

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

In the arbitration proceeding between

MARCO GAVAZZI AND STEFANO GAVAZZI

Claimants

and

ROMANIA

Respondent

ICSID Case No. ARB/12/25

**DECISION ON JURISDICTION, ADMISSIBILITY
AND LIABILITY**

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

Secretary of the Tribunal
Ms. Martina Polasek

Date of dispatch to the Parties: April 21, 2015

REPRESENTATION OF THE PARTIES

Representing Marco Gavazzi and Stefano
Gavazzi:

Prof. Avv. Giorgio Sacerdoti and
Dr. Avv. Anna de Luca
Via Privata Maria Teresa 4
20123 Milano
Italy

Representing Romania:

Ms. Mihaela Stanescu
Mrs. Laura Voinea
AAAS Privatization Agency of Government of
Romania,
Department of Legal Assistance and Litigations
50 Cpt. Av. Al. Șerbănescu St.,
District 1
014294 Bucharest
Romania

Ms. Alina Cobuz
Mr. Dan Visoiu
SCPA “Cobuz & Associates”
The Consortium Leader
14 Margaritarelor St., Sector 2
020564 Bucharest
Romania

Ms. Emilia Toader
Ms. Ramona Voinea
Mrs. Genoveva Luca
SPRL “Bostina & Associates”
70 Jean Louis Calderon St., Sector 2
020039 Bucharest
Romania

Ms. Manuela Sarbu
Mrs. Diana Croitoru-Anghel
12 B.P. Hasdeu Bvd., Cam. 1, sector 5
Bucharest
Romania

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

2007 Arbitration Award	Award of 30 October 2007 in an arbitration pursuant to the Share Purchase Contract
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
AAAS	Authority for State Assets Administration
APAPS	Authority for Privatization and Management of State Ownership
AVAS	Authority for State Asset Recovery
BIT	Agreement between the Government of the Italian Republic and the Government of Romania on the Mutual Promotion and Protection of Investments
C-1 ...	Claimants' exhibits
C-PHB	Claimants' Post-Hearing Brief, 9 July 2014
C-Request	Request for Arbitration, 23 July 2012
C-RJ/CC	Claimants' Rejoinder on Jurisdiction and Counterclaim, 14 May 2014
C-RL/OJ/A/CC	Claimants' Reply on Liability, Objections to Jurisdiction/Admissibility, and on the Counterclaim, 17 December 2013
C-RM	Claimants' Reply Memorial on Respondent's Objections to Jurisdiction and on the Admissibility of the Counterclaim, 31 July 2013
C-RPHB	Claimants' Reply to Respondent's Post-Hearing Brief, of 23 July 2014
Company or Socomet	S.C. Socomet S.A/ Gavazzi Steel S.A.

ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and National of Other States dated 18 March 1965
R-1 ...	Respondent's exhibits
R-PHB	Respondent's Post-Hearing Brief, 9 July 2014
R-PO/CM/CC	Respondent's Preliminary Objections, Counter-Memorial and Counterclaim, 15 July 2013
R-RL/RJ/CC	Respondent's Rejoinder on Liability and Reply on Jurisdiction and the Counterclaim, 14 April 2014
R-RPHB--	Respondent's Reply Post-Hearing Brief, 23 July 2014
Share Purchase Contract	Contract for Selling-Buying Shares No. 145 dated 19 April 1999 between Claimants and SOF
SOF	State Ownership Fund

I. INTRODUCTION

1. This case concerns a dispute submitted to ICSID pursuant to the Agreement between the Government of the Italian Republic and the Government of Romania on the Mutual Promotion and Protection of Investments, which entered into force on 14 March 1995 (“BIT”),¹ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). The BIT was agreed in the Italian, Romanian and English languages with all three texts being equally authentic, and in case of any differences of interpretation, the English text was to be considered as the text of reference. The ICSID Convention was agreed in the English, French and Spanish languages. For ease of reference, given also the language of this arbitration, the English texts of the BIT and the ICSID Convention are cited below.

II. THE PARTIES

2. The two Claimants are:
 - a) Mr. Marco Gavazzi, an Italian national, residing at Via Appiani 1, 22036 Erba (Como), Italy; and
 - b) Mr. Stefano Gavazzi, an Italian national, residing at Via Madonna del Bosco 12, 23807 Merate (Lecco), Italy

hereinafter, collectively “the Claimants” or “Gavazzi.”

The Claimants are represented in the present proceedings by Prof. Avv. Giorgio Sacerdoti and Dr. Avv. Anna De Luca, Via Privata Maria Teresa 4, 20123 Milan, Italy.

3. The Respondent is the Romanian State, acting by the Authority for State Assets Administration, headquartered in Bucharest, Romania, 50 Cpt A. Serbanescu St. (hereinafter “the Respondent” or “Romania”).

¹ Agreement between the Government of the Italian Republic and the Government of Romania on the Mutual Promotion and Protection of Investments, entered into force 14 March 1995 and terminated on 14 March 2010, subject to the ‘sunset provision’ in Article 11(3) (C-4).

4. The Respondent is represented in the present proceedings by a consortium consisting of SCA Cobuz & Associates, SPRL Bostina & Associates and Manuela Sarbu Law Office, with an address at Str. General Berthelot 59, Bucharest, Romania.

III. PROCEDURAL HISTORY

5. On 2 August 2012, ICSID received a request for arbitration dated 23 July 2012, together with exhibits C-1 through C-45 (the “Request”).
6. On 27 August 2012, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
7. By letter of 5 September 2012, the Claimants proposed a method of constituting the Tribunal pursuant to Rule 2(1)(a) of the Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”). By the same letter, the Claimants appointed Mr. V. V. Veeder QC, a national of the United Kingdom, as arbitrator.
8. On 9 October 2012, the Respondent accepted the Claimants’ proposed method of constituting the Tribunal. Pursuant to Article 37(2)(a) of the ICSID Convention, the Parties thus agreed that the Tribunal consist of three arbitrators, with each party appointing an arbitrator, and the presiding arbitrator to be appointed by the co-arbitrators in consultation with the Parties. The Parties’ method entailed the selection, by the co-arbitrators, of three qualified candidates, which the Parties would rank in order of preference. The co-arbitrators would then appoint one of the three candidates as President of the Tribunal.
9. By the same letter dated 9 October 2012, the Respondent notified the Centre that it appointed Mr. Mauro Rubino-Sammartano, a national of Italy, as arbitrator.
10. On the same day, the Centre called the Parties’ attention to Article 39 of the ICSID Convention which provides that the majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute (Romania) and the

Contracting State whose national is a party to the dispute (Italy), unless each individual member of the Tribunal has been appointed by agreement of the Parties. In accordance with Article 39, the Centre invited the Claimants to indicate whether they agreed to the Respondent's appointment.

11. On 11 October 2012, ICSID informed the Parties that Mr. Veeder had accepted his appointment as arbitrator.
12. On 17 October 2012, the Claimants informed the Centre that they had no objections to the appointment by Romania of Mr. Rubino-Sammartano.
13. On 19 October 2012, ICSID informed the Parties that Mr. Rubino-Sammartano had accepted his appointment as arbitrator. On the same day, the Centre asked the co-arbitrators to provide ICSID with a list of three candidates to serve as President, for transmission to the Parties.
14. On 26 October 2012, the Centre transmitted a message from the co-arbitrators to the Parties, requesting additional information on the qualifications of the potential candidates for President of the Tribunal. The Parties responded by letters of 29 October and 2 November 2012.
15. On 6 November 2012, the Centre transmitted a message to the Parties with three candidates proposed by the co-arbitrators and invited them to rank the candidates in order of preference.
16. On 20 November 2012, the Centre informed the Parties that the co-arbitrators intended to appoint Professor Hans van Houtte, a national of Belgium, as presiding arbitrator. By letters of 20 and 26 November 2012, the Parties confirmed that they had no objections to the appointment of Prof. van Houtte.
17. On 26 November 2012, the Secretary-General, in accordance with Article 37(2)(a) of the ICSID Convention and Rule 6(1) of the Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. The Secretary-General also informed the Parties that Ms. Martina Polasek, Team Leader/Legal Counsel, ICSID, would serve as Secretary to the Tribunal.

18. The Tribunal held a first session with the Parties on 19 February 2013 in Paris, France. The Parties confirmed that the Members of the Tribunal had been validly appointed. Among other things, Procedural Order No. 1 reflected the Parties' agreement that the proceeding would be conducted in accordance with the Arbitration Rules of 2006 and that the place of the proceeding would be Paris, France. It also set out a timetable for the filing of the Parties' written submissions, with two alternative calendars, in the event that the Tribunal decided to bifurcate the phase on jurisdiction from the merits. It was decided at the first session that the Claimants' Request was accepted as the Claimants' memorial on the merits, excluding quantum.
19. On 15 July 2013, in accordance with Procedural Order No. 1, the Claimants filed their submission on quantum, accompanied by exhibits C-46 through C-58 and an expert report of Deloitte. On the same day, the Respondent filed its objections to jurisdiction, a counter-memorial on liability and a counterclaim, accompanied by exhibits R-1 through R-56.
20. On 31 July 2013, the Claimants filed a reply to the Respondent's objections to jurisdiction and counterclaim.
21. On 23 August 2013, in accordance with Procedural Order No. 1, the Respondent filed its request for bifurcation. The request reiterated the preliminary objections that were raised in the Respondent's submission of 15 July 2013, and requested that the Tribunal order the suspension of the proceedings on the merits, pending the resolution of its preliminary objections.
22. On 9 September 2013, the Tribunal held a telephone conference with the Parties concerning the Respondent's request for bifurcation of the proceedings.
23. On 13 September 2013, the Tribunal issued Procedural Order No. 2 deciding to join the Respondent's objections to jurisdiction and the Claimants' objections to the counterclaim to issues of liability, and to bifurcate issues of quantum to a further stage of the proceeding. By the same order, the Tribunal adopted a new procedural calendar.
24. On 17 December 2013, the Claimants filed a reply on liability and a counter-memorial on jurisdiction and admissibility of the counterclaim, accompanied by exhibits C-59 through C-70, the witness statements of Mr. Marco Gavazzi, Mr. Stefano Gavazzi,

Mr. Michele Mugnai, Mr. Florin Frumosu. Mr. Raimondo di Carpegna Varini, and Mr. Betto Stendardi and the expert opinion of Professor Sergiu Deleanu.

25. On 11 March 2014, the Tribunal issued Procedural Order No. 3 concerning the procedural calendar.
26. On 14 April 2014, the Respondent filed a rejoinder on liability and a reply on jurisdiction and the counterclaim, accompanied by exhibits R-57 through R-146.
27. On 14 May 2014, the Claimants filed a rejoinder on jurisdiction and the counterclaim, accompanied by exhibits C-71 through C-77 and the second expert opinion of Professor Sergiu Deleanu.
28. On 22 May 2014, the Respondent sought leave from the Tribunal to file new evidence in the form of a witness statement and an expert opinion. On 23 May 2014, the Claimants objected to the admissibility of the Respondent's proposed new evidence. By the same date, the Tribunal invited the Respondent to produce the new evidence and the Claimants to provide their comments on its admissibility. The Tribunal also notified the Parties that it would consider the material *de bene esse*, for the purposes of determining the admissibility of the Respondent's evidence.
29. On 27 May 2014, the Respondent filed a witness statement of Ms. Viorica Tataru and an expert opinion of Prof. Bazil Oglinda. By letter of 28 May 2014, the Claimants filed their objections to the admissibility of the Respondent's new evidence. By communication of 29 May 2014, the Respondent submitted its rebuttal to the Claimants' objections of 28 May 2014.
30. On 1 June 2014, the Tribunal deliberated on the admissibility of the new witness statement and expert report and, the following day, at the opening of the hearing, informed the Parties that it decided to admit this new evidence into the record, subject to the Claimants' right to make any consequential application.
31. A hearing on jurisdiction and liability took place in Paris, France, on 2-5 June 2014. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For the Claimants:

Professor Avv. Giorgio Sacerdoti	Counsel for the Claimants
Dr. Avv. Anna De Luca	Counsel for the Claimants
Mr. Adrian Iordache	Eversheds Lina & Guia
Ms. Alexandra Kerjean	Eversheds, Paris
Mr. Marco Gavazzi	Claimant
Mr. Stefano Gavazzi	Claimant

For the Respondent:

Ms. Alina Cobuz	Cobuz & Associates Law Firm
Ms. Ramona Voinea	Bostina & Associates Law Firm
Ms. Genoveva Luca	Bostina & Associates Law Firm
Ms. Mara Asanache	Bostina & Associates Law Firm
Ms. Diana Croitoru-Anghel	Sarbu Manuela Law Office
Mr. Daniel Visoiu	Cobuz & Associates Law Firm
Ms. Laura Voinea	Head of the Legal Department within the Authority for State Assets Administration

32. The following persons were examined as oral witnesses:

On behalf of the Claimants:

Mr. Marco Gavazzi	Claimant
Mr. Stefano Gavazzi	Claimant
Mr. Michele Mugnai	Consultant
Mr. Raimondo di Carpegna Varini	Techint/Tenova
Mr. Betto Stendardi	Techint/Tenova
Mr. Florin Frumosu	Consultant

On behalf of the Respondent:

Mrs. Viorica Tataru	Legal expert within the Legal Department of the Authority for State Assets Administration
Professor Bazil Oglinda	Founder Partner at ONV Law Firm Arbitrator for the Court of International Commerce Arbitration attached to the Chamber of Commerce and Industry of

33. At the hearing, on 2 June 2014, the Tribunal learnt that there were new exhibits attached to Mrs. Tataru's witness statement. On the same date, the Tribunal issued Procedural Order No. 4 concerning the admissibility of the Respondent's new evidence. The Tribunal confirmed its decision to admit Mrs. Tataru's statement and Professor Oglinda's expert opinion into the record, but denied the Respondent's request to admit the new exhibits attached to the witness statement. The Parties agreed that the Claimants would cross-examine the new witness and expert, that Messrs. Gavazzi could be present during the examination of Mrs. Tataru, and that either of them could be called back for further testimony following her examination, to rebut any new evidence. The Claimants, ultimately, did not avail themselves of this opportunity.
34. On 5 June 2014, the Tribunal issued Procedural Order No. 5 with post-hearing directions.
35. The Parties filed simultaneous post-hearing briefs on 9 July 2014, and simultaneous reply post-hearing briefs on 23 July 2014.
36. The Claimants filed their statement of costs on 31 August 2014 and the Respondent filed its statement of costs on 19 September 2014.

IV. FACTS AND CONTENTIONS

37. The dispute before the Tribunal arose against the backdrop of the end of the Communist regime, when, in its transition toward a free-market economy during the early 1990s, Romania started to privatize large State-owned enterprises.
38. The Romanian Government had created the State Ownership Fund ("SOF"), a government entity with legal personality, to negotiate privatization agreements with investors.² SOF was dissolved and replaced in 2000 by the Authority for Privatization and Management of State Ownership ("APAPS"), which took over the

² See C-7 (Law on the Privatization of the Trading Companies, publ. 16 Aug. 1991, arts. 23-38). See also *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award, para. 5 (12 Oct. 2005).

responsibilities, assets, and personnel of SOF.³ In 2004, through the merger of APAPS with another State institution, the Government of Romania established the Authority for State Assets Recovery (“AVAS”).⁴ As of 22 December 2012, AVAS changed its name into Authority for State Assets Administration (“AAAS”).⁵

39. AVAS, its predecessors, and its successor were all Romanian government agencies tasked, among other things, with managing the privatization of State-owned enterprises.⁶ The dispute follows from the privatization of S.C. Socomet S.A. (“Socomet” or “the Company”), a large steel company based in Northern Romania. Socomet’s history dates back to 1796, when a metallurgical plant was established in Ferdinandsberg (now Otelu Rosu). Over the next two centuries, the enterprise underwent several changes of ownership and name. In 1948, the enterprise was nationalized by the Romanian Government and renamed “Otelu Rosu” (Red Steel). After the end of the Communist regime, the enterprise was transformed into a joint-stock company, named “S.C. Socomet S.A.” On 21 April 2000, Socomet was renamed “Gavazzi Steel S.A.”
40. At the time of its privatization, Socomet, like many companies that had been owned and controlled by the State for many decades, also carried a very significant amount of debt to Romanian government entities and needed substantial investment.
41. SOF wanted to privatize Socomet by selling its majority shareholding in the company, which amounted to 70 percent of its shares. On 22 September 1998, it issued the “Tender Book Regarding the Offer for Sale of Shares Managed by the State Ownership Fund for the Trading Company Socomet S.A. Otelu Rosu by Direct Negotiation” (“Tender Book”),⁷ to provide prospective investors with information about the financial and industrial conditions of Socomet.

³ See C-11 (Emergency Ordinance on the Incorporation of the Authority for Privatization and State Participation Administration, No. 296/2000).

⁴ See ANEIR-Foreign Trade Promotion Centre, <http://www.aneir-cpce.ro> (Business Environment/Evolution of the Privatization Process in Romania) & C-14.

⁵ R-PHB, para. 306.

⁶ See also *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1), Award, para. 3 (7 Dec. 2011).

⁷ C-18.

42. The Claimants, Messrs. Marco and Stefano Gavazzi (who are brothers), were interested in acquiring the offered 70 percent shareholding from SOF in Socomet and engaged in negotiations with SOF on the basis of the Tender Book.⁸

A. The Share Purchase Contract

43. On 19 April 1999, SOF, on the one hand, and the Claimants, on the other, signed a “Contract for Selling-Buying Shares No. 145” (“Share Purchase Contract” or “Contract”).⁹ Under the Contract, the Claimants undertook to purchase, and SOF undertook to sell, 4,522,197 shares in Socomet, representing 70 percent of Socomet’s registered capital, for the total price of USD 517,020. The Contract was made in the English and Romanian languages, with the latter text prevailing over the former. For convenience, given also the language of this arbitration, references below are made to the English text (the Tribunal is not aware of any material discrepancy between the English and Romanian texts). Under Article 14, the Contract was governed by Romanian law.

44. In Article 5.1 of the Contract, the Claimants undertook to pay the purchase price in two installments as follows:

(b) ... Within 48 banking hours from the date of fulfilling all the obligations specified in Art. 10.1, the Buyer shall pay 297,184 USD to the Seller’s account

(c) Within 48 banking hours from the date of fulfilling all the obligations foreseen in Art.10.1, the Buyer shall issue an Irrevocable Letter of Credit for the balance of price amounting to 219,836 USD, that will be valid for 90 days from the Signing Date, to the Seller’s account¹⁰

45. The Claimants also undertook, in Article 8.10.1 of the Contract, to make investments and capital contributions in Socomet in the following terms:

Article 8.10.1 BUYER’S COMMITMENT

⁸ See Autoritatea pentru Valorificarea Activelor Statului (Authority for the Capitalization of the State Assets) v. Marco Gavazzi and Stefano Gavazzi, Final Award No. 212 (Court of International Commercial Arbitration Attached to the Chamber of Commerce and Industry of Romania and Bucharest, Case No. 743/2002), at 7, paras. 4-5 (30 Oct. 2007) (hereinafter “2007 Romanian Award”) (C-6).

⁹ C-19.

¹⁰ Share Purchase Contract, Art. 5.1 (b)-(c) (C-19) (emphasis omitted).

(a) *Buyer commits himself to effect in the Company either by own sources and provided [i]n his name or by a third Party he attracted, within a period of maximum 5 (five) years starting with the Payment Date, investment/contribution to capital as provided by law, in a total value of 20,000,000 USD (out of which the environmental investments represent 480,000 USD), scheduled according to Annex No.6.*¹¹

46. This Article 8.10.1(a) was amended by the Addendum of 7 July 2000 as follows:

*Purchaser undertakes to bring in the company out of his own sources, brought on its name, or by a third party brought by the purchaser, for a period of maximum 5 (five) years, commencing on 24.06.2000, investments/capital contributions, in the forms provided by law, in a total amount of 20,000,000 US\$... scheduled in compliance with Annex no. 6.*¹²

47. Annex No. 6, as modified by the Addendum, specified that USD 2,000,000 would have to be invested during the period 24 June 2000-23 June 2001 with the following “Investment objectives”: “Oxygen Factory,” “Cooling water station Constructions,” “Transformation post.”¹³ It further specified that USD 4,000,000 would have to be invested during the period 24 June 2001-23 June 2002 with the following “Investment objectives”: “Stoves and accessories.”¹⁴

48. SOF, for its part, was to satisfy a number of conditions prior to the contractually specified payment date, which conditions were set out in Article 10 of the Contract in the following terms:

Article 10 CONDITIONS TO BE MET PRIOR TO PAYMENT DATE

10.1 Whether [sic: If] within 40 days from the Signing Date, Seller does not complete and settle the matters showed below, and/or whether [sic: if] the Company shall be closed due to the lack of any of the authorizations specified in Annex No.1/1/, the Buyer can decide to terminate de jure the Contract, and by informing the Seller on this decision in 5 days from the expiring of 40 days period, when this Contract will become null and void.

a. The Balance Sheet on 31.12.1998 is drawn up by the Company Management, and it is approved by the General Assembly of

¹¹ *Id.* Art. 8.10.1(a) (C-19) (emphasis omitted). In an Addendum No. 2 to the Share Purchase Contract, the parties agreed that the five-year period within which the Claimants were to make the investments and/or contributions would start to run on 24 June 2000 (“Addendum no. 2/07.07.2000 to Share Sale Purchase Contract No. 145/19.04.1999 – SC Gavazzi Steel SA Otelu Rosu,” Art. 1 (C-20)).

¹² C-20.

¹³ *Id.*

¹⁴ *Id.*

Shareholders, Auditing Committee and DGFPCS based on the inventory performed to the end of financial year 1998, in compliance with the Romanian laws.

- b. The Company debts to State Budget, Budget for Social Assurances, Health Budget, including credits got from the Ministry of Finances for paying the power and natural gas supply shall be rescheduled within 5 years, with a 2 years grace period, and all related penalties and additional payment for delay shall be cancelled.*
- c. Seller shall exert all diligence required, and he shall support Buyer in solving the rescheduling of outstanding debts, and for cancelling the penalties and additional payments for delay owed by the Company to CONEL and ROMGAZ.*

10.2 Seller shall inform at once the Buyer on the fulfillment of each of the conditions specified in Art. 10.1.

10.3 Whether one or more of the conditions mentioned above will not be met within the time provided in Art. 10.1., then Seller cannot require to the Buyer to make the payment of the purchase price, unless Buyer will make Disclaimer of Fulfilling Conditions.

10.4 In case the Contract will be terminated under the conditions specified in Art. 10.1., Seller shall retur[n] at once to Buyer the bank guarantee.¹⁵

49. Thus, under Article 10.1(b) of the Share Purchase Contract, the SOF was to bring about – “complete and settle”¹⁶ – the rescheduling of the Company’s debts to a number of State entities and the cancellation of all related delayed payment penalties that had been imposed on the Company (“Restructuring of the Company’s Debt”). Under Article 10 of the Contract, the SOF’s failure to fulfill this condition, as well as any of the other conditions listed in Article 10.1 of the Contract, within forty days of the signing of the Contract, entitled the Claimants to terminate the Contract and relieved them of their obligation to pay the purchase price. If the Claimants elected to terminate the Contract, the Contract would “become null and void.”

50. The Respondent contends that, under Article 10.1(b)-(c) of the Share Purchase Contract, SOF was obligated “to carry out legal proceedings, as per the applicable framework,” such that Socomet would “obtain” the Restructuring of the Company’s Debt, and to assist the Claimants in their endeavors to obtain the restructuring of

¹⁵ Share Purchase Contract, Art. 10 (C-19) (emphasis omitted).

¹⁶ Share Purchase Contract, Art. 10.1 (C-19).

Socomet's debts to its energy and gas suppliers, CONEL S.A. and ROMGAZ S.A.¹⁷ In other words, according to the Respondent, SOF undertook merely to facilitate, and not to grant, the Restructuring of the Company's Debt – indeed, so the Respondent contends, under Romanian law SOF had no authority to grant any exemptions from payment of debts due to the State Budget.¹⁸

51. Socomet was heavily indebted to the State and a multitude of State special funds and State-owned enterprises.¹⁹ The Claimants assert that the success of Socomet's privatization as well as of the Claimants' investment depended essentially on the Restructuring of the Company's Debt, which was fundamental for Socomet's revitalization and for the re-launch of its activities worldwide.²⁰ For those reasons, the Claimants assert, the restructuring of the Company's debts, listed in Article 10 of the Share Purchase Contract and specifically included in the Contract at the Claimants' request, were of paramount importance to them.²¹

B. SOF's Notice of 3 June 1999 to the Claimants

52. On 3 June 1999, some 45 days after the signing of the Share Purchase Contract and five days after the date the Claimants could still terminate the Contract pursuant to its Article 10, SOF informed the Claimants by Notice No. 1/4026 that it had fulfilled the conditions imposed by Article 10.1 of the Share Purchase Contract and, importantly, that the Romanian Prime Minister had approved the restructuring of the Company's debts to the State Budget, the Social Insurance Budget, the Health Budget and Special Funds, as well as the cancellation of all related penalties and late payment additions. Thus, SOF requested that the Claimants pay the contractually stipulated price for their 70 percent shareholding in Socomet. Specifically, the 3 June 1999 Notice stated:

In respect of the Stock Sale-Purchase Agreement no. 145/19.04.1999, we notify the following:

1. *By the letter no. P/2339/28.04.1999 (a copy enclosed hereto), the State Property Fund [SOF] requested and the Prime Minister of Romania approved the rescheduling of the debts of S.C. SOCOMET S.A. Otelu*

¹⁷ R-PO/CM/CC, para. 192 (emphasis omitted).

¹⁸ *Id.* paras. 194-200.

¹⁹ C-Request, para. 28.

²⁰ *Id.* para. 19.

²¹ *Id.* paras. 28-29.

Rosu to the State Budget, Social Insurance Budget, Health Budget and Special Funds, as well as the annulment of all related penalties and late payment additions.

2. *By the letter no. P/2994/28.05.1999 (a copy enclosed hereto), the State Property Fund [SOF] took all the necessary measures, by requesting the Minister of Industry and Commerce the rescheduling of the past due debts of S.C. SOCOMET S.A. Otelu Rosu to CONEL and ROMGAZ, as well as the annulment of all related penalties and late payment additions.*

By these, the State Property Fund [SOF] has fulfilled the conditions resting with it according to art. 10.1 of the Agreement, and Messrs. Marco and Stefano Gavazzi shall subsequently pay the amount of USD 297,184 by banking swift and issue an irrevocable letter of credit for the price difference, amounting to USD 219,836, according to art. 5.1. letters (a) and (b) of the Agreement.²²

53. Two documents were enclosed with the 3 June 1999 Notice, namely: (i) Note No. 5/3228 dated 17 May 1999, signed by the Chairman of the Board of Directors of SOF, the Minister of Finance, the Minister of Labor and Social Protection, and the Minister of Health and approved by the then Prime Minister of Romania, Mr. Radu Vasile (“Government’s Note No. 5/3228”);²³ and (ii) Note No. P/2994 dated 28 May 1999, addressed by the Chairman of the Board of Directors of SOF to the then Romanian Minister of Industry and Commerce, Mr. Radu Berceanu (“SOF’s Note No. P/2994”).²⁴ These two Notes are described in the following paragraphs.

a) *The Government’s Note No. 5/3228 of 17 May 1999*

54. The Government’s Note No. 5/3228 of 17 May 1999, which was entitled “Note on the proposals to reschedule the debts and exempt from the payment of penalties and delay penalties of S.C. SOCOMET S.A. Otelu Rosu,” stated in relevant part:

...

The STATE OWNERSHIP FUND signed Sale-Purchase Agreement no. 145/19.04.1999, for the stock of 70% of the shares of S.C. SOCOMET S.A. Otelu Rosu, together with Mr. MARCO and Mr. STEFANO GAVAZZI, Italian individuals, the latter being the only ones to submit a bid.

²² SOF Notice No. 1/4026 dated 3 June 1999 (C-21) (translated from Romanian into English).

²³ C-22.

²⁴ C-23.

Considering the difficult economic and financial situation of S.C. SOCOMET S.A. Otelu Rosu, the Purchasers are requesting, based on Government Ordinance no. 11/1996 on the enforcement of budget debts and Government Decision no. 55/1998 on privatizing companies, to benefit from the facilities that may be granted with regard to rescheduling overdue and unpaid debts, as well as exemption from the payment of related penalties and delay penalties.

The request of MARCO and STEFANO GAVAZZI refers to rescheduling the debts of S.C. SOCOMET S.A. Otelu Rosu that are overdue and unpaid on time to the State Budget, the Social Insurance Budget, the Health Budget and Special Funds, over a period of 5 years, with a grace period of 2 years. Subsequently, the payments shall be done as follows: 10% in the third year, 30% in the fourth year and 60% in the last year, as well as the cancellation of all related penalties and/or delay penalties.

The following is mentioned:

- MARCO and STEFANO GAVAZZI are the sole investors to submit a bid for S.C. SOCOMET S.A. Otelu Rosu. If the proposals for rescheduling the debts and exempt from the payment of penalties and delay penalties of S.C. SOCOMET S.A. Otelu Rosu are approved, these investors also intend to purchase the stock of shares held by the State Ownership Fund in S.C. LAMDRO S.A. Turnu Severin;

- the requests are conditions for the payment of the price in the sale-purchase agreement for the stock of shares managed by the State Ownership Fund in S.C. SOCOMET S.A. Otelu Rosu, but these requests exceed the competence of the State Ownership Fund;

- the bidder undertakes to perform important investments in the company, including those for environmental protection, in amount of USD 20 million, investments that the latter will perform over a period of 5 years, for the purpose of economically and financially readjusting and re-launching the production activity.

We also mention that the sale-purchase agreement has a clause that provides that if within 40 days as of the signing date the Seller does not finalize or settle the rescheduling of debts and cancellation of related penalties, the Purchaser may decide to terminate the Agreement de jure, informing the Seller of this decision within 5 days from the expiry of the 40-day period, and the Agreement shall become null and void.

If the Shares Sale-Purchase Agreement is unilaterally terminated by the Purchaser (by waiver), by the State Ownership Fund (due to the Purchaser's failure to pay the financial obligations stipulated in the agreement clauses, in the amount and within the provided deadlines) or for any other reason, including force majeure, the payment benefits provided in this NOTE lose their validity.

The exact amount of the debts, penalties and delay penalties, as well as their distribution shall be verified by DGFPCFS Caras Severin.

Considering the above, please approve the facilities regarding the payment of the said obligations of S.C. SOCOMET S.A. Otelu Rosu.²⁵

55. In the top right-hand part of the document, the Government's Note No. 5/3228 bears the printed notation "Approved – Prime Minister Radu Vasile," as well as the Prime Minister's official stamp and his signature over the printed notation.²⁶ As will be discussed in detail further in this Decision, the Claimants and the Respondent disagree on the nature and effect of Government Note No. 5/3228. For the Claimants, by this Note, the Romanian Government expressly approved the rescheduling and waivers provided by the Share Purchase Contract as a condition for the project. For the Respondent, the Note was merely an internal communication from the Prime Minister to various addressees requesting the approval of the proposed rescheduling, subject to the observance of applicable legal provisions.

b) SOF's Note No. P/2994 of 28 May 1999 to the Romanian Minister of Industry and Commerce

56. SOF's Note No. P/2994 of 28 May 1999 to the Romanian Minister of Industry and Commerce tracks, by and large, the language of the Government's Note No. 5/3228 of 17 May 1999. It also explicitly confirms that "*the approval of the Prime Minister of Romania on the rescheduling of the debts of S.C. SOCOMET S.A. Otelu Rosu ha[d] been obtained, as well as the annulment of all related penalties and late payment additions to the State Budget, Social Security Budget, Health Budget and Special Funds.*"²⁷ The Note goes on to request that the Minister of Industry and Commerce approve the restructuring of Socomet's debts to the National Electricity Company CONEL S.A. and the National Company ROMGAZ S.A. for the purchase of electricity, gas and petrol.²⁸ In an appendix to the Note, SOF proposed that Socomet's debts to those two State-controlled entities be restructured as follows: (i) with respect to CONEL S.A., rescheduling over five years the debts existing on 28 February 1999, with a grace period of two years, and cancellation of the related penalties and delayed

²⁵ C-22 (translated from Romanian into English).

²⁶ C-22 (translated from Romanian into English; stamp and signature on Romanian original).

²⁷ C-23 (emphasis added, translated into English from Romanian).

²⁸ According to the Claimants, the Minister of Industry and Commerce controlled and managed those two State-controlled entities. *See* C-Request, para. 41.

payment additions existing on 28 February 1999; and (ii) with respect to ROMGAZ S.A., rescheduling over 12 months the debts existing on 28 February 1999, with a grace period of six months, and cancellation of the related penalties and delayed payment additions existing on 28 February 1999.

C. Events Following SOF's Notice of 3 June 1999 to the Claimants and the Freezing of Socomet's Bank Accounts in September 1999

57. After receiving the Notice of 3 June 1999 from SOF,²⁹ the Claimants paid the second and final installment of the purchase price of their 70 percent shareholding in Socomet in accordance with Article 5.1 of the Share Purchase Contract³⁰ and the Claimants became members of the Board of Socomet.³¹ Further, so the Claimants allege, to re-launch production and sales abroad, they created S.C. Gavazzi Steel Consultants ("Gavazzi Steel Consultants"), a company incorporated in the British Virgin Islands but wholly owned and controlled by Socomet, to be Socomet's general agent abroad in charge of developing its international business and collecting purchase orders from foreign clients.³²
58. However, so the Claimants assert, the Restructuring of the Company's Debt was not carried out as required by Article 10 of the Share Purchase Contract, either within the contractually specified deadline or any time thereafter.
59. By letters of 10 June and 2 September 1999, Socomet requested that the Romanian Ministry of Finance carry out the Restructuring of the Company's Debt, pointing to the Company's unavailability of funds.³³

²⁹ See *supra* para. 51.

³⁰ See *supra* para. 43. See also the 2007 Romanian Award, at 8, para. 6 (C-6) ("[T]rusting [the] statement [in the Notice of 3 June 1999 from the SOF 3 that the SOF 'had fulfilled all the conditions that were incumbent upon it pursuant to Article 10.1 (b) of the Contract'], [Gavazzi] paid USD 219,836 (the second instalment)").

³¹ On 9 September 1999, the Claimants were formally registered as members of the Board of Directors of Socomet with the Romanian Chamber of Commerce, after having been appointed as such at the general meeting of Socomet's shareholders held on 9 July 1999 (See Minutes of the general meeting of the shareholders of Socomet, 9 July 1999 (C-25); C-Request, para. 50).

³² C-Request, para. 48.

³³ See first paragraph of the letter from the Romanian Ministry of Finance to Socomet dated 19 October 1999 (C-24).

D. The Romanian Ministry of Finance's Letter to Socomet Dated 19 October 1999

60. By letter of 19 October 1999, the Romanian Ministry of Finance replied to Socomet's letters of 10 June and 2 September 1999 ("19 October 1999 Letter").³⁴ The Claimants contend that the 19 October 1999 Letter, while formally affirming the rescheduling and waiver of the Company's debts approved by the Romanian Prime Minister in the Government's Note No. 5/3228 of 17 May 1999, in fact established new terms for the restructuring of Socomet's debt that were less favorable to the Company than those established in the Government's Note No. 5/3228 of 17 May 1999 (and undertaken by SOF in Article 10 of the Share Purchase Contract).
61. The 19 October 1999 Letter, according to the Claimants, introduced a new rescheduling scheme. In essence, in deviation from the terms of the Share Purchase Contract and the Government's Note No. 5/3228, it shortened the original two-year grace period for the repayment of Socomet's debt to some 5.5 months, *i.e.*, from August 2001 to 31 March 2000. Moreover, a substantial part of the penalties were not

³⁴ C-24; R-18. The 19 October 1999 Letter states in relevant part (translated from Romanian into English):

Referring to your letters no. 20252/10.06.1999 and no. 20977/02.09.1999, registered with the Ministry of Finance under no. 442.311/17.06.1999 and the Otelu Rosu Financial circumscription under no. 8/07.09.1999, whereby you requested to be granted benefits for the payment of obligations to the state budget given the temporary unavailability of funds. . . . we hereby inform you that, in accordance with Common Note no. 5/3228/RV/17.05.1999, of the State Assets Fund, the Ministry of Labor and Social Protection, the Ministry of Health[,] the Ministry of Finance and approved by the prime minister Radu Vasile, the following were approved:

- the exemption from payment of delay penalties related to the overdue state obligations in total amount of lei 67,288,123,853, representing delay penalties related to the tax on profit in amount of lei 9,148,169,519, delay penalties related to tax on salaries in amount of lei 22,256,879,517, VAT related delay penalties in amount of lei 26,370,526,132, delay penalties related to the research and development fund in amount of lei 743,704,685 and delay penalties related to overdue loans granted from the state budget based on the provisions of Government Decision no. 528/1998, in amount of lei 8,768,808,000;

- rescheduling the payment of the total amount of lei 56,099,839,056, representing tax on profit in amount of lei 4,408,095,093, due tax on salaries in amount of lei 14,694,870,037, VAT in amount of lei 3,814,601,110, research and development fund in amount of lei 743,704,685, overdue amounts from loans granted from the state budget in accordance with the provisions of Government Decision no. 528/1998 and penalties calculated for delayed payment of tax on salaries in amount of lei 3,438,568,131, in 54 increasing monthly installments starting with 31.03.2000, according to the annex hereto.

Granting the payment rescheduling is conditioned upon:

- payment of current obligations to the state budget, no later than 30 days after the due date. For failure to pay on the due date, delay penalties are owed according to legal provisions.

cancelled but only rescheduled with a high annual interest rate of 36 %.³⁵ Further, the rescheduling of the debts was subordinated to the payment of Socomet's current obligations to the State Budget and subjected to additional conditions – such as a bank guarantee to be provided to the local tax office – that were not mentioned in the Share Purchase Contract or the Government's Note No. 5/3228.³⁶ Finally, the Claimants allege that the debts covered by the 19 October 1999 Letter from the Ministry of Finance concerned only a portion of Socomet's taxes and similar debts towards the Ministry of Finance.³⁷ The Claimants also allege that the debts towards the other Ministries were not covered by the Order from the Minister of Finance.

62. The Respondent argues that, while the Government's Note No. 5/3228 of 17 May 1999³⁸ only established the general terms of a proposal, the Letter of 19 October 1999 from the Ministry of Finance established the terms for the rescheduling in specific terms, taking into account the Company's temporary illiquidity. Moreover, so the Respondent argues, the Claimants were aware of the procedure for the rescheduling of tax debts.³⁹ The Respondent states that, because the current debts to the State Budget and the rescheduling installment for January 2001 were not paid, the rescheduling could not be carried out.⁴⁰
63. For the Claimants, however, the Respondent's case lacks any foundation and is not evidenced by contemporaneous evidence.⁴¹ Moreover, so the Claimants submit, AVAS Memorandum of 2 May 2001 to State Secretary Zelenco indicates that Socomet was compliant with its rescheduling commitments and would be granted a rescheduling.⁴²
64. The Respondent maintains that SOF fully complied with its obligations under the Share Purchase Contract relating to the rescheduling of Socomet's debts, "in the sense that the budget debts, as well as the debts towards the energy and gas suppliers were

³⁵ C-PHB, para 49.

³⁶ R-18, at 2.

³⁷ C-PHB, para 50.

³⁸ C-22.

³⁹ R-RPHB, paras. 71-76.

⁴⁰ R-PHB, para. 133; C-36 ("Minutes of the Board of Directors," Gavazzi Steel, 4 May 2000, at 2).

⁴¹ The Claimants argue that the only evidence submitted by the Respondent is a defective and incomplete *a posteriori* internal report from AVAS of November 2002 (R-50).

⁴² See C-33.

in fact rescheduled, and the related penalties were cancelled, as a consequence of the approval of [the Government's Note No. 5/3228 of 17 May 1999], in accordance with the relevant legal provisions in force."⁴³ According to the Respondent, the 19 October 1999 Letter establishes that the Company's debts to the State Budget were rescheduled in accordance with the relevant Romanian laws; it does not represent a "second Release," as erroneously contended by the Claimants.⁴⁴ In this connection, the Respondent produced a letter dated 19 May 2000 from the Ministry of Finance to SOF, stating that, through its Letter of 19 October 1999, the Ministry of Finance had granted the Company "the fiscal facilities provided by the legislation in force," and that, in accordance with that legislation, "the scheduling of payment may start with a period of grace of maximum 6 months and not of 2 years, as requested."⁴⁵

65. Further, the Respondent points out, the Claimants never availed themselves of the remedies provided under Romanian law to challenge the 19 October 1999 Letter; indeed, they accepted its terms, as evidenced by the Company's letter of 3 December 1999 to the Otelu Rosu Tax Authority, which was co-signed by Mr. Stefano Gavazzi.⁴⁶
66. The Claimants concede that, in the belief that the Romanian Government would soon be able to restructure Socomet's debts as agreed, they continued the operations through Gavazzi Steel Consultants, which started to sign contracts on behalf of Socomet and to pay salaries to its foreign managers and suppliers. The Claimants also

⁴³ R-PO/CM/CC, para. 208 (emphasis omitted) (referencing C-22).

⁴⁴ *Id.* paras. 211-212.

⁴⁵ Letter dated 19 May 2000 from the Romanian Ministry of Finance to SOF (R-19). This letter provides in relevant part:

Referring to your notice no. 1/3746/05.04.2000 by which you request fiscal facilities for SC "Gavazzi Steel" SA Otelu[] Rosu, as approved by Note 5/3228/17.05.1999, respectively the scheduling for payment on a period of 5 years with a period of grace and the annulment of the surcharges related to the outstanding debts to the State budget, we inform you that, by notice of Ministry of Finance no. 443.604/443.685/442.311/442.215/19.10.1999 . . . , SC "Gavazzi Steel" SA Otelu[] Rosu has obtained the fiscal facilities provided by the legislation in force, respectively art. 82-85 of the Government Ordinance no. 11/1996 regarding the execution of the budgetary debts, as subsequently amended, and the Order of the Minister of Finance no. 1283/1998.

According to the above mentioned normative acts, the scheduling of payment may start with a period of grace of maximum 6 months and not of 2 years, as requested.

In the same time, we inform you that, according to the provisions of the circular letter no. 5775/03.04.2000, signed by the Minister of Finance, Decebal Traian Remes, the work on the files referring to the granting of facilities for the payment of budgetary obligations has been suspended, until new dispositions.

⁴⁶ R-PHB, para. 348.

injected additional funds into Socomet either directly, using their own personal funds, or through Gavazzi Steel Consultants.⁴⁷ All these actions, the Claimants contend, allowed Socomet to survive and remain active for some time.

E. The Substantiation Note of May 2001 and the Government’s Decision No. 692 of 19 July 2001

67. In May or July 2001, APAPS (SOF’s successor) and the Ministry of Finance in a “Substantiation Note” requested the Ministry of Justice to approve for certain privatized companies – among which Socomet (which, since 21 April 2000 had changed its name to “Gavazzi Steel S.A.”⁴⁸) – the rescheduling of debts towards the State Budget and the cancellation of related penalties.⁴⁹ The Respondent and the Claimants draw contradictory conclusions from this “Substantiation Note.” From the statement in the “Substantiation Note” that “*the privatized companies ... are at this time fully or partially paying current obligations to all state budgets and special funds*”⁵⁰ – the Respondent concludes that Socomet had outstanding debts. However, the Claimants conclude that Socomet had no outstanding debts from the statement in the “Substantiation Note” that the “*purchasers of the stocks of shares of the companies that are the object of this Note [including Socomet] have fulfilled the obligations undertaken through the shares sale-purchase agreements signed with the [SOF/APAPS], due until this time.*”⁵¹ The Note went on to propose conditions for the Restructuring of the Company’s Debt that were less favorable than the ones established for Socomet in Article 10.1 of the Share Purchase Contract and confirmed by the Government’s Note No. 5/3228 of 17 May 1999. In particular, it allowed for a grace period of six months while the grace period initially envisaged had been two years. The Respondent argues that the Substantiation Note, by its statement “... is

⁴⁷ C-Request, para. 61. *See also* 2007 Romanian Award, at 20-21, para. 1 (C-6).

⁴⁸ By addendum of dated 21 April 2000 to the Share Purchase Contract, Socomet changed its name to Gavazzi Steel S.A. C-Request, para. 48 & 2007 Romanian Award, at 7, para. 5 (C-6).

⁴⁹ C-32. The exact month in which the Substantiation Note was issued is not clear. The Claimants assert that it was transmitted to the Secretary of State, Ministry of Finance, in May 2001 and included in the Draft Government Decision of 19 July 2001 (*see infra* para. 68). C-PHB, para. 57.

⁵⁰ C-32 (emphasis added).

⁵¹ *Id.* (emphasis added).

submitted for approval,” shows clearly that it did not establish any obligation but had to be approved by a further Government Decision.⁵²

68. In the Government’s Decision No. 692 of 19 July 2001⁵³ – also countersigned by the Minister of APAPS, the Minister of Labour and Social Solidarity, and the Minister of Public Finances – the Romanian Prime Minister, Mr. Adrian Nastase, implemented the Substantiation Note for Socomet. The Restructuring of the Company’s Debt remained subject to conditions that were less favorable than those established in Article 10.1 of the Share Purchase Contract and confirmed in the Government’s Note No. 5/3228 of 17 May 1999. The original grace period became six months as of 1 August 2001. The Government Decision No. 692 of 19 July 2001 further modified the original conditions to the Claimants’ detriment: for example, it reduced the universe of debts to be rescheduled; and it unfavorably changed the rescheduling plan originally established in the Government’s Note No. 5/3228 of 17 May 1999.⁵⁴
69. The Romanian authorities, so the Claimants assert, did not even carry out the amended rescheduling scheme announced in the Romanian Government’s Decision No. 692 of 19 July 2001.

F. Events Leading Up to the Company’s Insolvency

70. The Claimants assert that, on 15 September 1999, Romanian banks, pursuant to a directive by the Minister of Finance, froze all accounts of Socomet to recover the Company’s debts to the State Budget, and then paid these debts, thereby depleting Socomet’s accounts.⁵⁵ The Claimants contend that Socomet’s funds deposited in Romanian banks were in this manner transferred to the Romanian State to pay the very same debts that Article 10.1 of the Share Purchase Contract had provided to be rescheduled or canceled and which the Respondent had indeed committed to be rescheduled or waived by the Government’s Note No. 5/3228 of 17 May 1999.

⁵² R-RPHB, paras. 77-81.

⁵³ Government of Romania, Decision No. 692, 19 July 2001, published in the Official Gazette of Romania (*Monitorul Oficial al României*), Part I, No. 425/31.VII.2001 (C-34).

⁵⁴ C-Request, para. 68.

⁵⁵ C-Request, para. 56. *See also* the 2007 Romanian Award, at 8, para. 6 (C-6) (“[T]he condition precedent under Article 10.1 (b) [of the Share Purchase Contract] was never properly met, and this led, in particular, to the freezing of Socomet’s bank accounts in September 1999.”).

71. All Parties agree that the Company's bank accounts remained frozen at the request of the Ministry of Finance till 6 December 1999, when the Oțelu Rosu Tax Authority (*Circumscripția Fiscală Oțelu Roșu*) ordered the suspension of five enforcement orders against the Company partially because some fiscal debts had been paid and partially because others had been rescheduled by the Romanian Ministry of Finance on 19 October 1999.⁵⁶ As of 6 December 1999, the Respondent asserts, the Company was again able to conduct banking operations in relation to its then current activities.⁵⁷ However, the Claimants contend, the Ministries continued to claim the payment of old debts and to block Socomet's accounts.⁵⁸ For instance, in April 2000, Socomet's accounts were blocked by the Labour Department (Caras Severin Labor) which requested immediate payment of the outstanding and current debts and which prevented Socomet from paying its workers and suppliers.⁵⁹ Because debts were not rescheduled, Socomet had to use its funds to pay such debts and could not redress its activities.⁶⁰ This, so the Claimants argue, is in great contrast to the original rescheduling and waiver scheme whereby Socomet would have been released from all interest and penalties and would only have had to pay 10% of its past debts in August 2002 after having benefited from a grace period until August 2001.⁶¹
72. The Claimants contend that, notwithstanding the freezing of the Company's bank accounts and the failure of the Romanian Government to carry out the Restructuring of the Company's Debt, the Claimants continued to attempt to revive the Company. Thus, they established a business plan for the recovery and development of the

⁵⁶ Letter No. 3319 dated 6 December 1999 from the Circumscripția Fiscală Oțelu Roșu to Banca Comercială Română S.A., Oțelu Rosu Agency (R-21, translated from Romanian into English):

Please be hereby informed that the enforcement orders issued against SC "GAVAZZI STEEL" SA Oțelu Rosu are suspended, as follows:

1. *Enforcement order no. 2069/04.06.1999*
2. *Enforcement order no. 2071/04.06.1999*
3. *Enforcement order no. 2072/04.06.1999*
4. *Enforcement order no. 2912/08.10.1999*

as the aforementioned economic operator obtained approval of its budget debt rescheduling.

In case it fails to comply with the provisions of Order no. 1238/98 issued by the Ministry of Finance, we will continue the judicial enforcement procedure, and in such situation we will provide you with a written notice in this respect.

⁵⁷ R-PO/CM/CC, paras. 216-220.

⁵⁸ C-PHB, paras. 52-55; 67-70; "Minutes of the Board of Directors," 16 May 2000 & 23 January 2001 (C-36).

⁵⁹ "Minutes of the Board of Directors," 4 May 2000 (C-36).

⁶⁰ "Minutes of the Board of Directors," 23 November 2000 (C-36).

⁶¹ C-PHB, para. 70.

Company involving an investment in the Company of USD 20,000,000 within five years from the payment of the share purchase price in accordance with their undertaking in Article 8.10.1 of the Share Purchase Contract.

73. On 12 July 2002, Mr. Marco Gavazzi informed AVAS of the negotiations the Claimants were conducting with potential partners to strengthen the financial basis of the Company and to implement the business plan.⁶² Techint S.p.A., an Italian steel company, and Simest S.p.A., a financial company owned by the Italian Government to support Italian investors abroad, were among those potential partners, so the Claimants contend. The business plan provided, among other things, for a financing of USD 27,000,000 by the Austrian Bank Hypo VereinsBank, to acquire new ‘Consteel’ production technology, developed by Techint S.p.A. In his letter, Mr. Marco Gavazzi noted that, because all the Company’s bank accounts had been frozen, the Claimants could not send new funds from abroad to pay the Company’s current debts to the State Budget, which payment was, in turn, a condition set by the Government for the Restructuring of the Company’s Debt. Mr. Marco Gavazzi further pointed out that local Romanian banks had refused credit lines to the Company to pay its debts because its balance sheet carried the “enormous weight of the old pre-privatization debts.”⁶³ The Claimants assert that a pledge from the Romanian Commercial Bank was necessary to implement the investment plan established by the Claimants, Techint S.p.A., and Simest S.p.A. and financed by Hypo VereinsBank. The Romanian Commercial Bank, however, refused to intervene because of the existing freeze of the Company’s bank accounts by the Romanian Government, even if its intervention would not require direct funding.⁶⁴ Mr. Marco Gavazzi concluded, in his

⁶² Letter 12 July 2002 Marco Gavazzi/APAPS (C-35).

⁶³ *Id.*

⁶⁴ C-Request, para. 75. The 2007 Romanian Award, at 22, paras. 7-8 (C-6) describes these events as follows:

... From a financial standpoint, the transaction provided that HypoVereinsbank – which had already expressed its agreement – would raise the funds required for the investment. To permit SACE’s (the Italian State export credit-insurance company) necessary guarantee of the investment, the Romanian Commercial Bank was asked to intervene – risk free – in order to transfer the loan directly to Gavazzi Steel, and to cross-guarantee the initial loan made by HypoVereinsbank.

... The Arbitral Tribunal finds that [Gavazzi] supplied sufficient documentary and written evidence that the non-completion of said financial transaction, having reached an advanced phase, was due to Romanian Commercial Bank’s refusal to participate, as a consequence of Gavazzi Steel’s inability to accede to current account, following its often quoted freezing by the Romanian Ministries.

12 July 2002 letter, that the only way to “make a very strong injection of new cash” in the Company was to bring in a new partner; to this end, his brother Stefano would sell his 39 percent stake in the Company to Acciaierie Venete S.p.A., an Italian steel company, which would then provide a cash infusion of USD 5,000,000. AVAS never replied to Mr. Marco Gavazzi’s 12 July 2002 letter.

74. Thus, so the Claimants contend, the Romanian Government’s failure to carry out the Restructuring of the Company’s Debt in breach of its commitments of 17 May 1999, together with the continued freezing of the Company’s bank accounts, frustrated the implementation of the business plan. The Respondent objects that the Claimants themselves were responsible for the blocking of the bank accounts by not paying what was due to the Respondent. The Claimants, however, reply that the freezing of the accounts was due to the Romanian authorities not having implemented their multiple commitments as regards waiver and rescheduling.⁶⁵
75. The Respondent further argues that the Tribunal should not take into account the Claimants’ investment plans, which do not rely upon any signed contemporaneous document.⁶⁶
76. The Claimants contend that Socomet became practically insolvent; and that, at this point, the Claimants could not but abandon their endeavours to revitalize the Company and, thus, their investment project.⁶⁷ At the general meeting of the shareholders of the Company held on 24 August 2002, the Board of Directors recognized the extreme seriousness of the situation, with the Company being “virtually insolvent.” The Board concluded that the only viable way to allow the Company to continue with its activities was a “judiciary reorganization pursuant to Law no. 64.” The Company’s Director General was charged with setting this procedure in motion.⁶⁸ Meanwhile, the Company’s creditors had already filed an application to initiate such procedure before the Tribunal of Recita.

⁶⁵ C-PHB, para. 71.

⁶⁶ R-RPHB, para. 57.

⁶⁷ C-Request, paras. 76-77.

⁶⁸ “Minutes of the Board of Directors,” 24 Aug. 2002 (C-36).

G. The Arbitration Proceedings Initiated by APAPS Against Messrs. Gavazzi in October 2002

77. On 31 October 2002, APAPS (as claimant) started an arbitration against Messrs. Marco and Stefano Gavazzi (as respondents) at the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania and Bucharest, pursuant to the dispute resolution clause contained in Article 13 of the Share Purchase Contract (the “2002 Romanian arbitration”). In its request for arbitration, APAPS alleged multiple breaches by Messrs. Gavazzi of the Share Purchase Contract and requested that the arbitral tribunal, among other things, should terminate the Contract, order that Messrs. Gavazzi return the purchased shares, pay an amount allegedly due for unpaid dividends and pay damages for the mismanagement of the Company totaling USD 14,000,000. Messrs. Gavazzi, for their part, denied any liability to APAPS and also pleaded, as a counterclaim, multiple breaches by APAPS of the Share Purchase Contract. They requested, among other relief, that the arbitral tribunal terminate the Contract and order APAPS to return the share purchase price and to pay damages for its breach.⁶⁹ In 2004, during the course of the Romanian arbitral proceedings, APAPS was succeeded by AVAS; accordingly, for the sake of convenience, in the following paragraphs the Tribunal will refer to AVAS as the claimant and the respondent to the counterclaim in the Romanian arbitral proceedings.
78. The arbitral tribunal, chaired by the late Professor Pierre Lalive, a national of Switzerland, issued its award on 30 October 2007 (the “2007 Romanian Award”), in which it dismissed AVAS’ claim and granted Messrs. Gavazzi’s counterclaim in its entirety.⁷⁰ Thus, it terminated the Share Purchase Contract and, among other matters, ordered AVAS to return the share purchase price to Messrs. Gavazzi and also to pay Messrs. Gavazzi a total of € 1,016,386 and USD 13,789,700 in damages. In reaching these decisions, the tribunal found, *inter alia*, that Messrs. Gavazzi had been induced by SOF’s Notice of 3 June 1999,⁷¹ to pay the share purchase price and that Messrs.

⁶⁹ 2007 Romanian Award, at 9 (C-6).

⁷⁰ 2007 Romanian Award (C-6).

⁷¹ *Id.* at 17, para. 3; *see also id.* at 20, para. 1 (“[O]nly [Gavazzi’s] reliance on AVAS’ debts rescheduling obligation (promised, assured but not fulfilled) induced [Gavazzi] to pay the share purchase price . . .”). Concerning the SOF’s Notice No. 1/4026 dated 3 June 1999 (C-21) *see supra* para. 51.

Gavazzi could have terminated the Share Purchase Contract pursuant to Article 10.1(b) of the Contract, but had not done so.

H. AVAS' successful challenge of the 2007 Romanian Award

79. AVAS subsequently challenged the 2007 Romanian Award before the Bucharest Court of Appeals, which annulled the award by its decision of 22 April 2009, on the ground that the 2007 Romanian Award “breached the principle of equal treatment, the principle of observance of the right to defense and the principle of contradiction, which are public order principles”.⁷² The Court of Appeals, in a subsequent proceeding, examined the merits of AVAS’ claim and Messrs. Gavazzi’s counterclaim that had been decided by the 2007 Romanian Award. By its decision of 16 March 2011,⁷³ the Court of Appeals, *inter alia*, terminated the Share Purchase Contract, determined that AVAS should retain the monies paid by Messrs. Gavazzi under the Share Purchase Contract and rejected as unfounded both the remainder of AVAS’ claims and Messrs. Gavazzi’s entire counterclaim. Messrs. Gavazzi unsuccessfully challenged both decisions of the Court of Appeals before the Romanian High Court of Cassation and Justice, which by decision of 23 February 2012 affirmed the decisions of the Court of Appeals.⁷⁴

V. THE PARTIES’ CLAIMS AND COUNTERCLAIMS

A. The Claimants’ Claims

80. The Claimants allege that the Respondent has breached its obligations under the BIT by the following acts and omissions: the Romanian Government was aware that the Claimants’ purchase of Socomet shares and their planned additional investments in Socomet depended on the rescheduling and waiver of Socomet’s debts towards different administrations and that the whole project undertaken by the Claimants depended upon a rescheduling over five years, with a two-year grace period and a

⁷² Bucharest Court of Appeals, Commercial Section A VI-A (*Curtea de Apel București, Secția A VI-A Comercială*), Commercial Decision No. 65 (Case No. 8799/2/2007), at 11 (22 Apr. 2009) (C-38).

⁷³ Bucharest Court of Appeals, Commercial Section A VI-A (*Curtea de Apel București, Secția A VI-A Comercială*), Commercial Decision No. 40 (Case No. 8799/2/2007) (16 Mar. 2011) (C-39).

⁷⁴ Romania High Court of Cassation and Justice, Civil Section A-II-A (*România Înalta Curte de Casație și Justiție Secția A-II-A Civilă*), Decision No. 899 (Case No. 5898/1/2011) (23 Feb. 2012) (C-40).

cancellation of all related penalties, as provided by Article 10.1 of the Share Purchase Contract. The Government Note No. 5/3228 of 17 May 1999, signed by the Chairman of the Board of Direction of the State Ownership Fund, the Minister of Finance, the Minister of Labour and Social Protection as well as by the Minister of Health and formally approved by the Prime Minister, requested the administration to approve the rescheduling of debts and cancellation of penalties, exactly as these were spelled out by the Claimants and the State Ownership Fund in the Share Purchase Agreement.

81. However, so the Claimants allege, the rescheduling and cancellation which the governmental authorities later envisaged, was substantially more restricted. By the 19 October 1999 Letter, the Minister of Finance only granted a grace period of 5.5 months and did not cancel a substantial part of the penalties. Moreover, the Letter conditioned the rescheduling on the constitution of a bank guarantee and the payment of Socomet's current obligations to the State budget. No evidence has been submitted of rescheduling schemes from the other Ministers.

82. In fact, because Socomet was unable to pay its current obligations towards the State Budget and its account had been frozen, Socomet never benefited from the substantially more limited rescheduling granted by the 19 October 1999 Letter. Likewise, the Government Decision No. 692 of 19 July 2001, signed by the Prime Minister and countersigned by the Minister of Privatizations, the Minister of Labour and Social Solidarity and the Minister of Public Finances, which was also substantially less favorable than the initial Government Note No. 5/3228 of 17 May 1999, so the Claimants allege, was never carried out. Moreover, the Claimants contend that, in spite of the commitment to grant a grace-period of two years – later incorrectly reduced to 6 months – in fact no grace period at all had been granted and Socomet's bank accounts were frozen pursuant to a directive of the Minister of Finance to recover the Company's debts to the State Budget – the same debts which had to benefit from the grace-period and rescheduling. Moreover, the Claimants' 2002 investment plan failed because the Romanian banks refused to grant credit lines to Socomet because its old debts weighted heavily on its balance sheet. In August 2002, the Claimants had no other solution but to file for Socomet's bankruptcy. In arbitration proceedings for alleged breaches of the Share Purchase Contract, which APAPS started against the Claimants in Bucharest, the tribunal granted to the Claimants the return of the share

purchase price and € 1,016,386 and USD 13,789,700 in damages because the confirmation that the rescheduling, as agreed in the Contract, would be carried out, had induced the Claimants to pay the share price. However, this award was abusively annulled on grounds, which, so the Claimants submit, were incorrect.

83. The Claimants request this Arbitral Tribunal to declare that the Respondent has breached the BIT, namely Article 2 (“Fair and Equitable Treatment”), Article 4(1) (“Nationalization and Expropriation”) and Article 10 (“Respect of Specific Contracts”) by the acts and omissions of its authorities. The Claimants request the Arbitral Tribunal additionally to declare that the Respondent, through the manner in which the Respondent’s judicial authorities carried out their judicial functions with regard to the 2007 Romanian Award, has breached Article 2(5).⁷⁵
84. The Claimants further request the Arbitral Tribunal to order the Respondent to compensate the Claimants for breaches of the BIT in an amount provisionally assessed to be at least USD 37,806,720 and € 1,016,386, plus interest at the commercial rate the Arbitral Tribunal considers appropriate and just – and to order any other relief as the Arbitral Tribunal considers appropriate.
85. The Claimants request the Arbitral Tribunal to order the Respondent to pay all the costs and expenses of this arbitration, the Claimants’ legal fees and expert fees, the fees and expenses of the Arbitral Tribunal and ICSID’s other costs.

B. The Respondent’s Response and Counterclaim

86. The Respondent raises a number of preliminary objections to the jurisdiction of the Tribunal and the admissibility of the claims, which will be discussed hereafter.
87. On the merits of the case, the Respondent seeks an Award:
 - Assessing that the Respondent has not violated the Claimants’ right or acted inconsistently with any of the Respondent’ obligations under the BIT;

⁷⁵ The Claimants also assert that the actions of judicial authorities with respect to the 2007 Romanian Award breached Article 10(1) (“Application of General International Law”) of the BIT. C-Request, fn 104.

- Rejecting the Request for Arbitration in its entirety as not grounded;
 - Compelling the Claimants to bear the Respondent's costs incurred by the preparation and prosecution of this arbitral proceeding, including fees and expenses of the arbitrators, legal counsel, experts and consultants fees, as well as the Respondent's own internal costs.
88. Further, the Respondent advances a counterclaim, requesting that Claimants be compelled to pay to the Respondent USD 20 million (plus costs) as damages caused to the Respondent because of the Claimants' failure to comply with their investment obligations and their mismanagement of Socomet.

VI. THE TRIBUNAL'S JURISDICTION OVER THE CLAIMS

89. The Respondent contends that, for several reasons, the Arbitral Tribunal has no jurisdiction over the Claimants' claims and that the claims are inadmissible. The Arbitral Tribunal will therefore discuss its jurisdiction over the Parties' dispute and the admissibility of the Claimants' claims in light of the relevant legal rules, *i.e.*, the ICSID Convention and the BIT.

A. Jurisdiction *Ratione Personae*

90. Article 1(2) of the BIT applies to any "natural or legal person being a national of either Contracting Party who effected, is effecting or has obliged himself to effect, investments in the territory of the other Contracting Party..." It is not contested that both Mr. Marco Gavazzi and Mr. Stefano Gavazzi are Italian nationals and are thus covered by the BIT (to the extent they have effected investments in Romania). In addition, they qualify as "nationals of another Contracting State" under Article 25(1) of the ICSID Convention.

B. Jurisdiction *Ratione Materiae*

91. The Respondent argues that (a) the purchase of the shares for an amount of USD 517,020 is not an "investment" for jurisdictional purposes and that (b) the Claimants

have not made the necessary and agreed investments after their acquisition of the shares.⁷⁶

92. As a preliminary point, the Tribunal does not agree with the Respondent that in this arbitration the notion of “investment” has to be understood pursuant to Romanian law and Romanian judicial and arbitral practice, *i.e.*, that only “participation in the company assets for the purpose of increasing the company share capital in exchange for an investor acquiring the equivalent shares”⁷⁷ can be considered an investment. Nor is it relevant, in the Tribunal’s view, whether Romanian formalities have been followed so as to have the contribution recognised as an “investment” under Romanian law. The Tribunal decides that the only relevant issue is whether any contributions by the Claimants are to be considered as “investments” under the BIT and the ICSID Convention, as interpreted under international law.

a) The Claimants’ Purchase of Shares in Socomet Qualifies as an “Investment” Under Article 1(1) of the BIT.

93. Article 1(1) of the BIT defines the term “investment,” in relevant part:

The term “investment” means every kind of assets owned by an investor of one Contracting Party, including goods, rights and financial means, invested in the territory of the other Contracting Party in accordance with its laws and regulations. The term includes in particular, though not exclusively:

[. . .]

*b. shares, stocks, debentures, other forms of participation in companies or partnerships incorporated in the territory of one Contracting Party and any other negotiable instrument of credit, as well as public securities in general*⁷⁸

94. The Claimants assert that their purchase of 70 percent of the shares of Socomet qualifies as a protected investment according to the plain meaning of Article 1 of the BIT. It falls within the notion of “every kind of assets owned by an investor” and is covered by the listed protected investments (“shares . . . in companies . . . incorporated

⁷⁶ R-RPHB, paras. 98-108.

⁷⁷ R-PHB, para.15; see also the Dissenting Opinion of Professor Dr. Dragos-Alexandru-Sitaru in the 2002 Romanian arbitration (R-3, at 13).

⁷⁸ BIT, Art. 1(1) (English text) (C-4).

in the territory of one Contracting Party” (Article 1(1)(b)); “claims to money or any right relating to obligations . . . having an economic or financial value connected with investments” (Article 1(1)(d)); and “rights of a financial nature accruing by law or by contract” (Article 1(1)(f)).

95. The Tribunal decides that the Claimants meet the requirements of Article 1(1) of the BIT as regards their purchase and holding of shares in Socomet in Romania. However, the Tribunal accepts the Respondent’s submission that Article 1(1) of the BIT must be applied together with Article 25 of the ICSID Convention.⁷⁹ It does not suffice for the Claimants to meet only the requirements of Article 1(1) of the BIT.

b) The Claimants’ Purchase of Shares in Socomet Qualifies as an “Investment” Under Article 25 of the ICSID Convention

96. Article 25 of the ICSID Convention limits the jurisdiction of ICSID to legal disputes arising directly out of an investment but does not define “investment.” The Respondent contends that, in establishing whether the Claimants have made an investment under Article 25(1) of the ICSID Convention, the Tribunal should follow the test established by the ICSID tribunal in *Salini Constuttori S.p.A. et al. v. Kingdom of Morocco* (the “*Salini* test”).⁸⁰ Under that test, so the Respondent submits, the investment requirement of the ICSID Convention is only satisfied when the operation of the foreign investor: (i) brings a contribution in money or other kinds of assets; (ii) has a certain duration; (iii) has an element of risk; and (iv) contributes to the host State’s economic development. The Tribunal will discuss successively the various characteristics of the Claimants’ alleged investments under the *Salini* test.

97. The Tribunal accepts that the Claimants bear the burden of proving their alleged investments under both the BIT and the ICSID Convention.

(i) Acquisition of Shares as Investment

98. The Respondent contends that the Claimants’ acquisition of the Socomet shares is not an investment in Romania and does not satisfy any of the criteria required by the *Salini*

⁷⁹ R-PO/CM/CC, para. 28.

⁸⁰ See *Salini Constuttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, paras. 50-58 (23 July 2001).

test.⁸¹ In support, in addition to *Salini*, the Respondent refers, *inter alia*, to the ICSID decisions and awards in *Phoenix Action*,⁸² *Fakes*,⁸³ *Mitchell*,⁸⁴ *Pantechniki*,⁸⁵ and *Joy Mining*.⁸⁶ The Tribunal notes, however, that these cases do not concern direct investments in material assets located in the host State, as is the case here. According to the Respondent, the payment of the purchase price of the Claimants' 70 percent shareholding in Socomet to SOF was not a monetary contribution to the company under the ICSID Convention.⁸⁷

99. Thus, so the Respondent concludes, the Claimants' purchase of shares in Socomet does not qualify as a protected investment within the meaning of Article 25(1) of the ICSID Convention.

100. The Claimants contend that investments aimed at acquiring a lasting management interest in an enterprise operating in an economy other than that of the investor are "investments" under Article 25 of the ICSID Convention.⁸⁸ Besides, so the Claimants point out, four different ICSID tribunals have accepted that the acquisition by foreign investors of majority shareholdings in state-owned companies through privatization contracts with AVAS have to be considered as "investments" under the ICSID Convention.⁸⁹

(ii) *Additional Investments*

101. The Claimants contend that, besides their payment for the shares, their actual contribution to the Socomet project was sizeable.⁹⁰ The Claimants point out that under

⁸¹ R-PHB, para. 42.

⁸² *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award (15 Apr. 2009).

⁸³ *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award (14 July 2010).

⁸⁴ *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Application for Annulment of the Award (1 Nov. 2006).

⁸⁵ *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award (30 July 2009).

⁸⁶ *Joy Mining Machinery Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction (6 Aug. 2004).

⁸⁷ R-PHB, paras. 22, 37-38; R-PO/CM/CC, para. 30.

⁸⁸ C-RM, para. 21.

⁸⁹ C-RJ/CC, paras. 19-20. The Claimants cite, *inter alia*, *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award (12 Oct. 2005); *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1), Award, paras. 59-61 (7 Dec. 2011); *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, para. 45 (18 Apr. 2008); *Ioan Micula et al. v. Romania* (ICSID Case No. ARB/05/20), Award (11 Dec. 2013).

⁹⁰ C-PHB, para. 123.

Article 8.10.1 of the Share Purchase Contract, they not only had to purchase the shares but also had to make additional investments for a minimum amount of USD 20,000,000 within five years after the share purchase. They submit that they had intended to take over the Socomet operations and actually had managed the Company for three years, repaired industrial equipment, set up a subsidiary to develop foreign markets, engaged Italian experts and provided financing.⁹¹ The Claimants also point out that, in spite of the blocked bank accounts, they were finalizing in May 2002 the installation of new technology which involved an investment of USD 27 million – well above the USD 20 million and well before the five year deadline, imposed by the Share Purchase Contract.⁹² However, ultimately, this commitment to additional investment – so the Claimants allege – could not be carried out because the Romanian bank refused its risk-free participation because of Socomet’s blocked accounts.⁹³

102. For the Claimants, these investments undoubtedly meet the contribution criterion of the *Salini* test.

103. The Respondent submits that the Claimants failed to achieve the agreed yearly investment obligation. The investment of USD 20 million provided by Article 8.10.1(a) of the Contract⁹⁴ was “not met,”⁹⁵ neither was the additionally agreed USD 2 million to invest in 2001 in the oxygen plant, the cooling water station, buildings and transformation unit⁹⁶ completed.⁹⁷ The investment project concerning the introduction of new technology was never carried out and, so the Respondent contends, cannot be considered at a hypothetical level, as a matter of mere possibility. The alleged USD 1,490,000 investment by converting Holdeast receivables cannot be considered as an investment, so the Respondent contends, as this amount was paid after the expiry of the agreed one-year term on 18 June 2002 and payment was not

⁹¹ *Id.* para. 42.

⁹² *Id.* para. 72.

⁹³ *Id.* para. 74.

⁹⁴ The parties amended Article 8.10.1(a) by Addendum No. 2 to the Share Purchase Contract of 7 July 2000, in which they agreed that the five-year period within which the Claimants were to make the investments and/or contributions would start to run on 24 June 2000 (“Addendum no. 2/07.07.2000 to Share Sale Purchase Contract No. 145/19.04.1999 – SC Gavazzi Steel SA Otelu Rosu,” Art. 1 (C-20)).

⁹⁵ The Respondent contends that the USD 20 million had to be invested after the shares were paid, so that the latter payment cannot be included in the former amount. *See* R-RPHB, paras. 42-47.

⁹⁶ “Addendum no. 2/07.07.2000 to Share Sale Purchase Contract No. 145/19.04.1999 – SC Gavazzi Steel SA Otelu Rosu,” amendment to Annex No. 6 (C-20).

⁹⁷ R-PHB, paras. 31, 126.

registered with the Trade Registry Office, as required by Article 8.10.2 of the Share Purchase Contract.⁹⁸ Nor was it published in the Official Monitor of Romania.⁹⁹

104. The Claimants contend that their alleged non-compliance with the Share Purchase Contract, including the alleged mismanagement of the Company and failure to register their investments with the Trade Register Office, are irrelevant for the purpose of the Tribunal's jurisdiction. The dispute brought before this Tribunal does not concern the Claimants' alleged breaches of the Share Purchase Contract, but the Respondent's breaches of the BIT.¹⁰⁰ According to the Claimants, the Respondent cannot evade its international obligations vis-à-vis investments made by foreign investors in its territory under the BIT by relying on its own domestic law or irrelevant contractual interpretations.¹⁰¹ Moreover, so the Claimants point out, AVAS itself has indicated that the share registration had only to be carried out at the end of the five years.¹⁰²
105. The Arbitral Tribunal agrees with the Claimants' position. It notes that the ICSID Convention (or the BIT) imposes no monetary threshold to the notion of investment and takes the view that actual plans to invest may qualify as "investments" under the ICSID Convention. Consequently, in the view of the Arbitral Tribunal, not only the purchase price for the shares paid for the shares but also the Claimants' other commitments and plans towards the financing of Socomet constitute "contributions" satisfying this first element under the *Salini* test.

(iii) *Duration*

106. Equally, so the Respondent continues, under the *Salini* test the Claimants' intended involvement in the activities of Socomet does not have the required duration to qualify as "investment."

⁹⁸ *Id.* paras. 29-30. Article Art. 8.10.2 of the Share Purchase Contract provides:

*The capital investment shall be considered fully achieved on the date of registration with the Trade Register Office of **Company** of the nominal capital increase with their counter value or, as the case may be with the cash subscribed and fully paid capital, made by the **Buyer** or a third Party he attracted.*

Share Purchase Contract, Art. 8.10.2 (C-19).

⁹⁹ Furthermore, with regard to the USD 1,490,000 contribution to capital, the Respondent argues that this investment in all events was carried out after the expiry of the one-year term and that it had not been carried out by 18 June 2002. See R-RPHB, paras. 48-52.

¹⁰⁰ C-RJ/CC, para. 30; C-PHB, para. 129

¹⁰¹ C-RPHB, para. 50.

¹⁰² *Id.* para. 6; letter AVAS/Gavazzi Steel S.A., 13 June 2001 (C-70).

107. The Claimants point out that their involvement in the activities of Socomet was of notable duration.¹⁰³ The Share Purchase Contract, for instance, provided that the Claimants would carry out additional investments after five years. In fact, the purpose of the Claimants' involvement in Socomet was to establish a lasting economic operation based upon their ability to manage Socomet. Their contribution to Socomet, so the Claimants contend, responded to the definition of "Direct Investment" in the OECD Code of Liberalisation of Capital Movements.¹⁰⁴

108. The Arbitral Tribunal agrees with the Claimants' case that the Claimants' involvement in Socomet had sufficient duration to qualify as an "investment" under the *Salini* test.

(iv) *Risk*

109. Further, so the Respondent contends, the Claimants did not assume the political risk typical of an investment and protected under the ICSID Convention. In fact, the Respondent asserts that the Claimants, professional investors, in any event, themselves caused the Socomet-project to fail by mismanaging the Company and not making their contractually required investments.¹⁰⁵

110. The Claimants reiterate that the breaches by the Respondent of the BIT, which are subject of the present proceedings, precisely involve political risks against which the BIT protects the investor. The investment failed because of these political risks, not because of commercial risks.¹⁰⁶

111. The Arbitral Tribunal agrees with the Claimants' case. In its view, there was more than sufficient risk to qualify as an "investment" under the *Salini* test.

¹⁰³ C-PHB, para. 123.

¹⁰⁴ Organisation for Economic Co-Operation and Development, OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS (2013). C-RJ/CC, paras. 16-18; C-PHB, para. 124. The Claimants rely on the following portion of the OECD's definition of "direct investment":

Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof:

A. *In the country concerned by non-residents by means of:*

1. *Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise;*

2. *Participation in a new or existing enterprise ...*

¹⁰⁵ R-PHB, paras. 39-41.

¹⁰⁶ C-RPHB, para. 55.

(v) *Economic Development*

112. The Respondent alleges that the Claimants did not contribute to the economic development of Romania, which the Respondent considers a decisive element for the qualification as “investment.” The Claimants contend that an “investment” under the ICSID Convention does not require a “contribution to economic development.” Referring to *Deutsche Bank A.G. v. Sri Lanka* and other ICSID decisions, the Claimants assert that this alleged requirement has been discredited and has not been adopted recently by any tribunal.¹⁰⁷
113. In any event, so the Claimants continue, their investment in Socomet in fact aimed at the economic development of Romania by injecting advanced technology into Socomet. Moreover, the Claimants made sizable investments in Socomet, by transferring over USD 2 million to the Company, by waiving claims against Socomet of roughly an equivalent amount, by granting loans and by paying salaries for key Italian expatriate personnel. The Claimants also revamped and modernized non-operational equipment (including rolling mills, a glass-pot furnace, a shear-pressing machine) and repaired part of the infrastructure (such as internal bridges and roads, residential buildings, a school for workers’ children). These improvements, so the Claimants maintain, have been recognized and listed in the Plan of Judicial Reorganization of Gavazzi Steel S.A. for 2004-2010 prepared by Iprolam S.A. and submitted by both Parties. The Respondent itself, so the Claimants point out, admitted that Socomet had, at least potentially, a substantive value after the Claimants’ departure.¹⁰⁸
114. The Arbitral Tribunal agrees that a contribution to an actual economic development of the host state is not always a *conditio sine qua non* to qualify as investment under Article 25 of the ICSID Convention. Indeed, if this were the case, an investment which was immediately prevented by wrongful acts or omissions of the host State could

¹⁰⁷ *Deutsche Bank A.G. v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, para. 306 (31 Oct. 2012). See C-RJ/CC, para. 26; C-PHB, para. 126.

¹⁰⁸ C-RJ/CC, paras. 27-28. See “Plan of Judicial Reorganising of the Company S.C. Gavazzi Steel S.A. Otelu Roşu – According to Law No. 64/1995 republished, modified and completed” (2004) & “Plan of Judicial Reorganising of the Company S.C. Gavazzi Steel S.A. Otelu Roşu – Correlation of the Plan of Judicial Reorganising with the stipulations of the Government Decision No. 655/2004, approving the strategy for restructuring the siderurgical industry in Romania, for the period 2004-2010,” both prepared by Iprolam S.A., Institute for Designing Rolling Sections and Plants, Bucharest (translated from Romanian into English) (C-57; R-52).

never qualify for protection as an investment, although such protection would be most needed in such a case. The circumstance that the Claimants' investment could only be made partially because of the Respondent's actions or omissions is thus no impediment to grant these investments the protection under the ICSID Convention, even when the investments failed and could no longer contribute to the economic development of Romania. The contribution to economic development should not be assessed *ex post facto*. Moreover, in this case, the Claimants' investments did not immediately fail: their management and the funds injected in Socomet were an initial contribution to the envisaged economic development of the Respondent.

c) *The 2007 Romanian Award as an "Investment"*

115. The Claimants have made an additional, subordinate claim that the Respondent breached Article 2(3)¹⁰⁹ and Article 2(5)¹¹⁰ of the BIT, through the manner in which the Bucharest Court of Appeals annulled the 2007 Romanian Award and the Romanian courts exercised their judicial functions, in disregard of all applicable legal rules and standards.¹¹¹ The Claimants assert that the Respondent was guilty of a denial of justice and due process through the abusive annulment of the 2007 Romanian Award by its national courts. According to the Claimants, abundant arbitral precedents confirm that abusive conduct by state courts in respect of, not only investment arbitration awards, but also commercial awards, may constitute a denial of justice and a violation of due

¹⁰⁹ Article 2(3) of the BIT provides:

Each Contracting Party shall offer in its territory a fair and equitable treatment for investments of investors of the other Contracting Party. Neither Contracting Party shall in any way impair by arbitrary, unreasonable or discriminatory measures the management, maintenance, use, enjoyment, conversion, repatriation of capital, liquidation and disposal of investments as well as the local companies, partnerships or firms in which these investments have been made.

BIT, Art. 2(3) (English text) (C-4).

¹¹⁰ Article 2(5) of the BIT provides:

Each Contracting Party undertakes to provide effective means of asserting claims and enforcing rights with respect to this present agreement, to the investment authorizations and properties. Each Contracting Party shall not impair the right of the investors of the other Contracting Party to have access to its Courts of justice, administrative Tribunals and agencies and all other bodies exercising adjudicatory authority.

BIT, Art. 2(5) (English text) (C-4).

¹¹¹ See *supra* para. 79.

process. ICSID tribunals are therefore competent, so the Claimants contend, to review such matters under BITs granting compensation for denial of justice.¹¹²

116. In any event, so the Claimants contend, the 2007 Romanian Award remains protected under the BIT because Article 1(1) of the BIT lists as protected investments, among other things, “credits” and “claims to money or any right relating to obligations,” and money awards and judgments are considered in international case law as property rights.¹¹³ The Claimants submit that “*by annulling abusively the award that was rendered in the dispute concerning their rights acquired under the privatization contract, which transferred to them SOCOMET (their investment in the host country), Romania has breached their treaty rights concerning that investment.*”¹¹⁴

117. The Claimants seek damages in the amount of the full value of the 2007 Romanian Award.

118. The Respondent objects to the Tribunal’s jurisdiction over the Claimants’ additional subordinate claim. The Respondent, relying (inter alia) on the ICSID award in *GEA Group Aktiengesellschaft v. Ukraine* of 31 March 2011,¹¹⁵ submits that the 2007 Romanian Award does not qualify as an investment under either the BIT or the ICSID Convention.¹¹⁶ The annulment of the 2007 Romanian Award does not “arise directly” out of the Claimants’ alleged investment in Socomet, as required by Article 25(1) of the ICSID Convention.¹¹⁷ The Respondent contends that the annulment of the 2007 Romanian Award cannot be a breach of the BIT as it follows directly from AVAS’ exercise of its right to request such annulment pursuant to Article 364 of the Romanian

¹¹² In support, the Claimants cite *Saipem S.p.A. v. People’s Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures (21 Mar. 2007) and Gabrielle Kaufmann-Kohler, *Commercial Arbitration before International Courts and Tribunals – Reviewing Abusive Conduct of Domestic Courts*, 2011 American University Washington College of Law Annual Lecture on International Commercial Arbitration, 29 (2) ARB. INT’L 153 (2013) (C-74). C-RJ/CC, paras. 71-73.

¹¹³ C-PHB, para. 146; C-RJ/CC, para. 74. In connection with the latter point, the Claimants cite ECHR, *Kin-Stib and Majic v. Serbia* (Application) No. 12312/05, Judgment, at 83 (20 Apr. 2010).

¹¹⁴ C-RJ/CC, para. 67.

¹¹⁵ *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award, paras. 161-62 (31 March 2011).

¹¹⁶ R-PHB, para. 65; R-PO/CM/CC, paras. 138-140.

¹¹⁷ R-PHB, paras. 43-66; R-PO/CM/CC, paras. 109-110, 121-42; R-RPHB para. 18-22.

Code of Civil Procedure.¹¹⁸ In the Respondent’s submission, this claim must therefore fall outside the Tribunal’s jurisdiction. The right to request the annulment of an arbitral award, the Respondent asserts, is unrelated to any investment, predates the 2002 Romanian Arbitration, and is of general application.¹¹⁹

119. The Claimants, in turn, emphasize that they do not contend that the 2007 Romanian Award represents a distinct “investment.” Rather, the 2007 Romanian Award and the rights thereby recognized, giving rise to a claim for damages in favor of Messrs. Gavazzi against AVAS, are an integral part of the investment operation of the Claimants in Socomet and are protected as such under the BIT and the ICSID Convention. The BIT requires that the investment overall enjoy due process.¹²⁰ For that reason, so the Claimants submit, the Tribunal should entertain, under both the BIT and the ICSID Convention, the claim relating to the annulment of the 2007 Romanian Award and the decision from the Romanian courts on the merits.

120. The Arbitral Tribunal (by a majority) accepts the Claimants’ case that an award which compensates for an investment made in the host State is a claim to money covered by the BIT as an investment. It also accepts, as regards Article 25 of the ICSID Convention, that, in the particular circumstances of this case, the 2007 Romanian Award forms part of the Claimants’ overall investment.¹²¹ However, the Arbitral Tribunal also notes that the Claimants only claim compensation for the annulment of the 2007 Romanian Award as a “subordinated” claim in the event that their “Principal Claim” of breaches of the BIT is not accepted by the Tribunal.¹²² Accordingly, as will

¹¹⁸ R-PHB, para. 50; R-PO/CM/CC, paras. 121-136. *See* Article 363 of the Romanian Code of Civil Procedure (translated from Romanian into English) (R-6).

¹¹⁹ R-PO/CM/CC, paras. 123, 128-134.

¹²⁰ C-PHB, para. 146.

¹²¹ *White Industries Australia Limited v. The Republic of India* (UNCITRAL), Final Award (30 Nov. 2011); *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award (31 March 2011); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 34877, Interim Award (1 Dec. 2008); *Saipem S.p.A v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007).

¹²² *See* C-PHB, at page vi: “This Additional Claim is submitted by Claimants as ‘subordinated’, in that the acceptance by the Tribunal of the Principal Claim of breaches of the BIT by Respondent and the awarding of damages thereby caused to Claimants ... would relieve the Tribunal from the duty to examine the Additional Claim”

appear later from this Decision, this issue (including the difference within the Tribunal) is not material to this Decision's end-result.

C. No Jurisdiction Over Share Purchase Contract Claims

121. In the Request for Arbitration, the Claimants claim also for non-compliance by the State-entity AVAS with the Share Purchase Contract. However, the Claimants have withdrawn their contractual claim based upon the Share Purchase Contract. Indeed, in their Post-Hearing Brief, the Claimants confirm that they are not bringing any claim based on the Share Purchase Contract.¹²³ They are not claiming that AVAS' breach of the Share Purchase Contract was also a contractual breach by or attributable to the Respondent itself.
122. The Tribunal takes note of the Claimants' confirmation that they are not claiming for breaches of the Share Purchase Contract.
123. However, in the written pleadings, the Parties have argued at great length whether a claim based upon AVAS' alleged breach of the Share Purchase Contract would be admissible in the present proceedings since the counterclaim which Messrs. Gavazzi's submitted in 2002 to the Romanian arbitration tribunal, likewise concerned alleged breaches by AVAS of the Share Purchase Contract – a matter later also decided by the Romanian courts. Although the question is no longer before the Tribunal, out of courtesy to the Parties, which extensively have discussed the issue, the Tribunal will address the issue.
124. Before the Claimants clarified that they did not bring any claim under the Share Purchase Contract, they had indicated that such claim would be based upon Article 10(2) of the BIT, which the Claimants considered to be “a kind of ‘umbrella clause.’”¹²⁴ That provision states: “*In case of specific contracts between an investor and either Contracting Party, the provisions of these contracts, without prejudice of the provisions of the present Agreement, will prevail for the concerned investor.*”¹²⁵

¹²³ C-PHB, para. 7.

¹²⁴ C-Request para. 130.

¹²⁵ BIT, Art. 10(2) (English text) (C-4).

125. The Respondent accepts that a BIT's so-called "umbrella clause" could elevate a breach of a contract into a breach of a BIT and thus make it subject of an ICSID tribunal's jurisdiction. However, for the Respondent Article 10(2) of the BIT is not a proper "umbrella clause."¹²⁶
126. The Tribunal agrees with the Respondent that Article 10 of the BIT is not to be interpreted as an "umbrella clause." Consequently, Article 10 does not grant the Tribunal jurisdiction over claims based upon the Share Purchase Contract.
127. Under the scenario that the Tribunal would have jurisdiction over such claims – *quod non* – the Respondent argued that Article 8(2) of the BIT, the so-called "fork in the road" provision, would exclude such contractual claims, as the claims have already been brought before other jurisdictional fora.¹²⁷ Indeed, the Claimants had already elected to bring these claims as a counterclaim before the Romanian arbitration institution, the forum upon which the Parties agreed in Article 13 of the Share Purchase Contract.¹²⁸ By filing a counterclaim in the 2002 Romanian arbitration, the Respondent contends, the Claimants "waived their right to pursue a similarly-grounded claim" before ICSID.¹²⁹ Once the investor has chosen a forum to resolve a certain dispute between the parties, so the Respondent submits, such choice is final; and the investor can no longer submit the same dispute to another jurisdictional

¹²⁶ R-PHB, paras. 105-108; R-PO/CM/CC, paras. 82-104.

¹²⁷ Article 8(2) of the BIT reads as follows:

In the event that such a dispute cannot be settled amicably within six months of the date of a writt[e]n application, the investor in question may submit the dispute, at his choice, for settlement to:

- a) *the Contracting Party's Court, at all instances, having territorial jurisdiction;*
- b) *an ad hoc Arbitration Tribunal, in accordance with the Arbitration Rules of the "UN Commission on International Trade Law" (UNCITRAL). . . [:]*
- c) *the "International Centre for the Settlement of [I]nvestment Disputes" for the application of the conciliation and arbitration procedures provided by [the] Washington Convention of 18th March 1965 on the "Settlement of Investment Disputes as between States and Nationals of other States."*

However, in specific contracts, investors and Contracting Parties may agree on disputes settlement procedures.

¹²⁸ R-PO/CM/CC, para. 52. Article 13 of the Share Purchase Contract, titled "Litigations," provides:

***Seller and Buyer** hereby agree that the disputes deriving from the interpretation and execution of this **Contract**, that cannot be settled on an amiable way, will be submitted to the Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry.*

Share Purchase Contract, Art. 13 (C-19).

¹²⁹ R-PO/CM/CC, para. 41.

forum.¹³⁰ Moreover, the Claimants' subsequent actions in the Romanian courts following the annulment of the 2007 Romanian Award – in particular their appeal to the Romanian High Court of Cassation and Justice¹³¹ – confirm that the Claimants consented to the settlement of their claim by other fora than this Tribunal.¹³²

128. The Tribunal decides that Article 8 of the BIT cannot be interpreted as a “fork in the road” clause. It does not offer the Claimants, for disputes arising out of the Share Purchase Contract, a mutually exclusive choice between the arbitration before the Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry, provided for by Article 13 of that Contract, and the dispute mechanism provided for by the BIT.
129. Consequently, this Arbitral Tribunal decides that it has jurisdiction to hear the claims for breaches of the BIT submitted by the Claimants against the Respondent in this arbitration.

D. Jurisdiction Over Claims for Breaches of the BIT

130. The Respondent alleges that it did not breach the BIT because the Respondent never assumed any legal obligation toward the Claimants to reschedule debts and to waive penalties, neither in the Government's Note No. 5/3228 of 17 May 1999 nor elsewhere. Under Article 18 of Romanian Law 37, the Prime Minister can issue individual administrative rescheduling acts. The legal procedure for obtaining such approval was established in the Privatization Law in force at the time and required that the Ministry of Finance issue a “fiscal certificate” for Socomet, on the basis of which a “common order for rescheduling” would be issued signed by the Minister of Finance.¹³³ According to the Respondent, the Ministry of Finance never issued such “fiscal certificate” for Socomet because of the “difficult fiscal status of the company.”¹³⁴ However, for the Claimants, this “difficult fiscal status of the company” was precisely due to the accumulated budget debts that were to be cancelled or

¹³⁰ R-PHB, para. 74.

¹³¹ *See supra infra* para. 79.

¹³² R-PO/CM/CC, para. 53.

¹³³ R-PHB, paras. 317-320.

¹³⁴ *Id.* para. 321.

rescheduled by the Respondent.¹³⁵ Thus, so the Respondent concludes, because the procedure required by law for Government approval for the Restructuring of the Company's Debt was never followed, Government Note No. 5/3228 of 17 May 1999 was never vested with "legal force and effect."¹³⁶

131. However, in this case, according to the Respondent, all the necessary preliminary steps had not been carried out by the Ministry of Finance because the stipulated conditions for rescheduling did not meet the legal requirements of Government Ordinance No. 11/1996, Article 83, and (inter alia) the Claimants had not established a bank guarantee of 4.5 billion ROL.¹³⁷ The Government's Note No. 5/3228 of 17 May 1999 was therefore not a promise creating legal obligations for its signatories.¹³⁸ It did not have the "legal force and effect" of an administrative act; and therefore it could not bind the Respondent.¹³⁹

132. The Claimants contend that the Government's Note No. 5/3228 of 17 May 1999 is "an administrative act of individual application,"¹⁴⁰ and the Claimants characterize the Note as an express approval of the rescheduling and waivers to which the Share Purchase Contract referred.¹⁴¹

133. In the Respondent's submission, however, the Government's Note No. 5/3228 of 17 May 1999 was not issued by the Prime Minister in the exercise of his executive power, but was merely an "internal communication," or a "technical-administrative note," ... "from the Romanian Prime Minister to the various addressees, requesting their approval" ... "prior to the issuance of an administrative act."¹⁴²

134. Besides, so the Respondent asserts, the Government's Note No. 5/3228 of 17 May 1999 had not been issued either by the Prime Minister or the Romanian Ministries

¹³⁵ C-RPHB, para. 28 n.31.

¹³⁶ R-PHB, para. 7.

¹³⁷ *Id.* paras. 321-324; letter No. 443.604 dated 19 Oct. 1999 General Department for State Revenue Collection and Enforcement/Socomet (R-18).

¹³⁸ R-PHB, para. 316.

¹³⁹ *Id.* para. 6.

¹⁴⁰ C-PHB, para. 36, n.38.

¹⁴¹ *Id.* para. 19.

¹⁴² R-PHB, paras. 10, 316, 323.

involved, but rather by AVAS.¹⁴³ In the Respondent's submission, AVAS merely requested that the competent authorities approve its proposal for the Restructuring of the Company's Debt.¹⁴⁴ The Respondent finally points out that at the hearing, Mr. Marco Gavazzi confirmed that the Claimants were fully aware that Government Note No. 5/3228 had to be further implemented by an actual Order.¹⁴⁵ For the Respondent, the Note represented nothing but a first step in the carrying out of a procedure aimed at obtaining the requested rescheduling.¹⁴⁶

135. Further, so the Respondent contends, even if the procedure had been followed in full, the text of the Government's Note No. 5/3228 necessarily leads to the conclusion that the Note did not create any legal obligation assumed by the Respondent to allow the Restructuring of the Company's Debt. Indeed, the final sentence of the Note reads: "*Considering the above, please approve the facilities regarding the payment of the said obligations of S.C. SOCOMET S.A. Otelu Rosu.*"¹⁴⁷ The words "please approve" make it clear for the Respondent that the signatories of the Note did not assume an obligation to reschedule and waive penalties, but that third parties had to carry out these matters, if approved.

136. The Respondent concludes that the Government's Note No. 5/3228 did not, by itself, grant the Restructuring of the Company's Debt; rather, it must "be construed as a favourable premise for the Claimants that they shall be granted the facilities in question, subject to the observance of the applicable legal provisions."¹⁴⁸

137. As a result, so the Respondent concludes, the Claimants have no cause of action against it under the BIT.¹⁴⁹ Because the Tribunal's jurisdiction extends only to breaches of obligations under the BIT, the Claimants' claim falls outside its jurisdiction.

¹⁴³ *Id.* para. 326.

¹⁴⁴ *Id.* paras. 317, 319, 326.

¹⁴⁵ At the hearing, Mr. Marco Gavazzi stated: "[W]e asked that this promise will be turned into an effective order." Transcript of Hearing, 3 June 2014, at 410.

¹⁴⁶ R-RPHB, para. 65.

¹⁴⁷ Government's Note No. 5/3228 dated 17 May 1999 (C-22) (translation from Romanian into English). *See supra* para. 54.

¹⁴⁸ R-PO/CM/CC, para. 205 (emphasis omitted).

¹⁴⁹ PHB, paras. 11-12.

138. The Tribunal notes that the issue whether the Government's Note No. 5/3228 of 17 May 1999 actually approved the rescheduling goes to the merits of the case and is not material to establish the Tribunal's jurisdiction. At this stage, it is sufficient to note that not only the Claimants but also SOF in its 3 June 1999 Notice to the Claimants was of the opinion that the Prime Minister of Romania had approved the rescheduling.¹⁵⁰ Consequently, for jurisdictional purposes an allegation of breach of the Government's commitments is sufficient to establish the Tribunal's jurisdiction.

E. The Claim Is Not Time-Barred

139. The Respondent's final objection to the Tribunal's jurisdiction is that the claims are time-barred.¹⁵¹ In the case at stake – so the Respondent argues – the time-bar would be governed by the substantive law (*lex causae*), *i.e.*, Romanian law. Indeed, for the Respondent, because the Parties to this ICSID arbitration did not agree on the law applicable to the dispute, Romanian law applies as “the law of the Contracting State party to the dispute,” pursuant to Article 42(1) of the ICSID Convention.¹⁵² Moreover, as already indicated above, Article 14 of the Share Purchase Contract provides that the Contract is “governed by the Romanian law.”¹⁵³ Consequently, in the Respondent's submission, any issue “related to the execution” of the Contract and “any claim arising therefrom” are “to be settled in accordance with the legal framework provided by Romanian law.”¹⁵⁴

140. In the Respondent's submission, the claims submitted in the present arbitration are time-barred because they were not submitted within the time period provided for under the applicable Romanian law¹⁵⁵ – that is, within three years from the date on which

¹⁵⁰ SOF Notice No. 1/4026 dated 3 June 1999 (C-21). *See supra* para. 52.

¹⁵¹ R-RPHB, paras. 24-25.

¹⁵² R-PO/CM/CC, paras. 5-7.

¹⁵³ Share Purchase Contract, Art. 14 (C-19).

¹⁵⁴ R-PO/CM/CC, para. 8.

¹⁵⁵ In support, the Respondent invokes provisions contained in Decree No. 167/1958 on the statute of limitations and the Romanian Civil Code.

Article 1 of Decree No. 167/1958 (R-10) provides:

Unless exercised within the legally provided deadline, the right to action in respect of a patrimonial right is extinguished by limitation.

Once the right to action related to a primary right is extinguished, the right to action related to the ancillary rights will also be extinguished.

Article 3 (1) of Decree No. 167/1958 provides, in relevant part:

the Claimants became aware, or should have become aware, of the alleged breach by Romania of “its obligations.”¹⁵⁶

141. The Respondent asserts that the statute of limitations for the Claimants’ claims arising from the “alleged non-observance” by AVAS of its obligations under the Share Purchase Contract began to run in 1999-2001 when, according to the Claimants, AVAS failed to perform those obligations. By the time the Claimants submitted their Request for Arbitration on 23 July 2012, the statute of limitations had thus already elapsed.¹⁵⁷

142. Moreover, for the Respondent, the statute of limitations applies to the Claimants’ denial-of-justice claim relating to the annulment of the 2007 Romanian Award. The prescription began to run on 22 April 2009, the date on which the Bucharest Court of Appeals issued its decision annulling that award.¹⁵⁸ Indeed, by that date, so the Respondent contends, the Claimants were aware (or should have become aware) of their alleged losses.¹⁵⁹ Referring (inter alia) to the decisions in *Mondev Int’l Ltd. v. United States of America*¹⁶⁰ and *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*,¹⁶¹ the Respondent accordingly concludes that, by the time the Claimants submitted their Request for Arbitration on 23 July 2012, the statute of limitations relating to the Claimants’ denial-of-justice claim had already elapsed, too.

143. The Claimants deny that their claims can be time-barred by operation of Romanian law. According to the Claimants, only international law (the law governing the arbitration proceedings as well as the dispute, *i.e.*, the alleged breach by Respondent

The limitation period is three years ...

The Respondent asserts that Article 7 of Decree No. 167/1958 states that the three-year period starts to run “on the date when the right to claim is born.” R-PO/CM/CC, para. 147.

The Respondent contends that the Romanian Civil Code of 1 October 2011 provides for a three-year statute of limitations (Article 2517), which starts to run “on the date when the holder of the right to claim is aware or should become aware that such a right is born” (Article 2523). R-PO/CM/CC, paras. 148-49.

¹⁵⁶ R-PO/CM/CC, para. 151.

¹⁵⁷ *Id.* para. 153.

¹⁵⁸ Bucharest Court of Appeals, Commercial Section A VI-A (*Curtea de Apel București, Secția A VI-A Comercială*), Commercial Decision No. 65 (Case No. 8799/2/2007), at 11 (22 Apr. 2009) (C-38 (English translation provided by the Claimants)).

¹⁵⁹ R-PO/CM/CC, paras. 154-63.

¹⁶⁰ *Mondev Int’l Ltd. v. United States of America* (ICSID Case No. ARB (AF)/99/2), Award, para. 87 (11 Oct. 2002).

¹⁶¹ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA) (UNCITRAL), Award (12 Jan. 2011).

of provisions of the BIT) can determine whether their claims are time-barred. No time-bar within which an investor must submit a claim to ICSID is established in the BIT, the ICSID Convention or the Rules of Arbitration.¹⁶²

144. In any event, the Claimants assert, their claim would not be time-barred even if, *arguendo*, Romanian law were applicable. Indeed, under Article 16(b) and Article 17 of Romanian Decree No. 167/1958 on the statute of limitations, the three-year time-bar would have been interrupted multiple times, and after each interruption, a new period of three years would have to restart.¹⁶³ Specifically, the three-year period would have been interrupted when AVAS initiated the 2002 arbitration, restarted when the award was rendered on 30 October 2007, to be stopped again when AVAS commenced proceedings seeking annulment of the 2007 Award.¹⁶⁴

145. The Claimants had already started the BIT dispute settlement process by submitting their written request for amicable settlement required under Article 8 of the BIT to Romania on 20 July 2011, long before the Romanian High Court of Cassation and Justice had issued the last decision in these proceedings on 23 February 2012 and the three-year time-bar could restart for the Claimants' claims in these proceedings.¹⁶⁵

¹⁶² C-RJ/CC, paras. 81-82, 87; C-PHB, paras. 150-151.

¹⁶³ Article 16 (b) of Decree No. 167/1958 provides:

The statute of limitation period is interrupted: . . . (b) by the submission of a writ of summons or request for arbitration, even if such request was submitted with an incompetent court of law or arbitration body...

Article 17 of Decree No. 167/1958 provides in full:

The interruption discards the statute of limitation commenced prior to the occurrence of the event that interrupted it.

After interruption, a new statute of limitation period begins.

If the statute of limitation was interrupted by a writ of summons or a request for arbitration or by a deed initiating enforcement, the new statute of limitation will not run as long as the decision to admit the request is not final or, in case of enforcement, until the performance of the last enforcement action. (C-73).

¹⁶⁴ The Respondent argues that in fact the statute of limitations of the claims which were not allowed by the court proceedings in File 8799/2/2007 was not interrupted by these proceedings (R-PHB, para.114). However as the three-year time bar under Romanian law is not applicable, this assertion does not affect the general outcome of the decision.

¹⁶⁵ C-RJ/CC, paras. 83-85; C-PHB, paras. 152-154. Article 8 of the BIT provides, in relevant part:

1) *Any dispute between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party, including disputes relating to compensation for expropriation and disputes relating to the amount of its relevant payments shall be settled, as far as possible, amicably by consultation and negotiations between the parties to the dispute.*

Even for the claims that were dismissed by the Bucharest Court of Appeal on 22 April 2009, if a three-year time-bar applied – *quod non*, the three-year statute of limitations would start to run from that date but would not have resulted in a time bar on 20 July 2011, when proceedings under Article 8 of the BIT started.

146. Besides, if any national law should be applicable, the Claimants submit (opposed by the Respondent)¹⁶⁶ that it would be Italian law because the Claimants derive their rights under the BIT from its Italian ratifying Law No. 704/1994. Under Article 2943 and 2946 of the Italian Civil Code, the statute of limitations on all rights is generally ten years; however, it is interrupted by the filing of judicial or arbitral claims and only restarts once the related judicial or arbitral proceedings are terminated.¹⁶⁷
147. The Tribunal decides that the Claimants' claims are not time-barred. In arbitration proceedings governed by international law, only international law – and no domestic law – can introduce time-bars.¹⁶⁸ Neither the ICSID Convention, nor the BIT, nor international law in general contains any statute of limitations in relation to treaty claims. Without such clear legal provision, no time-bar can operate to bar an ICSID arbitration.

F. The Majority's Views on Jurisdiction Over the Counterclaim

148. The Respondent has advanced a counterclaim against the Claimants of USD 20 million (plus costs) for damages, because of the Claimants' alleged failure to comply with their investment obligations and their alleged mismanagement of Socomet, which, according to the Respondent, culminated in Socomet's insolvency, deprived the Respondent of key industrial assets, and led to losses of jobs and local economic

2) *In the event that such a dispute cannot be settled amicably within six months of the date of a writt[e]n application, the investor in question may submit the dispute, at his choice, for settlement to: [. . .]*

BIT, art. 8 (1)-(2) (English text) (C-4). *See* letter of 20 July 2011 from Stefano and Marco Gavazzi to H.E. Traian Basescu, President of Romania (C-41).

¹⁶⁶ R-RPHB, paras. 26-29

¹⁶⁷ C-RJ/CC, para. 86; C-PHB, para. 155.

¹⁶⁸ *See, e.g.*, the award of the Iran-United States Claims Tribunal in *Alan Craig and Ministry of Energy of Iran, et al.*, Award No. 71-346-3 (2 Sept. 1983), *reprinted in* 3 IRAN-U.S. C.T.R. 280, 287.

decline. The counterclaim is based on the alleged breach of a number of legal provisions under Romanian law.¹⁶⁹

149. The Respondent submits that a counterclaim against the Claimants is admissible if the basis of the Tribunal's jurisdiction, the BIT, provides for the possibility for the Host State to advance a counterclaim against the investor. Moreover, the procedural framework of the present arbitration proceedings, more specifically Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules, regulates the modalities for advancing such a counterclaim.
150. For the Respondent, its right to submit a counterclaim under the BIT has to be presumed, as the BIT has not expressly excluded such counterclaim.
151. The Tribunal has noted that the BIT, in the second paragraph of its Preamble, indicates that it aims at "*a stable framework ... and maximum effective utilization of economic resources of either country,*" and, in Article 8(1), the BIT refers to "*[a]ny dispute between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party.*" Such language may seem to indicate that also the claims of the Host State against the investor should be covered by the BIT. However, whereas Article 8(1) of the BIT suggests amicable consultation and negotiations with respect to "*[a]ny dispute between one Contracting Party and an investor,*" Article 8(2) of the BIT only grants the investor the right to claim against the Host State.
152. The Tribunal has pondered how to interpret the absence of an express mention in Article 8(2) that the Host State may claim against the investor. It has noted that, under Article 8(3),¹⁷⁰ the Host State may elaborate its defence against the investor's claim and has considered why the Host State should be limited to opposing the investor's claims and not be entitled to install a counterclaim. As a matter of form, a counterclaim

¹⁶⁹ The Respondent has specified that its Counterclaim is not a tort claim based upon the Claimants' alleged violation of Romanian tax law, as the Claimants suggested (C-PHB, para. 161). See R-RPHB, para. 132;

¹⁷⁰ Article 8(3) of the BIT provides:

The Contracting Party which is a party to the dispute shall at no time whatever during the procedures involving investment disputes, asse[r]t as a defence its immunity as well as the fact that the investor has received compensation under an insurance Contract covering the whole or part of the incurred damage or loss.

BIT, Art. 8(3) (English text) (C-4).

can be pleaded as a claim operating by way of defence to an investor's claim or as a free-standing claim by the Host State against the investor. In substance, however, there is a significant difference between a defence and a free-standing claim.

153. The Tribunal has considered whether the omission of any express mention of the Host State's right to file a counterclaim is due to the fact that the drafters of the BIT focused on the protection of the investor. It has also considered whether this omission actually excludes any counterclaim by the Host State against the investor before the arbitration forum provided for by the BIT. It has been considered whether the Respondent's counterclaim is for damages caused by the investor, which, in the Respondent's contention, arise from the investment – or more precisely the failure of investments – and thus allegedly from the same subject matter as the Parties' dispute. Since the counterclaim is allegedly an extension of the Respondent's defence against the claim, so the Respondent submitted, the Tribunal was invited to consider that such counterclaim is included within the consent of the Parties to arbitrate before the Tribunal their dispute arising from the investment. It further has been raised within the Tribunal whether the BIT's Contracting Parties intended to avoid parallel proceedings and conflicting decisions before different courts and tribunals by preventing the Host State from asserting its rights against the investor in a counterclaim; and whether such exclusion would not be a breach of natural justice.

154. The Tribunal (by a majority), however, does not accept that the right of the Host State to file a free-standing counterclaim in an investment treaty arbitration should be presumed unless expressly excluded by the BIT. The majority considers that it is the letter of the BIT, interpreted under international law, that binds the Parties. Where there is no jurisdiction provided by the wording of the BIT in relation to a counterclaim, no jurisdiction can be inferred merely from the "spirit" of the BIT. For the majority, it is not unusual for parties to be in asymmetrical positions when a dispute relating to a BIT arises. The majority further observes that the counterclaim submitted by the Respondent is an entirely independent claim based upon Romanian law and unrelated to the Claimants' claim based upon breaches of the BIT. Both in form and substance, it is a free-standing counterclaim not operating merely as a defence to the Claimants' claim. Besides, it is significant that, in the Romanian arbitration and Romanian court proceedings, AVAS' claim for compensation for damage allegedly

caused by Messrs. Gavazzi's alleged failure to invest and mismanagement, to a substantial extent overlaps with the subject-matter of the Respondent's counterclaim, submitted in these proceedings.

155. Further, for the Respondent, Article 8(2) of the BIT provides that the international law provisions of the BIT can be supplemented by Romanian law, applicable to the Share Purchase Contract. Romanian law allows for a counterclaim. Therefore, for the Respondent, "it is logical and entirely reasonable to conclude that the Claimants and the Respondent, as parties subject to the Italy-Romanian BIT, would also be subject to their rights and obligations arising from Romanian law."¹⁷¹
156. The Tribunal notes that the BIT does not indicate that Romanian law applies to the substance of disputes. Article 8(2) of the BIT does not import Romanian law as substantive law to decide claims and counterclaims. By concluding the BIT, the Contracting Parties agreed to apply the BIT and international law to disputes for breaches of the BIT. Further, for the Tribunal, it is difficult to accept that two States, parties to a treaty, have agreed to be subject to a domestic law chosen in a later contract, concluded by one of the States and private third persons.
157. As for the ICSID Convention, Article 42 of the ICSID Convention – to which the Respondent also refers – only recognises that, in the absence of an agreement of the parties on the applicable law, the law of the Host State may apply to investment contracts, which are the direct subject-matter of the ICSID arbitration. However, in the present proceedings, not breaches of the Share Purchase Contract, but breaches of the BIT are the subject-matter of the present arbitration. Therefore, the reference to the domestic law of the Host State as the law on the merits in Article 42 of the ICSID Convention, is irrelevant in the present case.
158. Moreover, the BIT does not indicate that Romanian law would apply to the procedural aspects of the dispute settlement provided by the BIT. Article 8(2) does not make Romanian procedural law applicable to this arbitration. Article 42 of the ICSID Convention, does not refer at all to the procedural law of the Host State. On the

¹⁷¹ R-PHB, para. 480.

contrary, Article 44 expressly states that the procedure before ICSID Tribunals is regulated by the ICSID Convention itself (as supplemented by the Arbitration Rules).

159. The Majority therefore concludes that the BIT does not entitle the Respondent to advance in the present proceedings a free-standing counterclaim.
160. Moreover, even if such counterclaim would be possible under the BIT – *quod non* the counterclaim needs also to be admissible under Article 46 of the ICSID Convention and Article 40 of the Arbitration Rules, which require that counterclaims (a) arise “directly from the subject-matter of the dispute;” (b) are within the scope of consent of the parties; and (c) are within ICSID’s jurisdiction.
161. For the reasons stated above, for the Majority, the subject-matter of the counterclaim, *i.e.*, violations of Romanian domestic law, do not directly arise from the breaches of the BIT, being the subject-matter of the present proceedings. Moreover, nothing in the BIT allows the Majority to conclude that the counterclaim advanced by the Respondent falls within the scope of claims which could be brought in the present proceedings under Article 8(2) of the BIT.
162. On the basis of these considerations, the Majority concludes that it has no jurisdiction to decide upon the Respondent’s counterclaim.

VII. NO *RES JUDICATA* OR ISSUE ESTOPPEL BECAUSE OF ROMANIAN COURT JUDGMENTS

163. The Tribunal has extensively considered in great detail the impact upon the present proceedings of the judgment of the Bucharest Court of Appeals of 16 March 2011 (confirmed by the Court of Cassation of Romania). The Court of Appeals set aside the 2007 Romanian Award, decided the merits in AVAS and rejected the counterclaim made by Messrs. Gavazzi, which was based on the conduct and omissions by AVAS. The judgment of 16 March 2011 decided only on contractual claims and counterclaims and found, under Romanian law, that AVAS had not breached the Share Purchase Contract. The present proceedings concern treaty claims; and this Tribunal has to decide, under international law, whether the Respondent was in breach of Article 2(5) of the BIT, which, in the Claimants’ submission, has adversely affected the Claimants’ rights as investors under the BIT.

164. The Tribunal has examined whether the decision on the merits of the Bucharest Court of Appeals (confirmed by the Court of Cassation of Romania), denying the Claimants compensation for the non-rescheduling and non-waiver of public debts, has conclusive effects on the Parties to the present proceedings under the doctrine of *res judicata* or issue estoppel. If this were the case, the issue whether the Claimants would be entitled to compensation because their rights have been adversely affected could become moot. May this Tribunal find, in spite of the Bucharest Court of Appeals' final judgment denying the Claimants compensation under the Share Purchase Contract, that the rights of the Claimants as investors under the BIT have been violated and that the Respondent is liable for any violation of its treaty commitments? From its perspective as an international tribunal formed under the BIT, the Tribunal applies international law as the law applicable to these questions.
165. In deliberating the issue, the Tribunal considered various legal materials, including the recurring opinions expressed in the decisions in *Apotex Holdings et al v. United States of America*,¹⁷² *Amco v. Indonesia*,¹⁷³ *The Pious Funds of the Californias*,¹⁷⁴ *The Orinoco Case*,¹⁷⁵ *Grynberg v. Grenada*,¹⁷⁶ and *Diag Human SE v. Czech Republic*.¹⁷⁷
166. Under international law, three conditions need to be fulfilled for a decision to have binding effect in later proceedings: namely, that in both instances, the object of the claim, the cause of action, and the parties are identical.¹⁷⁸

¹⁷² *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, paras. 7.12 – 7.21, 7.31 and 7.59 (25 Aug. 2014) (hereinafter *Apotex v. United States of America*)

¹⁷³ *Amco Asia Corp. v. Republic of Indonesia* (ICSID Case No. ARB/81/1, Resubmitted Case), Decision on Jurisdiction (10 May 1988), 27 ILM 1281 (1988).

¹⁷⁴ *The Pious Fund of the Californias* (U.S. v. Mex.), Award (Permanent Court of Arbitration), at 3 (14 Oct. 1902) (unofficial English translation).

¹⁷⁵ *Claim of Company General of the Orinoco Case*, reprinted in REPORT OF FRENCH-VENEZUELAN MIXED CLAIMS COMMISSION OF 1902 355 (Jackson H. Ralston ed., 1906).

¹⁷⁶ *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corp. v. Grenada* (ICSID Case No. ARB/10/6), Award (10 Dec. 2010).

¹⁷⁷ *Diag Human SE v. Czech Republic*, Judgment, [2014] EWHC 1639 (English Commercial Court, June 2014).

¹⁷⁸ See *Apotex v. United States of America*. The Tribunal has already discussed these three conditions in a different context, when it considered whether the proceedings before the Romanian arbitration court excluded Gavazzi's claim under the Share Purchase Contract in the present proceedings under an alleged "fork-in-the-road" provision in the BIT (*see supra* paras. 126-127/128). As will be recalled, however, the Tribunal did not find that the BIT contained such a "fork-in-the-road" provision; moreover, the Claimants affirmed that they were not claiming for a breach of the Share Purchase Contract in the present proceedings.

(1) *Object of the Claim*

167. For the Respondent, although the *object* of the 2002 Romanian arbitration and the present proceedings are worded and assessed in different manners, the remedy sought is the same and therefore “identity of object cannot be rejected.”¹⁷⁹ For the Respondent, the object of Claimants’ counterclaim in the Romanian arbitration and of their claim in the present proceedings is identical. In both instances, the relief they seek for the alleged breaches is compensation through payment of pecuniary damages.¹⁸⁰

168. By contrast, the Claimants contend that the subject matters of the dispute in the 2002 arbitration and in the present ICSID proceedings are different. The fact that a contractual claim and a treaty claim might both aim at obtaining monetary damages (even in similar amounts) is of no relevance; and it does not undermine the well-established distinction between treaty claims and contractual claims.¹⁸¹ At issue in the 2002 Romanian arbitration was the alleged compliance with – or the alleged breach of – the Share Purchase Contract by either AVAS or Messrs. Gavazzi and the consequences in the light of the applicable Romanian law. At issue in the present ICSID proceedings are the alleged breaches of the BIT by the Respondent to the alleged prejudice of the Claimants as Italian investors protected by the BIT under international law.¹⁸²

(2) *Cause of Action*

169. For the Respondent, the Romanian arbitration and the present proceedings concern the same *cause of action*: in both instances the Claimants refer to the alleged breaches by the Respondent of the Share Purchase Contract and of the BIT.¹⁸³ Indeed, so the Respondent contends, the claims submitted in the present proceedings, although formally for breaches of the BIT, are in fact contractual claims based upon the Share Purchase Contract.

¹⁷⁹ R-PHB, para. 95.

¹⁸⁰ R-RPHB, para. 9.

¹⁸¹ C-RPHB, para. 51.

¹⁸² C-RJ/CC, paras. 33, 47-54.

¹⁸³ R-RPHB, para. 10.

170. The Claimants, for their part, argue that the objects of the disputes involved in the 2002 arbitration and in the present ICSID proceedings are different. The remedies sought in the former were the termination of the Share Purchase Contract; the reciprocal restitution of payments made and of shares bought; and damages for breach of contract measured in accordance with Romanian law as *damnum emergens* plus *lucrum cessans*. By contrast, the remedies sought in the present ICSID arbitration are: ascertaining of breaches of the BIT by the Respondent and compensation for an international wrong (unfair treatment and expropriation) equivalent to the value of the lost property.¹⁸⁴
171. The Tribunal (by a majority) finds that the claims before the Tribunal are based upon a breach of the BIT, and their decision turns on the respective provisions of the BIT, while in the proceedings before the Bucharest Court of Appeals, the claims were for breach of the Share Purchase Contract governed by Romanian law, and their decision turned on the duties and rights under that Contract.
172. Consequently, the present proceedings and the Bucharest Court proceedings had a different cause of action. Under international law, as confirmed by several precedents,¹⁸⁵ there is no identity between the cause of the contractual claims put before the Romanian courts and that of the BIT claims put before this Tribunal. For this reason alone, the majority concludes that the Bucharest court decisions cannot have conclusive [] effect for the Tribunal under the doctrines of *res judicata* and issue estoppel.

(3) *The Parties*

173. The Respondent argues that the *Parties* in the 2002 Romanian arbitration and in the present proceedings are in fact the same. Although AVAS was a party in the 2002 arbitration and the Respondent is a party in the present proceedings, the Respondent argues that AVAS' actions are in the present arbitration attributable to the Respondent,

¹⁸⁴ C-RJ/CC, paras. 33, 55-57.

¹⁸⁵ See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, paras. 90-91 (3 July 2002) paras. 95-96; *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, paras. 256 *et seq.*, 289 (22 Apr. 2005); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, paras. 148 and 268 (14 Nov. 2005).

while in the 2002 arbitration the Claimants (as Messrs. Gavazzi in their counterclaim against AVAS) argued that AVAS' breaches also encompassed alleged breaches by the Ministries of Finance, Health and Social Protection, *i.e.*, all executive organs of the Respondent.¹⁸⁶ However, for the Claimants, the 2002 Romanian arbitration and these ICSID proceedings involved different parties. The parties to the former were AVAS and Messrs. Gavazzi, whereas the parties to the latter are the Claimants (Messrs. Gavazzi) and the Respondent. While AVAS is a public body that depends on the Government of Romania, under Romanian law it has a distinct legal personality, is organized pursuant to its own articles of incorporation, and is managed by its own Board.¹⁸⁷ The Claimants point out that AVAS was the Respondent in the 2002 Romanian arbitration.

174. The circumstance that there is no identity between the relevant parties to the different proceedings¹⁸⁸ only confirms to the majority that the Bucharest Court decision, denying the Claimants any compensation for non-rescheduling and non-waiver, has no conclusive effect under the doctrines of *res judicata* or issue estoppel with respect to the present proceedings.

VIII. THE MERITS

A. The Principal Claims

175. The Claimants assert that Romania's authorities failed to carry out the Restructuring of the Company's Debt, which had been promised to the Claimants, by the following acts or omissions:

- (1) The Government of Romania and the relevant Ministries of Romania failed to carry out the Restructuring of the Company's

¹⁸⁶ R-RPHB, para 8.

¹⁸⁷ C-RJ/CC, paras. 42-46.

¹⁸⁸ In the Romanian court proceedings, the State of Romania was not a party to the Share Purchase Contract that was the subject-matter of the dispute, and AVAS, having its own legal personality under Romanian law, was not identical to the State of Romania. For this Tribunal, the State of Romania cannot be equated to AVAS; moreover, the Claimants do not hold the State of Romania responsible for breaches of the Share Purchase Contract (C- PHB para.7).

Debt as indicated in the Government's Note No. 5/3228 of 17 May 1999.

- (2) The Ministry of Finance granted Socomet a more limited debt restructuring in its letter to the Claimants of 19 October 1999 and subsequently failed to carry out this more limited restructuring.
- (3) The Ministry of Industry failed to release Socomet from its debts to the National Electricity Company CONEL S.A. and the National Company ROMGAZ S.A.
- (4) The Government of Romania granted Socomet a more limited debt restructuring in its Decision No. 692 of 19 July 2001 and subsequently failed to carry out this more limited restructuring.¹⁸⁹

176. According to the Claimants, the acts and omissions of the Romanian Prime Minister and the three Ministers, all of whom signed Note No. 5/3228 of 17 May 1999 in their official capacity as members of the Government of Romania and were competent to bring about the promised Restructuring of the Company's Debt, are attributable to Romania under international law, because the Government is an entity of the Romanian State.¹⁹⁰ The Claimants contend that, through breaches (1) - (4) listed above, the Respondent has breached the fair and equitable treatment standard under Article 2(3) of the BIT and has unlawfully deprived the Claimants of their investment under Article 4(1) and (2) of the BIT.

177. Additionally and subordinately, the Claimants aver that the Bucharest Court of Appeals abusively annulled the 2007 Romanian Award and that the Romanian courts wrongly exercised their judicial functions with respect to the contractual dispute between AVAS and Gavazzi. The Claimants contend that the Romanian courts are

¹⁸⁹ In their Request for Arbitration, the Claimants appeared to claim compensation under the alleged "umbrella clause" of Article 10(2) of the BIT for AVAS' failure to comply with its contractual obligation under the Share Purchase Contract to bring about the Restructuring of the Company's Debt. However, as the Tribunal has decided above, Article 10 of the BIT is not to be interpreted as an "umbrella clause" (para. 123). Moreover, in later submissions, the Claimants confirmed that they actually did not bring any claim based on the Share Purchase Contract, but only on the Respondent's breaches of the BIT itself. (C-PHB para. 7) Consequently, the Tribunal need not here discuss AVAS' alleged failure to comply with the Share Purchase Agreement.

¹⁹⁰ C-Request, para. 113.

likewise organs of the Romanian State, and that their acts and omissions are therefore equally attributable to the Respondent. By annulling the 2007 Romanian Award and deciding the merits of the contractual dispute between AVAS and Gavazzi, so the Claimants contend, the Respondent has deprived the Claimants of their investment under Article 4(1) and (2) of the BIT.

178. The Tribunal agrees that the acts and omissions of the Members of the Government, the respective Ministries, the governmental administrations, and the courts in relation to the Claimants' investment are attributable to the Respondent. Therefore, the Tribunal will proceed to examine the Claimants' allegations that the Respondent has:

- (a) not respected the "fair and equitable standard" (Article 2(3) of the BIT); and
- (b) unlawfully deprived the Claimants of their investment (Article 4(1) and (2) of the BIT).

179. Given the end-result of this Decision, the Tribunal need not here address the Claimants' subordinate claim that the Respondent failed to provide the Claimants with effective means to assert their claims and enforce their rights under Article 2(5) of the BIT. However, the Tribunal will nonetheless do so briefly, as a matter of courtesy to the Parties' submissions and also because the issue may be relevant to costs.

a) "Fair and Equitable Treatment Standard" Not Respected (Article 2(3) of the BIT)

180. Article 2(3) of the BIT provides:

Each Contracting Party shall offer in its territory a fair and equitable treatment for investments of investors of the other Contracting Party. Neither Contracting Party shall in any way impair by arbitrary, unreasonable or discriminatory measures the management, maintenance, use, enjoyment, conversion, repatriation of capital, liquidation and disposal of investments as well as the local companies, partnerships or firms in which these investments have been made.¹⁹¹

¹⁹¹ BIT, Art. 2(3) (English text) (C-4). The final paragraph of the BIT states that the BIT was done "in three original copies, each in Italian, Romanian and English languages, all texts being equally authentic" and provides that in case of "differences of interpretation," the English text "shall be considered as the text of reference."

(i) *The Parties' Contentions*

181. The Claimants contend that the Respondent has breached the fair and equitable treatment standard contained in Article 2(3) of the BIT (“Fair and Equitable Treatment Standard”) through the Romanian government authorities’ unjustified failure to accord the Claimants’ investment the treatment that was promised to them. More specifically, the Claimants argue that, in not carrying out the promised Restructuring of the Company’s Debt, which was an essential and explicit condition for the Claimants to sign the Share Purchase Contract, the Respondent breached the Fair and Equitable Treatment Standard. According to the Claimants, the Romanian authorities have thus engaged in “*arbitrary*” and “*discriminatory*” measures that “*impair[ed]*” and, ultimately, destroyed the “*management, maintenance, use, [and] enjoyment*” of the Claimants’ investment in “*local companies*” within the meaning of Article 2(3) of the BIT.¹⁹² The Claimants submit that this conduct is “*manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)*,”¹⁹³ and in breach of the Fair and Equitable Treatment Standard.¹⁹⁴

182. The Claimants further argue that the Respondent created a legitimate expectation on the Claimants’ part that it would carry out the Restructuring of the Company’s Debt by its solemn promise in the Government’s Note No. 5/3228 of 17 May 1999.¹⁹⁵ That promise, according to the Claimants, induced the Claimants to pay the second installment under the Share Purchase Contract and to perform its contractual obligations, which the Claimants otherwise would not have done, and which performance caused them great damage. By acting contrary to its explicit promises to the Claimants in respect of their investment, the Claimants argue, the Respondent has breached the Fair and Equitable Treatment Standard of Article 2(3) of the BIT.¹⁹⁶ In support of this argument, the Claimants refer to several decisions by ICSID tribunals

¹⁹² C-PHB, para. 78.

¹⁹³ *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award (UNCITRAL), para. 309 (17 Mar. 2006) (emphasis added).

¹⁹⁴ C-PHB, paras. 78-79.

¹⁹⁵ *See supra* para. 54.

¹⁹⁶ C-Request, paras. 108, 121; C-PHB, para. 80.

that reached the same conclusion in analogous circumstances.¹⁹⁷ For instance, the Claimants point out that the ICSID tribunal in *Total v. Argentina* decided:

117. ... *The expectation of the investor is undoubtedly “legitimate”, and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.*

118. *The situation is similar when public authorities of the host country have made the private investor believe that such an obligation existed through conduct or by a declaration. Authorities may also have announced officially their intent to pursue a certain conduct in the future, on which, in turn, the investor relied in making investments or incurring costs. As stated within the NAFTA framework “the concept of ‘legitimate expectations’ relates . . . to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages.”*¹⁹⁸

183. In response, the Respondent denies that it has breached the Fair and Equitable Treatment Standard contained in Article 2(3) of the BIT. The Respondent denies that it ever promised the Claimants that it would carry out the Restructuring of the Company’s Debt described in Article 10.1(b) of the Share Purchase Contract. In the Respondent’s view, the Government’s Note No. 5/3228 of 17 May 1999 was merely an internal communication from the Prime Minister to the various addressees, requesting the approval of the proposed debt rescheduling within the limits of the applicable law. For the Respondent, that Note did not, by itself, grant the Restructuring of the Company’s Debt, as sought by the Claimants. It was only “a favourable

¹⁹⁷ The Claimants cite, among others, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, para. 113 (25 May 2004); *Mondev Int’l Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, para. 116 (11 Oct. 2002); *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award, para. 299 (6 Feb. 2007); *Técnicas Medioambientales TECMED S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, para. 154 (29 May 2003); *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, para. 98 (30 Apr. 2004); *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1), Award, para. 323 (7 Dec. 2011); *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Award, paras. 706 *et seq.* (11 Dec. 2013).

¹⁹⁸ *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, paras. 117-118 (27 Dec. 2010) (footnotes omitted).

premise” to grant the Claimants a restructuring of Socomet’s debts, subject to the observance of the applicable legal provisions.¹⁹⁹

184. The Claimants take a diametrically opposite view, arguing that the Government’s Note No. 5/3228 of 17 May 1999 was not merely an internal memorandum. On the contrary, it was a true administrative decision “of individual application” addressed to the Claimants and SOF.²⁰⁰ The Claimants moreover emphasize that SOF, another State authority, explicitly confirmed in its Note No. P/2994 of 28 May 1999 to the Romanian Minister of Industry and Commerce that the Romanian Prime Minister had approved the Restructuring of the Company’s Debt.²⁰¹ Also, APAPS, the successor of SOF, confirmed that the Rescheduling, as described in the Government’s Note No. 5/3228, had been “approved in the session of the Government of Romania held on 17.05.1999.”²⁰²

185. The Respondent points out that the Government’s Note No. 5/3228 of 17 May 1999 had a limited scope. The Note did not provide for a rescheduling of all public debts. Only payments to the State Budget, to the Social and Health Insurance Budget and to Special Funds were included within the scope of the Note; payments for supplementary pension, for the unemployment help fund and for the health insurance fund, were not covered.

186. Moreover, the Respondent asserts that, in any event, SOF performed its obligations under Article 10 of the Share Purchase Contract to facilitate the rescheduling of Socomet’s budget debts.²⁰³ For instance, within 40 days after the signature of the Share Purchase Contract, SOF requested the Minister of Industry and Commerce to approve the restructuring of Socomet’s debts and the cancellation of delay penalties owed to its electricity and gas suppliers, CONEL S.A. and ROMGAZ S.A.²⁰⁴ SOF thus fulfilled its obligation under Article 10.1(c) of the Share Purchase Contract “to exert all diligence” and to “support” the Claimants in achieving the rescheduling of

¹⁹⁹ R-PO/CM/CC, para. 205.

²⁰⁰ C-RPHB, paras. 18-19.

²⁰¹ C-PHB, paras. 30, 38; C-RPHB, para. 18. *See supra* para. 55.

²⁰² Substantiation Note, issued by APAPS and Ministry of Finance (C-32). *See supra* para. 66.

²⁰³ R-PO/CM/CC, paras. 194-200; R-PHB, paras. 329-40.

²⁰⁴ Note No. P/2994 of 28 May 1999 (C-23). *See supra* para. 55.

the Company's debts to those two companies.²⁰⁵ In fact, the Respondent asserts, these debts were rescheduled.²⁰⁶

187. Likewise, the Respondent asserts that the rescheduling of the other debts within the scope of Article 10.1(b) had been carried out. For instance, the Romanian Ministry of Finance did, in accordance with the applicable law, reschedule the tax debts on 19 October 1999²⁰⁷ and did cancel the related penalties.²⁰⁸ The Claimants, in their letter of 3 December 1999 to the Otelu Rosu tax authorities, accepted the rescheduling.²⁰⁹ The Respondent further alleges that Socomet received additional payment facilities with respect to its debts to the State Social Insurance and Health Insurance Budgets.²¹⁰

(ii) *The Tribunal's Decision*

188. In examining the alleged breaches by the Respondent of its obligations under the BIT, the Tribunal will not dwell on the manner SOF has performed its obligations under the Share Purchase Contract. Under Article 10.1(c) of the Share Purchase Contract, SOF had diligently to support the Claimants in the rescheduling of Socomet's outstanding debts and the cancelling of its penalties and additional payments for delay to CONEL and ROMGAZ. SOF requested this rescheduling from the Ministry of Industry and Commerce on 28 May 1999 and supported Socomet's request to CONEL and ROMGAZ. It therefore performed its contractual obligations. However, as indicated

²⁰⁵ R-PHB, paras. 357-359.

²⁰⁶ In support of this assertion, the Respondent relies on

- (i) a letter dated 7 October 1999 from S.C. Distrigaz-Nord S.A. (one of ROMGAZ' successors) to S.C. Gavazzi Steel S.A. (R-23) (in its letter, S.C. Distrigaz-Nord S.A., among other things, made the October 1999 "internal natural gas supply program" for Gavazzi Steel S.A. contingent on the Company making specified payments and submitting a number of promissory notes);
- (ii) a "Debt Rescheduling Report" dated 29 May 1999, signed by Stefano Gavazzi on behalf of S.C. Gavazzi Steel S.A., on the one hand, and S.C. Electrica S.A. (one of CONEL S.A.'s successors) through its subsidiary Exploatarea de Distributie Resita, on the other (R-24); and
- (iii) a "Debt Rescheduling Report" dated 22 April 2002 signed by S.C. Gavazzi Steel S.A. and S.C. Electrica S.A. (R-25).

²⁰⁷ The Respondent asserts that the rescheduling of a company's debts to the State Budget is only possible under the procedure laid down in Government Ordinance No. 11/1996 on the Enforcement of Budget Debts (R-15), as amended and supplemented by Government Ordinance No. 53/1997 and subsequent enactments (namely, Order No. 83/1997 of the Ministry of Finance (R-27); Order No. 1283/1998 of the Ministry of Finance (R-28); Order No. 105/1999 of the Ministry of Labor and Social Protection (R-29); and Government Decision No. 1461/1996 (R-30)). R-PHB, paras. 273-74.

²⁰⁸ R-PHB, paras. 340-44.

²⁰⁹ *Id.* para. 348 (R-20).

²¹⁰ *Id.* para. 363; Decision No. 692 of 19 July 2001 by the Romanian Prime Minister (R-26; C-34).

above, the performance by SOF of its contractual obligations under the Share Purchase Contract is not within the jurisdiction *ratione materiae* of the Tribunal.

189. The Tribunal will therefore only examine whether the Respondent, through its respective State entities, has breached its obligation to grant the Claimants' investment fair and equitable treatment under Article 2(3) of the BIT. The Claimants, of course, bear the legal burden of proving any breach.

190. In assessing this matter, the Tribunal must first examine the importance of debt rescheduling for Socomet.

191. In 1999, Socomet was heavily indebted to Romania and to various organs of the Romanian State. The success of the Claimants' investment in Socomet depended on the rescheduling of these debts and upon the waiver of the related penalties. Under Article 10.1 of the Share Purchase Contract, Socomet's debts to the *'State Budget, Budget for Social Assurances, Health Budget, including credits from the Ministry of Finance for paying the power and gas supply, had to be rescheduled within 5 years with a 2 year grace period and all related penalties and additional payments for delay had to be cancelled.'*

192. Consequently, the Claimants agreed to pay USD 517,020 for 70% of the shares in Socomet and to invest an additional USD 20 million within 5 years on the condition that the respective Romanian governmental entities would reschedule Socomet's debts towards them and would waive penalties and delay payments as provided by Article 10.1 of the Share Purchase Contract. Were this condition not met, the Claimants were entitled to terminate the contract and receive reimbursement for sums already paid towards the purchase price.

193. On 17 May 1999, well within the 40 days after the signature of the Share Purchase Contract, the Romanian Prime Minister, on the request of the Minister of Finance, the Minister of Labor and Social Protection, and the Minister of Health, referred to the rescheduling condition of the Share Purchase Contract and approved the restructuring of:

"the debts of S.C. SOCOMET S.A. Otelu Rosu that are overdue and unpaid on time to the State Budget, the Social Insurance Budget, the Health Budget

and Special Funds, over a period of 5 years, with a grace period of 2 years. Subsequently, the payments shall be done as follows: 10% in the third year, 30% in the fourth year and 60% in the last year, as well as the cancellation of all related penalties and/or delay penalties.”²¹¹

194. The exact amount of the debts to be rescheduled or waived was to be verified by DGFPCFS Caras Severin, the regional administration.
195. In this Note No. 5/3228 of 17 May 1999, which bore the official stamp of the Prime Minister, the head of the Romanian Government, and three of his Ministers, acknowledged that they were familiar with the Share Purchase Contract, and that they were aware of the fact that the requested rescheduling and waivers were, for the Claimants, a preliminary condition for the purchase of the Socomet shares, for the assumption of the direction of Socomet, and for the additional investment of USD 20 million into Socomet’s further operations. Aware of this fact, the signatories of the Government’s Note confirmed that the Claimants could cancel the Share Purchase Contract if this rescheduling was not granted within 40 days after the signature of the contract. Consequently, as provided under Article 10 of the Share Purchase Contract, the Government’s Note No. 5/3228, issued within the contractual 40 days after the signature of the contract, would rightly be considered as a formal grant of the required scheduling. It is, therefore, evidence that the rescheduling and waiver, as required under Article 10 of the Share Purchase Contract, had been obtained within the envisaged timeframe.
196. Indeed, SOF, a specialized governmental institution in charge of privatizations, understood the Government’s Note No. 5/3228 to be exactly such a grant by the highest State authorities, of the rescheduling and waivers as provided for by Article 10.1 of the Share Purchase Contract. SOF invoked this grant in its request of 28 May 1999 to the Romanian Ministry of Industry and Commerce to reschedule Socomet’s energy debts. For the purposes of the present case, it is particularly crucial to note that SOF also confirmed to the Claimants on 3 June 1999 that all the conditions imposed by Article 10.1 of the Share Purchase Contract, including the rescheduling of

²¹¹ See *supra* para. 54.

Socomet's debts to the State Budget, the Social Insurance Budget, the Health Budget and Special Funds and cancellation of the related penalties, had been met.²¹²

197. Shortly after having been informed that the Government had approved the rescheduling and waivers, as provided for by the Share Purchase Contract, the Claimants paid the second and final part of the share purchase price (USD 297,184), joined the Board of Directors of Socomet, and created Gavazzi Steel Consultants to develop Socomet's international business.
198. The Tribunal decides the merits by majority vote. It agrees with the Claimants that, by the Government's Note No. 5/3228 of 17 May 1999, four Ministers of the Romanian Government, including its Prime Minister, granted and approved the rescheduling and waivers as required by the Share Purchase Contract. They justifiably considered this Government's Note as such – subject to further implementation of this rescheduling and waiver by the administrations concerned.
199. The Tribunal cannot, as the Respondent does, reduce the Government's Note No. 5/3228 to a mere internal communication to different administrative addressees of the Prime Minister's approval of some rescheduling and waivers, to the extent allowed by other legal provisions. The four Ministers who signed the Government's Note were well aware that the rescheduling and waivers were the preliminary condition of the Claimants' investment in Socomet. They were also well aware that the Government's Note would be notified to the Claimants, and would be considered by them the actual grant of the rescheduling and waiver, as required by the Share Purchase Contract.
200. Most importantly, the Tribunal observes that the Respondent in fact has never implemented the rescheduling and waivers granted in the Government's Note No. 5/3228 of 17 May 1999.
201. Indeed, on 19 October 1999 the Romanian Ministry of Finance formally affected to implement the rescheduling granted in the Government's Note of 17 May 1999 but in fact proposed less favorable terms. The grace period was shortened from two years to 5.5 months.²¹³ A substantial part of the penalties was not cancelled as the

²¹² See *supra* para. 52.

²¹³ The argument that the applicable law allowed only for a grace period of a maximum of 6 months does not convince the Tribunal. The Government's Note No. 5/3228 explicitly granted a grace period of 2 years and

Government's Note No. 5/3228 had indicated but was only rescheduled (with an interest rate of 36%). Furthermore, the rescheduling was subordinated to Socomet's payment of current obligations to the State Budget and to Socomet's establishment of a bank guarantee for rescheduled payments – conditions not at all mentioned in the Government's Note No. 5/3228 and which the Claimants could not fulfill because of lack of funds. Moreover, in fact the partial rescheduling, proposed by the Ministry of Finance in October 1999, was never carried out.

202. For many months, the other Ministries involved in the Government's Note No. 5/3228 did not even implement any rescheduling or waiver.
203. On 19 July 2001, a Government decision by the Prime Minister, countersigned by the Minister of Finance and Minister of Labor and Social Solidarity, provided for a rescheduling of some – not all – of the debts that were covered by the Government's Note No. 5/3228 of 17 May 1999.²¹⁴ Moreover, the rescheduling scheme that this Government Decision envisaged was less favourable than the scheme of the Government's Note, among other reasons because the grace period was reduced again from 2 years to 6 months. The 2001 rescheduling scheme likewise was never carried out.
204. The Claimants correctly understood the Government's Note No. 5/3228 of 17 May 1999 as the grant of the rescheduling and waivers, foreseen in the Share Purchase Contract. They reasonably relied upon the Note and were justified in expecting that the rescheduling and waiver would be implemented within a short time, as outlined by the Government's Note. The issuance of the Government's Note No. 5/3228 thus induced the payment of the second and final part of the share price, as well as the membership of the Claimants of the Board of Directors and management of Socomet, and the Claimants' investment in Socomet's operations.
205. In fact, the rescheduling and waiver, envisaged by the Government's Note No. 5/3228, were never carried out by the Romanian Government, its Ministries and lower administrations, whose acts and omissions are attributable to the Respondent under

did not submit the modalities of the rescheduling to legal restrictions. The Government's Note No. 5/3228 thus created legitimate expectations for the Claimants.

²¹⁴ See *supra* para. 68.

international law. Consequently, by failing to implement the rescheduling and waivers granted in the Government's Note No. 5/3228 of 17 May 1999, the Respondent obstructed the legitimate expectations of the Claimants and has not treated them in a fair and equitable manner as required by Article 2(3) of the BIT.

206. Due to the fact that the public debts were not rescheduled or waived as promised in the Government's Note No. 5/3228 of 17 May 1999, Socomet had to use its funds to pay these debts and Socomet became deprived of funds to finance its operations. When these debts were not paid, Socomet's Romanian bank accounts were frozen and Socomet could no longer finance its operations and further investments. Instances in which this happened included the freezing of Socomet's accounts by the Romanian Ministry of Finance in the autumn of 1999, and the blockage of Socomet's accounts by Caras Severin Labour in April 2000.
207. In August 2002 this situation ultimately resulted in Socomet's insolvency, by which the Claimants lost all the funds they had invested in the Socomet operations. The Tribunal concludes that the facts, as related above, which ultimately led to Socomet's insolvency, constitute a breach by the Respondent of the Fair and Equitable Standard, contained in Article 2(3) of the BIT. The heads of damages and the quantification of the damages, caused by this breach, will be discussed in the quantum phase of these proceedings.

b) Article 4(1) and (2) of the BIT

208. Article 4(1) and (2) of the BIT provides:

- (1) *The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, except where specifically provided by law by judgments or orders issued by Courts or Tribunals having jurisdiction.*
- (2) *Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized, requisitioned or subjected to other measures having directly or indirectly similar effect (all of these measures hereinafter referred to as "expropriation"), unless the following conditions are fulfilled:*
- a) *the measures are adopted in the national interest, or for public purposes and in accordance with due process of law;*

- b) *the measures are not discriminatory, compared to the measures taken against national investments and investors or against the investments and investors of third countries;*
- c) *a proper procedure is established to determine the amount and method of payment of compensation.*²¹⁵

(i) *The Parties' Contentions*

209. The Claimants assert that the Respondent's failure to effect the Restructuring of the Company's Debt, in conflict with the Government's Note No. 5/3228 of 17 May 1999, led to forced cash withdrawals in favor of the Government creditors and to the blocking of the Company's bank accounts, which limited the Company's potential for investments, frustrated i.a. a new investment by Techint and ultimately led to Socomet's insolvency, depriving the Claimants of all their investments in the Socomet project.²¹⁶ After the insolvency, AVAS had the Company valued at USD 22 million²¹⁷ and subsequently sold it to other investors.²¹⁸
210. The Claimants allege that the Respondent breached its obligations under Article 4 of the BIT in three different manners. First, by blocking the Company's bank accounts, the Respondent subjected the Claimants, in breach of Article 4(1) of the BIT, to a "*measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment,*" which was not "*specifically provided by law*" or "*judgments.*"²¹⁹ Second, (i) by not implementing the Restructuring of the Company's Debt; (ii) by blocking, and forcing withdrawals from, the Company's bank accounts; and (iii) by forcing the Company into insolvency, the Respondent subjected the Claimants to "*measures having directly or indirectly similar effect [to expropriation, nationalization, or requisition],*" which deprived them of their

²¹⁵ BIT, Art. 4(1)-(2) (English text) (C-4).

²¹⁶ C-Request, para. 124; C-PHB, para. 89.

²¹⁷ The Claimants refer to the "Plan of Judicial Reorganising of the Company S.C. Gavazzi Steel S.A. Otelu Roşu," prepared by Iprolam S.A., Institute for Designing Rolling Sections and Plants, Bucharest (C-57; R-52), which, according to the Claimants, in 2004 ascribed to the Company, *inter alia*, a liquidation value of USD 22 million. C-PHB, para. 92 n.120.

²¹⁸ In support, the Claimants rely on the hearing testimony of Mr. Florin Frumosu, a former member of the Board of Directors of Gavazzi Steel S.A. and the Company's Director General from May until July 2002, who stated that the Company and/or its assets were sold first to another Italian investor and subsequently to a Russian investor.

²¹⁹ C-Request, para. 126; C-PHB, para. 90.

investment in breach of Article 4(2) of the BIT.²²⁰ Third, by not implementing the 2007 Romanian Award and having a Romanian court instead decide on the merits of the dispute, the Respondent did not respect the “*proper procedure [for] determin[ing] the amount and method of payment of compensation,*” breaching, according to the Claimants, Article 4(2)(c) of the BIT.²²¹

211. The Respondent, however, alleges that the Claimants themselves triggered the insolvency of Socomet in three different ways. First, Socomet (by now the Company was called Gavazzi Steel) controlled by the Claimants, forfeited the debt rescheduling and waiver, which had been granted on condition of such payment, by failing to fulfill some payments, thus leading to the blocking of the Company’s bank accounts. Second, the Claimants failed to make the necessary investments as provided for in the Share Purchase Contract, which was a condition for the rescheduling and waiver. Third, Claimants’ general mismanagement of the Company inevitably led to the insolvency of Socomet.

(1) *Non-payment of Overdue Debts to the State Budget*

212. The Respondent asserts that the Company failed to comply with the conditions for the debt rescheduling as set forth in the Ministry of Finance’s letter of 19 October 1999, which, for instance, still required payment of the Company’s outstanding debts to the State Budget.²²² Thus, the Respondent contends that in February 2002, the General Directorate of Public Finance had to attach cash deposits on Gavazzi’s Steel’s bank accounts in order to cover these debts.²²³

213. For the Claimants, the Government’s Note No. 5/3228 of 17 May 1999 did not require payment of outstanding debts to the State Budget. The blocking of the bank accounts

²²⁰ C-Request, para. 127; C-PHB, para. 91.

²²¹ C-Request, para. 128.

²²² In support, the Respondent relies on “computation notes” and “computation minutes” prepared by the General Directorate of Public Finance of Caras-Severin County in 2002 (R-PO/CM/CC, paras. 258-59). The Claimants point out that the “computation notes” did not concern current payments due by the Company but rather the debts that should have been first suspended and thereafter rescheduled under the Ministry of Finance’s letter of 19 October 1999 (C-PHB, paras. 67-69).

²²³ R-PO/CM/CC, paras. 260-63; two notices of garnishment dated 25 February 2002 (R-34; R-35). As noted, the Respondent alleges that the previous freeze of the Company’s bank accounts, which had occurred in September 1999, was lifted on 6 December 1999. The Respondent asserts that the Company never challenged those garnishments, even though it could have done so under Government Ordinance No. 11/1996 on the Enforcement of Budget Debts.

in February 2002 confirms that the broad rescheduling and waivers, granted in the Government's Note No. 5/3228, were never implemented. Even the less favorable rescheduling proposals of 19 October 1999 by the Ministry of Finance, or by the Government's Decision No. 692 of 19 July 2001, were never implemented.

(2) *Lack of Investments*

214. Article 8.10.1 of the Share Purchase Contract provides:

*Buyer commits himself to effect in the Company either by own sources and provided [i]n his name or by a third Party he attracted, within a period of maximum 5 (five) years starting with the Payment Date, investment / contribution to capital as provided by law, in a total value of 20,000,000 USD (out of which the environmental investments represent 480,000 USD), scheduled according to Annex No.6.*²²⁴

215. Article 8.10.1 was amended by the Addendum of 7 July 2000, postponing the start of the 5 year investment period to June 2000:

*Purchaser undertakes to bring in the company out of his own sources, brought on its name, or by a third party, brought by the purchaser, for a period of maximum 5 (five) years, commencing on 24.06.2000 investment/capital contributions, in the forms provided by law, in a total amount of 20,000,000 US\$...*²²⁵

216. The Respondent alleges that the Claimants failed to make the investments in the Company as required by the Share Purchase Contract. This failure, so the Respondent maintains, was another direct cause of the Company's insolvency and eventual insolvency and liquidation.²²⁶

²²⁴ Share Purchase Contract, Article 8.10.1(a) (C-19) (emphasis omitted). *See supra* para. 45.

²²⁵ Addendum no. 2/07.07.2000 to Share Purchase Contract No. 145/19.04.1999, Article 1 (C-20). *See supra* para. 46.

²²⁶ R-PHB, para. 237 *et seq.* Article 8.10.1 of the Share Purchase Contract, the Claimants undertook to make investments or contributions in the Company totaling USD 20,000,000 within five years "starting with the Payment Date." In Addendum No. 2 to the Share Purchase Contract, the parties agreed that that five-year period would run from 24 June 2000 (*see supra* paras. 46 and 215); thus, under the Share Purchase Contract, as amended, the Claimants were to make the total investment/contribution of USD 20,000,000 by June 2005, the first installment totaling USD 2,000,000 being due by the end of June 2001. In response to a request by the Claimants that the deadline for the first installment be extended by six months to the end of 2001, APAPS replied:

According to [the Share Purchase Contract], you are not supposed to certify to A.P.A.P.S. . . . that the investments made each year have been included in the company's social capital. It is expressively [sic] indicated that this obligation is to be carried out only at the end of the 5 years period of time, after the complete fulfillment of the investment programme. . . .

217. The Parties have discussed at length the extent to which the Claimants were obliged to make investments in the Socomet project under the Share Purchase Contract and the extent to which the investments were actually made.
218. The Respondent asserts that, under Romanian law, an investment in a company requires participation in its capital through the exchange of shares. Financing a company without increasing its registered capital would not be considered an investment. The Respondent points out that, pursuant to Article 8.10.2 of the Share Purchase Contract, the capital investment would only be considered achieved on the date of registration of the nominal capital increase with the Trade Register Office.²²⁷ The Claimants, however, counter that the funds that Messrs. Marco and Stefano Gavazzi provided to cover the various needs of the Company between 1999 and 2002 qualified as an investment and had only to be converted and registered as capital increase by June 2005, the deadline established under Article 8.10.1 of the Share Purchase Contract, as amended.²²⁸
219. The Tribunal observes that Article 8.10.2 indeed requires that the capital investment be made by capital increase, and that such capital increase had to be registered with the Trade Register Office, but (by a majority) that the capital increase did not have to occur before June 2005.
220. However, independent of the issue of whether registration for a capital increase was required when the investment was made or later, by June 2005, the Parties disagree on whether specific operations by the Claimants by their nature could be considered as

In conclusion, we consider it is not necessary the time being to sign an Amendment [to the Share Purchase Contract] in order to lengthen the first investment year until 31st of December 2001. . . .

Letter from APAPS to Stefano Gavazzi, Chairman of the Board of Directors of Gavazzi Steel S.A. June 2001 (translated from Romanian into English) (C-70).

²²⁷ Article Art. 8.10.2 of the Share Purchase Contract provides:

*The capital investment shall be considered fully achieved on the date of registration with the Trade Register Office of **Company** of the nominal capital increase with their counter value or, as the case may be with the cash subscribed and fully paid capital, made by the **Buyer** or a third Party he attracted.*

Share Purchase Contract, Art. 8.10.2 (C-19).

²²⁸ The Tribunal notes that the Respondent has acknowledged that, “prior to the initiation of the Live Arbitration, the Claimants made an increase of the Company share capital [] by USD 2,000,000 by converting the Company’s debts towards Holdeast S.p.A., owned by the Claimants, into shares.” The Respondent adds, however, that “there is no evidence to prove the recording of this increase with the Trade Registry” (R-PHB, para. 156).

“investments.” For instance, the Respondent argues that neither the injection of the Claimants’ personal funds into the Company as a loan, nor the conversion of the Company’s debts into loans, should be given the status of investments.²²⁹

221. In this connection, for the Respondent “it is important to determine the juridical nature of each sum of money introduced in [the Company] pursuant to the domestic (Romanian) legislation.”²³⁰ Thus, the Respondent contends, the distinction under Romanian law between “investment” and “financing” must be respected. According to the Respondent, the amounts that the Claimants allegedly “used for SOCOMET’s establishment – namely amounts paid directly to the Company or paid to third parties [on] its behalf” – do not represent investments but, rather, “financing” because they “confer[] the right to interest payments.”²³¹

222. In sum, the Respondent concludes that there is no evidence that the Claimants “invested” in the Company, either directly or through Gavazzi Steel Consultants. Specifically, the Respondent contends that the Claimants have provided no documentary evidence supporting their allegations, such as bank documentation and other documents showing that the amounts alleged by the Claimants “were paid within the Company’s accounts as investments.”²³² For the Respondent, the witness testimonies and the minutes of meetings of the Board of Directors and shareholders of

²²⁹ The Claimants allege that funds in the amounts of USD 1,265,000 and € 438,000 had already been duly registered in the accounts of the company (C-RPHB, para. 11; C-RL/OJ/A/CC, para. 88). In support of this argument, the Claimants rely on a document entitled “Situation of Loans Made by Mr. Gavazzi, Entered in the Book-Keeping Records of SC Gavazzi Steel S.A.,” signed by the Company’s Economic Director and by an official of its Chief Bookkeeping Department (C-61, translated from Romanian into English).

For instance, the Claimants considered a conversion of a debt that Socomet S.A. owed Holdeast SRL, an Italian company wholly owned by the Claimants, to be an investment of USD 1,490,255. However, for the Respondent, this conversion cannot be considered an investment due under the Share Purchase Contract, because this conversion was discussed only after December 2001, the deadline for providing the first portion (totaling USD 2,000,000) of the contractually required USD 20,000,000 investment (R-PHB, para. 244). That debt resulted from the liquidation of Easteel, which was being performed by a Reșița court (Minutes of a meeting of the Board of Directors Gavazzi Steel S.A. held on 1 February 2002; C-36).

The Shareholders’ Meeting of 30 April 2002 decided that the corresponding increase of the Company assets should be registered as capital with the Trade Register (C-RPHB, para. 11; Minutes of the General Meeting of the Company’s Shareholders, 30 Apr. 2002 (C-25)). The Claimants point out that the Respondent itself admitted that this conversion took place and even indicates an amount of the full USD 2,000,000 (C-RPHB, para. 12). The Respondent contends that, however, the conversion of this debt into shares was not recorded with the Trade Registry (R-PHB, para 156 n.44).

²³⁰ R-PHB, para. 144.

²³¹ *Id.* paras. 155, 247, 255.

²³² *Id.* paras. 157, 249.

the Company proffered by the Claimants, suggesting investments, represent “*pro causa* evidence.”

223. The Claimants, on the other hand, refer to their negotiations with Kinglor, Techint, Simest and Hypo Vereinsbank to introduce new “Consteel” technology operations, in order to revitalize the Company’s outdated plant and production and to introduce Techint to join Gavazzi Steel as a new major shareholder. This operation, which would have involved an additional investment of some USD 20,000,000, was ultimately not realized because Gavazzi Steel’s bank accounts remained blocked. For the Respondent, however, the Claimants did not submit any convincing proof that this potential investment project would ever have materialized – the potential project can, in no events, be considered an actual investment.²³³

224. Finally, the Respondent observes that the Claimants did not respect their investment obligations under Annex No. 6 of the Share Purchase Contract, even as amended by the Addendum of 7 July 2000. Amended Annex No. 6 provides that USD 2,000,000 would have to be invested during the period 24 June 2000 - 23 June 2001 with the following “Investment objectives”: “Oxygen factory,” “Cooling water station Constructions,” “Transformation post.” It further provides that USD 4,000,000 would have to be invested during the period 24 June 2001-23 June 2002 with the following “Investment objectives”: “Stoves and accessories.”²³⁴ No evidence has been submitted that the Claimants invested in these specific items within the imposed timeframe of June 2000 to June 2002.

(3) *General Mismanagement*

²³³ See R-PHB, paras. 262-68; R-RPHB, paras. 56-57; C-RPHB, para. 36; C-RL/OJ/A/CC, paras. 91-94; Hypo VereinsBank Financial Offer, 7 Sept. 2001 (C-51); outline/draft of a share purchase option agreement between Techint and Gavazzi (C-52); draft letter of intent between Techint and Gavazzi, Nov. 2001 (C-53); Gavazzi Steel S.A. “Business Plan for an Investment Project in Rumania,” June 2002 (C-54); “Master Plan Regarding the improvement of the Steel-plant department (from scrap yard to two continuous casting machines) – Application of the Consteel technology,” prepared by Kinglor Ltd. for Gavazzi Steel S.A., Apr. 2002 (C-55); document described by the Claimants as the Technical Offer by Techint, 12 June 2001 (C-68); document titled “Details of Investments,” prepared by Kinglor SRL (C-69); Raimondo di Carpegna Varini witness statement (CW5); Betto Stendardi witness statement (CW6); hearing testimony of Raimondo di Carpegna Varini (Hearing Transcript, 4 June 2014, at 535-46); hearing testimony of Betto Stendardi (Hearing Transcript, 4 June 2014, at 547-52).

²³⁴ See *supra* para 46.

225. For the Respondent, the main cause of Socomet's insolvency was the Claimants' faulty management of the Company from July 1999 onwards.²³⁵
226. The Respondent contends that Socomet was profitable before the Claimants took over the Company but became insolvent under the Claimants' management. Socomet's 31 December 1998 balance sheet shows that the Company was not in financial difficulties in July 1999, as the Claimants allege.²³⁶
227. The Claimants contend that Socomet had made no profit in 1998; the nominal profit of Lei 1.315 billion (equaling some USD 70,000), as entered on the 31 December 1998 balance sheet, must be considered against the massive Lei 115.486 billion in "[d]ebt-related penalties not included in the balance sheet."²³⁷ As Claimant Mr. Marco Gavazzi testified at the hearing, after he and his brother joined the Board of Directors of the Company, they discovered that the indication of a profit on the 31 December 1998 balance sheet was "false."²³⁸ The Respondent submits that the Claimants, as Directors of the Company, did not take any judicial action against those responsible for the alleged irregularities in the balance sheet and, thus, had "tacitly assumed responsibility and liability for the financial situation of the Company."²³⁹
228. To prove the Claimants' mismanagement, the Respondent refers to the Minutes of the Board of Directors of the Company between July 1999 and August 2002, which show that, in that period, the Company did not pay its current debts to the State Budget and to its suppliers, that loans were not used for business purposes, that workers' salaries were not paid (which led to strikes), that revenues from export operations were not transferred to the Company's accounts (but to Gavazzi Steel Consultants), that the Company ceased production, and that the Company's equipment was stolen.
229. The Claimants contend that they created a Virgin Islands offshore company, Gavazzi Steel Consultants, to develop Gavazzi Steel's international business, to employ and

²³⁵ R-PHB, para. 138 *et seq.*

²³⁶ *Id.* paras. 162-64; Ministry of Finance, Balance Sheet Forms on 31 Dec. 1998, Socomet S.A. (R-135).

²³⁷ C-RPHB, para. 34; Statement of Socomet's General Manager annexed to the 7 July 2000 Addendum No. 2 to the Share Purchase Contract (R-14).

²³⁸ Hearing testimony of Marco Gavazzi (Hearing Transcript, 3 June 2014, at 361).

²³⁹ R-PHB, paras. 164-67, 208-209.

pay Italian steel engineers for operating and modernizing the factory,²⁴⁰ to collect purchase orders from foreign clients, and, generally, to assist the Claimants in managing the Company.²⁴¹ The Respondent, however, is of the opinion that Gavazzi Steel Consultants was not necessary for the operations of Gavazzi Steel and that its real purpose was to benefit from the tax advantages of the Virgin Islands by, *inter alia*, obliging the Company to pay Gavazzi Steel Consultants a 3% commission on obtained orders, thus depriving the Company of necessary funds.²⁴²

230. The Respondent stresses that it never approved the creation of Gavazzi Steel Consultants. The permission from the Romanian Central Bank to allow Socomet to transfer USD 100,000 for the acquisition of Gavazzi Steel Consultants is, for the Respondent, no proof that the Respondent considered Gavazzi Steel Consultants to be an investment under the Share Purchase Contract.²⁴³

231. Actually, as the Claimants point out, the Company lacked the necessary funds to pay these USD 100,000, and the Claimants intended only to transfer GBP 1,000, the amount equal to the nominal capital of Gavazzi Steel Consultants. As the Company in fact never paid this amount, Gavazzi Steel Consultants remained fully owned by the Claimants.²⁴⁴ Moreover, the Company never paid any commission to Gavazzi Steel

²⁴⁰ The Claimants contend that Socomet could not employ those technicians directly due to restrictive Romanian legislation and the fact that the Italian steel engineers did not agree to their salaries being paid in Lei (C-RPHB, para. 30).

²⁴¹ *See supra* para. 56. The Claimants assert that they announced, at their first meeting of the Board of Directors on 9 July 1999, the creation of Gavazzi Steel Consultants in order to advise “SOCOMET in sales and marketing matters and in obtaining production orders . . . [Gavazzi Steel Consultants] would be based on the technical and professional skills of top firms and sales professionals that prefer to work with Western companies and who would be in charge with European and Mediterranean markets.” (“Minutes of the Board of Directors of S.C. Socomet S.A.,” 9 July 1999 (C-36) (C-RPHB, para. 30)). At the same meeting, the Claimants continue, Mr. Marco Gavazzi announced his intention “to transfer the shares of the new company to SOCOMET SA, in a ratio of 100%, a percentage that would avoid future misunderstandings with the Romanian tax authorities” and conflicts of interest (C-RPHB, para. 30).

²⁴² R-PHB, paras. 181-184, 193-194; Commercial Agency Contract between Gavazzi Steel S.A. and Gavazzi Steel Consultants B.V., 25 Aug. 1999 (C-65). The Respondent alleges that the Claimants did not inform the other members of the Board of Directors of Gavazzi Steel S.A. of the existence and role of Gavazzi Steel Consultants, or of the conflict of interest between the two companies.

²⁴³ R-PHB, paras. 174-80.

²⁴⁴ C-RPHB, para. 30. In support, the Claimants rely on Minutes of meetings of Socomet’s Board of Directors held on 14 September and 16 November 1999 (C-36).

Consultants, and the salaries of the Italian engineers, totaling USD 500,000.36, were entirely paid by the Claimants.²⁴⁵

232. Moreover, the Respondent continues, on 5 December 2001, Gavazzi Steel authorized the company Mi & Cor Comaltex S.R.L. (“Mi & Cor”), its exclusive sales agent for the domestic market, to mortgage the Company’s assets to obtain loans and to incur new debt,²⁴⁶ as arbitrator Dr. Dragoș-Alexandru Sitaru confirmed in his dissenting opinion to the 2007 Romanian Award.²⁴⁷ As another example of mismanagement on the part of the Claimants, the Respondent refers to the imprudence of Mr. Stefano Gavazzi in signing a blank check, which was subsequently filled out for an exorbitant amount and refused by the bank.²⁴⁸

233. For the Respondent, the Claimants’ mismanagement was also illustrated in the letter of 8 January 2001, by which Gavazzi Steel’s General Manager requested the Romanian Minister of Finance to investigate the Company’s privatization – which the General Manager termed “fraudulent” – and its economic results.²⁴⁹ In his letter, the General Manager complained that (i) the investments of USD 2,000,000, due for the period 1 June 1999 – 1 June 2000, had not been made; (ii) that the Company’s debts had increased from Lei 321,636,058,000 as of 31 July 1999 to Lei 483,518,635,860

²⁴⁵ In support, the Claimants rely on a statement dated 26 September 2002 by Banca Commerciale Lugano (Switzerland) (C-62) and on an internal Gavazzi Steel Consultants memorandum (“Pro-Memoria”) dated 26 Dec. 1999 (C-63).

In this context, three Italian former employees sued Claimant Marco Gavazzi before the labor court in Como, Italy for payment of unpaid salaries. This labor dispute, the Respondent contends, resulted in a decision by the Como court on 4 September 2001, ordering Marco Gavazzi to pay three months’ salaries to the employees. The decision of the Como court was confirmed by the Cassation Court in Rome on 6 April 2006 (R-PHB, paras. 186-87).

²⁴⁶ R-PHB, paras. 158-60.

²⁴⁷ *Autoritatea pentru Valorificarea Activelor Statului v. Marco Gavazzi et al.*, Court of International Commercial Arbitration Attached to the Chamber of Commerce and Industry of Romania, Case No. 743/2002, Dissenting Opinion of Dragoș-Alexandru Sitaru (30 Oct. 2007) (R-3).

²⁴⁸ In May 2002, Claimant Stefano Gavazzi left a signed blank check in the Company’s safe, to be used in case of emergency while he was in Italy undergoing surgery. This check was abusively filled out in the amount of Lei 9,999,999,999 [at that time the equivalent of some € 333,000] by the Company’s Director General (who was subsequently dismissed), triggering Socomet’s insolvency (hearing testimony of Claimant Marco Gavazzi; Hearing Transcript, 3 June 2014, at 425). The check later wound up in the hands of Mi & Cor, which, according to the Claimants, used it to blackmail Gavazzi Steel S.A. (C-RPHB, para. 32; hearing testimony of Florin Frumosu (Hearing Transcript, 4 June 2014, at 586-587)), before finally presenting it to the Romanian Commercial Bank. Payment on the check was refused and Claimant Stefano Gavazzi was charged for, among other things, embezzlement, forgery, fraud, and “crimes related to companies.” He was later acquitted. (Criminal File No. 0048/01; 0049/01 (R-49, translated from Romanian into English)).

²⁴⁹ R-PHB, para. 194 *et seq.* & letter dated 8 Jan. 2001 from Margan Ion, General Manager of Gavazzi Steel S.A., to the Romanian Minister of Industry and Resources (R-44, translated from Romanian into English).

on 31 November 2000; (iii) that the Company's assets had been "decimated" through "asset sales" and "massive scrapping and dismantling of equipment"; (iv) that the production of "electro-steel and rolled products" had decreased; (v) that exports had decreased significantly; (vi) that the Company had embezzled the compensation paid by the Romanian State for laying off 500 employees by hiring outside staff at the same level with the lay-offs, thereby practically "annulling" the effects of the lay-offs; (vi) that employee salaries had not been paid in time, resulting in strikes; and (vii) that Claimant Stefano Gavazzi, contrary to assurances he had given, "left the company" on 22 December 2000 for the winter holidays in Italy, "leaving it without electricity and pit gas."²⁵⁰

234. The Respondent further refers to the conclusion of Iprolam S.A, the judicial liquidator of Gavazzi Steel, that "[i]nefficient management" had been one of the causes of the difficulties Gavazzi Steel had encountered.²⁵¹

235. The Respondent concludes, therefore, that because of the Claimants' mismanagement, the value of the Company's net assets decreased from Lei 68,056,056,000 in 1998 to Lei 44,894,261,000 in 2002, receivables were not collected, and the Company's debts increased threefold between the end of 1998 and the end of 2002.²⁵²

(ii) *The Tribunal's Decision*

236. The Tribunal agrees with the Claimants that the Company's insolvency was triggered by its failure to pay the increases for overdue debts to the State budget and by the blocking of its bank accounts, which resulted from this failure. However, neither Article 10.1 of the Share Purchase Contract, nor the Government's Note No. 5/3228 of 17 May 1999 mentioned that overdue debts would remain payable by the Company.

²⁵⁰ In his letter, the General Manager also states the following:

[T]he [described] illegalities . . . (including the privatization) have occurred after my dismissal on 8.02.1999 from the position of GENERAL MANAGER of SC SOCOMET SA, for political reasons . . . by the former [SOF] manager . . . and my replacement with a person who was a PNTCD member. After my dismissal, I was forced to retire starting with 01.06.1999, and on May 17, 2000 I was re-assigned as DEPUTY GENERAL MANAGER, and starting with 01.12.2000, appointed GENERAL MANAGER of SC GAVAZZI STEEL SA.

Letter dated 8 January 2001 from Margan Ion, General Manager of Gavazzi Steel S.A., to the Romanian Minister of Industry and Resources (R-44, translated from Romanian into English).

²⁵¹ R-PHB, para. 203 & Note regarding the Plan of judicial re-organization of Gavazzi Steel S.A., prepared by the judicial liquidator Iprolam S.A., Mar. 2004 (R-52, translated from Romanian into English).

²⁵² R-PHB, para. 161.

On the contrary, they granted a general waiver of “the Company’s debts to State Budget, Budget for Social Assurances, Health Budget, including credits got from the Ministry of Finances for paying the power and natural gas supply,” as well as the “cancellation of all related penalties and/or delay penalties.” In fact, the blocking of the Company’s bank accounts, as well as the diversion of its funds to occasional payment of these debts (instead of investments and operations of the plant), were precisely caused by the Respondent’s failure to implement its obligations assumed in the Government’s Note No. 5/3228. The Respondent is not entitled to argue that the Claimants caused the non-implementation of the rescheduling and waivers and thus its own insolvency because of the failure promptly to pay “increases for overdue debts to the State budget,”²⁵³ since the rescheduling and waivers, to which the Respondent committed itself, included these debts.

237. The argument that the Company’s failure and subsequent insolvency was due to insufficient investments has been discussed by the Parties in great detail as to whether investments were made by the Claimants and, if so, which investments were made. However, the Tribunal is conscious that the debts, which had to be rescheduled or waived under Article 10.1 of the Share Purchase Contract and the Government’s Note No. 5/3228 of 17 May 1999, have actually not been waived or rescheduled. The Respondent argued that the Claimants have not exercised their right to cancel the Contract as a result of the rescheduling or waivers not being granted within 40 days of the signature of the Contract, but the rescheduling and waivers remained a preliminary condition for the Claimants’ performance of their investment obligations even if the contract had not been cancelled. The Government’s Note No. 5/3228 expressly mentions that the rescheduling and waivers were a condition for these investments.

238. Consequently, the Claimants were entitled to suspend investments they were obliged to make under the Contract, as long as they had not obtained the rescheduling and waivers under the conditions granted in the Government’s Note No. 5/3228 of 17 May 1999. The Tribunal agrees with the findings in the 2007 Romanian Award that the failure to reschedule and/or waive the public debts as provided for by the Government’s Note No. 5/3228 of 17 May 1999 was “fundamental, enduring and

²⁵³ R-PHB, para. 293.

paralyzing,” and that the Claimants’ lack of investments was therefore “logically and chronologically subsequent and secondary in importance.”²⁵⁴

239. The insolvency was not, as the Respondent alleges, entirely or partially triggered by the lack of investments required under the Share Purchase Contract. On the contrary, the Respondent’s own failure effectively to reschedule and waive the debts as provided in the Government’s Note No. 5/3228 of 17 May 1999 ensured that these investment could not be carried out.

240. The Tribunal by majority concludes that the Respondent’s acts and omissions following the Government’s Note No. 5/3228 of 17 May 1999, without justified legal basis, solely and exclusively limited the Claimants’ right of possession, control, and enjoyment of the funds they invested in the Company, in breach of Article 4(1) of the BIT. These investments have been subjected to measures having directly or indirectly similar effect as an expropriation in breach of Article 4(2) of the BIT, whereby the measures, in view of Government’s Note No. 5/3228 of 17 May 1999, were not adopted in accordance with due process of law. The Tribunal does not have to decide whether the measures are discriminatory (Article 4(2)(b) of the BIT) or whether a proper procedure was established to determine the amount and method of payment of compensation (Article 4(2)(c) of the BIT). Consequently, the Tribunal decides that, in the present case, the Respondent has breached Articles 4(1) and (2) of the BIT by its failure to reschedule and/or waive debts as set out in the Government’s Note No. 5/3228 of 17 May 1999.

241. The Tribunal emphasizes that the preceding paragraphs discussed the notion of “investment” in the light of the Claimants’ contractual obligation to invest under the Share Purchase Contract. This issue has to be distinguished from the extent to which contributions that the Claimants have made to the Socomet project qualify as a “protected investment” under Article 1(b)/(d)/(f) of the BIT, which latter issue may have to be discussed further in the quantum phase of the present proceedings.

242. The Tribunal is aware that various events occurred as to the Company in the four years after the Claimants acquired the majority of its shares. The Minutes of the meetings of the Board of Directors refer to even more incidents and difficulties than the ones raised

²⁵⁴ 2007 Romanian Award, at 18 (C-6).

by the Respondent. Indeed, the Claimants certainly also encountered fierce obstruction from the Company's workers, staff, and suppliers. The Tribunal will hear further submissions during the quantum phase of the proceedings on these difficulties and incidents as well as other matters, which may be attributable to factors for which the Respondent bears no legal responsibility under the BIT.

B. The Claimants' Additional, Subordinate Claim Under Article 2(5) of the BIT

a) *The Claimants' Position*

243. The Claimants submit that, by its judiciary annulling the 2007 Romanian Award and rendering its decision of 16 March 2011, by the judgment of the Court of Appeals of Bucharest confirmed on 23 February 2012 by the Romanian Court of Cassation, the Respondent breached its duty to ensure to them "effective means of asserting rights" and "enforcing rights" with respect to their investment, thereby violating the Claimants' due process rights and committing a denial of justice, within the meaning of Article 2(5) of the BIT:

*Each Contracting Party undertakes to provide effective means of asserting claims and enforcing rights with respect to this present agreement, to the investment authorizations and properties. Each Contracting Party shall not impair the right of the investors of the other Contracting Party to have access to its Courts of justice, administrative Tribunals and agencies and all other bodies exercising adjudicatory authority.*²⁵⁵

244. The Court of Appeals annulled the 2007 Romanian Award on the ground that it "breached the principle of equal treatment, the principle of observance of the right to defence and the principle of contradiction, which are public order principles."²⁵⁶

245. The Claimants contend that the Court of Appeals utterly misrepresented the record of the arbitral proceedings. In support of their contentions, the Claimants refer *inter alia* to the 2007 Romanian Award,²⁵⁷ to the procedural orders issued by the arbitral

²⁵⁵ BIT, Art. 2(5) (English text) (C-4). (Emphasis added.)

²⁵⁶ Bucharest Court of Appeals, Commercial Section A VI-A (*Curtea de Apel București, Secția A VI-A Comercială*), Commercial Decision No. 65 (Case No. 8799/2/2007), at 11 (22 Apr. 2009) (C-38, translated from Romanian into English). See *supra* para. 79.

²⁵⁷ C-6; R-2.

tribunal,²⁵⁸ to the minutes of the hearings held in Bucharest on 20 and 21 March 2001,²⁵⁹ to the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania and Bucharest,²⁶⁰ and to the expert testimony of Professor Sergiu Deleanu.²⁶¹

246. To counter the Respondent's argument that the arbitral tribunal should have appointed its own expert, instead of relying on the Claimants' expert (*see below*), the Claimants proffer that, in Romania, as elsewhere, international arbitral tribunals may rely on expert evidence provided by party-appointed experts and are not restricted to considering expert evidence provided by tribunal-appointed experts. To address Respondent's objection that, as Romanian courts would have to appoint their own court-expert, the arbitral tribunal should have done the same, the Claimants assert that, even if different rules may apply in Romanian domestic judicial courts, such domestic court practice is irrelevant for international commercial arbitration.

247. The Claimants further specify that the arbitral tribunal in the 2002 Romanian Arbitration actually afforded both sides the opportunity to present reports prepared by party-appointed experts: Gavazzi thus submitted the Deloitte & Touche report, whereas AVAS submitted an 2003 Auditing Report and the Iprolam Plan of Judicial Reorganization of Gavazzi Steel S.A. In addition, the Claimants aver, the arbitral tribunal, by unanimous decision, afforded both parties ample opportunity to comment on the admissibility, presentation, and content of the evidence. AVAS, however, did not avail itself of this possibility, nor did it make use of the possibility it had requested to hear its witnesses in Bucharest. Also, AVAS, according to the Claimants, did not challenge the minutes of the witnesses heard in Milan.

248. According to the Claimants, all this evidence shows that both parties had ample opportunity to make their case and to submit evidence (AVAS itself produced an expert report on damages), and that the parties also had full opportunity to challenge

²⁵⁸ 2002 Romanian Arbitration, Procedural Order No. 5, 10 Feb. 2006 (R-55); 2002 Romanian Arbitration, Procedural Order No. 6, 18 May 2006 (R-56).

²⁵⁹ C-71 & C-72.

²⁶⁰ C-76.

²⁶¹ Legal Opinion of Professor Sergiu Deleanu, School of Law, University "Babeş-Bolyai," Cluj-Napoca, Romania (2 Dec. 2013) (Ex. CEW-2); Hearing Transcript, 4 June 2014, at 588-660 (testimony of Sergiu Deleanu).

the partial lack of video transmission and its replacement by written witness statements (which replacement was agreed to by the parties and the arbitral tribunal), if they so wished.²⁶²

249. The Claimants contend that, in annulling the 2007 Romanian Award, the Court of Appeals manifestly breached Romanian law as well as UNCITRAL, ECHR, and general arbitration principles, which limit the grounds for the annulment of an award to serious departures from fundamental notions of public policy and procedural justice.²⁶³ Referring to the legal opinion of their expert witness on Romanian law, Professor Sergiu Deleanu, the Claimants assert that the arbitral tribunal had “not breached the public policy of Romanian private international law, and that Romanian courts have wrongly assessed that a violation occurred in this respect. . . .”²⁶⁴ According to the Claimants, Romanian scholarly writing confirms that, under the Romanian Code of Civil Procedure, Romanian courts have to interpret very strictly the grounds for annulment of an arbitral award. Very few requests for annulment have ever been successful.²⁶⁵
250. The Claimants are of the opinion that the Romanian courts were neither entitled to extensively review the merits of the international commercial arbitral award, nor to decide the counterclaim on the merits.
251. The Claimants conclude that the Court of Appeals’ annulment decision deprived them, in “breach of property rights under the European Convention on Human Rights”, of USD 14,377,352 and € 1,163,468, granted to them by the 2007 Romanian Award as compensation for their investment.²⁶⁶ In this context, the Claimants point out that

²⁶² C-PHB, para. 101.

²⁶³ C-PHB, paras. 95, 105-10; C-Request, paras. 138-46.

²⁶⁴ Legal Opinion of Professor Sergiu Deleanu, School of Law, University “Babes-Bolyai,” Cluj-Napoca, Romania (2 Dec. 2013) (CEW-2).

²⁶⁵ C-PHB, paras 104-6. The Claimants quote from Crenguta Leaua, *Update on Romanian Jurisprudence on the Annulment of Arbitral Awards*, THE EUROPEAN AND MIDDLE EASTERN ARBITRATION REVIEW 2012 (published by Global Arbitration Review) 82, 84 (C-45). In this connection, the Claimants also rely, among other things, on the written legal opinion of Professor Sergiu Deleanu, who concludes that “the application of [the] grounds for setting aside an arbitral award [] as made by the Court of Appeals of Bucharest and accepted by the High Court of Cassation and Justice in the AVAS-Gavazzi case are totally in contradiction with the consolidated European and Romanian jurisprudence on the matter, as well as with Romanian scholars specialized in it.” Legal Opinion of Professor Sergiu Deleanu, School of Law, University “Babes-Bolyai,” Cluj-Napoca, Romania (2 Dec. 2013), para. 130 (CEW-2).

²⁶⁶ C-PHB, para. 113.

international decisions considered that final awards compensating a foreign investor, such as the 2007 Romanian Award, are property rights or, more appropriately, part of the protected investment.²⁶⁷

252. The full amount of damages suffered by the Claimants because of breaches of the BIT, the Claimants assert, corresponds to the full value of the 2007 Romanian Award, plus the attorneys' costs incurred by the Claimants in the annulment proceedings before the Romanian judiciary.²⁶⁸

b) The Respondent's Position

253. The Respondent denies that it has breached Article 2(5) of the BIT. In support of its position, the Respondent relies on the views expressed by its expert witness on Romanian law, Professor Bazil Oglinda,²⁶⁹ who confirmed that the Court of Appeals acted lawfully in annulling the 2007 Romanian Award on the ground that it violated Romanian public policy pursuant to Article 364(i) of the Romanian Code of Civil Procedure ("CCP"), which provides for annulment if i.a. the award "infringes the public policy, the principles of morality or the imperative legal provisions."²⁷⁰ For the Respondent, the Court of Appeals correctly concluded that the Award violated the equal treatment of the parties, AVAS' right of defense as well as the adversarial principle. The Respondent points out that also European legal systems and the UNCITRAL Model Law on International Commercial Arbitration allow annulment on such grounds.²⁷¹

254. The Respondent endorses the Bucharest Court of Appeals in its decision that it was unacceptable that the arbitral tribunal had relied on an expert report produced by Gavazzi²⁷² in breach of the Romanian Code of Civil Procedure: the complexity of the case would have required the Arbitral Tribunal "to perform a specialized expert

²⁶⁷ *Id.* paras. 113-14. In this connection, the Claimants cite ECHR, *Kin-Stib and Maijic v. Serbia* (Application) No. 12312/05, Judgment (20 Apr. 2010) and *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Award, at 166-67 (30 June 2009).

²⁶⁸ C-PHB, para. 115.

²⁶⁹ Hearing testimony of Bazil Oglinda (Hearing Transcript, 4 June 2014, at 663-99).

²⁷⁰ Article 364 (i) of the Romanian Code of Civil Procedure (R-6, translated from Romanian into English); R-RL/RJ/CC, paras. 656-63; R-PHB, paras. 410-13.

²⁷¹ R-RL/RJ/CC, para. 666; R-PHB, paras. 415-16.

²⁷² "Gavazzi Steel S.A. – Determination of Damages in the Form of Lost Profit," report prepared by Deloitte & Touche, 9 Mar. 2004 (C-56).

appraisal,”²⁷³ rather than basing itself on a unilateral expert report which the parties had requested to be reviewed by an independent expert.

255. For Professor Oglinda, the Respondent’s expert, in cases where “amounts of money” are at stake, “accounting reports are essential, because the arbitrators are no experts and it will be very hard for them to pronounce a legal sentence [sic: award] in the absence of such a proof.”²⁷⁴ By ignoring AVAS’ request that the arbitral tribunal appoint an “international expert” to establish the damages suffered by the parties,²⁷⁵ the arbitral tribunal committed a “serious infringement of the fundamental principle . . . of the right to a fair trial,” in the sense that a refusal or omission by a tribunal to decide a request for evidence constitutes a breach of the adversarial principle.²⁷⁶

256. As also the Court of Appeals stated, for the Respondent, Gavazzi’s report was only an “extrajudicial document.” During the evidentiary hearing, it was clarified that by this term Respondent referred to a unilateral document produced by Claimant during those proceedings.²⁷⁷ The Respondent agrees with the Court of Appeals that the arbitral tribunal’s reliance on the “Master Plan Regarding the improvement of the Steel-plant department”, prepared by Kinglor Ltd. for Gavazzi Steel S.A. in April 2002,²⁷⁸ and the “Plan of Judicial Reorganization of Gavazzi Steel S.A.,” prepared by Iprolam S.A.,²⁷⁹ instead of appointing an independent expert, had to be sanctioned, because a document produced by a party cannot form the basis to award damages when both parties have requested the appointment of an independent expert on the very issues addressed by such a document.²⁸⁰ The Respondent also agrees with the Court of Appeals that the arbitral tribunal had erroneously stated that AVAS had acquiesced in

²⁷³ Bucharest Court of Appeals, Commercial Section A VI-A, Commercial Decision No. 65 (Case No. 8799/2/2007), at 10 (22 Apr. 2009) (C-38, translated from Romanian into English)).

²⁷⁴ Hearing testimony of Bazil Oglinda (Hearing Transcript, 4 June 2014, at 666). The Respondent, in this connection, argues that, in the absence of a report on the assessment of damages prepared by a tribunal-appointed expert, the arbitral tribunal “could not have issued an award,” and that, if there is “a need for a specialist to express [an] opinion concerning a matter in a trial[,] the respective court *must* resort to such expert.” R-PHB, para. 123.

²⁷⁵ See 2002 Romanian Arbitration, Minutes of Hearing, 20 Mar. 2006 (C-71).

²⁷⁶ R-PHB, paras. 462, 464; Bazil Oglinda, expert opinion, para. 105 (emphasis omitted).

²⁷⁷ R-RL/RJ/CC, para. 674; R-PHB, paras. 455-56, 462.

²⁷⁸ C-55.

²⁷⁹ C-57.

²⁸⁰ R-RL/RJ/CC, para. 674; R-PHB, para. 462.

that report's conclusions,²⁸¹ and that the arbitral tribunal had wrongly based its 2007 Romanian Award on witness statements that could not be video-recorded due to technical problems, thereby rejecting AVAS' request to hear the witnesses in person.²⁸² More generally, the Respondent concurs with the Court of Appeals' opinion that the arbitral tribunal did not afford to AVAS the "actual possibility" to support its arguments, invoke evidence, challenge Messrs. Gavazzi's evidence, and file procedural objections.²⁸³ Therefore, according to the Respondent and the Court of Appeals, the 2007 Romanian Award was based only on evidence presented by Messrs. Gavazzi, without regard to AVAS' rights.²⁸⁴

257. The Court of Appeals, so asserts the Respondent, did not annul the award because it disagreed with the arbitral tribunal's assessment of the evidence, but rather because of "breaches of the fundamental principles of procedure under Romanian law."²⁸⁵ Further, the Respondent asserts, the Court of Appeals did not review the merits of the dispute in the proceedings to annul the 2007 Romanian Award, but did so under Article 366 CCP only *after* the award was set aside, in order to render a decision on the merits.²⁸⁶

258. Furthermore, the Respondent alleges, the Claimants were afforded a full opportunity to exercise their rights of defence and to present their case before the Court of Appeals, both in the annulment proceedings and in the subsequent proceedings on the merits. They also availed themselves of their right of appeal. Accordingly, Respondent

²⁸¹ R-PHB, paras. 440-41.

²⁸² R-RL/RJ/CC, para. 674; R-PHB, paras. 457, 470.

²⁸³ R-PHB, para. 442.

²⁸⁴ R-RL/RJ/CC, paras. 674.

²⁸⁵ R-RPHB, para. 125.

²⁸⁶ Article 366 of the Romanian Code of Civil Procedure provides:

By admitting the action, the court will annul the arbitration award and, if the state of the proceedings so permits, it will also rule on the substance of the case, within the limits of the arbitration convention. However, if the ruling on the substance requires new evidence, the court will rule on the substance after such evidence is produced. In this last case, the annulment decision may only be challenged at the same time with the decision on the substance.

The court decision related to the action for annulment may only be challenged by second appeal.

(R-6, translated from Romanian into English).

contends that at no time did it “impair Claimants’ right to have access to [Romania’s] courts of justice” within the meaning of Article 2(5) of the BIT.²⁸⁷

c) *The Tribunal’s Decision*

259. The Tribunal recalls that Article 2(5) of the BIT requires Romania to “provide effective means of asserting claims and enforcing rights” and that it may not “impair the right of access to its Courts of Justice.”

260. The Tribunal takes the view that whether the Respondent has breached Article 2(5) of the BIT may be decided based on the reasoning of the tribunal in *White Industries v. India*,²⁸⁸ where the tribunal expounded on the application of the “effective means” standard in BITs. This Tribunal notes that “effective means,” also the language used in Article 2(5) of the BIT at hand, is a wide notion that does not guarantee that each and every decision is correct. In the present case, the Tribunal notes that the complaint was not that there was no effective means for the Claimants to assert their claims and enforce their rights. Nor was the complaint that Romania has not respected the separation of powers and that the Romanian government has intervened in the judicial decision-making. Nor has it been alleged that the courts intended to deprive the Claimants of their fundamental rights. The Claimants criticize only that the decision that was arrived at, was wrong.

261. The Tribunal examines also the issue whether the Romanian courts’ annulment of the 2007 Romanian Award amounts to an abuse of rights contrary to the international principle of good faith, *i.e.*, did they interpret and apply Article V(2)(b) of the New York Convention in a discriminatory manner?²⁸⁹

262. This, in the eyes of this Tribunal, does not constitute an argument of a denial of justice but relates to judicial discretion, which is inherent in the application of the law and certainly in the assessment of public policy considerations. As was stated in *Frontier Petroleum Services Ltd. v. Czech Republic*:

²⁸⁷ R-RL/RJ/CC, para. 670; R-PHB, para. 418.

²⁸⁸ *White Industries Australia Limited v. The Republic of India*, Final Award (UNCITRAL), para. 11.3.2 (30 Nov. 2011).

²⁸⁹ *Frontier Petroleum Services Ltd. v. Czech Republic*, Final Award (UNCITRAL), para. 525 (12 Nov. 2010).

526. ... [T]he reference to “public policy” in Article V (2)(b) of the New York Convention refers to . . . the particular national conception of international public policy that is relevant rather than to a conception of public policy that is in some way detached from the legal system at the place where recognition and enforcement is sought....

527. ... States enjoy a certain margin of appreciation in determining what their own conception of international public policy is.²⁹⁰

263. The Tribunal does not find proof that the Romanian Courts have abused the notion of “public policy” taking into account that they were entitled to interpret and apply this notion to protect essential principles of the Romanian legal order as they perceived it.

264. Moreover, the Tribunal accepts – with Dolzer and Schreuer – that even a “clear and malicious application of the law” might be covered by the principle of due process:

*The principles of access to justice, fair procedure, and the prohibition of denial of justice relate to three stages of the judicial process: the right to bring a claim, the right of both parties to fair treatment during the proceedings, and the right to an appropriate decision at the end of the process. In Azinian v. Mexico, [the tribunal found that] “[t]here is a fourth type of denial of justice, namely the **clear and malicious application of the law.**”²⁹¹*

However, in the present case, nothing along the lines of a “clear and malicious application of the law” has been proven by the Claimants.

265. The Tribunal also bears in mind the well-known passage from Brierly’s *The Law of Nations*:

It will be observed that even on the wider interpretation of the term “denial of justice” which is here adopted, the misconduct must be extremely gross. The justification of this strictness is that the independence of courts is an accepted canon of decent government, and the law [i.e., international law] therefore does not hold a state responsible for their faults. It follows that an allegation of a denial of justice is a serious step which states, as mentioned above, are reluctant to take when a claim can be

²⁹⁰ *Frontier Petroleum Services Ltd. v. Czech Republic*, Final Award (UNCITRAL), paras. 526-527 (12 Nov. 2010) (emphasis in original).

²⁹¹ RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 163 (Oxford 2008) (emphasis added) (footnote omitted), quoting Robert Azinian, *Kenneth Davitian & Ellen Baca v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, para. 103 (1 Nov. 1999).

*based on other grounds [i.e. an international claim in support of its aggrieved national].*²⁹²

The Tribunal does not find, on the evidence adduced in this arbitration, extremely gross misconduct by the Respondent's judiciary; and, hence, it decides that the Claimants' allegation of denial of justice is unproven.

266. Therefore, the Tribunal dismisses all claims by the Claimants in this regard on the following ground: for the majority, for want of sufficient evidence to discharge the Claimants' burden of proof, and for the minority for lack of any such evidence.²⁹³

267. All issues relating to heads of damages, quantification of damages, and other like matters will be considered by the Tribunal in the next phase of the proceedings.

²⁹² J.L. BRIERLY, *THE LAW OF NATIONS* 287 (Oxford 1963).

²⁹³ For the same reasons, the Tribunal concludes that there was no breach of Article 10(1) of the BIT.

IX. THE OPERATIVE PART

268. For the reasons set out above, the Tribunal decides as follows:

- (1) Jurisdiction Over the Claimants' Claims and Respondent's Counterclaim
 - a. The Tribunal has jurisdiction over the Claimants' claims under both the BIT and the ICSID Convention, and decides by majority that the Claimants' case is admissible.
 - b. By majority: The Tribunal has no jurisdiction over the Respondent's counterclaim under the BIT.
- (2) Merits of the Claimants' Claims
 - a. By majority: Article 2(3) BIT: By its failure to restructure the Company's Debt, the Respondent committed a breach of the fair and equitable treatment standard under Article 2(3) of the BIT. The Tribunal therefore must assess the compensation for the breach of Article 2(3) in the next phase of this arbitration.
 - b. By majority: Article 4(1) and 4(2) BIT: The Respondent's acts and omissions following the Government's Note No. 5/3228 of 17 May 1999 constituted an expropriation in breach of Articles 4(1) and (2) of the BIT. The Tribunal further decides that the Respondent breached Article 4(2)(c) of the BIT, which requires an appropriate procedure to determine the amount and method of payment of compensation in case of expropriation. The Tribunal therefore must assess compensation for breach of Article 4 in the next phase of this arbitration.
 - c. Article 2(5) BIT: The Claimants have not proved that the Respondent, through its judiciary, failed to provide the Claimants with effective means to assert their claims and enforce their rights. Therefore the Respondent is not liable for breach of Article 2(5) of the BIT and Claimants' claims in this regard (including denial of justice) are dismissed.

- (3) Damages and Costs: All issues relating to compensation and related matters (including interest and allocation of costs) will be considered by the Tribunal in the next phase of this arbitration.
- (4) Save as ordered above, all other claims made by the Parties in this arbitration are dismissed.

A dissenting opinion by arbitrator Mauro Rubino-Sammartano is attached hereto.

SIGNED BY THE TRIBUNAL:

[signed]

Hans van Houtte
President

Date: 17 April 2015

[signed]

V.V. Veeder

Date: 16 April 2015

[signed]

Mauro Rubino-Sammartano

Date: 14 April 2015