

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

In the arbitration proceeding between

**THE ROMPETROL GROUP N.V.**  
Claimant

and

**ROMANIA**  
Respondent

ICSID Case No. ARB/06/3

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**Award**

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*Members of the Tribunal:*

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

*Secretary of the Tribunal:*

Ms. Aurélia Antonietti

*Representing the Claimant:*

Mr. Barton Legum  
Ms. Ioana Petculescu  
*Dentons, Paris*

and

Mr. George Burn  
*Dentons, London*

*Representing the Respondent:*

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

and

Dr. Victor Tanasescu  
Ms. Carina Tanasescu  
*Tanasescu & Asociatii, Bucharest*

and

Dr. Crenguta Leaua  
Mr. Marius Grigorescu  
*Leaua & Asociatii, Bucharest*

*Date of dispatch to the Parties: 6 May 2013*

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## **A. PROCEDURAL BACKGROUND**

### **A1. Request for Arbitration and Notice of Registration**

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” or “the Claimant”) against the Republic of Romania (“Romania” or “the Respondent”).
2. TRG was 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” or “the Treaty”). The Request invokes the ICSID arbitration provisions in the Treaty.
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.

## **A2. Constitution of the Arbitral Tribunal**

6. As recalled in the Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility of 18 April 2008, the Arbitral Tribunal was constituted on 20 December 2006, in accordance with Article 37(2)(b) of the ICSID Convention and Rule 3 of the Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"). Its members are Mr. Donald Francis Donovan, Esq., a national of the United States of America, appointed by the Claimant, the Honourable Marc Lalonde PC, OC, QC, a national of Canada, appointed by the Respondent, and Sir Franklin Berman KCMG, QC, a national of the United Kingdom, appointed by the co-arbitrators, as President.
7. Ms. Claudia Frutos-Peterson, Counsel, ICSID, was designated to serve as Secretary of the Tribunal. She was subsequently replaced by Mr. Marat Umerov, Consultant, ICSID, and Ms. Aurélia Antonietti, Senior Counsel, ICSID.

## **A3. The First Session**

8. The first session of the Tribunal was held on 28 February 2007 at the World Bank in Paris, France. 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.
9. At the first session, it was agreed that the proceedings on the merits would be suspended in accordance with ICSID Arbitration Rule 41(3) 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 filed by the Respondent on 22 December 2006, whether the objection related strictly to jurisdiction, or to competence or admissibility.

## **A4. Decision on Jurisdiction and Admissibility**

10. Each Party filed its written pleadings for the preliminary phase of the proceeding pursuant to the procedural calendar agreed at the first session and further to a hearing on jurisdiction on 25 and 26 September 2007, the Tribunal rendered a Decision on Respondent's Preliminary

Objections on Jurisdiction and Admissibility on 18 April 2008 (“Decision on Jurisdiction and Admissibility”). A copy of the Tribunal’s Decision on Jurisdiction and Admissibility is appended to the present Award as an integral part of it.

11. In its Decision on Jurisdiction and Admissibility of 18 April 2008, the Tribunal decided 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.*

#### **A5. Written submissions on the Merits**

12. The schedule for the Parties’ submissions on the merits was as follows:

- Claimant’s Memorial on the Merits (“Statement of Claims”) on 8 December 2008;
- Respondent’s Counter-Memorial (“Statement of Defence”) on 24 July 2009;
- Claimant’s Reply on 12 November 2009; and
- Respondent’s Rejoinder on 31 March 2010.

These submissions are analysed in more details under paragraphs 48 *et seq.* below.

#### **A6. Requests for Production of Documents**

13. TRG filed a request for the production of documents on 17 August 2009. Further to exchanges of submissions, the Tribunal ruled on the issue of production of documents in a letter of 29 October 2009 attaching a Redfern Schedule and in its Procedural Order No. 1 dated 3 November 2009.

14. By letter of 4 November 2009, Romania requested the Tribunal to clarify its understanding of the scope of the production of documents ordered by Procedural Order of 3 November 2009

regarding the Claimant's Request No. 7. On 17 November 2009, the Tribunal gave further clarification.

15. On 4 December 2009, TRG requested the Tribunal to order the Respondent to produce documents relating to the Claimant's document Requests Nos. 1, 2 and 7, and to draw an adverse inference in case the Respondent failed to do so. The Tribunal ruled on the Claimant's request in its Procedural Order No. 2 dated 21 January 2010.

#### **A7. Proposal for disqualification of a counsel by the Respondent**

16. By letter dated 21 July 2009, the Claimant's Counsel, Salans & Associés (Salans), currently Dentons, Paris office, informed the Centre that the legal representation of the Claimant would from then on be in the hands of Mr. Barton Legum and two of his colleagues at the firm.
17. On 31 July 2009, the Respondent wrote to the Tribunal, stating that Mr. Legum and the Member of the Tribunal appointed by the Claimant had until recently been members of the same law firm, and demanded that the Claimant make "*full disclosure of all relations, past and present, between both Mr. Legum and any other member of the firm of Claimant's counsel*"<sup>1</sup> with the member of the Tribunal in question.
18. Having heard both Parties in writing, the Tribunal ruled on 14 January 2010 on the Respondent's application to disqualify Mr. Barton Legum and decided:

*In sum, the Tribunal can find in the circumstances before it no basis for any suggestion that it should interfere in the choice by Claimant of its counsel for these proceedings, or indeed for any suggestion that the preservation of the integrity of these proceedings requires it to consider doing so. The Respondent's application is accordingly denied.*<sup>2</sup>

#### **A8. The Hearing on the Merits**

19. The President of the Tribunal held a pre-hearing conference with the Parties by telephone on 14 April 2010 to discuss the details of the organization of the hearing on the merits, which were embodied in minutes circulated by the Secretary on 27 April 2010.

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<sup>1</sup> Respondent's letter to the Tribunal, 3 July 2009, p. 2.

<sup>2</sup> Decision of the Tribunal on the Participation of Counsel, 14 January 2010, ¶ 27.



20. The hearing on the merits was held at the World Bank in Paris from 3 May 2010 to 10 May 2010.
21. The Parties were represented as follows:

Claimant

Mr. Jeffrey Hertzfeld, Special counsel;  
Mr. Barton Legum, Salans;  
Mr. George Burn, Salans;  
Mr. William Kirtley, Salans;  
Mr. Viorel Dinu, Salans;  
Ms. Anca Vatasoiu, Salans;  
Mr. Gabriel Albu, Local counsel for Salans;  
Mr. Obie Moore, Special counsel to The Rompetrol Group N.V.;  
Mr. Alexey Golovin, The Rompetrol Group N.V.

Respondent

Mr. Michael E. Schneider, LALIVE Attorneys-at-law;  
Dr. Matthias Scherer, LALIVE Attorneys-at-law;  
Dr. Veijo Heiskanen, LALIVE Attorneys-at-law;  
Mr. Antoine Romanetti, LALIVE Attorneys-at-law;  
Mr. Sam Moss, LALIVE Attorneys-at-law;  
Mr. Jaime Gallego, LALIVE Attorneys-at-law;  
Mr. David Bonifacio, LALIVE Attorneys-at-law;  
Ms. Anne-Marie Loong, LALIVE Attorneys-at-law;  
Dr. Victor Tanasescu, Tanasescu & Asociatii Law Firm;  
Dr. Crenguta Leaua, Leaua & Asociatii Law Firm;  
Ms. Carina Tanasescu, Tanasescu & Asociatii Law Firm;  
Mr. Marius Grigorescu, Leaua & Asociatii Law Firm.

22. After the opening arguments, the examination of witnesses and experts started with the following witnesses for the Claimant:

Mr. George Philip Stephenson, former TRG officer;  
Mr. Dan Costache Patriciu, former TRG CEO;

Mr. Sorin Rosca Stanescu, journalist;

Mr. Dan Ioan Popescu, former Minister of the Economy;

Mr. Ovidiu Budusan, criminal defense counsel and former prosecutor;

Mr. Karim Benabderrazik, the former Managing Director of Vector AG, TRG's international trading arm.

And two witnesses for the Respondent:

Ms. Cecilia Morariu, spokesperson for the Superior Council of Magistracy;

Ms. Valeria Nistor, legal counsel – General Legal Directorate of the National Agency for Fiscal Administration.

These witnesses were followed by the examination and cross-examination of the Claimant's legal experts:

Professor Corneliu-Liviu Popescu, Romanian Public and Constitutional Law expert;

Mr. Alexandru Boroι (by video conference on May 6, 2010), Romanian Criminal Law expert.

And then of the Respondent's legal experts:

Dr. Lucian Mihai, former President of the Constitutional Court of Romania;

Dr. Hans-Heiner Kühne, Expert on criminal procedure and human right guarantees.

As far as damages experts are concerned, Messrs. Chudozie Okongwu and Timothy McKenna, NERA, were heard on behalf of the Claimant and Messrs. James Dow and Carlos Lapuerta, The Brattle Group, Ltd, were heard on behalf of the Respondent. On 8 May 2010, the Tribunal heard the damages experts in conference.

23. The closing arguments were presented by both Parties on 10 May 2010.

#### **A9. Post-Hearing submissions and correspondence**

24. In a letter dated 21 May 2010, the Secretary of the Tribunal informed the Parties of the schedule to be followed for the rest of the proceeding. The schedule was subsequently revised on 16 July 2010, 28 July 2010, 2 September 2010 and 7 September 2010 to accommodate requests emanating from the Parties.

25. Ultimately the schedule for the Parties' post-hearing written submissions was therefore as follows:

Parties' simultaneous Post-Hearing Briefs on 4 August 2010;  
Parties' simultaneous answer to Post-Hearing Briefs on 27 September 2010;  
Parties' Statements of Costs on 8 October 2010; and  
Parties' comments on the Statements of Costs on 22 October 2010.

26. On 4 August 2010, the Parties filed their first round of post-hearing pleadings. On 13 August 2010, Romania submitted a letter alleging that TRG introduced in its Post-Hearing Brief 'new evidence,' namely a new method of quantification, asking the Tribunal to exclude the new material. On 27 August 2010, TRG contested Romania's arguments affirming that no new evidence was filed in their Post-Hearing submission by explaining the methodology applied in it and they suggested an extension of four weeks to file the second round of the Post-Hearing submissions. Further to another exchange on this topic, the Tribunal ruled on this issue by letter of 2 September 2010 deciding that no new evidence was to be accepted, unless otherwise required by the Tribunal.
27. The Claimant submitted its Statement of Costs on 8 October 2010 and the Respondent on 9 October 2010. They were followed by each Party's observations on the other Party's Statement of Costs, and a further round of comments.
28. The Tribunal issued directions on 20 September 2010 and on 6 September 2011 indicating that it did not wish to receive any further submissions from the Parties without leave having been sought and granted in advance.
29. On 17 August 2011, the Claimant applied for leave to submit the statement of the reasons of the High Court of Cassation and Justice for a decision it rendered on 18 February 2011 regarding the wiretapping of TRG's former CEO. By letter of 24 August 2011, the Respondent objected to this application. By letter of 6 September 2011, the Tribunal ruled that *"the document which the Claimant now seeks leave to admit contains the statement of the High Court of Cassation and Justice's reasons for declining to review a decision of the Court of Appeals that has been commented on extensively by both Parties in the course of argument. Given that the judgment of the Court of Appeals is already part of the record of the Arbitration, the Tribunal is of the view that it should not exclude from consideration the decision of a higher court that forms part of the process of appeal or review of that judgment."* The Tribunal invited both Parties to agree on which parts of the decision were relevant and to submit an agreed translation. In the absence of agreement, the Claimant in due course

submitted into the record the full text of the decision on 21 October 2011 in a translation that incorporated the Respondent's comments.

30. On 26 June 2012, the Respondent filed with the Tribunal a decision of the European Court of Human Rights ("ECHR") rendered on 17 January 2012 in the case of *Dan Costache Patriciu v. Romania*. The Tribunal indicated that it was reluctant to admit further argument at such a late stage but invited the Respondent to make a reasoned request to submit the decision following which the Claimant would have the opportunity to comment. On 5 July 2012, the Respondent applied for formal leave to admit the above mentioned decision. The Claimant objected by letter of 10 July 2012. By letter of 17 August 2012, the Centre informed the Parties that "*[h]aving considered with care the submissions of both Parties in the correspondence cited above, the Tribunal is of the view that they do not make out a sufficient case for the admission of the Decision into the record at this stage of the proceedings; the Respondent's application is therefore denied. The Tribunal will accordingly not take cognizance of any portions of the correspondence referred to above (or the letter on the same subject from the Respondent dated June 26, 2012) which relate to the substantive contents of the ECHR Decision.*"
31. By letter of 10 September 2012, the Claimant applied for leave to submit a further decision from the Bucharest Court, First Criminal Division on 28 August 2012, to which the Respondent objected on 13 September 2012. Having received observations from both Parties on 21 and 24 of September 2012, the Centre informed the Parties by letter of 25 September 2012 that the Tribunal was unable to find a strong showing of substantive relevance to the issues for decision in the arbitration and denied the application.
32. By letter of 21 December 2012, the Parties were informed that the proceedings had been closed in accordance with ICSID Arbitration Rule 38.

## **B. THE FACTUAL BACKGROUND**

### **B1. Privatisation of Rompetrol S.A.**

33. The general background to the present dispute lies in the extensive reconstruction of Romania's political and economic system during the past two decades.
34. 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. Dan Costache Patriciu, a Romanian national, purchased a controlling stake in Rompetrol S.A.

35. 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**

36. The state of the shareholdings in Rompetrol S.A. and the changes that took place over time are described in paragraphs 35-44 of the Tribunal's Decision on Jurisdiction and Admissibility. Paragraphs 45-47 of the Decision set out the detail of TRG's acquisition of a controlling stake in S.C. Petromidia Rafinare S.A. ("Petromidia") from the Romanian State Ownership Fund, and the re-naming of Petromidia as Rompetrol Rafinare S.A. ("RRC"), which in the period since 2003 was producing about 30% of Romania's needs for refined petroleum products.
37. In August 2007, 75% of Mr. Patriciu's holding in TRG was sold to KazMunaiGaz, the State-owned energy company of Kazakhstan. As of late 2008, therefore, Mr. Patriciu was the 100% shareholder in Rompetrol Holding S.A., which retained a 25% shareholding in TRG after the sale to KazMunaiGaz. Some time thereafter, the name of Rompetrol Holding S.A. was changed to DP Holding S.A., which however no longer owns any stake in TRG, as its remaining 25% stake in TRG was sold to KazMunaiGaz in June 2009. From that point on, Mr. Patriciu has not held any position with TRG.

## **B3. The Underlying Dispute**

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

39. In brief, the Claimant asserts that these investigations are oppressive and in breach of the treatment to which TRG's investment is entitled under the BIT. 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 ARGUMENTS OF THE PARTIES**

40. Three documents were served by each of the Parties prior to the hearing, which set out and refined their positions and are summarized below. At the hearing, each side's case was developed further and the Parties finalised their submissions in two rounds of Post-Hearing Briefs, along with two sets of submissions and further correspondence in relation to costs.
41. The initial statements of case are found in the Request for Arbitration filed by the Claimant on 14 December 2005 and in the Answer to the Request for Arbitration dated 22 December 2006.
42. The Statement of Claims is dated 8 December 2008, and the Statement of Defence is dated 24 July 2009. The Claimant filed a Reply brief dated 12 November 2009, and the Respondent filed a Rejoinder dated 31 March 2010.
43. The Parties' submissions were further developed at the Hearing, held at premises of the World Bank in Paris for seven days in early May 2010. At the conclusion of the Hearing, the Tribunal ruled, on the basis of a joint request from the Parties, that Post-Hearing Briefs would be filed simultaneously within three months, followed by reply briefs, limited to 50 pages, seven weeks later. The Post-Hearing Briefs were duly filed on 4 August 2010, and the replies on 27 September 2010.
44. Great care and skill has been deployed in the preparation and presentation of the written and oral submissions of each Party. The summaries that follow are not intended to repeat or deal with every point raised, but to capture the essence of the arguments presented, which, as one might expect in litigation of this scale, developed over time at the various stages of the proceedings as they took their course.

## C1. Claimant's arguments

### C1.A. The Request for Arbitration

45. Aside from introductory and jurisdictional matters, the Request for Arbitration describes TRG as having contributed a considerable quantity not just of financial investment but of management attention to RRC, turning the company into profitability and leading to growth of more than US\$500 million between 2001 and 2005. TRG claims that it is precisely this success that “*turned Rompetrol into a target of State-orchestrated harassment,*”<sup>3</sup> citing the activities of Mr. Ioan Talpes, former head of the National Security Department of the Presidential Administration, the National Anti-Corruption Prosecution Office (“PNA”) and the Prosecutor’s Office attached to the High Court of Justice (“GPO”).<sup>4</sup>
46. The State conduct complained about was grouped under four headings, each covering the time period after mid-March 2004. Under the first heading, the Request for Arbitration argued that the State had harassed TRG since 2001 by conducting “*an extraordinary and unreasonable array of fiscal and other governmental controls,*” i.e. 120 controls between 2001 and 2004.<sup>5</sup> More detailed complaints were set out under the following four headings:
- a. **The Talpes Report:**<sup>6</sup> The Request argues that Mr. Talpes had sought to pressure Mr. Patriciu into merging RRC with RAFO Onesti, a competing Romanian refinery, and, when that failed, the Presidential Administration, so as to damage TRG for its refusal, leaked to the press a report that was later formally forwarded to the then President of Romania and stamped as an official document of the National Security Department of the Presidential Administration (referred to hereafter as “the Talpes report”). The Request describes the Talpes report as containing “*various accusations (with criminal implications) relating to the Petromidia refinery Privatization Contract and to the post-privatization activity of RRC,*”<sup>7</sup> and as relying in this respect on information obtained by the fiscal controls already referred to that had been conducted since 2001,<sup>8</sup> and finally alleges that the Report was deliberately leaked to the press:

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<sup>3</sup> Request for Arbitration, ¶ 21.

<sup>4</sup> Request for Arbitration, ¶ 21.

<sup>5</sup> Request for Arbitration, ¶ 22.

<sup>6</sup> Request for Arbitration, ¶ 22 - ¶ 30.

<sup>7</sup> Request for Arbitration, ¶ 27.

<sup>8</sup> Request for Arbitration, ¶ 28.

*“The Talpes Report marked the launch of a concerted and sustained government effort to publicly discredit and harm Rompetrol’s interests, through multiple and overlapping investigations against it and its management that were conducted in breach of Romanian procedural law and international standards of due process and in clear violation of Romania’s Dutch-Romanian BIT obligations...”*<sup>9</sup>

- b. **Misconduct of the PNA:**<sup>10</sup> The Request alleges that it was only through a press release dated 24 March 2004 (hard on the heels of the Talpes report) that TRG learned that the PNA had commenced activities preliminary to a criminal investigation, arising from the privatisation of Petromidia, and prompted by the Talpes report.<sup>11</sup> These activities then became a general criminal investigation (*in rem* investigation), according to a press release of 31 May 2004.<sup>12</sup> The Request argues that the use of this device, rather than specific criminal investigations against individuals (*in personam* investigations), had the effect of evading the procedural guarantees that would otherwise be triggered under Romanian law. The Request argues that the PNA conducted its investigation in *“an abusive and non-transparent manner that amounted to unfair and inequitable treatment, in violation of Romanian law and Romania’s international treaty obligations.”*<sup>13</sup> It is further alleged that TRG learned in October 2004 that the PNA had closed its investigation because no corruption within its area of competence had been discovered, and that the file had been passed to the GPO, but all of this only from press releases or reports of television interviews.
- c. **Misconduct of the GPO:**<sup>14</sup> The Request alleges that in September 2004 the GPO commenced *in personam* investigations against three members of the RRC management in connection *inter alia* with the privatization of Petromidia and the making of ‘in-kind’ loans. The Request draws a link between these events and the transfer to the GPO of Ms. Adriana Cristescu, the investigator who had conducted

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<sup>9</sup> Request for Arbitration, ¶ 30.

<sup>10</sup> Request for Arbitration, ¶ 31 - ¶ 36.

<sup>11</sup> Request for Arbitration, ¶ 31.

<sup>12</sup> Request for Arbitration, ¶ 32.

<sup>13</sup> Request for Arbitration, ¶ 35.

<sup>14</sup> Request for Arbitration, ¶ 37 - ¶ 45.



the PNA *in rem* investigation, and who led the GPO investigation against Rompetrol officers. Under her responsibility, the Request alleges, the GPO put out press releases in January 2005 and subsequently which contained conclusory statements as to the guilt of those under investigation. TRG argued that these investigations were conducted in a manner “*wholly lacking in transparency and in breach of ... international standards of due process,*”<sup>15</sup> itemised as follows:<sup>16</sup>

- i. Disregarding evidence from the competent authority certifying that TRG complied with its privatization obligations under the Privatization Contract;
  - ii. Singling out only RRC for sanctions in connection with the industry-wide practice of swap transactions imposed by the Government’s own oil products custodian;
  - iii. Prosecuting RRC management for actions reasonably taken in reliance on valid Romanian court decisions, thereby unfairly and inequitably disregarding valid court decisions;
  - iv. Bringing unreasonable charges of fraud and money laundering against Rompetrol managers despite prior full disclosure to the Government of Romania;
  - v. Violating due process standards in connection with Mr. Patriciu’s arrest and detention on 26 and 27 May 2005;
  - vi. Imposing an unreasonable travel ban on TRG’s CEO, Mr. Patriciu.
- d. The Request also complains about further charges brought in August 2005 against Mr. Patriciu and Mr. Stephenson, following notice of the commencement of the

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<sup>15</sup> Request for Arbitration, ¶ 41.

<sup>16</sup> Listed at Request for Arbitration, ¶ 41.

present proceedings a month earlier. The Request further alleges the following specific breaches of procedural rights under Romanian and international law:<sup>17</sup>

- i. Failing to notify defence counsel of the dates and times of interviews of witnesses;
  - ii. When counsel was so notified, excluding them from attending witness interviews relating to these charges;
  - iii. In the event they were permitted to attend, refusing to record the attendance of defence counsel and forbidding such counsel from participating or asking questions during the course of the interview;
  - iv. Refusing to make certain corrections to the record of the witness interview when explicitly requested to do so by defence counsel;
  - v. Influencing witnesses by the way questions were phrased; and
  - vi. Demanding the production of all documents regarding all banking operations of approximately sixty individuals since January 2001, fourteen of whom were current or former Rompetrol employees, directors or shareholders, and the others were connected with Mr. Patriciu or TRG.
- e. **Collusion between GPO Prosecutor and the RAFO Group:**<sup>18</sup> The Request alleges continuing collusion between State officials and the RAFO Group, offering as hard evidence in support that in October 2005 a confidential document prepared by Ms. Adriana Cristescu appeared as an annex in a lawsuit filed against TRG as co-defendant, which sought the cancellation of the Petromidia privatization. The document dated from between March and October 2004 and concerned *inter alia* themes for an investigation into the Petromidia privatization (referred to by TRG

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<sup>17</sup> Request for Arbitration, ¶ 44 and ¶ 45.

<sup>18</sup> Request for Arbitration, ¶ 46 - ¶ 52.

as the Cristescu Themes), and must, the Request alleges, have been illegally leaked.<sup>19</sup>

47. The Request alleges in sum<sup>20</sup> that the conduct described above breached the Respondent's obligations under the Dutch-Romanian BIT, the Energy Charter Treaty ("ECT"),<sup>21</sup> and international law, and claims *inter alia* the following relief, without prejudice to any other or further claims to which it might be entitled:<sup>22</sup>
- a. A declaration that the Republic of Romania has breached Article 3(1) of the BIT, Article 10(1) of the ECT, Romanian law, and international law;
  - b. A declaration that the Republic of Romania has breached the Claimant's and its directors', managers', and employees' procedural (due process) rights under Romanian law, as well as international standards of due process;
  - c. Order the Respondent to take urgent action to ensure that the perpetrators of such violations are disciplined;
  - d. Order the Respondent to cease conducting the GPO investigation in breach of TRG's and its directors', managers', and employees' procedural rights;
  - e. Order the Respondent to pay damages in an amount to be established, but which the Claimant estimated to be an amount in excess of US\$100 million; and
  - f. Order the Respondent to pay costs and interest.

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<sup>19</sup> Request for Arbitration, ¶ 49.

<sup>20</sup> Request for Arbitration, ¶ 56.

<sup>21</sup> TRG explained that the ECT was within the jurisdiction of the Tribunal by virtue of Article 3(5) of the BIT, which provided that "*If the provisions of law of either Contracting Party or obligations under international agreements existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall to the extent that it is more favourable prevail over the present agreement.*"

<sup>22</sup> Request for Arbitration, ¶ 60.

C1.B. Memorial on the Merits

48. The Claimant’s Memorial on the Merits (or “Statement of Claims”), filed on 8 December 2008, was accompanied by factual exhibits, a witness statement of Mr. Patriciu and the second witness statement of Mr. George Philip Stephenson, a Legal Opinion of Professor Alexandru Boroi (“the Boroi Opinion”) and an expert Report on damages of Dr. Frederick Dunbar of National Economic Research Associates, Inc. (NERA) (“the Dunbar report”), and expressly incorporated by reference TRG’s previous pleadings.<sup>23</sup>
49. The Memorial disclaims any challenge to the Respondent’s “*power to investigate and prosecute crimes within its jurisdiction.*”<sup>24</sup> Instead, what TRG requests the Tribunal to examine are:

*the measures taken by Respondent in commencing and pursuing these investigations and proceedings and to determine that such measures have been in breach of the specific protections afforded by, and of legally binding commitments undertaken by, Romania to Dutch investors under the Treaty.*<sup>25</sup>

50. The Memorial expands upon, and backs with documentary evidence, the substantive complaints set out in earlier pleadings,<sup>26</sup> but adds to them three further matters said to constitute egregious instances of heightened harassment and persecution of TRG, Rompetrol and their executives and management;
- a. the illegal interception of Mr. Patriciu’s personal and business telephone calls since 2003 (“the Wiretapping Complaint”);<sup>27</sup>
  - b. the GPO’s attempts to have Mr. Patriciu and Mr. Stephenson arrested on the basis that they were a ‘danger to the public order’ and responsible for ‘excessive media broadcasting’ of the investigation which was damaging to Romanian society,<sup>28</sup> and were seeking to influence criminal investigations by bringing ICSID arbitral

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<sup>23</sup> Statement of Claims, ¶ 2.

<sup>24</sup> Statement of Claims, ¶ 4.

<sup>25</sup> Statement of Claims, ¶ 5.

<sup>26</sup> Statement of Claims, ¶ 6 - ¶ 17.

<sup>27</sup> Statement of Claims, ¶ 18.

<sup>28</sup> Statement of Claims, ¶ 19.

proceedings; whilst these requests were not accepted by the Romanian courts, they had “*taken their toll*”<sup>29</sup> on TRG and its executives;

- c. the GPO’s ordinance of 21 February 2006 imposing an attachment on RRC shares held by TRG (“the GPO Attachment Ordinance”), which took seven months to remove by Court Order, causing loss in the form of lost security for loans and a technical default under existing financial arrangements.

51. As an explanation for the ‘apparent motivations’ of the state in orchestrating this alleged harassment, the Memorial on the Merits advances:

- d. Mr. Patriciu’s status as a former politician with political enemies, which has led to vendettas against him through misconduct directed at TRG, allegedly at the direction of President Basescu (“the Political Motivations”).<sup>30</sup>
- e. Secondly, the Memorial argues that there were “*clearly strong commercial forces at play in motivating the State’s conduct as well,*”<sup>31</sup> citing specifically the circumstances of the release of the Talpes report and the ensuing investigations as indicating that State entities were seeking to assist the RAFO Group to acquire RRC, which had been turned around by TRG.<sup>32</sup>

52. The Memorial on the Merits argues that these acts engaged the international responsibility of the State as soon as the State’s conduct, or any conduct attributable to it, was in breach of its international obligations, citing Articles 1 and 2 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>33</sup> Under Article 4(1), conduct of a State organ is attributable to the State “*whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the*

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<sup>29</sup> Statement of Claims, ¶ 19.

<sup>30</sup> Statement of Claims, ¶ 23.

<sup>31</sup> Statement of Claims, ¶ 24.

<sup>32</sup> Statement of Claims, ¶ 24 - ¶ 34.

<sup>33</sup> Statement of Claims, ¶ 38.

organization of the State.”<sup>34</sup> Accordingly, all of the actions complained of are attributable to the Romanian State.<sup>35</sup>

53. On the basis of the guarantees contained in the BIT and (via the most-favoured-nation clause) the Energy Charter Treaty of 1994 and in customary international law, the Memorial on the Merits claims the benefit of the following standards of treatment:

- a. **Fair and Equitable Treatment.**<sup>36</sup> This standard is said to contain the following sub-elements from arbitral case law: (1) Transparency and the protection of the investor’s basic expectations; (2) Freedom from harassment; (3) Procedural propriety and due process; and (4) Good faith.
- b. **Protection and Security,**<sup>37</sup> which included both physical and other forms of security, including security of the investment, and protection from State harassment. This standard was said to require a broader interpretation of the Fair and Equitable Treatment standard.
- c. Protection against **Unreasonable or Discriminatory Measures,**<sup>38</sup> which was said to be related to the Fair and Equitable Treatment standard.

54. In support of its claim that the actions of the Respondent breached these standards:

- a. First, it is argued that Mr. Talpes and his office lacked any powers to investigate the privatization of Petromidia, and that the excess of authority demonstrated by the report breached the fair and equitable treatment standard.<sup>39</sup>
- b. Secondly, it is argued that the conduct of the investigations by the PNA intentionally circumvented procedural requirements by artificially maintaining *in rem* investigations in breach of Article 6(3)(a) of the ECHR and Romanian law.<sup>40</sup>

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<sup>34</sup> Statement of Claims, ¶ 39.

<sup>35</sup> Statement of Claims, ¶ 40.

<sup>36</sup> Statement of Claims, ¶ 49 - ¶ 72.

<sup>37</sup> Statement of Claims, ¶ 73 - ¶ 83.

<sup>38</sup> Statement of Claims, ¶ 84 - ¶ 85.

<sup>39</sup> Statement of Claims, ¶ 95, referring to *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5.

- c. Thirdly, it is argued that the GPO blatantly ignored valid Romanian court decisions in RRC's favour that vindicated the conduct of its executives, rendering any investigation into such matters abusive harassment.<sup>41</sup>
  - d. Fourthly, these investigations included arrests and attempted arrests of key TRG executives, in violation of due process requirements.<sup>42</sup>
  - e. Fifthly, non-compliance with the applicable banking legislation in pursuing the GPO investigation was abusive and a breach of the duty to act in good faith.<sup>43</sup>
  - f. Sixthly, the GPO committed gross procedural violations in failing to keep investigations secret, failing to notify defence counsel of dates and times of interviews and excluding counsel from participation in such interviews etc. (see paragraph 47(d) above).<sup>44</sup>
  - g. Seventhly, the Wiretapping was said to be illegal, and to have engendered fear and a lack of confidence among Rompetrol employees.<sup>45</sup>
  - h. Eighthly, the GPO Attachment Ordinance over TRG-owned shares in RRC (see paragraph 50(c) above) was said to be in breach of Article 3(1) of the Treaty by impairing TRG's ability, as a protected investor, to dispose of these shares.<sup>46</sup>
55. The Memorial on the Merits argues that each of these eight matters is sufficient to engage Romania's international responsibility since they are in utter disregard of the protections and rights guaranteed by the Dutch-Romanian BIT and the ECT, as well as international standards

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<sup>40</sup> Statement of Claims, ¶ 98.

<sup>41</sup> Statement of Claims, ¶ 104 - ¶ 124.

<sup>42</sup> Statement of Claims, ¶ 125 - ¶ 138.

<sup>43</sup> Statement of Claims, ¶ 139 - ¶ 142.

<sup>44</sup> Statement of Claims, ¶ 143 - ¶ 157.

<sup>45</sup> Statement of Claims, ¶ 158 - ¶ 168.

<sup>46</sup> Statement of Claims, ¶ 169 - ¶ 174.

of due process and good faith; in addition, if these various failings are “*viewed collectively, there can be no doubt that Respondent is in breach of its Treaty obligations.*”<sup>47</sup>

56. As to the damages claimed, the Memorial on the Merits relies on Article 31 of the ILC Articles on State Responsibility, and the well-known principle set out by the Permanent Court of International Justice in the *Chorzów Factory* case 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.*”<sup>48</sup>
57. As to the quantum of damages due, TRG submits the expert opinion in the Dunbar report, which takes as its objective to calculate the impact on TRG’s market value as a result of identified acts of the Respondent that caused loss to TRG, employing for that purpose the ‘event study’ method, and basing itself on a selection of such acts over a shorter period than all of the conduct complained of by TRG; the claim is thus characterised by TRG as ‘conservative,’ and amounts to a total claim for compensation in the amount of US\$139,385,084 as at 28 March 2006, plus interest. TRG further claims reimbursement of its costs in the arbitration.

#### C1.C. Claimant’s Reply

58. In its Reply, filed in response to Romania’s Statement of Defence, TRG makes three broad points: that Romania misconstrues the Claimant’s case as a claim for denial of justice and thus misunderstands the relevance of local remedies; secondly, that the primary contentions of fact set forth in the witness statements of Mr. Patriciu and Mr. Stephenson’s second witness statement are effectively uncontested, Romania’s counter-evidence being beside the point;<sup>49</sup> thirdly, the Claimant responds to the criticisms of the Dunbar report’s methodology and its application to the facts, and maintains its contention that the record establishes that Romania’s breaches caused Rompetrol significant damage. TRG further submits that, given the important circumstance that the Respondent has exclusive access to the bulk of the evidence going to the explanation of the acts of harassment against RRC, the factual burden of proof has shifted to the Respondent to disprove the *prima facie* case established by the evidence submitted by the Claimant.

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<sup>47</sup> Statement of Claims, ¶ 175.

<sup>48</sup> *Chorzów Factory Case (Germany v. Poland)* 1928 PCIJ (Ser A) No. 17, ¶ 40.

<sup>49</sup> Reply, ¶ 2.



59. Accompanying the Reply were further witness statements from Mr. Patriciu and Mr. Stephenson, and statements from five new witness: Mr. Karim Benabderrazik (former Managing Director of Vector AG, TRG’s international trading arm); Mr. Adrian Volintiru (former RRC CFO); Mr. Dan Ioan Popescu (former Minister of the Economy); Mr. Sorin Rosca Stanescu (a journalist); and, Mr. Ovidiu Budusan (former Romanian prosecutor and criminal defence counsel to Mr. Patriciu and Mr. Stephenson). In addition, TRG filed three further expert reports: a second legal opinion by Professor Alexandru Boroι (“the Second Boroι Opinion”); an expert opinion (on Romanian public and constitutional law) by Professor Coreneliu-Liviu Popescu (“the Popescu opinion”); and, a further report on quantum from Dr. Chudozie Okongwu of NERA (“Okongwu report”) (replacing Dr. Dunbar, who had in the interim been appointed to the US Securities and Exchange Commission) in response to the Respondent’s expert report by Dow and Lapuerta.
60. The first broad point made by TRG, that Romania responds to a case that TRG did not advance (denial of justice), divides into four parts:
- a. First, that Romania misunderstands the proper place of local remedies.<sup>50</sup> TRG argues that Article 26 of the BIT is a waiver of the local remedies rule, and that in any event TRG’s complaints are not about the conduct of the courts, but of the prosecutors. TRG relies in this regard on the Award of an ICSID Tribunal in *Benvenuti & Bonfant v. Congo*,<sup>51</sup> and the judgments of the ICJ in *LaGrand (Germany v. US)*<sup>52</sup> and *Avena (Mexico v. US)*<sup>53</sup> TRG asserts, in reliance on the ICJ judgment in *ELSI (US v. Italy)*,<sup>54</sup> that findings of local courts might be “*relevant to an argument that it was also arbitrary*”<sup>55</sup> but that could not be determinative.
  - b. Second, that TRG’s case is not about the adequacy of Romania’s administration of justice but about its abuse.<sup>56</sup>

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<sup>50</sup> Reply, ¶ 19 - ¶ 29.

<sup>51</sup> *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, ¶ 4.59 and ¶ 4.62. Exhibit CLA-83.

<sup>52</sup> Judgment (27 June 2001) 2001 ICJ 466, pp. 497-498. Exhibit CLA-93.

<sup>53</sup> Judgment (31 March 2004) 2004 ICJ 12, pp. 50-51. Exhibit CLA-81.

<sup>54</sup> Judgment (20 July 1989) 1989 ICJ 15, p. 74. Exhibit CLA-85.

<sup>55</sup> *Ibid.*, ¶ 124, p. 74.

<sup>56</sup> Reply, ¶ 31 - ¶ 33.

- c. Thirdly, that Romania’s system of justice is not in any event as transparent or functional as asserted by Romania.<sup>57</sup>
  - d. Lastly, that Romania’s reliance on human rights jurisprudence is misplaced.<sup>58</sup> The key argument here is that Romania is wrong to claim that the Convention supplies the appropriate standard for BIT, and to argue that if the ECHR standard is respected then there can be no breach of the Treaty standard. TRG instead argues that human rights standards set a ‘floor,’ but not a ‘ceiling’ that would limit the level of protection that might be granted under the Treaty, so that ECHR case law can only be of assistance by analogy.<sup>59</sup>
61. The Reply equally contests Romania’s factual assertions that its conduct was legitimate and justified, pointing to the absence of any evidence to counter that of Mr. Patriciu and Mr. Stephenson in their witness statements, in particular:
- a. The threats made by Mr. Talpes in the context of mentioning the competing refinery RAFO Onesti that “*Romanian enterprises must work together*”;<sup>60</sup>
  - b. That in early March, Mr. Patriciu was threatened by a representative of RAFO that a report by Mr. Talpes would be published that would be damaging to TRG if he would not agree to a merger with the RAFO Group;
  - c. That the Talpes report was leaked to the press;
  - d. That the allegations in the Talpes report were rejected by the competent State organs;<sup>61</sup>
  - e. That the PNA shortly thereafter announced criminal investigations against TRG executives; and

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<sup>57</sup> Reply, ¶ 34 - ¶ 38.

<sup>58</sup> Reply, ¶ 39 - ¶ 46.

<sup>59</sup> Reply, ¶ 45 and ¶ 109.

<sup>60</sup> WS Patriciu 1, ¶ 12.

<sup>61</sup> WS Patriciu 1, ¶ 20.

f. That the investigations hampered the ability of TRG to access financing or achieving its business goals.<sup>62</sup>

62. In response to Romania's argument (see paragraph 79b. below) that no 'orchestrator' of the supposed campaign of harassment has been identified by TRG, the Reply asserts that there in fact were two orchestrators: first, the former General and Presidential Counsellor, Mr. Talpes and, second, after he rose to office, President Basescu.
63. In support, the Reply invokes<sup>63</sup> the written evidence of Mr. Stanescu<sup>64</sup> and Former Minister Popescu,<sup>65</sup> in which Mr. Stanescu says that Mr. Talpes was a controversial figure in Romanian society who became interested in the energy sector and was associated with Mr. Tender, a leading figure in RAFO Onesti, and Mr. Popescu says that the Talpes report was subjective and unreliable. The Reply notes that Romania accepts that the Talpes report led to investigations led by Ms. Cristescu, who is alleged in a Romanian press report to be connected to Mr. Talpes.
64. In relation to President Basescu,<sup>66</sup> Mr. Stanescu's witness statement says that President Basescu threatened Mr. Patriciu because of his political opposition,<sup>67</sup> and that it was only once President Basescu was in office that the GPO investigation commenced.
65. The Reply also takes issue with Romania's justification of its investigations:
- a. **The privatization of Petromidia.**<sup>68</sup> TRG argues that the Romanian privatization agency concluded that there were no irregularities, and that in any event the RRC managers were appointed after the decrease in share price which is the subject of Romania's investigation.
  - b. **The privatization of Vega.**<sup>69</sup> TRG counters as untenable Romania's claim that the court decision that the privatization of Vega had been properly conducted did not preclude its invalidation on the basis of fraud by pointing out that the supposedly

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<sup>62</sup> WS Stephenson 2, ¶ 39.

<sup>63</sup> Reply, ¶ 56 - ¶ 68.

<sup>64</sup> WS Stanescu, ¶ 22.

<sup>65</sup> WS Popescu, ¶ 9.

<sup>66</sup> Reply, ¶ 69 - ¶ 77.

<sup>67</sup> WS Stanescu, ¶ 7 - ¶ 18.

<sup>68</sup> Reply, ¶ 84 - ¶ 87.

<sup>69</sup> Reply, ¶ 88 - ¶ 91.

fraudulent misrepresentation was about the amount of the State's own shareholding.

- c. **Alleged unpaid excise taxes:**<sup>70</sup> TRG argues that the logical step, in the event of unpaid excise taxes, would be to commence collection action, not to institute criminal proceedings for alleged tax evasion; but there was in any case a court decision to the effect that no such excise taxes were due: “*TRG has no obligation to pay excise taxes for the fuel owned by SC Rafinarie Steaua Romana SA held in its custody, an issue definitively settled by the abovementioned decisions.*”<sup>71</sup>
- d. **The Libyan receivable:**<sup>72</sup> TRG argues that there was no justification for the action taken against *inter alia* Mr. Patriciu and Mr. Stephenson, because there were clear Romanian court decisions<sup>73</sup> to the effect that the company and not the State owned the receivable (and the same applied to a variety of other similar companies who also had receivable).<sup>74</sup>
- e. **Alleged market manipulation:**<sup>75</sup> According to Mr. Stephenson's witness statement<sup>76</sup> the relevant listing of shares had been investigated and cleared by both the Bucharest Securities Exchange Board and the National Securities Council.

66. TRG further argues that, far from the actions of Romania being legitimate and justified, in fact they breached international law standards in each of the following ways, and by taking these events together:

- a. **The Talpes report:**<sup>77</sup> Professor Popescu's Opinion<sup>78</sup> was that there was no authority for the production of the report and as a matter of Romanian constitutional law it was an abuse of power to produce such a report; former

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<sup>70</sup> Reply, ¶ 92 - ¶ 94.

<sup>71</sup> Reply, ¶ 94. Exhibit C-127, Minutes of the Bucharest Court – 1<sup>st</sup> Criminal Division, in file No. 10352/3/2006, 27 March 2006, p. 42.

<sup>72</sup> Reply, ¶ 95 - ¶ 100.

<sup>73</sup> TRG referred as an example to the Supreme Court decision to this effect at Exhibit C-165.

<sup>74</sup> See WS Stephenson 3, ¶ 29 - ¶ 34.

<sup>75</sup> Reply, ¶ 101 - ¶ 106.

<sup>76</sup> WS Stephenson 3, ¶ 11.

<sup>77</sup> Reply, ¶ 113 - ¶ 124.

<sup>78</sup> Popescu Opinion, pp. 6-25.

minister Mr. Popescu's written evidence<sup>79</sup> was that he had never seen the Presidential Administration deal with issues of privatization in the energy sector. In short Romania had no answer to the argument that this report was part of an orchestrated abuse of state power in order to inflict maximum damage on TRG.

- b. **The Media Campaign:**<sup>80</sup> TRG argues that press releases were conclusory, and were timed so as to inflict damage on it,<sup>81</sup> and that the content of the press releases was false, and did not represent what Romania describes as a "*delicate balance*"<sup>82</sup> between the right to privacy and the presumption of innocence on the one hand, and the public interest in knowing about investigations on the other hand.
- c. **Attempts to Incarcerate TRG executives.**<sup>83</sup> TRG notes that the facts of Romania's attempts to incarcerate its executives are not contested, and that Romania's expert, Professor Kühne, is not qualified, by contrast with TRG's witnesses, Professor Boroï and Mr. Budusan, to give expert evidence on whether the State's actions were justified under Romanian law. TRG further argues that international law is in any case the appropriate standard, not Romanian law, and that seeking to imprison TRG's CEO on the basis that TRG had brought arbitral proceedings under the BIT is *per se* a violation of the fair and equitable treatment standard, citing *Compañia de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*.<sup>84</sup>
- d. **The seizure of Rompetrol's shares.**<sup>85</sup> TRG points out that Romania does not contest that its actions to seize these shares was found to be illegal but relies instead on Professor Kühne's Opinion about practice in other countries and on its argument that it was a good faith difference of interpretation of what the law permitted. TRG contests that there was any room on the facts for an argument as to 'good faith interpretation,' and that the subsequent prevarications of the GPO

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<sup>79</sup> WS Popescu, ¶ 13.

<sup>80</sup> Reply, ¶ 125 - ¶ 137.

<sup>81</sup> WS Patriciu, ¶ 36.

<sup>82</sup> Statement of Defence, ¶ 200.

<sup>83</sup> Reply, ¶ 138 - ¶ 145.

<sup>84</sup> *Compañia de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.4.45, p. 221, Exhibit CLA-41.

<sup>85</sup> Reply, ¶ 146 - ¶ 153.

slowing down resolution of the seizure, were deliberate and a manifest cause of harm to TRG, provoking an event of default under TRG's financing arrangements.

e. **The PNA and GPO's abuse of powers:**<sup>86</sup> TRG reiterates that the appropriate standard for assessing its complaints about the extent of investigations, the failure to provide access to prosecutorial papers, the conducting of *ex parte* interviews, and use of 'technical scientific assessment reports' to achieve biased evidence rather than independent experts, is not (as Romania asserts) the ECHR or 'good faith,' but the terms of the BIT, while rejecting also the suggestion that there is no evidence of bad faith; the wiretapping in particular is clear evidence of illegality.

f. **Tax audits:**<sup>87</sup> TRG tenders Mr. Volintiru's evidence to the effect that the tax audits were oppressive and damaging.<sup>88</sup>

67. Finally, in relation to the second broad point that the actions of Romania were legitimate and justified, TRG reiterates that the burden of proof shifts<sup>89</sup> to Romania to disprove the complaints in circumstances where most of the relevant information is not available to TRG, but TRG has given *prima facie* evidence of bad faith and oppressive conduct orchestrated by the State.

68. The third broad point of the Claimant's Reply is that there are clear indications of significant damage caused to TRG,<sup>90</sup> shown not only by the Dunbar report, but also the Okongwu report. TRG repeats that the 'event-study method' for calculating damages is a reliable way to calculate loss which accords with the BIT. In particular, the Okongwu report explains: (i) that NERA analysed the right shares (RRC's shares were the only ones traded, and since they did not carry a premium were a conservative estimate of any loss); (ii) that the prosecutorial events are the correct events (they were not justified, but politically motivated wrongs); (iii) that NERA's calculation is accurate (that the events were selected with hindsight is not a problem, but ensures accuracy); and (iv) NERA did not fail to include significant events, nor make technical errors and did use 'reality checks'. Furthermore TRG tenders in corroboration the

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<sup>86</sup> Reply, ¶ 154 - ¶ 171.

<sup>87</sup> Reply, ¶ 172 - ¶ 175.

<sup>88</sup> WS Volintiru, ¶ 3 - ¶ 19.

<sup>89</sup> Reply, ¶ 176 - ¶ 195.

<sup>90</sup> Reply, ¶ 176 - ¶ 195.

witness statement of Mr. Benabderrazik as to the financial impact of the Romanian conduct complained about.

## **C2. Respondent's arguments**

### C2.A. Respondent's Answer to the Request for Arbitration

69. Romania's response to TRG's Request for Arbitration sets out in some detail the historical context for the claim, explaining in particular, with reference to the post-Ceausescu period after the fall of Communism in 1989, that "*many of the privatizations that took place during this period are considered seriously flawed.*"<sup>91</sup> This was a period in which, according to Romania, a legacy of corruption hindered economic restructuring, and in 2001 the State intensified efforts to fight corruption, tax evasion and economic crime as part of a process that led to accession to the European Union (EU) in 2007.<sup>92</sup>
70. Romania explains that in the spring of 2004 the European Commission focussed on full implementation of the rule of law as a core part of preparation for accession to the EU.<sup>93</sup> Accordingly, Romania revised its 2001 anti-corruption measures in early 2005.<sup>94</sup> Further, in October 2005, the European Commission published a comprehensive monitoring report that concluded that whilst significant steps had been taken, there was still a key need to tackle corruption, "*particularly for high-level political corruption.*"<sup>95</sup> Another report in May 2006 noted continued progress, but stated that further action was required to ensure "*that all judges have sufficient specialist knowledge to hear and judge complex economic and financial cases based on DNA's [a then new anti-corruption agency] recent investigations into fraud in privatisations and public procurement.*"<sup>96</sup>
71. Romania claims that systematic efforts to root out corruption were bound to cause a level of interference with business activities of foreign and domestic investors and points out that "*any*

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<sup>91</sup> Answer to the Request for Arbitration, ¶ 12.

<sup>92</sup> Answer to the Request for Arbitration, ¶ 13.

<sup>93</sup> Answer to the Request for Arbitration, ¶ 15.

<sup>94</sup> Answer to the Request for Arbitration, ¶ 16.

<sup>95</sup> 'Romania: 2005 Comprehensive Monitoring Report' European Commission, SEC (2005) 1354, Brussels, 25 October 2005.

<sup>96</sup> 'Romania: May 2006 Monitoring Report' Commission of the European Communities, SEC (2006) 596, Brussels, 16 May 2006, p. 8, Exhibit R-4.

*seriously conducted investigations into economic crime are likely to be perceived as 'harassment' by those affected.*"<sup>97</sup>

72. Romania argues that its methods for conducting such investigations were already subject to the watchful eyes of the international community, and in particular the safeguards provided by the European Convention on Human Rights.<sup>98</sup>
73. Romania goes on to describe the investigations which TRG complains about as being part of the picture of its anti-corruption activities, and argues that “[t]he Claimant presents the Government’s anti-corruption campaign out of context, as if Mr. Patriciu and his colleagues, and the companies controlled by them, had been the sole target of the Government’s investigations.”<sup>99</sup> Romania explains that other commercial actors have been subject to investigations, including the managers of the RAFO Group, which TRG claimed were colluding with Romania to its detriment.<sup>100</sup> Romania describes the transfer of Ms. Adriana Cristescu from the PNA to the GPO as entirely innocent; she had been with the PNA on secondment from the GPO, and was returned there with the file to ensure continuity of the criminal investigations, a key objective of the National Anti-Corruption Strategy 2005-2007.<sup>101</sup>
74. Romania alleges that, far from its investigations being inappropriate and not targeted on TRG, to the contrary, it was TRG which in the course of 2005 began a concerted effort to pressurise the Government into ceasing its investigations.<sup>102</sup>
75. Romania complains in particular that:

*the Claimant has not made any attempt to identify the specific acts or omissions attributable to the Respondent which, in the Claimant’s view, constitute breaches of the relevant standards in Article 3(1) of the Dutch Romanian BIT, or to link such acts or omissions to the relevant treaty standards.*<sup>103</sup>

76. Romania responds to the specific claims as follows:

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<sup>97</sup> Answer to the Request for Arbitration, ¶ 21.

<sup>98</sup> Answer to the Request for Arbitration, ¶ 23.

<sup>99</sup> Answer to the Request for Arbitration, ¶ 26.

<sup>100</sup> Answer to the Request for Arbitration, ¶ 27.

<sup>101</sup> Answer to the Request for Arbitration, ¶ 29.

<sup>102</sup> Answer to the Request for Arbitration, ¶ 32 - ¶ 33.

<sup>103</sup> Answer to the Request for Arbitration, ¶ 63.



- a. Out of the 120 fiscal controls referred to by TRG, most of them were requested by one of the companies concerned, or were otherwise “*limited in scope and lasted no more than a day*”;<sup>104</sup>
  - b. Given the importance of the matters at stake, it would have been a “*cause for concern*”<sup>105</sup> if the matters set out in the Talpes report had not been investigated;
  - c. The transfer from the PNA to the GPO was not a signal of the end of the PNA’s investigation, rather it was that information had come to light that economic crimes may have been committed which lay within the competence of the GPO and not the PNA;<sup>106</sup>
  - d. The investigations of Mr. Patriciu and his colleagues were founded on evidence,<sup>107</sup> and the claim that detaining Mr. Patriciu for one day was a breach of due process is denied, but ought in any event to be heard elsewhere and there is no legal basis for the complaint.<sup>108</sup>
77. The Respondent’s Answer also criticises the relief claimed on the basis that the Tribunal has no jurisdiction to consider the violation of Romanian law,<sup>109</sup> and on the basis that no explanation is given as to why the ECT standards are thought to be higher than those contained in the BIT.<sup>110</sup>

C2.B. The Respondent’s Counter-Memorial (Statement of Defence)

78. The Respondent’s Counter-Memorial (“Statement of Defence”), filed on 24 July 2009, refutes generally all elements of the Statement of Claims. Not all of the facts alleged by TRG are disputed, but their characterisation by the Claimant is regularly challenged by the Respondent which puts forward alternative interpretations of its own. The Counter-Memorial is accompanied by factual exhibits and by the witness statements of Ms. Cecilia Morariu (of the

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<sup>104</sup> Answer to the Request for Arbitration, ¶ 65.

<sup>105</sup> Answer to the Request for Arbitration, ¶ 67.

<sup>106</sup> Answer to the Request for Arbitration, ¶ 68.

<sup>107</sup> Answer to the Request for Arbitration, ¶ 69.

<sup>108</sup> Answer to the Request for Arbitration, ¶ 71 - ¶ 72.

<sup>109</sup> Answer to the Request for Arbitration, ¶ 60.

<sup>110</sup> Answer to the Request for Arbitration, ¶ 61.

Superior Council of Magistracy or “CSM”) and Ms. Valeria Nistor (of the National Agency for Fiscal Administration), an expert report on damages by Professor James Dow and Mr. Carlos Lapuerta (“the Dow-Lapuerta report”) and an expert legal opinion by Professor Dr. H-H Kühne (“the Kühne Opinion”).

79. There are four main strands to the Statement of Defence:

- a. First, that the Claimant mischaracterized the investigations undertaken by Romanian State agencies. The incidents referred to by the Claimant are dealt with one by one with “*detailed factual explanations ... necessary in order to put the record straight and show that none of these incidents were in violation of Romanian law, let alone international law.*”<sup>111</sup> The main argument is that the investigations were legitimate and reasonable and did not in any way breach the State’s international obligations to TRG. The Defence further alleges that the investigations were in fact in TRG’s interests, since they were directed at preventing a small number of managers from using RRC to “*reap illegal benefits,*”<sup>112</sup> stating that “*it must not be overlooked that RRC is a public company with a considerable number of Romanian shareholders;*”<sup>113</sup> the Claimant would accordingly benefit from the investigations, particularly if their outcome established wrongdoing that had caused harm to TRG.
  
- b. Secondly, the Defence rejects TRG’s theory of orchestrated State persecution, in particular the insinuation that Romania’s prosecutors act “*at the behest of the Government and those who run it,*”<sup>114</sup> arguing rather that the justice system, including the role of prosecutors, had been “*the subject of profound change*”<sup>115</sup> as part of the process of Romania’s entry into the European Union.<sup>116</sup> The investigations, the subject of the complaints, are characterised by the Respondent as part of a fresh drive to eradicate corruption in Romania, and that these changes

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<sup>111</sup> Statement of Defence, ¶ 7. See also ¶ 41 - ¶ 64.

<sup>112</sup> Statement of Defence, ¶ 6.

<sup>113</sup> Statement of Defence, ¶ 5.

<sup>114</sup> Statement of Defence, ¶ 19.

<sup>115</sup> Statement of Defence, ¶ 21.

<sup>116</sup> Statement of Defence, ¶ 20 and ¶ 23 - ¶ 40.

come as somewhat of a surprise to Mr. Patriciu, who as a Romanian has not been used to such investigations in his country until this point.<sup>117</sup>

- c. Thirdly, the Defence argues that the complaints amount to a series of technical complaints about Romanian procedure, which cannot and do not amount to breaches of its obligations under the BIT, which would instead require evidence of a denial of justice,<sup>118</sup> and that the real purpose of the arbitral proceedings was to apply pressure as a litigation tactic to undermine the domestic criminal proceedings.<sup>119</sup>
- d. Finally, the Defence takes fundamental issue with the Claimant's approach to quantum, arguing that the Dunbar report is unreliable and that the approach to loss on a proper view could give rise to no sure losses; moreover many incidents which formed the basis of a complaint are not linked to any loss, and can therefore be disregarded by the Tribunal.<sup>120</sup>

80. The Defence proffers material to show that the investigations complained about were justified by evidence, in relation to four issues: (1) suspected wrongdoing in relation to the privatisation of Petromidia; (2) suspected tax evasion by RRC; (3) suspected market manipulation in relation to the sale of RRC shares on the Bucharest Stock Exchange; and (4) the failure by RRC to pay US\$85 million to the Romanian government arising from an oil and gas project initiated in Libya in the 1980's ("the Libyan receivable"). The Defence argues that each of these investigations was justified, but only the last two had thus far crystallised into criminal charges by way of an indictment dated 7 September 2006 ("the Indictment"):

- a. First, the Petromidia privatisation investigations were justified<sup>121</sup> on the basis that there was evidence that indicated that the price of shares decreased five times during the privatization process, even though this decrease was not justified by the financial state of the company. There appeared to be irregularities in the final

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<sup>117</sup> Statement of Defence, ¶ 22.

<sup>118</sup> Statement of Defence, ¶ 12, referring to *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.33, Exhibit RLA-41. See also Statement of Defence, ¶ 100.

<sup>119</sup> Statement of Defence, ¶ 13.

<sup>120</sup> Statement of Defence, ¶ 15.

<sup>121</sup> Statement of Defence, ¶ 45 - ¶ 51.

price that TRG paid and the manner in which the privatization was structured that justified investigation. The GPO investigations into the matter, *in personam*, uncovered evidence suggesting that assets belonging to Petromidia SA had been transferred by TRG in breach of the privatization contract. Criminal allegations of fraud and money laundering were investigated on the basis of plausible concern. These investigations were still in train at the date of filing of the Counter-Memorial.

- b. Secondly, tax fraud allegations were at the date of the Statement of Defence still under way in relation to the suspicion that RRC had failed to pay certain excise taxes as a result of sales of oil products made to Steaua Romana, and for failure to record income for sales that had been made to RAFO Onesti.<sup>122</sup>
- c. Thirdly, the Libyan receivable issue<sup>123</sup> formed part of the Indictment. The nub of this issue was whether the Libyan receivable, which had been agreed prior to the privatization, was due to be paid for the benefit of RRC or that of the State. The Indictment set out the view that the money belonged to the State and that the individuals charged had conspired to launder the funds giving rise to charges of money laundering, embezzlement and complicity in embezzlement.
- d. Fourthly, the Indictment also contained evidence of charges of market manipulation in relation to what the GPO regarded as highly suspicious trading that took place on the Bucharest Stock Exchange on the first days of trading RRC shares, namely that RRC shares appeared to have been undersold in a coordinated fashion to manipulate the share prices.<sup>124</sup>

81. The Defence argues that, although accused individuals are entitled to the presumption of innocence until proven guilty, there was clearly sufficient evidence to warrant investigations and, where they had been brought, prosecutions. The Respondent claimed therefore that TRG's

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<sup>122</sup> Statement of Defence, ¶ 52 - ¶ 53.

<sup>123</sup> Statement of Defence, ¶ 54 - ¶ 58.

<sup>124</sup> Statement of Defence, ¶ 59 - ¶ 64.

action in bringing the present proceedings was geared towards “*escaping the reality of*” the criminal investigations and ought to be regarded as spurious.<sup>125</sup>

82. In relation to TRG’s theory of orchestrated persecution, which the Defence cites TRG as describing as at the “*heart*” of its case,<sup>126</sup> the following points are advanced:

- a. The Claimant offers no orchestrator for its orchestration theory;<sup>127</sup>
- b. The reference by the Claimant to President Basescu does not make sense in light of the complaints made, e.g. the Talpes report was published during President Iliescu’s term of office, but Mr. Talpes left office when President Basescu (who was a member of a different political party to President Iliescu) took office;<sup>128</sup>
- c. The idea that the State sought to assist RAFO Onesti is baseless. In fact members of the RAFO Group have been jailed and subject to criminal proceedings, and RAFO was forced into bankruptcy. This is not a company that enjoyed the patronage and protection of the State;<sup>129</sup>
- d. No proof is given that the prosecutors had any ulterior motives, and no Romanian court has adopted this view. Consequently, if there were orchestration it would have had to include the Romanian judiciary, but no such claim of conspiracy against the judiciary is made.<sup>130</sup>

83. In general, the Defence argues that the Claimant does not have any claims under international law, but its complaints are best characterized as complaints for breaches of Romanian law, which fall outside of the jurisdiction of the Tribunal. Specifically:

- a. The claims relating to the Romanian tax authorities are misguided on the basis that the relevant tax legislation required frequent visits, these visits were justified, there were no serious complaints by the witnesses about tax reports, and some

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<sup>125</sup> Statement of Defence, ¶ 65.

<sup>126</sup> Statement of Defence, ¶ 66, citing the Statement of Claims, ¶ 3.

<sup>127</sup> Statement of Defence, ¶ 67.

<sup>128</sup> Statement of Defence, ¶ 68 - ¶ 72.

<sup>129</sup> Statement of Defence, ¶ 76 - ¶ 78.

<sup>130</sup> Statement of Defence, ¶ 79.

complaints merely attempt to re-litigate matters finally determined by domestic proceedings.<sup>131</sup>

b. The Presidential Administration acted lawfully in its investigations and in producing the Talpes report.<sup>132</sup> It was argued that the Report highlighted serious concerns about Romania's largest refinery – a matter that was essential to Romania's national security interests, which was wrongly defined by the Claimant. The complaint that Mr. Patriciu should have been notified of the Report was dismissed on the basis that it was an internal document, and this is unaffected by the fact that the document later appeared in the public domain.

c. Finally, there is no evidential basis for the allegations of bad faith or ulterior motive against the prosecutorial authorities which are very serious in nature and amount to allegations of criminal conduct under Romanian law (but do not amount to violations of international law standards).<sup>133</sup> It was noted that there have been no findings by any domestic court of bad faith by any of the investigators, despite the numerous complaints that Mr. Patriciu and TRG have brought against the prosecutors. This section also argues that many complaints against the prosecutions are misguided because they mischaracterise stages of investigation as at the 'judicial examination' stage, rather than as within the prosecutor's discretion whether to proceed further,<sup>134</sup> and reinterprets the facts surrounding Mr. Patriciu's arrest. Romania also argues that the State's conduct involved in the Wiretapping Complaint was lawful in Romania and consistent with European human rights law at the time it was conducted (between October 2003-January 2005), and that it only later became unlawful as a result of a subsequent decision of the European Court of Human Rights in 2007 in *Dumitru Popescu v. Romania* ("Popescu").<sup>135</sup>

84. Last of all, the Statement of Defence casts fundamental doubts on the Claimant's approach to damages and quantum,<sup>136</sup> on the basis that it did not seek to quantify direct damage, but on

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<sup>131</sup> Statement of Defence, ¶ 82 and ¶ 85 - ¶ 100.

<sup>132</sup> Statement of Defence, ¶ 101 - ¶ 133.

<sup>133</sup> Statement of Defence, ¶ 134 - ¶ 261.

<sup>134</sup> Statement of Defence, ¶ 139.

<sup>135</sup> Statement of Defence, ¶ 184 - ¶ 191.

<sup>136</sup> Statement of Defence, ¶ 262 - ¶ 313.

‘virtual damage’ represented by share prices, which rise and fall. The Respondent also notes the Dunbar report does not quantify any losses outside of its period and therefore noted that no claim need therefore be determined in relation to the conduct of the tax authorities and the Presidential Administration on the basis that no damage is quantified in respect of their activities.<sup>137</sup> The Respondent also disputes the claims for interests and costs. On the strength of the Dow-Lapuerta report, the following criticisms are levelled at the Dunbar report:

- a. It analyses the wrong shares<sup>138</sup> – it looks at the shares of RRC, and not TRG, and looks only at the minority shares and does not take into account the “minority discount” when compared with the controlling holding, and does not consider the fact that minority discount may fluctuate differently in price from one event to another compared with those of the controlling stake in RRC. Accordingly, these fluctuations are not a reliable indicator of actual losses.
- b. It uses as ‘events’ incidents that are not the subject of a complaint by TRG<sup>139</sup> - for instance it does not consider that some actions taken by the State not in violation of the Treaty may have caused a drop in the share price. Moreover, apart from the large number of items complained about that are not listed as part of the 12 events,<sup>140</sup> important corrections to the RRC share price have been ignored, for instance the ‘surge’<sup>141</sup> in share price of 7.4% on the news that the Romanian privatization agency had completed its investigations on 2 February 2007 finding no irregularities, and also the news of the sale of Mr. Patriciu’s 75% stake in TRG to KazMunaiGaz; these increases alone wiped out the decreases in share price.
- c. It contains serious technical errors,<sup>142</sup> notably that the 12 event days were chosen on the basis of finding a negative impact, and thereby excluded twenty other days, which if they had been included, would have rendered the ‘damages’ sum statistically insignificant with a margin of error of US\$0 - 280 million.

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<sup>137</sup> Statement of Defence, ¶ 273.

<sup>138</sup> Statement of Defence, ¶ 282 - ¶ 286.

<sup>139</sup> Statement of Defence, ¶ 287 - ¶ 290.

<sup>140</sup> A full list is given in Annex A to the Statement of Claims.

<sup>141</sup> Statement of Defence, ¶ 295.

<sup>142</sup> Statement of Defence, ¶ 298 - ¶ 301.

- d. Finally, no ‘reality checks’ were undertaken against the results, which would have shown that the figures were not reliable.<sup>143</sup>

85. In sum, the Respondent asks the Tribunal to dismiss all the Claimant’s claims with costs.

### C2.C. The Respondent’s Rejoinder

86. The Respondent’s Rejoinder repeats the argument that TRG advances in substance a denial of justice claim but fails to show that domestic remedies have been exhausted and thus cannot succeed, and reasserts that the investigations were justified and that the orchestration theory (which Romania describes as now being two theories) fails. Further, the Respondent argues that there are no breaches of the Treaty, individually or collectively, and that no loss has been established.

87. The Rejoinder addresses these points in four sections:

- a. First, by looking at the legal principles in the case, namely the issues of denial of justice and burden of proof;
- b. Secondly, addressing what Romania refers to as the new allegations related to the State-orchestrated harassment;
- c. Thirdly, Romania deals with the allegations on the facts relating to the tax authorities, the Presidential authorities and the prosecutorial authorities; and
- d. Fourthly, issues of quantum, interests and costs.

88. The Rejoinder is supported by a second witness statement of Ms. Nistor, a second expert report on damages by Messrs. Dow and Lapuerta, an expert report on Romanian constitutional law by Professor Mihai, and a second legal opinion by Professor Kühne.

89. In relation to the first section about the legal principles at issue,<sup>144</sup> Romania first argues that the case advanced is really one of denial of justice, but that the prerequisite of exhaustion of

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<sup>143</sup> Statement of Defence, ¶ 302 - ¶ 305.

<sup>144</sup> Rejoinder, ¶ 39 - ¶ 115.



domestic remedies is not met. Secondly, Romania argues that TRG's approach to standard of proof is incorrect, especially when very serious allegations of bad faith by State authorities are advanced on the basis of what it characterises as scarce evidence. These two issues can be summarised as follows:

- a. **Denial of Justice:**<sup>145</sup> Romania argues that in asking the Tribunal to decide whether Romanian prosecutors have abused the system of administration of justice TRG is in effect making a denial of justice claim, which is a specific form of complaint under the fair and equitable treatment Treaty standard and under customary international law. Romania argues that the acts of the prosecutors are partaking in the administration of justice, and it is irrelevant whether they are formally part of the judiciary or the executive. Romania argue that since this is in substance a denial of justice case there is a requirement to exhaust local remedies, which renders the complaints premature or moot, and as such inadmissible. The only exception to this requirement is if the system itself is regarded as inadequate or ineffective, but no such complaint is made by TRG.
  
- b. **Burden and Standard of Proof:**<sup>146</sup> The Rejoinder claims that TRG is seeking to lower the standard of proof and indeed to shift the burden of proof onto Romania because it has "*no evidence to substantiate the serious claims it makes.*"<sup>147</sup> Whatever principles of international law may exist to shift the burden of proof in certain circumstances should not be applied to the present allegations of State-orchestrated harassment, largely because the allegations are so serious, amounting to criminal conduct, and they should be measured against the need for a high level of proof. Various international authorities indicate that clear evidence is required of fraud or other serious conduct,<sup>148</sup> in the present case such evidence as has been tendered is unreliable and emanates from interested witnesses and parties, which does not even meet a *prima facie* standard.

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<sup>145</sup> Rejoinder, ¶ 44 - ¶ 58.

<sup>146</sup> Rejoinder, ¶ 59 - ¶ 76.

<sup>147</sup> Rejoinder, ¶ 59.

<sup>148</sup> See the authorities discussed at Rejoinder, ¶ 62 - ¶ 65.

c. **International and ECHR Standards of Due Process:**<sup>149</sup> The Rejoinder argues that the criticisms levelled against the actions of the prosecutors have to be judged against the international standard of due process, which is a subset of the fair and equitable treatment standard (and other Treaty standards) relied on. The ECHR standards provide relevant guidance in this connection, particularly Article 6 (right to a fair trial), not least because the jurisprudence of the European Court of Human Rights (“ECtHR”) offers thousands of decisions to draw on, but its relevance is as guidance by analogy only, and is not binding.<sup>150</sup> Romania chides TRG with trying to have matters both ways, both referring to ECtHR judgments and also claiming that the Treaty imposes a higher standard.

90. The second section of the Rejoinder deals with TRG’s orchestration theory, arguing that the motivation alleged to underpin it is elusive and self-defeating: the two ‘orchestrators’ are said to have different objectives,<sup>151</sup> and the different objectives (a merger between TRG and RAFO Onesti on the part of Mr. Talpes, and keeping Mr. Patriciu out of political opposition on the part of President Basescu) conflict with one another and lack credibility.<sup>152</sup> It is further argued that the State in fact assisted TRG (by allowing the restructuring of a large State debt) while letting RAFO Onesti undergo bankruptcy, and an eventual change of ownership, which is hardly consistent with a conspiracy to pressurize RRC in favour of RAFO Onesti. The Rejoinder notes in this context that the original claim that the State was seeking to undermine the privatization of RRC has now been dropped and replaced<sup>153</sup> by a claim that President Basescu persecuted Mr. Patriciu for political and commercial objectives, which Romania argues remains elusive and unexplained, particularly in respect of its allegedly commercial objectives. Further, Romania points out that Mr. Stanescu is currently indicted for market manipulation along with *inter alia* Mr. Patriciu and Mr. Stephenson, and his evidence is not to be trusted.<sup>154</sup> The Rejoinder reiterates that the investigations were commenced for proper purposes.<sup>155</sup>

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<sup>149</sup> Rejoinder, ¶ 77 - ¶ 115.

<sup>150</sup> Rejoinder, ¶ 107.

<sup>151</sup> Rejoinder, ¶ 121.

<sup>152</sup> Rejoinder, ¶ 141 - ¶ 156.

<sup>153</sup> Rejoinder, ¶ 133.

<sup>154</sup> Rejoinder, ¶ 136.

<sup>155</sup> Rejoinder, ¶ 171 - ¶ 201.

91. The third section of the Rejoinder deals with the tax authorities, the Presidential administration and the prosecutorial authorities:

- a. **Tax authorities:**<sup>156</sup> The Rejoinder argues that TRG no longer bases its arguments on the objective evidence provided in the Statement of Claims, but instead on tendentious and inaccurate evidence from Mr. Volintiru, for example, that the number of copies made during investigations was in the region of 10,000, whereas Ms. Nistor's second witness statement shows that the true figure was approximately 1,500.<sup>157</sup>
- b. **Presidential Administration:**<sup>158</sup> The Rejoinder notes that the case has shifted from saying that the President has no investigatory powers to saying that any powers are merely formal, whereas Professor Mihai's expert opinion shows that presidential powers are real and significant, and encompass the creation of the Talpes report.
- c. **Prosecutorial authorities:**<sup>159</sup> This question occupies the most substantial part of the Rejoinder. In arguing that there is no sufficient basis for the serious allegations made against the prosecutorial authorities, the Rejoinder makes a number of separate points: that there is only one complaint made for which there has been a finding of a breach of Romanian law;<sup>160</sup> that the press releases contained nothing that could be characterized as 'conclusory statements'; that much of the case now rests on the timing of the press releases, but offers no evidence of bad faith in that respect; that the courts did indeed find that there was sufficient evidence to justify preventive arrest,<sup>161</sup> but simply found that the circumstances did not warrant arrest prior to trial (although in relation to Mr. Patriciu this was on one occasion only on a majority decision);<sup>162</sup> that the allegation that there was a breach of Treaty *per se* when the GPO sought to justify the arrest on the basis that the ICSID proceedings

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<sup>156</sup> Rejoinder, ¶ 207 - ¶ 216.

<sup>157</sup> WS Nistor 2, ¶ 19.

<sup>158</sup> Rejoinder, ¶ 217 - ¶ 249.

<sup>159</sup> Rejoinder, ¶ 250 - ¶ 412.

<sup>160</sup> Rejoinder, ¶ 255.

<sup>161</sup> Rejoinder, p. 101 for the chart on the rights to arrest, and when they arise.

<sup>162</sup> Rejoinder, ¶ 316.

had been sought to pressurise prosecutors, was “*pure rhetoric*”<sup>163</sup> – especially in light of the fact that the GPO’s arrest proposal was rejected by the court.

92. In its fourth part, the Rejoinder returns to the arguments on damages and quantum in TRG’s Reply, and claims that TRG has had to amend its argument and contend that the entire criminal proceedings brought against Mr. Patriciu are illegal, otherwise it would not be able to stand by the NERA calculations which find decreases in share price due to events that were not claimed to be illegal by TRG (see paragraph 418 of the Rejoinder).<sup>164</sup> Romania also criticises the arguments advanced in the Reply as to direct damages on the basis that Mr. Benabderrazik, Mr. Patriciu and Mr. Stephenson tender nothing to support the assertions contained in their witness statements. The Rejoinder re-iterates that there is no sufficient evidence of any damage at all, and finally disputes both the amount of interest claimed and the date from which it is claimed as being without foundation.

## **D. THE HEARING**

93. The hearing was conducted over seven days at the premises of the World Bank in Paris between 3 and 10 May 2010.<sup>165</sup> This summary of the hearing will take the following format:

- Opening statements;
- Fact witnesses;
- Experts; and
- Closing statements.

### **D1. Opening Statements**

#### D1.A. Claimant

94. The opening statement for TRG was given by Mr. Legum who began by noting three matters on which the Parties were in his submission agreed:

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<sup>163</sup> Rejoinder, ¶ 319.

<sup>164</sup> Rejoinder, ¶ 416 - ¶ 418.

<sup>165</sup> The penultimate sessions on Saturday, 8 May 2010 were held, by agreement between the Parties and the Tribunal on private premises that had been graciously placed at the Tribunal’s disposal. The Tribunal places on record its gratitude to Debevoise & Plimpton LLP.

- a. The merits of the criminal charges are not relevant to the issues before the Tribunal;
  - b. An abuse of the state’s prosecutorial machinery to achieve commercial or political aims is a failure to accord fair and equitable treatment under the BIT; and
  - c. There is broad agreement on the legal standards to be applied. Whilst there are some disagreements on denial of justice, exhaustion of domestic remedies, burden of proof and other issues, the main Treaty standards are agreed.
95. Mr. Legum submitted that the real disagreement was on the evidence. Mr. Legum contrasted TRG’s seven fact witnesses, all of whom were directly and personally involved in the matters on which they testified, with Romania’s two witnesses who presented no more than an after-the-fact analysis based on a review of the paper record, and address only peripheral issues such as the number of tax audits of RRC and the procedure for complaints about prosecutors. Mr. Legum stated that “[i]n many respects the most prominent feature of this hearing is the number of empty chairs,”<sup>166</sup> notable examples being Mr. Talpes, his assistant Mr. Sarbu, Mr. Tender of RAFO Onesti, Prosecutors Cristescu and Nastasiu, and no-one from the presidential administration. As the ICJ had recently pointed out in the *Pulp Mills* case,<sup>167</sup> a respondent should cooperate in the provision of evidence in its possession that would assist in resolving the dispute.
96. Mr. Legum submitted that the Parties were however in disagreement over two important legal issues: denial of justice and the burden of proof. In relation to denial of justice, it was submitted that there was no reason to consider prosecutors in the same category as courts, nor could Romania legitimately disregard Article 8(3) of the BIT which expressly waived the exhaustion of domestic remedies. In relation to the standard of proof, Mr. Legum noted that in Romania even criminal courts do not apply a standard of ‘beyond reasonable doubt,’ and thus it was curious that Romania claimed that an equivalent standard should apply before the Tribunal. As to the burden of proof, Mr. Legum cited from the Parker case: “[t]he Commission denies the ‘right’ of the respondent to merely wait in silence in cases where it is reasonable that it should speak ... in any case where evidence which would probably influence

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<sup>166</sup> Transcript, Day 1, p. 19, lines 24-25.

<sup>167</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Reports 2010, 20 April 2010, p. 14.

*its decisions is peculiarly within the knowledge of the claimant or of the respondent government, the failure to produce it unexplained may be taken into account by the Commission in reaching a decision.”*<sup>168</sup>

97. As to liability, TRG’s case was based on the following five elements: the central facts of TRG’s case remained unanswered; Romania repeatedly failed to reflect the record accurately, and mischaracterised it; Romania frustratingly continued to offer a misleading account of the basics of its own criminal procedure; the Tribunal should draw appropriate inferences from Romania’s failure to comply with the Tribunal’s document production order (on grounds precisely the same as those the Tribunal had rejected) in relation to the requests for the production of banking documents, and the wiretapping warrants; finally, the record established a close causal link between the acts violating the treaty and the injury suffered by TRG. Mr. Legum emphasised in this context that TRG’s assessment of damages was conservative.

#### D1.B. Respondent

98. Opening the case for Romania, Mr. Schneider also laid emphasis on the significance of the facts. The facts in dispute ranged however from the important, to the less important, to the trivial. The issue according to TRG was said to be whether the facts sustained the contentions behind their claims; but in Romania’s submission there was also an issue about what needs to be established to determine this. In that context, there were also a number of important legal issues in dispute. It was agreed that it is not for the Tribunal to decide the investigations and criminal charges pending in Romania; instead TRG sought damages under the BIT. But it could only do so through the “*prism*”<sup>169</sup> of the Treaty.
99. Dr. Heiskanen pointed out that damages were not being sought either for the tax investigations or for the Talpes report, thus showing that they were “*not so much causes of action as ... legal theories that the claimant is pursuing in support of its conspiracy theory.*”<sup>170</sup> TRG’s core claims related to the administration of justice, in which context Romania had registered a preliminary objection during the jurisdictional phase, which the Tribunal had joined to the merits.<sup>171</sup> These core claims remained ones for denial of justice and the standard for claims of that kind was high and went well beyond the mere erroneous application of local law. They

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<sup>168</sup> Transcript, Day 1, p. 29, lines 1-8.

<sup>169</sup> Transcript, Day 1, p. 61, line 20.

<sup>170</sup> Transcript, Day 1, p. 63, lines 6-8.

<sup>171</sup> Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, ¶ 114.

were unavoidably subject to the requirement to exhaust local remedies, because it is an inherent part of the delict and not a mere procedural bar that could be waived.<sup>172</sup> TRG persistently contradicted itself by relying on some of the decisions emerging from the Romanian judicial system while seeking in the Arbitration to re-litigate other such decisions or to raise issues pertinent to the Romanian judicial process.<sup>173</sup> In most of these cases, the proper place for these arguments to be made was in the Romanian legal proceedings that were still pending.

100. Revisiting TRG's orchestration theory, Mr. Schneider drew attention to the precise nature of the so-called Talpes report: in fact a document prepared by Mr. Paul Sarbu and approved by Mr. Talpes, and forwarded to the President with the request that he (the President) request that certain information be provided to him, which the President duly did. The entire issue of the 'legality' of the Report was a red herring. There was no need to call evidence from Messrs. Talpes, Iancu, and Tender, as TRG had argued: the latter two had never been part of the Romanian government, and the former had long since ceased to be so. The sheer incompatibility of the events in 2004/5 with the conspiracy theory (the PNA investigation was concluded, RRC was given a substantial tax benefit by the State, Mr. Iancu and Mr. Tender were indicted, RAFO Onesti went bankrupt, and a new President took office) shows how unacceptable it is for the Claimant to throw a few allegations into the air and say that that reversed the burden of proof, and required Romania to disprove conspiracy. As stated in comparable circumstances by the *Tokios Tokelés* Tribunal:<sup>174</sup> *"there was every reason for the authorities to begin, and continue to press, an enquiry into the connection of [the investor's subsidiary] with these dubious events. There is thus an entirely plausible alternative to the hypothesis of a [conspiracy]. It is not for the State to prove that [the investor's subsidiary] was guilty of economic offence, and the relevance of this material is simply to show that the Claimant is in error in asserting that the events have no credible alternative explanation other than a concerted, malicious and politically inspired campaign."*
101. Mr. Schneider concluded his submissions by analysing in greater detail, on the basis of the documents on the record including internal e-mails within RRC, the grounds for the investigations into (i) the Petromidia privatization, (ii) the Libyan receivable, and (ii) market manipulation of the flotation of Petromidia shares in their initial public offering, in order to

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<sup>172</sup> Transcript, Day 1, p. 66, lines 6-8.

<sup>173</sup> Transcript, Day 1, p. 68, lines 6-7.

<sup>174</sup> Rejoinder, ¶ 204.

show that in each case they met the recognized threshold for the initiation of investigations – irrespective of whether offences were or were not ultimately proved to have been committed.

102. The opening statement was completed by Mr. Scherer who analysed examples of the conduct of the tax authorities, the Presidential administration, and the Prosecutorate in the course of exercising their functions, in order to show that none of them amounted to the sort of manifest injustice or gross deficiency that would be required to constitute a breach of the standards under the BIT.

## D2. Fact Witnesses

### D2.A. Claimant's Witnesses

103. The following among the Claimant's witnesses of fact were called for examination:
  - a. **Mr. Stephenson**<sup>175</sup> gave evidence that he sold his entire interest in TRG in 2007, and had no current business relationship with TRG or Mr. Patriciu. He noted that criminal charges were still pending against him in Romania, and that he had been advised not to answer questions relating to those proceedings. Mr. Stephenson recalled being told about the meetings Mr. Patriciu had with Mr. Talpes and Mr. Tender, though he was not present. He explained further matters set out in his statements. He also explained how he was aware of the detrimental impact of the events referred to by TRG on its value, by constant monitoring of the news and the share price, as well as to the impact on day to day business operations, such as securing finance facilities and access to favourable interest rates. Mr. Stephenson clarified paragraph 25 in his third witness statement as being inaccurate as a result of "*exuberance*,"<sup>176</sup> on the basis that the investigation referred to came to an end and did not conclude that there was no evidence of a violation of securities laws in relation to RRC shares.
  - b. **Mr. Patriciu**<sup>177</sup> explained his professional background, and how he became interested in the oil industry, including the acquisition of the Petromidia refinery.

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<sup>175</sup> Transcript, Day 1, p. 135ff.

<sup>176</sup> Transcript, Day 1, p. 179, line 22.

<sup>177</sup> Transcript, Day 2, p. 28ff.



In direct examination (examination in chief) Mr. Patriciu stated that the restructuring of debt referred to in Romania's Rejoinder was not anything like state aid (as attested to by the European Commission and the Romanian Competition Council) but rather this was a restructuring of a government debt, which was converted into bonds which the company had to pay interest on.<sup>178</sup> Mr. Patriciu gave evidence of the state of the oil industry in the first few years after 2000, that some of the controls against RRC had been undertaken because RRC was suggesting reform to improve the collection of taxes; in Romania there were many illicit payments and therefore it was unpopular in both energy sector and political circles to clean up the industry.<sup>179</sup> Mr. Patriciu saw the action of Mr. Talpes as being in support of private interests. In cross examination Mr. Patriciu was uncertain whether President Basescu was interested in causing difficulty for TRG for political or for commercial reasons. He was referred to a press interview with President Basescu where the latter said that if they were like RAFO Onesti they would receive equal treatment. Mr. Patriciu understood this to mean that he was comparing the two entities and equating TRG with a criminal entity and inviting its prosecution. In his view this came across more clearly in another interview. In response to Counsel's suggestion that in fact the President was being even handed, Mr. Patriciu said that in context the President was referring to TRG in the same breath as the company (RAFO) he had referred to as public enemy number one, and described Constanta Port (where the refinery was based) as Petromidia's fiefdom in a mafia context. He accepted that the President signed the debt restructuring into law, which was good news for the company, but soon after that that prosecutions started. He said that there were contacts who knew the President had influenced the investigation, who were part of the Romanian political elite, but could not be named. In response to the Chairman's question that it appeared contradictory to have increased tax revenues by such a tremendous margin and to be the subject of targeted controls, Mr. Patriciu responded that Romania was a tribal society, and that different factions in the government would be leading the

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<sup>178</sup> Transcript, Day 2, p. 39.

<sup>179</sup> Transcript, Day 2, pp. 46-47.

harassment than those who were pleased with the privatization process; there was conflict between the “*two palaces*”<sup>180</sup> of the Prime Minister and the President.

- c. In the course of his direct evidence (evidence in chief) **Mr. Stanescu**<sup>181</sup> told the Tribunal that, very shortly before the hearing, he had reconsidered his decision to withhold the names of those prosecutors who had told him about the political motivation in this case, having come to the conclusion that these confidences were not offered to him in his capacity as a journalist, but as a friend and a private individual. He proceeded to name four individuals and described the various ways in which each of them had come to him ‘as a friend of Mr. Patriciu’ to inform him of the pressure that the State prosecutors were under to take action against Mr. Patriciu.<sup>182</sup>

Under cross-examination, Mr. Stanescu gave further detail about the criminal process against him in Romania, about the severance of his relations with the Romanian Press Club, and about the closeness of his relations with Mr. Patriciu, as exemplified by the substantial shareholding in the journal *Ziua* given him by Mr. Patriciu as a wedding present, which he later sold; he was however unable to give a figure (including in response to questioning from the Tribunal) on the profit he made from the sale, although he did not think it was more than US\$1.5 million.

- d. **Mr. Popescu**,<sup>183</sup> in cross-examination, described the thorough process instituted in his Ministry (the Ministry of Economy) for preparing its response to the Talpes report, on the basis that the President of Romania had asked to be accurately informed; the Ministry’s response was written on the facts and without any personal comment about the way that the Talpes report was put together, although he had personally been surprised to see Mr. Sarbu and Mr. Talpes dealing with this question. In relation to the restructuring of the government debt, Mr. Popescu gave evidence that this was not to be characterised as a benefit only to TRG, but in fact was a way of ensuring that the interest would be paid and the debt repaid,

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<sup>180</sup> Transcript, Day 2, p. 111, line 19.

<sup>181</sup> Transcript, Day 2, pp. 115ff.

<sup>182</sup> Transcript, Day 2, pp. 119-121. Respondent’s counsel protested against the surprise introduction of this new evidence; see further paragraphs 217-218 below.

<sup>183</sup> Transcript, Day 2, p. 150ff.

which benefitted the State. The alternative, bankruptcy, would be negative for the State as well as for TRG. The solution had been discussed in an inter-Ministerial Committee, approved by the Cabinet, discussed and approved in Parliament, and then formally approved by the President and signed into law.

- e. **Mr. Budusan**<sup>184</sup> described some of the actions of the prosecutors in the opening and conduct of their investigations which he regarded as egregious, and therefore as indications of malicious intent. There was no cross-examination by the Respondent on the basis that Mr. Budusan was the lawyer acting for TRG, Mr. Patriciu and others in the criminal proceedings in Romania, so that his assertions amounted to argument, not evidence.<sup>185</sup> In answer to questions from the Tribunal, Mr. Budusan described the political pressures he and his colleagues had felt they were under during his service as a Prosecutor which might emerge as ‘threats and pressures’ from the persons being investigated or interviewed and the ‘attitude’ of some politicians. So far as he himself personally concerned, he believed that the internal disciplinary action that led to his dismissal from the Ministry had been politically motivated. In his opinion the irregular motivation in the present case had as its target primarily the reversal of the Petromidia privatization in RAFO Onesti’s favour and then to damage Mr. Patriciu as a political rival to the Government in office.<sup>186</sup>
- f. **Mr. Benabderrazik**<sup>187</sup> confirmed that he had no subsisting business relationship with TRG or Mr. Patriciu, and that Mr. Stephenson was a minority shareholder in his company. He also explained the critical importance of financing to the business model of TRG and its daughter companies in and outside Romania, as well as the subjective assumptions that underlay his estimate of the cost to TRG’s capital valuation of the loss of the opportunity to acquire Petromirrales.<sup>188</sup> In response to extensive questioning by the Tribunal, Mr. Benabderrazik offered further explanations of (i) his assumptions of the attitudes of TRG’s and Dyneff’s bankers, (ii) his opinion that at a certain point the focus of Romanian measure

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<sup>184</sup> Transcript, Day 3, p. 2ff.

<sup>185</sup> Transcript, Day 3, p. 10.

<sup>186</sup> Transcript, Day 3, p. 10ff.

<sup>187</sup> Transcript, Day 3, p. 24ff.

<sup>188</sup> Transcript, Day 3, p. 30, line 5.

shifted from Mr. Patriciu and Mr. Stephenson personally to TRG-owned companies, and (iii) his valuation in terms of EBITDA of the potential purchase of Petromirrales<sup>189</sup> and eventual sale of RRC, including matters he had chosen not to mention in his witness statement in the interests of brevity.<sup>190</sup>

#### D2.B. Respondent's Witnesses

104. The fact witnesses for Romania called for examination were the following:

- a. **Ms. Morariu**,<sup>191</sup> a spokesperson of the Superior Council of Magistracy, gave evidence as to: (i) the structure and independence of the Council, (ii) how the complaints about the conduct of judges or prosecutors were investigated and handled, (iii) the applicable legal provisions. Under cross-examination, Ms. Morariu was asked by Counsel for the Claimant if she had an opinion about whether the actions of the prosecutors in this case were correct, or in accordance with normal practice. Ms. Morariu answered that she was not permitted to express any opinion, but only to report the facts. She confirmed that prosecutors and judges performed different functions and there were separate disciplinary commissions for both, within the Council.<sup>192</sup> Ms. Morariu gave evidence that it was very rare for a prosecutor not to cooperate with an investigation into his or her conduct, but later in her evidence clarified that there was no legal or employment obligation to do so.
- b. **Ms. Nistor**,<sup>193</sup> explained in detail the materials on the basis of which she had drawn up, as head of the legal service of the Romanian tax administration, following TRG's Request for Arbitration, her summary and analysis of the tax controls applied in respect of RRC. She explained the different kinds of tax controls and the reporting changes introduced by the 2004 Fiscal Code in respect of oil companies, which allowed many controls to be exercised thereafter at desk, without on-site verification. She had not, however, been involved personally in any of the tax controls over RRC. Some of these controls had in fact been to RRC's

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<sup>189</sup> When asked in re-direct examination, Mr. Benabderrazik corrected the figure to €40-60 million. Transcript, Day 3, p. 46, lines 3-11.

<sup>190</sup> Transcript, Day 3, pp. 47-54.

<sup>191</sup> Transcript, Day 3, p. 55ff.

<sup>192</sup> Transcript, Day 3, pp. 76-77.

<sup>193</sup> Transcript, Day 3, p. 143ff.

benefit, because they had been carried out to verify, for example, refunds or rebates for which RRC had applied. Asked to comment on Mr. Patriciu's opinion that RRC was the most controlled oil company in Romania, she responded that there were many taxpayers who made the same claim; but in fact the most controlled company was RAFO Onesti, by a factor of roughly four, partly because of the existence the criminal investigation for fiscal fraud and money laundering. In her view Rompetrol was uniquely benefited by restructuring the RRC debt into bonds; the same treatment was refused to RAFO Onesti, leading the tax administration to apply for it to be declared bankrupt, though in the end the Courts permitted a restructuring and the RAFO Onesti tax liability was repaid in full, whereas RRC's continued to be carried in the special bonds. Later in cross examination, it was put to her that other companies had their debt written off. Ms. Nistor accepted that, but only after the matter had been approved by the Competition Commission.

### **D3. Expert Witnesses**

#### D3.1. Legal Experts

##### D3.1.A. Claimant

105. Legal expert evidence was presented on behalf of TRG by:

- a. **Professor Popescu**, an expert in public law, with teaching posts in both Romania and France,<sup>194</sup> on the powers of the presidency and the legality of the Talpes report. He characterized Romania as "*a parliamentary regime with some elements of a semi-presidential regime.*"<sup>195</sup> Simply because there may be political actions of the President did not make them constitutional. Instead, the powers attached to the role are formal or symbolic, other than as constitutional mediator. In that context, he described in detail what he considered to be the different forms of mediation, which governed the right of the President to information for the purposes of the mediation function. He discounted the legal effect of political and constitutional practice, since it was the constitutional provisions that were decisive.

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<sup>194</sup> Transcript, Day 4, p. 2ff.

<sup>195</sup> Transcript, Day 4, p. 6, lines 6-7.

It was put to the Professor that he is known publicly in Romania as an advocate of limited powers of the presidency.<sup>196</sup>

- b. **Professor Boroi**, who teaches criminal procedure at a police academy in Bucharest, but had never practiced law or been a judge or prosecutor, gave his evidence by video link.<sup>197</sup> Professor Boroi explained that ECHR case law was automatically effective in Romania and had to be understood as having a retroactive effect. He explained the difference between legal investigations *in rem* and *in personam*, and the obligation on the prosecutor to identify suspects and inform them of the charges against them as soon as possible. He analysed the provisions of Romanian law governing public information in criminal charges and the restrictions applicable in that respect. In his view the prosecutors acted unlawfully by detaining Mr. Patriciu for 24 hours before he had had an opportunity to complete his defence statement and there had been a variety of other breaches of criminal procedure, but accepted in cross-examination that the complaints lodged against them had not been upheld in the Romanian internal procedures. He described the regime under Romanian law for the interception of communications (wire-tapping) and the decisions of the ECtHR on that subject. He confirmed that the President is responsible for the appointment of prosecutors, but does so at the proposal of the Minister of Justice, with the endorsement of the Superior Council of the Magistracy, from among prosecutors or judges with ten years of experience.

#### D3.1.B. Respondent

106. Legal expert evidence was presented on behalf of Romania by:

- a. **Professor Mihai**<sup>198</sup> who gave evidence, as an expert in civil law and intellectual property, about the powers of the presidency and the legal status of the Talpes report. Apart from numerous academic and professional activities, Professor Mihai had acted as expert before, as well as sitting as an *ad hoc* judge at the

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<sup>196</sup> Professor Popescu later clarified under cross-examination that by ‘mediates’ he means where one is invited by disputing sides to mediate a dispute and that “*a mediator does never intervene on his own initiative*”: Transcript, Day 4, p. 35, line 14.

<sup>197</sup> Transcript, Day 4, p. 110ff.

<sup>198</sup> Transcript, Day 4, p. 86ff., and Transcript, Day 5, p. 5ff.

ECtHR. He had been for two years Secretary General of the lower Chamber of the Romanian Parliament and was President of the Constitutional Court of Romania from 1998 to 2001, in which capacity he had been directly involved in approximately 1,000 judgments, and was currently a member of the Council of Europe's Venice Commission. In Professor Mihai's opinion, the President was entitled to seek and receive information in order to conduct his role to "*guard the observance of the Constitution and the proper functioning of the public authorities*" (per Article 80(2) of the Constitution). He disagreed with Professor Popescu's approach towards the analysis of the President's powers via a typology of constitutional forms, since it was more profitable to look at the particular provisions in the particular constitution. Professor Popescu's was an isolated view, the commonly accepted view among experts being that the President had three principal capacities: Head of State, head of the executive power (jointly with the Prime Minister) and mediator between various branches of state. In the last of these capacities he could act on his own initiative, not only on request. Moreover the President plainly did have decision making powers in the field of national security and national defence, as witness the express words of Articles 92, 93 and 119 of the Constitution. He referred specifically to the powers under Article 119 of the National Defence Council (over which the President presided), as regulated by a specific law which Professor Popescu had not mentioned in his evidence. The Decree establishing the Presidential Administration indicates that its purposes are to support the President in the accomplishment of his duties, and the National Security Department (which at the time Mr. Talpes had headed) was part of it. Professor Mihai cited various legal provisions which showed that the Talpes report and the information requested in it fell under the Department's recognized functions. The extensive cross-examination of Professor Mihai covered, *inter alia*, the conduct of the President's function of mediation, the appointment and functions of the staff in his Administration, and the legislation dealing with national defence, and the consequences in law if a public official exceeds his functions. In the course of the cross-examination it was established that the Head of the Presidential Administration by decree functioned also as Presidential Counsel for National Defence.

b. **Professor Kühne**,<sup>199</sup> a specialist on human rights and the ECHR, with considerable experience teaching criminal procedure internationally, who described his participation in helping to revise the Criminal Procedure Code in Romania (as well as other countries), in particular so as to take account of recent developments in criminal procedure in Europe. He explained that, while ECtHR jurisprudence is directly effective in Romania, until there is a decision by the Strasbourg Court, the domestic courts are entitled to decide the matter as they see fit, and there is no retroactivity of ECtHR judgments. He pointed to the very extensive nature of the Strasbourg jurisprudence on the right to a fair trial, which covered 60% of the cases heard to 2009, in 62% of which the claimant had been successful. In his view no State was entitled to grant exemptions from criminal law or procedure, which explained the limited impact in this field of investment treaty obligations and the like. He described the successive stages of a criminal investigation and charges and what procedural rights attach at various points, both under general principles of law and as reflected in the law of Romania. It was the daily business of the criminal process that courts disagreed with prosecutors, but that did not amount to a ‘breach of the law’ or an ‘abuse’. He discussed the duty of prosecutors to provide public information about investigations, but strictly limited by the presumption of innocence. He described what he thought was the impressive amount of detail in the indictment in the Romanian proceedings, amounting to 700 pages. The formal structure of the Romanian prosecutorate was familiar from other European systems, and in some respects superior to that of the French, on which it had been modelled. His extensive cross-examination covered various ECtHR cases, notably those on interception of communication, the sequestration or confiscation of evidence and fair trial rights, and the nature of Romania’s obligations under the ECHR for its system of domestic law.<sup>200</sup>

### D3.2. Damages Experts

107. Each Party’s damages expert was heard and subjected to cross-examination by the other Party, following which the experts were examined jointly in conference by the Tribunal itself.

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<sup>199</sup> Transcript, Day 4, p. 154ff.

<sup>200</sup> Transcript, Day 4, pp. 178-224.



### D3.2.A. Claimant

108. Expert evidence for TRG was given by Dr. Okongwu of NERA<sup>201</sup> who presented to the Dunbar and Okongwu reports, and commented also on the reports of Dow and Lapuerta. He explained the event study method, and justified its application to the circumstances of the present arbitration, noting that the basic working premise had been that the investigations of the PNA and the GPO were illegitimate, and as a consequence had caused harm to TRG, more specifically in the form of the effects on RRC which could be observed in the public trading of its shares on the Bucharest Stock Exchange. The source of the harm was taken to be the negative effect it had on RRC's creditworthiness; RRC's difficulty to obtain the financing it needed, so limiting its opportunities to make productive investments; increased costs of doing business; as well as lost management time in responding to the investigation. The performance of RRC on the stock market had been compared to that of its peers, and showed systematic underperformance. The 32 'event dates' selected for the Dunbar report represented the emergence of 'new news' about the PNA and GPO investigations linked to the precise time at which it emerged. The event study method was simply an empirical technique, and its appropriateness in these circumstances lay both in the fact that it offered testable and replicable results, with a known margin of statistical error, and because it helped identify the price movement (in terms of the share price) caused by the 'new news'. It was of course dependent for its validity on the existence of an efficient market and on the assumption that investors were pricing the stock by reference to the future cash flows likely to be earned by the underlying operating assets. The 12 specific dates selected for use in the Dunbar report on the basis that they showed a noticeably larger than expected movement in the share price, were a satisfactorily large return, 8 of which showed a substantial drop in the share price, and 4 of which a rebound in the wake of favourable news. From that it was a simple matter to multiply the price variance per share by the TRG holding in the company to arrive at a damages figure. He explained the reasons why Dr. Dunbar had applied a 'cap' to the curative effect of items of favourable news. He explained also the statistical assumptions that led Dr. Dunbar to focus on only 12 out of the 32 'event days' and exclude the remainder from his calculations, which led to confidence in the estimate being more secure (there is less 'noise'), and resulted in a more conservative and accurate figure for damages. In his view, the criticism by Dow and Lapuerta that the Dunbar report ignored a (possibly variable) 'minority discount' in respect of the small

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<sup>201</sup> Transcript, Day 5, p. 101ff.

proportion of RRC shares traded in the open market was speculative, and not based on evidence. Finally, he thought that the exclusion of the sale to KazMunaiGaz, and its effect on the share price, was justifiable, as it had no connection with the PNA or GPO investigations. Under cross-examination Dr. Okongwu accepted that, particularly over longer periods of time, the lack of news could be regarded by the market as news in itself, with the effect, for example, of progressively correcting for discounts earlier applied in the wake of bad news.<sup>202</sup> He accepted also that some of the trigger events chosen were actions other than those of the PNA or GPO investigations themselves, but justified this on the basis that they were reactions to PNA or GPO actions.

### D3.2.B. Respondent

109. Expert evidence for Romania was given by Professor Dow and Mr. Lapuerta.<sup>203</sup> They gave their evidence together. Their presentation was centred around three elements: which shares to study; how to pick event days; and understanding what caused the share price to move. The NERA study, in their view: looked at the wrong shares; made an unscientific, and ultimately incorrect, choice of event days for study (which Dow and Lapuerta had been unable themselves to replicate on the information provided) owing to the spread out nature of the ‘event’ in time; and made an unjustified *a priori* assumption about what caused the share price to move – in effect chance could explain everything. Far from there being any need to ‘prove’ the existence of a minority discount, NERA simply made the assumption that the 87% of RRC shares held by TRG, and not traded, tracked exactly the movements of the 17% minority shareholdings that were traded. In fact, RRC bought 87% of its inputs from various TRG subsidiaries and sold 33% of its output to TRG subsidiaries, so that the pricings of these inputs and outputs had a decisive effect, which could operate in a starkly differential way as between the majority and minority stakes in RRC. That also illustrated why the minority discount could vary in any direction over time. For a scientifically valid study, the ‘event days’ would have to be selected in advance, and then subjected to statistical analysis, not selected in circular fashion in terms of the effects one was trying to isolate, and then discarding the data that doesn’t show much in the way of effects, and particularly so where one might expect to have numerous days with relatively small pieces of news, the cumulative effect of which might be large even though individually they were small. On the one hand, the effects that the

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<sup>202</sup> Transcript, Day 5, p. 168, lines 20-23.

<sup>203</sup> Transcript, Day 5, p. 198ff.

NERA reports claimed to have identified were not large enough to be identified compared to the normal price movements that you would expect over a two - to three-year period. Referring to the title of a Sherlock Holmes story (Silver Blaze), ‘The curious incident of the dog in the night time,’<sup>204</sup> Professor Dow argued that the days where ‘nothing happened’ were relevant and could not be ignored, because they could represent good news. To their mind the NERA study arbitrarily excluded days which seem to be relevant, and where large positive price movements took place, the first of these being the clearance of the Petromidia privatization and the other the purchase by KazMunaiGaz of a large majority stake in TRG, which took place in February and August 2007 respectively. A problem, moreover, as with so many valuation studies, was the difficulty in isolating, or even defining, the appropriate counter-factual; in this case, with the cause of action represented to be an unlawful criminal investigation, the precise counter-factual ought to be a ‘lawful criminal investigation’ – for want of which a qualitatively different comparator had been chosen, namely no investigation at all. They could conceive of five competing possibilities to explain the results found by the NERA event study: (i) nothing really happened, it was down to chance; (ii) a transfer of value took place from the minority to the majority shareholders; (iii) the feared loss of the Petromidia refinery; (iv) loss of the ‘political premium’(i.e. political favour or disfavour, which had nothing to do with investment treaty claims); or (v) management distraction, cancelled projects, cancelled investments, and increased borrowing costs. Dr. Dunbar had opted for (v), but only by taking RRC as a proxy for TRG itself (the actual claimant), whereas the published material in analysts’ reports and company reports showed that – for TRG – the general sales and administration expenses as a percentage of revenue were actually going down in the period in question.

110. Messrs. Dow and Lapuerta were cross-examined at length over the validity of the event study methodology, the existence and effects of a minority discount, the selection of events, the widening of the event window, and the relationship between the movements of the RRC share prices and the market in general. The cross-examination established that there was a certain period in respect of which the damages calculation had not been performed, so no damages claimed, because it preceded the listing of the shares on the Bucharest Stock Exchange.

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<sup>204</sup> Transcript, Day 5, pp. 211 and 261.

111. On Saturday, 8 May 2010, the two sets of damages experts were examined in conference by the Tribunal. Dr. Okongwu was joined for this purpose by Mr. McKenna.<sup>205</sup>
112. In the course of this examination, it was accepted:
- a. That the calculations in the NERA reports were proxy measurements, though there was disagreement over exactly what the proxy stood for, and over whether the proxy technique used was appropriate;
  - b. That the event study method had been used in situations of multiple events, for the purposes of class actions in US courts;
  - c. That there would be dangers in pre-selecting events by the application of legal criteria (breach/no breach) rather than economic criteria, but by the same token it would be impossible to disaggregate the effects of make-up events;
  - d. That the major disagreement over the events excluded by the Dunbar report lay not in the level of damages calculated, but in the effect on the confidence interval in respect of the results;
  - e. That there were particular difficulties in finding a monetary value for a ‘lost opportunity’; the alternatives to valuation by the market via share prices were likely to give no better than a range of values, the selection between which would have to entail applying other criteria of reasonableness; the problem was to a large extent one of causation: can you link the lost opportunity to the event which is said to have generated the loss of the opportunity?
  - f. That the NERA reports had allocated interest (at rates specified by their client, TRG) on the basis that the damage was suffered as of the particular event day, but had not allocated interest at all (even from the event day) when there had been a subsequent curative event fully offsetting the initial damage.

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<sup>205</sup> Transcript, Day 6, p. 2ff.

113. At the conclusion of the day's hearing, the President gave the Parties, on behalf of the Tribunal, the following guidance as to matters on which it would like to hear from them in their closing arguments on the final day:

*... the Tribunal would be interested, in addition to the assumption we make that you will want to use your closing statements to assess the state of the evidence and the conclusions to be drawn from the evidence we heard during the week, to have the argument focus on breach of treaty, which actions by whom are asserted to be a breach of treaty and on what basis; and in particular, if you are talking about ... fair and equitable treatment, what the standard is that you assert should be used. All of these [are] fairly standard and obvious questions.*

*The Tribunal would also be grateful to hear argument from the parties on causation. In other words, insofar as damage is asserted or claimed for breach of treaty, what the link is between the events/actions/omissions asserted to be a treaty breach and the damage which is asserted to have been caused. I suppose connected with causation one should also incorporate, to the extent to which you feel able to deal with it, the question of foreseeability, which in some legal systems is an element defining claimable damage.*

*That branches out into two further questions. We ... would like to hear argument from the parties on what law should govern the assessment of damage. We would also like to hear from you on the question of the attribution of various acts that have been brought into issue to one or other of the parties, depending of course on the identity of the act and the actor. That's a question that goes in both directions, both to claimant and to respondent.*

*I think those are the main issues. I ought perhaps to say that when we are talking about breach of treaty, we are thinking specifically of the protections that the treaty covers, and therefore how all of the forms of damage which have been at issue can, or alternatively cannot, be brought within the umbrella of the treaty.<sup>206</sup>*

#### **D4. Closing Statements**

##### D4.A. Claimant

114. Closing for the Claimant, Counsel submitted<sup>207</sup> that the evidence of the witnesses for TRG was thoughtful, honest and probative. He sought to contrast this with the lack of utility to be gained from the fact witnesses for Romania, who had no first-hand experience of the case, whereas those who did have this knowledge had not been put forward as witnesses. In relation to the evidence as to the President's powers, Mr. Legum submitted that Professor Popescu was right about the law and Professor Mihai (for the Respondent) was right as to the practice,

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<sup>206</sup> Transcript Day 6, pp. 76-77.

<sup>207</sup> Transcript, Day 7, p. 10ff.

leading to the conclusion that the Talpes report was an excess of authority.<sup>208</sup> Although in excess of authority, the actions were cloaked with governmental authority and therefore attributable to the State in international law. Two categories of acts might be considered as directed at TRG: acts that on their face addressed TRG or its investments in Romania (including the attachment of TRG's shares and the prosecutorial press releases that mentioned TRG or its investments); and acts that addressed officers or directors of TRG or its Romanian investments in their corporate capacity as such (including the detention of Mr. Patriciu). The announcements by the PNA were described by Mr. Legum as "*nothing more and nothing less than a trial of TRG in the press,*"<sup>209</sup> without redress. At the time Mr. Iancu and Mr. Tender approached Mr. Patriciu about a merger to ensure that Romanian oil companies fully 'cooperate,' it was common knowledge in the region that Romanian companies, led by RAFO Onesti and supported by Mr. Talpes, were the leading supplier of oil products to Serbia during the UN-imposed embargo of the Milosevic regime; TRG, with Western institutions as shareholders, lenders and stakeholders, could not be involved in such practices, and Mr. Patriciu made that plain. Although the focus later shifted from Mr. Talpes and his links to RAFO Onesti when Mr. Basescu was elected as President, the latter was at daggers drawn with the new Prime Minister, Mr. Tariceanu, who was close to Mr. Patriciu, which made Mr. Patriciu a vulnerable political target. The evidence of Mr. Stanescu was particularly telling in this regard. These two motivations for persecution of TRG had been not directly addressed by Romania, who argued only that there were justifications for the actions of the prosecutors; he submitted that the ends did not justify the means, which were unfair and inequitable. The proposal by the Respondent that the Tribunal could recognize the existence of probable cause for the prosecutors' investigations was a red herring, and was not the role of an investment tribunal; it was well established that actions that were legal under the local law could nonetheless breach international law. A prosecution mounted for commercial or political reasons is internationally wrongful regardless of probable cause. Mr. Legum submitted that there were a number of specific actions that in and of themselves constituted breaches of the BIT,<sup>210</sup> as well as there being an overall violation when the effect of all the Romanian measures were put together. The key text was Article 3(1) of the BIT with its guarantee of fair and equitable treatment, which was not qualified by any reference either to customary international law or to the international minimum standard for the treatment of aliens. He

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<sup>208</sup> Transcript, Day 7, p. 20, lines 15-20.

<sup>209</sup> Transcript, Day 7, p. 26, lines 18-19.

<sup>210</sup> Transcript, Day 7, p. 40 line 24 – p. 43 line 4.

analysed in detail what TRG submitted was a pattern of abusive acts directed against TRG or its officers, both those confirmed by Romanian court decisions and those that were established by the record but had not been found to be breaches by the courts, mentioning in particular in the former category the unprecedented fine levied on the GPO for failing to attend court hearings. The consequences of breach of the BIT guarantees were regulated by international law, which was in any case part of the law of Romania for the purposes of Article 42 of the ICSID Convention. Therefore, as in the *SD Myers v. Canada* award, the Tribunal should allow all damages flowing from the breach that were not too remote. Under the definitional structure of the BIT there was no reason not to evaluate these damages by reference to TRG's shares in RRC, which constituted its investment. He marshalled the evidence showing the causal link between the breaches of treaty and the damage being claimed.

115. Mr. Burn addressed matters of damage and quantum. The event study method was indeed one amongst various alternatives, but was tried and trusted in US courts and had been accepted by courts in other jurisdictions and deployed in other arbitrations. He submitted that the NERA assessment provided a conservative but reliable assessment of what was likely to be a significant underestimate of the damage actually suffered by TRG. One of its merits was to reduce the amount of subjectivity inherent in other methods. Nothing in the witness conferencing had shaken the methodological validity of the NERA studies.

#### D4.B. Respondent

116. Closing for Romania,<sup>211</sup> Counsel characterised the case as a dispute between two large clans in the oil industry in Romania, both of which were at the time under investigation in Romania, a country seeking to root out corruption as part of its recent accession to the EU; TRG had not in general been treated any differently than other companies. The only exception was the substantial financial advantage it had been granted over its tax indebtedness to the State, which Romania had had to battle to see through against the initial opposition of the EU Commission. The two objections raised in respect of the Talpes report (excess of power, and tax secrecy) had both been argued exclusively in relation to domestic Romanian law, without any attempt to show that they were Treaty breaches. It could not simply be shrugged off that none of the Ministers to whom the Talpes report had been forwarded took objection to it, and that it was the Ministry of Justice (not the Presidential Administration) that had forwarded it to the

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<sup>211</sup> Transcript, Day 7, p. 63ff.

prosecutorate. In relation to the actions of the Presidential Administration, Mr. Schneider pointed out that Professor Mihai's expert evidence was based on the law, but placed the constitutional texts in the context of constitutional practice, which was as it had to be. Ms. Nistor's evidence was factual and put paid to any suggestion of 'harassment' by the tax authorities. Once the evidence was examined, President Basescu's television interviews of 2004 that arose during the cross examination of Mr. Patriciu showed no more than that in rooting out corruption Petromidia, RAFO Onesti and other oil companies would be treated equally during investigations. Mr. Stanescu's evidence should be disregarded, on the basis of his conduct, his record, and his evident bias, which destroy his credibility; his evidence did not, in any case, add anything, since the 'political' element in the prosecutions was simply, as had been seen, that all oil companies should be treated equally. As to the criminal investigations themselves, there could be no question as to a State's right or even duty to investigate breaches of the law, or that the standard for initiating an investigation was the same as that for conviction in court. There was no basis for the Claimant's argument on a shifting of the burden of proof. As to absent witnesses, most of those mentioned by the Claimant either no longer had any connection with government or were business competitors of RRC; nor could it possibly be appropriate to bring the prosecutors themselves to the Tribunal to discuss the case they had under investigation. Mr. Schneider referred to the expert evidence of Professor Kühne about the importance of the indictment in the Romanian criminal process, and noted the significance of the fact that there had been no complaint about the indictment; likewise, in all the Claimant's expert investigations of damage caused, the issuing of the indictment did not figure. Mr. Schneider dealt with the separate charges of market manipulation in the IPO of RRC shares, which involved Mr. Stephenson as well as Mr. Patriciu, and drew attention to the change in Mr. Stephenson's evidence in this regard.

117. Dr. Heiskanen dealt with the way in which the criminal investigations had been conducted, and the questions of damages and quantum. As to the first, he recalled the central importance of the applicable Treaty standard which (as expressed by other tribunals) was manifest injustice, gross deficiency, abuse of state authority, or discrimination. International law was concerned with systemic injustice, and did not allow interference with the state's administration of justice until local remedies had been exhausted, and the alleged injustice had become ripe for determination by an international tribunal. The BIT added nothing to this, but the area was a very sensitive one which could have wide-ranging consequences for the system of investment arbitration. Even without the local remedies rule, the Claimant's case would fail because the



applicable international law standards had not been breached, which could be confirmed by bench-marking against the more demanding standards of the ECHR, even though the latter were not directly applicable as such. Mr. Patriciu and his colleagues had regularly availed themselves of local remedies, often with success. The facts showed that the wire-tapping was entirely separate from the criminal investigations complained about. The ECHR decisions were not about the lawfulness of individual warrants but about the overall control system for wire-tapping. As for the attachment of shares, it appeared, not least from the dissenting opinion of one judge, that the issue under Romanian law was far from clear.

118. In relation to the damages and quantum issues, international law laid down that there had to be a loss, which meant a loss that had materialized, not a mere prospect of loss, and that the loss must not be merely speculative. In this case there was no loss, as TRG still owned RRC, RRC still owned Petromidia and the share price had recovered. The Claimant had not relied on best evidence, but on a proxy approach, which ended up with no more than approximate values for purely speculative loss, as in the famous fable of la Fontaine about the dog that dropped its prey for the shadow, and ended up losing both; the prey being the ‘direct damages’ and the shadow the larger prey, represented by the claimed losses to RRC, which were too remote and too speculative to be claimed as damages. It was possible that the event study method might have been appropriate – if, for example, RRC had in fact lost the Petromidia refinery – but that was not the case. He recalled the methodological flaws in the NERA reports as they emerged in the expert examination.
119. Winding up for the Respondent, Mr. Schneider contested TRG’s claim for pre-judgment interest unless it could be shown that the Claimant was in fact out of pocket and had to borrow, and contested the rate TRG had used for post-judgment interest, which ought to be the same as for loans to the Romanian Government.

#### D4.C. The Tribunal

120. Bringing the hearing to a close, the Chairman offered further guidance to the Parties, as to issues to be covered in the Post-Hearing Briefs:

*Perhaps in that context -- but I don't make this as a formal request or guidance -- it might be useful for the parties, in putting together their post-hearing briefs, to think about the question of whether damage is an essential element of the kind of claims for breach that are being put forward in this case. And if so, or if not, is it possible to conceive, even hypothetically, of a breach of the kinds that have been spoken about which has no damage attached to it?*

*Alternatively, if damage either is an essential element of the claim or a liability in damages flows automatically from a breach, then the greater the clarity the Tribunal can have on the exact nature of the damage claimed will, of course, be of enormous help in beginning to formulate a decision on this issue. In that context, it does seem to me, on the basis of the responses of the members of the Tribunal to the argument before us, that questions of timing of loss will be important, as indeed will be a further development of the arguments about interest in that connection, which have been touched upon by the respondent now but which are certainly capable of being further developed by both sides in the course of their subsequent written briefs.*<sup>212</sup>

## **E. POST-HEARING SUBMISSIONS**

### **E1. Claimant**

#### E1.A. Claimant's First Post-Hearing Brief

121. In responding to the questions posed by the Tribunal (paragraph 120 above), the Claimant's First Post-Hearing Brief submits that damage is not a necessary element of its claims. Rather, responsibility under international law flows from breach, not proof of loss. Nevertheless it contends that TRG is well able to establish loss in this case, for which "*the event study put forward by NERA ... represents a solid and reliable basis for quantifying the damage incurred in this dispute*"<sup>213</sup> and that "*TRG has suffered losses at least in the magnitude assessed by NERA.*"<sup>214</sup> The heads of direct damage are stated to be: increased legal costs, increased public relations costs, increased financing costs, lost or diminished investment opportunities, and moral damages.
122. The Post-Hearing Brief further develops the Claimant's case in relation to specific issues that were explored during the hearing, as follows:
- a. The **Talpes Report**,<sup>215</sup> and the threatening meetings which preceded it, are said to show principally that the subsequent investigations were not legitimate but were

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<sup>212</sup> Transcript, Day 7, pp. 126-127.

<sup>213</sup> The Post-Hearing Brief also put forward in parallel an alternative basis (without prejudice to the NERA report) for the assessment of direct damages, in the range US\$178,735,927 - US\$272,140,187. In its direction dated 2 September 2010, the Tribunal ruled that it had not given leave for the submission of new evidence at the stage of the Post-Hearing Briefs, so that new documents submitted with the Post-Hearing Briefs were not in evidence and would not be taken into account by the Tribunal, but that it reserved the right to call for further submissions from the Parties on the assessment of damages, although it would do so only if it found this to be necessary for the framing of its Award.

<sup>214</sup> Claimant's First Post-Hearing Brief, ¶ 261.

<sup>215</sup> Claimant's First Post-Hearing Brief, ¶ 10 - ¶ 20.

rather instigated on commercial motives. Secondly, the Talpes report itself was an excess of authority by Mr. Talpes's Department, which had no authority regarding the privatization of an oil refinery.

- b. The **PNA Press Campaign**,<sup>216</sup> is said to have caused great damage to TRG due to the timing of their press releases (shortly before RRC's shares were relisted on the Bucharest Stock Exchange), and the content of these releases, which contained unjustifiable conclusory statements referring to fictitious share capital contributions by Petromidia shareholders and quantifying damages that resulted. The market understood TRG to be the target of this press campaign.
- c. **President Basescu's Interview on Realitatea TV**,<sup>217</sup> on 10 January 2005, is said to have shown his clear intent to support unwarranted investigations against TRG, motivated by the political objective of causing damage to the Tariceanu government, which was supported by Mr. Patriciu and which was the principal beneficiary of the substantial tax payments made by TRG.
- d. **Further Acts taken by Romania**,<sup>218</sup> also caused damage to TRG, measured by falls in RRC's share price, such as the charges of embezzlement against RRC managers and press releases on 17 January 2005 with conclusory statements that RRC was one among several organized criminal groups under scrutiny by the GPO; the highly publicised summons of Mr. Patriciu for interview in early May 2005; Mr. Patriciu's arrest on 27 May 2005, and the attempt to extend this by 29 days, resulting in TRG being put on negative credit watch by Standard and Poor's; (iv) the release of TRG's complaint to the prosecutorial authorities that they were prevented from participating in witness hearings; the extensive requests in early November 2005 for banking information from TRG's partners, and the intelligence service's illegal wiretapping campaign, which caused the Black Sea Trade and Development Bank to refuse to extend a loan; the GPO's application for a 30-day arrest of TRG's chief executives, based on the fact that TRG had begun the present ICSID proceedings, and its effect on operations at Dyneff (TRG's newly acquired

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<sup>216</sup> Claimant's First Post-Hearing Brief, ¶ 21 - ¶ 29.

<sup>217</sup> Claimant's First Post-Hearing Brief, ¶ 30 - ¶ 33.

<sup>218</sup> Claimant's First Post-Hearing Brief, ¶ 34 - ¶ 54.

subsidiary); and finally the GPO's unlawful ordinance seizing TRG's ownership interest in RRC, which was widely reported in the press, but not discharged by the courts until months later and not before causing substantial direct damage to TRG's access to finance.

- e. **Fiscal Audits**<sup>219</sup> were conducted in bad faith according to the reliable eyewitness evidence of Mr. Volintiru, whereas Ms. Nistor's evidence was limited to the general structure of tax audits and her feeling that there was nothing unusual about the audits of RRC.
- f. The impact of these actions on TRG,<sup>220</sup> were wide ranging: seventeen examples are given in the Post-Hearing Brief, ranging from damage to reputation and increased legal costs, to more specific matters such as losing a €100-150 million Eurobond offering, losing the opportunity to acquire Petromirrales, and increased borrowing costs of between 0.2 and 0.35%.

123. These actions are all attributable to Romania, on the authority of Article 7 of the Draft Articles on State Responsibility; each of the acts complained of was cloaked in governmental authority.

124. The Post-Hearing Brief argues that there are four scenarios for which there is liability under the BIT:

- a. a pattern of abusive acts by Romania;<sup>221</sup>
- b. criminal proceedings brought for political or commercial purposes;<sup>222</sup>
- c. individual acts by prosecutors or others breaching the Treaty,<sup>223</sup> or
- d. a combination of the above.<sup>224</sup>

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<sup>219</sup> Claimant's First Post-Hearing Brief, ¶ 55 - ¶ 56.

<sup>220</sup> Claimant's First Post-Hearing Brief, ¶ 57 - ¶ 75.

<sup>221</sup> Claimant's First Post-Hearing Brief, ¶ 102 - ¶ 108.

<sup>222</sup> Claimant's First Post-Hearing Brief, ¶ 109 - ¶ 126.

<sup>223</sup> Claimant's First Post-Hearing Brief, ¶ 127 - ¶ 135.

<sup>224</sup> Claimant's First Post-Hearing Brief, ¶ 136.

125. The Claimant reiterates that its case is not to be characterised as a denial of justice and therefore conditional on the exhaustion of local remedies, on the basis that (i) GPO prosecutors are not courts, (ii) the local remedies rule is expressly waived in the Treaty and the ICSID Convention, and (iii) that Romania identifies no effective remedy available to TRG that was not pursued.
126. The loss claimed by the Claimant is a computation in monetary terms of the results flowing from the wrongful acts.<sup>225</sup> The NERA event study methodology is said to share this objective with any other methodology, such as an assessment of direct damages. The Post-Hearing Brief sets out the Claimant's position in relation to the legal standards to be used to assess recoverable losses, including the applicable law,<sup>226</sup> whether damages are an essential element,<sup>227</sup> the causation test for damages,<sup>228</sup> the nature of the damages suffered by TRG,<sup>229</sup> whether damages need to be fixed with certainty,<sup>230</sup> along with further submissions in relation to the suitability of the NERA quantification of damages. As already noted in paragraph 121 above, the direct damages claims is accompanied by a further claim for moral damages (as awarded in several earlier ICSID arbitrations<sup>231</sup>) in the sum of US\$46 million.<sup>232</sup>
127. The Post-Hearing Brief itemizes in tabular form the Claimant's submissions as to the timing of the individual items of loss or damage, and asks for interest at 6%, compounded monthly.

#### E1.B. Claimant's Answer to the Respondent's Post-Hearing Brief

128. In its Answer to the Respondent's Post-Hearing Brief (also called "the Claimant's Second Post-Hearing Brief"), the Claimant rejects again the idea that its claim is for a denial of justice, and states that it has never advanced such a case. The Answer further claims that the Respondent's Post-Hearing submission repeats assertions that are demonstrated to have been false and ignores evidence it cannot answer. In particular, the Answer responds on the following specific matters:

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<sup>225</sup> Claimant's First Post-Hearing Brief, ¶ 168.

<sup>226</sup> Claimant's First Post-Hearing Brief, ¶ 172 - ¶ 178.

<sup>227</sup> Claimant's First Post-Hearing Brief, ¶ 179 - ¶ 185.

<sup>228</sup> Claimant's First Post-Hearing Brief, ¶ 186 - ¶ 195.

<sup>229</sup> Claimant's First Post-Hearing Brief, ¶ 196 - ¶ 201.

<sup>230</sup> Claimant's First Post-Hearing Brief, ¶ 202 - ¶ 204.

<sup>231</sup> *S.A.R.L. Benvenuti & Bonfant v. People's Republic of Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, and *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.

<sup>232</sup> Claimant's First Post-Hearing Brief, ¶ 262 - ¶ 278.

- a. The **attachment of RRC shares**<sup>233</sup> was founded solely on the false proposition (as found by the Bucharest Court of Appeals) that the State had suffered damage, and the GPO delayed lifting the sanctions by *inter alia* neglecting to attend three hearing dates (which led to it being fined).
- b. The arrest of (or attempt to arrest) Mr. Patriciu and Mr. Stephenson,<sup>234</sup> contrary to Romania's assertion, was indeed unlawful, and it was wrong to suggest that the attempt to arrest Mr. Patriciu following commencement of these ICSID proceedings was inconsequential and doomed to fail. On the contrary, it had been shown that this led to a US\$70 million drop in RRC's share value.
- c. The **PNA and GPO press releases**<sup>235</sup> were timed to harm TRG, and it is no excuse to say that they coincided with key events in the investigations. Instead, these key events always seemed to coincide with important events for TRG. In relation to the conclusory statements, TRG agrees that the statements should be read as a whole, and nowhere does 'alleged' appear to indicate that the matters are other than a foregone conclusion.
- d. The **wiretapping**<sup>236</sup> had been described by the Court of Appeal as being under the 'pretext' of national security, which should be taken in its ordinary meaning of being an ungrounded or untrue reason invoked as justification.
- e. Romania accepts that the **bank requests** were directed to some 60 banking institutions,<sup>237</sup> but has provided no justification for doing so.
- f. Romania's case distorts the record over the **PNA and GPO's other procedural violations**.<sup>238</sup>

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<sup>233</sup> Claimant's Second Post-Hearing Brief, ¶ 46 - ¶ 52.

<sup>234</sup> Claimant's Second Post-Hearing Brief, ¶ 53 - ¶ 57.

<sup>235</sup> Claimant's Second Post-Hearing Brief, ¶ 58 - ¶ 59.

<sup>236</sup> Claimant's Second Post-Hearing Brief, ¶ 60 - ¶ 65.

<sup>237</sup> Claimant's Second Post-Hearing Brief, ¶ 66.

<sup>238</sup> Claimant's Second Post-Hearing Brief, ¶ 67.

129. The Claimant's Answer acknowledges that the Tribunal has not admitted into evidence the new documentation submitted on direct damages, arguing instead that there was already on the record evidence of direct damages of well over US\$100 million; these include legal and public relations costs, increased costs of financing, the loss of three projects or acquisitions, the obstacles in the way of the integration of Dyneff, and moral damages for loss of reputation and creditworthiness.<sup>239</sup>

## **E2. Respondent**

### E2.A. Respondent's First Post-Hearing Brief

130. The Respondent's First Post-Hearing Brief argues that the case has far-reaching consequences for treaty arbitration, because the context is the investigation of a politically active Romanian national for serious economic crimes arising from the privatization of a key refinery, the misappropriation of State assets and manipulation of the stock market. That national, Mr. Patriciu, is seeking to influence these investigations by abusing the dispute resolution procedure available under the BIT: he admitted as much during the Hearing, stating that he sought the closure of "*the investigation against us.*"<sup>240</sup>
131. The Tribunal is invited in these circumstances to exercise restraint where there are such high political, social and economic interests at stake for the State, and the claims are essentially ones for denial of justice, and the investigations are still ongoing. This restraint is said to be an 'eminently sensible' requirement of the law "*for the proper administration of international justice.*"<sup>241</sup> The Post-Hearing Brief reiterates that in the face of such serious allegations the standard of proof that the Claimant must meet is higher than the ordinary balance of probability.
132. The Respondent's First Post-Hearing Brief further elaborates Romania's legal arguments in relation to what it asserts is the essential nature of TRG's claims,<sup>242</sup> including the argument that local remedies must first be exhausted, because (i) the claims are made against prosecutors who are part of the justice system, (ii) exhaustion of domestic remedies is an inherent element of a claim for denial of justice, and (iii) there cannot, accordingly, have been a 'waiver' of this

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<sup>239</sup> Claimant's Second Post-Hearing Brief, ¶ 92 - ¶ 102.

<sup>240</sup> Transcript, Day 2, p. 102, lines 4-12.

<sup>241</sup> Respondent's First Post-Hearing Brief, ¶ 8.

<sup>242</sup> Respondent's First Post-Hearing Brief, ¶ 19 - ¶ 101.

inherent substantive requirement (the waiver referred to by TRG relates to a procedural requirement for admissibility). Romania also reiterates its submissions as to the higher standard of proof required because: “*the Claimant has chosen to make its claim specifically in terms [of] State-orchestrated conspiracy – an allegation that is by definition based on criminal intent, bad faith and systemic abuse of State authority.*”<sup>243</sup>

133. The Post-Hearing Brief argues that TRG’s orchestration theory, which is the centre of its case,<sup>244</sup> has collapsed, noting in particular that the early argument that tax audits from 2001-2004 were part of state harassment has effectively been dropped, citing TRG’s opening statement at the Hearing that this was “*peripheral*” to the case.<sup>245</sup>
134. The Post-Hearing Brief argues instead that it is now clear that there is no link between the two orchestration theories, and also that there is no evidence that these theories led to the criminal investigations,<sup>246</sup> which it submits are entirely justified. There was no tax investigation singling out TRG, as witness Ms. Nistor’s testimony at the Hearing that “*we have in Romania many taxpayers that are saying that they are the most controlled;*”<sup>247</sup> instead TRG was “*highly privileged by the State*”<sup>248</sup> when compared with RAFO, because it enjoyed the restructuring of its government debts in the region of almost US\$700 million.
135. The Post-Hearing Brief submits further that the Talpes theory collapses as confused, incoherent and speculative,<sup>249</sup> and based on a paucity of flimsy evidence; likewise the theory in relation to President Basescu also collapses,<sup>250</sup> as the statements to the press by President Basescu relied on by TRG in fact show that he rejected political favouritism and sought to eliminate corruption in Romania as part of the aim to comply with the stringent requirements of the EU. Mr. Patriciu’s evidence that he saw blue binders in President Basescu’s office with Rompetrol’s name on them is open to the perfectly legitimate explanation that the President wished to remain informed. The only other witness presented was Mr. Stanescu, whose evidence involved a dramatic *volte face* with respect to whether he was bound to protect his sources because of journalistic obligations of confidentiality. His evidence was in fact

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<sup>243</sup> Respondent’s First Post-Hearing Brief, ¶ 73.

<sup>244</sup> Respondent’s First Post-Hearing Brief, ¶ 102.

<sup>245</sup> Respondent’s First Post-Hearing Brief, ¶ 103, especially footnote 133.

<sup>246</sup> Respondent’s First Post-Hearing Brief, ¶ 104 - ¶ 105.

<sup>247</sup> Transcript, Day 3, p. 150, lines 9-10, cited at Respondent’s First Post-Hearing Brief, ¶ 108.

<sup>248</sup> Respondent’s First Post-Hearing Brief, ¶ 109.

<sup>249</sup> Respondent’s First Post-Hearing Brief, ¶ 112 - ¶ 130.

<sup>250</sup> Respondent’s First Post-Hearing Brief, ¶ 131 - ¶ 151.



worthless: he had been publicly discredited as a journalist, is under indictment for insider trading in RRC's shares, and is beholden to Mr. Patriciu personally – Mr. Patriciu is the godfather of his children and has made gifts to him worth many hundred thousands of dollars

136. The Post-Hearing Brief reiterates Romania's case that the investigations were justified,<sup>251</sup> drawing a parallel with what the Tribunal found in the *Tokios Tokelés* case that there was a “*plausible alternative to the hypothesis of a [conspiracy]*,”<sup>252</sup> namely that the enquiries were justified.
137. In relation to the four scenarios said to amount to breaches of the Treaty, the Post-Hearing Brief argues in detail that each of them is misguided and misconstrues the facts.<sup>253</sup> Specifically:
- a. TRG's case over the **tax authorities**<sup>254</sup> shifted substantially during the proceedings, from stating that the number of controls were excessive, to recasting this discredited argument to focus on the manner in which the controls were conducted, which was later also discredited by Ms. Nistor's evidence.
  - b. The Presidential Administration did indeed have the authority to produce the **Talpes report**,<sup>255</sup> given the wide-ranging interest that the Presidency has in matters of national security (Articles 92, 93 and 119 of the Constitution); and his role as a mediator (Article 80 of the Constitution) requires him to remain informed, as Professor Mihai's evidence shows.<sup>256</sup> There is no evidence that the report was deliberately leaked to the press.
  - c. TRG availed itself of domestic legal remedies and therefore has no complaint in relation to the **attachment of RRC shares**.<sup>257</sup> It was not the case that there was no basis for the attachment, as shown by the dissenting Judge in the Bucharest Court of Appeal who found that it was “*possible and necessary to establish the*

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<sup>251</sup> Respondent's First Post-Hearing Brief, ¶ 154 - ¶ 206.

<sup>252</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, ¶ 136, Exhibit RLA-85, cited at Respondent's First Post-Hearing Brief, ¶ 166.

<sup>253</sup> Respondent's First Post-Hearing Brief, ¶ 207 - ¶ 495.

<sup>254</sup> Respondent's First Post-Hearing Brief, ¶ 212 - ¶ 228.

<sup>255</sup> Respondent's First Post-Hearing Brief, ¶ 229 - ¶ 280.

<sup>256</sup> Transcript, Day 4, p. 93, lines 8-12, cited at Respondent's First Post-Hearing Brief, ¶ 243.

<sup>257</sup> Respondent's First Post-Hearing Brief, ¶ 281 - ¶ 302.

*attachment upon the shares.*”<sup>258</sup> In any event, no damage is claimed in relation to this complaint – the Dunbar report excluded it as being statistically insignificant. Lastly, the complaints in relation to delays of the GPO in attending hearings in relation to the attachments are highly misleading; the prosecutorial authorities have ruled that there was no bad faith, and the so-called ‘unprecedented fine’ amounted to some €50.

- d. The timing of the **PNO and GPO press releases**<sup>259</sup> either matched events in the investigations or responded to statements made by the press concerning the investigations, and were not targeted at TRG. There was no basis for the claim that the press releases contained ‘conclusory statements,’ as the very purpose of the press releases was to announce that an investigation had commenced, and could not therefore be construed as involving final conclusions, as borne out by the wording of the announcements taken as a whole.
- e. The complaints by TRG over the **arrest and further applications for arrest of TRG executives** are hollow.<sup>260</sup> The arrest of Mr. Patriciu was confirmed to be legal by the Romanian courts. The fact that the Romanian courts did not accept the applications for further arrests does not make those applications contrary to Romanian or international law.
- f. It was wrong to interpret the Court of Appeal as saying that **the wiretapping** was brought falsely on the basis of national security.<sup>261</sup> The Romanian word “*pretextul*” in this context has a variety of nuances, and the Court of Appeal made clear that they would not challenge the merits of a justification on the basis of national security.<sup>262</sup> There was no evidence that in 2003-4 the wiretapping was *prima facie* contrary to the ECHR.

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<sup>258</sup> Official record of the hearing in file No. 12139/3/2006 before the Bucharest Tribunal – 1st Criminal Division, 26 September 2006, p. 17, Exhibit C-153, cited at Respondent’s First Post-Hearing Brief, ¶ 289.

<sup>259</sup> Respondent’s First Post-Hearing Brief, ¶ 303 - ¶ 325.

<sup>260</sup> Respondent’s First Post-Hearing Brief, ¶ 326 - ¶ 380.

<sup>261</sup> Respondent’s First Post-Hearing Brief, ¶ 381 - ¶ 420.

<sup>262</sup> Respondent’s First Post-Hearing Brief, ¶ 389.

- g. **Requests were made of some 60 banks**<sup>263</sup> but this was neither illegal nor cause for complaint, being merely a lawful part of legitimate investigations.
  - h. The court decisions alleged to have been **wilfully disregarded by the GPO**<sup>264</sup> did not preclude legitimate criminal investigations on matters outside the scope of those decisions.
  - i. The complaints about the **PNA and GPO's alleged procedural violations**<sup>265</sup> are misguided and have been universally rejected as involving no bad faith or gross negligence on the part of the prosecutors.
138. The Post-Hearing Brief goes on to set out Romania's submissions in relation to the law applicable to damages, in particular that only damages that have materialized are not too remote and are not speculative are recoverable as a matter of international law,<sup>266</sup> the figures in the NERA study are rejected as wholly speculative and unreliable.<sup>267</sup> If the Tribunal rejects the contention that the investigations were motivated by a political conspiracy then the entire NERA analysis can be disregarded.<sup>268</sup> There is no direct loss, which explains why none had been claimed, and the claim for interest is considerably overstated, as the award of interest is case specific; the Tribunal is invited to decline to award interest, but the rate of 6% is accepted as appropriate if it does do so,<sup>269</sup> but not compounded, and to start only from the date of the Award.

#### E2.B. Respondent's Answer to Claimant's First Post-Hearing Brief

139. In its Answer ("Comments on Claimant's First Post-Hearing Brief," also called "the Respondent's Second Post-Hearing Brief"), the Respondent argues that aside from the attempt to introduce a fresh quantum claim, there was not much of substance that had changed in TRG's case, but there were rather misrepresentations or inaccuracies of presentation of the evidence, so that Romania's submissions in earlier pleadings stood.

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<sup>263</sup> Respondent's First Post-Hearing Brief, ¶ 421 - ¶ 437.

<sup>264</sup> Respondent's First Post-Hearing Brief, ¶ 438 - ¶ 451.

<sup>265</sup> Respondent's First Post-Hearing Brief, ¶ 452 - ¶ 490.

<sup>266</sup> Respondent's First Post-Hearing Brief, ¶ 503 - ¶ 519.

<sup>267</sup> Respondent's First Post-Hearing Brief, ¶ 520 - ¶ 583.

<sup>268</sup> Respondent's Second Post-Hearing Brief, ¶ 589 - ¶ 595.

<sup>269</sup> Respondent's Second Post-Hearing Brief, ¶ 637.

140. In general, Respondent's Answer alleges that TRG is desperately looking for any finding it can to assist Mr. Patriciu and his associates in the context of legal and political battles in Romania.
141. In relation to the new quantification of damages, Romania argues that TRG sought to restructure its case on quantum following its collapse at the Hearing, but characterised the evidence on which it was based as misleading, inaccurate, and unreliable; specifically:
- a. The claim for reputational damage is farcical, being without proof and based arbitrarily on a third of NERA's assessment of loss in the Dunbar report;<sup>270</sup>
  - b. Although damages may "*not be fixed with total certainty*," the Respondent has demonstrated that the NERA calculations are statistically no different from zero, and hence that "*there is no evidence of any damage at all*";<sup>271</sup>
  - c. There appears to be "*no causal link between the Claimant's claims and its alternative quantification*";<sup>272</sup>
  - d. There is no sufficient evidence to support the losses claimed.<sup>273</sup>

## **F. COSTS SUBMISSIONS**

### **F1. Claimant's Costs Submissions**

142. The Claimant's Answer seeks recovery of the following costs: €4,524,781 plus US\$3,064,481 plus £2,321, plus interest at a rate of 6% compounded monthly until full payment.
143. The basis for seeking this sum is that Article 61(2) of the ICSID Convention gives the Tribunal discretion in awarding costs, but commentators have noted that the principle that costs follow the event is gaining ground.
144. Conversely Romania's claimed legal costs are unreasonably high, especially in light of the fact that it has done very little to advance or develop any positive case, but has rather confined

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<sup>270</sup> Comments on Claimant's First Post-Hearing Brief, ¶ 110.

<sup>271</sup> Comments on Claimant's First Post-Hearing Brief, ¶ 111.

<sup>272</sup> Comments on Claimant's First Post-Hearing Brief, ¶ 147.

<sup>273</sup> Comments on Claimant's First Post-Hearing Brief, ¶ 148 - ¶ 167.

itself to casting doubt on TRG's case. TRG denies that it added to the costs of the proceedings itself by changing its case or case theory; any amendments were only made as a result of the unfolding of subsequent events.

145. In a subsequent exchange of submissions (on 2 and 8 November 2010) each Party countered the arguments of the other as to the reasonableness of its legal costs.

## **F2. Respondent's Costs Submissions**

146. The Respondent seeks recovery of €9,440,710.93 in costs, plus interest at a reasonable commercial rate (6 months EURIBOR plus 2%), from the date of the final Award to the date of payment.

147. The Respondent argues in particular that it is entitled to recover its costs on the basis that the Claimant substantially contributed to the complexity of the case by way of repeatedly changing its case theory and the substance of the allegations in the course of the arbitration.

148. The Claimant's claim that in principle costs follow the event is contested; Article 61(2) gives the Tribunal instead a discretion in the awarding of costs. The Respondent also disputes that it should be responsible for the costs of the jurisdictional phase of the hearing and its efforts to exclude a Counsel, on the basis that its claims were reasonable in light of the decisions of other investment treaty tribunals.

149. Instead, the Respondent rests on the argument that the arbitral proceedings were brought with the intention of disrupting domestic criminal investigations while these investigations were ongoing, for which reason they were premature and, irrespective of the outcome, TRG should bear the full costs.

150. In a subsequent exchange of submissions (see paragraph 145 above) each Party countered the arguments of the other as to the reasonableness of its legal costs.

## **G. THE TRIBUNAL'S FINDINGS**

### **Part I: PREMINARY ISSUES**

151. Many arbitral tribunals feel the temptation to say that the case before them exhibits special or unusual features. In the present instance, the Tribunal feels justified in asserting that it does.

The special character of the case is, in essence, that the Claimant's claims originate in and focus on measures taken by authorities of the Respondent State in the area of investigation and possible prosecution of criminal offences. These measures, moreover, are or have been directed not against the investor itself, a Dutch company, nor even for the most part against its investments in the host State, but rather against individuals (principally Mr. Dan Costache Patriciu and his former business associate Mr. Philip Stephenson), the link between the two being the directing role that was played at the time by Messrs. Patriciu and Stephenson in the affairs of Rompetrol Rafinare S.A. ("RRC"), the principal Romanian subsidiary of the Claimant investor, as well as in the management and control of the Dutch holding company itself.<sup>274</sup> There are, to be sure, certain other complaints about the treatment of RRC's own tax affairs, and about other actions alleged to have damaged either the Claimant or its Romanian subsidiary, but the Claimant's case stands or falls by whether it is able to make out its claim that the criminal investigations have breached the rights of the Claimant itself – or (more precisely) that these criminal investigations are incompatible with the treatment the Claimant is entitled to expect, as a Dutch investor in Romania, under the terms of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and Romania of 1995 ("the BIT"). In this context, the Tribunal notes that the relief sought, as originally formulated in the Claimant's Request for Arbitration, included<sup>275</sup> a declaration that the Republic of Romania had breached the Claimant's and its directors', managers', and employees' procedural (due process) rights under Romanian and international law, a request that the perpetrators be disciplined, and an order for the cessation of the criminal investigations. Since then, the remedies sought by the Claimant have, for understandable reasons, undergone successive mutations. In the Statement of Claims, although the relief sought was now framed in terms of the damage suffered by TRG in itself and through its Romanian subsidiary, the conduct specifically complained of to found the relief sought was contained in a list of eight points, six of which related, in terms, directly to the conduct of criminal investigations against the individuals involved, first by the PNA and subsequently by the GPO.<sup>276</sup> Associated with these were two further complaints relating, first, to the issue of a report by the Presidential Administration of Romania,<sup>277</sup> and secondly to an attachment of shares in RRC owned by the Claimant, TRG. All of these grounds of claim the Tribunal will

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<sup>274</sup> See ¶ 48 and ¶ 49 of the Tribunal's Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008.

<sup>275</sup> See paragraph 47 above.

<sup>276</sup> Paragraph 54 above.

<sup>277</sup> The so-called 'Talpes report' – for the detailed treatment of which see paragraph 209ff. below.

discuss in detail in the substantive part of this Award. For the moment, it suffices to say that neither of these two latter grievances (the Talpes report and the share attachment) appears to the Tribunal to constitute the primary source of TRG's complaint about its treatment by the Romanian authorities, nor does either of them appear to be put forward as the basis for separate and freestanding claims on their own under the BIT. Rather their significance lies in their alleged relationship to the criminal investigations and the way in which these were carried out. In the Claimant's Reply, both the complaints and the relief requested were formulated in broadly the same way, with certain additions and refinements.<sup>278</sup> Lastly, in finally summarizing its overall case in the Post-Hearing Brief, the Claimant puts forward four alternative scenarios, all of which, in its submission, give rise to liability under the BIT.<sup>279</sup> Of these four scenarios, two implicate directly either the bringing of the criminal proceedings or the way these proceedings had been conducted; a further scenario is described as 'a pattern of abusive acts,' but on examination the overwhelming majority of the individual acts cited turn out to be steps in or around the conduct of the criminal proceedings just mentioned; a fourth and final scenario is then put in terms of a combination of all of the others. Subject to some of the individual comments that will appear in the detailed reasoning below, the Tribunal finds nothing surprising or out of the ordinary in these successive adjustments of the Claimant's case; it would be a sad day for investment arbitration if parties did not set out to confront in this way the counter-arguments of their opponents and the emerging facts, so that at the end of the day the tribunal is faced in a concrete form with the Claimant's final case and the Respondent's final answer to it. The important point for present purposes is rather that the Claimant's case in its final version has not broken away from the criminal proceedings against particular individuals which from the beginning were at their heart; indeed, it still revolves around them.

152. That is a circumstance which poses a particular challenge to an investment tribunal, against the background that there are very few cases indeed amongst the reported Awards which centre on criminal proceedings against individuals, so that there is a paucity of accumulated wisdom as to where to strike the balance in that regard between the legitimate interests of the State and

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<sup>278</sup> Paragraph 66 above.

<sup>279</sup> Paragraph 124 above. The four scenarios are: a pattern of abusive acts by Romania; criminal proceedings brought for political or commercial purposes; individual acts by prosecutors or others breaching the Treaty; or a combination of the above.

those of the foreign Investor.<sup>280</sup> Romania, as the Respondent, has made the argument before the Tribunal that the proceedings about which TRG, as the Claimant, complains should be seen as part of Romania's vital fight against corruption, and indeed has situated this aspect specifically within the framework of the stringent requirements placed upon Romania by the European Union in the context of its application for membership. Moreover the Tribunal cannot but take note of the fact that it emerges clearly from the evidence on both sides that the specific context of the issues leading to the criminal investigations is the privatization of State assets after Romania's transition to a market economy – a process which has notoriously led to acrimonious disputes in numerous other States at a similar stage of their economic restructuring. The Tribunal wishes to make it plain from the outset that it would be acutely sensitive to any well-founded allegation that the investment arbitration process before it was intended to (or was in fact operating in such a way as to) block or inhibit the legitimate operation of the State's inherent function in the investigation, repression and punishment of crime, including economic crime and corruption. At the same time the Tribunal acknowledges the validity of the Claimant's argument that the pursuit of crime – or even its mere invocation – cannot serve on its own as a justification for conduct that breaches the rights of foreign investors under applicable treaties. To all of which the Tribunal adds a rider of its own, namely that association with the management of a foreign investor or a foreign investment cannot serve to immunize individuals from the normal operation of the criminal law, irrespective of whether the individual is a local national (Mr. Patriciu) or a foreign national (Mr. Stephenson).

153. The above is enough to indicate that the Tribunal is confronted with a balancing exercise of some considerable complexity and intricacy, which it will attempt to conduct in all objectivity, on the basis of the evidence led before it, and with scrupulous fairness to all involved.

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<sup>280</sup> Only three such cases have been cited to the Tribunal: in *Benvenuti and Bonfant v. Congo*, 'ordinary' criminal proceedings brought against the director of an enterprise were one factor amongst many others considered by the tribunal in the context of the investor's claim of *de facto* expropriation; in *Saluka Investments v. The Czech Republic*, there was a subsidiary argument over abuse of process in connection with the periods of limitation in civil and criminal proceedings, but this did not form part of the tribunal's decision; and in *Phoenix Action v. The Czech Republic*, although 'ordinary' criminal proceedings had been brought against the main investor, the tribunal declined jurisdiction on the basis of the nature of the investment. The Tribunal has noted two further cases not cited before it: in *City Oriente v. Ecuador*, the Tribunal's Provisional Measures Order of 19 November 2007 required the Respondent to desist from pursuing a criminal investigation, but that was simply for the purpose of freezing the situation as it stood at the time of the initiation of the arbitration, and pending the Tribunal's Award; and in the well-known case of *SGS v. Pakistan*, the Tribunal expressed itself as follows, again in the context of a Provisional Measures Order: "We cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory." (Procedural Order No. 2, 16 October 2002, p. 301, 13 ICSID Rev. – FILJ (2003))



154. There remain certain other preliminary matters which the Tribunal finds it convenient to dispose of at this point, before it proceeds to examine the detail of the evidence in front of it on each of the Claimant's heads of claim: the Respondent's inadmissibility objection; the relationship between local remedies and BIT claims; the European Convention on Human Rights; the relationship between legality under local law and BIT claims; the burden and standard of proof; and damage as an ingredient of BIT claims.

A. The inadmissibility objection

155. In its Answer to the Request for Arbitration and its Memorial on Preliminary Objections, the Respondent advanced, in parallel with its Objections to Jurisdiction as such, a general objection to the admissibility of the Claimant's claims. In its Decision of 18 April 2008 on Jurisdiction and Admissibility,<sup>281</sup> the Tribunal decided to join this objection to the merits, under Arbitration Rule 41(4), "*to the extent that the objection retains its force in the light of the Pleadings as they develop.*"

156. In that Decision,<sup>282</sup> the Tribunal described the admissibility objection in these terms:

*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'." 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.*

157. The present question that arises is therefore whether this objection does indeed 'retain its force in the light of the Pleadings as they have developed'.

158. The key submissions in that respect are the Respondent's Rejoinder of 31 March 2010, paragraph 7 of which asserts that "[t]he failure of the Claimant to exhaust the remedies offered

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<sup>281</sup> Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, ¶ 114 and ¶ 116(b).

<sup>282</sup> *Ibid.*, ¶ 111.

*by the Romanian system precludes the Claimant from complaining before the present Tribunal about an abuse of the system which it did not allow to function properly;*” and paragraph 7 of the Respondent’s First Post-Hearing Brief of 4 August 2010, which reads, “[t]his case in substance concerns a claim for denial of justice. In the Respondent’s submission, it is not ripe for adjudication by an international arbitral tribunal, as the Claimant has not yet exhausted local remedies or, in instances where it has resorted to local remedies and has obtained relief, it cannot re-litigate the same claim before an international tribunal. ...” The Claimant’s answer to these submissions, as summarized in its First and Second Post-Hearing Briefs,<sup>283</sup> is in part that the local remedies rule has either been waived or is inapplicable, and in part that the available remedies have either been exhausted in fact, or else are (or would be) ineffective.

159. These arguments will be gone into in greater detail, so far as material, in the next following section of this Award. For the moment, however, the question remains whether there is still in being, at the end of the arbitral process, an inadmissibility objection as such, which the Tribunal would therefore have to dispose of before it could proceed to the merits.
160. The Tribunal is not persuaded by the Respondent’s assertion that, once the Claimant’s claims are subjected to proper legal analysis, they can be seen to be equivalent to classic claims for denial of justice, which therefore attract all the technical rules that have grown up over the years around claims of that kind, notably the inadmissibility of such a claim until local remedies have been exhausted. The objection against the Respondent’s assertion is rather one of substance. Once a Claimant investor has established its entitlement to the protection guaranteed under an investment treaty (as the Tribunal has already decided, in TRG’s favour, in its Decision on Jurisdiction and Admissibility), it becomes simply a matter as to whether the facts which the investor alleges, if they can be substantiated, do or do not constitute contraventions of those standards of protection, and, if they do, what the consequences are in terms of remedies. It would not, in the Tribunal’s view, be consistent with the established norms for the interpretation of treaties to read into a given investment protection treaty additional conditions or limitations that could readily have been incorporated into the treaty text had the parties so wished, but are not there. In the present Arbitration, the Claimant’s case rests in the main on alleged breaches of the standard of ‘fair and equitable treatment’ laid down in Article 3(1) of the BIT, and to a lesser extent on the guarantees of non-impairment and physical security and protection laid down in the same paragraph. Article 3(1) (which will be

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<sup>283</sup> Claimant’s First Post-Hearing Brief, p. 52-57, and Claimant’s Second Post-Hearing Brief, p. 7-10.

further analyzed below) reads, in relevant part, as follows: “*Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.*” The Tribunal cannot find either in the terms of that paragraph, taken in its context in the BIT, or in the rules for treaty interpretation reflected in Articles 31 *et seq.* of the Vienna Convention on the Law of Treaties, any warrant for reading into it an implied term that would subject some claims for breach of ‘fair and equitable treatment’ to conditions or restrictions, even of a purely temporal kind, that would not apply to other claims to the same standard of protection.

161. The Tribunal accordingly finds that, to the extent that an inadmissibility objection on Respondent’s part should be regarded as still extant, it does not raise an issue calling to be determined by the Tribunal *in limine*. The questions that remain under this head will therefore be decided in connection with the merits, below.

#### B. Local remedies

162. The Respondent’s argument on the question of local remedies has however fluctuated; at times, it has been a full-blooded admissibility objection (see above) aimed at a formal ruling that the Claimant’s claims are not ripe for the Tribunal to pronounce on them at all; at other times, it has been more of a defence on the merits, that the Claimant has not proved a definitive interference with its protected rights sufficient to found an award in its favour on the merits. This last is therefore an issue for the Tribunal to determine on the merits.
163. The first question to be settled in this regard would appear to be whether the Claimant’s claims are in fact to be regarded as claims for ‘the denial of justice’ in the classic sense well known in international law. It is a main plank of the Respondent’s argument that the claims in this arbitration should indeed be so regarded, because that is what they amount to in substance, regardless of whether the Claimant chooses to frame them as breaches of the fair and equitable treatment standard in order to bring them within the framework of the BIT. That being so (the Respondent’s argument continues), “[t]he requirement to exhaust local remedies here is entirely different from the exemption from the local remedies rule under customary international law, as reflected in Article 26 of the ICSID Convention and Article 8(3) of the Treaty ... In the case of denial of justice, the requirement to exhaust local remedies is an

*inherent element of the delict without which the claim is not ripe for international adjudication ... , whereas the local remedies rule under customary international law is merely an exemption from a procedural requirement and therefore can be waived ...*”<sup>284</sup> In its answers, the Claimant takes issue with the Respondent over whether, on the normal understanding of the local remedies rule, there do remain – in actual and specific fact – effective local remedies that might need to be exhausted.<sup>285</sup>

164. There is also an issue between the Parties as to whether the activities of prosecutors engage the denial of justice regime in the first place which should (so says the Claimant) be confined to the operation of the courts. The Tribunal is hard put to find much of substance in this disagreement. It would defy logic to suppose that international law lays down a more demanding standard for the actions of prosecutors than it does for the operation of the courts before which their prosecutions are brought. Nor can the Tribunal see valid grounds for distinguishing between them on the basis that the courts enjoy judicial independence whereas prosecutors are in a more direct sense the agents of the executive power, since (on the one hand) international law makes no distinction between executive, legislative or judicial organs for the purpose of attributing State responsibility, and (on the other hand) it is common ground in the vigorously advanced submissions of both Parties before the Tribunal – the Claimant as much as the Respondent – that the Romanian prosecutors are required to carry out their functions in a manner that preserves their independence from executive or political interference.
165. The Tribunal begins with the threshold observation that ‘denial of justice’ (with its concomitant local remedies rule) is a legal institution which has as its very essence the relationship between a State and aliens within its territory (or under its jurisdiction). It is not a barrier interposed between a State and its own citizens; whatever rules apply to that relationship originate in other chapters of international law. This may serve as a further reminder that the claims before the Tribunal for adjudication in these proceedings are those which allege unlawful harm to TRG, the Claimant in the arbitration, and that the Tribunal is not competent, in general or in particular, to pronounce on actions said to have injured either Mr. Patriciu or Mr. Stephenson, except to the extent that the latter can be shown to have occasioned unlawful harm to TRG.

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<sup>284</sup> Respondent’s First Post-Hearing Brief, ¶ 25.

<sup>285</sup> Claimant’s Second Post-Hearing Brief, ¶¶ 16ff.

166. Once the matter is seen in that light, then, so it seems to the Tribunal, the Respondent's argument simply falls away. If there have been breaches of Mr. Patriciu's or Mr. Stephenson's procedural rights in the course of the criminal investigation process, of a kind that could conceivably fall within the scope of 'denial of justice' (or its equivalent, in the case of Mr. Patriciu), then – even if those breaches are duly established – they do not and cannot, in and of themselves, constitute valid BIT claims at the instance of TRG. The rights so breached would be personal rights of the individuals under investigation. For their breach to entail a valid BIT claim would require a separate investigation into their direct or indirect effect on the investments of TRG itself in Romania, and into whether that effect did or did not amount to a failure to respect the protections guaranteed to TRG, as a foreign investor, under the BIT. But that would be an investigation of a qualitatively different kind, applying a potentially different standard, namely that laid down by the relevant provisions of the BIT, properly interpreted and then applied to the facts of the case. The position is no different if (as is indeed alleged by the Claimant in certain respects) the interests of TRG itself became incidentally caught up in steps taken in the criminal investigations against Mr. Patriciu or Mr. Stephenson.
167. It matters little in this context whether the question of the availability and effectiveness of local remedies is put in terms of a procedural issue as to whether a claim for injury is ripe for determination by an arbitral tribunal, or in terms of a substantive issue as to whether the alleged injury has in fact been sustained. To the mind of the Tribunal, both come down in the end, within the context of an investment treaty arbitration, to the same qualitative evaluation of the effects of the particular State conduct that has been put in issue by a claimant before a tribunal.

C. The European Convention on Human Rights (ECHR)

168. The Tribunal finds this to be the convenient place to address also the relevance to the proceedings before it of the ECHR, and in that context of the jurisprudence of the European Court of Human Rights (“ECtHR”) under the Convention. This was a subject to which a great deal of attention was paid in the written and oral pleadings of both Parties, specifically in relation to the European Court's Judgments on the interception of communications (several of which were decisions against Romania itself), but also in the more general context of the fair trial provisions of the ECHR, on which the Court's jurisprudence is very extensive indeed.<sup>286</sup>

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<sup>286</sup> Cf. paragraph 106.b above.

Both aspects were considered at length in the expert legal report of Professor Kühne (for the Claimant), and were covered extensively in his oral evidence before the Tribunal.

169. The Parties are in basic agreement that the provisions of the ECHR are not directly applicable as such to the substantive dispute between TRG as the Claimant and Romania as the Respondent in this arbitration (although there was some suggestion that the ECHR ought to be taken into account as relevant material for the interpretation of the BIT, under the rule in Article 31(3)(c) of the Vienna Convention on the Law of Treaties)<sup>287</sup> Beyond that basic agreement though, the submissions of the Parties on the relevance of the ECHR to the issues before the Tribunal, diverged sharply: the Respondent argued that the ECHR was designed to set the bench-mark standard for the protection of the individual, so that it was “*plainly obvious*”<sup>288</sup> that any system or practice that met the ECHR standard would *a fortiori* satisfy the requirements of the BIT for the treatment of investments; the Claimant argued, in contrast, that the BIT represented *lex specialis*, both in time and in substance, so that an ECHR standard was of no more than incidental or secondary interest.<sup>289</sup> In reality, however, the competing submissions of the Parties turned out to be less straightforward than that: the Claimant, for example, invoked judgments of the ECtHR in support of its submissions as to the illegality of the interception of Mr. Patriciu’s and RRC’s communications,<sup>290</sup> as to the effect of bad faith on prosecution,<sup>291</sup> as to the difference between the status of a prosecutor and that of a court,<sup>292</sup> and as to the place of local remedies,<sup>293</sup> whereas the Respondent, in addition to claiming that certain aspects of Romanian internal law offer a higher standard of protection than does the ECHR,<sup>294</sup> also advanced the proposition mentioned above in its reverse form, i.e. that if the Claimant was unable to establish a breach of the ECHR standard, there ‘certainly’ could not be a breach of the BIT standard.<sup>295</sup>
170. Leaving aside for the moment the issues of local law, which will be dealt with below so far as relevant, the Tribunal’s own view of the matter is as follows. The Tribunal starts from the

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<sup>287</sup> “*There shall be taken in account, together with the context: ... any relevant rules of international law applicable in the relations between the parties.*”

<sup>288</sup> Respondent’s First Post-Hearing Brief, pp. 40-41.

<sup>289</sup> “[A] floor but not a ceiling for Romania’s obligations,” Claimant’s Reply, p. 2; see also *ibid.* p. 20.

<sup>290</sup> Reply, pp. 67-68.

<sup>291</sup> *Ibid.*, pp. 39-41.

<sup>292</sup> *Ibid.*, p. 53.

<sup>293</sup> *Ibid.*, pp. 56-59. And at one moment seemed to be asserting that the ECHR itself set the standard of legality under international law for investment treaty purposes (Transcript, Day 7, pp. 32-33).

<sup>294</sup> Respondent’s First Post-Hearing Brief, ¶ 36.

<sup>295</sup> *Ibid.*, p. 41.

elementary proposition that it is not called upon to decide any issue under the ECHR, whether the issue in question lies in the past or is still open. Its function is solely to decide, as between TRG and Romania, “*legal dispute[s] arising directly out of an investment*”<sup>296</sup> and to do so in accordance with “*such rules of law as may be agreed by the parties,*”<sup>297</sup> which in the present case means essentially the BIT, in application of the appropriate rules for its interpretation. The ECHR has its own system and functioning institutional structure for complaints of breach against States Parties. If either Mr. Patriciu or Mr. Stephenson – or any of their colleagues – feels that the conduct of a Romanian authority in his regard violates his Convention rights as an individual, a Convention remedy is available him, ultimately before the only judicial body that has the power to give an authentic and binding decision on the interpretation of Convention rights and their application. Those remedies will continue to be available and will be unaffected by whatever decision the Tribunal gives in the present case. Convention rights, with their associated remedies, might also be available in appropriate circumstances to corporate entities in respect of their presence or activities within the jurisdiction of a State Party. That would certainly appear to be the case for RRC. Whether a Convention remedy would equally be available to TRG itself is not a matter on which the Tribunal feels called upon to speculate; the answer would no doubt depend on the Convention right alleged to have been breached, the nature of the conduct by a Romanian authority alleged to have caused the breach, and where that conduct took place.

171. The above leads the Tribunal to recall once more however – an observation to which it will return on several occasions in the course of this Award – that neither Mr. Patriciu, nor Mr. Stephenson, nor RRC, are claimants in this arbitration; the sole Claimant is TRG, the foreign investor, on the basis of the Tribunal’s Decision on Jurisdiction and Admissibility of 18 April 2008.
172. It seems to follow automatically that much of the detailed argument about the application of specific provisions of the ECHR in the jurisprudence of the European Court of Human Rights, interesting and illuminating as it has been, is beside the point when it comes to the issues under the Netherlands-Romania BIT which form the subject of the dispute before the Tribunal. The Tribunal’s conclusions in this regard march with its conclusions above in respect of denial of justice and local remedies, and can be summarized in condensed form as follows:

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<sup>296</sup> Article 25(1) of the ICSID Convention.

<sup>297</sup> *Ibid.*, Article 42(1).

- i. The Tribunal is not competent to decide issues as to the application of the ECHR within Romania, either to natural persons or to corporate entities;
- ii. The governing law for the issues which do fall to the Tribunal to decide is the BIT, and notably its requirements for fair and equitable treatment and non-impairment of, and full protection and security for, the investments of investors of one Party in the territory of the other Party;
- iii. The category of materials for the assessment in particular of fair and equitable treatment is not a closed one, and may include, in appropriate circumstances, the consideration of common standards under other international regimes (including those in the area of human rights), if and to the extent that they throw useful light on the content of fair and equitable treatment in particular sets of factual circumstances; the examination is however very specific to the particular circumstances, and defies definition by any general rule;
- iv. The claims for decision in the arbitration are those of TRG, in respect of RRC, TRG's investment in Romania, which are qualitatively different in kind from whatever complaints there might be by individuals as to the violation of their individual rights by Romanian state authorities.

#### D. Local law

173. The next closely connected issue of general significance is that of the application of local law. A very substantial portion of the argument advanced before the Tribunal, both by the Claimant and by the Respondent, went to the legality, under the laws of Romania, of various actions (and in some cases omissions) on the part of a range of State organs – the President of Romania; the Presidential Administration; the tax administration; the anti-corruption authority (PNA); the General Prosecutor and his office (GPO) being the principal bodies involved. Although there was some dispute as to whether certain individuals, notably Mr. Talpes (see above) and Ms. Cristescu (first at the PNA, later at the GPO), exceeded their authority or acted out of personal motives, there was no dispute that all of the authorities and agencies in question were at all material times organs of the Romanian State, and that their conduct was



accordingly attributable to the Romanian State for the purposes of the law of State responsibility.<sup>298</sup>

174. The question for present purposes is however what relevance it holds for the Tribunal's decision on the dispute before it under the BIT that a particular action or course of action on the part of an organ of the Romanian State is said to have been (or even in particular cases may have been established to have been) unlawful under the laws of Romania. The Tribunal begins with two elementary propositions: first, that it is well established that a breach of local law injuring a foreigner does not, in and of itself, amount to a breach of international law; second, that the provisions or requirements of local law cannot be advanced as an excuse for non-compliance with an international obligation.<sup>299</sup> Both propositions are, as indicated, elementary, and neither is contested by either of the Parties in this Arbitration. Likewise, the Parties are clearly in agreement that the Tribunal is not called upon to act as Romanian judge of final instance, either to pronounce on the rightness or wrongness of the pending criminal charges or to substitute a view of its own for the decisions of the competent Romanian instances on individual steps in the prosecutions or preliminary investigations, or on any other internal process.
175. What place, then, does this leave for the pertinence to the dispute before the Tribunal of the question of lawfulness or unlawfulness under Romanian law? 'Lawfulness or unlawfulness' refers in this context of course to the substantive aspects of the dispute, not to the different issue covered above as to applicability of the local remedies rule on broad admissibility grounds.
176. Neither Party's answer to this question is entirely clear. The Claimant's answer would no doubt be that a series of unlawful acts, and even more so if they form a pattern of illegality, can at its highest be evidence of a deliberate and premeditated intention to cause injury, or at least of a pervading animus or hostility pursued by inadmissible or improper means, either of which would be capable of amounting to a breach of the obligations to ensure fair and equitable treatment or non-impairment or of the obligation to accord full protection and security. The Respondent's answer would be a riposte largely on the factual level, to the effect

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<sup>298</sup> See Articles 4 and 7 of the Draft Articles on State Responsibility annexed to UN General Assembly Resolution 56/83 of 12 December 2001.

<sup>299</sup> Cf. Article 3 of the International Law Commission's Draft Articles on State Responsibility, 2001, and the Commentary, which sets out *in extenso* the international authorities.

that it had not been established that there was either an intention to cause injury or a concerted animus or hostility, and that for the greater part the asserted illegalities had either not been made out, or had been remedied, or had been proved unfounded, and in any case had not been shown to have caused injury.

177. The Tribunal does not find either of these conjectural answers to be entirely to the point, in the formulation of its decision on the dispute before it. To take the Claimant's position first (as would be logical) the Tribunal would certainly not want to exclude the possibility that deliberate and sustained illegality in the treatment of a protected investment could, in appropriate circumstances, be suggestive of a failure to meet the applicable standards of fair and equitable treatment or non-impairment; whether it would be equally apt to suggest a failure to provide physical protection and security is more open to question, and would no doubt depend to a large extent on the particular kind of unlawful conduct that was in question. But material of this kind would be suggestive only; the Tribunal finds it difficult to see (given the elementary propositions of international law recited in paragraph 174 above) how it could amount in itself to the fulfilment of a claimant's burden of proof that the applicable standard of treatment had been breached, unless supplemented by other evidence of a sufficiently persuasive kind. The Tribunal reverts at this point to its earlier observation that it is not Mr. Patriciu or Mr. Stephenson who is the entitled Claimant in this arbitration but solely TRG, the foreign investor, in respect of its investment in RRC. From this central feature of the case the Tribunal derives the conclusion that something more would be required in order to bring allegedly improper actions towards Mr. Patriciu or Mr. Stephenson (which represent the large majority of TRG's accusations in this respect) into the legitimate matrix of consideration as indicators suggestive of internationally unlawful conduct towards TRG. What that 'something more' might consist in seems to the Tribunal once again to be very much a matter of the specific facts of the case and of the particular conduct impugned, which must therefore be remitted to a later stage in this Award where the Tribunal considers the criteria by which it will identify which actions are covered by the BIT and in light of that, assess the detailed evidence brought before it.

#### E. Burden and standard of proof

178. Before proceeding to a more detailed analysis of the competing contentions advanced by the Parties, the Tribunal thinks that a word of clarification is in order, specifically as to the burden of proof vs. the standard of proof. The Tribunal believes that the distinction between the two

can be stated quite simply: the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole. As soon as the distinction is stated in that way, it becomes evident that the burden of proof is absolute, whereas the standard of proof is relative. By this the Tribunal means (again, in simple terms) that if, according to basic principle, it is for the one party, or for the other, to establish a particular factual assertion, that will remain the position throughout the forensic process, starting from when the assertion is first put forward and all the way through to the end. Operating within an international system characterised by principle rather than procedural formality, the Tribunal is not enamoured of arguments setting out to show that a burden of proof can under certain circumstances shift from the party that originally bore it to the other party, and then perhaps in appropriate circumstances shift back again to the original party. To the mind of the Tribunal, arguments of that kind confuse, unhelpfully, the separate questions of who has to prove a particular assertion and whether that assertion has in fact been proved on the evidence. Conversely, by stating the standard of proof as relative, the Tribunal means that whether a proposition has in fact been proved by the party which bears the burden of proving it depends not just on its own evidence but on the overall assessment of the accumulated evidence put forward by one or both parties, for the proposition or against it. A trivial example is that, if a factual allegation is put forward by one side and conceded by the other, it no longer requires to be 'proved'.

179. Against that background, the Tribunal finds that it can safely rest, so far as the burden of proof is concerned, on the widely accepted international principle that a party in litigation bears the burden of proving the facts relied on to support its claim or defence. This is often put as a maxim: he who asserts must prove (*onus probandi incumbit actori*). A claimant before an international tribunal must establish the facts on which it bases its case or else it will lose the arbitration. The respondent does not in that sense bear any 'burden of proof' of its own, but if it fails where necessary to throw sufficient doubt on the claimant's factual premises, it runs the risk in turn of losing the arbitration; but only 'the risk,' because the particular factual premise may not in the event turn out to be decisive in the legal analysis. Conversely, if the respondent chooses to put forward fresh allegations of its own in order to counter or undermine the claimant's case, then by doing so the respondent takes upon itself the burden of proving what it has alleged. The authorities cited by the Claimant in these proceedings under the 'burden of proof' heading, as the Tribunal reads them, refer more to the inferences that a judicial organ may draw from the failure of a party to produce necessary evidence which it must be presumed

to possess; whether any situation of that kind exists in the present case will be addressed below, in connection with the particular factual allegations in question. It does not, however, in the Tribunal's view, amount to casting on a respondent a 'burden of (dis)proof'.<sup>300</sup>

180. The Tribunal does not therefore believe that there are any serious issues as to the burden of proof in the present arbitration. Such issues as there are relate instead to the standard of proof, where the Parties adopt conflicting positions – though only, it must be said, in respect of certain aspects of the factual record presented to the Tribunal. For the most part, however, the Parties are in broad agreement that the standard of proof that must be met is the 'normal' standard for claims of breach of the protection provided under a bilateral investment treaty.<sup>301</sup> Where they differ is over the question whether certain aspects of the Claimant's factual case require proof to a higher standard, on account of the nature of the allegations made. More precisely, the Respondent submits that a settled line of international judicial authority establishes that 'clear and convincing evidence' is required to sustain allegations of unlawful or malicious conduct, or of bad faith, against a State. The Claimant retorts that this is an evasion designed to cover the Respondent's inability to counter the Claimant's evidence. It accepts that a higher standard may be applicable in particular circumstances,<sup>302</sup> but asserts that, on the authorities, this is relevant only when the respondent is impugning the claimant's conduct, not vice versa.
181. The Tribunal is unable to accept, in full, the position of either Party. It starts from the position that in international arbitration – including investment arbitration – the rules of evidence are neither rigid nor technical. If further confirmation of that were necessary, in the specific ICSID context, it can be found in Articles 43-45 of the Washington Convention, the intention behind which is plainly that a tribunal should possess a large measure of discretion over how the relevant facts are to be found and to be proved – a general principle which finds strong reinforcement in the Arbitration Rules, notably in paragraphs (1) and (3) of Rule 34. The overall effect of these provisions is that an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, whether particular evidence or kinds of evidence should be admitted or excluded, what weight

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<sup>300</sup> As illustrated by the awkward formulation advanced by the Claimant in its Second Post-Hearing Brief (shifting "*the burden of proof to Romania to come forward with evidence*"), ¶ 27.

<sup>301</sup> Claimant's Second Post-Hearing Brief, ¶ 24; Respondent's First Post-Hearing Brief, ¶ 63.

<sup>302</sup> "[P]articularly important or delicate questions such as allegations of bribery or fraud": Claimant's First Post-Hearing Brief, ¶ 153.

(if any) should be given to particular items of evidence so admitted, whether it would like to see further evidence of any particular kind on any issue arising in the case, and so on and so forth. The tribunal is entitled to the cooperation of the parties in that regard, and is likewise entitled to take account of the quality of their cooperation. When paragraph (2) of Rule 34 lays down that “[t]he tribunal shall take formal note of the failure of a party to comply with its obligations under [that] paragraph and of any reasons given for such failure,” it no doubt intends, among other things, that a given tribunal is specifically authorized to draw whatever inferences it deems appropriate from the failure of either party to produce evidence which that party might otherwise have been expected to produce.

182. All of the above tells heavily against any argument that the present Tribunal should regard itself as bound in advance to expect or to require specific levels of proof or of rebuttal in respect of particular factual allegations advanced by the Claimant in this arbitration. That said, the Tribunal will (in this matter as in others) draw on the accumulated experience of other tribunals for help and guidance when it finds that they have dealt with issues of the same kind as confront the present Tribunal. It notes in this connection that some of the cases cited to it derive from the State-to-State dispute settlement field (where the governing principles are not *ex hypothesi* identical with investor-state arbitration); and that some of the decisions have in contemplation bad faith, or fraud, or corruption (rather than, as here, improper, irregular, or potentially sanctionable conduct on the part of State officials).<sup>303</sup> The guidance which the Tribunal draws from the cases is that there may well be situations in which, given the nature of an allegation of wrongful (in the widest sense) conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence – as opposed to pure probabilities or circumstantial inferences. But the particular circumstances would be determinative, and in the Tribunal’s view defy codification. The matter is best summed up in general and non-prescriptive terms by Judge Higgins, “*the graver the charge the more confidence must there be in the evidence relied on.*”<sup>304</sup> Or as the matter was put in greater detail (citing Judge Higgins) by the tribunal in *Libananco v. Turkey*:

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<sup>303</sup> Unlike the majority in the *Tokios Tokelès* Award, the present Tribunal does not find it useful to approach the matter in terms of presumptions either of regularity or of irregularity in the actions of ranking State officers.

<sup>304</sup> “*Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court (who already will know they bear the*

*In relation to the Claimant's contention that there should be a heightened standard of proof for allegations of "fraud or other serious wrongdoing," the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that —the graver the charge, the more confidence there must be in the evidence relied on ..., this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.*<sup>305</sup>

183. Therefore the Tribunal, while applying the normal rule of the 'balance of probabilities' as the standard appropriate to the generality of the factual issues before it, will where necessary adopt a more nuanced approach and will decide in each discrete instance whether an allegation of seriously wrongful conduct by a Romanian state official at either the administrative or policymaking level has been proved on the basis of the entire body of direct and indirect evidence before it.
184. Connected with the discussion above of the burden and standard of proof is the distinct (but not unrelated) question of the state of the Respondent's compliance with the Tribunal's directions on the Claimant's requests for document disclosure. The connection between the two arises out of the Claimant's argument that a respondent in ICSID arbitral proceedings is not permitted simply to sit on its hands, but is under a duty, made into a specific obligation by Arbitration Rule 34(3), to cooperate in the production of relevant evidence; and its further argument that, when Article 34(3) lays down that the Tribunal "*shall take formal note of*" the failure of a party to comply with this obligation, that has as an automatic consequence that the Tribunal should be ready to draw adverse inferences from the failure. The issue is however distinct in its substance from the burden and standard of proof except to the extent that it may condition the circumstances under which a Tribunal may take particular factual allegations as 'proved' for the purpose of the arbitration.
185. The Tribunal begins with the observation that the statutory position under the Arbitration Rules is not quite as simple as the Claimant would have it. Article 34(3) enjoins the Tribunal also to take formal note of "*any reasons*" given by a party for a failure to comply, which inevitably implies, in the Tribunal's view, that certain failures might, in the particular

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*burden of proof) as to what is likely to satisfy the Court."* Separate Opinion of Judge Higgins in the *Oil Platforms* case, *ICJ Reports* 2003, p. 234.

<sup>305</sup> *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 125.

circumstances, be excused, or at least mitigated. It is also the case that Arbitration Rule 34(3) does not have in view particular failures to comply with particularized disclosure requirements, but rather an overall failure to comply with the broad obligation of cooperation enunciated in the Article. Finally, the formula used (“*take formal note of*”) is an old one going back to the Hague Convention of 1907 and does not necessarily imply specific consequences in the drawing of adverse inferences that Arbitration Rule 34(3) could have stated but did not.

186. In the second place, the disagreement between the Parties in this regard relates to a relatively limited part of the Tribunal’s Order on document disclosure of 29 October 2009, which accepted some of the Claimant’s disclosure requests in qualified form, while rejecting others on various grounds. The subsequent correspondence between the Parties, and between them and the Tribunal, reveals that in the last analysis, the Parties are at odds only over whether the Respondent has made a sufficiently full disclosure of the authority for the tapping of Mr. Patriciu’s personal and business telephones in the period after 31 October 2003, and of the requests by the PNA and GPO respectively for information from banking institutions in 2004 and 2005. The Tribunal recalls that, as to the telephone tapping, it declined to order disclosure of the interception warrants for the time being pending a further report from the Respondent on means by which disclosure could be made without prejudicing Romania’s essential security interests, but did order disclosure of relevant material obtained by the interception, subject however to the Respondent’s right to raise individual objections on security grounds. As to the banking information, disclosure was ordered, relating to defined periods in 2004 and 2005, of the requests made to banking institutions, and of the latter’s responses but only to the extent that they disclosed specific protests against the requirement to provide the information requested. The correspondence on the state of the Respondent’s compliance rests with the Respondent’s submission to the Tribunal dated 11 December 2009, in which the Respondent sets out in detail (against the background of the quality of the disclosures it had made under these two heads) the reasons why, on the one hand, it was not able to make further disclosure, and on the other hand why no further disclosure was needed in order to open the way to the argument the Claimant had signalled it intended to make on the basis of the documentary material in question. The Respondent’s reasons can be summarized in condensed form as being (in relation to the banking requests) that release would alert the holders of the bank accounts to the fact that they were under investigation, with the risk of the destruction or concealment of important evidence and with it of irreparable harm to the investigation itself; and (in relation to the interception warrants) that they would reveal sensitive material relating

to intelligence sources, which bore a high level of security classification, and to which the individuals in question would have no right of access under Romanian law; and further that none of the individuals in question had sought to exercise the right they did have under Romanian law to apply for the security classifications to be downgraded. The Respondent further says that a substantial quantity of the material sought is already available to the individuals concerned under the normal operation of internal procedures and explains why, in its view, this is so. The Tribunal sees no need to go into the matter in greater detail, nor to pronounce in any more formal way on whether the Respondent's admitted partial non-compliance is or is not justified by the reasons given. It suffices to note that the reasons put forward by the Respondent, in some detail, are serious ones, of a kind that have been recognized by other arbitral tribunals, and that they therefore fall comfortably within the 'reasons' of which an ICSID Tribunal is required 'formally to take note' under Arbitration Rule 34(3). The Claimant did not, in its closing oral argument or Post-Hearing Brief, press a request for a specific adverse inference to be drawn. All this being so, and given further the degree of partial compliance documented in the correspondence between and from the Parties, and given also the opportunity the Tribunal has since had, after the conclusion of the oral hearing, to consider the final Judgment of the Romanian Supreme Court on the legality of the telephone tapping, the Tribunal does not believe that the circumstances call for the drawing of any adverse inferences in general or in particular. The establishment of the Claimant's specific factual allegations, and the arguments based upon them, rests intact, to be judged issue-by-issue in Part II of this Award.

#### F. Damage

187. The final preliminary matter to be dealt with at this point in the Award is one that was raised by the Tribunal with the Parties at the end of the oral hearing, namely whether damage is an essential element of the kind of claims for breach advanced in this case. Or, to put the question the other way round, whether it is possible to conceive, even hypothetically, of a breach of this kind which occasions no damage.<sup>306</sup>
188. The Claimant dealt with the issue in its Post-Hearing submissions. For the Claimant, the simple answer is that, in international law, responsibility flows automatically from breach, not from proof of actual loss. The Claimant cites in this respect Articles 29-31 of the International

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<sup>306</sup> See paragraph 120 above.



Law Commission's (ILC) draft Articles on State Responsibility, which in its view establish both that breach of an international obligation entails legal consequences going beyond the obligation to make full reparation for loss, and that damages are not an essential element of an international claim. This is, it goes without saying, without prejudice to the Claimant's submission that it had indeed produced proof of actual economic loss, and its further submission that TRG is in the circumstances also entitled to moral damages for harm to its reputation.<sup>307</sup> The Respondent contended, to the contrary, that actual economic damage was an essential component of the Claimant's claims in this arbitration.<sup>308</sup>

189. It is convenient therefore to begin with an examination of the draft Articles on State Responsibility, bearing in mind that their status remains that of a draft, although the degree of approval accorded to them by the UN General Assembly<sup>309</sup> and in subsequent international practice<sup>310</sup> amply justifies treating the draft Articles as guidelines for present purposes. While the Tribunal cannot fault the Claimant's submission that, under the draft Articles, breach of an international obligation has wider consequences than the duty to pay damages, it notes (subject to what will appear later) that, in its final form, the Claimant's claim is primarily a claim for damages.<sup>311</sup> The crux therefore lies in draft Article 31, and specifically the ILC's commentary to that article (read together with its commentary to draft Article 2). In both places, the ILC states clearly that there is no general rule requiring damage as a constituent element of an international wrong giving rise to State responsibility. The ILC goes on to say that whether damage is or is not actually required depends on the nature of the primary obligation that has been breached.<sup>312</sup> Moreover the ILC goes on to make explicit that its formulation of the rule in terms of an automatic obligation borne by the wrongful State is designed to side-step the problems that would otherwise be caused by the possible existence of more than one State 'specially affected by the breach,'<sup>313</sup> the latter being a phrase repeatedly used in the draft Articles, along with the expression 'injured State,' to express the idea of a State which has

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<sup>307</sup> Claimant's Post-Hearing Brief, ¶¶ 179ff.

<sup>308</sup> Respondent's Post-Hearing Brief, ¶¶ 504-507.

<sup>309</sup> See UN General Assembly Resolution 65/19 of 6 December 2010.

<sup>310</sup> See Olleson, *The Impact of the ILC's Articles on Responsibility of States for International Wrongful Acts*, British Institute of British International Comparative Law (2004) [http://www.biiicl.org/files/3107\\_impactofthearticlesonstate\\_responsibilitypreliminarydraftfinal.pdf](http://www.biiicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf).

<sup>311</sup> Claimant's Post-Hearing Brief, ¶ 303; the inclusion of "other and further relief" under e) the Tribunal regards as entirely *pro forma* in the light of the substantive arguments made before it.

<sup>312</sup> Commentary to Article 2, ¶ 9, and Commentary to Article 31, ¶¶ (6)-(7).

<sup>313</sup> Commentary to Article 31, ¶ (4).

suffered damage in some direct sense sufficient to entitle it to ‘invoke the responsibility of’ the wrongful State.<sup>314</sup>

190. Transposing the above from the State-to-State to the investment treaty context leads, in the Tribunal’s opinion, to the following conclusions. The starting point, as the ILC points out, is the nature of the particular international obligation (the ‘primary obligation’) breach of which is being invoked. In the present case, as the Tribunal has already observed, that is essentially Article 3(1) of the BIT with its guarantees of fair and equitable treatment, non-impairment, and physical protection and security. When Article 3(1), for example, lays upon the host State the obligation not to “*impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal [of the investments of investors of the other Contracting Party] by those investors,*” and Article 8 grants the investor a right to arbitration “[f]or the purpose of solving disputes with respect to investments” between it and the host State, the Tribunal is in no doubt that those provisions have principally in mind ‘disputes’ over breaches which occasion actual (and therefore assessable) loss or damage to the investor. As a matter of law, though, it remains the case that breaches of that kind of obligation under an investment treaty may give rise to claims for relief of different kinds: for example for the cessation of host State measures against an investor, or for the re-instatement of a *status quo ante*, or (if the circumstances were appropriate) for a bare declaration of breach. To the extent, however, that a claimant chooses to put its claim (as in the present Arbitration) in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach.<sup>315</sup> All of that is matter for examination later in this Award, and the Tribunal sees no need to go further into it at this point. The Tribunal wishes merely to recall once again that individual damage to Mr. Patriciu or his associates is analytically distinct from damage to TRG itself, the Claimant in this arbitration, or to TRG’s investments in Romania.

## H. THE INTERPRETATION AND APPLICATION OF THE BIT

191. Having dealt with those preliminary considerations, the Tribunal is now in a position to proceed to the substantive part of its Award. As the Tribunal regards the case as turning to a

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<sup>314</sup> See Part III of the draft Articles, *passim*.

<sup>315</sup> See paragraph 173 above.

very great extent on its facts, it will analyze the factual evidence in detail, in accordance with the following schema:

- (a) The Rompetrol and Petromidia privatizations;
- (b) The Libyan receivable;
- (c) The Talpes report;
- (d) The instigation of criminal investigations against Messrs. Patriciu and Stephenson;
- (e) The procedural irregularities alleged to have occurred during the criminal investigations –
  - i. The arrest proposals;
  - ii. The attachment of the RRC shares;
  - iii. The telephone interceptions;
- (f) The tax investigations into RRC.

192. Before proceeding to a factual analysis of the Claimant's complaints, however, it will be convenient for the Tribunal to address the interpretation of the relevant provisions of the BIT, in the light of the respective submissions of the Parties. This will then provide the framework for how those provisions should be applied to the specific circumstances of the case, and will in particular guide the Tribunal's findings as to the relevance or otherwise of the Parties' arguments on the facts to the issues which the Tribunal must decide. In Sections I and J, the Tribunal will then consider the respective submissions and expert evidence tendered by the Parties on the question of the loss or damage suffered by TRG, including the claim for moral damages. Sections K, L, M contain the Tribunal's decision on the dispute, and its rulings as to costs and damages.

193. The Tribunal has already noted that the main substantive provision of the BIT that comes into play in the merits phase of the present arbitration is Article 3(1), the text of which has been set out in paragraph 160 above, but bears repeating:

*Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.*

The Claimant alleges that the first limb at least of this treaty guarantee has been breached by the conduct of the Respondent in respect of its investment in Romania, and in some respects the second and third limbs as well.

194. The Tribunal recalls, as set out in paragraph 165 above, and following its Decision of 18 April 2008 on Jurisdiction and Admissibility, that the ‘investor’ for the purposes of Article 3(1) is TRG, and its ‘investment’ is its holdings in RRC.<sup>316</sup> The Tribunal notes that during the period 2007-2009, Rompetrol Holding S.A. sold its shares in TRG to KaiMunaiGaz, a Kazakhstan energy company, so that that company now wholly owns TRG. Although there is some dispute over the effect of this sale on the calculation of damage, a matter which the Tribunal will address in Section I of this Award, there has been no suggestion that the transfer affects TRG’s right to proceed with the claims put forward in this arbitration. The Tribunal has accordingly proceeded on that basis.
195. The Claimant points out that the BIT’s reference to fair and equitable treatment is in plain language and is unqualified, on the basis of which it submits that the Treaty standard is, in the words of the *Biwater Gauff* tribunal,<sup>317</sup> an “*autonomous conventional one*.”<sup>318</sup> This has the consequence, in the Claimant’s view,<sup>319</sup> that the standard is broad and flexible, and that its precise application is left to the tribunal in each individual case, in the light of all the circumstances of the case before it. The Claimant subdivides the general concept of fair and equitable treatment into four elements that have been isolated in arbitral awards, namely transparency and consistency (including the protection of the investor’s basic expectations); freedom from harassment; procedural propriety; and good faith.<sup>320</sup> It makes a similar point about the breadth and generality of the BIT’s references to the non-impairment standard and to the standard of full protection and security, adding that those two standards have been found in arbitral awards to encompass protection against both private interference and interference by the State,<sup>321</sup> and it invokes specifically<sup>322</sup> the dicta of the *Vivendi* and *Eureko* tribunals that State-organized harassment would breach the full protection and security standard.

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<sup>316</sup> And certain other Romanian enterprises, though RRC seems clearly to be the primary investment.

<sup>317</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

<sup>318</sup> Claimant’s First Post-Hearing Brief, ¶ 88.

<sup>319</sup> Citing F. A. Mann, 1981, Exhibit CLA-66, and Schreuer, 2005, Exhibit CLA-170.

<sup>320</sup> Statement of Claims, ¶¶ 52ff., and Claimant’s First Post-Hearing Brief, ¶¶ 89-90.

<sup>321</sup> Claimant’s First Post-Hearing Brief, ¶¶ 95ff.

<sup>322</sup> Statement of Claims, ¶ 81.

196. The Respondent offers no detailed analysis of its own as to how the provisions of Article 3(1) of the BIT should be interpreted. Its defence is largely (as has already been indicated) at the factual level, residing in other words in its insistence that the Claimant's claims of misconduct are not well founded. Beyond that, the Respondent's case rests on its characterization of the Claimant's claims as implicating international standards of due process, and as amounting therefore to 'denial of justice' in the classic category of customary international law. These aspects of the case have already been discussed by the Tribunal at paragraphs 163-167 of this Award.
197. The Tribunal, for its own part, has no difficulty in following the Claimant's invitation as to the general approach to be taken towards the interpretation of Article 3(1). It sees no benefit in engaging in an abstract debate as to whether Article 3(1), and in particular its reference to 'fair and equitable treatment,' was or was not intended by the Parties simply to incorporate the 'minimum standard' under customary international law, still less to engage in any debate as to what that 'minimum standard' should now be understood to be. It prefers instead (in keeping with the approach adopted by other arbitral tribunals) to follow the ordinary meaning of the words used, in their context, and in the light of the object and purpose of the BIT.<sup>323</sup> In doing so, it will take into particular account the two general elements that other tribunals have found come into play in connection with claims to 'fair and equitable treatment,' namely the way in which the foreign investor or the foreign investment have been treated by the organs of the host State (whether in a regulatory context or otherwise), measured against the expectations legitimately entertained by the foreign investor in making its investment. As to the parallel guarantees of 'non-impairment' and 'full protection and security,' the Claimant does not appear to argue that, in the concrete circumstances of this case, they cover any situation which is not already covered by its claims under the guarantee of fair and equitable treatment. The Tribunal will accordingly consider the application of all of these standards of protection together, against the Claimant's allegations of breach. The Tribunal notes however that, just as with the 'fair and equitable treatment' standard, the 'full protection and security' standard relates specifically to the treatment of the foreign investment as such by the host State, and notes further that, on the terms of Article 3(1), the protection and security required is expressly qualified as 'physical'. Finally, so far as the 'non-impairment' standard is concerned, what the treaty language has in view is the possibility of harmful effects on the operation, management

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<sup>323</sup> Cf. Article 31 of the Vienna Convention on the Law of Treaties.

etc. of the foreign investment itself, by the foreign investor (and then only by measures that are ‘unreasonable or discriminatory’).

198. Against that background description of the applicable legal provisions in the BIT, the Tribunal must now return to what it has described as the cardinal feature of this case, namely how these provisions are to be applied in circumstances in which the Claimant is the Dutch investor, TRG, and the investment is TRG’s holdings in its subsidiary, RRC.<sup>324</sup> Mr. Patriciu is not the actual or entitled claimant, nor are his (former) interests through TRG in TRG’s Romanian subsidiaries protected interests under the BIT. This distinction is fundamental to the case. As the Tribunal stated the matter in paragraph 151 above: “*the Claimant’s case stands or falls by whether it is able to make out its claim that the criminal investigations have breached the rights of the Claimant itself – or (more precisely) that these criminal investigations are incompatible with the treatment that TRG is entitled to expect, as a Dutch investor in Romania, under the terms of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and Romania of 1995 (‘the BIT’).*”<sup>325</sup> The focus of the Tribunal’s attention will therefore be on actions taken by Romania against TRG itself or against TRG’s Romanian investments, or (as the case may be) actions that affect TRG’s management, operation and enjoyment of its Romanian investments. Such actions will be viewed against the background of TRG’s legitimate expectations in respect of those investments, and notably whether the evidence shows that the actions by Romania in question were tainted by unfairness or unreasonableness, or were discriminatory. An important element, in the particular context of unreasonableness or discrimination, will be to keep in mind the qualitative distinction between the proposition that an investigation by the State into potential wrongdoing was illegitimate in itself, and the proposition at a different level that things done in the course of a legitimate investigation were wrongful, unreasonable, or discriminatory. A final important point is that when a treaty provision such as Article 3(1) establishes a requirement to secure “fair and equitable treatment” for the investments of foreign investors, that requirement refers in the first instance to the host State’s treatment of the investment, taken as a whole; the Claimant has said something similar when it framed its complaints in terms of a ‘campaign of harassment’.<sup>326</sup> The requirement may however also apply to specific individual acts attributable to the State, if the circumstances were appropriate

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<sup>324</sup> See footnote 316 above.

<sup>325</sup> See also paragraphs 167 and 172.

<sup>326</sup> Reply, ¶¶ 54ff.; see also Claimant’s First Post-Hearing Brief, ¶ 197, Second Post-Hearing Brief, ¶ 75.

and of sufficient seriousness as to lead a tribunal to conclude that the standard of ‘fair and equitable treatment’ had been breached.

199. The Tribunal finds therefore that, to qualify as a violation of the guarantees laid down in the BIT, actions or omissions by the Respondent must consist of conduct toward TRG itself, the protected entity, or towards its investments in Romania. Such conduct can however be direct, or it can be indirect. The great majority of the Claimant’s claims are based on indirect conduct of this kind, i.e. conduct against individual persons, which might have been in their capacity as the representatives of the protected investor or investment, or might have been in their personal capacity. The Tribunal must therefore decide what additional elements would suffice to turn actions not directed as such against an investor or his investment, but against individuals associated with their ownership or management, into an actionable breach of the rights of the investor itself. This is not an easy question to answer; it is one of first impression, and one on which the Tribunal has little by way of assistance in the submissions of the Parties. The Claimant, in its Request for Arbitration and initial pleadings, seems largely to have assumed the existence of the necessary connection, and it was not until its closing argument at the end of the oral hearing that the Claimant began to focus specifically on this question.<sup>327</sup> Its argument then was that two categories of events should be understood as directed against TRG. The first category was actions directly addressing TRG or its Romanian investments, and comprised the share attachment and the mentions of Rompetrol in the GPO’s press releases. The second category comprised actions against officers or directors of Rompetrol in respect of things done in their corporate capacity, and included the detention (or attempted detention) of Messrs. Patriciu and Stephenson.<sup>328</sup> But this aspect of the case was not much developed in the Claimant’s Post-Hearing submissions, except to the extent that the Claimant elaborated briefly the exceptional circumstances which, in its view, would justify awarding moral damages to TRG.<sup>329</sup> The Respondent, on the other hand, rested its defence against the Claimant’s claims in the arbitration largely on the factual level, denying in other words that the treatment of Mr. Patriciu and his associates was wrongful or malicious at all, and did not therefore address the question of its connection to TRG.

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<sup>327</sup> See, however, the First Witness Statement of Ovidiu Budusan (paragraph 237).

<sup>328</sup> Transcript, Day 7, pp. 22-23, 25ff.; Counsel did not specify what other actions might equally be so ‘included’.

<sup>329</sup> Claimant’s First Post-Hearing Brief, ¶¶ 272-273.

200. To start with, there can be no dispute that actions directed against TRG or its investments in Romania fall within the zone of protection accorded by Article 3(1) of the BIT. Conversely, discrete actions or even a campaign of actions directed against Mr. Patriciu or others associated with him in their personal capacities would not in and of themselves be capable of amounting to a breach of TRG's treaty rights merely because of the association of those individuals with TRG or its investments. To come within the zone of protection, something more would be required. The Tribunal considers that the necessary link might take one of two forms. Either the conduct complained about could have been directed against the individuals for actions taken on behalf of and in the interest of the investor or its investment, so that that conduct should fairly be understood as implicating the protected interests of the investor itself. An example would be steps taken against an individual, whether in the form of criminal charges or otherwise, in respect of actions that individual had taken to enforce or defend the investor's rights. Or the conduct complained about could have been directed against individuals (even in their personal capacity) for the purpose of harming the investor or its investment through the medium of injury to the individuals. The Tribunal accordingly reaches the conclusion that the following (and only the following) would fall within the area of protection under the BIT: (a) actions against the investor itself (or its investment); (b) action against the investor's executives for their activity on behalf of the investor; and (c) action against the executives personally but with the intent to harm the investor. In each case, much would turn on the facts of the particular complaint, and in particular the crucial question whether, even if the situation fell within the zone of protection, the conduct in question did in fact constitute a failure to respect the treaty protection at issue.

201. It is to the Claimant's factual allegations, therefore, that the Tribunal must now turn, against the legal background set out above.

## **Part II.A: THE FACTUAL EVIDENCE**

### **(a) The Rompetrol and Petromidia privatisations**

202. For the most part, the facts relating to these privatizations are not in dispute between the Parties. Reference is made in this connection to the Decision of 18 April 2008 on Jurisdiction



and Admissibility. It will suffice therefore to resume briefly the essential elements, as background for what will follow.<sup>330</sup>

203. The Ceausescu regime in Romania fell in 1989. The privatization of companies that had formerly been owned by the State became thereafter a key part of process of building a market economy, leading to Romania's eventual accession to the European Union in 2007. Rompetrol S.A., which had been the second-largest of the State-owned companies, was privatised by way of a management and employee buy-out in 1993. In 1998, an investor group led by Mr. Patriciu, a Romanian national, purchased a controlling stake in Rompetrol S.A. The ownership of Rompetrol S.A. then passed to The Rompetrol Group B.V. by a series of steps described in paragraphs 35ff. of the Tribunal's Decision of 18 April 2008. Rompetrol S.A. was then (as it still was at the time this arbitration was brought) an oil refining, marketing and trading company, active also to a limited extent in exploration and production.
204. TRG itself (the Claimant in this arbitration) was constituted in its present form in 2002. One of TRG's major additional investments in Romania was (and still is) the Petromidia oil refinery situated at the port of Constanza on the Black Sea. TRG acquired a controlling stake in Petromidia S.A., the owner of the oil refinery, later renamed Rompetrol Rafinare S.A., in a further privatization that took place in 2000.<sup>331</sup> It is the circumstances of this latter privatization<sup>332</sup> that have become the central issue in the present case, as well as a matter of great political controversy within Romania. Mr. Patriciu told the Tribunal in evidence that, when TRG acquired Petromidia, the refinery was wholly non-productive, had been shut down for the past six months, and had no working capital or stocks of material; its debts had been stated in the tender documents as being US\$107 million, but after takeover it was discovered that US\$285 million was owing to the State in unpaid back taxes.<sup>333</sup> The refinery was turned around through the investment of considerable sums (over US\$170 million) in upgrading its equipment and technology to handle 'sour' crude oil, which then paid off when in due course the price differential with 'sweet' crude began to increase, ultimately reaching US\$9 a barrel.

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<sup>330</sup> A full and circumstantial account is offered in the GPO's criminal indictment against Mr. Patriciu and others (Exhibit R-25, pp. 30ff.).

<sup>331</sup> *Ibid.*, ¶¶ 45ff.

<sup>332</sup> And that of another oil refinery, S.A. Vega S.A., located at Ploesti, Romania.

<sup>333</sup> A fuller and more circumstantial account of the financial situation of Petromidia, both before and after the privatization, can be found in the Ministry of the Economy's comments on the Talpes report (Exhibit C-66); see further paragraphs 266ff. below.

205. These factual averments were not directly contested by the Respondent, which submitted however that a crucial element in the revival of Rompetrol's fortunes had been the positive action by the State to ease the burden of the substantial tax liability by converting it into bonded debt repayable over an extended period of time. This had not been a straightforward matter; it required the specific approval of the legislature, and had moreover initially been contested by the EU Commission as a prohibited State aid, which Romania had had to exert itself to rebut. The Tribunal will revert to this matter below.
206. The Claimant further alleges that the burgeoning success of the revitalized Rompetrol enterprise attracted the envious attention of the competing RAFO Group, which was running into major financial difficulties of its own and set about trying to coerce Rompetrol into a merger through unscrupulous methods, using or misusing for this purpose its political contacts and influence. This is further discussed under (c) and (h) below.

(b) The Libyan receivable

207. One of the issues arising consequentially on the Rompetrol privatization is what has become known in the proceedings as 'the Libyan receivable'. It refers to an exploration and production sharing agreement that had been concluded in the 1980s by Rompetrol S.A. (then still a State-owned company) with the Libyan National Oil Company, Rompetrol's rights under which were later assigned to the Spanish oil major, Repsol, against a substantial cash down payment in US dollars, to be followed by further instalment payments by Repsol in the total sum of US\$85 million. The assignment required, in the circumstances, the approval of the Romanian State which was conveyed by formal Government Decrees of 1993 and 1995. The essential point at issue was that, in these Decrees, and based both on the status of Rompetrol S.A. at the time and on the financial investments that had been made by the Romanian State in the project, Romania had made its consent to the assignment subject to the condition that the payments due would accrue to the State and would be passed on accordingly by Rompetrol as and when received. Hence 'the Libyan receivable'. It would appear (and this was not contested before the Tribunal) that the initial payments were indeed remitted to the State under these arrangements.<sup>334</sup>

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<sup>334</sup> Expert report of Philip Haberman, ¶¶ 2.2-2.13.

208. It was only after the privatization of Rompetrol and its passing into the ownership of TRG that the picture changed. After one payment had been remitted, the Claimant says that Rompetrol formed the view that it was not under an obligation similarly to remit further payments received out of the Libyan venture, but could instead retain them for its own purposes. It is not contested that Rompetrol informed the Ministry of Public Finance accordingly, by letter, in December 1999, in relation to an instalment of US\$10 million that was then falling due from Repsol. Romania does however assert that, with the complicity of a senior official in the Ministry (who, in consequence, was later indicted for complicity in embezzlement), the letter was deliberately not forwarded to the appropriate authorities, so that no action was taken on it – and, indeed, no reply was ever sent to Rompetrol. Subsequently, and perhaps in reliance on this anomalous silence, Rompetrol S.A. appears to have assigned the right to future payments to other, non-Romanian, companies in the Group, which would inevitably have had the effect that these payments no longer passed through the hands of Rompetrol S.A. itself, and moved therefore outside the ostensible scope of the arrangements under the Romanian Government Decrees of 1993 and 1995 referred to above. Internal e-mails that had come to light as part of the process of document disclosure in these proceedings were appended to the expert report of Ernst & Young attached to the Respondent’s Memorial on its Preliminary Objections. On the strength of this, the Respondent asserts<sup>335</sup> that Rompetrol’s decision to evade its obligations in respect of the Libyan receivable was conscious and deliberate; that Rompetrol subsequently became aware of the inconsistency in its having remitted some payments to the State but then denying its obligation to do likewise with further payments of the same kind; and that Rompetrol then sought to cover over this inconsistency by making to the Romanian Ministry a wholly contrived *ex post facto* claim to the reimbursement of the earlier remittances, which can be shown to have been just for the record, because it was never followed up.<sup>336</sup> The Respondent also says that the proceeds of the Libyan receivable are in fact inextricably linked to the Petromidia privatization, because it was these proceeds that funded Rompetrol’s bid and without them Rompetrol would simply have lacked the wherewithal to make a bid out of its own resources, as it had contracted to do.<sup>337</sup>

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<sup>335</sup> As set out in full in the Respondent’s First Post-Hearing Brief at Section 3.3.2. A comprehensive and circumstantial account is offered in the GPO’s criminal indictment against Mr. Patriciu and others (Exhibit R-25, pp. 39-58 *et seq.*).

<sup>336</sup> *Ibid.*, ¶¶ 4.14-4.23.

<sup>337</sup> *Ibid.*, ¶ 13.18.

(c) The Talpes report

209. What has been referred to by both Parties as “the Talpes report” occupied a prominent, even a central place in the Claimant’s case; the Tribunal will therefore devote some attention to an analysis, in the light of the written and oral evidence and argument before it, of the facts and of the allegations and counter-allegations put forward on the strength of those facts. The Tribunal adopts the same short-hand term, “Talpes report,” for pure convenience, although it has not been conclusively shown who exactly it was who drafted the document, or at whose instance, who approved it or authorized its issue, or whose responsibility the document engages.<sup>338</sup> Be that as it may, the essential uncontested facts about this 20-page document are: that it issued under the letterhead and official stamp of the National Security Department of the Presidential Administration of Romania; that it takes the form of a Memorandum addressed to the President, put up by Mr. Paul Sarbu, Counsellor in the National Security Department, for approval by Mr. Talpes in his capacity of Presidential Counsellor and Head of the Presidential Administration; that its subject is the Petromidia privatization; and that, after a lengthy and detailed analysis of what are claimed to be serious irregularities in TRG’s performance of its contractual obligations under the terms of its acquisition of Petromidia S.A., it recommends in the following terms:<sup>339</sup>

*The G.E.O. no. 118/2003 considers as legal an absolutely abusive and illegal manner of performing a privatization contract with huge financial stakes, ensuring in fact the sale of a jewel of the Romanian industry for an effectively trivial price and gives the opportunity for buying at the same price the difference remaining as shareholding of the state (as for example, it is taken into account a creation of a debt to a person in whom the initial investor has an interest, the non-payment of this debt and the conversion of it into shares at the price of the nominal value).*

*Taking the foregoing into consideration, we kindly ask you to approve to request some communications from the Ministry of Economy and Commerce, the Ministry of Public Finances, Ministry of Justice, A.P.A.P.S., the Prosecution Department attached to the High Court of Cassation and Justice and, as the case may be, the analysis of the opportunity to present this memorandum to the Supreme Council of State Defence.*

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<sup>338</sup> As submitted in the factual exhibits to the Claimant’s Memorial on the Merits (Exhibit C-60), it is described as ‘Report no. DSN/C/1 06/2004 by the Presidential Administration of Romania - Department for National Security (“Talpes report”)’ – but under the following Translator’s note: “Please note that professional efforts have been made to provide as accurate a translation to this document as possible. However, because the document is poorly written in Romanian (with grammar and punctuation mistakes, improper sentence structures, etc.), it would be difficult to further improve the translation without rewriting the document and perhaps changing the intended meaning of the authors’ words.”

<sup>339</sup> But see footnote 338 above.

It seems clear from the context that the ‘approval’ being sought for the information mentioned to be requested from the institutions mentioned is that of the President.

210. The Claimant’s attack on the Talpes report was two-pronged: firstly, that the report as a whole was ‘illegal,’ as being either altogether outside the powers of the Presidential Administration or else as being an abuse of the powers it does rightly possess; secondly, that the report formed the central element of a conspiracy amongst certain parts of the Romanian governmental machine to injure Mr. Patriciu either directly or via his interests in Rompetrol, evidence of which lay in the mysterious appearance of the report in public, no doubt as the result of its having been deliberately leaked. By the conclusion of the argument in the case, the Claimant was in fact ranking these two elements in the reverse order, as set out in its Post-Hearing Brief:

*The main line of the story begins, from TRG’s perspective, with threats made by Presidential Counselor Ioan Talpes to TRG’s CEO in early 2004, followed by the public release of a document prepared by Mr. Talpes’s office referred to as the “Talpes Report,” which in turn led to the PNA’s announcement of an inquiry preceding any formal investigation in March 2004.*

*TRG’s principal assertion with respect to the Talpes meeting and Report is that these events show that the investigations were instigated based on commercial motives rather than the pursuit of justice. TRG secondarily asserts that the Talpes Report was an excess of authority by the Presidential Administration’s Department of National Security, which Mr. Talpes headed.<sup>340</sup>*

The ‘Talpes meeting’ referred to was covered in the evidence of Mr. Patriciu and that of Mr. Stephenson and Mr. Stanescu: Mr. Patriciu invoked also Romanian media reports from the period 2004-05 which were said to show Mr. Talpes’s implacable hostility to TRG and its investments in Romania.

211. Mr. Patriciu said in his first witness statement that the pressure on him to accept a merger with RAFO Onesti began with a meeting in early 2004 initiated by Messrs. Tender and Iancu, two Romanians whom he knew to be beneficial owners of RAFO Onesti which in turn he knew to be in financial difficulties. It continued a month later via a meeting brought about through a mutual friend for the purpose of enabling him to come face to face with Mr. Talpes, who was personally abusive and, with reference to RAFO, made veiled threats of a forcible merger. A month after that Mr. Iancu had come to see him to warn him of the existence of a negative

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<sup>340</sup> Claimant’s First Post-Hearing Brief, ¶ 10.

report prepared at Mr. Talpes's request and that he (Mr. Patriciu) should reconsider his position on a merger with RAFO or 'be prepared to face the consequences'. Further pressure followed in separate meetings with Mr. Iancu and with Mr. Tender, which he firmly rejected in a meeting with Mr. Tender at Rompetrol's offices in early March, and then, hard on their heels in mid-March, came first the Talpes report itself, which he took to be exactly the document about which Mr. Iancu had warned him, and the report's emergence in public after being leaked to Mr. Corneliu Vadim Tudor;<sup>341</sup> Mr. Patriciu had himself drawn attention to some of this in a press conference in June 2004. Mr. Stephenson, by contrast, was not present at any of these meetings or discussions, but recalled being given accounts of some of them by Mr. Patriciu in Rompetrol's offices at the time; he had also been told by Dr. Rutenstorfer of the Austrian national oil company OMV that the latter had had an approach in Vienna by some of the same RAFO representatives, who sought to persuade him to sell OMV's stake in TRG in return for a promise of political support for (or at least non-interference in) OMV's business activities in Romania. Mr. Stanescu's evidence (which will be dealt with in more detail below) was on this issue no more than an account in general terms of the tension between RAFO and Rompetrol, of RAFO's increasing business and financial difficulties, and of the attitudes of Mr. Talpes towards Mr. Patriciu and Rompetrol since about 2002 or 2003 and his own attempts to persuade Mr. Talpes not to 'attack Mr. Patriciu's business interests'.

212. At this point the story of the Talpes report merges with that of the criminal investigations, to which the Tribunal will now turn.

(d) The instigation of the criminal investigations (the Talpes report)

213. The Claimant's allegation is that the criminal investigations were triggered (improperly) by the Talpes report. This allegation is based very largely on the coincidence in timing between the issue and subsequent public emergence of the Talpes report (March-April 2004) and the opening of the initial investigations by the PNA relating to the privatization of Petromidia in May 2004. But the Claimant also supports this allegation by various items of personal testimony, notably by Mr. Patriciu and Mr. Stephenson, and most significantly in this context by Mr. Stanescu. In truth, however, the relevant parts of the evidence of Messrs. Patriciu and Stephenson deal in little more than surmise, so the crux of the matter lies in the evidence of

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<sup>341</sup> Described in Mr. Stephenson's evidence as "*the leader of the extreme nationalist party in Romania.*"

Mr. Stanescu, a Romanian journalist and former newspaper proprietor, which the Tribunal must therefore focus on in detail.<sup>342</sup>

214. Mr. Stanescu's witness statement was submitted with the Claimant's Reply in November 2009. Its thrust is neatly summed up in its first substantive paragraph: "[i]t is clear to me that the criminal investigations against The Rompetrol Group ... and its affiliates and executives are politically motivated."<sup>343</sup> Mr. Stanescu further asserts that Mr. Talpes was involved in initiating the prosecutions and indeed goes so far as to assert that Mr. Talpes "*personally chose Prosecutors Cristescu and Nastasiu to work on the Rompetrol file.*"<sup>344</sup> These are of course far-reaching allegations and, if substantiated, would have material significance for the case. The basis on which they are put forward is therefore something that demands closer investigation.
215. The Tribunal begins with Mr. Stanescu's witness statement itself which (under the agreed minutes of the first session of the Tribunal stands as his evidence in chief). From this it appears that Mr. Stanescu's general claim that the criminal investigations were politically motivated is based on the interpretation he places on oblique or suggestive remarks made in the course of various conversations, either face to face or over the telephone, by Mr. Traian Basescu, who was elected President of Romania in December 2004. Mr. Stanescu invokes also what he describes as the well-known political tension between Mr. Basescu and Mr. Patriciu. Mr. Stanescu – as is no doubt understandable from his background – appears to be basing himself largely on what he regards as some form of common knowledge in Romania, or at least on what is or was at the time taken as common knowledge in journalistic circles. But common knowledge, even if it can be shown to have existed, is not the same as proof. The Tribunal cannot therefore regard these aspects of Mr. Stanescu's evidence (and their counterparts in the evidence of Messrs. Patriciu and Stephenson) as more than expressions of opinion – coincident opinion, it is true – but opinion nonetheless, and the fact that these opinions are strongly held does not of itself serve to establish that they are valid. Conversely, the manner in which Mr. Stanescu links the allegedly political motivation behind the initiation of the criminal investigations to Mr. Basescu lacks a certain conviction inasmuch as (all other considerations aside) Mr. Basescu's election to the Presidency did not happen until some eight months after the investigations began; and indeed Mr. Stanescu's witness statement speaks at

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<sup>342</sup> See paragraph 232 below for the documentary evidence that does in fact establish without room for argument the link between the initiation of the first criminal investigation and the Talpes report.

<sup>343</sup> WS Stanescu, ¶ 5.

<sup>344</sup> WS Stanescu, ¶ 27.

the appropriate point of the ‘continuation’ of the prosecutions at the instance of Mr. Basescu, not their initiation. In sum, however, the nature of this material seems to the Tribunal to make it of limited forensic use in the absence of anything further in the way of confirmation or corroboration. And the confirmation which was dangled before the Tribunal in Mr. Stanescu’s witness statement is a mention of specific sources, albeit an opaque one: President Basescu’s alleged order to ‘continue the criminal investigations against TRG, Mr. Patriciu and others’ is sourced to ‘individual prosecutors,’ and President Basescu’s alleged order to ‘open the GPO investigations against TRG’s affiliates and its executives’ (as well as his ‘interest in speeding up the proceedings’) is sourced, rather more vaguely, to ‘some of the individuals’ who had been on Mr. Basescu’s staff while Mayor of Bucharest and who went with him to the Presidential Palace after his election.

216. In relation to the role played by Mr. Talpes, Mr. Stanescu’s claims are equally sharply pointed. In his witness statement, he says that he ‘knows’ that Mr. Talpes was involved in initiating what he refers to as the prosecutions (though in fact he must mean the investigations). Once again, though, this ‘knowledge’ would appear to be based on articles in the investigative press, although Mr. Stanescu does make mention of one attempt by himself to persuade Mr. Talpes in person ‘not to attack Mr. Patriciu’s business interests’. It is perfectly possible that a meeting of that kind between Mr. Stanescu and Mr. Talpes took place, but the Tribunal cannot accept Mr. Stanescu’s subjective assertions as to his own purpose in arranging the meeting as probative evidence of the presumed purposes or intentions of the other party to the meeting, his interlocutor Mr. Talpes. When it comes, however, to the sharpest allegation of all – that Mr. Talpes ‘personally chose’ the Prosecutors – Mr. Stanescu says that he has a specific source, whom he describes as ‘someone with a high position at the GPO (General Prosecutor’s Office)’ but, once again, does not name.
217. That was the evidentiary position on the eve of the oral hearing. At that stage, however, a significant change occurred, in the shape of a decision on Mr. Stanescu’s part that he would, after all, disclose the names of his sources as detailed above, which in due course he did in his opening oral evidence. It remains unclear to the Tribunal exactly what it was that brought about this somewhat dramatic change of mind. Nor indeed was the Tribunal apprised by the Claimant (whose witness Mr. Stanescu is) of what efforts might have been made either at the time of Mr. Stanescu’s witness statement or in the twelve months or so between then and the



oral hearing to elicit the names and to give proper notice of them to the Respondent.<sup>345</sup> The sole indication offered by Mr. Stanescu himself as to why he had left matters in the vague was the lapidary remark in his witness statement that it was ‘for reasons of confidentiality and sensitivity’. This remark is made solely in connection with the prosecutors (not his other informants) and is not particularly informative; it is capable of covering a journalist’s protection of his sources, though it would require some imaginative interpolation to discover that that was what it meant since the context is not the open publication of matters of public interest, but testimony in private arbitral proceedings. At all events, the Respondent – not surprisingly – objected vigorously to this eleventh hour development, which it characterized as an ‘ambush’ of a kind which the procedural arrangements established between the Tribunal and the Parties had been designed to avoid. In its defence, the Claimant made it plain that it was itself unaware of Mr. Stanescu’s change of mind until the week before the hearing, and could only repeat Mr. Stanescu’s own explanation: that he had originally considered that the information in question had been given to him as a journalist, so that he felt under an obligation to protect his sources, but that he had thought about the matter since and (to use his own words as they came through in interpretation) that he now “*understood that the statements made by them were not given to me as a journalist but as a friend and as a private person.*”<sup>346</sup>

218. This unusual and unexpected turn of events posed a troubling problem for the Tribunal, which had in the centre of its mind its overriding obligation to preserve absolute fairness and equality between the two litigating Parties. Various options were discussed privately between the Parties and between them and the Tribunal, some of which would almost certainly have entailed adjourning the hearing and resuming it at some later date by which further evidence might have been gathered to confirm – or alternatively to contradict – Mr. Stanescu’s revelations. In the end, the Respondent, having lodged its objections, decided to acquiesce in the new evidence being heard and remaining on the record, but declined to cross-examine Mr. Stanescu on it, on the basis that it would be for the Tribunal to decide what weight to attach to

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<sup>345</sup> Cf. the Claimant’s explicit disclaimer in this respect on Transcript, Day 7, p. 79.

<sup>346</sup> Transcript, Day 2, p. 119. The Tribunal feels bound to interpolate that it is in some difficulty in grasping the logic why this particular internal reclassification by Mr. Stanescu was thought by him to dissolve whatever seal of confidentiality originally attached to these communications (cf. Article 6 of the Code of Ethics of the Romanian Press Club: Exhibit R-64); Mr. Stanescu did not himself volunteer that he had secured the consent of his original informants nor did Claimant’s counsel seek to elicit this information from him in direct examination. But in view of the way in which the proceedings then developed before the Tribunal, it becomes unnecessary to pursue this matter further.

his evidence in the light of Respondent's submissions on the subject (and of course those of the Claimant). The Tribunal accordingly decided to release Mr. Stanescu.<sup>347</sup>

219. The Parties' submissions on Mr. Stanescu's credibility as a witness were given partly in their closing statements on the last day of the hearing and partly in their Post-Hearing Briefs. The Claimant's argument rested on Mr. Stanescu's courage in coming forward with evidence that was liable to offend important and influential public personages in Romania<sup>348</sup> and on the Respondent's failure to cross-examine him on the issues in question despite having every opportunity to do so<sup>349</sup>. For the Respondent, on the other hand, Mr. Stanescu had discredited himself by his unexplained change of position on his duty of journalistic confidentiality without apparent prior discussion with his sources;<sup>350</sup> the Respondent relied also on the closeness of Mr. Stanescu's links to Mr. Patriciu, which cast doubt on his independence of judgement, and on other factors which cast doubt on his probity.<sup>351</sup>
220. The Tribunal does not believe that it can simply disregard these aspects of Mr. Stanescu's evidence on purely procedural grounds, or alternatively (a further submission put forward on Respondent's part<sup>352</sup>) set them aside as hearsay. If Mr. Stanescu is to be believed, it would constitute hard evidence to suggest that what might otherwise appear as coincidence was in fact the outcome of a conscious and deliberate design to injure Mr. Patriciu and his interests and that that design was executed in common by several different organs of the Romanian State. The question is therefore: is Mr. Stanescu to be believed?
221. There are several reasons, which in combination the Tribunal finds to be decisive, why Mr. Stanescu's evidence on these key points should be treated with a substantial dose of scepticism, and should not in any event be regarded on its own, without more specific

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<sup>347</sup> The Chairman's statement, which can be found at p. 2-3 of the transcript of 7 May, reads as follows:

*"As for the Tribunal, in the light of the degree of common ground we have detected between the parties, the Tribunal will not pursue further the idea of putting additional questions to Mr. Stanescu during this hearing. So he is now formally discharged as a witness and can go back home. The Tribunal looks forward, of course, to receiving in due time, as indicated by both parties, their argument as to credibility and relevance of the evidence in question. That being so, the Tribunal will keep the matter under review and will decide it at a later stage during the consideration of its deliberations following this hearing whether it wishes on its own part to call further evidence either from Mr. Stanescu or further evidence relating to the issues that Mr. Stanescu raised in his witness statement. But for the moment we can leave matters where they are."*

<sup>348</sup> Transcript, Day 7, p. 13.

<sup>349</sup> Claimant's First Post-Hearing Brief, footnote 10, p. 5.

<sup>350</sup> Transcript, Day 7, pp. 78-80.

<sup>351</sup> Respondent's First Post-Hearing Brief, ¶¶ 141ff.

<sup>352</sup> Drawing on the *Corfu Channel* case before the International Court of Justice (1949 ICJ Report, pp.16-17).

corroboration, as reaching the level of certainty necessary to establish allegations of this level of seriousness.

222. In the first place, the Tribunal finds the circumstances of Mr. Stanescu's last-minute change of mind over the revelation of his supposed sources, and the reasons given for it, a long way short of convincing. Paragraphs 215-217 above and footnote 346 already contain some indication of the uncertainties and inconsistencies both in the original witness statement itself and in Mr. Stanescu's explanations given in oral evidence in chief, and the Tribunal has no need to go further into them. It is not enough for the Claimant to rest on the fact that the Respondent chose neither to cross-examine nor to seek leave to produce contradictory witnesses of its own, since that was an option open to the Respondent, confronted with what it understandably regarded as a last-minute ambush, so long as it did so with its eyes open to the degree of risk that the testimony might gain greater weight through being unchallenged.
223. The question remains, therefore, that of the credence to be given to Mr. Stanescu's evidence on its own terms and in its own right. While, as indicated, the Tribunal is less than convinced by his last-minute volte-face over his sources, it is the coincidence of this and other factors that it finds decisive in the evaluation of his evidence. Mr. Stanescu (who was not put forward as a witness until the Claimant's Reply) describes himself in his witness statement as being on friendly terms with Mr. Patriciu, and there is nothing surprising in that, but it was clearly more than a simple friendship. The witness statement makes one incidental reference to Mr. Stanescu and Mr. Patriciu travelling abroad together with their wives, but it was not until his oral evidence that it emerged that Mr. Patriciu was what Mr. Stanescu described metaphorically as his 'matrimonial godfather' and was also in fact godfather to both of Mr. Stanescu's children, and most notably, that Mr. Stanescu had in addition been the beneficiary of Mr. Patriciu's largesse, in the shape of a wedding gift consisting of 10% of the shares in the newspaper 'Ziua' which, when sold to market, had produced a return that might have been as large as €1 million. Mr. Stanescu's evasiveness when questioned by a member of the Tribunal over the actual amount realized by the sale of these shares reinforced the impression of an attempt to play down what was recognized to be of some significance in the context of the

arbitration. The Tribunal can be in no doubt that the overall effect of the admitted facts was to place Mr. Stanescu under considerable personal obligation to Mr. Patriciu.<sup>353</sup>

224. All in all, therefore, the Tribunal is not in a position to regard Mr. Stanescu's allegations as reliable evidence on their own of political motivation and direction of the investigations into possible criminal activity by Mr. Patriciu and his associates. Without any further specific confirmation from other sources (and the Claimant has provided none), Mr. Stanescu's accusations, Mr. Patriciu's suspicions, and Mr. Stephenson's reflection of Mr. Patriciu's mood at the time, do not amount to evidence of a sufficiently persuasive quality to support the very serious allegations of improper conduct and bad faith based upon them by the Claimant.
225. The argument between the Parties on the 'legality' of the Talpes report was a lengthy one. It revolved around two elements: the overall scope and limits of the Presidential functions under the Romanian Constitution; and the scope and limits of Mr. Talpes's particular functions as head of the Department of National Security in the Presidential Administration. Using a very broad brush, the Claimant's arguments can be summarized in four propositions: Mr. Talpes held the post of Head of the Department of National Security in the Presidential Administration; his powers were therefore limited within the scope of the President's attributions in the field of national security; the President had recognized, but not unlimited, functions in this field, which did not extend either to the oil industry in general or to the privatization of Petromidia in particular; the President's more general functions of 'mediation' in public affairs were properly to be understood in a restrictive way that did not confer on him a general licence to intervene in public administration, which remained the responsibility of the Government, as the executive power. Both Parties tendered to the Tribunal learned expert evidence on Romanian constitutional law, and both experts were subjected to cross-examination and to questions from the Tribunal, on the provisions of the Romanian Constitution and on their application in practice.
226. For the Claimant, Professor Corneliu-Liviu Popescu, professor at the Law School of Bucharest University and the University of Paris 1 Panthéon-Sorbonne, defined the Romanian constitutional dispensation as an attenuated semi-presidential regime, closer to a parliamentary system than to a semi-presidential system, or alternatively as a parliamentary regime with

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<sup>353</sup> The Tribunal feels it unnecessary to go into a further allegation of insider share dealing, on a tip-off by Mr. Patriciu, since this is currently the subject of criminal investigation.

some elements of a semi-presidential regime.<sup>354</sup> The President possessed no executive power, there were no public authorities subordinated to him, and the most significant Presidential Decrees required the countersignature of the Prime Minister; the President's powers were largely symbolic and representational.<sup>355</sup> In the national security field, the President was commander-in-chief of the military forces (a purely formal position) and presided over the Supreme Council of National Defence, an organ exercising a purely coordinating function, but which the Constitutional Court had consistently held to be subject to parliamentary control. The real decision-making power rested with the government, including over the intelligence services.<sup>356</sup> The Presidential Administration was a public institution, but not a public authority; conversely the Supreme Council of National Defence was expressly qualified by law as a public authority.<sup>357</sup> There was no legal text defining the attributions or functions of Mr. Talpes as Head of the Department of National Security; by law, the personnel of the Presidential Administration were personal appointees owing allegiance to the President not career professionals, but by definition as a 'counsellor' Mr. Talpes's role would be purely advisory.<sup>358</sup> Article 17 of the Romanian Law concerning National Security enumerated exhaustively the organs with attributions in that field, which did not include the Department of National Security in the Presidential Administration. From that alone it followed that the Talpes report was an abuse of power and a serious breach of the constitution.<sup>359</sup> The President's function as mediator (which could apply also between the State and society) depended on a request for him to act as such.<sup>360</sup>

227. The Respondent submitted an expert opinion of its own by Professor Lucian Mihai, of the Law Faculty at the University of Bucharest and member of the Venice Commission for Democracy through Law of the Council of Europe, who had also been at one time or another judge ad hoc at the European Court of Human Rights, Secretary-General of the Chamber of Deputies of the Romanian Parliament, and President of the Constitutional Court of Romania. In Professor Mihai's opinion, the powers of the President are effective and more than merely symbolic.<sup>361</sup> Once one started from the general functions of the President laid down in Article 80, paragraph

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<sup>354</sup> Transcript, Day 4, pp. 5-6.

<sup>355</sup> *Ibid.*, pp. 10-12.

<sup>356</sup> *Ibid.*, pp. 13-14.

<sup>357</sup> *Ibid.*, p. 16.

<sup>358</sup> *Ibid.*, p. 18.

<sup>359</sup> *Ibid.*, p. 20.

<sup>360</sup> *Ibid.*, pp. 35 and 39.

<sup>361</sup> Professor Mihai's written opinion, ¶ 33.

2, of the Romanian Constitution,<sup>362</sup> it followed automatically that the President needed information regarding the most important aspects of the political, economic, social, cultural etc. life of the country, and his sources for that information would be the public media, on the one hand, and the State authorities on the other. That would be regarded as normal practice in any country, as would be the fact that national security was obviously an area of particular interest, and it was nowadays universally accepted that energy was a matter involving public security; to which one should add that at the time the Talpes report was prepared (2004) corruption was an area of especial concern in Romania, and privatization was one of the fields where corruption was allegedly very present.<sup>363</sup> The President's function as a mediator was linked to the purposes stated in the Constitution; it was political mediation, not dispute settlement, therefore the President was not hemmed in by the need to await a request.<sup>364</sup> The legislative texts defining the attributions and structure of the Presidential Administration and of the Supreme Council of National Defence, over which the President presided with full voting rights, were before the Tribunal.<sup>365</sup>

228. It is no disrespect to either of these learned witnesses when the Tribunal remarks that it remained as unconvinced at the end of their oral evidence as it had been beforehand that the issues which had been put before them were in reality of particular significance for the Tribunal's decision in the present case. This may partly be because the whole issue of the 'legality' of the Talpes report, although debated at great length between the Parties, has been done in so abstractly detached a way, without sufficient focus on its effective relationship to the matters that are properly for decision by an investment tribunal, and specifically by this Tribunal in the specific circumstances of this case.
229. The Tribunal begins by noting that the Talpes report is, in terms, a request for information (sc. to be provided for the benefit of the President of Romania). It is not immediately apparent to the Tribunal how a request for information can be either 'lawful' or 'unlawful'. As Professor Mihai tartly put it during his oral evidence (though not quite in these words): anyone can ask, the question being what he is given by way of an answer. The Tribunal observes in this connection that the letter of transmission, under cover of which the Talpes report was sent out

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<sup>362</sup> "*The President of Romania shall guard the observance of the Constitution and the proper functioning of the public authorities.*"

<sup>363</sup> Transcript, Day 4, pp. 92-94.

<sup>364</sup> Transcript, Day 5, pp. 7-9.

<sup>365</sup> Exhibits LM-12, C-51 and C-59.

to various recipients,<sup>366</sup> sought ‘verification’ so that the President could be ‘correctly informed’. In the second place, the request in this form was put to a number of responsible, high-level State organs, any or all of whom had it within their power, in response, to limit their answers to what they considered to be proper either as a matter of strict law or one of policy, or to object outright if the request was considered to be altogether unacceptable, either in general or in relation to their own particular fields. As the Respondent has pointed out, Mr. Dan Ioan Popescu, the then Minister of Economy, overseeing the Ministries of Finance, Transport and Agriculture (and himself a witness in the arbitration), had made it plain in his evidence that he didn’t think much of the quality of the Talpes report but saw nothing untoward in replying to it and setting right what he saw as its errors, after having established a small inter-ministerial committee for the purpose. In the same vein, Professor Mihai drew the Tribunal’s attention to the fact that, so far as the requests in the Talpes report included the administration of justice, the report was sent to the Ministry of Justice, and the Tribunal must assume that that Ministry would simply have declined to pass the requests on to the State Prosecutors had that been considered an improper thing to do.<sup>367</sup> No direct evidence has been offered to the Tribunal to suggest that improper pressure was brought to bear on any of the Ministries or authorities concerned (including the tax inspectorate and prosecutors’ offices) to force them to respond, or override their reluctance to do so, and the written record gives rise to no such suspicion. In the third place, the entire structure of argumentation back and forth between the Parties as to whether the Petromidia privatization and connected matters fell properly within the ambit of ‘national security,’ given Mr. Talpes’s functions as head of the National Security Department, seemed to the Tribunal to fall to the ground once it emerged in the course of the oral evidence that the office held by Mr. Talpes was in fact that of the head of the entire Presidential Administration, all of the Departments of which reported to him, so that his functional responsibilities were co-extensive with those of the Presidential Administration as a whole; moreover that in that capacity Mr. Talpes was not a mere functionary but carried senior Ministerial rank (equivalent in fact to that of Mr. Dan Ioan Popescu; v. sup.) and that his office carried with it, by law,<sup>368</sup> membership of the Supreme Council of National Defence.<sup>369</sup> It is hardly surprising that, in these circumstances, if there was any irregularity in the Talpes report,

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<sup>366</sup> Sample versions are at Exhibits R-88-R-92; see Transcript, Day 4, for the disagreement as to its proper translation, which does not however affect the point here.

<sup>367</sup> It does however appear that the Talpes report was also sent to the Chief Prosecutor of the GPO direct; see Exhibit R-88.

<sup>368</sup> Article 5(3) of the Law of June 2002 on the organization and operation of the Supreme Council of National Defence.

<sup>369</sup> Which Professor Popescu conceded did have the quality of a ‘public authority’ (v. sup.).

the irregularity was far from self-evident, as a matter of Romanian law and practice. The Tribunal can do no more than to say that, looking at the matter entirely at large, in the light of experience in general, it can find nothing inherently improper in a State President whose office is endowed with a certain number at least of executive powers, seeking or being given a briefing on a topic that was clearly a matter of public attention and public concern.<sup>370</sup> The question that matters is not the fact of the briefing, or even its content, but what action, if any, followed as a result.

230. The Tribunal does not by any means exclude, as a hypothetical possibility, that the production of the Talpes report might have reflected an animus against Mr. Patriciu personally, or against his business ventures, on the part of Mr. Talpes or those associated with him. But such animus cannot be assumed; it would have to be proved. It is, again, hypothetically possible that a blatant and conscious disregard of applicable legal constraints in the commissioning of the Talpes report could serve as an evidentiary element in that direction. But if so, the Claimant has failed to demonstrate such disregard. The issue for the Tribunal thus remains, not the Talpes report itself, but the consequences claimed to have followed from it, notably the criminal investigations and the tax controls, and it is to these that the Tribunal now turns.

(e) The alleged procedural irregularities in the criminal investigations

231. The conduct of the Romanian State prosecutors, first in the anti-corruption agency PNA and then in the office of the General Prosecutor (GPO), carried out in the course of their investigations into possible criminal conduct occupied the central focus of the Claimant's argument so far as liability for breach of the BIT is concerned. The Claimant's allegations can be subsumed under two heads: in the first place, that the investigations were wholly unfounded and malicious; in the second place, that they had been carried out in an improper way which was both wrongful in itself and confirmed the malicious intent behind the initiation of the investigations in the first place.

232. As to the first of these allegations, there is not much that can be said. It will already be apparent that the Claimant's argument rests largely on the coincidence in time between the

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<sup>370</sup> This is, broadly speaking, the interpretation the Tribunal places on the remark claimed to have been made to Mr. Patriciu directly by President Basescu, to which the Claimant would attribute a sinister implication. When the President is reported as saying "*You do not think that I have to be informed as the President. I have to be informed.*" it does not seem to the Tribunal necessarily to reflect anything more than that he had indeed been briefed on a matter which had certainly by then become one of public interest; the further colouration supplied by Mr. Patriciu in his second witness statement is a matter of Mr. Patriciu's subjective assessment.



Talpes report and the opening of the initial investigation and on the more specific allegations made by its witnesses, Mr. Patriciu, Mr. Stephenson, and Mr. Stanescu. The Tribunal recalls its findings above that the combined evidence of these three witnesses (so far as it can be relied on) is not sufficient to support allegations of the gravity the Claimant places on it. As to the coincidence in time, by contrast, the Tribunal would itself have inclined to the view that the thrust of the Talpes report, taken together with the bodies and authorities to whom it was in due course forwarded, made it more probable than not that there was a connection of some kind between the report and the initiation of the original investigation by the PNA into the Petromidia privatization. But even with that connection as the working hypothesis, it carries one nowhere, in the Tribunal's opinion. The legitimacy of a criminal investigation cannot depend on the source from which the responsible investigating authority receives the information leading it to suspect that criminal offences may have been committed. It might be a private complaint, or an exposure by investigative journalism, or a whistle-blower's tip-off, or the anonymous receipt of confidential internal documents, or a discovery made by a regulatory authority, or indeed a request for an investigation by a responsible Government Ministry; what matters is not the source but the quality of the information, whether more is likely to be uncovered, and the public interest in the possible criminal conduct it implies. The Tribunal accordingly finds that, even though it does in fact seem to have been established by direct documentary evidence that the Talpes report had actuated the PNA's investigation,<sup>371</sup> that could not, in and of itself, give rise to an issue as to the breach of the protection guaranteed under Article 3(1) of the BIT.

233. There was at a certain stage in the proceedings some debate between the Parties as to whether the criminal investigations were so devoid of substantial merit (i.e. of real and grounded suspicion of the possible commission of criminal offences) that they had to be presumed to have been initiated and then pursued out of improper motives. But the Parties were in the event agreed that it was not for this Tribunal to determine whether adequate grounds ('probable cause') did or did not exist under Romanian law to justify the opening of an

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<sup>371</sup> The relevant item of documentary evidence is the PNA's 'Ordinance for the declination of competence' of 6 September 2004 (Exhibit R-33), the opening paragraph of which refers specifically to what appears to be the Talpes report as the event that triggered the opening of its investigation *in rem*. See also the Statement of Defence, ¶ 107.

investigation, and by so doing either to supervise or to supplant the decisions of the competent organs of the Romanian judicial system.<sup>372</sup> The Tribunal can only agree.

234. The above is however without prejudice to the main thrust of the Claimant's argument in respect of the criminal investigations, namely that the manner in which these have been conducted has been improper, to such an extent as to show a deliberate and focused intention to cause harm to TRG either directly, or indirectly through their effect on Mr. Patriciu and his associates, and that such harm has in fact been caused. The harm itself will be the subject of Part I of this Award (below); the present section will focus on the manner and implications of the conduct of the criminal investigations.
235. It will be convenient to begin with a résumé of the subject, timing and course of the criminal investigations, as these emerge from the pleadings of the Parties. It is to be noted that that will take the story up to the date of the second Post-Hearing Briefs, at which point it appears that the investigations were still in train. The Tribunal is, naturally, not in possession of any evidence or argument as to what may have taken place beyond that point, nor is any such of relevance to the decision it is called upon to give on the dispute submitted to it.
236. There is no dispute between the Parties that the first criminal investigation began in May 2004. It was initiated by the anti-corruption agency PNA and its subject was possible irregularities in the Petromidia privatization. As described in the PNA press release of 21 April 2004, “[t]he investigators verify the way and the circumstances in which the shares sale-purchase agreement was concluded by the State Ownership Fund and the company Rompetrol Group B.V. On the other hand, the anticorruption prosecutors analyse the way in which the conditions to transfer the profit from SC Rompetrol Rafinare Complex Petromidia to other trade companies were created, as well as the way in which the company's share capital was increased.”<sup>373</sup> It is also common ground that the investigation was commenced ‘*in rem*,’ which the Tribunal understands to mean without particular suspected persons being identified – although in due course (see below) the investigation became one ‘*in personam*’ against various officers of Rompetrol, to whom were later added Messrs. Patriciu and Stephenson and several others. A further PNA internal document (seemingly undated, referred to by the Parties in their submissions as the ‘Cristescu themes’) describes the five potential offences

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<sup>372</sup> Claimant's Post-Hearing Brief, ¶ 119; Respondent's Post-Hearing Brief, ¶ 166.

<sup>373</sup> “Specifications” issue No. 149 of the National Anti-Corruption Prosecutor's Office, 21 April 2004, Exhibit C-67.

under investigation as being: deliberate understatement of the real market value of assets during the privatization process; tax evasion; and money laundering; together with two further offences of a technical character the precise nature of which is not clear to the Tribunal. In each case, the particular statutory prohibition that may have been breached is specified. This is followed by some 30 pages of more detailed description of the commercial and financial transactions under investigation (which include the Libyan receivable). Ultimately, though, some five months later, the PNA closed its investigation, not having found a sufficient basis for the pursuit of corruption offences, and transferred the file to the GPO, on the basis that the offences remaining under investigation fell within the competence of the regular prosecution authorities. The offences in question were ‘abuse of office against public interests,’ tax evasion and money laundering. This was done by means of a formal written decision<sup>374</sup> which set out in full the findings to which the PNA investigation had come.

237. It would appear from the evidence on the record that the GPO had in fact already begun an investigation in parallel into offences within its own competence. With the transfer of the file from the PNA, the continuing investigation by the GPO – specifically by its Department for the Investigation of Organised Crime and Terrorism (DIICOT) – became the sole criminal investigation in train.<sup>375</sup> In due course, the DIICOT investigation led to a formal indictment dated 7 September 2006.<sup>376</sup> The indictment prefers charges against Mr. Patriciu on various counts, which can be summarized as involving primarily embezzlement (the Libyan receivable), money laundering, share market manipulation (the re-listing of Rompetrol shares on the Bucharest stock exchange), and conspiracy, together with various apparently lesser charges associated with the above. Similar, though not identical, charges are preferred against Mr. Stephenson and (in varied combinations) against some 10 or 11 others connected with Rompetrol in various ways.<sup>377</sup> The indictment is somewhat over 400 pages long; it deals in separate sections with the history of the investigation, the facts deriving from documentary and witness evidence, and an analysis of the applicable law. Professor Kühne describes it in his

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<sup>374</sup> ‘Declination of competence,’ see Exhibit R-33, and footnote 371 above.

<sup>375</sup> The Claimant makes something of the fact that, when the file was transferred from PNA to GPO, Ms. Cristescu was transferred with it, seeing in this evidence of an intention to persecute Mr. Patriciu and his associates. In fact it would appear that Ms. Cristescu was originally on the strength of the GPO, was loaned to the PNA for the purposes of its own investigation, and on conclusion of that investigation reverted to her old position. Be that as it may, the Tribunal sees nothing, on the face of it, that would give Ms. Cristescu’s transfer an untoward connotation, since it would be equally consistent with the simple aim of efficiency, unless there was specific evidence to the contrary.

<sup>376</sup> “*Rechizitoriu*” in Romanian, Exhibit R-25.

<sup>377</sup> Including Mr. Stanescu (see paragraphs 215ff. above).

written<sup>378</sup> and oral evidence (drawing in this respect on his own experience as judge and defence counsel) as having all the appearance of a professional piece of work. The Tribunal can only agree. The indictment lays out *in extenso* the charges that are being brought against each of the accused persons individually and identifies each charge by reference in specific terms to the relevant statutory provisions; it sets out in specific terms the facts alleged to ground the charges and the evidence in support of these factual allegations; and it lays out the legal arguments said to sustain the necessary link between the facts and the offences alleged. The indictment would thus appear, in other words, to offer the necessary basis on which each of the accused can then set about preparing his defence. To note that is of course wholly without prejudice to whether the factual allegations are indeed accurate and sustainable, and the legal argument correct. As already noted however, those assessments are not for this Tribunal to make, but are a matter for the Romanian courts. The Parties are in agreement (see paragraph 233 above) that it is not for this Tribunal to determine whether or not there was a substantial basis for the criminal charges against Mr. Patriciu and his associates. For present purposes, it is enough to record the Tribunal's conclusion that there is no evidence to show that the initiation of the criminal investigation and the indictment in and of themselves breached the standard of Article 3(1) of the BIT. The nature of the indictment does not, on its face, bear out any argument that it embodies a trumped-up set of criminal allegations that are accordingly only explicable as stemming from bias or improper motive.

238. That being so, the Claimant's claims of bias and improper motive reduce to a question, not of the basis on which the charges as such were brought, but of the persistent irregularities that allegedly occurred in the conduct of the prior investigation, and what inferences should be drawn from that (if these irregularities can be sustained). The Claimant advances a whole series of actions by the State prosecutors in charge of the PNA and DIICOT investigations which it says were unjustified or wrongful,<sup>379</sup> and which it asks the Tribunal to find were part of a pattern of deliberately oppressive conduct against Mr. Patriciu and the others under investigation. It would be impossible for the Tribunal to investigate all of these accusations in detail – and indeed to do so would contradict the underlying proposition (see paragraph 174 above) that it is not for an investment tribunal to set itself up as a court of final review over the criminal justice systems of host States. The Tribunal will instead focus, in the light of the

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<sup>378</sup> First expert report, ¶ 17; Second expert report, ¶¶ 37ff.

<sup>379</sup> See paragraphs 46, 49-50, and 54 above.

evidence and argument led before it, on the set of six main issues into which the individual allegations eventually resolved themselves. These are:<sup>380</sup>

- the attachment of RRC shares
- the arrest and attempted imprisonment of Messrs. Patriciu and Stephenson
- the PNA and GPO press releases;
- the interception of Mr. Patriciu's and/or RRC's telephone conversations;
- the requests for information addressed to the banks; and
- the tax controls.<sup>381</sup>

The Tribunal will review each alleged wrongful activity first individually, but then will conclude by reviewing the totality of alleged conduct to see if the Claimant has sustained its burden of proving that Romanian failed to abide by its treaty obligations.

(f) The GPO (DIICOT) prosecutors

239. In respect of all of these issues, the underlying facts are not in principle in dispute, as they represent incidents in the investigation which are matters of record.<sup>382</sup> The differences between the Parties relate rather to their significance and effect, including in that respect whether the alleged irregularities were open to effective correction when they occurred. These issues were dealt with in detail in the written and oral expert evidence of Professor Boroi (for the Claimant) and Professor Kühne (for the Respondent), which will be discussed below. They were also covered to a certain extent in the evidence of one fact witness each for the Claimant and for the Respondent. The Claimant offered the evidence of Mr. Ovidiu Budusan, Mr. Patriciu's principal legal counsel in the criminal proceedings against him, but who had also had considerable inside experience at a senior level as a Romanian State prosecutor. In his brief witness statement, Mr. Budusan listed what he considered the most glaring breaches.

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<sup>380</sup> Claimant's Second Post-Hearing Brief, pp. 24ff. The Claimant maintains also its complaints about a number of other 'procedural violations' (Claimant's First Post-Hearing Brief, ¶ 104) but for the reasons given the Tribunal does not propose to examine them further individually.

<sup>381</sup> Not singled out in the Claimant's Second Post-Hearing Brief, but the Tribunal has retained it as a specific ground of complaint all the same given the attention paid to the question at the oral hearing, but more particularly because it is one of the limited number of examples of actions directed unambiguously against Rompetrol as such not against individuals.

<sup>382</sup> Although there are some factual disputes in relation to items e. and f. which will be considered below.

According to Mr. Budusan, the interrogation of Mr. Patriciu was unduly long and inappropriate; the prosecution conducted *ex parte* witness interviews without notifying defence counsel of their time and place; during some witness interviews the witnesses were personally threatened by the prosecutors, and at others the prosecutors often instructed the stenographers not to record portions of the interview.<sup>383</sup> Mr. Budusan also cites the attempts to put Rompetrol senior management in pre-trial detention in 2005 and 2006 (which the Tribunal will deal with below). Mr. Budusan summed up his view of the proceedings against Mr. Patriciu as follows: “[b]ased on my experiences as a prosecutor and as defense counsel (which admittedly postdates the Communist era), I have never seen such a case, in which the prosecutors have routinely and repeatedly disregarded the express provisions of the Criminal Code, Criminal Procedure Code and basic concepts of due process.”<sup>384</sup> Mr. Budusan mentioned also what he saw as the Prosecutors’ disregard for the harm caused to the commercial interests of the Rompetrol companies by many of the unwarranted measures taken in the investigations against Mr. Patriciu.<sup>385</sup> The Respondent did not call Mr. Budusan for cross-examination.<sup>386</sup>

240. The Respondent offered the evidence of Ms. Cecilia Morariu, who described herself as the spokesperson for the Romanian Superior Council of Magistracy (CSM), a body which, she said, had existed for almost a century but now had, under the revised Romanian Constitution and a new Law of 2004, ‘an organization, functions and attributions broadly similar to the *Conseil supérieur de la magistrature* in France and the *Consejo General del Poder Judicial* in Spain’. Until 2003, the CSM had been subordinate to the Ministry of Justice, but then became a constitutional organ in its own right, and independent of the Executive. As shown by its organizational chart, the CSM contained separate sections for judges and prosecutors. Ms. Morariu’s witness statement sets out the remedies available for prosecutorial and judicial misconduct,<sup>387</sup> as well as the CSM’s published guidelines explaining to the public how to file a complaint, and gives the statistics from 2005 (when the CSM began to maintain its own statistical database) to 2008 for the number of complaints filed against, respectively, judges

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<sup>383</sup> WS Budusan, ¶ 1-7.

<sup>384</sup> WS Budusan, ¶ 7.

<sup>385</sup> WS Budusan, ¶ 5.

<sup>386</sup> Transcript, Day 3, p. 10: “*Mr. Budusan is counsel for the principal protagonist in this case. What he has to say is argument, not evidence. We don’t propose to question him on this argument, just as we don’t propose to question Mr. Legum as a witness. We have no questions.*”

<sup>387</sup> Ms. Morariu later explained, when giving oral evidence, that the CSM was not equivalent to a court of law, so that its internal disciplinary function was entirely without prejudice to the operation of the ordinary courts, before which the invalidity or illegality of official acts could be (and should be) challenged.

and prosecutors,<sup>388</sup> the proportion of those that went on to detailed investigation,<sup>389</sup> the proportion of the latter that were found sufficiently well grounded in fact to justify a full adversarial procedure,<sup>390</sup> and the proportion of these last that led to a disciplinary sanction.<sup>391</sup> The proportions are not markedly different as between complaints against prosecutors and those against judges. These official figures seem to the Tribunal to disclose an elaborated system of redress in full working order. The Tribunal is not of course in a position to assess the merits of the individual disciplinary decisions reached by the CSM, nor is it required to. But the figures show a public awareness of the existence of avenues of formal complaint against the actions of prosecutors and judges, that the avenues of recourse are not difficult to access, and that they do lead to an organized and systematic follow-through. Although the proportion of complaints that led to a formal investigation is low in percentage terms, it does nevertheless represent in numerical terms up to 440 formal investigations in a single year (on average nearly 225 per year over the four-year period), and a substantial ‘conviction rate’ of over 75% for the 78 complaints that survived the prior screening processes. The Tribunal cannot see in this state of affairs evidence of any systematic arrangement designed to offer the mere appearance of avenues of redress, against a reality characterized by justifiable complaints disappearing into bureaucratic thickets without substantive result. The issue in this context therefore becomes whether Mr. Patriciu et al. (or, as the case may be, TRG and RRC themselves) took advantage in fact of their possibilities of redress and what the outcome was if they did.

241. As to those questions, Ms. Morariu’s evidence was as follows. She lists 18 situations in which complaints were filed, the great majority by Mr. Patriciu on his own account or together with associates, but one (in relation to the attachment of RRC shares) by Mr. Patriciu, RRC and TRG jointly.<sup>392</sup> Most of the complaints address actions by Ms. Cristescu specifically, usually together with colleagues. Ms. Morariu summarizes the corresponding decisions of the CSM as follows: “*the CSM found that the prosecutors did not commit any disciplinary offences. This includes the cases where, although the CSM found that prosecutors had committed some*

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<sup>388</sup> c.900

<sup>389</sup> 5%.

<sup>390</sup> 9.6%.

<sup>391</sup> 75.6%.

<sup>392</sup> The number may in reality have been greater than 18, as one Report of the Disciplinary Commission from August 2006 refers to 24 complaints having been lodged in respect of that case file in 2006 alone (see also Transcript, Day 3, p. 64).

*procedural breaches,*<sup>393</sup> *these were not found to have been committed in bad faith or with gross misconduct as specified at Art. 99 (1)(h) of Law 303/200.*<sup>394</sup>

242. Ms. Morariu's evidence also describes the role of the CSM in its other, parallel function, that of guaranteeing and protecting the independence of the judiciary (including the prosecutors), and describes in this context two situations in which complaints were raised from within the judicial branch in connection with the investigations against Mr. Patriciu and his associates, one by a judge against press reporting of her alleged conflict of interest, the other by a group of prosecutors, including Ms. Cristescu, alleging undue pressure affecting their independence and reputation. The note on the latter, approved by the Plenum of the CSM, referred to the perturbing and negative atmosphere surrounding the Rompetrol investigation 'marked by a strong feeling of indirect pressure on the prosecutors'; it points the finger at public statements by politicians and their reporting in the media. The CSM issued a press release on the question on 27 March 2006,<sup>395</sup> which traces the pressures to a meeting between the then Prime Minister and the Minister of Justice and Mr. Patriciu and statements made in relation to Mr. Patriciu's case, but without disclosing further details. The CSM's conclusions were that "*the limits of the freedom of expression were exceeded when opinions were expressed in regard to the existence or non-existence of the deeds wherefore the investigations were performed, the guilt of the investigated persons, the reliability of the produced evidence, as well as the observance of the procedural norms by the prosecutors and judges on the occasion of taking procedural measures*" but stopped short of finding that there had been actual interference with the judicial process. Many of the missing details emerge, however, from the Note of 9 March 2006 which the CSM apparently had under consideration before it issued its press statement, and which is now included as an attachment to Ms. Morariu's witness statement.<sup>396</sup> From this, it appears that the triggering event was only to a limited extent Mr. Patriciu's meeting with the Prime Minister and Justice Minister and the conflicting accounts given of that meeting by the participants, but to a much greater extent was the extensive debate and controversy that followed in the Romanian press, involving direct and overt discussion of Mr. Patriciu's guilt or innocence, criticism of individual decisions taken in respect of Mr. Patriciu by named prosecutors and judges, together with criticism of the qualifications of the prosecutors and

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<sup>393</sup> It emerged in oral evidence that procedural breaches had been established in five cases (Transcript, Day 3, pp. 109-110).

<sup>394</sup> WS Morariu, ¶ 20.

<sup>395</sup> WS Morariu, Exhibit CM-11, drawn up by Ms. Morariu herself as press spokesperson.

<sup>396</sup> WS Morariu, Exhibit CM-10.



judges involved. It is left unsaid – nor were there any submissions to the Tribunal on the question by either Party – how far this public debate was based on critical press briefing by the persons concerned themselves.

243. The Tribunal found this evidence helpful in sketching, through objectively factual reporting, the general background to what must plainly have been a highly charged state of affairs, some of which played itself out in public and political controversy in parallel with what was taking place in private within the Romanian judicial system. Far less helpful, on the other hand, was Ms. Morariu's oral evidence when called by the Claimant for cross-examination. Ms. Morariu had said in her witness statement that she was authorized by the President of the CSM to appear as a witness of fact, which she then expanded to indicate that she could speak freely about facts within her personal knowledge, but was not permitted to "*express an opinion on the decisions taken by courts, prosecutors or the CSM itself or on any ongoing judicial proceeding.*" Ms. Morariu explained this as deriving from her status as a judge. Understandable as this is as a matter of principle, Ms. Morariu applied it on the witness stand with adamant rigour, and in a way that appeared to exclude any thought that her appearance as a witness in arbitral proceedings might bring with it a duty of some kind towards the Tribunal to assist it in its efforts to understand the material before it and the significance of that material in the context of the arbitration. Her demeanour under cross-examination thus reduced to something like a play-back device which could reproduce in oral form what was already on the written page of the documents before the Tribunal, but was so constructed as to disable it from formulating anything in the nature of an assessment or expression of opinion. This applied equally to questions of an entirely objective character posed by members of the Tribunal itself as it did to potentially hostile questions from the Claimant's counsel. To take one egregious example, Ms. Morariu flatly refused to say whether, when the CSM formally disapproved certain conduct (by Prosecutor Cristescu), that sort of disapproval was commonplace or wholly exceptional – even though information of that kind is essentially factual and must have been at least to some extent within her personal knowledge as an experienced magistrate who fulfilled a representative role within the structure of the CSM. To take another, although Ms. Morariu had been careful in her own evidence to point to an amendment to the law governing the magistrature and the date of its coming into operation, she declined to express a view of any kind on the amendment's legal effect. To take a third, Ms. Morariu refused to commit herself, when questioned on the point by the President of the Tribunal, as to whether a serving judge or prosecutor had a duty to cooperate with an

investigation being carried out by the CSM either *sua sponte* or as the result of a public complaint.

244. The Tribunal's reaction to this somewhat unusual situation is as follows. The Tribunal is of course in full sympathy with the delicacy of Ms. Morariu's situation, and can appreciate how she might have felt buffeted by the not always coincident demands of her own professional integrity and the independence and prerogatives of the CSM, in circumstances in which important criminal investigations surrounded by great public controversy were still in train and had not been brought to trial, still less to a verdict. It can also understand that, although the present arbitral proceedings are not taking place in public, one or more of the persons under investigation are closely involved with them, and were present at the hearing, so that her comments in evidence had at least a potential for being reflected back into the turbulent atmosphere of the continuing investigation, all this against the background that one of the persons under investigation (Mr. Patriciu) had been bombarding the CSM with formal complaints about the actions of the prosecutors looking into his case. All of that said, however, Ms. Morariu was put forward as a witness by the Respondent and the expectation must follow that such a witness was being offered on the basis of a certain degree of cooperation with the Tribunal in achieving its task. Ms. Morariu's demeanour, however, which seemed to harden as the cross-examination went on, stood in sharp contrast, and the Tribunal can only say that, whatever the value of her written evidence (see the preceding paragraph), as an oral witness she did no credit to the Respondent's case, and indeed raised inevitable questions in the Tribunal's mind to which the materials supplied provide no clear answer. The failure of Ms. Morariu (and indeed the Respondent's representatives as a whole) to provide any comment or context to the specific situations, established on the documentary record, in which Prosecutor Cristescu (and colleagues) knowingly refused to cooperate with the investigative processes of the CSM – leading on one occasion to a specific sanction – is particularly unfortunate.
245. In sum, the Respondent's decision neither to cross-examine Mr. Budusan nor to produce any witness (other than Ms. Morariu) to defend or explain the conduct of the prosecution leaves the Tribunal with no evidence to counter in any direct sense the Claimant's allegation that this was a prosecution which went seriously awry. The Tribunal is accordingly left with a series of possible hypotheses and no certain means of deciding between them, for example:

- that the investigation followed a more-or-less normal course in local terms for an investigation into complex economic crime with strong political overtones, in which mistakes were made by the prosecutors but not beyond the ordinary limits;
- alternatively, that there was a series of procedural defaults so continued and so marked as to imply at the least a careless attitude towards the procedural niceties, or at the worst a deliberate disregard for them;
- that the conduct of the investigators can only be evaluated against the background of a vigorously aggressive defence mounted by the suspects and their legal representatives, which could either have been a response to a similarly aggressive approach by the prosecutors, or alternatively the stimulus for a corresponding tactic on the part of the prosecutors – or alternatively a mixture of both;
- that the lodging of so great a number of formal complaints against the actions of the prosecutors is evidence that the investigatory process went seriously awry;
- alternatively, that the lodging of so great a number of formal complaints against the actions of the prosecutors is evidence merely of the aggressive tactics of the defence;
- that the complaints system of the CSM worked as intended, provided a ready avenue for redress when something went wrong, and effectively weeded out the few cases of culpable error from the great mass of minor accusations that had no serious consequence;
- alternatively, that the complaints system of the CSM showed itself as adept at whitewashing the conduct of the prosecutorial branch wherever possible, resorting to findings of misconduct only when absolutely unavoidable.

Assessing such evidence as it does have at its disposal, however, and applying for this purpose what it considers to be the appropriate burden and standard of proof (see paragraphs 178-183 above), the Tribunal concludes as follows: first that the probabilities are that there was, within the prosecutorial staff of the DIICOT, an animus and hostility towards Mr. Patriciu, and a

determination to succeed in nailing criminal charges on him, which in turn infected to a certain extent the investigation's tactical approach;<sup>397</sup> second that if such an attitude existed it was closely associated with Ms. Cristescu and Mr. Nastasiu, but there is no positive evidence that it affected other officials within the DIICOT or the GPO; still less is there evidence of any corresponding bias in the attitudes of the Romanian courts when considering challenges to prosecutorial actions; third that the complaints process before the CSM does not appear to be a broken reed, but impresses by the serious attention shown to individual complaints, although there are also signs of a progressive loss of patience with the continuing stream of complaints lodged in the present case.<sup>398</sup> The Tribunal stresses that these conclusions have been reached on a balance of probabilities, for the purpose of applying the protections under the BIT to the Claimant's claims. The Tribunal stresses also that, although the existence of a remedy against prosecutorial actions is a material part of any analysis of treaty breach, none of the domestic Romanian instances (neither the courts nor the CSM) was called upon, as is this Tribunal, to make an overall assessment of prosecutorial conduct in the round. The Tribunal's final conclusions in that respect will be found the next Section of this Award, following further analysis of the particular items of prosecutorial conduct on which the Claimant has laid greatest stress, measured against the proper interpretative approach as discussed in paragraphs 196-199 above.

## **Part II.B: SPECIFIC FACTUAL ALLEGATIONS**

246. With that as background, the Tribunal moves now to consider, one by one, the six items listed in paragraph 238 above, in the light (where applicable) of the expert legal argument offered to it by both Parties.

### **(g) The attachment of RRC shares**

247. In February 2006, the DIICOT prosecutors ordered the attachment of 5.4 million shares in RRC owned by TRG in connection with the investigations arising out of the Libyan receivable.

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<sup>397</sup> But it might be as well to complete this somewhat impressionistic finding with the remark that the phenomenon of the crusading prosecutor is by no means unknown in various jurisdictions, and is not, in and of itself, automatically either a good thing or a bad thing; it all depends.

<sup>398</sup> The Tribunal does not regard it as an evasion, but rather a statement of legal fact, when the reported decisions of the CSM repeatedly recall that the only place in which the nullity or ineffectiveness of challenged prosecutorial actions can be established is before the ordinary courts of law, and that proceedings before the CSM serve only an internal disciplinary function.

This is a chapter that may be of special significance, as it relates directly to property owned by TRG, the Claimant in this Arbitration, and which represents part of its investment in Romania, so that the complaint to the CSM in this regard was, according to Ms. Morariu's table, brought in the names of TRG, RRC, and Mr. Patriciu jointly. It thus merits the Tribunal's particular attention. Mr. Patriciu testified that the attachment of the shares constituted a breach of covenant under many of TRG's financing agreements, and TRG executives needed to scramble in order to persuade the banks not to declare a default.<sup>399</sup> The Claimant asserts that its shareholding in RRC was attached on the orders of the prosecutors without any legal basis; the asserted reason that the State had suffered damage from the alleged wrongdoing and that the attachment was necessary to protect the State's interest in recovery was then shifted in the course of the proceedings to the money laundering statutes in an attempt retrospectively to extend the scope of the applicable attachment powers so as to cover the property of third parties,<sup>400</sup> and DIICOT then compounded the injury by deliberately delaying the legal proceedings for the release of the attachment for which it was ultimately fined. The attachment was eventually discharged by way of a decision of the Bucharest Court of Appeals, but only on 22 September 2006, i.e. more than seven months after the attachment had taken effect. The Respondent replies, first, that the original attachment order did invoke the money laundering legislation from the outset; second, that the interpretation laid down by the Bucharest Court (that it was only lawful to attach the assets of the defendants themselves, not those of third parties) was anything but self-evident, as witnessed by the fact that the Court of Appeals had divided 2 – 1 on precisely this issue; third, that a legal remedy had in fact been obtained, so that there was nothing left to complain about; and finally that the delays caused by the failure of the DIICOT to appear at the court hearing or to submit the file had already been the subject of a complaint to the CSM which found that there had been no bad faith or gross negligence.<sup>401</sup>

248. There is nothing of particular relevance to this issue in the legal expert opinions, except that Professor Kühne (for the Respondent) expresses the view that the Romanian legislation invoked as the ground for the attachment falls well within international norms and so likewise does the corrective process before the ordinary criminal courts as it operated in this case. As to the legality of the attachment, and in the light of the ruling of the Romanian court, the Tribunal

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<sup>399</sup> Transcript, Day 2, p. 40.

<sup>400</sup> Claimant's First Post-Hearing Brief, ¶ 166, and Claimant's Second Post-Hearing Brief, ¶¶ 46ff.

<sup>401</sup> Respondent's First Post-Hearing Brief, ¶¶ 281ff.

attaches greater significance not to the specific finding that the attachment was unlawful, but to the decision of the Bucharest Criminal Court that the prosecutors' continued delay in litigating the issue was so egregious as to warrant fining the prosecutors.<sup>402</sup> It is not necessary to consider whether these facts would, standing alone, constitute a treaty breach, but the Tribunal regards them as cogent confirmatory evidence of prosecutorial animus, as set out in paragraph 244 above, and in apparent disregard of the effect that the measure was almost certain to have on a protected foreign investment.

(h) The arrest and attempted imprisonment of Messrs. Patriciu and Stephenson

249. It is uncontested that on 27 May 2005, Ms. Cristescu and a DIICOT colleague<sup>403</sup> invoked their general powers under the Criminal Code to order Mr. Patriciu's detention for a 24-hour period, and simultaneously initiated an application to the Court for Mr. Patriciu's preventative arrest for a further 29 days. Both were done by formal written notices<sup>404</sup> which recite in some detail the charges under investigation and the state of the evidence resulting from the investigation to date; the application for preventative arrest cites as its basis that, under the specified provisions of the Criminal Procedural Code, the offences under investigation carried penalties in excess of four years imprisonment and "*that there is solid evidence regarding the fact that leaving the defendant free represents a real danger to public order, based on art. 149 of the Criminal Procedure Code.*"<sup>405</sup> The Claimant cites these measures as further items of oppressive behaviour, basing itself primarily on the facts (again uncontested as such) that the 1st Criminal Division of the Bucharest Court rejected the preventative arrest application as unfounded<sup>406</sup> and that, when the matter later came before the CSM, the latter decided that both formal notices were fatally flawed by the failure of Ms. Cristescu to follow certain specified procedural requirements under the Criminal Procedure Code. It is likewise uncontested that on 16 February 2006 Ms. Cristescu and a DIICOT colleague made a further application for preventative arrest for a similar period, this time not only against Mr. Patriciu but against Mr. Stephenson and one further non-Romanian defendant as well. The 2006 application, noticeably more elaborate than the 2005 application (partly on account of the further evidence claimed to have been gathered in the intervening period), responds also to the reasoning of the

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<sup>402</sup> Claimant's First Post-Hearing Brief, ¶ 53

<sup>403</sup> Although it in fact appears (see below) that the papers were signed by Ms. Cristescu alone, even though two signatures were required by law.

<sup>404</sup> Exhibits C-82 and C-83.

<sup>405</sup> Exhibit C-83.

<sup>406</sup> Exhibit C-84.

Bucharest Court when it rejected the earlier application, including in respect of the constitutional guarantee of liberty of the person and the application of the equivalent provisions of the ECHR. It cites as the grounds for preventative arrest: in respect of Mr. Stephenson and the other foreign defendant, their alleged attempts to evade justice (by leaving Romania); and in respect of Mr. Patriciu, excessive media broadcasting of the case allegedly designed to influence the witnesses and other parties; in addition it cites against Mr. Patriciu what it refers to as an attempt to influence the criminal proceedings by proceedings under a bilateral investment treaty – plainly a reference to the present arbitration – “*when in fact the object of the criminal investigation ... [far from being against the Dutch legal entity investor] ... refers to the defendant’s activity within the Rompetrol group as a natural person.*”<sup>407</sup> The Claimant stigmatizes this as yet another item of oppressive conduct, notably what it describes as the wholly unacceptable attempt to penalize Mr. Patriciu for the commencement of the ICSID arbitration, which was once again rejected out of hand by the Romanian courts<sup>408</sup> The Respondent answers that the Claimant in every case exaggerates what the courts found, that in none of these instances was the prosecutors’ applications found to be without an arguable basis, and that in any event the applications were without effect as they were not granted by the court.

250. These events were covered in the expert evidence of Profs. Boroi and Kühne. Professor Boroi, in his written opinion, concentrates largely on the procedural defects identified in the judgments of the Bucharest court and the Court of Appeal. Professor Kühne, for his part, says that, even granted these procedural defects, neither the 24-hour actual detention nor the applications for preventive detention in fact caused any appreciable prejudice to Mr. Patriciu or his co-accused, since the first was of short duration, the second never took effect, and ample remedies were to hand both before the courts and the CSM; the Romanian legislation was in any event, in his opinion, more protective than the standards required by and under the ECHR.
251. In the light of this evidence, the Tribunal’s view of the matter is close to that of Professor Kühne. The 24-hour detention of Mr. Patriciu seems clearly to have been *de minimis* in the wider scheme of things. The applicable local legislation expressly empowers a prosecutor to apply to the court to authorize pre-trial detention for up to 30 days, and in the light of

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<sup>407</sup> Exhibit C-111, pp. 38-39.

<sup>408</sup> At first instance on 23 March 2006 (Exhibit C-122) and again on appeal by the Public Ministry on 10 April 2006 in respect of Mr. Patriciu (Exhibit C-129) and on 13 June 2006 in respect of Mr. Stephenson and the third defendant (Exhibit C-143).

unchallenged expert evidence that the legislation in question falls well within the European and international norm, the Tribunal cannot find anything wrongful in a prosecutor resorting to that procedure. However, the entire chapter reflects no credit on the DIICOT prosecutors – and Ms. Cristescu in particular – when one puts together cumulatively the procedural defects in their first application, the patently thin grounds advanced by them to justify the need for pre-trial detention, their persistence with a second application nine months later with no apparently stronger basis, and finally what appears plainly to be Ms. Cristescu’s defiance of the CSM investigation into the matter for which (see above) the Respondent has offered no explanation.<sup>409</sup>

(i) The PNA and GPO press releases

252. On this issue the argument is somewhat different. At the factual level, there is once again no dispute that the DNA and GPO issued press releases relating to the progress of the investigation at various stages of its development.<sup>410</sup> But at the legal level the Claimant does not frame its argument primarily in terms of lawfulness or unlawfulness, alleging rather that what the prosecutorial authorities did amounted to a ‘press campaign’ which, it says, was both gratuitous and knowingly harmful to the individuals under investigation and to RRC. The Claimant singles out in particular a press release by the PNA in March 2004 announcing that it had begun informal and preliminary enquiries into the matters that had been the subject of the Talpes report, and a subsequent press announcement in May of the same year that formal investigations had begun ‘*in rem*’.<sup>411</sup> The Claimant’s allegation is that these press announcements overstepped the acceptable boundaries set by the presumption of innocence by stating in what it (the Claimant) describes as ‘conclusory terms’ factual findings that had never yet been put to judicial proof, and that, by some mysterious process, these press releases

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<sup>409</sup> As to the specific complaint raised by the Claimant in respect of the veiled reference in the DIICOT request to the present ICSID proceedings, the Tribunal does not read this passage (subject to the endemic uncertainties that have emerged in the course of the proceedings about the reliability of translations from Romanian into English) in the same way as the Claimant. In the Tribunal’s view, the passage seems to allege instead an attempt to use the position of TRG as an investor to shield individuals against criminal liability – which (whether right or wrong) is a different matter, and one to which the Tribunal has itself already drawn attention earlier in this Award.

<sup>410</sup> It should however be noted that the Claimant also alleges (as part of this ‘press campaign’) a deliberate leak of the Talpes report, which the Respondent does not admit.

<sup>411</sup> Claimant’s First Post-Hearing Brief, ¶¶ 22-24. A more specific analysis of the press releases in general is contained in the Claimant’s expert opinion on damages, which will be dealt with in paragraphs 281-288 below.



always seemed to coincide with important events in TRG's operational plans.<sup>412</sup> The Respondent's answer is that the press releases either corresponded to key events in the investigations or were in answer to items that were being carried in the press about the investigations.<sup>413</sup> It refers in particular to what it describes as 'intense media coverage' of the circumstances surrounding the Petromidia privatization in March 2004 before the PNA investigation was initiated.<sup>414</sup>

253. The nature and content of the press releases was covered in the expert evidence of Professors Boroi and Kühne, both of whom balance the freedom of information duties of public authorities<sup>415</sup> against the principles of the ECHR, notably the presumption of innocence. Professor Boroi's analysis, on behalf of the Claimant, is in the abstract, without commenting on the specific press releases complained about. On behalf of the Respondent, Professor Kühne draws attention to the difficulty experienced in many jurisdictions in reconciling the tension between these two competing principles. He analyzes the 'Guidelines for the Cooperation between Courts, Prosecutor's Offices attached thereto and Mass Media' currently applicable in Romania and concludes that none of the press releases in issue breaches the restrictions laid down, given on the one hand Mr. Patriciu's status as a public figure and the importance of his economic interests, and on the other hand what he finds to be the consistent pattern in the drafting of the press releases of maintaining the distinction between charges or suspicions and criminal convictions, and between provisional findings and formally established facts. He points out that, both in principle and under Romanian law, a prosecutor is bound of necessity to reach his own 'conclusions' on allegations brought forward, as the basis for his decision whether or not to prefer formal criminal charges.
254. The Tribunal is inclined, once again, to take much the same view as Professor Kühne. It does, however, find itself in some difficulty in forming any sort of definitive opinion on the matter in the absence of any comparative information or evidence (from either Party) as to the normal practice in Romania in comparable situations. Much would appear to turn – here as in other contexts in the arbitration – on the flavour of the language used, and in this respect the

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<sup>412</sup> Claimant's Second Post-Hearing Brief, ¶ 58. See also the Claimant's Reply, ¶ 135 (the press statements were "defamatory") and ¶ 126 (the press releases were "timed to keep the charges concerning TRG's investment constantly in the news").

<sup>413</sup> Respondent's First Post-Hearing Brief, ¶ 308.

<sup>414</sup> *Ibid.*, ¶ 309.

<sup>415</sup> Professor Boroi's First Legal Opinion, Section 2, Professor Kühne's First Legal Opinion, ¶ 103 - ¶ 115, and Professor Kühne's First Legal Opinion, ¶ 21 - ¶ 32.

Tribunal is far from confident that the translations into English from which it (and Counsel) were working were able to capture the subtleties of usage or reflect them with enough accuracy to allow judgements to be formed on the basis of the documents alone. The Claimant's argument was, however, based in its entirety (so far as the content of the press releases is concerned) on the interpretation it gives to the language of these translations alone, notably by reading as if they were assertions of ecumenical fact phrases that seemed to the Tribunal to be equally consistent with the alternative reading that they represented, linguistically, no more than what Professor Kühne described as the Prosecution's provisional findings. As to the question of the timings of the various press releases, on the other hand, the Claimant's argument appeared to the Tribunal to be a purely empirical one, derived simply by putting one time line alongside another to see how far they coincided, and then asking the Tribunal to draw specific inferences from the mere existence of any coincidence in time that emerged, without offering any more concrete evidence, however fragmentary, to support turning the adventitious into the purposive. The Tribunal accordingly finds that the Claimant has not established that the press releases raise any issue in respect of the Claimant's protection under the BIT.

(j) The interception of Mr. Patriciu's and/or RRC's telephone conversations

255. Here, once again, there is little if any dispute between the Parties over the facts, namely that Mr. Patriciu's telephones – including, so it would seem, the telephone line in his business premises – had been subject to interception since 2003, initially on the strength of applications from the Romanian intelligence services under the Law on National Security, though subsequently for the purposes of the criminal investigations themselves. The Claimant stigmatizes this telephone tapping as illegal both on account of procedural defects in the process for securing authorization and, more broadly, because the Romanian Law itself had been found by the European Court of Human Rights to provide insufficient guarantees to meet the requirements of the ECHR. It complains further of the failure by the prosecution authorities to provide Mr. Patriciu with information, which it says prejudiced his rights as a defendant, and adds to this a further complaint about the Respondent's failure fully to comply with the Tribunal's order for disclosure in respect of the warrants authorizing the various interceptions. It also says that the telephone tapping as such damaged the interests and operations of TRG, Rompetrol and RRC by creating an atmosphere of anxiety and concern amongst the companies' employees, and supports this by the brief evidence given by two of

them in Court proceedings in Romania, though neither of the two was tendered as a witness in this Arbitration.

256. The Tribunal finds it unnecessary to go into these questions in greater detail, as it is now in possession of an authoritative determination by the Romanian High Court of Cassation and Justice in its decision of 18 February 2011. It will be evident from the chronology that the High Court's decision intervened after the closure of the oral proceedings in the arbitration. As, however, the decision was on an appeal against a judgment of the Bucharest Court of Appeal that was already on record in the arbitration,<sup>416</sup> and had been in certain respects the subject of extended discussion between the Parties in the course of the oral hearing,<sup>417</sup> and in Post-Hearing submissions,<sup>418</sup> the Tribunal did not feel that it would be right to exclude the decision from consideration. It ruled accordingly on 6 September 2011, having taken into account the competing submissions of the Claimant and Respondent on the matter; as the Parties were unable to meet the Tribunal's request to agree on which parts of the final appellate decision were relevant to the arbitration, the Tribunal ultimately admitted the entire decision.<sup>419</sup> The decision is too long and complex to be summarized in its entirety in this Award. It will be sufficient to note:

- that the parties to the litigation were Mr. Patriciu and Rompetrol, as claimants, and the Romanian Intelligence Service, as defendant;
- that the court of first instance had awarded Mr. Patriciu moral damages of RON 50,000 plus costs for the invasion of his privacy, but had rejected his other claims and those of Rompetrol;
- that the matter had come to the High Court on applications for *cassation* filed by all three parties against the Judgment of the Bucharest Court of Appeals in which the latter had turned down their respective appeals against the decision of the lower court, on various grounds, both of law (the superior force of the ECHR) and of fact (the absence of proof of any prejudice to Rompetrol or access to its IT or telephone systems in relation to its business activities); and

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<sup>416</sup> As Exhibit R-51.

<sup>417</sup> Transcript, Day 1, pp. 44-45, Day 2, pp. 4ff.

<sup>418</sup> Respondent's First Post-Hearing Brief, ¶¶ 383ff., Claimant's Second Post-Hearing Brief, ¶¶ 60ff.

<sup>419</sup> In an agreed English translation produced by the Parties. See above paragraph 29.

- that the High Court dismissed the applications of all three parties, holding *inter alia* that there had been nothing arbitrary in the assessment of the quantum of Mr. Patriciu’s moral damage and that it was not open to it, in cassation proceedings, either to revisit the findings of fact by the lower courts or to consider new claims that had not been brought in the proceedings before the lower courts.

257. It follows from this summary account that the net result of this extended litigation was that the judgment of the lower court stood, and in particular its finding that Mr. Patriciu was entitled to a certain limited compensation for moral damage but not to any further relief, nor was Rompetrol entitled to any remedy; the ground for Mr. Patriciu’s individual entitlement was the breach of the guarantee of respect for his private life through the extended interception of his telephone calls without a proper legal basis.

258. The direct relevance of this to the Claimant’s claims in this arbitration is therefore limited to the characterization of the evidence as found in the High Court’s ruling. Given that decision of the High Court had not yet been rendered at the time of the Post-Hearing submissions, the Claimant rested on a statement by the Court of Appeals in rejecting the appeal against the lower court’s findings, which reads as follows (in translation,<sup>420</sup> with emphasis added by the Tribunal to identify the particular phrases at issue):

*Under the pretext [sub pretextful] of the existence of threats to the national safety were registered the telephone conversations of the plaintiff Patriciu Dan Costache for an extremely long period (1 year and 3 months) and subsequently the data were used against him in criminal suits the subject matter of which was exclusively the committing of common law offences and no court of law may cense [sa poata censura] the legality of administering such means of evidence.*

259. The Claimant had asked the Tribunal to read this passage as constituting a formal and authoritative finding by a senior Romanian jurisdiction that the threat to national security advanced in the Intelligence Service’s request for authorization was no more than a convenient fiction without any substantive justification, and hence asks the Tribunal to treat the finding as another element in the campaign of harassment against TRG and Mr. Patriciu.

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<sup>420</sup> To be more precise, the translation tendered by the Respondent, in Exhibit R-51.

260. The High Court's decision supports Claimant's contentions. While agreeing that it was not the Intelligence Service's responsibility to ensure conformity between Romanian law and Romania's obligations under that Convention, the High Court went on to uphold the Intelligence Service's liability on the ground that the Service had no valid indication of a threat to national security as required by law. In this context, the High Court, like the Court of Appeals, referred to the national security justification as a 'pretext' [pretextul], indicating that by this it meant a 'false reason'. Accordingly, although the Respondent submitted that the term 'pretextul' in itself was capable of a wider range of nuances in the Romanian language than its literal equivalent in English, the Tribunal is satisfied that a Romanian court at the highest level has established that national security was not the real motive for the interception but only a convenient device.

261. That said, the High Court's Judgment leaves it beyond any doubt that the litigation was directed towards the guarantee of respect for Mr. Patriciu's private life, as embodied in the ECHR, and finds expressly that Mr. Patriciu's business activities were not affected. In the circumstances, and in the absence of any positive evidence to show collusion between the intelligence services and either the DNA or DIICOT prosecutors – in respect of surveillance that originally began well before the initiation of the criminal investigations – the Tribunal is unable to conclude that the episode comes within the area of protection under the BIT. The Romanian courts at all three levels found that Rompetrol had not substantiated its claim of interference with its own business operations. Moreover, even so far as Mr. Patriciu's individual interests are concerned, the Tribunal can see no sign whatever of Mr. Patriciu, having allegedly fallen foul of important enemies, receiving on that account a biased or unfair treatment at the hands of the Romanian courts when he set out to vindicate his rights. At the very most, therefore, the telephone interception saga might go, once again, to suggest that there were elements in the State apparatus determined to pin something on Mr. Patriciu, if they could; as such, the Tribunal places this alongside the other fragments of evidence mentioned in paragraphs 248, 251, and 257 above relating to the conduct of the prosecutors.

(k) The requests for information from banks

262. The Claimant points out that the Respondent had conceded, in the context of the Tribunal's Orders on document production,<sup>421</sup> that the GPO had in the course of the DIICOT criminal

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<sup>421</sup> See paragraph 186 above.

investigation directed requests for information to some 60 banking institutions, and relating to some 400 companies, as to the financial transactions of Rompetrol. The Claimant complains that “[n]othing in the record provides any legitimate justification for such a massive campaign of requests directed to TRG’s business partners. These requests were made simply to harass TRG and to harm its relationships with businesses and financial institutions.”<sup>422</sup> The Respondent’s answer is, in essence, that the requests were in accordance with Romanian law (citing specifically the legislation against money laundering) and that the powers conferred under the legislation in question, wide as they were, conformed to the European Union Directives on Money Laundering and the EU Framework Decision on Money Laundering.<sup>423</sup> In addition, the Respondent denies (by reference to the voluminous attachments to the criminal Indictment)<sup>424</sup> the Claimant’s assertion that none of the information sought was in fact ever used for the criminal process.<sup>425</sup>

263. The question was considered to an extent in the expert evidence of Professors Boroi and Kühne. For Professor Boroi, it was only once the criminal investigations had become *in personam* that it became legally justified to override bank secrecy. Professor Kühne, on the other hand, took the view that it was not necessary that the persons concerned had already become formally identified as suspects or had been charged; he sets out in detail why he considers that Romanian law complies with the broad European standard in respect of the fight against money laundering.
264. The Claimant links with its arguments, however, its complaint about the inadequate response by the Respondent to the Tribunal’s disclosure Orders. The Tribunal has already considered this matter (at paragraphs 184-186 above) and decided that, in the circumstances, the situation as to document production does not call, in general or in particular, for the drawing of any adverse inferences on matters of fact. The Tribunal is prepared to regard as a matter of common knowledge that, once a money-laundering investigation is properly launched, it is likely to lead to the investigators’ net being cast wide to gather in a picture of financial transactions that may be both complex and opaque. That leaves at large the Claimant’s allegation that this particular money-laundering investigation was not genuine but was designed to be either oppressive or damaging or both.

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<sup>422</sup> Claimant’s First Post-Hearing Brief, ¶ 46.

<sup>423</sup> Respondent’s First Post-Hearing Brief, ¶¶ 428-429.

<sup>424</sup> See paragraph 237 above.

<sup>425</sup> Respondent’s First Post-Hearing Brief, ¶ 433.

265. Given that the requests for information from the banks were directed at a wide range of targets that had in common their business affiliation with TRG, this aspect of the investigation and prosecution constituted conduct that fell within the zone of protection under the BIT. The Claimant has been unable however to offer any positive proof of its allegation that the requests were wrongfully motivated, but instead asks the Tribunal to fill in the gap by drawing inferences from the observable facts. A reasonably sceptical approach is justified towards determining whether the scope of these requests was in accord with standard criteria when this question is considered in conjunction with other aspects of the investigation and prosecution already discussed. The Claimant has nevertheless failed to demonstrate to a sufficient degree of reliability that the requests were themselves irregular or abusive. Accordingly, the Tribunal does not regard this matter as evidence of a pattern of serious irregularities on the part of the prosecutors such as might bring Article 3(1) of the BIT into play.

(1) The tax controls

266. This issue need not trouble the Tribunal at length. It is once again of a slightly different kind from some of the preceding issues dealt with above: there is no dispute, on a factual level, that the tax controls complained about took place, nor does the Claimant contend that they were unlawful; it complains instead that the combination of their number and frequency and the manner in which they were conducted shows that they represented yet another element in a campaign of harassment against Rompetrol.

267. Witnesses of fact were presented from each side. The Claimant proffered the evidence of Mr. Adrian Volintiru (formerly the Chief Finance Officer of RRC, now in the employment of the Romanian subsidiary of another Dutch company ultimately owned by Mr. Patriciu)<sup>426</sup> in support of the propositions that the level of tax controls was significantly ramped up in 2003 after TRG's acquisition of Petromidia, that the attitude of the tax inspectors was 'rude and aggressive,' that the tax inspectors had clearly been instructed to find irregularities and not to make a proper assessment of RRC's financial situation, and that the investigations were unduly prolonged and deliberately burdensome. For its part, the Respondent produced as a witness Ms. Valeria Nistor (a senior official of the General Legal Directorate of the National Agency

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<sup>426</sup> Though it would be more accurate to say that Mr. Volintiru's witness statement, which was produced only with Claimant's Reply, was in fact in response to the first witness statement of Ms. Nistor annexed to the Statement of Defence.

for Fiscal Administration, ANAF).<sup>427</sup> In her two witness statements, Ms. Nistor deals *inter alia* with the allegations by the Claimant of the unjustified increase in the tax controls on Petromidia or RRC, with the length and manner of the investigations, and with the allegation that the form of the investigations was changed in mid-stream in order to evade the possibility of challenge in the courts.<sup>428</sup> She includes in her first witness statement a table breaking down by year and by type the tax controls that had been carried out in the period from 1999 onward. According to this table, for the period up to and including 2003, 15% of the controls were to verify the company's entitlement to benefits it had itself claimed, roughly 50% (75% in the year 2003) were cross-checks of transactions reported by other companies, and 10% were specific verifications required by law for production and trade in excisable products; so that only 25% represented what Ms. Nistor classified as 'tax controls on RRC's activity'. According to Ms. Nistor's table, far from accelerating after RRC's acquisition of Petromidia, the gross number of controls peaked in 2001/02, and then fell off sharply in all categories with the sole exception of cross-checks on the declarations of RRC's trading partners. There was then a further sharp drop in 2004 and 2005 which (Ms. Nistor points out) coincided with radical changes in the Fiscal Code, particularly in respect of the petroleum industry. She sets out in addition, through another table, the steady rise, despite the company's increasing turnover, in RRC's accumulated tax debt (from US\$195.3 million in 2000 to US\$693.7 million in late 2003). Finally, Ms. Nistor draws attention to the fact that Mr. Volintiru's opinions had not been backed up by documentary corroboration but that she had extracted from the ANAF files the relevant papers which did not bear out his assertions.

268. The Respondent did not call Mr. Volintiru for cross-examination. Ms. Nistor, on the other hand, was called by the Claimant and was cross-examined at length.<sup>429</sup> She impressed the Tribunal as a responsible and knowledgeable witness, and the Tribunal has no hesitation in giving credence to her evidence.<sup>430</sup> She supplemented her evidence in chief by testifying that

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<sup>427</sup> By the time she came to give her oral evidence, however, Ms. Nistor had become the General Counsel to a major Romanian Investment Fund designed to compensate people whose property had been confiscated during the communist era.

<sup>428</sup> And with certain other questions that the Tribunal does not find of significant importance for its Award.

<sup>429</sup> She gave her evidence in English, and not through the medium of interpretation with the difficulties that entailed in other contexts.

<sup>430</sup> It should however be noted that it emerged under questioning from the Tribunal that Ms. Nistor had prepared her witness statements in English, which had then been translated by Respondent's counsel into Romanian and put before her to sign in a version that did not correspond at all accurately to the English originals deposited with the Tribunal as 'translations'. This was an unfortunate lapse, which the Respondent ought never to have allowed to happen, but it does not alter the Tribunal's view of the value of Ms. Nistor's evidence as such.



the number of tax controls undertaken in the same period in respect of RAFO Onesti comfortably exceeded that in respect of RRC. When it was put to her that Mr. Patriciu had complained that Rompetrol was the most controlled oil company in Romania, she replied to the effect ‘they all say that,’ which to the Tribunal rang particularly true. The Claimant seeks in its Post-Hearing submissions to undermine the value of her evidence on the basis that she was not present at the tax investigations carried out on RRC whereas Mr. Volintiru was there in person.<sup>431</sup> The Tribunal does not regard this as a particularly convincing argument. At most, it could bear only on the Claimant’s allegation as to the aggressive demeanour of the tax inspectors when on the premises of RRC – an allegation which the Tribunal evaluates against what must be the general assumption that no business enterprise regards the descent of the tax inspectors as a happening inspiring unmitigated joy. But it does not touch the main part of Ms. Nistor’s evidence which the Tribunal has already assessed above.

269. The Tribunal accordingly finds that the Claimant has not met the burden falling on it to establish that the conduct of the tax authorities towards RRC was oppressive, either absolutely or by comparison with the treatment of its competitors. Hence, though directed at the company itself, the tax controls do not implicate the protections afforded by Article 3(1) of the BIT.

## Summary

270. The Claimant’s case, therefore, reduces to a submission that the Tribunal should find, on a balance of probabilities, by drawing the necessary inferences from the objectively established (or admitted) facts, that certain of the prosecutors in positions of authority and responsibility in the PNA and the DIICOT were driven by hostility and bias towards Mr. Patriciu (and therefore his interests and his associates) and a determination to find something to pin on him (or them), that they allowed this hostility and bias to influence, in a substantial way, their prosecutorial functions (or at least their tactics), specifically an unnecessarily large and sweeping effort to pull in potentially incriminating material from banking sources, to freeze financial assets, to take Mr. Patriciu and Mr. Stephenson into custody and to enter into the public polemic over Mr. Patriciu’s affairs, and that the result was to cause damage both material and moral to RRC, and through it to TRG. This submission was reflected in an argument the Claimant developed over the course of the arbitral proceedings, and particularly in the Post-Hearing submissions,

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<sup>431</sup> Claimant’s First Post-Hearing Brief, ¶ 56.

namely that, over and above the individual items of conduct complained of, the conduct of the Romanian State, judged overall, was such as to engage its liability to TRG under the BIT. The Tribunal identifies in paragraph 124 above those portions of its First Post-Hearing Brief in which the Claimant identifies four ‘scenarios’ giving rise to liability, the first of which is ‘a pattern of abusive acts by Romania,’ and the final ‘scenario’ asks the Tribunal to look at the global effect of all of the three prior ‘scenarios’ taken together.

271. In the face of that approach, this Tribunal can join other recent tribunals in accepting that the cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord fair and equitable treatment even where the individual actions, taken on their own, would not surmount the threshold for a Treaty breach.<sup>432</sup> But this would only be so where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough. As the matter was put by the *Rosinvest* Tribunal:

*In conclusion therefore, the Tribunal considers that the totality of Respondent’s measures were structured in such a way to remove Yukos’ assets from the control of the company and the individuals associated with Yukos. They must be seen as elements in the cumulative treatment of Yukos for what seems to have been the intended purpose. The Tribunal, in reviewing the various alleged breaches of the IPPA, even if the justification of a certain individual measure might be arguable as an admissible application of the relevant law, considers that this cumulative effect of those various measures taken by Respondent in respect of Yukos is relevant to its decision under the IPPA. An illustration is, as Claimant has pointed out, that despite having used nearly identical tax structures, no other Russian oil company was subjected to the same relentless and inflexible attacks as Yukos. In the view of the Tribunal, they can only be understood as steps under a common denominator in a pattern to destroy Yukos and gain control over its assets.*<sup>433</sup>

272. The Claimant’s Statement of Claims referred to “*the extraordinary State orchestrated harassment to which it has been subjected ...*”<sup>434</sup> The Respondent refers to this – with some justification – as a conspiracy theory,<sup>435</sup> its answer to which is as follows. The Respondent says first that proof of any conspiracy is wanting: the allegations advanced by the Claimant

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<sup>432</sup> As, for example, in *RosinvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, ¶ 599: “the Tribunal considers that an assessment of whether Respondent breached the IPPA can only be effectively conducted if the conduct as a whole is reviewed, rather than isolated measures or aspects.”

<sup>433</sup> *RosinvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, ¶ 621.

<sup>434</sup> Statement of Claims, ¶ 3.

<sup>435</sup> A term that was also used by the Respondent in *Rosinvest*.

rest entirely on the self-interested evidence of Mr. Patriciu and Mr. Stephenson and the discredited evidence of Mr. Stanescu; everything else is pure speculation and anecdote. But the Respondent rests also on what it submits are the improbabilities inherent in a conspiracy theory, since it would depend on a chameleon-like shift in the cast of conspirators; the original conspiracy would have had its orchestrator Mr. Talpes, in pursuit of his undercover commercial links to RAFO, and would then have to switch to a different orchestrator, President Basescu on his election, in pursuit of a wholly different set of purposes, of a purely political kind, deriving from the hostility between the President and Prime Minister, with Mr. Talpes acting somehow as the hinge joining the two in influencing Mr. Basescu's attitudes despite the lack of political affinity between the two men.<sup>436</sup>

273. There is much force in the Respondent's argument. The Tribunal starts from the proposition that, whether the conduct in question is stigmatized as 'conspiracy' or as 'organized harassment,' some proof is required, even if all of the actors have the status of State agencies, that different actions pursued on different paths by different actors are linked together by a common and coordinated purpose. This was clearly the view taken by the *Rosinvest* tribunal, a view which the present Tribunal shares. What degree of proof would be required cannot be stated in the abstract; it would depend on the nature of the allegations and the circumstances of the case. The Tribunal recalls its finding in paragraph 182-183 above as to the sufficient weight of positive evidence that would be required to sustain serious allegations of sustained and coordinated misconduct, as opposed to pure probability or circumstantial inference. The Tribunal is quite prepared to assume as a working hypothesis that, given conditions in Romania at the time, there may have been tensions and rivalries, both commercial and personal, between Mr. Patriciu's enterprises and those connected with RAFO, and that Mr. Talpes may have had personal links to the latter. It is equally prepared to assume that there may have been, or there may have built up, a political hostility between Mr. Patriciu and Mr. Basescu after the latter succeeded Mr. Ion Iliescu as President. But, even if so, this could only go to establish motive, and in investment arbitration the gap between motivation and action is not one that can be leapt over by conjecture rather than evidence.

274. The Tribunal turns therefore to the evidence the Claimant offered, starting with that of Mr. Patriciu. The Respondent is justified in warning of the element of self interest in Mr. Patriciu's

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<sup>436</sup> See Respondent's First Post-Hearing Brief, ¶¶ 102ff. The Respondent points also to an unexplained gap in the theory covering the earlier period from 2001 to 2004.

evidence. As to its content, in his witness statement Mr. Patriciu says: that it was the then Minister of Industry and Commerce (Mr. Dan Ioan Popescu, also a witness in this arbitration) who brought about the meeting at which Mr. Tender made the threats recorded at paragraph 211 above; and that there were links between Mr. Talpes and RAFO; to which he adds (but only in his second witness statement) the belief that, for political reasons, Mr. Basescu had not only endorsed the campaign of harassment but directed that it be expanded and intensified and involved himself directly in the DIICOT investigations. He offers no corroboration of this other than Mr. Stanescu's account of certain events, the files dealing with Rompetrol in Mr. Basescu's office (which the Tribunal has dealt with in footnote 373 above), and Mr. Basescu's television interviews (which the Tribunal will discuss below). The Tribunal notes that Mr. Popescu, in his evidence, failed to corroborate Mr. Patriciu's claim that he arranged the meeting with Mr. Tender of RAFO. As to Mr. Stephenson's evidence, so far as the present issue is concerned he is not able to more than repeat certain elements of Mr. Patriciu's evidence without any first-hand knowledge of his own – other than in respect of a shareholder court action launched against TRG by a minority shareholder in RRC (Faber Invest & Trade) which he says was backed by a leaked copy of the 'Cristescu themes'.<sup>437</sup> Mr. Stanescu's evidence has already been dealt with at length in paragraphs 213-224 above. The Tribunal turns finally therefore to President Basescu's television interviews.

275. The reference is to two interviews given by Mr. Basescu to Realitatea TV at the time of his election to the Presidency. There was some initial confusion among the Parties between the two interviews, with the result that the Tribunal did not see the full texts of both until a late stage in the proceedings, but no serious difficulty ensued as a result. The issues arising from the contents of the interviews were extensively canvassed in the Parties' written and oral submissions, and in the evidence of Mr. Patriciu. The Tribunal sees no need to recite the arguments in detail. The key submissions are in the Post-Hearing Briefs: for the Claimant, at paragraphs 30-33 of its First Brief; and for the Respondent, at paragraphs 133-138 of its First Brief and 66-69 of its Second – and these submissions on both sides take into account the cross-examination of Mr. Patriciu, in which he interpreted the two interviews by the President (and particularly the first of them) as a public declaration that Petromidia was guilty of criminal practices and stood in this respect on the same footing as RAFO. This is the version

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<sup>437</sup> See paragraph 236-237 above. Mr. Stephenson confirmed under cross-examination that he was unable to read the Romanian original of any of the documents in question, but was going on apparently oral translations given to him by RRC's local staff.

of events espoused by the Claimant, but the Respondent rejects it on the basis that the actual texts of the interviews do not bear this meaning out. The Respondent asserts instead that, in response to loaded questions from his interviewer at a time of political excitement, the newly-elected President was saying no more than that corruption and cronyism would not be tolerated under his Presidency and that RAFO and RRC would receive exactly the same treatment in this respect. Due allowance made for the translation of live interviews into English which (as in so many places in the evidence before the Tribunal) leaves a question as to whether the nuances were or were not properly captured, the Tribunal has no doubt that the Respondent's reading – set out in full in the paragraphs of its Post-Hearing Briefs noted above – is clearly the better one.

276. The Tribunal accordingly finds that the evidence mustered by the Claimant falls well short of what would be required to establish its claim that the woes that befell Mr. Patriciu and RRC must be linked together and seen as part of a co-ordinated campaign of harassment by the Romanian State.<sup>438</sup>
277. Having found unproved the Claimant's contention of a broad campaign of orchestrated harassment, the Tribunal must still consider whether the evidence analysed above sustains the hypothesis of a pattern of disregard by the GPO and DIICOT prosecutors for the procedural rights of TRG's executives, and in particular for the likely and foreseeable effects on the interests of TRG itself as a protected foreign investor. The Tribunal's conclusion is that the evidentiary record goes sufficiently far in that direction to raise a question as to the breach of Article 3(1) of the BIT, notably the guarantee of fair and equitable treatment. The question must therefore be examined further.
278. As the *Rosinvest* Tribunal recognized, the 'cumulative effect' of a series of wrongful acts may amount to a treaty breach even if the individual components of that series do not. Likewise, in this Tribunal's view, a State may incur international responsibility for breaching its obligation under an investment treaty to accord fair and equitable treatment to a protected investor by a

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<sup>438</sup> The Tribunal reaches this conclusion independently of the arguments advanced by the Respondent that the theory of determined and implacable hostility to RRC and/or Mr. Patriciu is not reconcilable with the State's rescue of the company by agreeing to convert the accumulated tax liability into bonded debt (see paragraphs 104.b and 205 above), nor is it easy to reconcile with the incontrovertible fact that at no stage was there any interference in the ownership either of Mr. Patriciu's personal interests, nor in the ownership of RRC's assets (notably the Petromidia refinery), nor in TRG's ownership interests in Rompetrol or RRC. These arguments are plainly not without merit, but they go only to reinforce a conclusion which the Tribunal had already reached on other grounds.

pattern of wrongful conduct during the course of a criminal investigation or prosecution, even where the investigation and prosecution are not themselves wrongful. The provisos are however that the pattern must be sufficiently serious and persistent, that the interests of the investor must be affected, and that there is a failure in these circumstances to pay adequate regard to how those interests ought to be duly protected. In the Tribunal's considered view, it is part of the legitimate expectations of a protected investor – without in any way trenching upon the sovereign right of the host State to prescribe and enforce its criminal law – that, if its interests find themselves caught up in the criminal process either directly or indirectly, means will be sought by the authorities of the host State to avoid any unnecessarily adverse effect on those interests or at least to minimise or mitigate the adverse effects.

279. The Tribunal notes that from a certain point at least in the lengthy saga of the criminal investigations, the GPO and the DIICOT knew that the interests of TRG as such stood directly or indirectly in the line of fire. It is not easy to put a finger on a particular point in time, but knowledge of this kind must be assumed to be there at the very latest by the time of the second request for detention (of Mr. Patriciu and Mr. Stephenson), for the simple reason that the request refers directly to the present Arbitration and to its having been brought at the instance of 'the Dutch investor' (i.e. TRG).<sup>439</sup> From that point onwards, the Respondent could not be heard to deny that the GPO, as a responsible organ of the Romanian State whose actions or omissions would engage Romania's international responsibility, was aware that its actions in pursuit of the criminal investigation stood to harm the interests of a protected foreign investor. In fact, the Tribunal finds sufficient by way of reference to 'the Rompetrol Group' in the GPO press releases and in the various DIICOT formal documents that it feels justified in projecting back in time the element of knowledge so that it would in practice cover the attachment of the RRC shares and the requests for banking information as well as later events in 2006 and onwards. There is however no evidence that steps were taken either to assess or to avoid, minimise, or mitigate that possibility of harm, nor has the Respondent so pleaded in its written arguments. On the basis of the procedural irregularities during the criminal investigation of Mr. Patriciu and others, including the conduct of the prosecutors discussed in paragraph 245, the attachment of RRC's shares discussed in paragraphs 247-248, and the arrest and attempted imprisonment of Messrs. Patriciu and Stephenson discussed in paragraphs 249-251, the Tribunal accordingly holds that to that limited extent the Respondent is in breach of the

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<sup>439</sup> See paragraph 249 above.

guarantees accorded to the Claimant by Article 3(1) of the BIT, notably the guarantee of ‘fair and equitable treatment’. In so finding, the Tribunal wishes to make it plain that it would not regard any breach, or indeed any series of breaches, of procedural safeguards provided by national or international law in the context of a criminal investigation or prosecution as giving rise to the breach of an obligation of fair and equitable treatment. All will depend on the nature and strength of the evidence in the particular case, on the impact of the events complained about on the protected investor or investment, and on the severity and persistence of any breaches that can be duly proved, as well as on whatever justification the respondent State may offer for the course of events. The Tribunal’s finding is based entirely on the facts of the present case.

280. All of the Claimant’s remaining claims are dismissed.

## **I. LOSS AND DAMAGE**

281. Given the Tribunal’s limited findings as to potential liability under the BIT set out above, it will be clear that many of the assumptions against which the Claimant put forward its expert evidence on loss and damage, and the Respondent replied to that, including through its own expert evidence, are no longer intact. The analysis of loss and damage remains, all the same, a necessary element in the completion of the Tribunal’s reasoning in this Award. The Tribunal would like to note at this stage the high quality of the expert evidence put forward on both sides on this aspect of the case. Not only were the experts on each side - for the Claimant, Messrs. Dunbar and Okongwu of NERA (assisted at the hearing by Mr. McKenna), and for the Respondent, Messrs. Dow and Lapuerta of the Brattle Group - deeply knowledgeable in their field, but they were each ready to engage with the arguments of the opposing experts in an exemplary fashion. The Tribunal found its joint session with both sets of experts on the penultimate day of the hearing to be genuinely informative, as well as helpful to it in forming a view of the case, and would like to record its particular appreciation for that.

282. The Tribunal finds it unnecessary, at this stage in its Award, to rehearse in any detail the successive submissions of the Parties on the question of loss and damage; these can be found in Sections C, D and E above. For present purposes it suffices to summarize the final submissions by each Party as follows, based on their closing statements at the end of the oral hearing and their Post-Hearing Briefs. In the eyes of the Claimant, the damage it suffered consisted, on the one hand, of injury to its reputation which affected its current and future

business, and on the other hand of the actual loss of property or property rights flowing from specific acts on the part of the Respondent. That damage then manifested itself (so says the Claimant) in various ways, including legal costs incurred in dealing with the wrongful acts of the Romanian investigators and prosecutors, increased financing costs for its continued business activities, and the loss of business opportunities. These sources of damage were, the Claimant maintains, precisely what its expert study set out to measure.<sup>440</sup> The Respondent's answer is that the only damages that are recoverable in law are those that are non-speculative, have actually materialized, and are not too remote, but that the figures put forward by the Claimant are derived through the use of a method that makes them wholly speculative and unreliable.<sup>441</sup> The Claimant, while accepting that damage may not be purely speculative and must have a sufficiently proximate link to treaty breaches established, retorts that both criteria are satisfied by its damage claims as formulated. The Respondent, in rejecting these assertions, replies that the Claimant has not, in fact, produced evidence of any loss at all. In short, the entire question whether the Claimant, TRG, has proved any loss or damage at all is in issue between the Parties.

283. It is against that background that the Tribunal must assess the expert evidence. The Claimant's experts base their assessment of the damage suffered by the Claimant on what is known as the 'event study' method.<sup>442</sup> This method is defined in the following terms in the Claimant's first expert report on damages, produced by Dr. Dunbar in December 2008:

*An event study is an empirical technique used to measure the stock price impact of a specific event, such as a company's earnings announcement. The technique examines stock price returns - the percentage change in stock prices from one day to the next - to determine how much of the price movement on a particular day is due to the event being examined, and how much is due to changes in conditions affecting the market in general.*<sup>443</sup>

Dr. Dunbar's report goes on to explain that the event study method is a form of purely statistical regression analysis by which, on the hypothesis of a sufficiently efficient market for trading in the shares in question, he has set out first to construct an expectation of share

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<sup>440</sup> Claimant's First Post-Hearing Brief, ¶ 198.

<sup>441</sup> Respondent's First Post-Hearing Brief, ¶¶ 508ff.

<sup>442</sup> By a direction dated 2 September 2010, the Tribunal ruled inadmissible further evidence put forward by the Claimant with its First Post-Hearing Brief as the basis for an alternative method for the assessment of its damage. See footnote 213.

<sup>443</sup> Dunbar report, ¶ 68. The rebuttal report by Dow and Lapuerta (see below) defines it as "a statistical technique that consists, in essence, of specifying a priori certain days on which a particular event became known to the stock market, and on which there appear to be no confounding events that might also move the stock price, and then seeing how much the stock price moved on those days" (¶ 3).



movements overall in the relevant market, and then to assess whether it can be said, with a sufficient degree of statistical reliability, that, under the effect of selected ‘events,’ the observed movement in the traded price of the shares under examination undershoots - or alternatively overshoots - the movement that would have been expected. It is self-evident that, in applying this analytical method, the selection of ‘events’ is of particular significance, and in the specific circumstances of this case the search was for possible correlations with the actions by or on behalf of the Romanian State about which the Claimant complains in this arbitration; or, more precisely, not directly with the actions themselves but with when news of them reached the market. Dr. Dunbar explains in some detail how he put together the string of 32 ‘event days’ affecting RRC, on the basis of an extensive examination of the published information that would have been available to market participants at the relevant times, principally from the published media. These choices are further justified and explained in the report of November/December 2009 by Dr. Dunbar’s colleague, Dr. Okongwu (who also appeared as an expert witness at the hearing). The final stage of the analysis then consisted in several further steps: (i) isolating which ‘event days’ from among the chosen 32 were to be treated as significant, (ii) calculating the excess downward or upward<sup>444</sup> movement in the RRC share price on each of these significant ‘event days,’ (iii) converting that into a cash figure by a multiplier derived from TRG’s shareholding in RRC, (iv) adding those figures together to arrive at a cumulative total, which is then put forward as the figure representing the Claimant’s overall damages.<sup>445</sup>

284. The criticism of the above in the expert report of March 2010 by Professor Dow and Dr. Lapuerta, on behalf of the Respondent, focuses to a large extent on the technical defects which in their view render the Dunbar report unreliable as an application of the event study methodology.<sup>446</sup> In summary, they say that it analyses the wrong shares, tests the wrong days, and embodies other technical errors, and finally that it fails to cross-check its statistical findings against other indicators (‘reality checks’) which would have shown that the true picture of what happened to TRG is quite different from that put forward. These are strong criticisms. In part they derive from the fact that the Dunbar report chooses as the representative quantity to measure the relatively small minority of RRC shares actually traded

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<sup>444</sup> E.g. under the impact of the withdrawal or reversal of an earlier negative event.

<sup>445</sup> US\$139 million.

<sup>446</sup> Although Dow and Lapuerta also express, and explain, their doubts as to whether the event study method, as applied by Dr. Dunbar, was appropriate to the case at all.

on the Bucharest Stock Exchange, which Dow and Lapuerta regard as an unreliable, and at best indirect, guide to the effect on TRG as such, as the holder of the very large controlling stake in RRC. In part these criticisms derive also from what they regard as technical defects in the handling of the statistical ‘confidence interval’ which they say deprive the Dunbar calculations of any serious value as a demonstration of cause-and-effect. Dow and Lapuerta also criticize the way in which the Dunbar report arrives at its final selection of the 12 ‘significant event days,’ these being the days in respect of which the corresponding effect on shareholder value, as calculated in the report, go to making up the cumulative figure put forward as the Claimant’s damages flowing from the Respondent’s alleged breaches of treaty. Specifically, Dow and Lapuerta say that the technique adopted by Dr. Dunbar falls into fundamental technical error by abstracting the 12 particular ‘event days’ from the set of 32 such days originally selected for examination *ex post facto* and on the basis of the outcome of the observations on those days, the result of which (say Dow and Lapuerta) is mathematically bound to skew the outcome of the calculation. Dow and Lapuerta also challenge, amongst other things, the choice made by Dr. Dunbar for the beginning and the end of the period studied. And in that connection they challenge in particular the exclusion of certain ‘favourable’ dates, most notably the buy-out by KazMunaiGaz in 2007,<sup>447</sup> which led to a massive rebound in the share price. But they also assert that the technique applied in the Dunbar report is incapable of taking proper account of the ‘no news is good news’ phenomenon, in which the markets gradually discount over time a risk or risks they had previously factored into the share price because the anticipated risk (in the present case, for example, the loss of the Petromidia refinery) had failed to materialize, but without this happening in any dramatic fashion hinging on any specific event. Overall, Dow and Lapuerta claim that the statistical confidence that can as a result be placed in the Dunbar calculations is so low that the latter do not amount to proof of any loss at all, let alone one of the magnitude put forward.

285. These sharply conflicting expert views were vigorously argued out at the oral hearing, both in the examination and cross-examination of each set of experts, and in a separate session arranged for the specific purpose of allowing the two sets of experts to be questioned jointly thereafter in conference by the members of the Tribunal. A full account of both is given in paragraphs 107-112 above, and need not be repeated here. So far as the purely technical

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<sup>447</sup> See paragraph 37 above.

aspects of the calculation of damage are concerned, the Tribunal need go no further than to observe that the criticisms mounted by Dow and Lapuerta were both trenchant and far-reaching and, although responded to with determination and conviction by Dr. Okongwu, they raise a serious doubt as to whether in these circumstances the Claimant can be said to have met the burden resting on it of proving its damages.<sup>448</sup> The Tribunal wishes at this stage merely to highlight one question relating to the overall approach of the Dunbar report to the problem put before its author, what one may call its fundamental underlying hypothesis.

286. The issue in question is that Dr. Dunbar (and Dr. Okongwu in his turn) took as the axiom underpinning their reports that all the Romanian criminal investigations connected with Rompetrol should be regarded in principle and in their entirety as unlawful in terms of the BIT. This emerged with unmistakable clarity from paragraph 3.2.1 of Dr. Okongwu's Consolidated Rebuttal Report of November 2009 and in particular from its paragraph 31. Whether Messrs. Dunbar and Okongwu were specifically instructed to that effect by their client is not revealed. Be that as it may, this all-or-nothing approach ends up leaving the analysis somewhat stranded. As will have appeared in Section H of this Award (paragraphs 247-248 above) the Tribunal's findings do not sustain this basic axiom of the Dunbar and Okongwu reports. On the contrary, the Tribunal has not only declined to find that the criminal investigations were *per se* illegal, but it has also declined to find similarly in respect of the majority of the individual aspects of those investigations put specifically in issue by the Claimant. The underlying problem became in due course the subject of discussion between the two sets of experts during the hearing. There seemed to be a large measure of agreement between them that the technically proper approach, for the event of only a partial finding of illegality, would be to reconfigure the experiment and run it again. This was not of course done – if only for the simple reason that it would have required foreknowledge of what the Tribunal was going to decide. The Tribunal was convinced by the argument of Dow and Lapuerta that the Dunbar/Okongwu application of the event study method can offer no means of differentiating between the market effects of a company's coming under investigation by the authorities for any legitimate purpose and the asserted incremental effects of illegalities that happened in the course of such an investigation. The Tribunal has held that the investigations

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<sup>448</sup> The Tribunal observes *en passant* that Dr. Dunbar is clearly wrong when he states in ¶ 62 of his report that “[t]he main purposes of damages in arbitral proceedings are to restore a claimant's economic losses caused by a respondent's conduct **and to deter such future conduct**,” the aim of reparation in international law is compensation, not punishment. The Tribunal does not however regard this misstatement as having any material bearing on the conclusions that follow below.

were not per se illegal. This therefore wholly compromises the event study method as a means of proving damage in this case.

287. The Tribunal does not regard this question of appropriateness as being a matter of law, but rather as one to be assessed on the basis of the economic and statistical rationale behind the event study method – specifically in its relationship with the factual matrix of the case in hand. The test is: what does the method set out to measure, and does it do so with sufficient accuracy and reliability? The Tribunal accepts that the event study method has, on the evidence, been properly employed in judicial proceedings where the issue arising for determination is the effect of a specified event or closely related events on the share price itself, for example in a shareholder lawsuit or one arising out of a corporate merger or acquisition. Something equivalent might, for example, conceivably apply in respect of the expropriation of an investment or the effect of a specific regulatory measure imposed by the host State. In such circumstances the value of the investment, or the deterioration in its value, might well be reflected in the instantaneous response of the market. That is however qualitatively different from the situation with which this Tribunal is confronted, in which the Claimant’s case is characterized by an extended series of disparate events spreading over a period of years which are said to have had a negative effect on an enterprise’s running costs and the development of its business opportunities. An investment tribunal would be faced with a near to impossible task if it was required, on an allegation of breach, say, of the applicable standard of fair and equitable treatment in respect of a going concern, to investigate separately every individual item of conduct (or omission) by the host State’s authorities, to assess and calculate the damages applicable to each, and finally to merge those individualized calculations into an overall assessment of the damages due. The Tribunal notes Dow’s and Lapuerta’s fundamental caution that an event study grows less reliable the less well defined the events to be studied and the longer in time over which they extend. The Dunbar report, *per contra*, appears to assume (but without saying so expressly) that ‘damage’ is a day-to-day affair and that the total damage suffered is a cumulation of selected day-to-day individual damages. In the opinion of this Tribunal, that is fundamentally misconceived. The true position is that damages, in the legal sense, must be understood as what is required to make good in monetary terms some enduring alteration for the worse in the economic, financial or commercial position of the foreign investor which can be traced, in a sufficiently direct and proximate way, to the host State’s unlawful course of action, taken as a whole. If so, then it means that the application of the event study method to the present case must be regarded as inherently

questionable. And especially so if it brings in its train an arbitrary starting point (after the allegedly unlawful conduct had already begun) and also an arbitrary end point which excludes at least one highly significant development for the economic and financial situation of the foreign investor which had, by common agreement, a dramatically positive effect on the very quantity the method sets out to measure (the RRC share price).<sup>449</sup>

288. The Tribunal therefore could only accept as a valid technique for the quantification of economic damages one which, proceeding from the prior need to establish by the appropriate standard of proof a sufficient causal nexus between the claimed illegality and the asserted loss, allows a suitably objective comparison then to be made between the *status quo ante* and the Claimant's situation at the time that suit is brought. The event study method as advanced in these proceedings fails that test, and no alternative method has been advanced that would put the Tribunal in a position to determine whether any quantifiable economic loss to the present Claimant flowed specifically from the potentially actionable events identified at paragraph 270 above.

#### **J. DIRECT DAMAGE AND MORAL (REPUTATIONAL) DAMAGE**

289. Against this background, the Tribunal now turns to the alternative claim put forward by the Claimant of the discretionary assessment of a notional amount to serve as compensation for moral damage. The Claimant asserts in its Post-Hearing submissions that “*moral damages cover non-pecuniary injury for which monetary value cannot be mathematically assessed and ... must be determined by the tribunal with a certain amount of discretion.*”<sup>450</sup> This would conform to the approach taken by the only two ICSID tribunals that have hitherto awarded moral damages.<sup>451</sup> A leading commentary draws as its conclusion from the cases that tribunals seem to enjoy “*an almost absolute discretion in the matter of determining the amount of moral damages.*”<sup>452</sup> The very fact, however, that this alternative claim for damages is both notional and widely discretionary prompts a considerable degree of caution on the part of the present Tribunal in facing the proposition that compensable ‘moral’ damage can be suffered by a corporate investor. The case law in the investment field, as indicated, is very thin: two

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<sup>449</sup> I.e. the sale to KazMunaiGaz.

<sup>450</sup> Claimant's First Post-Hearing Brief, ¶ 278.

<sup>451</sup> *S.A.R.L. Benvenuti & Bonfant v. People's Republic of Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, and *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.

<sup>452</sup> Ripinsky & Williams, *Damages in International Investment Law*, Exhibit CLA-110.

tribunals have accepted claims for moral damage<sup>453</sup> and two have declined to award it.<sup>454</sup> In general international law, while the award of moral damages is certainly accepted,<sup>455</sup> both practice and the published literature show that this represents either damage to the honour and dignity of a State – in which case the remedies are non-economic – or else indirect compensation under the rubric of diplomatic protection for injuries of a personal kind suffered by the citizens of the claimant State. In the opinion of the Tribunal, neither of these categories fits the present case. The Tribunal has already indicated that reputational damage to a protected foreign investor is a perfectly conceivable consequence of unlawful conduct by the State of the investment, and if so is likely to show itself, for example, in increased financing costs, and possibly other transactional costs as well. But the Tribunal regards that as just another example of actual economic loss or damage, which is subject to the usual rules of proof. To resort instead to a purely discretionary award of moral solace would be to subvert the burden of proof and the rules of evidence, and that the Tribunal is not prepared to do.

290. The Claimant does make an assertion of actual reputational damage of this kind, which it says affected RRC's creditworthiness, as shown on the one hand by its increasing difficulties in obtaining finance for its operations and investments, and on the other hand by the higher interest rates it found itself having to pay for the loans it was able to raise. The specific evidence offered by the Claimant to that effect is however quite limited. It is confined to the testimony of Messrs. Patriciu and Stephenson, supplemented by that of Mr. Benabderrazik, who had been from 2004 until the KazMunaiGaz buyout in 2007 the Managing Director of Vector AG, TRG's international trading arm focusing *inter alia* on the supply of crude to RRC; he was also closely involved in the leveraged acquisition of Dyneff SA, TRG's first venture into Western Europe. To start with Mr. Patriciu, he says that TRG's relationships with many of its key bankers and investors were negatively affected by the investigations, citing as examples the reduction of its credit ranking by international rating bodies, the loss of investment opportunities, and greater difficulty in obtaining finance and then only on worse terms. Mr. Stephenson is more specific, and cites the failure of a Eurobond offering in 2004, which he attributes to the fixation of potential investors on the PNA investigation then in train,

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<sup>453</sup> See footnote 451 above.

<sup>454</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, and *Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V (114/2009), Award, 30 March 2010, to which must now be added the very recent Award in *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013.

<sup>455</sup> Article 31 (and Commentary) of the International Law Commission's Draft Articles on State Responsibility.

the refusal of a loan guarantee by the US Ex-Im Bank in 2005, and the refusal of credit facilities in 2006 by a Belgian bank, by the Black Sea Trade & Development Bank, and by the European Investment Bank, as well as the credit downrating by Standard & Poors in May 2005 and by Fitch in March 2006 which only returned to a stable state in late 2006. Mr. Benabderrazik's witness statement is short; he says, unspecifically, that the banks (mentioning only Société Générale) took a more restrictive view of TRG in 2006, because Mr. Patriciu was central to their view of TRG's prospects, that medium and long-term financing disappeared leaving reliance on more expensive and more precarious short-term loans, and that other targets for leveraged acquisition as in the case of Dyneff foundered on the impossibility of obtaining finance. None of the statements by these three witnesses was backed up by documentary evidence. Nor was much added by their oral evidence under direct and cross-examination at the hearing, except to the extent that Mr. Benabderrazik explained that the RRC shares attached by the GPO were part of the security pledged to the banks for the leveraged acquisition of Dyneff, and to the extent that it emerged that his evaluation of the 'lost opportunity' represented by the failure to acquire the Spanish company Petromirrales was based on the possibility it would have offered to enhance its book value simply by virtue of its ownership by TRG, through applying to it an EBITDA multiple of 12-14 in place of 7.

291. The Tribunal is therefore faced with the difficulty that the evidence of TRG's increased problems with its bankers and potential investors during the relevant period is thin, lacks concreteness, and derives from sources within the TRG complex who were themselves *in personam* targets of the GPO investigation. This stricture applies, no doubt, less to Mr. Benabderrazik than to Messrs. Patriciu and Stephenson, but Mr. Benabderrazik did no favours to the weight of his testimony by evading, under cross-examination, the perfectly reasonable question by Respondent's counsel whether the precision of his figures for losses incurred had been derived from access to the financial records or were based simply on memory. Still less was the Tribunal impressed by the plausibility of Mr. Benabderrazik's blithe assertion that, on acquisition via leveraged purchase by TRG, Petromirrales could miraculously have acquired a very substantially increased book value by the application to it of what the Tribunal can only describe as a highly optimistic EBITDA multiple.
292. Against the above evidence for the Claimant, the Tribunal must also range the quite substantial body of evidence culled in the Dow-Lapuerta report from the published financial statements, which in the aggregate casts doubt on how far TRG did in fact find itself in real difficulties over the obtaining of finance and whether its investment activity was in fact noticeably

inhibited over the period in question. Conceding without difficulty that a reputational cloud was likely in principle to show up in extra financing costs, Dow and Lapuerta essay an extrapolation of their own from the two concrete and specific pieces of evidence offered by the Claimant's witnesses, and come up with a worst-case estimate of US\$3.7 million, an estimate based however on the hypothesis that all of the Claimant's assertions of illegality in the Romanian investigations are treated as valid. The Tribunal takes due note of their expert opinion that extra borrowing costs are likely in principle to result from reputational damage and of their estimate of the absolute maximum such extra costs could amount to in the present case if all of the Claimant's assertions of liability were to be upheld.<sup>456</sup>

293. The Tribunal is firmly of the view that 'moral damages' cannot be admitted as a proxy for the inability to prove actual economic damage. Given, therefore, the failure by the Claimant to produce any reliably concrete evidence of actual losses incurred under this head by TRG, as analysed in the preceding paragraphs, the Tribunal declines to make any award of damages under this head.

#### **K. OTHER RELIEF**

294. The Tribunal notes that the Claimant framed its requests for relief from the outset (starting from the Request for Arbitration itself) in terms of a request for a determination of breach followed by an award of damages; by the time of the Post-Hearing submissions this had become refined into a statement that TRG 'seeks damages in compensation for' Romania's measures, of which the declaration of breach was the first 'specific' step. This modification might give the impression that the determination of breach was conceived of as the necessary stepping-stone to the award of damages, not as a substantive claim in its own right. Nevertheless, in the Tribunal's view, the correct assessment of the submissions of the Parties is that the claim to declaratory relief retained an independent existence of its own irrespective of the question of consequential loss or damage. The Tribunal does not however, given the rejection in Section I above of the great majority of the Claimant's allegations of breach, regard the circumstances of the present case as justifying declaratory relief in anything like the all-embracing terms requested.

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<sup>456</sup> The Claimant's figure of US\$46 million (Claimant's First Post-Hearing Brief, ¶ 278) appears to be nothing more than a purely arithmetical fraction of its main damages claim.



## L. COSTS

295. The Tribunal moves finally to consider its duty under Article 61 of the ICSID Convention and Rule 47(1)(j) of the Arbitration Rules, to decide on the distribution of the costs of the arbitration proceedings. The Tribunal recalls in this regard that its Decision of 18 April 2008 on the Respondent's Preliminary Objections expressly reserved the costs of that phase of the proceedings.
296. Each Party has claimed costs in its formal submissions: the Claimant in its Response Memorial on Preliminary Objections and its Reply asked the Tribunal to order the Respondent to pay the costs of the Arbitration, including "*all expenses that TRG has incurred or shall incur herein in respect of the fees and expenses of ... Claimant's legal counsel, experts and consultants, as well as its own internal costs and management time;*"<sup>457</sup> the Respondent in its Memorial on Preliminary Objections and its Rejoinder asked that the Claimant be ordered to bear the costs of the arbitration, including the costs Respondent has incurred in its defence "*including the fees and disbursements for its attorneys and its experts as well as costs of its witnesses and administration incurred in relation to this case.*"<sup>458</sup> Both requests were reiterated in the Post-Hearing submissions. The Tribunal is in receipt of corresponding cost claims from both Parties submitted in October 2010, as well as each Party's comments on the cost claim of the other, pursuant to the Tribunal's directions of 21 May 2010 given after the close of the oral hearing. The Claimant's costs claim is for €4,524,781 + US\$3,064,481 + GB£2,321, the Respondent's for €8,212,538.64. Reducing those claims to a common base in US dollars as at the date of this Award gives figures of approximately US\$9 million for the Claimant and approximately US\$10.75 million for the Respondent.<sup>459</sup> The Claimant criticizes the size of the Respondent's claim as being excessive, making a particular point that its own legal fees amount to only 54% of those claimed by the opposing Party.
297. As is evident from the preceding Sections of this Award, the Claimant has succeeded in making out only a very limited number of the claims of fact and law on which its request for relief in this Arbitration was based. It now appears that the inability of the Claimant to make

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<sup>457</sup> Claimant's Reply, ¶ 271(c), and Claimant's First Post-Hearing Brief, ¶ 303(c).

<sup>458</sup> Statement of Defence, ¶ 314(b), Respondent's Rejoinder, ¶ 437(b), and Respondent's Post-Hearing submission, ¶ 648(b).

<sup>459</sup> Additional marginal costs will of course have been incurred by each Party in respect of the Post-Hearing applications mentioned in paragraphs 121-141 above, but in view of what follows the Tribunal did not consider it necessary to put the Parties to the further trouble of submitting supplementary cost claims in that regard.

out its allegations is in large part connected with what the Tribunal has referred to in Section F of Part I above as the very special and unusual nature of the Claimant's case, namely that it revolved around criminal investigations, that these were against individuals not the investor, and that they were still in train in parallel with the arbitral proceedings themselves. It also appears on closer examination that these special features had been brought into focus by the Respondent from the very earliest stages. In the circumstances, the Respondent is entitled to some degree of reimbursement for the costs expended in defending itself against those allegations and the claims based on them. Against that must be set the fact that the Respondent was itself responsible for launching the unsuccessful preliminary objections phase, which delayed the arbitral process by somewhat over a year; likewise the Respondent was responsible for putting forward a largely unmeritorious challenge to the Claimant's new lead counsel, which the Tribunal dismissed in January 2010, but at the cost of some further delay.

298. The Claimant's costs submission cites, with apparent approval, commentaries and previous awards expressing themselves in favour of a principle that costs in ICSID proceedings should generally follow the event. Both Parties agree however that an ICSID Tribunal is endowed with a broad measure of discretion in this respect, a view which the Tribunal itself shares. The Tribunal can see no good reason not to apply a 'costs follow the event' principle in the particular circumstances of this case. It does so, however, subject to the modification that the proceedings in this arbitration have consisted, not of one single 'event', but rather of the series of events listed in paragraph 297 above, in two of which the Claimant was successful, and in one of which the balance of success lay heavily (though not entirely) with the Respondent. That being so, the Tribunal finds that the most appropriate solution, as regards the costs of the Arbitration, is for them to be borne equally by the Parties, and that in the circumstances as described above no further order is called for, with the result that each Party will bear its own costs.

## **M. CONCLUSIONS**

299. For the reasons set out above, and on the basis of the final submissions of the Parties, the Tribunal decides as follows:

- a. The Claimant's claims are admissible.

- b. On the evidence presented to the Tribunal, the Claimant has not made out its claim that the treatment by the Romanian State of the Claimant and its investments in Romania was in breach of Articles 3(1) and 3(5) 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.
- c. Notwithstanding paragraph (b) above, on the evidence presented to the Tribunal, the Claimant has established a breach by Romania of Articles 3(1) and 3(5) of that Agreement to the extent, but only to the extent, specified in paragraph 279 above.
- d. On the evidence presented to the Tribunal, the Claimant has not however met the onus on it of proving that it suffered economic loss or damage resulting from the breach specified in paragraph (c) above.
- e. The Claimant's claim for moral damage is rejected for the reasons given in paragraphs 289-293 above.
- f. The costs of the Arbitration are to be shared equally between the Parties.
- g. The Tribunal makes no further order as to costs.

## The Arbitral Tribunal

*[Signed]*

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The Honourable Marc Lalonde  
Arbitrator  
Date: [25 April 2013]

*[Signed]*

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Mr. Donald Francis Donovan  
Arbitrator  
Date: [27 April 2013]

*[Signed]*

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Sir Franklin Berman  
President  
Date: [29 April 2013]