

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

In the arbitration proceeding between

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

Claimants

and

**ROMANIA**

Respondent

ICSID Case No. ARB/10/13

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**DECISION ON THE ADMISSIBILITY OF THE RESPONDENT'S THIRD OBJECTION  
TO JURISDICTION AND ADMISSIBILITY OF CLAIMANTS' CLAIMS**

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*Members of the Tribunal*

Professor Piero Bernardini, President

Professor Dr. Rudolf Dolzer

Dr. Hamid G. Gharavi

*Secretary of the Tribunal*

Ms. Aïssatou Diop

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## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. The present decision deals with a Motion for a Summary Decision on the Admissibility of Respondent's Jurisdictional Objection filed by Claimants Hassan Awdi (U.S.A.), Enterprise Business Consultants, Inc. (U.S.A.), and Alfa El Corporation (U.S.A.) on May 1, 2013 (the "**Motion**"). In order to place the Motion in the context of the Parties' dispute, it is convenient to summarize briefly the factual background of such dispute.
2. The Claimants' investment in Romania mainly consists of a press distribution company called Rodipet S.A. ("**Rodipet**," now "**Network Press Concept**"), which was state-owned before being privatized, and a historic property located in downtown Bucharest called Casa Bucur, which the Claimants transformed into a luxury boutique hotel and restaurant.<sup>1</sup>
3. In December 2003, the Authority for Privatization and Management of State Ownership ("**AVAS**") of Romania sold, by way of a Privatization Contract, 100 percent of Rodipet's share capital to the Romanian company Magnar System Com srl ("**Magnar**"). The transfer became effective on July 31, 2004. In February 2004, Mr. Awdi and members of his family acquired Magnar and, on April 25, 2007, Magnar's shares were transferred to the Romanian company Street Corner srl. The latter is wholly owned by Enterprise Business Consultants, Inc. ("**EBC**") which, in turn, is wholly owned by Mr. Awdi.<sup>2</sup>
4. Under the Privatization Contract, Romania undertook to enact a law granting of a 49-year concession (with an option to extend) to Rodipet over land on which Rodipet's points of sale are located. This obligation was fulfilled when Ordinance 45/2004 of January 29, 2004 was issued and Law 442/2004 of October 28, 2004 was passed.<sup>3</sup> Magnar undertook to invest 3.75 million Euros in Rodipet, to be paid in five yearly instalments. This obligation also was fulfilled.
5. The dispute between the parties arose when Law 442/2004, after being successfully challenged, was declared unconstitutional by the Romanian Constitutional Court on July 7 and 15, 2008.<sup>4</sup> Subsequently, AVAS claimed that Magnar's fourth instalment payment under the Privatization Contract was not made validly. Thus, on June 30, 2009, AVAS registered a security pledge, that guaranteed Magnar's fulfilment of its commitments under the Privatization Contract, on a block of Rodipet shares. This gave AVAS control over 51% of Rodipet. On July 16, 2009, Romanian authorities announced the appointment of a provisional administrator for Rodipet.<sup>5</sup>
6. Regarding Casa Bucur, the Claimants' other main investment, it used to be a privately owned piece of property that had been nationalized in 1950. After the 1989 revolution,

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<sup>1</sup> Request for Arbitration, paras. 17-18, 31.

<sup>2</sup> Request for Arbitration, paras. 19-22.

<sup>3</sup> Request for Arbitration, paras. 24, 29-30

<sup>4</sup> Request for Arbitration, para. 42.

<sup>5</sup> Request for Arbitration, paras. 47, 49-50.

Romania transferred its ownership to AVAS which, in turn, transferred it to Alfa El Bucur srl, a company indirectly owned by Mr. Awdi.<sup>6</sup>

7. On November 15, 2005, however, the Romanian Supreme Court decided that Casa Bucur should be returned to its original owners. This decision, the Claimants contend, constitutes an expropriatory measure for which no compensation was paid.<sup>7</sup>
8. The Claimants assert that they notified Romania of the existence of a dispute since 2008 and, subsequently, undertook various efforts to reach amicable settlement, as required under Article VI.3 of the BIT, but without success.<sup>8</sup> Thus, on May 31, 2010, the Claimants filed a Request for Arbitration with the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”).
9. According to the Request for Arbitration, Romania breached the Treaty between the Government of the United States of America and the Government of Romania concerning the reciprocal encouragement and protection of investment dated May 28, 1992 (the “BIT” or “Treaty”), which entered into force on January 15, 1994.
10. Specifically, the Claimants contend, Romania breached Article II.2.a on fair and equitable treatment and full protection and security; Article II.3 relating to the entry and sojourn of aliens, nationals of either Party into the territory of the other Party; Article II.2.b on the prohibition against unreasonable or discriminatory measures; Article III.1 on expropriation guarantees; Article II.2.c on the observance of obligations; and Article II.7 on making public any measures that pertain to or affect investments.
11. Claimants request compensation for all damages suffered as a consequence of these breaches, including moral damages, loss of profits, arbitration costs, interest, plus any further relief deemed appropriate by the Tribunal.
12. The Request for Arbitration was registered on June 16, 2010. The Tribunal was constituted on January 19, 2011, and held its first session on March 10, 2011 in Paris, France. The Tribunal issued the Minutes of the First Session on April 8, 2011. Item 13 of the Minutes provisionally set out the schedule of pleadings. By agreement of the parties, as approved by the Tribunal, the schedule was subsequently modified on June 27, 2012, and extended on October 12, 2012. Under the extended schedule, the Claimants filed their Memorial on October 20, 2012.
13. On February 11, 2013, the parties agreed a further modification of the procedural calendar under which the Respondent filed a Counter-Memorial on March 15, 2013.
14. Under cover of letter of May 1, 2013, the Claimants filed their **Motion** along, *inter alia*, the witness statements of Ms. Ana Calenic, Ms. Georgeta Popescu, Ms. Aurelia Turea, Mr. Florin Lungoci and Mr. Shem Orina. The Motion is directed to the Respondent’s contention in the Counter-Memorial of March 15, 2013 (the “**Counter-Memorial**”) that

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<sup>6</sup> Request for Arbitration, paras. 32-34.

<sup>7</sup> Request for Arbitration, para. 54.

<sup>8</sup> Request for Arbitration, paras. 83-86.

the Claimants' actions were not in good faith and that their claims are inadmissible (at paras. 425 *et seq.*) Accompanying the Motion is a request for a modification of the procedural calendar of February 11, 2013.

15. According to the Motion, the Respondent's admissibility objection is based "on alleged facts and information that are all subjected to ongoing criminal investigations or proceedings in Romania," namely the Claimants' criminal actions such as "*human trafficking*," "*looting of Rodipet's assets and business*," "*crimes of running a criminal organization, embezzlement, tax evasion and money laundering*."
16. The Claimants have requested the Tribunal to decide the Motion as a matter of urgency and on a preliminary basis, before they answer to the merits of the Respondent's accusation, and to rule that the Respondent's objection is inadmissible.
17. By letter of May 3, 2013, the Respondent replied by contending that there is no procedural basis for the Tribunal to deal with the Motion, the Claimants' allegation that responding to the Respondent's arguments is costly and time consuming being hardly a ground for departing from the agreed procedural timetable. According to the Respondent, the Motion should be rejected as unfounded.
18. Should the Tribunal be minded to accede to the Claimants' request, in the Respondent's view an appropriate pleading schedule should be set out or the proceedings be bifurcated to deal initially with all of the Respondent's jurisdictional and admissibility objections, suspending the proceedings on the merits.
19. By letter of May 8, 2013, the Claimants contended that they were forced to bring the Motion due to the Respondent reneging on its representations that the arbitration would not be about the existence of a criminal liability by Mr. Hassan Awdi, that delaying a decision on the Motion would go against the principle of procedural economy and that the Tribunal is empowered under Article 44 of the ICSID Convention and Rule 19 of the ICSID Arbitration Rules to decide on any questions of procedure.
20. By communication of May 10, 2013, the Tribunal informed the Parties of the decision to admit the Motion and the invitation to try to agree on a revised calendar for the entire proceedings by May 15, 2013 or, in case of failure to agree, on a calendar limited to the Motion, including a hearing, by May 24, 2013.
21. Having failed to agree on the revised schedule for the proceedings by the date of May 15, 2013, the Parties informed the Tribunal on May 22, 2013 of their respective positions regarding the procedural calendar limited to the Motion. Based on the Parties' positions, on May 24, 2013 the Tribunal fixed the calendar as follows:

Respondent's Reply	June 17, 2013
Parties' election of witnesses to be heard	July 1, 2013
Hearing	July 9-10, 2013

Tribunal's expected decision

end of July 2013

22. Under cover of letter of June 17, 2013, the Respondent submitted its Reply (the "Reply"), as provided by the procedural calendar.
23. By communication of July 1, 2013, the Respondent advised the Tribunal that none of the Claimants' witnesses should be heard at the hearing of July 9-10, 2013, reserving to hear them at the hearing on the merits scheduled for October 2013.
24. Following the Parties' disagreement on the schedule for the hearing on the Motion, except for the fact that one day would be sufficient, the Tribunal fixed the schedule.
25. Prior to the hearing, each Party submitted additional documents with the other Party's consent.
26. The hearing on the Motion took place on July 9, 2013, at the World Bank European Headquarters in Paris, France. The following persons attended the hearing in addition to the members of the Tribunal:

For the Claimants:

- Hassan Awdi Claimant
- Dany Khayat Mayer Brown
- José Caicedo Mayer Brown
- Joy Kreidi Mayer Brown
- William Ahern Mayer Brown
- Raëd Fathallah Bredin Prat
- Hollis Dufour Bredin Prat
- Liliane Djahangir Bredin Prat
- Violeta Oancea Mr. Hassan Awdi's local counsel
- Adrian Bendeac Mr. Hassan Awdi's local counsel
- Andrei Oancea Mr. Hassan Awdi's local counsel

For the Respondent:

- Mr. Veijo Heiskanen Lalive
- Mr. Matthias Scherer Lalive
- Ms. Laura Halonen Lalive
- Ms. Crenguta Leaua Leaua & Asociatii
- Mr. Marius Grigorescu Leaua & Asociatii
- Mr. Stefan Dudas Leaua & Asociatii

27. The hearing transcript was made available to the Tribunal and the Parties soon after the hearing.

## II. SUMMARY OF THE PARTIES' ARGUMENTS

28. What follows is a summary of what each Party has pleaded both in writing and at the July 9, 2013 hearing, the Tribunal having fully considered the respective argument and supporting evidence to reach its decision.

### A. The Claimants' position

29. According to the Claimants, in order to deny their claims, the Respondent is attempting to rely on facts and information subject to on-going criminal investigations, thus importing into this arbitration these investigations and proceedings in violation of Mr. Awdi's most basic rights, including the right to the presumption of innocence, the right to remain silent and the right to a fair trial.
30. The Respondent's position is contrary to what it emphatically stated in its Response to the Request for Provisional Measures of January 28, 2011, namely that "*This arbitration is not about the existence or not of criminal liability by Mr Hassan Awdi or his associates and the investigated persons have the right to the presumption of innocence in the on-going criminal investigation.*"
31. However, in the Counter-Memorial, the Respondent argues that the Claimants' claims are inadmissible because they "*are trying to benefit from their own illegality and unconscionable conduct,*" namely criminal actions. Under international law, the Respondent is estopped from contesting the Tribunal's jurisdiction to decide the Claimants' claims based on said criminal actions.
32. In the Claimants' view, the Respondent's objection is in breach of the international obligation to accord Mr. Awdi the presumption of innocence and a fair trial and is therefore inadmissible considering also the extensive, costly and complicated analysis required by the criminal issues that the Respondent attempts to introduce into this arbitration.
33. According to the Claimants, the Respondent is asking the Tribunal to decide that its criminal accusations against Mr. Awdi are not only justified but that they should also prevent to hear their claims since the Claimants' investments were "illegal" and made in "bad faith" based on criminal accusations. The Respondent is estopped from contesting the Tribunal's jurisdiction since the Claimants relied in good faith upon its statement during the Provisional Measures phase that "*there is no overlap between the subject-matter of the ICSID arbitration and the ongoing criminal investigations*" and on its subsequent representations, the Claimants having suffered a detriment by such reliance since they are expected to conduct a *de facto* criminal defense without access to all the relevant evidence.
34. In the Claimants' view, the presumption of innocence applies to the Respondent's objection since the latter considers Mr. Awdi guilty from the time it filed its objection on jurisdiction on 15 March 2013, otherwise such objection would have no basis. The Respondent is expecting the Tribunal to rule upon the criminal matters now pending before the Romanian courts. In the Claimants' view, the presumption of innocence

extends to subsequent or parallel proceedings, such as this arbitration, as held by the European Court of Human Rights (“ECtHR”).

35. It is the Claimants’ position that a Tribunal’s decision to stay the arbitration pending a final decision by the Romanian courts regarding Mr. Awdi’s criminal guilt would be inconsistent with Article 26 of the ICSID Convention and, more generally, with international law, ICSID tribunals having emphasized that they are not bound by the judicial tribunals of the host State in criminal matters.
36. In the Claimants’ view, if, as argued by the Respondent, the Treaty and the ICSID Convention entitle them to rely on an objection to admissibility of the claims in breach of the presumption of innocence, that would be contrary to a peremptory norm of international law. The only reasonable interpretation guaranteeing the validity of the Treaty is holding that the Respondent’s objection based on the violation of Mr. Awdi’s presumption of innocence is inadmissible.
37. According to the Claimants, the presumption of innocence can only be lifted if a fair trial is possible. Since due to the Respondent’s tactics of transforming this arbitration into a *de facto* criminal hearing this is impossible, the Tribunal should refrain from deciding the Respondent’s objection.
38. Some key aspects of the criminal proceedings reveal in the Claimants’ view the Respondent’s *mala fide* procedural conduct. Thus, the criminal investigations were initiated and conducted by policemen having a financial dispute with Rodipet, as shown by cases dealing with the franchise program adopted by Rodipet in which a policeman named Ivanovic and the wife of another policeman, Ms. Margineau, were involved. In reality, they were only nominees of a group of policemen having business relations with Rodipet. These relations having worsened, Mr. Invanovic’s colleagues began investigating Mr. Awdi’s companies in January 2008 playing a key role in the criminal investigation regarding the Honduras nationals and this despite the conflict of interest would have forbidden their involvement according to the law.
39. Further, according to the Claimants, the criminal investigations in the CFR-Mesagerie case and the Rodipet case were prosecuted by the mother of a former employee of Rodipet, Prosecutor Giorgiana Hosu. It was the latter’s husband, Mr. Dan Hosu, in charge of the illegal immigration special unit, who revealed the alleged human trafficking of forced labour and who should have disclosed the existence of a conflict of interest in a case in which his wife was prosecutor. As recalled by the Claimants, Prosecutor Hosu’s decisions in this case (File 390/D/O/2006) are at the heart of their claim against the Respondent for breach of the full protection and security clause of the US-Romania BIT.
40. Still according to the Claimants, there are strong indications that the criminal accusations regarding the alleged human trafficking (File 304/D/P/2008) were fabricated, the Honduras’ statements being fictitious and the evidence being plainly absent. The 31 October 2008 inspection during which the Hondurans were found and liberated by the labour police was a set-up organized to prepare accusations regarding human trafficking. Hard evidence from DIICOT’s file 304/D/P/2008 proves that the Hondurans lied in their

statements, several among them having refrained from following their colleagues in making false accusation.

41. It is the Claimants' position that since the legality of the testimonial evidence on which the accusation of human trafficking for forced labour as well as the independence of the prosecutor in charge of the CFR-Mesagerie and the Rodipet criminal investigations are contested before Romanian courts, the Tribunal cannot admit such evidence.
42. According to the Claimants, the presumption of innocence includes the privilege against self-incrimination, the right to silence and the right not to disclose the nature of one's defence before trial. Should the Tribunal hold the Respondent's objection admissible in these proceedings, the Claimants would have to disclose their criminal defense and the Tribunal would, unwittingly, assist the Respondent in violating Mr. Awdi's rights, the Respondent's counsel in this arbitration and AVAS<sup>9</sup> being closely cooperating with the Romanian prosecutors.
43. The Claimants note that the Respondent has failed to allow Mr. Awdi to face his accusers and cross-examine the witnesses on those testimony the criminal accusations rely and has failed to produce as witnesses the Honduran "victims" and Mr. Vasile Uifalean who drafted two reports on the financial status of Rodipet, which were transmitted to the prosecutors together with Rodipet's files. Mr. Uifalean's failure to appear before the Tribunal results in his evidence becoming inadmissible.
44. As the Respondent has not met its international obligations regarding the presumption of innocence, the Tribunal shall according to international law refrain from deciding the Respondent's objection or, at least, remove from the file all evidence on which it relies to prove the alleged "illegalities" and "bad faith".
45. The following summary decision is requested by the Claimants under the Motion (at para. 161):
  - (a) Declaring that the Respondent's Objection to the admissibility of the claims is inadmissible.
  - (b) Ordering the Respondent to produce evidence of the following concerning the subsidiary request to reconsider the stay of the criminal proceedings:
    - Disclosure by Respondent's police officers having conflicts of interest due to financial relations with Rodipet to those officer's appropriate superiors and measures taken by such superiors;
    - Disclosure by Prosecutor Hosu of her son's professional relationship with Rodipet (including unethical behavior leading to his dismissal) to appropriate professional board and such board's subsequent finding;

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<sup>9</sup> AVAS is the entity in charge of the present arbitration on behalf of the Respondent..

- Prosecutor Hosu's annual affidavit recorded and submitted to her professional file setting out Mr. Dan Hosu's role in charge of the illegal immigration special police unit *Serviciului de Combatere a Migrației Ilegale din cadrul Direcției de Combatere a Criminalității Organizate* including all details of his role in cases involving the Claimants in which she is prosecutor."

46. At the hearing, following a request for clarification by the President of the Tribunal, the Claimants have stated that the request under (b) of para. 161 "is moot" (transcript, page 158, lines 1-5 and 6).

#### **B. The Respondent's position**

47. The Respondent contends initially that, as a rule, preliminary objections that are linked to the merits are joined to the merits so as not to prejudge the latter. The links between the Motion and the merits are obvious since in order to defend itself the Respondent has to rely on facts and information subject to on-going criminal investigations or proceedings. As a matter of fact, one of the Claimants' claims arise directly out of the criminal investigations, the Claimants alleging that the Respondent has "breached the Treaty by abusively prosecuting the Claimants and its managers for fictitious criminal actions".
48. According to the Respondent, the Claimants are trying to use the criminal proceedings to interfere with the Respondent's rights in this arbitration and, *vice versa*, to use this arbitration as an argument in the criminal proceedings. The Claimants have not explained why they are at a procedural disadvantage considering that neither the Respondent's counsel nor AVAS have access to confidential criminal files while the Claimants have been given the opportunity to review evidence held by DIICOT during the document access process. If the Claimants were indeed concerned about the possible impact on this arbitration of the on-going criminal proceedings they might ask for the suspension of this arbitration.
49. According to the Respondent, the Motion should be rejected, with full costs awarded, to avoid that the Claimants use these proceedings to deny the Respondent's fundamental due process rights and in order to deter such conduct by the Claimants in the future.
50. In the Respondent's view, the Motion misrepresents the Respondent's inadmissibility objections. The latter have regard to the lack of good faith by the Claimants' actions in their dealing with Romania, such actions having undermined internationally recognized labour rights and the well-being of Rodipet's employees. As a result of their actions, the Claimants have foregone the protections under the BIT.
51. As recognized by several previous ICSID tribunals, including in the *Plama v. Bulgaria* case of 2008, States cannot be deemed to offer access to ICSID arbitration to investments not made in good faith, good faith being one of the principles of international law. As held by the ICSID award in *Inceysa Vallisoletana v. El Salvador* of 2006, no legal system allows the party that committed a chain of clearly illegal acts to benefit from them.

52. As a further admissibility requirement, the Respondent refers to the worker rights mentioned in the preamble to the BIT, to be considered a guiding principle of the BIT protections and investments to which such protections are available. Investors that grossly abuse internationally recognized worker rights and undermine the well-being of workers should not be entitled to the BIT substantive protections. The Respondent recalls that the requirement for the workers' well-being was specifically agreed upon in the Privatisation Contract and the Protocol entered into with trade unions and, further, that Romania is party to international conventions prohibiting forced labour and punishing the trafficking of persons.
53. It is the Respondent's position that since the Claimants' actions have undermined internationally recognized labour rights and the well-being of Rodipet's employees, as detailed in the Counter-Memorial, the Claimants have foregone the protections under the BIT and their claims must be dismissed. First of all, the Claimants did not provide the host State with relevant and material information concerning the investor and the investment, their *modus operandi* being to find cash rich companies and strip them off their assets. Secondly, there was never any intention by the Claimants to fulfil the obligations under the Privatisation Contract regarding Rodipet, specifically to invest and to maintain Rodipet's employees, the aim being to loot and exploit.
54. Thirdly, according to the Respondent, in addition to financially mismanaging Rodipet, the Claimants' actions, starting in 2008, adopted a reprehensible scheme to lure unsuspected Hondurans to Romania to be used as forced labour in Rodipet's kiosks to the expense of Rodipet's employees.
55. Regarding the interplay between this arbitration and the criminal proceedings, contrary to the Claimants' contention the Respondent's admissibility objection is made at the level of jurisdiction and applicable law within the jurisdiction of an international tribunal established under the BIT. This is different from the criminal investigations and prosecutions in which Mr. Hassan Awdi is involved, which are governed by the Romanian criminal law and fall within the jurisdiction of Romanian courts.
56. The Respondent accepts that there may be a factual overlap between the two proceedings but contends that the same fact shall give rise to independent legal consequences depending on the applicable law and the competent jurisdiction. This has a specific reference to Mr. Awdi's conduct in his dealing with Rodipet and the Honduran employees. There is nothing unusual in criminal proceedings and investment arbitration being conducted in parallel, as shown by a number of ICSID arbitrations, including those involving Romania.
57. Regarding the Claimants' specific allegations, they are in any event unfounded according to the Respondent. The presumption of innocence invoked by the Claimants applies to criminal proceedings only, the ECtHR holding that no violation of the presumption of innocence is found "if the findings of administrative bodies had no influence or prejudicial effect on the criminal investigation"<sup>10</sup>. In this arbitration, the Respondent has

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<sup>10</sup> *Sikic v. Croatia*, Reply, para. 44 and fn. 68.

not alleged that Mr. Hassan Awdi has met the test for being guilty of a crime under Romanian law.

58. The conspiracy theory advanced by the Claimants rests on unfounded allegations. Mr. Vlad Hosu, who is not the son of Prosecutor Giorgiana Hosu but the son of her husband Mr. Dan Hosu, resigned from Rodipet after three months, leaving no debts to the company, to become an attorney of good standing at the Bucharest Bar. There was no conflict interest regarding Prosecutor Hosu, not one that would come under Article 70 of Law 161/2003 referred to by the Claimants.
59. No policemen involved in the investigations into the Awdi Group had any financial interest in it, according to the Respondent. The Claimants have misrepresented the relationship between Mr. Ivanovic and Rotmar, Rotmar and Rodipet as well as Mr. Ivanovic and the investigating officers. Mr. Ivanovic, who worked at the IGPR, was not a colleagues of the officers that began investigating human trafficking in 2008, the latter belonging to the IGPF, a different department of the Ministry of Internal Affairs entirely independent of the IGPR.
60. In the Respondent's view, there was nothing out of the ordinary in the initiation of the human trafficking case which began when the Honduran workers complained to the IGPF on 17 October 2008, followed by the latter's inspection on 31 October 2008 at Rodipet kiosks where they were working. As foreseen by Romanian law, medical, legal and social assistance as well as repatriation was provided to the Honduran workers. The latter presented claims against Mr. Hassan Awdi and his assistant Alex Sweis as civil parties in the criminal proceedings. On 8 May 2013 the first instance court enacted a verdict of not guilty which was appealed by the prosecution.
61. The Respondent asserts that there is no violation of Mr. Awdi's right to silence since there is no question of deciding criminal guilt or innocence in this arbitration. The criminal defence of Mr. Awdi does not come into play since he has to demonstrate that the Claimants acted in good faith, were not trying to benefit from their wrongdoing and their investments contributed to the well-being of workers and promote respect for internationally recognized worker rights, as foreseen by the BIT preamble.
62. In the Respondent's view, there is no violation of Mr. Awdi's right to face his accusers and cross-examine witnesses on whose testimony the criminal accusation rely. The ICSID Rule 41(1) provides that the Tribunal is the judge of the admissibility of any evidence adduced and of its probative value. The Claimants shall have the opportunity of cross-examining the five witnesses of fact proposed by the Respondent at the October 2013 hearing, the rest of the evidence being documentary.
63. According to the Respondent, the witness statements in the human trafficking case are not witness statements produced in this arbitration since they were not prepared for these proceedings but only for the purposes of the criminal proceedings. The same apply to the various reports prepared by the special administrator of Rodipet which are submitted in these proceedings as evidence of his analysis of the actions taken by the Awdi Group when they were running Rodipet. The Claimants may test Mr. Florea, the special

administrator of Rodipet, who filed a witness statement in this arbitration. The Claimants have the right to examine the prosecution witnesses in the criminal proceedings, this being the right forum for it.

64. The Respondent denies the Claimants' request that the Tribunal order the Respondent to produce evidence based on the reservation made by the Tribunal in the Decision on Provisional Measures (at para. 75). Such reservation was in fact limited to the specific question whether the amount of damages to the Romanian State for tax evaded would have had an impact on the amount of damages allegedly suffered by the Claimants, which is not the present case.
65. In conclusion, in the Reply (at para. 101) the Respondent requests the Tribunal to:
- " a. Dismiss the Motion in its entirety;
  - b. Confirm the timetable agreed between the Parties, including directing the Claimants to file their reply to the inadmissibility objection within two weeks of the Tribunal's decision; and
  - c. Order, with prejudice to the further proceedings, that the Claimants have to bear all the costs of these ancillary pleadings on the Motion including but not limited to all costs and fees of the Tribunal and ICSID and that it has to pay to the Respondent the costs it has incurred for its defence, including the fees and disbursement for its attorney and the disbursement for its witnesses, to be quantified".

### III. DISCUSSION

66. The problem raised by the Motion and discussed between the Parties in their written submissions and at the oral hearing is of relevance for the development of investment treaty arbitration. It concerns the interplay between, on the one hand, the sovereign power of the host State to investigate and prosecute by its own courts according to its domestic law criminal acts committed in its territory and, on the other hand, the autonomy from such criminal investigations and proceedings of the investment arbitration conducted under an international treaty by a tribunal appointed and acting according to the provisions of such treaty.
67. This is particularly so when, as in the present case, the proceeding is conducted under the ICSID Convention which provides for the exclusivity of the chosen method of dispute resolution. The Convention states in Article 26 that "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."
68. The Motion specifically regards the Respondent's third objection under the Counter-Memorial (paras. 425 *et seq.*) that the "Claimants' actions were not in good faith and their claims and [are] inadmissible" (para. 1). The Counter-Memorial refers in this regard to the facts that are considered in detail in Section II.C.iii, consisting in the alleged looting and mismanagement of Rodipet (paras. 148-194), including dismissal of

Rodipet's employees and human trafficking of Hondurans nationals to replace them (paras. 195-212).

69. In order to prove these facts the Respondent relies on evidence consisting of:
- a. as to the looting and mismanagement of Rodipet: the witness statement of Mr. Cornel Florea, Rodipet's judicial administrator; Reports by Mr. Vasili Uifelean, Rodipet's special administrator; Report by Consulta 99 SPRL to the Bucharest Tribunal-7<sup>th</sup> Commercial Section; various documentary evidence; criminal proceedings, specifically the investigation by DIICOT in File No. 390/D/P/2006 dated October 23, 2006<sup>11</sup> and the indictment by DIICOT in File No. 38/D/P/ 2011 dated December 20, 2012<sup>12</sup>;
  - b. as to the human trafficking of Hondurans nationals, in addition to part of the evidence under a) above, statements by some of the Hondurans workers and the indictment by DIICOT in File No. 304/D/P/2008 dated April 24, 2012.<sup>13</sup>
70. Evidence relied upon by the Respondent<sup>14</sup> may be freely tested by the Claimants. The latter may call on their own motion or, if needed, with the Tribunal's assistance, each person having signed witness statements or expert reports to appear at the October 2013 hearing to be cross-examined, regardless of whether the statements or reports were prepared for the purpose of this arbitration if not subject to confidentiality under the criminal proceedings. They may likewise dispute any part of the documentary evidence proffered by the Respondent. The Claimants' right to challenge evidence is a sufficient reason for the dismissal of the Motion since the latter requests that the entirety of the Respondent's admissibility objection be declared inadmissible even when that objection is founded on evidence unrelated to or not emanating from criminal proceedings.
71. As regards evidence from on-going criminal proceedings and involving Mr. Hassan Awdi, the Tribunal, having carefully considered the arguments submitted by both Parties, recalls the following. As mentioned by the Motion, during the Provisional Measures phase the Respondent has repeatedly represented that the criminal proceedings against Mr. Awdi do not affect the Tribunal's jurisdiction, so that the Respondent would now be estopped from relying on such proceedings as evidence of the illegality and lack of good faith of Mr. Awdi's actions. Among such statements by the Respondent, the Motion notes the following.
72. In the Response on Provisional Measures, the Respondent stated: "*This arbitration is not about the existence or not of criminal liability by Mr. Hassan Awdi or his associates and the investigated persons have the right to the presumption of innocence in the on-going investigation in Romania.*"

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<sup>11</sup> CPM-8 (Counter-Memorial, paras. 230-239).

<sup>12</sup> R-102 (Counter-Memorial paras. 220-229).

<sup>13</sup> R-172 (Counter-Memorial, paras. 240-254).

<sup>14</sup> The fact that the Respondent may rely on other evidence not specifically mentioned in para. 56 of the text does not change the Tribunal's analysis and conclusion.

In the Rejoinder on Provisional Measures, the Respondent has further asserted:

*It is clear from the evidence that the exclusivity of the ICSID proceedings is not affected in any way by the pending criminal investigations [...] there is no overlap between the subject matter of the ICSID arbitration and the ongoing criminal investigations.*

At the hearing of March 10, 2011, the Respondent added: ‘

*Whatever the outcome of the criminal investigations, and the possible legal proceedings, an acquittal or a conviction, this will not affect in any way this Tribunal's exclusive jurisdiction to determine the treaty claims. These two proceedings may be conducted in parallel.*

73. In order to reject the Claimants' allegation that the Respondent is estopped from contesting the Tribunal's jurisdiction to decide the Claimants' claims the Respondent points to the different level of jurisdiction and applicable law characterizing investment arbitration as opposed to criminal proceedings.
74. According to the Respondent, the Claimants' inadmissibility objection is made under international law and transnational public policy and falls within the jurisdiction of an international arbitral tribunal established under the Treaty. By contrast, the criminal proceedings determining whether Mr. Awdi's (and his co-defendants') guilt or innocence are governed by domestic Romanian law and fall within the jurisdiction of domestic Romanian courts (Reply, para. 34). Therefore, even if there may be a factual overlap between the two proceedings, depending on the applicable law and jurisdiction the legal consequences of the same fact are independent, the subject-matter of the two proceedings being different.
75. According to the Claimants, given the Respondent's objection to their claims, the context is no longer the same, the subject-matter of the criminal proceedings having to be compared with the subject-matter of the said objection (hearing transcript, p. 30, lines 24-25; p. 31, lines 1-5). Thus, the subject-matter of the Rodipet criminal proceedings is whether the transactions involving Rodipet and other companies of the Awdi group were concluded by the Claimants with the intention to loot or embezzle Rodipet, which is precisely the subject-matter on the basis of which the Respondent claims in Section II.C.iii of the Counter-Memorial that the Claimants' actions and investments were illegal and not in good faith (hearing transcript, p. 32, lines 5-25).
76. The Tribunal agrees with the Respondent that proceedings arising under Romanian domestic criminal law and the one brought by the Claimants under the Treaty are different. Even if there may be factual overlaps between the two proceedings, the respective causes of action are different, namely criminal offences under the criminal proceedings and breach of the Treaty under this arbitration.<sup>15</sup> For the same reason, in the

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<sup>15</sup> The importance of the different cause of action, although in a different context, was affirmed by the Annulment Committee in *Vivendi v. Argentina* in order to distinguish between a treaty dispute and a contract

Tribunal's view the Claimants' reliance on estoppel to dispute the Respondent's objection is unwarranted.

77. The idea that criminal proceedings and investment arbitration may be conducted in parallel is emphasized by the Respondent in the Reply by reference to a number of ICSID cases, some of them involving Romania, illustrating how this interplay has manifested itself "without any allegations such as those in the Motion being brought forward" (para. 36). The examination of those cases reveals that in none of them the tribunal relied on evidence from ongoing criminal proceedings against the claimant to reach its decision in the arbitration proceeding. In some of these cases reference to criminal investigations or proceedings was meant to establish whether there was a breach of the relevant BIT due to the manner by which such proceedings were conducted. Thus, in one case the tribunal, having analyzed such conduct, concludes as follows.

*The Parties are in agreement (see paragraph 233 above) that it is not for this Tribunal to determine whether or not there was a substantial basis for the criminal charges against Mr. Patriciu and his associates. For present purposes, it is enough to record the Tribunal's conclusion that there is no evidence to show that the initiation of the criminal investigation and the indictment in and of themselves breached the standard of Article 3(1) of the BIT. The nature of the indictment does not, on its face, bear out any argument that it embodies a trumped-up set of criminal allegations that are accordingly only explicable as stemming from bias or improper motive.<sup>16</sup>*

78. Other cases referred to by the Respondent deal with provisional measures requested by claimant as a protection against criminal proceedings by preserving such rights as the right to the non-aggravation of the dispute, to the procedural integrity of the arbitration proceedings and to the exclusivity of the ICSID proceedings.<sup>17</sup> The Tribunal notes that questions of the same nature have already been examined during the Provisional Measures phase of this arbitration and that the Decision of March 29, 2011 under Procedural Order No. 1 has been issued in that regard. The content of that Decision is confirmed in the light also of the subsequent developments of this case.

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dispute: "A treaty cause of action is not the same as a contractual cause of action" (Decision on Annulment, 3 July 2002, para. 113).

<sup>16</sup>*Rompetrol v. Romania*, Award, 6 May 2013, para. 237. The same applies in another case referred to by the Respondent, *Spyridon Roussalis v. Romania*, Award, 7 December 2011: "In conclusion, the Tribunal notes that Romanian courts and administrative procedures have been open to Claimant at all relevant times, Claimant has been successful in his efforts to have the first decision overturned and he had the opportunity to have the case heard on remand. Consequently, there appears to have been no denial of due process or denial of justice that would rise to the level of a violation of international law" (para. 513). In another case, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, Award, 7 September 2009, the tribunal merely draws from the conclusion reached in other legal proceedings comfort for concluding as it had already concluded (para. 148).

<sup>17</sup>*Quiborax v. Bolivia*, Decision on Provisional Measures, 26 February 2010, para. 46; *Tokios Tokelés v. Ukraine*, Procedural Order No. 3, 18 January 2005, paras 12-13; *Libananco v. Turkey*, Preliminary Issues, 23 June 2008, Sect. VII.3.

79. The present case finds therefore no useful precedent in other investment treaty cases to the extent the Tribunal is invited by the Respondent to consider the evidence relating to or emanating from ongoing criminal proceedings in order to draw its conclusion regarding issues to be decided in this arbitration. Thus, in the Counter-Memorial it is stated: “The Tribunal is invited to read the indictment in its entirety for an overview of the scheme. In addition, the Respondent is providing a selection of the affidavits of the victims, as well as other evidence on the file with DIICOT, in Exhibits R-173 to R-198”(para. 204). The Reply states: “The present Tribunal is thus free to consider for itself the evidence relating to or emanating from the CFR-Mesagerie and human trafficking prosecution as well as the Rodipet investigation... to the extent is on the record of this arbitration... in order to draw its own conclusion” (para. 97).
80. The Motion makes repeated references to the presumption of innocence to which Mr. Hassan Awdi is entitled as a reason to dismiss the Respondent’s admissibility objection. The Tribunal recalls that the presumption of innocence is provided by Article 6.2 of the Human Rights Convention as follows: “*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*” The presumption of innocence is a rule of public international law under a number of international treaties to which also Romania is a party and has been applied by international tribunals. As stated by the ECtHR,

*the presumption of innocence considered in the light of the general obligation of a fair criminal trial under Article 6.2 [of the Human Rights Convention] excludes a finding of guilt outside the criminal proceedings before the competent trial court, irrespective of the procedural safeguards in such parallel proceedings and notwithstanding general consideration of expediency.*<sup>18</sup>

81. The Tribunal reaffirms in that regard that like any other international tribunals it is endowed with the inherent power and corresponding duty to preserve the integrity of the arbitral process. As expressed by another tribunal, the principle implies that:

*parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).*<sup>19</sup>

82. It is worth recalling in this context that already in its Decision on Provisional Measures under Procedural Order No. 1 the Tribunal has confirmed that the exclusivity of the ICSID proceedings gives it the “exclusive power to rule upon the legal issues brought before it” and that “an ICSID tribunal has to ensure that its exclusive jurisdiction is not, in law or in fact, impaired or undermined by the criminal proceedings conducted in the host State” (Decision, para. 74). Precisely in view of the different cause of action of this

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<sup>18</sup> Case of *Böhrer v. Germany*, referred to by the Motion (para. 49, end of first bullet point).

<sup>19</sup> *Libananco v. Turkey*, Decision on Preliminary Issues, 23 June 2008, para. 78.

arbitration (expropriation of the Claimants' investments in Rodipet and Casa Bucur and payment of compensation for the breach of the BIT), the Tribunal already concluded that "the pending criminal proceedings against Mr. Awdi will not prevent the decision of legal issues brought before it" (*ibid.*, para. 75).

83. Regarding evidence related to criminal proceedings that the Respondent invites the Tribunal to consider,<sup>20</sup> what matters for the issue before the Tribunal is not that the facts and information relied upon by the Respondent for its admissibility objection are all subjected to the on-going investigations or criminal proceedings in Romania, as contended by the Motion (para. 2). What matters is the Claimants' right to challenge in this arbitration the evidence regarding such facts and information to the extent that it is proffered by the Respondent not to prove criminal guilt but to prove the illegality of the Claimants' activities under public international law. There is therefore reason to dismiss the Motion also regarding evidence relating to criminal proceedings.<sup>21</sup>
84. In conclusion, the issue raised by the Motion is not the admissibility of the evidence related to criminal proceedings. The issue is rather the probative value of such evidence for the purposes of this arbitration, which the Tribunal is empowered to weigh and determine.<sup>22</sup> In assessing this value, the Tribunal shall be guided, among other things, by consideration of the presumption of innocence as a rule of public international law.<sup>23</sup>
85. The issue raised by the Motion, which relates to the interplay between this arbitration and the criminal proceedings against Mr. Hassan Awdi and his co-defendants, shall have to wait for the full development and conclusion of the merits phase. In its communication of May 24, 2013, the Tribunal has already pointed to the link between the jurisdictional issues and the merits in this case to exclude any bifurcation of the proceeding.
86. No decision shall therefore be made regarding the value of evidence produced in this arbitration which relates to or emanates from the criminal proceedings. Any such decision shall have to wait for the conclusion of the merits phase of the arbitration. For the same reason, no decision shall be made at this stage regarding the costs of this phase of the proceedings.

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<sup>20</sup> *Supra*, para. 79.

<sup>21</sup> See para. 70 for the same conclusion regarding the other evidence.

<sup>22</sup> Rule 34(1) of the ICSID Arbitration Rules: "The Tribunal shall be the judge of the admissibility of any evidence and of its probative value".

<sup>23</sup> The respect due to the presumption of innocence is accepted also by Respondent. Referring to some of DIICOT investigations, the Respondent states: "While all of the financial crimes and mismanagement discussed above are serious and, if Hassan Awdi and his associates are convicted, deserving of significant punishment...", the footnote after the word "convicted" mentioning that "they are of course for the time being presumed innocent in the criminal proceedings" (Counter-Memorial, para. 240).

#### IV. DECISION

87. In the light of all the foregoing and after due consideration of the Parties' written and oral submissions and the evidence proffered by each of them, the Tribunal holds and decides as follows:

1. The Motion filed by the Claimants on May 1, 2013, is dismissed.
2. Any other claims or demands by either Party are denied.
3. The costs of this phase of the proceedings shall be considered at a later stage.

[signed]

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On behalf of the Tribunal  
Professor Piero Bernardini  
President of the Tribunal

Date: July 26, 2013