

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

IN THE PROCEEDING BETWEEN

EDF (SERVICES) LIMITED
(CLAIMANT)

AND

ROMANIA
(RESPONDENT)

(ICSID CASE NO. ARB/05/13)

AWARD

Members of the Tribunal:

Professor Piero Bernardini, *President*

Mr. Arthur W. Rovine, *Arbitrator*

Mr. Yves Derains, *Arbitrator*

Secretary of the Tribunal:

Mr. Ucheora Onwuamaegbu

Representing the Claimant:

Mr. Christoph Liebscher
Mag. Florian Haugeneder
Wolf Theiss
Vienna, Austria

Representing the Respondent:

Mr. Darryl S. Lew
Ms. Abby Cohen Smutny
White & Case LLP
Washington, D.C., U.S.A.

Mr. Florentin Țuca
Mr. Cornel Popa
Țuca Zbârcea & Asociații
Bucharest, Romania

Date of dispatch to the Parties: October 8, 2009

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DISSENTING OPINION OF MR. ARTHUR W. ROVINE REGARDING COSTS

TABLE OF ABBREVIATIONS

Cl. 1 st PHB	Claimant's Post-Hearing Brief dated December 8, 2008
Cl. 2 nd PHB	Claimant's Second Post-Hearing Brief dated February 6, 2009
Cl. Mem.	Claimant's Memorial dated June 6, 2006.
Cl. Reply	Claimant's Reply dated July 2, 2007
Exh. C -	Claimant's Exhibits
Exh. R -	Respondent's Exhibits
DNA	Romanian Anti-Corruption Authority
FET	Fair and Equitable Treatment
ILC Articles	International Law Commission Draft Articles on State Responsibility
PCIJ	Permanent Court of International Justice
R. CounterMem.	Respondent's Counter-Memorial dated October 11, 2006
R. 1 st PHS	Respondent's First Post-Hearing Brief dated December 5, 2008
R. 2 nd PHS	Respondent's Second Post-Hearing Brief dated February 6, 2009
R. Rej	Respondent's Rejoinder dated March 10, 2008
Request	Claimant's Request for Arbitration dated June 14, 2005
Tr.	Transcript of the hearing of September 22-27, 2008

I. PROCEDURE

1. On June 14, 2005, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received from EDF (Services) Limited (“EDF” or the “Claimant”), a company incorporated in the Bailiwick of Jersey, a Crown Dependency of the United Kingdom, a request for arbitration (the “Request,”) dated June 14, 2005, against Romania (“Romania” or “Respondent”).

2. The Request indicated that EDF was represented by Mr. Barry Appleton of the law firm of Appleton & Associates and that Romania was represented by the Prime Minister of Romania.

3. On June 15, 2005, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”), acknowledged receipt of the Request and on the same day transmitted a copy thereof to Romania, with a copy to its Embassy in Washington, D.C.

4. The Request, as supplemented by Claimant’s letter of July 15, 2005, replying to the Centre’s inquiries about Claimant’s status as a company and the nature of its investment in Romania, was registered by the Centre on July 29, 2005, pursuant to Article 36(3) of the ICSID Convention. On the same day, the Secretary-General of ICSID, in accordance with Rules 6 and 7 of the Institution Rules, notified the Parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

5. The Parties having not agreed on the number of arbitrators and the method of constituting the Tribunal, and it being sixty days since the registration of the Request, by letter of September 27, 2005, Claimant invoked Article 37(2)(b) of the ICSID Convention, under which the Tribunal

should consist of three arbitrators, one appointed by each party and the third, who would be the President of the Tribunal, appointed by agreement of the Parties.

6. On September 29, 2005, Respondent appointed Mr. Yves Derains, a French national, as arbitrator and on October 26, 2005, Claimant appointed Mr. Arthur W. Rovine, a national of the United States, as arbitrator in this proceeding.

7. By letters of October 26, 2005 and October 27, 2005, Claimant requested that, if the Parties did not agree on the appointment of a presiding arbitrator by October 29, 2005, at which point more than 90 days would have elapsed since the registration of the Request, the Chairman of the ICSID Administrative Council should appoint a presiding arbitrator pursuant to Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules.

8. The Parties having failed to appoint a presiding arbitrator, and more than 90 days having elapsed since the registration of the Request, by letter of October 31, 2005, the Centre confirmed that, as requested by Claimant, an appointment would be made by the Chairman of the ICSID Administrative Council, in consultation with the Parties.

9. On December 19, 2005, the Chairman of the ICSID Administrative Council, in consultation with the Parties, appointed Professor Piero Bernardini, a national of Italy, as the presiding arbitrator.

10. All three arbitrators having accepted their appointments, the Acting Secretary-General of ICSID, by letter of December 20, 2005, informed the Parties of the constitution of the Tribunal, consisting of Professor Piero Bernardini, Mr. Arthur W. Rovine and Mr. Yves Derains, and that

the proceeding was deemed to have commenced on that day, pursuant to ICSID Arbitration Rule 6(1).

11. By letter of January 25, 2006, Respondent notified the Centre of its appointment of Mr. Darryl S. Lew and Ms. Abby Cohen Smutny of the law firm of White & Case LLP and Messrs. Florentin Țuca and Cornel Popa of the law firm of Țuca & Asociații as its legal representatives in this matter.

12. The first session of the Tribunal was held on February 6, 2006, at the headquarters of the World Bank in Washington, D.C. Various aspects of procedure were determined at the session.

13. The Parties having failed to reach agreement, as directed by the Tribunal, on the schedule for submission of written pleadings and dates of a hearing, on February 23, 2006, the Tribunal issued an Order with a schedule for further proceedings. According to the Order, incorporated in the Minutes of the First Session, Claimant was to file its Memorial by May 29, 2006, Respondent was to file its Counter-Memorial by September 18, 2006, Claimant was to file its Reply by December 11, 2006, and Respondent was to file its Rejoinder by March 5, 2007. An oral hearing was scheduled for May 1–4, 2007.

14. The procedural schedule was further revised by the Tribunal's decision, issued upon Respondent's request of March 27, 2006, and Claimant's and Respondent's respective observations of April 5, 2006 and April 6, 2006. On April 11, 2006, the Tribunal fixed the revised schedule as follows: Claimant was to file its Memorial by June 6, 2006, Respondent was to file its Counter-Memorial by October 6, 2006, Claimant was to file its Reply by February 5, 2007, and Respondent was to file its Rejoinder by April 30, 2007. The Hearing was re-scheduled to commence on May 28, 2007.

15. In accordance with the revised schedule, Claimant filed its Memorial on June 6, 2006.
16. On July 11, 2006, Claimant filed a request for an order to Respondent to produce documents, and on July 17, 2006, Respondent filed observations on Claimant's request. On July 24, 2006, Claimant filed a response to Respondent's observations, and on July 25, 2006, Respondent filed further observations on Claimant's request. On July 27, 2006, the Tribunal invited Respondent to continue its efforts to locate and produce documents not yet produced and to report on the status of documents production by September 25, 2006.
17. On the same date, the Tribunal issued an order concerning confidentiality, pursuant to the Parties' joint proposal of April 25, 2006.
18. On August 18, 2006, Respondent filed a request for an order to Claimant to produce documents, and on the same day Claimant filed observations on Respondent's request. On August 21, 2006, Respondent filed a response to Claimant's observations, and on August 22, 2006, Claimant filed further observations on Respondent's request, followed by a reply from Respondent on the same day. On August 24, 2006, the Tribunal invited Claimant to locate and produce as many documents as possible to meet Respondent's request and to report on the status of documents production by December 20, 2006.
19. On September 25, 2006, Respondent filed a report on the status of production of the documents requested by Claimant and on September 27, 2006, Claimant filed observations on Respondent's report, followed by Respondent's reply on the same day.
20. On October 11, 2006, Respondent, having had its request granted for an extension of time by letter dated October 5, 2006, filed its Counter-Memorial.

21. On the same day, Respondent filed further observations on Claimant's request for documents. Having considered both parties' observations thereon, on October 18, 2006, the Tribunal decided that it would issue no order for Respondent to produce documents.

22. On October 26, 2006, the law firm of Appleton & Associates notified the Tribunal of its withdrawal as counsel for Claimant. By letter, dated November 13, 2006, Claimant notified the Tribunal of its appointment of the law firm of Wolf Theiss Rechtsanwälte GmbH as its counsel.

23. By letter of December 12, 2006, Claimant requested extensions of time to meet Respondent's request for production of documents and for filing of its Reply. The Parties then engaged in discussions to revise the procedural calendar, and on January 22, 2007, the Tribunal approved the revised calendar agreed by the Parties. According to the revised calendar, Claimant was to file a report on its production of documents by January 31, 2007, and was to file its Reply by April 30, 2007. Respondent was to file its Rejoinder by April 28, 2007. The Hearing was re-scheduled to commence on November 12, 2007.

24. Claimant filed its report on documents production on March 2, 2007, having been granted by the Tribunal an extension of time necessary to receive from Respondent copies of correspondence and documents that were exchanged directly between Claimant's former counsel and Respondent's counsel.

25. On April 18, 2007, Claimant filed a request for an order to direct Respondent to produce documents and a request for an extension of time to file its Reply, and on April 25, 2007, Respondent filed observations on Claimant's said requests. On April 27, 2007, Claimant filed a response to Respondent's observations, and Respondent filed further observations on Claimant's requests. On the same day, the Tribunal granted Claimant's request for extension of time to file

its Reply, extended the time limit for filing of Respondent's Rejoinder until December 7, 2007, and invited the Parties to propose new dates for the Hearing. On May 8, 2007, the Tribunal ruled that it would issue no order to Respondent to produce documents and requested the Parties to report on the status of the production of documents by May 15, 2007. As further agreed, the Parties filed their reports on May 18, 2007, followed by observations by each party on the other Party's report.

26. On July 2, 2007, Claimant, having been granted another extension of time, filed its Reply.

27. On July 13, 2007, after consultation with the Parties, the Tribunal decided that the Hearing would be held during the week of May 5, 2008, in Washington, D.C.

28. On August 22, 2007, Respondent filed a request for an order to direct Claimant to produce documents, and on September 21, 2007, Claimant filed observations on Respondent's request. On October 5, 2007, Respondent filed a response to Claimant's observations, and on October 17, 2007, Claimant filed further observations on Respondent's request, followed by a reply from Respondent on October 23, 2007. On October 25, 2007, the Tribunal issued a procedural ruling concerning Respondent's request for documents.

29. By letter of November 15, 2007, and as directed by the Tribunal, Claimant produced documents in response to Respondent's request of August 22, 2007. By communication of November 26, 2007, the Tribunal indicated that no further steps would be taken regarding Respondent's request.

30. By letter of February 4, 2008, Respondent requested an extension until March 19, 2008, of the time limit to submit its Rejoinder. Claimant objected to the requested extension by letter of February 7, 2008, proposing that the same be limited to no more than one week.

31. On February 8, 2008, the Tribunal granted Respondent an extension to file the Rejoinder with all exhibits by March 10, 2008 or, in the alternative, to file the Rejoinder by the due date of February 22, 2008 and the expert's opinion by March 19, 2008.

32. On March 6, 2008, Claimant filed a request for an order directing Respondent to produce documents.

33. On March 11, 2008, Respondent filed its Rejoinder.

34. On March 17, 2008, Respondent filed its observations on Claimant's request of March 6, 2008. On March 20, 2008, the Tribunal ruled that it would not issue the order requested by Claimant on March 6, 2008.

35. On April 23, 2008, Claimant filed a request for admission of new evidence and on April 28, 2008, Respondent filed its comments on the request. In view of the need to permit both Parties to present their arguments regarding the proposed admission of new evidence and the need to conduct the Hearing efficiently, the Tribunal decided to postpone the Hearing scheduled for the week of May 5, 2008, and the decision was transmitted to the Parties on April 30, 2008. On May 2, 2008, the Tribunal invited the Parties to file, over the course of June and July 2008, observations on Claimant's request for admission of new evidence and fixed new dates for the Hearing for September 22–27, 2008. On May 5, 2008, Claimant filed "Objections Pursuant to Rule 27 of the ICSID Arbitration Rules," objecting to the Tribunal's decision of April 29, 2008.

The Tribunal responded to Claimant's objections in a letter communicated to the Parties on May 6, 2008.

36. In the context of the procedural background described in the preceding paragraph, on May 2, 2008, Respondent filed a request for provisional measures. On May 8, 2008, Claimant filed observations on the request for provisional measures. On May 9, 2008, Respondent filed a reply on Claimant's observations, and on May 13, 2008, Claimant filed further observations. On June 3, 2008, the Tribunal issued Procedural Order No. 2, concerning the request for provisional measures.

37. On June 2, 2008, Respondent filed observations on Claimant's April 23, 2008 request for admission of new evidence. On July 7, 2008, Claimant filed a rebuttal to Respondent's observations and on July 30, 2008, Respondent filed a reply to the rebuttal. Claimant, specially authorized by the Tribunal, filed a response to Respondent's reply on August 12, 2008. On September 3, 2008, certified copies of the Tribunal's Procedural Order No. 3, dated August 29, 2008, were transmitted to the Parties. The Order rejected Claimant's request for the admission of new evidence. On September 10, 2008, Claimant filed "Objections Pursuant to Rule 27 of the ICSID Arbitration Rules," objecting to the Procedural Order No. 3. The Tribunal confirmed its Order in a communication to the Parties of September 15, 2008.

38. The evidentiary Hearing was held from September 22, 2008 to September 26, 2008, at the headquarters of the World Bank in Washington, D.C. The following witnesses and experts were examined:

Mr. Henrique Weil, Claimant's witness

Mr. Marco Maximilian Katz, Claimant's witness

Mr. Jean-Liviu Tache, Respondent's witness
Mr. Constantin Ciungu, Respondent's witness
Mr. Dan Vulcan, Respondent's witness
Mr. Nicolae Demetriade, Respondent's witness
Mr. Constantin Tudose, Respondent's witness, *by videoconference*
Mr. Miron Mitrea, Respondent's witness
Mr. Gabriel Țară, Respondent's witness
Mr. Ioan Orbescu, Respondent's witness
Mr. Ion Șelaru, Respondent's witness
Ms. Liana Iacob, Respondent's witness
Mr. Gabriel-Valentin Carbutaru, Respondent's witness
Mr. Adrian Cucu, Respondent's witness
Mr. Sorin Teșu, Respondent's witness
Mr. Gheorghe Răcaru, Respondent's witness
Professor Valeriu Stoica, Claimant's expert
Dr. Lucian Mihai, Respondent's expert
Mr. Andrés Ricover, Claimant's expert
Mr. Howard Rosen, Claimant's expert
Mr. Eliot Lees, Respondent's expert
Mr. Zvi Frank, Respondent's expert
Mr. Brent Kaczmarek, Respondent's expert

39. On November 24, 2008, the parties filed corrections to their transcripts. On December 5, 2008, as directed at the Hearing, the Parties filed their respective post-hearing briefs, followed by the filing of reply post-hearing briefs on February 6, 2009.

40. The Parties' respective statements on costs were filed on March 27, 2009. By letter of April 15, 2009, Claimant added the amount of USD38,000.00 omitted from its previous statement. By letter of May 8, 2009, Respondent added a total of USD1,233.94 to its previous statement.

41. On June 8, 2009, the Tribunal declared the proceeding closed pursuant to ICSID Arbitration Rule 38(1).

42. On June 11, 2009, Claimant filed a “Request to Reopen the Proceeding and to Admit New Evidence.” On June 26, 2009, Respondent, as directed by the Tribunal, submitted its Response. By Order No. 4, dated July 23, 2009, the Tribunal denied Claimant’s request. By letter of August 11, 2009, Claimant objected to Order No. 4. Respondent replied to such letter on August 14, 2009. The Tribunal confirmed Order No. 4 by communication of August 24, 2009.

43. As directed by the Tribunal, on July 27, 2009, and September 7, 2009, the Parties updated their respective statements on costs to take account of their further submissions after the closing of the proceeding.

44. Members of the Tribunal deliberated by various means of communication.

II. FACTUAL BACKGROUND

45. This Section sets forth the main facts of the case. Additional facts shall be addressed in the following Sections, to the extent deemed appropriate.

46. EDF’s investment in Romania consisted of its participation in two joint venture companies with Romanian entities owned by the Romanian Government, E.D.F. ASRO S.R.L. (“ASRO”) and SKY SERVICES (ROMANIA) S.R.L. (“SKY”). EDF was certified as a foreign investor in Romania in the two joint-venture companies by the Romanian Development Agency, respectively, with Certificate of Investor dated January 28, 1992, and Certificate of Investor dated April 17, 1995.

1. ASRO's Operation

47. On November 20, 1991, EDF, C.N. Bucurest Aeroport Otopeni ("AIBO") and C.N. Casrom S.A, a State enterprise formerly controlled by the State Ownership Fund ("CASROM"), entered into a joint-venture contract to establish ASRO (the "ASRO Contract").

48. Under Clause 7 of the ASRO Contract, the initial duration of ASRO was for ten (10) years, the Clause providing that such duration "will be extended for further ten (10) year periods with the agreement of the General Assembly."

49. Under Clause 8 of the ASRO Contract, EDF contributed USD510,000.00 in exchange for 68% of ASRO's share capital. AIBO and CASROM made contributions in kind, in the form of "commercial spaces" in the case of AIBO and "commercial spaces and furniture and fittings" in the case of CASROM, in exchange for, respectively, 5% and 27% of ASRO's share capital.

50. On June 30, 1997, Compania de Transportationuri Aeriene Romane Tarom S.A. ("TAROM"), Romania's national airline company, purchased a 10% interest in ASRO from EDF and, later on, the whole of CASROM's interest in ASRO. On July 5, 2000, EDF acquired a portion of CASROM's shareholding (representing 15% of ASRO's share capital) following TAROM's default on a loan from EDF. As at July 5, 2000, therefore, EDF held 73% of ASRO's shares while TAROM and AIBO held 22% and 5%, respectively.

51. Under Clause 19 of the ASRO Contract, AIBO had to make available exclusively to ASRO "the whole commercial and retail outlets in all areas within the perimeters of Airport Otopeni," in exchange for a rent for that purpose to be paid by ASRO to AIBO based on a separate contract.

52. On January 20, 1995, ASRO entered into an agreement with JARO International S.A. to provide duty-free services at Constanta International Airport. This agreement was followed on April 3, 1996, by a joint venture agreement with Constanta International Airport Authority, covering all commercial services at such Airport by ASRO for at least fifteen (15) years.

53. In October 1997, ASRO opened a duty-free store at the Timisoara International Airport.

54. There were several amendments to the ASRO Contract. Two of these amendments were of particular importance. Amendment No. 3 of April 1, 1997, provided that AIBO's contribution in kind consisted of "*commercial assets*" rather than "*commercial venues*" (in Romanian, "*mijlcace fixe*" replaced "*spatii comerciale*"). Under Amendment No. 7 of July 15, 1998, AIBO granted ASRO a pre-emptive right to use new commercial spaces at Otopeni Airport at the new terminal being built as part of that airport's expansion.

55. On January 17, 2002, AIBO and TAROM agreed to withdraw from ASRO, leaving EDF as the sole shareholder of ASRO. EDF then attempted to exercise its right to extend the duration of ASRO (which had then expired) indefinitely, seeking to continue its operations at the Otopeni Airport. The registration of the ASRO extension was challenged by AIBO, and the challenge was upheld by the competent court on April 17, 2002. ASRO had to leave its premises at the Airport upon expiry of the lease agreement with AIBO on March 27, 2002.

56. AIBO then proceeded to auction all available commercial spaces at the Airport for duty-free sales. Three auctions were organised by AIBO. The first and the second one were held on April 15, 2002, and May 20, 2002, respectively, with no result since ASRO was the only bidder. The third auction was held on July 30, 2002, EDF's bid being rejected for failure to supplement financial information that had been requested.

57. On September 5, 2002, Romania passed Government Emergency Ordinance No. 104 (“GEO 104”), regulating duty-free business within airports. As a result, ASRO’s duty-free licences were revoked (there were over three years left in their term regarding duty-free operations at Constanta Airport). GEO 104 led to the closure of ASRO’s duty-free operations at Constanta and Timisoara airports and the discontinuance of its duty-free operation at the Otopeni Airport.

58. Following the coming into force of GEO 104, further auctions were organised by AIBO for duty-paid sales, in which EDF Properties, a member of the EDF group of companies, and ASRO also participated. However, ASRO was disqualified for lack of legal capacity (since its term expired on January 27, 2002, and it was in a winding-up status) and EDF Properties was disqualified for having submitted a bid on a category of goods not contemplated by the tender. By 2003, all commercial spaces at the Otopeni Airport had been rented by AIBO.

59. Following a fine imposed and a sequestration of assets ordered by the Financial Guard on November 26, 2002, ASRO was declared bankrupt on September 9, 2004.

2. SKY’s Operation

60. On December 19, 1994, EDF, TAROM and Mr. Ion Staicu, a former CASROM economic manager, entered into a joint venture contract to form SKY (the “SKY Contract”). The object of SKY was to provide in-flight duty-free services on board TAROM’s aircraft. Further objects were transportation services at the airport and the construction and operation of a transit hotel at the Otopeni Airport, land being purchased by SKY for that purpose. The hotel project, however, was never implemented.

61. Under Art. 2 of the SKY Contract the initial duration of SKY was for a period of fifteen (15) years, extendable for other periods by decision of the Partners' General Meeting.

62. Under Article 4 of the SKY Contract, the participation in SKY's share capital was initially as follows: TAROM 46%, EDF 35.17%, Ian Staicu 16.83%.¹ Subsequently, Mr. Staicu's participation was acquired by EDF, which therefore became the majority shareholder of SKY.

63. SKY provided in-flight duty free services on board TAROM's aircraft between May 1997 and November 2002. Following the entry into force of GEO 104, SKY and TAROM obtained new duty-free licenses on December 12, 2002 and December 20, 2002, respectively. On November 25, 2002, TAROM terminated the SKY's services agreement, refused to grant SKY further access to its aircraft and took over for itself the in-flight duty-free business. On July 1, 2005, the Bucharest Tribunal granted TAROM's petition to withdraw from SKY, EDF then becoming the sole shareholder of SKY.

64. The factual circumstances summarized above have given rise to the dispute before this Tribunal. Claimant contends that by its actions, Romania violated the protection assured to its investment by the Bilateral Investment Treaty signed on July 13, 1995, between the Government of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments, which entered into force on January 10, 1996 (the "BIT"). The BIT was extended to nationals of the Isle of Man and the Bailiwicks of Guernesey and Jersey (EDF being a juridical persona established under the laws of the Bailiwick of Jersey) by

¹ The aggregate of the various share interests under Art. 4 of the SKY Contract, however, equals 98%, not 100%.

an Exchange of Notes dated February 25 and March 22, 1999, which agreement entered into force on March 22, 1999. Romania denies any such violations. In the following Sections, the Tribunal will analyse more closely, to the extent deemed appropriate, the facts of the case in the light of the Parties' submissions, the evidence proffered by each of them and the applicable legal provisions.

III. SUMMARY OF THE PARTIES' SUBMISSIONS

65. This Section will analyse the most significant aspects of the Parties' positions. Further arguments, allegations and evidence relied upon by each of the Parties will be referred to in the appropriate sections.

1. Claimant's position

a. The facts

66. Claimant's case is based on the alleged violation by Romania of the BIT. Claimant contends that it was invited by Romania to invest in the country, to build up from almost nothing a sale of goods business in several of its airports and also on board airplanes. Once this business had been established at a high standard and become very profitable, it was taken by Romania for arbitrary reasons.

The development of the ASRO venture

67. In furtherance of the ASRO Contract, EDF and ASRO invested millions of dollars between 1992 and 2002 in the development of the commercial spaces at the Otopeni Airport, transforming a small operation, selling a few imitation brands, into a world-class facility offering

a full range of retail and commercial services. By 2001, ASRO had nearly 400 employees and earned USD1.4 million in after-tax profits with income growing at a rate of 37% per year. The venture had expanded to Romania's two other major international airports, Constanta and Timisoara.

68. In view of these very positive results, AIBO and TAROM sought to increase their financial interests in ASRO to 49% before they would consent to an extension of ASRO's duration. In order to secure its partners' consent, EDF considered it reasonable to comply with the request, although no such consent was required under the ASRO Contract. In a shareholders' decision dated November 29, 2000, AIBO's purchase of a further 22% shareholding in ASRO was approved, based on an order issued by the Ministry of Transportation. However, the 10-year extension of the ASRO Contract had to wait for a specific mandate of the Ministry of Transportation to AIBO's representatives in ASRO's General Assembly.

69. The new government that was elected in November 2000 and sworn in on December 28, 2000, was not satisfied with owning 49% of ASRO; it wanted all the commercial spaces to which ASRO was entitled at the Otopeni Airport. The new Minister of Transportation, Miron Mitrea, refused to authorise the proposed increase of financial interests in ASRO by AIBO and TAROM. This change of policy resulted from no other reasons than EDF's refusal to comply with demands for bribes from senior Romanian Government officials in August and October 2001. There is in fact no document prepared by the management of AIBO or TAROM throughout 2001 in which the management declines to extend ASRO's term.

70. Following a trip to Israel during the summer of 2001, in the course of which he could briefly discuss the ASRO's extension issue with Prime Minister Nastase, the Chairman and Chief

Executive Officer of EDF, Mr. Henrique Weil, tried to arrange a meeting with the Prime Minister on the assumption that the issue of the extension rested in the latter's hands.

71. On August 24, 2001, following receipt in London of a telephone call that invited him to come to Romania to resolve the extension issue, Mr. Weil met at the parking lot of the Hilton Hotel with Mr. Sorin Tesu, Chief of Cabinet to Prime Minister Nastase.² Their discussion was short. After Mr. Weil refused to pay a USD 2.5 million bribe requested by Mr. Tesu, the latter left the parking lot. Mr. Weil then left Romania the following day, on August 25, 2001.

72. On October 19, 2001, Mrs. Liana Iacob, State Secretary under Prime Minister Nastase, repeated the bribe request to Mr. Marco Katz, logistics and operational director of ASRO, during a private conversation held at her home in Bucharest, confirming that the request was made on behalf of Prime Minister Nastase. Mr. Katz reported the meeting to Mr. Weil during a phone conversation. Mr. Weil once again categorically refused to comply with this request.

73. Following this refusal, the Romanian State engaged in a concerted attack on EDF's business in Romania resulting in the total loss of its operation in the country. This is evidenced by the events that followed.

74. At the General Meeting of ASRO shareholders on January 8, 2002, EDF requested that the Company's term be extended for a further period of ten (10) years. The representatives of AIBO and TAROM stated that they only had a mandate to approve an extension of 3 months and that no decision could be taken by them according to the Ministry of Transportation's mandate.

² There is a discrepancy in Claimant's briefs regarding the date of Mr. Weils's meeting with Mr. Tesu. This date is indicated as August 24, 2001 in Cl. Reply (para. 141) and as August 21, 2001 in Cl. 1st PHB (para. 169).

The meeting having been adjourned, AIBO and TAROM expressed, on the following day, the intent to terminate the joint venture. EDF voted in favour of the extension of ASRO's duration.

75. In a meeting held on January 11, 2002, between representatives of EDF, AIBO, TAROM and the Ministry of Transportation, the Ministry insisted that ASRO's term should not be extended and proposed that the two minority shareholders, AIBO and TAROM, withdraw from the Company, assigning their shares to the majority shareholder, EDF. The latter agreed to buy these shares.

76. On January 17, 2002, the Parties concluded a share assignment agreement providing that the price of the AIBO and TAROM shares would be determined by evaluation. The agreement was registered by the Trade Registry on January 17, 2002, so that EDF became the sole shareholder of ASRO on that day. Also on the same day, EDF voted for a 10 -year extension of ASRO and requested the registration of this decision, which request was granted by the Trade Registry the following day.

77. In a letter dated January 21, 2002, EDF requested AIBO to renew the rent contracts. AIBO replied by announcing that it intended to conduct auctions regarding the lease of the commercial spaces after a short extension of the lease contract with ASRO. The lease was in fact extended on January 22, 2002 to March 27, 2002, the rental amount being increased from USD 48.00 to USD 73.70 per square meter to compensate AIBO for the lack of dividends, rent and bonus.

78. On February 4, 2002, AIBO filed a recourse against the registration of the assignment agreement concluded on January 17, 2002, by which the assignment of shares in ASRO from

AIBO and TAROM to EDF had been agreed. The recourse was based on formal grounds and was filed only a few hours before the agreed date of the signing of the assignment agreement.

79. The challenge to the registration was the basis of all subsequent measures of the Romanian State against the continuation of EDF's business in Romania. TAROM signed the assignment agreement on February 4, 2002, but AIBO refused to sign it unless an article was removed the wording of which could be interpreted, according to AIBO, to mean that ASRO had rights to spaces at the Otopeni Airport. AIBO ultimately refused to sign the assignment agreement, maintaining its recourse against its registration. This recourse was subsequently dismissed by the Bucharest Tribunal which, on February 25, 2005, confirmed the validity of the registration. At this point, however, ASRO's business had already been destroyed.

80. On March 27, 2002, the date of the expiry of the extended rental agreement, ASRO was evicted from the commercial premises at the Otopeni Airport. ASRO's attempts to obtain court injunctions with regard to the extension of the lease agreement and the reconnection of the utilities at the Airport (water, electricity, etc.) failed because of the Trade Registry's determination that ASRO be dissolved, its term having expired.

81. ASRO's attempts to prevent AIBO, through a court injunction, from conducting auctions regarding the commercial spaces at the Otopeni Airport failed, the court dismissing ASRO's action due to alleged lack of capacity by reason of ASRO's dissolution.

82. The first auction took place on April 15, 2002. Since ASRO was the only bidder, the procedure was cancelled by the Evaluation Commission, the tender documentation entitling it to annul the auction if there was one bidder only. The second auction was held on 20 May 2002, and again the procedure was cancelled since ASRO was the only bidder.

83. The third auction took place on July 30, 2002, five companies having submitted bids, including EDF Properties. The latter was subsequently requested by AIBO and the Evaluation Committee to supplement its financial information. EDF Properties replied on August 22, 2002 that its financial information was included in that of the EDF's group of companies financial information. Jersey law in fact does not require separate financial information when a company is part of a group of companies. That notwithstanding, however, EDF Properties' bid was rejected on August 28, 2002 for this reason, and because it included proposals allegedly disadvantageous to AIBO.

84. Two further actions by Romania contributed to seal ASRO's fate. The first was the enactment of GEO 104, the other the Financial Guard's control (audit) of ASRO following an anonymous denunciation letter received on August 22, 2002.

85. GEO 104 was allegedly enacted to combat corruption and to align Romania's duty-free regime with the "*acquis communautaire*." Neither reason is correct or credible. By regulating duty-free business within airports, the purpose of GEO 104 was to eliminate EDF from such business since it was the only significant provider of duty-free business in Romanian airports. That GEO 104 had nothing to do with EU considerations is made manifest by the circumstance that it did not distinguish between travel within the EU and outside the EU, but cancelled all duty-free licenses at airports, whatever the flight destination.

86. In commenting to the press on the reasons for the enactment of GEO 104, the Minister of Transportation, Miron Mitrea, pointed to EDF as the target of GEO 104, accusing it of corruption. The only episode which may have a bearing in that context occurred in 1998, when EDF was accused of smuggling (but never found guilty). It is not credible to respond in 2002 to

events four years earlier. Contrary to Minister Mitrea's witness statement, the cancellation of duty-free activities from international airports was not a pre-conditions for Romania's accession to the EU, as shown by the duty-free laws enacted in 2006 permitting duty-free activities in international airports in order to align internal legislation to the EU *acquis*.

87. The anonymous letter of August 22, 2002, that led to the Financial Guard's audit of ASRO, proved to be incorrect as to its content. No single control report of the Financial Guard mention's any irregularity, apart from the purported lack of extension of ASRO's duration. As a sanction for carrying out trading activities after January 27, 2002, "when the company's duration expired,"³ the Financial Guard ordered the seizure of the entire ASRO revenues from that date until November 26, 2002. This happened, despite the fact that ASRO had earned revenues up to March 27, 2002, the date ASRO was evicted from the Otopeni Airport although ASRO had operated until that date with AIBO's and TAROM's consent under a rent contract.

88. The fine imposed by the Financial Guard amounted to 2.000.000 lei (approximately, USD 59,414) and the value of the seized revenues was 60.973.245.123 lei (approximately, USD 1,811,445). A financial sanction of this magnitude drove ASRO into bankruptcy. Upon the request of the Finance Ministry, following the failure to obtain payment of the amounts representing the fine and the confiscated revenues, ASRO's bankruptcy was declared on September 9, 2004. Four creditors were on the list, the Ministry of Finance's portion alone amounting to over 59%. Following confirmation by the Court in January 2005 that the registration of ASRO's extension in 2002 was legally correct, ASRO requested the Ministry of

³ This was the Financial Guard's finding under the Sanctioning Minutes of November 26, 2002 (R-234).

Finance to erase the fine. However, the Ministry refused, so that ASRO then had to apply to the courts.

The development of the SKY venture

89. In 1994, TAROM approached EDF to establish the SKY joint venture. Following preparation of a feasibility study outlining the essential business elements of the proposed venture, the SKY Contract was concluded. The main purpose of the Contract was SKY's furnishing of duty-free services aboard TAROM's aircraft. There was no requirement of a service contract to provide the said duty-free services. In addition, the building and operation of a transit hotel and transportation services at the airport were contemplated as other SKY purposes.

90. Initially, TAROM was allocated 48% of SKY's share capital, EDF 35.17% and Ion Staicu 16.83% (as consideration for his contribution in kind of the land on which the hotel would have been built). Subsequently, on August 3, 1995, Ion Staicu assigned his interest in SKY to EDF, so that the latter became a majority shareholder, owning 52% of SKY's share capital.

91. SKY's management had to be confirmed by the Partners General Meeting by a unanimous vote. Therefore, the members of SKY's Managing Board could only be selected with TAROM's approval, so that the latter was in a position to influence decisions taken by the joint venture.

92. During the initial period, from 1994 to 1996, it was anticipated that SKY would make investments, amounting to almost USD 3 million, to prepare for its operations, including the building of the transit hotel and the passengers' transportation. A catalogue of on board duty-free

items had to be prepared and flight attendants had to be trained to conduct computerized duty-free sales.

93. SKY was ready to start its operations on August 1, 1996, when TAROM suddenly claimed that SKY needed to sign a service contract to be permitted to commence duty-free operations on board TAROM's aircraft. In addition, a rent contract had to be concluded for the rent to be paid by SKY to TAROM for the use of the space on board TAROM's airplanes. The two conditions were refused by SKY since they were contemplated neither in the feasibility study nor in the SKY Contract.

94. Following a resolution of its Board of Directors on July 30, 1996, TAROM threatened SKY with dissolution if it did not start its operations within 90 days. On October 3, 1996, SKY started operations on board TAROM aircraft with the latter's approval, under a drawback regime and without a service contract.

95. However, by letter of October 11, 1996, TAROM notified SKY that SKY's activities would be stopped three days later unless all legal problems, including sales under a drawback regime, were resolved. Following TAROM's demand, SKY applied for and obtained, on October 22, 1996, the Ministry of Finance's confirmation that the drawback regime was included in the duty-free regime. That notwithstanding, TAROM continued to refuse SKY permission to operate on board its aircraft.

96. On October 14, 1996, Government Decision No. 967 ("GD 967") was issued, exempting from custom duties the importation of merchandise being sold under the duty-free regime on board aircraft by a Romanian air company. In the absence of a legislative framework allowing SKY to operate in-flight duty-free, SKY had to accept the amendment of its Articles of

Association by replacing “duty-free activity” with “activity according to legal provisions.” This was achieved through Additional Act No. 2 of May 16, 1997 to SKY’s Articles of Association. The change enabled SKY to start, on the same date, in-flight activity on TAROM’s aircraft, the service contract demanded by TAROM being concluded on May 28, 1997. On July 18, 1997, SKY obtained a duty-free licence on the basis of GD 967, authorising it to carry on duty-free activity on board aircraft although SKY was not an air company as required by GD 967.

97. SKY’s transit hotel never got beyond the planning stage. This was due to TAROM’s delaying the required loan to enable SKY to take the loan necessary to finance the transit hotel project.

98. SKY’s ground transportation services suffer losses by reason of TAROM’s lack of cooperation in selling TAROM’s passengers tickets on board its aircraft, such cooperation forecasted as needed in the feasibility study prior to SKY’s establishment. TAROM’s lack of cooperation was acknowledged by its Managing Director, Mr. Nicolae Demetriade. He had promised to do everything possible to optimise SKY’s transportation activities, as reflected by the Minutes of SKY’s General Assembly of April 9, 2001.

99. Although on June 30, 2001, SKY’s service contract expired, it could continue to operate on board TAROM’s aircraft until November 2002. When SKY’s duty-free licence expired on November 10, 2002, SKY applied for a new duty-free licence, which was granted on December 12, 2002. TAROM, which had in the meantime refused to grant SKY access to its airplanes, was also granted a duty-free licence on December 20, 2002.

100. In order to perform duty-free activities on board its airplanes itself, TAROM began to take steps to cease its association with SKY. TAROM offered SKY various alternative solutions,

including the dissolution of SKY or the sale of TAROM's shares in SKY to EDF. Neither offer was acceptable to EDF, the latter desiring TAROM to remain an associate for the agreed duration of the joint venture. A petition was filed by TAROM on March 26, 2003 to the Bucharest Tribunal in order to be allowed to withdraw from SKY. The petition was granted by the Tribunal, so that EDF remained the only shareholder of SKY. TAROM could thus perform duty-free activities on board its aircraft.

b. The law

101. The conduct of organs of a State engages the State's international responsibility. The bribe request by Mr. Sorin Tesu and Mrs. Liana Iacob on behalf of Prime Minister Nastase is attributable to Romania. Likewise, the audit of ASRO by the Financial Guard in November 2002, including the "confiscation" order and the order to pay a fine, as well as the enactment of GEO 104 are all actions clearly attributable to organs of the Romanian State.

102. Likewise, the acts of AIBO and TAROM are attributable to Romania since both were Governmental agencies, controlled and directed by the Romanian State. Their acts were part of an orchestrated action to take the investor's investment in retaliation for his refusal to pay bribes. Arbitral practice and international law confirm that acts of a commercial nature may be attributed to the State as long as such acts emanate from a government agency. The structural, functional and control aspects of AIBO and TAROM determine that both entities were acting as agents of the Romanian State in their relationship with EDF.

103. The conduct of Romania with regard to EDF's investments violated its obligation under the BIT to provide fair and equitable treatment, not to impair the maintenance, use or enjoyment

of the investment by unreasonable or discriminatory measures, to observe its contractual agreements, and to compensate investors for expropriation.

104. In applying the fair and equitable treatment standard, arbitral tribunals have identified several principles as forming its substance, including:

- transparency, stability and the protection of the investor's legitimate expectations;
- good faith;
- freedom from coercion and harassment;
- compliance with contractual obligations.

It is generally accepted that the standard in question is independent of legality or illegality under domestic law.

105. Romania breached the fair and equitable treatment standard in several instances, each of which constitutes a breach of the BIT entailing Romania's international responsibility. The instances of breach of the standard in question relied upon by Claimant include:

- the bribe request by Romania Government officials;
- the failure to extend the duration of ASRO;
- the contestation of the registration of the assignment and of the extension of ASRO;
- the refusal of AIBO to conclude rental contracts with ASRO;
- the application of GEO 104 to EDF;
- the non-transparent and arbitrary conduct of the auctions;
- the actions of the Financial Guard;
- TAROM's arbitrary refusal to grant SKY access to its aircraft.

106. The conduct of Romania in attempting to extract a bribe from Mr. Weil and then retaliating for his refusal to pay the requested bribe by the various actions listed above constitutes unreasonable and arbitrary measures.

107. The present case is an instance of a creeping expropriation, the taking of a series of successive measures by Romania resulting in the total loss of EDF's investment.

108. AIBO's and TAROM's breaches of contractual obligations entered into with EDF under the ASRO Contract and the SKY Contract violate the obligation undertaken by Romania under Article 2 (2) of the BIT to "observe any obligation it may have entered into."

109. EDF is entitled to damages by reason of Romania's violation of its obligation under Article 2(2) of the BIT and the obligation not to expropriate Claimant's investments without prompt, adequate and effective compensation according to Article 5 of the BIT. The principle of full reparation in case of state responsibility has long been accepted in international law, the leading decision being the *Chorzow Factory* case in which the PCIJ held that "... *reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*"

110. The amount of compensation requested by Claimant is equal to USD132.576.000 (to be adjusted to the date of the award), with post-award interest from 30 days of the award, compounded monthly, at the rate Respondent pays for government bonds or public loans.⁴ The amount of compensation is based on the DCF- method adopted by Claimant's accounting experts, taking the date of the award as the valuation date.

⁴ Cl. 1st PHB, para 263.

c. *Relief requested by Claimant*

111. “Claimant upholds its request that the Arbitral Tribunal rule that:

- (i) Romania has violated its obligation under the BIT;
- (ii) compensation be granted to Claimant based as requested in Claimant’s First Post-Hearing Brief, and
- (iii) the costs of the arbitration and Claimant’s legal costs be borne in their entirety by Respondent.”⁵

2. Respondent’s position

a. *The facts*

The development of ASRO venture

112. In 1991, EDF’s principal, Mr. Henrique Weil, came to see AIBO’s Manager, Mr. Constantine Tudose, expressed an interest in developing duty-free operations at the Otopeni Airport. This led to the conclusion of the ASRO Contract. Due to AIBO’s inexperience, the terms of the ASRO Contract were highly favourable to EDF, which could receive very positive returns on its capital investment in ASRO. Claimant therefore received the benefit of its bargain. In addition, over the term of the ASRO Contract Claimant caused ASRO to engage in numerous transactions with other companies controlled by EDF’s Chairman, Mr. Weil, to the benefit of the latter, not of ASRO. Under the ASRO Contract, Mr. Weil was appointed General Director and in that capacity was empowered to appoint a chief executive manager to administer the daily operations, to define the duties of ASRO’s directors, and to fix their compensation.

113. Claimant contends that in exchange for a mere 5% shareholding in ASRO, AIBO contributed to ASRO’s share capital with its “commercial assets,” a term that, according to

⁵ Cl. 2nd PHB, para. 81.

Claimant, encompasses all rights needed to carry on a business, including business location. As a contribution to ASRO's share capital, such rights remained in the patrimony of ASRO as an asset of the Company even after AIBO's withdrawal as shareholder from ASRO in January 2002.

114. In addition, Claimant contends that it enjoyed a continuing right of first refusal as to all additional commercial spaces to be developed at the Otopeni Airport for the duration of ASRO. Therefore, according to Claimant, ASRO's eviction from the commercial spaces at the Otopeni Airport in March 2002 and the conduct by AIBO of the public auctions in 2002 for the right to rent the spaces interfered with ASRO's property interests as defined by Romanian law.

115. As indicated by the expert opinions on Romanian law, Claimant's characterisation of the nature of ASRO's rights and AIBO's obligations is erroneous. As agreed under Amendment No. 3 to the ASRO Articles of Association, dated April 11, 1997, AIBO's contribution was recharacterised as "*fond comercial*," "*vad comercial*" in the Romanian language. Thus, AIBO only contributed in kind to ASRO's share capital by a right of use of its goodwill and the part of its clientele associated with the then existing terminal at the Otopeni Airport. This contribution was limited to ASRO's duration of ten years, *i.e.* until January 27, 2002, regardless of whether AIBO was or was not a shareholder of ASRO at that time.

116. Amendment No. 3 to the ASRO Contract followed a Government examination in January 1997 of AIBO and the findings by the Control Department that ASRO's Articles of Association contained a series of irregularities and had been concluded in a defective manner and violated provisions of Romanian competition law.

117. Article 19 of the ASRO Contract, providing for rent to be paid by ASRO to AIBO, confirms that ASRO did not own the commercial spaces at the Airport and that its rights to use

such spaces derived solely from lease agreements. Given the 10-year term of ASRO's Contract, the two lease agreements of August 1998 were valid until January 27, 2002. Furthermore, ASRO's exclusive right to exploit the advertisement space at the airport under Article 19 was unequivocally lost following the Competition Council's finding, on July 2, 1998, that the said Article was null and void.

118. The so-called pre-emption right to lease commercial spaces in the new terminal, agreed in Addendum No. 7/1998, was exercised by ASRO in August 1998 by concluding lease agreements for commercial spaces in the said new terminal. The pre-emption right being a contractual right, AIBO's obligation was extinguished upon its withdrawal from ASRO in 2002 along with the expiry of ASRO's 10-year term.

119. ASRO's right to use goodwill and part of the clientele did not survive the expiry of the 10-year term for which the contribution in kind had been made. As of March 2002, ASRO's lease agreements with AIBO had ended in accordance with their terms, so that by that time ASRO enjoyed no legal rights to commercial spaces at Otopeni Airport.

120. Claimant's claim that it had the right to extend ASRO's duration solely by casting its majority shareholding votes is mistaken as a matter of Romanian law, since the latter as well as the ASRO Articles of Association required the unanimous vote of all shareholders. ASRO's Addendum No. 7 to the Articles of Association and Bylaws of July 15, 1998 confirms the requirement of unanimity.

121. Following the expiry of ASRO's ten-year term, EDF sought the agreement of AIBO and TAROM to extend the term. However, both AIBO and TAROM did not wish by that time to

extend the ASRO Contract, the Ministry of Transportation, as shareholder of AIBO and TAROM, concurring with such decision.

122. Claimant's main claim regarding Constanta airport is that GEO 104, passed on September 11, 2002, resulted in the loss of ASRO's rights to engage in duty-free activity as authorised by the five-year licence it had obtained, expiring on June 8, 2005. EDF claims that the passage of GEO 104 forced the termination of all of ASRO's operations at Constanta airport. However, since GEO 104 related only to duty-free sales, it could not have caused ASRO to lose the benefit of all other activities but rather only the right to conduct duty-free operations until June 8, 2005, in 49 square meters of space, as agreed with the Airport Authority in July 2002.

123. Claimant's description of its rights at Timisoara Airport is limited to a single assertion that EDF Properties opened there a duty-free operation in 1997. In April 2001, EDF Properties assigned to ASRO two lease agreements. The rights upon which Claimant's claims are based are those under the two lease agreements, expiring on May 1, 2003, and July 1, 2003, respectively. GEO 104 was not adopted until September 2002.

124. Following the findings of an inspection of ASRO in February 1998 by the General Customs Department, ASRO's duty-free licenses were temporarily withdrawn because the inspectors found that EDF Properties was missing goods from the bonded warehouse and had merchandise in excess of that recorded as having been imported duty-free.

125. Further investigations and evidence revealed that nearly half of all receipts examined in ASRO's accounts over a three-day period contained fictitious information, the suspect merchandise consisting principally of liquor and tobacco. Alerted by the Custom Department, the Financial Guard performed its own audit of ASRO, finding a number of other irregularities. As a

result, the Ministry of Finance revoked ASRO's duty-free license on April 28, 1998. EDF's business partners, AIBO and TAROM, supported ASRO's efforts to obtain a new duty-free license, which was granted on June 8, 2000 by the Ministry of Finance. ASRO and EDF Properties then withdrew the lawsuits they had instituted complaining of the revocation of the duty-free licenses, including the criminal complaint against the Director of the General Customs Department, Mr. Sapunaru.

126. In October 2000, EDF sought consent by AIBO to extend ASRO's duration for ten years. On November 15, 2000, AIBO's Board of Directors agreed to extend the ASRO Contract for another ten years in view of the more than 16 months absence of duty-free services due to ASRO's licenses having been revoked. AIBO's Board also approved the acquisition by AIBO of 22% of ASRO's share capital from Claimant. This would have given AIBO and TAROM a 49% combined shareholding.

127. On November 29, 2000, AIBO's General Assembly of Shareholders approved the proposed share purchase even without a price having been negotiated for the shares. It further resolved to draft a mandate for the Minister of Transportation regarding the proposed extension of ASRO's duration.

128. On February 16, 2001, the general managers of AIBO and TAROM wrote to the newly elected Minister of Transportation, Miron Mitrea, that they "believe[d] that the extension [of the ASRO Contract] could be beneficial if the Romanian part[ies] could own 49% of the shares...."

129. At about the same time, the Control Body of the Ministry was performing an examination relating to the operation and management of AIBO. The report of February 23, 2001 (i.e., over six months before the alleged bribe payment request) highlighted that the rent

paid by ASRO was far below those paid by other commercial tenants. It concluded that “All the commercial area within AIBO which are no longer subject to any agreement shall be put up for auction.” The report was approved by the Ministry of Transportation. Its conclusion was communicated to AIBO.

130. Consistent with the Control Body report, AIBO concluded that its economic interests would be better served by holding competitive auctions for the delivery of commercial services, including duty-free, rather than extending the ASRO Contract. TAROM shared AIBO’s position in view also of the worsening status of its relations with EDF.

131. At the ASRO General Assembly of Shareholders of January 8, 2002, AIBO and TAROM informed EDF that they had a mandate from the Ministry of Transportation to extend the ASRO Contract for three months while AIBO organised auctions for the commercial spaces at the Airport.

132. Following a recess in the meeting and the decision by AIBO and TAROM not to renew the ASRO Contract, ASRO’s General Assembly of Shareholders approved, on January 17, 2002, in an addendum to ASRO’s Articles of Association signed that day by the three shareholders, the sale by AIBO and TAROM to EDF of their shareholdings in ASRO, following a valuation of the shares and the execution of acceptable share assignment agreements. That same day, without waiting for the valuation of the shares or execution of the assignment agreements, Mr. Marco Katz, as proxy for Claimant’s decision as sole shareholder of ASRO, voted to extend the duration of ASRO and registered the addendum and the signed minutes with the Trade Registry.

133. EDF claims that once ASRO’s duration was extended AIBO was required to enter into rental contracts with ASRO, which conflicts with the Parties’ discussions. AIBO had in fact

made it clear that AIBO would organize auctions in which ASRO might participate, so that the lease agreements were extended only until March 27, 2002, at which date auctions were in fact conducted.

134. Valuation of the shares to be transferred to EDF was made (the Valuation Report dated January 22, 2002) and the price for the transfer of AIBO's and TAROM's stake fixed. ASRO was notified of the need to conclude the assignment agreements by February 3, 2002, along with the advice that if the Parties could not agree on the terms of the assignment by a date certain, then AIBO and TAROM would challenge ASRO's registration at the Trade Registry of the addendum regarding the transfer of shares.

135. A meeting was convened for February 4, 2002 to sign the assignment agreements between EDF and AIBO. Prior to the meeting, since no agreement had been reached by the date it had indicated, AIBO filed a challenge of ASRO registration regarding the transfer of shares at the Trade Registry, advising Claimant that the challenge would be withdrawn upon the signing of the assignment agreement.

136. TAROM signed the assignment agreement on February 4, 2002. AIBO informed Claimant that its signature was subject to the exclusion from the draft agreement of a provision (in Article 6 of the draft) since its language might be interpreted as preserving ASRO's rights to spaces at the Otopeni Airport, thus interfering with the planned auctions. AIBO's concern was justified since EDF, soon after, asserted that it enjoyed continuing rights to commercial spaces at the Airport.

137. Upon expiry of the lease agreements on March 27, 2002, ASRO vacated the spaces that same evening, handed over to AIBO the keys to the airport business lounge and removed

merchandise from the shops and the restaurant, locking the shops and sealing the spaces, thereby preventing AIBO from accessing the property. On November 14, 2002, in the presence of the court-appointed expert, the seals were broken and the property was inventoried and moved to storage.

138. ASRO's court actions and requests for injunctions aiming at suspending AIBO's auction proceedings, claiming that the spaces were ASRO's "*commercial assets*," were denied. On April 17, 2002, AIBO held its first auction and on May 20, 2002 the second one. Both auctions were cancelled since ASRO was the only bidder, having discouraged other bidders from participating.

139. On July 31, 2002, AIBO held the third auction, in which five companies participated. Claimant, one of such companies, was disqualified, since it had failed to submit the requested financial information. Following the issuance of GEO 104, the auction for duty-free spaces at Otopeni Airport was cancelled.

140. Bids for duty-paid spaces were thereafter solicited. EDF Properties, ASRO and SKY were among those expressing an interest in bidding. Only six companies, including EDF Properties, were financially qualified to bid. SKY and ASRO were disqualified, the former because of insufficient capitalisation and the latter since it was listed in the Trade Registry as under dissolution. EDF Properties was eventually disqualified since it had bid for a category of stores, "liquor and tobacco," that was not on the approved list of shops having been changed to "gift." Contrary to Claimant's suggestion, this change had been notified by AIBO six days before its distribution of the second phase tender documentation to the qualified bidders, not "at the last minute."

141. The Financial Guard's audit of the EDF Group in November 2002 was not related to the article published by *Die Welt* on November 15, 2002, in which Mr. Weil alleged that certain Romanian officials had solicited a bribe from him. Such controls were the culmination of a three-month investigation prompted by an August 2002 denunciation letter from five ASRO employees, alerting the Financial Guard of possible unlawful acts by companies of the EDF Group.

142. During the November 2002 examination, the Financial Guard found no discrepancy between the inventoried goods and the company record, which is hardly surprising since the EDF companies had ample time to put their records in order. Having discovered from the Trade Registry that ASRO was in the process of being wound up and, therefore, had operated illegally since January 27, 2002, the Financial Guard seized ASRO's revenues as from that date and imposed a fine of approximately USD 61.00 (not USD 59,414, as mistakenly stated by Claimant).

143. While Claimant succeeded in January 2005 in obtaining a court judgment recognising that the registration of ASRO's share transfer and extension were not null and void as had been held by a previous court judgment of April 17, 2002, there is no basis to conclude that this 2002 judgment was obtained abusively or in bad faith. ASRO had a remedy under Romanian law to recover the revenues that had been confiscated by the Financial Guard, but failed to invoke it in a timely manner.

144. Claimant asserts that Romania's challenged actions, first of all the decision not to extend the ASRO Contract and the passage of GEO 104, are attributable to its refusal to pay a bribe requested by members of the former Prime Minister's staff. Claimant's allegations are not

supported by reliable evidence that the numerous decision-makers involved in the process of deciding whether to extend the ASRO Contract or to approve GEO 104 were even aware of, let alone influenced by, alleged bribes solicited by the Prime Minister's staff members.

145. Mr. Weil did not report the alleged demand for corrupt payment in 2001 to the authorities, nor did he pursue criminal charges at that time. Romanian authorities nonetheless commenced an investigation after publication of an article in the German newspaper *Die Welt* in November 2002. The Romanian Anti-Corruption Authority ("DNA") concluded, in two successive Resolutions, the first dated March 10, 2003 and the other August 31, 2006, that "the deed does not exist," namely that there was insufficient evidence to substantiate Claimant's allegations of corruption. By decision of the Bucharest Court of Appeal dated September 27, 2007, which is final and irrevocable, Claimant's allegations were rejected.

146. Claimant's allegations contravene not only the findings of the Romanian anti-corruption authorities but also the testimony in these proceedings of Mr. Sorin Tesu and Mrs. Liana Iacob, the members of the then Prime Minister's staff who, according to Claimant, solicited the bribe payment on behalf of the Prime Minister. Further, the then Minister of Transportation, Miron Mitrea, unequivocally testified that he was unaware of any bribe solicitation regarding Mr. Weil or his companies and that no decision regarding AIBO, TAROM or ASRO was taken for a corrupt or illegal motive.

147. Claimant's attribution of the issuance of GEO 104 on September 5, 2002 to its refusal to pay a bribe does not withstand scrutiny. GEO 104 is neither arbitrary nor discriminatory. Contrary to Claimant's contention, GEO 104 affected not only Claimant, but also other duty-free operators and companies seeking to obtain leases for duty-free services through auctions at the

Otopeni Airport. Claimant's non duty-free operations at Timisoara and Constanta were not affected by GEO 104.

148. GEO 104 is one in a series of laws enacted over time in the context of accession to the EU to regulate the duty-free regime in Romania. It was one step in a multi-step deliberative process involving the Government, both houses of Parliament and the President of Romania before being enacted into a law. Like the previous GEO 208, GEO 104 continued to allow duty-free operations at the naval and land border crossings, at the diplomatic clubs and aboard international passenger flights, eliminating duty-free operations at the airports entirely. More recently, GEO 48 of June 28, 2006 permitted duty-free activity at international airports but only for passengers departing to non-EU States.

149. Based on publicized suspicions of corruption, particularly at the Otopeni Airport, the Government recommended restricting duty-free sales to onboard international flights and limiting the license term to one year. This led to the preparation of a draft version of GEO 104, documented through a "substantiation note" describing the urgency of the circumstances, signed by the proposing ministries and containing the rationale of the final draft GEO 104. The draft was submitted to Parliament after endorsement by the Legislative Council.

150. Reference to GEO 104 in the context of EU initiatives is not a pretext, as alleged by Claimant. Countries which are candidates for accession to the EU are supposed to align themselves progressively to the *acquis communautaire* prior to accession, a process that is continuously monitored by the European Union. Romania was under continued pressure by the European Commission to align its legislation on indirect taxation with Community law, especially regarding exemptions.

151. The process for accession to the EU included alignment to the *acquis* on taxation, duty-free sales in the EU being regulated by legislation on indirect taxation. Duty-free sales are allowed in the EU only to travellers departing from the territory of the EU to third countries, while duty-free sales had been abolished for travels within the EU since 1991. This means that, in the case of Romania, duty-free sales would not be allowed for passengers travelling on the majority of flights from Bucharest.

152. The European Commission progress reports on Romania from 1998 to 2002 emphasize that Romania should make it a priority to combat “fraud and corruption,” a concern that was taken very seriously by Romania. The media had reported, in late 2001- early 2002, on smuggling involving Romania’s airports and duty-free sales. Measures were adopted to combat fraud and corruption in the customs and border control spheres.

153. GEO 104 and GEO 48 are consistent with Romania’s two-pronged accession requirements: to combat corruption and to align its duty-free regime to the *acquis communautaire*. GEO 104’s ban on all duty-free sales at international airports was fully consistent with EU law. In order to align its legislation in the field with the EU practice, GEO 48 authorised duty-free sales “only to passengers flying directly to a third state,” *i.e.*, a non-EU member state. Other non-EU and EU countries, such as Serbia, had decided, around the same time as Romania enacted GEO 104, to eliminate duty-free sales at airports due also to the same concerns for corruption, smuggling and tax evasion. GEO 104 was amended by Law No. 330/200, dated July 21, 2006, to permit duty-free sales at airports and aboard flights for passengers travelling inside the EU. There are still no duty-free shops at Otopeni, Constanta or Timisoara airports.

The development of the SKY venture.

154. Claimant maintains that SKY had the right to operate duty-free sales onboard TAROM's aircraft pursuant to its Articles of Association and that TAROM violated its good-faith obligation under the law not to compete with SKY since in effect the said Articles were a joint venture agreement. This characterization of SKY's Articles of Association is untenable under the law since this document does nothing other than establish SKY.

155. As noted by the former TAROM General Manager, Dan Vulcan, in his witness statement, "18 months after its creation, SKY essentially was non-operational," although much of its capital had been depleted by its management. TAROM had invested USD 528,000 in SKY but had received no dividends. Mr Vulcan expressed his concerns to Mr. Weil in June 1996, asking for a specific business plan before TAROM would decide to continue its business relations with SKY, but received no satisfactory explanation.

156. TAROM's on-board commercial sales had decreased in 1996, in part because TAROM expected SKY to take over those operations. Termination of the SKY Contract was considered by TAROM. A solution was eventually reached, according to which SKY would commence drawback operations for a limited time. SKY was requested to sign a service agreement for these operations. This request was rejected by Mr. Weil. In the absence of such agreement, TAROM obtained, on October 14, 1996, its own duty-free license.

157. The difficulties in business relations continued during 1997. After several meetings, SKY amended its articles of association to permit the Company to perform drawback sales and on May 16, 1997, executed a two-year service agreement with TAROM. Following a change in

legislation, SKY obtained a duty-free license to sell goods aboard aircraft. Duty-free operations could thus be started by SKY two and-a-half years after its founding.

158. The commencement of on-board operations did little to halt SKY's descent into bankruptcy. By July 1999, TAROM had several reasons to dissolve SKY. Its losses exceeded more than half of its share capital, so that capital had to be replenished. SKY's ground-transportation business had suffered huge losses. Further, the transit hotel never got beyond the planning stage because of EDF's refusal to guarantee its part of the bank loan required to finance SKY in that regard. TAROM had no representative in SKY's executive management and received insufficient information about SKY's operation and expenses. Furthermore, TAROM considered Claimant untrustworthy in view of "some scheme with EDF" to siphon funds out of SKY and Mr. Weil's failure to keep his promise in 1994 to guarantee TAROM USD 300,000 in annual revenues.

159. In light of these problems, in July 1999, TAROM's Board of Directors recommended the dissolution of SKY. This recommendation was approved by TAROM's shareholders. However, since dissolution required a unanimous vote, TAROM's effort to terminate SKY was blocked by Claimant.

160. SKY's 1999 audit report confirmed that SKY's losses were ten times greater than its share capital, so that it could not legally continue operating unless its capital was replenished, which neither TAROM nor Claimant wished to do. On August 10, 2000, TAROM notified SKY that it was invoking the service agreement's 90-day termination clause so as to terminate SKY's in-flight duty-free sales operations. Various lawsuits were then initiated by SKY. During that

period of time, TAROM allowed SKY to continue sales operations on board its aircraft without the service agreement, the latter having expired on June 30, 2001.

161. Ultimately, on 6 August 2002, TAROM's Board of Directors approved withdrawal from SKY and commencement of duty-free services aboard its airplanes. GEO 104 revoked TAROM's and SKY's existing duty-free licenses. Both had therefore to reapply for a new duty-free license. Ultimately, TAROM was granted a duty-free license on December 20, 2002, after SKY had obtained a license for on board sales on December 12, 2002.

162. On November 25, 2002, TAROM denied SKY access to its planes. SKY had no license to sell duty-free goods and no services agreement at that time, so that it was operating unlawfully. The legality of TAROM's action was recognised by the Bucharest Court of Appeal on May 13, 2003.

163. Having reacquired its duty-free license and in view of SKY's totally unsatisfactory financial results, on January 13, 2003, TAROM notified SKY of its intention to dissolve the Company or, alternatively, to sell its shares to Claimant. Following Claimant's blocking of TAROM's efforts to dissolve SKY, TAROM petitioned the Bucharest Tribunal to allow it to withdraw from SKY. The petition was granted by the court on July 1, 2005, on the ground that SKY's losses represented sufficient cause for TAROM's decision to withdraw from that Company.

b. The law

164. Neither the conduct of AIBO nor the conduct of TAROM is attributable to Romania. Neither AIBO nor TAROM is in fact an organ of the State. The essential characteristics that

define State ownership of a non State organ is the degree to which the entity exercises public authority or performs public functions. Neither AIBO nor TAROM was organized structurally as a Romanian State organ nor did they perform such functions as the State or on the State's behalf.

165. Claimant cites several cases which it claims support the principle that State-owned entities are organs of the State as a matter of international law. However, none of these cases actually address the issue of what constitutes an organ of the State under public international law. The cited cases demonstrate that in order to support the conclusion that an entity is a State organ, the evidence that the entity acts for the State must be clear.

166. AIBO's object of activity is to use its own assets for economic gain to the benefit of its shareholders. Public services, such as those relating to aircraft and flight operations, are performed by AIBO using public property as a concessionaire. Control over AIBO is exercised by the Ministry of Transportation as a governmental authority only in connection with public services provided by AIBO. Regarding commercial dealings, the Ministry acts as a shareholder. In its dealings with EDF in respect of ASRO, including lease agreements as to its property, AIBO acted as a commercial enterprise. Accordingly, AIBO does not have structurally the status of an organ of the Romanian State.

167. TAROM is a commercial company, the Ministry of Transportation holding the State's majority shareholding. Its corporate structure and operations have always been governed by private law. It has separate legal capacity, including the capacity to sue and to be sued. Profits are distributed as determined by the corporate bodies. As any other commercial entity, TAROM must pay taxes to the State and has to obtain licenses to perform activities subject to applicable regulation, such as duty-free retail services.

168. In sum, TAROM is a commercial entity governed entirely by private law and conducts commercial operations under the same regulatory structure that applies to all air carriers conducting operations in Romania. Accordingly, TAROM is not an organ of the State and it has no such status under Romanian law.

169. Neither AIBO nor TAROM is authorised by the State to exercise functions of a public character which are normally exercised by State organs. The Commentary to the ILC Draft Articles on State Responsibility indicates that the internal law must specifically authorise the conduct as involving the exercise of public authority. None of the conduct at issue in this case was within the scope of a delegated governmental authority over transportation infrastructure, such as the administration of public airports and airlines. None of the agreements or conduct at issue in this case have anything to do with public property.

170. As stated by the Commentary to the ILC Draft Articles, the conduct of public entities, although owned by, and therefore subject to the control of, the State is not attributable to the State “unless they are exercising elements of governmental authority within the meaning of [ILC] Article 5.” There is therefore a strong presumption in international law that the separateness of corporate entities should be observed.

171. As sole shareholder of AIBO, Romania, through the Ministry of Transportation, did not exercise control over the Company beyond its role as shareholder. The fact that the Ministry issued written mandates in respect of certain actions regarding ASRO is consistent with its role as representative of AIBO as shareholder of ASRO.

172. In conclusion, neither AIBO nor TAROM is an organ of the Romanian State nor were AIBO or TAROM performing delegated governmental authority within the meaning of Article 5 of the ILC Draft Articles. Finally, neither AIBO nor TAROM took the actions to which Claimant objects at the direction of the State, independent of corporate formalities, within the meaning of Article 8 of the ILC Draft Articles. The actions of AIBO and TAROM in their relations with Claimant regarding ASRO and SKY are not attributable to the Romanian State.

173. Romania fully complied with its obligation under the BIT, as interpreted according to the Vienna Convention on the Law of Treaties. As explained by other cases involving investment protection treaties, the treaty's substantive provisions should be interpreted in a balanced way rather than in a way that exaggerates the protection to be accorded to foreign investments.

174. No contractual obligations were entered into by Romania, the State being a party neither to the ASRO Contract nor to the SKY Contract. Such contracts were concluded by AIBO and TAROM not on behalf of, or as agents of, the State. Claimant's claims regarding the so-called umbrella clause of Article 2(2) of the BIT therefore fail at the threshold. In any case, not every breach of municipal law obligation is a violation of the umbrella clause, the umbrella clause prohibiting only the use of sovereign prerogatives to avoid or otherwise interfere with municipal law obligations.

175. As to Claimant's allegations regarding the acts that allegedly violated Article 2(2) of the BIT, AIBO did not breach any right of first refusal over the commercial spaces at the Otopeni Airport that was owed to EDF under the ASRO Contract. Such right was not part of AIBO's contribution to ASRO's share capital, but only a one-time contractual right that ASRO exercised in 1998 and that in any case terminated with AIBO's withdrawal from ASRO in January 2002

and the expiry of ASRO's ten-year term. TAROM had no legal obligations under Romanian law to permit SKY to continue its unprofitable operations on board TAROM aircraft. No obligations existed under Romanian law binding TAROM not to compete with SKY.

176. Fair and equitable treatment is an objective legal standard, the observance of which is heavily fact-dependent and case-specific. The focus should be the investor's legitimate expectations and not its subjective standpoint. The cases cited by Claimant have found that in order to violate this standard, State action must be "conscious and overtly" taken, "not for cause but for purely arbitrary reasons . . ." and that the State action disregarded obligations in a manner that was characterized as "outrageous" and "shocking" (*Eureko v. Poland*, Partial Award of August 19, 2005, at paras. 232-234).

177. In the present case Claimant could not have had legitimate expectations that its contracts rights would exist beyond the expiration of their specified term, much less that such contracts would be renewed regardless of commercial considerations and interests of AIBO and TAROM. As to GEO 104, Claimant could not similarly have had legitimate expectations that the legal regime governing duty-free operations in Romania would not change.

178. TAROM's decision to deny SKY further access to its aircraft cannot seriously be considered as violating the fair and equitable treatment of Claimant's investment in light of the totality of the facts and circumstances concerning SKY's relations with TAROM and TAROM's concern that it continuously manifested regarding SKY's unprofitable and unsatisfactory operations.

179. Romania's treatment of Claimant's investment was neither unreasonable nor discriminatory. AIBO acted in accordance with its contractual rights regarding the alleged

eviction of ASRO from the commercial spaces at Otopeni Airport. Similarly, GEO 104 was a legitimate measure.

180. There can be no dispute that a *bona fide* generally applicable regulation, adopted within a State's police power for objective reasons, does not constitute a compensable expropriation, even if it limits permissible activities or makes them uneconomic. In light of precedents, Claimant's allegations that it suffered expropriation in violation of Article 5 of the BIT are insufficient both as a matter of fact and as a matter of law. Specifically, when GEO 104 took effect on September 11, 2002, ASRO's lease agreements with AIBO had already terminated as of March 27, 2002, so that there were no rights that could have been affected by GEO 104's provisions.

181. Having failed to establish that the State's challenged conduct is in breach of the BIT, Claimant is not entitled to compensation. In any case, Claimant may not assume causation between Romania's alleged breaches of the BIT and its alleged losses, but must prove it.

182. The request for compensation is grossly inflated, based as it is on unrealistic assumptions and speculative or uncertain damage. It contains a number of fundamental errors. One of the most significant methodological flaws in Claimant's damage calculation is the valuation of ASRO's loss of profits as if the injury occurred in June 2006 (the date of Claimant's submission), thus failing to apply a discount factor from the date of the alleged injury in 2002 to June 2006, which would have reduced the *quantum* claim by one-half.

183. Also the arguments that profits allegedly lost "in the past" (until the date of the award) must be accepted as certainly earned is erroneous. Claimant's "increase" of the amount of damage follows from its selection of the valuation date and the allegation that its contract rights entitled it to earn profits in perpetuity from its ventures. Further, Claimant's earning projections

(as per Annex A to its letter to the Tribunal of September 21, 2007) are based on unreliable support. The simple passing of time does not support an assumption that ASRO's projected earnings from 2002 to 2008 or 2009 would have actually occurred. In addition, Claimant fails to reduce its request for compensation to account for its actual shareholding in ASRO.

c. Relief requested by Respondent

184. "For all of the reasons set forth above and in Respondent's previous submissions, Respondent requests that the Tribunal dismiss Claimant's claim in their entirety and order Claimant to bear all costs incurred by Romania in connection with this arbitration, including its attorney fees, fees of expert witnesses, the fees and expenses of the members of the Tribunal and the charges for use of the facilities of the Centre."⁶

IV. THE TRIBUNAL'S ANALYSIS

1. The issue of attribution

185. The Tribunal is obliged to determine a number of issues raised by Claimant to substantiate its claim of BIT violations by Romania. The said violations have been asserted with regard to a series of acts attributed to Romania under two distinct bases. On the one side, Claimant asserts that certain acts and conduct by AIBO and TAROM alleged to be in breach of the ASRO Contract and the SKY Contract, as well as AIBO's organisation of auctions in 2002, are attributable to Romania under Articles 4, 5 and 8 of the Draft ILC Articles on State Responsibility. On the other hand, according to Claimant, Romania is responsible for BIT violations deriving from the Financial Guard's audits of ASRO's business in 2002 as well as

⁶ R. 2nd PHS, para 37.

from the enactment of GEO 104 in September 2002, any and all such acts being directly attributable to the State.

186. There can be no doubt that the enactment of GEO 104 and the audits of ASRO by the Financial Guard are attributable to Romania, the former as an act of the legislative power and the latter as acts of a State organ. However, attribution to the Romanian State of acts and conduct of AIBO and TAROM regarding the performance of the ASRO Contract, the SKY Contract and the organisation by AIBO of auctions in 2002 must be carefully examined.

187. According to Claimant, the conduct of AIBO and TAROM, whatever their precise characterization, is attributable to Romania on one or the other of the following grounds:

- a) they are organs of the State within the meaning of Article 4 of the ILC Articles;⁷
- b) they are entities exercising governmental authority within the meaning of Article 5 of the ILC Articles;
- c) they act under the control and direction of the State within the meaning of Article 8 of the ILC Articles.

The foregoing Articles set out respectively structural, functional and control tests for determining whether an act or conduct by an entity should be attributed to the State.

188. Article 4 of the ILC Articles reads as follows:

“ARTICLE 4
Conduct of organs of a State

⁷ The ILC Draft Articles on State Responsibility have frequently been applied by courts and arbitral tribunals as declaratory of customary international law.

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

In the 2002 Commentary of the ILC Articles it is specified:

“(1) Paragraph 1 of article 4 states the first principle of attribution for the purpose of State responsibility in international law – that the conduct of an organ of the State is attributable to that State. The reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.”⁸

As stated by ILC Article 4 (2), the State internal law determines whether an entity is a State organ. As mentioned by Respondent’s expert on international law, Professor Christopher Greenwood, “once it is established that an entity is an organ of the State, the presumption is that all of its acts are attributable to the State unless the contrary is proven.”⁹

189. In its Reply, Claimant characterizes AIBO and TAROM as entities “acting as an agent of the Romanian state in their conduct with EDF” (para. 344), a position that points to the functional test of attribution within the meaning of ILC Article 5 rather than to the structural test under ILC Article 4. However, in its Post-Hearing Brief, Claimant relies on the attribution of AIBO’s and TAROM’s conduct to Romania “under the structural and control test” (para. 55), therefore referring again also to ILC Article 4 (the structural test).

⁸ *The International Law Commission Articles on State Responsibility, Introduction, Text and Commentaries*, James Crawford, 2002 (hereinafter “Crawford”), p. 94.

⁹ Professor Greenwood’s Opinion of March 10, 2008, para. 28.

190. In the Tribunal's view, neither AIBO nor TAROM, both possessing legal personality under Romanian law separate and distinct from that of the State, may be considered as a State organ. This was recognised by Claimant's expert on Romanian law, Professor Valeriu Stoica who stated that "As there is no law granting AIBO or TAROM the status of a body of the Romanian State, the two entities may not be considered state bodies within the meaning provided by the above-mentioned article [*i.e.* ILC Article 4]."¹⁰

191. Article 5 of the ILC Articles reads as follows:

ARTICLE 5

Conduct of persons or entities exercising elements of governmental authority.

The conduct of a person or entity which is not an organ of the State, under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Therefore, in order for an act to be attributed to the State under ILC Article 5, two cumulative conditions must be fulfilled:

- first, the act must be performed by an entity empowered by the internal law of the State to exercise elements of governmental authority;
- second, the act in question must be performed by the entity in the exercise of the delegated governmental authority.

192. The issue before the Tribunal is therefore whether AIBO or TAROM were specifically empowered by Romanian law to exercise elements of governmental authority and, if so, whether they exercised such authority when performing any of the acts which Claimant attributes to

¹⁰ Professor Stoica's Opinion annexed to Claimant's Reply, para. 26.

Romania, either in the course of the performance of the ASRO Contract or the SKY Contract or, in the case of AIBO, when it organised auctions of its commercial spaces at the Otopeni Airport.

The Tribunal will examine these two questions in turn.

193. The test to determine when an entity falls within the scope of application of ILC Article 5 is a functional one.

“[t]he fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. **Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.**”¹¹

Therefore, in order for an act of a legally independent entity to be attributed to the State, it must be shown that the act in question was an authorized exercise of specified elements of governmental authority. As stated by the ILC Commentary to Article 5, “It is accordingly a narrow category.”¹²

194. In the instant case, and following the ILC approach, what matters is (i) whether AIBO and TAROM were empowered by the internal law of Romania to exercise elements of Romanian governmental authority, and (ii) whether the specific acts in question were performed by AIBO and TAROM in the exercise of any such delegated governmental authority. In the Tribunal’s view, neither the auctions organised by AIBO nor the exercise by AIBO and TAROM of their

¹¹ Crawford, p. 100, para. 3 (emphasis added).

¹² Crawford, p. 102.

rights as shareholders of ASRO and SKY and under the ASRO Contract and the SKY Contract were exercise of delegated governmental authority.

195. As convincingly shown in the case of AIBO by Respondent's legal expert, Professor Dr. Lucian Mihai there is a distinction to be made between the legal regime of public property at the airport (such as runways, embarking or disembarking platforms or taxiways), which is held and managed by AIBO under the terms of a concession with the Ministry of Transportation as public assets regulated by public law, and the legal regime of AIBO's private property which is a part of its own patrimony (such as all retail and other commercial spaces at the airport). Regarding the latter, the evidence before the Tribunal shows that AIBO takes decisions within its own corporate bodies, as any other commercial company operating in Romania.¹³ This finding is, however, subject to the Tribunal's determination as to ILC Article 8, which is considered below.

196. The auctions of commercial spaces at the Otopeni Airport organised by AIBO in 2002 fall within the category of the legal regime of AIBO's private property. They were not acts performed in the exercise of delegated governmental authority, but rather were acts aiming at the better exploitation by AIBO of commercial spaces, which were part of its private property, and the conduct of its own duty-free business, subject only to its corporate bodies' determinations.

197. Likewise, AIBO's and TAROM's contractual relations with EDF under the ASRO Contract and the SKY Contract were not exercises of delegated governmental authority. Rather,

¹³ Professor Mihai, Supplemental Expert Opinion, February 2008, paras. 35-44. The private law regulation applicable to AIBO's commercial spaces is confirmed by the ASRO Contract, which provides for the contribution in kind by AIBO to ASRO's share capital of "commercial assets" (in the original formulation), and the rent paid by ASRO to AIBO for its commercial spaces at the airport under lease agreements.

these relations were entered into and performed in pursuit of the corporate objects of a commercial company with the view to making profits, as any other commercial company operating in Romania.

198. Accordingly, neither AIBO nor TAROM were agents of Romania or exercised governmental functions when they performed the specific acts and conduct alleged by Claimant to be in breach of the BIT. These acts and conduct do not fall within ILC Article 5 and cannot therefore be attributed to Romania under the functional test laid down by that Article. It remains to be seen whether the same acts and conduct may be attributed to Romania, in whole or in part, pursuant to ILC Article 8.

199. Article 8 of the ILC Articles reads as follows:

ARTICLE 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or the group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct.

200. The ILC Commentary makes clear that such attribution is exceptional. In order to attribute the act of a person or group of persons to a State, Article 8 stipulates that the person or group of persons must be acting on the instruction of, or under the direction or control of, the State in carrying out the conduct the attribution of which is in question.

“The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the

meaning of Article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or *that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.*¹⁴

201. The evidence on record indicates that the Ministry of Transportation issued instructions and directions to AIBO and TAROM regarding the conduct these Companies should adopt in the exercise of their rights as shareholders of ASRO as to acts and conduct that, according to Claimant, were in breach of the BIT. There is also evidence on record of instructions or directions given to AIBO by the State, through the Ministry of Transportation, regarding the organisation of auctions of AIBO's commercial spaces at the Otopeni Airport in 2002. Further, the evidence before the Tribunal indicates that the Romanian State was using its ownership interest in or control of corporations (AIBO and TAROM) specifically "in order to achieve a particular result" within the meaning of the ILC Commentary above. The particular result in this case was bringing to an end, or not extending, the contractual arrangements with EDF and ASRO and instituting a system of auctions.

202. Claimant contends that major decisions within the Board of Directors and the General Assemblies of AIBO and TAROM were adopted according to instructions received from the Ministry of Transportation "by means of mandates directing them to take concrete decisions."¹⁵

203. Respondent argues that the Ministry of Transportation did not dictate orders to the Company board representatives through the mandates, but rather that the mandates were not

¹⁴ Crawford, pp. 112-113, footnotes omitted, italics added.

¹⁵ Cl.1st PHB, para. 39.

legally binding on AIBO or TAROM, and that the Ministry approved courses of action proposed to it through mandates drafted by Company board representatives. Respondent maintains that none of the mandates can be understood, either *de jure* or *de facto*, as an order from the Ministry to the Company.¹⁶

204. The Tribunal does not share Respondent's interpretation of the role of the mandates issued by the Ministry of Transportation to companies falling under its authority, whether *de jure* or *de facto*. Not *de jure* since, as indicated in the preamble of Order No. 597 of April 17, 2001 (establishing the applicable regulation on the subject),¹⁷ the mandate is granted to the corporate bodies of said companies:

“to support the standpoint of the Ministry of Public Works, Transportation and Housing in the General Meetings of Shareholders, Boards of Directors, respectively managing committees at the units under the authority, respectively subordinated to the Ministry”

The objective of the mandate “to support the standpoint of the Ministry” is repeated in Article 2(3) of the Order.

205. In the Tribunal's view, this is not the kind of language that leads to an understanding that the corporate bodies of companies under the authority of the Ministry of Transportation had the initiative to originate, in full independence, proposals to the Ministry concerning the kind of decisions to be taken, much less that such bodies were free to decide other than as provided by the mandates. The fact that directions are given by the mandates to the members of the board of

¹⁶ R. 1st PHS, paras. 14-19.

¹⁷ Exh. R-825. This Order was subsequently replaced by Government Order No. 645 of April 17, 2002 (Exh. C-437), drafted in similar terms.

directors, a body that should decide in full autonomy in the company's interest, is indicative of the compelling nature of the Ministry's mandate system.¹⁸

206. That Respondent's interpretation cannot be shared also *de facto* is shown by the decision taken by AIBO and TAROM regarding the extension of the ASRO Contract and ASRO's duration. The favourable position expressed in that regard by the Board of Directors of AIBO on November 15, 2000 had to await a mandate from the Ministry of Transportation in order to be approved by AIBO's General Assembly (*supra*, para. 127). No such mandate was ever issued by the new Minister of Transportation, Miron Mitrea, due to the change of policy by the new Government which took office on December 28, 2000.

207. A mandate with the decision that the duration and the operation of EDF Asro SRL should be extended by 3 months, was given by the Ministry of Transportation on January 8, 2002 to the representatives in the Board of Directors and General Assembly of Shareholders of AIBO and TAROM.¹⁹ The minutes of the General Meeting of the Shareholders of ASRO, held on January 8, 2002, underline the effect of the mandate as expressing a compelling directive, as follows:

“Mrs. Rodica Miculescu [for TAROM] and Mr. Tara Gabriel [for AIBO] informed the participants that the Ministry of Transportation **decided** that the duration and the operation of EDF Asro SRL should be extended by 3 months, and during this period, tender procedures **shall be applied** for each field of activity currently operated by EDF Asro SRL. Mrs. Rodica Miculescu and Mr. Tara Gabriel presented the document named “MANDATE of the representatives in the Board of Directors and in the General Meeting of the Shareholders for the

¹⁸ Examples of mandates may be found in the following exhibits: Exh. R-217, mandate for TAROM's Board of Directors and General Assembly of Shareholders of January 8, 2002; Exh. R-126, mandate for AIBO's Board of Directors and General Assembly of Shareholders of January 8, 2002; Exh R- 128, mandate for AIBO's Board of Directors and General Assembly of Shareholders of January 15, 2002.

¹⁹ Exh. R-126; Exh. R-217.

extraordinary meeting of January 8, 2001,” issued on January 8, 2002, signed by Mr. Ion Selaru, with no. 29/IS (attached to the present minutes).”²⁰

Given the very different position expressed by EDF’s representative, Mr. Zvika Barak, AIBO’s and TAROM’s representatives could not react, but had to request a break in the meeting:

“Mrs. Rodica Miculescu and Mr. Tara Gabriel requested the interruption of the meeting in order to consult the lawyer and mentioned that **the mandate received from the Ministry of Transportation does not allow for approaching this issue from the perspective presented by Mr. Zvika Barak.** The break was granted as per the request.”²¹

208. The system of mandates issued by the Ministry of Transportation was not limited to direction and control of AIBO and ASRO’s shareholders. As shown by the evidence on record, it was also applied to determine AIBO’s conduct in other respects which are relevant for the decision of the case before the Tribunal. A specific mandate, issued by the Ministry of Transportation on January 8, 2002, directed the representatives on the Board of Directors and the General Assembly of Shareholders of AIBO (following approval of the proposal regarding termination of the ASRO Contract as a consequence of expiration of the terms thereof) as follows:

“a tender **shall** be organised for the acquisition of the services package offered by this company, in compliance with the provisions of Government Emergency Ordinance 60/2000.”²²

A resolution was passed that same day by AIBO’s General Assembly of Shareholders conforming textually to the Ministry of Transportation’s mandate.²³

²⁰ Exh. R-124, p. 2, emphasis added.

²¹ *Ibidem*, emphasis added.

²² Mandate No. 29/IS, January 8, 2002, Exh. R-123, emphasis added.

209. Based on the evidence on record and after close examination of the Parties' arguments, the Tribunal concludes that the conduct of AIBO and TAROM in the performance of the ASRO Contract and the SKY Contract as shareholders of ASRO and SKY was under the direction and control of the State within the meaning of ILC Article 8. Further, the conduct was carried out in order to achieve the particular result of bringing to an end the contractual arrangements with EDF and ASRO and to institute instead a system of auctions for commercial spaces at the Otopeni Airport.

210. In Respondent's First Post-Hearing Submission, the argument is made that the phrase "in order to achieve a particular result" in the Commentary to Article 8 means an action "plainly outside of the company's interests" (at para. 8, p. 3). Support for this position is said to be found in *Foremost Tehran v. Iran*, an award dated April 10, 1986, of the Iran-U.S. Claims Tribunal. But that is not what *Foremost Tehran* says. *Foremost Tehran* says that decisions may be attributable to the State shareholder of a company where the adopted measures "went beyond the legitimate exercise by the majority of the shareholders...or by its duly elected directors, of their right to manage the company's affairs in what they *perceived* to be its best interests." The test, as it has to be, is subjective, not objective, under the "particular result" formulation of the Commentary to Article 8, if for no other reason than neither this Tribunal nor any tribunal is generally in a position to make a judgment as to what is objectively in the best interests of a company for purposes of State attribution.

211. The question of attribution to the State then becomes what the management of AIBO and TAROM perceived to be in the Companies' interest just before the change in government policy

²³ Exh. R-125 (referring to "Governmental Emergency Ordinance no. 60/2001 on the public procurement").

regarding the extension of ASRO's term and the ASRO Contract, and the change to a system of auctions. As previously noted,²⁴ on November 15, 2000, AIBO's Board of Directors, following a request by EDF, agreed to extend the ASRO Contract for a second term of ten years. However, the favourable position so expressed in that regard by the AIBO's Board of Directors, and obviously preferred by ASRO, had to await a mandate from the Ministry of Transportation in order to be approved by AIBO's General Assembly. There was also an acquisition of shares as part of the agreement. AIBO's Board approved the acquisition of 22% of ASRO's share capital, which meant a 49% combined shareholding in ASRO by AIBO and TAROM. The proposed share purchase was approved on November 29, 2000, by AIBO's General Assembly of Shareholders, even though no purchase price had been set. The share acquisition was something that AIBO had long wanted to do.²⁵

212. In the Tribunal's view, all of this evidences how AIBO and TAROM perceived their business interest. But, as noted, no mandate was ever issued by the new Minister of Transportation, Miron Mitrea, endorsing that position due to the change of policy by the new government, elected in November, 2000 and which came to office on December 28, 2000. AIBO and TAROM then changed their position to coincide with the new policy of the Ministry.

213. In the Tribunal's view, such conduct, including the subsequent bringing to an end of the contract arrangements and the institution of a system of auctions in their place, was clearly designed to achieve a particular result within the meaning of the Commentary to Article 8 of the ILC Articles. As such, this conduct was attributable to Romania. The question that remains is

²⁴ *Supra*, paras. 126 and 206.

²⁵ R. CounterMem., p. 71, footnote 452.

whether the acts and conduct that according to the Tribunal's determination were attributable to Romania were in violation of the BIT, as alleged by Claimant.

214. Claimant has summarized as follows the BIT breaches it alleges were committed by Romania:

“The BIT between Romania and the UK contains Romania's obligation to provide fair and equitable treatment, Romania's obligation to not impair the maintenance, use or enjoyment of the investment by unreasonable or discriminatory measures, Romania's obligation to observe its contractual agreements and Romania's obligation to compensate investors for expropriations. The conduct of Romania with regard to the investor's investments violated these standards.”²⁶

These alleged breaches will be examined in turn.

2. Fair and equitable treatment (FET)

215. Article 2(2) of the BIT provides as follows:

Investments of nationals or companies of each contracting party shall at all times be accorded fair and equitable treatment.

As in all other investment treaties, there is no definition in the BIT of “fair and equitable treatment” (FET), nor is there a general consensus on the meaning of this phrase by ICSID tribunals.

216. The Tribunal shares the view expressed by other tribunals that one of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made. Claimant has specifically referred to this component.²⁷

²⁶ Cl. Reply, para 377.

²⁷ Claimant refers to this component as “A central pillar of the fair and equitable treatment granted to the investor”: Cl. 1st PHB, para. 4; *ibidem*, para. 56.

It comes into consideration whenever the treatment attributable to the State is in breach of representations made by it which were said to be reasonably relied upon by the Claimant. This concept was stated by the tribunal in *Waste Management v. Mexico* as follows:

“In applying this standard [*i.e.*, the FET] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”²⁸

217. The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State’s normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.

218. Further, in the Tribunal’s view, the FET obligation cannot serve the same purpose as stabilization clauses specifically granted to foreign investors. As stated recently by another ICSID tribunal in *Parkerings-Companiet AS v. Lithuania*:

“It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.”²⁹

²⁸ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB/AF/003 (NAFTA), Final Award, April 30, 2004, para. 98.

²⁹ *Parkerings-Companiet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award of September 11, 2007, para. 332.

The same idea was put forward by the tribunal in the Argentina case, *Continental*, stating that:

“the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.”³⁰

219. Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State’s power to regulate its economic life in the public interest. As stated by the tribunal in the *Saluka* case:

“A foreign investor protected by the Treaty may in any case properly expect that the [Government] implements its policies bona fide by conduct that is, as far as it affects the investor’s investment, reasonably justifiable by public policies and that such conduct does not violate the requirements of consistency, transparency even-handedness and non-discrimination.”³¹

220. In the light of the foregoing principles, the Tribunal will now examine the allegations by the Claimant of breaches by Romania of its FET obligations,³² and Respondent’s defence in reply.

a. *The alleged bribe solicitation*

221. The Tribunal shares the Claimant’s view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that “exercising a State’s discretion on the basis of corruption is a [...] fundamental breach of transparency and legitimate

³⁰ *Continental Casualty Company v. Argentina Republic*, ICSID Case No. ARB/03/91, Award of September 2, 2006, para. 254.

³¹ *Saluka v. Czech Republic*, Ad hoc UNCITRAL, Partial Award of March 17, 1996, para 307.

³² Cl. Reply, paras 398-420.

expectations.”³³ The heart of Claimant’s case is that the contractual arrangements at the Otopeni airport were not extended beyond their ten-years term because Mr. Weil refused to pay a USD2.5 million bribe to secure the extension, that the request for a bribe was obvious bad faith by Respondent in negotiating an extension, and was clearly impossible to reconcile with the legitimate and reasonable expectation of Claimant. Respondent flatly denies that such a request for a corrupt payment was made. In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.³⁴ The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.

222. Of course, assuming that a bribe solicitation had actually occurred, a person in Mr. Weil’s position would not have wished to report it to the authorities for fear of prejudicing the chances of obtaining the desired extension of ASRO’s duration which was still open in August 2001. It is reasonable to believe that when such chances all but disappeared following AIBO’s auctions and the Financial Guard’s intervention, Mr. Weil took the decision to denounce publicly, in an article published on November 15, 2002, by the German newspaper *Die Welt*, the alleged bribe

³³ Cl. 1st PHB, para. 167.

³⁴ The cases referred to by Respondent are sufficiently representative of the status of international case law on the subject (R. Rej., paras 378-383).

solicitation,³⁵ following which an investigation was opened by the DNA. The Tribunal has examined closely the evidence made available by Claimant regarding the alleged request for a bribe.

223. The testimony of Mr. Marco Katz, a witness for Claimant, is of doubtful value. He denied initially, in 2002, when questioned by the PNA (later replaced by the DNA) having any knowledge of the person who solicited the bribe.³⁶ But he said in his written statement to the Tribunal in these proceedings, dated July 2, 2007 that he had been immediately informed by Mr. Weil³⁷ that the bribe request had been made by Mr. Sorin Tesu. On May 18, 2006, in a Statement delivered to the DNA, Mr. Katz mentioned the name of Mr. Sorin Tesu as the person who requested the payment of USD2.5 million from Mr. Weil.³⁸ The obvious question for the Tribunal is in which of these statements was Mr. Katz telling the truth. There is no way to know. The evidence is not clear and convincing.

224. Further, the reference made by Mr. Katz in his written statement concerning the bribe request is only hearsay since he says he learned of the request for a bribe from Mr. Weil. Mr. Katz was not present at the meeting at the Hilton Hotel in Bucharest where the request was said to have been made. While hearsay evidence is admissible in international arbitration, confirmatory evidence is normally required, and in the instant case, the gaps in the story are very significant. Mr. Katz also refers to a meeting at Mrs. Iacob's home on October 19, 2001, in an e-

³⁵ C-119.

³⁶ Tr., p. 387.

³⁷ Mr. Katz's Witness Statement dated July 2, 2007, para. 26.

³⁸ Exh. R-1164, p.3.

mail sent the following day to Mr. Weil,³⁹ reporting a bribe solicitation by Mrs. Iacob during that meeting.⁴⁰ However, Mr. Katz was not able to confirm to the DNA, in July 2006, whether he had actually written and sent the e-mail in question.⁴¹ The authenticity of this e-mail was disputed by Respondent based on expert evidence produced by it, indicating that the message had been manipulated.⁴² Again, the evidence is not clear and convincing.

225. In an attempt to better substantiate the allegation of bribe solicitation, the Claimant requested on April 23, 2008, that new evidence be admitted. The new evidence consisted of an audio tape, with the relevant transcript, allegedly recording the conversation between Mr. Katz and Ms. Iacob during the meeting on October 19, 2001 mentioned above, in the course of which the bribe request was said to have been repeated by Mrs. Iacob. By Order No. 3 of August 29, 2008, the new evidence was declared inadmissible by the Tribunal for various reasons, including lack of authenticity of the audio tape.

226. At the hearing Mr. Weil confirmed the bribe request,⁴³ as he had already reported to the DNA in a Statement of June 17, 2006.⁴⁴ Mr. Katz's testimony at the hearing was less straightforward. On the one hand, he referred again to what he said he had been told by Mr. Weil about the bribe request having been made by Mr. Tesu. Questioned by counsel for Respondent regarding the meeting at Mrs. Iacob's home on October 19, 2001, during which the bribe request

³⁹ Exh. C-69.

⁴⁰ Mr. Katz's Witness Statement dated July 2, 2007, para. 32.

⁴¹ Tr. p. 385. Mr. Katz made reference to this e-mail in the Statement of May 18, 2006 to the DNA (Exh. R-1164, p. 3).

⁴² Mr. Casey's Report of March 7, 2008, paras. 11-16.

⁴³ Tr., p. 206.

⁴⁴ Exh. C- 397.

was said to have been made again, Mr. Katz simply confirmed the description of the meeting made in the e-mail sent by him to Mr. Weil on October 20, 2001,⁴⁵ the authenticity of which – as already mentioned – had been challenged by Respondent’s expert. Still again, clear and convincing evidence of the alleged bribe solicitation is not before the Tribunal.

227. At the hearing both Mr. Tesu and Mrs. Iacob confirmed the content of their witness statements, denying the bribe request.⁴⁶ Mrs. Iacob also denied that during the meeting at her home on October 19, 2001 with Mr. Katz she repeated the bribe request on the account of the Prime Minister, as maintained by Mr. Katz, stating that she did not “recall any specific subject of this conversation.”⁴⁷ This followed a more straightforward denial of any request for money on behalf of Prime Minister Nastase made by Mrs. Iacob to the DNA on May 5, 2006.⁴⁸ In the Tribunal’s view, and judging from their credibility at the hearing, Respondent’s witnesses’ denials were also not clear and convincing.

228. The DNA twice investigated the Claimant’s bribery claim and twice rejected it, first in 2003 and again in 2006. The criminal courts in Romania have twice reviewed and affirmed the DNA’s conclusions that the Claimant’s bribery allegations are groundless.⁴⁹ The proceedings were reopened by the DNA following submission by the Claimant’s representative of new

⁴⁵ Tr., p. 411.

⁴⁶ Tr., p. 846 and p. 773, respectively. Mr. Sorin Tesu had already denied to the DNA, in a statement of (illegible) 13, 2006, to have had any meeting with Mr. Weil at the Hilton Hotel on August 24, 2001. He confirmed this position in his Second Statement of February 25, 2008 (para. 4).

⁴⁷ Tr., p. 802, confirming in her Second Statement of January 28, 2008, that Mr. Katz had come uninvited to her home and the general nature of the conversation (paras. 28 and 29) and that Mr. Katz’s e-mail to Mr. Weil detailed “what to me were obviously fabrications” (para. 34).

⁴⁸ Exh. C-392.

⁴⁹ Bucharest Tribunal, 2nd division, Criminal Division, May 31, 2007 (Exh. R- 1187); Bucharest Court of Appeal, 2nd division, September 27, 2007 (Exh. R- 648).

evidence – the audio tape - on April 23, 2008. The new evidence submitted by Claimant to the DNA on April 23, 2008, filed in this proceeding on the same date, was declared inadmissible by the Tribunal’s Order No. 3 dated August 29, 2008.⁵⁰

229. After the closing of the proceeding, Claimant filed, on June 11, 2009, a “Request to Reopen the Proceeding and to Admit New Evidence” (the “Request to Reopen”). The new evidence consisted of two statements given to the DNA respectively by Mrs. Tova Ben Nun and by Mrs. Liana Iacob (copies of which were attached to the Request to Reopen). According to Claimant, the evidence was new and decisive so as to justify the reopening of the proceeding pursuant to Rule 38(2) of the ICSID Arbitration Rules. On June 29, 2009, as directed by the Tribunal, Respondent filed its Response to Claimant’s Request to Reopen, asking that the latter be denied.

230. By Order No. 4 dated July 23, 2009, the Tribunal declared the new evidence proffered by the Claimant not admissible and denied the latter’s Request to Reopen. The documentation produced by Claimant with its Request to Reopen shows that:

- a) the DNA Prosecutor decided on February 11, 2009, to cease the prosecution against Mrs. Liana Iacob and Mr. Sorin Tesu “since the criminal investigation failed to prove that such offences have been committed;”⁵¹
- b) the criminal case was transferred to the Bucharest Tribunal on May 14, 2009 following Claimant’s challenge of the DNA Prosecutor’s decision.

⁵⁰ *Supra*, para. 225.

⁵¹ C-523, last page, (English version).

231. In the light of all of the foregoing, the Tribunal concludes that Claimant has failed to satisfy the required level of proof of the alleged bribe solicitation by government officials. The produced evidence reveals weaknesses as to the bribery allegation and inconsistencies among the various witnesses. The testimony of Mr. Weil, the only direct testimony, was contradicted by Mr. Tesu, the person who, according to Mr. Weil, had solicited the bribe. The doubtful value of Mr. Katz's testimony has already been indicated.⁵²

232. The burden of proof lies with the Claimant as the party alleging solicitation of a bribe. Clear and convincing evidence should have been produced by the Claimant showing not only that a bribe had been requested from Mr. Weil, but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect. In the absence of such evidence, the Tribunal is compelled to draw the conclusion that Claimant did not sustain its burden of proof.

233. As noted, the issue of the alleged bribe solicitation is central to Claimant's case. For that reason, the Tribunal considered Claimant's unauthorised letter dated August 11, 2009, objecting to the Tribunal's Order No. 4 of July 23, 2009 denying Claimant's request to reopen the proceedings and to consider new evidence from the DNA in the penal investigation of Mr. Sorin Tesu and Mrs. Liana Iacob. As authorised by the Tribunal, by letter of August 14, 2009, Respondent replied to Claimant's letter requesting that Claimant's objections to the Tribunal's Order No. 4 be rejected. As noted, the Tribunal had held in Order No. 4 that, under ICSID Rule 38(2), the new evidence had to "constitute a decisive factor" in the case so as to justify

⁵² *Supra*, para. 223.

“exceptionally” the reopening of proceedings previously closed. Particularly, Claimant objected to the Tribunal’s decision not to admit into evidence a new statement by Mrs. Ben-Nun, dated May 9, 2009, given to the DNA. Claimant maintained that the Tribunal’s decision constituted a denial of Claimant’s right to be heard.

234. In Claimant’s view, as set forth in its letter of August 11, 2009, Mrs. Ben-Nun’s statement is of a “decisive character as it corroborates Mr. Weil’s testimony and statements with regard to the bribe request made by Mr. Sorin Tesu.” Further, “Mrs. Ben-Nun’s statement plainly contradicts Mr. Tesu’s and Mrs. Iacob’s statements on decisive points and the credibility of their statements is a decisive matter.” Claimant maintains that Mrs. Ben-Nun’s statement shows that:

- Sorin Tesu called Tova Ben-Nun Cherbis for an immediate meeting between Mr. Tesu and Mr. Weil in Romania;
- Mrs. Tova Ben-Nun Cherbis and Mr. Weil went to see Mr. Tesu in a government building upon Mr. Tesu’s request;
- Sorin Tesu told Mrs. Ben-Nun Cherbis and Mr. Weil to leave and to wait for him at the Hilton hotel in Bucharest;
- Sorin Tesu called and announced his arrival;
- Mr. Weil went out for the discussion with Sorin Tesu and came back troubled and nervous.

235. None of the material in Claimant’s August 11, 2009 letter is new. Claimant emphasizes the Tribunal’s statement in Order No. 4 that “To a large extent, the content of Mrs. Ben Nun’s statement merely confirms evidence previously brought to the Tribunal’s attention,” making the

point that “The Tribunal thus acknowledges that the presented statement is prima facie decisive as it confirms Claimant’s corruption case.” The problem is that the presented statement does *not* confirm Claimant’s corruption case. As the Tribunal stated in Order No. 4, “Little or no weight should be given to a statement indicating the “troubled and nervous” state of Mr. Weil when he returned from a discussion with Sorin Tesu, considering that such state might have been attributable to a number of different factors” (Order No. 4, para. 29). Further, Mrs. Ben-Nun’s statement that “I don’t remember him telling me with this occasion the reason for being troubled or the content of his discussion with Tesu Sorin” (C-513, penultimate sentence of the penultimate page, English version) does little to assist Claimant in making its case that a bribe had been solicited.

236. Claimant maintains further that it is crucial that Claimant requested that Mrs. Ben-Nun be heard as a witness and that her credibility was evaluated by the Tribunal without hearing her testimony. Claimant points to the following statement by the Tribunal in its Order No. 4:

“Mrs. Ben Nun’s statement contradicts what she had previously told the DNA when she specifically denied ever hearing of the USD 2.5 million bribe request (Statement of June 16, 2006, C-398, page 2). In addition, as pointed out by Respondent, Mrs. Ben Nun’s new DNA statement is materially inconsistent with Mr. Weil’s and Mr. Katz’s testimony, particularly whether Mr. Weil had discussed with her the alleged bribe request which, according to Mr. Weil, was the reason for her being “shocked” (Mr. Weil’s Witness Statement of May 30, 2006, para. 95) while, according to Mrs. Ben Nun’s last statement, she does not remember Mr. Weil telling her “the reason for being troubled or the content of his discussion with Tesu Sorin” (Response, para. 18, referring to Mrs. Ben Nun’s statement, at 5).”

The problem is that hearing her testimony would have made no difference. Last in time does not necessarily mean “decisive” and in the Tribunal’s judgment does not mean “decisive” in this case. In view of the contradictions, the memory failures, the hearsay, and the reliance on Mr. Weil’s apparent (to Mrs. Ben-Nun) psychological state, this evidence cannot be a “decisive

factor” within the meaning of ICSID Rule 38(2) and cannot confirm or prove Claimant’s allegation of a bribe solicitation.

237. The Tribunal concludes that Claimant has not successfully shouldered its burden of proof with respect to its allegation of a bribery solicitation by Respondent, and therefore no FET violation can be held by the Tribunal to be present as to this aspect of the case.

b. Failure to extend the duration of ASRO. Contestation of the registration of the assignment and extension of ASRO. Refusal of AIBO to conclude rental contracts with ASRO.

238. These instances of alleged breach of the BIT will be examined together in view of their common feature. They are all based on the allegation that certain contract actions by AIBO and TAROM were attributable to the State and were in breach of the FET obligation.

239. The Tribunal has determined that the acts and conduct of AIBO and TAROM in the performance of the ASRO Contract and the SKY Contract are attributable to Romania (*supra*, para. 209). The Tribunal has now to examine whether AIBO’s and TAROM’s acts and conduct complained of by Claimant are in breach of the FET standard under the BIT, as alleged by Claimant.⁵³

240. To conclude that Romania breached its FET obligations when directing certain acts or conduct by AIBO and TAROM in the performance of the ASRO Contract or the SKY Contract presupposes that the acts or the conduct in question were in breach of AIBO’s and TAROM’s contractual obligations. Since Claimant, at the time of concluding the ASRO Contract and the

⁵³ According to Claimant, in all these instances “Romania breached the fair and equitable treatment”: Cl. Reply, para. 398.

SKY Contract, could not have legitimate expectations other than the due and proper performance by AIBO and TAROM of the contractual obligations they were going to undertake, there would obviously be no breach of FET (at least insofar as legitimate expectations are concerned, which is Claimant's main contention) to the extent that AIBO's and TAROM's acts and conduct were in compliance (or not in contradiction) with said obligations.

241. The analysis has therefore to turn to AIBO's and TAROM's obligations under the ASRO Contract and the SKY Contract and whether or not they were carried out in light of the law applicable to such contracts, which is Romanian law.

i. Failure to extend the duration of ASRO

242. Under Article 7 of ASRO's Articles of Association, the initial period of ASRO was ten (10) years, "and will be extended for further ten (10) year periods with the agreement of the General Assembly." The Parties have thoroughly argued their positions, with the support of legal experts, regarding the proper interpretation of this provision. Claimant contends that under the applicable law the General Assembly could extend the duration of ASRO by a simple majority. Respondent asserts that unanimity was required in order to amend the ASRO term provided by the Articles of Association. In the end, however, according to Claimant, whether unanimity or majority was required to extend ASRO's term "is not an issue in this arbitration."⁵⁴

243. Claimant's assertion that Respondent violated its FET obligation regarding the duration of ASRO and the failure to extend ASRO's term has many facets. The main argument appears to be that Claimant had a legitimate and reasonable expectation regarding the duration of ASRO

⁵⁴ Cl. Reply, para. 47.

since it was led to believe that the term would be extended for at least an additional ten year term. This expectation was legitimate and reasonable, argues Claimant, in view of explicit assurances by the State during the negotiation of the ASRO Contract and the assurance by AIBO, in November 2000, when the time had come for the extension of ASRO.⁵⁵ However, there is no documentation in the file from the negotiation period indicating that the ten-year term would be extended as a matter of right. Further confirmation of the long-term nature of its investment is demonstrated, according to Claimant, by the duty-free licenses issued to ASRO for five years commencing in 2000.⁵⁶

244. The reasons adduced by Claimant as ground for its expectation of a long-term duration of its investment are based on circumstances related to the negotiation and performance of the contract with AIBO regarding ASRO. Likewise, Claimant's expectations regarding SKY are based on the negotiation and performance of the contract with TAROM regarding the SKY contract. As noted, however, such expectations cannot but relate to the due and proper performance by the other parties to the ASRO Contract and the SKY Contract of their contractual obligations.

245. The fact that the ASRO Contract provided for the possibility of an extension "for further 10-year periods with the agreement of the General Assembly"⁵⁷ or, in the case of the SKY Contract, "for other periods that will be set up, in legal conditions, by the Partners General Meeting,"⁵⁸ is indicative only of the Parties' willingness to consider an extension of the

⁵⁵ Cl. 1st PHB, paras. 95-98.

⁵⁶ Cl. 1st PHB, para. 127.

⁵⁷ ASRO Contract, Article 7 (Exh. C-2).

⁵⁸ SKY Contract, Article 2 (Exh. C-12).

Company's duration at the time of expiry of the initial term, in light of the then prevailing circumstances. This provision, which is customary in these kinds of agreements and in a company's articles of association, cannot constitute a valid basis for a legitimate and reasonable expectation that there would necessarily be an extension of the Company's duration or that there was a legal obligation to extend the term beyond the initial ten-year period. Had Claimant truly intended to have a legal right to a term beyond ten years, it would have negotiated that longer term for ASRO's initial duration.⁵⁹

246. Claimant also maintains that the government's change of position regarding the extension of ASRO's duration constituted a "reversal of the investment framework and the business environment contrary to the investor's legitimate expectation" and that this "reversal of the position was due to a changed governmental decision, for arbitrary and improper motives."⁶⁰ In the Tribunal's judgment, however, there is nothing improper about not extending a ten-year contract when there is no legal obligation to do so, and as noted, there is insufficient proof of refusal to pay a bribe or other improper motive as the explanation for not extending the contract.

247. Having carefully reviewed Claimant's position on this aspect of the case, also in light of the available evidence, the Tribunal concludes that no "arbitrary and improper motives" (to use Claimant's words) are to be found in AIBO's and TAROM's acts and conduct. Such acts and conduct are to be evaluated in the context of Romanian law, which is the law applicable to the

⁵⁹ Claimant indicates that the initial ten-year term of the ASRO Contract had been agreed under legal advice only because an unlimited duration would not have been acceptable to Respondent. (Cl. Reply, para. 16). Had an unlimited term, or a term longer than ten years, been acceptable to both sides, then agreement would have been reached. As in the case of the SKY Contract (having a 15-year initial duration), a longer period might have been agreed also for ASRO.

⁶⁰ Cl. Reply, para 402.

Parties' contractual relations.⁶¹ The fact that the acts and conduct in question may be attributed to Romania since they had been directed by the Ministry of Transportation does not change the nature of the issue involved, which remains contractual, nor does it indicate that any contractual obligations were breached. Regarding these aspects of the case, the claim in question does not rise therefore to the level of a treaty claim for breach of the FET obligation.

ii. Challenge of the registration of the assignment and extension of ASRO.

248. With a view to evaluating the conduct of AIBO and TAROM with regard to this issue it is necessary to review briefly the relevant events in chronological order. To overcome the difficulties that had emerged for obtaining AIBO's and TAROM's consent to extend ASRO's term for another ten-year period, on January 17, 2002, EDF agreed to purchase AIBO's and TAROM's shares in ASRO and the latter agreed to sell such shares to EDF.⁶² In a meeting held three days before, on January 14, 2002, among EDF, AIBO and TAROM, under the supervision of the Ministry of Transportation, the Ministry indicated that, in order to avoid the expiry of the ASRO's duration, the assignment agreements had to be "executed by all the parties."⁶³

249. The decision taken at the General Assembly of Shareholders of ASRO on January 17, 2002, is relevant to the subsequent events and to Claimant's claim. The Minutes record the

⁶¹ The application of Romanian law is also prescribed by Article 42(1) of the ICSID Convention.

⁶² ASRO General Assembly of Shareholders Decision dated January 17, 2002 (Exh, R-131).

⁶³ Minute of Proceeding of the meetings of representatives of EDF, AIBO, TAROM and the Ministry of Transportation of January 14, 2002 (Exh. R- 127, p.3). The meeting had been convened "For the purpose of recording the procedural matters preceding the Assignment Agreements, whereby the minority shareholders in their capacity as assignors, assign their shares to the majority shareholder of SC EDF ASRO SRL..."(*ibidem*, p. 1).

unanimous agreement of the three shareholders regarding the assignment by AIBO and TAROM of their respective entire shareholdings in ASRO to EDF and the latter's acceptance of the assignment. The resolution concludes as follows:

"The equivalent value of the shares assigned by the withdrawing shareholders, calculated on the execution date of the resolution of the Extraordinary General Assembly of Shareholders shall be established under the assignment agreement concluded between the parties based on the audit to be conducted as of January 18, 2002, concurrently with the issuance of the mention regarding the registration of this addendum with the Bucharest Registry Office."⁶⁴

The text of "this addendum" (the "Addendum") follows the resolution.⁶⁵

250. The General Assembly of Shareholders' resolution of January 17, 2002, although not a model of clarity (possibly, by reason of the English translation), records the shareholders' agreement:

- a. to have the value of the shares of the withdrawing shareholders established by an audit to be conducted as of January 18, 2002, "calculated on the execution date of the resolution;"
- b. to make the value so established part of the assignment agreement to be concluded between the Parties;
- c. to have the Addendum registered with the Bucharest Registry Office at the time of the assignment agreement, *i.e.*, following the establishment of the value of the shares of AIBO and TAROM, as confirmed by the words "*concurrently* with the mention regarding the registration of the Addendum with the Bucharest Registry Office" (emphasis added by the Tribunal).

⁶⁴ Exh. R-131, p. 2.

⁶⁵ Exh. R-20.

251. The intent to have the registration of the transfer of shares wait for the conclusion of assignment agreements providing also for the value of the shares (therefore, for the price to be paid by EDF as consideration for the transfer) is confirmed by the understanding reached three days before, at the meeting among EDF, AIBO and TAROM under the supervision of the Ministry of Transportation.

252. The “Minute of Proceedings” reflecting such understanding records the request of EDF’s representatives for “a written and unconditional agreement to be used in view of the extension of the company’s duration.” However, such agreement was refused by the Ministry’s Secretary General, Mr. Ioan Orbescu, who nevertheless made it clear that the Ministry had no objection to the fulfilment of the formalities with the Trade Registry in order to avoid the expiry of the company’s duration (such expiry falling on 27 January 2002), “provided that the assignment agreements are executed by all parties.”⁶⁶

253. It was therefore clear to all parties involved that the registration of the extension of ASRO’s ten-year term had to wait for the execution of the assignment agreements and that the Ministry of Transportation would endorse only a procedure so providing. The Addendum signed by the three shareholders on January 17, 2002, after a premise stating that the 100% holding by EDF was obtained “through the assignment of the shares” held by the other shareholders, records the amendment of Article 6 of the ASRO’s Bylaws as follows:

“The share capital of the company is 100% held by its sole shareholder, SC EDF SERVICES LTD.”⁶⁷

⁶⁶ Exh. R-127, p.3.

⁶⁷ Exh. R-20.

254. On January 17, 2002, Claimant (i) voted in its capacity as ASRO's sole shareholder for the extension of the Company's duration for an unlimited period,⁶⁸ (ii) requested the registration of the Company's extension with the Trade Registry,⁶⁹ and (iii) registered the "Addendum" and the decision of ASRO's General Assembly of January 17, 2002.⁷⁰ The Trade Registry granted this request the following day,⁷¹ presumably interpreting the Addendum of January 17, 2002, as entitling EDF to such registration as sole shareholder of ASRO.

255. The registration of the extension of ASRO's duration was challenged by AIBO on February 4, 2002 on the ground that no assignment agreement for the transfer of its shares had been signed.⁷² The challenge followed a warning given by AIBO and TAROM to EDF, on January 28, 2002, that unless the assignment agreements were finalised by February 3, 2002, AIBO and TAROM would file a challenge to the registration of the Addendum (referred to in the warning letter as "Additional act to the Articles of Association and to the By-Laws of S.C. EDF ASRO S.R.L.") with the Trade Registry.⁷³ On April 17, 2002, the Bucharest Tribunal cancelled the registration of the transfer of shares.⁷⁴

256. The absence of an assignment agreement by the time AIBO filed the challenge against the registration of ASRO's extended duration was due to AIBO's refusal to accept a provision in

⁶⁸ Exh. R-132.

⁶⁹ Exh. R-133.

⁷⁰ Exh. R-134.

⁷¹ As mentioned by the Bucharest Tribunal's Decision of April 17, 2002, cancelling the registration regarding amendments to the transfer of shares (Exh. R-25, p. 2).

⁷² Exh. R-254.

⁷³ Exh. R-140.

⁷⁴ Exh. R-25.

the draft of the assignment agreement that, in its view, would have guaranteed ASRO continued availability of commercial spaces at the Otopeni Airport. On February 4, 2002, TAROM signed the assignment agreement, but AIBO did not. AIBO was concerned with the provision stipulating that the assignment agreement would not “conflict with or lead to a breach of any terms, provisions or conditions of the documents related to the incorporation of ASRO....” The problem for AIBO, which was of no interest for TAROM, was the concern that Claimant or ASRO would rely on this provision to maintain its position with respect to an extension of the contractual arrangements. In the Tribunal’s view, this was a perfectly reasonable concern, even though such documents did not require a legally binding extension of the ten-year term.

257. The Tribunal is aware that following lower court decisions upholding AIBO’s challenge, the validity of the extension of ASRO’s duration was confirmed by a decision of the Bucharest Tribunal on January 25, 2005,⁷⁵ holding that a completed assignment agreement was not a necessary precondition of a valid registration. This does not mean, however, that AIBO’s conduct was in breach of the FET obligation as being arbitrary, in bad faith, or a breach of the FET for any other reason when it challenged the registration of the extension of ASRO’s duration.

258. The sequence of events leading to AIBO’s challenge of the registration of the transfer of shares in ASRO and the latter’s extended duration, as summarised above, shows that AIBO had reasonable grounds to file such challenge, as recognised by decisions of the lower courts. No assignment agreements had in fact been signed when Claimant requested and obtained the registration of ASRO’s extension on January 18, 2002. ASRO might have asked the higher court

⁷⁵ Exh. C- 137; Exh. R-27.

to suspend the enforcement of the decision of April 17, 2002 pending the appeal, but failed to do so.

259. In any event, as held by a decision of the Bucharest Tribunal, dated April 3, 2008, ASRO no longer had any rights to commercial spaces at the Otopeni Airport after March 27, 2002, since, as held by that decision, its contention “as to the leased spaces becoming the commercial assets of the company and to defendant [i.e., AIBO] undertaking the obligation to extend the lease agreements according to article 6 of the company’s by-laws lacks substantiation,” AIBO’s contribution in kind was “the goodwill, the customers and not the commercial spaces.”⁷⁶

260. AIBO’s conduct with respect to reaching agreement on the assignment agreements was directed and supervised by the Ministry of Transportation, which, through the Secretary General Ioan Orbescu, had made clear during the meeting of January 14, 2002, that the extension of ASRO’s duration was conditioned on the conclusion of the assignment agreements.⁷⁷ Thus, AIBO’s conduct in this instance is attributable to the State according to ILC Article 8. However, in the Tribunal’s view such conduct did not give rise to any BIT violation.

iii. Refusal of AIBO to conclude rental contracts with ASRO.

261. Under Addendum no. 3 to the ASRO Articles of Association of April 11, 1997, AIBO’s contribution in kind was redefined as “commercial asset” in lieu of the initial “commercial

⁷⁶ Bucharest Tribunal Commercial Decision of April 3, 2008 (attached to Respondent’s letter of September 20, 2008), p. 5.

⁷⁷ Exh. R-127; *supra*, para. 252.

spaces.”⁷⁸ The Parties have argued extensively about the nature and extent of the redefined in-kind contribution by AIBO.

262. Claimant has contended that AIBO contributed the right to use the commercial spaces inside the airport and that such contribution remained with ASRO after AIBO ceded its interests in ASRO and the latter validly extended its duration.⁷⁹ Respondent has asserted that what was contributed in kind was a 10-year right to use AIBO’s goodwill and clientele relating to the airport’s old terminal,⁸⁰ so that this in-kind contribution expired following the original 10-year duration of ASRO, on January 22, 2002.⁸¹ Both Parties have filed expert opinions on Romanian law in support of their respective positions. The Tribunal notes again in this regard that by Decision of April 3, 2008, the Bucharest Tribunal has determined that AIBO had no obligation to extend the lease agreement,⁸² since the in-kind contribution was not of spaces at the airport, but rather, as Respondent maintains in these proceedings, a 10-year right to use AIBO’s goodwill and clientele relating to the airport’s old terminal. The argument based on AIBO’s in-kind contribution is therefore of no avail to Claimant.

263. The Tribunal’s task is not to decide an issue of Romanian law, which is to be left for decision by the Romanian courts, but rather to judge whether AIBO’s refusal to conclude rental contracts with ASRO was arbitrary and in bad faith and whether the State is responsible if this

⁷⁸ Exh. R-7, Article 1.

⁷⁹ Cl. Reply, para. 22.

⁸⁰ R. Rej., para. 17.

⁸¹ R. Rej, para. 18.

⁸² *Supra*, para. 259.

conduct is attributable to the State. The claim raised by Claimant concerns a possible breach of the FET obligation, specifically of its legitimate expectations component.⁸³

264. After careful consideration of the evidence, the Tribunal concludes that no ground exists for a finding of State responsibility for breach of Respondent's obligation of FET, for the following reasons.

265. Under Article 19 of the ASRO Articles of Association, AIBO's 5% contribution to ASRO's capital was made contingent upon AIBO's obligation to make available to ASRO "the entire commercial area and other retail outlets located within the area of the airport..." with a rent to be paid monthly by ASRO to AIBO "on a tariff basis established under a separate agreement."⁸⁴ As stated above, under Addendum no. 3 to the ASRO's Articles of Association of April 11, 1997, AIBO's contribution in kind was redefined as "commercial asset" in lieu of the initial "commercial spaces."

266. Respondent maintains that AIBO's obligation and, correspondingly, ASRO's rights under Article 19 were contractual, covering the conclusion between them of rental agreements for the commercial spaces at the Otopeni Airport. Being contractual, ASRO's rights and AIBO's obligations existed only so long as AIBO remained bound by the Articles of Association of ASRO, *i.e.*, so long as it kept the status of shareholder of ASRO.⁸⁵ Consistent with this interpretation, AIBO concluded a series of rental (or lease) agreements with ASRO until such

⁸³ Cl. Reply, para. 409.

⁸⁴ ASRO's Articles of Association, Article 19 in its original formulation (Exh. R-1).

⁸⁵ R. Rej., paras. 21-22

time as it ceased to be a shareholder of ASRO on January 17, 2002, when its obligation under Article 19 terminated,⁸⁶ following expiration of ASRO's ten-year duration.

267. Likewise, the pre-emptive right granted by AIBO to ASRO by the new Article 19, as amended by Addendum No. 7/1998,⁸⁷ terminated upon AIBO's withdrawal as a party to ASRO's Articles of Association on January 17, 2002.⁸⁸

268. The Tribunal agrees with the interpretation of Article 19 presented by Respondent. Such interpretation is consistent with the new wording of the first paragraph of Article 19 of the Articles of Association of ASRO following Addendum no. 7 approved by ASRO's General Assembly on July 15, 1998, which reads:

“Regia Autonoma Aeroportul International București – Otopeni [i.e. AIBO] makes available commercial spaces with a view to enabling the accomplishment of the object of activity within the Otopeni Airport premises, according to the rental agreements concluded for the entire duration of the company.”⁸⁹

The Addendum refers to “rental agreements concluded for the entire duration of the company.” However, the obligation was assumed by AIBO as a shareholder of ASRO “in view of the accomplishment of the object” of the Company activity,” in a document regulating the Company's life and the rights and duties of its shareholders. It is logical therefore to interpret AIBO's obligation as contingent upon its status as shareholder of ASRO.

269. In light of the foregoing, the Tribunal concludes that AIBO's conduct in declining to conclude further lease agreements with ASRO following the expiry, on March 27, 2002, of the

⁸⁶ R. Rej., para 24. The last lease agreement expired two months later, on March 27, 2002.

⁸⁷ Exh. R-13, Article 1.

⁸⁸ R. Rej., para. 33.

⁸⁹ Exh., R- 13, Article 1.

last of such agreements was justified. In view of this conclusion, that conduct, while attributable to the State pursuant to Article 8 of the ILC Articles, does not entail a BIT violation.

c. Romania maintains the alleged taking through auctions.

270. Claimant contends that the auctions were organised by AIBO under the direction and control of the Ministry of Transportation and performed in such a manner as to ensure that ASRO and EDF had no chance to continue doing business at the Otopeni Airport.⁹⁰ There is no evidence on record to support this specific claim.

271. In February 2001, the Control Body of the Ministry of Transportation, following an audit of AIBO's operations, highlighted the low level of rent paid by ASRO in comparison with other companies, recommending that commercial areas no longer subject to any agreement "be put up for auctions."⁹¹

272. The objective of improving AIBO's quality, efficiency and profits underlying the idea of having tenders of commercial spaces through auctions is evident. It led the Ministry of Transportation to implement the auction program by directing AIBO to limit the extension of the lease agreements with ASRO until AIBO was ready for the conduct of the auctions.⁹² This program was announced to EDF in the course of ASRO's General Meeting of Shareholders of

⁹⁰ Cl. Reply, para 411.

⁹¹ Report of the Ministry of Transportation Control Body, February 23, 2001, Exh. R-119, last page.

⁹² In his first witness statement the then Minister of Transportation, Miron Mitrea, confirmed this program and the underlying objective as follows: "The decision of the Ministry of Transportation, as shareholder of AIBO, not to extend the ASRO agreement (but instead to conduct public auctions for commercial services) was taken as part of a broader determination that companies in which the state owned a controlling interest would not simply renew long-term contracts when terms expired, but would follow competitive procedures in order to enhance economic performance" (para 7). The objective of moving "to a more transparent competitive system" for those contracts where the State was losing money was confirmed at the hearing by Mr. Mitrea. (Tr., p. 646).

January 8, 2002.⁹³ Directing AIBO against the perceived interest of EDF and ASRO means that the Ministry was controlling the program. There is attribution within the meaning of ILC Article 8. However, as shown hereafter, no BIT violations are found in Respondent's conduct.

273. In a subsequent meeting held on January 21, 2002 between EDF and AIBO in connection with the valuation of the shares of AIBO and TAROM, it had been envisaged that the validity of the rental of commercial areas to ASRO could be extended "for an additional period of three months or until a tender is organised, otherwise SC EDF ASRO SRL ends its commercial activities in these locations on January 25, 2002"94

274. Therefore, Claimant knew since January 2002, that is, from the date the ten-year term expired, that AIBO had agreed to extend ASRO's leases only until March 27, 2002⁹⁵ and that after that date AIBO was going to organise auctions for commercial spaces at the Otopeni Airport. In fact, AIBO extended the lease agreement with ASRO for 60 days, until March 27, 2002.

275. The Tribunal discerns no breach of the FET obligation in AIBO's conduct in the organisation and performance of the auctions, whether as to the decision to organise such auctions or regarding the manner in which the auctions were implemented. AIBO's conduct is attributable to the State, considering that the Ministry of Transportation directed AIBO to proceed to auction the commercial spaces at the Otopeni Airport and this was a direction contrary to the perceived interests of Claimant and ASRO. But there was no FET or other BIT

⁹³ *Supra*, para. 208.

⁹⁴ Exh. R- 137, p. 2.

⁹⁵ Exh. R-339.

violation in such conduct. In the Tribunal's view, the decision not to extend the ten-year term and to proceed to auctions instead was entirely reasonable and done for appropriate economic reasons.

276. The reason for the rejection of ASRO's bid at the end of the first two auctions, namely that the Company was the only bidder, is based on a specific and common rule of auction procedure. The rule appears reasonable, since a bidding process is based on competitive offers (therefore, on more than just one bid) in order to ensure that the best available economic and other terms can be secured. It is worth noting in this regard that the evidence indicates that Claimant itself contributed to creating the conditions for being the only bidder by challenging, through court actions, press articles and otherwise, the legitimacy of the auction process by claiming that it alone was entitled to the commercial spaces, thus discouraging other companies from participating in the auction.

277. The evidence also shows that the disqualification of Claimant and ASRO by the Evaluation Commission on the occasion of the subsequent auctions was due to the disregard of published bid requirements in the case of EDF and to the lack of legal capacity in the case of ASRO. The disqualification was a ground for the filing by ASRO of a claim before the competent court in Romania. The claim was rejected by the Bucharest Tribunal.⁹⁶

278. The outcome of the various auctions regarding Claimant or ASRO does not constitute a basis for a claim of violation of the FET standard under the BIT. There is no evidence on record that the rules governing the auctions and the manner in which they were applied to Claimant's

⁹⁶ Decision of February 2, 2004, Exh. R- 437.

and ASRO's tenders were discriminatory, arbitrary or otherwise unreasonable so as to justify a claim rising to the level of a breach of the BIT.

d. The action of the Financial Guard

279. Claimant contends that the investigation of ASRO's activities exercised by the Financial Guard in 2002, with the confiscation of ASRO's revenues leading to the Company's bankruptcy, represented the culmination of the process of the taking and destruction of its investment.⁹⁷ In reply to Respondent's contention that the Financial Guard's conduct was entirely consistent with its practice.⁹⁸ Claimant asserts that "irrespective of what the Financial Guard's practice is, it had the effect of destroying the entire value of EDF's shares in ASRO."⁹⁹

280. In the Tribunal's view, the issue is not whether the conduct of the Financial Guard in investigating ASRO's activity and imposing sanctions was consistent or not with its practice. Being clearly attributable to Romania, the Financial Guard's conduct is first and foremost to be examined in the light of Romanian law. Even if consistent with Romanian law, the Financial Guard's conduct is in any case to be examined as well under international law (including the provisions of the BIT) since wrongfulness of the State's conduct according to international law is not excluded by its conformity with internal law.¹⁰⁰

⁹⁷ Cl. Reply, para. 415.

⁹⁸ R. Counter-Mem., para 285.

⁹⁹ Cl. Reply, para. 241.

¹⁰⁰ ILC Articles, Article 3: "The characterisation of an act of a State as internationally wrongful is governed by International law. Such characterisation is not affected by the characterization of the same act as lawful by internal law."

281. The Financial Guard's investigation of ASRO's activity was part of its duty as a public body entrusted with the power "to assess and punish contraventions provided by Law no. 12/1990."¹⁰¹ The investigation was initiated following the receipt, in August 2002, of an anonymous letter signed by employees of Claimant, maintaining that unlawful activities were being carried out by various EDF-related companies.¹⁰² The anonymous character of the denunciation did not preclude the Financial Guard from its obligation to examine what had been brought to its attention. In the course of its investigation, the Financial Guard discovered that ASRO's legal existence had expired as of January 27, 2002. The resulting sanctions, particularly the confiscation of ASRO's revenues earned after that date, were issued pursuant to the applicable law, as referred to in the Findings Note issued on November 26, 2002.¹⁰³

282. Claimant objected to the Financial Guard's confiscation sanction being applied retroactively from January 27, 2002, considering that ASRO had operated until March 27, 2002 under lease agreements with AIBO.¹⁰⁴ The Trade Registry information to the Financial Guard, on November 19, 2002, had however indicated that the registration of the extension of ASRO's

¹⁰¹ Professor Mihai's Second Expert Opinion, para. 496.

¹⁰² Exh. R-227.

¹⁰³ Exhs. R-234 and R- 243. By decision of the Buftea Court of March 31, 2003, confirmed by the Bucharest Tribunal on December 18, 2003, the Financial Guard's sanction was declared lawful (Exh. R-770).

¹⁰⁴ Claimant asserts that "Retroactive sanctions are universally recognised to violate human rights and basic standard of transparency" (Cl. 1st PHB, para 196): however, the issue must be examined in the context of Romanian law and the remedies available thereunder.

duration had been annulled by decision of the Bucharest Tribunal on April 17, 2002.¹⁰⁵ This decision was irrevocable, subject only to an extraordinary challenge.¹⁰⁶

283. In November 2002, at the time of the Financial Guard's investigation, the Company was therefore deemed to have expired on January 27, 2002, in accordance with Law no. 31/1990. It had entered into the winding up procedure, with the ensuing prohibition of carrying out operations other than those leading to the completion of the liquidation process.¹⁰⁷ The sanctions imposed by the Financial Guard were in conformity with the applicable legal provisions in view of the conduct by ASRO, since January 27, 2002, of the illegal activity of carrying out commercial operations¹⁰⁸ after the company no longer had a legal existence. AIBO's consent to ASRO's operations beyond January 27, 2002, through lease agreements expiring on March 27, 2002,¹⁰⁹ may not be held to exempt the Financial Guard from applying the above-mentioned provisions of Romanian law.

284. There is no indication in the evidence that the conduct of the Financial Guard, based as it was on information received from the Trade Registry and on the applicable provisions of Romanian law, had been prompted by reasons foreign to its authority and duty as a public body,

¹⁰⁵ Exh. R-767; see the Decision of April 17, 2002 of the Bucharest Tribunal in Exh. R-25.

¹⁰⁶ Professor Mihai's Supplemental Expert Opinion, February 2008, para. 490.

¹⁰⁷ Art. 228 (1) of Law No. 31/1990: "The Company is maintaining its legal personality for the operations of the liquidation until its completion." See Professor Mihai's Supplemental Expert Opinion, February 2008, paras. 485-492.

¹⁰⁸ Articles 1(a) and 2 of the Law no. 12/1990 on the Protection of the General Public from Illicit Commercial Activities, as amended, referred to in Professor Mihai's Supplemental Expert Opinion, February 2008, paras. 494-498.

¹⁰⁹ Cl. 1st PHB, para. 200.

as suggested by Claimant.¹¹⁰ Had this conduct been contrary to the law, the Romanian judicial system offered Claimant the means to redress the situation, as shown by the many cases in which the Romanian courts have intervened, upon Claimant's request, ruling more than once in Claimant's favour. Judicial recourse against the actions of the Financial Guard was certainly an option open to Claimant.

285. Claimant appears to suggest that a kind of "concerted attack" was organised and designed to bring about the taking and destruction of its investment in Romania.¹¹¹ There is no evidence on record to that effect. All of the entities involved – AIBO, the Trade Registry, the Financial Guard, the competent court – having acted, in the eyes of the Tribunal, in accordance with their respective duties.

286. In light of the foregoing, there is no basis for Claimant's claim of violation of the FET obligation by the conduct of the Financial Guard,¹¹² therefore by the State to which such conduct is attributable. This conduct did not lack proportionality, transparency and good faith, was not improper and discreditable and was far from constituting "an act that shocks or at least surprises a sense of judicial propriety," as asserted by Claimant.¹¹³

¹¹⁰ Cl. Reply, para. 417: "The action of the Financial Guard is the direct consequence of EDF's refusal to pay bribes and the final retaliation of the involved officials against this refusal."

¹¹¹ Cl. Reply, para. 415; see also CL. 1st PHB, para. 199.

¹¹² Cl. Reply, para. 417: "The actions of the Financial Guards blatantly violates fair and equitable treatment standards."

¹¹³ *Ibidem*.

e. GEO 104

287. On September 5, 2002, GEO 104 came into force, abolishing duty-free activities at airports. Claimant has contended that GEO 104 specifically targeted EDF. It relies, *inter alia*, on an interview in a Romanian newspaper by Miron Mitrea, the then Minister of Transportation, indicating the need to discourage those that, having “branches in airports, carry out contraband activities in Romania.”¹¹⁴

288. Claimant has argued further that, contrary to Minister Mitrea’s written statement, GEO 104 was not issued to comply with European Union requirements and to combat corruption. There were no allegations of corruption by EDF or ASRO nor were there duty-free operations functioning at the airport for which allegations of corruption could be made.¹¹⁵ According to Claimant, the fact that GEO 104 was modified in 2003 and 2006 to comply with EU requirements indicates that Romania’s alleged basis for the enactment of GEO 104 is not credible.¹¹⁶

289. In its written submissions, Respondent has denied that GEO 104 was directed at EDF, insisting that it had been prompted by the need to harmonise gradually Romanian duty-free legislation with the EU requirements and to adopt anti-corruption measures as requested by the EU.

¹¹⁴ Cl. Reply, para. 233. Contrary to Claimant’s allegation, according to the quoted passage of the article it is not Minister Mitrea that mentions ASRO as carrying out contraband activities but rather the comment that follows the Minister’s words. The full text of the interview was not provided by Claimant.

¹¹⁵ Cl. Reply, para. 236.

¹¹⁶ Cl. Reply, para. 240.

290. The Tribunal has carefully reviewed the evidence on record regarding the various procedural steps which led to the adoption of GEO 104. It has taken note that, independent of the Parties' allegations regarding the objectives of the Ordinance:

- a) neither the Substantiation Note originating the process¹¹⁷ nor the text of GEO 104¹¹⁸ nor any other document filed in the course of the legislative process and in evidence in these proceedings makes reference to the need to align the customs regime of the duty-free sale of goods to the EU requirements;¹¹⁹
- b) the Substantiation Note indicates that the main purpose of the proposed Ordinance was to reorganise the retail sale of goods for foreign currency in a duty-free regime, the urgent character of the regulation made necessary by the need to regulate immediately “a situation which as the press repeatedly noticed, has led to suspicions pertaining to possible cases of corruption.”¹²⁰
- c) the Substantiation Note, signed by the Minister of Public Finance, Mitrai Nicolae Taŭăsescu, and the Minister of Justice, Rodica Mihaela Stănoiu, led to the adoption by the Government of Romania of GEO 104, signed by the Prime Minister, Adrian Năstase, on September 5, 2002, and countersigned by the above-mentioned Minister of Public Finance;

¹¹⁷ Exh. R- 62.

¹¹⁸ Exh. R-63.

¹¹⁹ At the hearing Mr. Miron Mitrea, Minister of Transportation at the time of the adoption of GEO 104, mentioned that the great number of laws and regulations to be adopted in the EU accession process and the scarcity of personnel explain why “we did not give a lot of importance to the substantiation note” (Tr., p. 640).

¹²⁰ Exh. R- 62.

- d) GEO 104, once so adopted, was submitted by the Prime Minister to the Parliament for approval through Law the same day.¹²¹ The track of the legislative procedure at the Chamber of Deputies showed that, following endorsement by the Legislative Council, debate in the Chamber of Deputies and Parliamentary approval of the mediations commission report, the draft Law was promulgated by Decree No. 206/2003 of April 10, 2003, by the President of the Republic.¹²²

291. It is difficult to believe that such a complex procedure, involving members of the Government (including the Prime Minister), the Romanian Chamber of Deputies and Senate with the various committees appointed by either of them, up to the President of the Republic, was put in place merely for the purpose of enacting legal provisions directed against EDF, in retaliation for the latter's refusal to make bribe payments allegedly requested by government officials.¹²³ In any event, the Tribunal has determined that the Claimant's burden of proof concerning its allegation of solicitation of a bribe has not been met.

292. There is evidence in the file that cases of corruption mentioned by the Substantiation Note as a reason for the urgent character of GEO 104 had occurred. In March 2002 (i.e., few months before the process leading to the enactment of GEO 104 had started) the Constanta Regional Customs Directorate had found 600 undeclared cigarette containers, with a market value of more than ROL 8 billion, brought to Constanta Port.¹²⁴ One month later, Minister

¹²¹ Exh. R- 64.

¹²² Exh. R- 65, p. 5.

¹²³ The same line of reasoning has been convincingly developed by Respondent (R. CounterMem., paras 336-347).

¹²⁴ R. CounterMem.1, para. 350. See also the article "Cigarette Smuggling uncovered in Constanta," Journal National, March 21, 2002 (Exh. R-589).

Mitrea commented: “from some report of the Police, we understand that the duty-free shops were part of the smuggling with cigarettes,” adding that the auction at the Otopeni Airport “does not aim at eliminating a company, but is a manner of fighting against corruption.”¹²⁵ Thus, GEO 104, although possibly aiming as well toward a gradual alignment with the EU system, was certainly prompted by the need to fight corruption, as indicated by the Substantiation Note and as confirmed by the foregoing circumstances. GEO 104 was therefore a measure falling within the police power of the State, taken in the public interest.

293. As held by other tribunals, in addition to a legitimate aim in the public interest there must be “a reasonable relationship of proportionality between the means employed and the aim sought to be realized”; that proportionality would be lacking if the person involved “bears an individual and excessive burden.”¹²⁶ The aim of GEO 104 to combat corruption was certainly legitimate and in the public interest. In addition, the proportionality requirement was met as shown by the fact that the adverse effect of this measure regarding Claimant was limited to the latter’s duty-free operation at Constanta Airport.¹²⁷ The compensation claimed by Claimant in that regard amounts to USD400,000.00,¹²⁸ which is not an excessive burden in itself and in the context of Claimant’s overall claim for compensation of USD132.576.000,00.¹²⁹

¹²⁵ Adevarne-News of the Day, Press Release of April 15, 2002 (Exh. R- 590).

¹²⁶ *Azurix Corp. v. The Argentina Republic*, Award of July 14, 2006, para. 311, quoting approvingly the European Court of Human Rights’ Judgment of February 21, 1986 in *James v. United Kingdom*, paras. 50 and 63. See also the Legal Opinion of Claimant’s Expert, Professor Schreuer, of June 4, 2007, para. 505.

¹²⁷ *Supra*, para. 57.

¹²⁸ Report of Claimant’s Expert, Mr. Rosen, attached to Cl. Reply, para. 8.4 and Appendix 5.

¹²⁹ *Supra*, para. 110.

294. In view of the foregoing considerations, Claimant's allegation that the enactment of GEO 104 was "discriminative" and "clearly designed as a pretext to take away Claimant's right to do business"¹³⁰ is unsustainable. As a measure of a general nature taken in accordance with Romanian law, GEO 104 equally applied to the other airport duty-free operators in Romania. Such operators were all affected by the loss of their duty-free licences, including those present at airports where Claimant did not operate, as shown by the evidence produced by Respondent.¹³¹ Following expiry on March 27, 2002, of its rights to commercial spaces at the Otopeni Airport, Claimant's right to do business was limited by GEO 104 to the conduct of duty-free operations on 49 square meters of space at Constanta Airport until June 8, 2005.¹³²

295. But there is more that renders Claimant's position untenable and confirms that the enactment of GEO 104 does not entail State responsibility for violation of the FET obligation. Had GEO 104 been truly prompted by Claimant's refusal to pay bribes, it was certainly a belated reaction (the bribe request and refusal dating back to August 2001, more than one year before) and a disproportionate one in light of Claimant's and ASRO's situation in September 2002.

296. At that point in time, ASRO's rights to commercial spaces at the Otopeni Airport had expired as of the end of March of that year. Also its pre-emptive right to new spaces under the new Article 19 of Addendum No. 7 to the Articles of Association had terminated upon AIBO's

¹³⁰ CI 1st PHB, title of point 6 and para. 204; see also CI 2nd PHB, paras. 46-53.

¹³¹ Letter from the Ministry of Finance of September 26, 2006, listing duty-free operators (Exh. R-594).

¹³² *Supra*, paras. 122.

withdrawal as ASRO shareholder.¹³³ When GEO 104 was enacted, ASRO was attempting to acquire rights to commercial spaces by participating in AIBO's auctions.

297. By cancelling the duty-free activities from international airports GEO 104 had compelled AIBO to organise new auctions for duty-paid commerce rather than for duty-free commerce. Having expressed an interest, ASRO was among the possible candidates for the fourth auction, but was disqualified by the Evaluation Committee for lack of legal capacity due to its expiration. This means that ASRO would have been excluded from further auctions in any case, independent of GEO 104.¹³⁴

f. Regarding the SKY and Constanta joint venture.

298. Claimant's claims regarding SKY are of a contractual nature, based as they are on the SKY Contract. As such, no breach of the FET obligation may properly be invoked by Claimant since "the legitimate expectations that TAROM continue the joint venture with EDF," relied upon by Claimant¹³⁵ with respect to this aspect of the case, found a basis, if any, only in the SKY Contract. Legitimate expectations that TAROM continue the joint venture with EDF could have come from many sources beyond the Contract itself. Such expectations could have come from specific assurances in writing from Government representatives, statutes, regulations or other commitments by the Government. To validly claim a breach of the FET standard under the BIT,

¹³³ *Supra*, para. 266. See also the court's decision referred to *supra*, para. 259.

¹³⁴ ASRO's disqualification was upheld by the Bucharest Court of Appeals Civil Decision of February 2, 2004 (Exh. R- 437); Civil Sentence of May 19, 2004 (Exh. R-438). The tender in the same auction of EDF Properties, a company related to Claimant, was rejected for failure to bid for the category of goods that had been listed. What is precisely Claimant's claim with respect to this Company, which is not party to these proceedings, is unclear.

¹³⁵ Cl. Reply, para. 419.

Claimant should have proven not only a breach of the SKY Contract, but also that such other assurances had been given by the Government and had been breached. Claimant has failed to provide such proof.

299. The same considerations apply to the Constanta joint venture. The loss of ASRO's rights to engage in duty-free activities for the residual term of its license (expiring on June 8, 2005), caused by GEO 104, was the result of the legitimate and non-discriminatory exercise by the State of its police power in the public interest. Having concluded that the issuance of GEO 104 does not entail any State responsibility, this conclusion applies also with regard to Claimant's operations at Constanta airport to the extent they had been affected by GEO 104.

300. The foregoing conclusion applies equally to the reference made by Claimant to the alleged breach of full protection and security¹³⁶ "through coercion and harassment."¹³⁷ It is unclear whether, according to Claimant, this standard of protection is part of the FET or is an independent standard (as the Tribunal believes). Be that as it may, no coercion or harassment has been found by the Tribunal to be attributable to Romania.

g. Conclusion regarding the FET

301. In light of the foregoing considerations and findings, the Tribunal holds that Claimant's claim of violation of the FET obligation under the BIT is unfounded in fact and in law and is therefore rejected.

¹³⁶ Another standard of investment treatment under Article 2(2) of the BIT.

¹³⁷ Cl. 1st PHB, para. 9.

3. Unreasonable or discriminatory measures

302. Article 2(2) of the BIT provides in relevant parts:

Neither contracting party shall in any way impair, by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other contracting party.

303. In an attempt to give a content to general expressions such as “unreasonable or discriminatory measures,” Claimant relies on the categories of measures that its legal expert, Professor Christoph Schreuer, has described in his opinion as “arbitrary”:

- a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
- b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
- c. a measure taken for reasons that are different from those put forward by the decision maker;
- d. a measure taken in wilful disregard of due process and proper procedure.¹³⁸

The Tribunal will consider the claim of “unreasonable or discriminatory measures” according to the terms proposed by Claimant.

304. The Tribunal’s approach to each of the foregoing categories is to a large extent provided in previous parts of this award. Regarding the allegation of solicitation of a bribe, which is specifically referred to by Claimant also in this context, the dismissal of this claim for lack of

¹³⁸ Cl. Reply, para. 424.

sufficient supporting evidence¹³⁹ renders moot the allegations and conclusions drawn therefrom by Claimant.¹⁴⁰

305. As to the individual categories that are listed, but not commented upon by Claimant, it is sufficient to recall that:

- a. there is no evidence of measures applied to Claimant without a legitimate purpose; on the contrary, the non-extension of ASRO's term, the non-renewal of rental contracts, the auctions organised by AIBO for commercial spaces at the Otopeni Airport, the Financial Guard's action and the enactment of GEO 104 have all been held by the Tribunal as justified either by the terms of the contract binding the Parties or by the exercise of the State's police power in the public interest;
- b. none of such measures was based on discretion, prejudice or personal preference, as made clear by the Tribunal's examination;
- c. no evidence has been proffered indicating that any such measures were taken for reasons other than those stated by the decision maker;
- d. as shown by the numerous recourses by Claimant to legal procedures in Romania, including courts proceedings, more than once with a positive outcome for Claimant, due process and proper procedural requirements appear to have been satisfied by Respondent.

¹³⁹ *Supra*, para. 232.

¹⁴⁰ Cl. Reply, para. 425.

306. For all the foregoing reasons, the claim for unreasonable or discriminatory measures is denied.

4. Expropriation

307. Article 5(e) of the BIT provides in pertinent parts as follows:

“Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.”

308. According to Claimant, the present instance is one of creeping expropriation, the adverse measures having been taken in a series of steps “to be considered not in isolation but with their aggregate effect.”¹⁴¹ The measures that Claimant has in mind,¹⁴² the aggregate effect of which would have brought about the creeping expropriation of its investment, have been individually examined by the Tribunal, which has reached for each of them a conclusion adverse to Claimant’s claim. The only possible takings in the instant case were the sanctions of the Financial Guard, for which there was a judicial recourse, and GEO 104, which was a non-compensable police power measure. In the Tribunal’s view, the measures in question, also taken in their aggregate effect, do not constitute a creeping expropriation, in addition to which there was no evidence of a coordinated pattern adopted by the State for their implementation.

309. Again, also in the context of the claim for expropriation Claimant asserts that the measures were taken by Romania “in retaliation for EDF’s refusal to pay the requested bribes to

¹⁴¹ Cl. Reply, para. 428.

¹⁴² Cl. Reply, para 433.

government officials.”¹⁴³ The dismissal of the claim for lack of sufficient evidence relating to the bribe request renders moot Claimant’s argument that the measures were taken in “retaliation” for Claimant’s refusal to pay the allegedly requested bribe.

310. The foregoing considerations are sufficient to dismiss Claimant’s expropriation claim. A few comments may be added regarding Claimant’s specific reference, in this context, to the action of the Financial Guard. Claimant has challenged this action as having produced the ultimate effect of depriving Claimant of its investment as a result of the confiscation of ASRO’s revenues, in addition to a fine.¹⁴⁴ The action of the Financial Guard was ultimately held to be without legal justification by the judiciary authority, considering that the dispute regarding the registration of ASRO’s extension had been finally decided in favour of ASRO.¹⁴⁵

311. The Tribunal has determined that the confiscation sanction was within the legal power of the Financial Guard and that it was applied in good faith in November 2002 to cover as well the period after January 27, 2002, therefore retroactively, since ASRO’s activity after that date was held to be illegal.¹⁴⁶ Reference may be made in this context to the uncontested analysis offered

¹⁴³ Cl. Reply, para. 431.

¹⁴⁴ Cl. Reply, para. 434: “There is absolutely no bona fide regulatory purpose that would justify the action of the Financial Guard. The dispute regarding the registration of the extension of ASRO was a dispute between ASRO and AIBO pending within the courts, which was finally decided in favour of ASRO. Romania is unable to point to one regulatory aspect of the action justifying the “confiscation” of ASRO’s revenues earned prior to the court decision and – provisionally – deleting the registration of ASRO’s extension. In addition, the circumstances of the control, the contradictions associated with the initiation of such control and the dubious denunciation letter all suggest that the control was set up by the authorities to harass the investor to ultimately deprive it of its assets.” Cl 1st PHB, para. 216: “. . . the combined effect of the series of violations committed by Respondent against Claimant’s investment, culminating with the unlawful confiscation of the ASRO JV’s revenues by the Financial Guard, constitutes an unlawful taking of Claimant’s investment and must therefore be compensated.”

¹⁴⁵ Cl. Reply, para. 434.

¹⁴⁶ *Supra*, para. 283.

by Respondent's legal expert, Professor Mihai, who examined the various procedural steps undertaken by ASRO before the Romanian courts to obtain the reimbursement of the revenues confiscated by the Financial Guard following the quashing of the decision of April 17, 2002 that had annulled the registration of the transfer of ASRO's shares to Claimant.

312. The analysis convincingly shows that:

- a. the Romanian judicial system made available to Claimant the necessary means to redress its position if good grounds to that effect had been found to exist;
- b. Claimant, through ASRO, did what it believed should have been done in order to obtain the revocation of the confiscatory measures; however, it failed mistakenly (i) to invoke the proper ground under the Civil Procedure Code for requesting the revision of the prior court decision validating the Financial Guard's action, and (ii) to file the recourse within the required time limit;¹⁴⁷
- c. as a result, under an irrevocable decision of the competent court, the sanction applied by the Financial Guard to ASRO was maintained.¹⁴⁸

313. The Tribunal has duly noted the fact that due process was assured to Claimant by Romania and that the maintenance of the sanction applied by the Financial Guard to ASRO was due to ASRO's failure to comply with procedural requirements. These requirements, which were known or should have been known to Claimant and ASRO, are, in the Tribunal's view, in

¹⁴⁷ Professor Mihai's Supplemental Expert Opinion, February 2008, paras. 507 – 515. The analysis and conclusions of Professor Mihai have remained uncontested. Both Parties have waived the right to hear legal experts at the hearing and Claimant has provided no comments in that regard in the two post-hearing briefs.

¹⁴⁸ Decision no. 16 of January 4, 2007 by the Bucharest Tribunal (Exh. R-772).

keeping with normal procedural rules. Unless a breach of the BIT is otherwise found, which the Tribunal has excluded, the BIT is not an appropriate instrument to provide the investor with a means to enforce rights available to it under the applicable legal system but that it failed to duly and timely invoke.

5. The umbrella clause

314. Article 2(2) of the BIT provides (in the last sentence):

“Each contracting party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other contracting party.”

315. Claimant maintains that Romania failed to observe the obligations prescribed by this clause since

- a. AIBO breached the assignment agreement agreed with EDF on January 17, 2002 by contesting the registration of that agreement and the extension of ASRO;¹⁴⁹
- b. TAROM breached the agreement concluded with EDF regarding the SKY joint venture by repudiating its association with EDF.¹⁵⁰

316. Claimant’s position is untenable since it is based on a misconception of the provision of Article 2 (2) of the BIT. This provision, when applied to the present case, clearly refers to obligations entered into by Romania with regard to Claimant’s investments. There is no evidence of the assumption by Respondent of direct obligations toward Claimant, whether by contract or otherwise.

¹⁴⁹ Cl. Reply, para. 445.

¹⁵⁰ Cl. Reply, para. 446.

317. The references made in this context to the ASRO Contract and the SKY Contract are evidence of Claimant’s misconstruction of the umbrella clause. The “obligations entered into,” to which Article 2(2) of the BIT refers, are obligations assumed by the Romanian State. The breach of contractual obligations by a party entails such party’s responsibility at the contractual level. There is in principle no responsibility by the State for such breach in the instant case since the State, not being a party to the contract, has not directly assumed the contractual obligations the breach of which is invoked.

318. It is unclear whether Claimant relies on the attribution to the State of certain acts and conduct of AIBO and TAROM on the assumption of their being in breach of the ASRO Contract or the SKY Contract in order to impute to the State the responsibility for such breach. If so, this construction of the umbrella clause would be incorrect since the attribution to Respondent of AIBO’s and TAROM’s acts and conduct does not render the State directly bound by the ASRO Contract or the SKY Contract for purposes of the umbrella clause.

319. Attribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual,¹⁵¹ nor does it make Romania party to such contracts. In any case, absent a breach of the ASRO Contract or the SKY Contract under the governing law, there can be no State responsibility under international law for violation of the umbrella clause.¹⁵²

¹⁵¹ As held by the *ad hoc* Committee in *CMS v. Argentina*: “The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.*, the person bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause” (Decision of September 25, 2007, para. 95(c), emphasis in the text).

¹⁵² Legal Opinion of Respondent’s Expert’s, Professor Greenwood, para. 10.

320. The Tribunal has held that there has been no breach of the ASRO Contract or the SKY Contract by AIBO or TAROM. Accordingly, the umbrella clause has no applicability in the instant case even if Romania were a party to these contracts, which it is not.

V. COSTS

321. Each Party has requested that the other Party pay all of the costs of the arbitration and all of the costs of the other Party. The following arbitration costs have been indicated by each Party in the respective statements on costs of March 27, 2009, as amended:

Claimant	USD2,761,308.90
	EUR3,678,294.82
Respondent	USD18,574,642.14

The Tribunal has not failed to note the material disproportion between Claimant's and Respondent's arbitration costs, a circumstance that shall be duly considered when deciding the allocation of such costs.

322. The Tribunal notes that the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party. Rather, the practice has been to split the costs evenly, whether the claimant or the respondent prevails. See, as one example, *Metalclad v. Mexico* (5 ICSID Rep. 209 NAFTA/ICSID (AF), 2000), in which the claimant prevailed but still had to bear its own costs. The same approach of splitting all costs evenly was adopted in cases in which the State was the winning party. See,

as examples, *Tradex v. Albania* (5 ICSID Rep. 43 (ICSID, 1999)), and the NAFTA case *ADF v. United States* (6 ICSID Rep. 449, 536-237 (NAFTA/ICSID) (AF), 2003) in which the losing investors were not ordered to pay the costs of the winner, but rather each party had to pay its own legal costs and to share the costs of the arbitration.

323. In *ADF*, the Tribunal cited “the circumstances of [the] case, including the nature and complexity of the questions raised by the disputing parties” (at 537). In *Tradex*, the Tribunal noted that Tradex had prevailed on the challenge to the Tribunal’s jurisdiction, and stated that the claim could not “be considered as frivolous in view of the many difficult aspects of fact and law involved and dealt with” (at 105).

324. Even in very ICSID recent cases, there are examples of tribunals splitting the costs equally or in a manner not corresponding to the outcome of the case. Thus, in the 2008 case of *Duke Energy Electroquil Partners (United States) and Electroquil S.A. (Ecuador) v. Republic of Ecuador* (ICSID Case No. ARB/04/19 (2008)) small sums of money were awarded to the claimants. While in another 2008 case, *Duke Energy International Peru Investments No. 1 Ltd (Bermuda) v. Peru* (ARB/03/28 (2008)), Claimant won a significant sum; nevertheless, the costs were divided equally. In the 2008 case *Biwater Gauff v. Tanzania* (ARB/05/22(2008)), the claimants won their claim as to liability but were unable to establish their damages. The Tribunal held that each party was to bear its own legal costs, and the costs of the arbitration were to be shared between the parties equally. In the December 2008 case of *TSA Spectrum de Argentina v. Argentina* (ARB/05/5 (2008)), the Tribunal decided that the costs of the arbitration were to be shared equally with each side to bear its own costs.

325. But the investment arbitration tradition of dividing the costs evenly may be changing, although it is a bit early to know whether a different approach is evolving. In the 2005 NAFTA case of *Methanex Corp v. the United States* (NAFTA/UNCITRAL, 2005), all of Methanex's claims were dismissed and Methanex was ordered to pay the costs of the arbitration as well as the U.S.' reasonable legal costs of almost USD3 million pursuant to Article 38(e) of the UNCITRAL Rules. That was the amount sought by the United States.

326. In the 2006 case of *Thunderbird v. Mexico* (NAFTA/UNCITRAL, 2006), another NAFTA case, the Tribunal's majority said that the same approach as to costs should apply to international investment arbitrations as to international commercial arbitrations. The costs were allocated on a 75:25 per cent basis against the losing party. Thomas Walde, in a Separate Opinion, said that the allocation of most of the costs against the losing party was a "significant departure from established jurisprudence" (at para. 126). Yet in the 2008 case *Rumeli v. Kazakhstan* (ARB/05/16 (2008)), the Tribunal held that Respondent had expropriated Claimant's investment, awarded a large sum to be paid to Claimant, and then held that Respondent was to pay 50% of Claimants' legal fees and costs. In the 2004 ICSID case of *CSOB v. Slovakia* (ARB/97/4 (2004)), CSOB having prevailed on the merits, Slovakia was ordered to pay its own costs as well as approximately 60% of CSOB's costs.

327. In the instant case, and generally, the Tribunal's preferred approach to costs is that of international commercial arbitration and its growing application to investment arbitration. That is, there should be an allocation of costs that reflects in some measure the principle that the losing party pays, but not necessarily all of the costs of the arbitration or of the prevailing party.

328. In the Tribunal's judgment, the instant dispute was fairly brought by Claimant and good faith was evidenced by each side. The disputing parties presented their cases well, both the

written submissions and the oral presentations at the hearings. There were many difficult and close issues of fact and law requiring resolution by the Tribunal. Certain legal issues were sharply disputed by the legal experts named by each side. Although ultimately Claimant is the losing party, Respondent has failed on the issue of attribution.

329. Under these circumstances and given also the material disproportion between the Parties' respective costs, the Tribunal holds that Claimant and Respondent should share equally the costs of the arbitration, and, by majority, that Claimant should pay all of its own costs and contribute to Respondent's costs, as claimed by the latter, for the amount of USD6,000,000.00 (six million United States Dollars).

VI. DECISION

330. Having carefully considered the Parties' arguments in their written pleadings and oral submission and the evidence filed by each of them, for the reasons above stated the Tribunal unanimously decides and orders as follows:

1. Respondent did not breach its obligations to Claimant under the BIT.
2. Accordingly, the claims of Claimant are dismissed with prejudice.
3. The Parties shall share equally all fees and expenses of the Tribunal as well as ICSID's administrative charges, which are paid out of the advances made by the Parties.
4. Claimant is ordered to pay Respondent the sum of USD6,000,000.00 (six million United States Dollars) on account of Respondent's legal fees and other costs.
5. All other claims and requests by the Parties are dismissed.

THE ARBITRAL TRIBUNAL

[signed]
Subject to the attached dissent on costs.

ARTHUR W. ROVINE
Arbitrator

October 2, 2009
DATE: _____

[signed]

YVES DERAÏNS
Arbitrator

October 1, 2009
DATE: _____

[signed]

PIERO BERNARDINI
President

September 30, 2009
DATE: _____