifically, the Claimants allege that, starting in 1998, they expanded their business under a ten-year plan to capitalize on the EGO 24 incentives with the objective of building an integrated food platform, incorporating several companies in the process.[5] In 1999 they incorporated European Food (Claimant 3), which as explained below was the first Corporate Claimant to benefit from the EGO 24 program (see paragraph 174 below). The Claimants state that they imported the majority of their raw material products through European Food, which brought them customs duties savings and allowed them to pursue a two-phase expansion plan (C-Reply, ¶¶ 161-170).

168. The <u>first phase</u> consisted in production of fast-moving consumer products new to the Romanian market, which had significant market potential and would generate quick

[5] The record shows the following with respect to the Claimants' incorporation or participation in companies during this period (1998-2007):

a. From June 1998 to December 1999, Messrs. Micula incorporated or acquired an interest in 23 Romanian companies, including S.C. European Food S.A., which was established as a Romanian joint stock company in Ştei, Bihor county on 30 November 1999 (Exh. HEC-1).

b. During 2000, Messrs. Micula incorporated or acquired an interest in five other Romanian companies ("Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25), including Scandic Distilleries S.A., which was incorporated on 20 January 2000 (Exh. R-60).

c. During 2001, Messrs. Micula incorporated or acquired an interest in 3 Romanian companies ("Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25; Exh. R-60).

d. During 2002, Messrs. Micula incorporated or acquired an interest in five Romanian companies, including S.C. Multipack S.R.L. and S.C. Starmill S.R.L., which were incorporated on 21 February 2002 ("Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25; Exh. R-60).

e. During 2003 and 2004, Messrs. Micula incorporated or acquired an interest in four Romanian companies ("Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25; Exh. R-60).

f. Between July 2005 and January 2007, Messrs. Micula incorporated or acquired an interest in three Romanian companies ("Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25; Exh. R-60).

cash flow. Together with the incentive savings, this approach would allow the companies to integrate vertically and achieve economies of scale. The companies could thereby save on operational costs and minimize waste and energy consumption.

169. In this context, in February 2002 the Claimants incorporated Starmill and Multipack (Claimants 4 and 5):[6]

a. Starmill was incorporated to establish integrated in-house grain milling facilities. It was designed to provide the milling capacity necessary for the planned brewery, but started as a corn mill which provided raw materials for the distillery. It was also responsible for the production of flour for several food products. According to the Claimants, through the use of the Raw Materials Incentive, Starmill would create cost efficiencies to help carry the businesses forward after the incentives expired. The Claimants claim that they made substantial investments for Starmill, including the purchase of land and construction (C-Reply, ¶¶ 197-200).

b. Multipack was incorporated to carry out the packaging and labeling for nearly all of the companies' products. The Claimants also allege that it relied heavily on the Raw Materials Incentive, and required substantial investments and created over 200 new jobs (C-Reply, ¶¶ 201-204).

170. The <u>second phase</u> of the Claimants' alleged expansion plan was to build a brewery, the core capital expenditure for which would be funded by the profits from the other investments. According to the Claimants, the construction and integration of the brewery consisted of 4 components:

a. A state-of-the-art brewery with an initial capacity for 2M hectoliters/year, expandable to 6M.

b. A malt plant, which would reduce the cost of malt by in-house manufacture;

c. A canning plant, which would reduce packaging costs;

d. A co-generation plant, which would use the biomass by-products of the brewery and other food and beverage production, and would save costs and produce revenue through sales back to the state of excess electricity.

171. The Claimants allege that in 2001 they started construction of the brewery (component (a) of paragraph 170 above), which was integrated into the other facilities of the companies. The first phase of construction was completed in 2003 and the second in 2006. (C-Reply, ¶¶ 205-207).

172. The Claimants claim that they had plans to build the components identified in letters (b) through (d) of paragraph 170 above, but their completion was thwarted by cash-

[6] Starmill and Multipack were incorporated on 21 February 2002 ("Correct Timeline of Messrs. Micula's Investments", C-Reply at page 25; Exh. R-60).

constraints caused by the revocation of the incentives. The Claimants further claim that the construction of these components began prior to the revocation of the incentives, but that none of these components was ever completed. The Respondent disputes all of these assertions (*See* Section VII below on Damages).

3. Permanent Investor Certificates

173. In order to benefit from EGO 24, the Claimants allege that the three Corporate Claimants were required to obtain Permanent Investor Certificates ("PICs"), all of which were issued by the North-West Regional Development Agency. Prior to their issuance, the Claimants state that the Corporate Claimants could operate on the basis of a Temporary Investor Certificate ("TIC") for a period of 3 months (C-Reply, ¶¶ 156-160; WS of M. Ban, ¶¶ 41-46).

174. European Food (Claimant 3) obtained its Temporary Investor Certificate on 9 December 1999 (Exh. C-442). It was then issued PIC No. 524 on 1 June 2000 (Exh. C-42, Exh. C-638), which stated that European Food

> is the beneficiary of the facilities under Government Decision no. 194/1999, in accordance with the provisions of Emergency Government Ordinance no. 24/1998, republished and subsequently amended, and in accordance with the provisions of Government Decision no. 728/2001 on the approval of the methodological norms for the application of Emergency Government Ordinance no. 24/1998 on the disfavoured regions regime.
>
> The present certificate is valid until 01.04.2009.[7]

175. Starmill (Claimant 4) was issued PIC No. 1664 on 17 May 2002 (Exh. C-43), which stated that Starmill

> is the beneficiary of the facilities under Government Decision no. 194/1999, in accordance with the provisions of Emergency Government Ordinance no. 24/1998, approved and amended by Law no. 20/1999 and in accordance with the provisions of Government Decision no. 525/1999 on the approval of the methodological norms for application of Emergency Government Ordinance no. 24/1998 on the disfavoured regions regime.
>
> The present certificate is valid until 4/1/09

176. Multipack (Claimant 5) holds PIC No. 1663 issued on 17 May 2002 (Exh. C-44), which stated that Multipack

> is the beneficiary of the facilities under Government Decision no. 194/1999, in accordance with the provisions of Emergency Government Ordinance no. 24/1998, republished and subsequently amended, and in accordance with the provisions of Government Decision no. 728/2001 on the approval

[7] The Tribunal observes that this cannot have been the original PIC, because it includes a reference to the 2001 Methodological Norms, which had not been issued at the time. The original PIC appears to be at page 1 of Exh. C-638, which has not been translated. This version also appears to state that European Food is the beneficiary of the facilities under GD 194/1999, in accordance with the provisions of EGO 24. However, it does not say "republished and subsequently amended", but rather appears to say "approved and amended by Law 20/1999", and adds a reference to the 1999 Methodological Norms (GD 525/1999).

> of the methodological norms for application of Emergency Government Ordinance no. 24/1998 on the disfavoured regions regime.
>
> The present certificate is valid until 01.04.2009.

177. The legal nature and relevance of the PICs are disputed by the Parties.

D. ROMANIA'S ACCESSION PROCESS

178. In this section, the Tribunal will set out the chronology of events leading up to Romania's accession to the EU. One of the key areas of tension between Romania and the EU during this process was the alignment of Romania's competition policy and state aid laws with the *acquis communautaire* (hereinafter the "*acquis*"), namely the European body of law as it existed at a given time and resulting from, without limitation, legal acts, court decisions or Commission's ordinances. In this process, the incentives granted under the EGO 24 framework became increasingly relevant, and were finally repealed. As a result, the Tribunal will include in this chronology the developments relating to this framework.

1. Early steps: the Europe Agreement and Romania's application for EU membership

179. On 1 February 1993, Romania signed the Europe Agreement with the predecessor of the EU (the "European Community"[8]) and its Member States (Exh. R-10, C-565). The Europe Agreement, which was to enter into force on 1 February 1995, established an association between the European Community, its existing Member States and Romania and provided the legal framework for the accession process. Among its objectives was the promotion of Romania's economic development and its gradual integration into the European Community, in exchange for which Romania would have to work towards fulfilling certain conditions (Europe Agreement, Article 1).

180. The Europe Agreement covered many different areas of governance, including competition. With respect to state aid, Article 64 of the Europe Agreement provided:

> Article 64
>
> 1. The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and Romania: [...] (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.
>
> 2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86, and 92[9] of the Treaty establishing the European Economic Community.

[8] The Tribunal will use the term "European Community" to refer to the predecessor of the EU that signed the Europe Agreement, formed by the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community.

[9] Article 92 of the Treaty establishing the European Economic Community became Article 87 of the EC Treaty (Exh. RS-9; C-583), which provided:

3. The Association Council shall, within three years of the entry into force of the Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.

4. (a) For the purposes of applying the provisions of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Romania shall be assessed taking into account the fact that Romania shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Romania, decide whether that period should be extended by further periods of five years. [...]

181. In turn, Article 87(3)(a) of the EC Treaty (which replaced Article 92(3)(a) of the Treaty establishing the European Economic Community) (Exh. RL-177; C-583) provided:

> The following may be considered to be compatible with the common market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; […]

182. Another of the aims of the Europe Agreement was to promote economic cooperation between Romania and the EC Member States. In this context, Article 74 of the Europe Agreement on investment promotion and protection provided:

> Article 74 - Investment promotion and protection
>
> 1. Cooperation shall aim to establish a favourable climate for private investment, both domestic and foreign, which is essential to the economic and industrial reconstruction of Romania.
>
> 2. The particular aims of the cooperation shall be:
>
>   - for Romania to establish and improve a legal framework which favours and protects investment;
>
>   - the conclusion by the Member States and Romania of Agreements for the promotion and protection of investment [...]

183. In addition to establishing principles and rules of governance, the Europe Agreement provided that Romania would have to harmonize its existing and future legislation with that of the Community:

> Article 69 - The Parties recognize that an important condition for Romania's economic integration into the Community is the approximation of

1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.
2. The following shall be compatible with the common market:

[…]

3. The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; […]

> Romania's existing and future legislation to that of the Community. Romania shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.
>
> Article 70 - The approximation of laws shall extend to the following areas in particular: [...] rules on competition [...].

184. On 21-22 June 1993, the European Council concluded at its meeting in Copenhagen that countries from Central and Eastern Europe which wished to become members of the European Union would have to satisfy the economic and political conditions required for membership (known as the "Copenhagen criteria"), including "the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union." The European Council also "underlined the importance of approximation of laws in the associated countries to those applicable in the Community, in the first instance with regard to distortion of competition [...]" (Exh. R-62).

185. On 1 February 1995, the Europe Agreement entered into force.

186. On 22 June 1995, Romania presented its application for EU membership. On 17 July 1995, Romania's application was submitted to the Commission, which pursuant to [the EC Treaty] was required to give a favorable opinion for accession negotiations to begin (Exh. C-317).

187. In its December 1995 meeting in Madrid, the European Council referred to the need, in the context of the pre-accession strategy, "to create the conditions for the gradual, harmonious integration of the applicant countries, particularly through: the development of the market economy, the adjustment of their administrative structure, [and] the creation of a stable economic and monetary environment" (Exh. C-317).

188. The European Commission, in an opinion dated 15 July 1997 (Exh. C-317), summarized the state of Romania's economy in 1995 as follows:

> Romania, with a population of 22.6 million, had in 1995 a gross domestic product (GDP) of ECU 93 billion (expressed in purchasing power parity); its population was about 6.5% of the Union's, while its economy was only about 1.5%. Per capita GDP is about 24% of the Union average.

189. On 10 April 1996 (effective 30 April 1996), Romania passed Law No. 21/1996 on competition (Exh. R-73). The purpose of this law was to "protect, sustain and stimulate competition and a normal competitive environment in order to promote the interests of consumers." This law created the Competition Office and the Competition Council, which were tasked with overseeing the implementation of the law.

190. On 15 July 1997, the European Commission issued its Opinion on Romania's Application for Membership of the European Union (Exh. C-317). That Opinion concluded that, despite its post-communist reforms, Romania did not meet the Copenhagen criteria and thus was not yet ready to initiate accession talks. Specifically, the European Commission concluded that:

> - Romania has made considerable progress in the creation of a market economy, but it would still face serious difficulties to cope with competitive pressure and market forces within the Union in the medium term;
>
> - despite the progress that has been made, Romania has neither transposed nor taken on the essential elements of the acquis, particularly as regards the internal market. It is therefore uncertain whether Romania will be in a position to assume the obligations of membership in the medium term. […]

191. The European Commission described Romania's economic situation in the pre-accession context as follows (Section 2.2):

> Romania has made enormous progress since the beginning of the transition, although it cannot be considered, as yet, to be a functioning market economy. […]
>
> Policy-making on economic issues has not always been coherent. As a result, progress towards macroeconomic stability has not been steady: recent years have been characterised by widely fluctuating performances in term of growth, inflation and unemployment. Economic agents do not necessarily perceive the macroeconomic environment to be stable enough to promote the necessary level of savings and investment (both domestic and foreign).
>
> If fully implemented, the comprehensive programme of macroeconomic stabilisation and structural reforms announced by the authorities in early 1997 should radically transform Romania's economy and lay the foundations for healthy growth in the years ahead. But the implementation of the basic features of the programme, especially with regard to restructuring, will take many years. It is yet too early to assess whether the programme will be implemented fully and successfully. […]
>
> In order to complete its transformation process successfully and prepare for EU membership, the country still needs to implement many, detailed and complex measures. […]
>
> In the past, foreign investors have singled out the unpredictable evolution of the legal system and the different interpretation of double taxation treaties as obstacles to doing business in Romania. […]
>
> [T]he ability to withstand competitive pressure depends not only on the current structure of the economy, but also on the way in which it will develop in the near to medium-term future. In this respect, Romania offers a contrasted situation: the existing economic structure points to very important structural weaknesses, while the reforms that have been announced at the beginning of 1997 could have a very positive impact in a relatively short period of time, especially if rapid privatisation is achieved and foreign direct investment is forthcoming. However, in order to withstand competition within the Union both the industrial and agricultural sectors would need to undergo major structural transformation.
>
> […]
>
> The current production base in industry relies to a large extent, although not exclusively, on sectors with very high energy intensity, or which are strongly dependent on imported raw materials, or have been the object of exercises of capacity reduction within the Union. […] The current structural reforms should aim at the restructuring of the very large state-owned

combinats, which, in their present condition, would face strong competitive pressures from their western competitors.

A diversification of the industrial base towards lighter industries, entailing the creation of a large number of new, small and medium-sized enterprises, and increased participation of foreign capital and know-how, will help Romania adjust to the restructuring of the large enterprises. Light industry is already well-developed in some sectors (wood products, leather, textiles) and has achieved good performances on exports markets.

Although agriculture has been neglected in the last decades, it represents a potentially important source of comparative advantage for Romania […]. But the process of modernisation of the agricultural sector has just begun and will require a policy aiming at stimulating investments both in the farming sector and in the food industry.

Foreign direct investment has been low for a country the size of Romania: at the end of 1996 cumulative FDI per capita stood at ECU 50. With a few notable exceptions, FDI has not made a significant contribution to the modernisation of either industry or agriculture. This means that production in many sectors still relies on old and obsolete technologies. Increasing the chances that Romanian producers will be able to withstand competition of high-quality, high-standards EU goods, and improving the level of skills in the economy calls for much bigger inflows of FDI.

[…]

Romania possesses a number of key advantages: its geographical location at the cross-roads of many trade routes and in particular as the sea-gate for accessing central European markets; the size of its population which will attract industries with economies of scale; the relatively young population which points to vast needs for durable goods; and its low level of labour costs. All these factors could make Romania a strong export base for accessing markets of smaller neighbours, especially for consumer goods.

[…]

The relative success which Romania achieved in macroeconomic stabilisation during 1995 and 1996 rested on very fragile foundations. In fact, given the very slow progress in structural reforms, the high growth rates of this period were not sustainable, and not compatible with the aim of integrating Romania in the European and world economy. This diagnosis was at the heart of the economic and social programme of the new government elected in November 1996.

The programme of macroeconomic stabilisation and structural reforms announced in February 1997 represents a very ambitious attempt to radically transform, in a relatively short period of time, the old economic structures and lay the foundations for a fully-functioning market economy. However, this is only a first step in the right direction and much remains to be done.

A stable and predictable macroeconomic framework is the first key condition for laying the foundations of sustainable growth and modernisation of the microeconomic side of the economy. […]

The new Romanian authorities have already recognised the crucial role that foreign investors and international financial institutions will play in the success of their reform efforts. Restoring confidence among international investors and lenders and securing their medium-term investment in Romania calls for a stable macroeconomic framework, a sustained and credible commitment to structural reforms, a clear and broad political consensus over a medium-term strategy and the continuing legitimacy of reforms among the population. These conditions are indispensable to reduce political and economic uncertainty and so lay the foundations for successful investment planning.

192. The Commission concluded with respect to the economic conditions for accession (Section 2.3):

> Romania has made considerable progress in the creation of a market economy. The reorientation of economic policy since the recent change of government marks a change for the better, but much still needs to be done. While prices have been almost fully liberalised, property rights are not yet fully assured for land, the legal system is still fragile and policy-making on economic issues has not always been coherent. Further efforts to consolidate the legal and administrative framework, and to address persistent macroeconomic imbalances, are required to ensure a stable environment.
>
> Romania would face serious difficulties coping with competitive pressure and market forces within the Union in the medium term. It has recently made progress towards improving the competitive capacity of its economy, notably by addressing major distortions such as low energy prices, accelerating privatisation and beginning to wind up large loss-making state-owned firms. However, much of Romania's industry is obsolete, and agriculture needs to be modernised. The low levels of research and development, and of skills among the workforce also suggest that the economy needs a number of years of sustained structural reform.

2. Romania's initial efforts to align its state aid laws

193. On 10 March 1998, the European Commission issued its Guidelines on Regional Aid, a set of criteria for assessing whether to allow regional aid under Article 87(3) of the EC Treaty (previously Article 92(3) of the Treaty establishing the ECC) (Exh. RJ-9). These Guidelines stated:

> 1. Introduction
>
> […]
>
> Regional aid is designed to develop the less-favoured regions by supporting investment and job creation in a sustainable context. It promotes the expansion, modernisation and diversification of the activities of establishments located in those regions and encourages new firms to settle there. In order to foster this development and reduce the potential negative effects of any relocation, it is necessary to make the granting of such aid conditional on the maintenance of the investment and the jobs created during a minimum period in the less favoured region.
>
> In exceptional cases, such aid may not be enough to trigger a process of regional development, if the structural handicaps of the region concerned are too great. ***Only in such cases may regional aid be supplemented by operating aid.***
>
> […]

2. Scope

A derogation from the incompatibility principle established by Article 92(1) of the Treaty may be granted in respect of regional aid only if the equilibrium between the resulting distortions of competition and the advantages of the aid in terms of the development of a less-favoured region (6) can be guaranteed. The weight given to the advantages of the aid is likely to vary according to the derogation applied, having a more adverse effect on competition in the situations described in Article 92(3)(a) than in those described in Article 92(3)(c) (7).

3. Demarcation of regions

[…]

The derogation in Article 92(3)(a)

3.5. Article 92(3)(a) provides that aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered compatible with the common market. As the Court of Justice of the European Communities has held, 'the use of the words "abnormally" and "serious" in the exemption contained in Article 92(3)(a) shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole` (12).

The Commission accordingly considers, following a tried and tested approach, that the conditions laid down are fulfilled if the region, being a NUTS (13) level II geographical unit, has a per capita gross domestic product (GDP), measured in purchasing power standards (PPS), of less than 75,0 % of the Community average (14). The GDP/PPS of each region and the Community average to be used in the analysis must relate to the average of the last three years for which statistics are available. These amounts are calculated on the basis of data furnished by the Statistical Office for the European Communities.

[…]

4. Object, form and level of aid

4.1. The object of regional aid is to secure either productive investment (initial investment) or job creation which is linked to investment. Thus this method favours neither the capital factor nor the labour factor.

4.2. To ensure that the productive investment aided is viable and sound, the recipient's contribution (20) to its financing must be at least 25 %.

The form of the aid is variable: grant, low-interest loan or interest rebate, government guarantee or purchase of a State shareholding on favourable terms, ***tax exemption***, reduction in social security contributions, supply of goods and services at a concessionary price, etc.

In addition, aid schemes must lay down that an application for aid must be submitted before work is started on the projects.

[…]

Operating aid

> 4.15. Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 92(3)(a) provided that (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate (36). It is for the Member State to demonstrate the existence of any handicaps and gauge their importance.
>
> 4.16. In the outermost regions qualifying for exemption under Article 92(3)(a) and (c), and in the regions of low population density qualifying either for exemption under Article 92(3)(a) or under 92(3)(c) on the basis of the population density test referred to at point 3.10.4, aid intended partly to offset additional transport costs (37) may be authorised under special conditions (38). It is up to the Member State to prove that such additional costs exist and to determine their amount.
>
> 4.17. With the exception of the cases mentioned in point 4.16, operating aid must be both limited in time and progressively reduced. In addition, operating aid intended to promote exports (39) between Member States is ruled out.
>
> (Emphasis added).

194. In its Annual Report of 1998 regarding PHARE Program[10] (Exh. C-391), the European Commission concluded:

> Romania meets the Copenhagen political criteria. Much remains to be done in rooting out corruption, improving the working of the courts and protecting individual liberties and the rights of the Roma. Priority should also be given to reform of the public administration.
>
> Romania has made very little progress in the creation of a market economy and its capacity to cope with competitive pressure and market forces has worsened.
>
> Despite progress made in transposition of key parts of the acquis, Romania has a long way to go in terms of additional legislative transposition, implementation and enforcement before the country will be able to assume the obligations of membership. (p. 61).

195. The EC's 1998 Annual Report also highlighted the importance of regional development in Romania (p. 63):

> Case study: regional development in Romania
>
> Through a series of projects beginning in 1994, Phare is contributing to the creation of the institutional and legal framework for the development of

[10] The Programme of Community aid to the countries of Central and Eastern Europe (Phare) is the main financial instrument of the pre-accession strategy for the Central and Eastern European countries (CEECs) which have applied for membership of the European Union. Since 1994, Phare's tasks have been adapted to the priorities and needs of each CEEC. The revamped Phare programme, with a budget of over EUR 10 billion for the period 2000-2006 (about 1.5 billion per year), has two main priorities, namely institutional and capacity-building and investment financing. Although the Phare programme was originally reserved for the countries of Central and Eastern Europe, it is set to be extended to the applicant countries of the western Balkans (See http://europa.eu/ legislation_summaries/enlargement/ 2004_and_2007_enlargement/e50004_en.htm).

regional policy in Romania, and to preparations for programmes to be implemented along the lines of the EU structural funds.

Under a 1994 Phare budget, EU and Romanian experts prepared an analysis of regional disparities in Romania, and drew up proposals for a legal and institutional framework for the development of regional policy.

In 1997, the conclusions of a Phare-financed study were published as a Green Paper on Regional Development, which proposed the establishment of a number of macro regions as planning units, based on associations of elected county councils. The Green Paper also defined a national framework for the development of regional policy and the financing of programmes.

The government adopted the main points of the Green Paper as its policy on regional development; consequently, a 1997 Phare budget was approved, providing support for institution building at national and regional level.

In 1998 a Law on Regional Development was passed, creating an appropriate institutional framework and establishing a National Agency for Regional Development and a National Fund for Regional Development.

A 1998 Phare budget was approved, providing preliminary financial support for projects which would be proposed by the regions and financed out of the National Fund for Regional Development. Linked to this is technical assistance under the Special Preparatory Programme for Structural Funds, which provides further support and training to relevant institutions at regional and national level.

196. It is in this context that Romania adopted EGO 24/1998, which established the legislative framework for the incentives at issue in this arbitration. As noted in paragraph 145 above, the original version of EGO 24/1998 was passed on 30 September 1998 and entered into force on 2 October 1998.

197. On 22 March 1999, the Council of the EU issued Council Regulation (EC) No. 659/1999, which set out detailed rules for the application of Article 93 of the EC Treaty with respect to the implementation of state aid measures and recovery of unlawful and incompatible state aid (Exh. R-128).[11] Article 1 of this Regulation provided the following definitions:

[11] Articles 88 and 89 of the EC Treaty (previously Articles 93 and 94 of the Treaty establishing the EEC) provided:

Article 88 [previously Article 93]

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.

> (b) “existing aid” shall mean: (i) all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty; […]
>
> (c) 'new aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid; […]
>
> (f) 'unlawful aid' shall mean new aid put into effect in contravention of Article 93(3) of the Treaty;

198. Under the Regulation, if the Commission considered that an existing aid scheme was not, or was no longer, compatible with the common market, it would consult with the Member State and issue a recommendation, which could consist in a substantive amendment of the aid scheme, the introduction of procedural requirements, or the abolition of the aid scheme. If the Member State did not accept the proposed measures, the Commission could initiate a formal investigation procedure (Articles 17-19, 4(4), 6-9 of the Regulation).

199. On 27 July 1999, Romania passed Law No. 142/1999 on state aid (the “State Aid Law”, Exh. R-75), which granted the Competition Council a wide range of powers to regulate state aid in Romania, including the power to authorize or forbid the granting of state aid.

200. In its composite paper “Reports on Progress towards Accession by each of the Candidate Countries” dated 13 October 1999 (Exh. R-76), the EC noted that Romania had made “some progress” in aligning state aid laws.

201. For context, the Tribunal recalls that, during 1999, the following events relating to the EGO 24 framework and the Claimants’ investments took place:

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2.

The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

Article 89 [previously Article 94]

The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 87 and 88 and may in particular determine the conditions in which Article 88(3) shall apply and the categories of aid exempted from this procedure.

a. On 25 March 1999, by means of Government Decision No. 194/1999 ("GD 194/1999", Exh. C-31), Romania designated the Ştei-Nucet region as a disfavored region for a period of ten years, starting on 1 April 1999, and stipulated that all six incentives offered under EGO 24/1998 would be available to investors in the Ştei-Nucet region while that region was designated disfavored.

b. As noted in paragraph 146 above, on 8 November 1999, Romania republished a renumbered version of EGO 24/1998 (Exh. R-68).

c. On 9 December 1999, European Food obtained its Temporary Investor Certificate (Exh. C-442).

3. Romania and the EU begin formal accession negotiations

202. On 10 and 11 December 1999, the European Council met in Helsinki to take a series of decisions related to the EU's enlargement process. As reflected in the Presidency's Conclusions (Exh. R-11, C-318), the European Council decided to convene bilateral intergovernmental conferences in February 2000 to begin accession negotiations with Romania and other countries.

203. In February 2000, Romania began its formal accession negotiations with the EU. Chapter 6 was dedicated to competition policy.

204. The Respondent's expert Prof. Streinz notes that in July 2000, "[i]n accordance with its mandate under Article 106 of the Europe Agreement, the Association Council determined [...] to extend retroactively the application of Art. 87(3)(a) of the EC Treaty to Romania for an additional period of five years." (First ER of R. Streinz, p. 7, note 22). According to Prof. Dashwood, this was done in Decision 4/2000 published in April 2001 (Exh. R-65; C-579).

4. The Decision of the Romanian Competition Council and amendments to the EGO 24 regime

205. On 15 May 2000, the Romanian Competition Council, in the context of reviewing proposed amendments to EGO 24/1998, issued Decision No. 244/2000 (Exh. R-78), in which it determined, *inter alia*, that certain facilities provided under EGO 24/1998 distorted competition (specifically, the Raw Materials Incentive and the Components Incentive) and had to be eliminated. It stated:

> Whereas:
>
> 3. Exemption from customs duties· on raw materials are deemed State aid for operating purposes and goes beyond the purpose of Emergency Government Ordinance No 24/1998 on Less-Favoured Areas, leading to distortion of competition. The granting of such facilities, subject to the conditions set forth in the Ordinance, solely to economic operators who make and register new investments puts the economic operators already in the market at a disadvantage, as was alleged before the Competition Council by both the Milling and Baking Industry Employers' Association and the Romanian Meat Association. Exemption from paying customs duties effectively stimulates imports to the detriment of domestic

producers. Largescale importing of live pigs from Hungary and the mere slaughtering of these animals in Less Favoured Areas have occurred, with the meat being sold in the form of carcases and no significant degree of processing occurring. The cost of these products, which were subsidised in their country of origin and also benefited from the facilities provided by Emergency Government Ordinance No 24/1998, is lower and they are penetrating neighbouring markets, with the result that they are in competition with products produced outside Less Favoured Areas.

The Competition Council takes the view that the granting of these facilities is distorting competition within the market, and has also expressed this opinion in other similar cases.

[…]

On the basis of Article 12(2) [unclear letter - possibly "c" or "e"], the Competition Council hereby takes the following·

DECISION

Article 1. The aid scheme set forth in Article 6 of Emergency Government Ordinance No 24/1998 is authorised subject to the following conditions:

a) the provisions of Article 6(1)(b) of Emergency Government Ordinance No 24/1998 republished, concerning the reimbursement of customs duties on imported raw materials, spare parts and/or components necessary for own production purposes within an area, and consequently, the proposed amendment concerning exemption from customs duties on raw materials shall be deleted;

[…]

d) the methodological standards for the application of Emergency Government Ordinance No 24/1998 on Less Favoured Areas are to be submitted to the Competition Council for approval, in accordance with the provisions of Article 27(j) of Law No 21/1996.

Article 2. Pursuant to Article 13(2) of Law No 143/1999, the Competition Council may decide to suspend the State aid scheme if the aid provider fails to take the steps referred to in Article 1 of this Decision.

[…]

206. It was in this context that, on 1 June 2000, European Food was issued its PIC (see paragraph 174 above).

207. On 16 June 2000 (effective 1 July 2000), Romania passed Emergency Government Ordinance No. 75/2000 ("EGO 75/2000", Exh. C-45, R-81), which amended EGO 24/1998 in the following ways: (a) it provided for an exemption (rather than the refund originally contemplated) on customs duties on imported raw materials; (b) it excluded spare parts and components from the customs duty exemption, and (c) it amended the provisions regarding the award of funds under the Special Development Fund. It did not eliminate the Raw Materials Incentive and the Components Incentive, as recommended by the Competition Council.

5. Romania's progress towards accession in the period 2000-2001

208. On 1 August 2000, the Romanian government presented a Position Paper on Chapter 6 (Competition Policy) (Exh. EC-1), in which Romania "accepts the entire *acquis communautaire* in force on 31 December 1999, does not request transition periods or derogations and declares that it will be able to entirely implement it upon accession." However, Romania added that:

> Regarding the state aid rules and agreeing to the principles provided for in Art. 87 and 88 of the Treaty establishing the European Community, it is necessary to grant state aids to the sensitive sectors of economy and the deprived areas due to the difficulties confronting the Romanian economy during the transition to a market economy.
>
> It is also obvious that, after accession, Romania's development level will not exceed the EU average, and, consequently, the whole territory of Romania will comply with the conditions laid down in Art. 87(3) of the Treaty establishing the European Community.

209. In this Position Paper, Romania gave a detailed description of EGO 24/1998, as amended by EGO 75/2000:

> Regional development. Deprived areas
>
> Based on the Romanian legislation, namely the Law on Regional Development no. 151/1998, eight development regions were established. Those regions correspond to the NUTS II level of the European classification. At that level, the programs and projects of regional development are funded through the National Fund for Regional Development that was established according to the Law no. 151/1998. The funds for these programmes are yearly allocated through the state budget as distinct item [sic] for the policy on regional development and also from other domestic and foreign resources. The National Agency for Regional Development administers, as provided for in the law, the National Fund for Regional Development by annual allocations of funds to the eight Funds for Regional Developments that were established in accordance to same law and are managed by eight Agencies for Regional Development. The funds allocated in this manner are granted to the recipients on competitive basis, such as tendering for regional development projects.
>
> The Government Emergency Ordinance no. 24/1998 on the deprived areas (D areas) ensures a framework for granting state aid for the NUTS IV (villages) to NUTS III (counties) areas. Since July 1999 the majority of facilities granted to the investors within those areas became applicable after the Methodological Rules which were authorised by Government Decision no. 525/1999, came into effect.
>
> On 16 June 2000, the Government Emergency Ordinance no. 75 amending the Government Emergency Ordinance no. 24/1998 was adopted, the main facilities granted to the investors acting within the D areas being the following:
>
> - customs duty and VAT exemptions for machinery, equipment, motor-vehicles, other capital assets which are imported for making investments within the area;

- VAT exemption for the domestic machinery, equipment, motor-vehicles, other capital assets which are used for making investments within the area;

- customs duty exemption for the raw materials imported for producing within the area; profit tax exemption during the existence of the 0 area;

- fee exemption for the alteration of destination or driving out from agricultural use of lands necessary for the investment.

In accordance to the legislation in force, the terms under which the investors are deemed to benefit of the mentioned facilities are the following:

- the facilities are granted only to the companies where the majority is owned by private shareholders, Romanian legal persons; to private undertakings or family associations which are licensed in accordance to the Law no. 54/1990;

- the companies must have their headquarters and act within the D area;

- the new investment to be made and registered within the financial records of the undertaking, after the qualification of [sic] as a D area;

- the investment to be made within the interest fields which are covered by the Government Decision qualifying the area as D area;

- through investment new jobs must be created for the unemployed people which live within the D area;

- the goods for which facilities, such as fee exemption, must be used for investments/production within the D area;

- the investment within the D area must be in function for a period twice as long as the period when the facilities were granted, otherwise, the investor is held to reimburse the amounts granted as facilities.

210. On 31 October 2000, at an Accession Conference with Romania, fifteen EU Member States and Romania adopted the first European Union Common Position on Competition Policy ("EU Common Position 2000", Exh. EC-2). In this Common Position, the EU stated:

> The EU underlines the particular importance of the "acquis" under chapter 6 for the proper functioning of the internal market, including the creation of a level playing field for investment. The significance of the "acquis" is such that Romania has undertaken, under the Europe Agreement, to comply with the Community rules on competition. Thus, while welcoming Romania's statement that it accepts the "acquis" and will apply it as from the accession, the EU underlines that the "acquis" under chapter 6, in accordance with the Europe Agreement, has to be applied by Romania already now. In this context, the EU also underlines the importance of reinforcing the administrative capacity for effective implementation and enforcement of the "acquis". Therefore, the EU will conduct a general assessment of whether Romania has set up effective structures to enforce and apply the relevant substantive rules of the "acquis". Moreover, the full and immediate application of the "acquis" is also necessary in order to adapt companies well before the date of accession to be able to withstand

the competitive pressures of the internal market resulting from the full and direct application of the competition "acquis" upon accession. It is inconceivable that the Romanian economy would be able to support the switching from one day to the next to the full and correct application of the "acquis".

211. With respect to the timely implementation of the Europe Agreement and the fulfillment of accession criteria in the state aid field, the EU invited Romania, *inter alia*, to

- provide details regarding existing aid measures (i.e. those programs on the basis of which aid continues to be granted and which existed already before the entry into force of the present state aid law). In particular, Romania should explain which measures are envisaged for bringing such aid into line with the EU "acquis";

- provide a more detailed analysis of the aid facilities in the so-called D areas of the country. In particular, Romania should explain what action, in light of the Community Guidelines on Regional Aid, the Competition Council has taken with regard to the Government Ordinances providing for these aid facilities.

212. In its Regular Report on Romania's progress towards accession dated 8 November 2000, the EC noted that:

Romania has made further progress in the transposition in the *acquis* in this chapter.

Further alignment with the EC competition legislation and the improvement of the administrative capacity in this field is a short-term priority in the Accession Partnership.

Romania's anti-trust legislation is largely in line with the *acquis*. During the period under consideration the legislative framework for anti-trust has been developed further by the adoption of secondary legislation. The anti-trust enforcement authorities have dealt with an increasing number of cases. The main challenge is now to ensure that the application and enforcement of the anti-trust rules is effective and that priority is given to such cases that concern the most serious distortions of competition. In order to achieve this, the administrative capacity of the Romanian Competition Council and Competition Office will need to be reinforced.

As concerns state aid the entry into force of the new state aid law on 1 January 2000 and the subsequent adoption of secondary legislation is an important step forward. However, the major challenge is to ensure that the legislation will be properly implemented and enforced. The recent adoption of the law on 'industrial parks' is a major concern.

State aid reports have still to be submitted for the years 1998 and 1999. The latest report broadly follows the methodology and the presentation of the Community's Survey on State Aid. Additional work is needed in order to finalise a comprehensive state aid inventory covering all aid measures in operation in Romania.

In order to ensure a differentiation of maximum aid intensities in assisted areas, Romania still has to prepare a regional aid map in consultation with the Commission.

213. On 28 February 2001, Romania issued its Complementary Position Paper on Chapter 6 (Competition Policy) (Exh. EC-3). In this Complementary Position Paper, Romania explained the EGO 24/1998 incentive regime as follows:

> Through the Emergency Ordinance no. 75/2000 modifying the Emergency Ordinance no. 24/1998 on the deprived areas, the following facilities may be granted to the investors within D areas:
>
> - customs duty and VAT exemptions for machinery, equipment, installations, motor-vehicles, other capital assets which are imported for making investments within the area;
> - VAT exemption for the domestic machinery, equipment, installations, motor vehicles, other capital assets, which are used for making investments within the area;
> - customs duty exemption for the raw materials imported for the own production within the area;
> - profit tax exemption during the existence of D area;
> - fee exemption for the alteration of destination or driving out from agricultural use of lands necessary for the investment.
>
> Facilities provided for by Government Emergency Ordinance (GEO) no. 24/1998, amended by GEO no. 75/2000, are granted to undertakings operating within deprived areas, mention being made that in the deprived area co financing is approved only for projects selected by the National Agency for Regional Development (NARD) through public tender, nationwide, and within "Special Programs", as approved by decision of the Government, programs which have been notified to the Competition Council.
>
> [The] Competition Council analyzed the existing state aid scheme provided in GEO no. 24/1998; it found out that it seriously distorts competition, and thus issued Decision no. 244/15.05.2000 whereby it authorized with conditions the state aid scheme as contained in art. 6 of the GEO no. 24/1998. Providing for the elimination of art. 6 (l)(b) referring to refunding of customs duties for imported raw materials, spare parts and/or components dedicated to the own production in the deprived area, and for modification of art. .6 (l)(c), mainly, the exemption from profit tax payment during the existence of the deprived area shall be done only for plowed-back profit. The modification of the existing state aid scheme contained in 311.6 of the GED no. 24/1998, referring to exemption from customs duty payment for imported raw materials, notified by NARD, has not been authorized by the Competition Council.
>
> GEO no. 75/2000 amending GED no. 24/1998 overlooked the conditions set by the Competition Council through Decision no. 244/15.05.2000, and maintained the facilities in art. 6 (l)(b) and (c) of GEO no. 24/1998. Although the Competition Council did not authorize the modification of the state aid scheme, GEO no. 75/2000 provides for exemption from payment of custom duties for imported raw materials for the own production in the deprived area.
>
> In December 2000, the Competition Council has brought action at the Court of Appeals alleging failure to comply with Competition Council's Decision no. 244/15.05.2000 by the Government, which authorized, with

conditions, the modification of the state aid scheme within GEO no. 24/1998, modification made through GEO 00.75/2000.

The request was made in front of the Court of Appeals to cancel GED no. 75/2000 and to recover the state aid.

The Government will made [sic] a study in order to assess the effects of enforcing this Ordinance, and further takes necessary measures.

214. On 10 April 2001, the EU-Romania Association Council adopted Decision 4/2000 (the "Implementing Rules", Exh. R-65), which prescribed the manner in which Article 64 of the Europe Agreement would be implemented by Romania.

215. In its Regular Report on Romania's progress towards accession dated 13 November 2001 (Exh. R-141), the EC provided the following assessment of Romania's competition policy:

> Romania has made considerable progress in creating a legal framework in this area that is broadly aligned with the Community *acquis*. However, additional efforts are necessary to complete the legal framework and ensure its adequate enforcement.
>
> As regards anti-trust, Romania's legislation is largely in line with, and covers most of, the *acquis* provisions. However, further secondary legislation still needs to be adopted, to take account of the Commission's new vertical restraints policy and its policy on horizontal cooperation agreements. The Competition Council has broad powers to enforce competition rules but will need further reinforcements- especially in the form of training and IT equipment, in order to fulfil the tasks assigned to it. It is essential that the Competition Council could focus its resources more effectively on cases with most serious distortions to competition. A more deterrent sanctioning policy will also be required. Finally, general transparency, including an improved access of the public to relevant documents should be increased.
>
> As regards state aids, the existing legislation covers the basic principles of state aid control. However, the field of application of this law is not comprehensive and numerous state aid measures are not notified to the competition authorities. Romania should rapidly adopt the required secondary legislation on state aids, which is currently being prepared. This is a precondition to any effective enforcement activities. A significant number of unaligned aid schemes remains such as the profit tax rate 5% on export earnings and the law on direct investment promotion. Moreover, implementation of state aid policy in sensitive sectors is still at an early stage. There are continuous problems with the monitoring of frequent waivers by public bodies of the accumulated debt.
>
> Romania has now formally adopted state aid reports for the period 1996 – 1999 but has yet to finalise the state aid inventory. In addition, Romania's recent proposal for the regional aid map would allow aid intensities for regional investment aid of up to 50% net grant equivalent. In the area of state aids, both the Competition Office and the Competition Council require further strengthening in terms of human resources and training.
>
> In addition to strengthening administrative capacity within the competition authorities, particular attention should also be given to intensifying the training of the judiciary in the specific fields of anti-trust and state aid. There is also a need to raise awareness amongst all market participants,

> and especially amongst administrations granting state aids, of the policy and legislative provisions in this area.

216. The EU Common Position issued on 21 November 2001 (the "2001 EU Common Position", Exh. EC-5) once again stressed "the particular importance of the *acquis* under chapter 6 for the proper functioning of the internal market, including the creation of a level playing field for investment", and reminded Romania that "the *acquis* under chapter 6, in accordance with the Europe Agreement, has to be applied by Romania already now." The EU Common Position also stated:

> The EU further notes that there are a number of existing as well as new incompatible aid schemes which have not been brought into line with the *acquis*. The EU notes that such schemes include in particular the new draft law on industrial parks, the fiscal facilities offered in the free areas which are set up under Law No. 84/1992, the reduced rate of corporate income tax of 5% for income from exports, and facilities provided under Emergency Ordinances no. 24/1998 and 75/2000 in the so-called "D-areas". The EU urges Romania to align the existing incompatible aid schemes without delay. (2001 EU Common Position, p. 4)

217. However, the 2001 EU Common Position also stated:

> With regard to aid which Romania wishes to operate beyond the date of accession, the EU invites Romania to draw up a list of those existing aid measures which the Competition Council considers as compatible with the *acquis*. The EU invites Romania to transmit this list to the Commission; Romania may continue to operate any aid which is included in the list and against which the Commission has not objected for the period for which the aid was approved by the Competition Council. A reference to the existing aid list and to the procedure for its establishment will be included in the Accession Treaty. (2001 EU Common Position, p. 4)

6. Further amendments to the EGO 24 Regime (2000-2001)

218. On 29 November 2000, by means of Government Decision No. 1199/2000 (Exh. C-32) Romania extended the boundaries of the Ştei-Nucet disfavored region to include Drăgăneşti, and specified that the entire region would remain disfavored until 31 March 2009.

219. On 26 January 2001, by means of Civil Decision No. 26 (Exh. C-582, R-140), the Bucharest Court of Appeals dismissed the Competition Council's application for the partial annulment of EGO 75/2000.

220. On 26 April 2001, Government Decision No. 728/2001 repealed the earlier methodological norms [for the implementation of] EGO 24/1998 and provided new methodological norms (the "2001 Methodological Norms", Exh. R-69, R-35).

221. In August 2001, Prime Minister Nastase announced a new policy in relation to the establishment of new disfavored regions and the time periods for which the zones would be declared disfavored. As reported by the press, he stated that "for the existing zones, the current law shall be maintained", although "the economic and social status of the area shall be considered when allotting budgetary funds, with a view to balance facilities through the level of budgetary allotments" (Exh. C-630).

222. On 7 November 2001, Romania passed Law No. 621/2001 (Exh. R-33, R-129), which amended EGO 75/2000 by, among others, reinstating the customs duties exemption on imported components.

7. Parallel developments in the EU and EGO 24 fronts (2002)

223. In its Regular Report on Romania's progress towards accession dated 9 October 2002, the EC noted that "there are still a large number of incompatible fiscal aid schemes which need to be aligned" (Exh. R-109).

224. On 19 February 2002, the High Court of Cassation of Justice of Romania rejected, on admissibility grounds, the lawsuit brought by the Competition Council for the partial annulment of EGO 75/2000 (Exh. C-643).

225. On 17 May 2002, Multipack and Starmill were issued their PICs (see paragraphs 175-176 above). Both PICs stated that they would be valid until 1 April 2009.

226. On 29 May 2002, Romania and Sweden signed the Bilateral Investment Treaty under which this arbitration is brought (Exh. C-1). Romania ratified the BIT through Law No. 651/2002 (Exh. C-15) enacted on 7 December 2002. The BIT entered into force on 1 April 2003.

227. On 1 June 2002, Romania passed Law No. 345/2002 (Exh. R-90), which abolished two of the incentives contemplated under EGO 24/1998, the Machinery Incentive and the VAT Incentive.

228. In June 2002, the Romanian Government issued a "Report on the progress in preparing for the accession to the European Union September 2001-May 2002", dated June 2002 (Exh. HEC-6), which stated that:

> All existing State aid measures will be assessed, establishing their compatibility with the acquis in order to suggest measures eliminating or transforming the incompatible ones in compatibles [sic] aids, taking into account the legal and economic implication of the modification of any incompatible schemes on the already granted specific allocations.
>
> This approach will be made according to the European Commission recommendation and will take into consideration [sic] following three steps: (i) closing the incompatibles [sic] schemes in order to stop potential future allocations; (ii) the modification of these scheme to reach the compatibility with the acquis; (iii) the identification of the solutions for the economic agents that received the State aid under the present schemes (e.g. Free areas, deprived areas etc). […] (p. 132)

229. More specifically with respect to EGO 24, it stated that:

> Regarding the "D areas", the State aid granted in the present ***must* [] *be converted into a compatible State aid.*** The Ministry of Development and Prognosis started the technical debates with the beneficiary associations in order to identify solutions and to make, in 2 months, proposals for alteration of the present system of facilities. (p. 133)

230. At the same time, Romania's "National Programme for Accession of Romania to the European Union" dated June 2002 (Exh. HEC-7) stated that "[t]he provisions of the normative acts on facilities granted for 'D areas' will be maintained till the moment of Romania's accession to the European Union" (p. 148).

231. On 1 July 2002, Romania passed Law No. 414/2002 (Exh. C-48), which repealed the Profit Tax Incentive but grandfathered it for investors who held a PIC prior to the date in which this law entered into force. The Profit Tax Incentive was later reintroduced on 1 January 2004 by Law No. 507/2004 (Exh. C-52).

232. On 7 November 2002, Romania provided the EC with Additional Information on Chapter 6 – Competition Policy (Exh. EC-6). With respect to EGO 24, Romania merely informed the Commission that state aid for the D-areas was regulated by Law 621/2001, which approved EGO 75/2000, and informed the Commission of the amendment to the VAT and the repeal of the profit tax incentive (noting that it had been grandfathered for PIC holders).

> "D area" granted facilities
>
> Presently in Romania D areas are regulated by Law no. 621/2001 on the approval of Government Emergency Ordinance (GEO) no. 75/2000 for the alteration of Government Emergency Ordinance no. 24/1998, republished, on deprived area (OG no. 737 of 19th November 2001), GEO no. 75/2000 for the alteration of GEO no. 24/1998, republished and GEO no. 24/1998 on deprived areas, approved and modified by Law no. 20/1999.
>
> The regime of the facilities granted in '"D" areas was changed by the recent entering into force of the law on VAT and of the law on profit tax.
>
> The Law 345/2002 on VAT entered into force on 01.06.2002 and abrogated the facility of exempting from VAT payment granted for machines, outfits, installations, equipments, means of transport, other depreciable goods imported or produced in the country that were necessary for the investments in a D area. This facility was stipulated in Art. 6(1) of the GEO no. 24/1998 regarding the regime of the deprived areas.
>
> The Law no. 414/2002 (OG no. 456/27.06.2002) on profit tax abrogated the facility of exempting undertakings acting in "D" areas from the payment of the profit tax. This facility was stipulated in Art. 6(1), let. c) of the GEO no. 24/1998 regarding the regime of the deprived areas.
>
> For ensuring the legislative continuity, the legal persons that had obtained the permanent certificate of investor in "D" area before the Law no. 414/2002 entered into force, will further benefit from the profit tax exemption on the whole duration of existence of the deprived area, according to Art. 35, par. 3.

233. On 19 November 2002, Romania passed Law No. 678/2002 (Exh. C-49) which amended the Raw Materials Incentive by excluding from the customs duties exemption raw materials for the production, processing and preservation of meat.

8. Events leading up to the revocation of EGO 24

234. On 7 April 2003, the Mission of Romania to the EU sent a communication to the Romanian Minister for European Integration and other state officials, including Mr. Orban and Mr. Berinde (Communication No. 1480, Exh. R-93). It stated:

> Community officials stated clearly that the ***negotiations on this chapter may be closed if, and only if, the following conditions*** (relating primarily to State aid, which was found to have the highest potential to distort the Internal Market) ***are met:*** new aid must comply strictly with the acquis, ***existing aid must be aligned or in the process of being aligned*** (including in terms of duration; the granting of transition periods may be considered depending on the outcomes of discussions between the competent institutions in Romania and the relevant operators), and ALL cases of non-notified State aid must be analysed and resolved.
>
> […]
>
> The Commission stated that it had asked all of the candidate countries to bring their tax breaks into line with the acquis communautaire, including those granted in Free Zones or ***Less Favoured Areas***, which entails either their withdrawal or their conversion into compatible aid. In the latter case, ***negotiations with a view to converting them into compatible schemes must be pursued directly by the Competition Council with the economic operators concerned.*** Only once this has occurred can the companies for which transition periods may be negotiated with the EU be identified.
>
> (Emphasis added)

235. In its Common Position dated 28 May 2003 (Exh. EC-8), the EU invited Romania to provide information on benefits granted in disfavored regions and urged Romania to close "incompatible aid schemes for new entrants with immediate effect." More specifically:

> The EU recalls that all fiscal aid provisions, (for example those included in the VAT Law; the ***Law on customs duties exemptions*** - including benefits for transactions undertaken by firms located in industrial parks, free zones and ***disadvantaged areas*** […]) ***should be subject to the approval by the Competition Council. In cases where the Competition Council assesses the respective measures to be incompatible with the State aid rules, the EU invites Romania to either <u>end</u> the measures or to <u>align</u> them with the acquis.***
>
> The EU invites Romania to bring all incompatible aid measures <u>in line</u> with the acquis without delay and to continue to provide information on the progress made towards this goal. […]
>
> The EU moreover invites Romania to provide information on individual benefits granted in the free zones and the disadvantaged areas and on any other individual tax benefits that have already been granted and which provide for tax benefits beyond Romania's target date for accession. ***The EU urges Romania to <u>close</u> incompatible aid schemes for new entrants with immediate effect.***
>
> In this context Romania is further invited to present a ***plan outlining how it intends to <u>convert</u> the benefits that are incompatible with the acquis***

> and to hold further technical consultations with the Commission to explore the possibilities for this conversion.
>
> […]
>
> With regard to aid which Romania wishes to operate beyond the date of accession, the EU recalls it's invitation to Romania to draw up a list of those existing aid measures which the Competition Council considers as compatible with the acquis and to transmit this list to the Commission. The EU recalls that Romania may continue to operate any aid which is included in the list and against which the Commission has not objected for the period for which the aid was approved by the Competition Council. A reference to the existing aid list and to the procedure for its establishment will be included in the Accession Treaty.
>
> The EU recalls that the ***existing aid measures*** are subject in accordance with Article 88(1) of the EC Treaty to the ***appropriate measures procedure***, under which the Commission can, in cooperation with the (future) Member State, propose changes to an aid measure for the future. To the extent that Romania wishes to benefit from this mechanism, the EU invites Romania to present the following to the Commission, every six months as from 1 January 2002, and up until the date of accession:
>
> (a) a list of all existing aid measures (both schemes and ad hoc aid) (i) which have been assessed by the Competition Council and (ii) which it found to be compatible with the *acquis*; (b) any other information which is essential for the assessment of the compatibility of the aid measures referred to under (a).
>
> Details on the precise format for this reporting have been provided by the Commission.
>
> The EU underlines that all aid measures in Romania which are considered State aid according to the acquis and which are not included in this list shall be considered as new aid upon Romania's accession. After that date, application of such an aid measure will be conditional upon Romania's notification of it pursuant to Article 88 of the EC Treaty, and a decision of the Commission that the aid measure in question is compatible with the Common Market. As regards individual aid, no measures which continue to have effects after accession and which are incompatible will be acceptable.
>
> (Emphasis added)

236. On 23 December 2003, Law No. 571/2003 on the Fiscal Code (Exh. R-37) revoked Law 345/2002, thus reinstating the Machinery Incentive and the VAT Incentive.

237. In an interview on national TV conducted on 12 January 2004, Prime Minister Nastase indicated that the incentives regime provided by EGO 24/1998 could be terminated due to EU requirements. However, he also stated that the Government was examining whether some of the incentives would remain in place until 2007, noting that the Government had negotiated some transition periods with the EU and that they were trying to find "elegant solutions" (Exh. C-651). When asked to confirm if certain investors could benefit from the program until 2007, Minister Nastase stated that they would try to negotiate an extension that would allow the incentives to remain in place until that time. When asked what would happen to investors who had

invested large amounts of money, the Minister stated that the Government was negotiating with each investor.

238. On 24 March 2004, Romania issued its Complementary Position Paper III on Chapter 6 – Competition Policy (Exh. EC-9). With respect to EGO 24/1998, Romania noted:

> The Ministry of Administration and Interior elaborated a draft law for completing the Government Emergency Ordinance no. 24/1998 on the regime of deprived areas. The draft provides that the facilities the undertakings that have an investor certificate and operate in deprived areas benefit from, will be granted below the maximum admitted intensity foreseen in the Regulation on regional aid. At present, the draft normative act is under inter-ministerial endorsement procedure.
>
> By entering into force of the Fiscal Code, the fiscal facilities have been significantly diminished. In fact, ***the undertakings with investor certificate in the deprived areas will benefit from*** the exemption from the payment of the taxes perceived for changing the destination or removing from the agrarian circuit of certain fields designated to achieving the investment as well as ***the exemption from the custom duties payment for raw materials and imported components, excepting the import of the raw material for meat production, processing and preserving***. Also the undertakings that obtained before 1 July 2003 the permanent certificate of investor in the deprived area, will benefit from exemption from the profit tax payment related to the new investment, during the whole existing duration of the deprived area.
>
> (Emphasis added).

239. In May 2004, in an interview in Oradea, Bihor County (Exh. C-652), Prime Minister Nastase indicated that "[s]ubsequent to 2007, when we want to be accepted in the European Union, these disfavored areas will no longer exist in Romania." When asked about compensation to investors in those areas, the Prime Minister answered that Romania would discuss these matters during its negotiations with the European Union and they would see if Romania was "able to obtain some transition periods for them." The Prime Minister specified that "there will be no fiscal incentives, there will be some compensation packages, established during direct negotiations." The Prime Minister also stated that the government would talk to the investors, and "based on the conclusions of the negotiations of the Competition Chapter, we will negotiate with those who initially obtained these fiscal incentives" (Exh. C-652, pp. 7-9 of translation).

240. On 7 June 2004, Romania passed Law No. 239/2004 to supplement EGO 24/1998 (Exh. R-147). This law subjected all state aid to a maximum intensity requirement.[12] In other words, it provided that the EGO 24/1998 facilities could not exceed the thresholds of permissible state aid approved by the Competition Council. If investors exceeded the maximum permitted intensity, the facilities would cease to be granted.

[12] In June 2004, Romania passed Law 239/2004, which made all State aid subject to a maximum-intensity requirement. According to a definition provided by the Respondent, "[v]alid intensity is measured as the amount of aid in relation to the costs of production or the costs of investment of the company or project that receives the aid." P. Nicolaides, M. Kekelekis, P. Buyskes, State Aid Policy in the European Community (2nd edn 2005) (Exh. RL-179), p. 38.

241. On 31 August 2004, by means of Government Ordinance No. 94/2004 ("GO 94/2004", Exh. R-94), Romania repealed Article 6(1)b)d) and e) of EGO 24/1998, thus repealing/revoking the incentives provided under EGO 24/1998, including the Raw Materials Incentive, with the exception of the Tax Profit Incentive. The repeal was originally to become effective 90 days from the date of entry into force of GO 94/2004 (that is, on 3 December 2004). However, the date of repeal was subsequently extended to 22 February 2005 by means of Law No. 507/2004 of 22 November 2004 (Exh. C-52), which approved and amended GO 94/2004 to that effect. The substantiation report accompanying GO 94/2004 stated:

> In order to meet the criteria in the Community rules on state aid, and also to complete the negotiations under Chapter No. 6 – Policy it is necessary to eliminate all forms of State aid in national legislation incompatible with the *acquis communautaire* in this area and, in this respect, it is proposed to repeal […] the provisions of Article 6 paragraph (1), letter (b), letter (d) and letter (e) of the Emergency Government Ordinance no. 24/1998 on the disadvantaged areas […]
>
> (Substantiation Report accompanying EGO 94/2004, 26 August 2004, Exh. R-95, pp. 12-13).

242. On 13 September 2004, the Claimants requested Romania to restore the tax incentive regime (Exh. C-8, ER of G. Piperea, ¶ 5.3).

243. On 8 December 2004, the EU issued a Common Position ("2004 EU Common Position", Exh. EC-10), in which it welcomed the amendments to the regimes related to Free Trade Areas and Deprived Areas. In this context, the EU noted that Romania had requested two transitional periods, one with respect to the Profit Tax Incentive under EGO 24/1998 and another with respect to a royalty exemption under Law No. 84/1992. The EU accepted both transitional arrangements proposed by Romania. With respect to the Deprived Areas, this meant that investors holding a PIC granted prior to 1 July 2003 could continue to benefit from the Profit Tax Incentive for as long as the Deprived Areas continued to exist, under certain conditions (limited to 2008, 2009 or 2010, depending on the deprived area; net intensity of aid granted must remain below certain specified aid ceilings and the eligible costs must be defined in accordance with the Regional Aid Guidelines).

244. On 22 February 2005, the revocation of the EGO 24/1998 incentives (with the exception of the Profit Tax Incentive) became effective.

245. Also on 22 February 2005, the EC issued its Opinion on Romania's EU application (Exh. R-50) where it stated:

> (7) In joining the European Union, the Republic of Bulgaria and Romania accept, without reserve, the Treaty establishing a Constitution for Europe, and until its entry into force, the Treaty on European Union and the Treaties establishing the European Communities including all their objectives and all decisions taken since their entry into force, and the options taken in respect of the development and strengthening of those Communities and of the Union.

> (8) It is an essential feature of the legal order introduced by the Treaties establishing the European Communities and, at its entry into force, the Treaty establishing a Constitution for Europe that certain of their provisions and certain acts adopted by the institutions are directly applicable, that the law of the Union takes precedence over any national provisions which might conflict with it, and that procedures exist for ensuring the uniform interpretation of the law of the Union; accession to the European Union implies recognition of the binding nature of these rules, observance of which is indispensable to guarantee the effectiveness and unity of the law of the Union.

9. Subsequent events

246. On 25 April 2005, the Member States of the EU signed the Accession Treaty with Romania and Bulgaria (the "Accession Treaty", Exh. R-27). The Treaty was to enter into force on 1 January 2007 [i.e., this would be the date of accession]. However, pursuant to Article 4(3), the institutions of the EU could adopt before accession certain measures specified in the Protocol annexed to the Accession Treaty, which set out the conditions and arrangements for admission. Annex VII to the Accession Protocol (Exh. R-52, R-98), Section 4 on Competition Policy, subsection A on Fiscal Aid, set out the transitional period with respect to the Profit Tax Incentive referred to in the 2004 EU Common Position. With respect to the Ştei-Nucet disfavored regions, it stated that Romania could continue granting the Profit Tax Exemption until 31 December 2009, subject to certain state aid intensity requirements and other conditions.

247. On 28 July 2005, the Claimants filed their Request for Arbitration.

248. On 4 March 2006, the EC issued the Guidelines on National Regional Aid for 2007-2013 (Exh. C-298), which set out the principles according to which EU Member States could grant regional aid to disadvantaged areas. With respect to operating aid, the Guidelines provided:

> Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 87(3)(a) provided that (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate (69). It is for the Member State to demonstrate the existence and importance of any handicaps (70). In addition, certain specific forms of operating aid can be accepted in the low population density regions and the least populated areas.

249. On 1 January 2007, the Accession Treaty entered into force and Romania became a Member State of the EU.

IV. SUMMARY OF THE PARTIES' POSITIONS

250. The purpose of this section is to provide an overview of the Parties' positions. The Parties' detailed positions with respect to each claim are described in Section VI below (Analysis of the Claimants' Treaty Claims).

A. THE CLAIMANTS' POSITION

251. The Claimants' case has evolved over time. Although its core elements remain unchanged, the focus of the Claimants' arguments has shifted, as has the structure of these arguments.

252. The Claimants contend that "[i]n the course of enacting, promoting and implementing the EGO 24 regime, the Respondent made unambiguous and binding commitments to foreign investors, the Micula brothers, that they would be granted a number of incentives for a 10 year period in return for making certain large investments in one of the poorest and least developed regions of Romania" (C-PHB, ¶ 1). The Claimants claim that, in specific reliance on these commitments, and in particular in reliance on the expectation that the incentives would last through the entire 10 year period, the Claimants invested massively in the Ştei-Nucet-Drăgăneşti area, one of Romania's most remote and disfavored regions.

253. In the latest formulation of their case, the Claimants argue that Romania entered into these binding commitments through EGO 24; its implementing legislation, in particular GD 194/1999; and the issuance of Permanent Investor Certificates (PICs) to the three Corporate Claimants. The Claimants submit that these PICs certified that the Claimants had the right to receive the incentives until 1 April 2009, which was also the date in which Ştei-Nucet-Drăgăneşti would cease to be considered a disfavored region.

254. The Claimants argue that Romania's binding commitment to provide the incentives to the Claimants until 1 April 2009 gave rise to a right to receive those incentives until that date, or at least generated a legitimate expectation that they would benefit from those incentives until that date. The Claimants contend that Romania's revocation of these incentives effective 22 February 2005 (approximately 4 years before they were set to expire) breached that commitment or undermined that legitimate expectation.

255. The Claimants contend that Romania's premature revocation of the incentives was unfair and unlawful. While Romania argues that it was forced to revoke the incentives to comply with EU requirements, the Claimants assert that the incentives were in fact compatible with EU law, and no competent authority had issued a decision requiring Romania to terminate the incentives. The Claimants also complain that Romania did not attempt to negotiate with either the EU or the Claimants to find a solution that would mitigate the adverse effects on their business of the premature revocation of the incentives. The Claimants argue that, most egregiously, Romania revoked only the provisions of EGO 24 that established the incentives, while retaining those that

set out the Claimants' obligations to remain invested in the Ştei-Nucet-Drăgăneşti region for twice the time they received the incentives.

256. In view of the above, the Claimants argue that Romania has breached the Claimants' rights under the Sweden-Romania BIT and under international law. Specifically, they contend that the premature revocation of the EGO 24 incentives:

a. Breached a clear commitment undertaken by Romania vis-à-vis the Claimants, and therefore breached the BIT's umbrella clause contained in Article 2(4) of the BIT;

b. Undermined the Claimants' legitimate expectations, upset the stability of the regulatory regime, lacked transparency and consistency, and was taken in bad faith, and therefore breached Romania's obligation under Article 2(3) of the BIT to afford the Claimants fair and equitable treatment;

c. Impaired by unreasonable measures the management, maintenance, use, enjoyment and disposal of the Claimants' investments, and therefore breached Article 2(3) of the BIT; and

d. Expropriated without compensation the Claimants' right to receive the incentives and substantially deprived their entire investment of value, and therefore breached Article 4(1) of the BIT.

257. The Claimants claim that, because the early revocation of these incentives violated an obligation entered into by Romania vis-à-vis the investors (and thus breached the BIT's umbrella clause), the revocation also undermined the Claimants' legitimate expectations (and consequently breached the BIT's fair and equitable treatment standard). However, in the Claimants' view, even if the premature revocation of the incentives does not breach the umbrella clause (e.g., because the promise allegedly made by the Respondent does not rise to the level of an obligation protected by the umbrella clause), the Tribunal could still find a violation of the fair and equitable treatment standard because the revocation upset the Claimants' legitimate expectations (Tr., Day 12, 126:22-128:6 (Reed)).

258. The Claimants deny that the termination of the incentives was required under EU law. The Claimants allege that, to the contrary, the incentives were one of the factors that allowed Romania to accede to the EU in the first place. Indeed, the Claimants argue that Romania desperately needed economic development, particularly in certain distressed regions, to be able to join the EU. In their view, incentive programs such as EGO 24 greatly contributed to this development.

259. The Claimants argue that Romania has failed to show how the EGO 24 incentives conflicted with EU law and that Romania has not provided evidence that the EU required the termination of the incentives in order to obtain accession.

260. The Claimants specific arguments with respect to the alleged treaty breaches are discussed in Section VI below (Analysis of the Claimants' Treaty Claims).

261. The Claimants argue that these breaches caused substantial damage to the Claimants, as set out in Section VII below (Damages).

262. On the basis of the foregoing, the Claimants request the following relief:

> The Claimants request an award be made granting the relief set out in paragraphs 1 to 6 below.
>
> Any damages payable, including interest and costs, should be awarded to the individual Claimants, Ioan Micula and Viorel Micula, to be divided between them on a 50:50 basis.
>
> In the alternative, any damages payable, including interest and costs, should be awarded to all five Claimants.
>
> 1. A declaration that Romania has violated the Sweden-Romania Bilateral Investment Treaty ("Treaty") and customary international law by:
>
>   1.1 failing to ensure fair and equitable treatment of the Claimants' investments (Article 2(3) of the Treaty) by treating the Claimants' investments in a manner that was inconsistent, ambiguous, and not transparent;
>
>   1.2 failing to ensure fair and equitable treatment of the Claimants' investments (Article 2(3) of the Treaty) by violating the Claimants' legitimate expectations regarding their investments;
>
>   1.3 impairing the Claimants' investments through unreasonable and discriminatory measures (Article 2(3) of the Treaty);
>
>   1.4 failing to observe obligations entered into with the Claimants with regard to their investments (Article 2(4) of the Treaty); and
>
>   1.5 expropriating the Claimants' investments without the payment of prompt, adequate, and effective compensation (Article 4(1) of the Treaty).
>
> 2. Damages for the following losses suffered by the Claimants:
>
> **A. Expectation losses**
>
>   2.1 Losses suffered as a result of the increased cost of raw materials following revocation of the incentives provided by Emergency Government Ordinance 24/1998 ("Incentives") and the lost opportunity to build a sugar stockpile in 2009, comprising:
>
>   (a) increased costs of sugar in the amount of RON 85.1 million;
>
>   (b) increased costs of PET in the amount of RON 6.3 million;
>
>   (c) increased costs of raw materials other than sugar and PET in the amount of RON 17.5 million; and
>
>   (d) lost opportunity to stockpile sugar in 2009 in the amount of RON 62.5 million.

2.2 Financial penalties incurred but not yet paid as a result of the Claimants being financially constrained due to the losses incurred as a result of the revocation of the Incentives in the amount of RON 63.65 million as 30 September 2010 unless these financial penalties are waived by the Respondent and a declaration that the Respondent shall waive or reimburse all additional financial penalties imposed or assessed until the date of Romania's full and final satisfaction of the award.

2.2A Financial penalties paid by the Micula brothers' companies in the period 1 April 2005 to 30 September 2010 in the amount of RON 40 million.

2.3 Lost profits on sales of finished goods following revocation of the Incentives of no less than RON 427 million.

2.4 Lost profits on sales of Sugar Containing Products ("SCPs") following revocation of the Incentives in the amount of RON 492.3 million.

2.5 Lost profits incurred as a result of the Claimants' inability to complete their incremental investments following revocation of the Incentives comprising:

(a) a malt plant in the amount of RON 28 million;

(b) a cogeneration [p]lant in the amount of RON 712.6 million; and

(c) a canning [p]lant and subsequent sales of private label beer in the amount of RON 720.4 million.

2.6 In the alternative to paragraphs 2.3, 2.4 and 2.5 above, lost profits on sales of finished goods following revocation of the Incentives in the amount of RON 2423.2 million.

B. Reliance losses

2.7 In the alternative to the losses described in paragraphs 2.1, 2.2A, and 2.3 to 2.6 above, but not 2.2, the amounts lost by the Claimants as a result of investing in reliance on the Incentives in the amount of RON 811 million.

3. An award of interest on the damages payable pursuant to paragraph 2 above calculated in the following manner:

3.1 For losses as described in paragraphs 2.1(a) to (c) above, interest compounded on a quarterly basis at a rate of 3 month ROBOR (Romanian Interbank Offer Rate) plus 5% from 1 March 2007 until the date of Romania's full and final satisfaction of the award.

3.2 For losses as described in paragraph 2.1(d) above, interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 July 2010 until the date of Romania's full and final satisfaction of the award.

3.3 For penalties as described in paragraph 2.2A above, interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 July 2007 until the date of Romania's full and final satisfaction of the award.

3.4 For losses as described in paragraph 2.3 above, interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 May 2008 until the date of Romania's full and final satisfaction of the award.

3.5 For losses as described in paragraph 2.4 above, interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 March 2007 until the date of Romania's full and final satisfaction of the award.

3.6 For losses as described in paragraph 2.5 above, interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 30 September 2009 until the date of Romania's full and final satisfaction of the award.

3.7 For losses as described in paragraph 2.6 above, interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 15 August 2007 until the date of Romania's full and final satisfaction of the award.

3.8 For the amounts lost by the Claimants as a result of investing in reliance on the Incentives as described in paragraph 2.7 above, interest to be applied compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 January 2002 until the date of Romania's full and final satisfaction of the award.

3.9 The ROBOR rate to be applied in relation to paragraphs 3.1 to 3.8 above is to be the average annual rate for each year or part thereof.

4. The total amount of damages payable by the Respondent comprising the amounts set out in paragraphs 2, 3 and 5 to be received net of any tax obligations imposed by Romania on the proceeds.

5. All costs incurred by the Claimants in relation to these proceedings, including but not limited to the Claimants' lawyers' fees and expenses, experts' fees and expenses, and all costs of ICSID and the Tribunal.

6. Any further relief that the Tribunal may deem fit and proper.

(Claimants' Revised Request for Relief, footnotes omitted)

263. In addition, the Claimants request that the Tribunal:[13]

[…]

b. provide in the Award that Romania is enjoined from any further tax collection measures of any kind in respect of the Claimants and the EFDC until such a time as the damages awarded by the Tribunal have been paid in full, and include a pecuniary alternative in case of non-performance;

[13] These additional requests were made in the context of the Respondent's application to revoke the provisional measures recommended by the Tribunal. As noted in paragraph 111 above, the determination of these matters was deferred to the final Award.

c. issue a declaration that Romania is not entitled to set-off tax debts of the EFDC against an Award in favor of Claimants;

d. order Romania to pay all of Claimants' costs in responding to this Application, including reasonable lawyers' fees and other costs; and

e. grant any other relief that the Tribunal may deem fit and proper in these proceedings.

(Claimants' Rejoinder on the Respondent's Revocation Application, ¶ 75).

B. THE RESPONDENT'S POSITION

264. The Respondent rejects each of the Claimants' claims under the BIT.

265. The Respondent argues that the key question in this case is "who bore the risk of regulatory change: the state or the investors who benefitted from the existing regulatory regime" (R-Rejoinder, ¶ 9).

266. The Respondent contends that the BIT does not require the Contracting States to tailor their laws and regulations to the preference of foreign investors, nor does it establish liability for every regulatory change that has a negative impact on the foreign investors' businesses. To the contrary, investment protection treaties accord host states considerable deference in relation to regulatory policy. As a result, the Respondent argues that where a state has exercised its sovereign powers to regulate in a general, non-discriminatory way to advance public welfare (including by legislative changes), such conduct is not an "expropriation", "unfair and inequitable treatment", or otherwise in breach of the provisions of an investment protection treaty. Absent a clear commitment from the state to stabilize a regulatory framework, states are usually free to change their laws.

267. Indeed, the Respondent argues that businessmen know this, and factor regulatory risk into their business plans. According to the Respondent, the Claimants did not do so because they thought they had a special status that protected them from any regulatory changes.

268. In the present case, the Respondent notes that it is undisputed that the modification of the facilities that had been granted pursuant to EGO 24/1998 was a generally applicable act. The Respondent also argues that it was compelled to curtail the facilities as an essential precondition to accession to the EU. Accordingly, the Tribunal should give deference to Romania's action when applying the substantive provisions of the BIT (R-CM, ¶ 92).

269. Building on this fundamental premise, the Respondent makes four main arguments.

270. The Respondent's <u>first</u> line of argument is that three (and possibly four) of the Claimants' claims fail because the Claimants have not proven that Romania made a binding promise to the Claimants that the facilities under EGO 24, either in their totality or the Raw Materials Facility individually, would remain unchanged until 2009. The Respondent argues that the Claimants' ability to establish the existence, terms

and duration of this promise is an essential condition for the following three claims (although it is not a sufficient condition for the success of any of them) (Tr., Day 13, 60:2-65-7; 73:3-83-25 (Petrochilos)):

a. First, the existence of such a promise is the basis for the Claimants' assertions regarding their legitimate expectations, including their expectation of legal stability, and is therefore necessary for proving this aspect of the Claimants' fair and equitable treatment claim.

b. Second, the existence of such a promise is necessary to establish the existence and scope of an obligation under Romanian law, the breach of which could result in the breach of the umbrella clause.

c. Third, the existence of such a promise is allegedly what gave rise to the Claimants' right to the facilities, which Claimants assert has been expropriated.

271. In addition, the Respondent contends that the Claimants' claims relating to an asserted lack of transparency and consistency in the regulatory regime are based on the notion that the Claimants were entitled to receive some kind of an advance notice or warning from Romania that the Raw Materials Incentive would change, because Romania had allegedly promised that the incentive would remain in place until 2009.

272. The Respondent argues that the Claimants must prove two distinct components of this promise: (i) that the EGO 24 facilities would remain unchanged until 2009, and (ii) that the promise was contained in an instrument which either conferred individual rights on them, or was otherwise one on which they could legitimately rely as securing some form of entitlement that was specific to them and that would remain in place even in the case of a general legislative or regulatory change.

273. The Respondent further contends that, to establish any of these claims, the Claimants must prove that Romania's promise was binding under Romanian law:

a. With respect to the fair and equitable treatment claim, the Respondent argues that the Claimants must show that, after exercising due diligence, they legitimately and reasonably relied on an instrument which a reasonable investor, properly advised by Romanian lawyers, would have understood as an assurance of the immutability of the EGO 24 facilities.

b. With respect to the umbrella clause and expropriation claims, the Respondent argues that the Claimants must show that they had an actionable vested right existing under Romanian law which was breached or expropriated.

274. According to the Respondent, the Claimants' claims fail because they have failed to establish the existence of a binding promise under Romanian law.

275. The Respondent's <u>second</u> line of argument is that, regardless of the existence of a promise, either the Claimants did not rely on the existence of that promise to make their investments, or any such reliance was unreasonable. The Respondent argues

that, given the lack of reliance, the Claimants' fair and equitable treatment claim fails, even if a promise existed. In this respect (and as noted below), the Respondent argues that the Claimants' case hinges on the credibility of their witnesses, and their testimony is neither credible nor reliable (Tr., Day 13:19-43 (King)).

276. The Respondent's third line of argument is that the remaining claims (namely, the Claimants' other fair and equitable treatment claims and their claims that Romania impaired the Claimants' investments through unreasonable measures) fail because Romania's actions were reasonably related to a rational policy, which was EU accession. The Respondent also argues that the actions giving rise to the Claimants' assertions of lack of transparency and inconsistency in the regulatory regime were, in fact, reasonable and consistent with the BIT.

277. The Respondent advances further arguments with respect to each of the Claimants' claims, which will be addressed in the specific analysis of each of the Claimants' claims in Chapter VI.

278. Finally, as discussed in Section VII below, the Respondent challenges the Claimants' case on quantum.

279. In addition to these four main arguments, the Respondent challenges the credibility and reliability of the Claimants' witnesses. The Respondent argues that this lack of credibility and reliability was exposed during the November 2010 hearing on the merits, and that this is the reason why the Claimants shifted the focus of their case. Specifically, the Respondent argues that while the Claimants originally focused on their legitimate expectations claim (which requires proof of the Claimants' subjective reliance on their alleged expectations and of the reasonableness of that reliance), after the hearing on the merits the Claimants shifted their focus to their claims related to the umbrella clause, expropriation and transparency. According to the Respondent, these are "claims that have nothing to do with the Claimants in particular", and the Claimants shifted their focus to them because they believe that "these are claims that might survive without the need to rely on the doubtful words of the Miculas and their employee witnesses" (Tr., Day 13, 30:21-31:2 (King)).

280. The Respondent has stated that its challenge to the credibility and reliability of the Claimants' witnesses extends to "all aspects that the Claimants have asserted" (Tr., Day 13, 62:6-8). However, given that the Respondent acknowledges that the umbrella clause, expropriation and transparency claims are premised on objective rather than subjective factors, it seems that the Respondent's challenge to the credibility and reliability of the Claimants' witnesses is directed principally to the Claimants' legitimate expectations claim and their damages case.

281. The Respondent also argues that, despite the Claimants' shift in focus, this is not and has never been a case about transparency; it has only become so because the hearing undermined the Claimants' previous case theory (Tr., Day 13, 19-43 (King)).

282. For the foregoing reasons, the Respondent requests the Tribunal to:

"(a) DISMISS the Claimants' claims in their entirety; and

(b) ORDER the Claimants to pay in their entirety the costs of this arbitration, including the fees and expenses of the Tribunal and the Centre and the reasonable fees and expenses incurred by Romania in defending against the Claimants' claims."

(Respondent's Post-Hearing Brief, ¶ 354).

283. In addition, the Respondent requests the Tribunal to:[14]

"[…]

c. if any amount is awarded to any of the Claimants, whether as damages, arbitration costs, or otherwise, explicitly provide in the award that the amount awarded is subject to set-off against the tax debts of all eleven EFDG companies, including lawful interest and penalties;

d. grant any other relief the Tribunal considers just and proper."

(Respondent's Reply regarding its Revocation Application, ¶ 41)

[14] These additional requests were made in the context of the Respondent's application to revoke the provisional measures recommended by the Tribunal. As noted in paragraph 111 above, the determination of these matters was deferred to the final Award.

V. PRELIMINARY MATTERS

A. THE TRIBUNAL'S JURISDICTION

284. The Tribunal's jurisdiction over this dispute was addressed in the Decision on Jurisdiction and Admissibility, which makes integral part of this Award. In that Decision, the Tribunal found that it had jurisdiction over the dispute submitted to it in this arbitration and rejected any objections as to the admissibility of the claims (Decision on Jurisdiction and Admissibility, ¶ 170).

285. Specifically, in the Decision on Jurisdiction and Admissibility the Tribunal found that:

a. The Tribunal's jurisdiction is determined by Article 25 of the ICSID Convention and Article 7 of the BIT.

b. Regarding jurisdiction *ratione personae*, the Tribunal rejected Romania's argument that the Individual Claimants' Swedish nationality could not be opposed to Romania because of purported tenuous links with Sweden. Accordingly, the Tribunal concluded that Messrs. Micula are and have been Swedish nationals at all times relevant to the Tribunal's jurisdiction. As for the three Corporate Claimants, the Tribunal resolved that they were held by nationals of another Contracting State at the time of consent to arbitration, in accordance with the requirements of Article 25(2)(b) of the ICSID Convention and Article 7(3) of the BIT.

c. Regarding jurisdiction *ratione materiae*, the Tribunal found that the investments made by the Corporate Claimants qualified as such for the purposes of the ICSID Convention. In the same vein, the Tribunal was satisfied that the shareholding of Messrs. Micula qualified as an investment under the ICSID Convention. The Tribunal also held that there was an investment for the purposes of the BIT. Further, the Tribunal expressed no doubt that the dispute was of a legal nature, arising directly out of an investment, for the purposes of Article 25 of the ICSID Convention. Moreover, the Tribunal understood that the dispute was not merely hypothetical and that the Claimants had made a *prima facie* case of entitlement.

d. Regarding jurisdiction *ratione temporis*, the Tribunal found that the dispute arose after the entry into force of the BIT and therefore fell within the scope of application of the BIT *ratione temporis*.

e. The Tribunal also rejected the Respondent's objection related to the remedy of restitution sought by the Claimants, ruling that the Tribunal had powers to order restitution both under the ICSID Convention and the BIT.

B. Applicable Law

286. Article 42(1) of the ICSID Convention provides that:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

287. The Parties note that the BIT does not contain a choice of law clause (C-SoC, ¶ 170; R-CM, ¶ 72; R-Rejoinder, ¶ 230). Accordingly, Article 42(1) of the ICSID Convention directs the Tribunal to apply the host state's law (here, Romanian law) and "such rules of international law as may be applicable." The Parties agree that, in the case of conflict between Romanian law and international law, international law should take precedence (C-SoC, ¶¶ 172; R-CM, ¶ 72).[15]

288. The Claimants submit that "where the basis of jurisdiction is a BIT and the claims put forward are based on the BIT, it is established practice to accept the BIT's substantive rules as the applicable law" (C-SoC, ¶ 170). The Respondent appears to agree, noting that "the interpretation of the BIT must be guided by relevant principles of international law", and adding that "[i]ts actual text is of course the starting point" (R-CM, ¶ 73;). Indeed, the Respondent contends that the rule of international law of primary significance to the Claimants' case is Article 2(3) of the BIT (R-Rejoinder, ¶ 230).

289. The Parties disagree however on the role of other rules of international law in this dispute. The Claimants contend that no international law principle displaces the terms of the BIT or otherwise excuses Romania's treaty breaches. In turn, the Respondent argues that the BIT must be interpreted in light of the context in which it was concluded, and should be consistent with Romania's and Sweden's other relevant international law obligations, including in particular Romania's obligations under the Europe Agreement and the EC Treaty. Romania argues that, in any event, the Parties intended EU law to prevail.

290. The Tribunal addresses the Parties' positions below, as well as comments made by the European Commission in its capacity as *amicus curiae*.

[15] See, e.g., *Compañía de Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1), Award, 17 February 2000 (hereinafter *"Santa Elena v. Costa Rica"*), ¶¶ 64-65; *LG&E Energy Corp, LG&E Corp, LG&E International Inc. v Argentine Republic* (ICSID Case No ARB/02/1), Decision on Liability, 3 October 2006 (hereinafter *"LG&E v. Argentina" or "LG&E"*), ¶ 94; *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Resubmission Proceeding, Award, 5 June 1990, ¶ 40.

1. The Claimants' position

291. The Claimants contend that EU law does not displace the terms of the BIT (C-Reply, ¶¶ 515-555; ER of D. Caron; C-PHB, ¶¶ 86-95). The Claimants argue that there is no conflict of treaties that could make EU law prevail over the BIT, but even if there were, the BIT should prevail (Section (a) below). The Claimants further contend that the Respondent's attempts to interpret the BIT in accordance with EU law should be rejected (Section (b) below). In any event, the Claimants contend that EU law requirements would not justify or excuse breaches of the BIT (Section (c) below).

a. There is no conflict of treaties, and even if there were, the BIT should prevail

292. The Claimants submit that there is no conflict of treaties in this case because the Accession Treaty and the EC Treaty were not in force vis-à-vis Romania at the time it entered into the BIT, or at the time when the breaches of the BIT occurred. Thus, the Claimants assert that:

> Everything here in this case is crystallised prior to the accession of Romania to the EU. The BIT was entered in force before, the breach predates the accession and hence the right to be compensated predates accession. [...] [T]he only element which postdates accession is the payment: the payment of a sum of money which represents the consequences of the breach which predates accession (Tr., Day 12, 141 (Gaillard)).

293. The Claimants also note that the Commission expressly concludes that the BIT has been neither superseded nor terminated by Romania's accession to the EU pursuant to Article 59 of the Vienna Convention.

294. In the Claimants' view, the only treaty with which the BIT could be deemed to be in conflict is the Europe Agreement. The Claimants deny that such a conflict exists, but if such a conflict were deemed to exist, they submit that the BIT should prevail:

a. First, under the preservation of rights provision in Article 9(2) of the BIT, the BIT prevails over external provisions, except to the extent that the latter would be more favorable to the investor than the provisions of the BIT.

b. Second, the BIT prevails as *lex posterior* pursuant to Article 30(3) of the Vienna Convention on the Law of Treaties of 1969 (the "VCLT")[16] because none of the requirements for Article 30(3) to apply is met (in particular, the Europe Agreement and the BIT were not entered into between the same parties, nor do they have the same subject matter).

c. Third, the BIT prevails as *lex specialis*, because it is the treaty with a more precisely delimited scope of application. In addition, the Claimants argue that

[16] Article 30(3) of the VCLT provides: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

there is no evidence of Romania's and Sweden's common intention to give precedence to EU law and subordinate the BIT to it. Indeed, the Claimants note that, in the few instances where Romania has intended to give precedence over a BIT to a particular source of law, it has done so expressly.

b. Romania's interpretation of the provisions of the BIT is flawed

295. The Claimants further argue that Romania misapplies Article 31(3)(c) of the VCLT in an attempt to supplant the BIT with EU law. Article 31(3)(c) of the VCLT provides: "There shall be taken into account, together with the context: […] (c) any relevant rules of international law applicable in the relations between the parties." According to the Claimants, Romania's attempt to "interpret" the BIT by taking into account EU law as part of the "relevant rules of international law applicable in the relations between the parties" is an improper attempt to displace the BIT and apply EU law instead. Relying on Prof. Caron's expert opinion, the Claimants argue that:

a. An "interpretation" cannot be construed to abrogate express language in the BIT;

b. The meaning of the terms "shall be taken into account" should be understood to mean that an interpreter of the treaty has the discretion to consider relevant rules of international law, not that such rules must be incorporated into the treaty, and

c. The "relevant rules of international law" are only those that are in place at the time of the violation.

296. As a result, the Claimants argue that, for purposes of Article 31(3)(c) of the VCLT, the Tribunal could "take into account" the Europe Agreement, which existed at the time the BIT entered into force and at the time Romania breached the BIT's provisions (subject to the additional requirement of the Europe Agreement being "between the parties", which the Claimants deny). However, the Tribunal cannot take into account the Accession Agreement or the EC Treaty, as Romania had not entered into either at the time it concluded the BIT. Therefore, in the view of the Claimants, if the Tribunal seeks to determine the relevant state aid requirements that applied to Romania, the Tribunal should refer to the regime existing under the Europe Agreement, rather than the post-accession regime.

c. EU law requirements would not justify or excuse breaches of the BIT or international law

297. The Claimants submit that even if Romania was required by EU law to repeal the EGO 24 incentives prior to their planned expiration in 2009, this would not justify or excuse breaches of the BIT and international law.

298. The Claimants note that, according to Art. 12 of the ILC Articles on State Responsibility (the "ILC Articles"),[17] "[t]here is a breach of an international obligation

[17] Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001. The Tribunal notes that the Claimants have included a complete version of the ILC Articles, with commentaries, at Exh. C-592 (ILC Articles on State Responsibility,

by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." In the Claimants' submission, the relevant international obligations here are those contained in the BIT. Romania would breach those obligations even if its actions were required by EU law. Pursuant to Article 31(1) of the ILC Articles, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

299. The Claimants submit that, for all of their claims except their fair and equitable treatment claim, the obligation to compensate arises irrespective of the rationale for the adoption of the internationally wrongful act. In their view, Romania's reasons for adopting the measure could only be relevant if Romania were trying to avail itself of one of the circumstances precluding wrongfulness described in Chapter V of the ILC Articles, i.e., force majeure (Article 23), duress (Article 24), or necessity (Article 25). Thus, for their expropriation and umbrella clause claims, the Claimants argue that Romania's "EU law defense" should be assessed after the Tribunal has decided whether there is liability under the BIT, to determine if the reasons for Romania's actions qualify as a circumstance precluding wrongfulness.

300. The Claimants note that Romania has not expressly invoked Articles 23-25 of the ILC Articles, but in any event the Claimants submit that none of them applies. In particular, Romania has not proven the "necessity" of its alleged compliance with its EU law obligations in the terms of Article 25.

301. Even if the doctrine of "necessity" applied, the Claimants contend that Romania would still be required to compensate them. Article 25 only provides an excuse for an act by a state; it does not affect a state's obligation to pay compensation for damages caused by that act (even if excused). Indeed, according to the Claimants ILC Article 27(b) leaves open whether a state relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered.

302. In contrast, the Claimants submit that Romania's EU law defense is relevant to the determination of whether Romania has breached the fair and equitable treatment standard. As explained in further detail below, the Claimants argue that EU law is part of the factual matrix against which the Tribunal must determine whether the Claimants' expectations were legitimate and, specifically, whether they were reasonable (Tr., Day 1, 159-164, 170-177 (Gaillard)). Thus, the Tribunal must assess Romania's EU law defense during the Tribunal's analysis of whether Romania has breached the fair and equitable treatment standard.

Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), and that the Respondent has done the same at Exh. RL-8 (International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries", [2001-II(2)] Yearbook of the International Law Commission 59). The Tribunal understands that all of these versions are identical and will use them indistinctly. The Tribunal further notes that, by Resolution 53/83 of 12 December 2001, the UN General Assembly took note of the ILC Articles and "commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action." All references to the ILC Articles themselves in this Award are to the version to which the UN General Assembly referred in Resolution 53/83. All references to the commentary to the Articles are to the version adopted by the ILC.

2. The Respondent's position

303. The Respondent argues that the BIT must be interpreted in light of the context in which it was concluded, and should be consistent with Romania's and Sweden's other relevant international law obligations, including in particular Romania's obligations under the Europe Agreement and the EC Treaty. Romania argues that, in any event, the Parties intended EU law to prevail (R-CM, ¶¶ 72-84; R-Rejoinder, ¶¶ 226-258; Tr. Day 13, 50:18-51:24 (King)).

a. The BIT must be interpreted consistently with EU law

304. As noted above, the Respondent does not dispute that the substantive rules of international law applicable to this dispute are those contained in the BIT. However, it argues that the BIT cannot be interpreted in a vacuum. Citing *AAPL v. Sri Lanka*, the Respondent argues that an investment protection treaty "is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context [...]."[18] In this respect, the Respondent argues that the BIT must be interpreted in light of the context in which it was negotiated and concluded between Romania and Sweden. In Romania's submission, this context should take into account the purpose for which it was concluded (Article 31(1) of the VLCT), as well as the circumstances of its conclusion (Article 32 of the VCLT). Romania argues that the conclusion of the BIT was a direct consequence of the Europe Agreement, in the context of Romania's accession to the EU and adoption of the *acquis.*

305. The Respondent also argues that, pursuant to Article 31(3)(c) of the VCLT, when interpreting a treaty, the "relevant rules of international law applicable in the relations between the parties" must also be taken into account. According to Romania, this includes the rules of international law existing at the time the BIT is being interpreted (that is, today). Thus, in Romania's submission, the Europe Agreement and the EC Treaty fall under the category of relevant rules of international law that should be considered when construing the BIT. In this respect, Romania notes that the ILC has stated that "[i]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."[19]

306. Specifically, Romania claims that "the BIT should be interpreted as part of a harmonious set of treaty obligations that Romania and Sweden have entered into, starting with the 1993 Europe Agreement and continuing, all pursuant to that same initial instrument with the BIT and the accession treaty [...] [T]he Europe Agreement indeed called on Romania to negotiate BITs with EU countries" (Tr., Day 13, 51 (King)). The Respondent submits that, if the BIT is construed in that light, no conflict between the various instruments arises.

[18] *Asian Agricultural Products Limited v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award, 27 June 1990 (hereinafter *"AAPL v. Sri Lanka"*), ¶ 21.

[19] International Law Commission, "Report of the International Law Commission on the Work of its 58th Session", UN Doc A/61/10 (2006), Exh. RL-187, p 408.

307. Romania contends that, in the present case, such a “systemic” interpretation of the BIT is of special importance. It submits that the treatment of foreign investors that Sweden and Romania intended to mandate through the BIT cannot be divorced from Romania’s obligations under the Europe Agreement and the EC Treaty. The Respondent argues that Sweden, together with the other EU Member States, expected Romania to take all reasonable measures to comply with the EU treaties, and in particular expected Romania to abolish EGO 24.

308. In view of the above, the Respondent contends that all substantive obligations contained in the BIT must be interpreted in a manner consistent with EU law. This includes in particular Article 64 of the Europe Agreement and Article 87 of the EC Treaty.

b. In any event, the Contracting Parties to the BIT intended European law to prevail

309. The Respondent further submits that, in the unlikely event that the Tribunal should find Romania’s obligations under EU law and the BIT impossible to reconcile, any conflict ought to be resolved in favor of EU law.

310. In this respect, the Respondent argues that where conflicts arise between competing rules of international law which cannot be resolved by systemic interpretation, the intention of the relevant States determines which of the competing rules takes precedence. According to the Respondent, in the present case the common intention of Romania and Sweden is clear: they intended the BIT to be subordinated to EU law. As EU law contains more specific rules on state aid, EU law should prevail by application of the principle *lex specialis derogat generali*.

311. In addition, the Respondent argues that it concluded the BIT with Sweden precisely in furtherance of its obligations to the EU and the EU Member States. It would thus be irrational to suppose that Sweden and Romania intended the BIT to circumvent or otherwise weaken EU law. Indeed, for Sweden this would mean breaching the EC Treaty.

312. Finally, the Respondent notes that the European Court of Justice ("ECJ") has ruled that EU law takes precedence over all pre-accession bilateral treaties concluded between Member States (Exh. RL-197 to RL-200).

c. EU law is relevant to the determination of wrongfulness

313. The Respondent asserts that, contrary to the Claimants' contentions, EU law is relevant to the determination of whether it breached the BIT.

314. Specifically, Romania argues that the rights and obligations of Romania and Sweden under the Europe Agreement and, eventually, the Accession Treaty, are not only rules of international law that the Tribunal should take into account when interpreting the BIT, but are relevant in at least three ways: (i) as the factual motivation for the change in Romanian law that is the basis of the Claimants' allegations; (ii) as binding rules of Romanian law, having been incorporated into Romanian law, and (iii) as factual circumstances to take into account as part of the consideration of what would have constituted fair and equitable treatment (R-Rejoinder, ¶ 227).

315. The Respondent further submits that it was indeed "necessary" for Romania to repeal EGO 98 in order to either comply with EU law or accede to the EU. However, the Respondent submits that "necessity" is not the test; the question is whether Romania's course of action was reasonable (R-Rejoinder, ¶ 99). The Tribunal understands Romania's position to be that the requirements of EU law play a role in determining whether Romania breached the standards of the BIT that require the state to act reasonably, in particular, the fair and equitable treatment obligation and the obligation not to impair the Claimants' investments by unreasonable or discriminatory measures. The Tribunal also understands that Romania is not invoking Articles 23, 24 or 25 of the ILC Articles to plead that there are circumstances precluding wrongfulness that would excuse any liability under the BIT.

3. The Commission's position

316. In its capacity as *amicus curiae*, the European Commission submitted comments on the law applicable to this dispute.

317. The Commission's position in this respect is similar to that of the Respondent. The Commission submits that the interpretation of the BIT should take into account the BIT's European context and origin. It notes that the ECJ has recommended interpreting intra-EU BITs in the light of EU law (ECJ Case 26/62, *Van Gend en Loos* [1963], ECR 3). The Commission also submits that the parties to the Europe Agreement intended that any future BIT should subscribe to the same logic regarding state aid law. Therefore, the Tribunal should take into account the EU's state aid rules when interpreting specific BIT provisions. The Commission further contends that Article 30(3) of the VCLT directs the Tribunal to apply the EU's state aid law rather than provisions of the BIT that would prove incompatible with the EC Treaty.

4. The Tribunal's analysis

318. There is no dispute among the Parties that the primary source of law for this Tribunal is the BIT itself. The disagreements lie in the role of other rules of international law, in particular rules arising from treaties established under EU law to which Romania and Sweden are parties.

319. As a first step, the Tribunal notes that there is no real conflict of treaties. In the time period relevant to this dispute, the relevant rules of international law applicable to Romania and Sweden were the Europe Agreement (which entered into force on 1 February 1995) and the BIT (which entered into force on 1 April 2003). The Accession Treaty was not signed until 25 April 2005, and entered into force on 1 January 2007 (date on which the EC Treaty also entered into force with respect to Romania) (ER of F. Jacobs, ¶ 12). Thus, from 1 February 1995 to 1 January 2007, Romania was in a negotiating phase during which it declared that it accepted the *acquis* but it was not properly subject to EU law, with the exception of its international obligations under the Europe Agreement itself. As a result, EU law was not directly applicable to Romania.

320. The relevant question then becomes whether EU law plays a role in the interpretation of the BIT. To answer that question, the Tribunal needs to address three points.

321. First, the Tribunal notes that the BIT does not contain any reference to EU accession or to the EU. Further, the Accession Treaty did not contain any references to the BIT, let alone seek to modify any of the BIT's provisions. To recall, the Europe Agreement entered into force on 1 February 1995, the BIT entered into force on 1 April 2003, and the Accession Treaty was signed on 25 April 2005, and entered into force on 1 January 2007 (on which date the EC Treaty also entered into force with respect to Romania). The Tribunal cannot therefore assume that by virtue of entering into the Accession Treaty or by virtue of Romania's accession to the EU, either Romania, or Sweden, or the EU sought to amend, modify or otherwise detract from the application of the BIT.

322. Second, Article 31(1) of the VCLT provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31(2) expressly notes that such context comprises, *inter alia*, the text of the treaty, including its preamble and annexes. The Preamble of the BIT states that the Contracting Parties have agreed on the terms of the BIT:

> *desiring* to intensify economic cooperation to the mutual benefit of both States and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,
>
> *recognizing* that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives […]

323. The Tribunal must interpret the BIT in light of these overarching goals, which the Parties do not dispute.

324. Likewise, it is undisputed that one of the goals of the Europe Agreement, which predated the BIT, was to promote economic cooperation between Romania and the EC Member States. In this context, Article 74 of the Europe Agreement on investment promotion and protection provided:

> Article 74 - Investment promotion and protection
>
> 1. Cooperation shall aim to establish a favourable climate for private investment, both domestic and foreign, which is essential to the economic and industrial reconstruction of Romania.
>
> 2. The particular aims of the cooperation shall be:
>
>   - for Romania to establish and improve a legal framework which favours and protects investment;
>
>   - the conclusion by the Member States and Romania of Agreements for the promotion and protection of investment [...]

325. This suggests that the BIT was part of Romania's strategy to develop economically in order to obtain accession.

326. That being said (and this is the third point), the Tribunal will interpret each of the various applicable treaties having due regard to the other applicable treaties, assuming that the parties entered into each of those treaties in full awareness of their legal obligations under all of them. In other words, there is no reason to assume that Sweden and Romania had any intent to defeat their obligations under any of the applicable treaties when they entered into each of them and the Tribunal must interpret each treaty – in particular, the BIT – according to that intent of the parties.

327. The Tribunal finds that, factually, the general context of EU accession must be taken into account when interpreting the BIT. In particular, the overall circumstances of EU accession may play a role in determining whether the Respondent has breached some of its obligations under the BIT.

328. The Tribunal notes in this regard that the Parties appear to agree that EU law forms part of the "factual matrix" of the case. In particular, the Parties agree that the question of EU law may be relevant to determining whether Romania acted fairly and equitably with respect to the Claimants' investments in accordance with Article 2(3) of the BIT. The Tribunal concurs. The overall context of EU accession in general and the pertinent provisions of EU law in particular may be relevant to the determination of whether, *inter alia*, Romania's actions were reasonable in light of all the circumstances, or whether Claimants' expectations were legitimate.

329. The Tribunal also sees merit in the Claimants' suggestion that, in theory, EU law could also possibly come into play as a circumstance precluding wrongfulness under ILC Articles 23, 24 or 25. However, as noted above, the Respondent has not put forth a case of force majeure, duress or necessity. Accordingly, the Tribunal does not address the relevance of EU law in this context.

C. THE ENFORCEMENT OF THE ARBITRAL AWARD AND EU LAW

330. The Respondent and the Commission contend that any payment of compensation arising out of this Award would constitute illegal state aid under EU law and render the Award unenforceable within the EU. Prior to determining whether it is useful for

the Tribunal to decide this question (Section 4 below), the Tribunal will set out the Parties' positions. As this point was first raised by the Respondent and second by the Commission, the Tribunal will address the Respondent's position first (Section 1 below), then the Commission's position (Section 2 below), and finally the Claimants' position (Section 3 below).

1. The Respondent's position

331. The Respondent contends that an award of damages in the present case would constitute impermissible state aid (R-CM, ¶ 78 (note 142); First ER of R. Streinz, ¶¶ 29-34; Second ER of R. Streinz, ¶¶ 21-24; ER of F. Jacobs, ¶¶ 45-49; 50(4) and (5); Respondent's observations on Commission's Submission, ¶ 3).

332. Relying on Professor Streinz's expert opinion, the Respondent argues that an award of damages for the abolition of the EGO 24 regime would amount to the granting of new state aid by Romania to the Claimants. For such new state aid to be granted, Romania must first seek and obtain prior approval from the Commission, which in the opinion of the expert would most likely be denied.

333. Professor Jacobs, another of the Respondent's experts, confirms that the payment of compensation in lieu of aid must be regarded as equivalent to a payment of the relevant aid itself. Such a payment in this case would amount to a payment of new state aid and could not be made without the European Commission being informed pursuant to Article 88(3) of the EC Treaty. Prof. Jacobs also states that, as a matter of EU law, an award of compensation in lieu of aid in respect of the period 2007-2009, and possibly in respect of earlier years as well, may be denied enforcement in the EU on grounds of public policy.

2. The European Commission's position

334. The Commission submits that "[i]f the Tribunal rendered an award that is contrary to obligations binding on Romania as an EU Member State, such award could not be implemented in Romania by virtue of the supremacy of EC law, and in particular State aid rules" (Commission's Written Submission, ¶ 125(4)).

335. In particular, the Commission submits that "any award requiring Romania to reestablish investment schemes which have been found incompatible with the internal market during accession negotiations, is subject to EU State aid rules", and "[t]he execution of such award can thus not take place if it would contradict the rules of EU State aid policy." The Commission notes that in the *Eco Swiss* case,[20] the ECJ held that the competition rules of the EC Treaty are part of the public order which national courts must take into account when they review the legality of arbitral awards under the public policy exception recognized by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Commission's Written Submission, ¶ 121).

[20] ECJ, Case C-126/97 *Eco Swiss v. Benetton* ECR [1999] 1-3055, ¶¶ 35-41.

336. The Commission acknowledges that Article 54(1) of the ICSID Convention provides that each Contracting State shall automatically recognize and enforce an ICSID award within its territory as if it were a final judgment of a court in that State. However, it contends that if a national court in the EU were asked to enforce an ICSID award that is contrary to EU law and EU state aid policy rules, the proceedings would have to be stayed under the conditions of Article 234 of the EC Treaty so that the ECJ may decide on the applicability of Article 54 of the ICSID Convention, as transposed into the national law of the referring judge. The Commission notes that "the ICSID Convention is not binding on the EC under Article 300(7) EC, as the terms of the Convention do not allow the EC to become a Contracting Party to it" and concludes that, "[a]ccordingly, the ICSID Convention does not form part of the EC legal order." However, the Commission adds that it "sincerely believes that such a conflict between the BIT, the ICSID Convention, and EC law can be avoided through a contextual interpretation of the BIT or the application of Article 30(3) of the Vienna Convention, as the case may be" (Commission's Written Submission, ¶¶ 122-124).

3. The Claimants' position

337. The Claimants argue that issues regarding enforcement of an award are irrelevant to the Tribunal's decision on the substance of the Claimants' claims. In particular, the Claimants deny that considerations relating to the enforcement of the Award should affect the interpretation of the BIT or the Tribunal's decision as to whether Romania has breached certain provisions of the BIT (Claimants' comments on the Commission's submission, ¶¶ 167-170; C-PHB, ¶¶ 270-278; ER of A. Dashwood, ¶¶ 92-100).

338. In any event, the Claimants submit that, contrary to the Respondent's and the Commission's contention, an award of damages in the present arbitration could not be characterized as a grant of state aid, since the payment of damages would result from the Tribunal's determination that Romania breached the BIT. The Claimants rely on the opinion of Prof. Dashwood, who asserts that an award of damages cannot be equated with the granting of state aid and consequently would not involve any conflict between Romania's obligations under the BIT and its present obligations as a Member State of the EU.

339. The Claimants further contend that Romania was not bound by EU state aid laws when it breached the BIT. The purpose of any award of damages would be to compensate the Claimants for the harm resulting from the Respondent's unlawful conduct, which occurred before Romania joined the EU and became bound by EU law. According to the Claimants, a payment for a breach that predates Romania's EU accession cannot violate EU law.

4. The Tribunal's analysis

340. The Tribunal finds that it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus

inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties' and the Commission's arguments on enforceability of the Award.

341. That being said, the Tribunal notes that Articles 53 and 54 of the ICSID Convention, which are reproduced below, apply in any event to the Award:

> Article 53
>
> (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
>
> (2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.
>
> Article 54
>
> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
>
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

VI. ANALYSIS OF THE CLAIMANTS' TREATY CLAIMS

342. In the latest presentation of their argument, the Claimants contend in the first place that, by revoking the EGO 24 incentives before they were due to expire, Romania violated an obligation entered into by Romania vis-à-vis the Claimants and thus breached the BIT's umbrella clause. However, even if the premature revocation of the incentives does not breach the umbrella clause (e.g., because the promise allegedly made by the Respondent does not rise to the level of an obligation protected by the umbrella clause), the Claimants argue that the Tribunal could still find a violation of the fair and equitable treatment standard because the revocation undermined the Claimants' legitimate expectations (Tr., Day 12, 126:22-128:6 (Reed)). In view of this alternative argument, the Tribunal will first address the Claimants' umbrella clause claim. If necessary, it will then move on to the Claimants' remaining claims.

A. UMBRELLA CLAUSE

343. Article 2(4) of the BIT provides in relevant part:

> Each Contracting Party shall observe any obligation it has entered into with an investor of the other Contracting Party with regard to his or her investment.

1. The Claimants' position

344. The Claimants contend that through the EGO 24 framework and the related PICs, Romania entered into an obligation with the Claimants with regard to their investment. As a result, they argue that, by revoking the Raw Materials Incentive before it was due to expire, the Respondent breached the BIT's umbrella clause, contained in Article 2(4) of the BIT.

345. Section (a) below addresses the Claimants' position with respect to the nature and scope of the BIT's umbrella clause. Section (b) sets out the Claimants' position with respect to the existence of a specific obligation vis-à-vis the Claimants. Section (c) sets out the Claimants' arguments with respect to the Respondent's alleged breach of that umbrella clause.

a. Nature and scope of the BIT's umbrella clause

346. The Claimants submit that the purpose of umbrella clauses (such as Article 2(4) of the BIT, also called "undertakings clauses") is to put the host state's compliance with commitments assumed vis-à-vis investors under the protective "umbrella" of the relevant treaty. This protection is extended to the state's commitments vis-à-vis the investor independently of whether a violation of the other provisions of the treaty has occurred, with the result that any violation of an assurance given by the host state becomes a violation of the treaty. As a result, claims raised under an umbrella clause are additional to and independent of claims based on unfair and inequitable

treatment, unreasonable or discriminatory measures, treatment less favorable than required by international law and expropriation (C-SoC, ¶ 286).

347. The Claimants submit that, unless a treaty expressly provides otherwise, an umbrella clause is not limited to contractual obligations or undertakings, but may cover unilateral undertakings by the host state, including obligations arising from legislation and regulations (C-SoC, ¶¶ 289-299; C-Reply, ¶¶ 461-468; C-PHB, ¶¶ 6-14).

348. In support of this contention, the Claimants argue that there is no justification to interpret Art. 2(4) of the BIT narrowly. First, pursuant to Article 31(1) of the VCLT, treaty provisions are to be interpreted in accordance to their ordinary meaning. Relying on *SGS v. Philippines*[21], *Eureko v. Poland*[22], *CMS v. Argentina*[23], *LG&E v. Argentina* and *Enron v. Argentina*[24], the Claimants contend that the ordinary meaning of the relevant terms supports the binding nature of the clause, as well as its comprehensive scope. The Claimants rely in particular on *Eureko v. Poland*, where the language of the umbrella clause at issue was very similar to the umbrella clause in the Sweden-Romania BIT ("Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party"). In that case, the tribunal held that:

> The plain meaning—the "ordinary meaning"—of a provision prescribing that a State "shall observe any obligations it may have entered into" with regard to certain foreign investments is not obscure. The phrase "shall observe" is imperative and categorical. "Any" obligations is capacious; it means not only obligations of a certain type, but "any"—that is to say, all—obligations entered into with regard to investments of investors of the other Contracting Party.[25]

349. In addition, the Claimants note that the tribunal in *Enron v. Argentina* held that "[u]nder its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature", noting that "[t]ribunals interpreting this expression have found it to cover both contractual obligations such as payment as well as obligations assumed through law or regulation."[26]

350. The Claimants argue that this is all the more so when the legislation or regulations are specifically designed to induce investors to invest in reliance on those assurances. The Claimants point out that the tribunal in *LG&E v. Argentina* found

[21] *Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (hereinafter *"SGS v. Philippines"*).

[22] *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 (hereinafter "*Eureko v. Poland"*).

[23] *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8), Award, 12 May 2005 (hereinafter *"CMS v. Argentina"*).

[24] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P*, (ICSID Case No. ARB/01/3), Award, 22 May 2007 (hereinafter *"Enron v. Argentina")*.

[25] *Eureko v. Poland*, ¶ 246.

[26] *Enron v. Argentina*, ¶ 274, (citing *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Award, 9 March 1998, ¶ 29; *SGS v. Philippines*, ¶¶ 127-128; *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, ¶ 166; *LG&E v. Argentina*, ¶ 175).

that laws and regulations that targeted foreign investors and applied specifically to their investments gave rise to "obligations" under the meaning of the relevant treaty's umbrella clause.[27]

351. In addition, the Claimants contend that the Contracting States could have chosen to draft the BIT's umbrella clause more restrictively (for example, limiting it to contractual obligations), and chose not to do so.

352. The Claimants deny that the wording of Article 2(4) makes it a particularly narrow umbrella clause, to the extent that it requires that an obligation be "entered into with an investor of the other Contracting Party". In the Claimants' view, this language does not set it apart from other umbrella clauses, as all umbrella clauses require that there be a party to whom the obligation is owed (i.e., the investor). Similarly, the Claimants argue that there is no real distinction between the term "obligations" and "undertakings" for these purposes: when someone undertakes to do something, he or she becomes obliged to do that thing.

353. Second, the Claimants argue that the umbrella clause must be interpreted in a manner that gives it substantive meaning. Relying on *Eureko v. Poland*, they contend that

> It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.
>
> It follows that the effect of Article 3.5 [the umbrella clause] in this proceeding cannot be overlooked, or equated with the Treaty's provisions for fair and equitable treatment, national treatment, most-favored-nation treatment, deprivation of investments, and full protection and security. On the contrary, Article 3.5 must be interpreted to mean something in itself. [28]

354. Third, the Claimants also argue that the binding force of obligations unilaterally assumed by the host State is supported by the binding nature of the consent to international arbitration granted by host states through their national legislation, and is in accordance with the treatment of unilateral undertakings in customary international law (citing the *Nuclear Tests Cases*[29]).

355. Finally, the Claimants argue that there is no way in which EU law can limit the breadth of this umbrella clause. EU law is only part of the factual matrix of the case, and thus the only role it could play in relation to an umbrella clause claim is when any factors precluding wrongfulness come to be examined.

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[27] *LG&E v. Argentina*, ¶ 175.

[28] *Eureko v. Poland*, ¶¶ 248-249.

[29] *Nuclear Tests Cases (Australia/New Zealand v. France)*, Judgment, 20 December 1974, ICJ Reports 1974 (hereinafter "*The Nuclear Tests Cases"*).

356. In response to the Respondent's arguments, the Claimants acknowledge that there is no dispute that umbrella clauses only protect specific obligations. However, as explained below, the Claimants submit that Romania entered into a specific obligation with the Claimants.

b. The EGO 24 regime gave rise to a specific obligation vis-à-vis the Claimants

357. The Claimants contend that, through the EGO 24 regime, Romania entered into a specific obligation vis-à-vis the Claimants, which consisted of Romania's undertaking with respect to the Claimants to maintain the incentives in the Ştei-Nucet disfavored region for the full 10-year period provided by GD 194/1999, which the Claimants argue was stabilized for 10 years (C-SoC, ¶ 300; C-Reply, ¶¶ 467-468; C-PHB, ¶¶ 6-24; Tr., Day 12, 70-91 (Reed), 163-164 (Gaillard)).

358. Although the Claimants acknowledge that, taken on its own, EGO 24 is a general and non-specific piece of legislation, they argue that "the regime as a whole and its specific application to the Claimants gives rise to a specific obligation" (C-PHB, ¶ 15).[30]

359. In the Claimants' view, this specific obligation arises primarily from the content of EGO 24 and its implementing legislation. The Claimants claim that, properly construed, EGO 24, read in conjunction with the implementing measures (in particular, GD 194/1999, the Methodological Norms and the PICs), contained a clear and unequivocal undertaking to provide PIC holders such as the Corporate Claimants with the Raw Materials Incentive until 1 April 2009. According to the Claimants, this undertaking arises from the following features of the EGO 24 regime:

a. EGO 24 was specifically targeted to persons who invested and conducted business within specific disfavored regions. To benefit from the incentives offered by EGO 24, investors had to be headquartered and conduct business in the disfavored area and had to create new jobs there for the unemployed (EGO 24, Articles 6 and 8).

b. These disfavored regions were created by government decisions (such as GD 194/1999 and GD 1199/2000), which set out a specific geographic scope and a specific period for which that region would be considered disfavored, as well as the incentives that would be made available in that area and the types of investments that could benefit from them (EGO 24, Articles 3 and 4).

[30] The Claimants had initially argued that Romania had entered into obligations towards foreign investors, including the Claimants, when it granted the incentives on the basis of EGO 24, GD 194 and GD 1199, and that these were the obligations protected under the umbrella clause (C-SoC, ¶ 300). The Claimants have since clarified that the obligations allegedly breached by the Respondent do not arise solely from provisions of a general legislative framework; they arise also from specific commitments and obligations undertaken by Romania in the form of the PICs granted to each of the Corporate Claimants (C-Reply, ¶ 466).

c. To take advantage of the incentives, investors were required to make a specific application for an investor certificate (either temporary or permanent), which required them to submit a detailed investment plan. If they wished to undertake new investments or activities, they needed to submit a new investment plan.

d. Investors were awarded a PIC that set out the period for which it was valid and the fields of activity for which it was valid. PICs were required for investors to obtain the incentives, and had to be presented to the Romanian authorities every single time that investors wished to take advantage of the incentives.

e. Investors assumed obligations in exchange for the incentives. In particular, they were required to employ persons living in the disfavored area (EGO 24, Article 8); they were required to undertake investments prior to obtaining the PIC and, after receiving the PIC, they had to maintain their investments in the disfavored region for twice the period of time they enjoyed the incentives (EGO 24, Articles 7 and 9).

360. In addition, the Claimants argue that the existence of Romania's specific obligation was evidenced by Romania's conduct, in particular its promotion of the EGO 24 regime and the extensive monitoring that PIC holders were subjected to throughout the period during which they received the incentives.

361. In view of the above, the Claimants contend that "the entire EGO 24 regime was far more than a general legislative scheme. Instead it was a specific scheme targeted to specific investors in specific regions for specific periods of time. Further the rights granted were given in exchange for investors undertaking specific obligations, carrying out investments specified in investment plans and receiving specific PICs by which the investors' rights were granted (and conversely from which the Respondent's obligations arose)" (C-PHB, ¶ 16). Relying on the testimony of Mr. Neculai Liviu Marcu, the Claimants add that "[t]he specific purpose of that regime was to entice investors to invest in the least developed areas of Romania; areas in which they would not otherwise invest" (*Id*. *See* also WS of N. Marcu, ¶¶ 31-32; Tr., Day 7, 51-53).

362. The Claimants argue that the fact that Romania's undertaking is not contained in one particular document is irrelevant. It is plain from EGO 24 itself that it did not stand alone; it required and expressly provided for implementing measures to be taken by the Romanian Government. Articles 3 and 4 of EGO 24 required government decisions to declare and delineate disfavored areas, determine the period of time for which each disfavored zone is to be declared, and determine the eligible investments and the incentives which would be granted to investors. In addition, Article 15 required methodological norms to be established by government decision.

363. Nonetheless, the Claimants contend that the basic scheme of the incentives program was set out in EGO 24 (Exh. R-68). Disfavored areas had to satisfy the conditions set out in Article 1. They could be declared for a period of between 3 and 10 years at the discretion of the government authorities. The incentives that could be granted

were set out in Article 6, but it was the government decision for each disfavored area that would determine which incentives were available in that area. In turn, Article 8 provided that, to benefit from the incentives, companies had to be headquartered and conduct business in the disfavored area and had to create new jobs there for the unemployed. Articles 7 and 9 provided that investors would have to refund the incentives if the investments were not maintained in the disfavored area for twice the period during which they had been eligible to receive the incentives.

364. Although the Claimants concede that EGO 24 did not spell out that the incentives available within the disfavored area would be maintained for the entire period for which the disfavored area had been declared disfavored, this is, in the Claimants' submission, the only sensible interpretation of EGO 24. Indeed, they argue that it is also the way it was interpreted by the Romanian Government, as evidenced by the government decisions that implemented EGO 24.

365. The Claimants rely in particular on GD 194/1999 (Exh. C-280, also C-31), which is the government decision that declared Ştei-Nucet a deprived zone (Article 1). Article 3 provides that the period for which Ştei-Nucet shall be declared a deprived zone is 10 years. Article 4 then states that "[d]uring the period of existence of the deprived zone [...] there shall be granted the facilities provided in Annex No. 2." In turn, Annex No. 2, which forms part of GD 194/1999, sets out that investors shall benefit from all of the facilities provided for in Article 6 of EGO 24. As a result, the Claimants argue that Article 4 of GD 194/1999 explicitly ties the period during which the incentives are granted to the period of existence of the deprived zone.

366. The Claimants find additional support in the fact that the language of Article 4 in 37 of the 38 government decisions which declared disfavored areas between 1998 and 2003 is either identical or virtually the same as the language of Article 4 of GD 194/1999 (Table contained at Tab 5 of Vol. 1 of the Claimants' documents for the closing hearing (Shearman & Sterling)). They note that 20 of these 37 government decisions, including GD 194/1999, were signed by Mr. Nicolae Staiculescu, who testified that the incentives were to be offered for the entire period during which the area was a disfavored region (WS of N. Staiculescu, ¶¶ 21-22).

367. The Claimants also note that Mr. Marcu, who was the president of the National Agency for Regional Development, submitted similar testimony:

> We interpreted Article 4 as a firm pledge, commitment on behalf of the government to maintain the zone for a ten-year period in order to persuade investors that we were meaning what we were saying and to give them incentives to invest bigger sums of money in those areas to fulfil the needs of those regions, for example. This created employment, provided social protection through income and also social protection for the families of the miners. (Tr., Day 7, 15:2-9 (Marcu))

368. The Claimants argue that neither Mr. Staiculescu nor Mr. Marcu's testimony was challenged at the hearing on that point.

369. The Claimants find further support in the Methodological Norms issued through GD 728/2001 (Exh. R-35, R-69), which define the period in which companies are deemed to have benefitted from the incentives for purposes of the obligation to repay the incentives if they are voluntarily liquidated or cease operations under Articles 7 and 9 of EGO 24, as "the period between the moment when the certificate of investor in the disfavored area was obtained and the moment when the disfavored area ceases to exist" (Article 1(f) of GD 728/2001, as translated in Exh. R-69). In the case of temporary investor certificates, "followed by the procurement of the certificate of investor in disfavored area, the period is calculated from the moment the provisional certificate of investor is obtained until the disfavored area ceases to exist" (*Id*.). Further, Article 5 of GD 728/2001 (as translated in Exh. R-35) confirms this when it states that "[t]he business entities which obtained the certificate of investor in the disfavored area and which perform activities from fields of interest other than those provided under annex no. 1 shall continue to benefit from facilities under the law, until the expiry of the period for which the disfavored area was declared."

370. According to the Claimants, it is thus clear from EGO 24, read in conjunction with the methodological norms, that the incentives were to be granted for the entire period between the date of the granting of the investment certificate (temporary or permanent), and the expiry of the disfavored area, which in the case of Ştei-Nucet was 1 April 2009. This was further evidenced by the PICs issued to the Corporate Claimants, which expressly stated that the certificate holder benefitted from the incentives under GD 194/1999 and that the certificate was valid until 1 April 2009.

371. The Claimants also submit that this interpretation is the only one that makes sense from a teleological standpoint. According to the Claimants, if the incentives could have been revoked at any time, they would have been ineffective in incentivizing investment, because investors would have lacked the certainty that they would have needed to commit funds.

372. Contrary to the Respondent's contentions, the Claimants submit that the implementing measures (such as GD 194/1999 and the PICs) did not go beyond what was authorized in the primary legislation (EGO 24). They argue that the only sensible interpretation of EGO 24 is that it authorized the grant by government decision of a predetermined list of incentives for a period between 3 and 10 years. The Claimants contend that this was confirmed by Prof. Baias, the Respondent's expert on Romanian law, who testified that when GD 194/1999 was adopted, it was not in conflict with EGO 24. Rather, his position was that it became in conflict with the modified version of EGO 24 when the incentives were revoked, because GD 194/1999 was not modified accordingly (Tr., Day 5, 264:5-266-2 (Reed/Baias)).

373. According to the Claimants, Prof. Baias's testimony confirms that, at the time when GD 194/1999 was enacted, it provided that the incentives set out in Annex 2 were being granted for the full period until 1 April 2009, and that it neither contradicted nor added to EGO 24. This proves that, at the time that the investments were made, the Claimants had a clear and unambiguous commitment from the Romanian State that the incentives would be granted for 10 years. There was nothing unlawful or

improper in that commitment, and any contradiction only arose when the incentives were repealed prematurely.

374. The Claimants also deny that the various amendments made to the EGO 24 regime demonstrate the absence of such a commitment by the Romanian State. Even if significant amendments were made to the EGO 24 regime to the investors' detriment, they were done in a way to protect existing investors' rights, or in order to address specific problems in relation to specific industries or in relation to Romania's tax regime.

375. The Claimants also argue that the absence of a stabilization clause did not mean that Romania could renege on its commitment. Contrary to the Respondent's contention, the *Parkerings v. Lithuania*[31] case does not require a stabilization clause to prevent a state from amending its legislation. In the Claimants' view, the *Parkerings* tribunal cites a stabilization clause as one (but not the only) type of measure pursuant to which a state can promise to freeze or stabilize an existing regulatory framework. The Claimants submit that an express promise enshrined in the legislation to keep a particular regulatory framework in place for a defined period of time also constitutes such an undertaking. In other words, the Claimants submit that, in agreeing to provide certain incentives for ten years, the state in effect agrees not to change the law before then. According to the Claimants, an additional promise that the state will not renege on its earlier promise would be superfluous.

376. Finally, the Claimants contend that the Respondent's reliance on Decision 130/2003 of the Constitutional Court of Romania (Exh. RL-214) is misplaced, because it deals with incentives granted under Law 35 and not the incentives granted under EGO 24. It is thus a matter of pure speculation what the Constitutional Court would have found if it had been dealing with EGO 24.

377. In particular, the Claimants reject Prof. Baias' opinion that it is possible to extrapolate from Decision 130/2003 what the Constitutional Court would have decided in a case dealing with EGO 24. The Claimants argue that Prof. Baias based his opinion on the premise that Law 35 and EGO 24 were "more or less identical" (Tr., Day 6, 27:9-10), when in fact there are key differences between Law 35 and EGO 24 which according to the Claimants go to the root of the Constitutional Court's reasoning in Decision 130/2003. The Claimants contend that Law 35 provided positive discrimination in the form of incentives for foreign investors investing anywhere in Romania, without requiring the investor to fulfill any requirements. Unlike EGO 24, Law 35 did not require the investor to invest in a disfavored area, nor did it require it to create any particular number of new jobs or employ the unemployed. It was not even necessary to obtain an investor certificate; all that was required was proof that the investor was foreign. The Claimants argue that the Constitutional Court decided that the repeal of Law 35 incentives did not breach the rule of law because it merely did away with

[31] *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007 (hereinafter *"Parkerings v. Lithuania"* or *"Parkerings"*),

positive discrimination and put foreign investors on a level playing field with domestic competition.

378. To the contrary, the Claimants argue that, to qualify for the incentives under EGO 24, the investor was required to show that it had met its side of the bargain. This included fulfilling all the obligations mentioned above, in addition to submitting an investment plan, undergoing an on-site inspection and various monitoring procedures during the lifetime of the investments. Thus, in the Claimants' submission, Decision 130/2000 is of no assistance and of no relevance to an analysis of EGO 24.

c. Romania breached the BIT's umbrella clause

379. In view of the above, the Claimants contend that, by revoking the Raw Materials Incentive effective 22 February 2005, Romania breached a specific obligation it had entered into with respect to the Claimants' investments, and as such violated the BIT's umbrella clause.

2. The Respondent's position

380. The Respondent denies that it has breached the BIT's umbrella clause. It contends that the Claimants' umbrella clause claim does not comport with the plain text of Article 2(4) of the BIT, and is inconsistent with established jurisprudence on the application of umbrella clauses. In particular, the Respondent argues that the regulatory acts upon which the Claimants rely created no "obligation" enforceable through Article 2(4). Thus, the necessary predicate of Article 2(4) – an enforceable obligation under Romanian law – is absent. The Respondent argues that Romania never "entered into" any obligation specifically with the Claimants, and nothing in the relevant Romanian legal texts suggests that Romania undertook to freeze its regulatory regime for ten years (R-CM, ¶¶ 175-188; R-Rejoinder, ¶¶ 37-38, R-PHB, ¶¶ 104-120, 203-206; Tr., Day 13, 75-134 (Petrochilos)).

381. Section (a) below addresses the Respondent's comments with respect to the nature and scope of the BIT's umbrella clause. Section (b) sets out its comments on the existence of an obligation covered by the umbrella clause. Section (c) addresses its arguments on the absence of a breach of the umbrella clause.

a. Nature and scope of the BIT's umbrella clause

382. The Respondent contends that the umbrella clause contained in Article 2(4) of the BIT is one of the narrowest used in investment treaties. According to the Respondent, its formulation limits the scope of the provision in the following ways:

a. It is limited to "obligations", and does not cover "undertakings".

b. The obligations must have been "entered into with an investor". It is not open to obligations or undertakings "related to an investment", as do the majority of umbrella clauses.

c. The obligations must be specific (i.e., entered into with a specific investor), and thus it does not cover general obligations.

383. The Respondent notes that there is debate on whether umbrella clauses elevate municipal law rights to the international law realm, or simply provide an international remedy to enforce rights that remain in their essence and scope creations of national law. However, it argues that the Claimants' case fails under either proposition. This is because, according to the Respondent, generally-applicable regulatory and legislative acts, standing alone, do not give rise to the kind of obligations covered by umbrella clauses (even under those more broadly formulated). In the Respondent's view, umbrella clauses only protect contractual or quasi-contractual obligations.

384. The Respondent relies on the writings of Dr. F.A. Mann, Dr. Shihata, Prof. Dolzer and Ms. Stevens, Prof. Gaillard and Prof. Schreuer, noting that in their view umbrella clauses mainly or exclusively protect contractual commitments. The Respondent also relies on *Continental Casualty v. Argentina*, where the tribunal, faced with an umbrella clause broader than the present one (applying to obligations "with regard to investments"), found that

> It should be clear that this umbrella clause does not come into play when the breach complained of concerns general obligations arising from the law of the host State. … Therefore, the provisions of the [disputed legislation] cannot be a source of obligations that Argentina has assumed specifically with regard to the Claimant's investment company and which are protected under the BIT's umbrella clause.[32]

385. To the contrary, the Respondent contends that there is no authority for the Claimants' position that legislative or regulatory acts, standing alone, can constitute "obligations" enforceable through an umbrella clause. They note that most decisions applying umbrella clauses have involved contractual obligations entered into by the state, and in the few cases where tribunals have found a breach of provisions due to a legislative change (such as *LG&E v. Argentina*), the state had provided separate and specific commitments to investors in which it guaranteed that a particular legislative regime would not change. Specifically, it argues that, in *LG&E v. Argentina,* the tribunal's determination that the dismantling of the regulatory regime in the gas-transmission sector resulted in the breach of the (broadly-worded) umbrella clause turned upon specific assurances that Argentina had given investors that the regulatory environment would remain stable.

386. The Respondent further contends that the Claimants' reliance on *CMS v. Argentina* is misplaced, noting that the part of that award dealing with umbrella clauses was subsequently annulled by an ICSID *ad hoc* committee. The Respondent argues that the *CMS v. Argentina* annulment committee reversed the tribunal's findings with respect to whether umbrella clauses can, as a matter of principle, extend to general legislative acts, in the following terms:

[32] *Continental Casualty Company v Argentine Republic* (ICSID Case No ARB/03/9), Award, 5 September 2008 (hereinafter *"Continental Casualty v. Argentina"*), ¶¶ 300 and 302.

> [I]t seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself (i.e. under the law of the host State or possibly under international law). Further they must be specific obligations concerning investment. They do not cover general requirements imposed by the law of the host State.[33]

387. According to the Respondent, the drafting of the umbrella clause applicable in this case reinforces the inadmissibility of a claim based upon regulatory acts. It argues that, by limiting the scope of the provision to obligations "entered into with" qualifying investors, the drafters of the BIT intended it to apply exclusively to contractual or quasi-contractual obligations (e.g., those arising from an individual license granted by the state), which are created and enforceable under domestic law. Unilateral instruments such as laws and regulations, which are per se liable to change, cannot be understood to have been "entered into" with anyone.

b. Romania did not enter into a specific obligation with the Claimants

388. Further, the Respondent argues that, whatever the scope of the BIT's umbrella clause, the claim fails because there is no "obligation" that may trigger the application of the clause. The Respondent contends that, in order to be elevated to the protection of the umbrella clause, this obligation must have given the Claimants an actionable vested right under Romanian law.

389. Relying on *SGS v. Philippines* and *Eureko v. Poland,* the Respondent submits that the obligation that is protected under the umbrella clause has a proper law (usually domestic law), and its nature does not change by being enforced under the treaty. Therefore, to be actionable under the treaty, the obligation must have been actionable under domestic law. For this, the alleged obligation must have constituted a vested right under domestic law, which the Respondent argues was the case in *Enron v. Argentina* and *LG&E v. Argentina*. However, it argues that it is not the case here.

390. Contrary to the Claimants' contentions, the Respondent argues that under Romanian law the Romanian State was under no obligation to make all of the facilities available to the Claimants for 10 years. The Claimants have identified no contractual or quasi-contractual obligations of any kind that might have been entered into and owed to them in relation to the facilities, nor have the Claimants alleged any assurances or other unilateral undertakings by Romania directed to them specifically. As a result, the Claimants had no vested right to the facilities.

391. The Respondent argues that the Claimants' case as to the source of that alleged obligation (and corresponding right) has changed over time, but all of those theories fail. The Respondent also contends that if Romania had decided to bind itself to regulatory stasis for ten years, it would have done so in one clear instrument, through an appropriate organ, and that instrument would contain clear terms with respect to the promise of stability and its duration. This obligation cannot be implied from a patchwork of documents and a selection of surrounding circumstances.

[33] *CMS v. Argentina,* Decision on Annulment, 25 September 2007, ¶ 95a.

392. More specifically, the Respondent contends that none of the regulatory acts invoked by the Claimants (EGO 24/1998, GD 194/1999 and GD 1199/2000), whether alone or in conjunction with the PICs, created obligations "entered into" with the Claimants.

393. First, the source of the obligation could not have been EGO 24. The Respondent concedes that "there is no doubt that EGO 24 set forth a generalized entitlement that could be claimed by qualifying investors" (Tr., Day 13, 85:7-10 (Petrochilos)). Article 4(c) of EGO 24 stated that a government decision would determine the facilities "provided by law" that would be granted to investors (which confirms that the source of the entitlement is EGO 24). But it contained no promise as to the length of time the facilities would remain available, nor any stabilization language (unlike its predecessor, Law 35, which did contain express stabilization language). The Respondent further argues that, under Romanian law, general laws such as EGO 24 do not confer individual vested rights (as was confirmed by the Romanian Constitutional Court in Decision 130/2003).

394. Second, the Respondent notes that the Claimants' latest theory seems to be that GD 194/1999, read together with the PICs, creates an obligation for the State. However, according to the Respondent this is impossible as a matter of Romanian law. Relying on the expert opinion of Prof. Baias, it argues that these were subsidiary normative or administrative instruments issued to implement and administer EGO 24 and Law 20/1999, which could not modify or contradict the authority of a government ordinance or a law, and as such could not have granted an entitlement beyond what EGO 24 authorized. In particular, they could not have imposed significant, long-term obligations on the State that the authorizing statute did not impose. As a result of the hierarchy of Romanian laws, the Government, implementing the law through the government decision, could not have bound the legislature not to change the law. And once EGO 24 was modified, GD 194/1999 could not have had a broader field of application than the modified EGO 24. Thus, no prudent investor in Romania could have understood Annex 2 of GD 194/1999 as freezing the facilities there listed. For the same reason, because EGO 24 created no vested right but only a general entitlement, neither could GD 194/1999 or the PICs create such a vested right.

395. In any event, the Respondent argues that the Claimants' theory has no support from their Romanian law expert, Prof. Mihai. Considering that the nature of GD 194/1999 and the PICs has become the cornerstone of their expropriation, umbrella clause and fair and equitable treatment cases, the Respondent considers it notable that Prof. Mihai made no mention of either instrument in his expert report.

396. The Respondent also denies that the PICs could have been the source of an investor's right to the EGO 24 incentives. For the Respondent, the correct interpretation is that the PICs were merely administrative tools that certified the holders' eligibility to obtain the facilities; the source of the right was EGO 24. Specifically, the Respondent argues that Article 5 of the GD 525/1999 published on 8 July 1999 (Exh. R-6),[34] which approved the 1999 Methodological Norms for the

[34] The Respondent notes that GD 525/1999 replaced an earlier version of the methodological norms, contained in GD 907 of 1998, published on 22 December 1998.

application of EGO 24, stated that the "incentives provided by the law shall be granted pursuant to the certificate of the investor in a disadvantaged region". Such a certificate was to be issued by the relevant Regional Development Agency, upon an investor's request. According to the Respondent, the language of Article 5 makes it explicit that the PICs merely certified eligibility to "incentives provided by the law". That law was EGO 24, as approved by Law 20, neither of which contained any provision concerning their duration nor any restriction on the government's ability to amend or repeal them.

397. According to the Respondent, this conclusion was reaffirmed by a subsequent version of the Methodological Norms, adopted by GD 728/2001 (Exh. R-35). Article 4(1) of these Methodological Norms stated: "The *facilities provided by the law* are granted based on the certificate of the investor in the disfavored area" (emphasis added by the Respondent). According to the Respondent, this demonstrates that the content of the facilities was established by law (i.e., EGO 24) and that PICs were an administrative tool attesting to eligibility to access facilities available under EGO 24.

398. The Respondent contends that the language of the PICs themselves does not change this conclusion. All the PICs stated was that the titleholder was the beneficiary of the facilities granted under GD 194/1999, in accordance with the provisions of EGO 24 approved and amended by Law 20, and in accordance with the government decision approving the methodological norms. Accordingly, all the PICs did was certify that the titleholder was the beneficiary of the facilities granted by the law, whatever the law determined that those facilities were at any point in time.

399. The Respondent further argues that the PICs did not list any individual facilities, let alone purport to stabilize them for any particular period. The PICs only stated that they were valid until a given date. That only meant that they certified eligibility to whatever facilities were available under the law until that date.

400. The Respondent rejects the Claimants' argument that the PICs were the source of the right to the facilities because they had to present them every time that they wanted to benefit from them. The PICs were needed so that administrators did not have to evaluate eligibility on each occasion that a business applied for an exemption. This conclusion is also supported by the fact that it was not necessary to obtain a new PIC each time EGO 24 was amended; the PIC continued to certify eligibility to the remaining facilities in EGO 24, as amended. This was confirmed by the Claimants' expert, Prof. Mihai (Tr., Day 5, 215).

401. The Respondent also denies that the administrative process to qualify for a PIC was equivalent to a contractual negotiation, or that the PICs were tantamount to contracts. In the legal order in which that process occurred, the issuance of a PIC did not create a contract. Nor did the obligation to submit an investment plan amount to a bilateral deal; the investment plan was merely a requirement for the government to establish that investors met the qualifying criteria.

402. Similarly, the requirements to employ a certain number of unemployed persons and to have made certain investments were part of the criteria for eligibility; they did not establish the existence of a promise that the facilities would be available for a certain duration. The Respondent adds that it is misleading to suggest that these requirements show that EGO 24 was intended to foster capital intensive industries, because there was no threshold of magnitude for a qualifying investment, the employment requirement was met by employing ten persons, five of which had to be unemployed, and the eligible sectors covered a wide range of activities.

403. The Respondent also denies that EGO 24 created an obligation for investors to maintain their investments for twice as long as the investor is a recipient of the incentives. The Respondent alleges that it "has repeatedly stated that the obligation does not exist and that (therefore) it has no intention of enforcing it" (R-Rejoinder, ¶ 118). In any event, it argues that the alleged obligation is of only theoretical interest, because the Claimants have no desire to move the operations from Bihor county, and thus the state has never had the occasion to enforce the alleged obligation. However, it notes that Prof. Mihai did not address this matter in his expert opinion, and the Claimants have not cited any instances in which any investor has been subjected to the supposed obligation, or any Romanian court or agency has interpreted it in that fashion.

404. The Respondent further contends that neither the monitoring process to which the Claimants were submitted, nor the alleged promotion of the EGO 24 regime by government officials, could have given rise to a promise that the facilities would remain unchanged for any period of time.

405. Finally, the Respondent contends that the Romanian Constitutional Court disagrees with the Claimants' theory: when the profit tax exemption available under Law 35 of 1991 was repealed, the Constitutional Court found that the repeal of that exemption could not be construed as the termination of a contract, nor as an infringement of the right to property or of the investor's right to recover debt (Decision 130/2003). The Respondent notes that Prof. Mihai called this decision *ultra vires* at the hearing but did not discuss it in his expert report, while Prof. Baias confirmed the decision's relevance for this case. Thus, Romania submits that the Tribunal should afford this decision great weight and conclude that GD 194/1999, alone or together with the PICs, did not constitute a contractual or other obligation under Romanian law.

c. Even if the umbrella clause were applicable, Romania did not breach it

406. Even assuming that the regulatory acts relied upon by the Claimants could have created "obligations entered into" with the Claimants, the Respondent argues that it could not have failed to observe such obligations simply by modifying the facilities. If the underlying obligation (properly construed under its governing law) has not been breached, then there cannot be a breach of the umbrella clause.

407. Specifically, the Respondent argues that nothing in EGO 24 could be construed as a guarantee to preserve EGO 24 unchanged for ten years. The only reference to

duration is found in Article 5, which provides that "[a] geographical area can be declared a disfavoured zone at least for three years but not for more than ten". Romania did not breach or amend this provision: both Ştei-Nucet and Drăgăneşti retained their status of "disfavoured regions" until April 2009, as provided in GD 94/1999[35] and GD 1199/2000.

408. As to the availability of the facilities, the Respondent argues that there was nothing in EGO 24 that prevented the Respondent from eliminating some of them (the Respondent notes that the Profit Tax Incentive was maintained). Relying on *Parkerings v. Lithuania*,[36] the Respondent contends that the mere existence of a law or regulation in no way implies that the government will not amend its terms. EGO 24/1998 contained no "stabilization" element that could ensure that the facilities listed therein would remain unchanged for ten years. Thus, Romania could not have assumed any obligation to freeze the content of the facilities regime simply by promulgating EGO 24/1998. To the contrary, the Respondent argues that by the time the facilities were first extended under EGO 24/1998, Romanian law on state aid (Exh. R-75) specifically provided that such measures were subject to possible repeal at any time. In particular, Article 13 of the State Aid Law provided:

> (1) The Competition Council and the Competition Office will supervise on a permanent basis all the existent aids. If it is determined that an existent aid distorts relevantly the normal competitive environment and affects the proper enforcement of the international agreements in which Romania is a party, the Competition Council will request the aid provider to adopt proper measures in order to remove its incompatibility with this law. Such measures may include a recommendation for cancellation or amendment of the existent aid. Such recommendations will be submitted also to the Competition Office achievement monitoring of the imposed measures.
>
> (2) If the measures are not adopted by the aid provider, within the time frame indicated in the request, the Competition Council may decide to stop the granting of the existent aid or may impose conditions and obligations which may insure the compatibility of the aid with this law's dispositions. The decision will not have a retroactive effect and must allow the aid provider a reasonable time period in order to comply with such decision.

409. Accordingly, the Respondent argues that as Romania was under no obligation to make all of the facilities available to the Claimants for 10 years, failure to do so cannot constitute a breach of the umbrella clause.

3. The Tribunal's analysis

a. Interpretation of the BIT's umbrella clause

410. Article 2(4) of the BIT provides that "[e]ach Contracting Party shall observe any obligation it has entered into with an investor of the other Contracting Party with regard to his or her investment."

[35] The Tribunal understands that the Respondent refers to GD 194/1999.
[36] *Parkerings v. Lithuania*, ¶ 332.

411. The Parties agree that, for the umbrella clause to apply, Romania must have entered into an obligation with the Claimants with regard to their investment. The Parties further agree that this obligation must be specific. The Parties dispute whether the EGO 24 framework and the PICs did in fact give rise to such an obligation. The Parties also dispute whether the repeal of the Raw Materials Facility constituted a breach of any such obligation, to the extent it arose.

412. The first step in the Tribunal's analysis is thus to determine whether the EGO 24 framework gave rise to an "obligation" in the meaning of Article 2(4) of the BIT. Pursuant to Article 31(1) of the VCLT, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Tribunal sees no reason to deviate from this rule.[37] Accordingly, the Tribunal must first turn to the ordinary meaning of the term "obligation".

413. Relying on *Enron v. Argentina*, the Claimants argue that "[u]nder its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature", noting that "[t]ribunals interpreting this expression have found it to cover both contractual obligations such as payment as well as obligations assumed through law or regulation."[38]

414. The Respondent denies this. It argues that generally-applicable regulatory and legislative acts, standing alone, do not give rise to the kind of obligations covered by umbrella clauses (even under those more broadly formulated). In the Respondent's view, umbrella clauses only protect contractual or quasi-contractual obligations.

415. The Tribunal agrees with the tribunal in *Eureko v. Poland* that the term "'[a]ny' obligations is capacious; it means not only obligations of a certain type, but 'any' – that is to say, all – obligations entered into with regard to investments of investors of the other Contracting Party."[39] In addition, the BIT specifies that these obligations must also be "entered into with an investor [...] with regard to his or her investment". This language suggests that the state must have committed with respect to a particular investor with regard to his or her investments.[40] Indeed, both sides agree

[37] In doing so, the Tribunal adopts the line followed by the tribunals in *SGS v. Philippines*, ¶¶ 114- 128 (although it partially based its decision on considerations extrinsic from the text); *Eureko v. Poland*, ¶¶ 244-260; *Enron v. Argentina,* ¶¶ 273-277; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Jurisdiction, 12 February 2010, ¶¶ 167-168; *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012 (hereinafter *"Burlington v. Ecuador"*), ¶ 212.

[38] *Enron v. Argentina*, ¶ 274.

[39] *Eureko v. Poland*, ¶ 246.

[40] *See, e.g.,* F.A. Mann, "British Treaties for the Promotion and Protection of Investments," 52 British Yearbook of International Law (1981), Exhibit RL-257, p 246 (explaining that an umbrella clause "only covers an obligation arising from a particular commitment either of the Contracting Parties may have entered into. […] What is assumed is that the State has entered into a particular commitment which imposes obligations. Such obligations may arise from contract with the State or from the terms of the licence granted by it. It may be express or implied, it may be in writing or oral. But it must be clearly ascertainable as an obligation of the State itself arising from its own commitments. No difficulty occurs where the contract is made with the State itself – and the term may fairly be said to comprise its instrumentalities, even if they are separate legal entities, as well as companies of which it is the sole

that the obligation must be specific. Thus, the umbrella clause in this BIT covers obligations of any nature, regardless of their source, provided that they are indeed "obligations" entered into with a particular investor with regard to his or her investment.

416. Having said this, for the umbrella clause to be triggered, there must be an obligation in the first place. The BIT does not define "obligation", nor have the Parties attempted to do so. The Claimants simply state that the term obligation is equivalent to an "undertaking", because when someone undertakes to do something, they become obliged to do that thing. The Respondent, however, submits (and the Claimants do not seem to dispute) that the determination of whether an obligation exists must be done in accordance to domestic law. Specifically, the Respondent has argued that in order to be elevated to the protection of the umbrella clause, the obligation must have given the Claimants an actionable vested right under Romanian law.

417. In the Tribunal's view, establishing whether an obligation exists is a question that cannot be answered by turning solely to the interpretation of the meaning of this term as stated in the BIT. The purpose of the umbrella clause is to cover or "elevate" to the protection of the BIT an obligation of the state that is separate from, and additional to, the treaty obligations that it has assumed under the BIT. As noted by the *Burlington v. Ecuador* tribunal, this separate and additional obligation does not exist in a vacuum; it is subject to its own proper law.[41] In the words of the tribunal in *SGS v. Philippines*, an umbrella clause

> … does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the [relevant agreement] from the law of the Philippines to international law.[42]

418. This Tribunal concurs with this view. Thus, whether an obligation has arisen depends on the law governing that obligation, and so the interpretation of the term "obligation" for purposes of the umbrella clause would rely primarily on that law rather than on international law. In other words, to be afforded the protection of the BIT, the obligation must qualify as such under its governing law. In this case, the governing law cannot be other than Romanian law and the Parties did not point to any other possibly applicable law. The obligation to which the Claimants wish to extend the protection of the BIT purportedly arose under EGO 24, its implementing legislation and/or the granting of the PICs. Thus, the existence and content of that purported obligation depends on Romanian law.

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shareholder. But where the contract is made with a private person, then the provision only applies if and in so far as an obligation of the State arising from its own particular commitment (as opposed to existing general legislation) may be discerned. Thus if the law of the land provides that the State is liable for the torts of its servants this is not an 'obligation arising from a particular commitment' the State may have entered into and may be changed, though in certain circumstances this may become subject to the provisions about expropriation.").

[41] *Burlington v. Ecuador*, ¶ 214.

[42] *SGS v. Philippines*, ¶ 126.

419. Accordingly, whether Romania was bound by an "obligation" to provide the incentives to the Claimants until 31 March 2009 is a question to be determined by Romanian law. The Tribunal will now address whether such an obligation arose.

b. Did Romania enter into a specific obligation with the Claimants?

420. The Claimants argue that, through the EGO 24 framework, Romania entered into a specific obligation with the Claimants with regard to their investment, which consisted of Romania's undertaking with respect to the Claimants to maintain the EGO 24 incentives in the Ştei-Nucet disfavored region for the full 10-year period provided by GD 194/1999. The Respondent concedes that EGO 24 created a generalized entitlement that could be claimed by qualifying investors, but denies that it promised that the incentives would remain in place or unchanged for any specific period. It also denies that this entitlement gives rise to an obligation on the part of Romania under Romanian law.

421. The Tribunal will first address the content of the entitlement created by EGO 24 (Section (i)). It will then address whether it gives rise to a specific obligation for Romania under Romanian law that may trigger the application of the umbrella clause (Section (ii)).

i. Content of the Claimants' entitlement

422. Having reviewed the evidence before it, the Tribunal's conclusion is that EGO 24 created a general scheme of incentives available to investors who fulfilled certain requirements, which were later "granted" to qualifying investors through a specific administrative act (the PIC). In other words, the legislation created a generalized entitlement that could be claimed by qualifying investors, but this general entitlement later crystallized with respect to qualifying investors through the granting of the PICs, becoming from that moment on a specific entitlement with respect to specific investors. Therefore, the Tribunal does not need to decide whether a general entitlement, in a law or regulation, could give rise to an obligation subject to the umbrella clause; here the general obligation was converted into a specific commitment.

423. In particular, EGO 24, as republished on 8 November 1999 (Exh. R-68) provided that the Government could declare the creation of certain "disadvantaged areas", at the proposal of the National Council for Regional Development (Article 3). This declaration would be made by means of a "government decision", which would also approve (a) the period for which a geographical area was declared a disadvantaged region, (b) the fields of investments, and (c) "the required financing and advantages provided by law, and granted to the investors" (Article 4). Article 5 provided that "[a] geographical area may be declared a disadvantaged area for a period of at least 3 years, but for not more than 10 years, with possibility for extension, under the conditions of this Emergency Ordinance." Article 6(1) went on to say that investors meeting certain requirements "will be granted the following advantages for their new

investments in these regions", and then listed those advantages (that is, the incentives or facilities) (*see* paragraph 148 above).

424. It is thus clear that EGO 24 did not stand alone: by its own terms it required an important part of its implementation to be carried out by way of a government decision (including the determination of the disfavored area and of the incentives or facilities that would be available for investors in that area). For the case of Ştei-Nucet, this government decision was GD 194/1999 (Exh. C-31, C-280), later extended to Drăgăneşti by GD 1190/2000. The boundaries of the disfavored region were extended to include Drăgăneşti by means of GD 1190/2000 on 29 November 2000 (Exh. C-32).

425. The Respondent argues that, even if EGO 24 delegated certain aspects to a government decision, because of the hierarchy of norms under Romanian law it was legally impossible for GD 194/1999 or GD 1190/2000 to grant anything that EGO 24 did not authorize. This may be so, but based on the relevant laws and regulations and the testimony of the Respondent's expert, Prof. Baias, the Tribunal concludes that GD 194/1999 and GD 1190/2000 did exactly what was authorized by EGO 24:

a. GD 194/1999 determined that Ştei-Nucet would be a disfavored region (Articles 1 and 2), established the time period for that (i.e., 10 years, Article 3), and provided that, "during the existence of the disfavored region, established according to this decision, the facilities under annex no. 2*) will be granted" (Article 4 of GD 194/1999). In turn, Annex 2 of GD 194/1999 listed all of the incentives provided under Article 6(1) of EGO 24 (*see* paragraph 153 above). Article 5 of GD 194/1999 also provided that "[t]he domains of interest for the achievement of investments in the zone shall be those provided for in Annex No. 3." In turn, Annex 3 provided that these domains of interest were agriculture and "zootechny", production (except the manufacture of distilled alcoholic drinks and manufacture of ethyl alcohol by fermentation), services (except public alimentation not included in an investment in tourism), trade (except marketing of products not made in activities performed in the zone) and environmental protection and rehabilitation of natural sites. Article 6 of GD 194/1999 provided that Annexes 1-3 would "be an integral part of the present decision."

b. Similarly, GD 1190/2000 extended the boundaries of the disfavored region to include Drăgăneşti (Article I), confirmed that "the period for which the Ştei-Nucet region is established as a disfavored region shall end on 31 March 2009", and added that "[f]or the commune of Drăgăneşti, the facilities related to the disfavored region shall be granted commencing with the date this decision is published in the Official Gazette of Romania, Part I." (Article II)

426. Prof. Baias confirmed that GD 194/1999 was *intra vires* at the time it was issued and until the time when EGO 24 was amended in 2004 by GO 94/2004 to revoke the facilities, because, in Prof. Baias's view, the subsidiary norm is automatically restricted to the scope of the amended primary norm.[43] However, at the time of its

[43] Specifically, Prof. Baias testified:

issuance in 1999 and up until the facilities were revoked in November 2004 (or February 2005, if we take the effective date), GD 194/1999 validly provided that qualifying investors investing in the Ştei-Nucet area (later expanded to include Drăgăneşti) would be granted the incentives listed in Annex 2 until the date in which the region ceased to be disfavored (i.e., 1 April 2009). The same conclusion should apply to GD 1190/2000.

427. Thus, EGO 24, GD 194/1999 and GD 1190/2000 by themselves do nothing more than establish a general entitlement to qualifying investors in the Ştei-Nucet disfavored region. Standing alone, they do not give rise to a specific entitlement to a specific investor. The rules for the actual granting of the incentives to investors were established by the Methodological Norms (GD 525/1999, the "1999 Methodological Norms", and later by GD 728/2001, the "2001 Methodological Norms"). Pursuant to these Methodological Norms, qualifying investors (only) became entitled to the incentives once they received their PIC (or TIC, on a temporary basis).

428. Specifically, Article 5 of the 1999 Methodological Norms provided:

> "(1) The incentives provided by the law ***shall be granted*** [in Romanian, "*se acorda*"] pursuant to the certificate of investor in a disfavored area, which is issued, upon the business entity's request, by the Regional Development Agency under the jurisdiction of which the head office of such business entity is located.
>
> […]
>
> (3) Business entities requesting the issuance of the certificate of investor in a disfavored area shall prove they meet the requirements set forth by the [EGO].
>
> (4) Emerging business entities, unable to produce evidence regarding the investment, the commissioning of the operations and the creation of new jobs, may request the issuance of a temporary certificate of investor in a disfavored area, for a maximum of 3 months. In case they do not bring, during this period, evidence of having met the requirements set forth by the [EGO], they shall be compelled to pay and return, respectively the equivalent value of all the incentives they have benefited of.

Q. So are we agreed, then, that when the government decision was issued, the way in which it should be interpreted is that in Ştei-Nucet, the incentives granted, or indicated in Annex 2, would be granted for the full duration of the time when Ştei-Nucet was declared a disfavoured zone; that was the position at that time?

A. At the very moment of the adoption of this government decision, I agree.

Q. That was in conformity with EGO 24 at that time?

A. At that moment.

Q. So your position is that because EGO 24 was subsequently changed, this government decision became in contradiction with -- not EGO 24 as it was, but the subsequent legislative position?

A. Yes. With the subsequent form of the EGO 24 as it was modified.

(Tr., Day 5, 265:11-266-2 (Reed/Baias)).

(5) The temporary certificate shall be issued pursuant to the business entity's commitment regarding the investment and the creation of new jobs.

[…]"

(Emphasis added).

429. The substance of these requirements was repeated in Articles 4 and 5 of the 2001 version, which added two specifications:

a. Investors applying for a certificate of investor had to prove that they had "at least 10 employees with individual employment contracts for an indefinite term out of which at least 5 should be employed from the unoccupied work" (Article 4(4)).

b. "The business entities which obtained the certificate of investor in the disfavoured area and which perform activities from fields of interest other than those provided under annex no. 1 shall continue to benefit from facilities under the law, until the expiry of the period for which the disfavoured area was declared" (Article 5(3)).

430. Prof. Mihai testified in cross-examination that the correct translation of Article 5(1) of GD 525/1999 should be "[t]he facilities provided by the law shall be granted on the basis of the certificate of investor" (Tr., Day 5, 214:14-215:1). Although the Respondent argues that the key words here are "provided by the law", in the Tribunal's view the key words are rather that such facilities "shall be granted." The applicable regulation (EGO 24) "provided" or created certain incentives or facilities; GD 194/1999 and GD 1190/2000 (by express delegation of the law) determined which of these incentives would be available to investors in a particular disfavored area and for what time period, and the Methodological Norms established the rules under which these incentives would be granted to specific investors. But the actual "granting", "awarding" or "vesting" of the entitlement to the incentives occurred at the moment of the issuance of the PICs. It is in this moment when the general entitlement becomes a specific entitlement with respect to a particular investor.

431. In other words, the specific entitlement of a particular investor to the incentives provided under the EGO 24 framework arises from an administrative act of specific scope (i.e., directed to specific investors with respect to specific investments). This administrative act is evidenced by the issuance of the PICs. In the Tribunal's view, it is irrelevant for purposes of determining the existence of a specific entitlement whether the PIC merely certified eligibility to the incentives under generally applicable legislation. The fact is that, without having been granted a PIC, an investor could not benefit from the incentives offered by EGO 24, GD 194/1999 and GD 1190/2000. In other words, the granting of the PIC was the moment in which a particular relationship between the Government and the investor was "perfected": an investor could benefit from the privileges offered by the legislative framework only after having applied for a PIC, proved it fulfilled the requirements and received a favorable decision from the government in the form of a PIC. Only thereafter did the investor have the actual entitlement to the incentives, and only after that moment did it have the obligations established under EGO 24.

432. The question that follows is: did the regulatory framework provide that this specific entitlement would last until 1 April 2009? The Tribunal finds that it did.

433. EGO 24 itself did not say anything with respect to the timing of the entitlement, but by its own terms it delegated this determination to a government decision. For Ştei-Nucet, this government decision was GD 194/1999. Article 4 of GD 194/1999 provided that the facilities listed in Annex 2 "shall be granted" ("*se acorda*" in Romanian) during the existence of the disfavored region. In turn, Article 3 provides that Ştei-Nucet is designated a disfavored region for a period of 10 years, starting on 1 April 1999. This was confirmed by GD 1199/2000 when the boundaries of the region were extended to include Drăgăneşti, which stated that the designation of the region as disfavored would end on 31 March 2009.

434. This was further confirmed by Article 5(3) of the 2001 version of the Methodological Norms (GD 728/2001, Exh. R-35), which provided that:

> The business entities which obtained the certificate of investor in the disfavoured area and which perform activities from fields of interest other than those provided under annex no. 1 ***shall continue to benefit from facilities under the law, until the expiry of the period for which the disfavoured area was declared***. (Emphasis added)

435. In addition, Article 1(f) of the 2001 Methodological Norms defined the period during which it would be understood that an investor had benefitted from the incentives for purposes of Article 7 and 9 of EGO 24 as the period "comprised between obtaining the certificate of investor in [the] disfavored area and disappearance of the disfavored area; in case of a temporary investor certificate, followed by obtaining an investor certificate in the disfavored area, the period shall be calculated as of obtaining a temporary investor certificate until the disfavored area ceases to exist."

436. It is true that these provisions were added in the 2001 Methodological Norms, and not in the 1999 version. However, they confirm an interpretation that was already reasonable in light of the interplay of the legal provisions.

437. In addition, all three of the Corporate Claimants' PICs provided that the certificate (which certified that they were the beneficiaries of the facilities granted under EGO 24 and GD 194/1999) would be valid until 1 April 2009. Indeed, Romania concedes that the PICs certified eligibility to the incentives until 1 April 2009, arguing however that the PICs only entitled the Claimants to whatever incentives were available under the general scheme from time to time.

438. Thus, the Tribunal concludes that the PICs, in the context of the EGO 24 regulatory framework, provided (or, to use Respondent's words, entitled) that PIC holders would be entitled to the incentives offered under EGO 24 until 1 April 2009.

439. The third question that arises is: did the legislative framework provide that the Claimants would be entitled to the same incentives, or at least substantially the same incentives, that were originally provided under GD 194/1999? The PICs merely state that the investor is the "beneficiary" of the facilities provided under the general

scheme, as republished and amended. This seemingly supports Romania's contention that they merely certified eligibility to whatever incentives were available under the general scheme from time to time.

440. However, Article 4 of GD 194/1999 provides that the facilities listed in Annex 2 "shall be granted" during the existence of the disfavored region, and that annex was attached to GD 194/1999 and was deemed to form an "integral part" of that decision (*see* paragraph 425.a). It could thus be argued that the facilities listed in that annex are incorporated into the Government Decision and thus "stabilized" in some form by the reference to a specific time period. It would be a difficult question to determine whether the Government would thus unduly exceed its authority under Romanian law and what the legal consequences would be under such law, but it is unnecessary to make that determination.

441. In fact, the incentives underwent several amendments during the life of EGO 24, which included the revocation of some of the facilities. Specifically:

a. On 16 June 2000 (effective 1 July 2000), Romania passed Emergency Government Ordinance No. 75/2000 ("EGO 75/2000", Exh. C-45, R-81). Although the Competition Council had issued Decision 244/2000 a month before, EGO 75/2000 ignored the Competition Council's recommendation to eliminate the Raw Materials Incentive. Instead, it amended EGO 24 in the following ways:

   i. It amended the Raw Materials Incentive by providing for an exemption (rather than the refund) on customs duties, and excluded spare parts and components from the customs duty exemption. Article 6(1)(b) of EGO 24 was replaced with the following text:

   > b) the exemption from the payment of customs duties for imported raw material necessary for the own production in the area.

   ii. It amended the provisions regarding the award of funds under the Special Development Fund.

b. On 7 November 2001, Romania passed Law No. 621/2001 (Exh. R-33, R-129), which amended EGO 75/2000 by, among others, reinstating the customs duties exemption on imported components. Article 6(1)(b) of EGO 24 was replaced with the following text:

   > b) the exemption of customs duties for imported raw materials and components required to perform the area's own production.

c. On 1 June 2002, Romania passed Law No. 345/2002 (Exh. R-90), which abolished the Machinery Incentive provided under Article 6(1)(a) of EGO 24 (both with respect to customs duties and VAT).

d. On 1 July 2002, Romania passed Law No. 414/2002 (Exh. C-48, R-34), which repealed the Profit Tax Incentive but grandfathered it for investors who held a PIC prior to the date on which this law entered into force (Articles 36(1)(d), 35(3)).

e. On 19 November 2002, Romania passed Law No. 678/2002 (Exh. C-49) which amended the Raw Materials Incentive by excluding from the customs duties exemption raw materials for the production, processing and preservation of meat.

f. In June 2004, Law 239/2004 (Exh. C-50) subjected the remaining facilities to a requirement that they not exceed a threshold of maximum intensity of state aid.

g. On 31 August 2004, Romania passed EGO 94/2004 (Exh. R-94), which abolished all the remaining incentives with the exception of the grandfathered Profit Tax Incentive. EGO 94/2004 also provided that "[i]n calculating the intensity of state aid, eligible costs related to investments made before 15 September 2004 shall be taken into account."

442. Thus, from its enactment in 1998 and until its final revocation in 2004, EGO 24 was amended several times, either to the benefit or to the detriment of PIC holders. The Machinery Incentive was eliminated completely in 2002. The Profit Tax Incentive was repealed in 2002, but grandfathered for PIC holders. The Raw Materials Incentive survived, in some ways enhanced (it was transformed into an exemption instead of a refund in 2000), but its scope of application was modified (it was eliminated for components in 2000 and then reinstated in 2001, and later eliminated for meat products in 2002). Only the Profit Tax Incentive was grandfathered for PIC holders.

443. This seems to confirm the Respondent's argument that the legislative framework only provided that PIC holders would be entitled to whatever incentives were available under the regime from time to time. However, the Claimants argue that these amendments (at least until 2002) did not indicate in any way that the entire regime would be brought to a premature conclusion. They argue that EGO 75/2000 strengthened the regime, even against the Competition Council's recommendation, noting that the Raw Materials Incentive was made into an exemption rather than a refund, and that the components part of it was reinstated the following year. They also argue that the amendments to the Machinery Incentive and the Profit Tax Incentive were made in the context of other reforms (VAT laws, profit tax laws) and did not target EGO 24 in the context of state aid. Finally, they argue that the elimination of the Raw Materials Incentive with respect to raw materials for the production, processing and preservation of meat was made to address problems specific to the Romanian meat industry.

444. In the Tribunal's view, Romania's conduct cannot change the content of the entitlement. That Romania did as a matter of fact amend or eliminate certain incentives without grandfathering them does not mean that it was entitled to do so, at least not if that amendment or elimination, in itself or in conjunction with other amendments or eliminations, would amount to a repeal of the entitlement altogether, more precisely of the entitlement based on PICs (or TICs). This does not contradict

the principle *lex posterior derogat legi priori:* it is undisputed that Romania may validly amend its laws, and presumably GD 194/1999 could be validly amended by subsequent legislation, but this is not the question.

445. The question is whether such an amendment could affect rights or entitlement created by previous laws with respect to private parties. In this case, the question is whether PIC holders continued to have the entitlement to the same incentives specified in Annex 2 of GD 194/1999 despite the later amendments to the EGO 24 regime. This question is addressed in the following section.

ii. Does Romania's undertaking qualify as an "obligation" under Romanian law? If yes, did Romania breach it?

446. The Tribunal has found that the EGO 24 framework, once specified with respect to the Claimants through the granting of the PICs, created for the Claimants a specific entitlement to the EGO 24 incentives until 1 April 2009. Thus, under the EGO 24 framework Romania committed to provide the EGO 24 incentives until 1 April 2009.

447. However, for purposes of the umbrella clause, the Tribunal will determine whether this commitment (or undertaking) amounts to an "obligation" under Romanian law. In addition, the Tribunal must answer the question raised in the preceding section: whether that undertaking, commitment or obligation consisted of providing the Claimants the *same* incentives that were listed in Annex 2 of GD 194/1999 until 1 April 2009. Both questions are relevant. If there is no obligation under Romanian law, the umbrella clause is not triggered. If an obligation under Romanian law exists but its scope is limited to providing the Claimants with whatever incentives are available under the regime from time to time, Romania discharges that obligation by providing whatever incentives were in force in a particular time. If, on the other hand, there is an obligation under Romanian law to maintain the same incentives through 1 April 2009 with respect to the Claimants, then Romania would be in violation of the BIT's umbrella clause.

448. The Tribunal considers two alternative approaches potentially relevant to that analysis. Under the first approach, the answer to the questions above depends on whether the EGO 24 framework provided the Claimants with a vested right to the incentives listed in Annex 2 of GD 194/1999 until 1 April 2009. In other words, under that approach, the Tribunal would need to decide whether the Claimants' entitlement qualifies as a "vested right" under Romanian law, and whether Romania's corresponding undertaking qualifies as an "obligation" under Romanian law. In many legal systems, the existence of a debtor's obligation is inseparable from the existence of the creditor's vested right to performance of the obligation and is a mirror view of that right from the debtor's perspective. Thus, presumably, under this approach, in order for Romania to be legally obligated to provide the Claimants with the incentives listed in Annex 2 of GD 194/1999 until 1 April 2009 (or legally obligated to compensate the Claimants if those incentives were eliminated or amended), the EGO 24 framework would have had to provide the Claimants with a vested right to receive those very same incentives.

449. These are matters of Romanian law that the Tribunal cannot answer in the abstract or with reference to comparative law. It is the Claimants' burden to prove that Romania's undertaking amounts to an obligation under Romanian law, and that the content of that obligation is such that Romania's actions have breached it. The Claimants have not addressed these issues convincingly. The Claimants' legal expert on Romanian law, Prof. Mihai, did not address whether the regulatory framework created an obligation under Romanian law. In particular, he did not address the nature of GD 194/1999 or of the PICs in his expert report, and only briefly in his oral examination. Nor was this matter addressed by Romania's expert, Prof. Baias. His report only referred to whether EGO 24, GD 194/1999 or the PICs created contractual relations between the Claimants and the state (his answer was no) (ER of F. Baias, ¶¶ 5.1-5.2).

450. Similarly, the Claimants have not addressed to the Tribunal's satisfaction whether their alleged right to the incentives might be lawfully withdrawn without compensation under Romanian law. The Tribunal has paid particular attention to Decision 130/2003 of the Constitutional Court. The Respondent argues that this decision (which applied to the incentives provided by Law 35 on Foreign Investment) proves that the EGO 24 framework did not give PIC holders a vested right to the incentives, and their withdrawal did not give PIC holders a right to compensation. Decision 130/2003 specifically stated:

> The Court finds that no contract was concluded between the Romanian State and the potential investors by the adoption of this law, as the entity raising the objection of unconstitutionality groundlessly claims, and no ownership right or right to recover debt was created in their favor, but a legal framework was created that could offer to the foreign investors an attractive business climate, taking into account the requirements of the transition from a State centralized economy to the market economy. Therefore, the fact that the contested provisions provide for the cessation of the applicability of such facilitations may not be construed as the termination of a contract and the least as infringement of the ownership right or of the investors; rights to recover debt, but the amendment of the legal framework in connection with the business background. The measure is not meant to harm foreign investors, as they must still carry out their activity under the usual conditions of a market economy, without the facilities that represented positive discriminations by comparison to the other participants to the business circuit. (Exh. RL-214, p.4).

451. The Claimants contend that the findings of this decision cannot be extrapolated to EGO 24 because the regimes created by Law 35 and EGO 24 were significantly different (in particular, because Law 35 provided all foreign investors in Romania with benefits, while EGO 24 only benefited investors who met certain specific criteria who invested in disfavored regions and fulfilled other obligations), adding that the testimony of the Respondent's expert, Prof. Baias, was based on the mistaken premise that both regimes were substantially similar. During cross-examination it became evident that Prof. Baias did not know the details of either incentive regime (Tr., Day 6, 26-31), while the Claimants' expert, Prof. Mihai, testified that there were important differences between EGO 24 and Law 35 (Tr., Day 5, 252 (Mihai)). Prof. Mihai (a former president of the Constitutional Court) also characterized Decision 130/2003 as "extremely infelicitous" and "ultra vires", stating that the reasoning of the

Constitutional Court was “inappropriate” and “not in line with the reality“ because “by the repeal of [EGO] 24, damages were brought to the foreign investors, because that repeal created […] a worse legal and economic situation than before the repeal.” (Tr., Day 5, 231, 252 (Mihai)). In the circumstances, the Tribunal is far from certain that it should revisit as such the validity of the Constitutional Court's decision, as opposed to the extent of its possible application by way of extrapolation to EGO 24, but finds that Decision 130/2003 is in any circumstance not decisive when interpreting the nature of the EGO 24 incentives.

452. However, the fact that Decision 130/2003 may not be applicable to the EGO 24 incentives does not prove that the EGO 24 incentives gave rise to vested rights or a right to compensation if they were withdrawn, and Prof. Mihai’s testimony was insufficient to establish this. Prof. Mihai testified that the constitutional principle of the rule of law set out in Article 1(3) of the Romanian Constitution[44] “required the Romanian state to maintain unchanged all facilities granted under prior regulations in favour of holders of investment certificates, issued before [GO 94/2004] was enforced”, or required GO 94/2004 to contain grandfathering provisions (ER of L. Mihai, ¶¶ 12.6-12.7). He also stated that, by failing to do so, GO 94/2004 was issued in breach of the ECHR’s jurisprudence on legitimate expectations and legal foreseeability, as well as the Romanian principles of vested/acquired rights (ER of L. Mihai, ¶¶ 13.1-13.3) and non-retroactivity (Tr., Day 5, 207-208, 247 (Mihai)). But Prof. Mihai refrained from going as far as stating that the EGO 24 framework gave rise to vested rights. He did say, with respect to the Machinery Facility repealed in 2000, that “those who had already acquired this right on the basis of some laws which were in effect at the moment when these rights had been acquired […] could continue to claim these tax exemptions” (Tr., Day 5, 210 (Mihai)). However, he accepted that most of the changes made to EGO 24 during its life did not contain grandfathering provisions (e.g., the revocation of the meat facility and the machinery facility), although he did characterize these regulations as unconstitutional (Tr., Day 5, 212, 234-238 (Mihai)). In the Tribunal’s view, this is not sufficient to establish the existence of a vested right to the incentives for the Claimants (and a corresponding obligation for Romania), or a right to compensation if the incentives were withdrawn.

453. The Tribunal concurs with the Claimants in that the entitlement created by the EGO 24 framework and the PICs creates an appearance, perhaps even a distinct appearance, of a vested right giving rise to the corresponding obligation. In particular, as discussed in paragraph 457 below, the relationship between the Claimants and the Romanian State included a certain *quid pro quo*. However, the Claimants have not proved that Romanian law would characterize such an appearance, even in the presence of such *quid pro quo*, as a vested right or obligation, or afford it the same protection.

[44] Article 1 paragraph (3) of the Romanian Constitution provides: "Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed."

454. Under this approach, therefore, the Tribunal lacks sufficient evidence on the content of Romanian law to be able to ascertain whether the EGO 24 framework, including after "crystallizing" through the issuance of a PIC, gave the Claimants a vested right under Romanian law to the incentives listed in Annex 2 of GD 194/1999 until 1 April 2009. For the same reason, it cannot ascertain that the EGO 24 framework created the corresponding obligation for Romania to provide those very incentives during that period.[45]

455. Under the second approach, it is not necessary that the obligation be “vested” or “actionable” in order to be considered an obligation covered by the umbrella clause. Although the Respondent has argued that granting a “vested” or ”actionable” right is a prerequisite for an obligation to arise and to have binding legal effect under Romanian law, its experts have not established that this is the case. Thus, to find an obligation it would be sufficient to find that (i) Romania undertook a firm commitment vis-à-vis the Claimants, and (ii) that the scope of that commitment was to provide substantially the same incentives during a specific period of time.

456. The first question is whether Romania undertook a firm commitment vis-à-vis the Claimants under Romanian law. Through its regulatory framework, which was intended to promote investments and job creation in certain disadvantaged regions, Romania made an offer to investors who would consider establishing their business in those regions. The offer included granting the incentives and maintaining them through 1 April 2009. The offer was however, conditional. Investors who accepted the offer would only qualify if they met certain requirements and remained in compliance with those requirements for a period twice as long as the period of the incentives. Therefore, Romania’s offer and the Claimants’ acceptance of that offer established a relationship of mutual rights and duties: Romania accepted to grant the incentives and maintain them through 1 April 2009 and the Claimants committed to comply with the requirements of the offer for the requisite period. To state it differently, Romania had the right to insist that the Claimants carry out their business activities in compliance with the requirements while the Claimants had the right to receive the incentives. The investors were taking a firm commitment and the regulatory framework required a firm commitment on the side of Romania. This relationship was certified by the PICs, the wording of which confirms that analysis of the regulatory framework. The offer and the acceptance thus included a *quid pro quo* and, therefore, can be considered a relationship of mutual rights and obligations. If such is the nature of the relationship, Romania must have undertaken an obligation to maintain the incentives through 1 April 2009 and the Claimants must have the corresponding right to the incentives during that period. Romania’s obligation, and the Claimants’ corresponding rights, are by definition obligations and rights under Romanian law because they were established through the regulatory framework that created the incentives.

457. The second inquiry relates to the scope of Romania’s undertaking. Romania has argued that, even if an obligation existed (which it denies), the scope of the obligation

[45] Arbitrators Lévy and Abi-Saab favor this approach.

was only to grant whatever incentives might be available under the EGO 24 framework from time to time. The question is thus whether Romania's commitment to provide the incentives contained an element of stabilization in the event of an amendment of the laws governing the EGO 24 framework. The commitment to maintain the incentives for a certain specific time period induced investors to take advantage of the offer. Therefore, Romania cannot in good faith ignore the fact that such a commitment would necessarily be understood as including a promise of stabilization; that is, that the incentives would be maintained for the specified period. Stated differently, because Romania promised certified investors that it would maintain the incentives through a certain date, that promise could not be understood otherwise than as including the undertaking that the incentives would not be withdrawn earlier. Thus, while Romania did not make a commitment not to amend its laws as a general matter, certified investors understood that they would benefit from the incentives through 1 April 2009. For example, if Romania promised to waive customs duties on the imports of certain raw materials for a certain period of time with respect to a certified investor, that promise would be understood as remaining valid regardless of whether Romania amends its general legal framework to impose higher or lower duties on the same raw materials during the specified period. Therefore, the certified investors were offered (and accepted as part of the *quid pro quo*) a guarantee of some stability of the legal regime within the scope of the incentives, as described in the PICs, for a specific time period.

458. Under both aspects of the second approach, therefore, the Tribunal would find that a legal obligation by Romania with respect to the Claimants exists. The mirror image of that legal obligation would be the Claimants' right to the incentives through 1 April 2009.[46]

459. The Tribunal has considered carefully both approaches and is conscious of the fact that their application would lead to different conclusions. The majority follows the first approach and concludes that the burden of proof lies with the Claimants and that the Claimants have not met that burden. The majority does not find that the Claimants have provided sufficient evidence and legal arguments on the content of Romanian law for the Tribunal to find the existence of an obligation protected by the umbrella clause. The majority accordingly dismisses the Claimants' umbrella clause claim, and the Tribunal will now address the Claimants' arguments in the context of their fair and equitable treatment claim, which spans the same injuries alleged by the Claimants under the umbrella clause.

[46] Arbitrator Alexandrov favors this approach.

B. FAIR AND EQUITABLE TREATMENT

460. Article 2(3) of the BIT provides:

> Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.

461. This section addresses the Claimants' allegation that the Respondent has breached its obligations under this provision by failing to afford to their investments fair and equitable treatment.

462. To facilitate the discussion of the Parties' arguments with respect to the Claimants' fair and equitable treatment claim, the Tribunal will first set out a summary of the Parties' general positions (Section 1 below). It will then address the nature, interpretation and content of the fair and equitable treatment standard (Section 2 below). Finally, it will address the Parties' specific arguments with respect to each alleged breach of the standard (Sections 3 to 6 below).

1. Summary of the Parties' positions

a. The Claimants' position

463. The Claimants argue that the fair and equitable treatment standard, which is contained in Article 2(3) of the BIT, is an autonomous standard that is additional to general international law, and is thus not restricted by the international minimum standard contained in customary international law (C-SoC, ¶¶ 183-192, citing scholarly opinion, an UNCTAD study and the practice of international tribunals, in particular, *Tecmed v. Mexico*[47], *Azurix v. Argentina*[48]). The Claimants also contend that the fair and equitable treatment standard has a specific meaning, which is not to be confused with a decision *ex aequo et bono* (citing *ADF Group Inc. v. United States*[49], ¶ 184).

464. According to the Claimants, the interpretation of the treaty provision containing the fair and equitable treatment standard should start from the normal canons of treaty interpretation as contained in Articles 31 and 32 of the VCLT, which include the ordinary meaning of the treaty's terms, their context, and the object and purpose of

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[47] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003 (hereinafter *"Tecmed v. Mexico" or "Tecmed"*).

[48] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006 (hereinafter *"Azurix v. Argentina"*).

[49] *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award, 8 January 2003 (hereinafter *"ADF Group Inc. United States"* or *"ADF Group").*

the treaty, the preamble being of particular importance (C-SoC, ¶¶ 194-200, citing *Tecmed v. Mexico*, *MTD v. Chile*[50], *Azurix v. Argentina*, *Siemens v. Argentina*[51]).

465. Starting with the text of the provision, the Claimants note that the Oxford Dictionary defines "fair" as "free from bias, fraud or injustice; equitably legitimate"; the word "equitable" as "characterized by equity or fairness"; and the word "equity" as "the quality of being equal or fair; impartiality; even-handed dealing […] that which is fair and right" (C-SoC, ¶ 200, Exh. C-83).

466. With respect to the context of the provision, the Claimants argue that a comparison of the fair and equitable treatment standard with other standards of the BIT shows that, as opposed to standards that are relative (such as the national treatment or most-favored nation treatment standards), the fair and equitable treatment standard is an absolute standard that provides a fixed reference point. As a result, it is not a valid defense for Romania to argue that investors of Romanian nationality or investors from third countries were also adversely affected by the revocation of tax exemptions or other incentives (C-SoC, ¶¶ 201-203).

467. In addition, the Claimants submit that the fair and equitable treatment standard should be interpreted in the light of the object and purpose of the BIT as reflected in its Preamble.[52] As a result, any interpretation of the fair and equitable treatment standard should be generally favorable to the intensification of economic cooperation between the two countries, help promote and protect investments, be conducive to expanding the economic relations between the two countries and stimulate investment initiatives. In this regard, the Claimants argue that attracting investors through tax exemptions and other incentives that are promised for a certain period of time, and withdrawing these incentives unilaterally, is not conducive to the intensification of economic cooperation nor the stimulation of investment initiatives (C-SoC, ¶¶ 205-206).

468. As discussed in Section V(B) on Applicable Law, the Claimants deny that the interpretation of the BIT must take into consideration EU law (see 291 above *et seq.*).

469. The Claimants endorse the definitions of the fair and equitable treatment standard made by several international tribunals (including, among others, *Waste Management v. Mexico II*[53], *MTD v. Chile*, and *Saluka v. Czech Republic*[54]). Relying in particular

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[50] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. 01/7), Award, 25 May 2004 (hereinafter *"MTD v. Chile"*).

[51] *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007 (hereinafter *"Siemens v. Argentina"* or *"Siemens"*).

[52] The Claimants note that the Preamble expresses the Parties' desire "to intensify economic cooperation to the mutual benefit of both States and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party" and recognizes "that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives..." (BIT, Preamble).

[53] *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (hereinafter *"Waste Management v. Mexico II" or "Waste Management II"*).

on *Saluka v. Czech Republic*, the Claimants submit that the fair and equitable treatment standard "prohibits at least six different types of host state misconduct [...], including: (1) a government's violation of an investor's legitimate expectations; (2) inconsistent treatment of an investment by different organs or officials of the same government; (3) a lack of transparency that hampers the ability of an investor to operate its investment or understand what is required by the government in order for an investment to succeed; (4) failure by a government to provide adequate advance notice of measures that will negatively impact an investment; (5) governmental treatment of an investment that is in bad faith; and (6) discriminatory conduct" (C-Reply, ¶¶ 367; 374). In later submissions the Claimants group categories (2), (3) and (4) into one single category covering lack of transparency (C-PHB, ¶¶ 51-62). The Claimants also seem to suggest that the fair and equitable treatment standard requires the state to ensure a stable and predictable legal and business environment beyond the protection of an investor's legitimate expectations (C-SoC, ¶ 211, C-Reply, ¶¶ 424-430).

470. The Claimants contend that Romania's treatment of the Claimants' investments fell below the standard of treatment required by the fair and equitable treatment obligation of the BIT. Specifically, the Claimants submit that Romania (i) failed to provide a stable and predictable legal framework and violated the Claimants' legitimate expectations, (ii) failed to act transparently with respect to the Claimants' investments, and (iii) acted in bad faith with respect to those investments.

471. First, the Claimants contend that Romania breached the fair and equitable treatment standard by failing to provide a stable and predictable legal and business environment for the investment, and in particular by violating the Claimants' legitimate expectations with respect to that regulatory framework.

472. The Claimants submit that the core element of the fair and equitable obligation is to ensure a consistent and stable legal environment (C-SoC, ¶¶ 211-225; C-Reply, ¶¶ 424-430; C-PHB, ¶¶ 40-41). Numerous tribunals concur with this interpretation of the obligation (*Metalclad v. Mexico*[55]*, Tecmed v. Mexico, CMS v. Argentina, Eureko v. Poland, Bayindir v. Pakistan*[56]*, LG&E v. Argentina*, *Duke Energy v. Ecuador*[57], *PSEG v. Turkey*[58], *Enron v. Argentina*). The fair and equitable treatment standard extends to regulation in matters of taxation (*Occidental v. Ecuador*[59]). For this obligation to be

[54] *Saluka Investments BV (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (hereinafter *"Saluka v. Czech Republic" or "Saluka"*).

[55] *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000 (hereinafter *"Metalclad v. Mexico"* or *"Metalclad"*).

[56] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisidiction, 14 November 2005 (hereinafter *"Bayindir v. Pakistan*).

[57] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (hereinafter *"Duke Energy v. Ecuador"*).

[58] *PSEG Global Inc. and Konya Ilgin Elektrík Űretím ve Tícaret Limited Şirketi v. Republic of Turkey* (ICSID Case No ARB/02/5), Award, 19 January 2007 (hereinafter *"PSEG v. Turkey"*).

[59] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004 (hereinafter *"Occidental v. Ecuador"*).

breached, investors do not need to have a contract with the state containing a stabilization clause.

473. In particular, the Claimants argue that the fair and equitable treatment standard requires the state to protect the investor's legitimate expectations based on the legal framework at the time of the investment and on any undertakings and representations made explicitly or implicitly by the host state. The legal framework on which the investor is entitled to rely consists of legislation and treaties, and assurances contained in decrees, licenses and similar executive assurances, as well as in contractual undertakings. Relying on a number of investment cases, the Claimants argue that a state will violate the fair and equitable treatment standard if it reverses assurances that have resulted in the investor's legitimate expectations (C-SoC, ¶¶ 211-228, citing *Metalclad v. Mexico, Tecmed v. Mexico, CMS v. Argentina, Eureko v. Poland, Bayindir v. Pakistan, LG&E v. Argentina*, *PSEG v. Turkey,* and *Occidental v. Ecuador*).

474. The Claimants contend that Romania failed to provide a stable and predictable legal and business environment for their investment, and undermined their legitimate expectations with respect to the regulatory framework. Specifically, they argue that Romania created a special regulatory regime for disfavored regions that consisted of certain tax exemptions and other incentives promised for a 10 year period. This special regime instilled in the Claimants the legitimate expectation that the EGO 24 incentives would remain in place during the 10 year period that Ştei-Nucet was designated a disfavored region. The Claimants assert that this legitimate expectation was an essential basis for their investment, and without it the Claimants would not have invested in the manner that they did. Having enticed the Claimants to make substantial investments in reliance on these incentives, in February 2005 Romania changed its legislation and withdrew most of the EGO 24 incentives, four years before they were scheduled to expire. The Claimants argue that, by prematurely revoking the EGO 24 incentives, Romania failed to provide a predictable and stable legal framework for the Claimants to plan their investments, and in particular violated their legitimate expectation that these incentives would be in place for the promised 10-year period.

475. The Claimants clarify that the obligation to accord fair and equitable treatment does not mean that a state must completely freeze its regulatory regime (and the Claimants acknowledge that a stabilization clause would be needed to obtain that result). However, it does mean that, by entering into the BIT, Romania accepted limitations on its power to fundamentally alter the regulatory framework of the investment, particularly in ways that would be unfair, unreasonable and inequitable, including by undermining an investor's legitimate expectations (C-PHB, ¶ 40). As a result, Romania could not, consistent with the BIT, simply dispense with the legal framework it had put in place, but instead was required to meet its commitments with respect to investors. Specifically, the Claimants concede that Romania was entitled to revoke the incentives it had put in place if it grandfathered them for existing PIC holders (as it did with the Profit Tax Incentive).

476. Second, the Claimants contend that Romania breached its obligation to accord them fair and equitable treatment by acting in a manner that was not transparent.

477. The Claimants submit that the obligation to accord fair and equitable treatment requires that the state's conduct toward investors and its legal environment must be transparent (i.e., free from ambiguity and uncertainty). The Claimants rely on *Metalclad v. Mexico*, *Tecmed v. Mexico*, *Waste Management v. Mexico II*, *Saluka v. Czech Republic*, *Bayindir v. Pakistan*, *Occidental v. Ecuador, CMS v. Argentina*, *LG&E v. Argentina*, *PSEG v. Turkey*, and an UNCTAD study.[60] In particular, the *Tecmed* tribunal held that a foreign investor "expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations." (*Tecmed*, ¶ 154). Similarly, the late Prof. Thomas Wälde noted that transparency requires "that government administration has to make clear what it wants from the investor and cannot hide behind ambiguity if it has created such ambiguity and contradiction itself."[61]

478. The Claimants contend that Romania acted in a manner that was not transparent. Specifically, they argue that Romania actively pursued two conflicting policies: on the one hand, it promoted the EGO 24 incentives, and at the same time it negotiated their revocation behind closed doors. In addition, they argue that Romania's conduct with respect to the validity of the EGO 24 incentives was contradictory and the manner in which they were revoked created uncertainty.

479. Third, the Claimants argue that Romania acted in bad faith with respect to the Claimants' investments. The Claimants contend that the fair and equitable treatment standard is breached if the host state acts in bad faith (C-SoC, ¶ 243, C-Reply ¶¶ 443-449). Although bad faith is not required for a violation of the standard to occur (*Tecmed v. Mexico*, *Mondev v. United States*[62], *Loewen v. United States*[63]*, CMS v. Argentina)*, the Claimants argue that host state measures taken in bad faith against an investor violate the fair and equitable treatment standard (*Waste Management v. Mexico II*, *Tecmed v. Mexico, Bayindir v. Pakistan, Saluka v. Czech Republic*).

480. Finally, the Claimants contend that Romania's responsibility for violation of the fair and equitable treatment standard arises regardless of its motives, and irrespective of any showing of bad faith (although, as explained above the Claimants do argue that Romania acted in bad faith). Consequently, the Claimants do not need to show that

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[60] UNCTAD Series on issues in international investment agreements, Fair and Equitable Treatment, p. 51 (1999) (Exh. C-74).

[61] T.W. Wälde, Energy Charter Treaty-based Investment Arbitration, 5 The Journal of World Investment 387 (2004), (Exh. C-94).

[62] *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002 (hereinafter *"Mondev v. United States" or "Mondev"*).

[63] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003 (hereinafter *"Loewen v. United States"*).

Romania acted with an improper motive in order to establish violation of the fair and equitable treatment standard. Conversely, a showing of good faith or legitimate cause on Romania's part does not excuse a violation of the fair and equitable treatment standard (C-SoC, ¶¶ 242-252, citing, *inter alia*, *Mondev v. United States*; *Tecmed v. Mexico*, *Loewen v. United States*, *Occidental v. Ecuador*, and *PSEG v. Turkey*).

481. Accordingly, the Claimants submit that, no matter how laudable or justifiable Romania's motives might have been, they do not excuse the fact that Romania breached the fair and equitable treatment standard. Whether Romania withdrew the incentives for fiscal reasons, for reasons of international economic policy or for other reasons of public interest, is irrelevant (C-SoC, ¶ 252). In particular, as discussed in Section V(B) above on Applicable Law, the Claimants contend that Romania's "EU law" defense does not immunize Romania from liability.

b. The Respondent's position

482. With respect to the content of the fair and equitable treatment standard, the Respondent does not dispute that many of the decisions cited by the Claimants can provide useful guidance to the Tribunal, subject to the general interpretative principles applicable to this dispute as explained in Section V(B) above on Applicable Law. Indeed, the Respondent concedes that "[m]ost of the general principles governing the interpretation of the fair and equitable treatment standard form common ground between the Parties" (R-CM, ¶ 101). In particular, the Respondent does not dispute that Article 2(3) of the BIT must be interpreted in accordance with Articles 31 and 32 of the VCLT, according to which the Tribunal must first look to the plain meaning or the language of the provision, and in the event of ambiguity construe the relevant provision in its context and in the light of the objective and purpose of the BIT (*Id.*). However, the Respondent disputes Claimants' actual interpretation of these terms.

483. With respect to the plain meaning of the provision, the Respondent accepts for present purposes the Claimants' definition of "fair and equitable" as "free from bias, fraud or injustice" and "even-handed dealing." The Respondent also concurs with the Claimants' reliance on *Waste Management v. Mexico II*, where the Tribunal concluded that:

> … fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety …

484. The Respondent agrees that the preamble of the BIT reflects the signatories' goal of intensifying economic cooperation between Romania and Sweden. However, the BIT's preamble does not in itself indicate what interpretation of "fair and equitable treatment" is appropriate to achieve this goal. The proper approach depends upon the state parties' intentions with respect to the intensification of economic relations. The Respondent submits that this intention was to intensify economic relations in the context of Romania's integration into the EU (R-CM, ¶ 108).

485. In this regard, the Respondent argues that the BIT was signed pursuant to Article 74 of the Europe Agreement (to which both Sweden and Romania were parties), which calls for Romania to enter into investment protection agreements with EU Member States. The goal of the Europe Agreement was to establish close and lasting economic political integration between Romania and the EU, with the ultimate goal of EU accession. For this, Romania undertook to harmonize Romanian law with EU law (Articles 69 and 70 of the Europe Agreement). Accordingly, the Respondent submits that "the fair and equitable treatment standard contained in the [BIT] must therefore be interpreted consistently with any requirements for Romania's integration into the EU, including the elimination of impermissible State aid [...]"(R-CM, ¶ 109).

486. The Respondent further contends that, under the Europe Agreement, the Accession Agreement and the EC Treaty, Romania owed an obligation to Sweden to eliminate all state aid that did not conform to EU law and that distorted competition in the common market. As a result, Romania and Sweden could not have intended that Romania's obligation to afford fair and equitable treatment to Swedish investors would require the preservation of non-conforming State aid. In other words, "the object and purpose of the [BIT], and the context in which it was concluded as an integral part of Romania's integration into the EU, indicate that the [BIT] cannot be construed to sanction as 'unfair and inequitable' the adjustment of the Facilities in accordance with the requirements of the Europe Agreement and the *acquis communautaire*" (R-CM, ¶¶ 109-110).

487. Referring to the Claimants' division of the fair and equitable treatment standard into different "strands", the Respondent contends that the fair and equitable treatment clause of the BIT is not a laundry list, and there is no claim under the BIT for violating any particular "strand." Citing *Mondev v. United States*, the Respondent submits that whether a host state has treated an investment fairly and equitably must be assessed in view of all of the facts and circumstances. However, for analytical organization, the Respondent accepts that the Claimants' allegations may be grouped into three categories, corresponding to types of conduct where other international tribunals have found breaches of the fair and equitable treatment standard (R-PHB, ¶¶ 15-16):

a. Cases in which the state's action is alleged to have been substantively improper (for example because it was unreasonable, arbitrary, or discriminatory);

b. Cases in which the state's action is claimed to have violated a promise the state made to the investor, thus upsetting the investor's "legitimate expectations", and

c. Cases in which a state's action may be attacked as having been procedurally unfair, as in cases of denial of justice or lack of due process, retroactive or secret regulation, or inconsistent and non-transparent administration (although there are very few awards finding a violation of fair and equitable treatment solely on the basis of this class of allegations).

488. The Respondent denies having engaged in any of these types of conduct. It contends that, given the factual circumstances surrounding the investment, the

Claimants could have had no reasonable expectation that the incentives (facilities) would remain in force unchanged for ten years. The modification of the incentives was wholly predictable and equitable, and Romania conducted itself as consistently and transparently as possible given the historical context of economic transition and EU accession (R-CM, ¶ 100).

489. First, the Respondent denies having engaged in substantively improper conduct. The Respondent contends that, where an investor challenges general legislation that modifies existing general legislation, the question for an international tribunal is whether that legislation is grounded in reason (rather than being arbitrary) and enacted in pursuit of legitimate objectives (rather than for illicit purposes, such as discrimination). Relying on *Saluka v. Czech Republic*, the Respondent argues that for a state's conduct to be reasonable it must "bear a reasonable relationship to some rational policy" (*Saluka,* ¶¶ 309 and 460). This requirement was further developed in *AES v. Hungary,*[64] where the Tribunal found that "two elements" must be analyzed in judging whether a state acted reasonably: "the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy" (*AES v. Hungary,* ¶ 10.3.7). According to that Tribunal, a policy is rational when the state adopts it "following a logical (good sense) explanation and with the aim of addressing a public interest matter" (*Id.*, ¶ 10.3.8), and an action is reasonable when there is "an appropriate correlation between the state's public policy objective and the measure adopted to achieve it" (*Id.*, ¶ 10.3.9).

490. In addition, for there to be a breach of the fair and equitable treatment standard, the state's conduct must be manifestly unreasonable. A state does not breach the standard merely by failing to adopt the optimal course of action. Citing *Glamis Gold v. United States,*[65] the Respondent contends that it is Claimants' burden to prove a manifest lack of reasons for the legislation.[66] (R-PHB, ¶ 33, fn. 50).

491. However, as explained further below, the Respondent argues that the Claimants do not allege that Romania engaged in any fraud, bias or discrimination, or that they were denied justice with respect to the Facilities. Nor do the facts show "grossly unfair, unjust or idiosyncratic" treatment (R-CM, ¶¶ 102-103). To the contrary, Romania argues that its conduct was fair and equitable under the circumstances.

492. Second, the Respondent denies having failed to provide regulatory stability or having violated the Claimants' legitimate expectations. The Respondent contends that the BIT does not require the Contracting States to tailor their laws and regulations to the preference of foreign investors, nor does it create liability for every regulatory change that has a negative impact on the foreign investors' businesses. To the contrary, investment protection treaties accord host States considerable deference in relation

[64] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award, 23 September, 2010 (hereinafter *"AES v. Hungary"* or *"AES"*).

[65] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009 (hereinafter *"Glamis Gold v. United States").*.

[66] *Id.*, ¶ 803.

to regulatory policy (*El Paso v. Argentina;* [67] *S.D. Myers v. Canada;*[68] *Saluka v. Czech Republic*;[69] *Waste Management v. Mexico II;*[70] *Parkerings v. Lithuania;*[71] *Genin v. Estonia*[72]; *Methanex v. United States*[73]). This is a reflection of the fundamental rule of international law that a state's regulatory sovereignty can only be subject to the specific limitations that flow from the international legal obligations that it has voluntarily assumed (relying on *The Case of the S.S. Lotus (France v. Turkey*)[74]) (R-CM, ¶¶ 85-90).

493. As a result, the Respondent argues that where a state has exercised its sovereign powers to regulate in a general, non-discriminatory way to advance public welfare (including by legislative changes), international law will not characterize such conduct as "expropriation", "unfair and inequitable treatment", or otherwise in breach of the provisions of an investment protection treaty. International law (and the BIT) does not call for a regulatory standstill, and there is no warrant that a legal regime will remain unaltered. Laws are inherently liable to change, even when the original legislative intent was to create a permanent regime or a regime for a given period (*Continental Casualty v. Argentina*, ¶ 258). The Respondent concedes that international law will require observance of specific commitments about the stability of legislation, but contends that such commitments will not be lightly inferred, and are never to be found in general legislative texts. Rather, they may be found in stabilization terms specially bargained for with specific investors (R-CM, ¶ 91).

494. In the present case, it is undisputed that the modification of the Facilities that had been granted pursuant to EGO 24/1998 was a generally applicable act. Moreover, Romania was compelled to curtail the Facilities as an essential precondition for accession to the EU. Accordingly, in considering Romania's compliance with the substantive provisions of the BIT, Romania is entitled to the deference under international law (R-CM, ¶ 92). The modification of the Facilities was fair under the circumstances. In light of the plain meaning of Article 2(3), Romania argues that an examination of the Claimants' supposed expectations is unnecessary. In any event, Romania contends that the Claimants had no legitimate expectations that were undermined by the modification of the Facilities.

495. The Respondent agrees that the doctrine of legitimate expectations is part of the general duty to afford fair and equitable treatment. However, under this doctrine a

[67] *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Jurisdiction, 27 April 2006 (hereinafter *"El Paso v. Argentina"*), ¶ 70.

[68] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (hereinafter *"S.D. Myers v .Canada"*), ¶ 263.

[69] *Saluka v. Czech Republic*, ¶ 305.

[70] *Waste Management v. Mexico II*, ¶ 94.

[71] *Parkerings v. Lithuania*, ¶ 332.

[72] *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001 (hereinafter *"Genin v. Estonia"*), ¶ 370.

[73] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005 (hereinafter *"Methanex v. United States"*), Part IV, Ch D, p 4, ¶ 7.

[74] *The Case of the S.S. "Lotus" (France v Turkey)*, PCIJ Series A No 10 (1927).

state would only violate this duty if it exercised its regulatory sovereignty in such a way as to create a legitimate expectation in an investor that the state will or will not act in a certain way in the future. In this way, the state itself derogates from its right and duty to change its regulations. Thus, the Respondent argues that an expectation of regulatory stability must be based on some sort of promise or at the very least, a proper representation made to the investor, on the part of the state. However, "if the state has not committed itself to freeze a particular area of regulation, or to shield an investor from regulatory change, the most an investor can legitimately expect is regulatory rationality and absence of arbitrariness" (R-Rejoinder, ¶ 169). The Respondent relies on *EDF v. Romania*[75] *and Parkerings v. Lithuania*. The Respondent's detailed position with respect to the standard of legitimate expectations is addressed in Section 3(b) below.

496. Third, the Respondent asserts it acted transparently and consistently. The Respondent appears to agree that transparency and consistency are a part of the fair and equitable treatment standard. For the Respondent, this "strand" refers to whether Romania complied with due process and fair administration. The Respondent notes that the UNCTAD report cited by the Claimants states the following:

> If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed.[76]

497. According to the Respondent, this means that investors should be able to find out what the rules are and how to comply with them, and the rules should be administered in an even-handed and reasonably consistent fashion (R-PHB, ¶ 160).

498. In the present case, the Respondent argues, the Claimants do not contend that Romania was unclear about the rules and procedures they had to follow, or that the rules were applied inconsistently. Rather, the Claimants contend that they were not given enough information about ongoing diplomatic negotiations. The Respondent argues that there is no authority suggesting that international investment law requires a state to disclose its assessment of the likely outcome of such negotiations. As a result, the Respondent argues that "the Claimants' contentions are not only irrelevant as a matter of law but illogical as a matter of fact: if, as the Claimants seemed to suggest at the hearing, Romania should have publicly announced at the earliest possible date that it did not expect to obtain the EU's agreement to continue the EGO Facilities in force, the only possible difference is that the Claimants would have lost the benefit of the Facilities sooner" (R-Rejoinder, ¶ 161). Likewise, the Respondent argues that there is no need to warn investors of legislative changes, in particular in legal and political environments that are unpredictable and evolving (*Parkerings*, ¶¶ 341-342, 345).

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[75] *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award, 8 October 2009 (hereinafter *"EDF v. Romania"*).

[76] "Fair and Equitable Treatment", UNCTAD Series on Issues in International Investment Agreements (1999) 3 UNCTAD/ITE/IIT/11, Exh. C–527, quoted at ¶ 433 of the Claimants' Reply.

499. In view of the above, the Respondent submits that there are four propositions that the Claimants must prove in order for their fair and equitable treatment claim to succeed, and they have failed to prove them. These propositions are (Tr., Day 13, 45:1-20 (King)):

(i) First, the Claimants must prove that Romania's actions, and in particular the 31 August 2004 amendment of EGO 24, were manifestly unreasonable.

(ii) Second, the Claimants must prove that Romania promised them ten years of stabilization of the EGO 24 facilities.

(iii) Third, the Claimants must prove that they made investments in reasonable reliance on the legitimate expectation that the EGO 24 facilities would not change until 2009.

(iv) Fourth, the Claimants must prove that Romania acted in such a non-transparent and inconsistent way as to violate the fair and equitable treatment clause.

500. The Respondent has clarified that these propositions are not cumulative except (ii) and (iii). In other words, the Respondent's position is that the Tribunal could find a breach if the Claimant can prove that either proposition (i), propositions (ii) and (iii) jointly, or proposition (iv) are true (Tr., Day 13, 58:5-60:7).

501. In addition, as noted in paragraph 279 above, the Respondent argues as a general matter that the Claimants' case on fair and equitable treatment hinges on the testimony of their witnesses, which the Respondent contends is neither credible nor reliable. It also argues that, despite the Claimants' shift in focus, this is not and has never been a case about whether Romania acted transparently; it has only become so because the hearing undermined the Claimants' previous legal theories (Tr., Day 13, 19-43 (King)).

2. Nature, interpretation and content of the fair and equitable treatment standard

502. The Tribunal will now address the nature, interpretation and content of the fair and equitable treatment standard.

a. Interpretation and general contours of the standard

503. The Parties seem to agree on the basics of the fair and equitable treatment standard, with certain nuances. The Respondent does not contest the Claimants' portrayal of the standard as an autonomous one, different from the international minimum standard. Nor does it contest that the standard has specific meaning. Likewise, both Parties agree that the interpretation of Article 2(3) of the BIT should start from the normal canons of treaty interpretation as contained in Articles 31 and 32 of the VCLT. Romania is not a party to the VCLT, but it is common ground that the VCLT reflects

customary international law[77] and Romania relies on it as the appropriate method to interpret the BIT.[78]

504. To establish the content of the standard, the Tribunal must first turn to the plain meaning of the terms "fair and equitable." The plain meaning of these terms, however, does not provide much assistance. As noted by the tribunal in *MTD v. Chile*, "[i]n their ordinary meaning, the terms 'fair' and 'equitable' [...] mean 'just', 'even-handed', 'unbiased', 'legitimate'."[79] Similarly, the tribunal in *S.D. Myers v. Canada* stated that unfair and inequitable treatment meant "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[80] This Tribunal agrees with the *Saluka* tribunal in that "[t]his is probably as far as one can get by looking at the 'ordinary meaning' of the terms of Article 3.1 of the Treaty."[81]

505. The question is rather how those concepts should be applied to the facts. It is undisputed that an analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case. As stated in *Mondev v. United States:*

> When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[82]

506. Similarly, the tribunal in *Waste Management II* said that "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[83] This has been echoed by several tribunals, including in *Lauder v. Czech Republic[84], CMS v. Argentina, Noble Ventures v. Romania[85], Saluka v. Czech Republic*.

507. That being said, as the Claimants point out and the Respondent does not contest, the content of the fair and equitable treatment standard does not depend on a tribunal's

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[77] *See, e.g., Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad),* [1994] ICJ Reports 6, ¶ 41 ("The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.")

[78] *See, e.g.,* R-CM, ¶¶ 73-75.

[79] *MTD v. Chile*, ¶ 113.

[80] *S.D. Myers v. Canada*, ¶ 263.

[81] *Saluka v. Czech Republic*, ¶ 297.

[82] *Mondev v. United States*, ¶ 118. See also *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Award, 31 July 2007, ¶ 370.

[83] *Waste Management v. Mexico II*, ¶ 99.

[84] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (hereinafter, *"Lauder v. Czech Republic"*).

[85] *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award, 12 October 2005.

idiosyncratic interpretation of the standard but "must be disciplined by being based upon state practice and judicial or arbitral case law or other sources of customary or general international law" (C-SoC, ¶ 193, citing *ADF Group,* ¶ 184). The tribunal in *Saluka* held:

> This does not imply, however, that such standards as laid down in Article 3 of the Treaty would invite the Tribunal to decide the dispute in a way that resembles a decision *ex aequo et bono*. This Tribunal is bound by Article 6 of the Treaty to decide the dispute on the basis of the law, including the provisions of the Treaty. Even though Article 3 obviously leaves room for judgment and appreciation by the Tribunal, it does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's. As the tribunal in *S.D. Myers* has said, the "fair and equitable treatment" standard does not create an "open-ended mandate to second-guess government decision-making". The standards formulated in Article 3 of the Treaty, vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. Over the last few years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning.[86]

508. In any event, it is established that the state's conduct does not need to be egregious to violate the standard (*Mondev, ADF Group, Waste Management II – see* paragraph 524 below).

509. Further, both Parties agree that the fair and equitable treatment standard should be interpreted in the light of the object and purpose of the BIT as reflected in its Preamble. This was also the approach taken by the *Saluka* tribunal, which noted that "[t]he preamble thus links the 'fair and equitable treatment' standard directly to the stimulation of foreign investments and to the economic development of both Contracting Parties."[87] The Respondent further argues that the standard should be interpreted in the broader context of EU accession.

510. The Preamble of the BIT states that the Contracting Parties have agreed on the terms of the BIT:

> *desiring* to intensify economic cooperation to the mutual benefit of both States and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,
>
> *recognizing* that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives, […]

511. The Parties agree that the Preamble reflects the BIT signatories' goal of intensifying economic cooperation between Romania and Sweden, but disagree on what interpretation of "fair and equitable treatment" is appropriate to achieve this goal. The

[86] *Saluka v. Czech Republic*, ¶ 284.
[87] *Id*, ¶ 298.

Claimants do not suggest a specific interpretation of the fair and equitable treatment standard in this context, other than to argue that attracting investors through tax exemptions and other incentives that are promised for a certain period of time, and then withdrawing those incentives unilaterally, is not conducive to the intensification of economic cooperation or to the stimulation of investment initiatives.

512. The Respondent for its part contends that the Contracting Parties' intention was to intensify economic relations in the context of Romania's accession to the EU. The Respondent argues that the BIT was signed pursuant to Article 74 of the Europe Agreement, which prompted Romania to sign investment protection treaties with EU member states. As the goal of the Europe Agreement was to integrate Romania and the EU at a political level, which carried with it the obligation to harmonize Romanian law to EU law, the goal of the BIT between Romania and Sweden must be interpreted in this context. Therefore, Romania's obligation to afford fair and equitable treatment to Swedish investors must be interpreted in such a way that it is consistent with EU law.

513. It is undisputed that the Europe Agreement predated the BIT and, indeed, promoted the conclusion of BITs such as the Sweden-Romania BIT. Despite the lack of express reference in the BIT to EU accession or the EU, the Tribunal has also found that the general context of EU accession must be taken into account when interpreting the BIT.

514. That being said, the Tribunal cannot conclude in the abstract (as Romania seems to suggest) that the revocation of the incentives is fair and equitable solely because it was undertaken pursuant to Romania's obligation under the Europe Agreement to harmonize its law with EU law. As previously stated, whether the state's conduct is unfair and inequitable must be assessed in view of all the facts and surrounding circumstances.

515. The Tribunal must bear in mind that the goal of the BIT is the "intensif[ication of] economic cooperation to the mutual benefit of both States" and, in this context, "to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party", and that when the Contracting States set this goal they recognized "that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives." In this respect, the Claimants argue that the objective of the BIT was to help Romania raise its level of economic development so it could join the EU (Tr., Day 1, 181-184 (Gaillard)).

516. In view of these considerations, the Tribunal favors a balanced view of the goals of the BIT similar to that adopted by the *Saluka* tribunal:

> This is a more subtle and balanced statement of the Treaty's aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the

> protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.
>
> Seen in this light, the "fair and equitable treatment" standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.[88]

517. Finally, the Tribunal agrees with the Respondent that the fair and equitable treatment standard is not a laundry list of potential acts of misconduct. Whether a state has treated an investor's investments unfairly and inequitably defies abstract analysis or definitions, and can only be assessed when looking at the totality of the state's conduct. As noted by the tribunal in *Total S.A. v. Argentina,*[89] "[s]ince this standard is inherently flexible, it is difficult, if not impossible, 'to anticipate in the abstract the range of possible types of infringements upon the investor's legal position'." [90]

518. Nonetheless, as noted by Professors Dolzer and Schreuer, one way to "gauge the meaning of an elusive concept such as FET" is "to identify typical factual situations to which this principle has been applied. An examination of the practice of tribunals demonstrates that several principles can be identified, which are embraced by the standard of fair and equitable treatment."[91] As noted by the *Total* tribunal, "[o]n the premise that a 'judgement of what is fair and equitable cannot be reached in the abstract; it must depend on the fact[s] of the particular case' and that 'the standard is to some extent a flexible one which must be adapted to the circumstances of each case', tribunals have endeavoured to pinpoint some typical obligations that may be included in the standard, as well as types of conduct that would breach the standard, in order to be guided in their analysis of the issue before them." [92]

519. According to Dolzer and Schreuer, tribunal practice shows that the concepts of transparency, stability and the protection of the investor's legitimate expectations play a central role in defining the FET standard, and so does compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom

[88] *Saluka v. Czech Republic*, ¶¶ 304-309.

[89] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Liability, 27 December 2010 (hereinafter *"Total S.A. v. Argentina"* or *"Total"*).

[90] *Total S.A. v. Argentina*, ¶ 107.

[91] R. Dolzer and C. Schreuer, Principles of International Investment Law, 2008, p. 133.

[92] *Total S.A. v. Argentina*, ¶ 109.

from coercion and harassment.[93] Cases reflecting these conclusions include *Bayindir v. Pakistan*[94] and *Total S.A. v. Argentina*.[95]

520. In this context, the Parties appear to agree that there are certain types of conduct that are usually deemed to violate the fair and equitable treatment standard, bearing in mind the facts of the particular case. For analytical purposes, the Tribunal will use the Respondent's distinction between (i) conduct that is substantively improper (because it is arbitrary, unreasonable, discriminatory or in bad faith), (ii) conduct that violates legitimate expectations relied upon by the investor (including here the Claimants' stability "strand"), and (iii) conduct that is procedurally improper. That being said, the Tribunal is not persuaded that the Claimants' claim that Romania acted non-transparently and inconsistently is based on an assertion that the violation is "procedural," so the Tribunal will not use the Respondent's terminology for that claim.

521. The Tribunal addresses the standard for substantively proper conduct in Section (b) below, the standard for determining when a legitimate expectation has arisen in Section (c) below, and the standard for transparency in Section (d) below.

b. Conduct that is substantively improper

522. There is no dispute that conduct that is substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or in bad faith, will violate the fair and equitable treatment standard. As stated by the *Waste Management II* tribunal:

> "[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in

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[93] *Id*.

[94] *Bayindir v. Pakistan*, Award, 27 August 2009, ¶ 178 ("The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process [*Metalclad v. Mexico*], to refrain from taking arbitrary or discriminatory measures [*Waste Management v. Mexico II, Lauder v. Czech Republic*], from exercising coercion [*Saluka v. Czech Republic*] or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment [*Duke Energy v. Ecuador*].")

[95] *Total S.A. v. Argentina*, ¶¶ 109 ("A breach of the fair and equitable treatment standard has been found in respect of conduct characterized by 'arbitrariness' [*ELSI* case] and of 'acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith' [*Genin v. Estonia*]. It has been also held that the standard requires 'treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment' [*MTD v. Chile*], thereby condemning conduct that is arbitrary, grossly unfair, unjust or idiosyncratic or that 'involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in administrative process' [*Waste Management v. Mexico II*]. Awards have found a breach in cases of discrimination against foreigners and 'improper and discreditable' or 'unreasonable' conduct. [*Saluka v. Czech Republic*] This does not mean that bad faith is necessarily required in order to find a breach: 'A State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.' [*Mondev v. U.S.*]").

judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[96]

523. On this subject, the *Saluka* tribunal stated:

> A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[97]

524. That being said, it is well established that the state's conduct need not be outrageous to breach the fair and equitable treatment standard. In *Mondev v. United States*, the tribunal held that "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[98] This finding was echoed by the tribunal in *Waste Management v. Mexico II*:

> Both the *Mondev* and *ADF* tribunals rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the *Neer* case, i.e. to treatment amounting to an "outrage, to bad faith, to wilful neglect of duty, or to an in insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[99]

525. With respect to the meaning of the term "unreasonable", both Parties appear to agree that "unreasonable" means lacking in justification or not grounded in reason (i.e., arbitrary), or not enacted in pursuit of legitimate objectives (C-Reply, ¶ 454; R-PHB, ¶ 33). The Respondent also proposes the formulation used by the *Saluka* tribunal: for a state's conduct to be reasonable, it must "bear a reasonable relationship to rational policies […]."[100] Although the definition is rather circular, the Tribunal finds it appropriate, with the specification made by the *AES* tribunal, namely that the determination of whether the state's conduct is reasonable requires the analysis of two elements: "the existence of a rational policy; and the reasonableness of the act of

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[96] *Waste Management v. Mexico II*, ¶ 98. The Tribunal notes that, strictly speaking, this case refers to the minimum standard of treatment contained in NAFTA Article 1105. However, both Parties have relied on this definition in their submissions in this case, so the Tribunal understands that they accept that it is relevant for the fair and equitable treatment standard under the BIT.

[97] *Saluka v. Czech Republic*, ¶ 307.

[98] *Mondev v. U.S.*, ¶ 116.

[99] *Waste Management v. Mexico II*, ¶ 93. This paragraph has been cited by many different tribunals, including *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010 (hereinafter, *"Chemtura v. Canada"*), ¶ 215. *See* Dolzer & Schreuer p. 129.

[100] *Saluka v. Czech Republic*, ¶¶ 309 and 460.

the state in relation to the policy" (*AES v. Hungary,* ¶ 10.3.7). As noted by the *AES* tribunal, a policy is rational when the state adopts it "following a logical (good sense) explanation and with the aim of addressing a public interest matter" (*Id.*, ¶ 10.3.8), and an action is reasonable when there is "an appropriate correlation between the state's public policy objective and the measure adopted to achieve it" (*Id.*, ¶ 10.3.9). In other words, for a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors.

526. That is not to say that any conduct that is "reasonable" under this definition will be "fair and equitable". As stated above, the determination of what is fair and equitable cannot be made in the abstract: it requires the assessment of all the factual and legal circumstances surrounding both the state's conduct and an investor's investments. There are conceivably cases in which reasonable action by a state in pursuit of a rational policy may nonetheless be unfair with respect to certain investors.

c. Regulatory stability and legitimate expectations

527. The Claimants argue that Romania's obligation to afford them fair and equitable treatment means that Romania must ensure a stable and predictable legal and business environment, and must protect the Claimants' legitimate expectations. In turn, the Respondent submits that "[t]he default position in international law is that a state is free to adopt, change, and repeal regulations as it sees fit – so long as its actions are reasonably related to a legitimate public interest and are not discriminatory" (R-Rejoinder, ¶ 9). However, the Respondent concedes that its regulatory sovereignty is limited by the legitimate expectations the state has validly created in investors, provided that these expectations arise from specific assurances entered into by the state, are reasonable, and were the predicate of the Claimants' investments (R-CM, ¶¶ 111-135; R-Rejoinder, ¶¶ 169-172, 191).

528. The tribunal in *LG&E v. Argentina* stated that "the stability of the legal and business framework in the state party is an essential element in the standard of what is fair and equitable treatment", and found that it "was an emerging standard of fair and equitable treatment in international law."[101] This Tribunal agrees as a general matter.

529. However, the fair and equitable treatment obligation is not an unqualified guarantee that regulations will never change. Investors must expect that the legislation will change from time to time, absent a stabilization clause or other specific assurances giving rise to a legitimate expectation of stabilization. The BIT's protection of the stability of the legal and business environment cannot be interpreted as the equivalent of a stabilization clause. In the Tribunal's view, the correct position is that the state may always change its legislation, being aware and thus taking into consideration that: (i) an investor's legitimate expectations must be protected; (ii) the state's conduct must be substantively proper (*e.g.*, not arbitrary or discriminatory);

[101] *LG&E v. Argentina*, ¶ 125.

and (iii) the state's conduct must be procedurally proper (*e.g.*, in compliance with due process and fair administration). If a change in legislation fails to meet these requirements, while the legislation may be validly amended as a matter of domestic law, the state may incur international liability.

d. Transparency / Consistency

530. Professors Dolzer and Schreuer submit that "[t]ransparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework." [102] They also state that by now the requirement of transparency is "firmly rooted in arbitral practice.[103]

531. This was also the view adopted by the tribunal in *Metalclad v. Mexico*, which stated as follows:

> The Tribunal understands [transparency] to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.[104]

532. The Tribunal is also mindful that, when defining fair and equitable treatment, the *Tecmed* tribunal stated that:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.[105]

533. The Tribunal agrees with the general thrust of these statements. However, as noted by the *Saluka* tribunal, such propositions must be considered in the proper context; "taken too literally, they would impose upon host States obligations which would be inappropriate and unrealistic."[106] Whether a state has been unfair and inequitable by failing to be transparent with respect to its laws and regulations, or being ambiguous

[102] Dolzer & Schreuer, pp. 133-134 (citing the UNCTAD Series on Issues in International Investment Agreements, Fair and Equitable Treatment (1991) p. 51).
[103] *Id*.
[104] *Metalclad v. Mexico*, ¶ 76.
[105] *Tecmed v. Mexico*, ¶ 154.
[106] *Saluka v. Czech Republic*, ¶ 304.

and inconsistent in their application, must be assessed in light of all of the factual circumstances surrounding such conduct. For example, it would be unrealistic to require Romania to be totally transparent with the general public in the context of diplomatic negotiations. The question before the Tribunal is thus not whether Romania has failed to make full disclosure of or grant full access to sensitive information; it is whether, in the event that Romania failed to do so, Romania acted unfairly and inequitably with respect to the Claimants. The same applies to consistency: the question is not merely whether Romania has acted inconsistently; it is whether, in acting inconsistently, it has been unfair and inequitable with respect to the Claimants. This is a question that cannot be answered in a vacuum; it is highly dependent on the factual circumstances.

534. Whether a state acted in an ambiguous or inconsistent manner is also assessed taking into consideration that state's past conduct which is part of the context. As stated by the *Tecmed* tribunal, "[t]he foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities […]."[107] It also found that "the Claimant was entitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly."[108] Consequently, the tribunal found that the investor's legitimate expectations were frustrated by the contradiction and uncertainty in Mexico's conduct, "which [were] prejudicial to the investor in terms of its advance assessment of the legal situation surrounding its investment and the planning of its business activity and its adjustment to preserve its rights." [109]

535. Following this reasoning, the Tribunal will thus now assess the Claimants' claims that Romania acted unfairly and inequitably.

3. Did Romania fail to provide a predictable and stable legal framework for the Claimants' investments? In particular, did it violate the Claimants' legitimate expectations of regulatory stability?

a. The Claimants' position

536. The Claimants contend that, by prematurely revoking the EGO 24 incentives, Romania failed to provide a predictable and stable legal framework for the Claimants to plan their investments. In particular, they argue that Romania violated their legitimate expectation that these incentives would be in place for the promised 10-year period (C-SoC, ¶¶ 211-228; C-Reply, ¶¶ 359-430; C-PHB, ¶¶ 36-50).

537. The Claimants address the stability and legitimate expectations "strands" of their fair and equitable treatment claim together in their Statement of Claim and Post-Hearing

[107] *Tecmed v. Mexico*, ¶ 154 (Emphasis added).
[108] *Id,* ¶ 167.
[109] *Id,* ¶¶ 172-173.

Brief, but treated the individual claims separately in their Reply. As discussed above, the Tribunal finds that the Claimants' arguments with respect to these two "strands" are closely interlinked, and will thus address them jointly. Indeed, as noted by the tribunal in *Duke v. Ecuador,* "[t]he stability of the legal and business environment is directly linked to the investor's justified expectations."[110]

i. The standard for determining whether there has been a breach of legitimate expectations

538. The Claimants argue that the threshold legal question is how a Tribunal should determine whether it was reasonable for an investor to rely on a particular expectation in a particular context. The Claimants rely on *Parkerings v. Lithuania* (at ¶ 331), where the Tribunal held that an investor's expectation is legitimate if:

a. The investor received an explicit promise or guarantee as to particular legal or regulatory provisions;

b. The investor received implicit promises or guarantees to that effect that it then took into account in making its investment; or

c. Absent such assurances or representations, the circumstances surrounding the investment were such as to give rise to a legitimate expectation.

539. Contrary to the Respondent's allegations, the Claimants contend that explicit assurances or specific representations from the host state are not required to generate legitimate expectations (C-PHB, ¶ 38). The Claimants' argue this was the position adopted by the tribunals in *Saluka v. Czech Republic*, *Occidental v. Ecuador*, *MTD v. Chile*, and *PSEG v. Turkey*).

540. According to the Claimants, in determining whether an expectation was legitimate, the Tribunal must also consider whether the Claimants conducted due diligence and whether the expectations were reasonable in light of the circumstances (*Parkerings,* ¶ 333). Furthermore, according to the Claimants, whether an expectation was legitimate must be examined at the time the investment was made (*EDF v. Romania,* ¶ 41).

541. The Claimants submit that an investor's expectation must be legitimate at the time when the promise or assurance was made, and when the investors relied on that promise or assurance (Tr., Day 1, 176:3-8 (Gaillard)).

542. In this case, the Claimants argue that Romania made a promise or assurance to them that gave rise to a legitimate expectation (Section (ii) below); the Claimants relied on that assurance (Section (iii) below), and the Claimants' expectation was reasonable (Section (iv) below). They also argue that Romania breached that legitimate expectation when it revoked the EGO 24 incentives (Section (v) below).

[110] *Duke Energy v. Ecuador*, ¶ 340.

ii. Romania made a promise or assurance to the Claimants that gave rise to a legitimate expectation

543. The Claimants submit that Romania made a promise or assurance to the Claimants (i.e., that the EGO 24 incentives would remain in place during the 10 year period that Ştei-Nucet was a disfavored region) that gave rise to a legitimate expectation (C-Reply, ¶¶ 411-423; C-PHB, ¶ 42). As explained in Section A above with respect to the umbrella clause, the Claimants argue that EGO 24 and its implementing legislation (in particular GD 194/1999) gave investors benefiting from that regime through the issuance of a PIC, a right to receive all of the incentives created by EGO 24 until 1 April 2009. Furthermore, the Claimants argue, Romania had a corresponding obligation to grant all of those incentives, substantially unchanged, during that time period. In the event that the Tribunal finds that the legislation did not give rise to an obligation *stricto sensu*, the Claimants argue that the legislation at least constituted a representation or promise that gave rise to a legitimate expectation that those incentives would remain in place until 1 April 2009.

544. The Claimants assert that their legitimate expectation arose "upon the granting to them of their PIC, or in the case of European Food possibly at the time of the granting of its temporary certificate" (Tr., Day 12, 91 (Reed)). In other words, it arose for European Food at the earliest on 9 December 1999, and for Starmill and Multipack on 17 May 2002.

545. According to the Claimants, the promise or assurance that gives rise to their legitimate expectation satisfies the *Parkerings* criteria.

546. First, as explained in Section A above, the Claimants contend that, through the enactment of EGO 24 and its implementing legislation, and through the issuance of investor-specific PICs, Romania explicitly committed to make the incentives available to the Claimants in the Ştei-Nucet disfavored region until 1 April 2009 (C-SoC, ¶ 300; C-Reply, ¶¶ 467-468; C-PHB, ¶¶ 6-24; Tr., Day 12, 70-91 (Reed), 163-164 (Gaillard)).[111] This assurance was made to investors generally through EGO 24 and its implementing legislation, and to the Claimants in particular by means of the issuance of investor-specific PICs to each of the Corporate Claimants that explicitly granted these particular Claimants the benefits of the EGO 24 incentives regime for a period of 10 years. The Claimants argue that this assurance from the Respondent was evident from the language of the relevant regulations and the PICs, and was reinforced by Romania's conduct. The Claimants stress that these PICs constitute a specific assurance that gives rise to a legitimate expectation, regardless of whether the Tribunal finds that Romania did or did not enter into an obligation with the Corporate Claimants.

547. Second, even absent the express language in EGO 24 and the investor-specific commitments made in the PICs, the Claimants submit that Romania implicitly committed to maintain the incentives for ten years. By offering, reaffirming and

[111] This argument is also the core of the Claimants' umbrella clause claim.

maintaining for their designated durations various incentives to invest in disadvantaged regions during the 1990s, Romania demonstrated the reasonableness of relying on the stability of the EGO 24 incentives and the rights embodied in the PICs. In addition, the fact that Romania offered the Raw Materials Incentive in 1998 – three years after it subjected itself to EU state aid requirements – reflected Romania's own belief that the incentive was permissible under those requirements and its intent to maintain the incentives regime despite the ongoing EU accession negotiations. Moreover, when the Romanian Competition Council issued its findings in 2000 questioning the legality of the Raw Materials Incentive, the Government disagreed with and opposed those findings, which were ultimately dismissed by Romanian courts.

548. Third, the Claimants submit that the circumstances surrounding their investments demonstrate Romania's commitment to maintain the incentives for ten years. The Claimants argue that "this is not a case of an investor taking advantage of a legal regime that just happened to be in place at the time of investment, and then complaining when the host state legislated a new regime. Rather, the regime was specifically designed to attract investors like Claimants, so that they would spend money and create jobs in Romania's disadvantaged regions" (C-Reply, ¶ 421).

549. As a result, the Claimants submit that this interpretation is the only one that makes sense from a teleological standpoint. According to the Claimants, if the incentives could have been revoked at any time, they would have been ineffective in incentivizing investment, because investors would have lacked the certainty that they would have needed to commit funds.

550. The Claimants argue that Romania was successful in attracting investors, but revoked the incentives before the Claimants could achieve the benefits that had been used to attract them. In this context, Romania violated the Claimants' legitimate expectation of basic regulatory stability with respect to the incentives regime.

iii. The Claimants relied upon that promise or assurance

551. The Claimants argue that they relied upon Romania's promise or assurance when deciding to invest on the scale and at the speed they did in the Ştei-Nucet disfavored region. In particular, they allege that they had a ten-year plan for European Food to capitalize on the EGO 24 benefits. Although the Claimants acknowledge that Messrs. Micula's initial investments in Bihor County were made in reliance on previous incentive regimes (specifically, Law 35 and GD 27) (C-Reply, ¶¶ 62-124), they claim that they would not have invested in the manner, scale and speed that they did if they had not reasonably relied on the expectation that the EGO 24 incentives regime would remain in place for the full 10-year period (C-Reply, ¶¶ 161-170; C-PHB, ¶ 43; Third WS of I. Micula, ¶¶ 44-64; WS of M. Ban, ¶ 38).

552. The Claimants allege that their investments in Bihor County only made economic sense if they could count on the benefits of the Raw Materials' Incentive for the 10-year period. Absent that incentive, the Claimants would not have invested in the way

they did, and Romania would not have achieved the socioeconomic benefits in its disadvantaged regions that it sought (C-Reply, ¶ 422).

553. The Claimants contend that Romania is incorrect and misleading when it states that EGO 24 was neither the predicate for the Miculas' initial investment decision, nor the cause of any apparent change in their investment strategy (C-Reply, ¶¶ 62-68). The Miculas allege that they did not invest in Bihor County because of legislative "fluctuations" happening at the time (implying instability); rather, they relied on legislative changes that promoted investment. Prior to the implementation of EGO 24, the Miculas relied on two predecessor state aid regimes, Law 35 and GO 27, which illustrates the reasonableness of the Claimants' reliance on other incentive programs such as EGO 24. In any event, the Miculas did not create the fully integrated and complex facilities that include today's food production business until after 1998, in reliance on EGO 24.[112]

554. The Claimants argue that their reliance on the EGO 24 incentives is proven by the following facts (C-Reply, ¶¶ 165-170, 197-204; C-PHB, ¶ 43):

a. *The Claimants' decision to invest in Ştei-Nucet instead of Bucharest.* In 1997, the Miculas had planned to relocate from Bihor county to Bucharest, which would have meant considerable cost savings (given its location within Romania's largest market and proximity to the port of Constanţa). They had already purchased two companies and land in Bucharest in 1997 and had entered into a contract for bottling lines to be installed in Bucharest in January 1998. However, after learning of the EGO 24 incentives, the Miculas changed their mind and remained in Bihor County. On the understanding that the incentives would last for the full 10 years, they determined that the incentives outweighed the costs of investing in such a remote region (Third WS of I. Micula, ¶¶ 31-36; Third WS of V. Micula, ¶¶ 28-29; Tr., Day 2:211, Day 3:133,141,145-150, Day 4:72-73 (I. Micula); WS of M. Ban, ¶ 38; Exh. C-439; C-346; C-679; C-676-678).

b. *The Corporate Claimants were created specifically to benefit from the incentives*. The Articles of Incorporation of European Food state that the company was created "in accordance with the provisions of Law 20/15.01.1999 regarding the approval of EGO 24/1998…" (Exh. HEC-1). The Miculas used European Food to import the majority of the raw materials used by the business to take advantage of customs duties exemptions. Starmill was incorporated to establish integrated in-house grain milling facilities, which would also take advantage of the Raw Materials Incentive and create cost efficiencies. Multipack was incorporated to establish the packaging and labeling for nearly all of the companies' products, and also relied heavily on the Raw Materials Incentive. (Third WS of I. Micula, ¶¶ 47, 55, 59-67; WS of M. Halbac, ¶¶ 17-19; Exh. C-385).

[112] The Claimants note that Romania's timeline of the Claimants' investments in Romania (R-CM, Figure 1, page 7) shows the dates in which the relevant companies were incorporated, rather than the dates in which Messrs. Micula acquired the shares in the preexisting companies created by others. The Claimants include a "correct timeline" at C-Reply, page 25.

c. *The scale of the investments, the integration of the Claimants' business model and the Claimants' expansion into new markets such as food and beer, only made economic sense if the incentives were to last for the full 10-year period.* The Claimants allege that their business strategy depended on taking advantage of the incentives to achieve long-term profitability through the vertical integration of their facilities and the construction of cost-saving and revenue-generating capital projects. This would allow them to achieve economies of scale and reduce costs, which would allow them to maintain successful businesses after the expiration of the incentives. However, for this strategy to be successful, they needed sufficient time (and the cash savings provided by the incentives) to integrate their existing operations and construct these additional capital projects, as well as time to penetrate domestic and foreign markets. As explained in Section III.C.2 above, this business strategy contemplated two phases, each of which depended on the availability of the Raw Materials Incentive. The first phase consisted in penetrating the Romanian market with fast-moving consumer products. This would generate quick cash flows, which together with the incentive savings, would allow the companies to integrate vertically and achieve economies of scale, allowing them to save on operational costs and minimize waste and energy consumption. The second phase was to build a brewery and the so-called "Incremental Investments" (malt plant, canning plant and co-generation plant). The Claimants thus planned to use the EGO 24 incentives to expand their production facilities so that they would no longer be dependent on the incentives after their expiration on 2009 (Third WS of I. Micula, ¶¶ 44-46; ¶¶ 59--64, 83-84; Third WS of V. Micula, ¶ 33, 51-52).

d. *The fact that the obligations were to last for twice the period that the investors benefitted from the incentives*. As the obligations imposed by EGO 24 would last for twice the period that the Claimants benefitted from the incentives, the Claimants argue that they had to invest up-front so as to take advantage of the incentives to develop an integrated business that would be competitive and successful in the long term (Third WS of I. Micula, ¶¶ 59-64; Third WS of V. Micula, ¶¶ 33, 51-52).

e. *The availability of funding.* Due to the higher debt/equity ratio that would have existed but for the incentives, the Claimants argue that, without the promise that the incentives would last 10 years, it is unlikely that sufficient funding would have been available for the Claimants to invest the way they did (Second ER of C. Osborne, ¶¶ 7.18-7.21).

555. The Claimants argue that the lack of written business plans reflecting their reliance on Romania's assurances is irrelevant. They contend that family businesses such as the Miculas' do not generally prepare all the types of written documents that the Respondent claims should exist. Instead, the Tribunal must consider the actual evidence before it, which shows that the Miculas carefully considered the impact of the incentives, how they could take advantage of those incentives, and how the incentives could be weighed against the disadvantages of investing in a disfavored

region that lacked basic infrastructure and skilled workers, which ultimately led to their decision to invest (C-PHB, ¶¶ 44-45).

556. The Claimants contend that it is likewise irrelevant that the Claimants may have adapted their plans over time to respond to changes in the market; what matters is that the Miculas made specific investment decisions in reliance on the expectation that the incentives would remain in place for 10 years (C-PHB, ¶¶ 46).

iv. The Claimants' reliance was reasonable

557. The Claimants' argue that their reliance on the expectation that the EGO 24 incentives would last for the entire 10-year period was reasonable. According to the Claimants, the reasonableness of this expectation is proven by (a) the content of EGO 24 and of its enacting legislation; (b) the content of the PICs; (c) Romania's intimate involvement in the granting and monitoring of the EGO 24 incentives program; (d) Romania's promotion and support of the EGO 24 regime and previous incentive regimes, and (e) Romania's interaction with the Competition Council. In addition, the Claimants argue that, contrary to Romania's contentions, the Claimants' reliance was reasonable in light of Romania's impending accession to the EU.

(a) The purpose and content of EGO 24 and its enacting legislation

558. The Claimants submit that the very purpose and content of EGO 24 – and of its enacting legislation – gave rise to a legitimate expectation that the facilities would remain in place until 31 March 2009 (C-Reply, ¶¶ 211-221).

559. First, the Claimants argue that the language of EGO 24 and its implementing legislation were clear, and it was legitimate for the Claimants to rely on that language. In particular, Article 3 of GD 194/1999 declared Ştei-Nucet a disfavored region for a period of 10 years, while Article 4 stated that the incentives were available to investors during the existence of that disfavored region. GD 1199/2000, which amended GD 194/1999, increased the size of the disfavored region to include Drăgăneşti, confirmed that the region would be declared disfavored for 10 years, and did not amend Article 4 of GD 194/1999. GD 728/2001, which established the Methodological Norms for EGO 24, also stated that investors who had obtained a PIC would continue to benefit from the incentives until the lapse of the period during which the region was declared disfavored (Art. 5(3) of GD 728). Law 20, which enacted EGO 24, allowed this period to be extended (Art. I(5) of Law 20). In the light of these provisions, it was reasonable for the Claimants to believe that the incentives would be granted for the full 10 year period.

560. The Claimants further argue that EGO 24 was designed to induce long-term investments. To this end, Article 9 of EGO 24 required investors to continue to operate in the disfavored regions for twice the period for which they received the incentives, or they would have to repay the amounts they had received and/or saved. This meant that the Claimants had to ensure that their investments lasted for twenty years. Thus, the reciprocal nature of the obligations demonstrated the existence of a

quid pro quo between the investors and the state and instilled in the Claimants the reasonable expectation that both parties would comply with their obligations.

561. In addition, because the benefits applied only to new investments, any investor wishing to take advantage of them would either need to make a greenfield investment or reform an outdated facility. The Claimants also had to build their own utility support, which was nonexistent in the region. All of this necessitated significant commitments of capital which only made economic sense if the promised benefits were to last their full, 10-year term.

562. The Claimants further argue that the amendments made to the EGO 24 regime in the following years were made for a variety of reasons and did not give rise to an expectation that the regime would come to an end in early 2005 (C-Reply, ¶¶ 230-238). For example, EGO 75/2000 solved certain practical problems in the application of the incentives and even made some of them more readily available to investors. Although EGO 75/2000 repealed the "Components Facility", Law 625/2001 reinstated it. GD 1199/2000 extended the disfavored region to include Drăgăneşti. Law 345/2002 repealed the exemption from customs duties and VAT provided in Art. 6(1) of EGO 24, but did so in the context of a general taxation reform, not for the purpose of regulating state aid. Law 414/2002 repealed the profit tax exemption, but that exemption remained in place for investors (such as the Claimants) who had received PICs prior to 1 July 2002. Although another set of amendments passed in 2002 targeted the Raw Materials Incentive, it was clear from parliamentary debates and other contemporaneous sources that their purpose was to address problems in the meat industry, not the harmonization of Romania's law with EU law.

(b) The issuance and content of the PICs

563. The Claimants argue that the issuance and content of the PICs further enhanced their legitimate expectations that the facilities would remain in place for the entire period (C-Reply, ¶¶ 239-245). All of the Corporate Claimants' PICs expressly stated that they would be valid until 1 April 2009. The granting of the PICs and the fact that the Government allowed the Claimants to use them repeatedly to receive the benefits confirmed this belief. Further, the PICs confirmed all of the activities for which the Claimants could receive incentives (C-Reply, ¶¶ 156, 159).[113] Thus, the PICs explicitly and implicitly confirmed that the Claimants were entitled to benefit from the incentives until 1 April 2009.

564. According to the Claimants, Romania's attempts to minimize the importance of investor-specific PICs based on the language granting the incentives "in accordance with the provisions of EGO 24/1998" are unconvincing. That language merely reflects that EGO 24 had been amended prior to the date the PIC was granted. In any event, Multipack's PIC does not contain that language. Further, the PICs do not contain any language contemplating potential revocation of the incentives.

[113] The reference seems to be to Exh. C-638, which contains various versions of the PICs and a list of investment activities, but it is unclear to the Tribunal if this list was attached to the original PICs.

(c) Romania's intimate involvement in the granting of the EGO 24 incentives

565. The Claimants further submit that the reasonableness of their expectations was reinforced by the state's intimate involvement in the EGO 24 regime and close monitoring of the Claimants' receipt of the EGO 24 benefits (C-Reply, ¶¶ 171-196; 260-272).

566. In this regard, the Claimants allege that they underwent lengthy and detailed approval processes with different government agencies, which kept the Government fully apprised of the Claimants' investment plans and actual investments. Specifically, to obtain their Temporary Investment Certificates they needed to file and secure approval of their investment plan with the NW-RDA (e.g., European Food's investment plan of December 1999 is found at Exh. C-385). Each time they planned a new investment, they had to file updated versions of the investment plans for approval and obtain new, modified PICs that reflected the newly-approved investments. Similarly, to obtain their PICs, the Claimants had to undergo another approval process, including an on-site visit from the NW-RDA to verify that the companies qualified for EGO 24 benefits. In addition, to actually benefit from the incentives, the Corporate Claimants had to obtain approval from different regulatory bodies to verify that they met their EGO 24 requirements. Indeed, each time European Food wanted to import equipment or raw materials it had to submit very specific information regarding the machinery or raw materials it wished to import, as well as the investment purpose.

567. In addition to monitoring and regulating Claimants' activities via the PICs, the NW-RDA and the Oradea Customs Department closely supervised and controlled the Claimants' activities on a day-to-day basis via the continuous approvals processes in relation to the importation of equipment and raw materials. The Claimants' investments were also reviewed outside the approvals process, *e.g.*, through audits, biannual reviews, information obligations, and other monitoring activities.

568. The Claimants thus argue that, through the key role the Romanian authorities played at all levels of the EGO 24 incentives regime, these authorities provided explicit as well as implicit assurances to Claimants that the EGO 24 incentives would be available for their full term. These approval processes allowed the Government to track the amount and type of incentives the Claimants received under the EGO 24 program and ensured that the Claimants received incentives only for those business purposes for which they had obtained approval under their Temporary or Permanent Investor Certificates. Each approval by the Government agencies solidified the Claimants' expectation that the Government had every intention of complying with its obligations under EGO 24, which in turn encouraged the Claimants to continue with their investments.

(d) Romania's promotion and support of the EGO 24 regime and previous incentive regimes

569. The Claimants argue that the legitimacy of their expectations and the reasonableness of their reliance was further enhanced by Romania's contemporaneous statements and conduct with respect to the EGO 24 regime and previous incentive regimes.

570. The Claimants first allege that the Government actively promoted the EGO 24 incentives regime in order to induce investments in disfavored areas, and gave assurances as to its 10 year duration (C-Reply, ¶¶ 222-229). The Claimants cite, *inter alia*:

a. Presentations by Mr. Neculai Liviu Marcu, then President of the NARD, in which he explained the EGO 24 regime and its benefits for investors. In his witness statement submitted in this arbitration, Mr. Marcu states that "[o]n all of the occasions where I presented in disfavoured regions that had been declared as such for a 10 year period I explained that the benefits of the regime would last for the full 10 years" (WS of N. Marcu, ¶ 32);

b. Meetings with potential investors run by the NW-RDA and local government representatives (WS of M. Ban, ¶¶ 32-37);

c. The NW-RDA's annual reports (Exh. C-393, C-458);

d. The preparation of a CD-ROM for international promotion ("Romania – Your Business Partner 1999/2000" (Exh. C-563)).

e. Media reports of government initiatives (Exh. C-568 and C-630). In particular, the Claimants allege that the Government's June 2003 press release[114] noted the success of the EGO 24 program and, according to the Claimants, assured that the EGO 24 incentives would continue to be in place at least until Romania joined the EU (Exh. C-489).

f. Romania's National Program for Joining the EU, where the Claimants allege that the Government stated that the laws in force at the time would continue to be in place.[115]

571. Further, the Claimants contend that the success of the EGO 24 program – and Romania's public acknowledgement of this fact – reinforced the Claimants' legitimate expectation that the regime would remain in place for the stated term (C-Reply, ¶¶ 273-278). The EGO 24 program was enacted as part of Romania's attempts to address significant economic problems related to regional development and to further Romania's accession aspirations. The Claimants allege that the program was extremely successful in attracting investors to areas in need of capital, and this

[114] The Claimants refer to June 2002, but the date on Exh. C-489 is 18 June 2003.

[115] The Claimants mistakenly cite Exh. C-489. The correct reference appears to be Exh. HEC-7, which states at page 147 that "[t]he provisions of the normative acts on facilities granted for "D areas" will be maintained till the moment of Romania's accession to the European Union."

success was recognized and hailed by the Government. Romania continued to reaffirm the need for investment and reduction of unemployment in the disfavored regions, and continued to issue PICs and promote the EGO 24 scheme. In this context, it was reasonable for the Claimants to believe that Romania would remain committed to the EGO 24 program.

572. The Claimants also argue that it was reasonable for them to rely on the EGO 24 incentive program and its stated duration because Romania had previously offered and maintained other incentive regimes similar to the EGO 24 regime, including Law 35 and GO 27 (both of which had been implemented in the context of the Europe Agreement and were never challenged by the European Commission or the Government). The Government never revoked the incentives granted under these programs, and when Law 35 ended the incentives were "grandfathered" so that existing investors were able to benefit from them until their original expiration date. The Claimants thus argue that Romania's consistent pattern of conduct and the Miculas' successful experience with these previous incentive programs created a course of dealing between Romania and the Claimants that made it reasonable for the Claimants to expect that Romania would maintain the EGO 24 incentive program for its full stated term or at least grandfather its benefits.

573. In addition, the Claimants contend that, under Romanian law, the government was not allowed to revoke the incentives without grandfathering the provisions or compensating the investors. Relying on the testimony of Prof. Mihai, the Claimants argue that new legislation cannot affect acquired rights (Tr., Day 5:207-208, 210, 247 (Mihai)).

574. Finally, the Claimants contend that Romania never suggested to investors that reliance on the EGO 24 regime was inappropriate (C-Reply, ¶¶ 279-280). Romania argues that the Claimants should have somehow known that the EGO 24 regime would come to a premature end. However, until its revocation, the Claimants aver that the Government never suggested to, let alone informed, investors that the regime would not remain in place for the full ten-year period (Tr., Day 9, 21-23 (Juratowitch/Ban)). Instead, the Government continued to promote, apply and support the EGO 24 regime. When Romania finally started to indicate that the incentives could be terminated, Romania did not clearly state the timing and effects of that termination. In fact, Romania suggested that investors that relied on that regime would be protected or compensated.

(e) Romania's interaction with the Competition Council

575. The Claimants further argue that their expectation that the EGO 24 incentives would remain in place for the entire 10 year period was solidified by Romania's reaction to Decision 244 of the Competition Council (C-Reply, ¶¶ 246-259). In Decision 244 of 15 May 2000 (Exh. R-78), the Competition Council recommended alterations to EGO 24 (including the Raw Materials Incentive and the Machinery Incentive) after finding that the incentives distorted competition. However, the Government ignored Decision 244 and instead adopted EGO 75/2000, which did not implement the

recommendations of Decision 244. The Claimants argue that this suggests that the Government disagreed with Decision 244. Indeed, the Claimants submit that Romania's comments to the Commission's Written Submission in this arbitration suggest that Romania still considered the EGO 24 incentives to be compatible with state aid at that time (C-Reply, ¶ 60, citing Romania's letter of 16 November 2009).

576. The Claimants argue that the Government was right to disagree with Decision 244 for a number of reasons, in particular because it was flawed and was not based on EU competition law considerations. As explained by Prof. Dashwood, its findings were not supported by evidence and were not based on facts relating to the Claimants or their business. The Decision made no reference to the EU or the requirement for Romania to harmonize its laws with those of the EU, nor did it state that EGO 24 was incompatible with EU law. Decision 244 was also silent on whether EGO 24 fell under Article 87(3) of the EU Treaty, which exempts certain forms of state aid, especially aid designed to alleviate under-developed regions, from a general prohibition of aid that distorts competition (ER of A. Dashwood).

577. This disagreement generated a public debate between the Government and the Competition Council, which later led to a lawsuit brought by the Competition Council against the Government. The Government prevailed both in the first instance before the Bucharest Court of Appeal and on appeal before the High Court of Cassation and Justice (Exh. C-528 and C-643; ER of L. Mihai). In both instances the courts held that the Competition Council did not have the authority to challenge emergency government ordinances such as EGO 24, which are legislative acts.

578. According to the Claimants, the Romanian courts' decisions highlighted the Competition Council's lack of authority regarding EGO 24. The Claimants argue that under Law 143/1999 (Exh. R-18) the Competition Council was not authorized to scrutinize all state aid or order government agencies to stop granting aid. With respect to existing state aid (such as the EGO 24 incentives), the Competition Council was only authorized to request the aid provider to remove the incompatibility of the measures with the law, including through a recommendation for cancellation or amendment. But as shown by the Court decisions, the Government was not required to comply, and the Competition Council had no ability to challenge the legislation in court. Indeed, the Government did not comply with the Council's recommendation. This strengthened the Claimants' reasonable belief that the Government was committed to the EGO 24 program. This belief was confirmed by the fact that European Food was granted its PIC on 1 June 2000, only a few weeks after Decision 244 was rendered, and Starmill and Multipack were granted their PICs soon after the Supreme Court Decision was granted.

579. The Claimants further submit that the Government's support of the EGO 24 regime in the face of the opposition of the Competition Council was a strong indicator that the Government considered the EGO 24 regime to be lawful, and made the Claimants' reliance on that regime all the more reasonable. They argue that investors are entitled to assume that the government is acting lawfully, and if the government was acting as if EGO 24 was lawful, the Claimants were entitled to rely on that.

580. In addition, the Claimants conducted sufficient due diligence prior to investing. According to the Claimants, investors cannot be required to conduct a higher standard of due diligence than the government itself: it would be unreasonable to require the investors to know whether Romania would accede to the EU and what effect that would have on EGO 24, if Romania itself did not know that.

(f) The Claimants' expectations were reasonable in light of Romania's impending accession to the EU

581. As discussed in Section V.B on Applicable Law, in the Claimants' view EU law plays a different role with respect to the analysis of the Claimants' fair and equitable treatment claim than with respect to its expropriation and umbrella clause claims. With respect to these latter two claims, the Claimants argue that Romania's EU law defense can only be analyzed as a circumstance precluding wrongfulness, and thus should be assessed after the Tribunal has decided whether there is liability under the BIT. In contrast, the Claimants submit that with respect to the fair and equitable treatment claim, Romania's EU law defense is relevant to the determination of the wrongfulness itself; in other words, it is relevant to determining whether Romania has breached the fair and equitable treatment standard. Thus, Romania's EU law defense must be assessed during the Tribunal's analysis of whether the fair and equitable treatment standard has been breached (Tr., Day 1, 159-164, 170-174 (Gaillard)).

582. Specifically, the Claimants argue that EU law is part of the factual matrix against which the Tribunal must determine whether the Claimants' expectations were legitimate and, specifically, whether they were reasonable (Tr., Day 1, 176-177 (Gaillard)). The Claimants deny that, as argued by the Respondent, Romania's impending accession to the EU made their reliance unreasonable. To the contrary, the Claimants contend that their expectation that the Raw Materials Incentive would be afforded to them for 10 years was reasonable despite Romania's accession process. The Claimants stress that this analysis must consider the state of EU law and Romania's relationship with the EU at the time that the expectation arose and at the time the Claimants made their investments in reliance on this expectation (Tr., Day 1, 167 (Gaillard)).

583. <u>First</u>, the Claimants argue that, from a substantive standpoint, the incentives were compatible with EU law. At the very least, it would have been reasonable (from the time in which EGO 24 was enacted and until the incentives were revoked) for an investor to believe that the incentives were compatible with EU law. With the support of their expert in EU law, Prof. Dashwood, the Claimants assert that the incentives could have fallen within the scope of a valid exception to the EC Treaty's prohibition on state aid as provided in Article 87(3)(a) of the EC Treaty (formerly Article 92 of the Treaty establishing the European Economic Community, and incorporated into the Europe Agreement regime by Article 64 of the Europe Agreement), and could have validly constituted regional operating aid under the EU Guidelines on Regional Aid (ER of A. Dashwood, ¶¶ 43-55).

584. The "Implementing Rules" for the application of Article 64 of the Europe Agreement were adopted on 10 April 2001 through Decision 4/2000 of the EU-Romania Association Council (Exh. R-65; C-579).[116] Article 2(1) of the Implementing Rules provided that "[t]he assessment of compatibility of individual aid awards and programmes with the Europe Agreement, as provided for in Article 1 of these Rules, shall be made on the basis of the criteria arising from the application of the rules of Article 87 of the Treaty establishing the European Community [...]."

585. According to Prof. Dashwood, "the criteria applicable in respect of regional aid granted by the Romanian authorities under the regime of the [Europe Agreement] were those of the 1998 Guidelines [on Regional Aid] relating to areas covered by the Article 83(3)(a) derogation" (ER of A. Dashwood, ¶ 22). Prof. Dashwood explained that the Guidelines on Regional Aid distinguished between various types of state aid, and described the circumstances under which certain state aid could be granted. These circumstances included cases where the economic situation was extremely unfavorable in relation to the European Community as a whole, and the Guidelines specified the types of aid that could be granted as tax exemptions. In addition, although Prof. Dashwood acknowledges that while "operating aid aimed at reducing a firm's current expenditure is normally prohibited, the Guidelines recognise that, exceptionally, such aid may be granted in regions eligible under the derogation in Article 87(3)(a), subject to certain conditions" (ER of A. Dashwood, ¶ 11). Relying on Prof. Dashwood's expert opinion, the Claimants argue that EGO 24 incentives met all of the criteria for state aid permitted by Art. 87(3)(a). Accordingly, the Claimants argue that the EGO 24 incentives could have qualified under the Art. 87(3)(a) exemption.

586. Indeed, the Claimants argue that Romania itself appears to have believed that, at the time EGO 24 was enacted, the incentives were compatible with EU state aid requirements, noting that Romania itself has acknowledged this point in its submissions in this arbitration (*see* R-CM, ¶ 29; Respondent's Comments to the Commission's Written Submission, 16 Nov. 2009, ¶ 1(b)). Thus, the Claimants argue that any reasonable investor would have relied on Romania's own position that EGO 24 was compatible with EU law, and would have had no reason to expect the incentives to be prematurely revoked.

587. The Claimants reject Romania's suggestion that the Implementing Rules effective 2001 (Exh. R-65; C-579) explain why it viewed the incentives compatible with EU law in 1998, but incompatible in 2004 (R-CM, ¶ 20). According to the Claimants, there is nothing in the Implementing Rules to suggest this. Instead, the Implementing Rules clarified that "the procedural rules to ensure effective application of the criteria

[116] Article 4(1) of the Implementing Rules also extended the time period in which Romania would be considered an underdeveloped area pursuant to Article 64(4)(a) of the Europe Agreement:

> In accordance with and within the limits of Article 64(4)(a) of the Europe Agreement, Romania shall be regarded as an area identical to those areas of the Community referred to in Article 87(3)(a) of the Treaty establishing the European Community. (Article 4(1) of Decision 4/2000).

governing the compatibility of aid granted in Romania with the proper functioning of the [Europe] Agreement were left to be determined exclusively as a matter of Romanian law." (ER of A. Dashwood, ¶ 25). Given that Romania had entered into the Europe Agreement in 1993, it was well aware by 1998 which kinds of state aid it could provide. It is thus inappropriate for Romania to rely on the issuance of the 2001 Implementing Rules to try to argue that in 1998 there was little specific guidance as to whether particular incentive regimes would be permissible under EC state aid rules.

588. According to the Claimants, nothing after the issuance of EGO 24 affects this conclusion. The EC never requested that Romania repeal the EGO 24 incentives, and there was never a determination (by the EC) that the incentives did not qualify for an exemption of Art. 87(3)(a). The only body that examined whether the incentives in EGO 24 were compatible with EU law was the Romanian Competition Council through Decision 244 in 2001. In any event, the Competition Council's complaint against the Government for failure to apply Decision 244 was dismissed by Romanian courts.

589. Indeed, the Claimants contend that, as late as 2003, the EU was giving signals that it would accept existing aid schemes and would only require that the rules be changed for new entrants. In its Common Position of May 2003, the EU invited Romania to:

> […] provide information on individual benefits granted in the free zones and the disadvantaged areas and on any other individual tax benefits that have already been granted and which provide for tax benefits beyond Romania's target date for accession. The EU urges Romania to close incompatible aid schemes for new entrants with immediate effect. (EU Common Position, May 2003, Exh. EC-8, p. 5).

590. According to the Claimants, this document shows that, even at that late point in time, the EU was only requiring Romania to change the rules for new entrants, but it had no problem with grandfathering vested rights of existing investors (Tr., Day 1, 180:13-25 (Gaillard)).

> So even at that late point in time, the EU is saying: hey, change the rules for the new entrants. Frankly, I take issue with what I call the Commission's brief in this matter, because they fail to quote that. They quote the rest of the document but they forget conveniently this reference to the new entrants. So it was pretty clear, even at that late point in time, that the EU had no problem with granting -- grandfathering vested rights to existing entrants, existing investors, and that they would maybe insist that the rules are changed going forwards for the new entrants, as they should, because, frankly, the rule of law should mean something, even in Europe. (Tr., Day 1, 180:13-25 (Gaillard))

591. <u>Second</u>, the Claimants contend that, from a procedural standpoint, only Romania (and not the European Commission) had the competence to determine which forms of state aid qualified as permissible state aid. This is because during the relevant time Romania was a pre-accession regime, where the only applicable law was Romanian law. As opposed to a post-accession regime, where there is a duality of functions between the State's legal order and the European Commission, in pre-accession

Romania the European Commission and EU law played no role (Tr., Day 1, 178-179 (Gaillard); ER of A. Dashwood, ¶ 25).

592. Specifically, Prof. Dashwood states that the Europe Agreement said nothing about the procedural aspects of disciplining state aid. The Implementing Rules merely established rules for cooperation, consultation and problem solving between the European Commission and the Romanian monitoring authority (which was the Romanian Competition Office and Competition Council). Thus, Prof. Dashwood concludes that "[w]hat emerges clearly is that in the State aid regime of the [Europe Agreement] the procedural rules to ensure effective application of the criteria governing the compatibility of aid granted in Romania with the proper functioning of the Agreement were to be left to be determined exclusively as a matter of Romanian law" (ER of A. Dashwood, ¶ 25).

593. Prof. Dashwood further asserts that the substantive rules regarding State aid (in particular, Article 87 of the EC Treaty) cannot apply independently of the procedural rules in Articles 88 and 89 of the EC Treaty: "There has to be a concrete finding, by way of an individual Commission decision or legislation, that a particular aid, or aid of a certain type, is or is not compatible with the common market. It follows that the granting of the disputed aid could only be rendered unlawful under the [Europe Agreement] regime by a ruling compliant with the procedural requirements of that regime, finding that the aid satisfied all four of the criteria in Article 87 (1) [of the EC Treaty], while not qualifying as an exemption under Article 87(3)(a)" (ER of A. Dashwood, ¶¶ 32-33).]

594. Fourth, the Claimants contend that Romania contradicts itself when it asserts that the Miculas should have known that the incentives would disappear with Romania's accession to the EU. Indeed, Romania's acknowledged that it enacted the incentives legislation in order to advance its accession prospects. According to the Claimants, Romania admits (at R-CM, ¶ 29[117]) that EGO 24 was not incompatible with the Europe Agreement's provisions and Romania's accession obligations, and was, in fact, necessary for accession (C-Reply, ¶ 210).

595. The Claimants argue that there is a similar "element of schizophrenia" in the Commission's position. On the one hand, the EU urged Romania to take the measures necessary to improve Romania's economic and legal status, including negotiating BITs, so that it would be in a position to join the EU. Romania's economic situation at the conclusion of the Europe Agreement was so dire that the EU expressly stated that the whole of Romania should be considered an underdeveloped area for purposes of State aid (Art. 64(4)(a) of the Europe Agreement). Accordingly,

[117] "Especially given Romania's status as an 'underdeveloped area' within the meaning of Article 87(3)(a) of the EC Treaty, the government could reasonably conclude at the time that the EGO 24/1998 regime was not incompatible with the Europe Agreement's provisions. Furthermore, given the economic dislocation that existed at the time, measures to ameliorate conditions in the disfavoured regions were necessary. Romania was not alone among EU candidate States in making the policy choice to implement new economic-assistance measures based upon such an assessment of the legal position. For example, Poland passed similar legislation authorizing State aid for underdeveloped regions in 1994, while it was a candidate for EU admission" (R-CM, ¶ 29).

to "establish and improve a legal framework which favours and protects investment" and with the higher aim of achieving EU accession, the EU promoted the conclusion of bilateral investment treaties between Romania and EU member states (Art. 74(2) of the Europe Agreement), including the BIT that is the basis of the Tribunal's jurisdiction. However, under the EC's argument, once Romania had achieved the necessary economic development for accession, and once the Claimants had made their investments under the BIT, Romania then had to renege on its BIT obligations because revocation of the incentives was allegedly needed to obtain EU accession. As stated by the Claimants:

> Now, the last thing I will say about the European attitude is that if you were to believe them at face value and take at face value what they say regarding the alleged EU requirements which would oblige countries to renege on their commitments when they join the EU, even if you were to take that at face value, and I don't think you should because, frankly, it's an argument for the purposes of litigation, it's nothing which remotely resembles the true goals of the EU, and that's fortunate -- but even if you were to take that at face value, you would notice a certain element of schizophrenia in the EU position.
>
> Because, and this is the last thing I would like you to look at in my table, back on page 1 and page 2, and you will see that an element of the Europe agreement of February, which came into force in February 1995; an element is what? Look at page 2 of my chart, Article 74(2). You see that in plain words the EU is promoting what? Promoting the conclusion of bilateral investment treaties.
>
> They say, in plain words, the particular aims of the cooperation will be: "... for Romania ..." That's entered into with Romania, it's specific to Romania: "... for Romania to establish and improve a legal framework which favours and protects investment, the conclusion by the Member States and Romania of agreements for the promotion and protection of investment."
>
> So the very BIT which is the basis of your jurisdiction has been blessed, promoted by Europe itself. They told Romania: you are a very disfavoured region; the whole of Romania would qualify in terms of state aids for an exemption, the whole thing, because you are so way behind because of the history you suffered, you are so behind that you qualify all together. Please enter into BITs because that will help you catch up.
>
> Now, that is exactly what Romania has done. They entered into the BIT, which does protect the investment. So I am saying that if you were to give any credence to the current litigation argument of the Commission, which is: well, they shouldn't be liable because they had to give up all this after the fact; that would be in direct contradiction with what the EU at the time was requesting Romania to do. ***So if you were to follow that type of argument, I would say -- frankly, it's an argument which is pretty shocking because it means: well, thank you for having invested, thank you for having helped Romania to catch up and to be able to join in the first place the EU, but now that it has joined, we don't need you any more, so we can dump you, and the state should renege and should renege without compensation on its promises. There is no problem whatsoever.***
>
> (Tr., Day 1, 181:1-183:6 (Gaillard)) (Emphasis added)

596. The Claimants argue that the Commission's position is wrong on four counts:

> It's wrong from a timing standpoint, because EU law has nothing to say before the accession; all these representations on the right side of the paper are compatible with our case.
>
> It's wrong from an EC law standpoint, because EC law is not that bad.
>
> It's wrong from a policy standpoint, because if that were true, no one could ever carry [sic] any policy, because if you were to listen to the EU litigation paper, you would have to say that investors, if they are in their right mind when representations are made to them, when they are given certificates, when they are given incentives, they shouldn't believe that that's valid; they should ignore that and invest elsewhere, in countries where they respect the rule of law I guess, and they should not invest in the places they are told to invest in, because EU law would somehow permit states to change their mind without carrying any consequence of that change.
>
> So that's wrong under EU law, but I would say for you the only thing which matters is that it's wrong from an international law standpoint: look at Articles 25 and 27 of the ILC Articles; and I would add just for the sake of the record that I find it wrong morally as well.
>
> (Tr., Day 1, 183:8-184:6 (Gaillard)).

597. In sum, the Claimants argue that:

> At the very least, it was reasonable for Claimants to expect, based on Romania's promulgation of the incentives regime in 1998 and its awarding the Corporate Claimants PICs in 2000 and 2002, that even assuming Romania entered the EU before April 1, 2009 (which was highly uncertain at the time), the Government would (1) wait for an official EC decision demanding the revocation of the Raw Materials Incentive before revoking it; (2) attempt to negotiate with the EC a disadvantaged-regions exception for the Raw Materials Incentive under Article 87(3) of the Europe Treaty; or (3) compensate Claimants or otherwise help to mitigate their damages as a result of revocation of the Raw Materials Incentive, perhaps by promulgating a new regulatory regime designed to meet EU requirements. But Romania did none of these things. Instead, having achieved the desired economic benefits from Claimants' investments in the country's disadvantaged regions and of EU membership, it unilaterally shifted all of the risks associated with EU accession to investors like Claimants. (C-Reply ¶ 419)

v. Romania violated this legitimate expectation

598. The Claimants argue that all the factors described above instilled in them the legitimate expectation that the EGO 24 incentives would remain in place for 10 years. The Claimants allege that, by prematurely revoking these incentives 5 years before they were due to expire, Romania violated that legitimate expectation, and consequently breached its obligation under the treaty to afford the Claimants fair and equitable treatment.

599. The Claimants acknowledge that not all incentives were revoked – indeed, the Profit Tax Incentive remained in place for the Claimants until the expiration of their PICs in April 2009. Nonetheless, they argue that the revocation of the Raw Materials Incentive was sufficient to constitute a breach of the BIT (C-PHB, ¶ 49). The Claimants also argue that leaving the Profit Tax Exemption in place until 2009

enabled Romania to keep the Claimants' obligations to maintain their investments in the disfavored region of eight years longer than if they had simply revoked all of the incentives (Tr., Day 12, 41-43 (Fleuriet)).

600. The Claimants contend that Romania's revocation of the incentives was unfair and inequitable, because:

a. Romania failed to provide alternatives or otherwise mitigate the effects of the revocation on investors through transitional periods or grandfathering the incentives for existing PIC holders. Nor did Romania provide any evidence that it attempted to negotiate any alternatives or transitional periods with the EU.

b. Romania failed to show how the incentives conflicted with EU law.

c. The Claimants' obligations under EGO 24 remain in place.

d. Romania failed to grandfather the incentives, in breach of Romanian Law. According to the Claimants, under Romanian law, grandfathering provisions are mandatory in all cases where an enactment of a new law affects legal relations established under an earlier statute and these relations are still in operation at the time the new law is enacted. (ER of L. Mihai, ¶ 6.1).

601. The Claimants summarize their legitimate expectations claim as follows:

> At its core, Claimants' story is a simple one: Romania attracted substantial investments from them on the basis of a Raw Materials Incentive granted to them through domestic legislation (EGO 24 and GD 194) and individual PICs until 2009; did so after subjecting itself to EU requirements, thereby representing to investors that the incentive was consistent with those requirements; successfully opposed its own Competition Council's determination to the contrary; achieved the desired benefits accruing from both Claimants' investments and EU accession; and then revoked the Raw Materials Incentive without waiting for an official demand from the EC, without attempting to negotiate an exception or transition period, and after it was too late for Claimants to modify their incentive-based business strategy pursuant to which they had invested hundreds of millions of dollars in the disadvantaged regions of northwestern Romania. As a result, Claimants have suffered significant damages that Romania has made no attempt to mitigate. When compared to leading BIT cases like *MTD* (in which the Tribunal found that the investor had failed to conduct proper due diligence) and *Saluka* (in which the Czech Government specifically refused to assure the investor of State aid), this case presents a classic instance of the violation of investors' legitimate expectations of minimal regulatory stability. (C-Reply, ¶ 423).

b. The Respondent's position

602. The Respondent denies that it has breached any legitimate expectation of the Claimants. It contends that the Claimants have not met any of the requirements necessary for the doctrine of legitimate expectations to apply. First, the Claimants received no assurance that could have created a legitimate expectation that the Facilities would remain in place for 10 years. Second, the Claimants did not invest in

reliance on that expectation. Finally, even if that had been the case, any such reliance would not have been objectively reasonable.

i. The standard for determining if a measure has undermined legitimate expectations

603. The Respondent agrees with the Claimants that the appropriate standard to evaluate whether a measure has undermined legitimate expectations is that set out in *Parkerings v. Lithuania* (R-PHB, ¶ 101). On the basis of this and other awards, the Respondent contends that for a legitimate expectation of regulatory stability to be protected, the following requirements must be met (R-CM, ¶¶ 111-135; R-Rejoinder, ¶¶ 170-173; R-PHB, ¶¶ 99-159):

i. There must be a contract, or at least a promise or specific representation that the law will remain unchanged, that created a subjective expectation.

ii. The expectation (or the reliance on that expectation) must have been objectively reasonable.[118] In particular, the investor must anticipate that the law may change, especially if the general legislative climate is in a state of flux (*Glamis Gold v. United States*, ¶ 767).

iii. The investor must have relied on that subjective expectation when it made its investment.

604. With respect to the first requirement, the Respondent submits that any claim based on the frustration of legitimate expectations requires the claimant to prove that the state created or reinforced the expectations through its own affirmative acts.[119] The practice of international tribunals shows that legitimate expectations may only be frustrated where the state has made "specific commitments" that particular laws or regulations would remain in place.[120] These specific commitments or assurances cannot be generated by inaction or generally applicable regulation. In addition, these specific commitments must be valid under domestic law.

605. Further, the Respondent contends that it is well established that a regulatory regime does not carry with it any promise that the law will remain unchanged indefinitely. Citing *Parkerings v. Lithuania*, the Respondent argues that "[a] State has the right to enact, modify or cancel a law at its own discretion", and "save for the existence of an agreement in the form of a stabilisation clause or otherwise, there is nothing

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[118] In some briefs, the Respondent focuses on the reasonableness of the expectation, whilst in others on the reasonableness of the reliance. The Tribunal considers this to be the same argument, which goes to the legitimacy of the expectation.

[119] *Gami Investments, Inc. v. The Government of the United Mexican States,* UNCITRAL, Final Award, 15 November 2004 (hereinafter, *"GAMI v. Mexico")*, ¶¶ 90-110; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (hereinafter, *"International Thunderbird v. Mexico"*), ¶ 196; *CMS v. Argentina*), ¶¶ 78-82; *CME Czech Republic B.V. v. The Czech Republic,* UNCITRAL, Partial Award, 13 September 2001 (hereinafter "*CME v. Czech Republic"*), ¶¶ 610-611; *MTD v. Chile,* ¶ 167; *Tecmed v. Mexico,* ¶ 154.

[120] *CMS v. Argentina* (Award), ¶¶ 127-166; *Tecmed v. Mexico,* ¶ 154; *Metalclad v. Mexico,* ¶ 87; *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2012 (hereinafter *"Feldman v. Mexico"*), ¶ 111.

objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment" (*Parkerings v. Lithuania,* ¶ 332).[121]

606. Similarly, the Respondent notes that in *AES v. Hungary* the tribunal found that, absent a specific representation to the investor, such as a stabilization clause, an investor cannot have a legitimate expectation of legislative stasis, and any general entitlement to regulatory stability does not preclude legislative changes that are significant and even surprising (*AES v. Hungary,* ¶¶ 9.3.17-9.3.34). In the *AES* case, the investor did have a contract with the state. Although in that case the tribunal found that the state did not have a rational policy in modifying or eliminating its own contractual obligations, "this does not mean that the state cannot exercise it[s] governmental powers, including its legislative function, with the consequence that private interests – such as the investor's contractual rights – are affected. But that effect would have to be a consequence of a measure based on public policy that was not aimed only at those contractual rights" (*AES v. Hungary,* ¶ 10.3.13). Romania concludes that, *a fortiori*, where the investor has no contract with the state, it can have no legitimate expectation that generally applicable legislation will not affect it.

607. Second, the Respondent submits that, for an expectation to be legitimate and therefore protected under international law, it must be reasonable and justified in the circumstances.[122] According to the Respondent, it is well established that foreign investors must accept the conditions of the host state as they find them (*The Oscar Chinn Case*[123]). An investor cannot complain if its business suffers economically from laws or practices that were in place at the time of the investment (*MTD v. Chile,* ¶ 204). The investor must conduct its business in a reasonable manner, which includes undertaking due diligence with respect to the regulatory environment in which it operates and the likelihood that it may change and evolve (*Parkerings v. Lithuania,* ¶ 333). Indeed, investors are required to seek relevant professional advice in assessing the risks inherent in a particular host state (*Feldman v. Mexico,* ¶¶ 114, 132). An investor who fails to conduct such due diligence cannot invoke any legitimate expectations (ECJ jurisprudence). Citing *Maffezini v. Spain*[124], the Respondent submits that BITs "are not insurance policies against bad business judgments (*Maffezini v. Spain,* ¶ 64).

608. The Respondent adds that regulatory change must be anticipated all the more in regulatory environments where there is public and continuous scrutiny of the actions

[121] The Respondent cites, inter alia, *PSEG v. Turkey*, ¶ 241 ("Legitimate expectations by definition require a promise of the administration …"); *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* (ICSID Case No ARB/03/5), Award, 6 June 2008 (hereinafter *"Metalpar v. Argentina"*), ¶ 186 ("There was no bid, license, permit or contract of any kind between Argentina and Claimants"); *Plama Consortium Ltd v Republic of Bulgaria* (ICSID Case No ARB/03/24), Award, 27 August 2008 (hereinafter, *"Plama v. Bulgaria"*), ¶ 219 ("It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all").

[122] *Parkerings,* ¶ 333; *Saluka v. Czech Republic,* ¶¶ 304 and 309; *Mondev v. U.S.,* ¶ 118; *Waste Management v. Mexico II,* ¶¶ 98-99; *Lauder v. Czech Republic,* ¶ 292.

[123] *The Oscar Chinn Case*, PCIJ Series A/B No 63 (1934), p. 25.

[124] *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000 (hereinafter, *"Maffezini v. Spain"*).

of the state (e.g., *Methanex v. United States*, Part IV D, ¶ 10, *Glamis Gold v. United States, Chemtura v. Canada*), and in transition or otherwise unstable economies (*Olguín v. Paraguay,* ¶ 65(b),[125] *Generation Ukraine v. Ukraine,* ¶ 20.37,[126] *Parkerings v. Lithuania,* ¶¶ 335-338).

609. The Respondent asserts that, even if an expectation is reasonable, it will not be protected absent specific assurances to the investor. As stated by the tribunal in *Glamis Gold v. United States*, the inquiry is not whether the expectations were reasonable, but whether the State has made specific assurances to the investor in order to induce the investor's investment (*Glamis Gold v. United States,* ¶¶ 810-811).

610. Third, the Respondent argues that for a breach of legitimate expectations to violate the fair and equitable treatment standard, the investor must have relied on that expectation when it made the investment. The Respondent submits that "a legitimate expectation is protected only if, and to the extent that, it was the predicate upon which an investment was made. If an expectation, however legitimate, was not the predicate of an investment, there is nothing inequitable in the state's acting against it" (R-Rejoinder, ¶ 191). Specifically, "[w]here an investor claims that it was induced by a particular regulatory measure, it must demonstrate that the existing regulatory framework was the crucial factor in determining whether or not to invest in the host state and that, absent that measure, the investor would not have made the investment" (*Id*., relying on *CMS v. Argentina,* ¶ 275).

611. In this case, the Respondent contends that it did not make a promise or assurance that could have created a subjective expectation that the Facilities would not change for 10 years (Section (ii) below); any expectation of regulatory stability would have been unreasonable (Section (iii) below), and the Claimants have not proven that they relied on a subjective expectation (Section (iv) below).

ii. Romania did not make a promise or assurance that could have created a subjective expectation

612. The Respondent contends that the Claimants have not proven that Romania made a promise or assurance that could have created a subjective expectation that the EGO 24 Facilities would remain unchanged for ten years. Romania never represented to the Claimants, or to anyone else, that the Facilities would be available to them for the entire 10 year period indicated in the PICs (R-CM, ¶¶ 113-117; R-Rejoinder, ¶¶ 169-189; R-PHB, ¶¶ 104-120).

613. As discussed in Section A above (umbrella clause), the Respondent denies that the EGO 24 framework gave rise to an actionable vested right to the Facilities for any particular period.[127] The Respondent also denies that it made a promise or assurance

[125] *Eudoro Armando Olguín v. Republic of Paraguay*, (ICSID Case No. ARB/98/5), Award, 26 July 2001 (hereinafter *"Olguín v. Paraguay"*).

[126] *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003 (hereinafter *"Generation Ukraine v. Ukraine"*).

[127] The Respondent focused on this argument in the context of the Claimants' umbrella clause claim, but it is also relevant to its defense to the Claimants' legitimate expectations case.

that could constitute the basis for a legitimate expectation, through the EGO 24 framework or elsewhere.

614. First, the Respondent argues that the Claimants have not proven that the State made a promise specifically to them. There is no evidence that any state organ made such a promise or representation to the Claimants. Nor do the Claimants or their witnesses claim to have received such an assurance from a State official. Mr. Ban's testimony (Tr., Day 9, 22–23 (Juratowitch/Ban)) only serves to highlight this: rather than admit that no one ever told him that the Facilities would be stabilized for 10 years, he stated that no one had explicitly warned him that the Facilities might not last that long. However, relying on *Parkerings v. Lithuania*, the Respondent argues that a state has no duty to warn investors that the law might change.[128] Even when a legislative change is sudden and radical, an investor has no claim for a lack of transparency or predictability unless there has been an "active inducement of a quasi-contractual expectation" (*Glamis Gold v. United States*, ¶ 799).

615. Similarly, the Respondent notes that Mr. Marcu never said he or anyone else ever spoke to any of the Claimants about EGO 24. In fact, his testimony about the NARD's general efforts to promote investment in disfavored areas showed that those efforts began after the Claimants' supposed decision to invest in the Ştei-Nucet region, rather than in Bucharest (Tr., Day 7, 49 (Marcu)). The two promotional activities he mentioned in 2000 were not attended by the Claimants, so anything Mr. Marcu may have said there is irrelevant. In any event, Mr. Marcu admitted that EGO 24 had been amended a number of times and that by the time of his presentations the Competition Council had already issued Decision 244. On this basis, the Respondent argues that it is difficult to see how Mr. Marcu could have said in his presentations that every EGO 24 Facility was locked in for 10 years.

616. Second, the Respondent contends that the Claimants have not proven that, through the EGO 24 framework or the issuance of the PICs, the State made a promise to investors in general. As discussed above, the Respondent argues that general regulation cannot generate a specific commitment of the kind needed to create a legitimate expectation. The Respondent argues:

> The Claimants contend that their legitimate expectation arose from unilateral acts taken by Romania which were general in scope, rather than specific assurances to the Claimants. Also, the Claimants' case relies extremely heavily on the PICs that the Corporate Claimants received in 2000 and 2002 – but they acknowledge that these were not individually negotiated documents. They were standard administrative certifications of eligibility that were received by thousands of beneficiaries of the EGO 24/1998 state aid scheme. The Claimants depend on the same government actions that any of those beneficiaries could cite, such as the terms of executive instruments implementing EGO 24/1998, which as we have seen (Chapter II) were necessarily subject to amendments to EGO 24/1998 itself. Overwhelmingly consistent authority suggests that it must be an extremely rare case when such general legislative acts, and

[128] *Parkerings v. Lithuania*, ¶ 345 ("The acts and omissions of the Municipality of Vilnius, in particular any failure to advise or warn the claimant of likely or possible changes to Lithuanian law, may be breaches of the Agreement but that does not mean they are inconsistent with the Treaty").

implementing regulations, can generate legitimate expectations that those acts will not be amended in future. (Rejoinder, ¶ 170).

617. In any event, as explained in Section A with respect to the umbrella clause, the Respondent argues that the relevant regulations did not promise that the Facilities would remain unchanged for a period of 10 years.

618. The Respondent also contends that, if Romania had decided to bind itself to regulatory stasis for 10 years, it would have done so in one clear instrument, through an appropriate organ, and that instrument would contain clear terms with respect to the promise of stability and its duration. However, the Claimants have not identified which regulation would embody this promise. It cannot be EGO 24, because that regulation lays out a general scheme and makes no reference to a 10 year time period. The Respondent concedes that "there is no doubt that EGO 24 set forth a generalized entitlement that could be claimed by qualifying investors" (Tr., Day 13, 85:7-10 (Petrochilos)). Article 4(c) of EGO 24 stated that a government decision would determine the facilities "provided by law" that would be granted to investors (which confirms that the source of the entitlement is EGO 24). But it contained no promise as to the length of time the facilities would remain available, nor any stabilization language (unlike its predecessor, Law 35, which did contain express stabilization language). The Respondent further argues that, under Romanian law, general laws such as EGO 24 do not confer individual vested rights (as was confirmed by the Romanian Constitutional Court in Decision 130/2003).

619. The Respondent notes that the Claimants appear to rely on GD 194/1999 and the PICs, which are lower ranking documents issued to implement and administer EGO 24 and Law 20/1999.[129] However, relying on the expert opinion of Prof. Baias, it argues that these were subsidiary normative or administrative instruments issued to implement and administer EGO 24 and Law 20/1999, which could not modify or contradict the authority of a government ordinance or a law, and as such could not have granted an entitlement beyond what EGO 24 authorized. In particular, they could not have imposed significant, long-term obligations on the state that the authorizing statute did not impose. As a result of the hierarchy of Romanian laws, the Government, implementing the law through the government decision, could not have bound the legislature not to change the law. And once EGO 24 was modified, GD 194/1999 could not have had a broader field of application than the modified EGO 24. Thus, no prudent investor in Romania could have understood that Annex 2 of GD 194/1999 as freezing the facilities there listed. For the same reason, because EGO 24 created no vested right but only a general entitlement, neither could GD 194/1999 or the PICs create such a vested right.

620. The Respondent also denies that the PICs could have been the source of an investor's right to the EGO 24 incentives. The Respondent argues that the PICs were

[129] The Respondent finds it notable that, considering that the nature of GD 194/1999 and the PICs has become the cornerstone of their expropriation, umbrella clause and fair and equitable treatment cases, Prof. Mihai (the Claimants' own expert in Romanian law) made no mention of either instrument in his expert report. Thus, the Respondent argues that the Claimants are left with no evidence to support an allegation that, under Romanian law, they had a right to the Raw Materials Facility until 2009.

merely administrative tools that certified the holders' eligibility to obtain the Facilities; the source of the right was EGO 24. Specifically, the Respondent argues that Article 5 of the GD 525/1999 published on 8 July 1999 (Exh. R-6),[130] which approved the 1999 Methodological Norms for the application of EGO 24, provided that the "incentives *provided by the law* shall be granted pursuant to the certificate of the investor in a disadvantaged region" (emphasis added). Such a certificate was to be issued by the relevant Regional Development Agency, upon an investor's request. According to the Respondent, the language of Article 5 makes it explicit that the PICs merely certified eligibility to "incentives provided by the law." That law was EGO 24, as approved by Law 20, neither of which contained any provision concerning their duration nor any restriction on the government's ability to amend or repeal them.

621. The Respondent contends that this conclusion was reaffirmed by a subsequent version of the Methodological Norms, adopted by GD 728/2001 (Exh. R-9). Article 4(1) of these Methodological Norms stated: "The *facilities provided by the law* are granted based on the certificate of the investor in the disfavoured area" (emphasis added). According to the Respondent, this demonstrates that the content of the facilities was established by law (i.e., EGO 24) and that PICs were an administrative tool attesting to eligibility to access facilities available under EGO 24.

622. In the Respondent's view, the language of the PICs themselves does not change this conclusion. All the PICs stated was that the titleholder was the beneficiary of the facilities granted under GD 194/1999, in accordance with the provisions of EGO 24 approved and amended by Law 20, and in accordance with the government decision approving the methodological norms. Accordingly, all the PICs did was certify that the titleholder was the beneficiary of the facilities granted by the law, whatever the law determined that those facilities were at any point in time.

623. The Respondent further argues that the PICs did not list any individual facilities, let alone purport to stabilize them for any particular period. The PICs only stated that they were valid until a given date. That only meant that they certified eligibility to whatever facilities were available under the law until that date.

624. The Respondent rejects the Claimants' argument that the PICs were the source of the right to the facilities because they had to present them every time that they wanted to benefit from them. The PICs were needed so that administrators did not have to evaluate eligibility on each occasion that a business applied for an exemption. This conclusion is also supported by the fact that it was not necessary to obtain a new PIC each time EGO 24 was amended; the PIC continued to certify eligibility to the remaining facilities in EGO 24, as amended. This was confirmed by the Claimants' expert, Prof. Mihai (Tr., Day 5, 215).

625. The Respondent also denies that the administrative process to qualify for a PIC was equivalent to a contractual negotiation, or that the PICs were tantamount to contracts. In the legal order in which that process occurred, the issuance of a PIC did not create

[130] The Respondent notes that GD 525/1999 replaced an earlier version of the Methodological Norms, contained in GD 907 of 1998, published on 22 December 1998.

a contract. Nor did the obligation to submit an investment plan amount to a bilateral deal; the investment plan was merely a requirement for the government to establish that investors met the qualifying criteria.

626. Similarly, the requirement to employ a certain number of unemployed persons and to have made certain investments were part of the criteria for eligibility; they do not establish the existence of a promise that the facilities would be available for a certain duration. The Respondent adds that it is misleading to suggest that these requirements show that EGO 24 was intended to foster capital intensive industries, because there was no threshold of magnitude for a qualifying investment, the employment requirement was met by employing ten persons, five of which had to be unemployed, and the eligible sectors covered a wide range of activities.

627. The Respondent also denies that EGO 24 created an obligation for investors to maintain their investments for twice as long as the investor is a recipient of the incentives. The Respondent alleges that it "has repeatedly stated that the obligation does not exist and that (therefore) it has no intention of enforcing it" (R-Rejoinder, ¶ 118). In any event, it argues that the alleged obligation is of only theoretical interest, because the Claimants have no desire to move the operations from Bihor county, and thus the State has never had the occasion to enforce the alleged obligation. However, it notes that Prof. Mihai did not address this matter in his expert opinion, and the Claimants have not cited any instances in which any investor has been subjected to the supposed obligation, or any Romanian court or agency has interpreted it in that fashion.

628. The Respondent further contends that neither the monitoring process to which the Claimants were submitted, nor the alleged promotion of the EGO 24 regime by government officials, could have given rise to a promise that the facilities would remain unchanged for any period of time.

629. Finally, the Respondent contends that the Romanian Constitutional Court disagrees with the Claimants' theory: when the profit tax exemption available under Law 35 of 1991 was repealed, the Constitutional Court found that the repeal of that exemption could not be construed as the termination of a contract, nor as an infringement of the right to property or of the investor's right to recover debt (Decision 130/2003). The Respondent notes that Prof. Mihai called this decision *ultra vires* at the hearing but did not discuss it in his expert report, while Prof. Baias confirmed the decision's relevance for this case. Thus, Romania submits that the Tribunal should afford this decision great weight and conclude that GD 194/1999, alone or together with the PICs, did not constitute a contractual or other obligation under Romanian law.

630. Finally, the Respondent argues that not only did Romania not make any specific commitments or representations that the Facilities would remain unchanged during the 10 year period indicated in the PICs, but:

> [T]he only indications that Romania offered were to the contrary. Six months before EGO 24/1998 was adopted, Romania publicly committed to harmonize its national law with the acquis, including competition law. This

> was consistent with the binding provisions of the Europe Agreement, to which Romania had been a party since 1995. Before any PICs were ever issued to the Corporate Claimants, Romania adopted Law 143/1999 on State aid, which expressly indicated that incentives like the Facilities (defined as "Existing Aid") could be subject to nullification or modification at any time. Within months after Law 143/1999 came into force, the responsible regulatory authority, the Competition Council, challenged the Facilities' validity in a public decision and, later, in the Romanian courts. Again, this public challenge was underway and reported in the Romanian media before European Drinks received a PIC in June 2000. The Claimants concede that by July 2000, the government had already begun restricting the Facilities, which in itself put all beneficiaries on notice that further modifications could be forthcoming. When Starmill and Multipack were established and obtained PICs in 2002, the European Commission was actively pursuing calls for the abolition of Romania's State aid programs, including specifically the EGO 24/1998 regime, and the dismantling of the Facilities was continuing apace. The PICs clearly reflected the evolution that was underway, and the lack of any undertaking by Romania to stop it: the benefits to be granted under the Facilities expressly depended in part upon the terms of EGO 24/1998 as amended. (R-CM, ¶ 116).

631. In any event, Romania's actions did not create a legitimate expectation that EGO 24 would not be amended, even substantially amended, before 2009 (Rejoinder, ¶¶ 173-188). According to the Respondent:

> 173. The doctrine of legitimate expectations is objective: the question is whether, in all the circumstances, the investor's claimed expectation is reasonable. To answer this, however, one first must know what the supposed subjective expectation was. In their Reply, the Claimants say they expected that "the Raw Materials Incentive would remain in place until 2009". However, in their Statement of Claim, the Claimants had asserted that it was the entire suite of EGO 24/1998 state aid that they legitimately expected would remain in force until 2009.
>
> 174. Indeed, that is what they must show: there is no logical or evidentiary basis for a supposed expectation that while all other Facilities were subject to change or repeal, the one Facility that the Claimants say they actually cared about had a special reason to remain unchanged. If the Claimants expected one EGO 24/1998 facility to last until 2009, there is no reason why they, and every other beneficiary, could not have expected all of the existing EGO 24/1998 facilities to have remained unchanged. There is no distinction between the Raw Materials Facility and the other Facilities, in terms of the state's conduct or statements with respect to each Facility, that would create a different regime of legitimate expectations.
>
> 175. In sum, the position is this. The Claimants are challenging a general legislative programme; if they are right, the repeal of any EGO 24/1998 facility was unfair and inequitable to every actual or prospective beneficiary. The Claimants must show, therefore, that there was a commitment or representation by Romania, binding on future Parliaments, that EGO 24/1998 would not be amended at all.
>
> (R-Rejoinder, ¶¶ 173-175)

iii. Any expectation of regulatory stability would have been unreasonable

632. In the Respondent's view, even if the Claimants had actually believed that the Facilities would remain unchanged for ten years (which the Respondent argues has not been proved), such an expectation would have been unreasonable, and thus irrelevant to the assessment of the fairness of Romania's conduct (R-CM, ¶¶ 118-126; R-Rejoinder, ¶¶ 176-189; R-PHB, ¶¶ 136-159).

633. As a preliminary matter, the Respondent contends that there is no reliable evidence of Messrs. Micula's reasoning. There are no documents, contemporaneous or otherwise, explaining the Claimants' reasoning at the time. The only evidence is the testimony of Messrs. Micula, which is unreliable. In any event, this testimony does not evidence reasonable reliance, but rather unreasonable expectations with no legitimate basis and reckless business conduct.

634. The Respondent's main argument is that any expectation that the Facilities would remain unchanged for ten years would have been unreasonable taking into consideration the regulatory framework in which the Facilities were granted, both from a Romanian law and an EU law perspective.

635. The Respondent argues that, as a general matter, the Miculas' alleged trust in the stability of Romanian law was misplaced. Ordinarily, an investor must take into account that the legislation will change. There were no representations or assurances that made this case an exception. Nor do the circumstances and context invoked by the Claimants change this basic principle.

636. In the context of EU accession, the Respondent argues that this alleged trust in the stability of Romanian law was even more misplaced. By 2000, it was public knowledge that the target date for EU accession was 1 January 2007 (as evidenced in Romania's first Position Paper on competition policy of August 2000, Exh. EC-1). As noted above, the Respondent submits that regulatory change must be anticipated all the more in regulatory environments where there is public and continuous scrutiny of the actions of the state, and in transition or otherwise unstable economies. In this case, the Claimants chose to invest in a transitional economy, and were fully aware of the risks associated with such a choice. Indeed, Mr. Ioan Micula testified that he and his brother were drawn to invest in Romania precisely because they sought to benefit from the rapid changes taking place in the local economy and regulatory system (Second WS of I. Micula, ¶ 7; Tr. Jur., Day 2, 53-54; 183). Messrs. Micula began to invest in Romania in 1991, and were fully aware of the risks of doing business in Romania during the transition period.

637. The Respondent rejects the Claimants' portrayal of themselves as *ingénues* who were oblivious to what was happening around them. Businessmen with substantial activity in Romania like the Miculas can have no excuse for their purported ignorance. It was public knowledge that Romania was undergoing significant regulatory changes to align itself with the *acquis.* Three reports shown during the hearing (Exh. HEC-6, HEC-7 and HER-1) show that over 100 draft laws were initiated (R-PHB, ¶ 144 and

Annex A). The Respondent contends that "[t]he fact that EU-accession changes would likely include Romania's state aid schemes was a fact readily knowable by anyone who cared to conduct even the most cursory research" (R-Rejoinder, ¶ 178).

638. With respect to the Facilities in particular, the Respondent contends that it would have been impossible for a rational investor not to perceive the risk that they could change or be withdrawn. Not only had they been changing since they were first enacted, but their continuing viability was seriously in doubt. Even the most optimistic business person would have known that the Facilities' continued existence was the subject of fierce political battle. Indeed, the Respondent submits that "[g]iven the political and economic environment in 2000 and 2002, when the Claimants obtained their PICs, it would have been impossible for a reasonable investor to expect any particular form of state aid to remain in place and unchanged. The only way one could entertain such an expectation is if the Competition Council or the European Commission had specifically approved EGO 24/1998. Both institutions, however, expressed views that were squarely contrary to any expectation of preservation of the Raw Materials Facility" (R-Rejoinder, ¶ 179).

639. In particular, the Respondent argues that Decision 244/2000 of the RCC was a clear warning signal that the Facilities were incompatible with Romania's current obligations under the Europe Agreement and future obligations under the EC Treaty. Although the Claimants try to characterize this decision as referring only to the pig farming industry, the Respondent asserts that it refers to the same Raw Materials Incentive and declared the entire aid scheme illegal.

640. The Respondent argues that, if the Claimants had conducted any legal due diligence, any competent lawyer would have advised them that EU accession would likely affect the Facilities. However, it notes that although the Claimants have alleged that they had a legal department of over 30 persons that was allegedly monitoring legislative changes (Third WS of I. Micula, ¶ 37), they have been unable to produce any evidence of contemporaneous due diligence on the subject.

641. The Respondent contends that, instead, the Miculas recklessly ignored obvious signs that the Facilities could change or be withdrawn. They paid no heed to the 2000 PWC Business Plan section on "Political Risk", which highlighted the possibility of legislative or regulatory change, or to all the PWC plans' note that Romania was "clamping down on incentives" even as early as 2000. Their attention and belief in the press was selective: when the reports were unfavorable, they simply did not believe them.

642. The Respondent also rejects the Claimants' suggestions that a particular statement in a government report, standing alone, could have led them to believe that the Facilities would be maintained until or after accession. First, as the Claimants profess ignorance of anything written or published about the future of the Facilities, any such statement is irrelevant, because they did not rely on it. But even if the Claimants had reviewed it, the Respondent contends that a diligent and prudent investor would not have been misled by that statement, because a diligent investor would have known

that each country had an independent monitoring authority (R-PHB, ¶ 156; Tr., Day 6, 127–8 (Petersen/Smith)). Even in the absence of EU requirements, under Romanian law it would have been unreasonable to expect that the Facilities would remain unchanged for any particular period of time. Contrary to the Claimants' allegations, the content and nature of EGO 24 did not make the Claimants' expectation of regulatory stability reasonable. Nor does the content of the PICs or the manner in which they were issued support that alleged expectation. As noted above, the Respondent argues that the PICs were administrative tools certifying eligibility to access facilities available under EGO 24. The source of the facilities was thus EGO 24, not the PICs. The PICs could not reasonably be read as anything more than confirmation that their holder was eligible for the EGO 24 Facilities, whatever those Facilities might happen to be at any particular time. EGO 24 had no stabilization clause or other clause of similar effect (unlike Law 35 which, as amended by Law 57/1993, promised that the changes would only affect investors if they were more favorable). The Claimants argue that there was no possibility of bargaining for a stabilization clause, suggesting that they were not at fault for failing to obtain one, but this cannot mean that the State is therefore impeded from amending its regulations.

643. In any event, the Respondent argues that the Claimants repeatedly contradict themselves as to the nature and significance of the PICs. At some points the Claimants assert that the PICs are the allegedly expropriated investment; at other times they state that the PICs "enhance" an expectation that has already arisen, while at others they are the instrument creating the expectation. The Claimants also state at that the PICs are administrative documents not subject to a bargain and whose terms were unilaterally imposed, while at other times describing them as akin to contracts. The Respondent submits that "[i]t is a claimant's burden to set out a coherent claim and then to prove it" (R-Rejoinder, ¶ 183).

644. The Respondent rejects the Claimants' remaining arguments with respect to the reasonableness of their expectation.

645. First, the Respondent argues that the Claimants' trust in the stability of the regulatory framework, based on the alleged stability of previous incentive schemes, was misplaced. Previous incentive regimes had been anything but stable. Indeed, the Claimants' trust seems to stem from the fact that they were not bothered by amendments to previous legislation. However, the Respondent argues that international law does not enshrine an investor's supposed faith that new legislation will always benefit him because he has had good fortune in the past.

646. Second, it was unreasonable for the Claimants to believe that if the Facilities were repealed they would get special treatment from the government in the form of grandfathering of benefits.

647. Third, the Respondent contends that the contemporaneous statements and actions by the Government or its officials are not sufficient to make their alleged expectation reasonable. In particular, the Respondent avers that:

a. The Government's Development Plan for 1998-2000 (Exh. C-567) does not mention tax customs or customs duty exemptions; it merely places Romania's regional development strategy within the country's general economic reform (the major objective of which was EU accession).

b. Although Mr. Marcu, then President of the body charged with administering EGO 24/1998, would have presumably been knowledgeable about EGO 24/1998, he had no authority to commit Parliament not to amend the law, and thus his statements would not have made the Claimants' alleged expectation reasonable. In addition, his remarks were so informal that there is no contemporaneous evidence of them. In the context of the public debates over the future of the Facilities, no reasonable investor could have taken Mr. Marcu's alleged oral statements as authority committing the state to leave the Facilities in place.

c. Although Mr. Ban alleges that he attended meetings hosted by government officials, he did not testify that those officials said specifically that all of the EGO 24/1998 facilities would remain unchanged, nor did he testify that he held any bilateral discussions with government officials in this regard or received particular assurances. In addition, there is no contemporaneous record of what any official purportedly did say in Mr. Ban's presence, whether at a meeting or otherwise.

d. The generic investment promotion materials cited by the Claimants (e.g. CD-ROM prepared by ANEIR, a non-governmental trade organization, Exh. C-563) do not highlight EGO 24/1998, nor do they make any representations as to its legislative future.

e. The two media reports (Exh. C-568 and C-630) cited by the Claimants are not attributable to the government, and it is not clear whether the reporters' words are direct quotations or narrative reporting.

f. The June 2002 government press release (Exh. C-489) was issued well after the Claimants' legitimate expectations are said to have arisen, their PICs obtained, and their supposed 10-year plan put into motion. In any event, the press release says the opposite of what the Claimants say it does:

> With view to joining the European Union, we are concerned with making the legislation of the disfavoured areas compatible as concerns the state aid … . The project for a norm to modify the Emergency Ordinance of the Government No. 24/1998 regarding the system of the disfavoured areas […].

g. The positive assessments of the incentive regime and their businesses by Government officials were not assurances that the Facilities would stay in place. The fact that the withdrawal of the Facilities could have negative social consequences for the region is not a reason to believe they would not be withdrawn. If there were policy reasons for adopting and maintaining the Facilities, a reasonable investor would also have considered that there may be other equally legitimate policies militating against them (e.g., pro-competition policies).

648. In any event, relying on *Saluka v. Czech Republic*, the Respondent contends that undocumented and informal remarks by government officials cannot generate legitimate expectations. Nor can road shows or general pronouncements create legitimate expectations on their own: citing *CMS v. Argentina*, the Respondent argues that, at best, such statements are confirmatory evidence of a legitimate expectation created by other, authoritative state actions.

649. Finally, the Respondent submits that the reasonableness of the Claimants' strategy (making decisions based on how to best run ahead of competitors with respect to customs duties) as the basis of a 20-year business plan is questionable.

650. In sum, considering all the circumstances, the Respondent argues that it would have been unreasonable for the Claimants to believe that they were guaranteed anti-competitive advantages until 2009. "In a legal system where everything was changing, sometimes dramatically, they adopted a fragile business model that depended on the stability of a customs policy and on state aid whose legality was publicly challenged and reported to be the subject of a fierce political battle. That things did not turn out as the Claimants would have wished does not give them a claim under the [BIT]" (R-PHB, ¶159).

iv. The Claimants have not proven that they relied on a subjective expectation that the facilities would not change for 10 years

651. Citing *CMS v. Argentina*, the Respondent argues that "[w]here a foreign investor claims that it was induced by a particular regulatory measure, it must normally demonstrate that the existing regulatory framework was the crucial factor in determining whether or not to invest in the host state and that, absent that measure, the investor would not have made the investment." It adds that "a legitimate expectation is protected only if, and to the extent that, it was the predicate upon which an investment was made. If an expectation, however legitimate, was not the predicate of an investment, there is nothing inequitable in the state's acting against it" (R-Rejoinder, ¶ 191).

652. The Respondent points out that the Claimants are not arguing that, had they known that EGO 24 would change over time, they would not have invested in Romania. Rather, they argue that they would have invested elsewhere in Romania, or in different sectors (R-Rejoinder, ¶ 192).

653. Nonetheless, the premise of the Claimants' case is that when they made the relevant investments, they expected the facilities to remain unchanged at least until 2009. Thus, the Respondent argues that they must prove that they had this subjective expectation at the time of the investments. It is insufficient to establish that they "relied on" the facilities that existed at the moment of any particular investment, in the sense that they took advantage of the tax and duty exemptions that were then available.

654. The Respondent contends that there is no evidence of that reliance. To the contrary, the evidence available suggests that the Claimants' business decisions had nothing

to do with the facilities or their duration. Indeed, the Respondent alleges that there is no contemporaneous record of the Claimants' supposed subjective belief that the EGO 24 facilities would remain in place and unchanged (R-CM, ¶¶ 128-135; R-Rejoinder, ¶¶ 177, 190-217; R-PHB, ¶¶ 121-135).

655. First, had the Claimants acted in reliance on any legitimate expectation, there would have been abundant contemporaneous evidence of such reliance in the form of business plans, possible press statements, legal advice about duration of the facilities, and decisions of the Corporate Claimants' Boards of Directors. Messrs. Micula's unsubstantiated and self-serving witness statements are not sufficient to prove reliance.

656. In particular, there is not a single contemporaneous record of the alleged "10-year business plan" to capitalize on the EGO 24 incentives. This is telling given that the Claimants' claim to have had many discussions with their management team and the shareholders and several analyses of market demand and the customs implications of different raw materials. The lack of contemporaneous evidence is also striking given the level of detail of the Claimants' alleged 10-year plan (supposedly consisting of two phases, beginning with food production and moving to "core capital expenditures", including a brewery, a malt plant, a canning plant and a co-generation plant).

657. The only "business plans" submitted by the Claimants do not prove reliance. None of the "feasibility studies" for the financing of the proposed investments mentions EGO 24. The 3 PWC business plans for 2000, 2002 and 2003 do not say that the incentives were stabilized for 10 years. To the contrary, they all noted that the government was "clamping down… on tax incentives") (Exh. R-215; R-204; R-214). The Miculas' explanation for these plans (that they were valuations prepared for a potential sale of all or part of EFDG) does not make sense: on one hand, it undermines the claim of a 10-year business plan, and on the other, if they truly were prepared for potential sale, the valuations would have included the existence of a 10-year guarantee of the facilities.

658. Indeed, according to the Respondent, the record suggests that the Miculas made decisions on an *ad hoc* basis, identifying good opportunities for short-term profit (Tr., Day 3, 37; Day 4, 161-163, 174; Day 5, 10 (I. Micula); Day 4, 214 (V. Micula)). Taking immediate advantage of whatever incentives happen to be available does not constitute reliance on a guarantee that those incentives will remain in place and unchanged for 10 years.

659. Significantly, the Respondent notes that Viorel Micula confirmed at the hearing that it was not true that the EFDG made sense only if they could count on the benefits of the Raw Materials Incentive for 10 years (Tr., Day 6, 279 (Petrochilos/V. Micula)).

660. Second, the Claimants' decision to base their businesses in Romania was motivated by their familiarity with their home country and their desire to profit from the rapid evolution of Romania's economic and regulatory system, not by the facilities (Tr. Jur.,

Day 2, 23, 32-33, 53-55). Indeed, Messrs. Micula began to develop their food and drinks business in Bihor County in 1991, long before EGO 24 was introduced, long before any of the Corporate Claimants were established, and long before any of the Corporate Claimants had obtained a PIC. When the Claimants invested in the 1990s, they did not even rely on the then-available incentives. Even considering that under Law 35/1991 they could have invested anywhere in Romania, from 1991 to 1998 they chose Bihor County for other reasons.

661. In fact, had the Claimants really wanted to establish businesses in Bucharest, as they claim they did, they could have taken advantage of the EGO 24 facilities there as well: there were a half-dozen disfavored areas far closer to Bucharest and the port of Constanţa.[131] Whatever led the Miculas to install new lines in the same place where they had always located their businesses, it was not EGO 24. If the cost savings of moving closer to their consumers were so significant, the Miculas could have gone to any of three disfavored areas within 90 km of Bucharest and enjoyed both those cost savings and the facilities.

662. <u>Third</u>, the timing of the investments confirms that these investments were not made in reliance of the facilities. The Claimants' investments made prior to the enactment of EGO 24 and the issuance of the PICs could not have been made in reliance on any expectation allegedly generated by the PICs. Starmill and Multipack were only incorporated in 2002, after Romania had begun to limit the facilities (a fact that the Claimants acknowledge, *see* SoC, ¶¶ 104-109). In addition, all three Corporate Claimants increased their investment activity after 2003, by which time Romania had already restricted or eliminated the Components Facility, the Machinery Facility, the Meat-Related Facility, and the Subsidies. More significantly, the Claimants continued to make substantial investments in Bihor County even after the revocation of the Raw Materials Facility; indeed, the Claimants invested a total of €182 million after the Raw Materials Facility was repealed (Second ER of D. Lessard, ¶ 128; Tr. Day 8, 69 (Lessard)). Each of the Corporate Claimants allegedly invested millions of Euro in 2005, and continued to invest more in 2007, allegedly pursuing the regional expansion of the EFDG. According to the Respondent, the Claimants continue to expand their economic activity today, boasting of increased turnover in 2006, 2007 and 2008.

663. Finally, there is no evidence that the Claimants relied on the specific document that they now claim incorporates a 10-year stabilization clause: GD 194. Indeed, the Miculas themselves always refer to EGO 24, which does not specify a period (R-PHB, ¶ 134).

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[131] The Respondent argues that the Miculas could have invested in the following regions that were closer to Bucharest and Constanta than Bihor and had been granted disfavored region status for ten years: Comăneşti, Bacău County (Exh. C-412); Baraolt, Covasna County (see Exh. C-414); Filipeşti, Prahova County (Exh. C-410); Ceptura, Prahova County (Exh. C-411); Altân Tepe, Tulcea County (Exh. C-415); and Motru-Rovinari, Gorj County (Exh. C-399); Zimnicea, Teleorman County (Exh. C-416) (R-Rejoinder, fn. 345).

664. According to the Respondent, "[a]ll of this belies any suggestion that Messrs Micula made investment decisions relying upon a belief that the facilities would remain unchanged until 2009. Indeed, the investment expansions in 2005 and thereafter cannot possibly assist the Claimants' legitimate expectations arguments: they espoused, rather than avoided, Romania's regulatory framework" (R-CM, ¶ 131).

c. The Tribunal's analysis

i. The standard to determine whether a legitimate expectation has been breached

665. As the Respondent puts it, the key issue before the Tribunal is "who bore the risk of regulatory change: the state or the investors who benefitted from the existing regulatory regime" (R-Rejoinder, ¶ 9).

666. In the Tribunal's view, the fair and equitable treatment standard does not give a right to regulatory stability *per se*. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability. Thus, the Claimants' "regulatory stability" argument must be analyzed in the context of the protection of an investor's legitimate expectations.

667. Cases supporting the doctrine of legitimate expectations are numerous. As noted by Dolzer and Schreuer, the protection of legitimate expectations is by now "firmly rooted in arbitral practice."[132] Although the question of whether these legitimate expectations were breached is a factual one, an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation.[133]

[132] Dolzer & Schreuer, p. 134.

[133] See, e.g., *Saluka v. Czech Republic*, ¶¶ 302 (The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations"); *Tecmed v. Mexico,* ¶ 154 (where the tribunal found that the obligation to provide "fair and equitable treatment" meant "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment"); *CME v. Czech Republic*, ¶ 611 (where the tribunal concluded that the Czech authority "breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon with the foreign investor was induced to invest"); *Waste Management v. Mexico II*, ¶ 98 ("In applying [the 'fair and equitable treatment'] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."); *International Thunderbird v. Mexico*, ¶ 147 ("[t]he concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages")

668. The Parties agree that, in order to establish a breach of the fair and equitable treatment obligation based on an allegation that Romania undermined the Claimants' legitimate expectations, the Claimants must establish that (a) Romania made a promise or assurance, (b) the Claimants relied on that promise or assurance as a matter of fact, and (c) such reliance (and expectation) was reasonable.[134] This test is consistent with the elements considered by other international tribunals.[135]

669. In the Tribunal's view, elements (a) and (c) are related. There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability. It is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance. The element of reasonableness cannot be separated from the promise, assurance or representation, in particular if the promise is not contained in a contract or is otherwise stated explicitly. Whether a state has created a legitimate expectation in an investor is thus a factual assessment which must be undertaken in consideration of all the surrounding circumstances.

670. In this regard, the Tribunal subscribes to the view of the tribunal in *Duke Energy v. Ecuador* (quoted in *Bayindir v. Pakistan,* ¶ 179):

> The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment [*Tecmed,* ¶ 154; *Occidental,* ¶ 185; *LG&E,* ¶ 127]. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest [*SPP v. Egypt*[136]*,* ¶ 82; *LG&E,* ¶¶ 127-130; *Tecmed,* ¶ 154].[137]

[134] In their final briefs, both Parties refer to the reasonableness of the reliance, although Romania at first had focused on the reasonableness of the expectation. In the Tribunal's view, both must be reasonable, but in particular the expectation itself.

[135] For example, the late Prof. Thomas Wälde explained that a claim of legitimate expectations required "an expectation of the investor to be caused by and attributed to the government, backed-up by investment relying on such expectation, requiring the legitimacy of the expectation in terms of the competency of the officials responsible for it and the procedure for issuing it and the reasonableness of the investor in relying on the expectation" (*International Thunderbird v. Mexico,* Separate Opinion of Thomas Wälde, 1 December 2005, ¶ 1). It must be noted that Prof. Wälde did not dissent on the standard, but rather on the application of that to the facts of the case).

[136] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award, 20 May 1992 (hereinafter *"SPP v. Egypt"*).

[137] *Duke Energy v. Ecuador*, ¶ 340. *See also Generation Ukraine v. Ukraine*, ¶ 20.37 ("it is relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations").

671. This promise, assurance or representation may have been issued generally or specifically, but it must have created a specific and reasonable expectation in the investor. That is not to say that a subjective expectation will suffice; that subjective expectation must also have been objectively reasonable. As stated by the *Saluka* tribunal, "the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances."[138]

672. The Claimants must also have relied on that expectation when they made their investments. However, it is not necessary for the entire investment to have been predicated solely on such expectation. Businessmen do not invest on the basis of one single consideration, no matter how important. In the Tribunal's view, that expectation must be a determining factor in an investor's decision to invest, or in the manner or magnitude of its investments.

673. When the alleged legitimate expectation is one of regulatory stability, the reasonableness of the expectation must take into account the underlying presumption that, absent an assurance to the contrary, a state cannot be expected to freeze its laws and regulations. As noted by the *Saluka* tribunal, "[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."[139] Accordingly, for a state to violate the fair and equitable treatment standard by changing the regulatory framework, the investor must have received a legitimate assurance that the relevant laws and regulations would not be changed in his or her respect. By legitimate assurance, the Tribunal refers to the considerations identified in paragraph 669 above.

ii. Did Romania make a promise or assurance that gave rise to a legitimate expectation?

674. In Section A on the umbrella clause, the Tribunal found that the EGO 24 framework, in conjunction with the PICs, created a specific entitlement for the Claimants, according to which they were entitled to receive the incentives until 1 April 2009. To recall, the Tribunal found that EGO 24 created a general scheme of incentives available to investors who fulfilled certain requirements, which were later "granted" to qualifying investors through a specific administrative act (the PIC). In other words, the legislation created a generalized entitlement that could be claimed by qualifying investors, but this general entitlement was later crystallized with respect to qualifying investors through the granting of the PICs, becoming from that moment on a specified entitlement with respect to specified investors.

[138] *Saluka v. Czech Republic*, ¶ 304.
[139] *Id*, ¶ 305.

675. Although the majority of the Tribunal found that it had insufficient evidence as to whether that entitlement gave rise to a legal obligation for purposes of the umbrella clause, it stated that the same set of facts could give rise to a breach of the fair and equitable treatment standard, if it found that the EGO 24 framework, in conjunction with the PICs, provided the Claimants with the legitimate expectation that they would be entitled to receive the incentives until 1 April 2009.

676. Another question remained open in the majority's analysis of the umbrella clause: whether there was an element of stabilization in the EGO 24 framework (in other words, whether PIC holders (including the Claimants) were entitled to receive the incentives in the same form (or substantially the same form) as when they were first given their PICs during the entire period, regardless of changes in the Romanian legislation). Although the majority of the Tribunal was not able to answer that question as a matter of Romanian law, it will do so now as a matter of fair and equitable treatment.

677. After a review of all of the facts and circumstances surrounding the Claimants' investment and Romania's enactment of EGO 24 and related legislation, the Tribunal (again by majority[140]) answers both questions in the affirmative. For the reasons set out below, it finds that, even from an objective standpoint the legislative framework in Romania between the years 1998-2002 (taking into consideration EU law, as it applied to Romania at the time), together with the PICs, instilled in the Claimants a legitimate expectation that they would be entitled to the EGO 24 incentives, in substantially the same form as when they received their PICs, until 1 April 2009. Specifically, the Tribunal finds that, through an interplay of the purpose behind the EGO 24 regime, the legal norms, the PICs, and Romania's conduct, Romania made a representation that created a legitimate expectation that the EGO 24 incentives would be available substantially in the same form as they were initially offered.

678. <u>First</u>, the purpose behind the EGO 24 regime was to attract investment in the disadvantaged areas, preferably long-term investment that created employment. In the context in which this legislation was passed, it is evident that Romania was eager to attract investment in order to boost its economy and work towards EU accession. If Romania had spelled out that it retained the right to eliminate the incentives at its discretion, despite the stated duration term for the incentives, Romania likely would not have achieved its objective of attracting investment. Investors require legal certainty, and Romania knew this full well, otherwise it would not have specified in several different documents that the incentives would be available during the period in which Ştei-Nucet was declared a disadvantaged area. Indeed, it is evident from Romania's conduct that it intended for the regime to remain in place until 1 April 2009 and, absent the EU's intervention, this is what would have happened, as discussed further below.

[140] Arbitrator Abi-Saab does not concur with this view, as expressed in his separate opinion.

679. <u>Second</u>, the regime required a certain *quid pro quo* from the investors. As specified in EGO 24 itself and in the Methodological Norms, investors had to fulfill certain requirements to obtain their PIC, and undertook certain obligations:

a. Investors were required to create employment. The 2001 Methodological Norms required 10 employees, 5 of which must have been previously unemployed (Article 4(4) of the 2001 Methodological Norms).

b. Investors were required to create new investments. In this regard, Article 6(1) of EGO 24 provided that the facilities would be granted to qualifying investors "for their new investments in [the disfavoured] regions." Only three of the Claimants' companies benefitted from the EGO 24 incentives, but the Claimants have argued (and Romania has not disputed) that for each new investment they had to submit an investment plan and amend their PIC.

c. PIC holders had to undergo substantial monitoring to continue receiving the incentives under their PICs (Articles 14 and 16 of the 1999 Methodological Norms, Articles 6, 8, 14 and 15 of the 2001 Methodological Norms). Indeed, the Claimants' witnesses have described audits and monitoring procedures that seem to go beyond what is provided in the Methodological Norms, but it is not surprising that actual administrative procedures were more detailed than the relevant norms set out. The Respondent has not challenged these descriptions.

d. Investors were required to maintain their investments in the disadvantaged area for at least twice the time they benefitted from the incentives (Articles 7 and 9 of EGO 24).

680. This last obligation was set out in Articles 7 and 9 of EGO 24, as follows:

> Art. 7. - If an investment which is benefiting from the provisions of the present Emergency Ordinance is ***voluntarily liquidated in a period of time shorter than twice the period of time in which they enjoyed the advantages*** granted through the Government Decision to create the underprivileged area, ***the liquidator(s) is/are obligated first to pay the funds related to the advantages*** granted in accordance with the provisions of the present Emergency Ordinance, to the State Budget, the State Social Insurance Budget and the Special Funds Budgets from the funds resulting from the liquidation procedure.
>
> Art. 9. - Businesses established in a disadvantaged area ***may voluntarily cease to operate in the respective area***, and those opening subsidiaries as legal entities in such an area may ***close them or move the location of their headquarters out of the disadvantaged area in a period shorter than the one provided in Art. 7 only if they pay the funds they owe*** to the State Budget, the State Social Insurance Budget and the Special Funds Budgets ***related to the advantages granted*** in accordance with the provisions of the present Emergency Ordinance. (Emphasis added)

681. Thus, Articles 7 and 9 of EGO 24 put investors on notice that, if they planned to benefit from the incentives for the full period they were offered, they had to be prepared to make long-term commitments and investments in the region, and make

sure that their investments would continue to be profitable without the incentives when the incentives were no longer available.

682. Third, the Respondent did not merely "trim down" the incentives, as the Respondent contends. It is true that the incentives were amended several times, and that by 2002 the Machinery Incentive had been eliminated and the Raw Materials Incentive could not apply to raw materials for the production, processing and preservation of meat. (The Profit Tax Incentive had also been eliminated but grandfathered for existing PIC holders). However, three of the original six incentives remained (four counting the grandfathered Profit Tax Incentive). These three remaining incentives (other than the Profit Tax Incentive) were eliminated by EGO 94/2004. Therefore, the incentives were virtually eliminated rather than simply modified or amended.

683. Specifically, Chapter II, Section 3, Article VI(2) of EGO 94/2004 provided (Exh. R-94):

> Art. VI. - Emergency Government Ordinance no. 24/1998 on Less-Favoured Areas, republished in the Official Gazette of Romania, Part I, Issue 545 of 8 November 1999, as subsequently amended and supplemented, shall be amended and supplemented as follows:
>
> 1. After paragraph (1) of Article 14^1 insert a new paragraph, paragraph (1^1) with the following content:
>
> > "(1^1) In calculating the intensity of State aid, eligible costs related to investments made before 15 September 2004 shall be taken into account."
>
> 2. Article 6(1)b)d) and e) shall be repealed within 90 days from the date of entry into force of this Ordinance."

684. As can be seen from the text of EGO 94/2004, the amendment eliminated the incentives and added rules for the calculation of the intensity of state aid. In turn, it left in place all remaining provisions of the regime, including its obligations, which is however disputed. In turn, this stripped EGO 24 of most of its practical content and reduced almost to nothing its advantages given that the purpose of the regime for disadvantaged areas was to attract investment in exchange for certain tax benefits. After EGO 94/2004, the only tax benefit that remained was the Profit Tax Incentive, and only for existing PIC holders. This is not a "trimming down" of the incentives. It was an outright termination.

685. The Tribunal thus finds that Romania's representation that the EGO 24 incentives would be available to PIC holders until 1 April 2009 meant that the Claimants would continue to benefit from substantially the same incentives that were available when the Claimants obtained their PIC.

686. As stated above, the Tribunal considers that, in determining whether the Claimants had a legitimate expectation, it must take account of the accepted principle that Romania is free to amend its laws and regulations absent an assurance to the contrary. However, in this case the Tribunal finds that Romania's conduct had included an element of inducement that required Romania to stand by its statements and its conduct. Romania launched a program directed to attract investors to the

disfavored regions. To obtain that investment, it offered certain tax benefits for a certain amount of time. In other words, Romania created the appearance of a ten-year tax holiday for investors who decided to invest in the disadvantaged area (and this appearance conformed to what Romania did in fact wish to enact). The Tribunal has noted in particular that the former president of the NARD, Mr. Neculai Liviu Marcu, testified that the incentives were to be understood to be granted for the full duration of the disadvantaged area (WS of Mr. N. Marcu, ¶¶ 28, 32; Tr., Day 7, 15:2-9 (Marcu)). In the Tribunal's view, Romania thereby made a representation that gave rise to the PIC holders' legitimate expectation that during this tax holiday they would receive substantially the same benefits they were offered when they committed their investments.

687. What is at stake is not Romania's regulatory sovereignty, which is not to be questioned. However, it cannot be fair and equitable for a state to offer advantages to investors with the purpose of attracting investment in an otherwise unattractive region, require these investors to maintain their investments in that region for twice the period they receive the investments, and then maintain the formal shell of the regime but eviscerate it of all (or substantially all) content.

688. The record shows that Romania itself shared that belief. It did all it could to preserve the incentives regime through its accession negotiations (*see* Section 4 below). Whether or not it felt committed to existing PIC holders, it certainly wished to maintain the regime for as long as possible and publicly stated so. Romania thereby created the legitimate expectation that the regime would not be repealed or fundamentally altered during the duration of each PIC.

689. Romanian officials also stated that investors would be compensated if the regime were repealed or fundamentally altered. In particular, in his interview in May 2004 (Exh. C-652), Prime Minister Nastase indicated that during its negotiations with the European Union, Romania would see if it was "able to obtain some transition periods" for PIC holders, as well as "some compensation packages, established during direct negotiations." The Prime Minister also stated that the government would talk to the investors, and "based on the conclusions of the negotiations of the Competition Chapter, we will negotiate with those who initially obtained these fiscal incentives" (Exh. C-652, pp. 7-9 of translation). These statements confirm that Romania itself understood that the EGO 24 regime was to last for 10 years, and that in repealing it prematurely Romania was undermining PIC holders' legitimate expectations and causing them to suffer damages.

iii. Was this expectation reasonable?

690. In broad terms, the Tribunal will analyze the reasonableness of the Claimants' expectation from two perspectives: (i) the legitimacy of the expectation in the context of Romania's accession to the EU, and (ii) the legitimacy of the expectation under Romanian law.

(a) Reasonableness in the context of Romania's Accession to the EU

691. After a careful review of the record, the Tribunal has come to the conclusion that between 1998 and late 2003 it was reasonable for the Claimants to believe that the EGO 24 incentives were compatible with EU law. The Tribunal agrees with Prof. Dashwood's conclusion that "a strong case can be made that the Romanian authorities were justified in treating the disputed aid as a valid regional operating aid, up until the moment when they abolished it" (ER of A. Dashwood ¶ 55).

692. There seems to be no dispute that, throughout the period during which the Claimants received the EGO 24 incentives (that is, from receipt of European Food's TIC in 1999 until the incentives were abolished in February 2005), the EGO 24 scheme was subject to the state aid regime of the Europe Agreement (which was the operative pre-accession treaty; ER of A. Dashwood, ¶ 31). As explained by Prof. Dashwood (with no convincing rebuttal by Romania's experts), under the Europe Agreement regime, the substantive rules to assess the compatibility of the EGO 24 incentives with the common market were the substantive rules of the EU state aid regime contained in Article 87 of the EC Treaty (through the operation of Article 64(2) of the Europe Agreement), as amplified by case law and Commission practice, and as subsequently clarified by the Implementing Rules that were annexed to Decision 4/2000 of the Romania-EU Association Committee (Exh. R-65; C-579).

693. Article 64 of the Europe Agreement provides in relevant part:

> 1. The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and Romania: [...] (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.
>
> 2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86, and 92 of the Treaty establishing the European Economic Community.
>
> 3. The Association Council shall, within three years of the entry into force of the Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.
>
> 4. (a) For the purposes of applying the provisions of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Romania shall be assessed taking into account the fact that Romania shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Romania, decide whether that period should be extended by further periods of five years. [...]

694. Article 64 of the Europe Agreement incorporated Article 87 of the EC Treaty, which is the primary source of the EU's substantive rules on state aid. Article 87(1) of the EC Treaty contains the general principle that "any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall,

in so far as it affects trade between Member States, be incompatible with the common market." However, Article 87(3)(a) (which replaced Article 92(3)(a) of the Treaty establishing the European Economic Community) expressly permitted "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment."

695. In turn, Art. 64(4)(a) of the Europe Agreement expressly stated that all of Romania would be considered an underdeveloped area for purposes of Article 87(3)(a) of the EC Treaty for the first five years after the entry into force of the Europe Agreement:

> For the purposes of applying the provisions of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Romania shall be assessed taking into account the fact that Romania shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Romania, decide whether that period should be extended by further periods of five years. [...] (Art. 64(4)(a) of the Europe Agreement).

696. Article 64(3) of the Europe Agreement provided that "[t]he Association Council shall, within three years of the entry into force of the Agreement, adopt the necessary rules for the implementation of paragraphes 1 and 2." With some delay, on 10 April 2001, the EU-Romania Association Council adopted Decision 4/2000 which contained these "Implementing Rules", Exh. R-65; C-579), which prescribed the manner in which Article 64 of the Europe Agreement would be implemented by Romania.[141]

697. Article 2(1) of the Implementing Rules provided that "[t]he assessment of compatibility of individual aid awards and programmes with the Europe Agreement, as provided for in Article 1 of these Rules, shall be made on the basis of the criteria arising from the application of the rules of Article 87 of the Treaty establishing the European Community, including the present and future secondary legislation, frameworks, guidelines and other relevant administrative acts in force in the Community, as well as the case law of the Court of First Instance and the Court of Justice of the European Communities and any decision taken by the Association Council pursuant to Article 4(3)."

698. The criteria applied by the European Commission when examining the Article 87(3)(a) exception were set down in the 1998 Guidelines on Regional Aid (first published in 1998 (Exh. RJ-9) and since replaced by a revised version for the years 2007-2013) (Exh. C-298).

[141] Article 4(1) of the Implementing Rules also extended the time period in which Romania would be considered an underdeveloped area pursuant to Article 64(4)(a) of the Europe Agreement:

> In accordance with and within the limits of Article 64(4)(a) of the Europe Agreement, Romania shall be regarded as an area identical to those areas of the Community referred to in Article 87(3)(a) of the Treaty establishing the European Community. (Article 4(1) of Decision 4/2000).

699. The Guidelines on Regional Aid distinguished between various types of state aid, and described the circumstances under which certain state aid could be granted, including where the economic situation was extremely unfavorable in relation to the Community as a whole. In such cases, the aid could be granted as tax exemptions. In addition, although operating aid aimed at reducing a firm's current expenses is normally prohibited, the Guidelines recognize that, exceptionally, such aid may be granted in regions eligible under the derogation in Article 87(3)(a), subject to certain conditions. Specifically, the 1998 EU Guidelines on Regional Aid (RJ-9) provided:

> Operating aid
>
> 4.15. Regional aid aimed at reducing a firm's current expenses (operating aid) is normally prohibited. Exceptionally, however, such aid may be granted in regions eligible under the derogation in Article 92(3)(a) provided that (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate (36). It is for the Member State to demonstrate the existence of any handicaps and gauge their importance.
>
> 4.16. In the outermost regions qualifying for exemption under Article 92(3)(a) and (c), and in the regions of low population density qualifying either for exemption under Article 92(3)(a) or under 92(3)(c) on the basis of the population density test referred to at point 3.10.4, aid intended partly to offset additional transport costs (37) may be authorised under special conditions (38). It is up to the Member State to prove that such additional costs exist and to determine their amount.
>
> 4.17. With the exception of the cases mentioned in point 4.16, operating aid must be both limited in time and progressively reduced. In addition, operating aid intended to promote exports (39) between Member States is ruled out.

700. The Tribunal agrees with Prof. Dashwood that the EGO 24 incentives appeared to meet most of the criteria for regional operating aid set forth in the 1998 Guidelines (ER of A. Dashwood, ¶¶ 52-53). Specifically:

a. EGO 24/1998 was created to contribute to regional development, and there is evidence that it did in fact contribute to such development.

b. The level of disputed aid appears to have been proportional to the handicaps of the disadvantaged areas that the aid was designed to alleviate, and the Romanian government could have been able to demonstrate this.

701. The only unsatisfied criterion would be its "non-degressive character" (i.e., the fact that the EGO 24 incentives were not meant to be progressive, as mandated by Article 4.17 of the 1998 Guidelines). However, given the level of unemployment in the Ştei-Nucet-Drăgăneşti area Prof. Dashwood did not consider it a determinative factor (ER of A. Dashwood, ¶ 54).

702. Neither the Respondent nor its experts contested Prof. Dashwood's conclusions persuasively, and the Tribunal finds Prof. Dashwood's assessment reasonable.

703. As a result, the Tribunal concludes that the EGO 24 incentives could have reasonably been thought (both by the Romanian government and the Claimants) to be valid regional operating aid under EU law. Indeed, Romania itself appears to have believed that, at the time EGO 24 was enacted, the incentives were compatible with EU state aid requirements. In its Counter-Memorial, Romania stated:

> Especially given Romania's status as an 'underdeveloped area' within the meaning of Article 87(3)(a) of the EC Treaty, the government could reasonably conclude at the time that the EGO 24/1998 regime was not incompatible with the Europe Agreement's provisions. Furthermore, given the economic dislocation that existed at the time, measures to ameliorate conditions in the disfavoured regions were necessary. Romania was not alone among EU candidate States in making the policy choice to implement new economic-assistance measures based upon such an assessment of the legal position. For example, Poland passed similar legislation authorizing State aid for underdeveloped regions in 1994, while it was a candidate for EU admission (R-CM, ¶ 29).

704. Similarly, in its comments to the Commission's Written Submission, Romania acknowledged that:

> The facilities in EGO 24/1998 appeared to be regional aid for economically disadvantaged areas. Thus, EGO 24/1998 was reasonably considered as falling within the exceptions in Article 87(3)(a) and 87(3)(c) EC Treaty. (Respondent's Comments to the Commission's Written Submission, 16 Nov. 2009, ¶ 2).

705. Romania's expert, Prof. Rudolf Streinz confirms the reasonableness of that position:

> In my opinion, in 1998 and particularly in the absence of effective State aid control and support from the European Commission, Romania could, in the exercise of its discretion, reasonably have considered that the EGO 24/1998 regime fell under one of the State aid exceptions of the EC Treaty [...]. For example, Romania, having been designated in its entirety in Article 64(4) of the Europe Agreement as underdeveloped within the meaning of Article 87(3)(a) of the EC Treaty, could have considered itself permitted to enact EGO 24/1998. EGO 24/1998 provided for State aid to foster economic development of areas – i.e. the whole of Romania – where the standard of living was abnormally low or where there was serious underemployment. Alternatively, Romania might have considered that the State aid granted pursuant to EGO 24/1998 was exempt under Article 87(3)(c), because the regime amounted to assistance of regions which are disadvantaged compared to the national average, based on national criteria (First ER of R. Streinz, ¶ 19).

706. As expressly acknowledged by Romania, many government officials maintained this "sincere belief" until after the Competition Council issued Decision 244 in 2000, and the Respondent's expert Mr. Petersen acknowledged that "Romanian politicians and officials who thought that EGO 24 was legal were incorrect, but they were not unreasonable, and they acted in good faith" (R-PHB, ¶ 174, Tr., Day 6, 111, 178). The Tribunal does not believe that investors should be held to a higher standard than the government. Investors are entitled to believe that the government is acting legally.

707. The question is when should the Claimants have realized that the incentives were (or became) vulnerable because they contravened EU law and, as a consequence, at what time they might be phased out. As late as June 2002, Romania's "National Programme for Accession of Romania to the European Union" (Exh. HEC-7) stated that "[t]he provisions of the normative acts on facilities granted for 'D areas' will be maintained till the moment of Romania's accession to the European Union" (p. 148). Mr. Orban testified that this was Romania's intention, and that it "battled a lot with the Commission to get this" (Tr., Day 8, 219-220 (Orban)). Indeed, when asked when it should have been clear to the public that the facilities would not survive, Mr. Orban testified that it could have been as late as April/May 2004 (Tr., Day 8, 12-14 (Orban)).

(b) Reasonableness under Romanian law

708. Determining whether the Claimants' expectations were reasonable under Romanian law is less straightforward. On the one hand, the Claimants argue that the purpose of EGO 24 and its enacting legislation, as well as the issuance and content of the PICs, made their expectations reasonable. Romania argues that, to the contrary, nothing in the regulation and the PICs themselves assured the Claimants that the incentives would remain in place for 10 years. However, the Tribunal has already found that the content of the legislation and the PICs themselves gave rise to a legitimate expectation that the incentives would last until 1 April 2009.

709. On the other hand, Romania argues that the regulatory framework as it existed at the time of the Claimants' alleged investment in reliance on Romania's assurances (from 2000 to 2004, if the issuance of European Food's PIC is taken as starting point) contemplated the possibility that the incentives could be subject to repeal. Romania argues that the incentives could have been revoked as a matter of general administrative law, or because in 1999, prior to the issuance of the PICs, Romania passed the Competition Law, which allowed the Competition Council to determine whether any existing aid was compatible with the Europe Agreement and, if it was not compatible, to recommend cancellation of such aid and request its repayment (Articles 12-13 of the Competition Law). In Romania's submission, the fact that Romanian legislation allowed the Competition Council to recommend the revocation of the incentives undermines the reasonableness of any expectation that these incentives would remain unchanged for 10 years. Indeed, Romania argues that this is exactly what the Competition Council did with Decision 244/2000.

710. In the Tribunal's view, two distinct but related issues must be analyzed: (i) the possibility that the incentives would be found incompatible with Romanian law, and (ii) Romania's interaction with the Competition Council with respect to Decision 244/2000.

711. With respect to the first point, the Respondent argues that, under the existing regulatory framework, the incentives were inherently subject to the Competition Council's review and possible cancellation. Thus, the fact that the fate of all existing legal aid could depend on a decision by the Competition Council weakens any reasonable belief that any incentives would remain unchanged for any particular

period of time. In other words, the Claimants should have known, when they obtained the PICs, that the incentives could be at any time declared by the Competition Council to be incompatible with Romanian law.

712. This proposition cannot be sustained. Any piece of legislation must comply with higher ranking norms. That does not change the fact that enacted rules are supposed to be valid and enforceable for so long as they have not been repealed or annulled. Law-abiding actors may not violate enacted laws or regulations because they question their validity or legality: they may know that such validity or legality is debatable, and seek appropriate relief in court or otherwise, but, in the meantime, they must obey the law. Romania has not argued that the incentives were illegal or that there were any doubts as to their legality. In other words, the possibility of cancellation of the incentives by order of the Competition Council is in itself not a valid argument.

713. With respect to the second point, on 15 May 2000, the Competition Council issued Decision 244/2000, which recommended that the Raw Materials Incentive be abolished. However, the Romanian Government (with the approval of the judiciary) overruled this decision, and thus confirmed the incentives' legality under Romanian law.

714. The Claimants' expectation that the incentives were compatible with Romanian law was particularly reasonable given the sequence of events with respect to the process surrounding Decision 244 and the granting of the Claimants' PICs. Decision 244 was rendered on 15 May 2000, European Food's PIC was issued on 1 June 2000, and EGO 75/2000 (which amended EGO 24 but maintained the Raw Materials Incentive) was enacted on 16 June 2000. The Competition Council brought a law suit against the Government, which the High Court of Cassation dismissed on admissibility grounds on 19 February 2002. Multipack and Starmill's PICs were issued on 17 May 2002.

715. In the Tribunal's view, given that the Government, in this case through Parliament, did not follow the Competition Council's recommendation to abolish the incentives, and decided instead to confirm them via new legislation (EGO 75/2000), and immediately afterwards issued the Claimants PICs confirming their eligibility for the questioned incentives, it was reasonable for the Claimants to believe that the Government considered that such incentives were legitimate and intended to maintain them for the stated period. The fact that the Competition Council sought to enforce Decision 244 in Romanian courts and that its action was dismissed by the original and appellate courts, further enhances the notion that the Government (at its legislative and judicial level) endorsed the legitimacy of the incentives. In other words, the Government implicitly confirmed the incentives' legality under Romanian law.

716. The fact that the court action was dismissed on admissibility grounds does not change this conclusion. Indeed, by determining that the Competition Council did not have the power to challenge legislative acts, the courts merely confirmed that, as a matter of Romanian law, the existence and legitimacy of the incentives depended on

Parliament, not on the Competition Council. And as a matter of Romanian law, the Claimants were entitled to rely on the assumption that the incentives were legal. The fact that Starmill and Multipack received their PICs after the challenge was dismissed further confirms that it was reasonable for the Claimants to believe that the incentives were legitimate.

717. In conclusion, the Tribunal finds that it was reasonable for the Claimants to believe that the incentives were legal under Romanian law and would be maintained for the full 10 year period.

iv. Did the Claimants in fact rely on that expectation?

718. There is no dispute that the Claimants invested in Bihor County, and that they made use of the incentives. However, it is also evident from the record that their initial investments were not made in reliance on the EGO 24 incentives, because they began to invest in the early 90s, before these incentives were created. Indeed, the Claimants concede that their initial investments were made in reliance on previous incentive regimes (R-Reply, ¶¶ 62-124). The Claimants have also stated that their expectation that the Raw Materials Incentive would be available for 10 years arose when the PICs (or TIC, in the case of European Food) were granted (Tr., Day 12, 91 (Reed)). In the Tribunal's view, a legitimate expectation could only have been crystallized at the time when the Corporate Claimants were granted their permanent investor certificates, not temporary certificates. A temporary certificate is, by its own nature, granted only for a limited time and does not necessarily guarantee that a permanent certificate will be issued. A TIC can give rise to an expectation that its beneficiary is temporarily entitled to some benefits but not that the permanent certificate will actually be issued as the beneficiary will have to prove that, in the meantime, it has satisfied some conditions. Thus, the only investments that could have been made in reliance on that expectation are those made after European Food obtained its PIC in June 2000, and after Starmill and Multipack obtained theirs in May 2002. Whether the Claimants relied on previous incentive programs neither proves their reliance on the EGO 24 incentives nor strengthens their reliance argument.

719. In addition, there is evidence that, further to the EGO 24 incentives, there were other reasons why the Miculas invested in Bihor County. The Tribunal recalls that, according to Mr. Viorel Micula's cross-examination, there were other reasons for the Claimants' investment in Bihor apart from the availability of the Raw Materials Facility for the planned 10 year period until 2009. Mr. Viorel Micula testified as follows:

> Q. Mr Micula, let's not beat around the bush. I will read out a proposition to you and you tell me if you agree. Your investment in Bihor in the European Food and Drinks Group only made economic sense if you could count on the benefits of the raw materials facility for the planned ten-year period until 2009, is that correct? Is it true to say that your investment makes economic sense only if you have the raw materials facility?
>
> A. It is wrong, Mr Petrochilos. I think no one, either myself or my brother who knew about this leverage had made such a mistake. That would have been a big mistake. Maybe you made that mistake.

(Tr., Day 6, 279 (Petrochilos/V. Micula)).

720. In addition, the Micula brothers were born in Bihor County and Ioan Micula conceded that that there was "a very emotional drive" behind their business initiative (Tr. Jur., Day 2, 23). However, he also stated that "it was not just a question of us being born there, it was also a question of long-standing facilities and exemptions that have been there for a very long time and many of them are still there" (Tr. Jur., Day 2, 54).

721. Taking all of this into consideration, it is clear that (i) not all of the Claimants' investments were predicated on the EGO 24 incentives; and (ii) even when the Claimants' took the EGO 24 incentives into account in making investment decisions, other factors also influenced the Claimants' decisions. However, the Tribunal is satisfied that a significant part of the Claimants' investments (from 2000 to 2004) were made in reliance on the incentives. In particular, the Tribunal is satisfied that the existence of the incentives was one of the reasons for the scale and manner of those investments. It is evident from the record that the Claimants built a large and complex platform for the production of food and drink products, and that its profits depended largely on the reduction of their operating costs resulting from the Raw Materials Incentive (Third WS of I. Micula, ¶¶ 44-67, 83-84; Third WS of V. Micula, ¶ 33, 51-52; WS of M. Ban ¶ 38; WS of M. Halbac, ¶¶ 12-61; First ER of D. Lessard, ¶¶ 32-42; ER of R. Boulton, Sections 4 and 5; ER of C. Osborne, ¶¶ 1.11-1.15; Section 4; Exh. C-385, C-987). Accordingly, the Tribunal is satisfied that the Claimants in fact relied on the incentives to build and develop their investment in the manner in which it stood at the date of the revocation of those incentives.

722. It goes without saying that the BIT only protects investments made in reliance on legitimate expectations (*see* paragraphs 667 to 673 above). It does not protect investments made after such an expectation has been destroyed. The Tribunal has found that the Claimants' expectations arose in June 2000, with the granting of European Food's PIC. This expectation was shattered once it became clear that Romania would revoke the incentives without compensation, which, as discussed further below, occurred on 31 August 2004, with the issuance of GO 94/2004. Although Prime Minister Nastase publicly announced the termination of the regime for the first time in January 2004, it was still uncertain at that time whether PIC holders would be compensated (*see* Section 4 below). Accordingly, the BIT can only protect the Claimants' investments made between 1 June 2000 and 31 August 2004.

723. The Tribunal does not ignore the fact that the Respondent has challenged the credibility and reliability of the Claimants' witnesses, in particular with respect to the question of whether, in making their investment decisions, the Claimants' relied on an expectation that the incentives would remain in place for 10 years, and with respect to their damages case.

724. The Tribunal will address the Respondent's arguments with respect to damages in due course. With respect to Claimants' legitimate expectations, however, the Tribunal is not persuaded that the testimony of the Claimants and their witnesses is unreliable. The key issue before the Tribunal is whether and to what extent the

Claimants relied on the EGO 24 incentives to make and develop their investments, and if that reliance was reasonable. It is evident from the documentary record that the Claimants did in fact rely on the EGO 24 regime to expand their business (*see* paragraph 721 above). The Tribunal has also found that the Claimants' expectation that the EGO 24 regime would be in place for 10 years was objectively reasonable. It was also reasonable to rely, at least until 31 August 2004, on the survival of that regime.

* * *

725. For the reasons set out above, the majority of the Tribunal finds that Romania violated the Claimants' legitimate expectations with respect to the availability of the EGO 24 incentives.

726. Although the majority of the Tribunal has found a breach of legitimate expectations, in order to provide a complete ruling on Romania's compliance with its obligation to provide fair and equitable treatment, the Tribunal will address the Parties' remaining arguments with respect to this standard. The Tribunal will next address Romania's defense that it acted reasonably (Section 4 below). It will then address whether Romania acted in bad faith (Section 5 below). Finally, it will address the Claimants' argument that Romania failed to act transparently and consistently (Section 6 below).

4. Did Romania act unreasonably?

727. The Respondent's main defense with respect to the Claimants' fair and equitable treatment and unreasonableness claims is that it acted reasonably when it terminated the EGO 24 incentives regime. It thus argues that it did not engage in what it has called "substantively improper conduct", and it should not be made to compensate for reasonable general regulation. Although the Respondent has acknowledged that the Tribunal may find a breach of the BIT if it finds that Romania promised that the incentives would remain unchanged for ten years and the Claimants reasonably relied on that expectation (see paragraph 500 above, Tr., Day 13, 19-43 (King)), the Respondent devoted considerable time and effort to establishing that it acted reasonably.

728. The Claimants have not addressed this defense directly in the context of their fair and equitable treatment claim, other than to argue that Romania's subjective motivation is irrelevant to determine if it has breached the fair and equitable treatment standard. However, in the context of their claim for "impairment by unreasonable or discriminatory measures" under the second section of Article 2(3) of the BIT (the "impairment clause"), the Claimants also argue that Romania acted unreasonably when it repealed the EGO 24 incentives. When discussing unreasonableness in the context of fair and equitable treatment, the Tribunal will thus refer to the arguments made by the Claimants on that issue in the context of the impairment clause.

a. The Claimants' position

729. The Claimants argue that Romania acted unreasonably by:

a. Actively promoting and extending the EGO 24 regime and encouraging investors to participate in that scheme (at least until 2003), despite the fact that behind closed doors it was negotiating for the scheme's early termination.

b. Revoking the incentives regime prematurely without being required to do so by any competent legal authority, without attempting to negotiate with the EU or the Claimants to mitigate the damages caused by the revocation, and in contradiction of its repeated statements over the years that the regime was legal and satisfied EU requirements.

c. Revoking the benefits of the incentives regime while maintaining the investors' obligations under that regime (in particular the obligation to maintain the investments for 20 years). In the Claimants' view, "a government's decision unilaterally to continue to reap the full benefits of a deal with investors while denying those investors the originally-promised benefits is a textbook example of unreasonableness" (C-Reply, ¶¶ 459-460; C-PHB, ¶¶ 65-66).

730. In terms of the relevant case authority, the Claimants argue that Romania deprived the Claimants of their legitimate rights under circumstances that are contrary to the rule of law (relying on the ICJ's decision in *ELSI*[142]). They further contend that there was no factual justification for the withdrawal of the tax exemptions and incentives (*Lauder v. Czech Republic*). In addition, they argue that the reversal of Romania's position upon which the Claimants had relied was not merely surprising but outrageous (*Pope & Talbot*[143]). Finally, they argue that the measures affecting the Claimants' position were not based on rational decision-making or any consideration of the effects on foreign investments, and did not balance the interests of the state with the burden imposed on Claimants' investments (*LG&E*).

b. The Respondent's position

731. The Respondent submits that the central question in this case is whether Romania acted reasonably in amending EGO 24 in August 2004. The Respondent argues that where an investor challenges general legislation that modifies existing general legislation, the question for an international tribunal is whether that legislation is grounded in reason (rather than being arbitrary) and enacted in pursuit of legitimate objectives (rather than for illicit purposes, such as discrimination). The Claimants have not argued that Romania acted in a discriminatory fashion; the question is thus whether Romania acted unreasonably. The Respondent contends that, to show that Romania acted unreasonably, the test is to determine whether, in light of all of the surrounding circumstances, what Romania did was reasonably connected to a rational policy (R-CM, ¶¶ 167-174; R-Rejoinder, ¶¶ 108-117; R-PHB, ¶¶ 33-98; Tr., Day 13, 45-50 (King)).

[142] *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, 20 July 1989 (hereinafter *"ELSI"*), [1989] ICJ Reports 15.

[143] *Pope & Tablot Inc v. The Government of Canada,* UNCITRAL, Award in Respect of Darnaqes, 31 May 2002, 41 ILM 1347 (2002), ¶ 64.

732. The Respondent argues that it is the Claimants' burden to prove that Romania's action in withdrawing the facilities was manifestly unreasonable (as stated in *AES v. Hungary*). The Respondent submits that the Claimants have not met that burden. Rather, the Claimants speculate about possible transitional measures or possibly delaying the withdrawal of the facilities, and other things Romania might have done. In the Respondent's view, such speculation is not sufficient to prove that Romania's actions were manifestly unreasonable. The Respondent submits that the Claimants' burden is to prove, not merely that Romania could have made better decisions, but rather that the decisions that it did make were so poor and so arbitrary, that they lacked any reasonable relationship to a rational policy goal.

733. In any event, according to the Respondent the record shows that Romania, over a 4 year period of negotiations with the EU, did endeavor to salvage what it could of the EGO 24 facilities. However, the Member States were adamant about the need to eliminate nonconforming state aid, not just by the date of accession but before the negotiations on Chapter 6 (the competition policy chapter of the EU accession negotiations) could be closed and the accession treaty signed. This was especially true of operating aid, and aid that would have been inconsistent with the rules of the customs union, which is what the raw materials exemption would have been.

734. More specifically, the Respondent argues that (i) its motivation in amending EGO 24 was to comply with EU accession; (ii) it acted reasonably in pursuit of conflicting policies, and (ii) none of the Claimants' contentions about what Romania could or should have done differently proves that Romania acted unreasonably.

i. The Respondent's motivation in amending EGO 24 was to comply with EU accession

735. The Respondent argues that its subjective motivation in amending EGO 24 was to address the EC's concerns over state aid. Romania alleges that it gradually repealed the facilities, not irrationally or unreasonably, but in response to increasing pressure from the Commission and the Member States, and in pursuit of the universally accepted national policy priority of joining the EU. According to the Respondent, the facts "indicate that the measures were based upon a rational decision-making process, related directly to the dual (and competing) policy goals of support for disadvantaged regions and admission to the EU" (R-CM, ¶ 173).

736. Specifically, the Respondent alleges that in 2000, Romania announced that the target for EU accession was 2007, and that was public knowledge. During the next three years, Romania, the Commission and the Member States talked with each other about state aid. The Respondent argues that there was a particular focus on EGO 24, especially once the EU was informed that in May 2000 Romania's Competition Council had found certain facilities to be incompatible with the *acquis* on state aid.

737. The Respondent contends that, as a result, Romania began to "chip away" at the customs duty exemptions. In 2002, it eliminated the Machinery Facility, and then the meat-related Raw Materials Facility. Also in 2002, it repealed the Profit Tax

Exemption but grandfathered it for existing PIC holders. Ultimately Romania managed to persuade the EU to accept the grandfathering of the Profit Tax Exemption.

738. The Respondent argues that, by 2004, time was running out if it was to meet its longstanding 1 January 2007 target date for accession. For that to happen, negotiations had to be closed in 2004 and the Accession Treaty had to be signed in 2005. So in June 2004 Romania placed maximum intensity caps on the EGO 24 facilities, but that was not enough for the EU. Finally, in August 2004 the Romanian Parliament passed GO 94/2004, withdrawing the remaining facilities. Romania communicated this fact to the EU in November 2004, and the very next month Chapter 6 was provisionally closed. The revocation of the EGO 24 facilities took effect on 22 February 2005, and two months later Romania and Bulgaria signed the Accession Treaty with the existing member states. Even then, the Accession Treaty imposed on Romania a probationary period regarding state aid, which it did not impose on Bulgaria.

739. The Respondent contends that the EU's position was clear: the EGO 24 incentives had to be terminated and, as confirmed by the Commission representatives during the hearing, the Commission and the Member States were inflexible on this point. According to the Respondent, the documentary record demonstrates that the EU insisted on the revocation of the Raw Materials Incentive and other types of illegal state aid. It argues that the Claimants' attempt to read the EU documents as leaving room for Romania to maintain the EGO 24 facilities ignores the structure of the accession negotiations. The Respondent points out that in its first Position Paper on competition policy of August 2000, Romania confirmed that it accepted the competition *acquis* in full. In light of Decision 244/2000 of the Competition Council in May 2000, this could not have been reasonably interpreted to mean that Romania believed that EGO 24 complied with the *acquis*. Nor does the fact that the EU did not expressly object to EGO 24 at that time mean that the EU accepted the regime; it merely meant that the EU did not yet know all the details of EGO 24.

740. In particular, the Respondent argues that in its Common Position of 2003 (Exh. EC-8) the EU invited Romania to "bring all incompatible aid measures in line with the *acquis* without delay and to continue to provide information on the progress made towards this goal." The Respondent argues that, despite the "diplomatic language" used by the EU, the message was strong: Romania must repeal the facilities as promptly as possible. Likewise, the EU's request that Romania "close incompatible aid schemes for new entrants with immediate effect" cannot negate other statements that made clear that such schemes must be removed for all beneficiaries. The Commission representatives confirmed at the hearing that EGO 24 had to be terminated immediately both for existing and new entrants.

741. In this respect, the Respondent argues that EU law is particularly hostile to operating aid in the form of customs duty exemptions. This is because operating aid reduces the recipient's operating costs, creating an artificial (even if temporary) ability to undersell competitors as long as the aid continues to flow. Romania asserts that this was confirmed by the Commission at the hearing (Tr., Day 5, 157-157 (Commission)).

742. In addition, the Respondent argues that the Raw Materials Facility is, by its very nature, contrary to the Customs Union, as it would create a hole in the metaphorical wall around the EU created by the Common Customs Tariff. This is illustrated by the Claimants' business model: taking advantage of the Raw Materials Facility enabled the Claimants to purchase their raw materials for a price substantially lower than their competitors outside the disfavored regions. This did not simply lower the cost of operations in the disadvantaged region; it gave the Claimants a chance to become sugar dealers (at least if the Claimants' quantum case is to be believed) by importing far more duty-free sugar than needed for their own operations, minimally processing it, and then selling it outside the disfavored region. According to the Respondent, this is exactly the type of situation that the EU's policies against operating aid are trying to prevent.

ii. Romania reasonably balanced conflicting policies

743. The Respondent contends that it reasonably balanced conflicting policies when negotiating the state aid aspects of Chapter 6. Romania states that "[t]he government, including a majority of Parliament, favoured the policy underlying subsidies for disadvantaged areas. But EU accession was also a crucial policy supported across the government (and among the Romanian people). As the conflict between those two policies became increasingly apparent, Romania had to balance conflicting policy objectives, as must any democratic state in which diverse constituencies pursue divergent interests" (R-PHB, ¶ 40). This balancing was made difficult by the differing and sometimes opposing views of various state organs and officials, as exemplified by the differing positions of Mr. Marcu (who was president of the NARD) and Mr. Orban (who was negotiating EU accession).

744. Even once the legal and political difficulties surrounding EGO 24 had become evident, Romania contends that it actively sought to maintain the facilities. Indeed, it argues that many of its actions during the accession negotiations can be explained by its intention to prolong the facilities as long as possible. According to Mr. Orban, this is why Romania was sometimes slow in providing information to the EU about the EGO 24 regime (Tr., Day 8, 205 (Orban)). This is also why Parliament refused to comply with the Competition Council's decision and why it gradually repealed the facilities in response to new demands by the EU.

745. The Respondent argues that whether Romania accurately assessed the EU's position is irrelevant. As Mr. Orban confirmed, Romania acted on the basis of its good-faith understanding of the EU's demands.

746. The Respondent further argues that it could not bargain with the EU from a position of strength. It contends that in EU accession negotiations, candidate countries had very little bargaining power, and that this was particularly true of competition policy.

747. Nonetheless, Romania notes that it obtained substantial concessions from the EU to the benefit of investors in the disfavored areas. Specifically, Romania was able to obtain (i) the grandfathering of the Profit Tax Exemption (for a maximum period of

three years after accession); (ii) a delay of the repeal of the Raw Materials Facility until February 2005; and (iii) a favorable formula to calculate the maximum state aid intensity that investors could receive, which excluded from the cap aid received prior to 1 January 2001. The Respondent asserts that all of these concessions were very real and useful solutions for many companies.

iii. None of the Claimants' contentions about what Romania could or should have done differently prove that Romania acted unreasonably

748. The Respondent denies that Romania could have obtained concessions from the Commission and EU Member States that would have allowed the incentives to remain in place. According to the Respondent, the Claimants must prove that Romania's actions were not reasonably related to its rational policy objectives; it is irrelevant whether Romania got the best possible deal. In the Respondent's view, none of the Claimants' contentions about what Romania could or should have done differently prove that Romania acted unreasonably.

749. First, the Respondent contends that the Claimants have not proven that Romania could have maintained the Raw Materials Facility after EU accession. Indeed, the Claimants have not proven that the Raw Materials Facility was legal under Article 87(3) of the EC Treaty. Nor is there any plausible basis to believe that the EU would have granted derogation, and the Claimants have not cited a single comparable instance in which this has happened.

750. Second, the Respondent argues that none of the alternatives to maintaining the Raw Materials Facility suggested by the Claimants (i.e., a delay in the repeal of the Raw Materials Facility, the grandfathering of the Raw Materials Facility, or the payment of compensation to PIC holders) were feasible. The Respondent contends that Romania kept the Raw Materials Facility in place for as long as possible without delaying accession. Mr. Orban testified that the Commission was very displeased when Parliament delayed the repeal of the Raw Materials Facility to February 2005.

751. Similarly, the Respondent argues that Romania could not have persuaded the EU to agree to grandfather the Raw Materials Facility or agree to other transitional arrangements. Because the Raw Materials Facility constituted incompatible state aid, Romania could not have included it in the list of aid it wished to continue after accession. The Respondent concedes that in its 2001 Common Position the EU invited Romania to submit "a list of those existing aid measures which the Competition Council considers as compatible with the *acquis*", stating that "Romania may continue to operate any aid which is included in the list and against which the Commission has not objected for the period for which the aid was approved by the Competition Council." However, Romania argues that by definition it could only include measures that the Competition Council considered compatible, which was not the case for the Raw Materials Facility.

752. The Commission confirmed at the hearing that to operate incompatible state aid beyond accession, Romania would have needed a special provision in the Accession

Treaty (Tr., Day 5, 90-91 (Gaillard/Commission)). Because the Raw Materials Facility involved an exemption from certain customs duties, grandfathering would have created a hole in the "wall" around the Customs Union. Relying on the Commission's testimony, the Respondent contends that, because of the characteristics of the EGO 24 scheme, grandfathering any facility other than the Profit Tax Exemption "would not have been agreed in the context of accession negotiations" (Tr., Day 5, 174 (Commission)). An exception was made for the Profit Tax Exemption because it constituted investment aid rather than operating aid.

753. Finally, the Respondent contends that the Claimants have not proven that Romania could (let alone, should) have paid compensation to all PIC holders. As Mr. Orban and the Commission testified, any compensation paid to the beneficiaries of the incentives would have been seen as incompatible state aid, and the Commission would have requested reimbursement (Tr., Day 5, 45-46 (Commission); Day 8, 216-217 (Orban)). Thus, the Commission and Member States would not have agreed to the payment of compensation to PIC holders.

754. Even if the Claimants could prove that Romania could have implemented these alternatives, the Respondent contends that that would not establish a breach of the BIT. For a breach to be established, the Respondent argues that the Claimants must show that the judgments made by Romania were not reasonably related to a legitimate policy, i.e., that Romania's judgment of how to balance the policies and interests at stake in the accession process was not merely incorrect, but unreasonable. The Respondent denies that the Claimants have proven this.

c. The Tribunal's analysis

755. Before addressing the Parties' arguments, the Tribunal will first summarize the relevant facts to establish whether Romania did indeed act in pursuit of a rational policy, as it asserts (Section (i) below). It will then turn to the question of whether Romania acted reasonably in pursuit of that policy and will review the Claimants' specific allegations of unreasonable conduct (Section (ii) below).

i. Did Romania act in pursuit of a rational policy?

756. As discussed in paragraphs 691 to 707 above, the Tribunal has found that, given Romania's status as an "underdeveloped area" within the meaning of Article 87(3)(a) of the EC Treaty, it was reasonable for Romania to believe that the EGO 24 incentives could qualify under the operating aid exception contemplated in the 1998 Community Guidelines on Regional Aid.

757. Romania's conduct suggests that, during the first years of the accession negotiations, this was indeed the belief of a significant part of the Romanian Government. The evolution of the government views on the compatibility of EGO 24 with EU law is described by Romania as follows:

> In August 2000, when Romania submitted its first position paper on competition issues to the EU, most officials (outside the Competition

Council) apparently still believed that EGO 24 was legal. When Romania received the Member States' response in October 2000, more Romanian officials began to realise that EGO 24 might be incompatible with EU state aid rules. Even then, there was considerable support for the EGO 24 Facilities outside the Competition Council and the negotiating team. For example, after the Court of Appeal rejected the Competition Council's litigation against EGO 75/2000, Parliament reinstated the one Facility that EGO 75/2000 had eliminated. (R-PHB, ¶ 175).

758. The exchange of position papers between Romania and the EU suggests that there may have been an initial miscommunication as to the nature of the EGO 24 regime.

759. In its first Position Paper 6 (Competition Policy) dated August 2000 (Exh. EC-1). Romania stated that it "accepts the entire *acquis communautaire* in force on 31 December 1999, does not request transition periods or derogations and declares that it will be able to entirely implement it upon accession." However, it also stated that:

> Regarding the state aid rules and agreeing to the principles provided for in Art. 87 and 88 of the Treaty establishing the European Community, ***it is necessary to grant state aids to the sensitive sectors of economy and the deprived areas*** due to the difficulties confronting the Romanian economy during the transition to a market economy.
>
> It is also obvious that, after accession, Romania's development level will not exceed the EU average, and, consequently, ***the whole territory of Romania will comply with the conditions laid down in Art. 87(3) of the Treaty*** establishing the European Community.
>
> (Emphasis added).

760. In that same Position Paper, Romania provided a description of EGO 24, as amended by EGO 75/2000. However, it did not mention Decision 244/2000 of the Competition Council, which had recommended the revocation of the Raw Materials Incentive.

761. This suggests that in 2000 Romania believed that the EGO 24 regime was compatible with the *acquis,* or at least that Romania hoped to be able to negotiate to maintain the EGO 24 aid after accession. It may very well be that the "full acceptance" of the *acquis* was a classic formula, as Mr. Orban testified (Tr., Day 8, 188-189 (Orban)), but Romania still appears to have been stating that it nonetheless required state aid for deprived areas to continue its economic development, and that it understood that Romania was considered underdeveloped for this purpose. In other words, Romania appeared to have been saying that it believed it fell into the Article 87(3)(a) exception. This conclusion was confirmed by Mr. Orban, who testified that, at the time Romania submitted its first position paper, the Government believed that the EGO 24 facilities were permissible state aid consistent with Romania's obligations under the *acquis*, and thus believed no derogations from the *acquis* would be needed (Tr., Day 8, 188-189; 196-197 (Orban)).

762. Romania argues that, because of the Competition Council's decision in 2000, Romania's acceptance of the *acquis* cannot be reasonably interpreted to mean that Romania believed that the EGO 24 regime complied with the *acquis*. The Tribunal disagrees. First, Romania expressly acknowledges that many government officials

maintained the “sincere belief” that the EGO 24 regime complied with *acquis* even after the Competition Council issued Decision 244 in 2000 (R-PHB, ¶ 174). Second, Mr. Orban testified that the Government believed that the EGO 24 regime complied with the *acquis*. Thus, if that belief was unreasonable, then Romania was being unreasonable. Third, the fact that the legislature refused to follow the Competition Council’s recommendation and instead confirmed the EGO 24 incentives via new legislation (EGO 75/2000) suggests that the Government (at least as a body even if some of its members possibly disagreed) verily believed that these incentives were compatible with the *acquis*.

763. Moreover, Romania omitted any mention of the Competition Council’s decision in its first Position Paper. This suggests, as one alternative, that Romania did not see the link between the Competition Council decision and EU state aid law (indeed, the decision made no mention of EU state aid rules). Another possible reason was that Romania did not believe it needed to inform the EU of this decision, perhaps because it considered that under domestic law Parliament had overruled that decision. The omission of any mention of the Competition Council’s decision could also suggest that Romania preferred not to raise thorny issues with the EU, because it wanted to maintain the incentives. Any of these interpretations suggests that Romania believed that the EGO 24 incentives were compatible with the *acquis*, or at least that it might be able to negotiate to maintain them.

764. The EU did not immediately ask Romania to revoke the EGO 24 regime. In its first Common Position (“EU Common Position 2000”, Exh. EC-2), it underlined that “the ‘acquis’ under chapter 6, in accordance with the Europe Agreement, has to be applied by Romania already now.” However, it also invited Romania to “provide details regarding existing aid measures”, and “provide a more detailed analysis of the aid facilities in the so-called D-areas”, in particular “what action, in light of the Community Guidelines on Regional Aid, the Competition Council has taken with regard to the Government Ordinances providing for these aid facilities.”

765. In February 2001, Romania issued a Complementary Position Paper on Chapter 6 (Competition Policy) (Exh. EC-3). In this position paper, Romania provided further information with respect to EGO 24, but, as confirmed by Mr. Orban, not the detailed analysis that the EU had requested (according to Mr. Orban, this detailed analysis was not made until 2004 (Tr., Day 8, 203-204)). Romania also provided a brief summary with respect to the Competition Council’s decision of 244/2000 of 8 May 2000, noting that it had been “overlooked” by EGO 75/2000, but did not explain whether the Competition Council had assessed EGO 24 in light of the Community Guidelines on Regional Aid. It appears that no such study was ever undertaken (there is none in the record).

766. In its next common position (the “2001 EU Common Position”, Exh. EC-5), the EU’s language became stronger:

> The EU further notes that there are a number of existing as well as new incompatible aid schemes which have not been brought into line with the *acquis*. The EU notes that such schemes include in particular [...] facilities

> provided under Emergency Ordinances no. 24/1998 and 75/2000 in the so-called "D-areas". The EU urges Romania to align the existing incompatible aid schemes without delay. (2001 EU Common Position, p. 4)

767. The Claimants argue that this request to "align" EGO 24 did not imply that EGO 24 necessarily had to be terminated. They further note that the 2001 EU Common Position also invited Romania to draw up a list of existing aid measures that it wished to operate beyond accession. Specifically, the EU stated that:

> With regard to aid which Romania wishes to operate beyond the date of accession, the EU invites Romania to draw up a list of those existing aid measures which the Competition Council considers as compatible with the *acquis*. The EU invites Romania to transmit this list to the Commission; Romania may continue to operate any aid which is included in the list and against which the Commission has not objected for the period for which the aid was approved by the Competition Council. A reference to the existing aid list and to the procedure for its establishment will be included in the Accession Treaty. (2001 EU Common Position, p. 4)

768. In view of these statements, it is not evident to the Tribunal that the EU was requesting the revocation of the EGO 24 incentives, and the record shows that it was not evident to Romania either. Mr. Orban testified that it was not necessary for the EU to expressly say that EGO 24 had to be eliminated, because in his opinion "the first position paper of the Union was very clear: every scheme incompatible with the *acquis* has to be eliminated immediately", but "it was the duty of the national authority in the competition policy to exactly define" what schemes were compatible with the *acquis* and which were not (Tr., Day 8, 212 (Orban)). However, he also confirmed that the Romanian Government continued to enact legislation and regulations that maintained the EGO 24 regime, because the Government still believed it to be a compatible scheme (Tr., Day 8, 213 (Orban)). Mr. Orban also testified that "it was a gradual process of learning" for the Romanian Government, that "a significant number of members of the government were not aware about the requirements of the [accession] process", that there was a "lack of expertise" within the Government, but also "a certain confidence that Romania would be able to get [...] a lot from the accession process, which finally proved to be wishful thinking" (Tr., Day 8, 208-209 (Orban)).

769. By June 2002, however, Romania apparently understood that the EGO 24 regime constituted incompatible aid, but believed that it could "align" it with the *acquis* by converting it into compatible aid. The Romanian Government's "Report on the progress in preparing for the accession to the European Union September 2001-May 2002", dated June 2002 (Exh. HEC-6) stated that:

> All existing State aid measures will be assessed, establishing their compatibility with the acquis in order to suggest measures eliminating or transforming the incompatible ones in compatibles aids, taking into account the legal and economic implication of the modification of any incompatible schemes on the already granted specific allocations.
>
> This approach will be made according to the European Commission recommendation and will take into consideration following three steps: (i) closing the incompatibles schemes in order to stop potential future

> allocations; (ii) the modification of these scheme[s] to reach the compatibility with the acquis; (iii) the identification of the solutions for the economic agents that received the State aid under the present schemes (e.g. Free areas, deprived areas etc). […] (p. 132)

770. More specifically with respect to EGO 24, it stated that:

> Regarding the "D areas", the State aid granted in the present ***must to [sic] be converted into a compatible State aid.*** The Ministry of Development and Prognosis started the technical debates with the beneficiary associations in order to identify solutions and to make, in 2 months, proposals for alteration of the present system of facilities. (p. 133. Emphasis added).

771. At the same time, Romania's "National Programme for Accession of Romania to the European Union" dated June 2002 (Exh. HEC-7) stated that "[t]he provisions of the normative acts on facilities granted for 'D areas' will be maintained till the moment of Romania's accession to the European Union" (p. 148). Mr. Orban testified that this was Romania's intention, and that it "battled a lot with the Commission to get this" (Tr., Day 8, 219-220 (Orban)).

772. In November 2002, Romania provided the Commission with Additional Information on Chapter 6 – Competition Policy (Exh. EC-6). With respect to EGO 24, Romania merely informed the Commission that state aid for the D-areas was regulated by Law 621/2001, which approved EGO 75/2000, and explained the amendment to the VAT and the repeal of the profit tax incentive (noting that it had been grandfathered for PIC holders) (*see* paragraph 232 above).

773. On 7 April 2003, the Mission of Romania to the EU sent a communication to the Romanian Minister for European Integration and other state officials, including Mr. Orban and Mr. Berinde (Communication No. 1480, Exh. R-93). It stated:

> Community officials stated clearly that the ***negotiations on this chapter may be closed if, and only if, the following conditions*** (relating primarily to State aid, which was found to have the highest potential to distort the Internal Market) ***are met:*** new aid must comply strictly with the acquis, ***existing aid must be aligned or in the process of being aligned*** (including in terms of duration; the granting of transition periods may be considered depending on the outcomes of discussions between the competent institutions in' Romania and the relevant operators), and ALL cases of non-notified State aid must be analysed and resolved.
>
> […]
>
> The Commission stated that it had asked all of the candidate countries to bring their tax breaks into line with the acquis communautaire, including those granted in Free Zones or ***Less Favoured Areas***, which entails either their withdrawal or their conversion into compatible aid. In the latter case, ***negotiations with a view to converting them into compatible schemes must be pursued directly by the Competition Council with the economic operators concerned.*** Only once this has occurred can the companies for which transition periods may be negotiated with the EU be identified.
>
> (Emphasis added)

774. In its Common Position dated 28 May 2003 (EC-8), the EU's language also became stronger:

> The EU recalls that all fiscal aid provisions, (for example those included in the VAT Law; the ***Law on customs duties exemptions*** - including benefits for transactions undertaken by firms located in industrial parks, free zones and ***disadvantaged areas*** […]) ***should be subject to the approval by the Competition Council. In cases where the Competition Council assesses the respective measures to be incompatible with the State aid rules, the EU invites Romania to either <u>end</u> the measures or to <u>align</u> them with the acquis.***
>
> The EU invites Romania to bring all incompatible aid measures <u>in line</u> with the acquis without delay and to continue to provide information on the progress made towards this goal. […]
>
> The EU moreover invites Romania to provide information on individual benefits granted in the free zones and the disadvantaged areas and on any other individual tax benefits that have already been granted and which provide for tax benefits beyond Romania's target date for accession. ***The EU urges Romania to <u>close</u> incompatible aid schemes for new entrants with immediate effect.***
>
> In this context Romania is further invited to present a ***plan outlining how it intends to <u>convert</u> the benefits that are incompatible with the acquis*** and to hold further technical consultations with the Commission to explore the possibilities for this conversion.
>
> […]
>
> With regard to aid which Romania wishes to operate beyond the date of accession, the EU recalls it's invitation to Romania to draw up a list of those existing aid measures which the Competition Council considers as compatible with the acquis and to transmit this list to the Commission. The EU recalls that Romania may continue to operate any aid which is included in the list and against which the Commission has not objected for the period for which the aid was approved by the Competition Council. A reference to the existing aid list and to the procedure for its establishment will be included in the Accession Treaty.
>
> The EU recalls that the ***existing aid measures*** are subject in accordance with Article 88(1) of the EC Treaty to the ***appropriate measures procedure***, under which the Commission can, in cooperation with the (future) Member State, propose changes to an aid measure for the future. To the extent that Romania wishes to benefit from this mechanism, the EU invites Romania to present the following to the Commission, every six months as from 1 January 2002, and up until the date of accession:
>
> (a) a list of all existing aid measures (both schemes and ad hoc aid) (i) which have been assessed by the Competition Council and (ii) which it found to be compatible with the *acquis*; (b) any other information which is essential for the assessment of the compatibility of the aid measures referred to under (a).
>
> Details on the precise format for this reporting have been provided by the Commission.
>
> The EU underlines that all aid measures in Romania which are considered State aid according to the acquis and which are not included in this list

> shall be considered as new aid upon Romania's accession. After that date, application of such an aid measure will be conditional upon Romania's notification of it pursuant to Article 88 of the EC Treaty, and a decision of the Commission that the aid measure in question is compatible with the Common Market. As regards individual aid, no measures which continue to have effects after accession and which are incompatible will be acceptable.
>
> (Emphasis added)

775. The Claimants argue that at this point the EU was still inviting Romania to "align" incompatible aid schemes, and the request for immediate termination was only for new entrants. They also argue that Romania could have included the EGO 24 scheme in the list of aid it wished to operate beyond accession.

776. The Respondent rejects these interpretations, arguing that, despite the "diplomatic language" used by the EU, the message was strong: Romania had to repeal the facilities as promptly as possible. Likewise, the EU's request that Romania "close incompatible aid schemes for new entrants with immediate effect" cannot negate other statements that made clear that such schemes had to be removed for all beneficiaries.

777. Although the EU had not expressly ordered, in so many words, that the EGO 24 scheme had to be terminated, at that point the message was clear for Romania. It appears that Romania interpreted that message to be diplomatic in language and adamant in substance. Mr. Orban testified that, from the technical consultations in 2003 "it was absolutely obvious [...] that for Custom duties exemptions there will be no, not at all, any chance to get, not only a transition period, but we were obliged to stop as soon as possible", and that "it was absolutely clear that for such kind of facilities, there is no room for manoeuvre" (Tr., Day 8, 229-230 (Orban)).

778. Nor could the revocation have been delayed until accession. Asked whether it would have been possible to keep the Raw Materials Facility until the entry into force of the Accession Treaty, Mr. Orban replied "[m]y clear answer is no. It was a very clear condition formulated by the Commission to stop, to repeal these facilities, the Customs duties exemptions, before the conclusion of the accession negotiation process" (Tr., Day 8, 232:6-9 (Orban)).

779. The Commission representatives confirmed during the hearing that the Commission's message was that the EGO 24 incentives had to be terminated:

> During the accession negotiations with Romania, the EU […] made clear through a number of common positions and other documents which we have submitted to this Tribunal that ***Ordinance No. 24/1998 involved illegal state aid and therefore would have to be revoked prior to accession***. In its reaction to this unambiguous position of the EU, Romania proceeded with the successive abolition of the incentives foreseen in the ordinance. (Tr., Day 5, 45 (Commission); Emphasis added)

780. Indeed, despite the difference in language in the EU's 2003 Common Position, the Commission representatives confirmed at the hearing that EGO 24 had to be terminated immediately both for <u>existing</u> and <u>new</u> entrants:

> So the EU does two things. It says, first of all: end your incompatible aid schemes, and that of course mean[s] also for existing entrants; but then the EU also says: stop them with immediate effect for new entrants, because of course allowing new entrants then creates further problems, deepens further the distortions of competition which arise from the scheme.
>
> So there are, in fact, several exhortations here. Now, this may all not seem very structured or logical; it's a diplomatic document which set out a number of desiderata that the Union had to formulate at the time towards Romania in the context of the accession negotiation. But I think the overall thrust is quite clear: the EU wanted that the aid scheme for disadvantaged areas be terminated. (Tr., Day 5, 156-157 (Commission))

781. Notwithstanding Mr. Orban's testimony, the record suggests that in early 2004 Romania was still attempting to prolong the incentives until the date of accession or negotiate transitional periods. In particular, in an interview on national television on 12 January 2004 (Exh. C-651), Prime Minister Nastase announced that the EGO 24 regime would be terminated due to EU requirements. However, he also stated that the Government was examining whether some of the incentives would remain in place until 2007, noting that the Government had negotiated some transition periods with the EU and that they were trying to find "elegant solutions." When asked to confirm if certain investors could benefit from the program until 2007, Minister Nastase stated that they would try to negotiate an agreement on that point. When asked what would happen to investors who had invested significant sums, the Minister stated that the Government was negotiating with each investor.

782. Notably, in its Complementary Position Paper III on Chapter 6 – Competition Policy dated 24 March 2004 (Exh. EC-9), Romania did not state that the EGO 24 regime would be terminated. Instead, it stated that PIC holders would be subject to maximum permitted intensity thresholds. Romania also highlighted that the EGO 24 incentives had been "significantly diminished" by the elimination of the Raw Materials Facility for the production, processing and preservation of meat. It also stated that investors who had obtained a PIC prior to 1 July 2003 would benefit from the Profit Tax Incentive, which would be grandfathered for the entire duration of the deprived area.[144] This suggests a final attempt by Romania to convince the EU that the EGO

[144] Specifically, Romania's Complementary Position Paper III on Chapter 6 – Competition Policy dated 24 March 2004 (Exh. EC-9) stated: "The Ministry of Administration and Interior elaborated a draft law for completing the Government Emergency Ordinance no. 24/1998 on the regime of deprived areas. The draft provides that the facilities the undertakings that have an investor certificate and operate in deprived areas benefit from, will be granted below the maximum admitted intensity foreseen in the Regulation on regional aid. At present, the draft normative act is under inter-ministerial endorsement procedure.

By entering into force of the Fiscal Code, the fiscal facilities have been significantly diminished. In fact, the undertakings with investor certificate in the deprived areas will benefit from the exemption from the payment of the taxes perceived for changing the destination or removing from the agrarian circuit of certain fields designated to achieving the investment as well as the exemption from the custom duties payment for raw materials and imported components, excepting the import of the raw material for meat production, processing and preserving. Also the undertakings that obtained before 1 July 2003 the permanent certificate of investor in the deprived area, will benefit from exemption from the profit tax payment related to the new investment, during the whole existing duration of the deprived area" (Emphasis added).

24 incentives could be aligned with the *acquis* without outright termination, or at least that the incentives could be prolonged until the date of accession.

783. Prime Minister Nastase confirmed this view in public statements. In an interview in Oradea, Bihor County in May 2004 (Exh. C-652), Prime Minister Nastase indicated that ***"[s]ubsequent to 2007***, when we want to be accepted in the European Union, these disfavored areas will no longer exist in Romania" (emphasis added). When asked about compensation to investors in those areas, the Prime Minister answered that Romania would discuss these matters during its negotiations with the European Union and they would see if Romania was "able to obtain some transition periods for them." The Prime Minister specified that "there will be no fiscal incentives, there will be some compensation packages, established during direct negotiations." The Prime Minister also stated that the Government would talk to the investors, and "based on the conclusions of the negotiations of the Competition Chapter, we will negotiate with those who initially obtained these fiscal incentives" (Exh. C-652, pp. 7-9 of translation).

784. However, by August 2004 Romania must have understood that no transitional periods or compensation packages were possible. On 31 August 2004, through GO 94/2004 (Exh. R-94), Romania repealed Article 6(1)(b)(d) and (e) of EGO 24/1998, thus revoking the incentives provided under EGO 24/1998, including the Raw Materials Incentive, with the exception of the Profit Tax Exemption. The repeal was originally to become effective 90 days from the date of entry into force of GO 94/2004 (that is, on 3 December 2004). However, the date of repeal was subsequently extended to 22 February 2005 by means of Law No. 507/2004 of 22 November 2004 (Exh. C-52), which approved and amended GO 94/2004.

785. Despite this strict position, Romania obtained certain concessions from the EU to the benefit of investors in the D-areas. Specifically, as previously mentioned, Romania was able to obtain (i) the grandfathering of the Profit Tax Exemption (for a maximum period of three years after accession), (ii) a delay of the repeal of the Raw Materials Facility until February 2005, and (iii) a favourable formula to calculate the maximum state aid intensity that investors could receive, which excluded from the cap aid received prior to 1 January 2001.

786. From the documentary and oral evidence described above, the Tribunal draws two broad conclusions. <u>First</u>, at the beginning of the accession negotiations Romania believed that the EGO 24 incentives were compatible state aid. This belief must have ended at least by 2002, when the Romanian government acknowledged in its report on the progress for accession that the EGO 24 regime constituted incompatible state aid and had to be converted into compatible state aid. However, only in mid-2003 did it become clear to Romania that the incentives must be revoked (see paragraph 777 above). That being said, it appears that by as late as May 2004 Romania still believed that it could negotiate transitional periods or compensation packages.

787. As acknowledged by Romania's expert in EU competition law, Mr. Petersen, Romania's belief that the EGO 24 regime constituted compatible state aid was incorrect, but it was not unreasonable:

> Q. [D]o you have any opinion on whether Romania thought as of 1999 that EGO 24 was fully compliant with its obligations under the Europe agreement?
>
> A. I have no knowledge about it. But I could understand that they have a certain good faith, I'm not doubting the good faith, because they were pursuing an objective which was definitely in line with the European Community's cohesion objective.
>
> Q. Do you think that view of the Romanian Government as of that time would have been reasonable?
>
> A. As to that policy, yes […].
>
> (Tr., Day 6, 111 (Smith/Petersen)).

788. Second, it is plain that Romania revoked the incentives in order to comply with EU competition regulations and, in particular, to obtain EU accession. Romania would not have been able to sign the Accession Treaty in 2005 if it had not brought the incentives into compliance with EU competition law. Although it is true that there does not appear to have been an official determination from the European Commission that the incentives constituted incompatible state aid, by mid-2003 it should have been quite clear to the Romanian government that the EGO 24 incentives were impermissible state aid under EU standards.

789. The EU did not explicitly order the revocation of the incentives in the Common Positions; rather, it requested the *alignment* of incompatible state aid regimes (such as EGO 24). However, Mr. Orban testified that in 2003 it became absolutely clear that this was the EU's position, and this was confirmed by the Commission. Indeed, the Commission confirmed during the hearing that, in its view, EGO 24 constituted incompatible state aid:

> Emergency Ordinance 24/1998 involved state aid which was not compatible with EU rules on regional aid. In particular, the various measures did not respect the basic EU rules on eligible costs, which exclude in particular that mere operating costs may not be compensated. Moreover, the limits on maximum aid intensities were not respected either. (Tr., Day 5, 45:10-16 (Commission)).

790. The Commission representatives also explained at the hearing that, because the Raw Materials Incentive constituted operating rather than investment aid, it could not have been transformed into compatible aid without substantially changing their nature. In response to questions from the Tribunal, the Commission testified as follows:

> THE PRESIDENT: […] Is there any way to read EGO 24/1998 specifically with respect to the raw material duty, Customs duty exemption which would make it compatible with EU law now?
>
> A. (By PROFESSOR MARTENCZUK) I find that somewhat difficult to see. There are, of course, various grounds in EU law which allow state aid to be

declared compatible. These grounds are contained in Articles -- today they are Article 107, paragraphs 2 and 3, of the Treaty on the Function of the European Union; at the material time, they were paragraphs 2 and 3 of 87 of the EC treaty.

Essentially you need to have a legitimate objective. Such a legitimate objective could, of course, be, for instance, to further regional development. The EU has rules under which member states can grant aid to help the regional development of certain defined particularly disadvantaged regions. And presumably many of the regions in Romania that are at issue here qualify as such areas; that's not contested.

However, in general the EU, as a matter of competition policy, has formulated limits to that. One of these limits is, for instance, that regional aid should always be granted in the form of investment aid. The reason for that is that it is felt that aid towards investment creates a more durable effect in the development of the underdeveloped region than aid which purely goes towards operating cost. It alleviates an undertaking which otherwise may already be there, and operating maybe inefficiently, of its normal running costs.

It would seem to me that one of the problems precisely with the exemptions that were at issue here is that they essentially are operating aid: they alleviate the undertaking from operating costs. And therefore I think it would have been very difficult to find a ground on which to find these aids compatible, and that is -- and that also doesn't seem to have been, in the end, pursued in the accession negotiations.

THE PRESIDENT: I just want to make clear. You said it would have been very difficult, and I will come back to that question, but much later.

My question right now is: right now, would it be possible, if the Romanian State just for any reason was to enact right now EGO 24/1998, which would be called EGO something/2010, would there be any way to read it which would make it compatible with the EU law now?

A. (By PROFESSOR MARTENCZUK) Unfortunately I am not here in the company of our competition law experts from DG Competition who might be able to provide more direct expertise on that. But my tentative response would be: probably not.

(Tr., Day 5, 158-160 (Tribunal/Commission)).

791. In response to further questions, the Commission added:

THE PRESIDENT: […] Taking Professor Alexandrov's question [on the possibility of redress for investors], what would have been your answer if -- if it had been possible to consider that the goal of the investment was compatible? That is the contrary, I think he said incompatible, and really what I was also interested in is knowing: what if it had been compatible?

A. (By PROFESSOR MARTENCZUK) Well, if the aid scheme by its nature had been such that it was compatible with – or capable of being compatible with EU law, then the correct approach for Romania would have been to include it in the list of compatible existing aid schemes which were adopted at the time of the accession treaty, and which in fact constitutes, if you like, the list of grandfathered existing aid schemes which the Commission sometimes under a number of conditions allows, and which may continue to be applied by Romania without requiring any further -- a new approval by the Commission which would otherwise be necessary.

> Now, however, because of the characteristics of the aid scheme, and with the exception of the profit tax exemption, Romania made no -- as far as I am aware, at least, made no such request, and that's why – and probably if it had made such a request, given the characteristics of the scheme, it would not have been agreed in the context of the accession negotiations.
>
> And that's why, if you like, these aid schemes did not find themselves on the positive list unless [*recte:* unlike] other schemes.
>
> THE PRESIDENT: Such kind of incentive as the Customs duties exemption on the import of raw material, is it totally incompatible with European law, even if it's for disfavoured areas and for a limited duration?
>
> A. (By PROFESSOR MARTENCZUK) I would believe that it would be, I'm at least not aware of any examples of such types of aid. There may be -- there may be specific rules, but I would -- that is something I would have to verify for -- there are some more specific regimes for what is called the ultra-peripheral regions of the European Union. This is for instance the DOM-TOM français, and so forth. For ultra-peripheral regions --
>
> THE PRESIDENT: Angola?
>
> A. (By PROFESSOR MARTENCZUK) For those regions, there are in fact possibilities to grant under more lenient conditions operating aid. I have a suspicion that you might find things there. But that's really just for those specific regions, and the regions that we are talking about here in Romania don't fall under any specific category.
>
> (Tr., Day 5, 173-175 (Tribunal/Commission)).

792. Other than these last comments, neither in its submission nor at the hearing did the Commission explain why the EGO 24 incentives could not have been covered by an exception to operating aid requirements under the 1998 Community Guidelines on Regional Aid (Exh. RJ-9). As noted above, both sides' experts agree that, as an underdeveloped region in meaning of Article 87(3)(a) of the EC Treaty, Romania could have been exceptionally allowed to grant operating aid.

793. The Tribunal cannot speculate as to why the Commission refused to consider the EGO 24 regime as permissible operating aid under the 1998 Community Guidelines on Regional Aid. The fact is that the EU (in particular, the Commission) wanted the EGO 24 regime terminated, and this termination was made a pre-condition for accession.

794. It also seems clear that Romania could not have included the EGO 24 incentives in the list of aid it wished to operate beyond accession. In its 2001 Common Position the EU invited Romania to submit "a list of those existing aid measures which the Competition Council considers as compatible with the *acquis*", stating that "Romania may continue to operate any aid which is included in the list and against which the Commission has not objected for the period for which the aid was approved by the Competition Council." It then reiterated this invitation in its 2003 Common Position. However, as is evident from the language of that invitation, for any state aid to be included in this list, it had to be approved by the Competition Council, and such approval was not given for the Raw Materials Incentive. The Commission confirmed

that this was probably the reason why Romania had not made this request (Tr., Day 5, 174 (Commission)).

795. Finally, the Tribunal notes that the Substantiation Note accompanying the repeal of the EGO 24 incentives stated that

> In order to meet the criteria in the Community rules on state aid, and also to complete the negotiations under Chapter No. 6 – Policy it is necessary to eliminate all forms of State aid in national legislation incompatible with the *acquis communautaire* in this area and, in this respect, it is proposed to repeal […] the provisions of Article 6 paragraph (1), letter (b), letter (d) and letter (e) of the Emergency Government Ordinance no. 24/1998 on the disadvantaged areas […]
>
> (Substantiation Report accompanying EGO 94/2004, 26 August 2004, Exh. R-95, pp. 12-13).

796. Under those circumstances, it is clear that Romania was under considerable pressure from the EU to terminate the EGO 24 regime. Thus, there is no doubt in the Tribunal's mind that Romania's repeal of the EGO 24 incentives was motivated by the EU's demands.

ii. The Claimants' specific allegations of unreasonable conduct

797. The Tribunal will now turn to the question of whether, in pursuit of its objective to join the EU, Romania acted reasonably and, in that context, will address the Claimants' specific allegations of unreasonable conduct.

(a) The Claimants' allegation that Romania actively promoted and extended the EGO 24 regime, while at the same time negotiating for the scheme's early termination

798. The Claimants first argue that Romania acted unreasonably by actively promoting and extending the EGO 24 regime, and (at least until 2003) encouraging investors to participate in that scheme, while at the same time it was negotiating for the scheme's early termination.

799. The Tribunal rejects this argument. As discussed above the record shows that, until mid-2003, Romania believed that the incentives were compatible with EU law and believed they could be maintained after accession. The record suggests that, after realizing that the incentives were incompatible aid, Romania tried to maintain the incentives for as long as possible, but there is no evidence to suggest that during that period after mid-2003 it actively promoted the regime. Romania has not been able to establish clearly when or how it began to inform stakeholders that the incentives would be terminated, but Mr. Orban confirmed that the public should have known at least by May 2004. This is consistent with the fact that Prime Minister Nastase announced the termination of the scheme in January and May 2004.

800. Accordingly, the record shows that Romania did not at the same time promote the EGO 24 regime and seek its early termination. During the time it promoted the regime, it sought to maintain the incentives. After it became clear that this would not

be acceptable to the EU, it announced that the incentives would be revoked. Thus, the factual basis for the Claimants' allegation is incorrect.

(b) The Claimants' allegation that Romania revoked the incentives regime prematurely, without being required to do so by any competent legal authority and without attempting to mitigate damages

801. The Claimants also argue that it was unreasonable for Romania to revoke the incentives regime prematurely without being required to do so by any competent legal authority, without attempting to negotiate with the EU or the Claimants to mitigate the damages caused by the revocation, and in contradiction of its repeated statements over the years that the regime was legal and satisfied EU requirements.

802. The Tribunal rejects this argument. Applying the standard enunciated in paragraph 525 above, the Tribunal does not find that Romania acted unreasonably. Romania did not act arbitrarily; to the contrary: it is evident that Romania's repeal of the EGO 24 incentives was done in response to conditions imposed by the EU for accession. It is true that the EU did not explicitly order the revocation of the incentives; rather, it requested the alignment of incompatible state aid regimes (such as EGO 24) with the *acquis*. However, as discussed above, the EU's demand must be interpreted as a request for termination of the incentives as a pre-condition for accession, and Romania understood that sometime in 2003. Thus, the repeal of the EGO 24 incentives was reasonably related to a rational public policy objective (i.e., EU accession), and there was an appropriate correlation between that objective and the measure adopted to achieve it (i.e., the repeal of the EGO 24 incentives). However, as will be seen, it does not follow of necessity that such repeal was fair and equitable to the Claimants.

803. As to the Claimants' argument that this termination was not ordered by a "competent legal authority", the demands were issued by the Commission on the behalf of the EU itself during accession negotiations. Given Romania's goal of accession, it was not unreasonable for Romania to comply with the EU's demands, even if such demands were not formally issued by a "competent legal authority" if that should have been the case. Even if the Claimants were correct as a matter of law that the termination was not ordered by a competent legal authority, it is not for this Tribunal to decide whether Romania properly understood the point at the time or whether it would have been opportune for Romania to raise the point in its negotiations with the EU.

804. Indeed, the "competent legal authority" appears to have been the Romanian Competition Council, which did in fact recommend the revocation of the Raw Materials Incentive in Decision 244/2000. The Claimants (relying on Prof. Dashwood) have argued that, from a procedural standpoint, during the pre-accession regime only Romania (and not the European Commission) had the competence to determine which forms of state aid qualified as permissible state aid (Tr., Day 1, 178-179 (Gaillard); ER of A. Dashwood, ¶ 25). This appears also to have been the position of the EU, which in its Common Positions repeatedly stated that the determination of whether aid was compatible with the *acquis* depended on the local Competition

Council. It is unclear whether Decision 244/2000 was premised on EGO 24's incompatibility with EU law (indeed, the decision makes no mention of EU law at all). However, to the extent that the Claimants argue that Romania eliminated the Raw Materials Incentive without a finding by a "competent legal authority", they may be technically incorrect.

805. What matters, however, is that, both at the EU and Romanian levels, there was some exhortation to end the EGO 24 scheme because of its capacity to distort competition. This, in addition to the fact that revocation of the Raw Materials Incentive was a pre-condition for accession, shows that Romania's decision to repeal the EGO 24 incentives was not irrational, arbitrary, or based on preference. It was a decision logically related to, narrowly tailored, and necessary for, the pursuit of a legitimate and rational policy.

806. The Claimants also contend that it was unreasonable for Romania to revoke the incentives without attempting to negotiate with the EU or the Claimants to mitigate the damages caused by the revocation. It is true that there is no convincing evidence that Romania tried to negotiate alternative solutions with the EU, such as a delay in the revocation date, a transition period, or payment of compensation. However, as became abundantly clear at the hearing, it would have been extremely difficult (perhaps even impossible) to obtain agreement from the EU on any of these alternative solutions.

807. First, the EU would not have allowed the revocation to be delayed until the date of accession. The Commission representatives testified that the Commission's unambiguous message was that "Ordinance No. 24/1998 involved illegal state aid and therefore would have to be revoked ***prior*** to accession" (Tr., Day 5, 45 (Commission), emphasis added). As mentioned above, when he was asked whether it would have been possible to keep the Raw Materials Facility in place until the entry into force of the Accession Treaty, Mr. Orban replied "[m]y clear answer is no. It was a very clear condition formulated by the Commission to stop, to repeal these facilities, the Customs duties exemptions, before the conclusion of the accession negotiation process" (Tr., Day 8, 232 (Orban)). He also testified that the Commission was very displeased when Parliament delayed the repeal of the Raw Materials Facility to February 2005 (*Id.*).

808. Second, the EU would not have accepted a transitional period or grandfathering for the Raw Materials Incentive. The Commission confirmed at the hearing that to operate incompatible state aid beyond accession, Romania would have required a special provision in the Accession Treaty itself (Tr., Day 5, 90-91 (Gaillard/Commission)). The Commission also confirmed that, because of the characteristics of the EGO 24 scheme, grandfathering any facility other than the Profit Tax Exemption "would not have been agreed in the context of accession negotiations" (Tr., Day 5, 174 (Commission)). As noted above, Mr. Orban testified that, from the technical consultations in 2003 "it was absolutely obvious [...] that for Custom duties exemptions there will be no, not at all, any chance to get, not only a transition period, but we were obliged to stop as soon as possible", and that "it was absolutely clear

that for such kind of facilities, there is no room for manoeuvre" (Tr., Day 8, 229-230 (Orban)).

809. There is some logic to the Commission's inflexibility, at least with respect to transition periods beyond accession. The Respondent is right in that, because of the very nature of the Raw Materials Facility, grandfathering it would have created a "hole in the wall" around the Customs Union. This would only have been the case after accession, not before. However, the Tribunal is not assessing whether the Commission was being reasonable when it imposed these conditions; the Tribunal's mandate is to determine whether Romania acted reasonably in the factual context in which it found itself.

810. Third, Mr. Orban and the Commission confirmed very clearly that any compensation paid to PIC holders would have been seen as incompatible state aid, and the Commission would have requested its reimbursement (Tr., Day 5, 45-46 (Commission); Day 8, 216-217 (Orban)). Thus, the Commission and Member States would not have agreed to the payment of compensation to PIC holders.

811. Given Romania's uncertain chances to obtain any of these alternative arrangements, its lack or, at least, weakness of bargaining power before the Commission, and the Commission's inflexible stance, the Tribunal does not find that it was unreasonable for Romania to revoke the incentives without making more efforts to maintain them. In addition, a negotiation involves many considerations and trade-offs. It is not for a Tribunal subsequently to second-guess decisions which are within the realm of diplomatic bargaining if there are no objective circumstances allowing and requiring such an evaluation.

812. Finally, the Tribunal finds that any contradiction in Romania's statements as to the legitimacy of the EGO 24 regime or its compatibility with EU state aid regulations in the earlier years of the accession process was based on a good faith lack of knowledge and an overly optimistic initial assessment of its bargaining power vis-à-vis the EU.

(c) The Claimants' allegation that Romania revoked the benefits of the incentives regime for investors, while maintaining the investors' obligations under that regime

813. The Claimants argue that it was unreasonable for Romania to revoke the benefits of the incentives regime for investors like the Claimants, while preserving the investors' obligations under that regime, in particular the obligation to maintain the investments for twenty years.

814. There is some dispute among the parties as to the content and length of this obligation. The Claimants argue that under Articles 7 and 9 of EGO 24 (republished version of November 1999, Exh. R-68) investors were required to maintain their investments for twice the period during which they benefitted from the incentives provided under EGO 24. However, relying on Article 1(f) of the 2001 Methodological Norms (GD 728/2001, Exh. R-69), the Claimants argue that the period in which an

investor is <u>deemed</u> to have benefitted from the incentives, for purposes of Articles 7 and 9 of EGO 24, is calculated as "the period between the moment when the certificate of investor in the disfavoured area was obtained and the moment when the disfavoured area ceases to exist."

815. Because Articles 7 and 9 of EGO 24 have not been repealed, and because the revocation did not affect the Profit Tax Exemption, the Claimants argue that European Food must maintain its investments until 2018. They argue that this was confirmed by both Prof. Baias and Prof. Mihai. In this respect, the Claimants argue that "Romania has acted like it did [the Claimants] a big favour by leaving the profit tax exemption in place until 2009, but in reality that was what enabled Romania to keep the obligations on [the Claimants] in place for eight years longer than they would have been otherwise if Romania had simply revoked all the incentives in early 2005." As a result, the Claimants "are effectively hostage in the [Ştei-Nucet-Drăgăneşti] region and they will be until 2018 or until they go bankrupt" (Tr., Day 12, 41-43 (Fleuriet)).

816. The Claimants further allege that Romania is still monitoring their compliance with EGO 24 to this day, and "still carrying out audits and inspections to make sure that Romania gets its benefit from its side of the bargain in terms of employment" (Tr., Day 12, 43 (Fleuriet)). In any event, the Claimants argue that, due to the nature of their investments, they cannot simply move them to another area of Romania (Tr., Day 12, 40-44).

817. In its Post-Hearing Brief, Romania argued that it "has repeatedly stated that the obligation does not exist and that (therefore) it has no intention of enforcing it." As the alleged 20-year obligation is non-existent, Romania argues that there is no merit to the Claimants' assertion of unfairness (R-PHB, ¶ 120).

818. However, Romania took a different position in its closing argument. First, it argued that the Claimants are not hostages in the Ştei-Nucet-Drăgăneşti region; they can leave whenever they wish. It explained that "the obligation is to repay the value of exemptions that have been received if a decision is made by an investor voluntarily to leave the deprived area", and that "[t]he state is not empowered to force a business to stay in the deprived area, nor does it wish to do so." Thus, "[t]his a business decision to be made by an individual investor"; "[i]t is just a money decision" (Tr., Day 13, 128-129 (Petrochilos)).

819. Second, relying on Prof. Baias, Romania argued the period for which the investments must be maintained is twice the period in which the investor actually enjoyed the facility, not twice the period between the issuance of the investment certificate and the termination of the designation of the region as disfavored. In this respect, the Respondent noted that the Claimants have conceded that they stopped receiving the Profit Tax Exemption in 2006 (ref. to Tr., Day 12, 42 (Fleuriet)). In any event, the Respondent argued that Claimants' arguments are irrelevant, because the Claimants have never sought to leave Bihor county (as confirmed by Mr. Ban, Tr., Day 9, 13), and thus they have never been threatened by an obligation to repay the benefits they have received (Tr., Day 13, 131-2 (Petrochilos)).

820. The Parties agree that the obligations set forth in Articles 7 and 9 of EGO 24 have not been repealed. Despite Romania's initial allegation that the obligation does not exist, Prof. Baias confirmed at the hearing that some form of obligation to maintain investments did indeed exist. His position was that the period for which investors were obliged to stay in the disfavored area was twice the period during which they had actually benefitted from the program (Tr., Day 5, 267-273).

821. Articles 7 and 9 of EGO 24 provide:

> ART. 7
>
> In the situation in which ***an investment*** that benefits [sic] from the provisions under the present expeditious ordinance ***is voluntarily liquidated in a period smaller than double the period in which it had enjoyed the facilities*** granted by the Government decision for the setting up of the deprived zone, ***the liquidator/liquidators shall compulsorily pay***, with priority, to the state budget, to the state social insurance budget and to the special funds budgets ***the amounts of money relating to the facilities*** granted in accordance with the provisions under the present expeditious ordinance, from the amounts of money resulting from the liquidation.
>
> ART. 9
>
> The trading companies set up in a deprived zone ***may voluntarily cease their activity in the respective zone***, and those that open branches with legal personality in such a zone may liquidate them or change their head-office from the deprived zone, ***in a shorter period than the one provided under Art. 7, only under the sanction of paying the debts*** to the state budget, state social insurance budget and special funds budgets, ***relating to the facilities*** granted in accordance with the provisions of the present expeditious ordinance.
>
> (Emphasis added)

822. In turn, Article 1(f) of the 2001 Methodological Norms (GD 728/2001, Exh. R-69) defines:

> f) the period in which it benefited from the facilitations granted by the Government Decision designating the area as disfavored, as specified under Art. 7 and 9 of the ordinance - the period between the moment when the certificate of investor in the disfavored area was obtained and the moment when the disfavored area ceases to exist; in the case of the provisional certificate of investor, followed by the procurement of the certificate of investor in disfavored area, the period is calculated from the moment the provisional certificate of investor is obtained until the disfavored area ceases to exist;

823. Prof. Baias insisted that Article 1(f) of the 2001 Methodological Norms contradicted the higher norm, which was Article 7 of EGO 24, and thus in his opinion the 2001 Methodological Norms should be ignored on this point.

824. The Tribunal does not find that the duration of the Claimants' obligation makes in itself a difference for purposes of assessing the reasonableness of Romania's conduct. The point is that Romania repealed the Raw Materials Incentive while at the

same time maintaining all of the Claimants' obligations under the scheme, including the obligation to maintain their investments for twice the period they received the incentives, or twice the period between the issuance of the certificate and the end of period in which the region is designated as disfavored, depending on the interpretation. The Tribunal finds that either scenario is unreasonable. The obligation to maintain investments had no rational justification after the incentives were terminated. The survival of the Profit Tax Exemption is not sufficient justification for the maintenance of investments made in reliance on the legitimate expectation that customs duties exemptions such as the Raw Materials Incentive would be available, just as the Profit Tax Exemption would not have been sufficiently attractive on its own to encourage investment in the disfavored region. Indeed, the maintenance of the Profit Tax Exemption ensured that, despite the absence of the Raw Materials Incentive, the Claimants would continue to be tied to the EGO 24 regime for as long as they made a profit. And, as the Claimants argue, the Profit Tax Exemption would have been useless for companies not making a profit, which could easily have been the case for businesses premised on the existence of operating aid such as the Raw Materials Incentive.

iii. Conclusion

825. For the reasons stated above, the Tribunal finds that, with one exception, Romania did not act unreasonably. Romania's decision to revoke the incentives was reasonably tailored to the pursuit of a rational policy (specifically, EU accession), and there was an appropriate correlation between that objective and the measure adopted to achieve it (i.e., the repeal of the EGO 24 incentives). The question is whether Romania could have negotiated a transition period for the incentives or their conversion into compatible aid. However, even if it could have done more, but failed to do so, objectively speaking the Tribunal does not find that it acted unreasonably. Even if Romania could have done more to maintain the incentives, its failure to negotiate transitional periods or compensation was not arbitrary, but appears justified under the specific circumstances of the accession negotiations.

826. The exception to this conclusion was Romania's decision to maintain the investors' obligations despite the repeal of the incentives. It is not for this Tribunal to say what would have been the right decision (i.e., possibly shortening the period or diminishing in other ways the obligations imposed upon the investors), but it was not reasonable for Romania to maintain as a whole the investors' obligations while at the same time eliminating virtually all of their benefits.

827. In other words, with the exception noted in the preceding paragraph, Romania's repeal of the incentives was a reasonable action in pursuit of a rational policy. That being said, this conclusion does not detract from the Tribunal's holding in Section 3(c) above that Romania undermined the Claimants' legitimate expectations with respect to the continued availability of the incentives until 1 April 2009. As a result, Romania's actions, although for the most part appropriately and narrowly tailored in pursuit of a rational policy, were unfair or inequitable vis-à-vis the Claimants. In

addition, the Tribunal finds that Romania could have been more transparent with PIC holders, as discussed in Section 6 below.

5. Did Romania act in bad faith?

828. The Tribunal now turns to the Claimants' arguments on bad faith.

a. The Parties' positions

829. The Claimants argue that Romania breached its fair and equitable treatment obligation by acting in bad faith when it repealed the EGO 24 incentives. Specifically, the Claimants argue that "Romania acted in bad faith by (1) reneging on its oft-repeated defense of the legality of the incentives regime within the EU accession framework by ultimately revoking the incentives prematurely without a decision from any competent legal authority requiring it to do so; (2) neglecting to negotiate with the EU in order to secure an exception to any potentially-violated State aid rules; (3) failing to negotiate with Claimants in order to protect them from premature revocation of the incentives regime via measures that would be acceptable to the EU; and (4) reaping the benefits from Claimants' investments in the Stei-Nucet-Drăgăneşti disadvantaged region, and in particular accepting fulfillment of Claimants' various obligations under the incentives program as described above, before revoking the incentives four years before the promised date, refusing to compensate Claimants, and thereby failing to fulfill its own obligations under the program" (C-Reply, ¶ 449).

830. The Respondent does not directly address the Claimants' arguments on bad faith. However, the Tribunal presumes that the Respondent's arguments as to the reasonableness of its actions (as discussed in Section 4 above) are applicable.

b. The Tribunal's analysis

831. Good faith is a standard that is flexible. A requirement of good faith is prevalent in all fields of the law and will arise in various matters, such as the interpretation of treaties (Article 31 of the VLCT), the prohibition to abuse rights, and the protection of legitimate expectations. As such, it eludes any strict definition. However, as a minimum, good faith would require that any party would not consciously conduct itself in such a way that should contradict the implications of that party's earlier behavior, a concept akin to the prohibition of estoppel.

832. The concept of bad faith is likewise difficult to define with precision. Black's Law Dictionary defines bad faith as "dishonesty of belief or purpose."[145] The commentary to Section 205 of the American Law Institute's *Restatement (Second) of Contracts* (1981) states with respect to good faith in the performance of an obligation:

> *d. Good faith performance*. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A

[145] Black's Law Dictionary, Ninth Edition (2009), p. 159.

> complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.[146]

833. In the treaty context, Bin Cheng notes that "[t]he principle that treaty obligations should be fulfilled in good faith and not merely in accordance with the letter of the treaty has long been recognised by international tribunals and is reaffirmed by the United Nations as an 'act of faith.'"[147] Similarly, citing a string of investment arbitration cases, the *Europe Cement* tribunal noted that "it is well accepted in investment arbitrations that the principle of good faith is a principle of international law applicable to the interpretation and application of obligations under international investment agreements."[148]

834. According to Bin Cheng, "[p]erformance of a treaty obligation in good faith means carrying out the substance of this mutual understanding honestly and loyally."[149] International investment tribunals confirm this interpretation. For instance, in *Canfor and Terminal Forest v. USA*, the tribunal stated that "a fundamental principle of international law that States Party to a treaty must perform treaty obligations in good faith and, therefore, would not intentionally take steps that would undermine performance of those obligations."[150] Similarly, the *Waste Management II* tribunal held that "[a] basic obligation of the State under Article 1105(1) [which sets out NAFTA's minimum standard of treatment] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."[151]

835. The Tribunal notes that the Claimants' allegations of bad faith are virtually identical to their arguments with respect to Romania's allegedly unreasonable conduct. The Tribunal understands that the difference between both sets of allegations is that the Claimants are arguing here that not only was Romania's conduct unreasonable (i.e., not justified by the reasonably tailored pursuit of a rational objective), but that it was intentional or at least conscious in its unreasonableness.

836. The Tribunal has already found that Romania's conduct was, with one exception, a reasonable action in pursuit of a rational policy. But even with respect to that one

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146 Restatement (Second) of Contracts § 205 cmt. d (1981).

147 Bin Cheng, General Principles of Law as Applied by International Courts Tribunals (1953, 2006), p. 114.

148 *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2), Award, 13 August 2009 (hereinafter *"Europe Cement v. Turkey" or "Europe Cement"*), ¶ 171, citing *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Award, 20 November 1984; *Plama v. Bulgaria*; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 August 2006; *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009.

149 Bin Cheng, p. 115.

150 *Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America* and *Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision of on Preliminary Question, 6 June 2006.

151 *Waste Management v. Mexico II*, ¶ 138.

exception (maintaining investors' obligations after terminating the incentives), the record does not include any indication that Romania acted in bad faith. Accordingly, the Tribunal rejects this argument.

6. Did Romania fail to act transparently or consistently?

837. The Tribunal now turns to the Claimants' allegation that Romania failed to act transparently or consistently.

a. The Claimants' position

838. In addition to failing to provide stability of the legal framework and violating their legitimate expectations, the Claimants argue that Romania breached its obligation to accord fair and equitable treatment by acting in a manner that was not transparent or consistent (C-SoC, ¶¶ 229-241; C-Reply, ¶¶ 440-442; C-PHB, ¶¶ 51-62). The Claimants argue that this was acknowledged by Romania's own witness, Mr. Orban (Tr., Day 8, 208-209, 221 (Orban)).

839. Specifically, the Claimants contend that Romania acted in a manner that was not transparent by actively pursuing two conflicting policies: on one hand, it promoted the EGO 24 incentives, and at the same time it negotiated their revocation behind closed doors. The Claimants allege that, at least until 2003, Romania actively promoted and supported the EGO 24 regime (as evidenced by the Government and Parliament's disagreement with the Competition Council on Decision 244 and the adoption of the Methodological Norms). However, at the same time Romania was secretly negotiating the revocation of these incentives. The Claimants also assert that there is no evidence that the government met with the Claimants to inform them that the incentives were likely to be prematurely revoked.

840. The Claimants further submit that Romania acted inconsistently when it repeatedly proclaimed that the incentives were compatible with the requirements of the *acquis*, but ultimately decided to revoke them prematurely based on their alleged incompatibility with those same requirements. The Claimants also allege that officials within the Romanian government took inconsistent positions with respect to the compatibility of EGO 24 with EU law. According to the Claimants, as explained above the evidence suggests that until 2004 Romania thought that EGO 24 was permissible state aid under EU law.

841. In addition, the Claimants argue that the manner in which Romania revoked the incentives created uncertainty. The Claimants state that the incentives were subject to a string of contradictory measures that repealed some of the incentives, partially reintroduced some of them, and then repealed them again. In particular, the Claimants note that Romania repealed the incentives from EGO 24, but it did not amend GD 194/1999, which states that investors in the Ştei-Nucet-Drăgăneşti region will benefit from the incentives for ten years. The Claimants argue that this led to insecurity and confusion, and as a result the investors could not plan their business in a rational way.

842. In any event, the Claimants contend that Romania did not align its measures with the various goals and policies behind EGO 24 and similar incentives programs granted to investors over the years (which pursued the goals of attracting capital, reducing unemployment, etc). In that context, the Claimants invoke *Tecmed*, as quoted in paragraph 534 above.

b. The Respondent's position

843. The Respondent denies that Romania treated the Claimants' investments in an inconsistent and non-transparent manner (R-PHB, ¶¶ 160-184).

844. As noted above, the Respondent understands that the transparency and consistency "strand" of the fair and equitable treatment standard requires Romania to comply with due process and fair administration. In particular, it means that Romania should conduct itself in such a way that investors are able to find out what the rules are and how to comply with them, and the rules should be administered in an even handed and reasonably consistent fashion.

845. However, the Respondent argues that the situation here is different. The Claimants do not contend that Romania was unclear about the rules and procedures they had to follow, or that the rules were applied inconsistently. Rather, the Claimants contend that they were not given enough information about ongoing diplomatic negotiations. According to the Respondent, international investment law does not require a state to disclose its assessment of the likely outcome of such negotiations. As a result, the Respondent argues that "the Claimants' contentions are not only irrelevant as a matter of law but illogical as a matter of fact: if, as the Claimants seemed to suggest at the hearing, Romania should have publicly announced at the earliest possible date that it did not expect to obtain the EU's agreement to continue the EGO Facilities in force, the only possible difference is that the Claimants would have lost the benefit of the Facilities sooner" (R-Rejoinder, ¶ 161). Likewise, the Respondent argues that there is no need to warn investors of legislative changes (*Parkerings*, ¶ 345).

846. The Respondent also contends that the Claimants' consistency and transparency allegations fail on the evidence. It asserts that Romania's conduct "was entirely fair and reasonable, particularly in a context in which its negotiating partners insisted on a degree of confidentiality and there were—legitimately and unsurprisingly—differing views among different government officials and constituencies as to the best approaches and the most likely outcomes" (R-PHB, ¶ 162). In any case, the Respondent argues that the Claimants knew or should have known (given their duty to conduct due diligence, and given their alleged strong political connections) that the future of the facilities was uncertain. The Respondent also denies that the Claimants were in fact misled by any of the supposedly inconsistent or non-transparent Government statements or omissions.

847. More specifically, Romania argues that (i) its balancing of confidentiality and openness was reasonable, (ii) it complied with any standard of consistency or transparency that could reasonably be imposed in the context of complex or politically

sensitive legislation and negotiation, and (iii) it was common knowledge that the facilities were vulnerable.

i. Romania's balancing of confidentiality and openness was reasonable

848. Romania asserts that some measure of confidentiality and discretion was necessary during the accession negotiations. Romania alleges that this discretion was important "if Romania was to have any hope of obtaining transitional provisions or delayed repeal of the Facilities", but also to comply with confidentiality conditions imposed by the EU. In this regard, Mr. Orban testified that

> We tried to inform as much as possible, but in a discreet way, because we were bound by the clear conditions of conducting accession negotiation process not to express publicly some of the conclusions which were already derived at that time from the negotiations with the Union (Tr., Day 8, 233 (Orban)).

849. Despite the confidentiality constraints imposed by the EU and the need to protect its bargaining position, Romania argues that it pursued a policy of openness. It asserts that the government disseminated information about its progress through governmental websites, the Official Gazette and national media, including detailed reports on the country's progress towards accession. Although the Claimants may criticize the way Romania made information available, Romania contends that the legislative process need not be perfect nor perfectly transparent (*AES v. Hungary,* ¶ 9.3.73).

850. Relying on Mr. Orban's testimony, the Respondent argues that "from the technical consultations in 2003, it was absolutely clear that for such kind of facilities [customs duty exemptions] there is no room for manoeuvre" (Tr., Day 8, 229-230 (Orban)). This conclusion was announced gradually rather than immediately to different stakeholders (mainly through non-public discussions) because Romania was "not in a position to make a public statement" (Tr., Day 8, 230 (Orban)). Romania argues that, as the EU's opposition to the facilities became increasingly apparent, Romania "sought to convey this information to stakeholders in a way that would not undermine its negotiating position with the Commission and Member States" (Tr., Day 8, 223-224 (Orban)).

851. In particular, the Respondent asserts that the Competition Council organized extensive discussions with stakeholders and provided them with copies of state aid documents, such as the EU guidelines on regional aid. With respect to the Claimants' suggestion that the Miculas had not been included in these discussions, Romania argues that it is implausible that businessmen with the Miculas' level of political access and experience could have been deprived of information made available to smaller stakeholders, or that they would not have insisted on being privy to that information. The Respondent notes that the Miculas have boasted about their political connections, and argues that the Romanian government has been responsive to the Miculas' concerns in the past (citing as an example the Parmalat affair, where it alleges that the Miculas were able to use their political influence to overturn a court judgment that was against their interests). Indeed, given the

Claimants own testimony about frequent contacts with government officials, Romania argues that the Claimants cannot prove that they were excluded from the consultative process. In any event, Romania argues that this information was public.

ii. Romania complied with any standard of consistency or transparency that could reasonably be imposed in the context of complex or politically sensitive legislation and negotiation

852. The Respondent contends that it complied with any standard of consistency or transparency that could reasonably be imposed in the context of complex or politically sensitive legislation and negotiation.

853. The Respondent asserts that "various agencies and individuals connected to the Government held differing views about the Facilities' future", which it argues "is normal for any state, and it certainly is to be expected of a state undergoing massive changes in its legal and political culture" (R-PHB, ¶ 173). The Respondent first highlights Romanian officials' lack of expertise in the enactment of EGO 24, noting that Mr. Orban described the EGO 24 program as a "non-professional" attempt by Romania to achieve its objective of regional development, passed "with an incredible lack of expertise in terms of how the regional policy is developed at the European Union level" (Tr., Day 8, 178-180 (Orban)).

854. In addition, the Respondent acknowledges that, at the time of EGO 24's enactment and even after the Competition Council issued Decision 244, a significant part of the government believed that the EGO 24 facilities were legal. Citing Mr. Marcu's testimony at the hearing, the Respondent alleges that "it was this sincere belief that motivated Romania to enact EGO 75/2000, which only partially implemented the Competition Council's decision" (R-PHB, ¶ 175, citing Tr., Day 7; 20-21(Marcu)). Relying on Mr. Petersen's testimony, the Respondent argues that "Romanian politicians and officials who thought that EGO 24 was legal were incorrect, but they were not unreasonable, and they acted in good faith" (R-PHB, ¶ 174, Tr., Day 6, 111, 178).

855. The Respondent argues that it was in this environment that Romania promulgated the 2001 Methodological Norms (GD 728/2001). This was the document on which Mr. Orban was being cross-examined when he admitted that Romania was not being particularly transparent to investors and was also acting inconsistently in terms of the availability of EGO 24 (Tr., Day 8, 208-209 (Smith/Orban)). However, the Respondent contends that when this document was promulgated, "the Government was publicly at odds with the Competition Council regarding the legality of several of the EGO 24 Facilities", and "[a]s Mr. Orban explained, any inconsistency in the position taken by different agencies resulted from different levels of knowledge and sophistication and different assessments (or even 'wishful thinking') of what might be obtained", which "is natural and unavoidable in any state" (R-PHB, ¶ 177).

856. In any event, the Respondent argues that the 2001 Methodological Norms did not say that any particular Facility would stay in place for any period of time. Rather, Article 5

of GD 728/2001 provided that PIC holders "shall continue to benefit from facilities under the law, until the expiry of the period for which the disfavored area was declared." The Respondent points out that the Claimants and other PIC holders did indeed continue to benefit from the facilities under EGO 24 [as amended] until 2009.

857. Similarly, any ambiguity in reports to the public regarding Romania's progress towards accession (Exh. HEC-6 and HEC-7) "can be explained by the quandary in which Romania found itself." (R-PHB, ¶ 178). Relying on Mr. Orban's testimony, Romania argues that single statements in the reports (such as statements saying that the provisions on the facilities granted in the D-areas would be maintained until the moment of Romania's accession) should not be taken at face value, but rather interpreted in context with other sections stating that the issue of state aid was a sensible subject in the negotiating process. For instance, the Respondent cites to the following testimony by Mr. Orban:

> Q. And in this public document in June 2002, anyone who took the time to read this would have been told by the government that the provisions on the facilities granted in the D-areas would be maintained until the moment of Romania's accession; correct?
>
> A. Yes, this was the intention, and this is why we battled a lot with the Commission to get this.
>
> Q. So any investor reading this report in June 2002 would be led to believe that these facilities under EGO 24 would be in place for -- the shortest period of time would be 2007; correct?
>
> A. No. Because -- once again, I don't want to repeat my previous answer, but at that time it was clear that this is a subject, a delicate subject in the accession negotiation process with not a very clear ending.
>
> Q. What's unclear about "will be maintained until the moment of accession"?
>
> A. No, you have to read all the documents, not only this sentence. Because it was clear, you mentioned the previous document, the report, where it is mentioned clearly at page -- so it's 9, okay, it's the negotiation on state aid control on Romania focused, pages 132, on the following sensible topics concerning the assessment of the fiscal aid.
>
> So it was clearly mentioned that this is a sensible subject in the accession negotiation process.

(Tr., Day 8, 219:21-220:21 (Smith/Orban)).

858. The Respondent also contends that the June 2002 programme (Exh. HEC-7) was equivocal about the facilities' future, as confirmed by Mr. Orban:

> Q. […] You were looking at page 148. You were directed to go to the second highlighted passage at the beginning. It says:
>
> "The provisions of the normative acts on facilities granted for 'D areas' will be maintained till the moment of Romania's accession to the European Union."

You were asked about this, you were asked about the import of this statement and what one would make of it. I think in fairness I want you to read the next two sentences, where it is said:

"In conformity with the commitment assumed within the Complementary Position Paper of Chapter 6 'Competition Policy', the Ministry of Development and Prognosis worked out a study analysing the activities carried out in D-areas since July 1999 till June 2001. This study showed that the facilities within deprived areas might be maintained."

I wanted to read out this passage and direct your attention to it, so that I can elicit your comment.

A. So, as I told you, I haven't seen this study. So it clearly shows that the study was made by the Ministry of Development and Prognosis. But here the formulation is not -- how to say? -- has presented some doubts about the possibility of preserving these facilities until the end of the -- until before the accession to the European Union.

(Tr., Day 8, 240:13-241:13 (Petrochilos/Orban)).]

859. The Respondent also denies the Claimants' accusation of deliberate adoption of contradictory positions, arguing that it is unsupported by the evidence. The Respondent contends that "[t]he state may be a unitary entity for purposes of international law, but in judging allegations of bad faith and intentional action, reality must prevail." The Respondent argues that "[d]ifferent officials—in any state—have different roles, different expertise, different levels of legal sophistication, and different opinions", and that "[i]n a period of transition, the diversity of knowledge and views is inevitably greater" (R-PHB, ¶ 179). Citing authors Newcombe and Paradell, the Respondent submits that "[i]n the case of a large investment that involves the jurisdiction of several government ministries and agencies and multiple levels of government, a host state cannot be held to a standard of strict or absolute liability whereby any degree of inconsistency, ambiguity or lack of transparency breaches fair and equitable treatment."[152]

860. According to the Respondent, the only conclusion that can be reached from the record is that the Romanian Government was unsure what would happen with the facilities. It submits that, "[o]n the totality of the record, no reasonable investor could have concluded that the Government was certain that the facilities would remain intact until accession, let alone until 2009. There was doubt, and there is nothing illegal about that, particularly in the context of a state making the transition to EU membership. Investors may choose to invest in conditions of greater uncertainty, in search of greater returns—but also taking on, knowingly, the greater risk that comes with it" (R-PHB, ¶ 180).

[152] A. Newcombe, L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment (2009), Exh. RL–365, p 294.

iii. It was common knowledge that the facilities were vulnerable

861. As explained in detail in Section 3 above, the Respondent argues that it was common knowledge that the facilities would be scaled back or withdrawn, and the Miculas knew or should have known of that risk. The Respondent contends that the fair and equitable treatment standard does not require more than that. Relying on *Parkerings v. Lithuania*,[153] the Respondent argues that it was not required to advise the Claimants of future modifications of the law. Referring to the four points addressed by the *Parkerings* tribunal, the Respondent contends that (R-PHB, ¶ 182):

   a. The record does not show that Romania "deliberately neglected to advise the Claimant[s] of the possible amendment of the law". There was a diversity of views among Romanian officials at different times about what was likely to happen and what was desirable. Particularly at the time when the Claimants say that they committed themselves to a 10- or 20-year investment program (circa 1988-2000) it would be highly unrealistic to say that the Romanian state "knew" that the facilities would be withdrawn before 2009. There is no evidence that this information was intentionally withheld from the Claimants; to the contrary, the evidence is that the Claimants were in frequent contact with many different officials, including the chief negotiator in the accession negotiations.

   b. Moreover, "the political environment was changing at the time… and the Claimant[s] should have known that the legal framework was unpredictable and could evolve."

   c. The fact that Romanian officials knew that the facilities might have to be changed or withdrawn does not mean that they knew exactly what was going to happen or when, particularly at the times relevant to the Claimants' case.

   d. The Claimants and their legal advisors were entirely capable of perceiving that the facilities were "in play" and there was a significant chance of amendment or repeal before 2009.

862. In addition, the *Parkerings* tribunal held that, while the municipality of Vilnius might well have breached a contractual obligation of disclosure, that would not amount to a

[153] *Parkerings v. Lithuania*, ¶¶ 341-342: "[T]he City of Vilnius was in possession of information, prior to the conclusion of the Agreement, concerning possible modifications of the Law on Self-Government and omitted to advise the Claimant ...

However, first, the record does not show that the Respondent deliberately neglected to advise the Claimant of the possible amendment of the law. Second, as described above, the political environment was changing at the time of the negotiation of the Agreement and the Claimant should have known that the legal framework was unpredictable and could evolve. Third, the fact that the City of Vilnius knew the intention of the legislator to modify certain laws, does not mean that the City of Vilnius knew the substance of the modification. Indeed, the record does not show that the City of Vilnius was in possession of any specific information which indicated that the Agreement would be affected by a modification of the law. Fourth, the Claimant failed to demonstrate that any investor or at least a qualified law firm was unable to get the information about the amendment process. Therefore, the Tribunal sees no reason why, in the circumstances, the alleged contractual obligation of the Municipality to inform BP of the future modification of the law is constitutive of a legitimate expectation for the Claimant."

breach of the relevant BIT. The Respondent notes that here there is no question of a contractual or other municipal law obligation requiring the Government to disclose to the Claimants the details of the accession negotiations or warn them that the law might change.

863. In view of the above, the Respondent argues that "[t]he Claimants' allegations about transparency and consistency are red herrings. The plain fact is that, no matter what calumnies the Claimants wish to direct at Romania's conduct, the Claimants could not reasonably have believed that the facilities were guaranteed to remain in place and unchanged until 2009. There is no evidence that they were in fact duped or misled by anything the Government said (or failed to say)—because they were not" (R-PHB, ¶ 184).

c. The Tribunal's analysis

864. It is evident from the record that, as the Respondent itself puts it, Romania was in a quandary whilst trying to balance two conflicting policies, *i.e.*, first, the continuation of the facilities regime and the protection of the interests of PIC holders in the disfavored regions, and, second, EU accession. The Tribunal has already found that Romania's actions, including its choice to terminate the EGO 24 regime in order to obtain EU accession, were not undertaken in bad faith. However, it finds that the manner in which Romania carried out that termination was not sufficiently transparent to meet the fair and equitable treatment standard.

865. The Tribunal cannot fail to note that the Respondent's own witness, Mr. Orban, who was Romania's Deputy Chief Negotiator for EU accession from 2001 to 2004, conceded that Romania acted inconsistently, non-transparently and ambiguously in terms of the availability of the EGO 24 program and the information given to PIC holders as late as 2002 (Tr., Day 8, 208-209, 221 (Orban)). For example, Romania's official reports regarding its progress towards EU accession were ambiguous (and perhaps even misleading, even if unintentionally) with respect to the duration of the EGO 24 regime. Specifically, Romania's "National Programme for Accession of Romania to the European Union" (Exh. HEC-7) stated that "[t]he provisions of the normative acts on facilities granted for 'D areas' will be maintained till the moment of Romania's accession to the European Union" (Exh. HEC-7, p. 148). Mr. Orban's protests that this document should not be interpreted literally (Tr., Day 8, 219:21-220:21 (Smith/Orban), cited above at paragraph 857) are unpersuasive: an ordinary reader would not have understood that, because the assessment of fiscal aid was a "delicate subject" in the accession negotiations, these statements should not be taken literally.

866. The Tribunal has already found that, until sometime in 2003, any inconsistencies in Romania's statements as to the compatibility of the EGO 24 regime with EU state aid regulations were based on a good faith lack of knowledge and an overly optimistic initial assessment of its bargaining power vis-à-vis the EU (*see* Section 4 above). In addition, although for purposes of attribution the state is one single entity, when it comes to assessing transparency one cannot ignore the reality that the state is made

of different departments which may hold conflicting views as to how to implement a particular policy. However, once it became clear to Romania that the incentives would have to be abolished (sometime in 2003, according to Mr. Orban), Romania should have made PIC holders aware of this fact. This was the position taken by the tribunal in *Metalclad*:

> The Tribunal understands [transparency] to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. ***Once the authorities of the central government of any Party*** (whose international responsibility in such matters has been identified in the preceding section) ***become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws***.[154] (Emphasis added)

867. Romania argues that it was bound by confidentiality obligations imposed by the EU. However, there is no evidence of such requirements, other than Mr. Orban's testimony. While the Tribunal does not discount this testimony (and finds Mr. Orban generally to be a credible witness), it seems unlikely that the EU would object to Romania informing affected parties of steps taken by Romania in order to align incompatible aid with the *acquis*, when such alignment was exactly what the EU was requesting Romania to do since the conclusion of the Europe Agreement. Even if confidentiality was required, or Romania preferred to keep the negotiations with the EU confidential for other reasons, Romania then had to make a choice and accept the consequences of maintaining such confidentiality.

868. Moreover, the Tribunal finds Romania's argument that it had to keep the negotiations confidential to maintain its "bargaining position" with the EU unconvincing. If, according to Mr. Orban, "from the technical consultations in 2003, it was absolutely clear that for such kind of facilities [customs duty exemptions] there is no room for manoeuvre" (Tr., Day 8, 229-230 (Orban)), then Romania had no bargaining position to speak of. Romania could be referring to negotiations to obtain transitional periods on the EGO 24 incentives, but there is no evidence whatsoever that Romania even attempted to negotiate transitional periods for the customs duty exemptions.

869. Thus, the Tribunal finds that Romania should have alerted PIC holders reasonably soon after it became clear that the EGO 24 incentives would be abolished. The statements made by Prime Minister Nastase on national television in January and May of 2004 were of a general nature (as befitting their context), and thus insufficient. Given the importance of the EGO 24 program and how intensely it was discussed in the context of Romania's EU accession, it was reasonable to expect that the Government would have given to the participants a formal advance notice of the program's anticipated termination. Prime Minister Nastase had also stated that the

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[154] *Metalclad v. Mexico*, ¶ 76 (Emphasis added).

incentives would be in place until the date of accession,[155] and that the government would try to negotiate transitional periods or that there would be compensation packages for PIC holders (*see* paragraph 689 above), so the actual situation was unclear to PIC holders. Nor has the Respondent pointed to any evidence of discussions with stakeholders organized by the Competition Council or other government agencies.

870. As a result, the Tribunal finds that the Respondent breached the fair and equitable treatment obligation by failing to inform PIC holders in a timely manner that the EGO 24 regime would be ended prior to its stated date of expiry (1 April 2009).

871. The Tribunal finds the Claimants' remaining claims on lack of transparency or inconsistency unsubstantiated. Although perhaps the manner in which Romania offered, amended and then finally revoked the incentives could give rise to some confusion, it did not rise to the level of a breach of the fair and equitable treatment obligation. The fact that the Government repealed the incentives from EGO 24 but made no amendment to GD 194/1999 (which states that investors in the Ştei-Nucet-Drăgăneşti region will benefit from the incentives for ten years) likewise could not have created the level of uncertainty that could rise to the level of a breach of the fair and equitable treatment standard.

* * *

872. The Tribunal concludes that, by repealing the EGO 24 incentives prior to 1 April 2009, Romania did not act unreasonably or in bad faith (except that the Respondent acted unreasonably by maintaining investors' obligations after terminating the incentives). The Tribunal, however, concludes by majority that Romania violated the Claimants' legitimate expectations that those incentives would be available, in substantially the same form, until 1 April 2009. Romania also failed to act transparently by failing to inform the Claimants in a timely manner that the regime would be terminated prior to its stated date of expiration. As a result, the Tribunal finds that Romania failed to "ensure fair and equitable treatment of the investments" of the Claimants in the meaning of Article 2(3) of the BIT.

[155] In an interview in Oradea, Bihor County in May 2004 (Exh. C-652), Prime Minister Nastase indicated that ***"[s]ubsequent to 2007***, when we want to be accepted in the European Union, these disfavored areas will no longer exist in Romania" (Emphasis added).

C. THE CLAIMANTS' REMAINING CLAIMS

873. In addition to their claims under the umbrella clause and their fair and equitable treatment claims, the Claimants assert that the Respondent has breached the second part of Article 2(3) of the BIT by impairing the management, maintenance, use, enjoyment and disposal of their investments through unreasonable or discriminatory measures; and Article 4(1) of the BIT by expropriating their right to receive the incentives (as well as their entire investment) without compensation.

874. In light of the Tribunal's conclusion that, by prematurely revoking the EGO 24 incentives in the manner that it did, the Respondent breached its obligation to treat the Claimants' investments fairly and equitably, the Tribunal does not need to address the Claimants' remaining claims. Indeed, each of those claims arises from the same facts as the fair and equitable treatment claim, and the Claimants claim the same compensation in each instance (see Section VII below). Thus, even if the Tribunal were to find in favor of the Claimants with respect to these claims, this would not impact the Tribunal's calculation of damages. As a result, any legal findings on these matters are unnecessary.

VII. DAMAGES

875. Having found a breach of the BIT, the Tribunal now turns to the Claimants' requests for reparation.

876. During the hearing on the merits, the Respondent argued that the Claimants had amended their case on damages. As a result, the Tribunal directed the Claimants to clarify their final request for relief, which they did on 20 December 2013 with their Revised Request for Relief and later confirmed in their Post-Hearing Brief and closing arguments. The Respondent had several opportunities to comment on this Revised Request for Relief, and submitted its own prayers for relief in response. The Tribunal has focused exclusively on the Parties' formal prayers for relief, namely the Claimants' prayers for relief as set out in their Revised Request for Relief,[156] and the Respondent's response in its Post-Hearing Brief.[157] The Tribunal has also considered that the Parties' additional requests for relief made in the context of their submissions on provisional measures fall under the category of formal prayers for relief. All arguments have been considered, but the Tribunal sees no need to decide on some of the arguments the Parties have made during the course of the proceedings where they are not necessary to the Tribunal's decisions on the actual requests themselves.

877. The Tribunal will first provide an overview of the Claimants' damages case and the Respondent's position in this respect (Section A below). It will then address certain preliminary matters (Section B below), before analyzing the Claimants' specific claims for damages (Section C below). The Tribunal will turn next to the Respondent's defense that EU accession benefitted the Claimants (Section D below), followed by the Claimants' request that damages be awarded net of taxes (Section E below). Finally, the Tribunal will address the question of who should be the beneficiaries of the Award (Section F below).

A. OVERVIEW

1. Overview of the Claimants' damages case

878. The Claimants' damages case has evolved over time, as described below.

a. The Claimants' original damages case

879. In their Statement of Claim, relying on ILC Articles 34 to 36, the Claimants articulated their damages case as follows:

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[156] At the end of their Post-Hearing Brief, the Claimants "request an award granting them the relief set out in the Revised Request" (C-PHB, ¶ 279).

[157] At the end of its Post-Hearing Brief, the Respondent requests that the Tribunal "(a) DISMISS the Claimants' claim in their entirety; and (b) ORDER the Claimants to pay in their entirety the costs of this arbitration […] (R-PHB, ¶ 354). Although the Respondent submitted a Supplementary Post-Hearing Brief commenting on the Claimants' Revised Request for Relief, it did not articulate a formal prayer for relief in that submission.

> "378. […] Claimants are entitled to restitution of the legal framework that would have prevailed had Romania not withdrawn the tax exemptions and other incentives. In addition, Claimants are entitled to consequential damages arising as a consequence of Romania's illegal acts.
>
> 379. In the alternative, if the Tribunal finds that restitution is impossible or constitutes a disproportionate burden, the Claimants are entitled to full damages for the loss suffered as a consequence of Romania's illegal acts. This includes damages for the direct loss suffered as a consequence of the impermissible withdrawal of the tax exemptions and other incentives. It also includes consequential damages for the loss suffered as a consequence of the loss of the cash flow and loss of opportunity."
>
> (C-SoC, ¶¶ 378-379)

880. On this basis, the Claimants requested the following:

a. "[R]estitution of the legal framework as in force at the time of the approval of the EGO 24/1998, alternatively adequate compensation for the losses suffered up to the amount of EUR 450,000,000; plus lost profits and any further losses suffered by Claimants as a consequence of Respondent's actions described above. The exact amount will be specified at an appropriate point during the proceedings" (C-SoC, ¶ 381).

b. "[R]eimbursement of their costs and expenses including the costs of the present proceedings" (C-SoC, ¶ 382), and

c. "[I]nterest compounded quarterly on all monetary claims with the precise rate of interest to be specified at an appropriate time during the proceedings" (C-SoC, ¶ 383).

b. The Claimants' damages case in their Reply

881. In their Reply, the Claimants abandoned their request for restitution (C-Reply, ¶¶ 583, 666, fn. 960). From this point forward, their case focused on compensation.

882. The Claimants submit that, to determine the compensation owed by Romania for its breaches of the BIT, the Tribunal should apply, in the first instance, any *lex specialis* in the BIT. In the absence of any *lex specialis*, the Tribunal must apply the rules of customary international law. The Claimants note that the only *lex specialis* found in the BIT with respect to compensation is in Article 4, which sets out the standard of compensation for a "lawful" expropriation (i.e., an expropriation that meets the requirements of Article 4). However, the BIT is silent with respect to the standard of compensation for "unlawful" expropriations and other breaches of the BIT's substantive protections, such as those alleged by the Claimants in this arbitration. In these cases, the Claimants contend that the appropriate standard for compensation under customary international law is the principle of "full compensation", as articulated by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów*

case.[158] According to the Claimants, this principle is supported by the ILC Articles and by an overwhelming majority of cases and authorities. The Claimants add that the generally accepted view is that they are entitled to be fully compensated irrespective of the breach or breaches of the BIT that the Tribunal may find (C-Reply, ¶¶ 575-588).

883. The Claimants argue that they can only be fully compensated by being placed in the position in which they would have been had Romania not breached the BIT. This includes in particular the lost profits that the Claimants would have made had the Raw Materials Incentive not been repealed. The Claimants further submit that the Tribunal has wide discretion in calculating damages (C-Reply, ¶¶ 589-609).

884. In their Reply, the Claimants requested an award of compensation for the damages described in Professor Lessard's First Expert Report, in the amount of €613.7 million for the following categories of damages (R-Reply, ¶¶ 611-655):

a. Increased costs for imported raw materials;

b. Lost sales of products containing sugar free of customs tax;

c. Financial penalties incurred to the state for delays in tax payments and that could have been avoided with cash available from the incentives and the lost product sales;

d. Lost opportunities to complete or initiate incremental investments (malt, can and cogeneration plants) that would have created cost savings and incentive payments for green energy; and

e. Lost incremental sales of private-label beer that would have been profitable with completion of the cost-saving investments.

885. The damages sought were broken down as follows (C-Reply, ¶ 653):

[158] *Case Concerning Factory at Chorzów (Germany v. Poland),* Judgment 13, Permanent Court of International Justice, 13 Sept. 1928 (hereinafter *"Factory at Chorzów" or "Chórzow Factory"*) (1928 PCIJ, Series A. No. 17).

Summary of Damages Including Incremental Sales
(Present Value at September 30, 2009 in Millions of RON unless Otherwise Noted)

	Damage (Million RON)	Grossed-Up For Tax on Award (Million RON)	Grossed-Up For Tax on Award (Million EUR)
Increased Costs on Raw Materials	139.8	166.4	39.6
Lost Sales of SCPs to Industrial Users	524.4	624.3	148.7
Incremental Margin from Lost Sales of Finished Goods	98.5	117.3	27.9
Penalties Avoided	46.9	55.8	13.3
Malt Plant	28.0	33.3	7.9
Cogeneration Plant	591.8	704.5	167.8
Can Plant	734.9	874.8	208.4
Total	2,164.3	2,576.5	613.7

886. The Claimants added that, in any event, their injury could not be found to be inferior to the amount that they invested in reliance upon Romania's undertaking to provide the incentives for a period of 10 years. The Claimants provided an "evaluation of that amount" in the expert reports of Chris Osborne of (FTI) (C-Reply, ¶ 655). Specifically, Mr. Osborne calculated this amount to be RON 811 million.[159]

887. In addition to the damages sought, the Claimants requested post-award compound interest (C-Reply, ¶¶ 657-665), and costs and expenses associated with this arbitration proceeding, including attorneys' fees (C-Reply, ¶¶ 656).

c. The Claimants' revised request for relief

888. On 20 December 2010, the Claimants submitted a revised request for relief ("Claimants' Revised Request for Relief"). In their Post-Hearing Brief submitted on 13 May 2011, the Claimants explained this Revised Request in detail, and set out three alternative methods (Methods A through C) according to which the Tribunal could calculate the damages sought. They stressed however that "it is not their contention that the three methods listed below, or the itemized injuries that comprise the elements of the three methods, must be strictly adhered to in the ultimate calculation of an award" (C-PHB, ¶ 96).

889. The Claimants explain that Methods A and B are "alternative expectation scenarios that are offered to demonstrate the value of the integrated and flexible factory platform that the Claimants could have expected to derive had the Incentives not been revoked" (C-PHB, ¶ 97).

[159] In his second expert Report, Mr. Osborne places the value of the Claimants' pre-EGO 24 business in "a valuation range of approximately Euro 340 million to Euro 450 million" (¶ 7.60), settling for a final estimation of Euro 400 million (¶ 1.38); see also C-PHB, ¶ 228. However, Mr. Osborne then deducts €100 million to take into account factors other than revocation that may have affected the Claimants' financial situation, arriving to a final estimation of €300 million (at the time, RON 811 million) (Second ER of C. Osborne, ¶ 1.43).

890. According to the Claimants, **Method A** "represents the expected returns from continuation of the ten year plan that Claimants undertook in reliance on the Incentives, a plan intended to both capitalize on the Incentives themselves during their duration, and to complete a platform that would have performed profitably after the Incentives statutorily expired" (C-PHB, ¶ 97).

891. Specifically, in Method A the Claimants request an award of **RON 2,655.35 million** (before interest) (at the date of this Award, approximately **€597 million**) representing the total of each of the following itemized injuries: [160]

No.	***Claim***	***Amount claimed before interest (RON)***	***Approximate equivalent in Euro***	***Interest applies from***
1.	Increased cost of sugar	RON 85.1 million	€ 19.1 million	1 March 2007
2.	Increased cost of PET	RON 6.3 million	€ 1.4 million	1 March 2007
3.	Increased cost of raw materials other than sugar and PET	RON 17.5 million	€ 3.9 million	1 March 2007
4.	Lost opportunity to stockpile sugar in 2009	RON 62.5 million	€ 14 million	1 July 2010
	Subtotal	**RON 171.4 M**	**€ 38.5 M**	
5.	Financial penalties incurred but not yet paid	RON 63.65 million (unless waived by Respondent)	€ 14.3 million	N/A
6.	Financial penalties paid between 1 April 2005 and 30 September 2010	RON 40 million	€ 9 million	1 July 2007
7.	Lost profits on sales of finished goods	No less than ROM 427 million	€ 96 million[161]	1 May 2008
8.	Lost profits on sales of SCPs	RON 492.3 million	€ 110.7 million	1 July 2007[162]
9.	Lost profits from inability to complete a malt plant	RON 28 million	€ 6.3 million	30 Sept. 2009
10.	Lost profits from inability to complete a canning plant	RON 720.4 million	€ 161.9 million	30 Sept. 2009
11.	Lost profits from inability to complete a co-generation plant	RON 712.6 million	€ 160.2 million	30 Sept. 2009
	TOTAL	**RON 2,655.35 M**	**€ 597 M**	

[160] Claimants' Revised Request for Relief, ¶¶ 2.1 to 2.5. The tables set out in this section are based on the tables included in pages 42-43 of the Claimants' Post-Hearing Brief. As the Parties have done in some of their respective submissions, the Tribunal has added, for indicative purposes only, the Euro equivalent of the amounts claimed rounded up to the nearest hundred thousand at the exchange rate of 9 December 2013 of 4.4482 RON/EUR, source: European Central Bank.

[161] Mr. Boulton's valuation was originally made in Euro, for an amount of "in excess of €100 million" (ER of R. Boulton, ¶ 5.99).

[162] In his expert reports, Mr. Osborne had proposed that interest be computed as of 1 March 2007. However, during the hearing on closing arguments, the Claimants circulated a letter from Mr. Osborne dated 7 June 2011 in which he made an adjustment to the calculation of this claim in order to take into account working capital needs (Tr., Day 13, 6-7, 293 (Schwartz)). This adjustment involved a delay of 120 days for computing interest, which meant that interest should be computed from 1 July 2007 (Letter from Mr. Osborne dated 7 June 2011).

892. As an alternative to Method A, the Claimants propose **Method B**, which they argue "represents the expected returns from the platform that the Claimants actually constructed, had the Claimants been able to maintain their respective market shares in their existing and proven product lines." The Claimants argue that they "have a proven track record of constructing flexible, cost-efficient, and integrated factories, and of successfully and profitably penetrating markets and building market share." They further contend that "[g]iven this track record, and the Claimants' known reliance on state investment incentives in building this track record, it was reasonably foreseeable to the Respondent that revocation of the Incentives at issue here would result in the losses reflected by either Methods A or B" (C-PHB, ¶ 97).

893. Specifically, in Method B the Claimants request an award of **RON 2,698.25 million** (before interest) (at the date of this Award, approximately **€606.5 million**) representing the total of each of the following itemized injuries:[163]

No.	***Claim***	***Amount claimed before interest (RON)***	***Approximate equivalent in Euro***[164]	***Interest applies from***
1.	The subtotal of items 1 through 6 of Method A	RON 275.05 million	€ 61.8 million	N/A
2.	Lost profits on sales of finished goods as calculated by BCG	RON 2,423.20 million[165]	€ 544.7 million	15 Aug. 2007
	TOTAL	**RON 2,698.25 M**	**€ 606.5 M**	

894. In the alternative to the expectation losses set out in Methods A and B, the Claimants have proposed **Method C**, a reliance damages calculation. According to the Claimants, Method C "is a means by which the Tribunal can measure the consequences of the Respondent's unlawful act by calculating the value of the investment actually made by the Claimants in reliance on the promised, ten-year duration of the Incentives, and which has been lost" (C-PHB, ¶ 98).

895. Specifically, in Method C the Claimants request an award of **RON 874.65 million** (before interest) (at the date of this Award, approximately **€196.6 million**), representing each of the following itemized injuries:[166]

[163] Claimants' Revised Request for Relief, ¶ 2.6.

[164] At the exchange rate of 9 December 2013 of 4.4482 RON/EUR, source: European Central Bank.

[165] Although the Claimants' final prayer for relief is made in RON, the Parties have also expressed this claim in different Euro amounts. These differences appear to stem from the fact that BCG's calculations were done in Euros, while the Claimants have expressed their claims in RON, and the fluctuations in the exchange rate since the submission of the BCG report have affected the Euro amount at which the Parties have referred to this claim. Specifically, BCG's second report calculates the lost profits at €722 million (Second ER of BCG, p. 17), while in its Supplementary Post-Hearing Brief the Respondent values this claim at €590 million (R-SPHB, p. 15).

[166] Claimants' Revised Request for Relief, ¶ 2.7.

No.	Claim	Amount claimed (before interest)	Equivalent in Euro[167]	Interest applies from
1.	Financial penalties incurred but not yet paid	RON 63.65 million (unless waived by Respondent)	€ 14.3 million	N/A
2.	Loss of value incurred in investing in reliance on the Incentives	RON 811 million[168]	€ 182.3 million	1 Jan. 2002
	TOTAL	**RON 874.65 M**	**€ 196.6 M**	

896. The Claimants further request interest and costs (Revised Request for Relief, ¶¶ 3 and 5), as described in Sections VIII and X below. The Claimants also request that "[t]he total amount of damages payable by the Respondent comprising the amounts set out in paragraphs 2, 3 and 5 [that is, all damages, interest and costs requested] to be received net of any tax obligations imposed by Romania on the proceeds" (Claimants' Revised Request for Relief, ¶ 4).

897. In addition, the Claimants have requested that "[a]ny damages payable, including interest and costs, should be awarded to the individual Claimants, Ioan Micula and Viorel Micula, to be divided between them on a 50:50 basis. In the alternative, any damages payable, including interest and costs, should be awarded to all five Claimants" (Revised Request for Relief, p. 1). This request was later confirmed in the Claimants' prayer for relief included at the end of their Post-Hearing Brief: "the Claimants request an award granting them the relief set out in the Revised Request" (C-PHB, ¶ 279).

898. Finally, in the context of their applications for provisional measures, the Claimants have also requested post-award injunctive relief, as described in Section IX.B below, as well as a declaration that the Respondent is not allowed to set off any damages awarded to the Claimants against the EFDG's tax debts (as described in Section IX.A below).

2. Overview of the Respondent's position

899. The Respondent argues that the Claimants' damages case is speculative and unsupported (R-Rejoinder, ¶¶ 259-288, R-PHB ¶¶ 207-210; R-SPHB, ¶¶ 1-6; Tr., Day 1, 191; Day 2, 137-138).

900. The Respondent contends that the Claimants' quantum case has changed substantially over the course of the proceedings. It notes that this claim began as an

[167] At the exchange rate of 9 December 2013 of 4.4482 RON/EUR, source: European Central Bank.

[168] Mr. Osborne's final valuation for the reliance claim was €300 million (at the time, RON 811 million) (Second ER of C. Osborne, ¶ 1.43). In line with this final valuation, in their Revised Request for Relief and in their Post-Hearing Brief, the Claimants requested RON 811 million for this claim (Revised Request for Relief, ¶ 2.7; C-PHB, ¶¶ 228-231). Although in their Closing Statements the Claimants stated that they disagree with this discount and therefore the claim remained within the range between €350-400 million (Tr., Day 12, 123-125 (Reed)), the Tribunal will disregard this latest argument. It is far from certain that the Claimants could purport to amend their sought relief at this late juncture and actually did.

unparticularized claim for €450 million "plus lost profits and any further losses", but was transformed substantially when the Claimants submitted their Reply. From that point forward, the Claimants' case has centered on direct losses for approximately €33 million, which they have "snowballed" into indirect losses for approximately €600 million. Specifically, the Claimants allege that the loss of the Raw Materials Incentive caused them to lose cash flows totaling approximately €33 million (mostly related to the higher cost of purchasing sugar), which have allegedly prevented the Claimants from pursuing a purported "10-year plan", causing the Claimants to forgo hundreds of million Euro in hypothetical lost profits (most of them relating to investments they never made or businesses they never developed). The Respondent also notes that the Claimants blame this "cash crunch" and their subsequent inability to expand for having prevented them from paying Romanian taxes in a timely manner, resulting in interest and penalties which they now claim as losses.

901. The Respondent also complains that the Claimants have instructed an army of experts, made conflicting damages calculations and constantly changed positions. For example, until the hearing their damages claims were mostly supported by Prof. Lessard's expert reports; however, in their Post-Hearing Brief the Claimants rely on Mr. Osborne's calculations. The Claimants have also advanced an alternative reliance losses claim on the basis of Mr. Osborne's expert reports. The Respondent also complains that the Claimants submitted expert reports from Mr. Juhász of BCG and Mr. Boulton of LECG, and that the status and relevance of these reports remained unclear to Respondent even after the hearing. However, the Claimants rely on both of these reports in their Revised Request for Relief.

902. The Respondent further argues that the Claimants' damages case is fundamentally flawed, and should be dismissed, for the following reasons.

903. <u>First</u>, the Respondent argues that all of the claimed categories of damages are barred by legal standards. The Respondent does not dispute the general applicability of the *Chorzów Factory* standard of compensation under international law, upon which the Claimants rely. However, it argues that "the 'full compensation' principle does not create an entitlement to collect a windfall based on damages not suffered, not proven, and not causally connected with a violation of a treaty obligation", which in the Respondent's view is what the Claimants seek here (R-Rejoinder, ¶ 277).

904. More specifically, the Respondent argues that the Claimants (i) have not met their burden of proof, in particular with respect to claims of lost profits, and (ii) have failed to prove causation.

905. With respect to ***burden of proof***, the Respondent argues that the Claimants bear the burden of proving every element of their claim, and have failed to do so. Even with respect to heads of damages where there is some evidence, the Respondent submits that it is incomplete and insufficient. The Respondent thus argues that the Tribunal should dismiss the Claimants' claims on this basis (R-PHB, ¶ 216).[169] In addition, the

[169] The Respondent's specific comments as to the lack of evidence of each head of claim are provided in Section C below.

Respondent contends that the Claimants must also meet the specific legal standard with respect to lost profits (discussed in Section VII.C.3 below), which it argues they have not done (R-PHB, ¶¶ 217-221, R-Rejoinder, ¶¶ 297-300).

906. With respect to ***causation***, the Respondent submits that a state's actions must be the direct and proximate cause of the damages suffered (R-Rejoinder, ¶¶ 316-321). The Claimants must prove that breaches of the BIT by Romania were the "underlying" or "dominant" cause of each head of damage claimed. The causal connection must not be too remote, and there can be no intervening causes breaking the chain of causation.

907. In the Respondent's view, this rule disposes of the Claimants' entire damages claim, leaving only the claim for alleged direct losses for payments of customs duties. The Respondent argues that all but the direct losses claim are premised on the theory that the Claimants had insufficient funds (or cash flows) to undertake other activities because of the repeal of the Raw Materials Facility. If the Tribunal were to consider that this "cash crunch" had other causes, or that the Claimants might have obtained alternative funds from other sources, then the chain of causation has been broken. As explained further below, Romania argues that the hearing exposed the Claimants' rapidly deteriorating financial position before repeal of the Raw Materials Facility and their own business decisions as the real causes of the Claimants' alleged losses, severing the causal link between repeal of the Raw Materials Facility and the claimed damages. The Respondent adds that, if the Claimants really had been able to convert €30 million of cash flow into more than €600 million, there would have been no shortage of lenders and equity investors ready to provide the funding.

908. In addition, the Respondent contends that the Claimants must also establish the causal link between each alleged breach of the BIT and the specific damages caused by such breach. The Respondent notes that the Claimants have consistently refused to do so, including in the Revised Request for Relief. As a result, the Respondent contends that no assumptions can or should be made about which damages flow from each alleged treaty breach. It would be wrong to expect the Tribunal to simply assume that all of the heads of damages claimed flow directly from all of the alleged treaty breaches. In particular, the Respondent argues that it would be wrong to assume that the same damages would flow from an expropriation than from a breach of other treaty standards. In this respect, the Respondent argues that the Claimants have not even purported to identify the fair market value of the assets expropriated (their alleged vested right to enjoy the Raw Materials Facility).

909. Second, the Respondent argues that every category of the Claimants' quantum case (with the exception of the direct losses claim) is based on two assumptions for which there is no evidentiary support:[170]

a. That the Claimants had a "10-year plan" that they would have implemented but for the withdrawal of the Raw Materials Facility, and

[170] The Respondent's arguments on the assumptions identified above (including arguments on evidence) are addressed in the analysis of each of the Claimants' claims in Section C below.

b. That, but for that withdrawal, the Claimants would have started selling SCPs to industrial customers (at about the time of revocation) and would have cornered the Romanian sugar market, thereby generating the cash flows necessary to undertake the Incremental Investments.

910. In addition, the Respondent argues that no award of damages can be made in respect to losses incurred by non-Claimant companies, nor for the diminution in value of the Individual Claimants' direct or indirect shareholdings in such companies, because they fall outside the jurisdiction of this Tribunal. In this regard, it argues that the Tribunal accepted jurisdiction over the Claimants' shareholdings only over the Corporate Claimants (R-PHB, ¶ 314).

911. Further, the Respondent opposes the Claimants' request that all damages be awarded to the Individual Claimants.

912. In view of the above, at the end of its Post-Hearing Brief the Respondent requests the Tribunal to award the following relief:[171]

> "(a) DISMISS the Claimants' claim in their entirety; and
>
> (b) ORDER the Claimants to pay in their entirety the costs of this arbitration […] (R-PHB, ¶ 354).

913. Finally, in the context of its application for the revocation of provisional measures, the Respondent requested the Tribunal to "explicitly provide in the Award that any amount awarded to any of the Claimants, whether as damages, arbitration costs, or otherwise, is subject to set-off by Romania against the tax debts of all eleven EFDG companies, including lawful interest and penalties" (Respondent's Revocation Application, ¶ 87(c)).

B. PRELIMINARY MATTERS

914. Before turning to the Claimants' specific claims for damages, the Tribunal will address certain preliminary matters, in particular legal standards (Section 1 below), and the Respondent's claim that certain of the Claimants' claims fall outside of the jurisdiction of this Tribunal (Section 2 below).

1. Legal Standards

915. A substantial part of the Respondent's arguments on quantum relates to the legal standards applicable to an award of damages. Accordingly, before addressing the quantification of the Claimants' claims, the Tribunal will address these standards.

916. The basis for the Claimants' expectations damages claims is the principle of full reparation enshrined in Article 31 of the ILC Articles,[172] which provides:

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[171] Although the Respondent submitted a Supplementary Post-Hearing Brief commenting on the Claimants' Revised Request for Relief, it did not articulate a prayer for relief in that submission.

Article 31. Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

917. As articulated by the PCIJ in the *Factory at Chorzów* case, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[173] This principle has been generally understood to mean that the claimant must be placed back in the position it would have been "in all probability" but for the international wrong. In most cases, this involves the payment of compensation (ILC Articles 34 and 36).[174]

918. The Respondent does not dispute the principle of full reparation. Rather, it contends that the Claimants have not met their burden of proof with respect to the damage suffered, and have failed to prove that the damages alleged were caused by Romania's breaches of the BIT.

919. The Respondent also argues that the Claimants must prove both the existence of the damage for which they request compensation, as well as the existence of a causal link between the breaches of the BIT found by the Tribunal and the damage alleged.

920. Article 36(2) of the ILC Articles provides that "compensation shall cover any financially assessable damage including loss of profits ***insofar as it is established***." The Parties do not dispute the general principles on <u>burden and standard of proof</u>, except when they relate to lost profits. The Tribunal addresses the standard for an award of lost profits together with the analysis of the Claimants' specific claims for lost profits in Section C.3 below.

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[172] The Tribunal is aware that Part Two of the ILC Articles, which sets out the legal consequences of internationally wrongful acts, may not apply, at least directly, to cases involving persons or entities other than States, such as in investment disputes as is the case here. In particular, it is aware that Comment (3) to Article 28 states that "[…] while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear." That being said, the ILC Articles reflect customary international law in the matter of state responsibility, and to the extent that a matter is not ruled by the treaties applicable to this case and that there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles for guidance. The Tribunal further notes that the Claimants have cited to the ILC Articles and the Respondent has not objected.

[173] *Factory at Chorzów*, p. 47.

[174] Article 34 of the ILC Articles (forms of reparation) provides that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

Article 36 of the ILC Articles (compensation) provides: "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

921. With respect to <u>causation</u>, the Respondent argues that the Claimants must not only prove causality in fact (which has been defined by the *Biwater v. Tanzania* tribunal as "the sufficient link between the wrongful act and the damages in question"[175]), but must establish that causation is proximate (i.e., not too remote or inconsequential). According to the Respondent, to prove proximate causation, it would not be enough for the Claimants to demonstrate that the repeal of the Raw Materials Facility had a detrimental impact on their business activities; they must also prove that the breaches of the Treaty were the "underlying" or "dominant" cause of each element of compensation that they seek. The Respondent relies (among others) on the *ELSI* case, where the International Court of Justice found that, despite the fact that there were several causes that led to the ELSI disaster, "the underlying cause was ELSI's headlong course towards insolvency,"[176] and on *GAMI v. Mexico*, where the tribunal found that the damages suffered by the claimant had been largely the result of market forces[177] (R-Rejoinder, ¶¶ 317-320). In addition, the Respondent contends that the Claimants must show a direct causal link between each violation of the BIT and the specific damages caused (see paragraph 908 above). Finally, relying on *Lauder v. Czech Republic*,[178] the Respondent argues that there must be no intervening cause for the damage (R-Rejoinder, ¶ 319).

922. The Claimants do not dispute the principles on causation described by the Respondent. Citing *Biwater v. Tanzania*,[179] the Claimants simply assert that "for each item of damage claimed, there is a 'sufficient link between the wrongful act and the damage in question'", and that "the Respondent's actions were the 'underlying' or 'dominant' cause of the Claimants' losses" (C-PHB, ¶ 100). The Claimants provide further details on these alleged causal links in the description of each claim.

923. The ILC Articles emphasize the need for a causal link between the internationally wrongful act and the injury for which compensation is due. Article 31(1) provides that "[t]he responsible State is under an obligation to make full reparation for the injury ***caused*** by the internationally wrongful act." Article 31(2) goes on to say that "[i]njury includes any damage, whether material or moral, ***caused*** by the internationally wrongful act of a State." Commentary (9) to Article 31 explains that

> "It is only '[i]njury … caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."

924. Commentary (10) adds that "[t]he allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process", and that "causality in fact is a necessary but not a sufficient condition for reparation. There is a further

[175] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No ARB/05/22), Award, 24 July 2008 (hereinafter *"Biwater v. Tanzania"*), ¶ 785.
[176] *ELSI*, ¶¶ 100 and 101.
[177] *GAMI v. Mexico*, ¶ 85.
[178] *Lauder v. Czech Republic*, ¶¶ 234-235.
[179] *Biwater v. Tanzania*, ¶ 785.

element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation." The commentary explains that "in international as in national law, the question of remoteness of damage 'is not a part of the law which can be satisfactorily solved by search for a single verbal formula'", but notes that international tribunals have used the criteria of directness, foreseeability or proximity to establish this, and that other factors may also be relevant.

925. With respect to the concept of directness, the Tribunal notes that under the ILC Articles not every event subsequent to the wrongful act and antecedent to the occurrence of the injury will necessarily break the chain of causation and qualify as an intervening cause. Indeed, the commentary to the ILC Articles explains that, in cases where "the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault" (Comment 12 to Article 31 of the ILC Articles). The only other exception seems to be cases "where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone", "[b]ut unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, ***not being too remote***, of its wrongful conduct" (Commentary 13 to Article 31 of the ILC Articles. Emphasis added).

926. Thus, an intervening event will only release the State from liability when that intervening event is (i) the cause of a specific, severable part of the damage, or (ii) makes the original wrongful conduct of the State become too remote. Unless they fall under either of these categories, cases of contributory fault by the injured party appear to warrant solely a reduction in the amount of compensation.[180]

927. Therefore, the question seems to be whether the intervening event is so compelling that it interrupts the causal link, thus making the initial event too remote. Accordingly, when assessing the impact of an intervening cause, the Tribunal will first focus on whether the damage can be properly attributed to the cause cited by the Claimants, or rather to the intervening cause.

928. Finally, the Respondent has argued that the Claimants must show a direct causal link between each violation of the BIT and the specific damages caused. In this particular case, however, all of the violations of the BIT alleged by the Claimants arise from the same fact: the premature revocation of the incentives or in direct connection with that premature revocation. Even if the Respondent's argument were correct, the damages claimed by the Claimants arise from one and the same set of facts, irrespective of the specific treaty breach alleged.

[180] Article 39 of the ILC Articles provides that "in the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission" of the injured party. Commentary 5 to Article 39 explains that the phrase "account shall be taken" "indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in the appropriate case".

2. Does the Tribunal have jurisdiction over claims for damages relating to the non-claimant companies of the EFDG?

929. During the course of this arbitration, it has become evident that all of the damages calculations provided by the Claimants (be it under Methods A, B or C) refer to the damages suffered by the entire EFDG.[181] In the Claimants' view, the Individual Claimants are entitled to all of the damages suffered by all of the companies in the EFDG because they assert that "all of the main companies [in the EFDG] are 100% owned, or virtually 100% owned, by the Micula brothers" (Tr., Day 11, 105 (Reed)).

930. The Respondent argues that no award of damages can be made with respect to losses incurred by non-Claimant companies, nor for the diminution in value of the Individual Claimants' direct or indirect shareholdings in such companies, because they fall outside the jurisdiction of this Tribunal. In this regard, they argue that the Tribunal accepted jurisdiction over the Claimants' shareholdings only over the Corporate Claimants (R-PHB, ¶ 314).

931. The Tribunal makes two observations in that regard. First, in its Decision on Jurisdiction and Admissibility, the Tribunal found that it had jurisdiction "over the dispute submitted to it in this arbitration" (Decision on Jurisdiction and Admissibility, ¶ 170), after having found that it had jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* over the Claimants' claims.[182] The Tribunal did not state that it accepted jurisdiction only with respect to the Individual Claimants' shareholdings over the three Corporate Claimants. The Tribunal noted that, at that juncture, "it need only determine whether there is an investment for the purpose of Article 25 of the ICSID Convention and Article 7 of the BIT" (Decision on Jurisdiction and Admissibility, ¶ 123). The Tribunal was satisfied that the investments made by the Corporate Claimants, as well as the shareholding of Messrs. Micula in the Corporate Claimants, qualified as investments (Decision on Jurisdiction and Admissibility, ¶ 125.) However, the Tribunal did not exhaustively determine what the Claimants' investments were nor hold that those were the only investments out of which the dispute arose. For example, the Tribunal concluded that it did "not need to establish at this stage whether the incentives as such are considered investments capable of expropriation" (Decision on Jurisdiction and Admissibility, ¶ 128).

932. Further, in their Statement of Claim, the Claimants stated that this dispute arose "out of investments made by Claimants in the Romanian areas Stei-Nucet and Drăgăneşti village", adding that "[t]hese investments comprise various facilities for the production of food and related services" (SoC, ¶¶ 32-33). The Claimants did not specify that all of those facilities were owned directly by the Individual Claimants or the Corporate Claimants, although they did suggest in a fashion (*see* SoC, ¶¶ 45-168). During the

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[181] *See, e.g.,* First ER of D. Lessard, ¶¶ 72-73; Tr., Day 8, 118-121 (Lessard); First ER of C. Osborne, fn. 1 and Appendix 2 (definition of "Companies"); ER of R. Boulton, p. i (definition of "Companies"); Second ER of BCG, p. 2; Tr., Day 10, 88-89 (Osborne).

[182] In particular, the Tribunal found that the Corporate Claimants' physical assets and the Individual Claimants' shares in the Corporate Claimants qualified as investments for purposes of the ICSID Convention and for purposes of the BIT (Decision on Jurisdiction and Admissibility, ¶¶ 124-128).

course of the arbitration, the Claimants have explained that their food production facilities are owned and operated through a group of Romanian companies, the EFDG, which they allege is ultimately owned by the Individual Claimants. The fact that part of the Claimants' business is channeled through Romanian companies that may be owned by the Individual Claimants, which was not brought to the Tribunal's (or the Respondent's) attention during the jurisdictional phase, does not negate the Parties' consent to ICSID arbitration, nor the Tribunal's competence and the Centre's jurisdiction over the dispute. Finally, it is not disputed that the claims related to the investments in non-claimant companies of the EFDG, which are within the competence of the Tribunal, were made in a timely fashion as they were raised at the latest in the Claimants' Reply.

933. Second, in the Tribunal's view, the question whether an award of damages can be made in respect to losses incurred by non-Claimant companies owned by the Individual Claimants is not a question of jurisdiction, that is, whether the Parties have consented to this Tribunal and to ICSID as the appropriate forum to adjudicate the dispute. The question is rather whether it is permissible for the Individual Claimants to seek remedy for losses suffered by companies owned by them but that are not claimants in this arbitration. Thus, the issue is whether the Individual Claimants are entitled to a remedy if neither of them personally suffered the prejudice directly suffered by corporations in which they are shareholders but which are not claimants in this arbitration.

934. In their Statement of Claim, the Claimants requested "adequate compensation for the losses suffered up to the amount of EUR 450,000,000; plus lost profits and any further losses suffered by Claimants as a consequence of Respondent's actions", the exact amount to be specified at an appropriate point during the proceedings (SoC, ¶ 381). The Claimants did not at that stage specify that the Individual Claimants' losses stemmed exclusively from their investment in the Corporate Claimants. The Respondent does not dispute that the Individual Claimants have standing to bring claims related to their investments in shares of corporations.[183]

935. Thus, to the extent that the Individual Claimants can prove their ownership of the other (Romanian) companies in the EFDG and can prove that they have been affected in this regard by the Respondent's breaches of the BIT, the Tribunal finds that claims for losses suffered by the Individual Claimants through those other companies are within the scope of permissible damages claims.

936. Although the Claimants provided surprisingly little documentary evidence of the Individual Claimants' ownership of the non-claimant companies of the EFDG, the evidence in the record (most of it provided by the Respondent) confirms that the

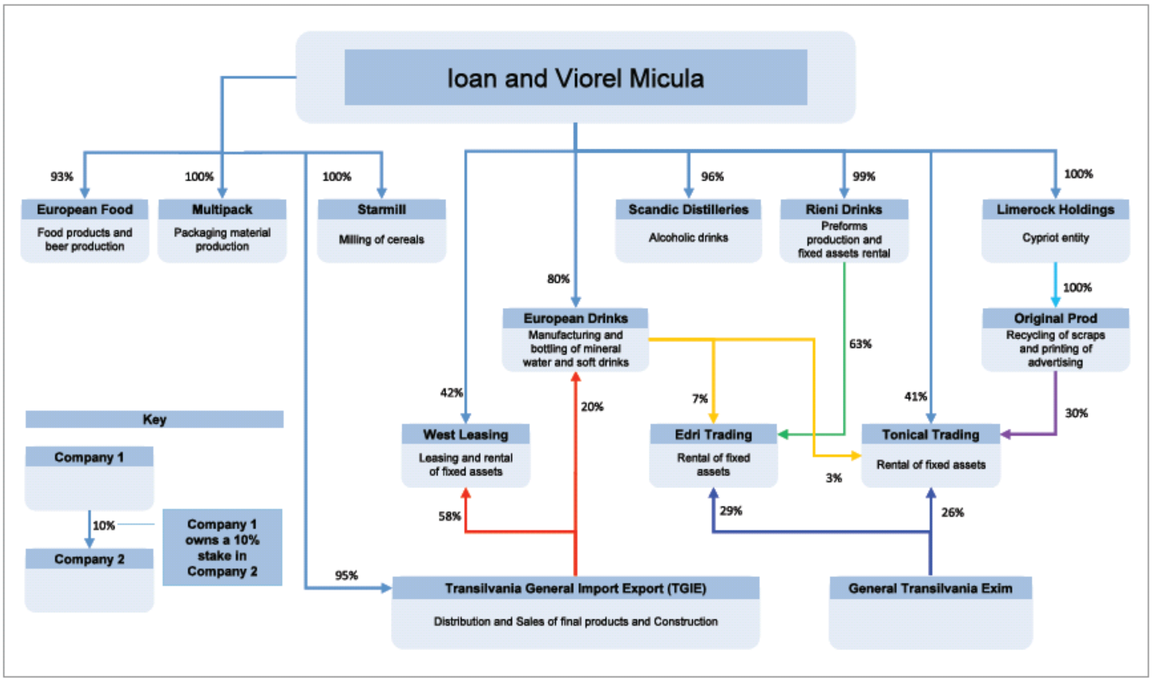
[183] Indeed, the Respondent does not dispute that the Individual Claimants could have chosen to bring a case by themselves, without joining the Corporate Claimants. That being said, the Respondent contends that, had the Individual Claimants done so, "they would have been entitled (assuming liability) only to damages they had suffered" (R-PHB, ¶ 338). This is a different issue which the Tribunal addresses in Section VII.F below.

Individual Claimants are jointly the owners of at least 99.96% of the companies in the EFDG that have allegedly suffered the losses claimed in this arbitration.

937. Mr. Osborne identified the following companies as part of the EFDG (Second ER of C. Osborne, ¶ 10.3, Figure 64): the Corporate Claimants (European Food, Multipack and Starmill), European Drinks S.A. ("European Drinks"), EDRI Trading S.R.L. ("EDRI Trading"), Original Prod S.R.L. ("Original Prod"), Rieni Drinks S.A. ("Rieni Drinks"), Scandic Distilleries S.A. ("Scandic Distilleries"), Transilvania General Import-Export S.R.L. ("TGIE"), Tonical Trading S.R.L. ("Tonical Trading"), West Leasing S.R.L ("West Leasing"). Mr. Osborne also provided a diagram of the ownership structure of these companies with an indication at Figure 3 of his First Expert Report (p. 57). However, he did not cite the source of the information shown. Figure 3 is reproduced below, together with Mr. Osborne's explanations:

> The Miculas are majority shareholders in most of the Companies, and the remainder are controlled by companies that are in turn owned by the Miculas. The diagram below shows the ownership structure of the 11 companies plus Limerock holdings, a Cypriot entity that owns Original Prod, and General Transilvania Exim. Some minor shareholdings have been omitted from the diagram for the sake of clarity, but shareholders not included are primarily other family members including Mrs Eeva Micula and Mrs Doina Micula.

Figure 3: The Companies' Major Shareholdings



938. As recorded in the Decision on Jurisdiction and Admissibility, during the jurisdictional phase the Claimants provided evidence of their shareholdings in the Corporate Claimants in 2008, as follows:

a. "Claimant 3 [European Food] is a Romanian joint stock company established on 30 November 1989. Respondent does not dispute that Claimant 3 was held on 1 February 2007 (Exh. C-25) at more than 93% by Messrs. Micula. The rest of the shares were held by Rieni Drinks SA, a Romanian company (6.5%). The excerpt from the Register of the Ministry of Justice dated 27 May 2005 (Exh. C-7) shows that the Miculas each held 46.7289% and Rieni Drinks 6.5415%" (Decision on Jurisdiction and Admissibility, ¶ 112).

b. "Claimants 4 [Starmill] and 5 [Multipack] were established as Romanian limited liability companies on 21 February 2002. Claimants 1 and 2 each hold 50% of the shares (Exh. C-7, dated 27 May 2005)" (*Id.*, ¶ 113).

c. "On 31 July 2008 Counsel for Mr. Ioan Micula and the Corporate Claimants submitted, for each of the three Corporate Claimants, excerpts from the Romanian commercial registry showing the status of each of these three companies as of 25 June 2008, as well as their corporate biographies from 1 July 2005 on. These documents confirm the above conclusions" (*Id.*, ¶ 113).

939. The Claimants did not provide updated information of the Individual Claimants' shareholdings in the Corporate Claimants during the merits phase. However, the Respondent has not disputed these shareholdings or suggested that there has been any change in them. In addition, an excerpt from the Bihor Trade Registry dated 9 December 2008 provided by the Respondent (Exh. R-60) shows that Ioan Micula holds 50.65% of Rieni Drinks, while Viorel Micula holds 49.34%, which would put their joint shareholding at 99.99%. Mr. Osborne confirmed this in Figure 3 of his First Expert Report, which showed Rieni Drinks as 99% owned by the Individual Claimants (although he did not cite the source for this affirmation). Accordingly, the Tribunal deems that all three Corporate Claimants are virtually 100% owned by the Individual Claimants, whether directly or indirectly.

940. By contrast, the Claimants have provided no documentary evidence of their shareholding in the remaining companies of the EFDG. They simply assert that most of the companies in the EFDG are "directly or indirectly wholly owned by the Micula brothers", with the exception of Original Prod, Tonical Trading, and EDRI Trading. However, with respect to those three companies, they also state that "[n]one of these companies has any real claim to any of the damages claimed in this case" (Tr., Day 1, 146 (Reed)). Accordingly, the Tribunal will disregard the three companies named above for purposes of its damages analysis. However, this statement also suggests that, in addition to the Corporate Claimants, there are five other companies within the EFDG (namely, European Drinks, Rieni Drinks, Scandic Distilleries, TGIE and West Leasing) that have suffered part of the damages claimed in this case. As a result, the Tribunal must determine whether they are indeed owned by the Individual Claimants.

941. The Tribunal shares the Respondent's frustration at the lack of evidence submitted by the Claimants. As noted by Mr. Ellison, it is difficult to understand why the Individual Claimants did not, of their own initiative, provide evidence of their shareholdings in the EFDG. It is the Individual Claimants' burden to prove that they are the owners of

the companies they assert they own and that have suffered the damages they now claim. It is not fair to impose upon the Respondent (or, for that matter, the Tribunal) the burden of searching through the Romanian Registry of Commerce in order to assess whether the Claimants' assertions are true. Like Mr. Ellison, the Tribunal cannot help but to find the Claimants' approach to this matter "bizarre" (Tr., Day 11, 100-105 (Reed/Ellison)).

942. That being said, the evidence submitted by the Respondent (in particular, an excerpt from the Bihor Trade Registry dated 9 December 2008 (Exh. R-60) and from the Orbis Commercial Database (Exh. R-61, date unclear), indicates that, at the date the information was collected, the shareholding of the remaining EFDG companies was as follows:[184]

a. **Rieni Drinks**: Ioan Micula with 50.65%, Viorel Micula with 49.34%, European Drinks with 0.001%, and Intermark S.R.L. with 0.00002%. In other words, Rieni Drinks is 99.99% owned directly by the Individual Claimants.

b. **TGIE**: Ioan Micula with 47.50%, Viorel Micula with 47.50%, and Rieni Drinks 5%. Considering that Rieni Drinks is 99.99% owned directly by the Micula brothers, the Tribunal deems this company owned 99.99% by the Individual Claimants.

c. **European Drinks**: Ioan Micula with 39.94%, Viorel Micula with 39.94%, and TGIE with 20.05%, Rieni Drinks with 0.05% and Edri Trading with 0.02%. Considering that, with the exception of Edri Trading, all the companies that have shareholdings are 99.99% owned directly by the Micula brothers, the Tribunal deems that European Drinks is 99.98% owned by the Individual Claimants.

d. **Scandic Distilleries**: Ioan Micula with 48.12%, Viorel Micula with 48.12%, Rieni Drinks with 0.05%, Intermark S.R.L. with 0.05%, European Drinks with 0.05%, and World Brands Production S.A. with 3.61%. Considering that, with the exception of Intermark and World Brand Productions S.A., all the companies that have shareholdings are at least 99.98% owned by the Micula brothers, the Tribunal deems that European Drinks is 99.96% owned by the Individual Claimants.

e. **West Leasing**: Ioan Micula with 21.25%, Viorel Micula with 21.25%, and TGIE with 57.50%. Considering that TGIE is 99.99% owned by the Micula brothers, the Tribunal deems this company owned 99.99% by the Individual Claimants.

943. These shareholdings are roughly consistent with the shareholdings shown by Mr. Osborne in Figure 3 of his First Report. Accordingly, although the evidence reviewed by the Tribunal is from December 2008, the Tribunal accepts Mr. Osborne's assertions and deems that the companies in the EFDG identified above are at least 99.96% owned by the Individual Claimants. Accordingly, the Individual Claimants can claim for damages that they have suffered by virtue of the harm to those companies as well as the harm to the Corporate Claimants.

[184] Numbers have been rounded up to the nearest hundredth.

C. Analysis of the Claimants' Damages Claims

1. General comments

944. As discussed above, the Claimants have advanced two expectation damages computations (Methods A and B) and one reliance damages computation (Method C). Method A quantifies the increased costs and lost profits that the Claimants would have made had they been allowed to develop their business the way they allege they had planned to do, in particular by implementing the Incremental Investments and the sale of SCPs to third parties. Method B quantifies the increased costs and lost profits that the Claimants would have made had they continued operating their existing platform. Method C presents a reliance damages scenario, which quantifies the value of the losses incurred by the Claimants in investing in reliance on their expectation that the incentives would remain in place for ten years. The Claimants have emphasized that the Tribunal need not adhere strictly to either of these three methods or the injuries itemized therein in order to make an award (C-PHB, ¶ 96).[185]

945. For the reasons set out below, the Tribunal will focus its attention on Method A.

946. First, Method A is the Claimants' primary expectation damages scenario. The Claimants have devoted most of their efforts to Method A and have identified Methods B and C as "alternative" damages scenarios. In their Reply, the Claimants focused almost exclusively on the damages listed in Method A, as calculated by Prof. Lessard (and partly on the reports of Dr. Fry and Prof. Steenkamp). In their Revised Request for Relief, the Claimants continue to rely heavily on Method A, although some of the claims are now calculated by Mr. Osborne and Mr. Boulton.

947. Second, the Tribunal rejects Method B, for the following principal reasons:

   a. Compared to Method A, the BCG Report (which quantifies the main head of claim under Method B) was subject to much less rigorous scrutiny in the proceedings. The Respondent repeatedly requested clarification as to the role of that report in the Claimants' quantum case, but this was only made clear with the Claimants' Revised Request for Relief. Although the Respondent had an opportunity to comment on that Revised Request (the Tribunal allowed it to submit a Supplementary Post-Hearing Brief), the Tribunal finds that it has a less complete and less well tested record as to Method B than Method A.

   b. The Tribunal has serious concerns regarding the methodology used by BCG. The flaws in BCG's First Report seem to have caused concern to the Claimants themselves, who requested Mr. Boulton to assist BCG and supervise the preparation of BCG's Second Report. However, as the Respondent pointed out, despite the changes in methodology and assumptions, the quantification of the

[185] The Claimants stated expressly: "Claimants' Revised Request for Relief submitted on 20 December 2010 is summarized below. Claimants wish to stress, however, that it is not their contention that the three methods listed below, or the itemized injuries that comprise the elements of the three methods, must be strictly adhered to in the ultimate calculation of an award" (C-PHB, ¶ 96).

Claimants' losses proposed by BCG's Second Report (€722 million present value of EBITDA, Second ER of BCG, p. 17) does not differ greatly from that proposed in its First Report (between €757-796 million present value of EBITDA, First ER of BCG, p. 14).

c. The BCG Report purports to quantify lost profits for sales of finished goods that the Claimants would have allegedly earned but for the revocation on the basis of the Claimants' existing production platform at the time of the revocation. But despite the fact that Claimants' platform at that time did not have the benefit of the Incremental Investments, BCG's calculations yield a higher result for only the sales of finished goods (quantified by the Claimants as RON 2,423 million) than all of the lost profits claims included in Method A combined (i.e., lost profits deriving from sales of finished goods calculated by Mr. Boulton, lost profits deriving from the sale of SCPs and lost profits deriving from the Incremental Investments, which combined amount to RON 2,380 million). In stark contrast to BCG's calculations, Mr. Boulton (on whose report the Claimants rely under Method A) quantified lost sales of finished goods at €100 million. Although part of the difference in their results can be attributed to the fact that Mr. Boulton excluded export markets in his calculations, the Tribunal finds that this further calls into question the credibility of the assumptions and methodology used by BCG. Accordingly, as explained in Section 3(b) below, the Tribunal relies on Mr. Boulton's analysis of lost profits on sales of finished goods rather than the analysis of BCG.

d. Although the Claimants specify that certain amounts calculated by Mr. Osborne in relation with Claims 1-4 of Method A (specifically, section 4 of Mr. Osborne's First Report and in section 3 of Mr. Osborne's Second Report) must be subtracted from the amount calculated by BCG (C-PHB, ¶¶ 204), the Claimants do not provide a final calculation that takes into account this subtraction. Indeed, the RON number claimed by the Claimants does not appear to consider any deductions at all, since BCG's valuation of the losses at € 722 million has simply been claimed in RON (*see* C-PHB, ¶ 206, note 305, where the Claimants simply state that "RON 2,423.2 million is the [sic] RON €722 million").

e. Finally, the Tribunal notes that the Claimants devote a mere three paragraphs to the BCG Report in their Post-Hearing Brief (C-PHB, ¶¶ 204-206). The least that can be said is thus that the Claimants did not build the core of their arguments and claims on the BCG Report.

948. Third, the Tribunal rejects Method C. Method C provides an alternative reliance approach to the calculation of the Claimants' losses, in which Mr. Osborne attempts to "value the business absent the investments made in reliance on the Incentives" (C-PHB, ¶ 332; Tr., Day 10, 36-37 (Osborne)). The Tribunal does not see any reason to deviate from the Claimants' primary expectation damages approach which, in the Claimants' own submission, should place them in the position that they would have been but for Romania's breach of the BIT, and is thus consistent with the full compensation principle articulated in the *Chórzow Factory* case.

949. The Claimants' claims under Method A are summarized in paragraph 891 above. For purposes of the analysis, the Tribunal will divide them into three main groups: the Claimants' claims for actual / realized losses (*damnum emergens*) as a result of the increased cost of raw materials (addressed in Section 2 below), the Claimants' claims for lost profits (addressed in Section 3 below), and the Claimants' claims for tax penalties (addressed in Section 4 below).

2. Increased cost of raw materials

950. The Claimants had previously presented this claim as a single claim, but in their Post-Hearing Brief they divided it up into claims for increased costs of sugar, PET, other raw materials and sugar stockpile. Each sub-claim is addressed below.

a. Increased cost of sugar

951. The Claimants claim losses for the increased cost of sugar in the amount of RON 81.5 million, based on:

a. The calculations contained in section 4 of Mr. Osborne's first report, and paragraphs 4.9 to 4.16 and 4.23 to 4.24 in particular;

b. The calculations contained in section 3 of Mr. Osborne's second report, and paragraphs 3.1 to 3.28 in particular; and

c. The evidence referred to in those sections, including exhibits CO-1.18, CO-1.19, CO-2.1 and CO-9.1 (C-PHB, ¶¶ 101-110).

952. Although in their Post-Hearing Brief the Claimants rely on Mr. Osborne's figures, they submit that the differences with the calculations made by Prof. Lessard (on whose report they relied on for this same claim prior to the hearing) are minimal. In particular, they argue that working capital does not impact the calculation of these damages. Mr. Osborne explains that the reason for the nominal differences between both calculations is the different approaches to estimating the volume weighted actual transport premium (Second ER of C. Osborne, ¶ 3.21).

953. For the reasons set out below, the Tribunal accepts this claim. Both the existence of the damage and the causal link between the revocation of the incentives and the damage suffered have been adequately proved. There is no dispute that, as a result of the revocation of the Raw Materials Incentive, the Claimants were required to pay an increased amount for the sugar they purchased after February 2005. The Respondent's expert, Mr. Ellison, accepts that this is the case, subject to certain criticisms and exclusions (First ER of J. Ellison, ¶ 6.2.24), as discussed further below.

954. The Tribunal is also satisfied with the quantification of this claim, which is based on reliable documentary evidence. In his second report, Mr. Osborne reconciled the sugar purchase data used by him and Prof. Lessard, and reconciled his work with the raw material audit work carried out by BDO. Mr. Ellison recognized and accepted these reconciliations, noting that "the reconciliation now appears valid" (Second ER of

J. Ellison, ¶ 2.2.16). Mr. Ellison also confirmed that BDO checked all 2,586 sugar invoices in the process of conducting their audit (Tr., Day 11, 96-97 (Ellison/Reed)).

955. Mr. Ellison contends that these damages should exclude sugar purchases by non-Claimant EFDG companies after revocation of the incentives (RON 64.7 million, approximately €14.9 million, about 75% of the losses claimed) (First ER of J. Ellison, ¶¶ 6.2.9-6.2.12; Second ER of J. Ellison, ¶¶ 5.1.4, 5.3.1-5.3.5). Mr. Ellison notes that, before revocation, European Food was making substantially all the sugar imports for the entire group and selling it to its affiliates; however, after revocation, each EFDG company started importing its own needs for sugar. The Claimants and their experts argue that this exclusion is perverse: after the revocation, there was no incentive for the sugar purchases to be channeled through the Claimant companies, because they no longer had a right to the customs duty exemption and thus there was no cost advantage for them or their affiliates that are not parties in this arbitration. Had the incentives remained in place, the Claimants would have continued to purchase sugar through European Food (Second ER of C. Osborne, ¶¶ 1.3, 3.13-3.17; Second ER of D. Lessard, ¶ 138). The Respondent argues that this is irrelevant, because there is no legal basis upon which the Corporate Claimants could be compensated for an outlay from someone else’s pocket (R-PHB, ¶ 313).

956. The Tribunal has difficulty with the Respondent’s argument. European Food lost the opportunity to buy cheaper sugar, and as a result the Claimants were forced to buy more expensive sugar, incurring an additional cost. That this more expensive sugar was bought by a different company of the group does not eliminate the loss to the Individual Claimants, who the Tribunal has confirmed are the ultimate shareholders of the entire group.

957. As previously noted, the Respondent also argues that no award of damages can be made with respect to losses incurred by non-Claimant companies, nor for the diminution in value of the Individual Claimants’ direct or indirect shareholdings in such companies, because they fall outside the jurisdiction of this Tribunal. As discussed in Section B.2 above, the Tribunal rejects this argument: this argument does not turn on jurisdiction, but rather whether it is permissible for the Individual Claimants to seek remedy for losses suffered by companies 99.96% owned by them that are not claimants in this arbitration. As set out in paragraph 943 above, the Tribunal has found that claims for losses suffered by the Individual Claimants through those other companies are within the scope of permissible damages claims.

958. Mr. Ellison also excludes the loss of the benefit to European Food of the arm's-length transactions by which it sold intermediate sugar products to European Drinks and Rieni Drinks. The documentary evidence appears to confirm (and Mr. Ellison conceded at the hearing) that the transactions were indeed at arm’s length (Tr., Day 11, 59-63 (Ellison/Schwartz). The Tribunal understands the Claimants to be saying that, prior to the revocation, European Food bought the sugar duty-free and then sold the intermediate products to other EFDG companies at the same price it would have sold them to third party companies. The Claimants’ argument seems to be that

European Food lost that "business" as a result of the revocation. The Tribunal sees no reason to exclude this loss from the calculation.

959. Finally, the Respondent argues that, because the Claimants cannot establish that they would have been entitled to import sugar duty free after 1 January 2007, no damages should be awarded for that period. Mr. Caspari, the Respondent's sugar expert, testified that the Claimants could not possibly have imported duty free sugar into the EU after accession (even absent the repeal), as such activity would have fundamentally undermined the EU sugar regime and threatened the stability of the EU sugar market (ER of C. Caspari, ¶ 26; Tr., Day 11, 261 (Caspari)). According to the Respondent, this warrants a reduction of RON 18.1 million (or 19.4 million, if adjusted to account for Mr. Osborne's approach) (R-PHB, ¶ 320, fn. 703).

960. The Claimants' sugar expert, Dr. Fry, seemed to recognize this problem but assumed that Romania would have negotiated with the European Commission a specific derogation allowing the Claimants to import duty free sugar into the EU. However, he conceded that he had no evidentiary basis for this assumption, and that such a derogation would have been unprecedented in EU history (Tr., Day 11, 234-236 (Fry)).

961. The Tribunal agrees with the Respondent that it is uncertain whether the Claimants could have imported sugar duty free after Romania's accession to the EU, even if the facilities had remained in place. However, the Respondent has not established that the Claimants could not have done so. The Claimants argue that the EU could have granted exemptions if Romania had negotiated such exemptions, and there is no evidence that Romania even tried to negotiate such exemptions. The Tribunal has found that Romania breached the Claimants' legitimate expectation to benefit from the Raw Materials Incentive until 31 March 2009. In these circumstances, the Tribunal considers that the Claimants are entitled to all losses regarding increased cost of sugar until that date.

962. For the foregoing reasons, the Tribunal accepts the Claimants' claim for increased cost of sugar, for a total amount of RON 85.1 million.

b. Increased cost of PET

963. The Claimants claim losses caused by the increased cost of PET in the amount of RON 6.3 million, based on:

a. The calculations contained in section 4 of Mr. Osborne's first report, and paragraphs 4.17 to 4.24 in particular;

b. The calculations contained in section 3 of Mr. Osborne's second report, and paragraphs 3.29 to 3.35 in particular; and

c. The evidence referred to in those sections, including the witness statement of Mr. Halbac dated 22 December 2009 and exhibits CO-1.18, CO-1.19, CO-2.1 and CO-9.1 (C-PHB, ¶¶ 111-115).

964. The Tribunal rejects this claim. It is undisputed that the Claimants never benefitted from the Raw Materials Facility in respect of PET imports because their PET equipment was not located in the Stei-Nucet region (R-PHB, ¶ 318; C-PHB, ¶ 112; First WS of M. Halbac, ¶ 42; First ER of D. Lessard, ¶ 83, Exh. C-681, C-686). Although Mr. Halbac testified that the Claimants did have PET equipment in Drăgăneşti as far back as 2002, it is unclear whether they benefitted from the incentives. The Claimants do not expressly say so, and Mr. Ellison testified that he found invoices for PET in 2002 that had duty on them (See C-PHB, ¶¶ 112-115; Second WS of M. Halbac, fn. 53; C-680; Tr., Day 10, 195 (Ellison)).

965. In fact, the Claimants' claim for PET is based on their alleged intention to relocate their PET equipment in late 2004 or early 2005 to the disfavored region precisely for the purpose of taking advantage of the incentives. As the Respondent states, "[i]n effect, this claim is for a hypothetical future lost opportunity to save money on the purchase of raw materials, rather than any claim for actual losses" (R-PHB, ¶ 318). The claim is thus not for actual losses, but for future losses. The Tribunal agrees with the Respondent: the Claimants have not met their burden to prove the existence of a lost opportunity; therefore, they cannot claim a loss for increased cost of PET if the repeal of the Raw Materials Facility did not in fact cause them to incur greater costs in purchasing PET.

966. In addition, the Claimants have not proven that they would have indeed relocated their PET equipment to the disfavored region. This claim appears to rely entirely on Mr. Halbac's oral testimony, which the Tribunal did not find convincing in this respect. Although he cites some contemporaneous documents (Exh. C-681, C-686), Mr. Osborne appears not to have considered them in his report (Tr., Day 11, 147-148). In any event, these documents are not sufficient to prove that alleged intention:

a. Exh. C-681 is an invoice dated 1 September 2004 cited as evidence for moving Husky PET Equipment from Rieni to Drăgăneşti. However, the document merely appears to list "Works of wiring within Drăgăneşti Complex, Hall 11, Plugs Machine - HUSKY, as per the work status due to May 2004" with respect to an "AGREEMENT 748/15th of July 2002". This does not clearly evidence a purported move of that equipment. In addition, the agreement that appears to serve as basis for those works was signed in July 2002, but it is undisputed that the equipment had not been moved by the time the incentives were repealed in February 2005. This raises questions with respect to the intent to move that equipment and the timing of that alleged move, as discussed further below.

b. Exh. C-686 is a drawing of a layout of the Multipack facilities showing where PET equipment would allegedly be installed. However, the Tribunal has no way of knowing when this drawing was made, how concrete of a project it embodied and what its intended use would have been.

967. In addition, the modest scale of the cost and effort allegedly required to move the equipment undermines the credibility of the claim. Mr. Halbac stated that the move would have cost only 250,000 RON (approx. €50,000) and taken approximately only 2

months to complete (see First WS of M. Halbac, ¶ 42). In these circumstances, and considering that Exh. C-681 cites an agreement dated July 2002, it is unclear why the Claimants had not moved that equipment before the date of the revocation of the incentives.

968. For all these reasons, the Tribunal rejects the Claimants' claim for increased cost of PET.

c. Increased cost of other raw materials

969. The Claimants claim losses caused by the increased cost of raw materials other than sugar or PET in the amount of RON 17.5 million, based on:

a. The calculations contained in section 4 of Mr. Osborne's first report, and paragraphs 4.17 to 4.24 in particular; and

b. The evidence referred to in that section, including exhibits CO-1.18, CO-1.19 and CO-2.1 (C-PHB, ¶¶ 116-120).

970. The Claimants base their claim on Mr. Osborne's calculations, but note that the differences with Prof. Lessard's results are nominal (Prof. Lessard calculates RON 17.37 million). They thus state that the Tribunal may choose either calculation.

971. The Tribunal accepts this claim, as calculated by Mr. Osborne. As in the case of sugar, it is undisputed that following the revocation of the incentives, the Claimants were required to pay more for the other raw materials they purchased, including tomato paste, juice concentrates, wheat and corn flower, vegetable fats, and potato flakes and granules. The Respondent's expert, Mr. Ellison concedes that losses from these higher costs were incurred by the Claimants, and does not dispute the prices used by their experts (which the Claimants argue are conservative and understated, because they switched to cheaper products, and because the experts were unable to find benchmark prices to estimate but for prices).

972. That being said, Mr. Ellison argues that the total loss should be discounted to RON 14.5 million (or RON 11.2 million if one counts only damages suffered until the date of accession) for two reasons: first, that only 20% of the amount claimed is supported by documentary evidence, and second, that much of these increased costs were paid by non-Claimant companies within the EFDG (First ER of J. Ellison, ¶¶ 6.3.1-6.3.5; Appendix JMHE-4C).

973. The Tribunal dismisses Mr. Ellison's second argument for the reasons set out in paragraphs 956 to 958 above. With respect to Mr. Ellison's first argument, the Tribunal understands that the documentary evidence cited by the Claimants (Exh. C-166, C-167, C-218, C-220 and C-222, which contain between them 43 customs declaration forms with customs duties amounting to RON 3.6 million) is a sample. Given the nature of the Claimants' business, the Tribunal does not expect the Claimants to provide an invoice for every item they ever imported, and thus accepts that a sample of customs declaration forms is an appropriate evidentiary means. In

addition, the Respondent has given no compelling reasons why that sample is not representative of the total. As a result, the Tribunal rejects Mr. Ellison's first argument.

974. For the reasons stated above, the Tribunal accepts this claim for a total of RON 17.5 million.

d. Lost opportunity to stockpile sugar

975. The Claimants claim losses for the lost opportunity to stockpile sugar in the amount of RON 62.5 million, based on:

a. The calculations contained in section 4 of Mr. Osborne's first report, and paragraphs 4.13 to 4.16 in particular;

b. The calculations contained in section 4 of Mr. Osborne's second report;

c. The calculations contained in the expert reports of Dr. Fry of December 2009 and July 2010; and

d. The evidence referred to in the abovementioned sections, including the witness statements of Mr. Balog dated 22 December 2009 and 30 July 2010 (C-PHB, ¶¶ 121-130).

976. The Claimants argue that, because the incentives were going to end in 2009, they planned to buy large quantities of sugar ahead of that and thus avoid paying higher sugar prices for some months. The stockpile would thus help them to maintain the effects of the incentives for a longer period of time. The Claimants assert that, in late 2004/early 2005, after they heard that the incentives would be revoked, they stockpiled what they could, but not as much as they would have liked to do.

977. Mr. Osborne includes this claim in his calculation of increased cost of raw materials, as follows:

> "4.1 The early termination of the EGO 24/1998 incentives has had a clearly detrimental effect on the Claimants. That effect comes in part from an impact on their costs – and therefore on their ability to earn a satisfactory return on the investments that they have made. […]
>
> 4.2 The first impact on the Claimants arises because of the increase in the effective cost of raw materials purchased for their own use – including sugar, fruit and tomato concentrates, and potato products. This applies both in respect of purchases that the Companies have made and ***purchases that the Companies would have made in creating a stockpile of sugar in 2009 to extend the period in which it could benefit from reduced sugar costs.***
>
> 4.3 In the latter case, the reason for including the effect of stockpiling in 2009 is that the Companies would, had the EGO 24/1998 incentives continued, have undoubtedly sought to create a stockpile of sugar in 2009 – in essentially the same way as was actually done in 2004/2005. On that basis it seems reasonable also to assume that equivalent amounts would or should have been negotiated by way of

> compensation in the alternative scenario in which the EGO 24/1998 incentives continued only to the point of EU accession. To ensure symmetry, the calculations treat the beneficial effects of the stockpile actually created in 2005 as reducing the losses suffered by the Claimants." (First ER of C. Osborne, ¶¶ 4.1-4.3, emphasis added).

978. In preparing his calculations, Mr. Osborne assumed that, if the Claimants had time to properly organize and prepare for the termination of the incentives, they would have built an optimal stockpile, based on, among other things, sugar price forecasts, storage costs, the cost of capital and the EFDG companies' sugar consumption (First ER of C. Osborne, ¶ 4.10). According to Mr. Osborne, this optimal stockpile would have been around 75,000 tonnes. The Claimants argue that they were prevented from amassing this optimal stockpile because (i) they did not have enough time to properly plan for the optimal stockpile, and (ii) in 2004/2005 they had not put funds aside for this purpose. Instead, they amassed around 30,000 tonnes. Mr. Osborne calculates damages based on the optimal stockpile, not the actual stockpile amassed by the Claimants.

979. The Respondent argues that including any stockpiling in the direct damages claim is impermissibly speculative, transforming this part of the case into yet another "lost opportunity" claim. The Respondent contends that there is no way of knowing what the Claimants would have done in 2009 had the Raw Materials Facility remained in place. In particular, would they have had the funds to purchase and store vast quantities of sugar? Would it have been permissible to stockpile at that time? The Respondent also notes that Prof. Lessard did not incorporate a stockpile in his original calculations (R-PHB, ¶¶ 315-316).

980. That being said, Mr. Ellison appears to accept this claim from an economic perspective, subject to proof that (i) the large quantities purchased in late 2004 and early 2005 were indeed a stockpile, and not, e.g., a period of intensified production or a seasonal issue, and (ii) that this stockpiling activity was a direct response in anticipation of revocation (and in this respect differed from the increased purchasing in 2003) and not, e.g., EFDG taking advantage of a particularly good price (beyond the discount provided by the incentives) and/or the replenishment of previously run-down stock levels and/or seasonal issues (Second ER of J. Ellison, ¶¶ 6.2.22-6.2.21).

981. The Tribunal concludes that it is established that the Claimants did in fact stockpile 30,000 tonnes in 2004/2005. Mr. Balog testified and Mr. Gamecho confirmed that the Claimants had purchased enough duty-free sugar to delay the economic effect of the repeal until the second half of 2006 (First WS of C. Balog, ¶ 7; Tr., Day 4, 28 (Gamecho)). Mr. Ellison accepts that large quantities of sugar were purchased in late 2004 and early 2005, although as described above he questions whether these purchases were meant to create a stockpile.

982. In contrast, evidence of the Claimants' intention to stockpile in the future is limited:

a. The Claimants contend that "Mr Balog has given clear and unchallenged evidence that upon hearing about the revocation of the Raw Materials Incentive in 2004, the Claimants set about building as large a sugar stockpile as possible

[WS of C. Balog dated 30 July 2010, ¶ 12]. It is safe then to assume that had the incentives lasted for the promised 10 year period, at the end of that period the Claimants would have built a sugar stockpile, and in fact, Mr. Ellison has accepted that a sugar stockpile would have been made at that time [Tr., Day 10, 196]. The real issue in dispute is therefore over the size of the stockpile that would have been built" (C-PHB, ¶ 123). However, the Respondent points out that Mr. Balog's testimony purports to describe what the Claimants did in response to the announcement of the repeal of the Raw Materials Facility, and that it does not directly support the suggestion that the Claimants ever intended to (or could have) stockpiled vast amounts of sugar in 2009 (R-SPHB, ¶¶ 12-13).

b. Mr. Osborne also relies on Mr. Viorel Micula's assertion that "we had planned to purchase and stock-pile a large amount of sugar on a customs duty free basis prior to the incentives coming to an end" (Third WS of V. Micula, ¶ 68; First ER of C. Osborne, ¶ 4.10, third bullet point).

983. Despite the absence of hard evidence on the Claimants' future intentions, the Tribunal considers that the Claimants' established past practice of stockpiling provides sufficient certainty that, but for the revocation, the Claimants would have stockpiled sugar in early 2008 in anticipation of the expiry of the incentives. In 2004, the stockpiling was organized as a reaction to the allegedly unforeseen occurrence of the early termination of the incentives. Indeed, the stockpiling was to be planned and organized closer to the scheduled expiry of the incentives and in preparation for such expiry, so there was no need for such stockpiling before the latter became looming. Other than Mr. Viorel Micula's testimony, the record does not show that the Claimants had planned for either event. However, this is understandable as the need for the actual stockpiling appears to have caught the Claimants off guard, and the scheduled expiry of the incentives was to occur almost 4 years after the revocation. In view of these considerations, the Tribunal finds that it is sufficiently certain that the Claimants would have acted in 2008/2009 as they actually did in 2004/2005. Indeed, Mr. Ellison conceded that, "on the basis that in early 2008, the claimants would probably have started preparing a stockpile, knowing that […] expiry was coming along" (Tr., Day 10, 196).

984. The Tribunal is also satisfied that there is a sufficient causal link between the damage asserted and the revocation of the incentives. The Respondent has not provided a plausible alternative explanation as to why the Claimants would have stockpiled sugar in late 2004/2005 if it was not in anticipation of the revocation of the incentives. Having accepted the causal link in 2004/2005, the Tribunal is satisfied that the same causal link would apply in 2008/2009 with respect to the scheduled expiry of the incentives.

985. However, the Tribunal agrees with Mr. Ellison that this loss should be circumscribed to the volumes actually stockpiled in 2004/2005. The "optimal stockpile" calculated by Mr. Osborne must be rejected because the size of such an optimal stockpile is too speculative. As Mr. Ellison points out, "the way [Mr. Osborne's] formula works is that he has used 2009 prices and forecasts to work out what would have been the best

stockpile to create in 2008. And the way commodities work, of course, you don't normally have that advantage of being able to look a year ahead and see actual prices" (Tr., Day 10, 197 (Ellison)).

986. Instead, it is more reasonable to use as counterfactual data the 30,000 tonnes that were actually stockpiled in 2004/2005 (Tr., Day 10, 196 (Ellison)). Using these volumes, Mr. Ellison recalculates the loss at RON 18,133,229 (approximately €4.3 million at the exchange rate of 30 September 2009 used by Mr. Ellison),[186] as follows:

> "6.2.20 I have recalculated the potential loss resulting from a higher price for white sugar. I have assumed a stockpile of 30,000 tonnes would have been assembled over the period 1 April 2008 to 31 March 2009, in line with the stockpiled volume possibly amassed in 2004 and 2005 (see paragraph 6.2.17 above). (Although whether there was any stockpiling in 2004/2005 is not entirely clear). In the absence of any contemporaneous documentation establishing the decision process undertaken by EFDG in 2004 and 2005 (or, indeed, any contemporaneous evidence that the volumes purchased were in fact a stockpile), this is a more reasonable approach than to pick an optimal stockpile with the benefit of hindsight.
>
> 6.2.21 I therefore calculate the impact of allowing for a delay in the (assumed) stockpiling patterns until 2008/2009, but at the volumes asserted to have been stockpiled in 2004/2005. My calculation of the loss for the Sub-Head of Claim relating to sugar therefore increases by approximately €4.3 million."
>
> (Second ER of J. Ellison, ¶¶ 6.2.20-6.2.21)

987. The Tribunal agrees with Mr. Ellison's methodology and calculations. As a result, the Tribunal accepts the Claimants' claim with Mr. Ellison's reductions (i.e., for RON 18,133,229).

988. By contrast, the Tribunal rejects Mr. Ellison's alternative calculation on the basis of the assumption that the incentives would only have been available until the date of accession, for the reasons set out in paragraph 961 above.

3. The Claimants' claims for lost profits

989. The Claimants advance five claims for lost profits under Method A. The Tribunal has grouped them into three categories: the Claimants' claim for lost profits on the sale of finished goods (Section (b) below); the Claimants' claim for lost profits on the sale of sugar-containing products (SCPs) (Section (c) below), and the Claimants' claim for lost profits due to the inability to complete the Incremental Investments (Section (d) below). Before addressing each of these claims, the Tribunal will address the standard for an award of lost profits (Section (a) below).

[186] Appendix JMHE-4C.

a. Standard for an award of lost profits

990. As noted above, Article 36(2) of the ILC Articles provides that "compensation shall cover any financially assessable damage including loss of profits insofar as it is established." The Respondent argues that the standard of proof for an award of lost profits is more restrictive than for an award of other losses, and the Claimant has responded to these arguments. As a result, the Tribunal will first address the Respondent's position, and will then turn to the Claimants' comments.

i. The Respondent's position

991. The Respondent contends that, for their claims for lost profits to succeed, the Claimants must meet a specific legal standard with respect to lost profits (R-PHB, ¶¶ 217-221, R-Rejoinder, ¶¶ 297-300).[187]

992. Specifically, the Respondent argues that international law requires a claimant to demonstrate lost profits with "reasonable" or "sufficient" certainty. The Respondent contends that a claimant must adduce probative evidence that lost profits are "probable" and not "merely possible".[188] If there is no proof that the alleged profit-making activity would have been undertaken at all, the standard has not been met. According to the Respondent, this disposes of the Claimants' claim in respect of the Incremental Investments and the alleged SCP opportunity, which together amount to more than €450 million.

993. Indeed, the Respondent argues that most of the Claimants' alleged lost profits claims (in particular the claims related to the Incremental Investments and sale of SCPs) constitute claims of lost opportunities, rather than lost profits. As none of these activities were ever undertaken in fact, the Claimants seek compensation for the loss of a hypothetical chance to profit, not for the loss of profit itself. According to the Respondent, in these circumstances international law does not recognize an entitlement to compensation for mere opportunities. The only circumstances in which international tribunals have accepted claims for lost opportunities are situations in which the lost opportunities had intrinsic value, which the Respondent argues is not the case here (R-Rejoinder, ¶¶ 278-288, citing *S.D. Myers v. Canada, Merrill & Ring v. Canada*[189]*, Sapphire v. NIOC*[190]).

994. But even where there is no doubt that an investment would have been undertaken, the Respondent submits that the reasonable certainty standard cannot be satisfied in the absence of a going concern and a proven record of profitability. Citing a string of cases including *Aucoven v. Venezuela*[191]*, PSEG v. Turkey, Metalclad v. Mexico and*

[187] This is in addition to a causal link between the international wrong and the profits allegedly lost. The Respondent's position on causation is addressed in the context of each specific claim.

[188] M.M. Whiteman, Damages in International Law, Vol. 3 (1937), Exh. RL–313, p. 1837.

[189] *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, 31 March 2010.

[190] *Sapphire International Petroleum Ltd v National Iranian Oil Company*, Award, 15 March 1963 (hereinafter *"Sapphire v. NIOC"*).

[191] *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela* (ICSID Case No ARB/00/5), Award, 23 September 2003 (hereinafter *"Aucoven v. Venezuela"*).

AAPL v. Sri Lanka, the Respondent contends that arbitral tribunals have consistently rejected lost profits claims where such a record of profitability could not be proven, noting that any compensation awarded in such circumstances has generally been limited to proven investment expenditures.

995. In this respect, the Respondent argues that international law precludes any award of prospective damages for projects that have not commenced. The Respondent submits that “no tribunal adjudicating an investment treaty dispute has ever awarded lost profits where, as here, the claiming party had not made the investment that allegedly would have generated the profits” (R-Rejoinder, ¶ 290). The Respondent cites *Aucoven v Venezuela*, where the Tribunal refused to award lost profits for the operation of a bridge that was never built or put into operation, despite the fact that it was undisputed that the bridge would have been built and would have been a profitable venture.[192] This tribunal also noted that “ICSID tribunals are reluctant to award lost profits for a beginning industry and unperformed work”, adding that this reluctance is confirmed by the practice of the Iran-U.S. Claims Tribunal.[193] Romania also cites *Himpurnia California Energy Ltd. v. PLN*, where the tribunal held that “it would be intolerable … to uphold claims for lost profits from investment not yet incurred”.[194]

996. Similarly, the Respondent argues that mere projections of future profits made by investors or draft contracts that were never finalized are insufficient to prove lost profits. In particular, the tribunal in *PSEG v. Turkey* held that “[r]elying on cash flow tables that were a part of proposals that did not materialize does not offer a solid basis for calculating future profits.”[195]

997. In addition, the Respondent argues that “even claims for the lost future profits of existing investments have been disallowed where the investment had no track record of profit generation. An award to the contrary would be inherently speculative, and therefore contrary to the dictates of international law” (R-Rejoinder, ¶ 290). The Respondent cites a string of cases where tribunals have rejected such claims, notably:

a. *AAPL v. Sri Lanka*, where the tribunal found, in connection with a newly formed company that had no record of profits and was undercapitalized, that neither the "goodwill" of the company nor its "'future profitability' [...] could be reasonably established with a sufficient degree of certainty".[196]

b. *Metalclad v. Mexico,* where the tribunal held that "where the enterprise has not operated for a sufficiently long time to establish a performance record or where it

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[192] *Id.,* ¶ 357, cited with approval in *PSEG v. Turkey*, ¶ 310.

[193] *Id*., ¶ 360.

[194] *Himpurnia California Energy Ltd v PLN,* UNCITRAL, Final Award, 4 May 1999, ¶ 330.

[195] *PSEG v. Turkey*, ¶ 313.

[196] *AAPL v. Sri Lanka*, ¶ 106.

has failed to make a profit, future profits cannot be used to determine going concern or fair market value."[197]

c. *PSEG v. Turkey*, where the tribunal found that compensation for lost profits "is normally reserved for the compensation of investments that have been substantially made and have a record of profits, and refused when such profits offer no certainty."[198]

d. Several decisions of the Iran–US Claims Tribunal (see R-Rejoinder, fn. 446).

998. The Respondent argues that in such circumstances, international tribunals have "repeatedly held that damages should be limited to proven, net out-of-pocket expenditures (or "sunk costs") that the claimant has incurred in advancing the project" (R-Rejoinder, ¶ 291). For example, in *Biloune v. Ghana*, the tribunal concluded that "[g]iven the nature of the project, and its early interruption by the respondents (…), the most appropriate method for valuing the damages to be paid [for expropriation] will be to return to Mr. Biloune the amounts he invested".[199]

999. The Respondent argues that, in the Claimants' case, there was no going concern with respect to the Incremental Investments or the sale of SCPs to third parties, and thus no proven record of profitability. As a result, the Respondent submits that the Tribunal need not even consider the evidence submitted with respect to the alleged lost opportunities. Even if the Tribunal were convinced of the Claimants' intention to "complete" the Incremental Investments and to engage in the sale of SCPs to third party industrial customers, it is undisputed that none of these ventures was ever launched, let alone earned profit (See, e.g, Tr., Day 8,33–38 and 45–46 (Lessard); Tr., Day 8, 10:66–67 (Osborne)). Thus, the Respondent argues that no award of damages for the Incremental Investments or the sale of SCPs to third parties can be contemplated in the present case as a matter of law. The Respondent's specific comments on the evidence submitted with respect to the sale of SCPs and the Incremental Investments is set out in Sections (c) and (d) below.

ii. The Claimants' position

1000. The Claimants do not contest the standard offered by the Respondent for an award of lost profits (that is, that the claim must have "sufficient certainty") (C-PHB, ¶ 145).[200] However, they offer a different interpretation of how this "sufficient certainty" must be established (C-PHB, ¶¶ 145-150; C-Reply, ¶¶ 604-609).

[197] *Metalclad v. Mexico*, ¶ 120.

[198] *PSEG v. Turkey*, ¶ 310.

[199] *Biloune & Marine Drive Complex Ltd v Government of Ghana,* UNCITRAL, Award, 30 June 1990 (hereinafter *"Biloune v. Ghana"*), pp. 228 and 229.

[200] Indeed, the Claimants concede that tribunals have traditionally been less willing to award compensation for lost profits than for other losses due to the inherently speculative nature of a lost profits claim. However, relying on the ILC Articles and an article by Prof. John Gotanda, they contend that such damages should be awarded where the claim for them has sufficient certainty. (See ILC Articles, Art. 36, and John Y Gotanda, Recovering Lost Profits in International Disputes, 36 Georgetown Journal of International Law 61, 111 (2004), Exh. C-603).

1001. Citing *Gemplus and Talsud v. Mexico*, the Claimants contend that the concept of certainty is both "relative and reasonable in its application". The Claimants argue that, in that case, the tribunal rejected the argument that the claimants had failed to prove their lost profits claims because their quantification was uncertain or difficult. The tribunal also emphasized that the assessment of a claim of lost profits was not an exercise in certainty but in "sufficient certainty", noting that "[i]t is not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal can only evaluate the chances of such a future event happening."[201] The *Gemplus and Talsud* tribunal was also more lenient with respect to the claimants' burden of proof, having concluded first that "the Claimant's evidential difficulties in proving their claim for loss of future profits [were] directly caused by the breaches of the BITs by the Respondent responsible for such loss."[202] The Claimants also rely on *Sapphire v. NIOC,*[203] *SPP v. Egypt,*[204] and *Lemire v. Ukraine*[205] for the proposition that the uncertainty in the amount of damages should not be an obstacle to an award of lost profits.

1002. The Claimants argue that, in the present case, the fact of injury from revocation of the incentives is not disputed; only the amount of the injury is in dispute. The Claimants also contend that the legal wrong giving rise to those injuries has been established beyond question. Relying on the cases cited above, the Claimants argue that the Respondent is therefore not entitled to invoke an unattainable burden of proof as to the amount of compensation for the Claimants' losses that would compound the Respondent's wrongs and unfairly defeat the Claimants' claim for compensation.

1003. With respect to the Respondent's arguments regarding the need for a proven record of profitability, citing *Sapphire v. NIOC*, *SPP v. Egypt* and *Lemire v. Ukraine,* the Claimants argue that tribunals have awarded damages to un-established businesses or businesses still in their infancy (C-PHB, ¶ 149). The Claimants note that in these cases the tribunals awarded damages despite the fact that the claimant was unable to

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[201] *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v. United Mexican States* and *Talsud, S.A. v. United Mexican States* (Conjoined ICSID Cases Nos. ARB (AF)/04/3 and ARB(AF)/04/4), Award, 16 June 2010 (hereinafter *"Gemplus and Talsud v. Mexico" or "Gemplus and Talsud"*), ¶ 13-91.

[202] *Id.,* ¶ 13-92.

[203] *Sapphire v. NIOC,* pp. 187-188, ("It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.").

[204] *SPP v. Egypt*, ¶ 215 (where the tribunal held that the inability to assess damages with certainty is not alone a reason not to award them when a loss has been suffered).

[205] *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011 (hereinafter *"Lemire v. Ukraine"*), ¶ 246 ("The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.").

prove the exact amount of damage suffered. However, these cases do not specifically address the situation where the claimant has not made the investment that would have allegedly generated the profits.

1004. In any event, the Claimants contend that the successes enjoyed by the Miculas' businesses from the early 1990s until the time of revocation of the incentives should satisfy the Tribunal to the requisite degree of certainty that, had the incentives remained in place, those successes would have continued. The Claimants emphasize that their business was not in its infancy; to the contrary, it was a very successful drinks and food business with large market shares at the time the incentives were revoked (C-PHB, ¶ 149).

1005. Accordingly, the Claimants argue that the Tribunal should have no hesitation in accepting the Claimants' claims for lost profits, and awarding them full compensation so as to put them in the position they would have been in had Romania not breached the BIT by prematurely terminating the incentives.

iii. The Tribunal's analysis

1006. Article 36(2) of the ILC Articles provides that "compensation shall cover any financially assessable damage including loss of profits ***insofar as it is established***." As discussed above, the Respondent submits that lost profits must be proved with "sufficient certainty". The Respondent argues that this means that they must at least be "probable", and "not merely possible."

1007. The Claimants do not dispute that lost profits must be established with sufficient certainty, but rather argue that the Tribunal must be more lenient in determining whether that standard has been met. In particular, the Claimants submit that once the fact of damage has been established, a claimant should not be required to prove its exact quantification. They argue that this is especially true where the conduct of the author of the damage has made that proof difficult or impossible.

1008. The Tribunal understands that any future damage is difficult to prove and is willing to take that into account. There remains nevertheless a requirement to show sufficient certainty as speculation is not the same as prediction. Indeed, the cases cited by the Claimants call for leniency in the assessment of the *amount* of damage, not of its existence. The Tribunal agrees with the tribunal in *Lemire v. Ukraine* when it states that "[o]nce causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."[206]

1009. The Tribunal also notes that the commentary to the ILC Articles limits compensation to "damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or too remote" (Comment 5 to Article 34 of the ILC

[206] *Lemire v. Ukraine*, ¶ 246.

Articles). In the case of lost profits, this can only mean that the claimant must have been deprived of profits that would have actually been earned but for the internationally wrongful act. Accordingly, before they are entitled to request a more lenient application of the standard of proof, the Claimants must first prove that they would have actually suffered lost profits, i.e., that they have been deprived of profits that would have actually been earned. In the Tribunal's view, this requires proving (i) that the Claimants were engaged in a profit-making activity (or, at the very least, that there is sufficient certainty that they had engaged or would have engaged in a profit-making activity but for the revocation of the incentives), and (ii) that that activity would have indeed been profitable (at the very least, that such profitability was probable).

1010. In the Tribunal's view, the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability. But it places the emphasis on the word "usually." Depending on the circumstances of the case, there may be instances where a claimant can prove with sufficient certainty that it would have made future profits but for the international wrong. This might be the case, for example, where the claimant benefitted from a long-term contract or concession that guaranteed a certain level of profits or where, as here, there is a track record of similar sales. This must be assessed on a case by case basis, in light of all the factual circumstances of the case. That is what the Tribunal will now do with respect to the Claimants' specific claims for lost profits.

b. Lost profits on sales of finished goods

1011. The Claimants claim no less than RON 427 million (originally calculated by Mr. Boulton as an amount "in excess of €100 million", ER of R. Boulton, ¶ 5.99) for lost profits on sales of finished goods, based on:

a. The calculations contained in section 5 of Mr. Boulton's report dated 30 July 2010 and paragraphs 5.24 to 5.70 and 5.95 to 5.99 in particular; and

b. The evidence referred to in the abovementioned section, including exhibits RB-2 and RB-4 (C-PHB, ¶¶ 151-161).

1012. Mr. Boulton carries out a very specific lost profits analysis: he focuses on the impact of the increased cost of raw materials on sales of the EFDG companies' branded goods, and that consequent impact on profits.[207] Mr. Boulton's analysis starts from the premise that the revocation of the incentives caused an increase in the cost of the Claimants' products, which in turn caused the Claimants to raise their prices. That price increase in turn caused the Claimants to lose market share, preventing them from making sales they otherwise would have made. This in turn caused a loss in profits.

[207] In his Expert Report, Mr. Boulton also makes comments on the expert reports submitted by the Respondent's experts Dr. Robinson (on the effect of Romania's accession to the EU on the Claimants) and Mr. Ellison (on quantum in general). He also comments on the First Expert Report submitted by BCG on behalf of the Claimants and provides his own calculation of the impact of price increases on the Claimants' sales of branded products in Romania. It is on this latter analysis that the Claimants rely for this claim.

1013. Mr. Boulton's empirical analysis focuses on the relationship between increased prices and loss of market share. Mr. Boulton does not carry out an empirical analysis of the first two causal links (that revocation caused an increase in costs, and that this increase in costs caused the Claimants to raise their prices), but rather appears to accept them through a combination of reliance on evidence rendered by the Claimants (including Mr. V. Micula's Witness Statement) and of conclusions based on his experience (i.e., his expert opinion) as explained in more detail below.

1014. Mr. Boulton's calculation overlaps with:

a. Prof. Lessard's quantification of lost profits for the EFDG's incremental sales at RON 97.3 million, which on 30 September 2009 was approximately €28 million when grossed up for taxes (Prof. Lessard's Updated Summary of Damages distributed at the merits hearing), and

b. BCG's quantification of the EFDG's lost profits on sales of finished goods at RON 2,423.20 million, which at the date of BCG's Reply Report (30 July 2010) was approximately €722 million (Second ER of BCG , p. 17).

1015. Mr. Boulton's methodology and conclusions can be summarized as follows:

a. Mr. Boulton focused on the relationship between price and market share (ER of R. Boulton, ¶¶ 5.25-5.70; Appendix 5.1). He first identified eleven factors that may have an impact on market share.[208] Out of these, he identified six that could have been affected by revocation (including cost structure and price decisions). Mr. Boulton stated that the factor with "most obvious" impact on market share was cost structure,[209] but testified that he had only quantified the effect of price decisions, because it was the only one for which he had sufficient empirical data:

> "[A]t a high level, what I did was say: is there a relationship between price and market share? And the answer to that is statistically "yes". I then cross-checked that statistics to make sure it made sense with what third-party research shows, which it does. I then sought to identify what price rises were made in response to revocation. And having done that, I quantified: what was the impact of those price rises on sales? And then [...] having identified the lost sales, you identify how much margin was lost and what profits have been lost." (Tr., Day 9, 159 (Boulton))

b. Mr. Boulton's empirical analysis only focused on lost sales for the Claimants' "own branded soft drinks products". Mr. Boulton identified five products within this larger "soft drinks" category: carbonated sugar drinks (CSDs), mineral water,

[208] These eleven factors were: macroeconomic factors, market structure, barriers to entry, competitive behavior, price decisions, cost structure, existing knowledge of the market, an established distribution network, market share of other products, marketing and availability of working capital (ER of R. Boulton, ¶ 5.24).

[209] With respect to cost structure, Mr. Boulton explained: "Of course, if the price of sugar goes up, then that changes the cost structure of the claimants' businesses for CSDs. That in turn is likely to affect price decisions and/or the ability to respond to competitive behaviour. It's much harder to maintain a price positioning below most of your competitors if you've lost your cost advantage." (Tr., Day 9, 157-158 (Boulton)).

still drinks,[210] nectars and juices. Of these five products, he then narrowed the analysis down to three: CSDs, nectars and juices. According to his testimony, these were the only products for which he was able to obtain sufficiently reliable and detailed price and market share data (relying on AC Nielsen data which the expert found trustworthy). In particular, Mr. Boulton excluded from his calculations losses related to mineral water where, in his submission, there is an element of government control that impacts price, as well as losses related to still drinks (i.e., soft drinks other than those identified above, for which he had insufficient historical price data)[211] (ER of R. Boulton, ¶¶ 5.36-5.70; Tr., Day 9, 167-168).

c. Mr. Boulton calculated that, over the period 2004-2009, lost profits for loss of market share for CSDs, juices and nectars amounted to €88 million. After netting out the effect of the higher margin obtained from raising prices, Mr. Boulton concluded that the net effect on the Claimants was a loss of €28 million (RON 119.3 million at the time of his report) (ER of R. Boulton, ¶¶ 5.36-5.70, Tr. Day 9, 168).[212]

d. To do this, Mr. Boulton calculated a "but for" market share: as he explained it, he used "the results of [his] regression analysis to say: if the price increases hadn't been made, what sales would have been achieved -- they would have been higher -- and then putting that back in as what would they then have been as a proportion of the total market." His conclusion was that "the claimants' market share would have declined more slowly over the period, converging when the sugar stockpile ran out in 2011. So I have assumed that there is no benefit after 2011." For this calculation, he assumed that the Claimants would have had the advantage of a sugar stockpile that would have allowed the Claimants to continue without increasing their prices (about 18 months) (Tr., Day 9, 169-171 (Boulton)).

e. Mr. Boulton then extrapolated the profits lost with respect to the Claimants' soft drinks business (€28 million) to all the EFDG companies' products, using a ratio based on what percentage soft drinks sales had in the total group's sales (in Mr. Boulton's submission, soft drinks accounted for 42% of the total value of sales made by the EFDG[213]). The exact result of this extrapolation would have been €66 million, but he rounded it down to €60 million (RON 255.7 million), because not all the products have the same sugar inputs (he stated that he did not have the data to make an exact calculation). This number is based solely on sales of

[210] In some places, Mr. Boulton refers to still drinks simply as "soft drinks", which may lead to confusion (see, e.g., Mr. Boulton's Presentation at the Merits Hearing, Slide 19). In this section the Tribunal refers to them as "still drinks", which was the terminology used by Mr. Boulton in his expert report.

[211] For these last two categories, Mr. Boulton stated that "price rises may still have been made in response to the Revocation, but I have not included any losses as a result in my calculations" (Mr. Boulton's Presentation at the Merits Hearing, Slide 19). See also Tr., Day 9, 218-219, where Mr. Boulton repeats that he has quantified no loss for mineral water.

[212] This reflects the corrected figures submitted by Mr. Boulton on 17 August 2010 (Letter from the Claimants to the Tribunal of 18 August 2010 and attachments).

[213] Mr. Boulton refers to Appendix 5-1 of his report.

the Claimants' products within Romania, and based only on the effect of price increases (ER of R. Boulton, ¶ 5.70; Appendix 5.1; Tr., Day 9, 177 (Boulton)).

f. After arriving at this €60 million number, Mr. Boulton's overall conclusion (which he acknowledged was his subjective "expert opinion") was that the Claimants suffered a loss "in excess of €100 million" (ER of R. Boulton, ¶ 5.99; Tr., Day 9, 177 (Boulton)). He justified this increase because in the original calculation:

   i. He did not take into account the impact of revocation on other factors that could affect market share, such as marketing, market share of other products, and the availability of working capital.

   ii. He used data from AC Nielsen, a well known global marketing company, which "almost certainly understates the size of the whole market", making his calculations "very conservative".

   iii. He ignored export markets, which were included in the much higher BCG calculation (Tr., Day 9, 178 (Boulton)).

g. The €100 million refers to losses over the period running from January 2005 through mid-2011. Mr. Boulton explained that "[i]t's certainly a convergence period post when the incentives would have ended, but on the assumption that there would have been a significant stockpile of sugar and prices would have come down and converged. But the vast majority of those losses are 2005-2009" (Tr., Day 9, 221-222).

1016. As a general matter, the Tribunal agrees with Mr. Boulton's analysis, if not with his full calculation. It seems difficult to dispute that the increased cost of raw materials caused by the revocation of the incentives would have an impact on the prices of the Claimants' products, thereby probably leading to a decrease in market share and lost sales, and consequently lost profits. As explained below, on the facts, the Tribunal finds that this has indeed been the case.

1017. First, this claim focuses on profits deriving from a business that the Claimants were actually engaged in, and is calculated on the basis of profits actually made in the past. The Claimants had a proven record of profitability regarding the sale of their own branded goods.

1018. The Respondent's main criticism has rather to do with causation. Romania argues that Mr. Boulton's report is premised on the assumption that the repeal of the Raw Materials Facility caused the Claimants to raise the prices of their finished goods, which in turn caused them to lose market share. But this, according to Romania, is false.

a. First, Romania argues that the prices of EFDG products were rising as early as January 2004, long before revocation (which took place in February 2005), so there could be no causal link with revocation (R-PHB, ¶ 300). Mr. Boulton accepts that the rise in prices predated revocation (starting in 2004), but states that his “understanding is the price decisions made in 2004 were a response to first of all the rumours and then the announcement of revocation” (Tr., Day 9, 200). Romania argues that Mr. Boulton admitted that this assumption was based entirely on the Claimants’ witness evidence, which Romania argues is unreliable, but this is not entirely accurate. Mr. Boulton did not state that he relied exclusively on the Claimants’ witness evidence; he also drew a conclusion (or an inference) from the evidential pattern and timing of the price increase. In addition, he noted that the loss of market share was not due only to an increase in prices in 2004, but to an inability to reverse them after revocation (Tr., Day 9, 200, 210-212 (Rubins/Boulton)).

b. Second, Romania argues that price increases in 2004 could not have been a response to rumors or announcements of revocation, because the Miculas testified that in January 2004 they still did not believe that the incentives would be revoked. In fact, Ioan Micula testified that he first became concerned with the revocation at the beginning of 2004 after Prime Minister Nastase’s interview on TV in January 2004, so the timing of the price increase is not inconsistent with his testimony (Tr., Day 2, 220 (I. Micula)). It is true however that Viorel Micula testified that he was not certain that the incentives would be withdrawn until the fall of 2004 (Tr., Day 4, 199 (V. Micula)).

c. Third, Romania argues that the price increases in 2004 could not have been a response to rumors or announcements of revocation because Mr. Balog testified and Mr. Gamecho confirmed that the Claimants had purchased enough duty-free sugar to delay the economic effect of the repeal until the second half of 2006 (see First WS of C. Balog, ¶ 7, Tr., Day 4, 28 (Gamecho)). Romania is correct: the witnesses did say that, and Mr. Boulton accepted that, if that was correct it “must follow” that the actual cost of sugar to the claimants wouldn’t have risen until the end of 2006 (Tr., Day 9, 195-196).

1019. The Tribunal has considered Romania’s arguments on causation. But absent another, more plausible explanation for this increase in prices, the Tribunal has difficulty rejecting the causation sequence used by Mr. Boulton. It is undisputed that the revocation of the incentives had an impact on the Claimants’ costs. It cannot be seriously disputed that this cost increase eventually would have had an impact on their prices. The increase in the Claimants’ prices started in January 2004, which coincides with Prime Minister Nastase’s announcement of the revocation. Even if the Claimants had a stockpile that lasted them through 2006, they may have increased their prices to anticipate future losses or smooth out the rise of their prices. In any event, as Mr. Boulton testified, the issue is not just the increase in prices in 2004, but the Claimants’ inability to lower them in the future. In any event, while this is a different question, Mr. Boulton only quantified damages after revocation (to be accurate, from January 2005) (Tr., Day 9, 196-197 (Rubins/ Boulton)).

1020. As a result, the Tribunal finds that, with respect to this particular claim, the Claimants have proved with sufficient certainty that, as a result of the revocation of the incentives, they were deprived of profits that they would otherwise have earned. The question that remains is: what is the value of this loss?

1021. The Tribunal accepts Mr. Boulton's first step in the quantification of this claim, that is, his quantification of lost profits related to lost sales of soft drinks for €28 million. It finds Mr. Boulton's methodology and conclusions reliable and conservative to this point. In particular:

a. Mr. Boulton did not conclude that, but for revocation, the Claimants would have maintained their entire market share. Mr. Boulton conceded that there has been a significant fall in market share over the last five years.[214] As a result he concluded that "about half of that is referable to revocation, and about half of it is referable to all of the other competitive forces in the market and would have happened anyway" (Tr., Day 9, 155 (Boulton)).

b. Although he looked at prices that increased in 2004, he did not quantify damages prior to 1 January 2005. Indeed, he rejected the suggestion that he should have calculated damages since 2004 (when revocation was almost certain), stating:

> "Yes, I think my clients would fairly put to me that I am being overly cautious. They would believe that a greater magnitude of the price increases were their response to revocation. I am seeking always to try to maintain, where things are uncertain, as much caution in my figures as I can." (Tr., Day 9, 167)

c. Mr. Boulton used AC Nielsen data, which was lower than the Claimants' figures and the Euromonitor figures relied upon by BCG, and which may have understated the size of the market. This was because, in his view, AC Nielsen was the only data provider that gave him a full data set of the Claimants' sales and prices and their competitors, and to be rigorous he had to use this data consistently. However, he stated that this had a significant impact on his calculations: according to Mr. Boulton, if he had used Euromonitor, his calculation would have been more than €10 million higher every year (Tr., Day 9, 175-176 (Boulton)).

d. Mr. Boulton ignored export markets in preparing his calculations, which the Tribunal finds appropriate considering that it is difficult to predict how the Claimants' products would have fared in export markets after EU accession.

1022. The Tribunal also finds Romania's additional criticisms of Mr. Boulton's report, to the extent that they refer to the first step of his analysis, unfounded. In particular, Romania argues that "even if there had been an anti-temporal causal link between repeal in 2005 and increased prices in 2004, Mr Boulton's analysis would still be deeply flawed", because he assumed that EFDG's entire loss of market share resulted from rising prices, and ignored the other 10 factors he identified that could

[214] Mr. Boulton testified that the fall in market share started in 2004, not in 2002 (Tr., Day 9, 164 (Boulton)). The Tribunal thus understands that, when Mr. Boulton states that market share has fallen "over the last five years", he is referring to the period 2004-2009.

affect market share" (R-PHB, ¶ 303). Mr. Boulton admitted that he has only quantified the effect of price increases, but denied that he has ignored the other factors or that this makes his quantification inaccurate. Specifically, Mr. Boulton explained: "What I have done is calculate by how much the fall in market share was attributable to the relative price increases, and that is the pink line. Therefore, I am not ignoring, as has been suggested, all of the other factors that affect market share, because they are all in that line. They are all in the actual line and they are also all in my adjusted actual. All I have done is adjust for the effect of price increases" (Tr., Day 9, 169, referring to slide 15 of his presentation). The Tribunal is satisfied with Mr. Boulton's response.

1023. The second and third steps of Mr. Boulton's analysis are however less straightforward.

1024. To recall, Mr. Boulton's second step in the analysis was to extrapolate the profits lost with respect to the Claimants' soft drinks business (€28 million) to all the EFDG companies' products, using a ratio based on what percentage soft drinks sales had in the total group's sales (42%). The exact result of this extrapolation would have been €66 million, but Mr. Boulton rounded it down to €60 million (RON 255.7 million), because not all the products have the same sugar inputs (he stated that he did not have the data to make an exact calculation) (Tr., Day 9, 177 (Boulton)).

1025. After arriving at this number, Mr. Boulton went a step further, and concluded that the Claimants actually suffered a loss of at least €100 million. Mr. Boulton justified this increase in the original calculation (which he acknowledged was his subjective "expert opinion") because in the original calculation:

a. He did not take into account the impact of revocation on other factors that could affect market share, such as marketing, market share of other products, and the availability of working capital.

b. He used AC Nielsen data, which "almost certainly understates the size of the whole market", making his calculations "very conservative".

c. He ignored export markets, which were included in the much higher BCG calculation (Tr., Day 9, 178 (Boulton)).

1026. The Respondent criticizes both of these steps. First, Romania argues that Mr. Boulton extrapolated his estimate of €28 million for soft drinks across the EFDG's entire business, arriving at €60 million, but in so doing he included products (such as beer) which use no sugar. Mr. Boulton defended his position as follows:

> "Q. Given that discussion we've just had, isn't it fair to say that €60 million extrapolated by a direct ratio, even rounded down, is bound to be an overstatement within the bounds of this calculation?
>
> A. Well, I think that's a fair question to put, because it's something I have worried about in thinking about how to get to those numbers.

> The reason that I was comfortable with the conclusion I came to is partly because my five products include some for which I found nil effect. So if you like, if you look at my slide 18, the bottom-left quadrant includes big categories like alcohol and beer where the incentives would not have a big effect. But my top-left box from which I am extrapolating includes mineral water. So I haven't just chosen the products that are affected, like CSDs and extrapolated to all products; I have chosen a mix of products, including mineral water, for which I've quantified no loss, and extrapolated that across all products.
>
> So it's not, I think, as open to criticism as you are suggesting. It is uncertain; I tried to say that. It's why I round it down.
>
> The other factor is, of course, the price increases may have been put through on other products, even where there wasn't the direct raw material cost impact coming through. Essentially pricing decisions were made in response to revocation, even where there wasn't that raw material impact.
>
> So could I argue that 60 million was definitely a better number than 50 million? No. Am I comfortable that I considered the relevant factors in coming to my conclusion? Yes.
>
> Q. When you say "comfortable", you think it's probable that that's the right number, that is the amount, €60 million?
>
> A. That would be my best estimate of what the loss was across these 14 categories, before taking into account the other factors that I look at about total size of the market and other impacts of revocation on market share."

(Tr., Day 9, 218-219)

1027. Romania also argues that Mr. Boulton "inflated" his €60 million figure to a level in excess of €100 million "without any support or explanation" (R-PHB, ¶ 304), adding that this €100 million figure is a "guess, based on no calculations whatsoever" (R-PHB, ¶ 214).

1028. The Tribunal has duly noted Romania's objections. However, it is evident to the Tribunal that the Claimants' losses under this claim are not limited to €28 million lost in relation to soft drinks. It is undisputed that the Claimants sold other products that did contain sugar, whose prices would have been affected by the increased cost of sugar. As noted in paragraph 1008 above, once the fact of damage has been established, the Tribunal has wide discretion to establish its exact amount, provided that the Claimants have provided a basis for that calculation.

1029. In the absence of exact data related to other sugar-containing products, the Tribunal accepts that an extrapolation may be appropriate. However, Mr. Boulton's analysis is premised on the assumption that an increased cost of sugar caused an increase in prices of certain products. It is thus not reasonable to extrapolate the profits lost on soft drinks containing sugar to products that do not contain sugar. The Tribunal is not fully satisfied with Mr. Boulton's explanation, cited above, as to why that extrapolation was reasonable. For the same reason, the Tribunal cannot agree with Mr. Boulton's conclusion that €28 million accurately reflects the losses related to an increased cost of sugar for 42% of the Claimants' total sales, because that 42% includes mineral water, which does not contain sugar.[215] According to the table provided on page 5 of Appendix 5-1 to Mr. Boulton's report, sugar-containing soft drinks (that is, CSDs, other soft drinks and juices/nectars) account for 32.76% of the Claimants' total sales over the period 2004-2008).[216] The Tribunal therefore rejects the specific calculations in the extrapolation carried out by Mr. Boulton.

1030. Instead, and in the exercise of its discretion in the calculation of damages, the Tribunal will extrapolate the Claimants' losses in sugar-containing soft drinks to the Claimants' other sugar-containing products. In the absence of an exact breakdown of what products contain sugar, the Tribunal has assumed that the following categories of products identified in Table A5-1.1 of Appendix 5-1 of Mr. Boulton's report contain sugar in some measure: soft drinks, juices and nectars, alcoholic drinks, biscuits, tomato sauce/ketchup, co-extruded products, breakfast cereals, and sticks. Based on the information provided in Table A5-1.1 of Mr. Boulton's report, the Tribunal has concluded that sugar-containing soft drinks account for approximately 54% of the EFDG's total sales in sugar-containing products (which amount to approximately 850 million over a period between 2004 and 2008). If the losses calculated by Mr. Boulton for sugar-containing soft drinks (i.e., €28 million) are then extrapolated to the remaining sugar-containing product line, the result is €51.6 million.[217]

1031. The Tribunal now turns to Mr. Boulton's third step, in which he concludes that the Claimants actually suffered a loss of at least €100 million. Mr. Boulton conceded that he was unable to quantify this step, which is testimony to his professional integrity; however, the Tribunal is not prepared to accept an increase of €40 million (equivalent to 67% of the amount he arrives to for the entire product line) solely on the basis of Mr. Boulton's "subjective expert opinion" (Tr., Day 9, 177 (Boulton)). In addition, the Tribunal finds that the arguments advanced by Mr. Boulton in order to reach this number are not satisfactory for the following reasons:

a. The fact that Mr. Boulton used conservative data, such as AC Nielsen data, should not be used as a reason to inflate the results by 67%. If the use of conservative figures is deemed warranted and justified, this approach should not be reversed subsequently, especially on the basis of assumptions, even where – as in this case – the assumptions are based on the expert's professional experience.

[215] The Tribunal understands that Claimants' entire soft drinks business (including the five categories identified by Mr. Boulton in para. 1018(b) above) account for 42% of the Claimants' total sales. See Table A5-1.1 in Appendix 5-1 of Mr. Boulton's report, p. 5.

[216] The Tribunal notes that this table does not distinguish between CSDs and still drinks, so it assumes they both categories fall under the label "soft drinks".

[217] The Tribunal will not set out in detail its calculations. It suffices to say that the results of the Tribunal's calculations are confirmed by the fact that 54% (i.e., the percentage of sugar-containing soft drinks in the EFDG's total sales of sugar containing products) of €51.6 million (the Tribunal's calculation of overall losses in sugar-containing products) is €28 million (Mr. Boulton's calculation of losses in sugar-containing soft-drinks).

b. Similarly, Mr. Boulton himself stated that he was unable to quantify exactly the impact of the revocation on other factors that could affect market share, such as marketing, market share of other products, and the availability of working capital. In these circumstances, there is no sufficient factual basis for Mr. Boulton's final number, and an increase of 67% appears unjustified.

c. Given the uncertainties that the Claimants' business would have faced after Romania entered the EU, the Tribunal does not believe that it would be appropriate to consider export markets in its calculation of damages.

1032. That being said, although Mr. Boulton has failed to prove that the Claimants have suffered a loss of €100 million, the factors outlined in the preceding paragraph suffice to convince the Tribunal that the Claimants have lost profits in excess of €51.6 million as a result of lost sales of finished goods. In particular, the Tribunal is satisfied that the revocation of the incentives must have had an impact on other factors that could affect market share, such as marketing, market share of other products and the availability of working capital, an impact which Mr. Boulton was unable to quantify. The Tribunal is not well-positioned to quantify the economic impact of factors that the expert himself was unable to quantify, however, it is satisfied that an additional damage was indeed suffered. Having reached that conclusion, and in the exercise of its discretion to quantify damages, the Tribunal is prepared to return to the initial figure proposed by Mr. Boulton in his second step, that is, €60 million.

1033. For these reasons, the Tribunal values the lost profits suffered by the Claimants for lost sales of finished goods at €60 million. In his report, Mr. Boulton calculates this to be equivalent to RON 255.7 million at the exchange rate of the date of his report (ER of R. Boulton, ¶ 5.70).[218] The Claimants have made their claims in RON; as a result, the Tribunal finds that it would be improper to use a different exchange rate and will in particular derive the consequences from this finding when it comes to compute the interest on the claims. Thus, the Tribunal values the lost profits suffered by the Claimants for lost sales of finished goods in RON, namely at RON 255.7 million.

c. Lost profits on sales of sugar containing products (SCPs)

1034. In addition to their claim for lost profits on sales of finished goods, the Claimants claim lost profits on sales of sugar containing products ("SCPs") following the revocation of the incentives, in the amount of RON 492.3 million (C-PHB, ¶¶ 162-170). This claim is cumulatively based on:

a. The calculations contained in section 4 of Mr. Osborne's first report and paragraphs 4.25 and 4.31 in particular;

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[218] Indeed, although Mr. Boulton quantifies the claim in Euro, his model was principally denominated in RON. Mr. Boulton explains that "[w]ith the exception of transportation and distribution costs, my model is denominated in RON. I have converted the RON values into Euros on a monthly basis in my model. However, for illustrative purposes here, I have used the 30 July 2010 €:RON exchange rate [equivalent to 1:4.26179, as noted in ¶ 5.69] to convert my Euro denominated calculations back into RON" (ER of R. Boulton, fn. 125, p. 54).

b. The calculations contained in section 5 of Mr. Osborne's second report;

c. The calculations contained in Dr. Fry's reports of December 2009 and July 2010; and

d. The evidence referred to in the abovementioned sections and reports, including paragraph 69 of Mr. Viorel Micula's witness statement dated 22 December 2009, paragraphs 82 and 124 of Mr. Halbac's witness statement dated 22 December 2009, paragraph 17 of Mr. Halbac's witness statement dated 30 July 2010, and exhibits CO-1.19 and CO-13.1.

1035. This claim can be summarized as follows. Relying on the evidence cited above, the Claimants assert that, from 2005, they planned on manufacturing SCPs and selling those SCPs to industrial third parties. They further assert that, as a result of the revocation of the incentives, they were unable to do so. As a result, they now claim for the lost profits they would have allegedly made had they been able to sell SCPs to third parties.

1036. For the quantification of this claim, the Claimants rely on the expert reports prepared by Dr. Fry (of LMC International) and Mr. Osborne (of FTI). In fact, the quantification analysis is carried out by Dr. Fry; Mr. Osborne has adopted his estimates, added interest and grossed-up for taxes (First ER of C. Osborne, ¶ 4.31; Second ER of C. Osborne, ¶ 5.3, 1.19).

1037. Specifically, Dr. Fry asserts that the SCP opportunity would have been worth €131 million to the Claimants had they been able to take advantage of it (Second ER of J. Fry, p. 5). Dr. Fry's quantification is based on the following main assumptions (some of which are the result of his own expert opinion):

a. That, with the price advantage the Raw Materials Incentive would have given the Claimants, they would have been able to capture 90% of the Romanian SCP market (excluding sales of SCPs from domestic sugar beet production, with about half of the market captured in 2005). The Claimants argue that Dr. Fry has successfully responded to all criticisms leveled at this conclusion (see C-PHB, ¶ 164).

b. That the Claimants, in taking advantage of the SCP opportunity, would not have undermined or come into conflict with the EU's sugar regime. This is because the EU's sugar regime defends a reference price and in so doing provides the Commission with mechanisms to deal with all kinds of events (see C-PHB, ¶ 165).

1038. In addition, the Claimants assert that "[a]t no stage of the proceedings has the Respondent ever alleged that sales of SCPs to industrial third parties would have been unlawful under Romanian law or outside what was permitted pursuant to the EGO 24 regime" (C-PHB, ¶ 168).

1039. Finally, the Claimants argue that "the additional capacity to enable the Claimants to engage in sales of SCPs would have attracted a premium in the valuation of the European Food and Drinks Companies prior to Revocation. This capacity gave the Claimants an option to generate incremental cash from a structural cost advantage relative to other sugar suppliers in the market and as such, would definitely have had a value" (C-PHB, ¶ 170). However, they do not attempt to give a value to this premium.

1040. The Respondent criticizes this claim for the following reasons (R-PHB, ¶¶ 244-254; R-SPHB, ¶¶ 19-23):

a. First, the Respondent argues that there is no evidentiary support for this claim. It notes that, in the five years during which the Claimants had access to the Raw Materials Incentive, no SCPs were ever marketed or sold to an industrial third party. Likewise, the Respondent notes that there is no contemporaneous evidence in the record reflecting the alleged intention to pursue the SCP opportunity. The Respondent argues that this claim is premised solely on Mr. Viorel Micula's and Mr. Halbac's testimony, which it characterizes as unreliable.

b. Second, for this same reason, the Respondent argues that there is no evidence of the scale upon which the SCP opportunity would have allegedly been pursued.

c. Third, the Respondent argues that the assumptions that underlie Dr. Fry's calculations are unreasonable. In particular, the Respondent contends that it is unreasonable to assume that the EFDG would have captured 90% of the Romanian market, on the further assumption that the EFDG's competitors (including Coca-Cola) would have been willing to purchase SCPs from EFDG and that all sugar producers capable of producing SCPs would have allowed their businesses to be wiped out (with the exception of sugar beet producers, who would have been able to survive on break-even margins). The Respondent also argues that it is unreasonable to assume that this strategy would have been legal as a matter of Romanian and EU law, or that Romania would have been able to maintain the customs duty exemption until March 2009 (R-PHB, ¶ 247).

1041. After analyzing the evidence before it, the Tribunal rejects this claim. In particular, it finds that the Claimants have not proved with sufficient certainty that, but for the revocation, they would have earned profits as a result of sales of SCPs to industrial third parties. First, it is undisputed that the Claimants never sold SCPs to industrial third parties (Section (i) below). Second, the Claimants have not proven that they would have in fact engaged in the business of selling SCPs to industrial third parties (Section (ii) below). The Tribunal therefore does not need to address the quantum of the alleged lost profits.

i. The Claimants never sold SCPs to industrial third parties

1042. It is uncontested that the Claimants never sold SCPs to industrial third parties. Mr. Osborne stated in his first report and confirmed at the hearing that "[t]he opportunity to sell sugar-based products is not one that was ever pursued. The objective of the

Micula brothers had rather been to build higher value-added businesses including manufacturing finished goods" (First ER of C. Osborne, ¶ 4.26; Tr., Day 10, 66-67 (Osborne)).

1043. In this respect, Mr. Halbac and Mr. Osborne both acknowledged that European Food only sold SCPs to other members of the EFDG. Specifically:

a. Mr. Osborne states that "[p]rior to revocation, European Food was processing sugar and selling intermediate sugar products to industrial users, in the way posited by LMC, although primarily to European Drinks" (Second ER of C. Osborne ¶ 5.5). Mr. Osborne cites Exh. CO-19.1, but this exhibit only reflects sales of SCPs from European Food to other EFDG companies (specifically, European Drinks and Original Prod SRL).

b. Mr. Halbac states that "European Food has been selling intermediate sugar products to industrial users since 2000, when it first began selling sugar syrup" (Second WS of M. Halbac, ¶ 3), but then he clarifies that "[w]hile many of European Food's customer's [sic] were EFDG related companies, this does not change the fact that European Food was well versed in selling intermediate products. Further, European Food had been selling these products to unrelated third party customers for some time before revocation, contrary to Romania's position" *(Id.*, note 3). But Mr. Halbac does not say that European Food sold *SCPs* to industrial third party customers.

c. Indeed, Mr. Halbac was not able to cite to a single invoice clearly reflecting sales of SCPs to industrial third party customers. All invoices cited refer either to sales of SCPs to other EFDG companies, or sales of other intermediate products (not SCPs) to third parties. Specifically:

i. Exh. C-840, C-841, C-842 and C-839 contain invoices for sugar syrup sales from European Food to European Drinks from 2002 to 2005.

ii. Exh. C-954 to C-958 are all bulk sales invoices for wafers, cocoa, and other sugar products from European Food to TGIE (another member of the EFDG) from 2002 to 2005.

iii. Mr. Halbac cites one invoice that could refer to sales to third parties, but the names are illegible and no translation was provided (Exh. C-959). In any event, most of the products may not be SCPs (e.g., tomato paste, ketchup, mustard, cereals), although there appears to be some reference to products containing cocoa, which presumably could involve SCPs. Importantly, there appears to be no mention of sugar syrup. The Tribunal cannot confirm, especially as the document is in Romanian.

1044. Given that no sales of SCPs to industrial third parties were proven to have been made, it also was not proven that the Claimants ever earned profits as a result of this activity. Thus, there is no proven record of profitability to support the Claimants' lost profits claim. As stated at paragraph 1010 above, the absence of a proven record of profitability need not necessarily be fatal to a lost profits claim. However, in this particular case the Claimants have not met their burden of proving that they would have in fact engaged in the business of selling SCPs to industrial third parties, as discussed below.

ii. The Claimants have not proven that they would have in fact engaged in the business of selling SCPs to industrial third parties

1045. The evidence in the record does not support, with the requisite degree of certainty, a finding that the Claimants would have in fact pursued the SCP opportunity. None of the Claimants' experts could identify any contemporaneous evidence of an intention to pursue the SCP opportunity (Tr., Day 8, 46 (Lessard); Tr., Day 10, 66–70 (Osborne); Tr., Day 11, 224–225 (Fry)). The Claimants rely heavily on witness evidence, in particular by Mr. Viorel Micula and Mr. Halbac, but the Tribunal finds this evidence unconvincing.

1046. Mr. Viorel Micula simply asserts that "[f]rom 2005, we had planned on manufacturing from raw sugar, sugar-based products such as sugar syrup, and then selling these sugar-based products to industrial third-parties" (Third WS of V. Micula, ¶ 69). Mr. Viorel Micula does not cite any documentary evidence.

1047. In his second witness Statement, Mr. Halbac testifies that the Claimants intended to sell SCPs to third party industrial consumers (Second WS of M. Halbac, ¶¶ 23-24). In that statement, he links the expansion of the chocolate cream line, done in December 2004 (although according to him it was planned since 2002) to an increased capacity to process sugar and produce SCPs, thus allegedly allowing for sales of SCPs. He also suggests that EFDG was already selling SCPs to industrial consumers (Second WS of M. Halbac, ¶¶ 3-7), but as stated above, this only referred to customers within the EFDG. Mr. Halbac also testifies that EFDG had the capacity to produce, sell and distribute SCPs to third parties (Second WS of M. Halbac, ¶¶ 25-55).

1048. The Tribunal has several comments on Mr. Halbac's statements. First, it is puzzling that Mr. Halbac did not mention sales of SCPs to third parties in his First Witness Statement. There Mr. Halbac referred only to the internal use of SCPs by EFDG companies (First WS of M. Halbac, ¶¶ 14-17; 81-120). Mr. Halbac did make one statement at paragraph 118 of his First Witness Statement that could potentially have referred to sales of SCPs (specifically, chocolate cream) to third parties, but this is unclear.[219] In any event, in his First Witness Statement he makes no mention of sugar syrup, which is a crucial aspect of the Claimants' SCP claim.

1049. Second, Mr. Halbac's statements do not prove that the Claimants had the capacity to sell SCPs to third parties at the scale assumed by Dr. Fry, Prof. Lessard and Mr. Osborne. Indeed, although Mr. Halbac's statements could support the assertion that

[219] Specifically, Mr. Halbac stated that "[w]hen we extended the chocolate cream line, we were planning for future developments such as the chocolate tablet line, the cream filled biscuit line, and the bulk delivery of chocolate cream for patisseries or other food producers. However, these projects were never realized due to the fact that we lost the EGO raw materials incentive" (First WS of M. Halbac, ¶ 118).

the December 2004 expansion of the chocolate cream line was sufficient to sell chocolate cream to industrial third parties, it does not support the conclusion that this expansion gave the Claimants sufficient capacity to sell powdered sugar or sugar syrup to industrial customers.

a. With respect to sugar syrup, Mr. Halbac states that "[b]efore the December 2004 expansion, we did not have the capacity to sell powdered sugar to industrial consumers. To prepare for these sales, we expanded our handling system with additional Reimelt and Wiener equipment. This equipment is identified in the attached diagram" (Second WS of M. Halbac, ¶ 23). However, the "attached diagram" (Exh. C-848) is an unsigned diagram in English, dated 09.04.03, that does not prove that the equipment was actually bought and installed.

b. Similarly, neither Mr. Halbac's statements nor the evidence cited prove that the Claimants had the capacity to sell sugar syrup to third party industrial customers. Mr. Halbac merely states that "[i]n addition to powdered sugar products and chocolate cream, EFDG planned to extend its sale of sugar syrup to third party industrial consumers. As previously stated, European Food was already selling significant amounts of sugar syrup to European Drinks for the soft drink production. These sales were processed just as they would be if European Food sold sugar syrup to a completely unrelated company, and each sale was invoiced." (Second WS of M. Halbac, ¶ 24). There is no reference to how the 2004 expansion of the chocolate cream line could have impacted the production of sugar syrup. Perhaps the implication is that the Claimants already had that capacity. However, as stated above, European Food never did sell sugar syrup to industrial third parties. If this was such a profitable venture and the Claimants already had the capacity to do so, it is difficult to understand why they did not pursue this opportunity before. There is no credible contemporaneous evidence that the Claimants contemplated or made any preparatory work for the sale of sugar syrup or significant quantities of SCPs to third-party industrial users, be it in or outside Romania. One would for instance have expected some internal correspondence or exchanges of memos as to the abandonment or alteration of such plans in relation to the repeal of the incentives.

1050. In turn, Mr. Osborne's position seems to be that the SCP opportunity was possible and valuable for the Claimants, and given their financial constraints he concludes that they would have "undoubtedly" pursued it. Specifically, Mr. Osborne makes the following statements:

a. "With the EGO 24/1998 raw materials incentive in place, the Claimant Companies ***could have made*** additional sales of sugar-based products to industrial users of sugar outside of the Companies controlled by the individual Claimants, in the same way that it does to Companies that are controlled by the Claimants. Post revocation of the raw materials incentive however, its cost advantage in the purchase of sugar for processing into such products had been removed." (First ER of C. Osborne, ¶ 4.25, emphasis added)

b. "The opportunity to sell sugar-based products is not one that was ever pursued. The objective of the Micula brothers had rather been to build higher value-added businesses including manufacturing finished goods. Given the financial constraints that the Companies are now under, however, the opportunity ***would have been valuable***, and ***would undoubtedly have been exploited***" (First ER of C. Osborne, ¶ 4.26; emphasis added).

c. "Selling intermediate sugar products to industrial customers that were not under common ownership was not the brothers' primary strategy from the outset of the EGO 24/1998 investment programme. However, it was an ***obvious potential source of significant incremental cash flow*** should the risks they were taking in investing in new businesses and new facilities crystallise on the downside, as they did" (First ER of C. Osborne, ¶ 5.1, emphasis added).

d. "During 2004 when the EBITDA contribution of European Food and soft drinks declined, and the import duty on refined sugar was doubled to 90%, the brothers were preparing to process and sell intermediate sugar products in large quantities to third parties. ***The brothers believed that this would allow them to avoid financial constraints*** within the corporate Claimants, and any negative effects on the other companies they owned" (Second ER of C. Osborne, ¶ 5.2. Mr. Osborne relies here on the Third WS of V. Micula, ¶ 69, emphasis added).

e. "Given the value of the opportunity, as set out by LMC, it appears to me that ***the natural assumption is that the opportunity would have been pursued***, at least at the point at which it became important to the financial well-being of the Companies" (Second ER of C. Osborne, ¶ 5.6).

f. "The EGO 24/1998 incentives allowed the corporate Claimants to sell intermediate sugar products to industrial customers. In fact sales of such products were only ever made to companies under common ownership, but ***there was scope to sell to third parties had the need arisen***. This could have been highly cash generative, especially towards the end of the original incentives period after Romania's accession to the EU" (Second ER of C. Osborne, ¶ 7.28).

1051. The Tribunal cannot accept Mr. Halbac's or Mr. Osborne's statements as proof with sufficient certainty that the Claimants would have in fact sold SCPs to third parties. Even if the Claimants had the capacity to do so, capacity alone does not provide sufficient certainty that an opportunity would have been pursued and that it would have been profitable. Nor can Mr. Osborne's assertions as to the reasonableness of this plan establish with sufficient certainty that the Claimants would have in fact pursued the SCP opportunity. Reasonable and viable as it may have been, Mr. Osborne is only speculating. In the Tribunal's view, this does not meet the standard of sufficient certainty. Excellent prospects of profitability may contribute to prove that an opportunity would have existed, especially from the vantage point of retrospective view rather than actual prediction, but this is still a far cry from demonstrating that this opportunity could and would have been availed of.

1052. The Tribunal is likewise not persuaded by the Claimants' explanations for the lack of documentary evidence. Relying on Mr. Boulton, the Claimants argue that it is "completely unrealistic" to treat the EFDG companies as though they are quoted public companies with documents prepared for every single decision, plan and aspect of the business. Although this may be true, this does not dispense with the requirement of proving their lost profits case with sufficient certainty. The Claimants also quote Prof. Lessard, who stated that "as an economic matter, the fact that Claimants invested to develop this capacity and the related product standards and permits is stronger evidence of their intent than would be internal memoranda, corporate resolutions, or other formalities" (Second ER of D. Lessard, ¶ 57). The Tribunal also accepts that in theory this could be true. However, it has found no convincing evidence that the Claimants indeed invested specifically with the purpose of developing this capacity. Although there is evidence that they invested to expand the chocolate cream line, it is unclear whether this gave them the capacity to sell SCPs (especially sugar syrup and powdered sugar) to industrial third parties at the scale that they allege. And even if they had this capacity, this is not in itself proof that they intended to produce different types of SCPs in large quantities to sell to industrial third parties.

1053. The Tribunal is also troubled by the fact the timing of the alleged SCP opportunity. In particular, if this opportunity was so attractive, why did the Claimants not pursue it earlier?

1054. The Claimants argue that there are "proper explanations as to why the SCP opportunity was not pursued prior to the unlawful premature revocation of the Incentives" (C-PHB, ¶ 167). According to the Claimants:

a. The evidence shows, and both Professor Lessard and Mr. Osborne explained during the course of the hearing, that the reason why the SCP opportunity became attractive at the start of 2005 is that the customs duties on sugar doubled at about that time (Exh. C-805; Tr., Day 8, 22 (Lessard); Tr., Day 10, 67 (Osborne); Second ER of D. Lessard, Exhibit A).

b. As explained by Mr. Osborne, the SCP opportunity, being reliant on the Raw Materials Incentive, was not a long-term business proposition but instead was helpful for cash generation. The suggestion seems to be that it was not necessary to pursue it before the Claimants became cash constrained (Tr., Day 10, 67-68 (Osborne)).

c. Mr Osborne also explained that as the financial ratios of the European Food and Drinks Companies were starting to decline by 2005 (though they were not poor), the SCP opportunity and its ability to be highly cash generative became more attractive (Second ER of C. Osborne, ¶ 5.2).

d. Additionally, it was only after the expansion of the Claimants' sugar production facilities was completed in December 2004 that the Claimants had sufficient capacity to produce and sell SCPs to industrial third parties in addition to selling their private label goods (Second WS of M. Halbac, ¶ 23).

1055. The Tribunal has the following comments:

a. First, if the SCP opportunity only became attractive in 2005 because of an increase in customs duties, it can hardly have been part of the Claimants' original plan. Thus, there was no ongoing investment plan that was frustrated by revocation.

b. Second, by 2005 revocation had already been announced. Thus, the SCP opportunity cannot be said to have properly existed pre-revocation.

c. Third, the expansion of the chocolate cream line (which purports to serve as intention of pursuing this opportunity) was made in December 2004. If the SPC opportunity only became attractive in 2005 because of an increase in customs duties in 2005, the purpose of the chocolate cream line expansion must have been other than pursuing the SCP opportunity. Indeed, Mr. Halbac asserts that this had been planned as early as 2002 (*see* Second WS of M. Halbac, fn. 8 at ¶ 19).

1056. In view of the above, there does not appear to be in the record sufficient evidence of existing and concrete plans rather than, in the most favorable hypothesis for the Claimants, some general speculations that the Claimants might have gone into such sales if certain events would have materialized. In addition, at best, this opportunity appears to have been thought of when the revocation became imminent, as a life saver of sorts to help the Claimants out of financial distress, a mitigating measure to obtain cash flows in times of financial constraint. Indeed, Mr. Osborne's comments cited at paragraph 1050 above seem to suggest this. This is also confirmed by the following statements by Mr. Osborne:

> "1.13 My own view remains that the Claimants had the ***motive, the means and the opportunity*** to generate significant profits from expanding the sales of intermediate sugar products. As I have said, the existence of the opportunity does not appear to me to be contested; and Professor Lessard has dealt with the question of whether the Claimants had the means to take advantage of that opportunity.
>
> 1.14 The fact that the Claimants had not done so, prior to revocation, goes in my view to the question of *motive*. Mr Ellison suggests that it is odd that the "quasi-arbitrage opportunity" was not pursued, prior to revocation, given the high profits apparently available and the low associated risk.
>
> 1.15 I do not find it odd: nothing in the history of the Claimants' operations in Romania suggests to me that the Claimants were motivated to maximise either short-term profitability or personal gain; and all of the interactions that I have had during the course of multiple site visits have suggested the reverse – that they were motivated primarily to build a long term, sustainable business.

1.16 For much of the period up to revocation, ***that motivation would not have been compatible with the exploitation of the opportunity to expand sales of intermediate sugar products***. Once the Claimants started to become financially constrained, however, the motivations would have been precisely aligned, since the survival of the underlying and potentially sustainable business would have been at stake.

1.17 To repeat a point that I have made before, it appears to me that ***the natural assumption is that the Claimants would have taken advantage of the opportunity, as soon as it became expedient or necessary to do so***. As I demonstrate in Section 6 of this report, ***it did indeed become necessary, for reasons connected with the scale of the investments undertaken by the Claimants***."

(Second ER of C. Osborne, ¶¶ 1.13-1.17).

1057. The Tribunal cannot accept Mr. Osborne's conclusions as sufficient evidence of intent to pursue the SCP opportunity. Even if the Claimants had the motive, the means and the opportunity to generate profits from expanding the sales of SCPs to third parties, this does not provide sufficient certainty that, but for the revocation, the Claimants would in fact have engaged in the sale of SCPs to third parties. Absent other convincing evidence in this respect, the Tribunal dismisses this claim.

d. Lost profits incurred as a result of the Claimants' inability to complete the Incremental Investments

i. Overview of the Parties' positions

1058. The Claimants' primary expectation damages case (Method A) is premised on the existence of an alleged ten-year plan to capitalize on the incentives and to complete an expanded manufacturing platform that would have performed profitably after the incentives expired (C-PHB, ¶ 97). This platform allegedly included a malt manufacturing plant, a can manufacturing plant, and a co-generation plant (which the Claimants collectively call the "Incremental Investments"). As part of Method A, the Claimants claim the profits that these Incremental Investments would have generated but for the revocation.

1059. There is no dispute that the Claimants never implemented the Incremental Investments. The Claimants are requesting, in their own words, "damages for lost cash flows that Claimants expected to receive from certain projects that they intended to implement as part of their business plan, and <u>would</u> have implemented, but for the premature revocation of the incentives" (C-Reply, ¶ 595, emphasis in original). Specifically, the Claimants claim:

a. RON 28 million in lost profits from the inability to complete a **malt manufacturing plant**. They base this claim on Prof. Lessard's first and second reports (First ER of D. Lessard, ¶¶ 97-99, Fig. 22, Table 7; Second ER of D. Lessard, ¶¶ 99-103, 113-122, Fig. 16), the evidence cited in those reports, including Mr. Halbac's two witness statements, and the figures contained in Updated Summary of Damages Separating Interest (in RON), Tab 2 of Mr. Schwartz's Opening Presentation;

b. RON 720.4 million in lost profits from inability to complete a **can manufacturing plant**. The Claimants base this claim on Prof. Lessard's first and second reports (First ER of D. Lessard, ¶¶ 105-110, Fig. 23, Table 9 and 10; Second ER of D. Lessard, ¶¶ 104-107, 113-122); Prof. Steenkamp's Expert Report, including Table 15; the evidence cited in those reports, including Mr. Halbac's two witness statements, and the figures contained in Updated Summary of Damages Separating Interest (in RON), Tab 2 of Mr. Schwartz's Opening Presentation.

c. RON 712.6 million from the inability to complete a **co-generation plant**. They base this claim on Prof. Lessard's first and second expert reports (First ER of D. Lessard, ¶¶ 100-104 Table 4; Second ER of D. Lessard, ¶¶ 108-111); the evidence cited in those reports, including Mr. Baciu's witness statement, and figures contained in Updated Summary of Damages Separating Interest (in RON), Tab 2 of Mr. Schwartz's Opening Presentation.

1060. The Claimants assert that they had planned to implement the Incremental Investments, and had in fact taken steps towards their implementation, but the revocation of the incentives deprived them of both the cash and financing leverage necessary to "complete" these Incremental Investments. Relying on the principle of full reparation enshrined in Article 31 of the ILC Articles, as articulated by the PCIJ in the *Factory at Chorzów* case, the Claimants' argument is that, but for the revocation, they would have implemented the Incremental Investments; consequently, to put them back in the position they would have been but for the revocation, the Tribunal should award them the future net cash flows that these plants would have generated.

1061. The Respondent contends that the Claimants have failed to prove with reasonable or sufficient certainty their claims for lost profits related to the Incremental Investments.

1062. First, the Respondent argues that there is no proof that the Incremental Investments would have been undertaken at all. The Respondent notes that Prof. Lessard, despite multiple site visits, meetings with the Claimants' employees, and having relied on much of the information provided by the Claimants, testified that he considered the Incremental Investments to be merely "plausible" (by which he appeared to mean that they would have made "economic sense"), but was unwilling to characterize them as "probable" (Tr., Day 8, 40-2), which the Respondent argues is the minimal standard under international law. Contrary to the Claimants' suggestion, the Respondent denies that all that remained was to "complete" the Incremental Investments. The Respondent argues that to make this assertion the Claimants have mischaracterized the documentary evidence and manipulated witness testimony.

1063. Second, even if there was no doubt that the Incremental Investments would have been undertaken, the Respondent submits that the Claimants cannot meet the sufficient certainty standard to establish that they would have been profitable, or what would have been the level of such projected profits, because the Incremental Investments were not going concerns and had no proven record of profitability. As noted above, the Respondent submits that international law precludes any award of prospective damages for projects that have not commenced, and that the reasonable certainty standard cannot be satisfied in the absence of a going concern and a proven record of profitability.

1064. In addition, the Respondent argues that the Claimants have failed to prove that the revocation of the incentives was the dominant or proximate cause of their failure to implement the Incremental Investments. The Respondent argues that the financial distress that allegedly prevented the Claimants from implementing the Incremental Investments is attributable to causes other than the revocation of the incentives.

ii. The Tribunal's analysis

1065. For the reasons set out below, the Tribunal rejects the Claimants' claims for lost profits allegedly incurred as a result of their inability to complete the Incremental Investments. It is undisputed that none of the facilities that would have allegedly generated the lost profits claimed (i.e., the malt plant, the canning plant and the co-generation plant) existed in their complete, revenue-generating form at the time of revocation. Instead, the Claimants claim that they intended to build these facilities, and that these facilities were at various stages of completion. The Claimants also argue that the Incremental Investments were consistent with their integrated business model, and submit this as further proof of their intention to complete these facilities. However, after an analysis of the record, the Tribunal finds that the Claimants have failed to prove with sufficient certainty that they would have indeed implemented the Incremental Investments that serve as the basis for this lost profits claim.

1066. In the following sections, the Tribunal addresses the evidence and arguments submitted by the Claimants with respect to each of the Incremental Investments, as well as their general arguments with respect to their integrated business model and advance planning for the Incremental Investments.

(a) The Claimants' integrated business model – Advance planning for the Incremental Investments

1067. In support of their intention to implement the Incremental Investments, the Claimants contend that the Incremental Investments were necessary to the success of the Claimants' overall business model, which they argue was designed to take advantage of the incentives' ten-year duration to build out a manufacturing platform that would be sustainable upon the expiry of the incentives in 2009. The Claimants argue that the Incremental Investments were tied to the brewery, which they claim was also an integral part of their plan for retaining profitability beyond the expiry of the incentives in 2009, because beer was not as dependent on the incentives as their soft drinks or food business. Specifically, they argue that:

a. The malt manufacturing plant would have improved the cost effectiveness of the brewery, improving the Claimants' competitiveness in the beer market;

b. The can manufacturing plant would have permitted the Claimants to competitively expand their beer sales into the private label market; and

c. The co-generation plant would have capitalized on the brewery's waste products to reduce the Claimants' overall energy costs and improve the Claimants' cost and price competitiveness. It would have also provided revenue from the sale of energy and green certificates to third parties.

(C-PHB, ¶ 171; Second ER of D. Lessard, ¶¶ 7-8; First and Second WS of S. Baciu).

1068. The Claimants contend that their model was driven by both the ten-year term of the incentives and the 20-year obligation to continue operations in the disfavored region imposed by EGO 24 (C-PHB, ¶¶ 172-173). This assertion is supported mainly by:

a. Mr. Ioan Micula's oral testimony, where he states that their strategy after 1999 was "to use the temporary facilities for ten years to turn them into permanent advantages. […] By way of these temporary facilities, we tried in fact to turn them into permanent standing facilities by building up those components of the equipment that could be used after termination of the facilities" (Tr., Day 3, 33-35 (I. Micula)).

b. Prof. Lessard's description of the Claimants' business model, which he explains "involved a high degree of commitment […] because the Claimants had to build factories and produce successful products well within the ten-year period that the Incentives were available in order to create a base that would sustain their activities for the ten years they were obligated to remain in business after the Incentives expired" (First ER of D. Lessard, ¶ 39).

1069. The Claimants argue that these facilities made economic sense in the context of their integrated platform and would have been easy to "plug in" to that platform. Through the witness testimony of Mr. Halbac (and to a lesser extent, Mr. Baciu), the Claimants claim that their infrastructure was engineered in such a way that new production facilities could be easily connected to it.

1070. Mr. Halbac explained (and the Respondent did not dispute) that the region in which the Claimants invested did not have the infrastructure in place to support large production facilities. As a result, it was necessary to invest heavily in basic utilities such as reliable electricity, gas, and water supply to support each of the production sites (First WS of M. Halbac, ¶ 45). Mr. Halbac asserted that the basic utilities were built on a larger scale than the companies needed at that time due to the obligation under the EGO 24 to maintain the investment for 20 years, and because the Claimants wanted to make use of the networks for future projects. As a result, the infrastructure was engineered in such a way that it could be easily connected to new production facilities (First WS of M. Halbac, ¶ 46).

1071. In his First Witness Statement, Mr. Halbac included diagrams showing the integration of the different facilities. He stated that the dashed lines in the diagrams "represent investments that EFDG has not completed, but that could have been easily integrated into EFDG's existing utility connections, had early revocation of the EGO 24 incentives not constrained our cash" (First WS of M. Halbac, ¶ 50). He also testified that "[t]he ability of EFDG to engineer and construct utility networks was absolutely critical, since the State did not provide these utilities for us. We planned ahead and built these networks so that they could support additional production capacities, and as a result, we have been able to expand our facilities fairly easily. This also means that the projects we have been unable to complete could be easily added to our existing network. Thus, EFDG's initial planning for the shared infrastructure has saved considerable amounts of money, because the infrastructure does not have to be duplicated at each site. These cost savings have been invested in the expansion and integration of the business" (First WS of M. Halbac, ¶¶ 60-61).

1072. On the basis of Mr. Halbac's testimony and other evidence in the record, the Tribunal has no reason to doubt that the Claimants built a highly integrated platform that allowed them to save costs if they decided to insert new product lines or plants. However, this does not provide sufficient certainty that the Claimants would have in fact built a malt plant, a can manufacturing plant and/or a co-generation plant. This finding is in line with the general pattern of conduct evinced by the Individual Claimants and the EFDG: they built up and expanded their businesses with foresight, with the intent always to preserve as many options as possible and keep flexible in order to be able to seize those opportunities which would actually materialize at the right time depending on market conditions and financial possibilities, among other considerations. This speaks for the fact that the two Individual Claimants are savvy and experienced business people, which their very success also establishes, but it does not prove that they would actually have embarked on all of the options that they had envisaged at one point or another.

1073. Indeed, there is virtually no contemporaneous evidence of advance planning for any of the Incremental investments. There are no specific feasibility plans for any of the plants, nor is there any record of them in the 2000, 2002 or 2003 PWC business plans (Exh. R-204, R-214 and R-215). Other than a few quotes and invoices, the Claimants have not been able to point to any internal documents, such as budget, memos or correspondence evidencing their intention to build these plants. This is particularly surprising considering that Mr. Halbac testified that EFDG had a "development department" specifically created to reduce costs associated with future investments (First WS of M. Halbac, ¶¶ 20-34). According to Mr. Halbac, this development department consisted of a group of engineers that "cover virtually every aspect of any investment, including mechanical engineers, architectural engineers, electric engineers, civil engineers, structural engineers, and even engineers who focus solely on plumbing" (First WS of M. Halbac, ¶ 21). Mr. Halbac also testified that for each new project, this department organized a team of project managers responsible for the optimum realization of the investments, starting from the initial contracts. Mr. Halbac even included a diagram titled "EFG Plant Building" (First WS of M. Halbac, p. 13) illustrating "EFDG's planning and implementation process for new investments". However, despite the existence of this team of engineers and highly organized and structured process, there is not a single internal plan, memo or email documenting the Claimants' intention to pursue the Incremental Investments.

1074. As discussed in detail in the sections that follow, the documentary evidence in the record refers mainly to correspondence with and quotations from third parties for equipment necessary to develop these projects. Although it does evidence an interest in these projects as potential investments, it does not prove that the Claimants would have in fact invested in them.

1075. Despite this lack of evidence of advance planning, the Claimants contend that they in fact took steps to materialize the Incremental Investments, which in their view shows that they intended to pursue them (indeed, they argue that only final steps were needed to complete them). The Claimants argue that they were a family-run business that took decisions verbally and did not usually operate on the basis of written plans. They submit that the development of the brewery is evidence of this, because it was built despite the absence of written plans and despite the fact that it was not mentioned in the 2000 or 2003 PWC business plans. Indeed, they point out that according to the 2003 PWC business plan, no major capital investment was planned or needed over the period 2003 to 2007, and despite that statement, the Claimants' heaviest capital investments occurred from 2003 to 2007 (including the expansion of the brewery) (C-PHB, ¶ 179). The Tribunal has duly considered this argument. However, as discussed below, it finds that the steps identified by the Claimants as evidence of their intention to implement the Incremental Investments do not show with sufficient certainty that these investments would in fact have been undertaken.

(b) The malt manufacturing plant

1076. Mr. Halbac testified that, because malt is one of the main ingredients used in beer production, "we had been exploring options for building a malt plant ever since we considered building the brewery. This is because we knew that we could realize significant cost savings if we produced our own malt instead of importing or buying it on the domestic market" (First WS of M. Halbac, ¶ 145).

1077. However, in his Second Witness Statement Mr. Halbac clarified that the plans to construct or complete the malt plan were not immediate. Although he stated that the Claimants always considered the malt plant as a portion of their brewery, he clarified that they "would complete [it] at a critical point in time to increase the brewery's overall efficiency" (Second WS of M. Halbac, ¶ 57). He also stated that at the time that the Claimants constructed the initial stages of the brewery (and later its expansion), it was "unnecessary for [the Claimants] to construct a complete malt plant." This was because they were still benefitting from EGO 24 and could import malt without paying customs duties. However, he added that "we knew that these Incentives would not last forever, and that it would be important for us to make preparations for the malt plant so that we could eventually control our malt production and not rely on outside sources for the main ingredient to one of our most successful products – beer" (Second WS of M. Halbac, ¶ 60). This suggests that the Claimants may have been considering the construction of a malt plant from early on, but they did not specifically plan to build one at any particular time until the expiry of the incentives was near.

1078. The documentary evidence suggests that the possibility of building a malt plant was indeed considered by the Claimants from at least 2002. There is evidence of correspondence with Buhler and Schmidt-Seeger for the construction of a malt plant during 2002,[220] including quotations for malt plants of various capacities (Exh. C-335; C-659; C-628; C-658; C-336[221]). However, the Claimants do not appear to have acted upon these quotations.

1079. Mr. Halbac testified that, at the time of the revocation, the Claimants already had many of the necessary components for a malt plant, including equipment for barley reception, silos for barley, transport, conveying, and cleaning systems for barley, utilities including steam supply, water, water treatment, compressed air, electrical, and cooling systems, malt transport, cleaning, and silos for storing malt (First WS of M. Halbac, ¶¶ 146-151, Second WS of M. Halbac, ¶¶ 57-65; Tr., Day 7, 141-144). According to Mr. Halbac, this accounted for 60% of the malt plant (Second WS of M. Halbac, ¶ 61). Mr. Halbac testified that the only missing elements were the germination equipment, construction of the actual building and final connection of utilities to finish the integration into the brewery (Second WS of M. Halbac, ¶¶ 61-65; Tr., Day 7, 143-144). He also testified that Claimants had taken steps to acquire these missing elements, including the finalization of a contract to purchase the germination machine and negotiations with the EBRD for the necessary financing.

1080. The Respondent denies that the malt manufacturing plant was nearly finished, as the Claimants claim. It notes that the Claimants never bought a germination machine, which was the central component of the malt plant (R-PHB, ¶ 259). The Respondent also argues that the Claimants have sought to pass off infrastructure and equipment used for other manufacturing processes as specifically meant for the malt plant. In particular, the Respondent argues that the empty silo that Mr. Halbac testified was reserved for barley was in fact constructed before EGO 24 (Mr. Halbac testified it was built before 2000) and could have been used for other purposes than storing grains for a malt plant (R-PHB, ¶ 260 and Tr., Day 7, 169 (Halbac)). The Respondent also asserts that Mr. Halbac[222] admitted that the transportation system for malt was in fact used for malt purchased from third parties (R-PHB, ¶ 260 and Tr., Day 7, 148 (Halbac)).

1081. The Tribunal's review of the documentary evidence confirms that, at the time of the revocation of the incentives, the Claimants did indeed have the components identified by Mr. Halbac. However, the Claimants have not established that any of those

[220] Although Mr. Halbac testified that their "first offer for equipment came from Seeger in 1997", that offer was not submitted.

[221] Exh. C-335 is a quotation dated 19 March 2002 from Schmidt-Seeger for a malt plant with a capacity of 23,000 tons; Exh. C-659 is an email from Buhler dated 19 March 2002 with an attached quotation for a malt plant with a capacity of 35,000 tons; Exh. C-628 is an email from Buhler dated 22 April 2002 mentioning the layout (sent by a previous email) for a malt plant with a capacity of 35,000 tons; Exh. C-658 is an email from Buhler dated 2 August 2002 attaching a revised quotation for a capacity of 22,960 tons worth over €3,9 million but with the possibility of extension to 34,440 tons; and Exh. C-336 is a quotation from Schmidt-Seeger dated 4 November 2002 for the establishment components of a malt plant with a capacity of 37,000 – 50,000 tons.

[222] The Respondent refers to Mr. Baciu, but the citation is to Mr. Halbac's testimony.

components were purchased exclusively for a malt plant. Indeed, many of them appear to have been for the brewery's normal operation. In particular:

a. The Claimants appear to have bought malt handling equipment, including silos and conveyor systems in 2004 (Exh. C-970 contains invoices dated November 2002 from Schmidt-Seeger), and invoices dated November 2004 from Privé and Denis (Exh. C-967-968)).[223] However, it is unclear whether this equipment was bought in connection with a malt *manufacturing* plant, rather than malt *handling* related to a brewery. As the Respondent notes, Mr. Halbac testified at the hearing that the silos and conveying systems were also used for other grains, although the silo reserved for barley was empty (Tr., Day 7, 145-148). Mr. Halbac also stated that the transportation system could be used for both malt and barley, but he also testified that the transportation system "was conceived to fit the malt plant", and in the absence of the malt plant to process the barley it was being used to transport malt only (Tr., Day 7, 146-148 (Halbac)).

b. With respect to utilities, Mr. Halbac testified that when the Claimants built the brewery they constructed a steam pipeline with sufficient capacity to supply both the brewery in its expanded form (which would account for 50% of the pipeline's capacity), <u>and</u> the malt and can manufacturing plants (which would account for the remaining 50% of the pipeline's capacity) (Tr., Day 7, 149-153 (Halbac); Exh. C-647, a certificate of completion of the steam pipe).

1082. Even if this equipment had been intended exclusively for the malt plant (which the Tribunal finds has not been established), it is undisputed that the Claimants were missing key elements for a malt plant, in particular the germination machine and the building. Although there is evidence in the record to support the Claimants' assertion that they intended to buy a germination machine and construct the building to house the malt plant, most of this evidence post-dates the revocation of the incentives. In particular:

a. Mr. Halbac testified that the Claimants had purchased land in 2000-2001 with an estimated value of €1 million, which they set aside for the malt plant (Second WS of M. Halbac, ¶ 62), and that the Claimants had "gained approval from the State to construct the building" (Second WS of M. Halbac, ¶ 62). Indeed, the Claimants submitted an Urban Planning Certificate that certifies that the land it refers to may be used to build a malt plant (Exh. C-976), but this certificate was issued on 5 Dec. 2005 (i.e., post-revocation). The certificate also states that it is not in lieu of the relevant building permit.

b. Mr. Halbac referred to a geotechnical study conducted by the Claimants for the malt plant (Second WS of M. Halbac, ¶ 62). This study is indeed in the record (Exh. C-978), but it is dated "2005", which means it was carried out after the announcement of the revocation in November 2004.

[223] Exh. C-970 contains invoices dated November 2002 from Schmidt-Seeger), and Exh. C-967-968 contain invoices dated November 2004 from Privé and Denis.

c. Mr. Halbac also testified that the Claimants had ordered the structural building design to the Romanian company IPROLAN (Second WS of M. Halbac, ¶ 63). However, the engineering design contract with IPROLAN (Exh. C-704) is dated 19 June 2006, more than a year after the revocation.

d. Mr. Halbac also testified that the Claimants had a contract in place with Lausmann GmbH for the germination machine (Tr., Day 7, 149 (Halbac); Exh. C-478). At the hearing, the Claimants stated that the document only concerned a germination machine (Tr., Day 7, 172 (Fleuriet)). However, this contract appears to involve more than just a germination machine, as Article 1.1 of the contract mentions a "complete malt producing plant, spare parts, wear parts and accessories as described in the Appendix 1", which in turn includes, among others, steeping, cleaning, kilning and transport equipment. In addition, the contract post-dates the revocation (Exh. C-478).[224]

e. Finally, the record confirms that in the Claimants' negotiations with the EBRD for a potential loan referred to financing for the "potential acquisition, installation and operation of a malt processing plant with a capacity of 30,000 tons" (Exh. C-744, C-745, C-746).[225] However, these documents are from 2006, and therefore post-date the revocation.

1083. The Tribunal's conclusion from the available evidence is that the Claimants contemplated the possibility of building a malt plant from at least 2002, and invested in certain cost efficiencies that they added to the brewery. They also planned ahead with respect to utilities, making sure that the steam pipe could service the brewery as well as future plants. However, they did not plan to build a complete malt manufacturing plant (i.e., a plant that could process barley into malt rather than handle ready-made malt) until close to the expiry of the incentives, presumably because prior to that it was cheaper for them to import duty-free malt. This would explain why their more serious efforts to set up this plant (financing with the EBRD, geotechnical study, contract for germination and other equipment) came in 2005 and 2006, after the early revocation of the incentives.

1084. In the Tribunal's view, this means that, although there is evidence of the Claimants' intention to build a malt manufacturing plant sometime in the future, the Claimants have not proven with sufficient certainty that they planned to build it prior to expiry of the incentives (whether by their early revocation in 2005 or their scheduled expiry in 2009). Nor is it accurate to say that at the date of the revocation the Claimants had built 60% of a malt manufacturing plant. At the date of the revocation, the Claimants could only boast certain minor equipment and cost efficiencies that would have made it relatively easy and less expensive to construct and operate a malt manufacturing plant. What they had was a highly integrated platform to which a malt plant could

[224] On its front page, the contract is dated 6 July 2005, but the final price appears to have been negotiated in December 2006 (the date "19.12.2006" is handwritten in Appendix 1 next to the final negotiated price (€ 4.425 million)

[225] Although the Claimants argue that negotiations with EBRD involved financing of a "germination machine", the EBRD documents refer to a full "malt processing plant".

easily have been added. This would prove again that the Claimants are savvy business people. This does not provide sufficient certainty that, but for the revocation of the incentives, they would have built a malt manufacturing plant.

(c) The can manufacturing plant

1085. With respect to their intention to build a can manufacturing plant, the Claimants again rely heavily on Mr. Halbac's testimony.

1086. Mr. Halbac testified that it is very expensive to buy and transport aluminum cans, while it is much cheaper to transport the raw materials needed to produce the cans. He further testified that EFDG had always understood that they would save money by importing raw materials to make their own cans. "Thus, ever since we started considering a brewery, we planned to construct a nearby can making facility." (First WS of M. Halbac, ¶¶ 156-157).

1087. Mr. Halbac also testified that "[t]here is a significant canned beer market in both the Romanian and export markets", and that while the Claimants were building the brewery, they "became even more interested in the prospect of having [their] own can plant" (First WS of M. Halbac, ¶ 162). In addition, Mr. Halbac stated that by reducing the can costs, they could reduce the price for which they sold their canned beer to about the same price as their PET bottled-beer, which would have made them more competitive in both the domestic and export beer markets by increasing their shelf space, which would have in turn increased sales to consumers (First WS of M. Halbac, ¶ 168). Mr. Halbac also testified that canned beer has a better shelf life than PET bottled beer and is cheaper to transport, which is why it was their preferred method of bottling for their export beer (First WS of M. Halbac, ¶ 169).

1088. The evidence in the record suggests that the Claimants did begin to consider building a can plant as early as 1998. Specifically, Mr. Halbac testified that in 1997/1998, the Claimants contacted various American companies to investigate the relevant technologies and visited a trade show in Denver and production facilities (First WS of M. Halbac, ¶ 158). The correspondence submitted as Exh. C-844-846 refers to meetings with Mr. Halbac in 1998 at the vendors' respective booths at "Cannex '98" in Denver, Colorado. Mr. Halbac testified that the Claimants "continued to receive and study vendor proposals" (First WS of M. Halbac, ¶ 162), and indeed, the record includes correspondence and quotations related to, inter alia, a turn-key canning plant and can manufacturing equipment and accessories (Exh. C-337, C-844, C-845, C-856, C-847).[226]

[226] Exh. C-337 contains a proposal from Pac International to Rieni Drinks, dated 20 May 1998. The detailed quotation concerns a turn-key canning plant offered for a price of over $2.6 million. Exh. C-844 is a letter of 18 May 1998 from Cambridge Applied Systems, Inc. (US), to Mr. Halbac concerning requested information on viscometers. Exh. C-845 is a letter 5 June 1998 from Kerry (UK) to Mr. Halbac with an offer for a "Kerry Seam Plus Station". Exh. C-846 is a letter of 30 June 1998 from Chemetall (Sweden) to Mr. Halbac concerning, i.a., can washer treatments. Exh. C-847 is a letter of 9 July 1998 from Omnitech International, Inc. (US), to Mr. Halbac with an offer for can manufacturing equipment and accessories offered at a price of $19.2 million.

1089. Efforts to find suppliers appear to have continued in the following years. Mr. Halbac testified that "[t]o determine whether the can plant was a viable option, our engineers attended a variety of symposiums and expositions. For instance, in 2002, we visited the Metpak exhibition in Essen, Germany to find possible suppliers for the can plant. After this exhibition, we decided we would construct the can plant after the brewery was complete." (First WS of M. Halbac, ¶ 162).

1090. The Claimants also refer to Exh. C-388, C-339 and C-343, which are quotations from 2006-2008 in relation to a can manufacturing plant. In particular, the Claimants appear to have engaged in negotiations with TG Can which included the possibility of financing of supply credit (Exh. C-339; Tr., Day 7, 168 (Halbac)).

1091. In addition to the documents cited above, the Claimants argue that their intention to build a can manufacturing plant is supported by the fact that they took certain steps and made investments in preparation for this plant. At the hearing, Mr. Halbac testified that about 50% of the can manufacturing plant had been either built or purchased (Tr., Day 7, 166). Using as an example an offer from PAC International for a turnkey can manufacturing facility (Exh. C-337), Mr. Halbac testified that the Claimants had already completed the following elements of the plant: support systems equipment area, warehousing, utility and steam supply systems, demineralization system, cooling and hot water systems, compressed air system, waste water treatment, electrical shop and quality control lab equipment, chemical storage, machine shop, and specialized can printing and labeling equipment (Tr., Day 7, 156-159 (Halbac)). According to the Claimants, the only missing elements to complete the can plant were the building (Tr., Day 7, 157 (Halbac)), and the can manufacturing machines for producing the aluminum cans (Tr., Day 7, 165 (Halbac)).

1092. As with the malt plant, the Respondent denies that any of these alleged steps or investments support the Claimants' intention to build a can plant. The Respondent argues that the Claimants have sought to pass equipment used for other manufacturing processes as evidence of a nearly completed can plant, although the most basic components of the plant were missing (R-PHB, ¶¶ 262-264).

1093. In the Tribunal's view, although there is evidence suggesting that the Claimants indeed contemplated the possibility of building a can manufacturing plant, the evidence of concrete plans or specific steps taken to materialize this project is weak. The documentation cited above shows that the Claimants had an interest in purchasing elements for a can manufacturing plant, but it does not prove that they seriously planned to purchase them, in particular considering that this interest did not materialize within an almost 10-year span.

1094. Similarly, while there is evidence to support Mr. Halbac's assertions that the Claimants already had many components necessary for building a can plant, most of these components appear to refer to shared utilities, land or facilities. Specifically:

a. As mentioned above for the malt plant, Mr. Halbac testified that the steam pipe was built with an expanded capacity, so that 50% was reserved for the can and malt facilities (C-PHB, ¶ 196 and Tr., Day 7, 152-153 (Halbac); Exh. C-649). In other words, it was not built specifically for the can plant.

b. Mr. Halbac also testified that, in late 1999, the Claimants set aside approximately 50,000 square meters of land for a can factory (Second WS of M. Halbac, ¶ 80). There is little evidence in the record of this land other than a photograph that was shown during the 2010 hearing. It is also unclear whether this land was purchased especially for the can plant. In his first witness statement Mr. Halbac had testified that the Claimants had available land located next to the brewery in Drăgăneşti West, which made sense because it would have allowed the canning plant to utilize EDFG's existing infrastructure and become integrated with the rest of the plants, and they would use a significant number of the cans to bottle beer from the brewery (First WS of M. Halbac, ¶ 164). The timing of this step and the absence of purchase documentation suggests that reserve land was indeed available but not that specific investments were made to acquire the land in connection with the can plant.

1095. That being said, some equipment appears to have been bought with the can plant in mind, although again it is unclear if the equipment could also be used in other manufacturing processes. Specifically:

a. Mr. Halbac testified that the grinding machine at the repair shop was purchased in 2002 especially for the can manufacturing plant (Tr., Day 7, 161-163). However, it is unclear why this machine was bought in 2002 if no can plant existed at the time. It is also unclear whether it was also used in other manufacturing processes.

b. Mr. Halbac testified that "one of the most difficult processes in can making is the design and production of the printing plates – which they have been able to do since 2000." (Second WS of M. Halbac, ¶ 90). For this purpose, the Claimants argue that they invested heavily in can printing plates and production equipment as well as film printing machines for the labeling of cans (C-PHB, ¶ 196). The Claimants submitted invoices to support this (Exh. C-951, C-946, C-942). Some of these invoices are from 1998 and pre-date the construction of the brewery, so it seems unlikely that the equipment related to beer cans. The Respondent also argues that machinery used to manufacture and wash printing plates could be used to print on cans, but was acquired and used in the Claimants' business to produce other types of packages (R-PHB, ¶ 262). However, Mr. Halbac testified that "[o]ne of the machines is equipped so as to be able to produce special plates for cans….So we bought that type of machinery instead of the cylindric one in order to be able to manufacture plates for the cans as well" (Tr., Day 7, 171 (Halbac)). Mr. Halbac also testified that no one sold unprinted cans, so they could not have used the plates to print on purchased cans as suggested by the Respondent (Tr. Day 7, 171-172 (Halbac)).

c. Mr. Halbac also testified that in 2003, allegedly anticipating a can making line being constructed in Drăgăneşti, EFDG invested €128,000 in the relocation of its can filling line to Drăgăneşti. An offer from Krones for new can conveyor equipment offered at a price of €120,000 was apparently accepted in this regard (Exh. C-644).

1096. Despite the purchase of this equipment, the Tribunal is not persuaded that the can plant project was 50% complete, as the Claimants assert, or that it was seriously planned by the Claimants. Even if this equipment was purchased with a possible can plant in mind, the Claimants were also using it for other purposes. In addition, the relocation of the can *filling* line does not necessarily imply that a can *making* line will be subsequently built. More importantly, it is undisputed that the Claimants never purchased the can manufacturing machines for producing the aluminum cans. As a result, the Tribunal finds that the Claimants have not proved with sufficient certainty that but for the revocation they would have built the can manufacturing plant.

(d) The co-generation plant

1097. Mr. Baciu and Mr. Halbac testified that from early on EFDG intended to build a co-generation plant to reduce internal operational costs. The co-generation plant would accomplish this by reducing EFDG's dependence on outside fuel, reducing energy costs, and using waste from the company's production processes (First WS of S. Baciu, ¶ 18; First WS of M. Halbac, ¶¶ 56-59). Mr. Baciu also testified that after Romania passed renewable energy laws in 2004, EFDG's intention was to produce energy to sell electricity to the wholesale market, as well as green certificates (First WS of S. Baciu, ¶¶ 15, 24-29). As a result, the profits that the co-generation plant would have allegedly made rested on both savings on operational costs and the sale of electricity/green certificates to third parties. The Respondent alleges, and Prof. Lessard confirmed at the hearing, that the green certificates accounted for 72% of the value that Prof. Lessard attributed to the project (Tr., Day 7, 109; Tr., Day 8, 95-96).

1098. According to Mr. Baciu, EFDG planned to construct a 20 MW electricity co-generation plant. The estimated cost to build the plant was €20 million (including equipment and connection) (First WS of S. Baciu, ¶¶ 16, 30-32).

1099. After reviewing the evidence, the Tribunal finds that the Claimants have failed to prove with sufficient certainty that they would have built a co-generation plant. Although there is some evidence that the Claimants considered the option of building a co-generation plant in the future, the evidence of advance planning or specific steps in the implementation of such a plant is inconclusive at best.

1100. According to Mr. Baciu, the co-generation plant was part of EFDG's plans from its early days. He testified that the Claimants began contemplating co-generation in the late 1990s, when they considered establishing beverage production lines in Bucharest, and continued with this plan when they established their food business in Bihor after the passage of GD 194/1999.

1101. The record confirms that the Claimants had an interest in building a co-generation plant as early as 1998, and contacted several manufacturers for this purpose. The record includes several offers or quotations for a co-generation plant between 1998 and 1999 (Exh. C-821, C-822, C-823).[227] The Claimants appear to have started to consider co-generation more seriously in 2002:

a. In 2002, the Claimants contracted with ABB to implement switch-gear technology in the substation, which would allow them to reverse the flow of electricity from a future co-generation source into the national distribution network (Exh. C-480).

b. Also in 2002, the Claimants contracted with Biothane International (Biothane) for the construction of their waste water treatment plant. Mr. Baciu explains that they also discussed the possibility of using the by-products of this facility as possible renewable energy sources. These discussions evolved into discussions for the construction of a co-generation plant (First WS of S. Baciu, ¶¶ 19-22).[228] However, there seems to have been no follow-up to this correspondence, and the Biothane co-generation project did not materialize. Indeed, in 2003 the Claimants initiated correspondence with Schmidt for biomass testing (Exh. C-712), and made inquiries with General Electric for turbines (Exh. C-708[229]) (Second WS of S. Baciu, ¶ 44).

1102. The Claimants' interest in a co-generation plant seems to have grown when Romania passed renewable energy laws. Although the laws were not passed until 2004, Mr. Baciu testified that around 2002 they already anticipated that these laws would be passed (First WS of S. Baciu, ¶ 23). According to Mr. Baciu, "[t]his probability of co-generation as a revenue generator gave us another reason to seriously consider construction of our own co-generation facility. Thus, we knew that we could produce energy for our facilities at a lower cost than what we were currently paying in electricity from the State's distribution network, and we knew that any additional energy we produced had the potential to be sold" (*Id.*). When Romania did pass the renewable energy laws in 2004, their attractiveness was enhanced by the possibility of trading green certificates. However, as a result of the revocation of the incentives,

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[227] Exh. C-821 is an offer/quotation from ABB dated 4 February 1999; Exh. C-822 is a preliminary proposal from Hyundai dated 3 November 1998, and Exh. C-823 is a quotation from Mannesman dated 19 February 1999.

[228] The record includes:

- Meeting Minutes from 16 April 2002 (Exh. C-483) between European Food and Biothane anticipating potential construction of a co-generation plant, where equipment and next steps were discussed;
- An email from Biothane to European Drinks, 2 May 2002 (Exh, C-484), documenting European Food Group's May 2002 delivery of a sample dried material (DDGS) to determine composition and biodegradability for fuel component testing.
- An email from Christian Flora of EFDG to Biothane dated 27 May 2002 (Exh. C-484, second page), referring to various "problems" related to the "project". Among other matters, Mr. Flora requested the final lay-out drawings, asked about the correct foundation they should build for tanks, requested an offer for tanks and engineering for the boiler, and a time schedule. However, given that the subject line contains the initials "wwtp", this appears to refer to the waste water treatment plant rather than the co-generation plant.
- An email from Biothane to European Drinks, 20 August 2002 (Exh. C-482), referencing a quotation for the construction of a co-generation plant.

[229] Exh. C-708 is an undated presentation from General Electric regarding turbines suitable for co-generation

Mr. Baciu states that "we were unable to continue with our planned expansion and integration (First WS of S. Baciu, ¶ 25). Mr. Baciu explains that this came at a great detriment to their company, because subsequent changes in Romania's renewable energy laws would have enabled them to earn more green certificates than under the original law (specifically, three instead of one per MWh produced), and they would have been entitled to sell these green certificates at a higher value (First WS of S. Baciu, ¶ 26).

1103. The Claimants continued to receive quotations for a co-generation plant after revocation. The Claimants submitted two offers from Siemens dated November 2005 and July 2006 for a turbine and generator and other equipment (Exh. C-687, C-708). Mr. Baciu also testified that in 2009 they received a quotation for a 20 MW co-generation plant from Bio-Energieanlagen, which estimated the project at less than €20 million (First WS of S. Baciu, ¶ 43).

1104. The Claimants' continued interest in a co-generation plant is also evidenced by the EBRD loan negotiation documents. As discussed above, during 2005 and 2006 the Claimants carried out negotiations with the EBRD regarding possible development financing. In addition to the malt plant, the early documents related to those negotiations mentioned the construction of a co-generation plant. Specifically, the co-generation plant was mentioned in the EBRD Environmental Questionnaire dated 12 March 2005 (Exh. C-743) and the first draft Loan Agreement dated 16 June 2006 (Exh. C-745). However, it is not mentioned in either the Term Sheet dated 4 March 2006 (Exh. C-744) or the last draft Loan Agreement dated 2 November 2006 (Exh. C-746). Thus, it would appear that the project either was dropped entirely or at least that by 2 November 2006 (over 20 months after the revocation) it had not yet reached a level of concrete planning.

1105. However, despite the evidence of the Claimants' continuing interest in building a co-generation plant (which spans several years), other than Mr. Baciu's testimony, there is no documentary evidence of concrete internal planning of such a project:

a. Mr. Baciu asserts that when the Claimants developed the lay-out of their factories, they "kept in mind" where an optimal place for the co-generation plant would be, and bought 20 hectares of land for this purpose (Second WS of S. Baciu, ¶¶ 3-5). However, there is no record of this advance planning in internal plans for the factories, nor documentary evidence of the purchase of land.

b. There is no feasibility study or other preliminary study. The Respondent pointed out during the cross-examination of Mr. Baciu that the Claimants had carried out a feasibility study for a corn mill valued at €4.8 million, and found it surprising that the Claimants had not carried out a similar feasibility study for a co-generation plant that would cost approximately €20 million. Mr. Baciu admitted that in the case of the co-generation plant, "no feasibility study was made; only some calculations, engineering calculations" (Tr., Day 7, 120 (Baciu)). However, Mr. Baciu was not able to point to any documentary evidence of these alleged calculations. He stated that they "just calculated internally" for themselves, and "never kept the figures". He added that these were not financial calculations, only simple calculations involving "the rough cost of the raw materials involved" and "the availability of [these] raw materials", that these calculations were "very easy to do" and that this was "not the kind of document that you save and keep" (Tr., Day 7, 120 (Baciu)).

c. Mr. Baciu submitted for the purposes of this arbitration a diagram showing an overview of the co-generation project at page 5 of his second witness statement showing how the different components fit in, but no such diagram or plan is found among the Claimants' contemporaneous evidence.

1106. Irrespective of the available documentation, the Claimants argue that their intention to build a co-generation plant is evidenced by the steps they took to complete it. Indeed, Mr. Baciu testified that at the date of the revocation of the incentives they had acquired or constructed most of the components of a co-generation plant, as discussed in sub-paragraphs (a) through (g) below. However, although the existence of these components appears to be undisputed, the Tribunal is not persuaded that these components were acquired or constructed specifically with the co-generation plant in mind, or that at the date of the revocation of the incentives the co-generation plant was as near completion as the Claimants suggest. Specifically:

a. Mr. Baciu testified that the Claimants had set aside 20 hectares of land, which would be used for the plant itself and for biomass storage (First WS of S. Baciu, ¶¶ 16, 38, 43; Second WS of S. Baciu, ¶ 5 and related photographs). However, there is insufficient evidence showing when this land was acquired or with what purpose.

b. Mr. Baciu testified that the Claimants had the biomass needed for co-generation, which came from by-products or waste from the products used for food production (Second WS of S. Baciu, ¶¶ 11-12; 18-23). According to Mr. Baciu, this was "the most important component" of a co-generation facility (Tr., Day 7, 95, 99 (Baciu)). However, Mr. Baciu acknowledged that for the size of plant they were considering (20 MW), they would need to purchase additional biomass (Tr., Day 7; 126 (Baciu)). Specifically, a 20 MW electricity co-generation plant would need 160,000 metric tons of biomass, of which 90,000 to 110,000 metric tons would come from internal sources. The remainder would have to be purchased from third parties, but Mr. Baciu testified that the Claimants were well-positioned to buy them at competitive rates and had a transportation system in place (First WS of S. Baciu, ¶¶ 33-38).

c. Mr. Baciu testified that the Claimants had acquired the equipment for the preparation, conditioning, storing and handling of the biomass sources. Mr. Baciu testified that the Claimants had "already built and already mastered the process of collecting, storing, handling, and drying these types of biomass" (Second WS of S. Baciu, ¶¶ 11; 24; Mr. Baciu also included several photographs of existing biomass conditioning installations and storage areas, and explained the process (Second WS of S. Baciu, pp. 6-21). With respect to conditioning, Mr.

Baciu testified that the Claimants had mincers for solid biomass, centrifuges for humid biomass, and dryers (Tr., Day 7, 96-97 (Baciu)). With respect to storage and handling, Mr. Baciu testified that the Claimants had silos, platforms, transportation equipment and loading equipment (Tr., Day 7, 97 (Baciu)). This appears to be undisputed, although it is unclear how much of this equipment was purchased for the cogeneration plant.

d. Mr. Baciu also testified that the Claimants had biogas, produced at the Claimants' wastewater treatment plant. The biogas would serve as catalyst in burning the biomass to produce steam and electricity (Second WS of S. Baciu, ¶ 21-22).

e. Mr. Baciu further testified that the Claimants had built an electrical substation precisely designed with plat space and additional electrical control capacity for constructing and handling co-generation, including step-up transformation capability and an installed switchgear that permits re-direction of co-generated power directly into the State's transmission lines (C-PHB, ¶ 202; Second WS of S. Baciu, ¶¶ 33-45). However, it is undisputed that the substation was not built exclusively for the co-generation plant, but to provide electricity to the group's production facilities (First WS of S. Baciu, ¶ 3). The Tribunal does not doubt that the substation was built with the capacity to eventually "plug in" a co-generation plant: (i) both Mr. Baciu and Mr. Halbac testified that when they built the substation, they also planned for the construction of a co-generation plant (First WS of S. Baciu, ¶¶ 4, 18; First WS of M. Halbac, ¶ 56), and that "[m]any of the features on the substation were placed there only because we had already planned the construction of a co-generation plant" (First WS of M. Halbac, ¶ 56); (ii) as noted above, Mr. Baciu testified that, with the co-generation plant in mind, in 2002 the Claimants contracted with ABB to implement switch-gear technology in the substation, which would allow them to reverse the flow of electricity into the national distribution network;[230] and (iii) the power plant appears to have been found suitable for co-generation.[231] However, this only proves that the Claimants designed their substation in a way that would allow them to easily plug in a co-generation plant; it does not prove that they would have actually built such a plant.

f. Mr. Baciu also testified that the Claimants built an electrical conversion plant to raise the current from 20 kv to 110 kv power (Tr., Day 7, 99 (Baciu)). However, it is unclear whether this was part of the electrical substation or was purchased specifically for the co-generation plant.

[230] The record includes a contract dated 2001-2002 with ABB for electric switchgear (Exh. C-480), but from the English translation it is impossible to determine if the equipment was bought with co-generation as the purpose.

[231] Mr. Baciu testified that a state-owned electric company subordinated to the Ministry of Economy acknowledged in 2010 that the "110/20kV power station European Drinks Sudrigiu has been such designed and made to allow the beneficiary S.C. European Drinks to deliver in SEN its own electricity (BIOMASS COGENERATION), by cell no. 3 and cell no. 20." (Second WS of S. Baciu, ¶ 45; Exh. C-820).

g. Finally, Mr. Baciu testified that the Claimants had a connection to the national power grid, which allowed them to take power from the grid or supply power (Tr., Day 7, 99 (Baciu)). Mr. Baciu also qualified this as one of the most important components for a co-generation plant, together with the biomass source (*Id.*). Once again, for what that connection was specifically built beyond the Claimants' ongoing operations remains unclear.

1107. According to Mr. Baciu, the only missing components to complete a co-generation plant were:

a. The turbine, which the Claimants would have to purchase, and for which they received several quotations from suppliers (Tr., Day 7, 98 (Baciu); Second WS of S. Baciu, ¶ 35). Presumably Mr. Baciu refers to the quotations cited in paragraphs 1101 and 1103 above.

b. A dedicated boiler for steam generation to run the turbine, which would have been designed and largely manufactured in-house.

c. The building to house the plant.

1108. The Respondent emphasizes that the most important (and missing) parts of the co-generation plant were the boiler and turbine and not the biomass and connection to the power grid as claimed by Mr. Baciu (R-PHB, ¶ 256). The Tribunal must agree. Mr. Baciu testified (both in his WS and in cross-examination) that although most of the biomass would come from internal sources, they would need to purchase part of it from third parties (First WS of S. Baciu, ¶ 36; Tr., Day 7, 126 (Rubins/Baciu). As the Respondent points out, this shows that having one's own source of biomass is not essential to the operation of a co-generation plant, although it would of course mean a cost advantage. With respect to the connection to the power grid, Mr. Baciu clarified that by "important", he meant "difficult to obtain." In particular, the connection to the national power grid was a huge advantage for them because it was very difficult for other investors to obtain (Tr., Day 7, 102-104 (President Lévy/Baciu)). However, it cannot be disputed that the boiler and the turbine are crucial elements of a co-generation plant, without which no energy can be produced.

1109. Mr. Baciu also testified that the Claimants had "all the necessary authorizations" to operate a co-generation facility, but in cross-examination he was obliged to retract in part. Mr. Baciu confirmed that they would have needed an authorization from the water management authorities for the boiler, an environmental authorization, an electricity generation license, and an electric supply license, none of which the Claimants had yet obtained. However, with respect to generation he stressed that the company had an authorization as a distributor and eligible consumer, and "most likely would have obtained" the generation license and electric supply license as well. (Tr., Day 7, 123-126 (Rubins/Baciu)). The Respondent argues that Mr. Baciu testified falsely on this point. However, while notable, Mr. Baciu's contradictory statements could have been the result of a misunderstanding during his oral examination: indeed, Mr. Baciu clarified that when he responded to Mr. Fleuriet's question in direct examination, he "understood that his question referred to the 110 plant and the connection to the national system" (Tr., Day 7, 123-124 (Rubins/Baciu)).[232]

1110. Finally, Mr. Baciu testified that the Claimants had "mastered the technological process for turning prepared biomass and biogas into steam and electricity", as well as considerable engineering expertise and experience designing boilers. In this respect, Mr. Baciu testified that after revocation (around 2010) the Claimants built three biomass boilers which are currently in operation (Second WS of S. Baciu, ¶¶ 25-31). Indeed, from Mr. Baciu's testimony it appears that the Claimants are already using biomass to produce energy. Specifically, Mr. Baciu states that "[i]n these existing boilers, we burn our existing biomass and biogas, capture the steam produced, and use it to run our factories. This reduces our heavy fuel oil costs and the emission of carbon dioxide that results from burning heavy fuel oil" (Second WS of S. Baciu, ¶ 26). Mr. Baciu also testified that the operation of these boilers was similar to that needed for the co-generation process, but they operated at lower capacities and pressures (Tr., Day 7, 97 (Baciu)). Mr. Baciu also clarified that these boilers started operating in May 2010 (Second WS of S. Baciu, ¶ 31). Although this shows the Claimants' capacity to use biomass to produce energy, steam to be precise, for their own consumption, it also shows that, without the turbine, they could not claim to have a co-generation plant. In particular, without the turbine they could not sell energy to third parties through green certificates, which is the main source of the profits they claim.

1111. The Tribunal's conclusion from the evidence discussed above is that the Claimants have not shown with sufficient certainty that they would have implemented a co-generation plant. The record does suggest that, despite the absence of evidence with respect to internal planning, the Claimants considered implementing ways to turn biomass and biogas into steam and electricity. However, that does not show that they would have built an actual co-generation plant. The Claimants requested quotations as early as 1998, and continued to show interest in 2002 and 2003, but it took them seven years from then to go into and to master the process of using their own biomass and biogas for fuel, which they only started doing in 2010 (after the revocation). In addition, the lack of a building, boiler and a turbine, along with the lack of licenses and authorizations, indicates that at the time of the revocation of the incentives the co-generation project was not as close to completion as the Claimants contend.

(e) Conclusions

1112. On the basis of the evidence analyzed above, the Tribunal finds that the Claimants have not proven with sufficient certainty that, but for the revocation, they would have implemented the Incremental Investments.

[232] The Respondent also contends that Mr. Baciu was unable to specify which company (or companies) was/were meant to make the investments required to build the co-generation plant (Tr., Day 7, 105-106 (Baciu)). However, this does not show much. Mr. Baciu was an engineer; it is not likely that he was privy to the Claimants' strategic corporate decisions with respect to the channeling of investments.

1113. With respect to their alleged intention to build these facilities, the Claimants rely heavily on witness testimony. In fact, other than offers and quotes provided by third party suppliers, there is surprisingly little contemporaneous evidence of advance planning predating the revocation. There is not a single business plan, feasibility study, internal memo or budget documenting the Claimants' intention to build these facilities. The construction of these plants thus seems to have been a desirable possibility for the Claimants, which they investigated with third party suppliers, but which never materialized into concrete plans.

1114. The Tribunal does not doubt that the Incremental Investments were consistent with the Claimants' integration model, and would have complemented it very well. Mr. Halbac and Mr. Baciu describe very persuasively the cost-efficiencies that the Claimants could have achieved. As Prof. Lessard testified on cross-examination, the investments were "plausible" (by which he seems to have meant that they made economic sense). However, this does not prove with sufficient certainty that the Claimants would have actually implemented those investments. After the fact, it is always possible to say that one would have engaged into an activity which turns out to have been potentially fruitful: this does not suffice, as it is necessary to prove with sufficient certainty that an intention to do so would have materialized but for the wrongful act. Contemporaneous evidence is not indispensable but, in this instance, its absence does not help the Claimants.

1115. The Tribunal has also given due consideration to the Claimants' argument that, as a family business, they did not make plans on paper, and that the best evidence of their intentions are the steps they took to materialize these investments. However, although there is some evidence of steps taken to further these investments, the record shows that the Claimants had built or acquired almost exclusively equipment that could be used with their existing platform (i.e., utilities, electric connections, transportation, storage and handling systems). Some of this equipment created cost efficiencies that would have made it easy to "plug in" the Incremental Investments, but for each of the Incremental Investments the Claimants still had to purchase the key equipment that would in fact allow them to operate these Incremental Investments as separate profit-making activities. For instance, for the malt plant, they still needed to purchase the germination machine; for the can manufacturing plant, they still needed to purchase the can manufacturing machines, and for the co-generation plant, they still needed to purchase the turbine and manufacture the boiler. As a result, the steps taken by the Claimants do not show with sufficient certainty that the Incremental Investments were projects at an advanced stage of completion, nor that the Claimants clearly intended to carry them out in the near future. They have proved that they had an option to build these Incremental Investments and that they were contemplating them as a possibility, but not more.

1116. The Tribunal does not believe that these conclusions would have been altered by conducting a site visit as proposed by the Claimants. After a full review of the record, the Tribunal confirms the views it expressed in its Procedural Order dated 20 January 2011. In particular, the Tribunal confirms that a site visit was not necessary nor useful for the resolution of the dispute, as it would not have supplied further evidence of the Claimants' intention to pursue the Incremental Investments than that already in the record. Due to the characteristics of a site visit, it could not have provided further useful, certainly not documentary, evidence of advance planning of these investments; rather, it would have allowed the Tribunal to see the size and characteristics of the Claimants' integrated platform and their ability to easily implement the Incremental Investments, which is sufficiently confirmed by evidence in the record (including the 17-minute video of the site and the Incremental Investments attached as Exhibit C-987, as well as the witness statements of Mr. Halbac and Mr. Baciu, which contain numerous color photographs and diagrams that explain the characteristics and distribution of the site, their oral testimonies and the documentary evidence they cite in their witness statements). However, the fact that the Tribunal has found that Claimants' platform was highly integrated and that they had made certain investments that would have made it easy to add the Incremental Investments does not provide sufficient certainty that, but for the revocation of the incentives, the Claimants would have implemented these projects.

1117. For the reasons stated above, the Tribunal finds that the Claimants have not proven with sufficient certainty that they would have in fact engaged in the activity that they claim would have earned the profits they were allegedly deprived of. In particular, the Claimants have not established that the lost profits that they claim in relation to the Incremental Investments "were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible."[233]

1118. For all these reasons, the Tribunal rejects all lost profits claims related to the Incremental Investments.

4. Financial penalties for failure to pay taxes

a. Overview

1119. It is undisputed that, following the revocation of the incentives, the Claimants have failed to pay certain tax debts to Romania. The Claimants do not question these debts, which they acknowledge are owed.

1120. However, the Claimants argue that their failure to pay these tax debts has caused them to incur substantial financial penalties, which are attributable to the Respondent's conduct and thus require compensation. Indeed, the Claimants contend that the tax penalties that they incurred post-revocation (from 2006 onwards), were "a direct result of the financial constraints caused by Revocation". Specifically, the Claimants argue that if they had been able to benefit from the Raw Materials Incentive until 2009, they would have been able to pay their tax debts to Romania and, as a result, would not have incurred the substantial tax penalties that have accrued since the revocation. Thus, to place them back in the position they would have been but for the revocation, the Tribunal should award them these penalties (C-PHB, ¶¶ 132, 142).

[233] Marjorie M. Whiteman, Damages in International Law, vol. II (1937), p. 1837 (emphasis in original); *AAPL v. Sri Lanka*, ¶ 104.

1121. The Claimants claim damages for two sets of financial penalties (C-PHB, ¶¶ 140, 144):

a. Financial penalties incurred but not yet paid as a result of the Claimants being financially constrained due to the losses incurred as a result of the revocation, in the amount of RON 63.65 million. The Claimants bring this claim unless Romania waives such tax penalties and declares that it shall waive or reimburse all additional financial penalties imposed or assessed until the date of Romania's full and final satisfaction of the award.

b. Financial penalties incurred and paid by the EFDG companies in the period 1 April 2005 to 30 September 2010, in the amount of RON 40 million.

1122. The Claimants argue that, because the Respondent's conduct caused the financial penalties to accrue, the unpaid portion of those penalties should be awarded to the Claimants (if not waived by Romania), and the portion of those penalties that the Claimants have already paid should be awarded back to the Claimants (C-PHB, ¶ 143).

1123. Both claims are cumulatively based on the following evidence (C-PHB, ¶¶ 131 and 141):

a. The calculations contained in paragraphs 85 and 86 and Table 4 of Professor Lessard's first report, dated 22 December 2009;

b. The calculations contained in paragraphs 132 to 135 of Professor Lessard's second report, dated 30 July 2010;

c. The calculations contained in paragraph 3.25 and table 4 of Mr. Osborne's first report and the calculations contained in section 8 of Mr. Osborne's second report;

d. Updated Summary of Damages from Penalties Avoided, Tab 51 from Mr. Schwartz's Opening Presentation;

e. Professor Lessard's corrected tables handed out by counsel at the hearing on 16 November 2010, table 4, page 2;

f. The evidence referred to in the abovementioned sections, paragraphs and tables, including Exh. CO-1.19 ("Workings for December 2009 report") (submitted as an exhibit to Mr. Osborne's second report).

1124. The two claims concern tax penalties incurred not only by the Corporate Claimants, but also by other companies of the group which are not parties to this arbitration (specifically, European Drinks, Edri Trading, Original Products, Rieni Drinks, Scandic Distilleries, TGIE, Tonical Trading, and West Leasing).

1125. The Respondent does not contest the calculations performed by Mr. Osborne or Prof. Lessard. Rather, it contests the existence of a causal link between the revocation and the accrual of the tax penalties, and criticizes the Claimants' experts for simply assuming that such a causal link existed. The Respondent argues that the Claimants' experts did not conduct their own analysis of the evidence but simply assumed (or "understood" or "believed") it to be true and simply added up the figures. (R-SPHB, ¶ 16). The Respondent points to:

a. Professor Lessard's assertion in his first report that "with revocation of the incentives, EFDG entered a sustained cash crunch";

b. Mr. Osborne's assertion that "since the Companies became financially constrained (2006) significant penalties have accrued on debts to the state";

c. Professor Lessard's "understand[ing] that penalties in earlier periods were in some cases caused by unanticipated changes in Romanian tax or excise regulations" and his "understand[ing]" that the terms of EFDG's credit lines did not permit the Claimants to pay down existing state debts (there being no evidence supporting either "understanding"); and

d. Mr. Osborne's "belief" that penalties "are likely to have arisen only because of the financial constraints the Companies have been under since 2006".

1126. The Respondent argues that these assumptions are in turn based solely on Mr. Ioan Micula's assertion that "we suffered delays in making required tax payments to the State because of the cash constraints caused by the State's termination of the incentives" (Third WS of I. Micula, ¶ 95). The Respondent argues that this is not evidence and stresses that "the Claimants must *prove* that they *could not* pay their taxes *because of* repeal of the Facilities" (R-SPHB, ¶ 17, emphasis in original). The Respondent denies that the Claimants have proved this. To the contrary, it argues that the evidence in the record in fact demonstrates that there is no causal link between the revocation of the incentives and the incurred tax penalties.

1127. In particular, the Respondent contends that the Claimants have not proven that they could not pay their taxes, nor have they proved that this alleged inability to do so was caused by the revocation of the incentives (R-SPHB, ¶ 17). In particular, the Respondent argues that:

a. The Claimants did indeed have access to funds, but chose to spend them elsewhere. The Respondent notes that it is undisputed that the Claimants spent €182 million on other projects and developments after the repeal of the Raw Materials Facility, at the same time that the EFDG companies were not paying their taxes and consequently incurring penalties.

b. The Claimants had access to financing at competitive interest rates after repeal, and thus could have borrowed to cover their tax debts.

c. While the Claimants assert that they could not pay the taxes they owed because of financial difficulties, Mr. Osborne accepted that those financial difficulties would have occurred in any event, even without repeal of the Raw Materials Facility. (Tr., Day 10, 137 (Osborne, acknowledging that "absent sales of SCPs, and assuming all else equal, they would have been in trouble, if I can put it that way.”)).

d. EFDG’s financial statements show that the Claimants were in arrears on taxes and incurred penalties in every year before the revocation of the incentives.[234] According to the Respondent, there is not a single year, at any time in the Corporate Claimants’ history, in which the Corporate Claimants did not incur fresh penalties for non-payment of taxes. That includes the period in 2004-05 in which the Claimants say they paid down their tax debts. The Respondent argues that there is therefore no basis to infer that the Claimants would have paid their taxes in and after 2006 if they had been able to, and hence no basis to infer that their failure to do so proves that they could not (R-Rejoinder, ¶ 340; First ER of J. Ellison, Section 9; Second ER of J. Ellison, Section 8).

e. EFDG entered into various tax-rescheduling agreements with Romania in 2001, 2002 and 2003, through which Romania forgave millions of Euro in tax penalties due from the Claimants. The Respondent argues that “it thus appears that the Claimants chose not to pay their taxes as part of a long-standing business strategy, hoping to negotiate advantageous restructuring of their tax debts and to use the funds that otherwise would have been paid to the state for other purposes. That this gamble ultimately did not pay off is a far cry from a causal link between the repeal of the facilities and the Claimants’ inability to pay taxes. Indeed, it reveals the entire tax-penalty claim to be an unseemly perpetuation of improper practices against Romania, which the Claimants ask this Tribunal to endorse and continue” (R-Rejoinder, ¶ 341; Second ER of J. Ellison, Section 8). The Respondent further notes (and the Claimants acknowledge) that these rescheduling agreements (and forgiveness of debts granted by Romania) are the main reason why the Claimants reduced their tax debts by 2005 (R-SPHB, fn. 27; *see* ¶ 1132 below).

1128. Finally, the Respondent stresses that the Claimants have failed to produce evidence (other than witness testimony and experts relying on these witnesses) in support of their claim (R-SPHB, ¶ 18). Specifically, according to the Respondent:

a. There is no contemporaneous correspondence with the Romanian tax authorities or internal documents explaining why they were not paying taxes;

b. There is no correspondence with banks refusing to grant loans due to financial constraints;

c. There is no evidence of the “business necessities” on which they spent the €182 million that they acknowledge was spent after the revocation of the incentives to

[234] The Respondent criticizes the Claimants’ experts for failing to mention this state of affairs. In particular, the Respondent notes that the table of penalties paid to the State presented in Mr. Osborne’s First Report (Table 4, p. 22) covers only 2006-2009, while his working papers include payments as far back as 2002 (R-Rejoinder, ¶ 340).

other ends. The only documentary evidence that Mr. Halbac could point out to was for €5 million in relation to the brewery (Exh. C-306). (R-PHB, ¶ 627).

1129. The Respondent also points out that "the vast majority" of the taxes (and resulting penalties) owed to Romania by the EFDG companies relates to VAT payments and employee social security contributions.[235] The Respondent thus argues that the Claimants have improperly retained money that belongs to their customers and employees. In other words, the Claimants have improperly used "other people's money" to finance their operations. The Respondent argues that this seriously undermines their claim, in particular with respect to VAT, because the Claimants had the cash on hand to remit the required amount of VAT, but failed to do so. This failure cannot be attributed to reduced cash flows (R-PHB, ¶ 295; Exh. A to F to the Claimants' Application for Provisional Measures; Respondent's Rejoinder on Provisional Measures, ¶ 18; Respondent's Opposition to Provisional Measures, fn. 9).

1130. With respect to the availability of cash and post-revocation investments, the Claimants acknowledge that they invested approximately €182 million post-revocation, but contend that these investments were for business necessities in order to continue the operation of the companies, comply with legal requirements and meet contractual obligations (Second ER of D. Lessard, ¶ 128; Tr., Day 8, 69 (Lessard); Second WS of M. Halbac, ¶¶ 145-167).

1131. The Claimants deny that the Respondent's additional arguments undermine their claim for damages for tax penalties incurred after the revocation of the incentives (C-PHB, ¶¶ 132-139). First, the Claimants deny that the mere existence of penalties prior to the revocation negates the causal link between the revocation and penalties post-revocation. As Prof. Lessard explains: "If the penalties post Revocation could have been avoided absent Revocation and not otherwise, then the fact of earlier penalties does not change the impact on damages" (Second ER of D. Lessard, ¶ 134).

1132. Second, the Claimants reject the Respondent's contention that they had a "strategy" of not paying taxes:

a. The Claimants contend that the tax arrears and penalties that they incurred in the years prior to the revocation were not due to any such business strategy, but were caused by hyperinflation, regulatory changes and widespread economic difficulties throughout Romania during that period. Romania has suggested that this does not explain the Claimants' situation because they could not have been the only taxpayers affected by this (Second ER of J. Ellison, ¶ 8.2.3). The Claimants agree but contend that Romania misses the point: the fact is that the period of hyperinflation in Romania was widespread and recognized by the government. Indeed, through the enactment of EGO 163/2000 and EGO 40/2002 (Exh. J and K to Claimants' Application for Provisional Measures),

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[235] In its Application to Revoke Provisional Measures, the Respondent alleges that VAT comprised approximately 43% of the tax liabilities incurred by EFDG from January 2010 to February 2012 (R-Application to Revoke PM, fn. 85; EFDG tax payment tables, RA-17).

Romania acknowledged "the great number of taxpayers recorded with outstanding budget debts" as "the outcome of the economic environment". These two normative acts offered extensions to taxpayers in arrears and reductions or eliminations of penalties under strict conditions, which the Claimants took advantage of. The Claimants made the additional investments required by Romania for the rescheduling of the debts, and the Claimants paid off outstanding debts in advance of the deadline imposed by Romania under the agreements. The Claimants note that the Respondent has not disputed those facts (C-PHB, ¶ 137).

b. The Claimants argue that they had fully paid off their tax arrears at the time of Revocation, a fact that the Respondent does not dispute (C-PHB, ¶ 138).

c. The Claimants deny that they are tax evaders, as they made partial payments on their outstanding state debts after the revocation when they were financially able to do so. For instance, the outstanding balance on state debts decreased from the third quarter to the fourth quarter of 2007, as well as from the second quarter to the third quarter of 2009. Thus, the Claimants reject any contention that they have deliberately avoided paying taxes or have acted in any way other than in good faith regarding their taxes (C-PHB, ¶ 139).

d. The Claimants argue that their claim for penalties already paid to Romania is further evidence that the Claimants have not altogether avoided paying their outstanding tax debts (C-PHB, ¶ 143).

1133. The Claimants do not deny that the unpaid taxes for which they are being charged penalties include VAT. However, they dispute the Respondent's calculations of EFDG's tax payments submitted as Exh. RA-17, including VAT calculations (Claimants' Response to Romania's Application to Revoke PM, ¶ 68). Specifically, the Claimants argue that:

a. The Respondent has erroneously duplicated European Food's VAT liability and payments and the figures in the section dealing with persons with disabilities, and

b. The Respondent has erroneously included interest and penalties on unpaid VAT for European Food and Rieni Drinks.

1134. At Exh. CA-23 of their Response, the Claimants provide a "full analysis" of the Respondent's Exh. RA-17. However, the Claimants do not explain what is the impact of these recalculations on the amount and percentage of VAT owed.

b. The Tribunal's analysis

1135. It is undisputed that the Claimants did not pay some of their taxes, and that, as a result, they accrued significant financial penalties.

1136. The key question to determine whether this damages claim has merit is whether the Claimants have been able to establish a sufficient causal link between the repeal of the EGO 24 incentives and their failure to pay their taxes. In essence, the Claimants are arguing that, but for the revocation of the incentives, they would have paid their taxes, but because of the revocation, they suffered financial constraints that prevented them from doing so. Thus, the argument goes, to place them back in the position in which they would have been but for the revocation, the Tribunal must award them the penalties they have already paid and those which they will be forced to pay (unless the Respondent waives the latter).

1137. In the Tribunal's view, to determine whether such a sufficient causal link exists between the Respondent's breach of the BIT and the losses alleged, the Claimants must prove:

a. First, that after the revocation of the incentives, the Claimants could not pay their taxes. In other words, that they did not, as a matter of fact, have sufficient funds to pay their taxes.

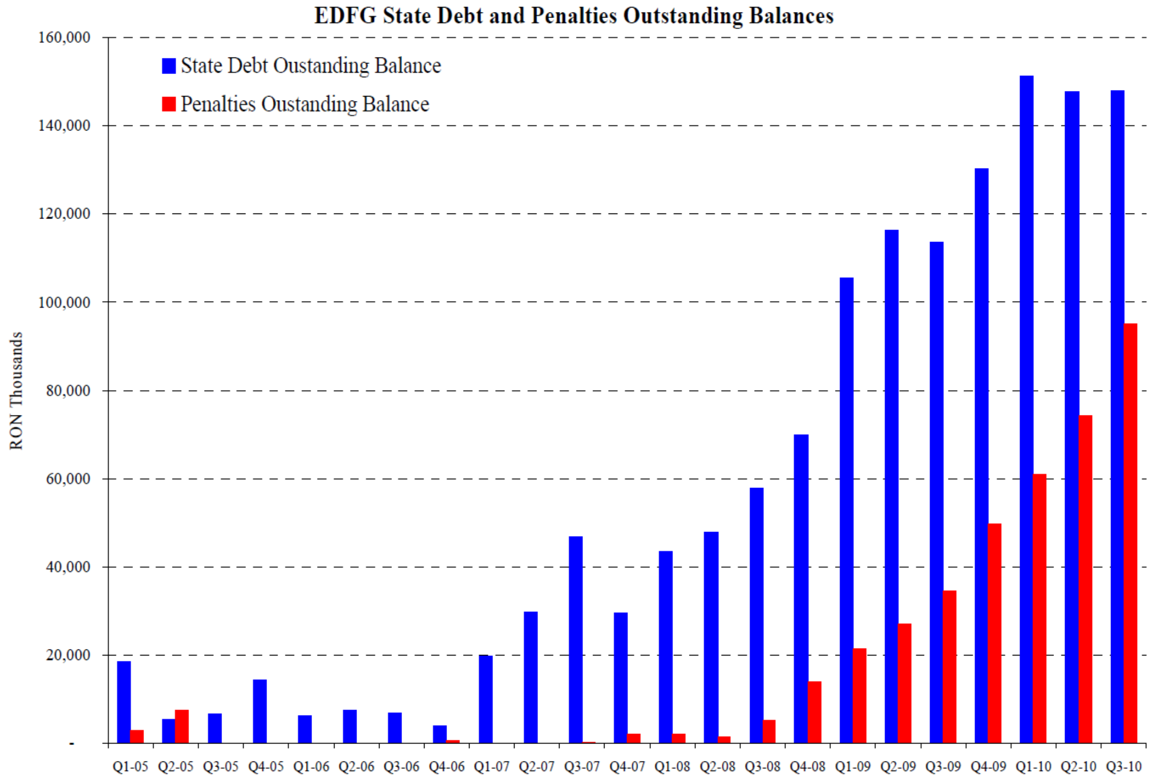
b. Second, that the dominant cause for this lack of sufficient funds (or the financial constraints that prevented them from borrowing them) was the revocation of the incentives.

c. Third, that but for that lack of sufficient funds, they would have paid their taxes.

1138. The Tribunal has found it unnecessary to address points (b) and (c) because it has come to the conclusion that the Claimants have not proved that, as a matter of fact, they had insufficient funds to pay their taxes. In the view of the Tribunal, the relevant question is whether the Claimants had sufficient funds to pay their taxes and to meet the needs of their business, giving due deference to the business judgment of the owners and managers of the business.

1139. The Tribunal has first tried to establish from the information in the record what was the amount of the EFDG companies' principal tax debts, which they allegedly could not pay after revocation. This information turned out to be difficult to locate in the Claimants' submissions on the merits, but additional information was provided in the context of the Claimants' various requests for provisional measures on which Romania commented. The Tribunal has found in particular two useful sources: (i) the table provided at paragraph 140 of the Claimants' Post-Hearing Brief, and (ii) footnote 5 of the Claimants' letter of 9 November 2012.

1140. The table provided by the Claimants at paragraph 140 of the Claimants' Post-Hearing Brief shows the outstanding balance of the Claimants' principal tax debt and penalties from 1 January 2005 up to 30 September 2010, as follows:



Source: Data from EFDG Overdue State Debt and Penalties Expense.xls produced as backup to December 22, 2009 Lessard Report, with updated data through September 30, 2010.

1141. The Claimants provide the amounts in RON and on a quarterly basis. It would appear from this table that, at the end of 2005, the outstanding balance of the Claimants' principal tax debt was approximately RON 18 million (today approximately €4 million[236]), and that by the end of 2006 this outstanding balance was less than RON 5 million (today approximately €1.1 million), with minimal penalties. However, by the end of 2007 the outstanding balance for the principal tax debt had risen to approximately RON 30 million (today approximately €6.7 million). Even then, their tax penalties were relatively minor. Since then there has been a steady rise, with its highest point at the end of 2009, where the outstanding principal tax debt appears to have been approximately RON 150 million (today approximately €33.7 million).

1142. These figures are roughly consistent with the Claimants' assertion in footnote 5 of their letter of 9 November 2012, where they stated that "[i]n March 2006, the EFDC companies had virtually no outstanding tax debt […]. By the end of 2006, as a result of the premature revocation of the EGO 24 incentives, the EFDC companies accumulated tax debts in the amount of €4.8 million. By 20 September 2012, as a result of draconian interest and penalties imposed, the EFDC companies' total outstanding tax debt had increased to €104.1 million." Indeed, the first quarter of 2007 shows a principal tax debt of approximately RON 20 million (today approximately €4.5 million) and no accrued penalties.

[236] All Euro amounts in this section reflect the exchange rate of 9 December 2013 of 4.4482 RON/EUR. Source: European Central Bank.

1143. From these numbers, the Tribunal concludes that, in 2007, the Claimants would have needed approximately €5 million to completely pay off their tax debt.

1144. The Tribunal now turns to the Parties' arguments on the availability of cash or financing for the payment of tax debts. The Respondent argues that the Claimants (i) did indeed have cash on hand, but chose to spend it elsewhere, and (ii) had access to financing from the EBRD and other banks, but chose not to use it.

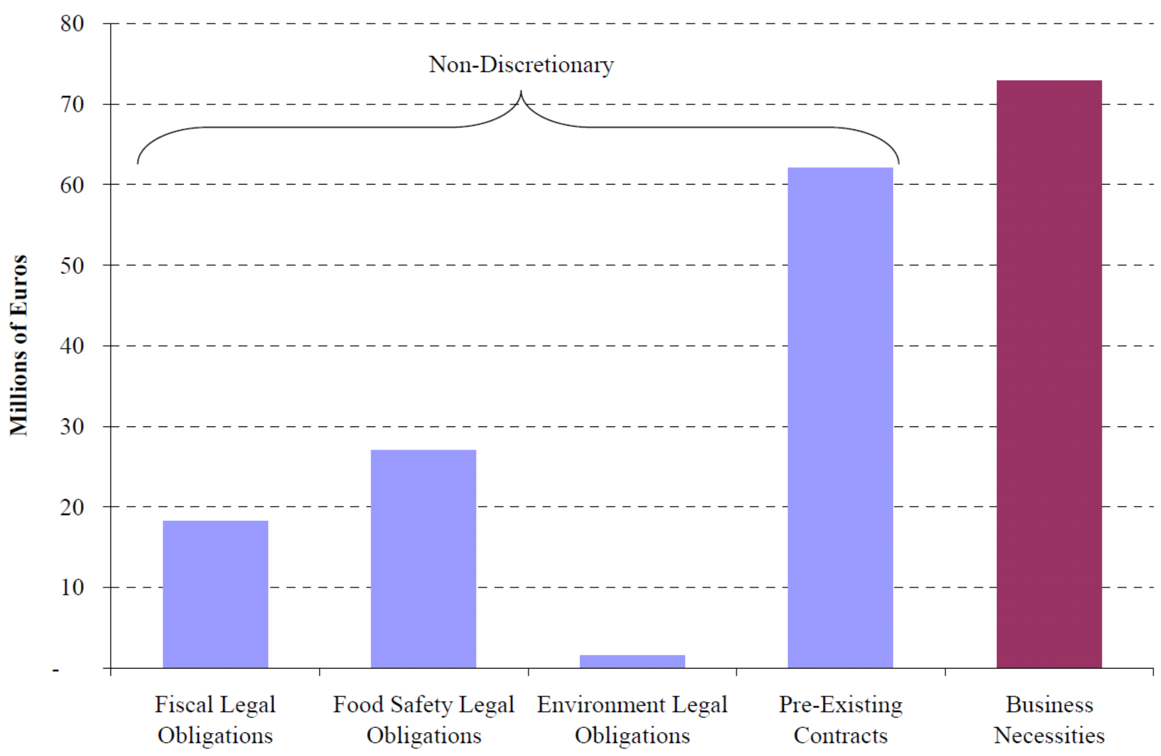
1145. With respect to the first point, it is undisputed that the Claimants spent €182 million on other projects and developments after repeal of the Raw Materials Facility (Tr., Day 8, 69 (Lessard); Second ER of D. Lessard, ¶ 128). The Respondent argues that these funds would have been sufficient to satisfy the Claimants' tax debts (and to fund the Incremental Investments).

1146. The Claimants defend their decision to spend money on other operations and expenditures after the revocation of the incentives. Mr. Halbac testified that "[i]t was determined that we would make investments in our business necessities, as a way of remaining competitive with the business adventures that we did have, and conforming to legal requirements imposed on food and beverage manufacturers" (Second WS of M. Halbac, ¶ 147). In particular, he testified that these expenditures were made to maintain their existing manufacturing platform, preserve their existing market positions, and comply with health and safety laws. According to Mr. Halbac, the Claimants spent approximately €140 million in investments they considered to be business necessities, and an additional €27 million in normal maintenance costs. Although Mr. Halbac described these expenditures in some detail (including a breakdown of the various costs), with one exception[237] he submitted no documentary evidence in support of his assertions (Second WS of M. Halbac, ¶¶ 145-167).

1147. In turn, Prof. Lessard stated that "total investment by EFDG since 2005 has been €182 million", noting that "[t]he majority of these investments were non-discretionary" (Second ER of D. Lessard, ¶¶ 127-128). According to Prof. Lessard, the Claimants had identified five categories of investments: fiscal legal obligations, food safety obligations, environmental legal obligations, investments to fulfill contracts signed before the revocation of the incentives, and "business necessities", as reflected in Figure 17 of his Second Expert Report, copied below:

[237] That exception is a contract with Krones dated 10 May 2004 (Exh. 306) for € 5.2 million related to the expansion of the brewery. [Mr. Halbac mistakenly refers to Exh. 305, and also mistakenly notes the date as 10 May 2003.]

Figure 17— Damages from Revocation



1148. Of these five categories, Prof. Lessard stated that only the first four categories were effectively "non-discretionary investments", which he defined as "amounts that EFDG was required to spend to comply with legal or contractual obligations." He stated that these non-discretionary projects accounted for 60% of the investments made since 2005. The remaining 40% was invested in projects that the EFDG considered to be "business necessities" (as shown in the table, these amounted to approximately €70 million). As examples of these "business necessities", Prof. Lessard referred to capital expenditures required to maintain the EFDG's existing productive capacity, to the purchase of beer dispensers and new coolers that allowed distribution of beer in draft form, or to the installation of equipment that allowed the EFDG to produce 2.5 liter bottles for mineral water and soft drinks (Second ER of D. Lessard, ¶¶ 129-130).

1149. The Respondent contests the sufficiency of the evidence provided by Mr. Halbac and Prof. Lessard. The Claimants argue that the Respondent had ample opportunity to cross-examine Mr. Halbac about these expenditures and their necessity, but chose not to do so (C-PHB, ¶ 189). The Respondent in turn argues that there was no need to cross-examine him, because (with the aforementioned exception) Mr. Halbac's assertions were unsupported by documentary evidence (R-PHB, ¶ 627). In addition, the Respondent points out that Prof. Lessard acknowledged that his understanding with respect to the non-discretionary nature of the Claimants' expenditures post-revocation came from discussions with the Claimants and their personnel (in particular Mr. Halbac), and could cite no documentary evidence in support of his assertion (indeed, in cross-examination Prof. Lessard acknowledged he had not seen any invoices justifying such "non-discretionary investments" or "business necessities") (Tr., Day 8, 70-71 (Lessard)).

1150. In view of the available evidence, the Tribunal cannot accept the Claimants' assertion that they did not have enough cash to pay their tax debts and, at the same time, meet the needs of their business. The Tribunal reaches that conclusion taking into account the need for the Claimants to be able to continue with their business operations and to exercise managerial discretion in doing so. As noted above, the Claimants could have paid off their outstanding tax debts in full by devoting a mere €5 million in 2007 for that purpose. But instead of paying these tax debts, the Claimants chose to spend over €70 million in "business necessities"[238], despite the fact that the payment of taxes to the State qualifies as a non-discretionary expenditure required to comply with fiscal legal obligations (indeed, Prof. Lessard includes fiscal legal obligations in his description of non-discretionary expenditures). This evidences that the Claimants had made a decision selectively to allocate their available funds among the five categories of "investments" they have identified. Expressed otherwise, they had a policy that they would pay taxes if that payment appeared to be sensible in view of the circumstances. In fact, the Claimants do have an earlier history of not paying their taxes, which corroborates that inference.

1151. The Tribunal does not doubt that the Claimants' investments in these "business necessities" were made with the underlying objective to maintain the competitive nature of their business. However, paying taxes is a legal obligation, and not paying them has legal and financial consequences attached to it. The fact of the matter is that, assuming that Prof. Lessard is correct in saying that 60% of the Claimants' expenditures since 2005 were non-discretionary, the Claimants still had approximately €70 million that they chose to use in other investments or activities. In other words, the Claimants made a conscious choice not to pay €5 million to extinguish their tax debt in 2007, in favor of making other investments.

1152. This may have been a business decision, based on the hope that, by investing in other business activities, the Claimants would have generated more cash than what they would eventually have to pay in taxes and accrued penalties. Prof. Lessard confirmed this at the hearing when, asked why the Claimants had chosen to invest in business necessities instead of in the Incremental Investments, he stated that "the only inference I can make is that the economics of those expenditures [the alleged business necessities] were even better than the economics of these projects [the Incremental Investments]" (Tr., Day 8, 71 (Lessard)). Prof. Lessard also stated that the investments in business necessities "heavily leveraged Claimants' existing assets, and it is reasonable for Claimants to have assumed that they would provide high incremental returns. Thus, Mr. Ellison's suggestion that EFDG could or should have diverted investment from these actual uses to alternative uses is incorrect" (Second ER of D. Lessard, ¶ 130).

[238] As shown in Figure 17 of Second ER of D. Lessard, cited above.

1153. What Prof. Lessard seems to be implying is that, economically, it made more sense to spend the available funds on the business necessities because it would have been more profitable than paying taxes (or building the Incremental Investments). In the case of tax payment (which is by definition not a profitable activity), the implication is that the Claimants believed that the profits they would generate from these business necessities would be higher than the penalties they would accrue by failing to pay their tax debts. Indeed, Prof. Lessard accepted as much in cross-examination:

> Q: […] The claimants had €182 million to invest after revocation; correct?
>
> A. They spent that amount on various projects, yes.
>
> Q. They chose not to spend any of that amount to pay down the remaining tax debts; correct?
>
> A. Which tells one that they had at least a 36% internal rate of return on the projects they invested in, because that's the cost of the penalties.
>
> Q. Okay. But they chose not to spend this amount to pay down their tax debts; correct?
>
> A. That's correct.
>
> (Tr., Day 8, 85 (Rubins/Lessard)).

1154. In other words, the Claimants' decision not to pay their tax debts was a strategic choice, which eventually proved to be the wrong one. The Claimants apparently exercised their business judgment, analyzed the pros and cons, and decided to invest in other projects rather than pay their taxes. But this does not mean that they did not have sufficient funds to pay them and still carry on with their business. It is evident from the record that they did have sufficient funds to pay their taxes, at least at a given juncture, namely in 2007. In the Tribunal's view, this fatally severs the chain of causation. Romania cannot be held liable for the Claimants' bad business decisions, especially if such decisions may have implied failure to comply with certain legal obligations, namely the payment of taxes.

1155. As a result, the Tribunal does not need to address the remaining elements of proof identified in paragraph 1137 above. Accordingly, the Tribunal dismisses this claim.

D. THE RESPONDENT'S DEFENSE THAT ACCESSION TO THE EU BENEFITED THE CLAIMANTS

1156. In addition to its specific defenses on each of the Claimants' damages claims, the Respondent argues that, even if the Claimants had to pay more for certain raw materials as a result of the repeal of the incentives, this does not necessarily mean that they were harmed overall. To the contrary, the Respondent contends that the Claimants received economic benefits from EU accession that must be taken into account when assessing what compensation is due (R-Rejoinder, ¶¶ 415-421; R-PHB, ¶¶ 329-331).

1157. Relying on two expert reports by Dr. Bill Robinson of KPMG Forensic, the Respondent contends that the EU accession process brought "price stability, increased trade, FDI, reduced risk premia, strong institutions and a marked acceleration in economic growth" (R-Rejoinder, ¶ 417, First ER of B. Robinson, sections 5.3 and 5.4). Specifically, the Respondent alleges that the Claimants benefited from "increased domestic sales due to increased local expenditure on food and beverages (over 42% between 2001 and 2008), an increase of sales abroad due to an expanded export market (between 13% and 30% higher in each year between 2002 and 2008), and access to duty-free imports through the EU customs union" (R-Rejoinder, ¶ 418; First ER of B. Robinson, sections 6.2 and 6.3).

1158. Using a macroeconomic approach, Dr. Robinson evaluated the tangible benefits of EU accession on 1 January 2007 to the Claimants' business. To quantify these benefits, Dr. Robinson calculated the impact on the Claimants' business of three counterfactual situations (Romania joins the EU in 2009, Romania joins the EU in 2011, or Romania never joins the EU at all), using the following methodology:

> For every percentage point reduction in Romanian GDP growth, the evidence suggests a 0.77 percentage point reduction in growth of expenditure of food and drink and hence (assuming a constant share of Accession-driven growth) in EFDG's sales. By applying actual and counterfactual rates of growth to variable costs and revenues shown in EFDG's financial statements, I calculate the net present value of the effect on EFDG's profits of Romania's Accession in 2007 compared with three counterfactual scenarios […]. (First ER of B. Robinson, ¶ 8.1.8)

1159. As explained by Dr. Robinson, he tried to assess the effect of a scenario in which the Claimants had access to the incentives but did not have access to the other benefits provided by the EU:

> […] in that world, where they can still have the import exemptions, I am taking it as instructed that they would not have been in the EU, or that accession would have been delayed for a couple of years, and in that world, although they would have had these nice cheap sugar imports, they wouldn't have sold so much soft drink. And my calculation tries to show, as it were, […] that net effect (Tr., Day 11, 184 (Robinson)).

1160. Dr. Robinson concluded that:

a. Had EU accession been delayed by two years, the Claimants would have lost €18.9 million in profits;

b. Had EU accession been delayed by an additional two years (*i.e.* four years in total), the Claimants would have lost €34.4 million in profits, and

c. Had EU accession not happened at all, the Claimants would have lost €235 million (First ER of B. Robinson, ¶ 8.1.8).

1161. Dr. Robinson confirmed his conclusions in his second report, which responded to Mr. Boulton's criticisms. In particular, he noted that Mr. Boulton had not disputed

Romania's growth in prosperity over the last decade, which in his opinion was largely due to EU membership (Second ER of B. Robinson, ¶ 3.6.1).

1162. As a result, the Respondent argues that "Romania's EU accession resulted in tangible financial benefits for the Claimants that offset any short-term disadvantages from repeal of the Facilities" (which in the Respondent's view are limited to the Claimants' direct losses claims), and that "[o]nce this adjustment has been made, the Claimants' direct losses are reduced to nil" (R-Rejoinder, ¶ 421).

1163. Relying on *Metalpar v. Argentina*[239] *and GAMI v. Mexico*,[240] the Respondent contends that in situations where state measures both harmed and benefited a claimant's business activities, tribunals have taken the positive impact into account in assessing what compensation is due. In its Rejoinder, the Respondent stated that "[s]ince the advantages of EU membership would have been lost or at least delayed had Romania maintained state aid (including the EGO 24/1998 facilities), these advantages must be considered to be a benefit accruing to the Claimants as a result of the repeal, to be deducted from any compensation assessed as a result of Romania's alleged breaches" (R-Rejoinder, ¶ 416). However, in its Post-Hearing Brief the Respondent clarified that it "is not making a counterclaim or seeking a set-off against an award of damages"; it "simply asks the Tribunal to take into account the important benefits to the Claimants arising out of EU accession in determining the extent to which the Claimants were harmed as a result of Romania's actions" (R-PHB, ¶ 331; see also R-Rejoinder, ¶¶ 415, and Tr., Day 2, 198-200 (Rubins)).

1164. In turn, the Claimants argue that Dr. Robinson's analysis should be disregarded, both with respect to expectation damages as well as reliance damages, as it is "entirely unsupported by authority" (C-PHB, ¶ 230).

1165. More specific comments are provided by the Claimants' expert, Mr. Boulton. Mr. Boulton criticizes Dr. Robinson's report as "deeply flawed" (ER of R. Boulton, ¶ 2.2), because:

a. "Dr Robinson applies a macroeconomic approach to what is essentially a microeconomic question. In other words, Dr Robinson takes a top down approach to estimating the effect of the EU accession on Romania as a whole, and then simply assumes that the Claimants have benefitted pro rata to the national economy" (*Id*.), and

b. "Dr Robinson does not consider whether there is any evidence that the Claimants have in fact benefitted from EU accession and ignores those factors that might have had a negative impact" (*Id*.).

1166. In particular, Mr. Boulton criticizes Dr. Robinson for failing to perform an analysis of the Claimants' financial statements to confirm that they have in fact benefitted from EU accession (*Id*., ¶ 3.10), for failing to take into account the impact of EU accession

[239] *Metalpar v. Argentina*, ¶¶ 218–233.
[240] *GAMI v. Mexico*, ¶¶ 83–87.

on the level of competition faced by the Claimants (*Id.*, ¶¶ 3.17-3.22), and for ignoring the potential effect of EU accession on the Claimants' fixed costs, in particular with respect to EU health and safety legislation (*Id.*, ¶¶ 3.26-3.28). As a result, in Mr. Boulton's opinion, Dr. Robinson fails to establish that the Claimants have in fact benefitted at all from EU accession (*Id.*, ¶ 2.3).

1167. The Tribunal cannot accept the Respondent's defense. As a legal matter, it is unclear whether EU accession, an act of general application in Romania which produced effects on every single person, should be accepted as an act having specific effect with respect to specific persons, such as the mitigation of a specific damage. Even if that were possible (a question that the Tribunal does not need to answer), the Tribunal rejects the Respondent's defense on its merits. The issue is what effect EU accession had on the damages suffered by the Claimants. The Respondent contends that EU accession had a mitigating effect on the Claimants' damages, because accession would have had the effect of increasing their sales and therefore their profits. However, the Respondent has not provided a convincing quantification of this effect: the Tribunal does not find that Dr. Robinson's macroeconomic analysis proves the extent, if any, of the benefits of EU accession to the Claimants in particular.

1168. First, the Tribunal is not persuaded by Dr. Robinson's methodology. It is theoretically possible to attempt to quantify the benefits that accession brought the Claimants by assessing the Claimants' situation in a counterfactual world where accession was delayed or did not happen at all; however, this evaluation must be made with a view to the specific circumstances of the case and a global assessment is relevant only if it is a means to ascertain the effects of accession in the specific case. As Mr. Boulton states, it seems overly simplistic to extrapolate the macroeconomic impact of EU accession on the Romanian economy as a whole to the microeconomic impact on the Claimants (ER of R. Boulton, ¶ 3.15). Although EU accession may have benefitted the Romanian economy as a whole, the extent of the benefits (and the costs) of EU accession will have varied greatly across different industries and companies. Indeed, Dr. Robinson accepted in cross-examination that EU accession could have had varying impacts on existing businesses in Romania (helping some and hurting others, even in the same sector). He also accepted that the costs of EU accession could be widely different for Romanian businesses in the same sector (Tr., Day 11, 184-185 (Fleuriet/Robinson)).

1169. However, Dr. Robinson appears to have focused only on the benefits of EU accession, but ignored the costs. For instance, he did not take into consideration in his calculations that the EFDG's labor costs could rise as a result of accession. Although he stated that his underlying model considered increases in labor costs, he "took the view that they would not change as a result of accession" (*Id.*, 188 (Robinson)). Nor did he consider that the increased sales that he estimated as a result of accession would have required an increase in the Claimants' labor costs: "I did not increase wage costs because I thought that additional volumes could be sold with the same labour force, and my evidence for that is that volumes at the time were lower than they had been, and I don't imagine the factory had shrunk" (Tr., Day 11, 203 (Robinson)).

1170. Similarly, Dr. Robinson did not consider that EU accession could have the effect of decreasing the Claimants' sales as a result of the increased costs and prices due to the revocation of the incentives (a loss of a competitive edge):

> Q. Now, you did not account for any lost sales that the claimants may have experienced as a result of paying increased Customs taxes, or as a result of them paying more domestically to avoid such taxes; correct?
>
> A. Correct.
>
> Q. You have simply assumed -- just so we're clear, you have simply assumed that EU accession only had the positive impact of increased sales?
>
> A. Yes, because Mr Ellison did the negatives.
>
> (Tr., Day 11, 189 (Fleuriet/Robinson).

1171. Further, Dr. Robinson did not take into consideration the fixed costs and regulatory burdens imposed by EU accession (e.g., in matters of health, safety or environment), because in his opinion they had not changed (*Id.*, 196-197). He acknowledged at the hearing that such costs could have affected the Claimants' performance, but decided that they ultimately did not affect his conclusions. Specifically, when counsel for the Claimants represented that the Claimants had incurred significant costs to comply with EU requirements on wooden pallets, Dr. Robinson made the following comments:

> Q. […] this is an example of one of the fixed costs that would have increased as a result of EU accession that you don't consider in your opinion; correct?
>
> A. Yes.
>
> Q. It's a pretty big omission, is it not, in your opinion, not to have considered increases in fixed costs that were required by -- required of our clients by virtue of the fact that Romania was acceding to the European Union?
>
> A. I don't think those are a very large sum in the general scheme of things. I mean, I worried about it, obviously, because I can see there is a case. I didn't worry about it too much, I mean, partly because, as I say, it's a level playing field; the competitors have those increases as well, so it doesn't mean they lose market share.
>
> I sort of comforted myself with the thought that many other judgments I had taken were really quite deliberately cautious. So the EU effect, you know, is 1.5 to 2, and I used 1.5. The food and drink is 1.1.
>
> Now, you might actually argue that the class of food and drink that EFDG are in are rather more towards the luxury end, with the soft drinks and so forth, so actually that would be a bigger number. But I went with the smaller number, which includes the potatoes and all those other very unelastic items.

> So, yes, I haven't specifically allowed for these factors; I admit that. But I don't think it affects my conclusion.
>
> (Tr., Day 11, 198-199 (Fleuriet/Robinson)).

1172. The Tribunal is aware that in re-direct examination Dr. Robinson clarified that, in the two scenarios involving delayed accession, all of those additional fixed costs would have happened to the Claimants anyway, it was just a question of when (Tr., Day 11, 209-210). However, that does not detract from the fact that EU accession brought a "mixed bag of goods" to Romanian companies, which included varying costs and benefits, all of which need to be assessed to understand the total impact of EU accession on the Claimants.

1173. The Tribunal thus finds that the Respondent has failed to prove the extent, if any, of the benefits of EU accession to the Claimants. This does not mean that the Tribunal is oblivious to the fact that EU accession may have had an effect (whether positive or negative) on the Claimants' investments. This raises a procedural question, namely which party must bear the consequences of this uncertainty. It is the Claimants' burden to prove their damage and the Tribunal has found to what extent such damage has been proved. The Respondent has argued that the Claimants' experts have failed to take into consideration the effects of EU accession, and has endeavored to quantify such effects, but – in the Tribunal's view – unsuccessfully. First, the effects of EU accession appear to be mixed, both potentially increasing or decreasing the value of the investment. Second, it is legally difficult to see why an alleged advantage, from which the Claimants should have benefitted in any circumstances and which is available to their competitors, including those who are not located in the distressed zones, should be taken into consideration to their detriment.

1174. For these reasons, the Tribunal dismisses the Respondent's defense to the extent that it requests a diminution of the damages awarded to the Claimants.

E. THE CLAIMANTS' REQUEST THAT DAMAGES BE AWARDED NET OF TAXES

1175. In their Reply, the Claimants had requested that any damages and interest payable be grossed up for taxes, as follows: "Claimants' Permanent Investor Certificates, valid until April 1, 2009, contained profit tax exemption provisions. Therefore, Romania would not have taxed the additional profit arising from lower costs on raw materials from the customs tax exemption. But-for cash flows after April 1, 2009, reflect the 16% profit tax. However, Professor Lessard assumes that an award in this proceeding would be taxable. Therefore, in order for the Claimants to receive the full amount of direct damages from the loss of the customs tax exemption, the damages and interest through April 1, 2009, must be grossed up to reflect the tax payable on the award" (C-Reply, ¶ 652).

1176. The Respondent had contended that there is no merit to the Claimants' gross-up claim (R-Rejoinder, ¶¶ 431-436). Citing Romanian law provisions, it had argued that "[t]he Corporate Claimants might also be able to set off tax losses against any future taxable profits (including a damages award). Moreover, to the extent that an award is paid to the Micula brothers, Romanian law provides that damages awards are non-taxable" (R-Rejoinder, ¶ 434).[241]

1177. However, in their Revised Request for Relief the Claimants did not include their request for gross-up, and instead requested, presumably for the same reasons, "[t]he total amount of damages payable by the Respondent comprising the amounts set out in paragraphs 2, 3 and 5 to be received net of any tax obligations imposed by Romania on the proceeds" (Revised Request for Relief, ¶ 4).

1178. In their Post-hearing Brief, the Claimants confirmed their primary position that the total amount of damages awarded should be "received by the Claimants net of any tax obligations imposed by the Respondent on the proceeds" (C-PHB, ¶ 268). In their view, the position under Romanian law in relation to both the Individual Claimants and the Corporate Claimants is unclear, but it would be possible for an award to be taxable in both instances. That said, the Claimants asserted that they would maintain their gross-up claim if the Respondent stated that in its view taxes would be payable on an award. Otherwise, the Claimants stated that "[s]hould the Respondent state in sufficiently clear terms that it will not tax any damages award in favour of the Claimants, the Claimants will not seek that that award be grossed-up for taxes" (C-PHB, ¶ 269).

1179. The Respondent opposed the Claimants' request that the award be paid net of any taxes, and requested the Tribunal not to add any language to that effect. Given the EFDG companies' outstanding tax debts, the Respondent argued that such request "could well lead to unknown and unintended consequences". The Respondent urged the Tribunal to "be cautious about phrasing any award in terms that the EFDG Companies might use in other proceedings", adding that the language of the award with respect to taxes that the Claimants request is not commonly used in investment arbitration awards (R-PHB, ¶ 322).

1180. The Tribunal sees no justification for providing that the amounts awarded be received net of taxes. First, part of the damages awarded, for instance the damages for increased cost of raw materials, are not profits at all, but a reimbursement of increased costs, even if they may have effect on the profits.

1181. Second, with respect to the part of the damages that does refer to lost profits, Mr. Boulton (on whose calculations the Tribunal has relied) has used gross profit margins for his calculations (ER of R. Boulton, ¶ 5.63). The Tribunal understands from this that the profits calculated by Mr. Boulton are before tax, and thus absent the Profit Tax Exemption would have been subject to tax. The Respondent does not contest that, under EGO 24, until 1 April 2009 the Corporate Claimants were entitled to the Profit Tax Exemption. However, the Tribunal understands that this exemption would apply only to profits made by the Corporate Claimants, and the Claimants have not shown which company within the EFDG would have made the profits that are being awarded.

[241] Romania relies on the Romanian Fiscal Code (Exh. R-200), Article 42(b), and the KPMG Damages Report, ¶ 13.3.2.

1182. Finally, the Tribunal is indeed aware of the tax dispute between the Claimants and the Respondent. Given this delicate situation which raises many questions of Romanian law and in view of all circumstances, the Tribunal does not consider it appropriate to use in the Award the language requested by the Claimants.

1183. For the foregoing reasons, the Claimants' request that any damages be awarded net of taxes is dismissed.

F. TO WHOM SHOULD THE AWARD BE MADE?

1. The Claimants' request for a different allocation of damages

1184. Up until the hearing on the merits, the Claimants did not specify to whom an award should be made.

1185. In their Reply, the Claimants requested "an award granting them the following relief", *inter alia*, "compensation to Claimants for all damages they have suffered, as set forth herein and as may be further developed and quantified in the course of this proceeding" (C-Reply, ¶ 666, second bullet point).

1186. During the hearing on the merits, however, the Claimants stated that "as a matter of investment treaty law, the Micula brothers are the foreign shareholders while the [C]orporate [C]laimants are the vehicles for some of their investments. For this reason, it's appropriate that any award granted by the Tribunal should be made only to the foreign shareholders protected by the Sweden-Romania BIT, Viorel and Ioan Micula, and […] they are agreed that as between themselves, the damages should be awarded on a 50/50 basis." Citing *Suez v. Argentina* and *PSEG v. Turkey*, the Claimants argued that this approach would be consistent with the approach taken in other treaty cases (Tr., Day 1, 143-145 (Reed)).

1187. The Claimants confirmed this position in their Revised Request for Relief submitted on 20 December 2010, where they requested that "[a]ny damages payable, including interest and costs, should be awarded to the [I]ndividual Claimants, Ioan Micula and Viorel Micula, to be divided between them on a 50:50 basis. In the alternative, any damages payable, including interest and costs, should be awarded to all five Claimants" (Revised Request for Relief, p. 1).

1188. This request was later confirmed in the Claimants' prayer for relief included at the end of their Post-Hearing Brief, in which "the Claimants request an award granting them the relief set out in the Revised Request" (C-PHB, ¶ 279).[242] This was further

[242] The Tribunal is aware that in the body of their Post-Hearing Brief, the Claimants argued that "[s]hould the Tribunal not award damages to the Individual Claimants alone, the Claimants' secondary position is that any 'reliance' damages, or damages calculated on the basis of the fair market value immediately before the alleged breach, awarded should be awarded to the Individual Claimants and any other damages should be awarded to all of the Claimants", and that "[t]heir tertiary position was that "any award be made to each of the five Claimants" (C-PHB, ¶¶ 258-259). However, these arguments were not formulated as formal requests for relief and, as noted in paragraph 876 above, the Tribunal has focused on the Parties' formal requests for relief.

confirmed by the Claimants in their closing arguments during the hearing of June 2011.[243] As a result, the Claimants have formally prayed for two alternatives:

a. That "[a]ny damages payable, including interest and costs, should be awarded to the [I]ndividual Claimants, Ioan Micula and Viorel Micula, to be divided between them on a 50:50 basis" (Revised Request for Relief, p. 1).

b. "In the alternative, any damages payable, including interest and costs, should be awarded to all five Claimants" (*Id.*).

1189. In its Procedural Order of 6 April 2011, which addressed the Respondent's objections to the Claimants' Revised Request for Relief, the Tribunal found that "in requesting that any damages be awarded to Mr. Ioan Micula and Mr. Viorel Micula (the "Individual Claimants") on a 50/50 basis (second sentence of the Revised Request), and in the alternative that any damages be awarded to all five Claimants (third sentence of the Revised Request), the Claimants have reformulated their damages case." The Tribunal also found that "this raises several issues of procedure and of the merits" (P.O. of 6 April 2011, Section 3.3), and issued certain directions in this regard. Specifically, at Section 4.5 of that same Procedural Order, the Tribunal requested the Claimants to confirm that they wished to maintain their request (Section 4.5(a)). The Tribunal then directed the Parties to address the following matters in their post-hearing briefs (Section 4.5(b)):

> (i) Is it possible, as a matter of procedure and of the merits, for the claims of the Individual Claimants to be designated as either sole or principal claimants (as opposed to the Corporate Claimants, who would become subsidiary claimants) at this stage of the proceedings? In particular, would the Corporate Claimants need to waive their claims in favor of the Individual Claimants, and would this waiver be possible under Romanian and international law?
>
> (ii) What are the consequences of this new distribution of damages (if any) on the damages sought by the Claimants as pleaded to this date, both with respect to the factual and legal basis for the sought damages and their quantification?

1190. In addition, by letter of 6 May 2011, the Tribunal formulated certain questions to be addressed by the Parties with respect to the Claimants' damages case. In particular, the Tribunal requested the Claimants to address the following points in relation to their new request for allocation of damages:

> 1.1 […]
>
> a. Please address the Tribunal's questions under Section 4.5 of the P.O. of 6 April 2011. In this context, please clarify what is the exact status of the Corporate Claimants' claims. Are they subsidiary? Are they withdrawn? What are the consequences of either alternative?

[243] In particular, the Claimants did not contradict the President when he stated that he understood that the first two paragraphs at the beginning of page 1 of the Revised Request attached to the Claimants' letter of 20 December 2010 to be a prayer for relief (Tr., Day 12, 134-135 (President Lévy)).

b. Please explain what is the legal basis on which the Tribunal should decline to award damages to the three Claimant Corporations and award damages only to the Individual Claimants? Is there a waiver of some kind by the Corporate Claimants?

c. Please address the exact evidence in the record of the harm allegedly suffered by the Individual Claimants.

(Tribunal's letter of 6 May 2011, Section III.A.1.1).

1191. The Parties' responses to these questions are set out in Section 2 below.

2. The Parties' positions

a. The Individual Claimants' right to claim damages in their capacity as shareholders

1192. Citing a string of cases, the Claimants submit that, as a matter of investment treaty law, the Individual Claimants have the right to claim damages in their capacity as shareholders (C-PHB, ¶¶ 232-238). According to the Claimants, it is well-established that shareholders have standing to bring claims under investment treaties and may submit claims independently from the corporate entities in which they hold shares without the participation of those corporate entities. This is particularly so in this case, where the BIT defines "investment" very broadly as "any kind of asset owned or controlled invested directly or indirectly by an investor". In the Claimants' view, this means that the BIT directly protects all the Individual Claimants' rights in the entire investment, including tangible assets and the PICs, rather than merely the individuals' shares. Given that during the jurisdictional phase the Tribunal found that the Individual Claimants were foreign investors covered by the BIT, it follows that they could have brought the claims independently and without the participation of the Corporate Claimants in relation to the entire investment. In the Claimants' view, the Tribunal's Decision on Jurisdiction and Admissibility did not limit the scope of the Individual Claimants' claims to those of the Corporate Claimants; to the contrary, the Tribunal declined to determine every element of property over which it had jurisdiction.

1193. With respect to the damages that shareholders may claim as a result of an investment treaty violation, the Claimants contend that shareholders do not need to prove that they suffered harm directly and separately or independently from that suffered by the entity in which they hold shares. According to the Claimants, there is nothing in the BIT, the ICSID Convention or investment treaty law that would limit the rights of shareholders in this respect. For example:

a. In *Goetz v Burundi*, the tribunal observed that "[…] prior ICSID case-law does not restrict the capacity to act to only those legal persons that are directly affected by the alleged breaching measures; it extends that capacity to cover the shareholders in such legal persons, who are the actual investors."[244]

b. In *Bogdanov v. Moldova*, the tribunal stated that "[i]n the practice of investment arbitration it is generally accepted that the shareholders may be awarded indirect damages (SCHREUER. C. "Shareholder Protection in International Investment Law", cit, pp.18f.). The remedy that may be claimed by the Foreign Investor, therefore, is not limited to the damage directly affecting his rights as shareholder in the Local Investment Company, but extends to any losses affecting the assets of the Local Investment Company, including also any reduction in value of the assets due to any alleged breach of contract by the Respondent. The indirect damage suffered by the Foreign Investor, therefore, corresponds to the loss of the Local Investment Company […]."[245]

1194. The Claimants also assert that, in cases where claims have been brought by both shareholders and the companies in which they hold shares, ICSID tribunals have awarded damages directly to the shareholders alone and without the need for those shareholders to quantify their losses separately from those of the companies. The Claimants rely on the following cases, among others:

a. *PSEG v. Turkey*, where the Tribunal, after noting that the project company was wholly owned by PSEG Global, decided to award all compensation to PSEG Global.[246]

b. *Eastern Sugar v. Czech Republic*, where the tribunal awarded full damages to the parent company for losses suffered by its subsidiary following the subsidiary's loss of its quota.[247]

c. *Vivendi v. Argentina II*, where claims were brought by both the parent shareholder (Vivendi) and its subsidiary, and the tribunal, after concluding that Argentina had breached its treaty obligations to both Vivendi and its subsidiary,

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[244] *Antoine Goetz and others v Republic of Burundi* (ICSID Case No. ARB/95/3), Award Embodying the Parties' Settlement Agreement, 10 February 1999, ¶ 89, as translated in S.A. Alexandrov, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals – Shareholders as 'Investors' under Investment Treaties", Journal of World Investment & Trade, vol. 6, issue 3, June 2005, pages 393-398 (Exh. C-234).

[245] *Bogdanov v. Moldova* (BIT Arbitration under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce), Award, 22 September 2005, pp. 18-19.

[246] *PSEG v. Turkey*, ¶ 340.

[247] *Eastern Sugar B.V.(Netherlands) v. Czech Republic,* SCC Case No. 088/2004, Partial Award, 27 March 2007 (hereinafter *"Eastern Sugar v. Czech Republic"*), ¶ 367. ("The Arbitral Tribunal is aware that the loss of quota was suffered primarily by Eastern Sugar Ceska Republika a.s. However, this is a practically wholly-owned subsidiary of the Claimant Eastern Sugar B.V and the value of the subsidiary is in the present circumstances in practical terms determined by the value of the quota allocated to it. The Arbitral Tribunal deems it correct to award to the Claimant full damages for Eastern Sugar Ceska Republika a.s.' loss of quota attributable to the Third Sugar Decree.")

stated that “[a]s its 94.4% de facto shareholder, Vivendi is entitled to a 94.4% share of [the subsidiary's] damages”.[248]

1195. The Respondent argues that “[t]he Claimants have confounded two issues: the Miculas’ standing to bring a claim and the quantum of damages to which they may be entitled” (R-PHB, ¶ 340, R-SPHB, ¶ 53). The Respondent submits that, “[w]hile the Miculas’ *jus standi* is a matter of jurisdiction, the amount of damages they can be awarded is a separate substantive legal issue.” The Respondent clarifies that it does not contest the Individual Claimants’ standing to bring a claim in respect of their identified investment (their shareholdings), and notes that the Tribunal accepted jurisdiction over claims arising from that investment. However, the Respondent emphasizes that that does not mean they are entitled to the same damages as the Corporate Claimants (R-PHB, ¶ 340).

1196. The Respondent contends that the cases cited by the Claimants do not support the proposition that a shareholder can be compensated for the quantum of harm suffered directly from the corporation (R-PHB, ¶¶ 343-345; R-SPHB, ¶¶ 54-55). For instance, in *PSEG v. Turkey*, a parent company was compensated for sunk costs that it had itself invested. In *AAPL v. Sri Lanka*, the tribunal declined to award the claimant damages for harm to the local company’s assets, and instead held that “[t]he scope of the international law protection granted to the foreign investor in the present case is limited to a single item: the value of his share-holding in the joint-venture entity […].”[249] In *Eastern Sugar v. Czech Republic*, the Respondent did not contest the payment of damages to the parent company rather than to the subsidiary, and the claimant had presented a report calculating the loss of share value.[250] In *Vivendi v. Argentina II*, the tribunal awarded the investment value of the concession, measured by the sunk costs that Vivendi had put into its local subsidiary.[251] In other cases cited by the Claimants, tribunals have awarded damages to compensate shareholders for the loss of value in their equity participation, measured differently from the damages incurred by their subsidiaries (as was the case in *Enron v. Argentina* and *CMS v. Argentina*), or lost dividends (as was the case in *LG&E v. Argentina*). As a result, the Respondent contends that “[s]hareholder damages are limited to losses suffered by the shareholder himself, such as any losses in the value of his shares or lost dividends” (R-PHB, ¶¶ 343-345).

1197. Citing *Nykomb v. Latvia*[252] and *Gemplus and Talsud v. Mexico*,[253] the Respondent argues that “[u]nder principles of company law common to virtually all jurisdictions, it

[248] *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 (hereinafter *“Vivendi v. Argentina II”* or *“Vivendi II”*), ¶. 8.3.20).

[249] *AAPL v. Sri Lanka*, ¶ 95.

[250] *Eastern Sugar v. Czech Republic*, ¶ 358.

[251] *Vivendi v. Argentina II*, ¶¶ 8.3.12-8.3.19.

[252] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC Case No 118/2001, Award, 16 December 2003 (hereinafter *“Nykomb v. Latvia” or “Nykomb”*), p 39. (“The Respondent has argued, and the Arbitral Tribunal must agree, that the reduced flow of income into Windau obviously does not cause an identical loss for Nykomb as an investor. […] [I]t is clear that the higher payments for electric power would not have flowed fully and directly through to Nykomb. The money would have

cannot be assumed that the harm suffered by even a 100% shareholder equates to the harm suffered by a corporation" (R-PHB, ¶¶ 343-348; R-SPHB, ¶¶ 57-58). The Respondent submits in this respect that "[t]his approach is clearly correct. As noted by the *Nykomb* tribunal, a number of deductions may be made to a company's income before it can be distributed to shareholders as dividends. To ignore this is to be blind to the legal and economic reality of equity ownership" (R-PHB, ¶ 346).

1198. In response to the Respondent's arguments, the Claimants submit, relying on scholarly writings by Ripinsky and Williams, that "two factors appear to be determinative of whether a shareholder can claim directly the losses of the underlying business or whether a shareholder is restricted to its flow-through damages […] first the provisions of the relevant BIT; and second, whether the shareholders hold a majority or a minority interest" (Tr., Day 12, 95 (Reed)). With respect to the first factor, a BIT's definition of investment will determine whether the protection to a shareholder extends only to its direct investments or also to its indirect investments. The Claimants argue that, if the definition of investment extends to a shareholder's indirect investments (as is the case here), then shareholders would be entitled to claim for harm to the assets of the underlying company. With respect to the second factor, the Claimants contend that it would be all the more appropriate to treat the underlying business unit as the protected investment when the shareholder owns a majority interest in the underlying company. In this regard, citing Ripinsky and Williams, they submit that "[i]f the business unit in its entirety is considered to be the claimant's protected investment, then all of the damages caused to the business must be assumed to flow to the shareholder as the owner of the business, or part thereof, directly without distortion" (Tr., Day 12, 102 (Reed)).[254]

1199. The Claimants argue that both of these factors were present in the cases cited by the Claimants where tribunals awarded the parent company the damages suffered by the subsidiary (*Azurix v. Argentina, Vivendi II, Eastern Sugar v. Czech Republic*). By contrast, in all of the cases cited by the Respondent except one, at least one of the factors was missing. Specifically, in *AAPL v. Sri Lanka*, the relevant BIT did not

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been subject to Latvian taxes etc., would have been used to cover Windau's costs and down payments on Windau's loans etc., and disbursements to the shareholder would be subject to restrictions in Latvian company law on payment of dividends. An assessment of the Claimant's loss on or damage to its investment based directly on the reduced income flow into Windau is unfounded and must be rejected.")

[253] *Gemplus and Talsud v. Mexico*, ¶ 12-50 ("The Claimants' claims for compensation derive only from their status as investors with investments in the form of their respective minority shareholdings in the Concessionaire, as distinct from any claim by the Concessionaire itself. Perhaps inevitably, the Parties' submissions occasionally elided this important distinction, effectively treating the valuation of the Concessionaire's future profits (if any) as the relevant exercise for the assessment of compensation due to the Claimants. The exercise required of this Tribunal is, in contrast, the valuation of the Claimants' lost investments in the form of their shares in the Concessionaire and not, as such, the lost profits incurred by the Concessionaire under the Concession Agreement. The latter are not, of course, irrelevant; but they are not directly relevant as if the Claimants' claims were made by the Concessionaire itself.")

[254] The Claimants do not provide a citation for this, but the Tribunal notes that the text roughly corresponds to S. Ripinsky & K. Williams, Damages in International Investment Law (2008), pp. 149-150.

protect indirect investments of shareholders and the claimant was a minority shareholder, while in *Gemplus and Talsud* the claimants were minority shareholders (Tr., Day 12, 99-103 (Reed)).

1200. The Claimants concede that *Nykomb v. Latvia*, cited by the Respondent, does not conform to Ripinsky's and Williams' theory. However, they submit that there is a third factor that should be considered, namely "whether the company in which the shareholder holds the shares was specifically set up for the purposes of carrying out the investment, and that is therefore whether the local entity is simply a vehicle for the investment, an investment vehicle" (Tr., Day 12, 105 (Reed)). The Claimants point out that Nykomb had not incorporated the local entity, but had acquired the shares at a subsequent point in time, when the dispute had already arisen, and submit that these circumstances could have been a factor that led the tribunal to limit Nykomb's recovery to the value of its shares.

1201. In view of the foregoing, the Claimants submit that all of the cases cited by the Parties "can be reconciled with the following proposition: that where a foreign investors [sic] incorporates an entity in the host state for the purposes of making an investment in the host state, and where the investor owns 100% interest or at least a majority interest in the entity thus created and controls it, and where the investment treaty protects both the investor's indirect and direct interests, the local entity can properly be viewed as a conduit or investment vehicle and the investor's protected interest is in the underlying business and assets carried out through the investment vehicle, such that the investor is entitled to claim the local entity's losses as its own" (Tr., Day 12, 107-108 (Reed)). The Tribunal understands that the Claimants' position is that this is the case here: (i) Article 1(1) of the BIT does not limit its protection to the Individual Claimants' direct investments (their shares), but extends to their indirect interest in the underlying EFDG companies; (ii) the Individual Claimants own virtually 100% of the shares of the EFDG, and (iii) the Corporate Claimants were created as investment vehicles.

1202. Despite these arguments, the Respondent contends that most of the cases cited by the Claimants do not support the right of shareholders to compensation for the profits lost by the underlying business of their company. For example, in *Siemens* the Tribunal refused to award damages to the shareholder for its subsidiary's lost profits; it only awarded Siemens the book value of the subsidiary itself. Similarly, it argues that claims for lost profits were rejected in *Vivendi II* and *Azurix v. Argentina* (Tr., Day 13, 249 (Rubins))

1203. The Respondent further contends that, "as the present case shows, it would be fundamentally unjust to ignore the fact that shareholders are last in line for corporate assets. Those assets cannot go to shareholders if that means creditors cannot be paid in full" (R-PHB, ¶ 346). More specifically, the Respondent argues:

a. "This is part of the basic bargain investors make when they choose to conduct business through corporations rather than in their own names. […] The Individual Claimants […] chose to run their food and drinks business through a complex network of corporations because it was advantageous to do so. They cannot now ignore the facts that the Corporate Claimants have separate legal personality; that the Individual Claimants do not own the corporations' assets; or that the corporations' creditors—including the state, through its undisputed entitlement to overdue tax payments—have the first claim on those assets, if (as the Claimants contend) the Corporate Claimants are incapable of paying their debts" (R-PHB, ¶ 347).

b. "[O]ne of the most obvious scenarios in which harm to a corporation causes no compensable harm to shareholders is when the corporation cannot pay its debts, so that the shares have no value in any event. This highlights an important reason for not diverting to the Individual Claimants damages actually suffered by the Corporate Claimants: the risk of a fraudulent conveyance" (R-PHB, ¶ 348). Indeed, the Respondent argues the Claimants "acknowledge that the very reason they have suddenly requested that all damages go to the Individual Claimants is to avoid paying the Corporate Claimants' tax obligations" (*Id.*).[255]

1204. In response to questions from the Tribunal regarding the protection of the Corporate Claimants' creditors (including Romania) in the case of an award to the Individual Claimants,[256] the Claimants stated in their oral closing arguments:

> [T]hose points are kind of answered in allowing shareholders to bring these kind of claims. And the reason for that in investment law is they are the real parties in interest in these matters, and creditors, including state creditors, cannot think that they have a claim to these kinds of losses because they know that shareholders have their own rights in international law. So a creditor or the taxman has no expectation that they can recover these taxes or whatever on the basis of amounts to be awarded in an ICSID arbitration.
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> […]
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> With respect to the position of the [C]orporate [C]laimants and their creditors and employees if the Tribunal were to make an award to the shareholders, […] in our view strictly as a legal matter, the answer is that the BIT protects foreign investors and breaches of the foreign investors' rights entitled them to compensation, and the foreign investors are the real parties in interest, as has been decided in a number of cases. The fate of the investment vehicle doesn't come into the balance, strictly legally speaking, in our submission.

[255] The Respondent cites a letter from King and Spalding dated 15 April 2011 (Exh. R-242), in which the Corporate Claimants state that they "certainly have no intention of avoiding their liabilities to commercial creditors, in respect of whom they are not in default." The Respondent concludes that "they apparently do intend to avoid their liability for taxes that they admit are overdue" (R-PHB, ¶ 348).

[256] Specifically, Dr. Alexandrov asked counsel for Claimants: "If the Tribunal decides to follow your suggestion and order payment to the two individual claimants, wouldn't the Tribunal expose respondent to a situation where respondent would not be able to collect principal due that is not disputed? […] [A]ssuming we agree with your legal proposition that the two individual claimants are entitled to the damages of the group, and that the damages should be paid to them, if there are any damages of course, the question then is […] if the Tribunal wants to protect Romania and make sure that Romania collects the debt that is owed by the corporate claimants, how do we reconcile that with the legal proposition that you are advancing that the shareholders are entitled to be paid the amount of damages?" (Tr., Day 12, 132-134).

> As a more pragmatic matter it seems to us that if you were to make the award that we urge, then my client -- Johnny Micula would have an award, and an award is not money. There would be a negotiation with the state and with the banks. Probably the banks would have to take a bit of a haircut because these are basically more or less sound businesses but crippled by debt. If the debt were relieved, things might be better. The state might have to do something as well.
>
> We see it more as an issue that arises after an award rather than in arriving at the award, as a strict matter. I suppose if the parties can't agree, it is of course plausible that the companies will go into bankruptcy. That doesn't actually mean that people will lose jobs because the businesses will presumably be sold, new investors will be found, they won't have to carry those debts; they will remain with the bankrupt entities. The banks will presumably lose money if the assets aren't sufficient to cover all the debts. We think that's the proper view.
>
> With that said, it does follow from some of the points that Professor Alexandrov made that you may be in a position to make a distinction between damages owed to the individual shareholders in their own right, and notably in relation to the investments of the companies that are not the corporate claimants, you may be able to take a view on the damages owed to the corporate claimants. So whilst we think that is possible, we don't actually think that is the right approach.
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> (Tr., Day 12, 133-140 (Reed))

1205. In its closing statement, the Respondent strongly objected to the Claimants' comments in this respect. According to the Respondent, the Claimants' comments suggest that "international law gives equity holders a right to take for themselves what may be their company's largest asset, a claim against the state, and creditors be damned", which is a result that would be "contrary to basic corporate law" and could not be expected either by the Corporate Claimants' creditors or their employees (Tr., Day 13, 253 (Rubins)). Instead, the Respondent reiterates that "the assets of a company, which includes all receivables, do not belong to the shareholders. The [C]orporate [C]laimants have obligations to third parties that rank higher in priority than dividends payments to shareholders: they need to pay corporate creditors, they need to pay their employees' salaries and they need to pay Romania for the undisputed taxes they owe. These are all ahead of them in line." (Tr., Day 13, 252 (Rubins)).

1206. The Respondent further criticized the Claimants' suggestion that an award of damages would be followed by a negotiation with the Romanian State and other creditors, arguing that the Claimants' position appeared to be that "international law gives shareholders a stick with which to beat their creditors" and that it allows them to "empty the company of its assets under the guise of a BIT and then strike a deal the banks and the state can't refuse because they are holding all the cards" (Tr., Day 13, 254 (Rubins)).

b. Is it possible for the Individual Claimants to be designated as the sole or principal claimants at this stage of the proceedings?

1207. The Claimants submit that "[i]t is possible as a matter of both procedure and the merits for the Individual Claimants to be designated as the sole or principal claimants at this stage of the proceedings" (C-PHB, ¶¶ 239-243).

1208. The Claimants first argue that, as "the Individual Claimants could have brought their claims independently without the participation of the Corporate Claimants in the first instance […] there is no legal basis why the Individual Claimants cannot become the sole or principal claimants at this stage" (C-PHB, ¶ 241). The Claimants rely on *Suez v. Argentina*, where the tribunal allowed the proceedings brought by the local company to be discontinued at the jurisdictional stage, noting that this discontinuance "[…] does not affect the rights of the Shareholder Claimants to bring a claim in ICSID arbitration under the two BITs in question. The Claimant Shareholders would have had a right to bring such claims independently without the participation of the [local company] in first instance."[257] Although the Claimants acknowledge that in this case no discontinuance is being sought, and the Claimants' request for damages to be awarded to the Individual Claimants was made at the merits stage rather than at the jurisdictional stage, they argue that the tribunal's reasoning in *Suez v. Argentina* is equally applicable to the present case.

1209. In addition, the Claimants assert that "the claims for monetary damages in this case have always related to the financial losses suffered by the individual shareholders. The Corporate Claimants were primarily included as Claimants five years ago as a result of the original alternative claim for restitution of the EGO 24 regime. Unlike monetary damages, which have consistently been awarded to shareholder claimants in BIT practice, restitution of a legal framework – essentially an order for specific performance – could only be awarded to the Corporate Claimants. Regardless, that claim for restitution was dropped at the beginning of the merits phase of this case. There has never been any question that this case involved claims for monetary damages, that the Micula brothers owned nearly 100% of the companies comprising the European Food and Drinks Companies, or that the brothers, as shareholders, were the Claimants who ultimately suffered the losses at issue in this dispute" (C-PHB, ¶ 242).

1210. In light of the case law cited in the preceding section, the Claimants contend that awarding damages to the Individual Claimants is lawful under international law:

a. The Claimants emphasize that the investment vehicle in *Suez v. Argentina* was entitled to lawfully withdraw its claim, leaving only the shareholders as claimants. Similarly, the Claimants argue that "as a matter of principle, it must be that in every case where both the shareholders and the local investment vehicle could have brought proceedings but only the shareholders did, the local investment

[257] *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction, 16 May 2006 (hereinafter *"Suez v. Argentina"*), ¶ 51.

vehicle 'waived' its rights to an award." In addition, they contend that "had the Individual Claimants commenced these proceedings alone, this issue would likely never have arisen. Consequently, this is a non-issue about which the Tribunal need not concern itself further" (C-PHB, ¶¶ 244-245).

b. The Claimants further submit that "[t]he approach in international investment law is to award damages to the foreign investor, not to the investment vehicle incorporated in the host state." According to the Claimants, "[t]here are sound policy reasons for this approach", as the contrary "would entirely undermine the protections afforded by investment treaties if states could breach their obligations to foreign investors, impose draconian penalties on the local investment vehicle and then demand that tribunals make payments only to the local investment vehicle on the basis that otherwise the investment vehicle will get away with not paying taxes and penalties (that it should never have incurred)" (C-PHB, ¶ 246).

1211. The Claimants further submit that awarding damages to the Individual Claimants is lawful under Romanian law (although they clarify that, in their view, Romanian law is irrelevant to this issue and the Tribunal should award damages in accordance with international law). Specifically, the Claimants argue that:

a. Pursuant to the "principle of availability", Romanian law recognizes the right of legal persons to exercise their civil rights as they see fit. According to the Claimants, this principle allows legal persons to determine whether or not they wish to commence legal proceedings, what claims or defenses to make in such proceedings, whether to discontinue or settle such proceedings, and whether to appeal or enforce any decision. The Claimants further submit that this principle gives to legal persons the right to agree that any damages award to which they are entitled be granted to other co-claimants with the same entitlement to such an award. Thus, pursuant to this principle the Corporate Claimants would be entitled to "waive" any rights they have to the award (C-PHB, ¶ 249). In support of this contention, the Claimants cite article 129(6) of the Romanian Procedural Civil Code, which provides that "[i]n all cases, the judges shall decide only regarding the request's object in dispute." According to the Claimants, "[a]s it is applied, that provision supports the Claimants' contention that they can decide amongst themselves how the Tribunal is to award their damages. There is no requirement that the Corporate Claimants formally waive their claims in order to apply that principle" (C-PHB, fn. 364).

b. In addition, the Claimants submit that nothing in the Romanian Commercial Code or laws regulating companies, including Law 31/1990, would prevent the Corporate Claimants from assigning their rights to the award to the Individual Claimants (C-PHB, ¶ 250).

1212. By contrast, the Respondent submits that the Individual Claimants cannot be designated as sole or principal claimants at this stage without Romania's consent or without complying with certain legal requirements (R-PHB, ¶¶ 335-338, R-SPHB, ¶¶ 59-64).

1213. The Respondent contends that, if the Individual Claimants were designated as sole Claimants at this late stage with the consent of the Corporate Claimants, that would constitute an abandonment of the Corporate Claimants' claims that would amount to a partial discontinuance of the proceeding. In that case, the Respondent argues that it would be entitled to an award with *res judicata* effect against the Corporate Claimants. The Respondent explains that the Corporate Claimants cannot discontinue the proceeding without Romania's consent under Rule 44 of the ICSID Arbitration Rules, and that Romania will not consent to any resolution that would permit the Corporate Claimants later to revive claims or requested relief that they have pursued (or could have pursued) in this proceeding, or without compensation for wasted costs.

1214. Romania further contends that the Claimants' reliance on *Suez v. Argentina* is inapposite, because in that case the local company's claims were withdrawn without objection by the Respondent. Here Romania has objected expressly: "apart from the substantive unfairness to the Corporate Claimants' creditors, including Romania, of the proposed waiver, a respondent that has been made to defend proceedings for five years has a legitimate interest in both an award with *res judicata* effect and reimbursement of its wasted costs as conditions of a discontinuance" (R-SPHB, ¶ 61).

1215. According to Romania, Romanian substantive and procedural law lead to the same conclusion. Citing Romanian case law, the Respondent submits that "[a] court need not accept a claimant's withdrawal of claims over the respondent's objection; but if the court does accept the withdrawal, it must render a judgment extinguishing the underlying right and determining the costs consequences of the claimant's waiver"[258] (R-SPHB, ¶ 61).

1216. The Respondent adds that, in any event, Romanian civil and company laws prohibit any action, including renunciation of claims, that could violate the rights of third parties, including removing assets from a company's patrimony to the detriment of creditors.[259] Given the value of the Corporate Claimants' damages claims and the Claimants' assertion that the Corporate Claimants have zero equity value and cannot pay their overdue debts, the Respondent argues that relinquishing those claims would prejudice the rights of creditors. The Respondent notes that Romanian law permits an interested party, such as a creditor, to move to nullify the waiver.[260] Romania, which is a substantial creditor, opposes the waiver, but notes that the other creditors of the Corporate Claimants may have no knowledge of a proposed waiver (R-SPHB, ¶ 62).

1217. Even if the Corporate Claimants were to waive their own damages claims, the Respondent argues that that would not be equivalent to assigning those claims to the Individual Claimants (R-PHB, ¶ 336). Only by assignment, and not by waiver, could

[258] The Respondent cites Civil Decision 28/30 January 2008, Constanta Court of Appeal, Civil Section; High Court of Justice and Appeal of Romania Decision 3519/26 November, 2008; Romanian Civil Procedure Code, Article 247(1).

[259] The Respondent cites Law 31/1990, Article 237(3), Article 237(4), and Article 272 (1)(2).

[260] The Respondent cites the Romanian Civil Code, Title III, Chapter III, Section II, Article 975.

the Individual Claimants receive compensation for harm to the Corporate Claimants. However, the Respondent argues that "Romanian law does not permit a debtor to give away an asset, receiving no payment in return, if that may frustrate creditors' ability to recover what they are owed. When the debtor is a corporation or limited liability company, the conditions are stricter, as such entities can only rarely make gratuitous transfers (particularly to their own shareholders). To effect an assignment, the Corporate Claimants and Individual Claimants would need to enter into an assignment agreement, on an arm's length basis – in other words, in which the Individual Claimants paid market value for the assignment. Procedurally, the assignment would have to be validly approved by a general meeting of shareholders, and it would have to be publicised in a manner set out by Romanian law if it were to have any effect against third parties – including, again, the Corporate Claimants' creditors who are not represented here" (R-SPHB, ¶ 63).[261] Here, the Respondent points out that the Corporate Claimants have not assigned their claims to the Individual Claimants, and it is highly unlikely that such an assignment could be made without violating Romanian civil and criminal law (R-SPHB, ¶¶ 63-64).

1218. Without an assignment of the Corporate Claimants' claims, the Respondent contends that the Individual Claimants cannot receive compensation that they have not proven to be their own. As explained in the previous section, the Respondent submits that, if liability is proven, each Claimant would be entitled to compensation for harm to his or its own investment, and damage to the Corporate Claimants' assets cannot be equated with damage to the Individual Claimants' shares in the Corporate Claimants. As a result, the Claimants cannot properly ask the Tribunal to award to the Individual Claimants damages that would have been awarded to the Corporate Claimants had they not stepped aside. Thus, the request for "all damages" to be paid to the Individual Claimants cannot entitle them to anything more than compensation for losses they have suffered (R-PHB, ¶¶ 336-337).

1219. The Respondent contends that, "[f]or the same reason, it is irrelevant that the Individual Claimants could have chosen to bring a case by themselves, without joining the Corporate Claimants. Had they done so, they would have been entitled (assuming liability) only to damages they had suffered. […] Whether the Corporate Claimants withdraw now, had never been in the case, or continue to pursue their own damages claims, the Individual Claimants would not be entitled to receive compensation that they have not proven to be their own" (R-PHB, ¶ 338).

c. The impact of the Claimants' requested allocation on the factual or legal bases for the claimed damages or their quantification

1220. The Claimants contend that "[a]warding damages to the Individual Claimants alone does not have any consequences with respect to the factual or legal basis for the claimed damages or the quantification of those damages" (C-PHB, ¶¶ 251-254). The Claimants assert that the Individual Claimants own (directly or indirectly) virtually all of the shares in each of the companies of the EFDG. As a result, had the Individual

[261] The Respondent cites Law 99/1999, Title VI, Chapter 1, Article 2(a) and Chapter 3, Article 29, as well as Articles 1391 *et seq*. of the Romanian Civil Code.

Claimants commenced these proceedings on their own, as the Claimants argue that they were entitled to do, they could have claimed and been entitled to all of the damages being sought in these proceedings.

1221. By contrast, the Respondent argues that the Individual Claimants are not entitled to any damages, because they have not proven the quantum of any loss. Indeed, the Respondent contends that there is no factual basis for any award of damages to the Individual Claimants, whether or not the Corporate Claimants stay in the case, because the Claimants have not assessed the damages incurred by the Individual Claimants, whether as shareholders of the Corporate Claimants or in any other capacity. The Respondent also argues that the Claimants have not justified their request for a different damages allocation, and that this request at such a late stage constitutes a change of position that should be taken into consideration when determining costs (R-PHB, ¶¶ 332-350, R-SPHB, ¶¶ 53-65).

1222. The Respondent contends that, because they have not proved damages that they themselves have suffered (*i.e.*, the diminution in value of their shares), the Individual Claimants should receive nothing. The Respondent adds that "[t]his is the Individual Claimants' burden of proof, and they have not even attempted to quantify the loss in value of their shareholdings in the Corporate Claimants. The Claimants have consistently declined to instruct one of their many quantum experts to carry out such a valuation. It would be fundamentally improper, and improper to Romania, to excuse this willful failure of proof and guess at a damages figure for the Individual Claimants, which is the only basis on which any damages could be awarded to them" (R-SPHB, ¶ 65).

1223. Contrary to the Respondent's contentions, the Claimants argue that there is significant evidence in the record showing that the Individual Claimants have suffered harm as a result of the Respondent's unlawful actions (C-PHB, ¶¶ 255-257):

a. According to Mr. Osborne's calculations, in 2001 the EFDG had retained earnings of €152 million. The Claimants argue that this means that the EFDG companies could have paid to their shareholders (the Individual Claimants) €152 million at that time. The Claimants further assert that today the EFDG's retained earnings are gone and as such, the Micula brothers, as shareholders, have lost at least that €152 million (less the €17 million worth of dividends paid in the interim period) (First ER of C. Osborne, ¶¶ 3.27-3.30).

b. In his reliance damages analysis, Mr. Osborne valued the Claimants' pre-EGO 24 businesses at €400 million.[262] According to the Claimants, had the Individual Claimants sold their businesses at that time for that price, the Individual Claimants, in their capacity as shareholders, would likely have received the vast majority of this sale. Also relying on Mr. Osborne, the Claimants contend that, if

[262] As noted in paragraph 886 above, the Tribunal understands that the Claimants' final prayer on the basis of Mr. Osborne's reliance damages analysis is RON 811 million, not €400 million. That being said, as the Tribunal is not awarding any damages for this head of claim it is unnecessary to determine whether the Claimants could have augmented this claim.

the Miculas were to sell their businesses today, they would likely recover not a single lei. The Claimants argue that Mr. Ellison agreed that the value of the shares prior to the revocation could have been as high as €350 million and that the current value of the shares is likely to be nil or virtually nil (Tr., Day 12, 109-110 (Reed); Tr., Day 10, 36-37 (Osborne)).

c. The Individual Claimants have suffered losses even from an expectation damages perspective. The Claimants argue that, "[h]ad the Claimants been able to make additional sales, due to the advantages of the Raw Materials Incentive (including an ability to sell their products at lower relative prices than their competitors to take advantage of the SCP opportunity) and by being able to complete the Incremental Investments (again by being able to take advantage of the incentives), the Claimants' businesses would have been more profitable, which would likely have led to increased dividends to the shareholders and/or the Individual Claimants being able to sell the businesses for a considerable profit.

1224. With respect to the impact of their requested allocation on the quantum of damages, in their closing statements the Claimants made the following comments (Tr., Day 12, 108-112 (Reed)):

a. "If the Tribunal considers that the Micula brothers' protected investments in Romania include the underlying business assets, then no separate damages calculation is required: all the damages should be awarded to the brothers as 50/50 shareholders. There's no need for the [C]orporate [C]laimants to withdraw from the case or to waive any claim, and the award would be binding upon them." (Tr., Day 12, 108-109 (Reed)).

b. In the Claimants' submission, the question of flow-through damages only arises if the Tribunal takes the view that only the Individual Claimants' shares constitute protected investments. In this case, their damages would be limited to the impact on the shares themselves, in particular to the loss of value of those shares. The Claimants argue that this loss of share value has been calculated by Mr. Osborne in his reliance damages analysis.[263] As explained in the paragraph 1223.b above, the Claimants submit that, based on this analysis, the loss of value of the Individual Claimants' shares is €400 million.

c. If, as in *Nykomb*, the Tribunal were inclined to take a stricter approach, and was inclined to limit the damages to the shareholders to amounts that would have been available to distribute as dividends, the Claimants submit that the Tribunal would still be able to establish quantum in this case. The Claimants argue that the Individual Claimants would have been entitled to take as dividends all of the retained earnings built up in the EFDG companies over the preceding years. The Claimants assert that the retained earnings of the EFDG companies over the years 1999-2004 amount to €173 million, a number that is not controversial as it

[263] The Claimants refute the Respondent's suggestion that they did not instruct any of their experts to carry out an evaluation of the loss of value of the shares of the Individual Claimants in the EFDG: they argue that this evaluation was carried out by Mr. Osborne in his reliance damages analysis.

is taken directly from the accounts and does not require computation. The Claimants argue that, because these amounts were earnings available for distribution as dividends, they take into account all of the creditors (Tr., Day 12, 110-111 (Reed)). The Claimants further contend that, under the *Nykomb* approach, the Individual Claimants would have been entitled to a proportion of the EFDG companies' future income (*i.e.* the Claimants' claims for expectation losses). The *Nykomb* tribunal assessed that the shareholders were entitled to one-third of the underlying company's losses, but the Claimants submit that under normal circumstances a higher proportion would be appropriate (Tr., Day 12, 110-112 (Reed)).

1225. In turn, the Respondent denies that the Individual Claimants' loss of shareholder value can be quantified on the basis of Mr. Osborne's reliance losses analysis:

a. The Respondent acknowledges that Mr. Osborne attempted to quantify the EFDG shareholder equity prior to the revocation by comparing EFDG to other publicly traded companies in the same line of business. However, the Respondent contends that the valuation date chosen by Mr. Osborne (2001) is not a proper valuation date because it is neither the date of the breach nor the date of the award. Rather, the Respondent argues that Mr. Osborne chose 2001 because it is the date of EFDG's financial peak, the "year just before the straight-line drop" in the financials, "so it's helpful to come up with a big number" (Tr., Day 13, 250 (Rubins)).

b. The Respondent also denies that Mr. Ellison confirmed a nil value for the EFDG today. The Respondent asserts that Mr. Ellison said that the value could be nil, but as he had not seen any audited financial statements for the EFDG since 2006, "he could say nothing about the state of EFDG's business today, and [the Tribunal] can't know because of the absence of documentation" (Tr., Day 13, 250 (Rubins)). Indeed, the Respondent asserts that, in their closing statements, the Claimants stated that the EFDG's business had been improving in 2009[264] and that this was also confirmed by a better EBITDA in the financials (Tr., Day 13, 250-251 (Rubins)).

c. The Respondent also notes that, according to Mr. Ellison, there was substantial shareholder equity in the business according to the 2009 draft financial statements, which suggests substantial remaining value for the Micula brothers. Specifically, the Respondent states that "[a]ccording to the draft 2009 accounts, shareholder equity was RON 461.7 million; […] €109 million roughly. So by assuming a zero value today, which is what Mr. Osborne does, he was asking you to ignore that €109 million are there, and the claimants would be likely to access that money on liquidation" (Tr., Day 13, 252 (Rubins)).

[264] The Respondent notes that, in their closing statements, the Claimants admitted that "on operating profits the company has actually performed better in 2009 than in 2008, although not well enough to meet their debt repayment obligations" (Tr., Day 12, 119 (Reed), and that "[t]hese are basically more or less sound businesses but crippled by debt. If the debt were relieved, things might be better" (Tr., Day 12, 139 (Reed)).

1226. Instead, the Respondent argues that the proper way to value the Individual Claimants' losses would have been "to perform a DCF valuation of the claimants' business as it was just before repeal and as it would have been with the €8 million per year in facilities through 2009", because this would have allowed the Tribunal to isolate the effect of the revocation. The Respondent "infer[s] that the result of such conventional modelling would have revealed the limited direct impact on equity value" (Tr., Day 13, 251-252 (Rubins)).

1227. The Respondent concludes that, "[o]n this record, the only damages that have been quantified are damages allegedly incurred by EFDG companies, not all of which are claimants. The Tribunal should ensure that only damages proven to have been incurred by each Corporate Claimant are awarded to the specific Corporate Claimant that incurred them. […] [D]amages allegedly incurred by other entities cannot be recovered by any of the Claimants" (R-PHB, ¶ 350).

1228. In response to questions from the Tribunal, the Claimants clarified that, if the Tribunal were inclined to award damages to all five Claimants, the damages suffered by the Individual Claimants may not be coextensive with those suffered by the Corporate Claimants:

a. With respect to the reliance losses claim, the Corporate Claimants could not make the same claim as the Individual Claimants, because the reliance loss is calculated on the loss of value to all companies of the EFDG (Tr., Day 12, 129 (Reed)), not all of which are claimants here. Possibly somewhat contradictorily, the Claimants have also argued that, should the Tribunal award reliance damages, it would be inappropriate to award these damages to the Corporate Claimants. This is because the reliance damages approach looks at the value lost from the pre-EGO 24 businesses as a result of investing in reliance on the incentives. As the Corporate Claimants were specifically created in order to receive the incentives, had the Individual Claimants not invested in reliance on the incentives, it is likely that the Corporate Claimants would have never been created and thus would have never incurred a reliance loss (C-PHB, ¶ 253).

b. For similar reasons, should the Tribunal award damages by looking at the fair market value of the investment immediately before the breach, the Claimants contend that such an award ought to be made to the Individual Claimants to compensate them for the loss in value of their business (C-PHB, ¶ 254).

c. With respect to expectation losses, counsel for the Claimants first stated that "they would not be coextensive if much of the loss was suffered outside of the three [C]orporate [C]laimants", but then clarified that "they may be more or less the same", depending on which company had suffered most of the damages, adding that in his understanding "most of the expectation damages would have been suffered by European Food" (Tr., Day 12, 129-130 (Reed)).

3. The Tribunal's analysis with respect to the requested allocation of damages

a. The Claimants' request that all damages be awarded to the Individual Claimants

1229. The Tribunal rejects, for procedural reasons, the Claimants' request that all damages be awarded to the Individual Claimants.

1230. Relying on *Suez v. Argentina*, the Claimants contend that, as "the Individual Claimants could have brought their claims independently without the participation of the Corporate Claimants in the first instance […] there is no legal basis why the Individual Claimants cannot become the sole or principal claimants at this stage" (C-PHB, ¶ 241).

1231. That the Individual Claimants could have brought claims on a stand-alone basis is not in dispute. However, the Tribunal disagrees with the consequences that the Claimants purport to derive from that observation. It is true that in *Suez v. Argentina* the tribunal, applying Rule 44 of the ICSID Arbitration Rules,[265] allowed the local company to withdraw its claim leaving only the shareholders as claimants.[266] However, the local company in that case elected to pursue a very different route than that followed by the Corporate Claimants in this case. First, the investment vehicle expressly withdrew its claim and sought a discontinuance of the proceeding. Second, upon Argentina's request, the local company supplied the minutes of their shareholders meeting authorizing that discontinuance. Third, having received those assurances, Argentina consented to the discontinuance.

1232. Here the situation is quite different. The Corporate Claimants have not requested the discontinuance of the proceedings with respect to their claims. Quite to the contrary, the Corporate Claimants are still seeking alternative relief in case the Tribunal decides not to grant all damages to the Individual Claimants. As a result, Rule 44 is simply not applicable to the situation at hand.

1233. Even if the Claimants' request could be interpreted as an implied request for a discontinuance with respect to the Corporate Claimants (*quod non*, because they have expressly stated that they are not seeking a discontinuance), the conditions set out by Rule 44 would not be satisfied because Romania has objected to such a discontinuance. Indeed, Romania has expressly stated that it will not consent to any resolution that would permit the Corporate Claimants to revive at a later date the claims or the relief that they have pursued (or could have pursued) in this proceeding, or without compensation for wasted costs.

[265] ICSID Arbitration Rule 44 provides: "If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue."

[266] *Suez v. Argentina*, ¶ 51.

1234. Rule 44 provides that if an objection is made, the "proceeding shall continue", regardless of the nature of the objection, or whether it is justified or not. In this case, moreover, Romania's objections are more than reasonable.

1235. As the Corporate Claimants have not discontinued their claims, it follows that they are not waiving their claims against Romania and, in fact, definitely maintain them in the event that the Tribunal should not make the award fully payable to the Individual Claimants. Moreover, there is nothing in the Claimants' submissions that could amount to a conditional waiver (that is, a waiver conditioned upon the Individual Claimants obtaining the requested relief). Even if the Corporate Claimants had indicated that they waived their claims against Romania, there is no evidence in the record establishing that such waiver would be valid, in particular under Romanian law (for instance, there are no shareholders' minutes or board resolutions from the Corporate Claimants or their shareholders authorizing such a waiver). In these circumstances, the Tribunal agrees with Romania that it is entitled to an award with *res judicata* effect against the Corporate Claimants.

1236. In the Tribunal's view, whether the Individual Claimants could have been entitled to bring this case independently, without the participation of the Corporate Claimants, is irrelevant. They did not choose to do so. The fact is that this arbitration was commenced and pursued by five Claimants, all of whom have requested relief to this Tribunal. The Corporate Claimants have sought the same relief as the Individual Claimants and have not withdrawn their claims. The Tribunal must thus decide the claims raised by the five Claimants and not only the claims raised by two of them.

1237. All five Claimants have requested monetary relief. The Tribunal having found liability, the Claimants' request to have all damages awarded to the Individual Claimants would thus deprive the Corporate Claimants of a right (credit or account payable) to the relief requested. This would amount to the Corporate Claimants suffering a loss in the amounts owed in favor of their shareholders, which is particularly serious considering that the Claimants allege that the Corporate Claimants are unable to pay their debts. The Corporate Claimants would have to give their valid consent to such a conveyance, for instance, through an assignment of their claims to the Individual Claimants, an assignment that would have to comply with the relevant provisions of Romanian law. There is no evidence in the record that they have done so. Thus, as things stand, the Tribunal cannot disregard the Corporate Claimants' requests for relief.

1238. For the reasons set out above, the Tribunal rejects the Claimants' request for all damages to be awarded to the Individual Claimants.

b. Allocation of damages to all five Claimants

1239. As previously explained, in calculating the total damages, the Tribunal has decided to follow the Claimants' primary damages methodology, which quantified expectation damages for the entire EFDG. The Tribunal has found that the Claimants have proven two groups of damages: (i) increased costs of raw materials (sugar, other raw materials other than PET, and the sugar stockpile) for a total of RON 120,733,229

(Section VII.C.2), and (ii) lost profits of RON 255,700,000 on the sale of finished goods (Section VII.C.3 above).

1240. The Tribunal still must consider whether, and how, the damages should be allocated among the five Claimants. The Tribunal has carefully considered the arguments of both sides. As discussed above, the Tribunal has concluded that (i) it cannot award the entirety of the damages to the Individual Claimants. For the reasons set out below, the Tribunal has also concluded that it cannot (ii) award the entirety of the damages to the Corporate Claimants; (iii) allocate the damages to each of the five Claimants; or (iv) without double counting, compensate the Corporate Claimants for the direct harm they suffered and compensate the Individual Claimants for the indirect harm they suffered. As a result, the Tribunal shall not allocate the damages but shall award the entirety of the damages to the five Claimants collectively.

1241. First, for the reasons set out in Section (a) above, the Tribunal cannot award the entirety of the damages to the Individual Claimants.

1242. Second, the Tribunal cannot award the entirety of the damages to the Corporate Claimants, for the simple reason that a portion of the damages are associated with *other* companies that the Individual Claimants own. The Corporate Claimants are not entitled to compensation for such damages.

1243. Third, in Method A, the Claimants' principal expectation damages scenario (which the Tribunal has chosen to follow for the reasons set out in Section VII.C.1 above), the Claimants have made no attempt to allocate the damages among the five Claimants other than to request that the total damages be split evenly between the Individual Claimants.[267] In addition, it is evident from the reports prepared by the Claimants' experts and from their oral testimony that, for each head of claim, they have quantified the losses for the entire EFDG, including damages suffered by the non-claimant companies.[268] While counsel for the Claimants asserted at the hearing on

[267] The Tribunal is aware that, at paragraph 258 of their Post-Hearing Brief, the Claimants stated that their secondary position was that "any 'reliance' damages, or damages calculated on the basis of the fair market value immediately before the alleged breach, awarded should be awarded to the Individual Claimants and any other damages should be awarded to all of the Claimants" (C-PHB, ¶ 258). However, the Claimants have not made a formal prayer for this relief. Even if this statement could be construed to be a prayer for relief, the Tribunal rejects it on the merits. First, the Tribunal has not awarded any reliance damages nor damages based on the fair market value of the Claimants' investments immediately before the breach. In addition to favoring the Claimants' expectations damages case (as discussed in Section VII.C.1 above), the Tribunal does not find that the record contains a reliable quantification of the fair market value of the Claimants' investments immediately before the breach. The Tribunal understands that Mr. Osborne's analysis of reliance losses does not attempt to quantify the fair market value of the Claimants' business before the breach, but rather the value of the Claimants' pre-EGO 24 business, that is, money they could have invested elsewhere if they had not invested in reliance on the incentives. Even if Mr. Osborne's quantification could be understood to be a proxy for the fair market value of the business before the breach, the Tribunal cannot accept it, as the valuation date chosen by Mr. Osborne (2001) predates the revocation by over three years. In any event, the Claimants have not demonstrated how these reliance damages would be compatible with other damages, nor provided sufficient support for the allocation requested.

[268] *See, e.g.,* First ER of D. Lessard, ¶¶ 72-73; Tr., Day 8, 118-121 (Lessard); First ER of C. Osborne, fn. 1 and Appendix 2 (definition of "Companies"); ER of R. Boulton, p. i (definition of "Companies"); Second ER of BCG, p. 2; Tr., Day 10, 88-89 (Osborne).

closing arguments that "most of the expectation damages would have been suffered by European Food" (Tr., Day 12, 130 (Reed)) and Prof. Lessard testified along the same lines during the merits hearing (Tr., Day 8, 118-121), neither the Claimants nor their experts have provided a figure for the damages suffered by each Claimant, or stated in what proportion these damages should be distributed. Nor does the record contain clear elements that would allow the Tribunal to carry out such an allocation. There is, therefore, no evidentiary basis for allocating the damages.

1244. The Respondent argues that the Claimants' failure to quantify damages for each Claimant is reason to deny the payment of some or all of the damages. According to the Respondent, "the only damages that have been quantified are damages allegedly incurred by EFDG companies, not all of which are claimants. The Tribunal should ensure that only damages proven to have been incurred by each Corporate Claimant are awarded to the specific Corporate Claimant that incurred them. […] [D]amages allegedly incurred by other entities cannot be recovered by any of the Claimants" (R-PHB, ¶ 350). The Respondent further argues that the Individual Claimants cannot be awarded damages suffered by the EFDG companies, because "damage to the Corporate Claimants' assets cannot be equated with damage to the Individual Claimants' shares in the Corporate Claimants" (R-PHB, ¶ 336). Instead, the Respondent submits that "[s]hareholder damages are limited to losses suffered by the shareholder himself, such as any losses in the value of his shares or lost dividends" (R-PHB, ¶ 344).

1245. The Tribunal has found that the Claimants have quantified the damage suffered by the entire EFDG, of which the Corporate Claimants are a part and of which the Individual Claimants own at least 99.96%. In the circumstances of this case, the Tribunal does not find that the Claimants' failure to specify and prove the exact quantum of damages suffered by each one of the five Claimants is sufficient reason to deny the payment of the damages that have been quantified. The Tribunal is satisfied that some or most of the damage was directly suffered by the Corporate Claimants, and that virtually all of the damage was indirectly suffered by the Individual Claimants. There is nothing inconsistent between those two conclusions. Indeed, while the Tribunal will not enter into the discussion of whether shareholder damages are equivalent to the damages suffered by the underlying company,[269] the Tribunal is satisfied that, given the size of the Individual Claimants' shareholding in the EFDG companies, the Individual Claimants indirectly suffered at least a large part, if not virtually all, of the damage suffered directly by the Corporate Claimants. Furthermore, the Tribunal has already found that, provided that the Individual Claimants can prove their ownership of the other companies in the EFDG and can prove that they have been affected in this regard by the Respondent's breaches of the BIT, they can claim for losses they have suffered indirectly through those companies (see Section VII.B.2 *supra*). The Tribunal has further found that the Individual Claimants have met that burden and are, therefore, entitled to damages suffered by the non-claimant EFDG entities as well. Having established that both the Corporate and Individual Claimants were harmed, the Tribunal is not comfortable with

[269] If the Tribunal had to address this matter, it would not do so unanimously.

declining to award damages to one group or the other simply because it lacks the information needed to allocate the damages among them.

1246. Fourth, on the current record, the Tribunal cannot separately award damages to the Corporate Claimants for their direct damages, and damages to the Individual Claimants for their indirect damages. In Method A, the Claimants have only quantified the direct damages suffered by the entire EFDG. The Tribunal has no basis to distinguish which part of those damages has been suffered directly by the Corporate Claimants, and which part has been suffered indirectly by the Individual Claimants as a result of their shareholdings in non-claimant companies of the EFDG. Nor can the Tribunal award the Corporate Claimants all of the direct damages quantified in Method A, and in addition award the Individual Claimants the reliance damages quantified in Method C.[270] To do so would result in double recovery.

1247. Given these constraints, the Tribunal concludes that the appropriate way forward is, as the Claimants suggest, to award any damages, interest and costs to all five Claimants collectively, without allocating the damages among them. The Tribunal believes that this conclusion is particularly appropriate given that neither party has actually prayed for a particular allocation of damages among the five Claimants. The Claimants have requested that all damages be awarded to the Individual Claimants or, alternatively, to all five Claimants. They have not proffered adequate evidence or legal arguments to support a particular allocation. The Respondent also has not sought any particular allocation, other than to oppose Claimants' request that damages be awarded to the Individual Claimants. This Award thus disposes of the total amount that Romania has to pay fully to discharge its obligations and does not deal with the specific entitlement of each Claimant individually.

1248. A tribunal should not pass judgment on what has not been claimed. In particular, if two or more claimants fail to request a specific allocation of damages and rather claim for common entitlement, there is no reason for a tribunal to determine which claimant is entitled to what, subject of course to counterclaims or defenses made by the respondent in this regard.

[270] In addition, the Tribunal has rejected Method C, for the reasons set out in Section C.1 and fn. 267 above.

VIII. INTEREST

A. INTRODUCTION

1249. Up until their Reply, the Claimants requested "post-award interest (until the date Romania pays in full) at the highest possible lawful rate" (C-Reply, ¶ 657). The Claimants further requested that this interest be compounded, arguing that compound interest is the generally accepted standard in international investment arbitrations (C-Reply, ¶¶ 657-658).

1250. However, in their Revised Request for Relief the Claimants requested "[a]n award of interest on the damages payable pursuant to paragraph 2 above calculated in the following manner:

> 3.1 For losses as described in paragraphs 2.1(a) to (c) above [i.e., increased cost of raw materials], interest compounded on a quarterly basis at a rate of 3 month ROBOR (Romanian Interbank Offer Rate) plus 5% from 1 March 2007 until the date of Romania's full and final satisfaction of the award.
>
> 3.2 For losses as described in paragraph 2.1(d) above [i.e., lost opportunity to stockpile sugar], interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 July 2010 until the date of Romania's full and final satisfaction of the award.
>
> 3.3 For penalties as described in paragraph 2.2A above [i.e., tax penalties already paid by the Claimants], interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 July 2007 until the date of Romania's full and final satisfaction of the award.
>
> 3.4 For losses as described in paragraph 2.3 above [i.e., lost profits on sales of finished goods], interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 May 2008 until the date of Romania's full and final satisfaction of the award.
>
> 3.5 For losses as described in paragraph 2.4 above [i.e., lost sales of SCPs to third parties], interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 March 2007 until the date of Romania's full and final satisfaction of the award.
>
> 3.6 For losses as described in paragraph 2.5 above [i.e., lost profits incurred due to the Claimants' inability to complete the Incremental Investments], interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 30 September 2009 until the date of Romania's full and final satisfaction of the award.
>
> 3.7 For losses as described in paragraph 2.6 above [i.e., the Claimants' alternative claim for lost sales on finished goods as calculated by BCG], interest compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 15 August 2007 until the date of Romania's full and final satisfaction of the award.
>
> 3.8 For the amounts lost by the Claimants as a result of investing in reliance on the Incentives as described in paragraph 2.7 above [i.e., the Claimants' alternative claim for reliance losses], interest to be

applied compounded on a quarterly basis at a rate of 3 month ROBOR plus 5% from 1 January 2002 until the date of Romania's full and final satisfaction of the award.

3.9 The ROBOR rate to be applied in relation to paragraphs 3.1 to 3.8 above is to be the average annual rate for each year or part thereof.

1251. The Respondent objected to the Claimants' specified interest claim, but in its Procedural Order of 6 April 2011, the Tribunal found that there had been "no detrimental reformulation of the Claimants' claim for interest" (P.O. of 6 April 2011, ¶ 3.2). The Tribunal does not see any good cause to change its view and, accordingly, will address the Claimants' request for interest as it was formulated in their Revised Request for Relief, to the extent that it refers to the heads of claim for which the Tribunal has decided to award damages.

B. THE CLAIMANTS' POSITION

1252. The Claimants request pre- and post-award interest at 3-month ROBOR plus 5%, compounded on a quarterly basis (Revised Request for Relief, ¶ 3; R-PHB, ¶ 261). The Claimants submit that this interest should be calculated from different starting dates depending on the head of claim, and run until the date of Romania's full and final satisfaction of the award (Revised Request for Relief, ¶ 3).

1253. With respect to their request that interest be compounded, the Claimants argue that compound interest is the generally accepted standard in international investment arbitrations. In this respect, the Claimants note that since 2000, 16 out of 17 BIT tribunals ruling on BIT cases have awarded compound interest[271] (C-Reply, ¶¶ 657-658).

1254. The Claimants submit that there are three reasons for awarding compound interest. First, the payment of compound interest "furthers the principle of full compensation because it aids in restoring the claimant to the position where it would have been had the respondent not committed the breach" (C-Reply, ¶ 662). They add that "[t]he role of interest is to compensate a claimant fully for the delay between the date of harm suffered and the award of damages. […] [I]nterest awarded on a compound basis more accurately reflects what the claimant would have been able to earn on the sums owed if they had been paid in a timely manner" (C-Reply, ¶ 663). Second, the Claimants argue that an award of compound interest "prevents unjust enrichment of the respondent by requiring it to pay compensation for the benefits received from using the money it wrongfully withheld" (*Id.*) Third, the Claimants argue that awarding

[271] The Claimants cite, inter alia, *Santa Elena v. Costa Rica*, ¶ 104; *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award, 8 December 2000 (hereinafter *"Wena Hotels v. Egypt"* or *"Wena"*), *Vivendi v. Argentina II*, ¶ 9.2.6; *LG&E v. Argentina*, Award, 25 July 2007, ¶ 103; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award, 12 April 2002, ¶ 174; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, 2 October 2006, ¶ 522; *Azurix v. Argentina*, ¶ 440, *PSEG v. Turkey*, ¶ 354; *Enron v. Argentina,* ¶¶ 451-52; *CMS v. Argentina*, ¶ 471; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt (*ICSID Case No. ARB/05/15), Award, 1 June 2009, ¶ 598.

simple interest generally fails to compensate claimants fully, because the claimant is in essence making interest-free loans to the respondent. This in turn creates an incentive for respondents to delay the proceedings because they are able to profit from the use of the claimant's money during the pendency of the arbitration (or enforcement proceedings) (C-Reply, ¶¶ 663-664). [272]

1255. With respect to the requested rate (ROBOR + 5%), the Claimants argue that this is the approximate rate at which they borrowed money during the relevant period. The Claimants acknowledge that the 5% above ROBOR is higher than that at which interest has been awarded in several other ICSID cases (which has tended to be 2% above LIBOR). However, the Claimants argue that in those cases the claimants were large, multinational companies, with greater access to funding, at lower rates, than the Claimants, who are not international companies and cannot borrow at only 2 points above the interbank offer rate. Thus, the Claimants argue that a higher rate is required in order to reflect the Claimants' higher actual borrowing costs and ensure that they are adequately compensated for the Respondent's breaches (C-PHB, ¶ 262).

1256. In the Claimants' view, the Respondent's objections to an interest rate based on ROBOR are unsustainable. They argue that "ROBOR is the rate at which banks lend to each other, that is set by the market and which accurately reflects Romania's underlying economic conditions. Therefore at times of high inflation, which occurred in Romania in the period relevant to this dispute, it is logical that ROBOR rose accordingly, including to 30% at one point. However, due to the manner in which ROBOR is calculated and applied, it cannot sensibly be contended that it is not an appropriate rate for the calculation of interest when a claimant borrows from Romanian banks and/or borrows in RON" (C-PHB, ¶ 263). The Claimants add that "in the period 2005 to date (which is the period relevant to the Claimants' expectation damages claim), the average (mean) 3 month ROBOR rate was only approximately 8.9%, which is considerably below the 30% rate which the Respondent would have the Tribunal believe was the norm. In fact, for extended periods since 2005 the 3 month ROBOR rate has been below 5%. Tellingly, as at 10 January 2011 (the date of Freshfields' letter objecting to the Detailed Request), the 3 month ROBOR rate was only 5.16%" (C-PHB, ¶ 264). Finally, the Claimants note that Romania has charged the Claimants a penalty interest on unpaid taxes "at a consistent annual rate of 36.5% (with an effective rate in excess of 40%)", arguing that "[i]f anything, the Claimants' use of ROBOR rates as the basis for their calculations is conservative when juxtaposed to the punitive, draconian interest rates imposed on the Claimants by the Respondent" (*Id.*).

1257. With respect to the date from which interest must be calculated on the damages awarded by the Tribunal, the Claimants argue that "each date is the approximate midpoint between the time the relevant loss or damage began to be incurred and the

[272] The Claimants cite Jeffrey Colón and Michael Knoll, Prejudgment Interest In International Arbitration, Vol. 4, Issue 6, TRANSNATIONAL DISPUTE MANAGEMENT 10 (Nov. 2007), and John Y. Gotanda, A Study of Interest, Villanova University School of Law Working Paper Series, Paper 83, at 4 (2007).

time when that loss or damage would have ceased to have been suffered" (C-Reply, ¶ 265). Specifically:

a. With respect to the claims for increased cost of sugar, PET and other raw materials, the Claimants claim interest calculated from 1 March 2007. This date is "approximately the midpoint between the time at which the Incentives were prematurely revoked (22 February 2005) and the time when the Incentives were due to come to an end (31 March 2009)" (C-Reply, ¶ 265(a)).

b. With respect to the claim for the lost opportunity to stockpile sugar in 2009, the Claimants request an award of interest calculated from 1 July 2010. According to the Claimants, this is "the approximate midpoint between the time when the sugar stockpile would have started being used (31 March 2009) and the time, based on Mr Osborne's calculations, when it would have all been used (31 August 2011)" (C-Reply, ¶ 265(b)).

c. With respect to their claim for lost profits on sales of finished goods, the Claimants claim interest from 1 May 2008, which is the approximate midpoint of the period for which Mr Boulton has calculated losses (1 January 2005 to 31 August 2011)" (C-Reply, ¶ 265(d)).

1258. According to the Claimants, "[t]he midpoint provides a sensible and practical date from which the Tribunal may make its calculations" (C-Reply, ¶ 266). It notes that this approach has been adopted by other tribunals, such as the tribunals in *PSEG v. Turkey* (where the tribunal chose the mean date of the seven year period during which the relevant expenses were incurred[273]), and *Nykomb v. Latvia* (where the tribunal awarded interest "from the mid point of the respective periods up to the time of the award"[274]).

C. THE RESPONDENT'S POSITION

1259. The Respondent argues that the Claimants' interest claim should be rejected with respect to the interest rate, compounding and date of calculation (R-PHB, ¶¶ 325-328).

1260. With respect to the interest rate, the Respondent contends that the rate requested by the Claimants (ROBOR + 5%) is far higher than that awarded by other investment arbitration tribunals, and could end up yielding a rate as high as 30%. The Respondent argues that this rate is at odds with the rates used by their own experts, noting that Mr. Osborne used EFDG's RON cost of debt for pre-award interest (about 11% according to Mr. Osborne, First Osborne Report, ¶ 4.10), whereas Professor Lessard applied ROBOR without any premium (First ER of D. Lessard, ¶ 111). The Respondent further argues that "the proposed rate is based on speculation as to what the Claimants' borrowing costs could be, rather than on their actual borrowing costs"

[273] *PSEG v. Turkey*, ¶¶ 349-351.
[274] *Nykomb v. Latvia*, p. 43.

(R-PHB, ¶ 326). According to the Respondent, the record on the EFDG's borrowing costs "reveals a rate of 5.88% for foreign currency and 10.75% for borrowings in RON" (EFDG combined financial statements for the year 2006, 31 December 2006, Exh. JMHE–8, p 27), which is consistent with Mr. Gamecho's testimony that the Claimants had access to financing at rates of less than 5.5% (Tr., Day 4, 54 (Gamecho)). The Respondent further contends that there is no justification for the 5% premium.

1261. The Respondent also objects to a rate based on ROBOR. It argues that the fact the Claimants' claims are made in RON does not mean that the Tribunal must use a RON-based interest rate for pre-award interest. The Respondent argues that the Claimants had substantial loans in Euros and purchased many of their imports in Euros. The Respondent contends that "the Claimants are subject to the inherent currency risks of their business", and thus "[i]t is not for Romania to subsidise that risk through payment of a higher interest rate. Therefore, only a pre-award interest rate that takes into account the fact that the Claimants can borrow in Euro would be appropriate" (R-PHB, ¶ 327).

1262. Further, the Respondent argues that any award of interest should be on a simple rather than compound basis. The Respondent relies on the Commentary to ILC Article 38, which states that "[t]he general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. […] [G]iven the present state of international law it cannot be said that an injured [party] has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation."[275] The Respondent also relies on *ADM v. Mexico*,[276] *Feldman v. Mexico*,[277] *Biloune v. Ghana*,[278] and *Occidental v. Ecuador*[279] (R-Rejoinder, ¶ 351, fn. 560).

1263. In view of the above, the Respondent submits that "the interest rate the Tribunal should apply for pre-award interest (the purpose of which is compensatory) is 3-month EURIBOR without any premium and on a simple basis" (R-PHB, ¶ 327). The Respondent further submits that "any post-award interest should be set a 3-month ROBOR, without any premium, and on a simple basis." The Respondent does not make entirely clear the reasons for the difference in approach between pre- and post-award interest, nor does it explain further or in more detail why it should be awarded on a simple basis.

1264. The Respondent further contends that the Claimants have manipulated the starting dates for the calculation of interest in order to maximize their claim. It argues that "[t]he selection of a mid-point date inflates the claim in this case in circumstances

[275] Commentary to ILC Article 38, ¶¶ 8-9.

[276] *Archer Daniels Midland Company and Tate & Lyle v United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007, ¶¶ 294-297.

[277] *Feldman v. Mexico*, ¶¶ 205, 206 and 211.

[278] *Biloune v. Ghana*, pp 230 and 231.

[279] *Occidental v. Ecuador*, ¶ 211.

where the largest of the Claimants' alleged losses occurred after this arbitrary point in time. For example, selecting a mid-point start date in respect of sugar purchases ignores the fact that most sugar purchases were actually made in later years" (R-PHB, ¶ 328). The Respondent adds that "it would not have been difficult for the Claimants to present interest calculations starting from the dates when losses were allegedly suffered", as Prof. Lessard did in his calculations (*Id.*).

D. THE TRIBUNAL'S ANALYSIS

1265. Having found a breach of the BIT, the Tribunal must ensure that the Claimants are restored to the position they would have been had the breach not occurred. This includes awarding interest on the sums that the Claimants would have had if the breach had not occurred in order to compensate for the cost of money until the full payment of the Award. The Respondent does not dispute the principle that interest must be awarded; rather, it objects to the rate, compounding and date of calculation proposed by the Claimants.

1. Simple versus compound interest

1266. The overwhelming trend among investment tribunals is to award compound rather than simple interest. The reason is that an award of damages (including interest) must place the claimant in the position it would have been had it never been injured. As noted by the *Wena* tribunal, "'almost all financing and investment vehicles involve compound interest. […] If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.'"[280] The Commentary to ILC Article 38, on which the Respondent relies to object to compound interest, does not reflect the recent tribunal practice, with which the Tribunal agrees.

1267. The Tribunal will thus award compound interest, at the rate determined below.

2. Rate

1268. The Claimants request the same treatment for both pre- and post-award interest (3-month ROBOR plus 5%, compounded on a quarterly basis), starting from different dates depending on the claim. The Respondent requests that (i) pre-award interest be granted at a rate of 3-month EURIBOR without any premium and on a simple basis, while (ii) post-award interest should be set at 3-month ROBOR, without any premium, also on a simple basis.

1269. As a preliminary matter, the Tribunal does not see why the cost of the deprivation of money (which interest compensates) should be different before and after the Award, and neither Party has convinced it otherwise. Both are awarded to compensate a party for the deprivation of the use of its funds. The Tribunal will thus award pre- and post-award interest at the same rate.

[280] *Wena Hotels v. Egypt,* ¶ 129 (citing John Y. Gotanda, Awarding Interest in International Arbitration, 90 Amer. J. Int'l L., 40, 61 (1996).

1270. The Tribunal agrees with the Claimants that the appropriate rate is that which would compensate them for their cost of borrowing money during the relevant period. In the Tribunal's view, the Corporate Claimants' cost of debt should be assessed on the basis of operations in RON: the Claimants are Romanian nationals with their principal place of business in Romania, and the fact that they could borrow in Euro does not detract that the currency in the place where they operate was and remains RON.

1271. The Respondent objects to using a ROBOR-based rate, arguing that at times it has risen as high as 30% (R-PHB, ¶ 325). It has not provided any sufficient evidence for this allegation, but the Claimants appear to accept that this in fact occurred at one point in time (C-PHB, ¶ 263). In turn, the Claimants argue that in the period 2005 to the date of their Post-Hearing Brief, the average (mean) 3-month ROBOR rate was approximately 8.9%. This allegation is similarly insufficiently supported. This lack of evidence on the actual ROBOR rates is, however, irrelevant: as the Claimants note, the ROBOR rate is the rate at which Romanian banks lend to each other, and commercial borrowing rates will usually thus be ROBOR plus a premium. It is thus highly likely that any borrowing by the Claimants in Romania between 2005 and the date of payment of the award would have been and will be subject to a ROBOR-based interest rate plus a premium. In any event, the rates reflected in the record (10.75% for RON-based operations for 2006, 13.8% for those operations in 2005, according to the Corporate Claimants' 2006 financials (Exh. JMHE–8, p. 27) and 11% according to Mr. Osborne (First ER of C. Osborne, ¶ 4.10)), are closer to the Claimants' allegation that the mean 3-month ROBOR rate during the relevant period was 8.9%, than to the 30% rate alleged by the Respondent. Accordingly, the Tribunal finds that a 3-month ROBOR plus a reasonable premium, compounded on a quarterly basis, is reasonable, 3-month ROBOR being computed at an average annual rate to be applied for each period of one year or part of a year.

1272. The question that remains is what premium is reasonable. The Claimants request 5% above the ROBOR rate. They argue that, because they are not international companies, they cannot borrow at only 2 points above the interbank offer rate (which is the premium that has been awarded by other investment tribunals). The Tribunal finds this argument persuasive: the Claimants probably would not have obtained better conditions. The Tribunal will thus award interest at 3-month ROBOR plus 5%, compounded on a quarterly basis.

3. Date of calculation

1273. Interest must be calculated from the date on which the loss was suffered. This is usually the day on which the breach occurs. This cannot be the case or, at least, is not easily practicable when the damage is suffered progressively after the date of the breach, as has happened here. After the revocation of the incentives became effective on 22 February 2005, the Claimants incurred their damages progressively: they progressively purchased raw materials at a higher price, thus progressively incurring higher costs, and they progressively lost profits that they could have earned on the sales of their own finished goods. With respect to the lost opportunity to stockpile sugar in 2009, because they were unable to stockpile sugar at that time, they progressively bought sugar at a higher price.

1274. Under the circumstances, the Tribunal finds that the midpoint approach proposed by the Claimants is appropriate. Despite the Respondent's arguments, it would have been difficult and next to impossible for the Claimants to point out to the exact date on which this damage was suffered, while at the same time, damage has definitely been proved to exist during that period. Indeed, a part of the damage may have been suffered every day since the revocation. The Tribunal also notes that this midpoint approach has been used by other investment tribunals.[281] And it does not seem that there exist circumstances in this arbitration that should detract as a matter of principle from this approach: for instance, the record does not point to a use of the stockpile that should not have been evenly spread over the months concerned (in which case the "midpoint approach" could lead to distortions).

1275. Finally, with respect to lost profits, the Tribunal is aware that, according to the Commentary to ILC Article 38, "[w]here a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery", because "[a] capital sum cannot be earning interest and notionally employed in earning profits at one and the same time" (Commentary to ILC Article 38, ¶ 11). However, the Commentary goes on to say that "interest may be due on the profits which would have been earned but which have been withheld from the original owner." The Tribunal understands that, by awarding interest on lost profits on sales of finished goods as of the midpoint in which the total quantified would have been earned, interest is only applied to amounts that would have been earned but were withheld from the Claimants.

1276. Accordingly, the Tribunal awards interest, at 3-month ROBOR, the ROBOR being computed at an average annual rate to be applied for each period of one year or part of a year, plus 5%, compounded on a quarterly basis, calculated from the following dates until full payment of the award:

a. With respect to the claims for increased cost of sugar and other raw materials, interest shall be calculated from 1 March 2007, which is the approximate midpoint between the time at which the EGO 24 incentives were revoked (22 February 2005) and the time when the incentives were due to expire (31 March 2009).

b. With respect to the claim for the lost opportunity to stockpile sugar in 2009, interest shall be calculated from 1 November 2009, which is the approximate midpoint between the time when the sugar stockpile would have started being used (31 March 2009) and the time, when it would have all been used (1 July 2010). The Tribunal is aware that, according to Mr. Osborne's calculations, the Claimants' optimal stockpile of 75,000 tonnes would have been used by 31 August 2011 (First ER of C. Osborne, ¶4.10). However, the Tribunal has

[281] *See, e.g., PSEG v Turkey*, ¶¶ 349-351; *Nykomb v. Latvia*, p. 43.

awarded this claim on the basis of Mr. Ellison's calculations, which account for a smaller stockpile of 30,000 tonnes. The Tribunal has thus adjusted Mr. Osborne's timing forecast to this smaller amount.

c. With respect to the claim for lost profits on sales of finished goods, the interest shall be calculated from 1 May 2008, which is the approximate midpoint of the period for which Mr Boulton calculated losses (1 January 2005 to 31 August 2011) (C-Reply, ¶ 265(d)).

IX. THE PARTIES' OTHER REQUESTS FOR RELIEF

1277. In the context of the Respondent's Application to Revoke Provisional Measures, both sides requested other specific relief that was deferred for determination to the final Award *(see* paragraph 111 above). These requests for relief concern (A) set-off of the amounts awarded to the Claimants against the EFDG's tax debts with Romania, and (B) post-award injunctive relief, as explained below. [282]

A. THE PARTIES' REQUESTS CONCERNING SET-OFF OF THE AMOUNTS AWARDED AGAINST THE EFDG'S TAX DEBTS

1. The Respondent's position

1278. The Respondent argues that, because of the EFDG's opaque intra-group finances and the prejudice to Romania's tax enforcement rights resulting from the Claimants' manipulation of provisional measures, if there were to be any monetary award in favor of any Claimant, the amount should be explicitly subject to set-off against all of the EFDG companies' tax debts (Respondent's Revocation Application, ¶ 8(b)).

1279. In support of this request, the Respondent argues that, in its Supplemental Decision on Provisional Measures, the Tribunal made a "straightforward recommendation" that the Individual Claimants should allow any award to them to be set off against the Corporate Claimants' tax debts — a recommendation that has been ignored by the Claimants (Respondent's Revocation Application, ¶ 60(c)).

1280. On this basis, the Respondent requests the Tribunal to "explicitly provide in the Award that any amount awarded to any of the Claimants, whether as damages, arbitration costs, or otherwise, is subject to set-off by Romania against the tax debts of all eleven EFDG companies, including lawful interest and penalties" (Respondent's Revocation Application, ¶ 87(c)).

1281. The Respondent maintained this request in its Reply on its Revocation Application (¶¶ 2 and 41(c)), but did not provide further arguments or respond to the Claimants' comments set out below.

2. The Claimants' position

1282. The Claimants argue that the Tribunal lacks jurisdiction to grant the Respondent's set-off request, for three main reasons (Claimants' Response, ¶¶ 113- 116):

a. First, because it is procedurally improper: The Claimants contend that the Respondent has not established, or even argued beyond a cursory request, that it is entitled to a set-off. Such a new claim would have to be briefed and it is far too late in the arbitral process for that. In any event, the Claimants assert that such a set-off would be unnecessary because the Respondent has retained all of

[282] All briefs cited in this section relate to the Respondent's Application to Revoke Provisional Measures.

its rights to collect outstanding taxes from the EFDG (Claimants' Response, ¶ 114).

b. Second, because the parties against whom the set-off would be ordered (that is, the Claimants) are not identical to the parties who owe the debts: The Claimants argue that the Tribunal would thus lack the necessary jurisdiction. Relying on Article 8.1 of the UNIDROIT Principles of International Commercial Contracts, the Claimants add that "[e]ligibility for set-off requires that the obligations be between the same parties", which is an argument going to the merits (Claimants' Response, ¶ 115 and fn. 113).

c. Third, the Claimants argue that the Tribunal has no jurisdiction *rationae materiae* because the Respondent's set-off request is not "a legal dispute arising directly out of an investment" within the meaning of Article 25(1) of the ICSID Convention, as it was not especially contracted for in an investment agreement and does not arise directly out of an investment (Claimants' Response, ¶ 116).

1283. In addition, the Claimants argue that, apart from any legal defense to the Respondent's set-off request, it would be fundamentally unfair to provide for a set-off, or for the Award (or at least a significant portion thereof, reflecting at least the value of the retained earnings at the time the incentives were withdrawn) to be made out to anyone but the Individual Claimants "on a 50/50 basis" (Claimants' Response, ¶ 117). The Claimants contend that they are entitled to full compensation for their significant losses over the years due to the revocation of the EGO 24 incentives, and that allowing set-off would be unfair in the light of these losses (Claimants' Rejoinder, ¶¶ 67-72).

1284. The Claimants add that a set-off would imply that the Individual Claimants should take personal responsibility for the EFDG companies' tax debts. In their view, this would not only be unfair to the Individual Claimants, but would also imply that the Individual Claimants, by paying further amounts to the ongoing business operations in Romania or paying debts relating to those investments, would be making additional investments, which are not reflected in the current damages claim and for which compensation would be owed (Claimants' Rejoinder, ¶¶ 63-66).

1285. The Claimants acknowledge that if the Award is made out to the Individual Claimants alone, unless the Award is of a certain size, some creditors may not be paid in full, including the Respondent. In that case, they note that the EFDG companies may no longer be viable as going concerns. They argue that these are factors to consider in determining how the Award should be drafted, but they should not be at the forefront of the Tribunal's considerations, as the ICSID Convention was put in place to protect investors, not creditors (Claimants' Response, ¶ 118). The Claimants further note that the Respondent did not respond substantively to their arguments, but merely referenced the Tribunal's recommendation. The Claimants argue that the Tribunal recommended that the Parties were free to agree to a set-off, and the Parties did not agree.

1286. For the reasons set out above, the Claimants request the Tribunal to "issue a declaration that Romania is not entitled to set-off tax debts of the companies against an Award in favor of Claimants" (Claimants' Response, ¶ 127(c)).

3. The Tribunal's analysis

1287. The Tribunal has carefully considered both sides' prayers for relief with respect to set-off, and dismisses them both.

1288. First, both prayers have been made too late in the arbitral proceedings. To the extent that both requests are for declaratory relief to be given in the Award, the requests must be seen as ancillary claims covered by Article 46 of the ICSID Convention[283] and Rule 40 of the ICSID Arbitration Rules. In particular, the Respondent has not raised the issue of set-off as a defense to the Claimants' claims: it has not requested an acknowledgment of set-off, nor for set-off to be ordered; it is seeking a declaration that any amounts awarded to any of the Claimants are subject to set-off by Romania against the tax debts of the EFDG companies. The Claimants request a declaration in the opposite sense. In this context, the Parties do not argue whether the legal conditions for set-off are satisfied, but discuss rather whether set-off should be allowed or not as a "modus" (qualification) added to any amount awarded. Such requests for declaratory relief must be treated as ancillary claims subject to the time limits set out in Rule 40 of the ICSID Arbitration Rules.

1289. Pursuant to Rule 40 of the ICSID Arbitration Rules:

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
>
> (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

1290. Both Parties' requests regarding set-off have been made considerably past the time limits set out in Rule 40. The Respondent's request was made in its Application to Revoke Provisional Measures submitted on 1 August 2012, more than three years after the submission of its Counter-Memorial. Similarly, the Claimants' request was made in their Response to the Respondent's Application to Revoke Provisional

[283] Article 46 of the ICSID Convention provides: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

Measures, submitted on 28 September 2012, almost two years after the submission of their Reply. The record does not evidence any good causes for such delay.

1291. If the Tribunal had not dismissed these requests on procedural grounds, it would have done so on the merits. Indeed, whether the Respondent has a right to set off the Award against the EFDG's tax debts would be (primarily at least) a matter of Romanian law and of enforcement of this Award. Romanian law establishes the conditions under which a set-off may be carried out and nothing the Tribunal says will affect that. In certain jurisdictions, set-off may even operate as a matter of law (*ipso iure)* when strict conditions are met. Thus, as a matter of principle, the Tribunal is not in a position to declare that Romania has a right to set-off the amounts awarded in this arbitration against the EFDG's tax debts. Whether Romania has a right to set-off the amounts awarded against the Claimants or other companies of the EFDG will depend on whether the conditions set out in Romanian law are fulfilled.

1292. Even if the Tribunal were to state that, in principle, Romania has a right to set-off, it would not be able to decide whether in this particular case such set-off is warranted. The Respondent has not explained why the (Romanian law) conditions for set-off are fulfilled in this case, what are the amounts to be set off, or which are the specific parties involved. The only apposite mention of legal principles applicable to set-off seems to be the Claimants' reference to the UNIDROIT Principles (see paragraph 1282 above) rather than applicable Romanian law. In addition, for the reasons set out in Section VII.F above, the Tribunal has declined to allocate the damages among the Claimants, and is instead awarding the totality of the damages to all five Claimants. Under the circumstances of the case itself, the Tribunal is simply not in a position to declare whether Romania is or is not entitled to set off an award in favor of the Claimants against the EFDG companies' tax debts.

1293. For these reasons, the Tribunal dismisses the Respondent's request that the Award explicitly provide that any amount awarded to any of the Claimants is subject to set-off by Romania against the tax debts of the EFDG companies, without prejudice to the application of Romanian law, especially but not exclusively its dispositions for the satisfaction of tax debts.

1294. For the same reasons, the Tribunal dismisses the Claimants' request for a declaration that Romania is not entitled to set off tax debts of the EFDG companies against the Award, again without prejudice to the application of Romanian law, including for the satisfaction of tax debts.

B. THE CLAIMANTS' REQUEST FOR POST-AWARD INJUNCTIVE RELIEF

1. The Claimants' position

1295. Again in the context of the Respondent's Application to Revoke Provisional Measures, the Claimants request the Tribunal to provide in the Award that the Respondent "is enjoined from any further tax collection measures of any kind in respect of the Claimants and the EFDC until such a time as the damages awarded by the Tribunal have been paid in full, and include a pecuniary alternative in case of non-performance" (Claimants' Rejoinder, ¶ 75(b); *see also* Claimants' Response, ¶ 127(b)).

1296. According to the Claimants, it is obvious that Romania intends to collect on the taxes owed to it as soon as it can, by whatever means it can (Claimants' Response, ¶ 108). The Claimants understand that the provisional measures recommended by the Tribunal will come to an end upon issuance of the Award. They thus argue that for any award in their favor to have any meaning, equivalent relief to that granted under the provisional measures must be put in place in the Award until the Claimants are compensated in full (Claimants' Response, ¶ 119; Claimants' Rejoinder, ¶ 58).

1297. The Claimants argue that the Tribunal has the jurisdiction to order permanent injunctive relief. They rely on *Enron v. Argentina,*[284] where the tribunal allegedly asserted that it had such power (Claimants' Response, ¶ 122). The Claimants also rely on writings by Prof. Schreuer, as well as the Decision on Jurisdiction rendered by this very Tribunal (Claimants' Rejoinder, ¶¶ 54-55).

1298. The Claimants note that already in their First Application for Provisional Measures, they requested

> an Order preserving the status quo ante by instructing Respondent to withdraw or otherwise cease and desist from enforcing the above-described seizure orders, or from implementing any new such orders against any of the EFDC prior to the Tribunal's issuance of its final award (***and that the award itself deal with the matter as appropriate at that time, such as by maintaining the Order in place until Romania has satisfied the terms of the award in full***) […] (Claimants' First Application for Provisional Measures, ¶ 43, emphasis added).

1299. The Claimants recognize however that this relief has not been expressly requested, but submit that the Tribunal is empowered to make such an order under paragraph 6 of Claimants' Revised Request for Relief,[285] which seeks "[a]ny further relief that the Tribunal may deem fit and proper" (Claimants' Response, ¶¶ 120-121; Claimants' Rejoinder, ¶ 59).

1300. In the alternative, if the Tribunal concludes that it cannot order relief on the basis of the Revised Request for Relief as drafted, the Claimants request that the Tribunal

[284] *Enron v. Argentina (Decision on Jurisdiction)*, ¶¶ 77-79.

[285] The Claimants refer to their "Detailed Request for Relief", which the Tribunal refers to throughout this document as their "Revised Request for Relief".

permit the Claimants to add a specific request for injunctive relief to their Request for Relief pursuant to Rule 40 of the ICSID Rules (Claimants' Response, ¶ 123). The Claimants argue that the Respondent has already had notice of the Claimants' intentions and will suffer no prejudice as a result of the requested amendment to the Request for Relief. Specifically, the Claimants assert that the cover letter enclosing their Revised Request for Relief put Romania on notice that Claimants might seek to amend the requested relief "[i]n the event that financial or operational circumstances materially change to Claimants' detriment prior to the Tribunal's issuance of its award" (Claimants' Response, ¶¶ 124-125).

1301. Even if the Tribunal were to conclude that Romania will suffer prejudice as a result of the requested amendment of the Request for Relief, the Claimants contend that such prejudice should be balanced against the greater harm that the Claimants would suffer if the request is not granted. According to the Claimants, "it would be a fundamental denial of justice to Claimants and an absurd result if Romania could bankrupt the companies on the day after the Award was issued, prior to making payment, the timing of which is solely within its control" (Claimants' Response, ¶ 125).

2. The Respondent's position

1302. The Respondent argues that the Claimants' request must fail for the following reasons.

1303. First, the Respondent submits that Provisional Measures are temporary in nature and cannot be upheld beyond the point where the proceedings come to an end. Relying on writings by Prof. Schreuer, the Respondent contends that the Tribunal's authority to grant interim relief pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules only extends throughout the arbitration and any provisional measure lapses automatically when a final award is rendered. According to the Respondent, this cannot be circumvented by including the provisional measures in the Award (Respondent's Reply, ¶ 36).

1304. Second, the Respondent argues that it is irrelevant whether the Tribunal has the power to grant injunctive relief, because the legitimacy of the collection of taxes has never been subject matter of the proceedings leading to the Award. By contrast, in *Enron v. Argentina* the request for permanent injunctive relief was linked to taxes that were the basis for Enron's expropriation claim (Respondent's Reply, ¶ 37).

1305. Third, the Respondent contends that the Claimants' new attempt to amend their Request for Relief is in fact a new claim submitted out of time. The Respondent notes that, pursuant to Article 46 of the ICSID Convention and Rule 40(2) of the ICSID Arbitration Rules, any incidental or additional claim must be presented no later than in the reply. The Respondent adds that such a new claim would require further written and oral proceedings, and the Claimants have failed to provide a justification for it (Respondent's Reply, ¶ 38).

1306. Fourth, the Respondent argues that the Claimants' request to amend their Request for Relief involves relief in favor of eight EFDG companies that are not parties to the present arbitration, but Article 46 of the ICSID Convention does not permit extension of the dispute *ratione personae*. The fact that the Claimants purported to reserve their right to amend their Request for Relief is thus irrelevant, as the issues at stake in the provisional measures are not part of the dispute which forms the subject matter of the arbitration proceedings (Respondent's Reply, ¶ 39).

3. The Tribunal's analysis

1307. There is no dispute that the provisional measures recommended by the Tribunal in its five decisions on Provisional Measures will lapse upon the issuance of the Award. The Tribunal concurs with Prof. Schreuer when he states that

> The provisional nature of interim measures implies that they are recommended only for the duration of the proceedings. [...] Provisional measures will lapse automatically upon the rendering of the tribunal's award. They will also lapse upon the discontinuance of the proceedings in accordance with Arbitration Rules 43-45. Although neither Art. 47 nor Arbitration Rule 39 say so explicitly, this is a consequence of their provisional nature.[286]

1308. However, the Claimants are neither requesting the extension of these provisional measures beyond the Award, nor the recommendation of new provisional measures. The Claimants frame their request as one for "permanent injunctive relief". Thus, the threshold question is whether the Tribunal has the authority to issue permanent (or rather, definitive) injunctive relief in the Award, even if it is only temporary.

1309. In its Decision on Jurisdiction and Admissibility the Tribunal recognized its power to grant non-pecuniary relief (Decision on Jurisdiction and Admissibility, ¶ 166).[287] An ICSID tribunal's powers derive from the nature and purpose of its mandate, which in turn is defined by the parties' consent. In this case, such consent is reflected in the ICSID Convention, the BIT and the Claimants' request for arbitration. From these instruments it emerges that the Tribunal's task is to resolve the legal disputes between the Claimants and the Respondent arising directly out of the Claimants' investments in the territory of the Respondent which have their origin in the Respondent's breaches of the BIT. As none of the aforementioned instruments *expressis verbis* defines the powers granted to a tribunal nor limits the remedies available to the Claimants in the event of an internationally wrongful act,[288] this

[286] C. Schreuer, The ICSID Convention: A Commentary, 2nd edition (2009), pp. 774-775.

[287] At paragraph 166 of its Decision on Jurisdiction and Admissibility, the Tribunal stated: "Under the ICSID Convention, a tribunal has the power to order pecuniary or non-pecuniary remedies, including restitution, i.e., re-establishing the situation which existed before a wrongful act was committed. As Respondent itself admits, restitution is, in theory, a remedy that is available under the ICSID Convention (Tr. p. 56). That admission essentially disposes of the objection as an objection to jurisdiction and admissibility. The fact that restitution is a rarely ordered remedy is not relevant at this stage of the proceedings. Similarly, and contrary to Respondent's argument, the fact that such a remedy might not be enforceable pursuant to Article 54 of the ICSID Convention should not preclude a tribunal from ordering it. Remedies and enforcement are two distinct concepts."

[288] The only remedy specified by the BIT is compensation in cases of expropriation (Article 4 of the BIT). However, the BIT does not specify what remedies are available in cases of breaches of other standards of protection.

Tribunal must conclude that its powers include all of those required to provide effective remedy in order to redress the injuries suffered by the Claimants as a result of such internationally wrongful acts, within the limits of the parties' requests for relief and provided that such relief is admissible under international law. In the Tribunal's view, such relief includes pecuniary and non-pecuniary relief.

1310. The Tribunal is aware that, although Article 54(1) of the ICSID Convention provides that a state shall recognize an award as binding, it then proceeds to limit a state's obligation to enforce an award to the pecuniary obligations imposed by that award.[289] However, this should not be interpreted as limiting ICSID tribunals to awarding pecuniary relief. As the Tribunal already stated, awarding remedies and enforcement are two distinct concepts.[290] Moreover, the *travaux préparatoires* of the ICSID Convention confirm that "the restriction in Article 54 to pecuniary obligations was based on doubts concerning the feasibility of an enforcement of non-pecuniary obligations and not on a desire to prohibit tribunals from imposing such obligations."[291] Indeed, the fact that Article 54 found it necessary to specify that only pecuniary obligations could be enforced confirms that a tribunal has the power to order non-pecuniary relief.[292]

1311. In the Tribunal's view, such non-pecuniary relief may take many forms, such as restitution or specific performance.[293] It may also take the form of definitive (i.e., not provisional) injunctive relief, if the Tribunal finds that such relief is necessary to ensure that the breach will be redressed. To quote Prof. Schreuer:

> There is a wide range of possibilities for non-pecuniary obligations that awards might impose. […] Possible obligations imposed upon the host State would include the restitution of seized property […] or desistance from imposing unreasonable taxes. In the cases so far published, ICSID tribunals have framed the obligations imposed by their awards in pecuniary terms. This is not due to a belief that they lack the power to proceed otherwise. Rather, the cases involved situations in which the investment relationship had broken down and the claimants had defined their demands in pecuniary terms. […] It is likely that in the future more cases will arise,

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[289] Article 54(1) of the ICSID Convention provides in relevant part: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. […]."

[290] *See* Decision on Jurisdiction and Admissibility, ¶ 166.

[291] C. Schreuer, Non-Pecuniary Remedies in ICSID Arbitration, Arbitration International, Vol. 20, No. 4 (2004), pp. 325-326.

[292] Indeed, Article 53(1) of the ICSID Convention, which deals with the binding nature of the award rather than enforcement, provides that "[t]he award shall be binding on the parties" and that "[e]ach party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention", without limiting such binding nature to the non-pecuniary obligations imposed by the award.

[293] In the state-to-state sphere, the ILC Articles expressly recognize a tribunal's power to grant non-pecuniary relief. Article 31 of the ILC Articles provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." In turn, Article 34 provides that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

> involving disputes stemming from ongoing relationships, in which awards providing for specific performance or injunctions will become relevant.[294]

1312. Finally, the power to award injunctive relief has been affirmed by ICSID tribunals. For instance, in *Enron v. Argentina* the tribunal expressly concluded that "in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts."[295]

1313. The Tribunal concludes that it has the power to grant injunctive relief in a final award. This relief, however, must be definitive (i.e., not provisional, not meant to "preserve the respective rights of either party" until final resolution of the dispute, which is the objective of provisional measures pursuant to Article 47 of the ICSID Convention). The Tribunal prefers the term "definitive" to "permanent", as the relief granted may be temporary (i.e., granted only until a certain date or until a certain condition is met). However, as the Tribunal will become *functus officio* upon the rendering of the Award (subject to a party filing a claim for rectification, supplementary decision, interpretation or revision of the Award pursuant to Articles 49, 50 or 51 of the ICSID Convention), the injunctive relief granted cannot be later reconsidered or lifted by the Tribunal, as would be the case with provisional relief: such definitive injunctive relief would have *res judicata* effect.

1314. The Tribunal turns now to the Claimants' specific request for post-award injunctive relief.

1315. The first question that arises is whether this request for relief is timely. As a request for definitive relief in the Award, the request must be treated as an ancillary claim, and thus the conditions set out in Rule 40 of the ICSID Arbitration Rules (cited at paragraph 1289 above) apply.

1316. The Claimants formally articulated their request for post-award injunctive relief in their Response to the Respondent's Application to Revoke Provisional Measures, submitted on 28 September 2012, which is considerably past the submission of their Reply (submitted in December 2009). Although the Claimants had included a similar request in their First Application for Provisional Measures, submitted on 3 November 2010 on the eve of the hearing on the merits (see paragraph 1298 above), that request was also submitted after their Reply. In any event, as the Claimants themselves acknowledge, this request was made in the context of a request for provisional measures and was not formulated as a substantive request for relief in the award.

1317. The Claimants contend that their request is timely because the Tribunal is empowered to award post-award injunctive relief as a result of their request for "[a]ny

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[294] C. Schreuer, The ICSID Convention: A Commentary, 2nd ed. (2009), pp. 1137-1138. Prof. Schreuer adds that "[t]ribunals imposing such non pecuniary obligations should keep the impossibility to enforce them in mind. Such awards should […] provide for a pecuniary alternative in case of non-performance such as liquidated damages, penalties or another obligation to pay a certain amount of money." (*Id*.)

[295] *Enron v. Argentina (Decision on Jurisdiction)*, ¶ 81.

further relief that the Tribunal may deem fit and proper" (Revised Request for Relief, ¶ 6). A first question is whether, as a result of such a generic request, the Tribunal has the power to order relief that has not been expressly requested. Assuming that the Tribunal has the power and the discretion to make such an order (a matter that the Tribunal does not need to address), in the particular circumstances of this case, the Tribunal would not wish to exercise any such discretion to order definitive injunctive relief such as the relief sought by the Claimants without having been expressly requested to do so. In particular, the Tribunal would be loath to do so because that would defeat one of the *rationes legis* of Article 40, namely afford the Responding State the possibility fully to put its case in defense to a given relief before the evidentiary hearing and take advantage of that hearing to bring forth the correlative necessary evidence. The Respondent was not in a position at the time to predict that Claimants would subsequently come up with the disputed prayers or that the Tribunal would exercise its discretion, if it exists, in the way the Claimants are suggesting now.

1318. The Claimants' request for definitive injunctive relief is thus untimely, and it falls to the Tribunal to determine, upon justification by the Claimants and after considering the Respondent's objections, whether it authorizes the presentation of the claim at a later stage in the proceedings. After considering both Parties' arguments, the Tribunal finds that there is not a sufficient justification to authorize the presentation of this claim at this stage of the proceedings. Nor was there sufficient justification to authorize the presentation of this claim in September 2012, when the Claimants first formulated their request for definitive injunctive relief. The Claimants submitted their first application for provisional measures in November 2010. They thus had ample time since the occurrence of the facts that gave rise to their alleged need for injunctive relief to properly file for an ancillary claim for definitive relief in accordance with Rule 40. The Claimants have not justified why such a claim could not have been brought before September 2012. Accordingly, the Tribunal dismisses the Claimants' request for definitive injunctive relief.

1319. Had it not dismissed the claim on procedural grounds, the Tribunal would have done so on the merits. The Tribunal has dismissed the Claimants' argument that the Respondent's wrongful act (the breach of the BIT) caused them to incur the tax debts and penalties that are the basis for the Respondent's tax enforcement actions (*see* Section VII.C.4 above). Thus, while during the pendency of these proceedings the legitimacy of the tax penalties imposed upon the Claimants could be deemed to be part of the subject matter of the dispute, the Claimants' claims in that respect have been dismissed on the merits. Similarly, now that the proceedings are finalized, the Claimants have no independent right to the maintenance of a status quo or to a non-aggravation of the dispute that could require preservation. There is thus no justification for providing the requested additional and definitive injunctive relief in the Award.

1320. Finally, although the Tribunal has the power to grant additional definitive injunctive relief in the Award, any such relief should be granted with the utmost caution. Once the Award is issued and subject to potential requests for rectification, supplementary decision, interpretation or revision, the Tribunal will become *functus officio*. It will not be able to reconsider the injunctive relief granted, which would have *res judicata* effect.

1321. Under the circumstances, the Tribunal is not convinced that such additional relief is warranted. In its decisions on provisional measures, the Tribunal repeatedly stated that Romania must be allowed to collect the taxes due to it. While these proceedings were pending and for their duration, the Tribunal afforded protection to the Claimants in order, among other reasons, to maintain the status quo and prevent the aggravation of the dispute. The Tribunal recognized the benefits of preventing the Claimants' bankruptcy and allowing the Claimants' business to survive as a going concern. However, the Tribunal cannot do so indefinitely. It trusts that the Parties will find a way to pay their respective debts in a way that allows the Claimants' investment to continue contributing to the prosperity of Bihor County.

1322. For these reasons, the Claimants' request for post-award injunctive relief is dismissed. Accordingly, all provisional measures recommended by the Tribunal will cease to have effect as of the date of dispatch of this Award.

X. COSTS

1323. Both sides request an award of costs in respect of the legal fees and expenses and the costs of arbitration incurred in connection with this proceeding and have filed submissions quantifying their fees and costs (Claimants' Request for Costs, ¶¶ 58-59; Respondent's Submission on Costs, ¶ 49).

1324. The Claimants' legal fees and expenses amount to EUR 18,409,213 or RON 86,478,476. They have advanced USD 1,510,000 on account of the fees and expenses of the Members of the Tribunal and the ICSID administrative fees and expenses, including the lodging fee of USD 25,000. The Claimants seek an award of the entirety of these costs and compound interest at a rate of 3-month ROBOR plus 5% until the date of payment.

1325. The Respondent's legal fees and expenses amount to EUR 11,499,347.97. It has advanced USD 1,485,000 to ICSID.

1326. The Parties agree that the Tribunal has broad discretion to allocate all costs of the arbitration, including legal fees and expenses, between the Parties as it deems appropriate, pursuant to Article 61 of the ICSID Convention. Both sides argue that a costs award is warranted because they should prevail in the arbitration and because the other party has conducted the arbitration in a manner which has led to delay and increased costs.

1327. The Tribunal has considered all the circumstances of this case: the procedure (including the jurisdictional phase, the Parties' requests for production of documents, the Claimants' requests for provisional measures, the Respondent's request for revocation of provisional measures, the Claimants' request for a site visit, the merits phase of the proceeding, the Claimants' revised request for relief, and multiple hearings) as well as the Parties' substantive arguments on jurisdiction, admissibility and the merits. As evidenced by Section II above, there were numerous procedural issues and difficult legal questions involved in the jurisdictional and merits phases. Many of these issues were far from clear-cut and involved meritorious arguments by both Parties. The Claimants have prevailed on jurisdiction and have established a breach of the fair and equitable standard under the BIT. They have, however, only been partially successful in regard to their claims for damages, which evolved during the proceedings.

1328. In light of these factors, the Tribunal has concluded that it is fair overall that both sides (that is, the five Claimants on one side and the Respondent on the other) bear the costs of the arbitration (the fees and expenses of the Members of the Tribunal and the charges for the use of the facilities of the Centre) in equal shares, and that each side bears its own legal and other costs incurred in connection with this case.[296]

[296] The Parties will receive a statement of the account from the ICSID Secretariat. Any remaining balance will be reimbursed to the Parties.

XI. DECISION

1329. For the reasons stated in the body of this Award, the Tribunal makes the following decision:

a. The Claimants' claim that the Respondent has violated Article 2(4) of the BIT by failing to observe obligations entered into with the Claimants with regard to their investments is dismissed by majority.

b. The Claimants' claim that the Respondent has violated Article 2(3) of the BIT by failing to ensure fair and equitable treatment of the Claimants' investments is upheld by majority. In view of this decision, the Tribunal does not need to determine whether the Respondent has breached the BIT by impairing the Claimants' investments through unreasonable or discriminatory measures (Article 2(3) of the BIT, second part) or by expropriating the Claimants' investments without the payment of prompt, adequate, and effective compensation (Article 4(1) of the BIT).

c. As a result of the Respondent's breach of the BIT, the Claimants are awarded and the Respondent is ordered to pay RON 376,433,229 as damages, broken down as follows:

    i. RON 85,100,000 for increased costs of sugar;

    ii. RON 17,500,000 for increased costs of raw materials other than sugar or PET;

    iii. RON 18,133,229 for the lost opportunity to stockpile sugar; and

    iv. RON 255,700,000 for lost profits on sales of finished goods.

d. The Respondent is ordered to pay interest on the amount specified in sub-paragraph (c) above, at 3-month ROBOR plus 5%, compounded on a quarterly basis, calculated from the following dates until full payment of the Award:

    i. With respect to the claims for increased cost of sugar and other raw materials, interest shall be calculated from 1 March 2007.

    ii. With respect to the claim for the lost opportunity to stockpile sugar, interest shall be calculated from 1 November 2009.

    iii. With respect to the claim for lost profits on sales of finished goods, interest shall be calculated from 1 May 2008.

e. The Claimants on one side and the Respondent on the other shall bear the costs of the arbitration in equal shares, and each Party shall bear its own legal and other costs incurred in connection with this case.

f. All provisional measures recommended by the Tribunal will cease to have effect as of the date of dispatch of this Award.

g. All other claims or prayers for relief are dismissed.

Dr. Stanimir A. Alexandrov
Arbitrator
Date: 9 December 2013

Prof. Georges Abi-Saab
Arbitrator
Date: 5 December 2013

Dr. Laurent Lévy
President of the Tribunal
Date: 5 December 2013