

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

Decision on Jurisdiction and Admissibility

Rendered by an Arbitral Tribunal composed of:

Dr. Laurent Lévy, President of the Tribunal

Mr. Stanimir Alexandrov, Arbitrator

Dr. Claus-Dieter Ehlermann, Arbitrator

Mrs. Martina Polasek, Secretary of the Arbitral Tribunal

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Table of Abbreviations

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Bilateral investment treaty; specifically “Agreement Between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments” of 29 May 2002
C-Statement	Claimants’ Statement of Claim dated 9 March 2007
R-Mem.	Respondent’s Objections to Jurisdiction and Admissibility dated 10 September 2007
C-C.Mem.	Claimants’ Counter-Memorial on Jurisdiction dated 1 February 2008
R-Reply	Respondent’s Reply on Jurisdiction and Admissibility dated 28 March 2008
C-Rejoinder	Claimants’ Rejoinder on Jurisdiction dated 30 May 2008
Exh. C-	Claimants’ Exhibits (including legal authorities)
Exh. R-	Respondent’s Exhibits
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
LA. R-	Respondent’s Legal Authorities
Request	Request for Arbitration of 28 July 2005
Tr.	Transcript of the hearing on jurisdiction

I. THE PARTIES

1. CLAIMANTS

1. There are two individual Claimants in this case:

- Mr. Ioan Micula, 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. According to Claimants, Mr. Ioan Micula is to be considered a Swedish national for the purpose of this arbitration.
- Mr. Viorel Micula, 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 where he obtained Swedish nationality in 1995 after having renounced his Romanian nationality. According to the Claimants, Mr. Viorel Micula is to be considered a Swedish national for the purpose of this arbitration.
- Claimants 1 and 2 hold shares in the Corporate Claimants.

2. There are also three Corporate Claimants:

- European Food S.A. with its registered office at 13 Septembrie Street, Stei, Bihor County, Romania, registered with the trade register under no. J5/892/1999, registration number 12457015 (hereinafter referred to as "Claimant 3"). Claimant 3 specializes in industrial manufacturing of food products.
- Starmill S.R.L. with its registered office at 41 Draganesti, Pantasesti Village, Bihor County, Romania, registered with the trade register under no. J5/177/2002, registration number 14467201 (hereinafter referred to as "Claimant 4"). Claimant 4 specializes in the manufacturing of milling products.
- Multipack S.R.L. with its registered office at 41, Draganesti, Pantasesti Village, Bihor County, Romania, registered with the trade register under no. J5/178/2002, registration number 14467210 (hereinafter referred to as "Claimant 5"). Claimant 5 is specializes in the manufacturing of plastic packaging.

3. Claimants 1, 3, 4 and 5 are represented in this arbitration 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. Claimant 2 is represented by Messrs. Eric A. Schwartz and Alain Farhad of the law firm of Dewey & LeBoeuf, Paris, and Messrs. Gheorghe Mușat and Gelu Titus Maravela and Mrs. Luminita Popa of the law firm Mușat & Asociații, Bucharest.
4. The Tribunal will collectively refer to Claimants 1 to 5 as the “Claimants”, and Claimants 3 to 5 as the “Corporate Claimants”.

2. RESPONDENT

5. Respondent is Romania.
6. Respondent is represented in this arbitration by H.E. Varujan Vosganian, Minister of Economy and Finance, and Mr. Bogdan Mirghis, Legal Advisor of the Ministry of Economy and Finance; Messrs. Brian King, Georgios Petrochilos and Boris Kasolowsky and Ms. Jacomijn J. van Haersolte-van Hof of the law firm of Freshfields Bruckaus Deringer, New York, Paris, Frankfurt and Amsterdam, and Mmes. Adriana I. Gaspar, Ana Diculescu-Sova and Manuela Nestor of the law firm of Nestor Nestor Diculescu Kingston Petersen in Bucharest.

II. PROCEDURAL HISTORY

1. INITIAL PHASE

7. On 2 August 2005, Claimants filed a Request for Arbitration dated 28 July 2005 (the “Request” or “RA”) with the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”), accompanied by 14 exhibits (Exh. C-1 to C-14). In the Request, Claimants invoked the provisions of 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”), which entered into force on 1 April 2003 (Exh. C-1). They sought the following relief:

73. Claimants request reinstatement of the legal framework as in force at the time of the approval of the Government Emergency Ordinance no. 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.

8. 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.
9. On 21 September 2005, the Request was supplemented by a Statement on the entry into force of the BIT with accompanying exhibits C-15 to C-19.
10. 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.
11. On 10 January 2006, in the absence of an agreement between the Parties, 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 Mr. 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.
12. 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 ("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.
13. 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 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.

2. THE WRITTEN PHASE ON JURISDICTION

14. In accordance with the timetable agreed during the first session, Claimants submitted their Statement of Claim on 9 March 2007 (C-Statement), accompanied by 125 exhibits (Exh. C-20 to Exh. C-144), as well as two witness statements. In their Statement of Claim, Claimants sought the following relief:

Claimants request that the Tribunal find that Romania has violated the BIT.

Claimants request restitution 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.

Claimants request reimbursement of their costs and expenses including the costs of the present proceedings.

Claimants also request interest compounded quarterly on all monetary claims with the precise rate of interest to be specified at an appropriate time during the proceedings.

(C-Statement, ¶¶ 380-383)

15. In accordance with the agreement of the Parties contained in Romania's letter of 20 June 2007, and the timetable set forth in the letter of 6 August 2007 from the Centre, Respondent raised objections to jurisdiction and admissibility in its Objections to Jurisdiction and Admissibility filed on 10 September 2007 (R-Mem.). The Objections were accompanied by 52 exhibits (Exh. R-1 to R-52) and 139 legal authorities (LA R-1 to R-139). An expert opinion of Mr. John Ellison of KPMG was also appended.
16. The Parties agreed that the Tribunal should consider Respondent's objections to jurisdiction and admissibility as a preliminary question pursuant to Rule 41(4) of the 2003 Arbitration Rules, and thus the Tribunal suspended the proceedings on the merits by letter of the Secretary of 9 October 2007.

17. On 14 January 2008, Romania filed a report of Mr. Donald Berlin in relation to Messrs. Micula's nationality (Exh. R-53). This report was not requested by the Tribunal.
18. In accordance with the schedule agreed upon by the Parties in Romania's letter of 4 October 2007 and reiterated in the Secretary's letter of 22 October 2007, Claimants submitted their Counter-Memorial on Jurisdiction on 1 February 2008 accompanied by 59 exhibits (Exhibits C-145 to C-203). An additional witness statement from each individual Claimant, Messrs. Micula, was appended.
19. In accordance with the schedule agreed upon by the Parties and pursuant to the Secretary's letter of 22 October 2007, Respondent filed its Reply on Jurisdiction and Admissibility (R-Reply) on 28 March 2008. A supplemental report by Mr. John Ellison of KPMG and a legal opinion of Professor John Dugard were also appended.
20. In accordance with the timetable set forth in the Secretary's letter of 22 October 2007, Claimants filed their Rejoinder on Jurisdiction (C-Rejoinder) on 30 May 2008 with Exhibits C-204 to C-220.
21. By letter of 16 May 2008, the Secretary asked the Parties if they would be agreeable to the appointment of Mrs. Aurélie Antonietti of the law firm of Lévy Kaufmann-Kohler as Assistant to the Tribunal, which the Parties accepted. The Parties were informed by letter of 28 August 2008 that Mrs. Antonietti ceased her functions as of 31 July 2008.

3. THE HEARING ON JURISDICTION

22. By letter of 13 June 2008, the Tribunal was informed that Claimant 2 had retained the law firms of Dewey & LeBoeuf and Muşat & Asociații as counsel and requested the postponement of the forthcoming hearing scheduled on 19 and 20 June 2008. The Tribunal held a conference call with the Parties on 14 June 2008. As the Parties and the Tribunal were not able to find any suitable replacement dates, the hearing was scheduled as initially agreed.
23. Therefore, on 19 and 20 June 2008, the Arbitral Tribunal held a hearing on jurisdiction in Paris, France. In addition to the Members of the Tribunal and the Assistant to the Tribunal, the following persons attended the jurisdictional hearing:

(i) On behalf of Claimants

- Prof. Christoph Schreuer, University of Vienna
- Mr. Gerold Zeiler, Schönherr Rechtsanwälte
- Mrs. Ursula Kriebaum, Schönherr Rechtsanwälte
- Mr. Alfred Siwy, Schönherr Rechtsanwälte
- Mr. Eric Schwartz, Dewey & LeBoeuf
- Ms. Sabine Konrad, Dewey & LeBoeuf
- Mr. Christophe Guibert de Bruet, Dewey & LeBoeuf
- Mr. Alain Farhad, Dewey & LeBoeuf
- Ms. Andreia Dumitrescu, Muşat & Asociații
- Mr. Gelu Maravela, Muşat & Asociații
- Ms. Luminita Popa, Muşat & Asociații
- Mr. Ioan Micula
- Mr. Viorel Micula
- Ms. Oana Popa, employee of Claimants
- Mr. Ciprian Popa, employee of Claimants

(ii) On behalf of Respondent

- Mr. Brian King, Freshfields Bruckaus Deringer
- Mr. Georgios Petrochilos, Freshfields Bruckaus Deringer
- Mr. Michael Feutrill, Freshfields Bruckaus Deringer
- Mr. Boris Kasolowsky, Freshfields Bruckaus Deringer
- Mr. Moto Maeda, Freshfields Bruckaus Deringer
- Mr. Manuela Nestor, Nestor Nestor Diculescu Kingston Petersen
- Mrs. Johanna Garrido, Freshfields Bruckaus Deringer
- Mr. Matei Purice, Freshfields Bruckaus Deringer
- Ms. Emma Sultan, observer.

24. The Tribunal heard oral testimony from Claimants 1 and 2.

25. Messrs. King, Kasolowsky, Pretrochilos, and Feutrill addressed the Tribunal on behalf of Respondent. Messrs. Schreuer, Zeiler and Schwartz and Ms. Kriebaum addressed the Tribunal on behalf of Claimants.

26. The jurisdictional hearing was audio recorded and a *verbatim* transcript was prepared and delivered to the parties (Tr.). At the end of the hearing, Romania asked for the opportunity to raise an objection to Mr. Viorel Micula's standing given

the circumstances of the acquisition of his Swedish nationality. It was agreed that Romania may make an application to that end, which Romania ultimately declined to do on 18 July 2008 as will be seen below.

* * *

27. The Tribunal has deliberated and considered the Parties' written submissions on jurisdiction and admissibility and the oral arguments delivered in the course of the jurisdictional hearing. In the following sections, the Tribunal will summarize the Parties' positions (III), present its analysis (IV), and set forth its decision on jurisdiction and admissibility (V). Before doing so, a brief summary of the factual background is provided in so far as it is necessary to rule on Respondent's preliminary objections.

4. THE PROJECT AND THE DISPUTE

28. The dispute submitted to the Tribunal stems from the introduction of a series of investment incentives (hereafter the "incentives") for the development of certain disfavoured regions of Romania and from the subsequent partial withdrawal or amendment of those incentives.
29. On 30 September 1998, Romania adopted Emergency Government Ordinance No. 24/1998 ("EGO 24/1998", Exh. R-5 or C-40) which laid down the foundation for the designation of "disfavoured regions" and the issuance of Permanent Investor Certificates. According to Claimants:

[A] Disfavoured Region is an area that meets at least one of the following requirements: (i) the production in this area focuses on only one industry that employs more than 50% of the employed labour force; or (ii) the area is a mining region where employees were dismissed due to the restructuring of the mining activities; or (iii) dismissals affected more than 25% of the population living in this area; or (iv) the unemployment rate in this area exceeds the national unemployment rate by at least 25 percent; or (v) the infrastructure of this area is either inexistent or underdeveloped.

(C-Statement, ¶ 73)

30. EGO 24/1998 was subsequently approved and amended by Law No. 20/1999 of 15 January 1999 (Exh. C-39).

31. Incentives were offered to investors making investments in disfavoured regions. EGO 24/1998, as approved and amended by Law No. 20/1999, included the following incentives:
- an exemption from customs duties on machinery, tools, installations, means of transportation and other goods imported into Romania as well as a VAT exemption on these goods if they had been manufactured in Romania with a view to performing and conducting investments in the disfavoured regions (i.e., Machinery Related Incentive, Article 6(1)(a));
 - a full refund of the customs duties on raw material, spare parts and components necessary for achieving the investor's own production in the region (i.e., Raw Material Related Incentive, Article 6(1)(b));
 - an exemption from the payment of profit tax during the existence of the investment in the disfavoured region (i.e., Profit Tax Related Incentive, Article 6(1)(c));
 - an exemption from the payment of taxes collected for improvements to the land or for conversion of agricultural land to industrial land (i.e., the Agricultural Land Related Incentive, Article 6(1)(d)); and
 - preferential subsidies from a special State development fund (i.e., Subsidies, Article 6(1)(e)).
32. The incentives above mentioned were to benefit privately owned Romanian legal entities, private entrepreneurs and family associations that were set up after the date of designation of the disfavoured region, to have their registered seat in the disfavoured region, and operate therein.
33. On 25 March 1999, Romania designated, by Decision No 194/1999 (Exh. C-31), the Ştei-Nucet a disfavoured region for a period of ten years, starting on 1 April 1999. The Ştei-Nucet region is located in Bihor County in the north-western part of Romania. The primary industry was a mining and oil industry. The boundaries of the disfavoured region were extended to include Draganesti (where some plants of the Corporate Claimants are located) on 29 November 2000 (Exh. C-32).

4.1 The investment

34. The three Corporate Claimants are mainly engaged in food production in the disfavoured region of Ştei-Nucet. They made greenfield investments that required

the purchase or importation of machinery as well as the purchase of raw materials, including raw materials imported from other states, including EU Member States. According to Claimants, they have invested over EUR 200 million in Romania in land, buildings, equipment and means of transportation. Claimants also claim to have created nearly 2,000 new jobs (C-Rejoinder, ¶ 34).

35. More particularly, Claimant 3 is said to have made an investment of at least EUR 170 million in production facilities in the disfavoured region. Claimant 3 owns and operates:

- A plant for the production of food and sauces located in Ştei;
- A plant for the production of emulsions and syrup flavours located in Draganesti;
- A facility for the production of beer and purification of water in Draganesti;
- A facility for the transformation of electricity in Draganesti;
- A facility for the production of syrup made of sugar;
- A facility for the production of vinegar;
- A plant for the production and bottling of fruit juice, mineral water, and other liquids.

(C-Statement, ¶ 145)

36. Similarly, Claimant 4 is said to have made an investment of at least EUR 18 million in production facilities in the disfavoured region. Claimant 4 owns and operates:

- A flour mill located in Ştei;
- A corn mill with hammers located in Pantasesti.

(C-Statement, ¶ 153)

37. Lastly, Claimant 5 is said to have made an investment of at least EUR 10 million in production facilities in the disfavoured region. Claimant 5 owns and operates:

- A packaging facility located in Draganesti;
- A typography plant.

(C-Statement, ¶ 167)

38. Claimants 1 and 2 are the sole shareholders of Claimants 4 and 5. They are also the majority shareholders of Claimant 3. In order to qualify for benefit from EGO 24/1998, the three Corporate Claimants were required to obtain Permanent Investor Certificates. These certificates specified the nature of the incentives as well as the period of validity. The Permanent Investor Certificates obtained by Claimants

were issued by the North-West Regional Development Agency in June 2000 and in May 2002, and are valid until April 2009. Specifically,

- Claimant 3 holds Permanent Investor Certificate No. 524 issued on 1 June 2000 that is valid until 1 April 2009 (Exh. C-42);
- Claimant 4 holds Permanent Investor Certificate No. 1664 issued on 17 May 2002 (according to Claimants) that is valid until 1 April 2009 (Exh. C-43);
- Claimant 5 holds Permanent Investor Certificate No. 1663 issued on 17 May 2002 that is valid until 1 April 2009 (Exh. C-44).

39. The nature and extent of the rights attached to the Certificates are disputed by the Parties. Respondent argues that the Corporate Claimants are not entitled to demand that the list of incentives included in EGO 24/1998 be available until 2009 without any modification (R-Mem., ¶ 18). More specifically, it is Respondent's argument that the Corporate Claimants have an entitlement to receive the benefits that Romanian law, especially EGO 24/1998, as amended from time to time, will make available. Claimants argue that a State may possibly have all latitude to amend its legislation under its own domestic law. However, this would not be the case in international law as unilateral commitments will bind States and investors may rely on such unilateral commitments (C-C.Mem, ¶ 14,15).

4.2 Romania's accession to the EU

40. From 1993 to 2007, Romania moved towards membership of the EU and completed the steps towards its accession to the EU on 1 January 2007.

41. According to Romania, EGO 24/1998 contained provisions that conflicted with European law and consequently Romania had to make amendments to it (R-Mem., ¶ 26). For example, Respondent submitted that exemption from customs duties and taxes would be considered State aid incompatible with the common market, in the context of EU competition policy and, therefore, inconsistent with Romania's EU obligations.

4.3 The changes in the legal framework

42. Government Ordinance No. 75/2000 of 16 June 2000 changed the initial refund of customs duties on raw material to an exemption, but excluded customs duties on imported spare parts and components from the exemption (Exh. C-45). Law No. 621/2001 (Exh. C-46) reinstated the customs duties exemption on imported

components as of 19 November 2001. In addition, Ordinance No. 75/2000 also restricted the award of subsidies to the financing of special programs approved by the Government.

43. Government Ordinance No. 75/2000 was approved by Law No. 621/2001 of 7 November 2001, but also amended through the reinstatement of the Raw Material Related Incentive.
44. In 2002, the Machinery Related Incentive was abolished, effective 1 June 2002, by Law No. 345/2002 (Exh. C-47).
45. Later that year, Law No. 414/2002 (Exh. C-48) abolished the Profit Tax Related Incentive, effective 1 July 2002. Investors that had obtained a Permanent Investor Certificate prior to 1 July 2002 were grandfathered under the law. The Profit Tax Related Incentive was later reintroduced on 1 January 2004 by Law No. 507/2004 (Exh. C-52). The Raw Material Related Incentive was abolished as of 23 December 2002 through Law No. 678/2002 (Exh. C-49).
46. In 2003, all State aid control functions were allocated to the Competition Council. Romania passed Law No. 239/2004 of 7 June 2004 which required that all State aid, including subsidies, be made subject to State aid requirements with effect from 11 June 2004. Law No. 239/2004 further amended the 1998 Ordinance, setting an upper limit for permitted State aid in disfavoured regions, in order to harmonise Romania's legislation with the *acquis communautaire*. The upper limit corresponded to the maximum amount of State aid ("intensity"), as referred to in the Regional State Aid Regulation approved by the Competition Council (Exh. C-50). Government Ordinance No. 94/2004 of 26 August 2004 abolished the Raw Material Related Incentive, the Agricultural Land Incentive, and the Subsidies. These incentives were effectively cancelled three months after the entry into force of Government Ordinance No. 96/2004 (3 September 2004), i.e., they were terminated on 3 December 2004 (Exh. C-51).
47. Law No. 507/2004 of 17 November 2004 approved, but also amended Government Ordinance No. 94/2004. Law No. 507/2004 reintroduced temporarily the incentives terminated by Government Ordinance No. 94/2004, but abolished them definitively three months after its own entry into force (22 November 2004), i.e., they were terminated on 22 February 2005 (Exh. C-52).
48. These events are at the origin of the dispute submitted to this Tribunal.

III. POSITIONS OF THE PARTIES

1. RESPONDENT'S POSITION

49. In its written and oral submissions on jurisdiction, Respondent has put forward the following main contentions:

- (i) Claimants do not have a sufficient legal interest to pursue their claims under the BIT and their claims must be dismissed. Claimants have suffered no actual loss, which renders their claims hypothetical and thus inadmissible.
- (ii) Claimants 1 and 2 have not demonstrated Swedish nationality. In particular, there are serious doubts as to the compliance by Claimant 2 with the residence conditions required under Swedish law to acquire Swedish nationality. In any case, Claimants cannot invoke Swedish nationality in a claim against Romania where the Claimants have no effective link to Sweden but maintain effective links to Romania.
- (iii) The claim for restitution of the legal regime as in force at the time of the approval of EGO 24/1998 is inadmissible.
- (iv) There has been no expropriation of an investment in the sense of Article 1 of the BIT.
- (v) The alleged violations of the BIT took place prior to its entry into force and are outside the temporal scope of the BIT.

50. On the basis of these arguments, Respondent requests the following relief:

For the foregoing reasons, and those that will be added in further submissions as may be directed by the Tribunal, Romania respectfully requests that the Tribunal:

- (a) DISMISS Claimants' claims in their entirety; and
- (b) ORDER Claimants to pay in their entirety the costs of this arbitration, including the fees and expenses of the Tribunal and the Centre and the fees and expenses incurred by Romania in defending against Claimants' claims. (R-Reply, ¶ 139)

2. CLAIMANTS' POSITION

51. In their written and oral submissions on jurisdiction, Claimants have developed the following arguments:

- (i) Claimants have shown a *prima facie* case with regard to both liability and actual damages.
- (ii) They are “investors” in the sense of Article 1(2)(a) of the BIT and “nationals of another Contracting State” -Sweden- under Article 25(2) of the ICSID Convention.
- (iii) There is an investment for the purpose of Article 25 of the ICSID Convention and Article 7 of the BIT.
- (iv) The dispute is within the *ratione temporis* scope of the BIT.
- (v) The claim for restitution is admissible and the discussion of remedies is premature.

52. In reliance on these arguments, Claimants request the following relief:

Claimants request that

- (i) the Tribunal find that the dispute is within the Jurisdiction of the Centre and the competence of the Tribunal;
- (ii) dismisses all of Respondent's objections to the admissibility of the claims, the jurisdiction of ICSID, and the competence of this Tribunal;
- (iii) make the necessary order for the continuation of the proceedings on the merits. (C-Rejoinder, ¶ 265)

IV. ANALYSIS

53. The Tribunal will first address some introductory matters (1). Then, it will address Respondent's objections with respect to the nationality of Claimants (*ratione personae*) (2), the nature and existence of the dispute (*ratione materiae*) (3), and the application in time of the BIT (*ratione temporis*) (4). Finally, the Tribunal will review the objection to the admissibility of the claim for restitution (5).

1. INTRODUCTORY MATTERS

1.1 Provisions relevant to the Tribunal's jurisdiction

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

55. The relevant provision of the ICSID Convention is Article 25(1), which reads as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

56. The Tribunal observes that both States relevant for the purposes of this dispute are Contracting States of the ICSID Convention. Respondent is a Contracting State of the ICSID Convention since 12 September 1975. Sweden is a Contracting State of the ICSID Convention since 29 December 1966.

57. The relevant provision of the BIT is Article 7, which provides for ICSID arbitration in the following terms:

- (1) Any dispute concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably.
- (2) If any such dispute cannot be settled within three months following the date on which the dispute has been raised by the investor through written notification to the Contracting Party, each Contracting Party hereby consents to the submission of the dispute, at the investor's choice, for resolution by international arbitration to either:
 - (i) the International Centre for Settlement of Investment Disputes (ICSID) for settlement by conciliation or arbitration under the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, (the Washington Convention); or
 - (ii) an ad hoc tribunal set up under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The appointing authority under the said rules shall be the Secretary General of ICSID.

[...]

1.2 Applicable standard

58. Respondent has raised various objections and has framed some of them as objections to admissibility rather than objections to jurisdiction. There is no dispute between the Parties as to the jurisdiction of this Tribunal to decide the jurisdictional and admissibility challenges brought by Respondent pursuant to Article 41 of the ICSID Convention. However, the Parties are at odds regarding the standard to be applied to Respondent's objections.

1.2.1 *Parties' positions*

59. In addition to objections in connection with the nationality of Messrs. Micula and the application in time of the BIT, Respondent submits that Claimants have failed to raise a case on the merits, resulting in “pathological” claims (R-Reply, ¶ 7). Respondent argues that Claimants have failed to demonstrate actual harm. Consequently, Respondent submits that the Tribunal should on a *prima facie* basis dismiss the case (R-Reply, ¶ 7). Citing ICSID jurisprudence, Respondent argues that the Tribunal should apply two tests: first, a narrow test as to whether there is a legal dispute, and second, a broader test “*as to whether the claim advanced has arguable merits*” (R-Reply, ¶ 10). According to Respondent, where no more than a hypothetical injury is asserted, the second test is not met. Respondent contends that this broader test includes the question of the frivolous and abusive nature of the claim (R-Reply, ¶ 15). It concludes that the relevant inquiries are two, namely:

[F]irst, a tribunal has to satisfy itself that the legal arguments advanced by the claimant, including the construction of any relevant treaty or other legal instrument, are plausible. Second, it has to satisfy itself that the pleaded facts are capable of sustaining the cause of action advanced by the claimant within the plausible legal framework. (R-Reply, ¶ 16, footnote omitted)

60. Claimants agree that ICSID practice requires them to present a claim that is *prima facie* plausible (C-Rejoinder, ¶ 4). However, they submit that the test is not whether the claim is sound, but rather whether “*the allegations made by the claimant are capable of constituting violations of law, provided the facts are proven correct at the merits stage*” (C-Rejoinder, ¶ 5). During the jurisdictional phase, the Tribunal should not examine the accuracy of the factual allegations made, particularly with regard to the alleged absence of harm (C-Rejoinder, ¶ 20).

1.2.2 *Tribunal's analysis*

61. The text of Article 25 of the ICSID Convention requires that four conditions must be met for the Tribunal to have jurisdiction: (i) the dispute must be between a Contracting State and a national of another Contracting State, (ii) the parties must have expressed their consent to ICSID arbitration in writing, (iii) the dispute must be a legal one, and (iv) it must arise directly out of an investment.

62. The Tribunal's jurisdiction is also contingent upon the terms of the document in which consent to arbitration is contained, in this case the BIT. The Tribunal needs thus to be satisfied that the terms of Article 7 of the BIT, and by extension the terms

of Article 1 (which defines the terms “investor” and “investment”), have been complied with.

63. Objections can be framed as matters of jurisdiction or as matters of admissibility, depending on the context in which they are raised. The Tribunal concurs with Respondent that an objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself and presupposes that the tribunal has jurisdiction. If a tribunal finds a claim to be inadmissible, it must dismiss the claim without going into its merits even though it has jurisdiction. It is disputed whether the concept of admissibility is helpful in ICSID arbitration.
64. The Tribunal is of the opinion that when an objection relates to a requirement contained in the text on which consent is based, it remains a jurisdictional objection. If such a requirement is not satisfied, the Tribunal may not examine the case at all for lack of jurisdiction. By contrast, an objection relating to admissibility will not necessarily bar the Tribunal from examining the case if the reasons for the inadmissibility of the claim are capable of being removed and are indeed removed at a subsequent stage. In other words, consent is a prerequisite for the jurisdiction of the Tribunal. In this proceeding, as it will be shown in the course of the Tribunal's analysis, the vast majority of Respondent's objections are actually objections to jurisdiction.
65. The Tribunal understands its duty to determine its jurisdiction, including through examination of the jurisdictional requirements, *sua sponte*, if necessary, as it has an obligation to reject a claim if the record shows that jurisdiction is lacking. Or, put differently, a tribunal can rule on and decline its jurisdiction even where no objection to jurisdiction is raised if there are sufficient grounds to do so on the basis of the record. However, a tribunal's duty to ascertain jurisdiction *sua sponte* does not include an obligation to re-open the evidentiary proceedings, far less to launch its own investigation, unless there are compelling reasons to do so (such as where it has been impossible for a party to have made such an investigation itself or where the other party has concealed relevant facts or evidence).
66. It is also common ground that the jurisdictional stage is not the appropriate time to enter the merits of the case. Indeed, it is not for the Tribunal to examine the claim in detail at the stage of jurisdiction¹. The Tribunal concurs with Claimants that a tribunal need not go beyond determining whether the facts alleged by a claimant, if

¹ See *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of 25 September 1983, ¶ 38, Exh. C-205.

established, are capable of constituting violations of the provisions that are invoked. However, when a jurisdictional issue hinges on a factual determination that may also relate to the merits of the claims, the Tribunal must proceed to a determination of the facts that are presented to it to the extent necessary for jurisdictional purposes. Therefore, a tribunal can make definitive factual findings at the jurisdictional stage too. For example, a tribunal must determine the nationality of a claimant in order to establish its jurisdiction *ratione personae* in a definitive manner. On the other hand, a tribunal which is satisfied that there is an existing investment out of which the legal dispute directly arose might not be required to determine in a definitive manner the exact composition or extent of the investment. Such examination can be left for the merits stage when dealing, for example, with a claim of expropriation. Thus, apart from any findings of fact necessary for jurisdictional purposes, a tribunal will only make a *prima facie* determination as to whether the facts are capable of constituting violations of the provisions that are invoked. In ICSID arbitrations, a new rule introduced as from 10 April 2006 (Rule 41(5) of the Arbitration Rules) is not directly applicable here but, nevertheless, makes it clear how to file objections to the manifest lack of legal merit of a claim and how an arbitral tribunal should dispose of such objections².

67. Respondent's reliance on the *Telenor*³ case in support of its argument that it is necessary to establish an arguable claim on the merits at the jurisdictional stage of the proceedings beyond a *prima facie* showing that the facts are capable of constituting violations of the provisions that are invoked is inapposite. The facts of the *Telenor* case differ significantly from this case. Under the applicable treaty, the jurisdiction of the *Telenor* tribunal was limited solely to claims for expropriation. Yet, claimant failed to assert a claim of expropriation in either the request for arbitration or in the memorial. The *Telenor* tribunal was forced to determine whether the facts as asserted could, *prima facie*, support a claim of expropriation. The tribunal concluded that Telenor had failed to adduce a *prima facie* case of expropriation. *Telenor* is therefore a case to be distinguished on the basis of the specific facts and legal issues of the matter.
68. The Tribunal will now proceed to review and analyze Respondent's specific objections.

² See *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25), Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules of 12 May 2008.

³ *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15), Award of 13 September 2006, 21 ICSID Rev.—FILJ 603 (2006).

2. OBJECTIONS RELATED TO THE PARTIES TO THE ARBITRATION (*RATIONE PERSONAE*)

69. Whether Claimants are nationals of another Contracting State requires a twofold investigation in this case. First, the Tribunal must determine whether Messrs. Micula are Swedish nationals (2.1). Second, the Tribunal must determine whether the three Corporate Claimants, which have the nationality of Respondent because they are constituted under the laws of Respondent, are “investors” of Sweden under the BIT and “nationals of another Contracting State” under the ICSID Convention because they are controlled by nationals of Sweden (2.2).

2.1 Nationality of Messrs. Micula

2.1.1 *Parties’ positions*

a) *Respondent’s position*

70. According to Respondent, Claimants have failed first to discharge their burden of proof to establish that Messrs. Micula had and have Swedish nationality continuously from the date of the alleged injury to the close of this arbitration (R-Mem., ¶ 170; R-Reply, ¶ 90) in accordance with Swedish law. In passing, Respondent claims that Article 25(2) of the ICSID Convention, which requires that the investor held the nationality at the date of consent as well as on the date on which the request is registered, does not exclude application of customary international law on continuous nationality (R-Reply, ¶ 100). Similarly, the BIT, which must be read against the background of customary international law, cannot be said to exclude customary international law rules on continuous nationality (R-Reply, ¶ 101).

71. Besides, Respondent submits that Messrs. Micula’s Swedish nationality would not be opposable to Romania as it is not their effective nationality. It maintains that “a state with which the injured party (or here, an ‘investor’) has overwhelmingly stronger links than the state under the nationality of which a claim is being raised is entitled to defeat that claim on the basis of those overwhelming links (and the absence of any material links with the state of nationality)” (R-Mem., ¶ 187).

72. According to Respondent, the rule of effective nationality applies even when there is only one nationality at stake as confirmed in the *Nottebohm* case (R-Mem., ¶¶ 188-191) where the International Court of Justice held that an individual who has no genuine or effective link with a state could not invoke the nationality of that state against another state, with which that individual has a longstanding and close

connection. Respondent asserts that the decision on jurisdiction in *Siag v. Egypt*, which held that the rule of effective nationality applies only in situations involving dual nationality, “*is not good authority*” (R-Reply, ¶ 115). Respondent asserts that this holding is incorrect for three reasons: (i) it is in contradiction of the *Nottebohm* principle, (ii) this aspect of the tribunal’s decision was *obiter dicta*, and (iii) the interpretation was based on a flawed reading of prior decisions (R-Reply, ¶ 115).

73. According to Respondent, the rule of effective nationality applies both under the BIT and the ICSID Convention (except in the case of dual nationality specifically provided in Article 25(2)(a) of the ICSID Convention quoted below at ¶ 83) as confirmed by Professor Dugard’s legal opinion (Exh. R-53) (R-Reply, ¶¶ 111-112). In the view of Respondent, the effective nationality of a claimant must be taken into account not only at the time of the acquisition of the nationality but also thereafter, i.e., on a continuous basis (R-Reply, ¶ 120).
74. In this case, Respondent argues that Messrs. Micula’s Swedish nationality is ineffective and was solely obtained “*to advance their purposes*” (R-Mem., ¶ 241). Looking at whether a genuine connection exists, the Respondent concludes on the basis of an investigative report (Exh. R-53) that Messrs. Micula permanently reside and physically remain almost constantly in Romania. It also finds that their professional and economic interests, as well as their cultural, social and family ties are in and with Romania. As a result of these strong and continuous links with Romania, Messrs. Micula are barred from invoking their Swedish nationality with respect to Romania (R-Reply, ¶ 96).
75. Having cross-examined Messrs. Micula, Respondent reserved at the hearing the right to apply to the Tribunal for leave to make an objection regarding the validity of the acquisition of Swedish nationality by Mr. Viorel Micula on the ground of fraud towards or patent error(s) on the part of the Swedish authorities. In support of the possibility that such objection might lead to a finding of lack of jurisdiction, Respondent referred to the *Soufraki* case (Tr., p. 196). According to Respondent, such an objection, if presented, would strike at the root of the nationality, and would be in lieu of the “inopposability” objection⁴. Romania wrote to the Tribunal on 4 July 2008 as agreed at the close of the hearing and asked for an extension of time until 18 July 2008 to make any application for leave to object to Viorel Micula’s acquisition of Swedish nationality. In its letter, Romania cast doubt as to his compliance with the five-year residence requirement for grant of nationality under

⁴ Romania’s letter, 4 July 2008, ¶ 2.

Swedish law between February 1989 (date of his permanent residence permit) and 23 February 1994 (acquisition of nationality). Not only did Romania question the intent of Mr. Viorel Micula to reside in Sweden but it contended that he “*did not as a matter of fact ‘habitually’ reside in Sweden after some time in 1992 at the latest*”⁵. Moreover, Respondent argued that the validity of the renunciation of Romanian nationality was a condition of validity of the acquisition of the Swedish nationality⁶. Mr. Viorel Micula’s renunciation was based on the fact that he resided in Sweden and that he had no interest in returning to Romania, which, according to Respondent, both proved to be incorrect. On 11 July 2008, the Arbitral Tribunal agreed to grant Romania’s application for an extension of time until 18 July 2008 in order to file its submission with regard to Mr. Viorel Micula’s Swedish citizenship. By letter of 18 July 2008, Romania wrote that it was not at this stage “*in a position to proffer cogent evidence of its own that Mr Viorel Micula (a) could not have complied with the five-year residence requirement under Swedish law or (b) obtained approval of his application to renounce his Romanian nationality on a false premise*”⁷ although doubts subsisted. It was therefore not seeking leave to make an application to submit an objection on those bases.

b) Claimants’ position

76. According to Claimants, Messrs. Micula had Swedish nationality on the relevant dates for the purposes of the ICSID Convention, i.e., date of consent and date of registration of the Request. It is only necessary to establish that Messrs. Micula have been granted Swedish nationality in accordance with Swedish law, which is the law applicable pursuant to Article 1(2)(a) of the BIT, to fulfil the positive nationality requirement of Article 25(1) of the ICSID Convention (C-C.Mem., ¶¶ 112 and 120). Messrs. Micula also satisfy the definition of an investor under Article 1(2)(a) of the BIT (C-Rejoinder, ¶ 177). As held by the *Soufraki ad hoc* Committee, if the claimant submits *prima facie* evidence of his nationality, the burden of proof shifts to the respondent (C-C.Mem., ¶ 134). The documents presented to the Tribunal, including certificates of naturalization for both Messrs. Micula (C-Rejoinder, ¶ 192), establish Swedish nationality and were not rebutted by Respondent (C-C.Mem., ¶ 140).
77. Claimants also submit that it is not contested that on the relevant dates Messrs. Micula were no longer Romanian nationals (C-C.Mem., ¶ 122; C-Rejoinder, ¶ 244). It is also not contested that Messrs. Micula obtained Swedish nationality in

⁵ *Loc. cit.*, ¶ 5.

⁶ *Loc. cit.*, ¶ 6(k).

⁷ Romania’s letter, 18 July 2008, p. 1.

accordance with Swedish law and that they have continuously held Swedish nationality since (C-C.Mem., ¶ 135). These two facts have been confirmed in a letter of April 2007 from the Swedish Migration Board to Respondent, sent upon Romania's request (C-Rejoinder, ¶¶ 194-196; Exh. C-247).

78. Additionally, Claimants maintain that the ICSID Convention does not contain a continuing nationality requirement, which is in addition highly doubtful under customary law (C-C.Mem., ¶ 125). In any event, Messrs. Micula were Swedish nationals at the time of the alleged BIT violations and continuously ever since (C-C. Mem., ¶ 127).
79. Further, contrary to what Respondent asserts, the effective nationality principle under customary international law is not applicable to this case, as it only applies to situations of dual nationality (C-C.Mem., ¶ 172, ¶ 192, ¶ 203; C-Rejoinder, ¶ 170 and ¶¶ 219-224). Therefore, the *Nottebohm* principle does not apply in this case. As confirmed by various ICSID tribunals, the ICSID Convention leaves no room for the application of the effective nationality principle, or of customary international law: nor does the BIT which only refers to Swedish law (C-C.Mem., ¶ 185; C-Rejoinder, ¶ 166). Swedish law, the only applicable law, does not require an effective link such as permanent residence for the continuation of citizenship (C-C.Mem., ¶ 247).
80. In any event, under customary international law, effective link is only required at the time of the acquisition of the nationality, not later on (C-C.Mem., ¶ 198; C-Rejoinder, ¶ 209). At that time, Messrs. Micula had lived in Sweden for several years and had substantial bonds there and they still have "a bond of allegiance and effective ties to Sweden" (C-C.Mem., ¶ 215). The case is thus to be distinguished from the *Nottebohm* case, which was silent on the issue of a continued effective link (C-C.Mem., ¶ 223).
81. Contrary to what Respondent argues, Claimants maintain that Messrs. Micula's nationality is not a nationality of convenience (C-C.Mem., ¶¶ 249-254; C-Rejoinder, ¶ 226). The links with Sweden are real and numerous (C-Rejoinder, ¶¶ 228-237).
82. Regarding the late application of Romania as to the invalidity of Mr. Viorel Micula's acquisition of Swedish law, Mr. Viorel Micula relies on the decision taken by Sweden and Claimants underline that the high burden of proof lies with Respondent to show why this decision should not be considered dispositive. Mr. Viorel Micula further denied the facts asserted in Romania's allegations. The other Claimants sided with Mr. Viorel Micula on this issue. On 31 July 2008, Mr. Ioan Micula and the Corporate

Claimants (Claimants 1, 3, 4 and 5) answered Respondent's letter of 18 July 2008. They recalled that the burden is on Romania to show that Mr. Viorel Micula did not fulfil the requirements for lawfully obtaining Swedish nationality, what such requirements were, and in the event such requirements were not satisfied, what the consequences would be under Swedish law. It is not clear whether Claimants 1, 3, 4 and 5 aver that the Tribunal should not investigate these issues *sua sponte*.

2.1.2 Tribunal's analysis

a) Applicable rules

83. Pursuant to Article 25(2) of the ICSID Convention "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.

84. Article 1(2)(a) of the BIT defines investors in this respect as:

a) any natural person who is a citizen of a Contracting Party in accordance with its Laws;

b) Applicable test

85. In accordance with Article 25(1) of the ICSID Convention, the Tribunal must determine whether Messrs. Micula were Swedish nationals at the time of their consent to arbitration, i.e., at the date of the Request, as well as on the date of the registration of the Request by the Centre (the so-called positive requirement). The Tribunal must also determine that Messrs. Micula were not Romanian nationals on either of these dates (the so-called negative requirement). Under the BIT, the Tribunal must examine whether Messrs. Micula were Swedish nationals in accordance with Swedish law.

86. It is not disputed by the Parties that as a general principle it is for each State to decide in accordance with its law who is its national. This is a well established principle of international law⁸ and, as just recalled, is consistent with the provision of

⁸ See International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, 2006, Yearbook of the International Law Commission, 2006, vol. II, Part Two, under Article 4, p. 31 [hereinafter *Draft Articles on Diplomatic Protection*]. See also the *1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*.

Article 1(2)(a) of the BIT. It is also well established in ICSID jurisprudence that the domestic laws of each Contracting State determine nationality⁹. Thus, in this case, the Tribunal must determine the nationality of Messrs. Micula under the national law of the State whose nationality they claim to have, i.e., Swedish law.

87. The Parties disagree as to the role of international law in the Tribunal's interpretation of Article 1 of the BIT with respect to nationality. The Tribunal is of the opinion that in interpreting the BIT, i.e., an instrument between two sovereign States, it may take into account, as directed by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, any relevant rules of international law. The Tribunal is also mindful of the role of international law when nationality is acknowledged for international purposes. Indeed, it is well established that the acquisition of nationality must not be inconsistent with international law¹⁰. The burden of proving that nationality was acquired in a manner inconsistent with international law lies with the party challenging the nationality. In that respect, there exists a presumption in favour of the validity of a State's conferment of nationality¹¹. The threshold to overcome such presumption is high.
88. In making its determination, the Tribunal will be mindful of Article 15 of the Universal Declaration of Human Rights according to which everyone has the right to a nationality, and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.
89. Romania's arguments are two-fold: on the one hand Romania argues that Swedish nationality albeit acquired legally is not "opposable" to Romania given the genuine connection that exists between Messrs. Micula and Romania, and conversely given the lack of effective ties with Sweden. On the other hand, Romania has raised doubts in connection with the validity of Mr. Viorel Micula's acquisition of Swedish nationality. The Tribunal will address the latter objection dealing only with Mr. Viorel Micula prior to dealing with the objection common to the two individual Claimants.
90. Respondent does not argue that Ioan Micula did not comply with Swedish law when he acquired Swedish nationality on 22 October 1992 (Exh. C-245). Indeed, it is clear from the record that Ioan Micula was married to a Swedish national (of Finnish

⁹ See *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) [hereinafter *Soufraki*], Decision of the *ad hoc* Committee on the Application for the Annulment of the Award of 5 June 2007, Exh. RL-76, ¶ 60; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* (ICSID Case No ARB/05/15), Decision on Jurisdiction of 11 April 2007, ¶¶ 143 and 146, Exh. RL-80 [hereinafter *Siag*].

¹⁰ See *Draft Articles on Diplomatic Protection*, Article 4, p. 31.

¹¹ *Ibid.*, p. 34.

origin) since 1988, that he held a residence and work permit from October 1987 to October 1989 and thereafter a permanent resident permit (Exh. C-251) until the day of his naturalization, and that his naturalization was obtained in full compliance with the applicable Swedish law. As stated by the Swedish Migration Board on 3 April 2007 in its answer to Romania's investigation (Exh. C-247), it decided on 12 September 1991 that Ioan Micula would be granted Swedish citizenship if he renounced his Romanian nationality within two years from that date. Conversely, it is not disputed that Ioan Micula's renunciation of his Romanian nationality on 27 August 1992 was valid and made in compliance with Romanian law. Nor is it disputed that Mr. Ioan Micula did not seek to re-acquire Romanian nationality, as he was eligible to do on the basis of repatriation.

c) *Acquisition of Swedish nationality by Mr. Viorel Micula*

91. It is correct, as asserted by Claimants, that Romania's doubts regarding the acquisition of Swedish nationality by Mr. Viorel Micula were articulated belatedly, namely on the occasion of his cross-examination on 20 June 2008, notwithstanding the fact that the Request was submitted in August 2005. The Tribunal also notes that Romania has not raised a formal objection regarding the acquisition of Viorel Micula's Swedish nationality. Regardless, nationality is an objective jurisdiction-requirement of the ICSID Convention and the Tribunal must make sure that this requirement is satisfied. For this reason, the Tribunal will examine this issue. It would be inappropriate for the Tribunal to consider Mr. Viorel Micula (or his brother) to be a Swedish national for the purpose of the ICSID Convention and the BIT if it were shown that he had obtained Swedish nationality by fraud or material error, in other words in a manner inconsistent with international law.
92. The Tribunal understands that the applicable law in 1994 was the Swedish Citizenship Act of 1950. According to Section 6(1) of this Act, as amended in 1992 (Exh. C-186) and thus applicable to the case of Ioan Micula, and as subsequently amended in 1995 and thus applicable to the case of Viorel Micula (Exh. C-187), naturalization of an alien requires satisfaction of three prerequisites. The candidate must have been at least 18 years old, he must have lived in Sweden for at least five years, or three years if married to a Swedish national, and must have led a respectable life. The requirement at stake in this proceeding is the five years of residence in Sweden from the date of obtaining a resident permit until the acquisition date. The record is unhelpful on what is required to satisfy the residence requirement and the requirement that the applicant "have led a respectable life". The

Tribunal also understands that Swedish law contains no provision on the withdrawal of Swedish nationality due to residence abroad (C-C.Mem., ¶ 137).

93. Viorel Micula left Romania in 1987. According to the State Migration Board, he entered Sweden on 7 January 1989. Prior to this entry, documents of the Swedish Migration Board (Exh. C-258-259) show that in 1988 his applications for residence and work permits were denied three times. However, he obtained a permanent resident permit and travel document in Sweden on 23 February 1989 (footnote 225 C-Rej., Exh. C-259) and was declared a refugee on the same date, a decision that was later revoked in January 1990. The Swedish Migration Board decided on 23 February 1994 that Viorel Micula would be granted Swedish citizenship if he renounced his Romanian nationality within two years from that date (Exh. C-247). Viorel Micula renounced his Romanian nationality on 17 January 1995 (Exh. C-193). He was granted Swedish nationality on 8 February 1995. Viorel Micula did not request to re-acquire his former Romanian nationality.
94. Romania casts doubt on whether Viorel Micula fulfilled the requirement of five years' residence in Sweden. Thereby, Romania questions the decision taken by the Swedish authorities when they naturalized Viorel Micula on 8 February 1995 (Exh. C-185). They took that decision because they were satisfied that he had spent the required period of time in Sweden. The Tribunal is mindful of the analysis and conclusions of the tribunal and the *ad hoc* committee in the *Soufraki* case and of the authorities quoted by the *ad hoc* committee in *Soufraki* to the effect that it has the power and the duty to examine the existence of the treaty-required nationality. In doing so, it might be that the Tribunal would not necessarily defer to the views of national authorities¹² at least if there has been fraud¹³ or an error (as alleged in the *Soufraki* case). This said, it is also clear that the State conferring nationality must be given a "margin of appreciation" in deciding upon the factors that it considers necessary for the granting of nationality¹⁴. For the Tribunal, it is not merely a

¹² *Soufraki*, ¶¶ 58 ff.

¹³ Fraud was not alleged in the *Soufraki* case but has been dealt with in the *Ellias Assad Flutie* case, the US-Venezuela Mixed Claims Commission pursuant to the Protocol of February 17, 1903, between the United States of America and the Republic of Venezuela, Decision of 1904, IX Reports of International Arbitral Awards, p. 148 (no standing of Mr. Flutie as his naturalization was improperly granted since he had no intent to reside permanently in the US and did not reside during the continued term of five years) [hereinafter the *Flutie* case]. Fraud was also mentioned in the *Flegenheimer* Case, Italian-United States Conciliation Commission, 20 September 1958, 14 Reports of International Arbitral Awards, p. 327, ¶ 38, as a motive for rejection of a certificate's *prima facie* probative value. In addition, as put by *Oppenheim's International Law*, R Jennings and A Watts (eds), 9th edn, 1996, p. 855, Exh. RL-78: "this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only manifestly groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that nationality".

¹⁴ See *Draft Articles on Diplomatic Protection*, commentary under Article 4 ¶ (7), referring to the advisory opinion of the Inter-American Court of Human Rights in the Proposed Amendments to the

question of probative value of a certificate of naturalization (which the Tribunal accepts to be *prima facie* evidence that is especially convincing against the backdrop of two States having friendly relations and sharing common membership of the EU). Rather, the question is: under which conditions is it appropriate for the Tribunal to overcome the sovereign decision taken by Sweden? It is worth recalling that such decision was made in 1995 in a context unrelated to the present claim. Under what circumstances can the Tribunal question the decision of the Swedish immigration authorities which, after investigation, decided that Viorel Micula had satisfied the Swedish requirements for naturalization? The Tribunal underlines at this juncture that there are no reasons of real importance to doubt the accuracy and thoroughness of the inquiry that was made by the Swedish authorities at the time. This case differs clearly from the *Soufraki* case where the Italian authorities that delivered a certificate of nationality were not aware of the loss of the Italian nationality by Mr. Soufraki. This case also differs from other international law precedents that involve nationality in the context of diplomatic protection, such as where the State granting the nationality is a party to the dispute and asserts claims based on its own determination of nationality¹⁵.

95. In these conditions, the Tribunal would only be inclined to disregard the decision of the Swedish authorities if there was convincing and decisive evidence that Viorel Micula's acquisition of Swedish nationality was fraudulent or at least resulted from a material error. It is for Respondent to make such a showing. For this purpose, casting doubt is not sufficient. The fact is that Respondent has presented only limited evidence, none of which is sufficient to make the necessary showing. Respondent has pointed to Mr. Viorel Micula's hesitations and inaccuracies under cross-examination by counsel for Respondent. Some of his answers may have left the feeling that his memory was selectively failing him, but they are not a basis to question the validity of the Swedish authorities' decision to naturalize him or even to question the convincing evidentiary value of the certificate that the Swedish Migration Board issued to Respondent. The record does not include any elements which should lead the Tribunal to investigate facts that are not before it. Nor do Respondent's allegations of facts lead to the need for opening a fact-finding procedure. Given the factual evidence presented by Respondent, the Tribunal, in its letter of 11 July 2008, directed Respondent how to proceed in the event that

Naturalization Provisions of the Political Constitution of Costa Rica, 79 I.L.R. 283, pp. 302-303, ¶¶ 62-63.

¹⁵ See McLachlan, Shore, Weiniger, *International Investment Arbitration*, Oxford 2007 5.10 p. 135 and fn. 16 with a reference to the *ELSI* case.

Respondent believed that it needed additional supplemental documentary production – an option that Respondent chose not to pursue.

96. For these reasons, the Tribunal considers that, contrary to the situation in the *Soufraki* case, Respondent has not met the burden of proof to establish grounds for the Tribunal to question Mr. Viorel Micula's nationality, and that, rather, Mr. Viorel Micula has established a strong and convincing case that he has been a national of Sweden during the period relevant to this dispute. The burden thus shifted to Respondent to establish that the Swedish decision was unfounded on the basis of the existing facts. Romania has not done so and the Tribunal sees no good reason to open an investigation.
97. Romania itself admits that it cannot proffer cogent evidence. As the Tribunal is mindful, Romania asserts that it was unable to locate the records for entries to and exits from the country and such of the Bihor County police concerning persons residing in that county for the period 1989-1995. This said, the Tribunal is unconvinced by Romania's justification that it is prevented from collecting this information due to the reduced number of staff available during the summer vacation period. Romania had three years to investigate this matter. The doubts it raised belatedly do not appear to be novel and are reflected in the letter it sent to the Swedish Migration Board in 2007 (Exh. C-247). It also submitted a report in January 2008 entitled "citizenship investigation" which focused on the Swedish aspect of Messrs. Micula's nationalities (Exh. R-53). While the Tribunal understands that Romania underwent drastic changes since 1989 and that its administration might be overwhelmed, casting doubts without adducing evidence is insufficient. In the circumstances, there are no bases to take a decision that would in effect render Mr. Viorel Micula stateless.

d) *Opposability of Swedish nationality to Romania*

98. It is clear for the Tribunal that there is one, and only one, nationality involved in this case: Swedish nationality. It has not been disputed that Messrs. Micula have renounced their Romanian nationality. Therefore, in the view of the Tribunal, a view that appears to be shared by Respondent, the relevant question is not about the choice of one nationality over another because the first is dominant or the second is ineffective. Rather, as presented by Respondent, the relevant question is whether Messrs. Micula held Swedish nationality at certain times relevant to this dispute. Respondent suggests that Messrs. Micula had genuine connections with Romania, the Respondent in this arbitration, the State in which the investment was made, and

the State of their former nationality. The Tribunal must therefore determine whether there is some room for the *Nottebohm*¹⁶ test of genuine connection in this particular case; in other words, whether the Swedish nationality of Messrs. Micula is not effective and cannot be opposed to Romania because of their strong links with Romania and the lack of genuine and effective links with Sweden.

99. The Tribunal notes that the role of a genuine or effective link with the state of nationality is disputable in public international law, and is indeed disputed, particularly in the case of a single nationality. It seems clear that, as put by the Special Rapporteur of the ILC on Diplomatic Protection in his first report, “*the Nottebohm requirement of a ‘genuine link’ should be confined to peculiar facts of the case and not seen as a general principle applicable to all cases of diplomatic protection*”¹⁷. He added “[t]he suggestion that the *Nottebohm* principle of an effective and genuine link be seen as a rule of customary international law in cases not involving dual or plural nationality enjoys little support”¹⁸. Indeed, the International Law Commission considered incorporating such a requirement in the Draft Articles on Diplomatic Protection, but ultimately decided against it and did not include such a requirement in Article 4 of the Draft Articles, which covers cases where there is only one nationality¹⁹. The fact that the genuine link test was omitted in the context of diplomatic protection is especially noteworthy because it is in the context of diplomatic protection that States may have a particular vested interest in relying on or disregarding a nationality that lacks foundation in reality. There is thus a clear reluctance in public international law to apply the genuine link test where only a single nationality is at issue, such as the case at hand.

¹⁶ *Nottebohm (Liechtenstein v. Guatemala)*, 18 November 1953, [1955] ICJ Reports 111, Exh. RL-72.

¹⁷ JR Dugard, *First Report on Diplomatic Protection*, 7 March 2000, A/CN.4/506, ¶ 110.

¹⁸ *Loc. cit.*, ¶ 111.

¹⁹ The commentary under *Draft Articles on Diplomatic Protection*, Article 4 reads as follows:

(5) Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case, as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were “extremely tenuous” compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was “not entitled to extend its protection to Nottebohm vis-à-vis Guatemala”. This suggests that the Court did not intend to expound a general rule applicable to all States but only a relative rule according to which a State in Liechtenstein’s position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today’s world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection. (Footnotes omitted, Exh. C-203)

100. The Tribunal must nonetheless examine whether there is any room for the *Nottebohm* requirement of a “genuine link” in this proceeding. There is little support for the proposition that the genuine link test has any role to play in the context of ICSID proceedings²⁰. The ICSID Convention requires only that a claimant demonstrate that it is a national of a “Contracting State”. In fact, Article 25(2)(a) of the ICSID Convention does not require that a claimant hold solely one nationality, so long as its second nationality is not that of the State party to the dispute. The Tribunal agrees with the conclusion of the tribunal in *Siag* that the regime established under Article 25 of the ICSID Convention does not leave room for a test of dominant or effective nationality²¹. No previous ICSID tribunal appears to have ever ruled to the contrary and Respondent has not supplied any convincing evidence to the contrary²². In fact, Respondent has not convinced the Tribunal to hold otherwise.
101. It is also doubtful whether the genuine link test would apply pursuant to the BIT. The Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. Sweden and Romania agreed in the BIT that the Swedish nationality of an individual would be determined under Swedish law and included no additional requirements for the determination of Swedish nationality. The Tribunal concurs with the *Siag* tribunal that the clear definition and the specific regime established by the terms of the BIT should prevail and that to hold otherwise would result in an illegitimate revision of the BIT²³.
102. The Tribunal observes that once naturalized, Messrs. Micula had no need to entertain closer links to Sweden (beyond those links resulting from their Swedish

²⁰ This said, the Tribunal notes that Aaron Broches mentioned in his Hague lecture, “*It is necessary to realize, however, that the Legal Committee abstained from defining ‘nationality’ and that there was a general recognition that in the course of ruling on their competence Commissions and Tribunals might have to decide whether a nationality of convenience [referring to the Nottebohm case] or a nationality acquired involuntarily by an investor could or should be disregarded*”, in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Recueil des cours, Volume No. 136, 1972, p. 358, Exh. RL-109. He had previously stated, in the *Chairman’s Reports on the Preliminary Draft of the Convention*, that “*it should be noted that the significance of nationality in traditional instances of espousal of a national’s claim should be distinguished from its relatively unimportant role within the framework of the Convention. In the former case, the issue of nationality is of substantive importance as being crucial in determining the right of a State to bring an international claim, while under the Convention, it is only relevant as regards the capacity of the investor to bring a dispute before the Center*”. Doc. Z11, 9 July 1964, ¶ 116, Exh. RL-73.

²¹ *Siag*, para. 198.

²² See *Champion Trading Company, Ameritrade International, Inc, James T Wahba, John B Wahba and Timothy T Wahba v. Arab Republic of Egypt* (ICSID Case No. ARB/02/9), Decision on Jurisdiction of 21 October 2003, p. 17, Exh. RL-110; *Siag*, ¶¶ 196-198; *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on Jurisdiction and Admissibility of 18 April 2008, ¶ 93, Exh. C-243 (albeit regarding corporate claimants).

²³ *Op. cit.*, ¶ 198 and 201; see *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Award of 8 May 2008, ¶ 414. Exh. C-244*op. cit.*, ¶ 415 [hereinafter *Pey Casado v. Chile*].

nationality itself) than any other national of Sweden. The record does not show that there would be any limitations on a Swedish citizen to leave Sweden, to migrate or to take a foreign residence or that such circumstances should have any effect on his nationality.

103. In addition, there is a major difference between the *Nottebohm* case and the case at hand. In *Nottebohm*, Guatemala never conferred its nationality upon Mr. Nottebohm, and argued that, given his relationship with Guatemala and Germany (his former nationality), he remained an enemy and was not to be treated as a Lichtenstein national. Here, Romania itself has agreed to Messrs. Micula's Swedish nationality when it accepted their renunciation of Romanian nationality. Romania does not even allege that this was in error or that it was fraudulently misled to accept such renunciation. Respondent cannot now argue that Messrs. Micula had insufficient ties to Sweden or even that such ties have tapered off subsequently. Messrs. Micula are not currently Romanian nationals and, therefore, their Swedish nationality cannot become less effective or less dominant than their Romanian nationality (or any other nationality for that matter, given that Messrs. Micula have only Swedish nationality). Even if dual nationality were not a prerequisite for applying the *Nottebohm* test, *Nottebohm* cannot be read to allow or require that a State disregard an individual's single nationality on the basis of the fact that this individual has not resided in the country of his nationality for a period of time.
104. Finally, even if there were some room for the application of the genuine link test in this case, Mr. John Dugard, expert for Respondent, pointed out that when dealing with a single nationality, the threshold for the Respondent State to show that the test is applicable is higher than in the cases of dual nationality and the use of the test should be limited to exceptional circumstances. In the Tribunal's view, the links of Messrs. Miculas with Sweden are not of such nature as to require that the Tribunal question the effectiveness of the Swedish nationality of Messrs. Micula or its opposability to Romania. Messrs. Micula have assets in Sweden. Mr. Ioan Micula's in-laws are living in Sweden and his two daughters are Swedish nationals. Messrs. Micula intend to retire in Sweden and they pay into pensions funds to that effect. The fact that they presently reside in Romania is not a decisive factor. Indeed, it is clear that they have done so in order to run their business, and as testified by Mr. Viorel Micula they could live in another country if they had their business located somewhere else.

105. For the above reasons, the Tribunal rejects Romania's argument that the Swedish nationality of Mr. Ioan Micula and Mr. Viorel Micula cannot be opposed to Romania because of purported tenuous links with Sweden.

106. The Tribunal thus concludes that Mr. Ioan Micula and Mr. Viorel Micula are and have been Swedish nationals at all times relevant to the Tribunal's jurisdiction in this dispute.

2.2 Nationality of the three Corporate Claimants

107. The position of the Parties as to the nationality of the three Corporate Claimants hinges upon the Tribunal's determination of the nationality of Messrs. Micula.

108. Pursuant to Article 25(2) of the ICSID Convention "National of another Contracting State" means:

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and **any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.**
(Emphasis added)

109. Relevant parts of Article 1(2) of the BIT define an investor as:

- b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of a Contracting Party and which have their seat in the territory of that same Contracting Party; and
- c) legal entities wherever located which are effectively controlled by citizens of a Contracting Party or by legal entities having their seat in the territory of that Contracting Party.

110. Article 7(3) of the BIT provides:

3. For the purpose of this Article and Article 25(2)(b) of the said Washington Convention, any legal person which is constituted in accordance with the legislation of one Contracting Party and which, before a dispute arises, is controlled by an investor of the other Contracting Party, shall be treated as a legal person of the other Contracting Party.

111. Pursuant to Article 25(2)(b) of the ICSID Convention, the relevant date for determining the nationality of the Corporate Claimants is the date of the consent to submit the dispute to ICSID arbitration, i.e., the date of the Request, namely 28 July 2005.

112. Claimant 3 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%.
113. Claimants 4 and 5 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).
114. 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.
115. Therefore, Claimants 3 to 5 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. Respondent has not disputed these facts.
116. Accordingly, the dispute is between an ICSID Contracting State, Romania, and nationals of another ICSID Contracting State, Sweden.

3. OBJECTIONS RELATED TO THE NATURE OF THE DISPUTE (*RATIONE MATERIAE*)

117. Respondent's objections can be summarized as follows: the dispute does not relate to an investment and is only hypothetical. The Tribunal will examine these two objections in turn.

3.1 Existence of an investment

3.1.1 *Parties' positions*

a) *Respondent's position*

118. According to Respondent, Messrs. Micula's shareholding in the Corporate Claimants as well as the Corporate Claimants' material and immaterial assets appear to have the characteristics of an investment. Respondent also "*does not take issue with the admissibility of the claims under Article 2 of the BIT*" (R-Reply, ¶ 57).

119. However, Respondent objects to the notion that investment incentives listed in EGO 24/1998 can be expropriated, as those incentives only create potential entitlements and are not private rights (R-Mem., ¶ 97). It submits that the incentives are not investments in themselves (R-Mem., ¶ 99). To support its position, Respondent underlines that Article 1(1) of the BIT requires that the investment must be an asset invested in the territory of Romania (R-Mem., ¶ 103). Respondent further denies that the incentives and the investor certificates could be considered licences or concessions under the BIT.

b) Claimants' position

120. Claimants contend that they have made an investment for the purposes of Article 25 of the ICSID Convention and Article 7 of the BIT.

121. Claimants assert that, with regard to Article 4 of the BIT, “[a]s an integral part of the overall investment operation, the facilities are susceptible of expropriation” (C-Rejoinder, ¶ 81). In addition, “[r]ights conferred unilaterally upon the investor can form important elements of the investment without the investor having contributed to their ‘creation or maintenance’” (C-Rejoinder, ¶ 82). They can also be described as “claims to money” or as “any kind of asset” (C-Rejoinder, ¶ 83) or business concessions in the sense of specific privileges or abatement (Tr. pp. 163-164).

3.1.2 Tribunal's analysis

122. Respondent argues in essence that there can be no claim for expropriation of the incentives since incentives are not investments.

123. At this juncture, the Tribunal considers that 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.

124. It is not disputed by Respondent that Messrs. Micula's shareholding in the Corporate Claimants, as well as the Corporate Claimants' material and immaterial assets, have the characteristics of an investment (R-Mem., ¶ 95). The fact that Respondent presents its argument as an objection to admissibility further supports the fact that it acknowledges the Tribunal's jurisdiction in this respect.

125. In any event, the Tribunal is satisfied, and Respondent does not argue otherwise, that the investments made by the Corporate Claimants as described above (see ¶¶ 34-38) qualify as investments for the purposes of the ICSID Convention. Indeed,

it would be hard to argue that the ownership and operation of plants for the production of food and related services, which involves a substantial commitment of resources over a significant period of time, is not an investment under any reasonable definition of the term. In the same vein, the Tribunal is satisfied that the shareholding of Messrs. Micula qualifies as investment for the purposes of the ICSID Convention.

126. The Tribunal is also satisfied that there was an investment for the purposes of the BIT. The investments fall within the scope of the definition of “investment” in Article 1 of the BIT, which reads as follows:

For the purposes of this Agreement

1. “investment” shall mean any kind of asset owned or controlled invested directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, though not exclusively:

- a) movable and immovable property as well as any other rights in rem, such as mortgage, lien, pledge, usufruct and similar rights;
- b) shares, debentures and other forms of participation in companies;
- c) claims to money and other rights relating to any performance having an economic value;
- d) intellectual property rights, technical processes, trade names, know-how, goodwill and other similar rights;
- e) business concessions conferred by law, administrative decisions or under contract, including concessions to search for, cultivate, extract or exploit natural resources; and
- f) goods that under a leasing agreement are placed at the disposal of a lessee in the territory of one Contracting Party by a lessor being an investor of the other Contracting Party.

A change in the form in which assets are invested does not affect their character as investments.

127. Respondent has not suggested that these investments were not made in the Romanian territory or in accordance with Romanian law. The investment certificates issued by Romania (Exh. C-42 to C-44) provide evidence that these investments were properly made.
128. Having established that Claimants have made investments in the territory of Romania out of which this dispute arises, the Tribunal does not need to establish at this stage whether the incentives as such are considered investments capable of expropriation. Be that as it may, investments do include income expectations and such income will of necessity be less if an investor is deprived of incentives. In

passing, the Tribunal notes that expropriation is only one of the BIT causes of action upon which Claimants rely in relation to their investment.

3.2 Alleged absence of compensable harm

129. The Tribunal will summarize the Parties' positions prior to setting out its analysis.

3.2.1 Parties' positions

a) Respondent's position

130. According to Respondent, harm is a necessary component of any claim and of all causes of actions that can be raised under the BIT (R-Reply, ¶ 20). Absent the certitude of harm already suffered, or certain to be suffered in the future, Claimants lack standing to bring a claim (R-Mem., ¶ 93). Only Sweden would have standing to invoke the BIT without a showing of specific and actual harm to itself or its nationals (R-Mem., ¶ 87). For a dispute not to be merely theoretical, there must be a relief to which Claimants are entitled (R-Reply, ¶ 22), or - put differently - that damage has occurred or been quantified (R-Reply, ¶ 25). Respondent maintains that there can be no breach without injury (R-Mem., ¶ 79). According to Respondent, Claimants have not shown anything but hypothetical harm resulting from Respondent's actions allegedly in violation of the BIT.

131. In addition, according to Respondent, the necessary showing of harm was to be made by the time of the Statement of Claim pursuant to the Minutes of the First Session²⁴ (R-Mem., ¶ 94). Respondent argues that Claimants violated the terms of the Minutes of the First Session by not providing in the Statement of Claim all evidentiary materials or the legal and factual basis for their damages claim and method of calculation (R-Reply, ¶ 33). In the view of Respondent, the damages model provided by Claimants is irrelevant. Most importantly, there is no evidence that any Corporate Claimant paid customs duty, VAT, profit tax or any other tax from which they would have been exempted had EGO 24/1998 not been modified

²⁴ Item 14(II) of the Minutes of the First Session reads:

a. Each party's submission shall contain a full statement of the relevant party's case, together with the formal relief claimed from the Tribunal and all evidential and legal materials upon which that party relies in support of its case, including documentary evidence, witness statements, and expert reports. At the session, the President clarified that each submission should include specific allegations and an indication whether the submitting party agrees with the other party's allegations and the reasons therefore.

b. As an exception to Item 14(II)(a) above, the Claimants will not be required to provide with the Memorial any expert reports on the amount of damages claimed, provided that the legal and factual bases for their damages claim and the method of its calculation are described in the Memorial."

(R-Reply, ¶ 37). Even if some customs duties would have been paid by European Food for EUR 27,600, this falls short of the EUR 450 million claimed (R-Rejoinder, ¶ 44). Respondent has submitted a report by Mr. Ellison of KPMG, which maintains that it cannot be established that any loss has been suffered (Exh. R-1).

b) Claimants' position

132. By contrast, Claimants point out that “[t]he Tribunal cannot establish the financial consequences of an illegality before it has examined the facts and their legal consequences” (C-Rejoinder, ¶ 22). At this juncture, Claimants are under no obligation to prove their financial losses, which will be properly addressed at the merits stage (C-Rejoinder, ¶ 24).
133. In any event, Claimants allege that they have suffered a financial loss. For example, it is clear that Claimant 3 paid customs duties on the import of tomato paste from Greece and hops pellets from Germany (Exh. C-166, C-167, C-214, C-215). These products would not have been subject to customs duties if the incentives were in place. Hence, Claimants have suffered damages because the customs duties resulted in lowered profits. In addition, due to the revocation of the incentives granted, the costs for the import of raw material increased to such an extent that Claimants had to stop the production of certain products (C-Rejoinder, ¶ 66). To support further their position, Claimants have submitted two expert reports by Deloitte (Exh. C-168 and C-223) setting out a damages model that compares the profits Claimants actually made to the profits they would have made had the incentives not been withdrawn. Hence, there was no violation of section 14(II) of the Minutes of the First Session.
134. Claimants also put forward that the primary relief being sought is restitution of the existing legal framework. Claimants maintain that they do not need to establish the existence of a compensable harm.

3.2.2 Tribunal's analysis

135. Respondent's primary argument in this proceeding is that “the Claimants have failed to state a claim in their Memorial because they have not made any showing of existing or certain future harm from the measures complained of” (Respondent's Opening Statement, p. 4). For the Tribunal, this argument actually relates to the question of whether there is a dispute. Respondent contends there is only a hypothetical dispute because Claimants have not suffered any harm. The issue of whether a dispute exists is a question of jurisdiction, to which the Tribunal will turn

shortly. The issue of the extent of damages, however, is a separate question that the Tribunal reserves for consideration for the merits phase.

136. The Tribunal has no doubt that the present dispute is of a legal nature²⁵ and that it arose directly out of an investment for the purposes of Article 25 of the ICSID Convention. The “dispute” was first notified by Claimants to Respondent on 13 September 2004 pursuant to Article 7(1) of the BIT for the purpose of entering into amicable discussions (Exh. C-8 to C-12). No amicable solution was found (Exh. C-13 and C-14). The conditions set forth in Article 7(1) and (2) of the BIT are therefore met.
137. It is also clear to the Tribunal that the dispute is not merely hypothetical. Indeed the dispute as framed and presented by Claimants relates to the effect of certain regulatory changes on their business. The changes in the regulatory framework are not disputed by Respondent. Whether Claimants are entitled to any incentives is a matter to be determined at the stage of the merits. Suffice it to note here that Claimants have made a *prima facie* case of entitlement: European Food SA has shown that it was entitled to a profit tax exemption (Exh. C-34), the extent of which remains to be determined. Moreover, Claimants argue that there is no mention in the BIT of the need for the investor to have incurred any loss or damage to pass the jurisdictional threshold – a requirement that does exist in other investment treaties, such as Chapter Eleven of the NAFTA (C-C.Mem., ¶¶ 33-36). The Tribunal would agree with such argument provided Claimants aver having incurred a loss or damage, which they do.
138. In so far as the existence of harm relates to the existence of a dispute, the Tribunal now turns to the specific issue of whether Claimants failed to show actual or future harm. The Tribunal is unconvinced by Respondent’s arguments to that effect. It is not disputed that some imports have occurred and Claimants have paid some import taxes. It is also undisputed that at least some of the incentives were terminated prior to the termination of Claimants’ Permanent Investor Certificates. In fact, it cannot be denied that Claimants 3 to 5 established *prima facie* the existence of a financial loss in connection with payment of customs duties, which Respondent conceded at the hearing (Tr., pp. 27-28).

²⁵ See ¶ 26 of the *Report of the Executive Directors on the Convention* according to which: “The expression “legal dispute” has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.”

139. Indeed, Claimants have adduced two customs declarations dated 3 May 2005 and 22 December 2005 in which Claimant 3 imported tomatoes from Greece (Exh. C-166 and C-214 and 215 for the proof of payment) and hops pellets from Germany (Exh. C-167). There are also on record for the years 2005, 2006 and 2007 various declarations and proof of payment by Claimant 3 of customs duties in connection with the import of tomato paste from China, apple concentrate from Israel, meat barrels from China and potato granules from Germany (Exh. C-218). Declarations are also on record for Claimant 4 with regard to the import of rice debris from Egypt during the course of 2005, 2006 and 2007 (Exh. C-219). Finally, one declaration in the name of Claimant 5 has been provided in connection with the import of polyethylene in 2006 (Exh. C-220).
140. In these circumstances, and on the basis of the facts as asserted, the Tribunal finds that the revocation of the incentives listed in EGO 24/998 is capable of having caused in the past, or causing in the future, harm to Claimants. The extent or existence of actual harm suffered by one or more of the Claimants, if Respondent is held liable, need not be addressed at this stage.
141. Finally, while Claimants could have presented more substantial reports on the harm allegedly suffered than they did, the Tribunal does not find that, based on the evidence presented, they failed to comply with the terms of the Minutes of the First Session. Claimants did properly describe in broad terms the various items of damages they alleged to have suffered. Respondent does not assert that it was unable to understand what Claimants are claiming, and out of which alleged specific breaches of the BIT their damages allegedly arise. This will suffice at this juncture. More specific claims as to the quantification of damages and losses will be part of the second phase of this arbitration.

4. APPLICATION RATIONE TEMPORIS OF THE BIT

142. The BIT dated 29 May 2002 (Exh. C-1) entered into force on 1 April 2003, subsequent to the required notifications between the two Contracting States (Exh. C-17 to C-19). The Parties disagree as to the scope of its application in time.

4.1 Parties' positions

4.1.1 Respondent's position

143. According to Respondent, some of the incentives that were allegedly expropriated were revoked or amended before the BIT entered into force on 1 April 2003. Based

on the principle of non-retroactivity of treaties, Respondent submits that amendments to EGO 24/1998 effective prior to 1 April 2003 cannot be part of a claim under the BIT. Indeed, the term “dispute” in Article 7(1) must be read in respect of alleged breaches of the substantive obligations set forth in the BIT (R-Reply, ¶ 72). This is consistent with Article 9(1) of the BIT, the purpose of which is to exclude from the scope of the application of the BIT disputes that have arisen before 2003 (R-Reply, ¶ 73). Thus, Article 7(1) can only apply to disputes that arise after 1 April 2003, the date of its entry into force. Disputes regarding incentives revoked prior to 1 April 2003 could not be said to have arisen after that date.

144. Respondent objects to Claimants’ argument that the Tribunal should apply customary international law to actions prior to 1 April 2003. According to Respondent, Claimants’ construction to the contrary would result in the concurrent application of the substance of the BIT and of customary international law. Romania requests that this construction be ruled inadmissible as untimely since it was not included in the Request for Arbitration, Statement of Claim or Counter Memorial of Claimants (R-Reply, ¶ 74). In addition, Respondent argues that Claimants have not articulated their claim based on a breach of customary international law (R-Reply, ¶ 78). Such a claim, namely a claim for violation of rights under customary international law, should, in any event, be raised by a State as a claim for diplomatic protection. Therefore the Tribunal would have no jurisdiction as the national having suffered harm as a result of the breach would not have a right of compensation; that right belongs to the state. Indeed, in the context of a diplomatic protection claim the Corporate Claimants would have no standing, as they are Romanian, and the individual Claimants would have no right of action for indirect damages (Tr. p. 70, lines 18-22).
145. Respondent also objects to the alternative argument of Claimants that the jurisdiction of the Tribunal is established on the basis of a continuing and composite breach. In Respondent’s view, there is no continuing or composite breach since there was no repetitive breach of any primary obligation. Indeed, each of the acts of revision or amendment of the incentives was a single act at one point in time (R-Reply, ¶ 84). In addition, the obligations allegedly breached were not continuous prior to and after the entry into force of the BIT, hence the violation cannot be ongoing. Respondent raises the same objections to the alternative composite breach theory. It argues that under that theory, the primary obligation must remain in force for the entire course of the breaching conduct, which is not the case here (R-Reply, ¶ 86).

4.1.2 Claimants' position

146. For their part, Claimants consider that the term “any dispute” in Article 7(1) of the BIT must be read expansively and may include events that took place prior to the BIT’s entry into force (C-C.Mem., ¶ 58). There is a difference between temporal rules concerning the substance of a dispute and jurisdiction. Article 7(1) of the BIT covers any dispute concerning an investment and the Tribunal’s jurisdiction is not limited to events covered by the BIT’s substantive rules (C-Rejoinder, ¶ 87).
147. According to Claimants, the Tribunal has jurisdiction, for the purpose of Articles 7 and 9 of the BIT, if the dispute arose after the entry into force of the BIT, irrespective of whether events leading to the dispute occurred before the BIT’s entry into force (C-C.Mem., ¶¶ 70 and 78; C-Rejoinder, ¶ 99).
148. Events that took place prior to the BIT’s entry into force would have to be judged in light of contemporaneous international law, i.e., customary international law (C-Rejoinder, ¶ 101). Claimants deny any change in the substance of their claim, as it is a mere extension of the basis of the applicable law (C-Rejoinder, ¶ 101). If this were to be considered as an amendment of the original claim, which it is not, it is not untimely and should be accepted under Article 46 of the ICSID Convention (C-Rejoinder, ¶ 102). The application of customary international law as the law applicable to the substance of the dispute would not affect the jurisdiction of the Tribunal based on the BIT (C-Rejoinder, ¶ 109) and Article 25 of the ICSID Convention.
149. In any event, Claimants maintain that Romania’s breaches are also both continuing and composite and fall within the jurisdiction of the Tribunal. They are of a continuing character since “[t]he revocation of the facilities took place through legislative provisions. Even those revocations that took place before the BIT’s entry into force on 1 April 2003 continued to be in force after that date and continue to be in force today”. (C-Rejoinder, ¶ 126). The continuing application of a piece of legislation that remains in force is an example of a continuing act under Article 14 of the ILC Articles on State Responsibility (Tr., p. 256, lines 9-12). Similarly, the obligation to observe “any obligation” in Article 2(4) of the BIT is a continuing obligation, as is the prohibition of creeping expropriation (C-Rejoinder, ¶¶ 129-130). The breaches are also of a composite nature under Article 15 of the ILC Articles on State Responsibility. The revocation and amendments of the incentives were the first step of the process and are actually brought to full effect as wrongful acts when the authorities assess and collect the relevant tax or fee (C-Rejoinder, ¶ 140). There

was and still is a series of actions as required by Article 15 of the ILC Articles on State Responsibility, which requires that the Tribunal take into account the aggregate effect of these actions.

4.2 Tribunal's analysis

4.2.1 Preliminary consideration

150. The Tribunal must first decide Romania's request to declare Claimants' reliance on customary international law inadmissible for untimeliness. The Tribunal rejects Respondent's request. It notes that in their Counter-Memorial, Claimants already argued that "*Romania's actions that took place before the BIT's entry into force were illegal under contemporaneous customary international law which in many respects is no different from the rules contained in the BIT*".(C-C.Mem., ¶ 64). Similarly, Claimants wrote:

[...] This question may be relevant to determine whether it is necessary to demonstrate that some of Romania's expropriatory actions were illegal not only under the BIT but also under customary international law. But this is not a question that has any **influence** on jurisdiction in this case (C-C.Mem., ¶ 79, emphasis in original).

151. Moreover, Claimants have alleged breaches of the BIT pointing to specific conduct of Romania, including tampering with the incentives listed in EGO 24/1998 and the Permanent Investment Certificates, and made the corresponding prayers for relief. The Tribunal must decide the dispute in accordance with such rules of law as may be agreed by the parties, possibly Romanian law and "such rules of international law as may be applicable", as required by Article 42(1) of the ICSID Convention. Therefore, pursuant to Article 42(1) the Tribunal will apply international law if necessary, and pursuant to Article 42(2) of the Convention the Tribunal will certainly apply residually international law if the other applicable rules are silent or obscure or are eventually determined not to apply *ratione temporis*. Without intending to determine at this stage what law will apply to the merits of the dispute, the Tribunal also notes that Article 9(2) of the BIT too makes it clear that international law may be applicable to a dispute under the BIT. According to Article 9(2), "*This Agreement shall in no way restrict the rights and benefits which an investor or one Contracting Party enjoys under national or international law in the territory of the other Contracting Party*".

152. The fact that Claimants' argument was developed later in the proceedings is not a reason to bar it from the record. This said, it will be for Claimants to expand their claims accordingly during the merits phase of the proceedings.

4.2.2 Tribunal's determination

153. In addition to Article 7 quoted above, the relevant text for the inter-temporal discussion of the BIT is Article 9. The two must be read together. Article 9 reads in relevant part as follows:

Application of the Agreement

This Agreement shall apply to all investments, whether made before or after its entry into force, but **shall not apply to any dispute concerning an investment which arose**, or any claim concerning an investment which was settled, **before its entry into force**. (Emphasis added)

154. The Tribunal considers that the time at which the dispute arose is the relevant and decisive question for purposes of determining the scope of the Parties' consent under Article 9 of the BIT and thus the Tribunal's jurisdiction²⁶.

155. It is not disputed among the Parties that the dispute as such arose after the entry into force of the BIT. Indeed, there is no record of stated disagreement between Claimants and Respondent before the date, on which Claimants notified Respondent of the existence of the dispute in April 2004. Thus, the dispute submitted to the Tribunal arose after the entry into force of the BIT and, therefore, falls within the scope of application of the BIT *ratione temporis*.

156. Respondent's objection relies on the fact that some of the events giving rise to the dispute took place prior to the entry into force of the BIT. In that respect, the Tribunal notes that most of the incentives were revoked after the entry into force of the BIT, save for two of them: the Machinery Related Incentive and the Raw Material Related Incentive (for the production, processing and preservation of meat). Both incentives were revoked in 2002. These earlier revocations do not modify the Tribunal's reasoning as to the timing of the dispute. Under Article 9, the critical date is the date when the dispute arose rather than the date when events and actions that may have given rise to the dispute took place.

157. Both Parties concur that the BIT's substantive provisions apply only from the date of its entry into force and do not apply retroactively. This is a clear temporal rule embodied in Article 28 of the Vienna Convention on the Law of Treaties. The

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As put by the *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Jurisdiction of 1 February 2006, ¶ 148, Exh. C-147 (incomplete document): "What is decisive of the Tribunal's jurisdiction *ratione temporis* is the point in time at which the instant legal dispute between the parties arose, not the point in time during which the factual matters on which the dispute is based took place". In that case the dispute was deemed to have arisen after a tax assessment had been imposed. See also *Pey Casado v. Chile*, *op. cit.*, ¶ 446.

temporal application of the substantive provisions of the BIT is indeed different from the matter of jurisdiction *ratione temporis*²⁷. The Tribunal will examine alleged breaches of the BIT based on acts that preceded the entry into force of the BIT if (i) there is a violation of another rule different from the BIT, if and when applicable, or (ii) the violations are of continuing or composite character. Both these issues are properly considered at the merits phase.

5. OBJECTION TO THE RESTITUTION CLAIM

158. The last of Respondent's objections relates to the remedy of restitution sought by Claimants. Claimants seek as primary relief the restitution of the legal framework in force at the time of the approval of the EGO 24/1998. Respondent argues that this claim is inadmissible.

5.1 Parties' positions

5.1.1 Respondent's position

159. For Respondent, the restitution remedy is unavailable to Claimants as a matter of international law, and Claimants' prayer for relief must be confined to monetary damages (R-Reply, ¶ 49).

160. First, Respondent notes that it would be absurd and unjust for Romania to reinstate an old regulatory regime that would likely breach the EC Treaty (R-Mem., ¶ 162). According to Respondent that makes restitution essentially impossible, which rules it out as an available remedy. Respondent also argues that ordering restitution would go beyond providing a remedy to Claimants because it would have an *erga omnes* effect and would thus entitle other eligible investors to the relevant incentives, exemptions and subsidies (R-Mem., ¶ 164).

161. Second, Romania has not undertaken any obligation to take or maintain a specific regulatory regime (R-Mem., ¶ 147). Claimants were not granted any specific individual rights under EGO 24/1998; rather they were only eligible to obtain certain incentives.

162. Third, Respondent maintains that the restitution sought would not flow directly from the causes of action. Claimant should show that there is a link, a *nexus*, between

²⁷ See e.g., *Pey Casado v. Chile*, *op. cit.*, ¶ 427-429. See also *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction of 29 November 2004, para. 176 (“[O]ne must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal (*i.e.*, the existence of a dispute) and applicability *ratione temporis* of the substantive obligations contained in a BIT”).

the cause of action and any reparation attendant to it: restitution may be a form of reparation under international law but why should it be appropriate or possible as a remedy in this very case?

163. Finally, Respondent questions whether specific performance can be ordered in investment cases and argues that in any event “*no form of restitution can be awarded (whether by way of order or declaration) when that would impinge on the state’s regulatory sovereignty*” (R-Mem., ¶ 156).

5.1.2 Claimants’ position

164. Claimants maintain that Respondent merely states that restitution is unavailable and has not proven that it is impossible or that it would involve a disproportionate burden compared to monetary compensation (C-Rejoinder, ¶ 71).
165. In any event, Claimants argue that they have requested restitution, and alternatively adequate monetary compensation, for the losses suffered, leaving it to the Tribunal to determine which form of relief is appropriate at the merits phase (C-Rejoinder, ¶ 78).

5.2 Tribunal’s analysis

166. 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 committed²⁸. 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.
167. In addition, the Tribunal finds no limitation to its powers to order restitution in the BIT, the instrument on which the consent of the parties is based. While Article 4 of the BIT dealing with expropriation only mentions compensation, it does not rule out

²⁸ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, annexed to the General Assembly Resolution 56/83, UN Doc A/RES/56/83, 12 December 2001, Article 35. See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction of 14 January 2004, ¶¶ 79 to 81, Exh. RL-64.

restitution. Moreover, the rest of the BIT provisions do not preclude a tribunal from ordering restitution, if and when appropriate, for a violation of other substantive provisions. Article 7 of the BIT contains no further limitations to the Tribunal's powers in that respect.

168. The Tribunal therefore does have the powers to order restitution, both under the ICSID Convention and the BIT, and thus cannot uphold Respondent's objection as an objection to jurisdiction and admissibility. Ultimately, whether restitution is an appropriate remedy, and whether restitution or compensation should be ordered, are questions properly addressed at the merits phase of the proceedings. It is premature to discuss this issue at this juncture. It requires, in any event, a showing by Claimants that Respondent violated the BIT.

6. COSTS

169. Having concluded that it has jurisdiction over the present dispute and having dismissed all the Respondent's objections, the Tribunal reserves all questions concerning the costs and expenses of the Tribunal and of the Parties for subsequent determination.

V. DECISION

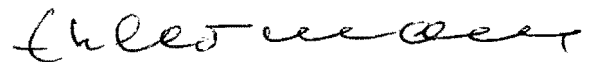
170. For the reasons set forth above,

- 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.

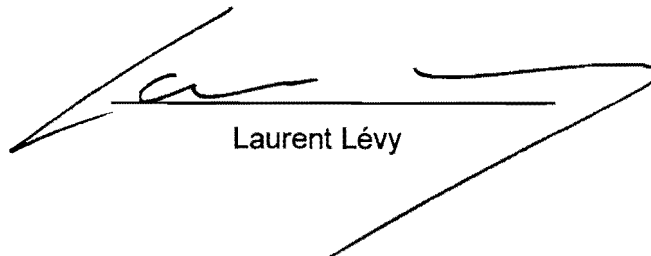
24 September 2008



Stanimir Alexandrov



Claus-Dieter Ehlermann



Laurent Lévy