

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

In the arbitration proceedings between

**ÖMER DEDE AND SERDAR ELHÜSEYNI**

Claimants

and

**ROMANIA**

Respondent

**ICSID Case No. ARB/10/22**

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**AWARD**

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*Members of the Tribunal*  
Professor William W. Park, President  
Professor Brigitte Stern, Arbitrator  
Dr. Nicolas Herzog, Arbitrator

*Secretary of the Tribunal*  
Ms. Milanka Kostadinova

*Date of dispatch to the Parties:* September 5, 2013

## REPRESENTATION OF THE PARTIES

*Representing Messrs. Ömer Dede and  
Serdar Elhüseyni:*

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Seda Eren Law Office,  
Vezir Köşkü Çikmazi B8 No. 4 Bebek,  
Beşiktaş, Istanbul, Turkey

*Representing Romania:*

Mr. D. Brian King  
Mr. Elliot Friedman  
Freshfields Bruckhaus Deringer LLP  
601 Lexington Ave., 31<sup>st</sup> Floor  
New York, NY 10022, USA

and

Mr. Boris Kasolowsky  
Mr. Moritz Keller  
Freshfields Bruckhaus Deringer LLP  
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60322 Frankfurt am Main, Germany

and

Mr. Florentin Țuca  
Mr. Cornel Popa  
Ms. Levana Zigmund  
Ms. Anca Pușcașu  
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## GLOSSARY

Claimants	Mr. Ömer Dede and Mr. Serdar Elhüseyni
Respondent	The Government of Romania
BIT	Agreement between the Government of Romania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments
The Company	SC IMUM SA, an unlisted joint stock company registered at the National Trade Registry Office of Constanta with the record No. J/13/509/1991 at the address of 12 Independentei St., Medgidia, Constanta County, Romania
Initial Purchasers	Mr. Emin Özyaşar and Mr. Radu Constantin
SPA	Share Purchase Agreement No. 20, executed on 19 March 2004
The Protocol	The Protocol for Keeping in Force the Share Purchase Agreement No. 20 of 19 March 2004, dated 18 August 2006
The Pledge Agreement	A pledge over 1,084,476 of IMUM shares, established by way of Pledge Agreement No. 72 of 11 December 2006
The Bank Guarantee	A bank guarantee, consisting of the Bank Guarantee No. 914TG00486 issued by Deniz Bank, valued at €500,000.00 and valid up to 1 August 2009

## **I. THE PARTIES AND COUNSEL**

1. Mr. Ömer Dede and Mr. Serdar Elhüseyni (“Claimants”) are nationals of the Republic of Turkey. Claimants were initially represented by the YükselKarkinKüçük Attorney Partnership. During the proceedings representation of Claimants was transferred to the Seda Eren Law Office.

Until 14 March 2013, Claimants were represented by:

Mr. Cüneyt Yüksel  
Mr. Murat Karkin  
Ms. Seda Eren  
YükselKarkinKüçük Attorney Partnership  
Büyükdere Caddesi No. 127  
Astoria A Kule Kat: 6-26-27  
34394 Esentepe  
Istanbul, Turkey

As of 15 March 2013, Claimants were represented by:

Ms. Seda Eren  
Seda Eren Law Office  
Vezir Köşkü Çikmazi B8 No. 4 Bebek,  
Beşiktaş, Istanbul, Turkey

2. The Government of Romania (“Respondent”) is represented by Freshfields Bruckhaus Deringer LLP and by the Romanian firm of Țuca Zbârcea & Asociații, as set forth below.

Mr. D. Brian King  
Mr. Elliot Friedman  
Freshfields Bruckhaus Deringer LLP  
601 Lexington Ave., 31<sup>st</sup> Floor  
New York, NY 10022, USA

Mr. Boris Kasolowsky  
Mr. Moritz Keller  
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Mr. Florentin Țuca  
Mr. Cornel Popa  
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Victoriei Square, West Wing, 8<sup>th</sup> Floor  
Sector 1, Bucharest 011141, Romania

3. Claimants and Respondent shall be referred to collectively as the “Parties.”
4. In the Request for Arbitration, both the Authority for State Assets Recovery (“AVAS”) and the Government of Romania were individually presented as Respondents. However, on 6 June 2011, Claimants informed the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) that Claimants did not wish to pursue this arbitration against AVAS. Claimants’ decision to drop AVAS as a party to these proceedings was memorialized in the Tribunal’s Procedural Order No. 1 of 4 January 2013, which recognized that Claimants’ decision to dismiss AVAS “is not recorded or construed as release of AVAS in relation to the disputed matters or a waiver in respect of attributable of AVAS’s misconducts to the State.”

## **II. THE ARBITRAL TRIBUNAL**

Professor William W. Park  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, Massachusetts 02215, USA

Dr. Nicolas Herzog  
Niedermann Rechtsanwälte  
Utoquai 37  
8008 Zurich, Switzerland

Professor Brigitte Stern  
7, rue Pierre Nicole  
75005 Paris, France

### III. OVERVIEW

5. This case concerns a dispute submitted to ICSID pursuant to the terms of the Agreement between the Government of Romania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, which entered into force on 7 April 1996 (the “BIT” or the “1996 BIT”), as well as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).
6. The dispute concerns SC IMUM SA, a Romanian agricultural equipment enterprise (the “Company”). Claimants assert that AVAS and the Government of Romania have taken over Claimants’ shares in the Company. Claimants contend that this conduct amounts to an illegal expropriation in violation of the 1996 BIT.
7. Claimants initially raised and briefed a number of issues related to both the jurisdiction of this Tribunal and the merits of Claimants’ claims. *See* Claimants’ Memorial dated 9 July 2012.
8. On 12 November 2012, Respondent submitted its Memorial on Preliminary Objections, which included a request for bifurcation of the proceedings. The Tribunal invited Claimants to comment on Respondent’s request for bifurcation by 12 December 2012.
9. After considering Respondent’s request of 12 November 2012 and Claimants’ comments of 12 December 2012, the Tribunal issued Procedural Order No. 1 of 4 January 2013. At that time, the Tribunal declined to bifurcate the proceedings into a preliminary jurisdictional phase followed by a stage to hear the merits of the dispute. However, the Tribunal directed a limited division of the proceedings for the purpose of addressing Articles 6(2) and 6(4) of the BIT. The Tribunal suspended the original procedural timetable, directing the Parties to confer on a schedule for simultaneous briefing on the amiable-settlement and local-remedies provisions of the BIT.



#### **IV. PROCEDURAL HISTORY**

10. The current dispute was submitted to arbitration on 3 November 2010.
11. On 19 November 2010, the Secretary-General of ICSID registered Claimants' Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
12. In the absence of an agreement between the Parties, Claimants elected to submit the arbitration to a Tribunal constituted of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention. The Tribunal was therefore to consist of three arbitrators; one appointed by each side and the third, presiding, arbitrator, appointed by agreement of the Parties. Respondents expressed agreement with this method of constitution of the Tribunal by letter of 20 April 2011.
13. On 28 April 2011, Claimants appointed Dr. Nicolas Herzog, LL.M. (a national of Switzerland), who accepted his appointment on 16 May 2011.
14. On 24 May 2011, Respondents appointed Professor Brigitte Stern (a national of France), who accepted her appointment on 14 June 2011.
15. On 10 October 2011, the Parties advised the ICSID Secretariat of their agreement to appoint Professor William W. Park (a United States national) as President of the Arbitral Tribunal. Professor Park accepted his appointment on 13 October 2011.
16. On 1 November 2011, the ICSID Secretary General informed the Parties that Professor William Park, Dr. Nicolas Herzog, and Professor Brigitte Stern had accepted their appointments as arbitrators in this case. The Parties were informed that, pursuant to Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), the Tribunal was deemed to have been constituted and the proceedings to have begun as

of 1 November 2011. This correspondence also notified the Parties that copies of the Request for Arbitration and its accompanying documentation, the Notice of Registration, and all correspondence between the Centre and the Parties relating to these proceedings would be sent to the Members of the Tribunal in accordance with Rule 30 of the ICSID Arbitration Rules. Finally, the Parties were informed that Ms. Milanka Kostadinova, ICSID Senior Counsel, would serve as the Secretary of the Tribunal.

17. The Tribunal held a first session with the Parties on 16 December 2011 by telephone conference. At the session, the Parties expressed their agreement that the Members of the Tribunal had been validly appointed and that the Tribunal had been properly constituted. It was also agreed, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006; that the procedural language would be English; and that the place of proceedings would be the World Bank's Office in Paris, France. The Parties further agreed on a schedule for filing of written pleadings.
18. The possibility of Respondents requesting the bifurcation of the proceedings was discussed at the first session. The Tribunal confirmed the Parties' agreed timetable for written pleadings communicated to the Tribunal on 28 November 2011, subject to the Respondents' right to file preliminary objections to jurisdiction pursuant to Rule 41 of the ICSID Arbitration Rules.
19. On 7 May 2012, the Claimants applied for an extension of the time limit for submission of the Memorial. The Tribunal suspended the initial deadline and invited the Parties to convene and attempt to agree on a revised timetable for the written phase.
20. On 11 May 2012, Claimants informed the Tribunal that the Parties had failed to reach an agreement. On the same date, Respondents filed observations on Claimants' application of 7 May 2012.
21. Having considered Parties' positions, on 18 May 2012, the Tribunal granted Claimants' application and issued a revised timetable.

22. On 1 June 2012, Respondents filed objections arguing that the revised timetable did not give a corresponding extension of time for Respondents' filings. Respondents applied for an extension of the time limit for filing of the Counter-Memorial, suggesting the date of the Tribunal's constitution as a starting point for calculation of any revised time limits. The Tribunal invited Claimants to file observations.
23. On 8 June 2012, Claimants informed the Tribunal that they did not intend to file further observations.
24. On 13 June 2012, the Tribunal held a meeting with the Parties by telephone conference concerning the objections raised by the Respondent.
25. Having carefully considered Parties' written and oral arguments, and with concerns to treat each side equally and to respect the methodology initially agreed by all Parties, the Tribunal granted Respondents' application of 1 June 2012, and adjusted the timetable for submission of written pleadings.
26. The decision of the Tribunal was conveyed to the Parties by letter of the ICSID Secretariat of 15 June 2012. In its letter, the Tribunal also directed the Parties to convene and discuss a mutually agreed date for filing of any preliminary objections to jurisdiction, reverting to the Tribunal by 22 June 2012.
27. On 22 June 2012, the Parties advised the Tribunal of their agreement that a preliminary objections-only brief, if any, will be filed by Respondent no later than 12 November 2012.
28. On 24 July 2012, the Tribunal fixed the hearing on 21 January through 24 January 2014. On 30 July 2012, both Parties confirmed their availability on the new hearing dates.
29. On 9 July 2012, Claimants submitted their Memorial along with several factual exhibits and legal authorities.

30. On 12 November 2012, Respondent submitted its Memorial on Preliminary Objections, which contained a request for bifurcation of the proceedings. Respondent's Memorial was accompanied by an Expert Opinion of Professor Flavius Baias and an Expert Opinion of Professor Sorin David.
31. On 12 December 2012, Claimants submitted their Reply Comments on Respondent's request for bifurcation.
32. By Procedural Order No. 1 of 4 January 2013, the Tribunal directed a limited division of the proceedings for the purpose of addressing Articles 6(2) and 6(4) of the BIT, which according to Respondent require a good-faith attempt at amiable settlement and recourse to local courts, respectively.
33. In the same Order, the Tribunal directed the Parties to indicate their availability for a one-day hearing in April 2013 on issues related to Articles 6(2) and 6(4) of the BIT. The Tribunal further stated that the Parties should confer on a briefing schedule to address these issues, and suspended the original procedural timetable.
34. The Parties proposed to the Tribunal a timetable for exchanges of written pleadings on the jurisdictional matters identified in paragraph 4 of the Order relating to Articles 6(2) and 6(4) of the BIT.
35. On 15 January 2013, the Tribunal approved the timetable for submissions on the particular jurisdictional matters as follows:
  - 15 March 2013 – First round of simultaneous exchange of written submissions;
  - 8 April 2013 – Second round of simultaneous exchange of written submissions;
  - 10 April 2013 – Pre-hearing conference call;
  - 19 April 2013 – Hearing (World Bank Conference Centre, Paris).

36. On 15 March 2013, Claimants submitted their Memorial on Jurisdiction. On the same date, Respondent submitted its First Brief on Jurisdiction.
37. On 8 April 2013, Claimants submitted their Reply to Respondent's First Brief on Jurisdiction. On the same date, Respondent submitted its Second Brief on Jurisdiction.
38. On 19 April 2013, the Parties and the Tribunal held a one-day hearing in Paris for the purpose of assessing Claimants' compliance with Articles 6(2) and 6(4) of the BIT.
39. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

*For the Claimant:*

Ms. Seda Eren

Seda Eren Law Office

*For the Respondent:*

Dr. Boris Kasolowsky  
Dr. Moritz Keller  
Mr. Carsten Wendler  
Ms. Alina Batineanu  
Mr. Florentin Țuca  
Ms. Levana Zigmund  
Ms. Anca Pușcașu  
Ms. Ruxandra Nita

Freshfields Bruckhaus Deringer LLP  
Freshfields Bruckhaus Deringer LLP  
Freshfields Bruckhaus Deringer LLP  
Freshfields Bruckhaus Deringer LLP  
Țuca Zbârcea & Asociații  
Țuca Zbârcea & Asociații  
Țuca Zbârcea & Asociații  
Țuca Zbârcea & Asociații

40. No witnesses and experts were called for cross-examination at the hearing.
41. At the hearing, Claimants objected to the alleged new factual evidence in Respondent's submission of 8 April 2013, as well as to the witness statements of Ms. Adriana Ghiga and Ms. Mariana Predescu.
42. As an initial matter, the Tribunal allowed Respondent to proceed with its opening containing a recitation of its factual evidence without any prejudgment of whether or not all or part of the submission of 8 April 2013 would be admitted into evidence.

43. Later in the hearing, the Tribunal ruled that it would accept into the record the disputed material of 8 April 2013, but without decision on what weight (if any) to give to the allegations of fact and/or the two controverted witness statements.
44. The Tribunal invited Claimants to indicate whether, in light of this ruling, they wished to submit rebuttal witness statements and/or a supplementary written reply.
45. On 24 April 2013, Claimants informed Ms. Kostadinova, the Tribunal and Respondent that Claimants would not submit an additional brief or evidence in reply to factual allegations provided in Respondent's Second Brief on Jurisdiction. Claimants emphasized that, by electing not to make an application as such, Claimants did not in any way confirm the correctness of Respondent's factual allegations. Claimants submitted that the disputed factual allegations concern the merits of the case, and that Claimants reserved their right to address these allegations during the merits phase of the proceedings.
46. For the sake of good order, the Tribunal notes that the reasoning and the disposition in this Award do not rely on disputed factual allegations included with Respondent's submission of 8 April 2013.
47. On 6 June 2013, the Tribunal invited each side to submit a statement indicating the amount of costs incurred along with any application for costs to be borne by the other side.
48. On 27 June 2013, Respondent wrote to the Tribunal to report that the Parties had agreed to extend the deadlines for cost submissions until 9 July 2013, with any reply comments due by 18 July 2013. Claimant confirmed the Parties' agreement in a message of even date.
49. On 9 July 2013, each side submitted its Statement of Costs.

50. On 16 July 2013, Respondent informed the Tribunal and the Centre that Respondent had no comments on Claimants' Statement of Costs, and waived its right to make a further submission with regard to Claimants' costs.
51. On 18 July 2013, Claimants submitted their Comments Concerning Respondent's Statement of Costs.
52. On 16 August 2013, Respondent submitted a revised Declaration of the President of AVAS correcting a clerical mistake identified following the submission of this document to the Tribunal on 9 July 2013. On 26 August 2013, Claimants confirmed that they had no objections concerning the figures provided in Respondent's revised Statement of Costs.
53. On 5 September 2013, the proceeding was declared closed in accordance with Rule 38(1) of the ICSID Arbitration Rules.

## **V. FACTUAL BACKGROUND**

54. Emin Özyaşar, a Turkish citizen and resident in Romania, and Radu Constantin, a Romanian citizen, (together, the "Initial Purchasers") acquired 60.1644% of the shares of SC IMUM SA through a privatization conducted by the Authority for Privatisation and Management of State Ownership ("APAPS"), the predecessor of AVAS. On 19 March 2004, APAPS and the Initial Purchasers signed the Share Purchase Agreement No. 20 ("SPA").
55. In order to perform the SPA, the Initial Purchasers proposed to AVAS to allow the transfer of the Company shares to third parties. Accordingly, on 30 August 2006, Mr. Özyaşar and Claimants signed an agreement for the transfer of 55% shares of the Company to Claimants ("Transfer Agreement"). To effect the assignment, Claimants became party to the SPA as joint debtors with the Initial Purchasers. The share transfer to the Claimants was registered with the Central Depository on 18 December 2006.

56. Claimants were required to provide guarantees securing the performance of the investment obligations assumed in the SPA in the form of (i) a pledge of shares in the Company, established by pledge agreement No. 72 of 11 December 2006 and (ii) a bank guarantee, established as Bank Guarantee No. 914TG00486 issued by Deniz Bank, valued at €500,000.00.
57. On 10 July 2009, the technical expert Dobre Florea and the legal expert Riviera Dinescu visited the Company for the purpose of an inspection purportedly mandated by AVAS.
58. Following the inspection, a notification by fax was sent to the Company listing alleged non-fulfillments of several obligations relating to the SPA and notifying several penalties. The same notification informed that AVAS would enforce guarantees provided to secure the investment obligation of €2,020,000.00.
59. On 2 September 2009, AVAS sent a request to the Central Depository to register the Claimants' shares in the name of AVAS.
60. The Central Depository notified the Company on 3 September 2009 that the shares of the Claimants were registered in the name of AVAS. The Company received this notification on 4 September 2009.
61. The Company was declared bankrupt on 15 October 2010.

## **VI. JURISDICTION**

### **A. Applicable Bilateral Investment Treaty**

62. According to Claimants, Romania and Turkey have executed two bilateral investment treaties.
63. The first of these agreements was executed on 24 January 1991 and entered into force on 7 April 1996. It is officially titled: "The Agreement between the Government of Romania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments" ("1996 BIT").



64. The second of the two agreements was signed on 3 March 2008, ratified by the Republic of Turkey on 3 July 2010, and ratified by the Government of Romania on 8 July 2010. Its official title is: “Promotion and Protection of Investments Agreement signed between Republic of Turkey and the Government of Romania” (“2010 BIT”).
65. Claimants note that Article 9 of the 2010 BIT provides that this agreement shall not apply to any disputes that arose before its entry into force. Claimants assert that this dispute arose in 2009, whereas the 2010 BIT entered into force on 8 July 2012. Accordingly, Claimants submit that the 2010 BIT does not apply to this dispute. Likewise, Respondent at all times during the course of these proceedings argued on the basis of the 1996 BIT.

## **B. Treaty Requirements and Respondent’s Objections to Jurisdiction**

66. According to Claimants, Article 6(1)(b) of the 1996 BIT states that: “For the purposes of this Article, an investment dispute is defined as a dispute involving . . . a breach of any right conferred or created by this Agreement with respect to an investment.”
67. Claimants also note that Article 1(b) of the 1996 BIT provides in pertinent part: “‘investment’ means every kind of asset and includes but not exclusively . . . (i) shares or any other terms of participation in a company . . . [and] (iv) a claim to money and a claim to performance having financial value and associated with an investment.”
68. Claimants contend that they made several investments in Romania, including: acquisition of a majority of shares in a Romanian company; financial contributions into said company in the amount of €2,020,000.00; payment of penalties in the amount of €279,204.80 and €70,357.80 as a precondition to acquiring shares in that company.
69. Claimants contend that their investment in Romania has been illegally expropriated in violation of Article 4 of the 1996 BIT.
70. Claimants assert that they qualify as investors as that term is defined in Article 4 of the 1996 BIT. According to Claimants, Article 1(a)(i) of the 1996 BIT provides in pertinent part that “Investor” means “a natural person who is a national of one Contracting Party

under its applicable law.” Claimants note that both individual Claimants are nationals of the Republic of Turkey, and accordingly that both Claimants qualify as “Investors” under the 1996 BIT.

71. According to Claimants’ Memorial dated 9 July 2012, Article 6(4) of the 1996 BIT provides: “In the event that the investment dispute cannot be resolved through [the procedures set out in sections (2) and (3)], the investor concerned is entitled to submit the dispute, for conciliation or arbitration, to the International Center for Settlement of Investment Disputes, at any time after the exhaustion of domestic remedies or after the expiry of one year from the date when the dispute has been submitted by the concerned investor to the tribunals of the Contracting Party which is a party to the dispute and there has not been rendered a final award.”<sup>1</sup>
72. Claimants contend that Article 6(4) provides that the dispute may be submitted for arbitration if the domestic remedies are exhausted or if the dispute which is referred to the courts of the Contracting State cannot be settled within one year with a final decision.
73. As described more fully below, Respondent contends that the Tribunal does not have jurisdiction over this dispute. Respondent generally contends that Claimants have failed to satisfy the requirements of Article 6 of the BIT because, according to Respondent: Claimants’ claims do not constitute an “investment dispute”; Claimants have failed to attempt to settle the dispute amiably; and Claimants have failed to bring the dispute before local courts or exhaust local remedies.

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<sup>1</sup> The Tribunal notes that Claimants later submitted a “corrected” version of Article 6(4) that does not use the term “investment dispute.” The Tribunal’s Analysis *infra* discusses the discrepancies among the various languages of the BIT.

## VII. THE PARTIES' ARGUMENTS

### A. Jurisdiction

#### 1. Claimants

##### a) Overview

74. Claimants draw a distinction between “investment disputes” as defined in Article 6(1) and “disputes” arising out of an investment as purportedly defined in Article 6(2). As stated by counsel for Claimants, Article 6 “makes a clear distinction between the definition of a dispute and the definition of an investment dispute . . . .” *See* Hearing Transcript of 19 April 2013 at page 112. According to Claimants, these two types of disputes are treated differently under Article 6 of the BIT.
75. Claimants assert that an “investment dispute” as defined by Article 6(1) can be submitted to ICSID pursuant to Articles 6(1) and 6(5), which according to Claimants contain Respondent’s unconditional consent to arbitrate such investment disputes. *See* Claimants’ Memorial on Jurisdiction dated 15 March 2013 at paragraph 30. As stated by counsel for Claimants at the hearing of 19 April 2013, “Article 6(1) provides for settlement of investment disputes, and Article 6(1)(b) provides investors the right to bring a breach of the BIT to arbitration. And the rules governing that arbitration are singularly provided for in Article 6(5).” *See* Hearing Transcript of 19 April 2013 at page 171.
76. Claimants contend that the only precondition to arbitration of investment disputes is found in Article 6(2), which uses the phrase “any dispute” before requiring an investor to make an attempt to settle the dispute amiably.
77. In comparison, Claimants contend that Article 6(2) through 6(4) govern the procedure for arbitration of “[a]ny dispute between one Contracting Party and an investor of the other Contracting Party, concerning an investment of that investor in the territory of the former Contracting Party.” Claimants assert that the term “dispute” as defined in Article 6(2) encompasses a broader category of controversies than the defined term “investment dispute.”

78. Claimants contend that this two-track approach is intended to emphasize that Article 6 of the BIT does not operate as a “fork in the road” provision. *See* Claimants’ Memorial on Jurisdiction dated 15 March 2013 at paragraph 31.

79. Claimants’ analysis of Article 6 of the BIT is summarized in the following table.

	<i>Investment Dispute</i>	<i>Dispute Concerning an Investment</i>
<i>Article 6(1)</i>	Applies. Defines “investment dispute.” Provides consent to arbitrate such disputes.	Does not apply.
<i>Article 6(2)</i>	Applies. Requires attempt at settlement of “any dispute.”	Applies. Defines broader category of “disputes.” Requires attempt at settlement of “any dispute.”
<i>Article 6(3)</i>	Does not apply.	Applies. Requires settlement in accordance with dispute settlement procedures, if any, agreed between the investor and the Contracting Party.
<i>Article 6(4)</i>	Does not apply.	Applies. Provides consent to arbitrate “disputes” concerning an investment at any time after exhaustion of local remedies or one year before local courts without an award.
<i>Article 6(5)</i>	Applies. Provides procedure for submission of investment disputes.	Does not apply.

b) Article 6(1)

80. Claimants assert that Article 6(1) defines the scope of “investment disputes” under the BIT.

81. In addition, Claimants submit that Article 6(1), in conjunction with the title of Article 6 (“Settlement of Investment Disputes”) provides investors the right to bring a breach of the BIT to arbitration.

82. Explaining Claimants' position, counsel for Claimants stated, "[A]n investment dispute here is defined as a breach of the BIT itself. And this is only provided in [paragraph] (1), and in that case Romania's consent is unconditional, because Romania provides consent that, if there is a breach of the BIT, Romania accepts to face its international responsibility arising therefrom." *See* Hearing Transcript of 19 April 2013 at page 175.

c) Articles 6(2) and 6(3)

83. Claimants assert that Articles 6(2) and 6(3) are not applicable to Claimants claims, except to the extent that "any dispute . . . shall be settled, as far as possible amiably, by consultations and negotiations between the parties to the dispute."

84. In this connection, Claimants submit that Article 6(2) refers to "any dispute between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party."

85. Claimants contend that reference in Article 6(2) to "any dispute . . . concerning an investment" is broader than the definition of "investment dispute" in Article 6(1). According to Claimants, Article 6(2) provides for negotiation related to "a dispute before it arises to the level of investment dispute." *See* Hearing Transcript of 19 April 2013 at page 97.

86. While Claimants take the view that Articles 6(2) and 6(3) are largely inapplicable to their investment dispute, Claimants assert that they have satisfied the negotiation requirement in Article 6(2).

87. Claimants contend that they showed best efforts to find an amiable solution to their investment dispute both before and after Claimants' shares were allegedly expropriated. Claimants assert that they wrote several letters and organized several meetings to convince AVAS not to transfer the shares.

88. In connection with Respondent's contention that any negotiations were with AVAS and not Romania, Claimants assert that Article 6(2) provides that disputes shall be settled as

far as possible amiably by negotiations “between the parties to the dispute” and not necessarily between the investor and the Contracting Party. In Claimants’ view, AVAS is not the contracting party, but AVAS is the party to the dispute, and AVAS’s actions are attributable to the contracting party. *See* Hearing Transcript of 19 April 2013 at page 100.

89. Claimants contend that Article 6(3) is inapplicable to Claimants’ claims. Claimants submit that the English version of Article 6(3) is incorrect to the extent that it purports to provide that a dispute “shall be submitted for settlement.” Claimants contend that this provision should read “*may* be submitted.” *See* Claimants’ Memorial on Jurisdiction dated 15 March 2013 at paragraph 26.
90. Accordingly, Claimants contend that Article 6(3) does not set forth any mandatory preconditions to Romania’s consent to arbitrate investment disputes.

d) Article 6(4)

91. Claimants contend that Article 6(4) of the BIT provides that the investor may bring a claim arising from an “investment” of the “investor” under the ICSID Convention upon lapse of one year as from the date when and if the investor refers the dispute to the local courts of Romania.
92. Claimants submit that the provision does not require the investor to bring a claim before national courts of Romania, nor to exhaust local remedies, as a condition of consent to this arbitration.
93. Claimants assert that the English version of Article 6(4) of the BIT is incorrect to the extent that it requires an “investment dispute” to be brought before local courts. Claimants cite the Turkish and Romanian versions of the BIT which do not use the defined term “investment dispute,” referring instead to the requirements for submitting “disputes” to arbitration.

94. Further, Claimants contend that Article 6(4) is a sort of “non-exclusive” entitlement. That is, according to Claimants, the fact that Article 6(4) entitles investors to go to arbitration after exhaustion of local remedies or after one year in local courts does not preclude the investor from being entitled to submit its claim to ICSID in other circumstances as well.

95. Claimants contend that the investment dispute before this Tribunal could not have been brought before local courts. As stated by counsel for Claimants, “if the investor went to a Romanian court with the same claims, that is falling within the scope of Article 6(1) of the BIT, that there is a breach of the BIT between Romania and Turkey, the local court would not be able to deal with that dispute.” *See* Hearing Transcript of 19 April 2013 at page 113.

e) Article 6(5)

96. Claimants contend that Article 6(5) provides the procedure for settlement of investment disputes under the BIT. According to Claimants, Article 6(5) requires that investment disputes be submitted to ICSID, and that, accordingly, investment disputes may not be brought before local courts.

f) Actions Taken Prior to Submission to ICSID

97. Claimants assert that they made several attempts to settle the dispute amiably. For instance, Claimants submit that they made extensive efforts to obtain a release on the guarantees and stop the conversion of shares before resorting to litigation. *See* Claimants’ Memorial on Jurisdiction dated 15 March 2013 at paragraphs 37-42.

98. Without prejudice to their argument that Articles 6(2), 6(3) and 6(4) do not present jurisdictional preconditions, Claimants contend that they have “duly followed the rules under . . . Article 6(4).” *See* Claimants’ Memorial on Jurisdiction dated 15 March 2013 at paragraph 7.

99. This contention was echoed at paragraph 19 of that Memorial, where Claimants assert that AVAS filed a claim against Claimants on 24 February 2010 alleging that the investment obligations were not fulfilled. Claimants submit that this claim encompasses “the heart of the dispute in this arbitration,” which according to Respondent is “whether Claimants complied with their investment obligations under the SPA, and whether, as a result of Claimants’ noncompliance with such obligations, the actions taken by AVAS were lawful.” *See* Claimants’ Memorial on Jurisdiction dated 15 March 2013 at paragraph 19(b) (quoting Respondent’s Memorial on Preliminary Objections dated 12 November 2012 at paragraph 261).
100. Alternatively, Claimants contend that the key issue was not, as Respondent asserts, whether Claimants complied with their investment obligations under the SPA. Instead, Claimants submit that the key issue or “heart of the dispute” was to prevent losing their entitlement to their investment, and accordingly, Claimants focus was on trying to stop registration of their shares in the name of AVAS.
101. Claimants assert that the following actions should be considered to have satisfied Articles 6(2) and 6(4):
- Claimants had requested release of guarantees on several occasions;
  - Claimants attempted to meet with AVAS on 3 August 2009, which was rescheduled by AVAS to take place on 10 August 2009. Claimants assert that AVAS refused at that time to provide any explanation as to why it would not release the guarantee;
  - Claimants attempted to schedule several follow-up meetings, but these meetings were not productive due to the absence of AVAS’s President;
  - On 15 September 2009, Claimants applied to the Central Depository to stop registration of the shares in the name of AVAS. As they failed to stop such registration, Claimants filed claims against enforcement of pledge in September 2009 in anticipation of an action to take back the shares;
  - On 9 November 2009, AVAS and Claimants had a conciliation meeting. Claimants assert that during this meeting, AVAS again refused to provide information concerning its arbitrary inspection results so as to allow for meaningful discussions to resolve the matter; and



- On 24 February 2010, AVAS filed a claim against Claimants to collect penalties under the SPA based on the grounds of an alleged non-fulfillment of investment obligations.

102. According to Claimants, the foregoing contentions indicate that Claimants did try to find an amiable solution and did try to solve the dispute without needing to commence this arbitration.

## 2. Respondent

### a) Overview

103. Respondent contends that the Tribunal lacks jurisdiction to hear the merits of the instant case because Claimants failed to comply with the dispute settlement mechanism of the BIT that established conditions to the host state's consent to arbitrate.

### b) Respondent's Consent to Arbitrate

104. Respondent submits that it has given its consent to arbitrate investment disputes under Article 6 of the BIT, provided that the investor has satisfied four procedural requirements, as follows:

- The investor must pursue an amiable settlement of the investment dispute that should be initiated by means of a request for a settlement (Article 6(2) of the BIT);
- If a settlement cannot be reached within three months after the request for settlement was made, the investor shall submit the dispute to whatever settlement procedures the parties to the dispute have agreed upon (if any) (Articles 6(2) and 6(3) of the BIT);
- If the first two steps do not result in settlement of the dispute, the investor shall submit the dispute to the tribunals of Respondent (Article 6(4) of the BIT);
- The investor may submit the dispute for ICSID arbitration after exhaustion of local remedies or after one year has passed since the investor submitted the investment dispute to the local courts and the courts have not handed down a final decision (Article 6(4) of the BIT).

105. Respondent argues that Claimants' interpretation of the BIT suggesting that Article 6 contains two types of the host state's consent, unconditional consent to arbitrate investment disputes (Articles 6(1) and 6(5)) and conditional consent to arbitrate non-investment disputes (Articles 6(2) - 6(4)), contradicts the structure and language of the dispute resolution provision in question. *See* Respondent's Second Brief on Jurisdiction of 8 April 2013 at paragraph 29.
106. Respondent contends that from the title of Article 6 "Settlement of Investment Disputes" it follows that the article is concerned only with investment disputes. In Respondent's opinion, had Turkey and Romania intended other disputes to be covered by Article 6 of the BIT, they could have easily done so.
107. Respondent submits that Article 6(1) defines "investment disputes" "for the purposes of the Article" and does not limit the application of the definition to the particular sections of the dispute resolution provision.
108. Respondent further contends that Article 6(4), requiring an investor to litigate in the local courts prior to arbitration, specifically refers to "investment dispute." In Respondent's view, Claimants' interpretation of Article 6 in the Turkish language version of the BIT is inapposite since under Article 11 the English language version of the BIT prevails.
109. Respondent argues that Claimants' construction of Article 6(4) as creating Respondent's consent to arbitrate any "dispute in connection with an investment of an investor" would lead to absurd results. In Respondent's view, Article 6(4) if interpreted as Claimant suggests, "would be an unprecedented 'super-arbitration clause' for any dispute with a remote connection to an investment and elevate all kinds of domestic disputes onto the international plane... [such interpretation] contradicts on its face to both the plain wording of the Article and the purpose of investment protection treaties." *See* Respondent's Second Brief on Jurisdiction of 8 April 2013 at paragraph 34.
110. Respondent further submits that the overall structure of Article 6 illustrates an approach common among the investment treaty drafters, pursuant to which a dispute resolution

clause includes a definition of the relevant investment disputes, an escalation mechanism, an arbitration clause with its conditions, and a clarification regarding the procedure and applicability of the ICSID Convention. Respondent avers that any other unorthodox interpretation of the dispute resolution provision of the BIT must be rejected.

c) Conditions of Consent to Arbitrate in Articles 6(2) and 6(3)

111. Respondent asserts that Claimants failed to comply with jurisdictional preconditions of Articles 6(2) and 6(3) of the BIT that require the investor to notify the host state of the investment dispute and pursue amiable settlement prior to commencement of arbitration. Respondent submits that Article 6(3) determines a minimum time period for settlement negotiations (three months) and links the beginning of this period to the “date of request for settlement.” *See* Respondent’s First Brief on Jurisdiction of 15 March 2013 at paragraph 9.

d) Mandatory Nature of the Requirements of Article 6(2) and 6(3)

112. It is Respondent’s position that the waiting period provided by Articles 6(2) and 6(3) of the BIT is mandatory on a plain reading of Article 6 and as a matter of general law.
113. Respondent argues that the mandatory nature of a waiting period is evidenced by use of words “shall” in Articles 6(2) and 6(3) of the BIT. Respondent objects to Claimants’ references to other language versions of the BIT since the BIT explicitly states in Article 11 that the English language version prevails.
114. Respondent further contends that Article 6(2) read in conjunction with Article 6(3) makes it clear that three-month settlement negotiations are a condition to proceed to the next procedural step established by the BIT. In Respondent’s view, the language of Article 6(4) also emphasizes the mandatory nature of the waiting period by stating that only “in the event that the investment dispute cannot be resolved through the foregoing procedures [Article 6(2) and 6(3) of the Treaty]” is the investor eligible to submit the dispute to the courts. *See* Respondent’s Second Brief on Jurisdiction of 8 April 2013 at paragraph 42.

115. Respondent submits that the mandatory interpretation of the requirement to seek an amiable solution of the investment dispute set out in Article 6(2) is further evidenced by the *travaux préparatoires* to the BIT and a recent arbitral decision based on the treaty between Turkey and the Netherlands containing a similar dispute resolution clause.<sup>2</sup> See Respondent Second Brief on Jurisdiction of 8 April 2013 at paragraphs 44-45.
116. Respondent further argues that characterization of the requirements of Articles 6(2) and 6(3) as mandatory is also consistent with the recent arbitral practice and that a number of arbitral tribunals found the dispute resolution clauses with analogous wording mandatory and legally binding. See Respondent's Second Brief on Jurisdiction of 8 April at paragraph 46.
117. Respondent contends that Claimants failed to address any legal authorities referred to by Respondent and that the only case cited by Claimants, *Lauder v. Czech Republic*,<sup>3</sup> based its findings not on a general principle, but rather on the specific circumstances of the case.

e) Claimants' Failure to Pursue an Amiable Solution

118. Respondent contends that to trigger the dispute resolution mechanism of the BIT, Claimants needed first to notify Respondent of the investment dispute by means of a "request for settlement" pursuant to Article 6(3). Respondent asserts that Claimants failed to do so.
119. Respondent submits that irrespective of any alleged meetings between the Company, Initial Purchasers, Claimants and AVAS, Claimants' failure to notify Respondent in accordance with the strict requirements of the BIT and pursue amiable solution for a period of three months suffices to deprive this Tribunal of jurisdiction.

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<sup>2</sup> *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, Exhibit RL-112.

<sup>3</sup> *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, Exhibit RL-81.

f) Conditions to Respondent's Consent in Article 6(4)

120. Respondent contends that Article 6(4) of the BIT lays down further conditions to Respondent's offer to arbitrate stating that an investor is entitled to submit an investment dispute to arbitration only if he has exhausted local remedies or one year has passed since the investor submitted the dispute to the local courts and the courts have not handed down a final decision.
121. Respondent contends that Claimants' interpretation of Article 6(4) as applying only to the disputes in connection with an investment (as opposed to investment disputes) is nonsensical for the reasons stated above.
122. Respondent submits that Claimants failed to fulfill the jurisdictional preconditions set forth in Article 6(4).

g) Content of Article 6(4)

123. Respondent contends that under Article 6(4) investors are entitled to submit investment disputes to arbitration only after the exhaustion of domestic remedies or after litigating for one year without a final judgment in the courts of the host state. Respondent argues that the requirements of Article 6(4) are jurisdictional preconditions to this Tribunal's authority. *See* Respondent's First Brief on Jurisdiction of 15 March 2013 at paragraph 18.
124. Respondent asserts that arbitral tribunals having interpreted similar dispute resolution clauses in bilateral investment treaties found that "unless such a gateway condition [is] fulfilled, a tribunal cannot assume jurisdiction."<sup>4</sup>

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<sup>4</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, at paragraph 194, Exhibit RL-73; *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, at paragraph 262, Exhibit RL-73; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, at paragraph 94, Exhibit RL-53; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, at paragraph 160, Exhibit RL-72.

125. Respondent objects to the interpretation of Article 6(4) suggested by Claimants pursuant to which Article 6(4) contains no requirement for the investor to pursue the investment dispute before domestic courts and that its only function is to identify that Article 6 of the BIT does not contain a fork-in-the-road clause. Respondent argues that Claimants failed to provide any support for their position and that the proposed interpretation contradicts the plain meaning of Article 6.
126. Respondent submits that Article 6(4) clearly says that the investor can submit a claim to an international tribunal “at any time [...] after” exhaustion of domestic remedies or after one year has passed in local litigation. In Respondent’s view, Claimants failed to provide any explanation as to why this wording creates an option for an investor and not a duty.
127. In response to Claimants’ assertion that “Article 26 of the ICSID Convention establishes consent to arbitration to the exclusion of any other remedy unless otherwise stated,” Respondent submits that Article 26 of the ICSID Convention merely reverses the traditional international law rule that requires exhaustion of local remedies unless expressly or implicitly waived.
128. Respondent asserts that Article 6(4) of the BIT clearly provides a conditional consent to arbitration “at any time after the exhaustion of domestic remedies,” thereby requiring exhaustion of local remedies as contemplated by Article 26 of the ICSID Convention, as one condition. *See* Respondent’s Second Brief on Jurisdiction of 8 April at paragraph 66.
129. Respondent further submits that Claimants did not address the legal authorities cited by Respondent in support of its position and did not refer to any case law in support of interpreting the wording of Article 6(4) as optional. Respondent argues that the only reference provided by Claimants does not support Claimants’ contention, but states the opposite.<sup>5</sup>

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<sup>5</sup> *See Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, at paragraph 36, Exhibit RL-77. According to Respondent, the tribunal

130. Respondent contends that the interpretation suggested by Claimant renders Article 6(4) superfluous and meaningless and serves only to exclude any fork-in the road provisions. Respondent argues that such an interpretation should be rejected in light of Article 31 of the Vienna Convention.
131. Respondent concludes that “Article 6(4) contains an exhaustion of local remedies requirement, as one alternative, and does not serve the purpose to exclude or disapply any fork-in-the-road mechanisms.” *See* Respondent’s Second Brief on Jurisdiction of 8 April at paragraph 70.

h) Actions Filed by Claimants

132. Respondent argues that in order to comply with Article 6(4) of the BIT, Claimants needed to submit the investment dispute in the sense of Article 6 to the Romanian courts. In Respondent’s opinion, Claimants were required “to submit the same dispute to the Romanian courts that they have now brought before this Tribunal.”
133. Respondent proposes several approaches to determine the sameness of the dispute brought by Claimants before the Romanian courts and before this Tribunal. *See* Respondent’s First Brief on Jurisdiction of 15 March 2013 at paragraph 19. *See* Hearing Transcript of 19 April 2013 at page 77.
134. According to Respondent, the first approach to ascertain whether the claim brought before the domestic courts and the claim brought before an arbitral tribunal constitute the same dispute is a “triple identity test.” Respondent argues that pursuant to this test “the two sets of proceedings must relate to: (i) the same parties; (ii) the same object; and (iii) an identical cause of action.” *See* Respondent’s Memorial on Preliminary Objections of 12 November 2012 at paragraph 236.

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in *Maffezini v Spain* held that a provision similar to the one of the instant BIT requiring investors to submit the dispute to domestic courts for the time period given was a condition to the host state’s consent.

135. The second approach argued by Respondent is whether Claimants in both fora brought “*in substance*” the same dispute based on the “*same normative source*” with arguments “*to the same or like effect.*” See Respondent’s First Brief on Jurisdiction of 15 March 2013 at paragraph 19.
136. Respondent relying on the *Urbaser* decision<sup>6</sup> further argues that to satisfy the exhaustion of local remedies requirement of Article 6(4), the cause of action to be adjudicated at the domestic level must be of such nature as to allow for the resolution of the dispute to the same extent as if the claim had been brought before an international arbitration under the BIT. See Respondent’s Second Brief on Jurisdiction of 8 April 2013 at paragraph 72. Hearing Transcript of 19 April 2013 at page 147.
137. Respondent argues that Claimants failed to satisfy all of the requirements of Article 6(4) and submits that the proceedings initiated by Claimants in the Romanian courts did not involve the same parties, or the same object, or the same cause of action. Respondent asserts that in Romanian courts Claimants pursued proceedings with an entirely different subject matter. See Respondent’s First Brief on Jurisdiction of 15 March 2013 at paragraph 20.
138. Relying on the expert opinion of Professor Flavius Baias of 6 November 2012, Respondent submits that all of the actions initiated by Claimants in the Romanian courts were mere remedies at the enforcement stage incapable of bringing the merits of the dispute to the attention of the court and can by no means be considered similar to the dispute in this arbitration. See Respondent’s First Brief on Jurisdiction of 15 March 2013 at paragraph 22.

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<sup>6</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012 [hereinafter, ‘*Urbaser v. Argentine Republic*’] at paragraph 181, Exhibit RL-117.



139. In Respondent's opinion, none of those actions would have allowed Romanian courts to address the investment dispute on the merits.<sup>7</sup>
140. Respondent further contends that Claimants never seriously prosecuted any of these actions. According to Respondent, all of the actions brought by Claimants were eventually dismissed as a consequence of Claimants' failure to comply with essential procedural requirements. *See* Respondent's First Brief on Jurisdiction of 15 March 2013 at paragraph 25. *See* also expert opinion of Professor Flavius Baias of 6 November 2012 at Section V.
141. As regards the claim brought against the Claimants by AVAS for the payment of contractual penalties for Claimants' and the Initial Buyers' breach of the SPA, Respondent argues that it is of no relevance for the question whether Claimants complied with Article 6(4) of the BIT since the provision at issue requires an investor to submit the relevant dispute to the courts, and not simply to be sued. *See* Respondent's Second Brief on Jurisdiction of 8 April 2013 at paragraph 76.

i) Remedies Available to Claimants

142. Respondent contends that Romanian law provided Claimants with effective remedies. In support of its position, Respondent relies on the expert opinion of Professor Flavius Baias of 5 November 2012. *See* Respondent's First Brief on Jurisdiction of 15 March 2013 at Section C.
143. Respondent asserts that pursuant to Article 39 of the Privatisation Law No. 137/2002, Claimants could have sought a confirmation of the fulfillment of the investment obligations under the SPA. Furthermore, Respondent argues that alternatively Claimants could have sought a confirmation that their investment was made in accordance with the statutory provisions under Article 11(1) of GO No. 25/2002 and Article 40 of the Privatisation Law. According to Respondent, if Claimants had brought the claims under

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<sup>7</sup> Respondent summarizes the proceedings initiated by Claimants before the Romanian courts at paragraph 20 of Respondent's First Brief on Jurisdiction of 15 March 2013.

those provisions, the Romanian courts would have been able to review the merits of the dispute.

144. Respondent further submits that Claimants' allegation that a resolution of the dispute could not have reasonably been achieved within the one year time period set forth in Article 6(4) is irrelevant and Claimants have in any event failed to provide any evidential support. *See* Respondent's Second Brief on Jurisdiction of 8 April 2013 at paragraph 80.

## **VIII. REMAINING ARGUMENTS ON JURISDICTION AND ARGUMENTS ON THE MERITS**

### *1. Claimants*

145. In summary, Claimants contend that their investment in SC IMUM SA (the "Company") was illegally expropriated by AVAS and the Government of Romania in violation of Article 4 of the 1996 BIT as well as international law.
146. Claimants submit that AVAS, Claimants, and the Initial Purchasers all agreed that Claimants would invest in the Company by virtue of an assignment of the original SPA. The terms of this assignment were embodied in several agreements: the Protocol for Keeping in Force the Share Purchase Agreement No. 20 of 19 March 2004 (the "Protocol"); Addendum 4 to the SPA, relating to the Electrica shares ("Addendum 4"); the 30 August 2006 Agreement between Claimants and the Initial Purchasers for the transfer of 55% of the Company shares (the "Transfer Agreement"); Addendum 5 to the SPA, relating to additional obligations to be undertaken by Claimants and confirming assignment of the rights and obligations under the SPA to Claimants ("Addendum 5"); and a Guarantee Agreement on Moveable Property (the "Guarantee Agreement").
147. Claimants assert that, after the assignment was effected, Claimants fulfilled all investment obligations under the SPA. Claimants contend that, nevertheless, Respondents would not release the investment guarantees. Moreover, Claimants submit that, on 24 July 2009, Respondents notified Claimants of an unidentified issue with the Company, and that on 3 September 2009, Respondent appropriated Claimants' shares.

148. In response to Respondent's contention that Claimants' claim is not an "investment dispute" as defined in Article 6(1) of the BIT, Claimants assert that their investment was illegally expropriated in violation of Article 4 of the BIT as well as international laws.

## 2. Respondent

149. Respondent did not submit its analysis of the merits of the dispute at the current stage of the proceedings. This section summarizes Respondent's jurisdictional arguments that were not addressed in the submissions made pursuant to the Tribunal's Procedural Order No. 1 of 4 January 2013.

150. In summary, Respondent argues that in violation of the BIT and the ICSID Convention Claimants submitted to arbitration a contractual dispute that fails to satisfy the jurisdictional threshold for two following reasons: (i) none of the alleged investments fall within the definition of investment of the ICSID Convention or the BIT; and (ii) Claimants failed to show a *prima facie* breach of the BIT. *See* Respondent's Memorial on Preliminary Objections of 12 November 2012 at paragraph 99.

151. Respondent disagrees with Claimants as to whether (i) acquisition of a majority of the Company shares; (ii) financial contributions to the Company in accordance with the SPA; and (iii) payment of penalties under the SPA should be considered an investment under the BIT.

152. According to Respondent, Claimants' "contributions" and "payment of penalties" clearly fall outside the definition of investment in the BIT. While Respondent agrees that an acquisition of the Company's shares might fall within a category listed in Article 1(b) of the BIT, it argues that Claimants fail to demonstrate how the acquisition of the majority of shares in the Company from Initial Purchasers occurred. Respondent asserts that "Claimants fail to provide any evidence that the alleged acquisition of sole ownership of the shares in [the Company] in fact took place at all." Respondent submits that the alleged transfer of shares to Claimants has never been executed. *See* Respondent's Memorial on Preliminary Objections of 12 November 2012 at paragraphs 117-118.

153. Respondent further asserts that in any case, the alleged acquisition of shares does not meet the requirements of Article 25 of the ICSID Convention and the *Salini* test.<sup>8</sup> According to Respondent, the alleged investment in the form of the acquisition of shares (i) was not made for any consideration, (ii) does also not involve any element of risk that goes beyond mere commercial risk, and (iii) has no bearing on the development of the host state. Respondent concludes that the alleged investment in the Company's shares falls outside the competence of ICSID and the jurisdiction of this Tribunal.
154. Respondent contends that Claimants failed to show *prima facie* breach of the BIT by Respondent. In particular, Respondent argues that Claimants do not explain how AVAS' enforcement of its contractual rights, *i.e.* the enforcement of the Pledge Agreement, constitutes a breach of contract in violation of Article 3(3) of the BIT and expropriation under Article 4 of the BIT. Respondent submits that Claimants failed to present both the facts and the legal argument necessary to show a colorable claim of a violation of the BIT.
155. Respondent further argues that Claimants' case is a dispute about the alleged breach of a commercial contract under Romanian law. Respondent asserts that it is not even a party to that contract and in any case that a breach of a commercial contract does not *per se* amount to a breach of the BIT. According to Respondent, the BIT's provisions to which Claimants refer do not provide any basis for Claimants to transform their claims for breach of contract into claims for a violation of public international law.
156. Respondent asserts that the central issue in the present dispute is Claimants' failure to make financial contributions to the Company and that the enforcement of the Pledge Agreement and AVAS' refusal to return the Bank Guarantee to Claimants are merely the consequences of the Claimants' failure to comply with the terms of the SPA. Respondent contends that all of these issues arose "in connection to the validity, interpretation,

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<sup>8</sup> *Salini Costruttori S.p.A and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/04, Decision on Jurisdiction, 23 July 2001, at paragraph 52, Exhibit RL-25.

performance or enforcement [of the SPA]” and should, in accordance with Articles 22 and 23 of the SPA, be decided by the Romanian courts.

## **B. Costs**

### *1. Claimants*

157. In their Statement of Costs dated 9 July 2013, Claimants request that the Tribunal reject Respondent’s jurisdictional objections, declare that the Tribunal has jurisdiction over the dispute and order Respondent to pay Claimants’ costs.
158. Alternatively, Claimants contend that if the Tribunal considers that it does not have jurisdiction, the Tribunal will not have the power to render a cost award and the Parties will have to bear their own respective costs.
159. Claimants outline their costs as follows:
- i. Advance on Costs – US\$ 225,000<sup>9</sup>
  - ii. Attorney Fees – US\$ 250,000
  - iii. Costs concerning the Hearing – US\$ 1,500
  - iv. Other Costs – US\$ 6,300
160. In their Comments Concerning Respondent’s Statement of Costs dated 18 July 2013, Claimants contend that if the Tribunal finds that it does not have jurisdiction over Claimants’ claims, the Tribunal would have no authority to render any cost award, either in favor of Claimants or Respondent. Accordingly, Claimants assert, any award declining jurisdiction but awarding costs would be subject to annulment pursuant to Article 52(b) of the ICSID Convention.
161. Alternatively, Claimants assert that the Tribunal should not accept Respondent’s application of the “costs follow the event” principle. Claimants contend that several

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<sup>9</sup> The Tribunal notes that ICSID Interim Financial Statements indicate payment of US\$275,000 by Claimants, perhaps indicating a typographical error in Claimants’ Statement of Costs.

other factors are relevant to the Tribunal's analysis, including "the relative merits of all claims made by the parties" and whether there was any improper conduct during the proceedings. In connection with the latter, Claimants argue that Respondent conducted itself improperly by submitting a reply brief that was in excess of the limits of a reply and that introduced evidence that was known and in the possession of Respondent long before the reply was due.

162. Claimants also assert that Respondent's costs are exorbitant. As stated by Claimants, "In an arbitration where material damage claimed is €2,000,000, Respondent expects to recover its legal fees in the amount of [€]1,348,897.89."

## 2. Respondent

163. In its statement of Costs dated 9 July 2013, Respondent requests that the Tribunal render a costs award in its favor on a full indemnity basis and interest at a reasonable commercial rate from the date of issuance of the Tribunal's Award until the date of full and final payment, and that Claimants be jointly and severally liable for the payment of all such costs incurred.
164. Respondent asserts that Claimants have failed to comply with all of the jurisdictional requirements under the Treaty. Accordingly, Claimants should bear Respondent's costs incurred as a result of this arbitration.
165. Respondent contends that Article 61(2) of the ICSID Convention gives the Tribunal the power to assess and allocate the costs incurred by the parties in relation to the arbitration proceedings.
166. Respondent asserts that the so-called "costs-follow-the-event" rule is increasingly applied in investment arbitration, and that the Tribunal should accordingly exercise its discretion by taking into consideration the outcome of the proceedings, the specific circumstances of the case and the conduct of both parties in this arbitration.

167. Applying that standard, Respondent concludes that Respondent is entitled to compensation of costs incurred due to Claimants pursuing a claim outside of the Centre's competence and the Tribunal's jurisdiction.
168. Moreover, Respondent asserts that Claimants' conduct of the case justifies cost allocation in favor of Respondent. In particular, Respondent submits that Claimants (i) brought their claims against the wrong party, AVAS; (ii) substantially changed their argument over the course of the proceedings; and (iii) advanced "nonsensical and contradictory" interpretations of the Treaty.
169. Respondent outlined its costs as follows:
- i. Legal Fees Paid – €91,972.77
  - ii. Disbursements Paid – €57,969.83
  - iii. Total Legal Fees Incurred – €1,348,897.89
  - iv. Total Disbursements Incurred – €140,855.41
  - v. Advances on Costs – US\$ 275,000.00
  - vi. Bank Fees – US\$ 414.00
170. On 16 July 2013, Respondent informed the Tribunal and the Centre that it had no comments on Claimants' Statement of Costs, and waived its right to make a further submission with regard to Claimants' costs.
171. On 16 August 2013, Respondent notified the Tribunal of a clerical error found in the Declaration of the President of AVAS submitted to the Tribunal on 9 July 2013. According the revised Declaration, Respondent's "Total Legal Fees and Expenses Incurred" amounted to €1,407,087.00.

## IX. TRIBUNAL'S ANALYSIS

### A. Overview

172. As an initial matter, the Tribunal notes, as described *supra*, that there are two BITs between Romania and Turkey. The present dispute, however, implicates only the 1996 BIT. The 2010 BIT entered into force on 8 July 2012, and provides that it shall not apply to disputes arising before that date.
173. The BIT sets forth the contours of a host state's consent to arbitrate investment disputes. If an investment dispute cannot be settled through consultations and negotiations between the parties to the dispute, an investor is entitled to submit the dispute to ICSID at any time after (i) exhaustion of domestic remedies or (ii) passage of one year without a final award from the date when the dispute was submitted to local courts.
174. In its entirety, Article 6 of the BIT provides as follows:

*For the purposes of this Article, an investment dispute is defined as a dispute involving:*

*(a) the interpretation or application of any investment authorization granted by a Contracting Party's foreign investment authority to an investor of the other Contracting Party, or*

*(b) a breach of any right conferred or created by this Agreement with respect to an investment.*

*Any dispute between one Contracting Party and an investor of the other Contracting Party, concerning an investment of that investor in the territory of the former Contracting Party shall be settled, as far as possible amiably, by consultations and negotiations between the parties to the dispute.<sup>10</sup>*

*If the dispute cannot be settled by consultations and negotiations within three months from the date of request for settlement then the dispute shall be submitted for settlement in accordance with the specific dispute*

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<sup>10</sup> While the Parties sometimes referred to “amicable” settlement, Article 6(2) of the BIT provides that any dispute “shall be settled, as far as possible amiably.” Accordingly, the Tribunal uses the term “amiable” throughout this Award.



*settlement procedures upon which a Contracting Party and an investor of the other Contracting Party have mutually agreed.*

*In the event that the investment dispute cannot be resolved through the foregoing procedures, the investor concerned is entitled to submit the dispute, for conciliation or arbitration, to the International Center for Settlement of Investment Disputes, at any time after the exhaustion of domestic remedies or after expiry of one year from the date when the dispute has been submitted by the concerned investor to the tribunals of the Contracting Party which is a party to the dispute and there has not been rendered a final award.*

*The submission of the investment disputes to the International Center for the Settlement of Investment Disputes will be done in accordance with the procedure provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965.*

175. As an initial matter, the Tribunal notes that Article 6 creates a standing offer by the host state to arbitrate claims only in connection with an “investment dispute” defined as “involving” either (i) interpretation or application of any investment authorization or (ii) breach of any right conferred by the BIT.
176. Consequently, the Tribunal must reject Claimants’ assertions that Article 6 of the BIT provides host-state consent to arbitrate some category of investor-state disputes that escapes the conditions set forth in the fourth section of that Article. In proposing such a distinction among arbitrable disputes, Claimants intend to lay the groundwork for their ultimate position that consent to arbitrate the “investment dispute” before this Tribunal derives from Article 6(1) and Article 6(5) of the BIT, and accordingly was never subject to the sharply circumscribed conditionality of the host state’s consent to arbitration contained in Article 6(4), which clearly makes entitlement to arbitrate subject to either exhaustion of domestic remedies or a year of local litigation.
177. In support of such a duality, Claimants submit that some sections of Article 6 use the defined term “investment dispute” while others refer simply to a “dispute” or to “any dispute . . . concerning an investment.”

178. Indeed, Article 6 at various places does speak of “any dispute concerning an investment” or “disputes” in general. In using such language, however, the BIT does not create consent to arbitrate any additional category of controversy other than “investment disputes” as defined above.
179. Rather, the word “disputes” and the phrase “concerning an investment” are used in the context of addressing circumstances that may eventually give rise to an arbitrable controversy. For example, Article 6(2) says disputes “concerning an investment” shall be settled amiably as far as possible. By the same token, Article 6(3) says that disputes that cannot be settled by consultation will be submitted to any mutually-agreed settlement procedures.
180. By referring to “any dispute . . . concerning an investment,” Article 6(2) contemplates that settlement negotiations may occur during the early stages of a conflict, when disagreements between the investor and the host state have yet to evolve into treaty claims.
181. Thus, the BIT recognizes that in some instances a dispute “concerning an investment” may take time to develop into an “investment dispute” that actually implicates breach of the BIT.
182. A common example of such evolution in investor-host interaction would be found in so-called “creeping” or “indirect” expropriation, where a series of questionable acts eventually reveals itself as an outright confiscation.
183. Likewise, Article 6(3) contemplates that a controversy between the investor and the host state might be subject to some supplementary *ad hoc* “settlement procedures” that precede arbitration itself.
184. In neither context does the use of the word “dispute” incarnate any new class of arbitrable controversies which might displace the circumscribed “investment dispute” for which an offer to arbitrate has been provided in Article 6(4) of the BIT.

185. Consequently, any submission to arbitration must meet the requirements of Article 6(4), which remain clear and unequivocal.
186. Pursuant to Article 6(4), the investor is “entitled to submit the dispute [to arbitration] at any time after” one of two trigger events. The first event would be the exhaustion of domestic remedies. The second implicates expiry of one year from commencement of local litigation without any final award.
187. The result might have been different if the treaty had been drafted with other wording, such as an absolute right to arbitrate coupled with subsequent local proceedings giving host-state courts a chance to sort things out while arbitration remained in abeyance. Such is not the case, however.
188. Article 6(4) clearly provides that an investor is “entitled” to submit an investment dispute to arbitration at any time *after* either (i) exhaustion of domestic remedies or (ii) at the expiry of one year from the date the dispute was submitted to host-state courts if there has not been a final judgment within that twelve-month period.
189. In connection with the claims before this Tribunal, it is undisputed that Claimants have not brought their dispute before Romanian courts and have not exhausted Romanian domestic remedies.
190. Accordingly, this Tribunal lacks jurisdiction pursuant to both the BIT and Article 25 of the ICSID Convention, each of which requires the investor’s consent according to the terms of the host state’s standing offer to arbitrate.

## **B. Scope of the Tribunal’s Decision**

191. As discussed more fully both *infra* and *supra*, the Tribunal finds that Article 6(4) of the BIT contains the only standing offer to arbitrate made by the Respondent host state.
192. Furthermore, the Tribunal has determined that Claimants have failed to satisfy the jurisdictional preconditions contained in that Article 6(4).

193. Consequently, the Tribunal need not consider whether Claimants have complied with Articles 6(2) and 6(3), which supply no basis for arbitral authority independent of Article 6(4) of the BIT.
194. The Tribunal notes that ICSID Convention Article 48(3) provides that the award shall deal with “every question submitted” to the Tribunal. This does not mean, however, that an arbitral tribunal must, or should, comment on arguments with no impact on the award. Article 48(3) does not require comment on arguments without impact on the award, and such questions are better left to cases where a need exists to address them.
195. Strong policy considerations run against an expectation that arbitrators in investor-state cases should address factually and legally complex questions not necessary to a decision that rests on other grounds. Arbitrators in an investment treaty case not infrequently have a role as arbitrator, counsel or expert in other such cases. Gratuitous resolution of unnecessary issues might present an appearance of impropriety, suggesting (rightly or wrongly) that members of a tribunal succumbed to the temptation of making needless decisions simply to create dictum persuasive in other cases in which they have a role.
196. Having given Claimants every benefit of the doubt on all objections related to jurisdiction, the Tribunal finds that it lacks competence over this dispute for the reasons summarized with respect to Article 6(4) of the BIT. Consequently, it becomes unnecessary, and would be unwise, for the Tribunal to speculate on matters not pertinent to its conclusion.

### **C. Consent**

197. In construing the relevant requirements for consent to arbitration, the Tribunal reads provisions of the BIT in accordance with their ordinary meaning, in their context and in the light of the treaty’s object and purpose. In so doing, the Tribunal follows the exegetical guidelines set forth in Article 31 of the Vienna Convention on the Law of Treaties.

1. *Language Discrepancies*

198. Claimants contend that Respondent's consent to arbitrate "investment disputes" can be found in Article 6(1) and Article 6(5) of the BIT, and thus escapes the preconditions described in Article 6(4).
199. A key element of this position lies in the contention that the English version of Article 6(4) erroneously refers to an "investment dispute" whereas the Turkish and Romanian versions simply mention a "dispute." *See* Hearing Transcript of 19 April 2013 at page 142.
200. Regardless of language variations in the Turkish and Romanian texts, the Tribunal must respect the uncontroverted mandate at the very end of the BIT which provides that "[i]n case of differences of interpretation, the text in the English language shall prevail."
201. The language in question appears immediately following section 3 in Article 11 (Entry into Force, Duration and Termination) which provides a ten year grace period for the effect of the BIT with respect to investments made prior to its expiry.
202. Thereafter, the treaty provides as follows:

*Signed at Ankara on 24th of Jan 1991 in two original copies, each in the Romanian, Turkish and English languages, all text being equally authentic. In case of differences of interpretation, the text in the English language shall prevail.*

203. In context, the phrase "two original copies" must make reference to two full sets of treaties, including one Romanian, one Turkish and one English version per set.
204. Claimants acknowledge this language following Article 11, but contend that it is not applicable to the present case, asserting that this is not a "difference of interpretation" but a simple typographical error. As stated by counsel for Claimants, "for this particular issue, there is no inconsistency between the Romanian and Turkish languages. They are

both the same. There is obviously a mistake in the English language, and both parties recognise that.” See Hearing Transcript of 19 April 2013 at page 142.

205. Claimants cite paragraph 232 of Respondent’s Memorial on Preliminary Objections, where Respondent makes reference to Article 6(4) as providing that an investor may invoke arbitration “if the dispute cannot be resolved by way of consultations and negotiations] at any time after . . . .” See Respondent’s Memorial on Preliminary Objections dated 12 November 2012 at paragraph 232, with underlining and single bracket in original.
206. In the words preceding the close-bracket symbol “]” (“if the dispute cannot be resolved by way of consultations and negotiations”) Respondent seems to paraphrase the opening sentence of Article 6(4), which refers to negotiation and consultation requirements set forth earlier in Article 6. The open-bracket symbol “[” was presumably omitted by inadvertence. The later part of paragraph 232 quotes Article 6(4) verbatim.<sup>11</sup>
207. Such a paraphrase should not be surprising, given Respondent’s position that that only “investment disputes” qualify as disputes arbitrable under the BIT. Thus use of “dispute” in that context would be a reasonable reference to the requirements of Article 6(4) which at that point refers to resolution through “foregoing procedures” that include negotiation and consultation.
208. Moreover, the Tribunal notes that Respondent cited the correct English version of Article 6(4) of the BIT at paragraph 218 of the same Memorial on Preliminary Objections.
209. The present controversy falls within the treaty expression “differences of interpretation” given that the two sides argue for different interpretations of the BIT, with one side

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<sup>11</sup> The original of paragraph 232, with the missing open-bracket symbol, reads as follows: “if the dispute cannot be resolved by way of consultations and negotiations] at any time after the exhaustion of domestic remedies or after the expiry of one year from the date when the dispute has been submitted by the concerned investor to the tribunals of the Contracting Party which is a party to the dispute and there has not been rendered a final award.”

relying on the English text and the other side citing the Turkish and Romanian versions, all three being equally authentic.

210. Under the circumstances, the Tribunal must follow the ordinary meaning of BIT terms, and cannot indulge in speculation about what might have been in the minds of the Turkish and Romanian diplomats when they signed the document. The English text creates no incongruity with the object and purpose of the BIT.
211. Given the BIT's clear instruction that the English prevails over the Turkish and Romanian, the Tribunal must construe Article 6(4) to cover an "investment dispute" as defined therein.

## 2. *Structure of Article 6(4)*

212. Respondent's consent to arbitrate "investment disputes" derives from Article 6(4) of the BIT, which is subject to mandatory preconditions.
213. Section 4 provides the only part of Article 6 that entitles an investor to arbitrate investment disputes under ICSID rules.
214. During the 19 April 2013 hearing, the President of the Tribunal asked counsel for Claimants whether their position was that Article 6(4) contained a "non-exclusive" entitlement.
215. In response, counsel for Claimants asserted that while Article 6(4) provides a conditional entitlement to arbitrate contractual disputes arising from an investment, "[I]f the investor has an investment dispute from the beginning . . . the investor can directly raise an investment dispute, as defined under paragraph (1), according to paragraph [6](5) of the BIT." *See* Hearing Transcript of 19 April 2013 at pages 102-106.
216. The Tribunal cannot find any unconditional entitlement to arbitrate in Article 6. The only place where investor is given an entitlement to arbitrate comes in the fourth section. The other sections address different matters, as outlined below.

- i. The first section sets forth the definition of an “investment dispute” but does not contain any language permitting an investor to arbitrate.
  - ii. The second section discusses negotiation and consultation, but without any entitlement to arbitration.
  - iii. The third section relates to ad hoc settlement procedures that might precede ICSID arbitration.
  - iv. The fifth section provides procedural guidelines for submitting an investment dispute to ICSID, in the event that an investor has fulfilled the conditions to consent provided in Article 6(4).
217. The title of Article 6 (“Settlement of Investment Disputes”) implies that investors’ conditional entitlement to arbitrate lies solely in Article 6(4). The other provisions do indeed relate to “settlement” in the broadest sense (such as negotiation, consultation, definitional matters) without in any way detracting from the core right to arbitrate derived from the fourth section.
218. The reference in Article 6(2) to “any dispute concerning an investment” acknowledges that an investor might have a disagreement with a Contracting Party that has yet to reveal itself as subject to remedy under the BIT. Often, the same factual circumstances can form the basis of both contractual and treaty-based claims. Accordingly, in the early stages of the dispute, the investor is not required to cite treaty provisions or to bring treaty-based claims before local courts.
219. In short, the BIT means what it says in Article 6(4). An investor is “entitled to submit the dispute . . . for arbitration” subject to the express conditions of either exhaustion of local remedies or host-state litigation unfinished within a year.
220. The conditional language of Article 6(4) would serve no purpose if there existed, somewhere in the shadows of the BIT, a parallel yet unwritten and unconditional entitlement to arbitrate.



### 3. *Preconditions to Arbitration*

221. Given that Article 6(4) provides the exclusive consent to arbitrate investment disputes, Claimants were required to fulfill several conditions before submitting their claims to ICSID arbitration.
222. The right to arbitrate is premised on a determination that “the investment dispute cannot be resolved through the foregoing procedures.” In other words, consultations, negotiations and other settlement procedures, as provided in Articles 6(2) and 6(3), must have failed.
223. Having complied with Article 6(2) and Article 6(3), the investor may submit the dispute to arbitration at any time after (i) exhaustion of domestic remedies or (ii) one year of litigation in local courts without a final award.
224. As discussed in greater detail below, Claimants have failed to satisfy the requirement either (i) to exhaust local remedies or (ii) to litigate for at least one year before local courts without a final decision.
225. The BIT clearly says that the investor is entitled to submit the investment dispute to arbitration only **after** compliance with these preconditions.

#### **D. Actions Taken by Claimants Prior to Initiation of This Arbitration**

226. As noted earlier, Claimants contend that their expropriation claims are an “investment dispute” as defined by Article 6(1) and that Respondent’s consent to arbitrate such disputes remains unconditional except for the requirement in Article 6(2) that an investor must make a good-faith attempt at amiable settlement.
227. In the alternative, Claimants assert that even if the Tribunal were to find that Article 6(4) contained jurisdictional preconditions, Claimants had in some way satisfied those conditions.

228. Accordingly, the Tribunal must consider whether the actions taken by Claimants prior to initiating this arbitration were sufficient to satisfy Article 6(4) of the BIT.

1. *No Exhaustion of Local Remedies*

229. With respect to the claims before this Tribunal, Claimants have not exhausted domestic remedies.

230. During the hearing on 19 April 2013, the President of the Tribunal asked counsel for Claimants, “With respect to the claims that are before us, is it your position that there has been an exhaustion of domestic remedies in Romania?” Counsel for Claimants replied “No” and then went on to explain as follows:

*Claimants perhaps could have pursued different ways to settle this dispute. They focused on stopping the enforcement of the pledge and losing their shares. But they could have brought a contractual claim before local courts, that is, arising from the SPA. Maybe they would lose their share, but they could have asked for a remedy, they could have asked for compensation, or they could have asked, as the Respondent suggests, for a confirmation that they fulfilled their investment obligations.*

*See Hearing Transcript of 19 April 2013 at page 121.*

231. The fact that Claimants had not exhausted domestic remedies applicable to their dispute is confirmed by the expert report of Professor Baias, who submits that “Claimants had available under Romanian law two main general courses of action to have the Dispute settled on the merits by the Romanian courts, categorized as follows by reference to the relief sought: (a) actions to obtain performance . . . and (b) an action whereby Claimants could have sought termination of the SPA and compensation for damages.”

232. In particular, Professor Baias details the following actions, *inter alia*, available to Claimants under Romanian law:

- a claim seeking confirmation of Claimants’ performance of the SPA pursuant to Article 39 of Privatisation Law No. 137/2002 and Article 969 of the Civil Code, to be filed in the first instance at the Commercial

Division of the Bucharest Tribunal with potential appeals to the Bucharest Court of Appeal and the High Court of Cassation and Justice;

- a claim seeking confirmation of Claimants' performance of the SPA pursuant to Article 11 para. (1) of Government Ordinance No. 25/2002, which would have been eligible for urgent, special procedure before the Commercial divisions of the Bucharest courts under Article 40 of Privatisation Law No. 137/2002; and
- an action seeking to terminate the SPA with a request for damages based on Article 1021 of the Civil Code, and on Article 39 of Privatisation Law No. 137/2002 (referring to "actions seeking termination of these [share sale and purchase] agreements, for which the prescription term is the general term [of 3 years]).

*See* Expert Report of Professor Baias dated 6 November 2012 at pages 40-52.

233. According to Professor Baias, each of these actions would have allowed Romanian tribunals to consider the merits of the dispute. It is common ground that Claimants did not attempt any of these measures.

*2. No Local Litigation of the Claims Subject to Arbitration*

234. With respect to the second leg of the conditions imposed by Article 6(4) (local litigation not completed within a year), the Tribunal must find that Claimants have not brought the present dispute before Romanian courts and thus cannot fulfill that jurisdictional prerequisite.
235. At the hearing of 19 April 2013, the President of the Tribunal engaged in the following exchange with Claimants' counsel:

*The President: . . . let me ask the follow-up question: with respect to the claims that are before this Tribunal, is it your position that one year has expired since those claims were submitted to Romanian courts?*

*Ms. Eren: As I said, the identical claims have not been raised before Romanian courts.*

*The President: With respect to the claims that have been submitted to this Tribunal, have those claims also been submitted to Romanian tribunals?*

*Ms. Eren: No.*

*The President: They have not?*

*Ms. Eren: No.*

*The President: So then the answer is, again, just to be sure that I have understood: you are saying that, as to the claims before us, this Tribunal, there has been no ‘exhaustion of [local] remedies,’ as the term is used in Article 6(4); and as to the claims before us, there has been no submission of those claims to Romanian tribunals?*

*Ms. Eren: That’s correct.*

*See Hearing Transcript of 19 April 2013 at pages 110-11.*

236. Claimants thus admit that the claims pending before this Tribunal were never brought before local courts.
237. The analysis might well end with Claimants’ acknowledgment that no local litigation was attempted with respect to the claims now subject to these arbitral proceedings.
238. Nevertheless, from an abundance of caution on this important point, the Tribunal proceeds to assess further the local court actions in 2009 brought to stay enforcement of the Pledge Agreement.<sup>12</sup>
239. Even absent the concession by Claimants’ counsel, expert testimony establishes that the Romanian court actions related to the Pledge Agreement were inappropriate to address the merits of the dispute before this Tribunal.
240. Professor Baias gave the following uncontroverted evidence:

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<sup>12</sup> The Tribunal notes that, according to Respondent, Claimants also brought two actions related to staying enforcement of the Bank Guarantee. *See* Respondent’s Memorial on Preliminary Objections dated 12 November 2012 at page 26. Such actions have nothing to do with the dispute pending before this Tribunal, given that Claimants have not pursued in this arbitration claims against AVAS for allegedly having unlawfully enforced the Bank Guarantee.

*The challenges and motions filed by Claimants could never have dealt with the merits of any alleged wrongful exercise by AVAS of its rights under the share sale and purchase, and related pledge agreement.*

See Report of Professor Baias dated 6 November 2012 at paragraph 52.

241. Consequently, the Tribunal finds that Claimants' actions challenging and/or seeking a stay of enforcement of the Pledge Agreement did not present any request for relief that would have permitted local courts to consider the claims presented in these arbitral proceedings.
242. The Tribunal has noted the litigation initiated by AVAS, an entity that was a Respondent in these proceedings until being dropped by Claimants as expressed in a letter to ICSID dated 6 June 2012, memorialized by the Tribunal's Procedural Order No. 1 of 4 January 2013. It is unnecessary to devote much time to this litigation in the context of the one-year requirement, given that it was initiated by AVAS on 24 February 2010, which under any calculation falls far short of twelve months prior to either Claimants' filing of the Request for Arbitration on 3 November 2010 or its registration by ICSID on 29 November 2010.

### 3. *Nature of Claims Submitted to Local Litigation*

243. In connection with the requirements to exhaust local remedies and submit claims to local courts, Claimants make the following contention:

*In relation to the claims before [the Tribunal], you cannot go to local courts, because they're [i.e., the claims before the Tribunal are] governed by arbitration. So exhaustion of local remedies or waiting for one year is not an applicable rule in respect of the exact same things that are before this Tribunal.*

See Hearing Transcript of 19 April 2013 at pages 119-20.

244. In essence, Claimants assert that Article 6(4) was inapplicable to the expropriation claims brought in these proceedings.

245. If indeed Claimants' dispute with Respondent does fall outside the scope of Article 6(4), then no occasion arises to give further consideration to the claims. The Tribunal has found, as discussed *supra*, that section 4 of that Article 6 provides the BIT's sole standing offer to arbitrate on behalf of a host state.
246. That being said, the Tribunal notes that Article 6(4) does not lend itself to the interpretation suggested by Claimants.
247. The BIT does not require an investment dispute to be brought before local courts in the sense of claims based on breaches of particular BIT terms. Indeed, in many cases the investor would be incapable of asserting breach of the treaty until after knowing how local courts and/or administrators had addressed the particular grievances.
248. In determining what dispute must be brought before local courts, the Tribunal considered a full range of alternatives, including *inter alia* (i) the "triple identity" test and (ii) the "in substance" test. The Tribunal has also considered the so-called *Urbaser*<sup>13</sup> test, which provides that the claims before local courts must allow for the resolution of the dispute to the same extent as if the claim had been brought to arbitration under the investment treaty.
249. The "triple identity" (same parties, same object and same cause of action) would not marry well with the purpose of Article 6(4), since both sides acknowledge that Claimants could not have cited BIT Article 4 before Romanian courts. Moreover, the Tribunal notes in passing that the cases cited by Respondent in support of the "triple identity" test tend to be based on fork-in-the-road provisions (abandonment of local remedies prior to pursuit of arbitration), not implicating the type of language used in Article 6(4) of the BIT.
250. Conversely, construing Article 6(4) without any "sameness" requirement at all would render the exhaustion of remedies and local litigation provisions meaningless. The

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<sup>13</sup> *Urbaser v. Argentine Republic* (n 6).

litigation requirement in Article 6(4) was designed to give the domestic judiciary an opportunity to resolve fully the existing dispute.

251. Consequently, for Article 6(4) to make sense, an investor would bring to local courts all claims that allow determination on the merits of the dispute that might later be submitted to arbitration.
252. While the investor is not required to assert breach of the investment treaty in the local courts, the local judiciary should still be given a chance to address the controversy dividing the investor and the host state.
253. In this context, the most reasonable test for implementing the ordinary meaning of Article 6(4), in light of the purposes of the BIT, requires that disputes brought before local courts be of a nature that permits resolution to substantially the same extent as if brought before an international arbitral tribunal pursuant to an investment treaty.<sup>14</sup>
254. As noted elsewhere in this Award, Claimants never initiated any action before Romanian courts that would cover substantially the same dispute as the one now before this Tribunal. Nor do Claimants make an assertion of having done so.

#### **E. Alternate Arguments: Futility and MFN**

255. Despite questions from the Tribunal, Claimants have not argued that jurisdiction might be based on the application of a most-favored-nation provision.
256. Nor have Claimants contended, again notwithstanding Tribunal questions, that recourse to local courts would have been futile, thus arguably justifying this Tribunal in asserting jurisdiction even in the face of Claimants' failure to meet the requirements of Article 6(4) of the BIT.

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<sup>14</sup> Having interpreted the language in the investment treaty between Romanian and Turkey, this Tribunal need not speculate on the extent to which its conclusion about the type of dispute covered by Article 6(4) may or may not comport with approaches adopted in other cases, including the so-called *Urbaser* test.

257. Dr. Herzog asked Claimants whether, in relation to the BIT's MFN clause, "there [is] anything relating to the claims before this Tribunal which you would like to add?"

258. Counsel for Claimants responded as follows:

*No, not for this Tribunal. I meant in general, MFN clauses are in fact clauses made extant to govern such contractual relationships, and the factors considered may come up as a breach of those BITs which may render protection under MFN or FET provisions, but in this case, our basic provision is that there is an expropriation of shares.*

*See Hearing Transcript of 19 April 2013, at page 178.*

259. Subsequently, the Tribunal President asked counsel for Claimants to confirm that her clients' arguments did *not* include a contention that "invocation of the local courts' authority or the local administrative bodies' authority" would be futile.

260. To that question, Claimants' counsel responded an unequivocal "Yes" confirming that Claimants did not present arguments about the futility of resorting to the local courts. *See* Hearing Transcript of 19 April 2013, at page 179.

261. Nor did Claimants propose any other alternative arguments that would support arbitral jurisdiction over the claims presented in this case, in spite of the Tribunal's findings with respect to Article 6 of the BIT.

## **F. Conclusion**

262. Claimants have failed to comply with the jurisdictional preconditions that must be satisfied prior to submission of their claims to arbitration, as provided by Article 6(4) of the BIT.

263. Accordingly, this Tribunal lacks jurisdiction to hear the present claims.



264. As noted *supra*, the conclusion that Claimants failed to satisfy the provisions of Article 6(4) of the BIT makes it unnecessary to determine whether there has been compliance with Articles 6(2) and 6(3) of the BIT.

### **G. Costs**

265. The Tribunal carefully considered the Parties submissions on costs, including each side's Statement of Costs dated 9 July 2013, Claimants' 18 July 2013 Comments Concerning Respondent's Statement of Costs, and Respondent's 16 August 2013 submission of a revised Declaration of the President of AVAS.

266. As a preliminary matter, the Tribunal notes that Article 61(2) of the ICSID Convention contains mandatory language ("shall") directing assessment of expenses without any distinction between awards that do or do not find jurisdiction.

267. The Tribunal notes that on 16 July 2013, Respondent informed the Tribunal and the Centre that Respondent had no comments on Claimants' Statement of Costs, and waived its right to make a further submission with regard to Claimants' costs.

268. While Respondent ultimately prevailed, interpretation of the BIT was not obvious. The Tribunal was required to provide close scrutiny to the Parties' finely balanced arguments.

269. None of the factors that would clearly justify cost allocation (such as unreasonable argument, exaggerated claim, or obstructionist tactics) was present in this arbitration.

270. Moreover, Counsel for both sides conducted themselves in a way that furthered procedural efficiency. No abuse of the proceedings occurred. Neither side advanced its case in bad faith.

271. Consequently, the Tribunal deems it appropriate that each side should bear its own legal expenses, and that the costs of the arbitration (arbitrators' fees and expenses and ICSID administrative fees) shall be borne on an equal (50/50) basis.

272. The Tribunal notes that according to each side's Statement of Costs, Respondent has advanced costs in the amount of US\$ 275,000.00, while Claimants have advanced costs in the amount of US\$ 225,000.00. As noted *supra*, ICSID Interim Financial Statements indicate payment of US\$275,000 by Claimants, perhaps suggesting a typographical error in Claimants' Statement of Costs.
273. The Tribunal also notes that Respondent has made a distinction in its Statement of Costs between legal fees and disbursements paid (totaling €949,942.60) and legal fees and disbursements incurred (totaling €1,547,942.41).

## **X. DISPOSITION**

### **A. Jurisdiction**

274. At the present time, the Tribunal does not possess jurisdiction to hear the claims presented by Claimants in these proceedings.
275. The Tribunal's decision is without prejudice to Claimants' right to file its claims once the jurisdictional preconditions of BIT Article 6(4) have been satisfied.

### **B. Costs**

276. Each side shall bear its own legal expenses.
277. The costs of this arbitration, including the fees of the arbitrators and the administrative expenses of the Centre, shall be divided on an equal (50/50) basis. The total of the costs of the arbitration, including arbitrators' fees and expenses, as well as the ICSID administrative charges, is set at US\$307,029.77 as of 22 August 2013.

The Tribunal

William W. Park

Professor William W. Park  
President

30 August 2013

Date:

Brigitte Stern

Professor Brigitte Stern  
Arbitrator

Date: 26.8.2013

Nicolas Herzog

Dr. Nicolas Herzog  
Arbitrator

Date: 23/8/2013