

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Marco Gavazzi and Stefano Gavazzi v. Romania  
(ICSID Case No. ARB/12/25)**

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**PROCEDURAL ORDER NO 4**

Prof. Hans van Houtte, President of the Tribunal  
Mr. V. V. Veeder, Arbitrator  
Mr. Mauro Rubino-Sammartano, Arbitrator

*Secretary of the Tribunal*  
Ms. Martina Polasek

**June 3, 2014**

**I. Background**

1. On May 20, 2014, the Respondent sought leave by the Tribunal to file new witness evidence. The Respondent stated that the new evidence was necessary for the understanding of the setting aside of the “Lalive award” in Romania, and to respond to certain arguments made by the Claimants in their submission dated May 14, 2014. It did not specify the names of any witnesses.
2. On the same date, the Claimants objected to the admissibility of any new witness evidence at this late stage of the proceeding and in violation of paragraph 15.6 of Procedural Order No. 1.
3. By letter of May 21, 2014, the Tribunal directed the Respondent to deliver, by May 22, 2014, the proposed new evidence to the Claimants and, if the parties were unable to agree, to file an application with the Tribunal by May 27, 2014 addressing (i) why the proposed new evidence was essential to the Respondent’s arguments; and (ii) why it could not be submitted earlier. The Claimants were invited to respond to the application by May 28, 2014.
4. On May 22, 2014, the Respondent specified that it wished to file: (i) a witness statement by Mrs. Viorica Tataru, past Head of Department of the Authority for State Assets Administration (AAAS) and currently a legal advisor at the Legal Department of AAAS; and (ii) an expert opinion of Prof. Bazil Oglinda, PhD, Professor of Business Law at the Bucharest Academy for Economic Business Studies and Partner with Oglinda, Nemes, Voicu Attorneys. The Respondent stated that Prof. Oglinda’s opinion would address arguments made in the Claimants’ May 14, 2014 submission and Prof. Deleanu’s second opinion; indicating that the evidence could not have been filed earlier because it was rebutting arguments made in this last submission. The Respondent further claimed that Mrs. Tataru’s statement was essential to the understanding of the Claimants’ compliance with the underlying Contract between AAAS and the Claimants, as she participated in several meetings concerning the Contract. The Respondent did not indicate why Mrs. Tataru’s statement could not have been filed earlier.
5. On May 23, 2014, the Claimants objected to the admissibility of the proposed witness statement and expert opinion in view of item 15 of Procedural Order No. 1 and disputed the relevance of the witness statement and expert report.
6. On May 23, 2014, the Tribunal invited the Respondent to produce the witness statement and expert opinion to the Tribunal and the Claimants by May 27, 2014, and the Claimants to file any further comments on the admissibility of the new material. The Tribunal stated that it would consider the material *de bene esse*, i.e. for the purposes of determining the Respondent’s application.
7. On May 27, 2014, the Respondent produced the statement and opinion in Romanian and English in electronic form by email at 5.07 p.m., EDT. It did not provide any further response

to the Tribunal's questions of May 21, 2014 concerning the essential character of the statements and why they could not be filed earlier. No other document was attached to the Respondent's email. The text of the email also provided "[a]lso, please be informed that the hard copies and electronic version of the witness statement and of the expert opinion, together with the related exhibits, will be dispatched tomorrow by courier, as per the requirements of paragraph 11.2.2 of Procedural Order No. 1." This email was sent to the Secretariat and to the Claimants' counsel, and was transmitted by the Secretary to the Tribunal.

8. On May 28, 2014, the Claimants filed further objections to the statement and opinion. The Claimants argued that this proposed new testimony was too late, did not respect the Tribunal's directions of May 21, 2014 or previous procedural orders, contained references to documents that were not in the record and would prejudice the Claimants as they were unable to rebut the evidence at this late stage of the proceeding.
9. On May 29, 2014, the Respondent replied to the Claimants' objections, stating that it had complied with the Tribunal's directions and that the Claimants were not prejudiced.
10. Given the urgency of the Respondent's application, the Tribunal deliberated on Sunday, June 1, 2014, and decided to admit the witness statement and expert opinion, subject to the right of the Claimants' to make any consequential application. This decision was communicated informally to the Claimants by the Secretary of the Tribunal by telephone on Sunday night. Unfortunately, the Respondent's counsel could not be reached that night and were therefore informed by the Secretary on Monday morning, before the start of the hearing.
11. At the beginning of the first day's hearing, the President of the Tribunal confirmed the order admitting the witness statement and expert opinion, subject to any consequential application of the Claimants. The President indicated that the Tribunal's ruling would be set out later in the form of a procedural order. At that time, however, the Tribunal and the Claimants did not know that, by "related exhibits" the Respondent was seeking to introduce new documentation to be attached to Mrs. Tataru's statement, as explained below.
12. It subsequently transpired that the Respondent had sent by courier to the Tribunal, the Secretariat and the Claimants hard copies of the witness statement and expert opinion, together with new documentation to be attached to Mrs. Tataru's statement. Unfortunately, this couriered material did not reach the Claimants before the Tribunal's ruling on Monday morning. As regards the Tribunal, although the couriered materials appear to have been delivered to each Member of the Tribunal on Friday afternoon, May 30, 2014, the Tribunal could not appreciate that the material contained new documentation. Consequently, neither the Claimants nor the Tribunal had the new documentation in mind at the time of that ruling.



13. At midday on June 2, 2014, it became apparent to the Secretary and the Tribunal that the package couriered to the Secretary's attention at the ICC contained new documentation. At the resumed afternoon hearing, the President of the Tribunal raised this matter with the parties. The Respondent confirmed that it wished the new documents to be admitted as exhibits in the arbitration, save for one document which was already in the evidential file. The Claimants strongly objected to the very late admission of the new documents, as a further violation of the Tribunal's Procedural Order No. 1 and reserved their rights regarding all consequences including an adjournment of the hearing.

## **II. Tribunal's Decision**

14. While the Respondent indicated reasons in support of the relevance of the witness statement and expert opinion, it did not justify the late filing of the proposed new evidence. The Tribunal recognized that the statement and opinion, as well as the new documentation, were not filed in accordance with item 15 of Procedural Order No. 1.
15. However, taking into account the contents of the evidence and the fact that the Respondent has so far filed no other witness and expert statements, the Tribunal confirmed its ruling to admit Mrs. Tataru's witness statement and Prof. Oglinda's expert opinion into the record. It did not admit the new documentation attached to Mrs. Tataru's statement, with the exception of Annex 3, which corresponds to Exhibit R23 already in the record. Further, Mrs. Tataru is not permitted to refer to any documentation not in the record.
16. The Tribunal was mindful that the late filing of the Respondent's witness statement and expert opinion might pose difficulties. It therefore granted the Claimants the opportunity to make a consequential application.
17. The Claimants stated that they did not want any additional delay or costs in the proceeding due to the new evidence. In view of the Tribunal's decision, they agreed to the examination of Mrs. Tataru and Prof. Oglinda during the hearing. They suggested that Messrs. Marco and/or Stefano Gavazzi be present during the examination of Mrs. Tataru (which would take place after their own testimonies) and that either of them may be called for further testimony after Mrs. Tataru's examination, to rebut any new evidence.
18. The Respondent had no objection to the Claimants' proposal.
19. The Tribunal therefore approves the procedure in this Order.

On behalf of the Tribunal

[signed]

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Prof. Hans van Houtte,  
President of the Tribunal