

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

Excerpts of the Award of April 18, 2017 and Decision on Rectification of July 13, 2017 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006

Claimant

Marco Gavazzi and Stefano Gavazzi

Respondent

Romania

Tribunal

Hans van Houtte (President of the Tribunal, Belgian), appointed by the co-arbitrators

Mauro Rubino-Sammartano (Italian), appointed by the Respondent

V.V. Veeder (British), appointed by the Claimants

Award

Award of April 18, 2017; dissenting opinion of Mauro Rubino-Sammartano; Decision on Rectification of July 13, 2017; dissenting opinion of Mauro-Rubino-Sammartano

Instrument relied on for consent to ICSID arbitration

Agreement between the Government of the Italian Republic and the Government of Romania on the Mutual Promotion and Protection of Investments signed December 6, 1990, which entered into force on March 14, 1995 (terminated on March 14, 2010, subject to Article 11(3)).

Procedure

Applicable Arbitration Rules: ICSID Arbitration Rules of 2006

Place of Proceedings: Paris, France

Procedural Language: English

Full procedural details: Available at <https://www.worldbank.org/icsid>

Factual Background

The dispute arose from the privatization of a Romanian steel company, S.C. Socomet S.A. (“Socomet”). In 1999, the Claimants entered into a contract to acquire 70% of the shares of Socomet (the “Contract”). The Contract provided that the Company’s existing debts would be rescheduled or forgiven and the Claimants undertook to make certain capital contributions and investments in Socomet.

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Excerpts of Award

The Claimants alleged that Socomet's debt was not restructured and that its bank accounts were frozen to cover the debt further to a directive of the Minister of Finance. The Claimants further alleged that they tried to revive Socomet, but as the company became practically insolvent, the Claimants efforts to revitalize it were not feasible. Socomet was subsequently subject to a judicial reorganization under Romanian Law.

Prior to the ICSID arbitration, the Romanian entity that entered into the Contract, Authority for Privatization and Management of State Ownership ("APAPS"), initiated commercial arbitration proceedings against the Claimants alleging breach of contract. In 2007, the tribunal in that case decided in favor of the Claimants, granting the Claimants' counterclaims in full. That award was challenged before the Bucharest Court of Appeals, which annulled the award in 2009 and held against the Claimants again in 2011. The Claimants' challenge to both decisions was unsuccessful.

The Claimants filed a request for arbitration with ICSID in 2012. A Decision on Jurisdiction, Admissibility and Liability was issued on April 21, 2015. The Tribunal unanimously held that it had jurisdiction over the Claimants' claim and, by majority, that it lacked jurisdiction over the Respondent's counterclaims. It further held by majority that the Respondent had breached the fair and equitable treatment standard under Article 2(3) of the BIT and that the acts and omissions of the Respondent also constituted an expropriation in breach of Article 4 of the BIT. The claim that there was a denial of justice was dismissed. Further to the Parties' agreement, the Decision, including the dissenting opinion of Mauro Rubino-Sammartano, was published on the ICSID website together with all procedural orders issued in the case.

On April 18, 2017, the Tribunal rendered its Award ordering the Respondent to pay compensation to the Claimants, including an award of costs. A Decision on Rectification was issued on July 13, 2017 correcting the sums due under the Award.

EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MARCO GAVAZZI AND STEFANO GAVAZZI

Claimants

and

ROMANIA

Respondent

ICSID Case No. ARB/12/25

AWARD

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

Secretary of the Tribunal
Martina Polasek

Assisting Legal Counsel
Celeste Mowatt

Date of dispatch to the Parties: 18 April 2017

REPRESENTATION OF THE PARTIES

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

2002 Business Plan	Gavazzi Steel S.A. “Business Plan for an Investment Project in Rumania,” June 2002 (C-54);
2007 Arbitration Award	Award of 30 October 2007 in the arbitration pursuant to the Share Purchase Contract
Arbitration Rules	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-LA 1...	Claimants’ legal authorities
C-PHB	Claimants’ Post-Hearing Brief, 9 May 2016
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 Post-Hearing Brief, 22 June 2016
C-RQ	Claimants' Reply on Quantum, 23 November 2015
C-SSQ	Claimants' Second Submission on Quantum, 7 July 2015
Company or Socomet	S.C. Socomet S.A / Gavazzi Steel S.A.
DCF	Discounted Cash Flow
Decision	Decision on Jurisdiction, Admissibility and Liability, 21 April 2015
Deloitte Note	Note of Mr Giovanni Gaspardo of Deloitte Financial Advisory S.r.L., 19 November 2016
Deloitte Report	Revised Expert Report of Mr Giovanni Gaspardo of Deloitte Financial Advisory S.r.L., 29 June 2015
Dissent	Dissenting Opinion of Professor Rubino-Sammartano, 27 April 2015
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
ILC Articles	ILC Articles on the Responsibility of States for Internationally Wrongful Acts
IUSCT	Iran-US Claims Tribunal

KPMG Letter	4 May 2016 letter of Mr Michael Peer of KPMG
KPMG Report	Expert Witness Report of Mr Michael Peer, Partner, KPMG, 1 October 2015
R-1 ...	Respondent's Exhibits
R-CMQ	Respondent's Counter-Memorial on Quantum, 14 October 2015
R-LA 1...	Respondent's legal authorities
R-PHB	Respondent's re-submitted Post-Hearing Brief, 3 June 2016
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, 22 June 2016
R-RQ	Respondent's Rejoinder on Quantum, 8 January 2016
Second KPMG Report	Second Expert Report of Mr Michael Peer, 23 December 2015
Share Purchase Contract	Contract for Selling-Buying Shares No. 145 dated 19 April 1999 between Claimants and State Ownership Fund

I. INTRODUCTION

1. On 21 April 2015, the Tribunal issued a Decision on Jurisdiction, Admissibility and Liability (“Decision”). The operative part of the Decision states:

(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.

2. As to the Tribunal’s Decision, Arbitrator Rubino-Sammartano issued a Partial Dissenting Opinion (“Dissent”). The Decision is incorporated into and forms part of this Award. For ease of reference, the Decision and the Dissent are appended to this Award as Annex 1.

II. PROCEDURAL HISTORY

3. The procedural history of this arbitration leading up to the Decision is contained in paragraphs 5-26 of the Decision. The following provides the procedural history of the arbitration from the date of the Decision to the date of this Award.
4. The Tribunal (by letter of 21 April 2015 sent by the ICSID Secretariat) invited the Parties to confer concerning the procedural timetable relating to the arbitration's further phase on quantum. In due course, the Tribunal issued Procedural Order No. 6 on 9 May 2015, which provided the procedural calendar for the quantum phase. The Claimants were directed to develop further the arguments presented in their 15 July 2013 submission on quantum and accompanying expert report. In particular, the Tribunal directed the Claimants to "elaborate on the methodology adopted by their Expert" and to "complete and qualify their case on quantum based on the Decision (see in particular paragraphs 241 and 242 of the Decision)."
5. On 7 July 2015, the Claimants filed a Second Submission on Quantum ("C-SSQ") accompanied by a revised expert witness report by Mr Giovanni Gaspardo (of Deloitte) dated 29 June 2015 and Exhibits C-71 and C-72.¹
6. On 24 September 2015, the Tribunal issued Procedural Order No. 7 concerning further aspects of the procedural calendar.
7. On 14 October 2015, the Respondent filed its Counter-Memorial on Quantum ("R-CMQ"), accompanied by an expert witness report of Mr Michael Peer (of KPMG) dated 1 October 2015, the second witness statement of Ms Viorica Tataru dated 1 October 2015, and Exhibits R-147 to R-181.
8. On 5 November 2015, the Tribunal issued Procedural Order No. 8 concerning still further aspects of the procedural calendar.

¹ An expert witness report of Mr Gaspardo dated 5 July 2013 was previously filed with the Claimants' Submission on Quantum dated 15 July 2013.

9. On 23 November 2015, the Claimants filed a Reply on Quantum (“C-RQ”), accompanied by an expert witness report by Mr Gaspardo (of Deloitte) dated 19 November 2015 and Exhibits C-73 to C-75. In their Reply, the Claimants objected to the second witness statement of Ms Tataru (which had been filed with the Respondent’s Counter-Memorial on Quantum) and requested that the statement be ruled inadmissible on the basis that her testimony was not relevant to the issues of quantum and instead re-opened issues finally determined during the liability phase by the Decision.
10. On 1 December 2015, the Tribunal issued Procedural Order No. 9 concerning still further aspects of the procedural calendar.
11. On 8 January 2016, the Respondent filed a Rejoinder on Quantum (“R-RQ”) accompanied by a second expert witness report by Mr Peer (of KPMG) dated 23 December 2015 and Exhibits R-182 and R-183. The Respondent also addressed the Claimants’ objections to the second witness statement of Ms Tataru.
12. The President of the Tribunal (with the consent of the Parties and his co-arbitrators) held a pre-hearing organisational meeting with the Parties’ legal representatives by telephone conference on 14 January 2016. During the telephone conference, the Parties’ representatives presented their respective views concerning the second witness statement of Ms Tataru.
13. On 17 January 2016, the Tribunal issued Procedural Order No. 10, which contained a summary of the items discussed during the pre-hearing organisational meeting, including items which had been agreed between the Parties, and provided a timetable for the quantum hearing. The Order decided that the second witness statement of Ms Tataru would be admitted into evidence. It also invited the Parties to agree on a list of issues to be addressed during the joint examination of the Parties’ quantum experts.
14. A hearing on quantum took place in Paris, France, on 1-3 February 2016. In addition to the Members of the Tribunal and the Assistant Secretary of the Tribunal, Ms Celeste Mowatt, present at the hearing were:

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For the Claimants:

Professor Avv. Giorgio Sacerdoti	Counsel for the Claimants
Dr Avv. Anna De Luca	Counsel for the Claimants
Mr Marco Gavazzi	Claimant
Mr Stefano Gavazzi	Claimant

For the Respondent:

Ms Alina Cobuz	Cobuz & Associates Law Firm
Mr Daniel Visoiu	Cobuz & Associates Law Firm
Mrs Diana Croitoru-Anghel	Sirbu Manuela Law Office
Mrs Laura Voinea	Legal Department of the Authority for State Assets Administration
Ms Emilia Toader	Cobuz & Associates Law Firm
Ms Genoveva Luca	Cobuz & Associates Law Firm
Ms Ramona Voinea	Cobuz & Associates Law Firm
Mr Ovidiu Popescu	KPMG
Mr Iulian Portasa	KPMG

The following person was examined as a fact witness:

Ms Viorica Tataru	Legal Department of the Authority for State Assets Administration
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The following persons were examined as expert witnesses:

On behalf of the Claimants:

Mr Giovanni Gaspardo	Deloitte
Ms Alessia Marrocchesi	Deloitte

On behalf of the Respondent:

Mr Michael Peer	KPMG
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15. During the hearing, Exhibit R-184 was admitted into the evidential record.²
16. Also during the hearing, the Respondent objected to certain information that was included in the presentation of the Claimants' expert witnesses (Mr Gaspardo and Ms Marrocchesi), on the basis that the Parties had agreed during the pre-hearing conference not to reference "new damages figures or new evidence in presentations", as recorded in paragraph 12 of Procedural Order No. 10. The Tribunal decided that new figures included in particular slides of the presentation would not be admitted into the evidential file; and it instructed the Parties to consult after the hearing to amend the hearing transcripts to remove all references to figures which had been decided by the Tribunal to be inadmissible. The Tribunal also instructed the Parties to file amended versions of their presentation slides with the inadmissible figures removed.³
17. At the conclusion of the hearing, following consultations with the Parties, the Tribunal decided that two rounds of post-hearing briefs would be filed by the Parties. These instructions were confirmed in the letter of 18 February 2016 sent by the ICSID Secretariat on behalf of the Tribunal. The Tribunal also requested that the Parties address certain issues in their post-hearing briefs,⁴ in particular: (i) the claim for moral damages, (ii) loss of opportunity and (iii) the Award and Partially Dissenting Opinion in *Quiborax v. Bolivia*.⁵
18. At the hearing, each Party identified concerns related to Exhibits entered into evidence by the other Party. The Parties were invited to address these concerns further following the hearing.

² R-184 [...] was referenced at R-CMQ, fn. 91. It was distributed in hard copy format at the hearing and an electronic copy of the exhibit was circulated on 18 February 2016.

³ These instructions were confirmed by letter of 18 February 2016.

⁴ See Hearing on Quantum Transcript, 3 February 2016, pp. 116-117.

⁵ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award and Partially Dissenting Opinion (16 September 2015).

19. The Claimants noted that the translation of Exhibit R-178 did not correspond with the original, Romanian version; and the Claimants also challenged the authenticity of Exhibits R-158 and R-177, which purported to be letters written by the Claimants (This controversy was addressed by the Tribunal's order of 12 April 2016: see below).
20. The Respondent stated that the electronic version of 13 Exhibits that it received from the Claimants were mis-numbered, and did not match the hard copy that it received, nor the index of exhibits provided by the Claimants. As instructed by the Tribunal, the electronic version of those exhibits received by ICSID were made available to the Respondent.
21. On 29 February 2016 the Respondent proposed revisions to the hearing transcript in order to address the removal of references to figures that the Tribunal had decided to be inadmissible. The Claimants commented on the Respondent's proposed transcript revisions on 3 March 2016. The Parties made further comments on the proposed transcript revisions on 7 and 8 March 2016.
22. On 12 April 2016, the Tribunal issued Procedural Order No. 11, by which the Tribunal: (i) decided that Exhibits R-158 and R-177 would remain in the evidential record, and that the Tribunal would consider the disputed authenticity of the documents when evaluating their probative value; (ii) ordered the Respondent to file a corrected translation of Exhibit R-178; and (iii) decided on the disputed revisions to the hearing transcripts. In addition, the Tribunal confirmed its understanding that the issue between the Parties concerning the numbering of certain exhibits received by the Respondent had been resolved.
23. On 15 April 2016, the Respondent filed a corrected translation of Exhibit R-178 and requested the Tribunal to order a graphological examination of Exhibits R-158 and R-177 to address the disputed authenticity of the documents. The Claimants commented on the Respondent's request on 18 April 2016, and the request was subsequently addressed in further correspondence from the Parties.
24. On 22 April 2016, the Tribunal issued Procedural Order No. 12, by which the Tribunal confirmed its decision set out in Procedural Order No. 11 and declined to order a graphological examination of Exhibits R-158 and R-177. Paragraph 10 of Procedural Order

- No. 12 noted that the decision was taken by a majority of the Tribunal, and that the reasons for Arbitrator Rubino-Sammartano's dissent would be provided separately. Arbitrator Rubino-Sammartano's Dissenting Opinion on Procedural Order No. 12 was issued on 27 April 2016.
25. On 9 May 2016, the Parties filed their Post-Hearing Briefs. The Claimants' Brief ("C-PHB") was accompanied by legal authorities C-LA 11 through C-LA 18, and the Respondent's brief was accompanied by a letter dated 4 May 2016 from the Respondent's expert witness, Mr Michael Peer (the "KPMG Letter").
 26. By email of 9 May 2016, the Claimants objected to the filing of KPMG and requested that it not be admitted. The Respondent provided its response on 10 May 2016. By letter of 17 May 2016, the Tribunal decided that the KPMG Letter would not be admitted as an independent expert opinion or exhibit, but it granted to the Respondent the opportunity to resubmit its Post-Hearing Brief in order to incorporate non-evidentiary elements from the KPMG Letter.
 27. In accordance with the Tribunal's directions in its letter of 17 May 2016, the Respondent filed its re-submitted Post-Hearing Brief on 3 June 2016 ("R-PHB").
 28. By email of 7 June 2016, the Claimants objected to the admission of certain portions of the Respondent's re-submitted Post-Hearing Brief (scenarios B and C). The Respondent responded to the Claimants' objection on 10 June 2016. On 13 June 2016, the Tribunal informed the Parties that the Claimants' objection was not sustained, but it allowed the Claimants the opportunity to reformulate their objection in view of the Respondent's response of 10 June 2016.
 29. On 16 June 2016, the Claimants submitted their reformulated objection concerning scenarios B and C of the Respondent's re-submitted Post-Hearing Brief. The Claimants requested the Tribunal to declare those portions of the Respondent's Brief to be inadmissible and, in the event that the Tribunal decided to admit scenarios B and C, requested the Tribunal to re-admit all new figures presented by the Claimants' expert witnesses at the hearing. The Respondent responded to the Claimants' reformulated

objection on 17 June 2016. By letter of 17 June 2016, the Tribunal informed the Parties that it maintained its previous decision to admit scenarios B and C in the re-submitted brief, and that the Tribunal granted the Claimants request to re-admit the figures referenced by the Claimants' expert witnesses at the hearing.

30. By letter of 15 June 2016, the Respondent requested permission to file an additional exhibit, a letter of 2 October 2002, in connection with the challenged authenticity of Exhibits R-158 and R-177. Following the Tribunal's invitation, the Claimants responded to the Respondent's request by letter of 20 June 2016, objecting to the admission of the new document and maintaining the Claimants' position concerning the non-authenticity of Exhibits R-158 and R-177.
31. On 21 June 2016, the Respondent requested the Tribunal to reverse its decision to readmit the figures referenced by the Claimants' expert witnesses during the hearing and, in the alternative, requested an opportunity to comment on those figures. On 22 June 2016, the Claimants undertook that they would not rely on the figures which had previously been declared inadmissible in their Reply Post-Hearing Brief.
32. On 22 June 2016, the Claimants and the Respondent filed their respective Reply Post-Hearing Briefs ("C-RPHB" and "R-RPHB").
33. By letter of 28 June 2016, the Tribunal: (i) confirmed its understanding that the Claimants were not relying on the figures from the presentation of their expert witnesses which had previously been declared inadmissible and that, in the result, the figures were not considered to be a part of the record of the hearing;⁶ (ii) informed the Parties that the Tribunal would admit the letter of 2 October 2002 (and its translation); and (iii) invited the Parties to make any further comments in respect of these matters by 1 July 2016.
34. Further to the Tribunal's instructions of 28 June 2016, on 29 June 2016, the Respondent filed the letter of 2 October 2002 (and its translation) as Exhibit R-184. On 1 July 2016,

⁶ The Tribunal also noted in that letter, "that the Respondent has included some comments on the figures in its Reply Post-Hearing-Brief (paragraph 213), which the Tribunal will not take into account in view of the fact that the figures have not been relied upon by the Claimants."

the Claimants commented on the Tribunal's decision to admit the document and the translation provided by the Respondent. By letter of 8 July 2016, the Tribunal noted the Claimants' comments concerning the translation of Exhibit R-184, and maintained its decision to admit the exhibit and to attach to it the weight that it considered appropriate.

35. On 28 July 2016, the Claimants and the Respondent filed their respective submission on costs. By email of 5 August 2016, the Claimants filed their response to the Respondent's cost submission. On 10 August 2016, the Respondent filed its response to the Claimants' cost submission.

36. These proceedings were closed on 11 January 2017, pursuant to ICSID Arbitration Rule 38.

III. THE TRIBUNAL'S ANALYSIS

37. A summary of the factual circumstances of the case is set out in Section IV (paragraphs 37-79) of the Decision. The Parties' submissions during the quantum phase are briefly summarised below. This summary has been prepared by the Tribunal to set in context the several decisions made by the Tribunal in this Award. It is not an exhaustive summary of the Parties' respective cases presented during this arbitration over many thousands of pages. The fact that a particular submission is not expressly referenced below should not be taken as any indication that it has not been considered by the Tribunal.

A. Overview of the Parties' Positions

a. The Claimants' Position

[...]

b. The Respondent's Position

[...]

B. Authenticity and Relevance of Settlement Documents

44. As described above in Section II, the Claimants have disputed the authenticity of certain documents submitted by the Respondent during the quantum phase. In particular, the Claimants challenge Exhibits R-158 and R-177, which were filed with the Respondent's Counter-Memorial on Quantum, and Exhibit R-184, which was admitted pursuant to the Tribunal's directions of 28 June and 8 July 2016.⁷ The Respondent claims that AVAS received these three documents from the Claimants in 2002, shortly after the insolvency of the Company.⁸
45. In summary, the Claimants contend that Exhibits R-158 and R-177 are not authentic and, in any event, take the position that the documents are not relevant to this quantum phase:
- [...]
46. In summary, the Respondent argues that Exhibits R-158, R-177 and R-184, should be taken into account by the Tribunal as they represent an independent and contemporaneous evaluation made by the Claimants concerning the value of their shares in Socomet in September and October 2002, shortly after the alleged expropriation date. The Respondent argues that the evaluation reflected in these documents was based on the full information available to the Claimants at that time, including the 2002 business plan, on which the Claimants' damages claims are based.⁹
47. The Tribunal, by majority, agrees with the Claimants that Exhibits R-158 and R-177, allegedly dated September 2002 and referring to settlement negotiations between the Claimants and AVAS, of which the Claimants challenge the authenticity, are irrelevant to assess the value of Claimant's share in Socomet Settlement offers reflect complex 'give-and-takes' whereby the money requested for the transfer of shares includes a cluster of other considerations as well. Moreover, in the case at stake the settlement offer apparently

⁷ C-RPHB, paras. 113-121. The Claimants also dispute the accuracy of the translation of R-184, which was filed by the Respondent.

⁸ C-RPHB, para. 113.

⁹ See Gavazzi Steel S.A. "Business Plan for an Investment Project in Rumania," June 2002 (C-54).

never was implemented. Consequently, the Tribunal does not need to consider whether Exhibits R-158 and R-177 were authentic.

C. Article 4 - Expropriation

i. Legal Standard for Compensation

a. The Claimants' Position

[...]

b. The Respondent's Position

[...]

c. The Tribunal's Decision

54. The Tribunal will determine the compensation pursuant to the standards provided for by Article 4 of the BIT and, whenever necessary, by customary international law.

ii. Date of Valuation

a. The Claimants' Position

[...]

b. The Respondent's Position

[...]

c. The Tribunal's Decision

62. The Tribunal, by majority, agrees with Claimants that the appropriate valuation date for the breach of Article 4 of the BIT is August 2002, i.e. when the Claimants were deprived of their investment.

iii. Valuation Methodology

a. The Claimants' Position

[...]

b. The Respondent's Position

[...]

c. The Tribunal's Decision

Socomet is not a “going concern”

84. The Tribunal decides that Socomet was not a going concern at any relevant time, within the meaning of the World Bank Guidelines on the Treatment of Foreign Direct Investment or by any other test. The Tribunal in particular finds, on the evidence, the following facts:

a) the Claimants' acknowledgment that it is:

[...]

b) the testimony of the Claimants that:

[...]

c) the fact that thereafter, including the times of the Respondent's several violations of the BIT, the Company remained in a precarious financial position threatening its future existence, with no realistic prospect of improving that position without significant further support, both financial and managerial, from the Claimants and their own supporters.

d) the low price of [...]for which the Respondent sold the company in 1999 indicates that it was not a going concern at that time.¹⁰

85. Consequently, the Tribunal concludes that Socomet was never a going concern at any material time.

¹⁰ See R-RPHB, para. 90 citing also C-PHB, para. 123.

The Unlevered Income-based Evaluation

86. The Tribunal further notes that the Claimants admit that no past records of the company's cash flow are available.¹¹ Thus, the Claimants' expert witness could not evaluate compensation on the basis of future estimated cash flows projected from past records of cash flow and profitability: "because of the lack of information regarding the financial projections of the Company, especially in terms of accounts payables/receivables and inventory dynamics."¹²
87. In these circumstances, the Tribunal decides that it would be inappropriate in this case to use any cash flow-based approach to assess compensation under the BIT when the company was never a going concern and lacked any objective record of any profitability, whether past or present. Its approach here is based on commercial common sense applied to this case's particular features, an approach supported by the decisions of many other tribunals addressing similar facts.
88. For example, in *Benvenuti & Bonfant v. Congo*, the tribunal decided that it could not base its evaluation of the company on its expected earnings, as only one contracted shipment had actually been delivered, and that was insufficient for the tribunal to consider the company a going concern.¹³ Similarly, in *Asian Agricultural Products v. Sri Lanka*, the tribunal found that the company's operations for at least two or three years would be necessary to establish a reliable basis for estimating future profitability.¹⁴ The Iran-United States Claims Tribunal ("IUSCT") in *American International Group v. Iran*, considered a period of four and a half years still too short to establish an appropriate forecast for future

¹¹ C-PHB, para. 178.

¹² Deloitte Report, Section 7.2, pp. 43-44, as quoted in C-PHB, para. 109.

¹³ *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo* (ICSID Case No. ARB/77/2), Award (15 August 1980) (hereinafter "*Benvenuti & Bonfant v. Congo*"), paras. 4.71 and 4.78.

¹⁴ *Asian Agricultural Products Limited v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award (27 June 1990) (hereinafter "*Asian Agricultural Products v. Sri Lanka*"), para. 103.

profitability.¹⁵ The IUSCT, in *CBS v. Iran*, also declined to use a Discounted Cash Flow (“DCF”)-based valuation where a company operating in the past had experienced losses.¹⁶

89. In *Southern Pacific Properties v. Egypt*, where 6% of the project contracted had already been completed, the tribunal found a past cash flow-based valuation inappropriate since the project was still “in its infancy”.¹⁷ The tribunal found that “the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation”.¹⁸ The Tribunal returns to the *SPP* award below (paragraphs 218-220).
90. Likewise, in *Metalclad v. Mexico*, a cash flow-based valuation was rejected by the tribunal because the operations of the company had not yet started, and therefore any compensation based on future profits was “wholly speculative”. Referring to earlier ICSID and IUSCT awards,¹⁹ the NAFTA tribunal decided:

*Normally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis. [...] However, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.*²⁰

91. Similarly, the tribunal in *Wena Hotels v. Egypt* rejected a cash flow method due to the short duration of the company’s operations and the lack of sufficient data.²¹ Citing with approval the decisions in *Metalclad v. Mexico*, *Southern Pacific Properties v. Egypt*, and *American*

¹⁵ *American International Group v. Iran*, 4 Iran-US CTR (1983) 96, p. 108.

¹⁶ *CBS Inc. v. Iran*, 25 Iran-US CTR (1990) 131, para. 52.

¹⁷ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award (20 May 1992) (hereinafter “*SPP v. Egypt*” or “*SPP award*”), para. 188.

¹⁸ *Ibid.*

¹⁹ Decisions cited by the *Metalclad* tribunal included *AGIP SpA v. Congo* (ICSID Case No. ARB/77/1), Award (30 November 1979), *Benvenuti & Bonfant v. Congo*, *Asian Agricultural Products v. Sri Lanka*, and *Sola Tiles Inc. v. Iran*, 14 Iran-US CTR 224.

²⁰ *Metalclad v. Mexico*, paras. 119-120.

²¹ *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award (8 December 2000) (hereinafter “*Wena Hotels v. Egypt*”), para. 123.

Manufacturing and Trading v. Zaire,²² the tribunal concluded that an award based on a DCF method in such circumstances would be “too speculative”.²³

92. This line of reasoning was also followed by the tribunal in *Técnicas Medioambientales v. Mexico*, where a period of two years, coupled with the difficulties in obtaining objective data and the fact that future cash flow depended upon investments to be made in the long term, “lead the Arbitral Tribunal to disregard such [discounted cash flow] methodology to determining the relief to be awarded to the Claimant.”²⁴
93. The Tribunal is aware that the tribunals in *Gold Reserve v. Venezuela*²⁵ and *Enron v. Argentina*²⁶ decided that an income-based cash flow method was appropriate in determining the amount of compensation claimed in those cases. In *Gold Reserve v. Venezuela*, the tribunal used the DCF method to calculate compensation even though the business in question was still not operational at the time of the breach. However, the reason, as submitted by the Respondent,²⁷ was because the tribunal was persuaded that the DCF method could be used reliably because of the nature of the product as a commodity, a detailed cash flow analysis previously performed and, moreover, the testimony of both parties’ experts who agreed upon the use of the DCF model.²⁸ In *Enron v. Argentina*, the tribunal was persuaded that the valuation could be based on long-term contracts where the future profitability depended on objective economic circumstances, such as consumer demand and expenditures.²⁹ All these factors are absent in the present case and, to the mind

²² *American Manufacturing and Trading Inc v. Zaire* (ICSID Case No. ARB/93/1), Award (21 February 1997), para. 7.14.

²³ *Wena Hotels v. Egypt*, para. 123.

²⁴ *Técnicas Medioambientales SA v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award (29 May 2003), para. 186.

²⁵ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/(AF)/09/1), Award (22 September 2014) (hereinafter “*Gold Reserve v. Venezuela*”).

²⁶ *Enron Creditors Recovery Corp. (formerly Enron Corporation) and Ponderosa Assets LP v. Argentine Republic* (ICSID Case No. ARB/01/3), Award (22 May 2007) (hereinafter “*Enron v. Argentina*”).

²⁷ R-RPHB, para. 85.

²⁸ *Gold Reserve v. Venezuela*, para. 830.

²⁹ *Enron v. Argentina*, para. 369.

of this Tribunal, materially distinguish the factual circumstances of these two cases from the features of the case before this Tribunal.

94. On the basis of this analysis, the Tribunal concludes that its approach is consistent with the reasoning of other tribunals who were faced with materially similar factual situations, and that the DCF method or any cash flow-based approach cannot be used to determine compensation in the present case.

95. However, the DCF method, although extensively debated by the Parties, is not directly relevant to the present case. Indeed, the Claimants have not evaluated their claimed compensation on the basis of Socomet's past record of cash flow and profitability. The Claimants invoked another method, the "Unlevered Income Valuation". The Deloitte Report submitted by the Claimants' expert witnesses describe this method as follows:

[...]

96. According to the same Deloitte Report:

[...]

97. The unlevered income-based valuation takes into account the profitability of sectorial comparators. In this context, the Tribunal accepts that other steel mills and companies in Romania, such as Mittal, turned a profit, *i.e.*, they were or became successful going concerns. Another point that the Tribunal considers potentially relevant is the fact that the September 2004 Report submitted to the local court in the Severin Case brought by IPROLAM found that, after the restructuring and sale of Unit 1, the entity became a profitable concern.³⁰

98. Conversely, the Tribunal is aware that the Respondent considers the unlevered income valuation method to be inappropriate in the present case, given that Socomet was not a going concern at any relevant time.³¹

³⁰ C-RPHB, para. 107.

³¹ R-RPHB, para. 20ff.

99. Considering the definition of the unlevered income method (as described by the Claimants' expert witnesses), the Tribunal does not accept that a necessary prerequisite for the application of this method is that the entity must be a going concern. The Tribunal observes that the unlevered income method is based upon general parameters, such as reference to data from other European comparable companies, and that such materials are also adjusted to the relevant stock exchange, country risk and market risks, as well as to the usual rate of return on risk-free assets. The Tribunal moreover notes the testimony of the Claimants' expert witnesses that the unlevered income method:

[...]

100. In the Tribunal's view there is no necessity for Socomet to have been a going concern for the unlevered income valuation method to apply in the present case. Accordingly, the Tribunal is willing to apply the unlevered income-based valuation method if the other conditions for its application are fulfilled.

The 2002 Business Plan offers no solid basis for an evaluation of future income

101. The Claimants applied the unlevered income valuation method "on the basis of the 2002 Business Plan prepared by the Management".³² The Claimants allege that with the waiver of the debts, the injection of [...] and the implementation of the 2002 Business Plan, the company could have started to make a profit in 2008. Indeed, for the Claimants, in the specific circumstances of the case and on the basis of the 2002 Business Plan, the Claimants "would have lower-fulfilled [sic] their investment obligations under the Privatisation Contract ... and effected the complete turnaround of Gavazzi Steel ...".³³

102. As is apparent, the Claimants' approach depends, critically, on the efficacy of the 2002 Business Plan. If materially ineffective, the Plan does not support the forecast of the profitability of Socomet alleged by the Claimants. In the tribunal's view, the Plan was not effective in three material respects.

³² C-PHB, para. 176.

³³ C-RPHB, para. 15. This is the "Scenario B" situation, as put forward by the Respondent,³³ a scenario whereby "[...]."

(i) The 2002 Business Plan remained embryonic

103. First, as a fact, the Tribunal decides that the 2002 Business Plan remained embryonic. The Tribunal accepts the criticisms to this effect made by the Respondent's expert witness, Mr Peer (of KPMG), namely, that the bank financing allegedly obtained from HypoVereinsbank "was not in fact even close to being finalized".³⁴ Likewise, the Tribunal finds, as a fact, that a proposed partnership between Socomet and Techint "was only in an incipient stage".³⁵ The Tribunal concludes that the 2002 Business Plan was never finalised, legally or commercially, contrary to the Claimants' submission.

(ii) Financing of the 2002 Business Plan remained uncertain

104. Second, the Tribunal finds, as fact, that the financing aspect of the 2002 Business Plan was unduly optimistic.

105. The Tribunal notes that there were several overdue debts that had not been financed. The Claimants allege that, as of 2002, the amount of overdue debts, after factoring in the historical debts of [...] ³⁶ and discounted at the valuation date, stood at [...] ³⁷

106. The costs of refurbishment under the 2002 Business Plan were described to be a total of [...] ³⁸

107. The 2002 Business Plan thus required, for the costs of refurbishment, the financing of almost [...]. The Claimants do not submit sufficient evidence to establish that this financing was probable, still less actually agreed or otherwise certain. The Tribunal concludes that, as the Respondent submitted, the net debt estimate submitted by the Claimants "does not factor in the financing of the purported investment ... of [...]."³⁹ In the Tribunal's view, the Respondent correctly states that, by "not providing for the investment required to achieve

³⁴ R-RPHB, para. 113, also KPMG Report, Section 5.5 and Second KPMG Report Section 6.1.1(f).

³⁵ R-RPHB, para. 114, also KPMG Report, Section 5.5.

³⁶ C-RPHB, para. 43. *See also* the details of the "Net financial position" in the Deloitte Report, pp. 49-50.

³⁷ C-PHB, para. 176.

³⁸ *See* [...], C-55.

³⁹ R-PHB, para. 195.

the projected earnings relied upon by the Claimants' expert [witness] the estimated damages are overstated.”⁴⁰

108. The weakness in the financing aspect of the Business Plan is well illustrated by the Claimants' assumption that the financing offer by HypoVereinsbank of 7 September 2001 would cover “the costs of the investment provided in part by Techint and Simest”.⁴¹ However, the Tribunal notes that this offer was for a reduced sum of [...] ⁴² and that, moreover, of that [...] was to have been obtained from HypoVereinsbank itself. The other [...] was to be a buyer-credit (to buy the equipment that Techint was to supply) to be granted by Romania Commercial Bank.⁴³ Moreover, that facility needed the preliminary approval of three other entities (SACE, SIMEST, and the HypoVereinsbank Credit Committee).⁴⁴ Still further, the financing by HypoVereinsbank and Romania Commercial Bank was conditional upon the Claimants' own funding.⁴⁵ There is no sufficient evidence to establish that these cumulative conditions for financing were or could have been obtained by the Claimants.⁴⁶
109. In fact, the Claimants themselves accept that the Romania Commercial Bank did not fulfill its obligations due to Socomet's bank accounts being blocked by the Respondent.⁴⁷ Moreover, two months after the financing offer of HypoVereinsbank of 7 September 2001, the Claimants mortgaged Socomet's assets in order to obtain loans from Romania Commercial Bank so as to finance a distribution agreement with Mi&Cor Comaltex S.R.L.⁴⁸ Socomet thereby guaranteed Mi&Cor's exposure to the Romania Commercial

⁴⁰ *Id.*, para. 196.

⁴¹ C-PHB, para. 153.

⁴² C-51, p. 2.

⁴³ C-RPHB, para. 34. *See also* R-PHB, para. 37.

⁴⁴ C-51, p. 2.

⁴⁵ *See e.g.*, R-155, p. 1, where the fund request was rejected by the Romania Commercial Bank on the grounds that there was no evidence of funding made available by the majority shareholders.

⁴⁶ *See also* R-RPHB, para. 39.

⁴⁷ C-PHB, para. 161. *See also* the testimony of the then-manager of Techint, Mr de Carpegna (Hearing on Jurisdiction and Liability Transcript, 4 June 2014, p. 544).

⁴⁸ R-160.

Bank in the amount of approximately [...] ⁴⁹ In the Tribunal's view, as the Respondent submits, these mortgages, pledges of fixed assets and promissory notes could have been used to obtain the necessary financing of Socomet's new plant. ⁵⁰ This was, of course, a management decision for the Claimants to make at the time, which reduced the company's ability to raise financing for its refurbishment. ⁵¹

110. Moreover, aside from the [...] costs of refurbishment, it is necessary to consider the increased working capital requirements of [...]. ⁵² As the Claimants themselves acknowledged, overdue debts are part of the company's net financial position. ⁵³ Excluding costs of refurbishment and of increased working capital requirements from consideration results in a skewed calculation of the amount of overdue debts, which could have a direct impact on the calculation of compensation in the present case.

111. However, the point discussed above is, for the Tribunal, merely a preliminary matter. Two other issues arise in relation to the Claimants' 2002 Business Plan: (a) the payment of costs and (b) the length of the forecast. The Tribunal will next address these two issues in turn.

112. In relation to the payment of costs, the Tribunal notes that, according to the Kinglor Master Plan and the corresponding figures in the 2002 Business Plan, approximately Consteel of the industrial and equipment investments were "internal workshop". ⁵⁴ An additional cost for "[m]iscellaneous, transport, insurance, custom duties" of approximately [...] was also alleged by the Claimants to "be covered by current income." ⁵⁵ Moreover, according to the Kinglor Master Plan, the Consteel equipment and technology was to be installed in 22

⁴⁹ R-PHB, para. 43.

⁵⁰ KPMG Report, para. 5.2.3. *See also* R-PHB, para. 43.

⁵¹ *Ibid.*

⁵² The Claimants' expert admitted that the Business Plan focus was on the industrial project, but did not focus on working capital dynamics, which generally involve short-term as needs, since the main financing for the investment in the Consteel technology was practically finalized' (Deloitte Report, Section 7.2, pp. 43-44, as quoted in C-PHB, para. 109).

⁵³ *See e.g.*, C-RPHB, para. 42, Table 10.

⁵⁴ C-RPHB, para. 31.

⁵⁵ *Ibid.*, citing C-55 and Deloitte Report Report, pp. 33-34.

months from mid-2002; and those direct costs amounted to USD [...] ⁵⁶ These were, therefore, costs that did not require additional financing and can be deducted from the costs requiring financing.

113. In their Second Submission on Quantum, the Claimants provided their evaluation of Socomet's income based on future production which, so the Tribunal notes, consists of figures that are materially different from those in the 2002 Business Plan. ⁵⁷ The Claimants also make several assumptions when computing Socomet's income, including diversifying production, prices of scrap, prices of steel and lower salaries. ⁵⁸ Indeed, the Claimants submit that production would see an annual growth of [...] % from 2002 to 2008, with EBITDA growth reflecting both the change in product mix and the cost efficiencies achieved by the introduction of the Consteel technology. ⁵⁹

114. In the Tribunal's view, these assumptions appear to make the "hypothetically restructured Socomet ...an overly profitable outlier in its industry", as the Respondents submitted. ⁶⁰ According to the figures provided by the Claimants, the targeted annual output of [...] would have been achieved with an investment that amounts to between a third and a quarter of the investments of other comparators in the market. ⁶¹ While such optimistic forecasts of future income and profitability may be appropriate were it accounted for in the cost of capital and the risk of not achieving such targets, the Claimants' expert witness acknowledged that such assumptions and targets were [...]:

[...]

115. Further, any hypothetical production increase is, for present purposes, irrelevant if it was not shown, as a fact, that Socomet was able to finance its operations. The Tribunal has

⁵⁶ C-RPHB, para. 32, citing C-55, Table 2 [...].

⁵⁷ C-PHB, para. 194ff, and in particular Table 4 on pp. 72-73, para. 195.

⁵⁸ *Id.*, paras. 153, and 188-201; C-RPHB, paras. 16-21.

⁵⁹ C-PHB, para. 196.

⁶⁰ R-PHB, para. 182.

⁶¹ KPMG, para. 6.11.6.

already decided that Socomet was never a going concern.⁶² Any expected profitability on the part of Socomet relied almost exclusively on the 2002 Business Plan, but the financing that needed to implement the 2002 Business Plan had not been secured. In this regard, the Tribunal concludes that the Claimants had not established any profitability on the part of Socomet in accordance with the 2002 Business Plan.⁶³

116. Other questions weigh upon the costs of the financing sought by Socomet. The Tribunal questions whether the [...] % figure given in relation to the weighted average cost of capital (“WACC”) is reliable.⁶⁴ The Claimants’ expert witnesses (of Deloitte) used [...] % as the cost of debt for Gavazzi Steel in its calculation of the WACC.⁶⁵ Given that these figures included the allocation of the costs of debt and the return on equity, and the fact that equity holders would not receive dividends when profits were reinvested or used to pay debts,⁶⁶ the Tribunal finds it, for instance, unrealistic that only [...] was evaluated as the risk that the 2002 Business Plan would not be fully implemented. Given that the costs of acquiring assets were also excluded,⁶⁷ and the pre-2002 debts had not been covered, this [...] risk evaluation was manifestly unrealistic in the circumstances of this case.
117. The second issue relates to the length of the forecast provided. The evaluations were made for 2002, 2008 and 2013.⁶⁸ In the Tribunal’s view, the span of these forecasts multiplies the unreliability factor, since the forecasts were all based upon the 2002 Business Plan.

(iii) Acquisition of Socomet shares remained uncertain

118. Third, the Tribunal considers that the indirect acquisition of [...] % of Socomet shares by Techint and Simest through the joint venture Mosella Acciai – another element of the Business Plan – was and remained too uncertain. The Tribunal notes that only an unsigned

⁶² See *supra* paras.84-85.

⁶³ R-PHB, para. 206. See also R-RPHB, paras. 17-19, and 93.

⁶⁴ See Deloitte Report, at p. 48, Table 8. See also C-RPHB, paras. 38-39.

⁶⁵ C-RPHB, fn. 32.

⁶⁶ C-PHB, paras. 190-197.

⁶⁷ R-PHB, para. 188.

⁶⁸ See [...], Annex 3.

draft letter of intent⁶⁹ existed and that the shares sale option was never signed. It was therefore never established as a fact that SIF-Banat, the minority shareholder, agreed to the sale of [...] % of Socomet shares. Further, there is no reliable evidence as to what price those [...] % of Socomet shares would have commanded.⁷⁰ The Tribunal finds, therefore, that the sale of [...] % of Socomet shares was not concluded – or would be concluded – and that it cannot be considered as a fact in evaluating the company’s profitability based on the 2002 Business Plan.

119. In the present case, therefore, the Tribunal concludes for all the above reasons, that the Claimants have not established their evaluation of the “effective and fair market value” of the company as to their [...] its shares, being [...] out of a total value [...]

Compensation under equitable objective principles

120. As decided above, for the various reasons stated here below, the Tribunal cannot base its assessment of compensation on the 2002 Business Plan. The Plan was based (a) on the assumption that only [...] employees were to be employed (instead of [...] which had been planned), (b) on prices for scrap and for sale of the finished products that were highly volatile, (c) without taking into account possible initiatives from the competition, or an adequate working capital, and (d) was subject to many variables, such as the price of electricity. Moreover, the implementation of the Plan, which was only in an embryonic stage, had still many flaws, as indicated above. At the time the 2002 Business Plan was drafted by Claimants, they should have been aware that their financial situation was precarious and that insolvency, which followed 1.5 months later, was imminent. In fact, it has even been suggested that the Business Plan was written to offer a platform to claim damages.⁷¹ This does not mean that the Claimants’ claims for compensation must be dismissed by the Tribunal without more.

121. In the Tribunal’s view, there is no doubt that the Claimants suffered some damage caused by the Respondent’s violations of the BIT. The difficulty in this case arises from the

⁶⁹ C-53.

⁷⁰ [...], para. 5.6.4.

⁷¹ R-RPHB, para. 104.

quantification of the monetary damages required from the Respondent to compensate the Claimants. The existence of such a difficulty, even in an extreme form, provides no justification in refusing any compensation to an innocent party, leaving the wrongful party with the fruits of its wrongdoing. Tribunals have traditionally resolved such difficulties applying a rule of reason, rather than a rule requiring absolute certainty in calculating compensation.

122. As the tribunal decided in *Sistem v. Kyrgyz Republic*:⁷²

154. The Tribunal is conscious of the desirability for conceptual clarity in valuing assets for the purposes of calculating compensation payable; and it is conscious of the criticism of ‘triangulation’ methods, which select a figure that lies somewhere in the middle ground of estimates put forward by the parties.

155. The Tribunal is also aware of the fact that all valuations in the absence of an actual sale are estimates, and is mindful of the fact that the Tribunal has a legal duty to render an award under a process which the Respondent has freely agreed to establish and the Claimant has freely chosen to pursue, and to do so on the basis of the material that the parties have decided to put before it. That is, necessarily, an exercise in the art of the possible; and the Tribunal has sought to arrive at a rational and fair estimate, in accordance with the BIT, of the loss sustained by the Claimant rather than to engage in a search for the chimera of a sum that is a uniquely and indisputably correct determination of the value of what the Claimant lost. The Tribunal derives some comfort from Immanuel Kant's observation that ‘Out of the crooked timber of humanity no straight thing was ever made.’⁷³

123. In *ADC v. Hungary*, the tribunal likewise decided that:

the assessment of damages is not a science. True it is that the experts use a variety of methodologies and tools in order to attempt to arrive at the correct figure. But at the end of the day, the Tribunal can stand back and look at the work product and arrive at a figure with which it is comfortable in all the circumstances of the case.⁷⁴

124. Under international law, there is thus by now a well-established and well-known *jurisprudence constante* to the effect that, however difficult, an international tribunal must

⁷² *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/06/1), Award of (9 September 2009), paras. 154 and 155.

⁷³ In the original German: “Aus so krummem Holze, als woraus der Mensch gemacht ist, kann nichts ganz Gerades gezimmert werden.”

⁷⁴ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award (2 October 2006), para. 521

do its best to quantify a loss provided that it is satisfied that some loss has been caused to the claimant by the wrongdoing of the respondent. The alternative of simply dismissing the claim for want of sufficient proof is not regarded as a fair or appropriate result. Almost invariably, this approach requires the tribunal to reject the full extent of the parties' primary cases on quantum and their expert witnesses' methodologies. For tactical reasons, a claimant may not wish to discount downwards the full amount of its pleaded claim; and a respondent similarly may not wish to offer a result resulting in any damages being awarded in the claimant's favour. In the absence of any principle akin to "baseball arbitration" (as is absent in this case), the tribunal must then work by itself in the rational middle ground left vacant by the parties and their expert witnesses, as best it can.

125. The Tribunal recalls that Article 4(4) of the BIT provides *in fine* that:

...In case that the effective and fair market value cannot be easily ascertained, the compensation shall be determined on equitable objective principles taking into account, inter alia, the capital invested, its appreciation or depreciation[,] current returns, replacement value and any other relevant factors.

126. Consequently, where the effective and fair market value cannot be easily ascertained (as in the present case), the Tribunal must look to "equitable objective principles" to establish the compensation to which the Claimants are entitled. In the application of those principles, Article 4(4) of the BIT next requires the Tribunal, as a non-exhaustive list of factors, to take into account "the capital invested, its appreciation or depreciation[,] current returns, replacement value and other relevant factors."

127. ***The Capital Invested:*** The Tribunal will first focus on the factor of "capital invested" under Article 4(4) of the BIT. The Tribunal finds that, as the Parties do not dispute, the Claimants paid [...] to purchase [...]% of Socomet's shares.

128. The Tribunal next considers other capital allegedly invested by the Claimants as listed in Exhibit C-61; namely, first, the loan amounts made by the Claimants [...], including personal guarantees that were connected to the Claimants' investment.

129. The Tribunal rejects the Respondent's arguments that strict evidence of actual contemporaneous payment must be provided by the Claimants.⁷⁵ The Tribunal considers that a reasonable probability that payment was made is sufficient. The Tribunal finds that the figures provided in Exhibit C-61 are sufficiently established for its decision. Also, in making its decision, the Tribunal uses the figures in Exhibit C-61 without deducting bank expenses.

130. This leads the Tribunal to find the following figures as "capital invested" from Exhibit 61, in addition to the share price of [...]:

[...]

131. ***The Holdeast Credit:*** It is necessary to examine the Parties' respective submissions and the factual materials in evidence in some detail as to this alleged investment by the Claimants in the sum of [...].

132. ***The Parties' Submissions:***

[...]

140. ***The Factual Evidence:*** Mr Marco Gavazzi testified (as did Mr Stefano Gavazzi in similar terms) in his written witness statement:

[...]

141. Mr Marco Gavazzi does not here explain how a credit due from the Company to Holdeast became a credit from the Company to the Claimants.

142. In his oral testimony at the first hearing on jurisdiction and liability, Mr Marco Gavazzi testified as follows:

[...]

⁷⁵ R-PHB, para. 84. *See also* R-RPHB, para. 44. The Respondent's arguments this regard are also summarized below at paras. 245 and 246.

(Mr Marco Gavazzi and Mr Stefano Gavazzi were not specifically cross-examined by the Respondent on this part of their testimony).

143. Mr Mugnai in his written witness statement testified (as personal consultant to Mr Stefano Gavazzi, at the relevant time):

[...]

144. Mr Mugnai does not here identify the meeting of the Company’s Board of Directors that “unanimously” approved the Company’s acknowledgement of the said credits.

145. In his oral testimony at the first hearing on jurisdiction and liability, Mr Mugnai testified as follows:

[...]

146. The Tribunal notes that Mr Mugnai’s recollection is here somewhat general.

147. Ms Viorica Tataru in her second witness statement testified (as, at the relevant time, an Expert and Head of Service of the Respondent’s Authority for the Administration of State Assets, also known as “AAAS”), as translated into English:

[...]

(Ms Tataru was not specifically cross-examined by the Claimants on this part of her written testimony.)⁷⁶

148. These conflicting accounts from the Parties’ factual witnesses, coupled with the feature that it comprises, on any view, a complicated chronology of events taking place a long time ago, induce the Tribunal to examine, in some detail from 1999 to 2002, the minutes of the Company’s Board of Directors and its shareholders’ special and general assemblies in regard to this alleged investment by the Claimants. In the Tribunal’s view, these contemporary documents, seen by and known to both the Claimants and others adverse to

⁷⁶ Hearing on Jurisdiction and Liability Transcript, 5 June 2014, pp. 718-768.

the Claimants at the time, constitute the most reliable factual evidence regarding the decisive factual issues. The Tribunal recognises that the legal burden of proof rests on the Claimants to prove their factual case.

149. *The Minutes*: The minutes of the Company's Board meeting on 9 July 1999 record the following, as translated into English:

150. On 14 September 1999,

[...]

151. The minutes of the Board meeting on 7 October 1999 state that the Company's extraordinary general assembly of shareholders was informed that [...].⁷⁷ Mr Stefano Gavazzi, [...], is requested to provide SIF Banat Crisana, a shareholder, [...].

152. The minutes of the Company's Board meeting on 21 March 2000, attended by (*inter alios*) Mr Stefano Gavazzi (president and director), Mr Marco Gavazzi (director) and Mr Florian Frumosu note that, as of that date:

[...]

153. Moreover, the minutes record that Mr Marco Gavazzi informed the Board that the negotiations with SIMEST in view of investing in Eastern Europe were advanced and the financial plan at issue involved the sale of Holdeast credits in Gavazzi Steel to a new Italian holding company which would use such credits to increase the capital of Gavazzi Steel. According to Mr Marco Gavazzi, the capital transaction would be supported by a long-term loan of several million dollars granted by [...] to the new Italian holding, and that amount would be used for a subsequent capital increase of [...]. On questioning at the same Board meeting, Mr Baghina explained that the Holdeast invoices referred to technology projects over a five-year plan, including the improvement of electrical furnaces and onsite technical checks. Mr Baghina noted that the documentation had been subject to

⁷⁷ C-25, as translated into English, p. 45.

independent external expert appraisal, and would additionally be available for inspection by interested parties.⁷⁸

154. The minutes of the Company's general assembly of shareholders on 23 November 2000 report that the shareholders unanimously, with the approval of auditor Mariana Dumitrescu, mandated Mr Stefano Gavazzi to request the judge administering the liquidation of Easteel to take into account:

[...]

155. The minutes of 4 October 2001 report that the Company's Board meeting decided to proceed to the registration of the entire debt of [...] as soon as the Resita tribunal issues a final decision regarding the liquidation of Easteel.⁷⁹
156. The minutes of the Company's Board meeting on 1 February 2002 state that Mr Stefano Gavazzi and Mr Marco Gavazzi were willing to waive the [...]claim, they acquired from Holdeast to be transferred to SOCOMET's capital. However, the final judgment on the liquidation of Easteel and the auditor's report, regarding the transfer of Easteel's claim to Holdeast and the Claimants, were at the time not yet established.⁸⁰
157. The minutes of the Company's general assembly of shareholders also on 1 February 2002 record that, in relation to the issue of [...],⁸¹ that Mr Stefano Gavazzi, as Chairman, mentioned first, the personal obligation undertaken by himself and Mr Marco Gavazzi with APAPS upon the execution of the privatization agreement regarding the first instalment of capital increase by [...]; secondly, the balance sheet registered a debt owed by the company to Holdeast (which was undergoing liquidation), as a result of the liquidation of the joint venture Easteel; and thirdly, that he and Mr Marco Gavazzi were willing to waive the [...] debt owed to them, which would be transferred to the Company's capital.⁸²

⁷⁸ *Ibid.*

⁷⁹ *Id.*, p. 87.

⁸⁰ *Id.*, p. 93: [...]

⁸¹ *Ibid.*

⁸² C-25, as translated into English.

158. The minutes of the Company's Board meeting on 21 March 2002 stated that the invoices issued by [...], and owned by the Gavazzi brothers were uncertain as they had not been registered in the accounting books. The Board decided to appoint a person to handle the receipt of such invoices for registration, and to establish a date for a General Meeting of Shareholders that would acknowledge the capital increase of the Company by [...]. The minutes further noted explicitly that the Board postponed the acknowledgement of the capital increase until the next meeting, so as to allow for time to put the accounting documentation in order.⁸³
159. The minutes of the Company's general assembly of shareholders on 30 April 2002 stated that the debt of [...] (which had been erroneously registered in the Socomet books as a debt owed to [...]) was actually owed to Holdeast, a company that was owned by the Gavazzi brothers, who wished to transfer such debt, subsequent to the rectification of the accounting records, to the capital of company Gavazzi Steel. The accounting records were accordingly rectified to show that the credit holder was Holdeast, rather than [...]. The meeting also decided that the:
- [...]
160. The minutes of the Company's general assembly of shareholders on 18 June 2002 record that the attendees were informed by the Company's auditors that [...] was owed as a debt to Holdeast, corresponding to the period preceding its privatization, and that Mr Marco Gavazzi agreed that such amount would be transferred to the capital for the Company.⁸⁴
161. At the Company's Board meeting on 24 August 2002, the materials related to the Holdeast invoices were accepted. However, Messrs Ioja and Mitariu dissented. The latter attached the following "appeal" to the Minutes of the meeting:

[...]

⁸³ C-36, as translated into English.

⁸⁴ *Id.*

162. It will be recalled that, as at this date (24 August 2002), the Company's Board of Directors considered the Company to be virtually insolvent, requiring a judicial reorganisation under Romanian law and facing claims to such effect from its creditors before the Tribunal of Resita.⁸⁵
163. The Tribunal considers that this recital of Board meetings and shareholder assemblies tells its own story.
164. It is clear that the credit owned by the Claimants came from a third person (Holdeast), juridically unrelated to the Company and originally pre-dating the Claimants' acquisition of the Company's shares upon its privatisation. Accordingly, this is not a case of a credit or loan or other form of financing made by the Claimants direct to the Company prior to or at the time of their original investment. The Tribunal accepts that the Claimants subsequently held a credit (as acquired from Holdeast) from the Company; and that the Claimants intended to transfer that credit for the benefit of the Company, as a contribution to its capital and, thereby, as part of their investment in the Company. However, a capital contribution in the form of a transfer of credit from the Claimants to the Company could not be made by means of a unilateral act by the Claimants alone. Something more was required from the side of the Company.
165. The Tribunal considers two issues to be decisive in the complicated series of events relating to Holdeast: (i) The Claimants bear the legal burden of proof; and (ii) There is no evidence of any actual increase of capital in the Company. In short, the Claimants have not proven their case.
166. As stated above, the Claimants bear the legal burden of proof. To this Tribunal, this means that their claim should be at least more probable than not.
167. There is no evidence of any actual increase in capital. The Tribunal notes that a company's capital is a legal and institutional matter. It is important *erga omnes* because the amount of a company's capital affects its credit-worthiness and financial standing. For example, when

⁸⁵ Decision, para. 76.

a company's assets are less than its capital, there are rules about its dissolution. A company's capital cannot therefore be increased by a mere resolution of the Board or General Assembly. It can only increase its capital after complying with the relevant formalities, *i.e.*, registration, act by public notary, amendment of its by-laws or act of incorporation.

168. In the case of a Romanian company, such as the Company, Romanian domestic law applies. The Tribunal found in its Decision that Romanian legal formalities for contribution to capital need not be followed in order for a finding that there was an "investment" under the BIT. However, the Tribunal considers that there is a difference between the requirements for "investment" and for "capital increase". Where these formalities are irrelevant to make an "investment" as defined under the BIT, they still need to be followed to increase the corporate capital of a Romanian company.
169. The Claimants announced their intention to increase the Company's capital in 1999. However, there is no evidence that such capital was ever increased and, in particular, registered in the Company's records after the required formalities under Romanian law.
170. From the appeal made by Mr Mitariu on 24 August 2002, there is no evidence that any increase in capital was registered in the Company's records after the required formalities. The Tribunal finds that the registration and requirements were never completed, despite the Claimants' attempts to do so. This accords with the oral testimony of Mr Marco Gavazzi, cited above: "But I didn't succeed." The Tribunal thus finds that there was never any actual increase in capital of the Company.
171. Accordingly, for these reasons, the Tribunal concludes that the Claimants have not proven their case that their investments, within the meaning of Articles 1(1)(b) and 4(4) of the BIT and Article 25 of the ICSID Convention, included a capital increase in the form of a conversion of a Company debt in any amount, including the alleged amount of [...]
172. ***The Italian Expert Technicians:*** It is again necessary to examine the Parties' respective submissions and the factual materials in evidence in some detail in regard to this alleged investment of [...].

173. *The Claimants' Position:*

[...]

184. *The Respondent's Position:*

[...]

186. *The Tribunal's Decision:* The Tribunal will successively discuss (i) The evidence to sustain the Claimants' claim for [...]; and (ii) The relevance of the payment of salaries outside of Romania.

The Evidence

187. In brief, for the Tribunal, the evidence as to how much money Messrs Gavazzi paid to these Italian expert technicians is at best unclear. Questions abound: for example, to which extent are the 1999 payments included in the 2002 bank statement of [...]? How does this 2002 bank statement relate to the claim that Gavazzi Steel Consultants paid more than [...] to the Italian expert technicians?

188. There is no doubt that certain of the Italian consultants, formally in the employment of Gavazzi Steel Consultants, worked for the benefit of the Company, five of them on a permanent basis in Otelu Rosu. However, the only contemporary written proof is the list appended to Exhibit C-63, dated 26 December 1999, of the twelve names and projected annual salary amounts of these experts for the years to come. On the basis of this document, the Claimants have advanced a lump sum of [...] allegedly paid out to these twelve technicians, without providing the Tribunal with any breakdown of how much, when and how each of the twelve technicians were paid. On the other hand, Exhibit C-62 refers to [...]. No evidence has been submitted by the Claimants to show how much of the money thus received was actually paid out to these Italian expert technicians and was not used for Gavazzi Steel Consultants to finance other activities. Indeed, at the hearing, Mr Marco

Gavazzi admitted that Gavazzi Steel Consultants used funds received by Gavazzi Steel Consultants not only to pay salaries: [... .]⁸⁶

189. The Tribunal observes that Gavazzi Steel Consultants appears to have been initially intended to act as Socomet's international agent, operating on a [...] % commission, to sell Socomet's products abroad to increase to maximum the profitability of its marketing operations. For instance, by 7 October 1999, important sales agreements had already been concluded. Moreover, Gavazzi Steel Consultants was also intended to purchase, for its principal, raw materials and equipment. The Tribunal observes that in the Minutes of the initial Board and Shareholders meetings, only this agency and marketing function of Gavazzi Steel Consultants were mentioned; there was no mention that Gavazzi Steel Consultants was intended as a conduit to pay the Italian technicians their salary in Switzerland.⁸⁷ It was only on 1 February 2002, after Socomet had acquired the shares of Gavazzi Steel Consultants, that the Minutes of the Board Meeting indicated that Gavazzi Steel Consultants would not only market Socomet's products outside of Romania but would also cover [...].⁸⁸ Similarly, the Minutes of the General Assembly of Shareholders of the same day describe [...].⁸⁹ Moreover, the Minutes state, [...].⁹⁰ The several functions of Gavazzi Steel Consultants contradict the notion that all funds invested in that Company were exclusively related to payment of the salaries of the Italian technicians. The Tribunal finds that this clearly not so.
190. The Claimants' submissions and evidence in relation to why [...] should have been due, are very succinct. There are four lines in its Second Submission at paragraph 101, and a mere reference in its Reply on Quantum. On the other hand, the Respondent has extensively pointed to a lack of evidence supporting the Claimants' claim of [...] in this regard.⁹¹

⁸⁶ Hearing on Jurisdiction and Liability Transcript, 3 June 2014, 364, 25; p. 365, 1-3 (Marco Gavazzi).

⁸⁷ See e.g., [...]C-36, as translated into English, and [...], C-25, as translated into English.

⁸⁸ C-36, as translated into English, p. 94.

⁸⁹ C-25, as translated into English, p. 75.

⁹⁰ *Ibid.*

⁹¹ R-PHB, paras. 17-24; R-RPHB, paras. 44-46; R-CMQ, paras. 179-181.

191. This lack of evidence is all the more striking as Gavazzi Steel Consultants was directly and fully controlled by the Claimants until February 2002, and indirectly through Socomet after that date. The Tribunal is willing to assume that the Claimants always had intended to request Socomet to reimburse them for the funds that the Claimants had invested in Socomet through Gavazzi Steel Consultants. However, if that assumption were correct, it can be expected that the Claimants would have kept careful financial records of what sums they considered to be due to them. Bearing in mind that the Claimants appear to have saved copies of all Socomet documentation, and submitted many of these documents into evidence in this case, the Tribunal cannot but wonder why the Claimants were unable to do the same for Gavazzi Steel Consultants. It can only assume that none existed.

Romanian Taxes

192. The Respondent argues that the Claimants cannot claim compensation for the payment of salaries to the Italian technicians working permanently at Otelu Rosu, who were paid in Lugano, Switzerland, when they returned via Switzerland to Italy. The Claimants admitted that these payments [...].⁹² Moreover, at the hearing, it was admitted that the payment were in breach of Romanian tax regulations.⁹³
193. The Tribunal will now discuss the possible illegality of the payments that had been made to the Italian expert technicians in light of Article 1.1 of the BIT which requires an investment to be “in accordance with its (Romanian) laws”.
194. The Tribunal observes that the Respondent focuses its argument about the illegality of the salaries paid to the five technicians who were allegedly active in Otelu Rosu on a permanent basis, but did not argue that the salaries paid to the other Italians, [...], who were consulting on a non-permanent basis, were also illegal under Romanian law. Any violation of Romanian domestic laws as regards the employment of foreign personnel and

⁹² See C-SSQ, fn.101.

⁹³ See Hearing on Jurisdiction and Liability Transcript, 3 June 2014, p. 379 19-21; as referred to by Respondent, R-CMQ, para. 179.

tax applied only to the five technicians who worked on-site, as opposed to all twelve of the Italian expert technicians.

195. The Tribunal has to address the Claimants' allegation that the Romanian authorities were aware of the fact that these five technicians received their salaries outside of Romania and that the National Bank of Romania had approved that mode of operation. It observes that Mr Marco Gavazzi's statement at the hearing that he [...]“ [...] is not sustained on the contemporary documentation. In fact, the Tribunal observes that, immediately after the Claimants entered the Socomet Board of Directors, it was decided to solicit from the Romanian National Bank the required authorisation to transfer funds abroad to acquire Gavazzi Steel Consultants BVI.⁹⁴ However, at that time, Gavazzi Steel Consultants was still being presented as Socomet's international agent: operating on a [...]% commission, it would sell Socomet's products abroad, purchase raw material and equipment and provide technical assistance for equipment delivered.⁹⁵ At the General Assembly of Shareholders of 7 October 1999, Gavazzi Steel Consultants was said “[...]”⁹⁶ No mention was made of the use of Gavazzi Steel Consultants as a serving hatch to pay permanently the Italian technicians working at Otelu Rosu. This other activity of Gavazzi Steel Consultants was only acknowledged much later, *i.e.*, on 1 February 2002, in the Board of Directors and the General Assembly of Shareholders.⁹⁷ In fact, the authorization that the Romanian National Bank issued in November 1999, on which Claimants rely, did not acknowledge that Gavazzi Steel Consultants would systematically be used to pay the Italian technicians; its scope only covered the transfer of funds for the purchase of Gavazzi Steel Consultants.⁹⁸ Consequently, the Tribunal is not convinced by the Claimants' argument that the payment of salaries outside of Romania was expressly approved by the Romanian authorities.

196. The Tribunal is aware that the Claimants argue that the Italian experts needed to be paid outside of Romania because Socomet's Romanian bank accounts had been unlawfully

⁹⁴ [...] C-36, as translated into English.

⁹⁵ C-36, as translated into English, p. 9.

⁹⁶ C-25, as translated into English, p. 44.

⁹⁷ *See* C-25, as translated into English, p. 75 and C-36, as translated into English, p. 94.

⁹⁸ C-64.

blocked by the Romanian authorities, making any direct payments by the Company to the Italian expert technicians impossible. The argument, made by the Respondent, that such payment is illegal under Romanian law and therefore non-compensable under the BIT for reasons of illegality, must be tempered by the fact that such breach of Romanian law was provoked by the Respondent's own breach of its commitments under the BIT.

197. The Tribunal observes that these bank accounts were only blocked as of 15 September 1999, whereas the Claimants themselves admitted that it had been their intention from the very beginning to pay the Italian consultants in convertible currency outside Romania. As Mr Marco Gavazzi confirmed at the hearing: “[...].”⁹⁹ Consequently, the Tribunal concludes that the payment of salaries outside of Romania was not initially caused by the Respondent's blocking of the Company's Romanian bank accounts.
198. However, as the Tribunal considers that the Claimants failed to substantiate the quantum of their claim for compensation of monies paid to the Italian consultants, the issue relating to the extent to which the fact that the payment of salaries outside of Romania to some or all Italian Consultants, becomes irrelevant in deciding this claim. The Tribunal does not therefore base its decision on this part of the Respondent's case.

iv. Loss of Opportunity

199. In the Tribunal's view, it would be wrong in this case as a matter of principle to limit the Claimants' compensation to the return of its capital invested (with interest) under Article 4(4) of the BIT. First, where (as here) the effective and fair market value of the Claimants' shares in the company cannot be easily ascertained, that provision requires the Tribunal to apply, above all, “equitable objective principles”. Second, the same provision lists factors which are expressly stated not to be exhaustive (“*inter alia*”). Last, but not least, the latter list includes a ‘catch-all’ reference to “other relevant factors”.
200. Applying all this to the present case, it is a fact of commercial life and international trade that investors do not do something for nothing. It would thus make no sense to limit the

⁹⁹ Hearing on Jurisdiction and Liability Transcript, 3 June 2014, p.354, 15-16.

Claimants' compensation in this case to capital invested. There is also another general principle at issue, common to all claims for compensation. As the tribunal held in *Himpurnia*:

291. Here the claimant seeks the benefit of its bargain. This is a fundamental aspect of the law of contracts; if recovery were limited to what a claimant has spent in reliance on a contract which has been breached, an incentive would be created which is contrary to contractual morality: obligors would generally find it in their interest to breach contracts which turn out to be valuable to their co-contractant. Parties do not enter into contracts involving risk in order to be repaid their costs. To limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is commercially intolerable when that party was at full risk for the amount of investments made on the strength of the contract.¹⁰⁰

201. In the Tribunal's view, the other factors listed in Article 4(4) of the BIT, that is, the appreciation and depreciation of the capital invested, current returns and replacement value, are not relevant on the factual circumstances of this case. The Tribunal therefore next considers together "equitable objective principles" and the catch-all reference to "any other relevant factors". In the Tribunal's view, the most relevant factor is the Claimants' "loss of opportunity" to benefit from its capital invested.

a. The Claimants' Position

[...]

b. The Respondent's Position

[...]

c. The Tribunal's Decision

209. The Tribunal is conscious of the Parties' reluctance, based on their different perspectives, to accept any approach by the Tribunal to use loss of opportunity as a basis for its assessment of compensation under Article 4(4) of the BIT.¹⁰¹ Despite the Parties' common

¹⁰⁰ *Himpurnna v. PT (Persero) Perusahaan Listrik Negara*, Yearbook Comm Arb'n XXV (2000) 13, pp. 83-84, Final Award (4 May 1999). This was a claim in contract under a national law, but the same general principle applies to an analogous claim for compensation under a treaty under international law.

¹⁰¹ C-PHB, paras. 205-218; R-PHB, paras.135-148.

reluctance, having given them both a fair opportunity to address the issue, the Tribunal considers that, in this case, it has a duty to adopt that approach, as explained further below.

210. In international investment arbitration, where arbitrators have to apply international investment treaties and general principles of international law, because of the international law dimension and issues in which the public has a stake, the principle of *iura novit curia* has even a more substantial impact than in international commercial arbitration.¹⁰² The parties have no veto right on the international legal principles to be applied. The Tribunal can reach its legal reasoning on the outcome of the case independently from the legal theories defended by the parties as long as it has submitted the legal theories for comments to the Parties in a fair and appropriate manner. Indeed, the Tribunal can “come to an appropriate legal resolution of the dispute once it understands the relevant facts”.¹⁰³

211. For instance, in *Bogdanov v. Moldova*, it was held that:

*...it is established that the principle of iura novit curia applies: therefore, the Arbitral Tribunal in applying the law, is not bound by the pleadings made by the parties, and may by its own motion apply legal sources or legal qualifications that have not been pleaded by the parties.*¹⁰⁴

212. The same position has been taken in other cases, including *Bosh International v. Ukraine*,¹⁰⁵ *RSM Production Corp. v. Grenada*,¹⁰⁶ and *Garanti Koza LLP v.*

¹⁰² See e.g. H. van Houtte and M. Brunetti, “Investment Arbitration – Ten Areas of Caution for Commercial Arbitrators”, (2013), 29(4) *Arbitration International* 553 at pp. 570-572. See also *Metal-Tech Ltd v. Republic of Uzbekistan* as follows: “[T]he Tribunal considers that, when it comes to applying the law, including municipal law, as opposed to establishing facts, the principle *iura novit curia* – or better *iura novit arbiter* – allows it to form its own opinion on the meaning of the law.” *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award (4 October 2013), para. 28.

¹⁰³ F.G. Sourgens, *A Nascent Common Law: The Process of Decision-making in International Legal Disputes between States and Foreign Investors* (Brill: 2015), pp. 93-94.

¹⁰⁴ *Yury Bogdanov v. Republic of Moldova*, Award (22 September 2005), p. 9.

¹⁰⁵ *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award (25 October 2012), para. 30.

¹⁰⁶ *RSM Production Corporation v. Grenada* Annulment Proceeding (ICSID Case No. ARB/05/14), Decision on RSM Production Corporation’s Application for a Preliminary Ruling (7 December 2009), para. 23.

Turkmenistan.¹⁰⁷ In *Wena Hotels v. Egypt*, for an extreme example, despite neither party arguing for or against compound interest, the tribunal nevertheless exercised its *iura novit curia* power to use compound interest in calculating damages.¹⁰⁸

213. “Loss of opportunity” in both contractual and delictual claims for compensation is a general principle of law that is applied in many civil legal systems¹⁰⁹ as well as in common law systems.¹¹⁰ The Tribunal is aware of a case where the French Cour de Cassation annulled the award made by the majority of the arbitration tribunal on the ground that the claimant’s counsel had only pleaded damages for loss of future profits and not damages for loss of an opportunity to make future profits (as awarded, a lesser sum). The reason of this annulment was the circumstance that, apparently, the tribunal had not submitted the possibility to grant damages for loss of such opportunity to the parties which, on the contrary – this Tribunal has here done expressly.¹¹¹ It is also clear from earlier decisions of the French Cour de

¹⁰⁷ *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Dissenting Opinion of Laurence Boisson de Chazournes on the Decision on Jurisdiction (3 July 2013), fn. 16.

¹⁰⁸ *Wena Hotels v. Egypt*, paras. 127 and 128.

¹⁰⁹ See .e.g., H. Mazeaud, L. Mazeaud and A. Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle – Volume I*, (6th ed., Montchrestian: 1965) at p. 272 et seq; P. le Tourneau and L. Cadiet, *Droit de la Responsabilité* (Daloz: 1998) at p. 214; and G. Mäsch, *Chance und Schaden* (Mohr Siebeck: 2004), at p. 240 et seq. and p. 320 et seq.

¹¹⁰ For example, the Court of Appeal in England decided to award such damages in *Chaplin v. Hicks* [1911] 2 KB 786, where the plaintiff was wrongly deprived of an opportunity, in breach of contract, to win a beauty competition leading to employment as an actress. The jury could not award her damages on the basis that she would have won the competition because she was only one of 50 competitors from which only 12 winners could be chosen; but she was nonetheless awarded substantial damages (£100, now equivalent to about £10,000). On the defendant’s unsuccessful appeal, the Court of Appeal emphasised that it remained legally possible to quantify the plaintiff’s damages, on a balance of probabilities under English law, even though her claim remained subject to future contingencies making that exercise “not only difficult but incapable of being carried out with certainty or precision”; and the Court rejected the notion “with emphasis” that, because such precision was not possible, then no damages could be ordered at all.

¹¹¹ *OMI v. CCN* (arrêt of 29 June 2011). The tribunal’s majority comprised both civilian and common lawyers (Horacio Grigera Naon and Jan Paulsson); the claimant’s counsel included a common lawyer (Toby Landau) and the applicable law was a civilian system. The case is reported online at: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/785_29_20477.html, where it was held that “*que la cour d’appel en a déduit à bon droit qu’en omettant d’inviter les parties à s’expliquer sur ce point, les arbitres avaient méconnu le principe de la contradiction*”.

Cassation that French law recognizes the concept of compensation for loss of opportunity (or loss of a chance).¹¹²

214. The principle of “loss of opportunity” as a basis for compensation, in a comparative approach, is best illustrated by the UNIDROIT Principles on International Commercial Contracts (2004, since immaterially revised). Article 7.4.3 (Certainty of Harm) provides:

(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.

(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.

(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

215. As regards the second sub-paragraph, the UNIDROIT commentary reads:

Para. (2) in addition covers loss of a chance, obviously only in proportion to the probability of its occurrence: thus, the owner of a horse which arrives too late to run in a race as a result of delay in transport cannot recover the whole of the prize money, even though the horse was the favourite.

216. As regards the third sub-paragraph, the commentary reads:

... where the amount of damages cannot be established with a sufficient degree of certainty then, rather than refuse any compensation or award nominal damages, the court is empowered to make an equitable quantification of the harm sustained.

217. Ripinsky & Williams summarized the principle as to loss of opportunity in regard to future profits as follows:

Where a tribunal cannot accept a claim for lost profits as not sufficiently certain, it may choose to award, instead, a compensation for the loss of business (commercial) opportunity, or for the loss of a chance. This head of damage appears to be a subspecies of lost profits, which is resorted to when the available data does not allow

¹¹² For example, see the judgment of the Cour de cassation of 18 March 1975, in the *de la Broise Case*, quashing the judgment of the Cour d’appel of Angers: “ ... *Attendu d'autre part qu'en se bornant à énoncer qu'il n'était pas certain que la victime eût obtenu la promotion qu'elle pouvait espérer, l'arrêt n'a pas justifié le rejet de la prétention des parties civiles qui invoquaient la perte d'une chance; qu'en effet, l'élément de préjudice constitué par la perte d'une chance peut présenter en lui-même un caractère direct et certain chaque fois qu'est constatée la disparition, par l'effet du délit, de la probabilité d'un événement favorable, encore que, par définition, la réalisation d'une chance ne soit jamais certaine; ...* ”

*making a more precise calculation of lost profits. The concept of the loss of opportunity, or the loss of a chance, is recognised in a number of national legal systems, as well as in the UNIDROIT Principles of International Commercial Contracts. The latter provide in Article 7.4.3(2) that '[c]ompensation may be due for the loss of a chance in proportion to the probability of its occurrence'. It is suggested that a chance of making a profit is an asset with a value of its own, and that compensation for the loss of a chance is an alternative to the award of lost profits proper in cases where the claimant has failed to prove the amount of the alleged loss of profit with the required degree of certainty, but where the tribunal was satisfied that the loss in fact occurred. Loss of a chance can thus be used as a tool allowing the injured party to receive some form of compensation for the loss of a chance to make a profit. In theory, the loss of a chance is assessed by reference to the degree of probability of the chance turning out in the plaintiff's favour, although in practice the amount awarded on this account is often discretionary.*¹¹³

218. In international law the concept of “loss of opportunity” has long been accepted. It suffices here to refer to the decisions in *Sapphire v. NIOC*,¹¹⁴ (albeit arguably influenced by *ex aequo et bono* considerations); *SPP v. Egypt*;¹¹⁵ *Gemplus v. Mexico*¹¹⁶ and *Lemire v. Ukraine*.¹¹⁷ Given the Parties’ common reluctance to accept or deploy this ‘jurisprudence constante’, the relevant passages from two of these decisions merit citing here at length.
219. The ICSID tribunal in *SPP v. Egypt* declined to award compensation by reference to any DCF methodologies because the project was in its infancy with an insufficient history on which to base projected revenues into the future (as already described above). Instead, the tribunal awarded compensation for the claimant’s loss of opportunity to make a commercial success of the project in the sum of [...]. The tribunal decided that it was incontestable on the evidential record that the claimants’ investment had a value that exceeded their out-of-pocket expenses. The tribunal acknowledged that determining the “opportunity of making a commercial success of the project” necessarily involved an

¹¹³ Ripinsky & Williams, *Damages in International Investment Law* (2008), p. 291 (footnotes omitted).

¹¹⁴ *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1963) 35 ILR 136, 187-188.

¹¹⁵ *SPP v. Egypt*, para. 215.

¹¹⁶ *Gemplus, S.A., SLP, S.A., Gemplus Industrial, S.A. de C.V. and Talsud S.A. v. United Mexican States* (ICSID Cases Nos. ARB(AF)/04/03 & ARB(AF)/04/), Award (16 June 2009) (hereinafter “*Gemplus v. Mexico*”), paras. 13-83ff.

¹¹⁷ *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award (28 March 2011) (hereinafter “*Lemire v. Ukraine*”), paras. 246-251.

element of subjectivism and, consequently some uncertainty; however, it stated that “it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred”.¹¹⁸

220. The SPP tribunal then proceeded to calculate such compensation as follows:

216. In determining the amount by which the value of the Claimants’ investment in ETDC exceeded their out-of-pocket expenses, the Tribunal will take as a starting point the lot sales actually made during the short life of the project and the revenues to be imputed to those sales. As the Tribunal has already observed, the evidence shows that during the period February 1977 to May 1978, ETDC’s actual sales of villa and multi-family sites amounted to US \$10,211,000. The lots involved - 383 villa sites and 3 multi-family sites represented only 6 percent of the villa sites and less than 1 percent of the multi-family sites with respect to which ETDC held rights. It is clear, therefore, that the remaining lots were a potential source of very substantial revenues.

217. The Tribunal will next consider what it took in the way of expenditures by the Claimants to generate the revenues imputed to the lot sales. The difference between these expenditures and the portion of imputed revenues corresponding to SPP(ME)’s shareholding in ETDC is, in the Tribunal’s view, the minimum measure of the value to be ascribed to the opportunity to make a commercial success of the project.

218. It is not disputed that SPP(ME) made capital contributions to ETDC of US \$1,310,000, and the Tribunal has already determined that the Claimants’ development costs were US \$1,719,000. In addition, loans totalling US \$2,058,000 were made to ETDC, but these loans will be disregarded for present purposes because they were intended to be reimbursed - for the most part with interest at commercial rates. The portion of the revenues imputed to the lot sales corresponding to SPP(ME)’s shareholding in ETDC was 60 percent of US \$10,211,000, or US \$6,127,000. Thus, the portion of the sales revenues corresponding to SPP (ME)’s shareholding in ETDC would have exceeded the Claimants’ non-reimbursable out-of-pocket expenses by US \$3,098,000. In these circumstances, the Tribunal is of the view that the value of which the Claimants have called the “opportunity of making a commercial success of the project” was not less than US \$3,098,000. Stated differently, the value of the Claimants’ investment in May of 1978 when the project was cancelled exceeded their out-of-pocket expenses by at least US \$3,098,000.¹¹⁹

221. In *Lemire v. Ukraine*, the ICSID tribunal adopted a similar approach, recognising that a loss of opportunity could be valued in its own right with sufficient certainty for the purpose

¹¹⁸ *SPP v. Egypt*, para. 212ff.

¹¹⁹ *SPP v. Egypt*, paras. 216-218.

of assessing compensation. It decided as follows, adopting the test suggested in the UNIDROIT Principles:

246. The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.

247. While the existence of damage is certain, calculating the precise amount of the compensation is fraught with much more difficulty, inherent in the very nature of the “but for” hypothesis. Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is to make an informed and conscientious evaluation, taking into account all the relevant circumstances of the case, not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings.

[...]

251 Compensation for a lost chance is admissible, and is normally calculated as the hypothetical maximum loss, multiplied by the probability of the chance coming to fruition. To take the example given in the Official Comment to the UNIDROIT Principles: ‘[T]he owner of a horse which arrives too late to run in a race as a result of delay in transport cannot recover the whole prize money, even though the horse was the favourite’. In this example, the owner must be satisfied with compensation proportionate to the probability of the win.¹²⁰

222. Applying the principle of loss of opportunity to the circumstances of this case, the Tribunal concludes that it is necessary, under Article 4(4) of the BIT, to quantify, beyond the amount of their capital investment, the loss of opportunity suffered by the Claimants caused by the Respondent’s breaches of the BIT. The Tribunal must of course do so with a reasonable degree of certainty, bearing in mind that the Claimants bear the overall legal burden of proving their loss. The Tribunal must also assess that opportunity in proportion to the probability of the counter-factual situation occurring; namely (as alleged by the

¹²⁰ *Lemire v. Ukraine*, paras. 246-251 (footnotes omitted).

Respondent): the complete financial failure of the Claimants' project caused by factors other than the Respondent's violations of the BIT.

223. Of course, the Tribunal is conscious that its calculations of loss of opportunity cannot be a rigorous scientific, mathematical or forensic exercise. However, considering what the international and domestic decisions and commentaries suggest, including the UNIDROIT Principles, and what is actually before the Tribunal in this case as evidence, it is a difficult but not an impossible exercise.
224. In assessing compensation for loss of opportunity, the Tribunal notes, potentially, a special factor. The reason why such compensation is so difficult in this case, subject to causation (addressed separately below), lies with the Respondent's own wrongdoing in violation of the BIT. Where a claimant as the innocent party has difficulty in proving its compensation, particularly as regards future events, because of the wrongdoer's acts or omissions, the wrongdoer should not be permitted to escape liability for compensation as a direct result of the difficulty or resulting uncertainty for which that wrongdoer is responsible. At that point, the evidential burden regarding uncertainty shifts from the innocent party to the guilty party. Otherwise, the guilty party would profit unfairly from its own wrong.
225. The Tribunal next notes that other steel companies in similar situations in Romania, such as Mittal Steel, were successful in turning a profit from their comparable operations in Romania. The same result, in theory, could have happened with Socomet. It is a matter of regret for all concerned that the Claimants' project failed.
226. As already summarised above, the Claimants based their assessment of loss of opportunity on the 2002 Business Plan, which was not implemented. They observe that its expert witnesses (of Deloitte) have estimated the value of Socomet based on the Business Plan as [...] On the other hand, IPROLAM, in a 2004 report to the local court in the Severin case, found that Socomet was mismanaged and needed a far more radical reorganisation than the 2002 Business Plan envisaged— if ever implemented, quod non.¹²¹ In a later report

¹²¹ [...] (R-52; C-57). These valuation numbers were only quoted to suggest that theoretically assets or part of the going concern 'outside the viable flow' could be sold, but without any prognosis at the price to be obtained.

of 5 October 2004, IPROLAM considered the take-over by Ductil, a well-performing Romanian Steel Mill, of the management of Socomet and substantial streamlining of Socomet's activities. This report also very briefly mentioned without attaching any conclusion that a 'Valuation Report of Gavazzi Steel SA Otelu Rosu, drawn up by economists Onete Bogdan and Arcanu Ungureanu Mihai, had valued Socomet, as a going concern without implementation of the Business Plan as [...] and Socomet's assets at [...].¹²² The Claimants argue that under the loss-of-opportunity approach, the difference between Deloitte's estimate and IPROLAM's valuation of Socomet would correspond to the value added to the company, had the Business Plan been implemented by the Claimants.¹²³ However, this Valuation Report has not been submitted; and it is unknown to the Tribunal whether it was drafted at the request of Socomet or the Claimants or by independent experts, nor what its assumptions and criteria were. More specifically, the conclusions of the Valuation Report hint that the Report considered the financial status of Socomet, which already had gone through the insolvency process and was freed from all liabilities. Moreover, as the Respondent has pointed out, such a calculation would imply an [...]% granted return on the Claimants' investment based on the hypothetical implementation of the 2002 Business Plan,¹²⁴ a granted [...]% return, based upon the unknown Valuation Report as a going concern and even a granted return of [...]% on the basis of asset value after the insolvency and over two year of inactivity. The Tribunal finds these figures wholly unrealistic and, for all practical purposes, unsuitable to quantify the Claimants' loss of opportunity.

227. Moreover, in the Tribunal's view, the 2002 Business Plan has to be severely discounted as its successful implementation was always improbable. The probability of Socomet's potential future returns under the 2002 Business Plan raises *inter alia* the following questions:

¹²² C-57 and R- 52.

¹²³ C-RPHB, para. 108.

¹²⁴ R-RPHB, para. 96.

- a) Whether the transaction being negotiated with Techint and Simest (the latter, in particular, being premised on many conditions), and HypoVereins Bank (which depended on cooperation with a Romanian bank) could or would materialise;
 - b) Even if the transaction did materialise, would it be profitable, despite all the variables and uncertainties involved; and
 - c) Even if were profitable, what would have been the amount of those profits for the company.
228. For the reasons already set out earlier in this Award, the Tribunal decides that there was no probability that Socomet would have generated substantial revenues with significant net profits. Therefore, the Claimants' scenarios of a [...]%, [...]% or [...]% loss of opportunity, based on the 2002 Business Plan, is simply, in the Tribunal's view, unrealistic, unreliable and unsuitable for present purposes.
229. The Tribunal therefore turns to the only solid data available: the amounts invested by the Claimants and seeks to estimate the probable future return on such investment. This is, again, not an easy exercise.
230. The Tribunal can readily accept that international investors, such as the Claimants, could hope to double their investment over time. However, this hope is certainly not established in the present case where there were significant overdue debts and the company, run in Communist times in a manner that had brought it close to bankruptcy, needed a "radical turn around".¹²⁵ In fact, the Claimants' investment in Socomet was subject to very considerable risks. Hence, what the Claimants might have hoped as a return on their capital invested must be discounted downwards.
231. In fact, the impact of the retraction of Romania's commitments was less dramatic than Claimants argued.¹²⁶ It was not certain that, without that retraction, Socomet would have become profitable. Moreover, the Claimants did not make much of an investment

¹²⁵ C-PHB, para. 116.

¹²⁶ C-SSQ, paras. 51-55.

themselves. The Tribunal notes that, even in their negotiations with Techint and the 2002 Business Plan, it was always envisaged that moneys should have hopefully been injected from third parties such as Techint, Simest, and HypoVereins Bank. If the Claimants had invested the planned amounts of [...] in 1999, [...] in 2001, and the balancing of [...] altogether, Socomet could have had a chance of survival and, perhaps, even success.¹²⁷

232. The Tribunal therefore, by majority, quantifies the Claimants' loss of opportunity at 50% of the amount of their investment, discounted to and assessed as at 1 September 2002. The Tribunal retained the date of 1 September 2002 as the relevant valuation date as the Board of Directors and General Meeting of Shareholders considered Socomet "virtually insolvent" on 24 August 2002 and by end August its judicial reorganisation was applied for. Without resorting to the unreliability of the 2002 Business Plan, or to other possible calculation scenarios for which the Tribunal has no or no sufficient evidence, the Tribunal determines the amount of compensation for the loss of opportunity at 50% of the share price and capital invested by the Claimants; namely:

[...]The Tribunal concludes that its determination of these amounts of compensation conforms to the rule of customary international law set out in Article 36(2) of the International Law Commission's draft Articles on State Responsibility (2001). These figures are not "speculative", but represent the established minimum damage actually suffered by the Claimants and financially assessed as at 1 September 2002.

233. The Tribunal concludes this assessment of compensation for loss of opportunity with some observations on the award of 30 October 2007 issued by the arbitral tribunal chaired by Professor Pierre Lalive ("2007 Romanian Award"), annulled by the Romanian courts, which had granted the Claimants substantial compensation, significantly greater than the compensation awarded by the Tribunal in this Award.¹²⁸ This difference requires explanation.

¹²⁷ Besides, in 1999, the Claimants envisaged an investment of approximately [...], a sum far larger than the amounts reflected later in the 2002 Business Plan. The Claimants were thus aware that very substantial funds were necessary to turn Socomet around, and to restructure it as a going concern capable of prospering.

¹²⁸ See Decision, paras. 77-79.

234. The Tribunal first notes that the 2007 Romanian Award was a majority award, deciding on a question of private contract rather than investment under a treaty. Moreover, the award was later annulled by the courts of Romania. The Tribunal also notes that the 2007 Romanian Award did not grant compensation for a loss of opportunity. Instead, the award, in a rather succinct manner, granted compensation for lost profits, thereby relying fully on Deloitte Report. However, the 2007 Romanian Award put into question neither the Kinglor Report, nor the 2002 Business Plan, as the present Tribunal does. Moreover, the 2007 Romanian Award also does not take into account the mismanagement of Socomet, a fact that was extensively discussed by IPROLAM in its Report. For these reasons, this Tribunal finds that it had to part ways with the reasoning in the 2007 Romanian Award.

D. Article 2(3) - Fair and Equitable Treatment

a. The Claimants' Position

[...]

b. The Respondent's Position

[...]

c. The Tribunal's Decision

251. In its endeavours above to apply “equitable objective principles”, the Tribunal has already decided to compensate the Claimants not only for their lost investments (in the form of capital invested) but also for their loss of opportunity to make a profit from such investments. The Tribunal has also decided that “the effective and fair market value” of the Claimants’ shares cannot be ascertained, easily or at all, on the basis of the factual and expert materials placed before the Tribunal.

252. In the Tribunal’s view, the granting of further compensation as claimed by the Claimants for breach of the FET standard would duplicate such compensation notwithstanding the difference in the dates invoked by the Claimants. As shown above, the Claimants sought compensation for the value of Socomet as of 2002, based (*inter alia*) on all the monies that the Claimants put into Socomet between 1999 and 2002. Accordingly, given that the

Tribunal has already taken such monies into account, that compensation necessarily precludes the Claimants from claim reimbursement of the same pre-2002 investments which kept Socomet in operation until 2002. The Claimants cannot, as the Belgians say, have their pistol and eat it, or, as in Ancient Rome: *electa una via, non recursum ad altera*.

253. Accordingly, for these reasons, the Tribunal decides that there are no additional items of loss qualifying as further compensation accruing to the Claimants for the breach of the fair and equitable treatment standard in Article 2(3) of the BIT.

E. Attribution of Losses

a. The Claimants' Position

[...]

b. The Respondent's Position

[...]

c. The Tribunal's Decision

267. The Tribunal has found that the Respondent is responsible for breaches of the BIT and has to compensate the Claimants for damage caused thereby. However, the Tribunal is also aware of the Respondent's arguments that it should not be held responsible for the totality of the damage alleged by the Claimants, since there were various acts and omissions on the part of the Claimants and of Socomet that contributed to Socomet's insolvency and for which Socomet itself or the Claimants were responsible.¹²⁹ The Tribunal has therefore to address specifically the Respondent's argument that the

[...]

268. The Tribunal will first focus on the legal question to what extent the Respondent's obligation to compensate for breach of the BIT is affected by the alleged responsibility of

¹²⁹ *Id.*, paras. 76 and 198.

Socomet or the Claimants for acts and omissions which contributed to the Company's insolvency, in whole or in part. It will then discuss the factual question to what extent the alleged acts and omissions have contributed to the insolvency and, more importantly, whether Socomet or the Claimants can be held responsible for them.

269. In international law, where a State has caused damage by a breach of its international obligations, and where the claimant has shown that its losses are sufficiently and reasonably linked to the State's breach, causation is held to have been established. Other possible concurrent events that are not attributable to the State are irrelevant; such events do not diminish the State's responsibility, nor do they reduce the amount of compensation for damages due. In this regard, the Tribunal agrees with the award in *CME v. Czech Republic*, where the tribunal held that:

*[...] a State may be held responsible for injury to an alien investor where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury....*¹³⁰

270. The tribunal in that case relied upon the ILC Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles"),¹³¹ as well as a study by a highly qualified jurist on the topic of complex liabilities, the latter of which reads:

*It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause.... In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable.*¹³²

271. Therefore, the tribunal in *CME v. Czech Republic* concluded that:

¹³⁰ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001) (hereinafter "*CME v. Czech Republic*"), para. 580.

¹³¹ Adopted on the second reading, United Nations International Law Commission, 9 August 2001, Article 31 and its Commentary in paras. 9-10 and 12-13.

¹³² J.A. Weir, "Complex Liabilities", in A. Tunc (ed.), *International Encyclopedia of Comparative Law*, Vol. XI (Mohr: 1983), at p. 41, quoted by *CME v. Czech Republic*, para. 581.

*International practice and the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault.*¹³³

272. The tribunal in *Stati v. Kazakhstan* took the same stance:

1330....as reflected in Art. 36 and 39 ILC Articles on State Responsibility, Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State's conduct.

1331. The Tribunal further agrees with Respondent's submission that Art 39 of the ILC Articles requires that such conduct be taken into account in determining compensation. Indeed, in investment cases, tribunals have reduced damages by a percentage reflecting the investor's role in the events leading to a loss.

*1331. And the Tribunal agrees with Claimants' that the burden then may shift to the state to prove that an intervening event – such as a factor attributable to the victim or a third party – caused the damage alleged, unless, as the tribunal in *CME v. Czech Republic* explained, the injury can be shown to be severable in causal terms from that attributed to the state.*¹³⁴

273. Similarly, the tribunal in *Gemplus v. Mexico* held:

*Article 39 of the ILC Articles on State Responsibility precludes full recovery of damages where, through the willful or negligent act or omission of the claimant state or person, that state or person has contributed to the injury for which reparation is sought from the respondent state. The ILC's Commentary on Article 39 refers to like concepts in national laws referred to as "contributory negligence", "comparative fault", "faute de la victime" etc. The common feature of all these national legal concepts is, of course, a fault by the claimant which has caused or contributed to the injury which is the subject-matter of the claim; and such a fault is synonymous with a form of culpability and not any act or omission falling short of such culpability.*¹³⁵

274. This Tribunal is of the same opinion and therefore agrees with the Claimants' submission that:

[...]

¹³³ *CME v. Czech Republic*, para. 583.

¹³⁴ *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, (SCC Case No. V (116/2010)), Award, (19 December 2013) (hereinafter "*Stati v. Kazakhstan*"), paras. 1330-1332.

¹³⁵ *Gemplus v. Mexico*, para. 11.12.

275. The Tribunal observes that many of these acts and omissions alleged against the Claimants followed closely on the freezing of Socomet's bank accounts. The closures directly resulted from Socomet's non-payment of its debts and the additional related penalties for delayed payment. The Tribunal recalls that those debts were covered by a grace period of two years, and were thereafter to have been re-scheduled. Further, the additional penalties for the delay were to have been waived pursuant to the 19 April 1999 Share Purchase Contract. As described in the Decision, despite this contractual commitment, the Romanian Ministry of Finance imposed, without any grace period, a substantially different and much less far-reaching rescheduling of debts and waiver of the additional penalties.¹³⁶
276. Therefore, the Claimants' failure to observe the rescheduling period for the debts, as imposed by the Romanian Ministry of Finance in breach of the Share Purchase Contract and which led to the freezing of the Company's bank accounts, cannot be held against the Claimants, despite the Respondent's arguments. Indeed, the Tribunal finds that the Claimants were not bound to comply with this amended rescheduling scheme, since it was in breach of the Share Purchase Contract. Consequently, the Claimants can be held responsible neither for the freezing of their bank accounts, nor for the consequences of that freeze.
277. Moreover, the Tribunal recalls that the bank accounts had already been frozen as of 15 September 1999. This meant that Socomet was, as of that date, unable to conduct its operations as it should have, which in turn contributed to some of the acts and omissions of the Claimants now argued by the Respondent to have contributed to Socomet's insolvency.
278. Further, the Respondent is not well placed to reproach the Claimants' failure to invest the [...] amount prior to June 2005 (including the [...] before June 2001), as was agreed in the amended Share Purchase Contract.¹³⁷ The Tribunal notes that the Romanian Ministry of

¹³⁶ Share Purchase Contract, Art. 8.10 as amended on 7 July 1999 (C-20).

¹³⁷ Share Purchase Contract, Art. 8.10 as amended on 7 July 1999 (C-20).

Finance had, as of 19 October 1999 – and within seven months of the agreement – rescinded that agreement through its breach of the rescheduling and waiver commitments it undertook in the Share Purchase Contract.

279. Finally, taking into account the situation Socomet found itself because of the Romanian Ministry of Finance’s retraction from the Share Purchase Contract’s commitments and bank accounts, which were blocked within five months after the Claimants took over the operation, the Respondent does not demonstrate how the decisions of the executive directors and the establishment of Gavazzi Steel Consultants, the latter of which moreover had no proven negative bearing on Socomet’s financial situation, would have contributed to Socomet’s insolvency.
280. Accordingly, the Tribunal determines that the Respondent caused the losses suffered by the Claimants as assessed in this Award, without any reduction for “contributory negligence” or other fault, as alleged by the Respondent.

F. Moral Damages

a. The Claimants’ Position

[...]

b. The Respondent’s Position

[...]

c. The Tribunal’s Decision

289. Moral damages may be awarded in investment arbitration only in exceptional circumstances. No precise definition exists on what constitutes such “exceptional circumstances”, and the definition must be gleaned from examples found in judicial and arbitral decisions.

290. In the *Desert Line Case*, the tribunal found that the claimant was subject to what it described as a siege with heavy artillery, an armed assault, an act of terror in its worst image,¹³⁸ that the claimant suffered threats and attacks on the physical integrity of its investment,¹³⁹ and that the settlement agreement was imposed onto the executives of the claimant under physical and financial duress.¹⁴⁰ The award described the cause of the moral damages as the “stress and anxiety of being harassed, threatened and detained” and “intimidated” and the “significant injury to [claimant’s] credit and reputation and [claimant’s] los[s] [of its] prestige”.¹⁴¹ In that case, the tribunal awarded the claimant [...] for moral damages.
291. The umpire in the *Lusitania Cases*, acknowledging the mental suffering or shock caused by the violent severing of family ties by reason of the deaths caused by the torpedoing of the British ocean liner *Lusitania*,¹⁴² went on to find that “one injured is ... entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation”,¹⁴³ excluding, however, punitive damages.¹⁴⁴
292. Other tribunals have found for the award of moral damages, such as *Von Pezold v. Zimbabwe*,¹⁴⁵ *LAFICO v. Burundi*,¹⁴⁶ and the *Fabiani case*.¹⁴⁷ However, the conclusion which can be drawn from these examples is that, as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that

¹³⁸ *Desert Line Case*, para. 166.

¹³⁹ *Id.*, para. 185.

¹⁴⁰ *Id.*, para. 186.

¹⁴¹ *Id.*, para. 286.

¹⁴² *Lusitania Cases*, p. 35.

¹⁴³ *Id.*, p. 40.

¹⁴⁴ *Id.*, p. 33.

¹⁴⁵ *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Award (28 July 2015) (hereinafter “*Von Pezold v. Zimbabwe*”), para. 923.

¹⁴⁶ *Libyan Arab Foreign Investment Company (LAFICO) v. Republic of Burundi*, Award (4 March 1991), 96 ILR 279.

¹⁴⁷ Mixed Claims Commission, France-Venezuela, *Antoine Fabiani case*, 31 July 1905, X RIAA 83.

- The State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
- The State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
- Both cause and effect are grave or substantial.¹⁴⁸

293. The Tribunal cannot find any evidence of such grave or substantial damage done to either of the Claimants by the Respondent in the present case, which would merit the award of compensation for moral damages. The Tribunal will apply the standards in the paragraph above to the acts identified by the Claimants.

294. First, the Claimants argue that they had been deceived as to the granting of rescheduling and waiver, which were explicit conditions for their investment.¹⁴⁹ The Tribunal finds that, although these actions on the part of the Respondent were in breach of their obligations, and caused the Claimants to have spent some four years in making requests for the rescheduling and waiver, such excessive or disproportionate efforts which an applicant may have incurred when requesting administrative licenses do not give rise to moral damages, since the injury does not meet any of the three standards required for the existence of moral damages.

295. Secondly, the Claimants argue that they were harassed and threatened with false and specious criminal accusations that were rejected by the Romanian courts.¹⁵⁰ The fact that the Romanian courts, themselves an organ of the Romanian State, rejected the accusations, only shows this Tribunal that these claims do not meet the standards required for the Tribunal to find the existence of moral damages.

¹⁴⁸ *Von Pezold v. Zimbabwe*, paras. 918-920.

¹⁴⁹ C-PHB, para. 238.

¹⁵⁰ *Id.*, para. 240.

296. Thirdly, the Claimants argue that the false accusations by the Respondent at the arbitration proceedings were “malicious”,¹⁵¹ and that the unlawful conduct of the Respondent was “manifestly and deliberately arbitrary”,¹⁵² and that such conduct caused the Claimants to lose their business credit and reputation in particular with major commercial partners such as Techint, Simest and SACE.¹⁵³ The Tribunal has considered the circumstances of the case and decides that the gravity required under the standards for moral damages is not here present. The Tribunal sympathizes with the Claimants’ predicament, but considers that the injury suffered cannot be compared to that caused by armed threats, by the witnessing of deaths or by other similar situations in which tribunals in the past have awarded moral damages. Moreover, the acknowledgement in the Decision that the Respondent has indeed breached the BIT, and the present award of substantial compensation, are elements of redress that significantly repair any loss of reputation the Claimants may have suffered.
297. Consequently, the Tribunal decides that the moral aspects of the Claimants’ injuries have already been compensated by the awarding of economic compensation, and that the extraordinary tests required for the recognition of separate and additional moral damages have not been met in this case.

G. Interest

a. The Claimants’ Position

[...]

b. The Respondent’s Position

[...]

¹⁵¹ *Id.*, para. 242.

¹⁵² *Id.*, para. 243.

¹⁵³ *Ibid.*

c. The Tribunal's Decision

301. As regards interest, Article 4(4) of the BIT provides:

Compensation shall include interest calculated on a six months LIBOR basis accruing from the date of expropriation to the date of payment, excepting the investor has maintained the enjoyment of the expropriated investment until the date of said compensation.

302. The Claimants have requested that the interest should be compounded semi-annually, while the Respondent argues that compound interest is not due as the principal claim is not substantiated. The BIT contains no express provision on compound interest. However the reference to “market value” in the first paragraph of Article 4(4) of the BIT points to the permissible application of reasonable compound rates, especially:

...given that it is the universal practice of banks and other loan providers in the world market to provide monies at a cost amounting to or equivalent to compound rates of interest and not simple interest. In addition, it is ... the current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal's opinion, there is now a form of jurisprudence constante where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.¹⁵⁴

303. Article 4(4) of the BIT provides for the consideration of LIBOR which, by definition, is a commercial rate of interest between commercial banks and financial institutions. As regards commercial rates of interest, even if the Tribunal is to consider financial practices frozen as at 1990 (the date of the BIT) or 1995 (the date of the entry into force of the BIT), it must include compound interest in this Award. Banks, then and now, do not charge simple interest. As private investors, the Claimants must pay compound interest on their debts and receive compound interest on their deposits.

¹⁵⁴ *Gemplus v. Mexico*, paras. 16-26. See also Dolzer and Schreuer, *Principles of International Investment Law* (2nd ed, Oxford UP: 2012), at p. 298; Ripinsky and Williams, *Damages in International Investment Law*, (BIICL: 2008) at p. 387; and Marboe, *Calculation of Compensation and Damages in International Investment Law*, (OUP: 2009), paras. 6.102 and 6.103.

304. Moreover, decisions such as *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*,¹⁵⁵ have established that, to reflect economic reality, arbitral tribunals may grant compound interest, as follows:

*In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owned; it is a mechanism to ensure that the compensation awarded the claimant is appropriate in the circumstances...*¹⁵⁶

305. These and other cases signify the genesis of a *jurisprudence constante* for international investment arbitration tribunals, unless precluded otherwise by, for example, the express wording of the BIT.¹⁵⁷ In the majority's view, it is here not precluded, but rather mandated, to order compound interest.

306. The Tribunal therefore, by majority, awards the Claimants compound interest on the amount of compensation, as calculated on the LIBOR rate for six months denominated in

¹⁵⁶ *Id.*, paras. 103-105.

¹⁵⁷ Dr F.A. Mann, in "Compound Interest as an Item of Damage in International Law" (1988) 21:3 *U.C. Davis Law Review* 577 at 586, concluded, almost thirty years ago: "... on the basis of compelling evidence compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals." Subsequently, scholarly opinion supported the award of compound interest under international law in even stronger terms: *see* N. Affolder, "Awarding Compound Interest in International Arbitration" (2001) 12 *Am Rev Int'l Arb* 45 at 92 ("While arguments for allowing compound interest in both domestic legal systems and international arbitrations focus on 'contemporary commercial reality', compound interest has been around for thousands of years. Compound interest is not a modern financial technique. Rather, it is a long-recognized economic principle that acknowledges that not only principal attracts interest, but interest does as well. Those who present the battle to allow compound interest as one of overcoming 'ancient and medieval prejudices' [footnote here omitted] ignore compound interest's long history." See also J.Y. Gotanda, "Compound Interest In International Disputes" (2003) *Law and Policy in International Business* 393 ("there is no rule of international law prohibiting compound interest"); and J.M. Colón & M.S. Knoll, "Prejudgment Interest in International Arbitration", (2007) 4:6 *TDM* 1 at 7 ("Awarding simple interest generally fails to compensate claimants fully and can create strong incentives for respondents to delay arbitration proceedings and cause harms, thereby wasting resources"). *See also* C-SSQ, paras. 149-154 and the legal materials cited in fn. 154 above.

USD, and adjusted every six months, from 1 September 2002 until the date of payment of this Award.¹⁵⁸

IV. COSTS

a. The Claimants' Position

[...]

b. The Respondent's Position

[...]

c. The Tribunal's Decision

307. The BIT does not provide a specific method by which to assess costs payable by each Party.

308. Under Article 61(2) of the ICSID Convention, however:

... the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.

309. There being no specific agreement between the Parties as regards arbitration expenses, the Tribunal has full discretion to assess the fees and costs of the arbitration and the legal expenses incurred by the Parties and to decide how and by whom these fees, costs and expenses are to be borne.¹⁵⁹

310. Article 61(2) of the ICSID Convention thus confers on the Tribunal a wide discretion to allocate all costs of the arbitration, including the legal fees and other costs, between the Parties as it deems appropriate.

¹⁵⁸ As submitted by the Claimants in C-PHB, para. 247.

¹⁵⁹ See also Rule 47(1)(j) of the ICSID Arbitration Rules.

311. Traditionally, arbitration costs were split evenly between the parties.¹⁶⁰ The Arbitral Tribunal, however, welcomes the newly established and growing trend, that there should be an allocation of costs that reflects in some measure the principle that the losing party should contribute in a significant, if not necessarily exhaustive, fashion to the fees, costs and expenses of the arbitration of the prevailing party.¹⁶¹
312. In the exercise of this discretion, the Tribunal will thus apply the principle that “costs follow the event,” by a weighing of relative success in the proceedings. In doing so, it will consider the two main phases of the arbitration: (i) the proceeding on jurisdiction, admissibility and the counterclaim; and (ii) the proceedings on quantum. The successful party’s reasonable costs in these two phases will be allocated proportionally to the outcome of the case.
313. The Tribunal will successively discuss the direct costs of the proceedings and the legal fees and costs of the Parties.
314. The direct costs of the proceeding include: (i) the fees and expenses of each Member of the Tribunal; (ii) payments made by ICSID for other direct expenses, such as those related to the conduct of hearings (*e.g.*, court reporting, audio visual, interpretation, the ICC hearing center charges and courier services), as well as estimated charges related to the dispatch of this Award; and (iii) ICSID’s administrative fees (the “Costs of the Proceeding”).
315. The total Costs of the Proceeding amount to (in USD):

Arbitrators’ fees and expenses	
Hans van Houtte	[...]
Mauro Rubino-Sammartano	[...]
V.V. Veeder	[...]
Other direct expenses (estimated)	[...]
ICSID’s administrative fees	[...]

¹⁶⁰ C.H. Schreuer “The ICSID Convention: A Commentary”, Second Edition, 2009, p. 1232.

¹⁶¹ *Lemire v. Ukraine*, para. 380; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award (27 August 2008), para. 316; *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/05), Award (15 April 2009), para. 151.

Total [...]

316. The Costs of the Proceeding relating to the proceeding on jurisdiction, admissibility and the counterclaim (*i.e.*, up to the Decision of 21 April 2015) amount to [...]. The Costs of the Proceeding relating to the proceeding on quantum amount to [...].

317. The above costs have been paid out of the advances made to ICSID by the Parties in equal parts. Once the case account balance is final, the ICSID Secretariat will provide the Parties with a detailed financial statement, and any remaining balance will be reimbursed to the Parties equally.

318. On the other hand, the legal and other fees and expenses of the Parties consist of:

For Claimants:

Legal Fees:	[...]
Expert Fees	[...]
Miscellaneous Expenses:	[...]

For Respondent:

Legal Fees:	[...]
Expert Fees	[...]
Miscellaneous Expenses:	[...]

319. The Tribunal has considered the Parties' legal and other fees and expenses and finds them reasonable. It does not interpret Arbitration Rule 28(2) to mean that all fees need to be paid before the conclusion of the proceedings.

320. While the Claimants did not succeed on every single claim on liability, they clearly prevailed in the first phase of the proceeding, and the Tribunal therefore decides that the Respondent shall bear the Claimants' full costs relating to that phase. The Claimants were awarded compensation in the second phase of the arbitration, but significantly less than they requested. Therefore, the Tribunal decides to allocate to the Claimants one third of the Costs of the Proceedings relating to the second phase of the proceedings and of its legal costs and expenses, and the full costs of their quantum expert.

321. Taking all these factors into consideration, the Arbitral Tribunal, by majority, hereby orders the Respondent to reimburse the Claimants a proportion of the reasonable costs and expenses of pursuing this arbitration in the following manner:
- 100% of the Claimants' legal costs, and the fees and expenses of witnesses presented by the Claimants other than Deloitte before April 2015; and
 - 33.3% of the fees and expenses of Deloitte and the Claimants' legal costs after April 2015.
322. The Claimants' share of the Costs of the Proceeding in the first phase amounts to [...] (including the USD 25,000.00 lodging fee paid by the Claimants). The Claimants incurred [...] on account of their legal and other fees and expenses.¹⁶² These costs shall thus be borne by the Respondent.
323. The Claimants' share of the Costs of the Proceeding amounted to [...] in the second phase, and the Respondent shall therefore bear [...] of these costs. The Claimants incurred [...] on account of their legal fees and miscellaneous expenses in the second phase of the proceedings, and [...] on account of the fees of their quantum expert, Deloitte, as per their submission on costs. The Respondent shall therefore bear [...] of these costs.
324. Accordingly, the Tribunal, by majority, orders the Respondent to pay the Claimants [...] for the expended portion of the Claimants' total Costs of the Proceeding and [...] to cover their legal and other fees and expenses.
325. The Secretariat is to provide the Parties a detailed breakdown of the fees paid to the arbitrators and of the costs incurred. Any excess amounts shall be reimbursed equally to the Parties.

¹⁶² This figure has been determined on the basis of the invoices included in the Annex to the Claimants' Submissions on Costs dated 28 July 2016 which pre-date 21 April 2015, including outstanding invoices which relate to services provided during the first phase of the arbitration (*i.e.*, Section 2.1 invoice nos. G/1-G/7 and Section 4.1 invoice nos. 1-3), but excluding the [...]invoices listed in Section 3.

V. OPERATIVE PART

326. On the basis of the reasons given both in its Decision on Jurisdiction, Admissibility and Liability of 21 April 2015, and in the present Award, the Tribunal hereby by majority:

1. Orders the Respondent to pay to the Claimants [...] and [...] as compensation for the Respondent's violation of Article 4 of the BIT;

2. Orders the Respondent to pay to the Claimants

a. 100% of the Claimants' legal costs, and the fees and expenses of witnesses presented by the Claimants other than Deloitte before April 2015; and

b. 33.3% of the fees and expenses of Deloitte and the Claimants' legal costs after April 2015

as compensation for the costs and expenses incurred in this arbitration, totaling [...] and [...];

3. Orders the Respondent to pay to the Claimants compound interest on the amounts established in sub-paragraph 1. above, as calculated at the LIBOR rate for six months denominated in USD, and adjusted every six months, from 1 September 2002 until the date of dispatch of this Award;

4. Orders the Respondent to pay to the Claimants compound interest on the amounts established in the sub-paragraphs 1. and 2. above; interest shall (i) accrue as from the date of dispatch of this Award until full payments of the amounts owed, (ii) be calculated at the LIBOR rate for six months denominated in USD, on the date of dispatch of this Award, and adjusted every six months thereafter and (iii) be capitalized every six months from the date of dispatch of this Award;

5. Dismisses all other claims.

A dissenting opinion on the above decisions by Arbitrator Mauro Rubino-Sammartano is attached hereto.

SIGNED BY THE TRIBUNAL:

[signed] _____

Hans van Houtte
President

Date: _____

[signed] _____

V.V. Veeder

Date: _____

[signed] _____

Mauro Rubino-Sammartano

Date: _____