

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON D.C.

IN THE PROCEEDING BETWEEN

THE ROMPETROL GROUP N.V.
(Claimant)

and

ROMANIA
(Respondent)

(ICSID Case No. ARB/06/3)

**Decision on Respondent's Preliminary Objections
on Jurisdiction and Admissibility**

Members of the Tribunal:

Sir Franklin Berman, KCMG, QC
Mr. Donald Francis Donovan, Esq.
The Honourable Marc Lalonde PC, OC, QC

Secretary of the Tribunal: Ms. Claudia Frutos-Peterson, Esq.

Assistant to the Tribunal: Mr. Jeremy Marc Brier, Esq.

Representing the Claimant:

Ms. Sarah François-Poncet
Ms. Caline Mouawad
Salans, Paris

and

Mr. Obie L. Moore
Salans-Moore & Associates SCA, Bucharest

and

Mr. Jeffrey M. Hertzfeld
Special Counsel

Representing the Respondent:

Mr. Michael E. Schneider, Dr. Veijo
Heiskanen & Mr. Matthias Scherer
Lalive, Geneva

and

Dr. Victor Tanasescu & Dr. Crenguta
Leaua & Ms. Carina Tanasescu
Tanasescu Leana Cadar & Asociatii, Bucharest

Date: 18 April 2008

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A. PROCEDURAL BACKGROUND

A1. Request for Arbitration

1. On 20 December 2005, the International Centre for Settlement of Investment Disputes (“ICSID”) received a request for arbitration dated 14 December 2005 (“the Request”) from The Rompetrol Group N.V. (“TRG”) against the Republic of Romania (“Romania”).
2. TRG is described in the Request as a company incorporated on 4 November 1999 as a private limited liability company in The Netherlands and registered on 17 November 1999 in the commercial register of the Chamber of Commerce Rotterdam as No. 24297754. On 18 April 2000, the company changed its name from Waverton B.V. to The Rompetrol Group B.V. and, on 28 May 2002, it changed its legal form from a private limited liability company (B.V.) to a public limited liability company (N.V.).
3. The Request relates to a dispute arising from the Claimant’s investment in the Romanian oil sector and, in particular, the purchase of shares by the Claimant in Rompetrol Rafinare S.A. (RRC), a privatised Romanian company which owns and operates an oil refinery and petrochemical complex. The Claimant alleges that the Romanian government ordered “extraordinary and unreasonable” investigations of RRC and its management, as well as “discriminatory and arbitrary” treatment of the company, which according to the Claimant amount to violations of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and Romania which came into force on 1 February 1995 (“the BIT”). The Request invokes the ICSID arbitration provisions in the Treaty.

A2. Notice of Registration

4. On 14 February 2006, the Acting Secretary-General of ICSID sent the Claimant and the Respondent a Notice of Registration in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention” or “Convention”).

5. In issuing the Notice, the Acting Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("the Institution Rules").

A3. The Appointment of Arbitrators

6. On 22 February 2006, the Claimant set out its proposals for the method of constitution of the Arbitral Tribunal in accordance with Rule 2(1)(a) of the Institution Rules. This was acknowledged by a letter from ICSID to the Parties dated 23 February 2006, in which the Centre also invited the Respondent to respond within 20 days as to whether it accepted the Claimant's proposals or wished to make alternative proposals.
7. By a letter dated 20 April 2006, the Respondent (*inter alia*) sought an extension of time for its response until 5 May 2006. The Claimant consented to this extension of time by a letter dated 25 April 2006.
8. By a letter dated 27 April 2006, the Respondent accepted the method of constitution proposed by the Claimant with the proviso that each Party appoint an arbitrator consecutively rather than simultaneously. It was accordingly agreed that (1) the Arbitral Tribunal shall consist of three arbitrators; (2) the Claimant shall appoint an arbitrator; (3) the Respondent shall appoint an arbitrator within 30 days of the appointment by the Claimant of its arbitrator; and (4) the third arbitrator, who shall be President of the Arbitral Tribunal, shall be appointed by agreement of the Parties, within 30 days of the date by which both arbitrators have accepted their appointment. In the event that the Parties failed to agree on the appointment of the third arbitrator within such a time limit, it was agreed that the third arbitrator shall be appointed by the other two arbitrators and, in the event of no agreement, by ICSID.
9. A schedule for appointments outlined by the Claimant in a letter dated 12 May 2006 was agreed to by the Respondent by a letter dated 16 May 2006.

10. By a letter dated 17 May 2006, ICSID confirmed the above proposals and the schedule for the constitution of the Arbitral Tribunal.
11. On 31 May 2006, the Claimant appointed Mr. Donald Francis Donovan, Esq., a national of the United States of America, as a member of the Tribunal. On 30 June 2006, the Respondent appointed The Honourable Marc Lalonde, a national of Canada, as a member of the Arbitral Tribunal. No objections were raised to either appointment.
12. On 5 October 2006, the Parties having failed to reach a consensus as to the appointment of the President of the Tribunal by the extended deadline of 30 September 2006, the Claimant requested that the two co-arbitrators should seek to reach agreement on the President of the Tribunal by 18 October 2006; this deadline was then extended by consent three times until 17 November 2006.
13. On 21 November 2006, in the absence of any objection on the part of the Parties, the co-arbitrators jointly agreed to appoint as President of the Tribunal Sir Franklin Berman KCMG QC, a national of the United Kingdom.
14. The Tribunal was officially constituted on 20 December 2006, in accordance with the Convention and ICSID Arbitration Rules. Ms Claudia Frutos-Peterson, Counsel, ICSID, was designated to serve as Secretary of the Tribunal.

A4. Answer to the Request

15. On 22 December 2006, the Respondent electronically filed its Answer to the Request for Arbitration (“the Answer”) and the Centre received a hard copy of the same on 27 December 2006.

A5. The First Session

16. The first session of the Tribunal was held on 28 February 2007 at the European Headquarters of the World Bank in Paris. At the session the Parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Institution Rules. The Parties also agreed upon a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal.

17. At the first session, the Tribunal heard the Parties' proposals for handling the objections as to jurisdiction and admissibility raised in the Answer. It was agreed that the proceedings on the merits would be suspended in accordance with Rule 41 of the Arbitration Rules to enable the objections to be dealt with in a preliminary phase of the proceedings. It was agreed that the preliminary phase of the proceedings would not be confined to a narrow interpretation of the term "jurisdiction" but would include all the objections of a preliminary character that were contained in the Answer, whether the objection related strictly to jurisdiction, or to competence or admissibility. The Tribunal stated its expectation that the Claimant would respond to all of the Respondent's objections in its subsequent written pleading.

18. The following procedural calendar was agreed for the preliminary phase of the proceedings:
 - the Claimant would file its Response to the Respondent's preliminary objections to jurisdiction and admissibility by 30 April 2007; the Respondent would file its Memorial on all of the preliminary questions by 20 July 2007; and the Claimant would file its Memorial in Response by 20 August 2007;
 - a pre-hearing conference would be held on 7 September 2007;
 - a hearing on all preliminary objections would be held from 25 to 27 September 2007, in Paris;
 - the Tribunal would decide after the hearing whether the Parties would file post-hearing briefs.

A6. Pre-Hearing Conference

19. The Parties filed the above written pleadings within the agreed time limits and it was agreed by mutual consent that the pre-hearing conference could take place by telephone on 4 September 2007.
20. The President informed the Parties that his co-arbitrators had authorised him to represent the Tribunal during the conference call, and sought the Parties' confirmation that this was acceptable. The Parties so confirmed, subject to the Respondent reserving its right to submit to the consideration of the Tribunal as a whole any issue on which agreement could not be reached.
21. The Parties signified their agreement (subject to final confirmation by the Respondent, later received) to the President's proposal to appoint a Legal Assistant from his Chambers to assist him in the proceedings.¹
22. After a discussion in which the Parties stated their respective positions notably in relation to the hearing of witnesses at the preliminary hearing, and a subsequent opportunity for the Parties to reconsider, the following procedural arrangements were agreed for the preliminary hearing:
 - there would be a single round of opening statements, starting with the Respondent followed by the Claimant;
 - each opening statement would be limited to 45 minutes with the possibility of extension up to one hour;
 - for witness evidence, the standard practice would be followed under which each witness's written statement would be treated as evidence in chief, subject to the witness being allowed to supplement or modify his statement orally, followed by cross-examination and re-examination in the usual way;
 - the witnesses would be heard in the order in which their statements had been tendered to the Tribunal, that is, first Mr. Haberman and then Mr. Stephenson; thereafter the Tribunal would first put any questions of its

¹ Mr. Jeremy Brier, a barrister, was subsequently duly appointed legal assistant to the Tribunal, and this was confirmed by ICSID by letter dated 21 September 2007.

own, and either Party might then ask the Tribunal to recall Mr. Haberman to deal with any point which that Party wished to address;

- any witness so recalled would be subject to cross-examination by the other Party;
- closing statements would be limited to two hours;
- finally, each Party would be allowed 30 minutes for reply and rebuttal, and to respond to any questions put by the Tribunal.

23. Other matters were also agreed, including a daily schedule for the preliminary hearing; the documents to be used during the hearing; the language to be used (English); transcription arrangements; and financial and administrative matters. The President reminded the Parties that, as indicated during the First Session, the Tribunal would decide after the hearing whether the Tribunal would require post-hearing briefs from the Parties or not.

A7. Subsequent Pre-Hearing Correspondence

24. By letter dated 11 September 2007, the Respondent intimated that it might wish to call as a witness Dr Heissner in addition to Mr. Haberman. By letter dated 18 September 2007, the Claimant objected and expressed the view that neither Dr. Heissner nor Mr. Haberman should be permitted to testify after the testimony of Mr. Stephenson, unless the latter's oral testimony contained statements that had not previously been advanced by him and were relevant to the issues before the Tribunal. The Claimant was however prepared to allow the Tribunal to deal with any such issues during the course of the hearing.

25. On 24 September 2007, the Respondent notified the Centre that Mr. Haberman had various corrections to make to his Expert Report following his review of the Claimant's Response Memorial and the supporting evidence, and set out the amendments in an enclosure.

A8. The Hearing on Respondent's Preliminary Objections

26. The hearing on the Preliminary Objections was held in Paris on 25 and 26 September 2007.
27. The Parties were represented as follows:-

Claimant

Ms. Sarah François-Poncet, Salans;
Mr. Obie L. Moore, Salans-Moore & Associates SCA;
Mr. Gabriel Albu, Salans;
Mr. Philip Stephenson, The Rompetrol Group N.V;
Mr. Jeffrey Hertzfeld, Consultant to The Rompetrol Group N.V;
Mr. Yuriy Matychak, Salans;

Respondent

Dr. Victor Tanasescu, Tanasescu Leaua Cadar & Asociatii Law Firm;
Dr. Crenguta Leaua, Tanasescu Leaua Cadar & Asociatii Law Firm;
Ms. Carina Tanasescu, Tanasescu Leaua Cadar & Asociatii Law Firm;
Ms. Aurora Damcali, Tanasescu Leaua Cadar & Asociatii Law Firm;
Mr. Michael E. Schneider, LALIVE Attorneys-at-law;
Dr. Veijo Heiskanen, LALIVE Attorneys-at-law;
Mr. Matthias Scherer, LALIVE Attorneys-at-law;
Mr. Antoine Romanetti, LALIVE Attorneys-at-law;
Mr. Catalin Doica, Secretary of State, Ministry of Economy and Finance;
Mr. Ciprian Badea, General Director, General Legal Direction, Ministry of Economy and Finance;
Ms. Zsuzsanna Peter, Secretary of State, Ministry of Justice;
Ms. Petronela Stan, Diplomatic Counsellor, Ministry of Justice;
Mr. Philip Haberman, Expert, Ernst & Young LLP;
Dr. Stefan Heissner, Expert, Ernst & Young LLP (*attending on Tuesday, Sep. 25, only*);
Mr. Kevin Shergold, Expert, Ernst & Young LLP;
Mr. Sebastian Okada, Expert, Ernst & Young LLP.

28. Following short opening statements by each Party, an expert witness for the Respondent, Mr. Haberman, was examined and a factual witness for the Claimant, Mr. Stephenson, was subsequently examined. Both Parties then made closing statements on the second and final day of the hearing (26 September 2007).
29. The President of the Tribunal informed the Parties after their closing statements that the Tribunal had no questions to pose. The President further informed the Parties at the close of the oral hearing that the Tribunal did not consider the filing of post-hearing briefs to be necessary.

A9. Post-Hearing correspondence

30. On 27 September 2007, the Respondent provided the Tribunal with a version of Mr. Haberman's Expert Report in which the corrections of 24 September 2007 were inserted and marked.
31. On 1 October 2007, the Claimant confirmed in writing the formal submission of two additional documents which it produced during the hearing, namely:
 - (1) Exhibit C45: Exploration and Production Sharing Agreement between National Oil Corporation and Rompetrol of Libya, dated May 1980; and
 - (2) Exhibit C46: The complete English translation of the PWC Report dated 4 August 2006 produced by the Respondent with Mr. Haberman's Expert Report at Exhibit EY303.

B. THE FACTUAL BACKGROUND

B1. Privatisation of Rompetrol S.A.

32. The general background to the present dispute lies in the extensive reconstruction of Romania's political and economic system during the past two decades.
33. Following the downfall of the Ceausescu regime in 1989, Romania engaged in a process of attempting to build a market economy, *inter alia* through privatising companies which were formerly owned by the State. In 1993, the second-largest State-owned company in Romania, Rompetrol S.A., was privatised by way of a management and employee buy-out. In 1998, an investor group led by Mr. Patriciu, a Romanian national, purchased a controlling stake in Rompetrol S.A.
34. In parallel with its domestic economic reforms, Romania began developing greater political and economic ties with the European Union in the early 1990s, which paved the way for Romania's eventual accession to membership of the European Union in January 2007 following extensive negotiations.

B2. Changes in structure and ownership

35. Many of the facts about the shareholdings over time in Rompetrol S.A. and certain related companies are not contested between the Parties. What is in dispute however is the relevance of those facts to the issues in the present arbitration, and particularly the conclusions which should be drawn from these facts about the ownership and effective control of the corporate entities in question.
36. Following the privatisation of Rompetrol S.A. in 1993, the shareholding position in the company on or about 15 September 1999 was that Mr. Sorin Marin and Mr. Dinu Patriciu, both Romanian citizens, each owned 32.15% of the shares in Rompetrol S.A., and had a similar shareholding in Grupul de

Societati Rompetrol. The remaining 35.7% of the shares was held by minority interests.

37. Separately from this, on or about 4 November 1999 Mr. Patriciu incorporated a private limited liability company in The Netherlands called Waverton B.V. (“Waverton”). Waverton was not connected to the Rompetrol Group. It was 100% owned by a Luxembourg company called ROGI, which was itself owned by a foreign fund (Romania and Moldova Direct Fund LP, “RMDF”) a closed-end private equity fund created in 1998, which had as its object to make direct investments in private and privatizing companies in Romania.
38. Shortly thereafter, Waverton and ROGI became part of the group of companies owning Rompetrol S.A. and Grupul de Societati Rompetrol in the following manner:²
 - a. On 18 April 2000, Waverton changed its name to The Rompetrol Group B.V. (“TRG B.V.”);
 - b. On or about 31 May 2000, TRG B.V. (still 100% owned by ROGI) became the 84.6% owner of Rompetrol S.A. and Grupul de Societati Rompetrol;
 - c. Mr. Marin and Mr. Patriciu each became 37% owners of ROGI; and
 - d. RMDF remained a minority interest shareholder (25%) in ROGI, as did a Mr. Works (1%).
39. The result was that, as of 31 May 2000, Mr. Marin and Mr. Patriciu between them owned 74% of ROGI, which owned 100% of TRG B.V., which in turn owned 84.6% of Rompetrol S.A. and Grupul de Societati Rompetrol.

² See page 3 of 8 of the Claimant’s Summary of Ownership Changes diagrams.

40. On 28 May 2002, TRG B.V. changed its legal form from a private limited liability company (B.V.) to a public limited liability company (N.V.), The Rompetrol Group N.V. (“TRG”).
41. By September 2002, a number of key changes to the structure had taken place:³
- a. The RMDf fund and Mr. Works were eliminated and ROGI became 100% owned by Rompetrol Holding, a Swiss holding company incorporated by Mr. Patriciu in or about December 1998 (“Rompetrol Holding”);
 - b. Mr. Marin was bought out and replaced by Mr. Patriciu and Mr. Stephenson; Mr. Patriciu then owned 80% and Mr. Stephenson 20% of the shares in Rompetrol Holding;
 - c. OMV, the State oil and gas company of Austria, bought a 25.1% minority interest in TRG, while ROGI owned the remaining 74.9%; as a result of which
 - d. TRG retained a majority shareholding (greater than 51%) in Rompetrol S.A. and in the Romanian companies, but in proportions that varied from time to time.
42. By 5 April 2005, OMV had disappeared from the picture, with the result that Rompetrol Holding was the owner of 100% of the shares in TRG.⁴
43. This was the structure in place at the time the Request was filed on 14 December 2005: between them Mr. Stephenson and Mr. Patriciu were the owners of Rompetrol Holding (with 20% and 80% of the shares respectively), while TRG was now wholly owned by Rompetrol Holding.

³ See page 4 of 8 of the Claimant’s Summary of Ownership Changes diagrams.

⁴ See page 5 of 8 of the Claimant’s Summary of Ownership Changes diagrams.

44. It is thus not in dispute that TRG, the Claimant in this arbitration, (a) was a company validly established in The Netherlands under Dutch law, (b) was itself wholly owned by Rompetrol Holding (a Swiss company) and (c) itself owned shares in a number of Romanian companies; and that this was the state of affairs at the time of the filing of the Request which initiated this arbitration.

B3. Petromidia S.A.

45. It further appears to be uncontested that, on or about 31 October 2000, TRG concluded a Share Sale and Purchase Contract with the Romanian privatisation authority, the State Ownership Fund,⁵ thus acquiring a controlling stake of 50.59% in S.C. Petromidia Rafinare S.A., a petroleum sector company which owned one of the largest oil refineries in Romania. TRG also indirectly owned an additional 27.41% holding in Petromidia through four Romanian subsidiaries in which it was the majority shareholder.
46. In the Share Sale and Purchase Contract TRG undertook to pay over US\$50 million in cash to the State Fund over three years; and to assume US\$205 million in investment obligations over a five-year period.
47. Since late 2003, Petromidia has been known as Rompetrol Rafinare S.A. (“RRC”) and it currently produces about 30% of Romania’s refined product needs.

B4. The Underlying Dispute

48. The substantive dispute in this arbitration arises out of investigations commenced in May 2004 by the National Anti-Corruption Office of Romania (“the PNA”) relating to the privatisation of Petromidia, shortly after the sale of the controlling shares to the Claimant. In September 2004, the file was transferred from the PNA to the General Prosecutor’s Office (“the GPO”) which has jurisdiction, *inter alia*, for investigating alleged economic crimes, and in January 2005 the GPO opened an investigation into Rompetrol Rafinare

⁵ Shares Sale-Purchase Contract, No. 29 of 31 Oct. 2000, at Exhibit 8 to the Request for Arbitration.

S.A. As part of this investigation, Mr. Patriciu was briefly detained in May 2005. The investigation continues.

49. In brief, the Claimant asserts that these investigations are oppressive and in breach of the treatment to which TRG's investment is entitled. The Respondent answers that the investigations are simply part of the implementation of Romania's National Anti-Corruption Strategy first introduced in 2001, and pursued since then with increasing emphasis in the perspective of Romania's move towards membership of the European Union.

C. THE PRELIMINARY OBJECTIONS

C1. Respondent's arguments

C1.A. Jurisdiction

50. The Respondent asserts that the dispute which is the subject of the Request, while it may concern an investment, is not brought against the Romanian State by a foreign investor; nor does it arise out of a foreign investment. The dispute amounts in its essence to a complaint by a Romanian national against Romanian authorities and in relation to activities in Romania. Accordingly, all the matters covered in the Request fall exclusively within the domestic jurisdiction of Romania, are subject to the authority of the Romanian courts, and are not within the purview of an ICSID tribunal. This is not altered by the fact that the claim was in fact brought through TRG, a “shell company” incorporated in The Netherlands.
51. The Respondent finds support for its argument in what it asserts are two basic principles of international law: (1) a person cannot bring an international claim against his own State; (2) in cases of dual nationality, or of links to more than one State, the “effective nationality” is to be preferred.
52. The first principle is said to have been taken up into the ICSID Convention (see for example Article 25(2)), which is not therefore available to a person against his own State; the Respondent relies in this connection on the Dissenting Opinion of Professor Prosper Weil, as President of the Tribunal in *Tokios Tokelés*.⁶ To allow claims by own nationals through the device of a foreign shell company would be a radical change from established international law and have a wide impact on the network of BITs. All the more so when, as here, the source of Rompetrol's funds is Romania, and the funds introduced by outside shareholders have (with the exception of \$1.4m spent buying Petros from the Ministry of Finance) been used to pay off previous equity shareholders and have not been invested in Romania.

⁶ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, *Decision on Jurisdiction*, 29 Apr. 2004.

53. The principle of effective nationality is not limited to natural persons but applies also to legal persons. That is, a company may be Dutch by the place of its incorporation, but may not be able to oppose that nationality to another State when it comes to determine whether the company can benefit from a Dutch tax treaty or the right of establishment reserved to Dutch nationals by treaty. The Respondent says this is not to propound a “double nationality” of legal persons, but is rather about “weighing different criteria and determining the effectiveness and opposability” of different links;⁷ the criterion of incorporation is not the only one.
54. While international courts and tribunals generally do not need to go beyond the formal test of where a legal person is “constituted under the law”, to consider issues such as the nationality of the natural persons owning or controlling the legal entity in question, or its effective seat (*siège réel*), there is a clear exception to this where it can be shown that the real and effective nationality of the legal entity in question is that of the Respondent State. The Respondent relies particularly in this context on the International Court of Justice’s judgment in the *Nottebohm Case*: just as the acquired nationality of a natural person whose real and effective links are with the Respondent State is not opposable to that State, so (as in the present case) a foreign nationality asserted by a corporation that is owned and controlled by a Romanian citizen and has its real seat in Romania is not opposable to Romania.

⁷ Transcript Day 2, page 23, lines 14-17.

55. The Respondent submitted the report of an expert witness, Mr. Haberman, to support its assertions that TRG is indeed owned and controlled by a Romanian citizen, and has its real seat in Romania, and that the origin of Rompetrol's funds is Romanian. In evidence, Mr. Haberman identified three principal areas of factual disagreement between the Respondent and the Claimant:
- a. whether control over TRG and its various subsidiaries rested with Mr. Patriciu, or Mr. Patriciu together with Mr. Stephenson, or was in fact shared with other managers;
 - b. whether the main source of TRG's funds in recent years has been the 'Libyan receivables' or whether they were mixed with funds from equity shareholders and banks; and
 - c. whether TRG is a 'shell company', in the sense that the executives of the holding company are the same people as the executives of the operating subsidiaries and exercise their control as executives of the subsidiaries, so that that the holding company "*is not really adding anything to the process*".⁸
56. The Respondent finally claims that, in the light of TRG's ownership, management, control, and funding, Romania has never consented to ICSID jurisdiction in respect of disputes with TRG, and that the Claimant seeks to read an implied term into the BIT "*as if it contained an additional provision stating that each contracting party also consents to submit a dispute with its own nationals to arbitration, provided the nationals act through a legal person constituted under the law of the other contracting party*".⁹

C1.B. Competence and Admissibility

57. The Respondent draws a distinction between a tribunal's 'jurisdiction' (the area within which it is authorized to exercise its capacities), and its 'competence' (its legal capacity to hear a particular case). Given that a number of the Claimant's prayers for relief are unusual in an international investment arbitration (the

⁸ Transcript Day 1, page 59, lines 5-6.

⁹ Transcript Day 2, page 19, lines 20-25.

requests for: a declaratory award and order; for the Tribunal to declare that the Respondent has breached not only the BIT and the ECT but also Romanian law; and to declare that the Respondent has breached the Claimant's and its managers' and employees' procedural due process rights under Romanian law), the claims in question fall outside the Tribunal's competence.

58. The Respondent further submits that the Claimant's claims must be characterised in international terms as a claim for denial of justice (*déni de justice*) since they are essentially about the conduct of the Romanian prosecutors. A claim for denial of justice cannot however be brought before an international tribunal until local remedies have been exhausted.
59. Finally the Respondent submits that, to the extent that the Claimant is seeking through the arbitration to terminate or to hinder legitimate criminal proceedings and investigations in Romania, that constitutes an abuse of the arbitral process and should not be entertained by the Tribunal.

C2. Claimant's arguments

C2.A. Jurisdiction

60. The Claimant recalls that its claim in the arbitration is that the Respondent is and has been engaged in various actions designed to destroy the Claimant's investment contrary to the treatment to which that investment is entitled under the BIT.
61. The Claimant submits that the wording of the BIT is clear on its face. It defines "investor" as including "(i) legal persons constituted under the law of the Contracting Party". Moreover it is well-established under general international law that a corporation has the nationality of its place of incorporation or its *siège social*. ICSID tribunals have uniformly adopted the test of the place of incorporation or seat, rather than control, when determining the nationality of a juridical person.

62. There is no exception in the text of the ICSID Convention referring to cases in which the ‘real and effective nationality’ of a legal entity is claimed to be that of the Respondent State. It was open to the Respondent to seek an express “high threshold” definition to that effect in the BIT – as indeed various States have done – so as to limit protection to legal persons constituted under the law of a Contracting State if they have “substantial activities” or “real economic activities” in that State. The absence of such a restriction in The Netherlands-Romania BIT must be deliberate, especially when viewed against other BITs concluded by Romania around the same time, for example the Romania-Argentina BIT signed in 1993, which refers to “real economic activities”, or the Romania-Chile BIT signed in 1995, which refers to companies which “effectively conduct their activities in the territory of the said party”.¹⁰
63. The Claimant accordingly submits that the Respondent’s factual and expert evidence is ultimately irrelevant; *even if* TRG were 99% owned by a Romanian national (which it denies), and *even if* TRG had made its investments solely with funds originating in Romania (which it also denies), that would not change the fact that the Tribunal had jurisdiction under the BIT.
64. For the event however that TRG’s ownership and control should be regarded as relevant, the Claimant further submits that Mr. Patriciu did not have more or less absolute control over TRG and that at all times there were shareholders’ agreements in place at the instance of different investors, be it the RMDF, OMV or Mr. Stephenson, which agreements restricted Mr. Patriciu’s control.¹¹ In the words of Mr. Stephenson (giving evidence for the Claimant) notwithstanding the fact that Mr. Patriciu was the “*dominant visionary*”, he and Mr. Patriciu worked together and treated their relationship as a “*practical partnership*”.¹²
65. The Claimant further takes issue with Mr. Haberman’s conclusion that the “Libyan receivables” were the most important source of TRG’s funds, and contrasts in this context the \$50 million of financing accruing from that source

¹⁰ Reply to Respondent’s Preliminary Objections, page 19, para 45.

¹¹ Transcript Day 1, page 106, lines 10 to 23.

¹² Transcript Day 1, page 107, lines 15-20.

with its total investment of over \$225m in the development of Petromidia. It also invokes the multiple sources of financing for TRG's investments in Romania, including RMDF, institutional investors such as banks, and DEG and OMV (respectively the international development agency of Germany and the Austrian State oil and gas company).

66. The Claimant further rejects Mr. Haberman's portrayal of TRG as a "shell", since the holding company was actively involved in corporate governance and financing and strategic matters, did some trading on behalf of the group,¹³ and had successfully expanded its activities throughout Europe, investing significantly since 1999 in several European countries. The Claimant characterises TRG as a well-established and important Dutch company with diverse international activities.¹⁴ Confirmation of this could be found in the fact that Kaz Munai Gaz, the State oil company of Kazakhstan, had one month before the hearing signed an agreement to purchase a 75% stake in TRG from the Swiss holding company.¹⁵

67. The Claimant finally rejects the allegation that TRG's incorporation in The Netherlands was a piece of forum-shopping with this arbitration in mind, not least because the search for jurisdictions from which to make the investment took place in 1999 (i.e. six years before the arbitration was commenced). Mr. Stephenson stated in evidence that the Claimant had indeed been "nervous" about the Romanian judicial system and wanted to find a jurisdiction outside Romania where minority shareholder protections would be respected, that various locations were looked at for that purpose, and that The Netherlands was ultimately chosen as it had many attractive features such as good corporate governance laws, a favourable tax treaty and a good infrastructure.

¹³ Transcript Day 1, page 110, lines 4-10.

¹⁴ Reply to Respondent's Preliminary Objections, page 5, para 12.

¹⁵ Transcript Day 2, page 69.

68. The Respondent was moreover aware that TRG was a Dutch company, and, having dealt with it as such when entering into the Petromidia privatisation agreement, cannot now be heard, seven years later, to deny TRG's Dutch nationality in the context of this arbitration.¹⁶

C2.B Competence and Admissibility

69. The Claimant denies both the legal and the factual basis for the Respondent's objections. It cites the circumstances in which it is recognized in international law that a State's responsibility becomes directly engaged by the acts or omissions of its organs as soon as an international obligation is breached, and the absence of any valid justification arising out of the prosecution of crime, and further submits that this preliminary objection is so closely linked to the merits of the case that to uphold it would amount to rejecting the Claimant's case without it being heard. It denies that the principal remedy sought is to compel an end to the criminal investigation, and points out that TRG has been harmed by those investigations but it is not *itself* on trial in Romania.

C3. Miscellaneous

70. A further issue briefly arose between the Parties in relation to the Energy Charter Treaty. It appears to the Tribunal however that, to the extent that this issue is pursued, it is really one for the merits, and that both Parties accept this. There is no need, therefore, to go into it further at this stage.

¹⁶ Transcript Day 2, page 60, lines 10-13.

D. THE TRIBUNAL'S FINDINGS

71. The essence of the Respondent's case at this preliminary phase is therefore that the Request for Arbitration is in reality based on a domestic (Romanian) investment seeking to clothe itself as a foreign (Dutch) investment in order to come within the protection of The Netherlands-Romania BIT. Its domestic character (so the argument runs) is shown by the twin facts that sole or dominant control over the assets in question at all relevant times rested (and still rests) in the hands of Mr. Patriciu, a Romanian resident and Romanian national; and that the effective source of all funds that went into the purchase of the substantive assets was Romanian, not international. The Claimant accordingly has no right *ratione personae* to invoke the jurisdiction of ICSID through this Tribunal.
72. There is then a further argument, of a subsidiary character, that the complaints which the Claimant is making against the actions of Romania do not in any case fall within the compass of the BIT at all, or at best are premature. The Respondent has framed this subsidiary objection as one of 'admissibility' – for the event that the Tribunal upholds its jurisdiction – and the Tribunal will deal with it on that basis, although a good part of the argument as set out in the written pleadings is closely tied to an argument about the scope of the substantive protection under the BIT, so much so that it could almost have been framed as an objection to jurisdiction *ratione materiae*.
73. Associated with this latter argument is a further contention that the Request for Arbitration should be held to be an abuse of process, and should thus not be entertained by the Tribunal in any event.
74. These three Preliminary Objections will be dealt with in turn, under the shorthand descriptions, Jurisdiction, Admissibility, Abuse of Process.

D1. Jurisdiction

75. It will be seen that the jurisdictional objection entails issues of fact (whether the investments were and are under Mr. Patriciu's dominant control; whether the origin of the investment funds was Romanian), and issues of law (what effect such factual circumstances would have on the Tribunal's jurisdiction to hear a complaint by the investor). The issues of fact are ones which the Respondent bears the burden of proving according to the requisite standard, in order to sustain the claims of law it bases on them. The Parties are in dispute over both the issues of fact and the issues of law.
76. The Tribunal finds it more convenient to begin with the issues of law.

The law

77. In law, the jurisdiction of the Tribunal is determined by the twin pillars of Chapter II of the ICSID Convention (which, as its heading indicates, establishes the jurisdiction of the Centre) and Article 8 of The Netherlands-Romania BIT (which regulates the settlement of disputes between a Contracting Party and an investor of the other). Pointing to its incorporation under the law of The Netherlands, the Claimant bases this Tribunal's jurisdiction on the first prong of Article 25(2)(b) of the Convention, which requires that it qualify as a "national of a Contracting State other than the State party to the dispute," and on Article 1(b)(ii) of the BIT (see paragraphs 98-99 below).
78. In response, the Respondent expressly concedes that the Claimant meets the 'formal requirements' of both the Convention and the BIT.¹⁷ It contends, however, that conformity with those requirements does not suffice if, on the basis of ownership and control, effective seat, or source of the funds used for the relevant investment, the Respondent can show that the Claimant's 'real and effective' nationality is that of the Respondent.¹⁸

¹⁷ Resp. Mem. ¶ 41.

¹⁸ Id. ¶ 42.

The ICSID Convention

79. Article 25(1) of the Convention extends the Centre’s jurisdiction to “any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.” In turn, Article 25(2)(b), on the first prong of which Claimant relies, provides that “ ‘National of another Contracting State’ means ... (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to ... arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.” The net result is that the Tribunal’s jurisdiction over the present claim depends upon whether TRG is to be regarded as having the nationality of an ICSID Contracting State other than Romania, i.e. The Netherlands, the critical date for that purpose being the date of the Request for Arbitration, i.e. 14 December 2005. As the Tribunal understands it, this is not contested between the Parties.
80. As ICSID tribunals and commentators have regularly observed, the drafters of the Convention abandoned efforts to define “nationality” for the purposes of Article 25, and instead left the States Parties wide latitude to agree on the criteria by which nationality would be determined. At the same time, it is also widely recognized that, as both Parties to this arbitration accept, Article 25 reflects objective ‘outer limits’ beyond which party consent would be ineffective.¹⁹
81. In the Tribunal’s view, the latitude granted to define nationality for purposes of Article 25 must be at its greatest in the context of corporate nationality under a BIT, where, by definition, it is the Contracting Parties to the BIT themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their ‘nationals’ for the purposes of

¹⁹ Resp. Mem., ¶39; see Cl. Reply, ¶40.

enjoying the benefits the BIT is intended to confer. Drawing on concepts of private international law, the Respondent says that there is no such thing as a ‘nationality’ of corporate entities in the same sense as for physical persons. To the extent that that were so, it would reinforce the point: not only does each Contracting Party have the sole authority to determine the status of juridical entities under its own law, but the Contracting Parties jointly have the sole authority to determine the criteria by which juridical persons with a defined status under each other’s law may enjoy the protections of their BIT.²⁰

82. To determine the criteria by which the Contracting Parties to a BIT have agreed that nationality would be determined for its purposes, we must look, of course, to the BIT itself. The Tribunal does not therefore share Professor Weil’s methodological critique, in his dissenting Opinion in the *Tokios Tokelés* case, of the majority decision in that case, which the Respondent invokes.²¹ Given the latitude granted to States under the ICSID Convention to settle the applicable nationality criteria, there is nothing illogical in looking first of all to whether the nationality criteria set forth in the BIT are satisfied before going on to examine whether there is anything in Article 25 of the Convention which stands in the way of giving effect to that. In any event, the Tribunal cannot see that anything of substance turns on the order of the analysis – and certainly not in the circumstances of this case.
83. It does not, in the Tribunal’s view, require any extended discussion to conclude that, within the framework of Article 25(2)(b) of the Convention, it is open to the Contracting Parties to a BIT to adopt incorporation under their own law as a necessary and also sufficient criterion of nationality for purposes of ICSID jurisdiction, without requiring in addition an examination of ownership and control, of the source of investment funds, or of the corporate body’s effective seat. Incorporation in a given jurisdiction is a widely used criterion internationally for determining the nationality of corporate bodies, and States determine corporate nationality by a wide variety of criteria in a wide variety of

²⁰ In any event, the ICSID Convention, on which the central weight of the Respondent’s argument rests, itself uses, without any apparent discomfort, the single expression “National of another Contracting State” to encompass both natural and juridical persons – and indeed speaks directly (in Article 25(2)(b)) of a juridical person ‘having the nationality of’ a Contracting State other than the State party to the dispute.

²¹ Resp. Mem. ¶ 66.

contexts, as indeed the Respondent acknowledged at the oral hearing.²² This is a matter of free choice between the pair of States Parties to the BIT under consideration. Hence the question becomes simply, what did these two States themselves agree to of their own free will in concluding the BIT? The Tribunal therefore holds that the definition of national status given in The Netherlands-Romania BIT is decisive for the purpose of establishing its jurisdiction.

84. The Respondent nevertheless argues that a claimant may not qualify to invoke the jurisdiction of an ICSID tribunal where it can be proved that the claimant's 'real and effective nationality' is that of the respondent State. The Respondent seeks to found this argument, as the Tribunal understands it, on three alternative, or supplementary, grounds: first, that actions of this kind would be an abuse of the ICSID mechanism; second, that the rule of 'real and effective nationality' is a rule of general international law, which applies equally to corporations and other artificial legal persons; third, that this position under general international law should inform, in a decisive way, the interpretation of both the ICSID Convention and the BIT itself. All three of these propositions encounter major difficulties however (as set out below) and the Tribunal is not persuaded of the validity of any of them.

“Abuse of the ICSID mechanism”

85. As to the “abuse of the ICSID mechanism”²³, the Respondent relies primarily on the dissenting Opinion by Professor Prosper Weil in *Tokios Tokelés*.²⁴ As is well known, Prof. Weil differed sharply from his co-arbitrators in that case, taking the view that economic reality should prevail over formal legal structure when it comes to the interpretation of both the ICSID Convention and the specific provisions of BITs for the purposes of ascertaining the nationality of corporate investors. The Tribunal (which is not, of course, bound by the decisions of other ICSID tribunals) can leave aside the question what authority should be attached to a dissenting opinion in contrast to the Award itself, since (as the Claimant argued) the view expressed by Prof. Weil has not been widely

²² See, for example, transcript day 1, page 12, lines 4-12.

²³ Resp. Mem. ¶ 63; *see id.* ¶¶ 63-66.

²⁴ *Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision of Jurisdiction, 29 Apr. 2004.*

approved in the academic and professional literature, or generally adopted by subsequent tribunals. The Tribunal would in any case have great difficulty in an approach that was tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion. Such an approach could not be reconciled with Article 31 of the Vienna Convention on the Law of Treaties (which lays down the basic rules universally applied for the interpretation of treaties), according to which the primary element of interpretation is “the ordinary meaning to be given to the terms of the treaty”.

General International Law

86. In order to show that there is a rule of general international law favouring ‘real and effective nationality’, which applies also for determining the legal status of corporate entities, the Respondent relies essentially on two leading cases before the International Court of Justice (“ICJ”), the *Nottebohm* case and the *Barcelona Traction* case.
87. In the *Nottebohm* case²⁵, a German citizen acquired by naturalization a new citizenship, that of Liechtenstein, and then sought to invoke the diplomatic protection of that State against Guatemala, the State of his long term residence and business activities. The ICJ held that, given the pattern of Mr. Nottebohm’s activities before and after his naturalization, and the relative weight of his links with the three States in question, his new Liechtenstein nationality, whatever its validity in law, was nevertheless not opposable to Guatemala. Liechtenstein was not therefore entitled to exercise diplomatic protection on his behalf against Guatemala.
88. In the Tribunal’s view, the *Nottebohm* case does not assist the Respondent. The case deals with the nationality of a natural person in the context of an international claim, and it is plain from its subsequent judgment in the second of the ICJ cases relied on – that of *Barcelona Traction*²⁶ – that the ICJ took the view that that question raised different issues from the question of the status of a corporate entity. In *Barcelona Traction* the Court says (at paragraph 70): “In

²⁵ *The Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 ICJ 4, 22 (Judgment of 6 April).

²⁶ *Case Concerning the Barcelona Traction, Light and Power Company, Limited* [1970] I.C.J., Rep. 1.

allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals.” And the Court then goes on to say (at the end of the same paragraph): “...given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in [the *Nottebohm*] case.” In the opinion of the Tribunal, there is nothing in the *Nottebohm* judgment that would serve to establish a general rule of ‘real and effective nationality’ for the purpose of determining the status of corporations under international law.

89. Nor, in the Tribunal’s view, do the remaining findings in the *Barcelona Traction* case assist the Respondent either. In *Barcelona Traction* the ICJ was called upon to consider whether, in the absence of a treaty, and, if so, in what circumstances, the national State of the shareholders in a commercial company might exercise the right of diplomatic protection as a matter of general international law. The Court held, first, that the injuries alleged were to the company and not its shareholders, and, second, that only the national State of the company itself had the capacity to bring an international claim in respect of an injury to the company. If the position under general international law is that only the national State of the company itself has the capacity to bring an international claim in respect of an injury to the company, it must follow that the Contracting States to a specific bilateral treaty act well within the normal parameters of international law when they employ that same criterion to set up the nationality regime of their treaty.
90. It is indeed true, as the Respondent points out, that certain dicta in the *Barcelona Traction* case suggest that in some circumstances criteria in addition to the place of incorporation may be taken into consideration in order to found (as in *Nottebohm*) a right of diplomatic protection. The fact remains that the whole of the ICJ’s reasoning in *Barcelona Traction* rests on the basic proposition that a corporate entity has a legal personality, and a set of rights and obligations, which are separate from those of its shareholders, and that for purposes of the exercise of diplomatic protection this institution of national law should be

recognized by international law. So the Court says (at paragraph 45): “Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.” Given that fundamental separation of interests, it is impossible to see how general international law can be said to bar Contracting States from agreeing to rely on the place of incorporation as a sufficient criterion of nationality for the purposes of a BIT.

91. Just as fundamental to the *Barcelona Traction* case is that the ICJ consciously recognizes that it is dealing with the default position in general international law in the absence of treaty. This is perfectly plain from a passage such as paragraph 90 of the Judgment, where the Court in fact refers to multilateral or bilateral agreements between States for the protection of foreign investments, and to their provisions as to jurisdiction and procedure in the case of disputes over the treatment of corporate investors, and does so in terms which unmistakably connote that, where such an agreement is present, its terms would prevail.
92. The Tribunal cannot therefore accept the Respondent’s argument to the effect that there is, in international law, a general rule of ‘real and effective nationality’ for determining the status of corporate entities. But, more specifically than that, the Tribunal cannot find any trace of justification for an argument that international law deprives the States concluding a particular treaty – whether a multilateral Convention like ICSID or a bilateral arrangement like a BIT – of the power to allow, or indeed to prescribe, the place and law of incorporation as the definitive element in determining corporate nationality for the purposes of their treaty.
93. In the light of these conclusions, the Tribunal is clear in its mind that there is simply no room for an argument that a supposed rule of ‘real and effective nationality’ should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT.

The BIT

94. Following the Tribunal's determination in paragraph 83 above that the definition of national status given in The Netherlands-Romania BIT is decisive for the purpose of establishing its jurisdiction, the key question is therefore to determine what the BIT expressly provides in respect of corporate nationality and how it should be applied to the circumstances of this case.
95. The relevant Articles of the BIT are Article 8 and Article 1.
96. Article 8 provides in standard terms for the settlement of investment disputes "between a Contracting Party and an investor of the other Contracting Party". Following a three-month consultation period, the investor is given the option of referring the dispute to the local courts, to ICSID arbitration, or to *ad hoc* arbitration under the UNCITRAL Rules, at its own choice.
97. The term 'investor' is defined in paragraph (b) of Article 1, while paragraph (a) contains the definition of 'investments'. Only paragraph (b) is relevant here, there being no dispute between the Parties, as the Tribunal understands matters, that the assets in question do constitute 'investments' (as indeed would appear to be plainly established by the wording of several of the detailed subparagraphs). It should however be noted that all of these definitions in Article 1 are explicitly stated, by the introductory words to the Article, to be established 'For the purposes of this Agreement'; that is to say, the Parties give no indication on the face of their treaty that they thought of these definitions as having a sort of general or ecumenical validity, or that they wished the BIT to be understood as tracking whatever conditions might be laid down by customary international law in the absence of treaty.

98. Article 1(b), which lies at the heart of the present issue, reads in full as follows:-
- “(b) the term ‘investors’ shall comprise with regard to either Contracting Party:
- i. natural persons having the citizenship or the nationality of that Contracting Party in accordance with its laws;
 - ii. legal persons constituted under the law of that Contracting Party;
 - iii. legal persons owned or controlled, directly or indirectly, by natural persons as defined in i. or by legal persons as defined in ii. above”.
99. The Claimant’s case is quite simply that point ii. in the Article 1(b) definition contains a straightforward, one might say lapidary, criterion for the case of legal persons, including companies; the criterion refers simply and exclusively to the place of incorporation – or, to be more exact, to the legal system under which the company was incorporated. In the case of TRG there is no room for dispute, and indeed it is not disputed, that this was The Netherlands, and it follows from this that TRG ranks as a Dutch investor for BIT purposes.
100. As noted above (paragraph 78), the Respondent does not contest that the Claimant, as a legal person, possesses in a formal sense the nationality of The Netherlands, as a consequence of its place of incorporation and the legal system under which the incorporation took place.²⁷ Nevertheless, Respondent argues that, because the Claimant’s ‘real and effective nationality’ – determined on the basis of its ownership and control, the source of its capital, and the nature of its commercial operations – is that of the Respondent, its Dutch nationality is not ‘opposable’ to the Respondent.
101. The Tribunal has set out above (paragraphs 86-93) its conclusion that neither the *Nottebohm* nor the *Barcelona Traction* cases has direct relevance to a dispute such as the present, brought before it within a treaty framework, and a framework moreover in which the right of diplomatic protection is expressly excluded.²⁸ Conversely, however, the fact that the ICJ in *Barcelona Traction* upholds as the basic rule of international law a rule to similar effect to the one the Tribunal finds the Parties to the BIT to have incorporated in their treaty, can only reinforce the Tribunal’s conclusion in favour of its own jurisdiction.

²⁷ See, for example, Transcript Day 1, page 14, lines 5-6.

²⁸ Article 27 of the ICSID Convention.

If it is the position under general international law that only the national State of the company itself has the capacity to exercise a right of diplomatic protection in respect of an injury to the company, then it is crystal clear that a similar analysis holds for the particular regime established by the present BIT. This follows from the plain text of the Treaty itself, which provides in conclusive fashion (see the terms of Article 1(b) cited above) that an ‘investor’ of one Contracting Party should be understood as including ‘legal persons constituted under the law of’ the other Contracting Party. And when the rubric to Article 1 specifies that the definitions it lays down are ‘for the purposes of this Agreement’, the Tribunal cannot see what warrant there can be for not reading that as meaning, for all purposes under the Agreement. It is not enough for the Respondent to interpose the argument (whatever its general merits or demerits may be) that a very specific consent by a State is needed to create jurisdiction in an international tribunal over a dispute which is in substance between the State and its own nationals, when that very specific consent is in fact contained in the treaty under which the tribunal is called upon to function. Or to put the matter another way, the Tribunal is in no doubt, in the face of the clear provisions of Article 1(b) of the BIT, that Romania did specifically consent to ICSID jurisdiction over claims brought by Dutch companies, without regard to the incidents of control or source of capital – in just the same way as The Netherlands consented to ICSID jurisdiction at the instance of Romanian companies (the BIT being of course a reciprocal bargain).

102. Conscious no doubt of these difficulties, the Respondent seeks repeatedly to limit its argument to a question of ‘opposability’: the Claimant’s admitted Dutch nationality should be deemed to be not ‘opposable’ to Romania for the purposes of establishing the jurisdiction of an ICSID tribunal, but no more than that.
103. Even to put the proposition in that narrow way does not seem to the Tribunal, however, to overcome the difficulties.

104. First and foremost, the question would remain whether issues of ‘opposability’ have any part to play in circumstances like the present where the Claimant founds its claims on rights under a bilateral treaty. Literally speaking, pure ‘non-opposability’ (to Romania) of TRG's Dutch nationality would entail that TRG had no nationality for the purposes of this arbitration at all, so that the Tribunal is driven to the conclusion that the ‘non-opposability’ argument in fact necessarily implies attributing Romanian nationality to the company – a Romanian nationality that would then be sucked in to fill the vacuum as and when the Dutch nationality fell away. That would go well beyond the findings of the ICJ in the *Nottebohm* case.²⁹
105. This problem aside, the question would still remain of how an ‘opposability’ argument of even the most narrowly limited kind would gain a foothold in the interpretation of the BIT³⁰ in the first place. The Respondent’s argument is less than entirely clear on this crucial point. One hypothetical answer might be that Article 31 of the Vienna Convention (see above: para 85) requires that the terms of the treaty be construed “in context” (and in the light of the treaty’s object and purpose); and that for this purpose a crucial part of the context is the ICSID Convention, on the basis that its patent object is that of protecting foreign investment.³¹
106. This line of argument encounters, however, numerous objections. An obvious one is that, even if the ICSID Convention should be read in this way (which the Tribunal has already rejected: see above para 85) there is nothing in the specific definition of “context” incorporated in Article 31(2) of the Vienna Convention that would bring the ICSID Convention within its reach in this case. The definition in Article 31(2) mentions the text of the treaty, including its preamble and annexes; any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and any instrument which was made by one or more parties in connection with the

²⁹ See above, paragraph 87.

³⁰ Or, for that matter, the ICSID Convention.

³¹ Another hypothetical answer might be that ‘opposability’ comes in as part of the “relevant rules of international law applicable in the relations between the parties” referred to in Article 31(3)(c) of the Vienna Convention. But that would be incompatible with the Tribunal’s conclusions above that there is no general rule of ‘real and effective nationality’ for the purpose of determining the status of corporations under international law.

conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. But none of those elements is apt to cover the ICSID Convention as such.

107. At a deeper level, though, the Tribunal is not persuaded that there is anything in the rules of treaty interpretation that would justify giving the ICSID Convention overriding effect for the interpretation of the BIT. It is not as if Article 8(2) of the BIT gave ICSID exclusive jurisdiction over disputes that might arise with an investor, or even gave ICSID primacy by comparison with other forums. On the contrary, in common with most clauses of this kind, Article 8(2) lists several dispute forums, on an equal basis, leaving the choice between them to the absolute discretion of the investor in each particular case. In this instance, the other options are the local courts and *ad hoc* arbitration under the UNCITRAL Rules, neither of which displays any bias against domestic interests of the kind for which the Respondent contends. What then could be the justification for calling in an argument specific to ICSID as a means for controlling the meaning said to have been intended by the Contracting Parties when concluding the BIT? It would be impossible to conceive of the definitions in Article 1 as having one meaning in the context of an ICSID arbitration and another for dispute settlement processes taking place elsewhere. The Tribunal therefore concludes that, in the absence of any specific evidence offered to it by the Respondent as to what the two States had in mind when negotiating the BIT, the only safe guide as to their intentions must be the unequivocal terms of the treaty text on which they formally agreed. That is the approach which the Vienna Convention requires.

108. For similar reasons, though the Claimant marshals (e.g. Reply to Respondent's Preliminary Objections, pp. 19-20) an impressive list of more-or-less contemporaneous Romanian BITs containing in express language restrictive definitions of the nationality of corporate investors, the Tribunal is in some doubt as to how far that can be taken in itself as positive confirmatory evidence of an intention to equip the present BIT with an unrestricted definition. There is nothing in the Vienna Convention that would authorize an interpreter to bring in as interpretative aids when construing the meaning of one bilateral

treaty the provisions of other treaties concluded with other partner States. The issue is one of theoretical importance,³² which may be of some significance to the decision in other cases, but there is no need for the Tribunal to dwell on it in order to dispose of the question before it now. What matters for present purposes is the terms of the BIT, which the Tribunal finds to be clear and unambiguous.

109. Finally, the Tribunal notes that, in the course of its written and oral argument, the Respondent referred on several occasions to a remark by the NAFTA tribunal in the *Loewen* case, to the effect that “it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents.”³³ Without wishing to go further into the details of a decision that has proved controversial, the Tribunal notes that the observation cited appears no more than a supplementary explanation of a conclusion the *Loewen* tribunal had already reached, not a holding in its own right. However that may be, the tribunal’s observation is plainly wrong, as it is by now a commonplace in international dealings that States may choose to establish by treaty standards of conduct which they intend should apply in respect of their own citizens and residents on exactly the same basis as they apply to foreigners. The classic instance is that characteristic feature of our period, human rights, but there is no reason why identical policy considerations should not animate States in trade, environmental, or other fields; and indeed, as one knows from practical experience, important elements connected with property, assets, and economic activity enter into the heart of human rights regimes. This Tribunal cannot therefore see that it would derive any benefit, in deciding the case before it, in approaching the interpretation of the BIT in the light of an *a priori* aphorism, as opposed to simply looking at the terms of the BIT itself. The question, in other words, is not what the Parties to this bilateral treaty might (or might not) conceivably have intended, but what they actually did, and the evidence for that is the terms of the treaty they concluded. That, so far as the Tribunal can see, is what the Vienna Convention requires.

³² And the ICJ has itself on occasion drawn support from material of this kind (see e.g., the *Oil Platforms* case (Iran v. USA, November 6, 2003, 42 ILM 1334 (2003)).

³³ *Loewen Group Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award (June 26 2003), at paragraph 223.

The Facts

110. The Tribunal accordingly finds that neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality under The Netherlands-Romania BIT,³⁴ and that the Claimant qualifies as an investor entitled to invoke the jurisdiction of this Tribunal by virtue of Article 1(b)(ii) of the BIT. That being so, there is no need for the Tribunal to consider whether the Respondent has met its burden of establishing its factual allegations in respect of any of those issues. To the extent that they may be relevant to subsequent phases of the arbitration, they remain at large, and the Tribunal expresses no opinion on them.

D2. Admissibility

111. As originally formulated by the Respondent in its Answer to the Request, the grounds of inadmissibility and abuse of process were run together, on the basis that: “The Claimant’s claims have been brought for the sole purpose of seeking to place undue pressure on the Romanian Government in order to force it to terminate the pending criminal proceedings against Mr. Patriciu and other managers of the Rompetrol group of companies. The principal remedy that the Claimant is seeking is that the Arbitral Tribunal ‘order Respondent to cease conducting the GPO investigation.’”³⁵ Subsequently, the inadmissibility argument was refined into a preliminary objection in its own right, to the effect that the Claimant’s claim in these proceedings is in substance a disguised claim for denial of justice and as such inadmissible *ratione temporis* so long as local remedies have not been exhausted. This is accordingly the essence of what the Tribunal refers to above as the Respondent’s admissibility objection.

112. It is convenient at this point to note that the Claimant and Respondent crossed swords in the course of the pleadings over whether an ICSID tribunal has the power to entertain an ‘admissibility’ objection at all. For the Claimant, no such

³⁴ With the exception of the particular situation covered by Article 8(6). The Tribunal interprets this provision (which neither of the Parties referred to in argument) as being the exercise by the BIT Parties of the additional faculty offered by the second limb of Article 25(2)(b) of the ICSID Convention (see para 79 above), and as therefore having no application to the circumstances of this arbitration.

³⁵ Respondent’s Answer, paragraphs 48 and 52.

power is conferred by the Convention, nor is there any trace of its being introduced by the terms of the BIT. Without going into the opposing arguments at greater length, the Tribunal observes merely that Rule 41(1) of the ICSID Arbitration Rules, although headed ‘Objections to Jurisdiction’, is so drafted as to cover (but without further definition or explanation), not merely objections that a dispute is not within the jurisdiction of the Centre, but also any objection that the dispute is ‘for other reasons, not within the competence of the Tribunal’. It might be possible to read the first part of this two-pronged provision as referring to the ‘outer limit’ under Article 25 of the ICSID Convention (see paragraph 80 above), whereas the second part refers separately to particular conditions or limitations contained in a more specific instrument like an investment contract or a BIT. But such a reading would not align itself easily with the fact that the investment contract or BIT in question would itself be the source of the consent of at least one of the parties to the dispute, and therefore a necessary element to found the ‘jurisdiction of the Centre’ under Article 25. In the circumstances – and in the absence of any indication of what the precise intention was behind the wording of Rule 41(1) – it seemed to the Tribunal only realistic to interpret the Rule with a degree of flexibility, one that would allow the respondent party some discretion over the formulation of reasoned objections, but on the basis that that party would bear the onus not merely of showing that its objection was well founded in substance, but also of demonstrating that, if the objection did not go to jurisdiction as such, it was nevertheless within the terms of the Convention and the Rules. In adopting this approach, the Tribunal drew on the Rules of the ICJ, which, in their current version, provide both for objections to jurisdiction and for any “other objection the decision upon which is requested before any further proceedings on the merits.”³⁶ With this in mind, the Minutes of the Tribunal’s First Session record that “It was understood that the scope of the preliminary phase will not be confined to a narrow interpretation of the term ‘jurisdiction’ on its own but will cover all of the objections of a preliminary character that have been included in the Respondent’s Answer, whether they go strictly to jurisdiction, or to questions of competence, or admissibility. The Tribunal expects the

³⁶ Article 79(1).

Claimant to respond to these objections and to address them in its subsequent written argument.”³⁷

113. In paragraph 111 above, the Tribunal notes the different forms which the admissibility objection took at various stages of the proceedings. If the Tribunal records these differences, it is not to take any technical point, but to highlight a conceptual difficulty encountered by this Preliminary Objection at a more basic level. Whether the Respondent’s attack should be seen as directed against the nature of the Romanian measures which the Request seeks to impugn, or against the nature of the relief the Claimant seeks, the problem remains the same, namely that the target of the Respondent’s attack is the substantive content of the complaints brought by the Claimant to the Tribunal. The Respondent’s objection must of necessity take the form: this particular allegation or this particular remedy is not covered by the BIT or available under it, at least at this stage. Anything less specific than that would give a Tribunal no basis on which it could pass judgment on the Objection. Yet all that the Respondent (or for that matter the Tribunal) has to go on in the present state of this case is the Request. Rule 41(3) of the Arbitration Rules lays down that “[u]pon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended” – and indeed paragraph (1) of the Rule requires any such objection to be made as early as possible. This has as its consequence that the case may be stopped in its tracks to allow the objection to be resolved, before the Claimant has in fact elaborated its precise claims in full which, as is normal, takes place in the Memorial or other opening formal Pleading.³⁸ That is precisely what has happened here, with the consent of both Parties, as recorded in the Minutes of the Tribunal’s First Session (paragraph 17 above). The Respondent says, however, that the Claimant has put forward a detailed Prayer for Relief, as formulated at the conclusion of the Request, and that it is entitled to rely on that, absent any formal move by the Claimant to amend the relief it seeks. There is of course some force in this argument. Nevertheless, it remains the case that international arbitration is not bound by formal rules of pleading, of the kind that may be encountered in particular domestic legal systems. On an issue such as this, an ICSID tribunal

³⁷ Minutes of the First Session, paragraph 15.

³⁸ See, more specifically, paragraphs 17-18 above.

must avoid formalism, and deal procedurally with the questions before it on the basis that best enables it to do substantial justice to the position of both Parties.

114. In these particular circumstances, the Tribunal finds itself unable to proceed to a decision on the admissibility objection as a preliminary question at this stage of the proceedings. This is irrespective of whether the objection is or is not properly to be classified as one of admissibility. To the extent that the objection retains its force in the light of the Pleadings as they develop, the decision on it is joined to the merits under Rule 41(4) of the Arbitration Rules. It should however be emphasised that this does not imply any decision by the Tribunal, one way or another, as to whether the claims advanced by the Claimant are or are not properly to be considered as tantamount to claims for a denial of justice, or as to whether such claims are or are not subject to the exhaustion of local remedies.

D3. Abuse of Process

115. It remains therefore to consider the Respondent's final fall-back argument, that the Claimant's application for arbitration constitutes an abuse of process and should not therefore be entertained by the Tribunal. Marshalled as it is as an objection at this preliminary stage, this is evidently a proposition of a very far-reaching character; it would entail an ICSID tribunal, after having determined conclusively (or at least *prima facie*) that the parties to an investment dispute had conferred on it by agreement jurisdiction to hear their dispute, deciding nevertheless not to entertain the application to hear the dispute. Given that an ICSID tribunal, under the Washington Convention as interpreted, is bound to exercise a jurisdiction conferred on it, so far-reaching a proposition needs to be backed by some positive authority in the Convention itself, in its negotiating history, or in the case-law under it. However that may be, it is plain enough to the Tribunal that, as the question has been put by the Respondent in the specific circumstances of this case, the abuse of process argument is one that seeks essentially to impugn the motives behind the Claimant's Request for Arbitration. It may or it may not be appropriate for an ICSID tribunal to enquire into the question whether either a Claimant or a Respondent party is actuated by a proper motive in advancing or defending its interests in

prosecuting or defending an arbitration. That question remains at large, and the Tribunal expresses no view on it now. But, if it were appropriate to do so, the decision would obviously be very closely dependent on the special circumstances of the particular case. From all this it follows automatically, without the need for further demonstration, that this Tribunal, at this very preliminary stage, before it has had even the benefit of the Claimant's case laid out in detail in a Memorial, let alone the supporting evidence, could not in any event be in a position either to assess a question of motive or to determine its relevance to the case before it. That said, the question became moot as the proceedings on the preliminary objections took shape. In particular, the Respondent stated during the oral hearing³⁹ that, in the light of the Claimant's clarification that it was challenging the manner in which the criminal proceedings were being conducted but not the proceedings themselves, it (the Respondent) was no longer maintaining this preliminary objection at this stage of the arbitral proceedings. The Tribunal registers that fact, and with it the Respondent's reservation of its right to revert to the objection later, i.e. presumably during the merits phase.

³⁹ Transcript Day 2, page 36, lines 1-4.

E. CONCLUSIONS

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

- a) The Respondent's jurisdictional objection is dismissed.
- b) The Respondent's admissibility objection (to the extent that it retains its force in the light of the Pleadings as they develop) is joined to the merits.
- c) The Respondent's abuse of process objection is not one which the Tribunal needs to entertain at this stage of the proceedings.
- d) The allocation of the costs of this preliminary phase of the arbitration is reserved for later.

The Arbitral Tribunal

[signed]

Mr. Marc Lalonde, P.C., O.C, Q.C.
Arbitrator

[signed]

Mr. Donald Francis Donovan, Esq.
Arbitrator

[signed]

Sir Franklin Berman, KCMG, Q.C.
President