IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND ROMANIA CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT DATED 28 MAY 1992 AND ENTERED INTO FORCE ON 15 JANUARY 1994.

-and-

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AS REVISED IN 2010

-between-

MR. JAK SUKYAS

(CLAIMANT)

v.

ROMANIA

(RESPONDENT)

Partial Award on Jurisdiction

The Arbitral Tribunal

Prof. Bernard Hanotiau (Presiding Arbitrator)
Prof. Dr. Stephan W. Schill
Ms. Loretta Malintoppi

Secretary to the Tribunal

Mr. Juan Camilo Jiménez Valencia

Date of dispatch to the Parties: 6 November 2024

REPRESENTATION OF THE PARTIES

(As submitted by the Parties in September 2024)

Representing Claimant

Kathryn Lee Boyd
Theodor D. E. Bruening

HECHT PARTNERS LLP
125 Park Avenue, 25th Floor
New York, NY 10017
U.S.A.

&

Prof. Dr. Berk Demirkol
Dr. Eda Cosar Demirkol

POTESTAS PARTNERS
77 Carlton Park Avenue,
London, England, SW20 8BJ
U.K.

&

Ms. Sofia Elena Cozac

COZAC SOFIA ELENA ATTORNEY'S OFFICE
1 Cpt. Av. N. Drossu Street
Bucharest, 012073
Romania

&

Former Counsel for Claimant

Parvan P. Parvanov
(March 2022 – February 2024)

I.A. CHAMBERS – NEW YORK

Representing Respondent

Valeriu Stoica
Cristiana Irinel Stoica
Andreea Irina Stoica
Anca Liana Caraiola Buftea
Yolanda Beșleagă
Andreea Gurică

STOICA & ASOCIAȚII
2 Dr. Staicovici Street
050558 Bucharest

&

Pierre-Olivier Savoie

SAVOIE ARBITRATION
26 rue Vignon
75009 Paris

&

Prof. Alina Miron
Dr. Daniel Müller

FAR AVOCATS
22 rue de Lisbonne
75008 Paris

&

Gustavo Laborde

LABORDE LAW
91 rue du Faubourg St-Honoré
75008 Paris

455 Main Street
New York, NY 10044
U.S.A.

Former Counsel for Respondent

Pierre-Olivier Laporte
(July 2020-May 2023)

SAVOIE LAPORTE
(until January 2023; thereafter Agora)
500, Place d'Armes, Suite 1800
Montréal (Québec)
H2Y 2W2, Canada

Table of Contents

CHAPTER I. THE PARTIES TO THE ARBITRATION

1. The Claimant is Mr. Jak Sukyas, a U.S. citizen who also holds Turkish nationality ("**Claimant**").[1] Whether or not Claimant has always held Turkish nationality is disputed by the Parties.

2. Claimant has been represented in these proceedings by the attorneys and counsel mentioned at page "i" above.

3. Respondent is the Romanian State ("**Romania**" or "**Respondent**").

4. Romania has been represented in these proceedings by the attorneys and counsel identified at page "i" above.

5. Claimant and Respondent are jointly referred to as "**Parties**" and individually as a "**Party**".

CHAPTER II. THE ARBITRAL TRIBUNAL

6. The Tribunal was constituted as follows:

(i) On 18 February 2020, Claimant appointed Professor Dr. Stephan W. Schill, a German national, as the first arbitrator. Professor Schill's contact details are:

Prof. Dr. Stephan W. Schill
c/o Max Planck Institute for Comparative Public Law and International Law
Im Neuenheimer Feld 535
69120 Heidelberg
Germany

(ii) On 8 September 2020, Respondent appointed Ms. Loretta Malintoppi, an Italian national, as the second arbitrator. Ms. Loretta Malintoppi's contact details are:

Ms. Loretta Malintoppi
39 Essex Chambers
Maxwell Chambers Suites

[1] The Tribunal clarifies that there is a parallel proceeding initiated by Mr. Edward Sukyas against Romania. As indicated in paragraph 16.1 of the Terms of Appointment "the proceedings initiated by Mr. Jak Sukyas and Mr. Edward Sukyas against Romania are legally distinct but shall be procedurally coordinated. In this sense, both proceedings shall follow identical procedural timetables, and the Parties will file a single set of pleadings addressing both claims".

28 Maxwell Road, # 03-04, 04-04
Singapore 069120
Tel.: (+65) 6320 9272
loretta.malintoppi@39essex.com

(iii) On 1 November 2020, the Parties appointed Professor Bernard Hanotiau, a Belgian national, as presiding arbitrator. Professor Hanotiau's contact details are:

Professor Bernard Hanotiau
Hanotiau & van den Berg
IT Tower, Avenue Louise 480, Box 9
B-1050 Brussels
Belgium
Tel.: +32 2 290 39 09
Fax.: +32 2 290 39 39
bernard.hanotiau@hvdb.com

CHAPTER III. THE TREATIES INVOKED BY CLAIMANT AND THE APPLICABLE ARBITRATION RULES

7. By Notice of Arbitration dated 18 February 2020, Mr. Jak Sukyas commenced arbitration proceedings against Romania pursuant to Article VI of the Treaty between the Government of the United States of America and the Government of Romania concerning the Reciprocal Encouragement and Protection of Investment dated 28 May 1992, which entered into force on 15 January 1994 ("**US-Romania BIT**" or "**BIT**").

8. Article VI of the US-Romania BIT provides as follows:

> "ARTICLE VI
>
> 1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
>
> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation, which may include the use of non-binding third-party procedures such as conciliation. If the dispute

cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or.

(b) in accordance with any applicable, previously agreed dispute settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

[…]

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

[…]

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an 'agreement in writing' for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or

guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention".[2]

9. The Parties agreed by correspondence dated 8 and 17 August 2020, that the 2010 UNCITRAL Arbitration Rules shall govern the proceedings ("**UNCITRAL Arbitration Rules**").

10. Pursuant to paragraph 6.1 of the Terms of Appointment, the legal place (or the "seat") of the arbitration is Paris, France.

11. On 1 April 2022, Claimant filed his Statement of Claim ("**SoC**"). In his SoC, Claimant advanced claims against Romania also pursuant to Article 6(3)(b) of the Agreement between the Government of the Republic of Turkey and the Government of Romania on the Reciprocal Promotion and Protection of Investments, dated 3 March 2008, which entered into force on 8 July 2010 ("**Turkey-Romania BIT**").

12. Article 6 of the Turkey-Romania BIT reads as follows:

"ARTICLE 6
Settlement of Investment Disputes

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

(a) 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.

(2) 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 amicably by consultations and negotiations between the parties to the dispute.

[2] **Exhibit RL-0001 Resubmitted**, US-Romania BIT, Article VI.

(3) If the dispute cannot be settled by consultations and negotiations within six months from the date of request for settlement then the dispute shall be submitted to, as the investor may, choose to:

(a) the International Center for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and Nationals of other States' done at Washington, on March 16, 1965, in case both Contracting Parties become signatories of this Convention.

(b) an ad hoc court of arbitration laid down under the Arbitration Rules or Procedure of the United Nations Commission for International Trade Law (UNCITRAL).

[…]

(5) The arbitral tribunal shall decide on the basis of the law, taking into account the sources of law in the following precedence:

- the provisions of this Agreement and other relevant Agreements between the Contracting Parties;
- the law in force in the Contracting Party concerned;
- the provisions of special agreements relating to investments;
- the general principles of international law as recognized by both Contracting Parties.

[…]

(7) The arbitration awards shall be final and binding for all parties in dispute. Each Contracting Party commits itself to execute the award according to its national law".[3]

13. As mentioned above, there is a parallel proceeding initiated by Mr. Edward Sukyas against Romania. As indicated in paragraph 16.1 of the Terms of Appointment, "the proceedings initiated by Mr. Jak Sukyas and Mr. Edward Sukyas against Romania are legally distinct but shall be procedurally coordinated. In this sense, both proceedings shall follow identical procedural timetables, and the Parties will file a single set of pleadings addressing both claims". There was one single hearing for both cases, and the Parties agreed that it had to comply with the transparency requirements under Annex C of the 2009 Canada-Romania BIT.

CHAPTER IV. THE PROCEDURAL HISTORY

14. On 18 February 2020, Claimant filed a Notice of Arbitration, pursuant to Article VI of the US-Romania BIT. At the time the Notice of Arbitration was filed, Claimant

[3] **Exhibit CL-58**, Turkey-Romania BIT, Article 6.

was represented by: (i) Mayer Brown; (ii) Pierce Bainbridge Beck Price & Hecht ("**Pierce Bainbridge**"); and (iii) Crina Baltag Law Office. On even date, Claimant appointed Prof. Dr. Stephan W. Schill as the first arbitrator.

15. In or around July 2020, Claimant informed Respondent that Pierce Bainbridge was no longer representing him, and that Hecht Partners LLP ("**Hecht Partners**") had joined his legal team.

16. On 8 September 2020, Romania appointed Ms. Loretta Malintoppi as the second arbitrator.

17. On 15 September 2020, Romania filed its Response to the Notice of Arbitration. At the time the Response to the Notice of Arbitration was filed, Respondent was represented by: (i) Stoica & Asociaţii; (ii) Savoie Laporte s.e.l.a.s.u; (iii) Savoie Laporte s.e.n.c.r.l; (iv) Professor Alina Miron; and (v) Laborde Law.

18. On 1 November 2020, the Parties appointed Professor Bernard Hanotiau as presiding arbitrator.

19. On 2 December 2020, Respondent sent a letter to Claimant, without copying the Tribunal, requesting the disclosure of any existing third-party funder.

20. On 7 December 2020, Claimant confirmed that he had no third-party funder arrangement. However, Claimant asserted that Hecht Partners "has general portfolio funding arrangements in place from various sources and the [Claimant's] present case against Romania is among a number of cases in the portfolio". On even date, Claimant confirmed that Maravela Mihaela Law Office had joined his legal team.

21. On 10 December 2020, the first procedural meeting was held virtually.

22. On 15 January 2021, with the agreement of the Parties, the Tribunal issued the Terms of Appointment dated 13 January 2021. In this document, the Tribunal, *inter alia*, confirmed the appointment of Mr. Juan Camilo Jiménez Valencia as Tribunal Secretary. On even date, the Tribunal issued Procedural Order No. 1, including a procedural timetable. According to the procedural timetable, Claimant was scheduled to file his Statement of Claim on 1 April 2021.

23. On 15 February 2021, Claimant confirmed that Maravela Mihaela Law Office was no longer representing him, and that Zamfirescu Racoti Vasile & Partners had joined his legal team.

24. On 19 March 2021, Respondent filed two applications: (i) seeking an order for Claimant to provide a bank guarantee of EUR 750,000,[4] on account of security for Respondent's costs ("**Application for Security for Costs**"); and (ii) seeking an order for Claimant to disclose any third-party funder and method of funding ("**Application for Disclosure of Third-Party Funder and Method of Funding**" jointly "**Respondent's Applications**").

25. On 22 March 2021, the Tribunal acknowledged receipt of Respondent's Applications and invited Claimant to provide his comments by 15 April 2021.

26. On 30 March 2021, Claimant's counsel informed the Tribunal that: (i) they were no longer instructed by Claimant to represent him in these proceedings, effective immediately; (ii) Claimant was in the process of retaining new counsel; and (iii) Claimant requested to stay the proceeding for a period of at least four months to find a new legal team. On even date, the Tribunal invited Respondent to provide its comments by 6 April 2021.

27. On 6 April 2021, Respondent requested the Tribunal to dismiss Claimant's request and proposed a new procedural timetable for the conduct of the proceedings.

28. On 7 April 2021, the Tribunal acknowledged receipt of Respondent's response and invited Claimant to provide any further comments by 12 April 2021.

29. On 12 April 2021, Mr. Jak Sukyas (Claimant in the present proceedings) sent an email to the Tribunal from his personal e-mail account, noting that both he and his brother, Mr. Edward Sukyas, were still in the process of assembling a new legal team and that therefore they were not in a position to comment on Respondent's letter dated 6 April 2021.

30. On 12 April 2021, the Tribunal decided: (i) to order the suspension of the proceedings for four months; (ii) to instruct Claimant to update the Tribunal every month on the progress made in retaining new counsel; and (iii) that a new procedural timetable would be discussed after lifting the suspension.

[4] The Tribunal clarifies that the **EUR 750,000** requested by Romania were deemed to cover Respondent's costs in this arbitration as well as in the parallel proceeding initiated by Mr. Edward Sukyas.

31. On 4 May 2021, Mr. Jak Sukyas informed the Tribunal that he and Mr. Edward Sukyas were "actively in the process of investigating the retention of new counsel and new funding terms in order to continue the matter".

32. On 29 June 2021, Mr. Jak Sukyas informed the Tribunal that he and Mr. Edward Sukyas were presently "working on the most important issue, the funding" and that he hoped to finalise this before the end of the four-month suspension period.

33. On 16 July 2021, Claimant, writing on his own and on Mr. Edward Sukyas' behalf, indicated that "[o]ur new counsel is very actively and intensely working on the case. To this end he has reached out to Romania [sic] counsel to attempt a settlement for the security of costs, but our settlement compromise offer, after two weeks, was refused. In the meantime our counsel contacted a relevant institution to insure the security of the cost. Presently this institution is pursuing its due diligence". Furthermore, he informed the Tribunal that he might require an extension of the suspension of the proceedings to be able to conclude the financial arrangements.

34. On 9 August 2021, Claimant, writing on his own and on Mr. Edward Sukyas' behalf, requested the Tribunal for an additional extension of the suspension of the proceedings, until the end of September 2021.

35. On 10 August 2021, the Tribunal noted that Claimant had already confirmed that he had retained new counsel on 16 July 2021. The Tribunal requested Claimant to: (i) reveal the identity of his new counsel; and (ii) provide an update on the progress made on the funding of the case. In addition, the Tribunal invited Respondent to comment on Claimant's request by 12 August 2021.

36. On even date, Claimant, writing on his own and on Mr. Edward Sukyas' behalf, indicated that "[w]e have retained M. Duarte G. Henriques and Mr. George Yates [from Victoria Associates] for the sole purpose (at this time) of negotiating settlement of security of costs and for getting funding in place. We are still working on both".

37. On 12 August 2021, Respondent agreed to extend the suspension of the proceedings until 30 September 2021. In addition, Respondent enquired as to the role of Ms. Kathryn Lee Boyd (partner in Hecht Partners) after her resignation as one of Claimant's counsel. Respondent pointed out that Ms. Boyd also appeared as a member of Victoria Associates, Claimant's new counsel.

38. On the same day, Claimant, writing on his own and on Mr. Edward Sukyas' behalf, clarified that "Victoria Associates is not a law firm, but a network of arbitration specialists".

39. On 13 August 2021, the Tribunal decided to extend the suspension of the proceedings until 30 September 2021.

40. On 1 October 2021, Mr. Duarte G. Henriques and Mr. George Yates, from Victoria Associates, informed the Tribunal that they had been instructed by Claimant to represent him in the present proceedings.

41. On the same day, the Tribunal took note of the pending issues before the suspension of the proceedings and invited the Parties to discuss a new procedural timetable.

42. On 8 October 2021, both Parties submitted their proposals for a revised procedural timetable. On even date, Claimant confirmed that Ms. Sofia Cozac had joined his legal team.

43. On 27 October 2021, after discussing with the Parties, the Tribunal issued an amended procedural timetable.

44. On 2 November 2021, Claimant submitted his Response to the Respondent's Applications (see paragraph 24 above) dated 19 March 2021.

45. On 12 November 2021, Respondent filed a request for disclosure of evidence relating to the existence, nature, and extent of the alleged funding commitments of Hecht Partners towards Claimant. Respondent requested the Tribunal to order Claimant to produce evidence regarding his funding arrangement with Hecht Partners, so that Respondent would be able properly to respond to this issue.

46. On 13 November 2021, Claimant objected to submitting information regarding the role of Hecht Partners, other than that which had already been provided.

47. On 16 November 2021, the Tribunal ordered Claimant to: (i) explain in detail the existence, nature, and extent of his funding arrangement with Hecht Partners; and (ii) clarify at which points in time since the initiation of these proceedings Hecht Partners had been acting as Claimant's (a) on-the-record counsel, (b) off-the-record counsel, (c) funder, or (d) in any other capacity. The Tribunal instructed Claimant to provide these clarifications by 26 November 2021.

48. On the same day, Claimant responded as follows:

> "Claimant[] have in place a contingency fee arrangement with Hecht Partners, which was executed on or around 7 December 2020. This agreement was subject to an amendment on 28 September 2021 and it is still in force since December 2020.
>
> The contingency fee agreement is under strictly confidential terms and subject to attorney-client privilege, the contents of which may not be further disclosed.
>
> In this regard, Claimant[] may only report to the Tribunal that Hecht Partners is committed to pay the Tribunal's costs (here comprising arbitrators' fees and administrative fees, and any other costs associated with the functioning of the Tribunal) and the opposing party's attorneys' fees (as well as costs and expenses) in the event of an unsuccessful arbitral award.
>
> […]
>
> Hecht Partners acted as Claimant['s] 'on-the-record' counsel from 7 December 2020 through 30 March 2021 and Ms. Lee Boyd (through Hecht Partners) has acted as 'off-the-record' counsel (as previously reported, in Ms. Lee Boyd's capacity of US liaison counsel) since 28 September 2021. Hecht Partners and Ms. Lee Boyd are not acting nor have acted in any capacity other than those aforementioned".[5]

49. On 6 December 2021, Respondent filed its Reply to the Respondent's Applications.

50. On 26 December 2021, Claimant filed his Rejoinder to the Respondent's Applications.

51. On 30 January 2022, the Tribunal issued Procedural Order No. 2: (i) ordering Claimant to provide a written undertaking from Hecht Partners, confirming that it is committed to pay an adverse costs award (the "**Undertaking**"); and (ii) dismissing Respondent's Application for Disclosure of Third-Party Funder and Method of Funding.

52. On even date, Claimant confirmed that Mr. George Yates was no longer representing him in these proceedings and that Ms. Kathryn Lee Boyd had joined his legal team.

[5] Claimant's email dated 16 November 2021.

53. The Parties were unable to agree on the text of the Undertaking. On 15 March 2022, after hearing the Parties' positions, the Tribunal issued Procedural Order No. 3, setting out the text of the Undertaking.

54. On 1 April 2022, Claimant submitted Hecht Partners' written Undertaking confirming that it is committed to pay an adverse costs award.

55. On even date, Claimant filed his SoC. The SoC included: (i) the First Witness Statement of Mr. Jak Sukyas, dated 31 March 2022; (ii) the First Witness Statement of Mr. Edward Sukyas, dated 31 March 2022; (iii) the First Expert Report of Professor Lavinia Stan, dated 30 March 2022; (iv) the First Expert Report of Professor Dr. Flavius Antoniu Baias, dated 31 March 2022; (v) the First Expert Report of Mr. David Nolte, dated 1 April 2022; and (vi) factual and legal exhibits. As mentioned earlier, for the first time, Claimant also advanced claims pursuant to the Turkey-Romania BIT ("**Turkey-Romania BIT Claims**") in his SoC. On the same date, Claimant confirmed that International Arbitration Chambers New York had joined his legal team.

56. On 15 April 2022, Claimant confirmed that Mr. Duarte G. Henriques was no longer representing him in these proceedings.

57. On 28 May 2022, Respondent filed an application requesting the Tribunal to: (i) declare that the Turkey-Romania BIT Claims were inadmissible prior to Romania's filling of its Memorial on Jurisdiction and Admissibility ("**J&A Memorial**"); and (ii) grant a two-month extension of time to file its J&A Memorial.

58. On 2 June 2022, Claimant filed his response, objecting to Respondent's application.

59. On 9 June 2022, the Tribunal issued Procedural Order No. 4: (i) deciding that the Tribunal's jurisdiction and the admissibility of the Turkey-Romania BIT Claims should be addressed within the normal course of submissions regarding the first tranche of these proceedings; and (ii) granting an extension of time for Respondent to file its J&A Memorial.

60. On 8 August 2022, Respondent filed its J&A Memorial. The J&A Memorial included: (i) the First Expert Report of Professor Răzvan Dincă, dated 5 August 2022; and (ii) factual and legal exhibits.

61. On 14 November 2022, Claimant filed his Counter-Memorial on Jurisdiction and Admissibility ("**Counter-Memorial on J&A**"). The Counter-Memorial on J&A included: (i) the Second Expert Report of Professor Dr. Flavius Antoniu Baias, of even date; and (ii) factual and legal exhibits.

62. On 13 January 2023, Respondent submitted its Statement of Reply on Jurisdiction and Admissibility ("**SoR**"). The SoR included: (i) the Second Expert Report of Professor Răzvan Dincă, dated 11 January 2023; and (ii) factual and legal exhibits.

63. On 20 February 2023, the Parties agreed to hold the hearing at Hôtel du Louvre in Paris.

64. On 14 March 2023, Claimant filed his Statement of Rejoinder on Jurisdiction and Admissibility ("**SoRj**"). The SoRj included: (i) the Third Expert Report of Professor Dr. Flavius Antoniu Baias, of even date; and (ii) factual and legal exhibits.

65. On 19 April 2023, the Tribunal sent a letter to the Parties concerning the hearing arrangements.

66. On 18 May 2023, Respondent confirmed that Mr. Pierre-Olivier Laporte and Ms. Justine Touzet from Savoie Laporte s.e.n.c.r.l., were no longer representing Romania in these proceedings and that Mr. Daniel Müller from FAR Avocats had joined Respondent's legal team.

67. On 1 June 2023, the Tribunal sent an additional letter to the Parties concerning the hearing arrangements.

68. On 10 June 2023, Claimant submitted a letter to the Tribunal, including a proposal concerning how to conduct a public hearing. The Parties actively discussed this issue until 30 June 2023.

69. On 3 July 2023, the Tribunal ruled as follows regarding the transparency of the hearing:

> "In order to comply with Annex C of the 2009 Canada-Romania BIT, the Parties should secure a room in the Hotel, or in a different venue (the 'Viewing Room'), in which the hearing will be live-streamed but without any recording being made. Any issue concerning confidentiality shall be raised and decided during the hearing without it being transmitted to the Viewing Room. The Parties shall ensure that there is also a camera at the Viewing Room, to ensure that the Tribunal is able to see the participants in the Viewing Room.

> The Parties are invited to liaise with the PCA to issue a Press Release announcing when the hearing will be held and how the transparency obligations will be respected. The Parties shall bear these costs in equal shares, which should not be paid from the funds held by the PCA".

70. On 5 July 2023, the PCA issued a press-release concerning the publicity of the hearing.

71. From 10-13 July 2023, an in-person hearing was held at Hôtel du Louvre in Paris.

72. On 15 September 2023, the Parties filed a joint list of corrections to the hearing transcripts.

73. On 15 September 2023, the Parties filed their costs submissions.

74. On 29 September 2023, Respondent filed its comments on Claimant's costs submission.

75. On 6 October 2023, Claimant replied to Respondent's comments.

76. On 25 March 2024, Claimant confirmed that International Arbitration Chambers was no longer representing him in these proceedings and that Potestas Partners had joined his legal team.

CHAPTER V. THE ABRIDGED FACTUAL BACKGROUND[6]

Section I. Messrs Melik and Vahram Sukyas and Messrs Jak and Edward Sukyas

77. According to Claimant, Mr. Melik Sukyas ("**Melik**") was born in Turkey in or about 1892. After immigrating to the U.S. and settling in New York, he became an American citizen in 1919 and remained one until his death in 1959. Melik's brother, Mr. Vahram Sukyas ("**Vahram**"), was born in Turkey on 25 January 1897.

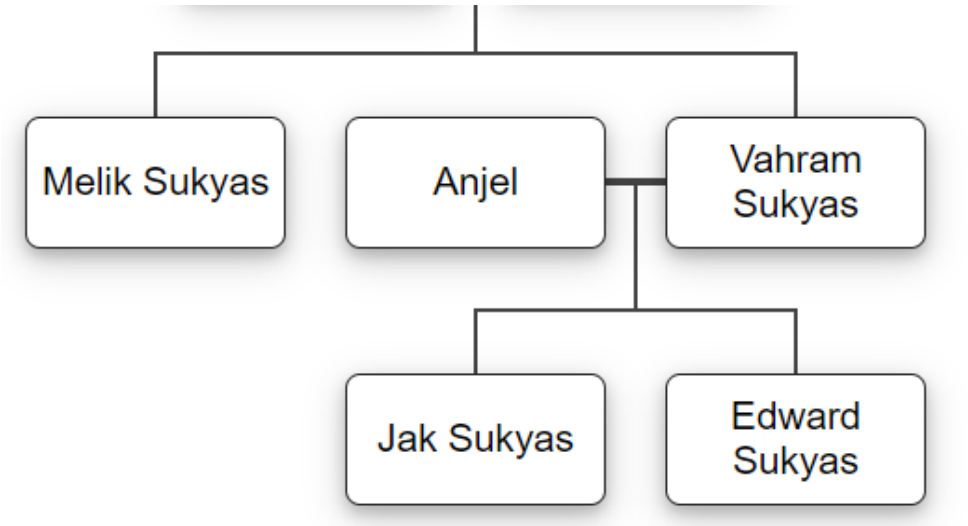
[6] The Tribunal clarifies that this section is an "abridged" factual background as opposed to a full factual background. Respondent has not yet presented its case concerning some of the historic events which led to the dispute between the Parties. Accordingly, the Tribunal has only set out the essential facts required to contextualize the dispute and to solve the preliminary objections in this Award. If required, the factual background may be amended in a future stage of the proceedings.

Messrs. Melik and Vahram Sukyas are hereinafter referred to as the "**Late Sukyas Brothers**".[7]

78. Out of the marriage between Vahram and Mrs. Anjel Bogcaliyan, Messrs Jak and Edward Sukyas were born in 1943 and 1946 respectively (the "**Sukyas Brothers**").[8]

79. Claimant submits that the Sukyas Brothers hold the following nationalities: (i) Mr. Jak Sukyas: (a) Turkish nationality by birth; and (b) U.S. citizenship acquired on 28 November 1990; and (ii) Mr. Edward Sukyas: (a) Turkish nationality by birth; and (b) Canadian citizenship acquired in 1977.[9]

80. The following diagram illustrates Claimant's relevant family tree.



Section II. The Late Sukyas Brothers' Businesses in Romania

81. Around the 1920s, Melik used his savings to start a film export business in New York. Soon thereafter, Melik brought Vahram into his business. Vahram began to travel regularly and then moved to Romania to handle the distribution of American films in that country.[10]

---

7 SoC, paras. 33-34; **Exhibit C-001**, Foreign Claims Settlement Commission Statement of Claim, dated 29 September 1956; **Exhibit C-002**, American Foreign Service Report of the Death of an American Citizen, dated 4 May 1959; **Exhibit C-003**, Vahram Sukyas Probate Documentation, dated 22 November 1983.

8 SoC, para. 120; J&A Memorial, para. 35; **Exhibit C-003**, Vahram Sukyas Probate Documentation, dated 22 November 1983; WS of Mr. Jak Sukyas, paras. 1.1.1, 1.1.5; WS of Mr. Edward Sukyas, paras. 1.1.1, 1.1.5.

9 WS of Mr. Jak Sukyas, para. 1.1.2; WS of Mr. Edward Sukyas, para. 1.1.2.

10 SoC, para. 36; WS of Mr. Jak Sukyas, paras. 1.1.2-1.1.10.

82. According to Claimant, through hard work and favorable market factors, in the 1930s, the Late Sukyas Brothers became the most important film distributors in Romania. The success allowed Vahram to acquire one of Bucharest's landmark residential mansions located at 10 Strada Herastrau.[11]

83. Around 1939-40, Melik acquired Cinegrafia Română, a privately held Romanian "corporation limited by shares" doing business under the "CIRO-FILM" trademark ("**CIRO**"). CIRO was organized as a joint-stock company under the laws of Romania.[12]

84. Claimant further explains that CIRO owned a fully functioning film production and post-production studio named Laboratorul Mogoşoaia (the "**Laboratory**"), which operated principally out of its facilities in Mogoşoaia in the outskirts of Bucharest. The term "laboratory" is customarily used in Romania to refer to the film facilities providing post-production processes, such as dubbing, editing, subtitling, synchronization, and copying. These processes required the purchase and assembly of a complex of machines and apparatuses. The Late Sukyas Brothers made the Laboratory into a state-of-the-art pre-production, production, and post-production plant, performing a full range of services.[13]

Section III. The Alleged Seizure of CIRO in 1942 and its Restauration in 1946

85. In April 1941, Marshal Antonescu's government issued a decree nationalizing foreign cinematographic laboratories. Because of Melik's U.S. citizenship, CIRO was considered an American company. After some court proceedings in Bucharest, and further decrees, on 30 March 1942, the Commercial Administration of the National Cinematographic Office ("**ONC**") of the Ministry of Propaganda physically seized CIRO's entire Laboratory.[14]

86. In mid-1944, Marshal Antonescu was overthrown and arrested and, on 12 September 1944, the U.S., the UK, and the USSR entered into an Armistice Agreement with Romania. Among other provisions, Article 13 of the Armistice Agreement obligated Romania to "[…] restore all legal rights and interests of the

---

[11] SoC, para. 42.

[12] SoC, paras. 44-45; **Exhibit C-012**, CIRO 23 June 1940 and 16 December 1940 Submitted shares and shareholder meeting minutes, dated 1940, p. 8; **Exhibit C-022**, Shareholders attending ordinary general meeting dated 29 June 1945, dated 29 June 1945.

[13] SoC, para. 47; WS of Mr. Jak Sukyas, paras. 1.2.1- 1.2.6; WS of Mr. Edward Sukyas, paras. 1.2.1- 1.2.6.

[14] SoC, paras. 57-59. **Exhibit CL-001**, Decree Law no. 960 of 1941, dated 7 March 1941; **Exhibit C-009**, 1946 Memorial, dated 31 March 1946, pp. 9, 26, 33; **Exhibit C-039**, Letter to Chairman of the Court of Appeal 3rd Section, dated 30 March 1942.

United Nations and their nationals on Rumanian territory as they existed before the war and to return their property in complete good order".[15]

87. Claimant avers that eventually, on 4 January 1946, the Late Sukyas Brothers regained control of the Laboratory and took immediate action to repair the damage, including purchases of new equipment, with the hope to return CIRO to pre-war operational status.[16]

88. Claimant submits that by 11 September 1946, the Late Sukyas Brothers were CIRO's only shareholders, each owning 50% pursuant to 1946 notarized conventions.[17] The Tribunal notes that the record shows inconsistent statements concerning CIRO's ownership between 1946 and 1948.[18] However, at this juncture, it is not required to determine exactly how CIRO's ownership was distributed between the Late Sukyas Brothers before the alleged taking of the company in 1948.

Section IV. The Alleged Taking of CIRO's Shares in 1948 and Subsequent Operation of the Laboratory by Romania

89. According to Claimant, a month after the Yalta conference, with the Red Army still stationed in the country, Stalin pressured King Mihai to install Dr. Petru Groza as Prime Minister of Romania, who took office on 6 March 1945.[19]

90. The Romanian secret police maintained a file on Vahram. The file described his ethnicity, citizenship, "rich relatives in America", and "enviable material situation". The secret police also knew that the Late Sukyas Brothers owned CIRO and Astoria Film, S.A. ("**Astoria**"), which was the exclusive distributor for Metro Goldwyn Mayer in Romania.[20]

---

15 SoC, paras. 63-64; **Exhibit C-189**, Agreement Between the Governments of the United States of America, the United Kingdom, and the Union of Soviet Socialist Republics, on the One Hand, and the Government of Rumania, on the Other Hand, Concerning an Armistice, dated 12 September 1944.

16 SoC, para. 73; **Exhibit C-046**, Vahram Sukyas Affidavit in Support of Foreign Claims Settlement Commission Statement of Claim, dated 11 September 1956, p. 2.

17 SoC, paras. 44-45; **Exhibit C-009**, 1946 Memorial, dated 31 March 1946, pp. 1-8; **Exhibit C-012**, CIRO 23 June 1940 and 16 December 1940 Submitted shares and shareholder meeting minutes, dated 1940, p. 8; **Exhibit C-022**, Shareholders attending ordinary general meeting, dated 29 June 1945; **Exhibit C-015**, Agreement between Melik Sukyas and Vahram Sukyas re Astoria Film, dated 11 September 1946.

18 See **Exhibit C-008**, Vahram Sukyas Letter to the American Legation, dated 10 July 1948, pp. 1-4; **Exhibit C-009**, 1946 Memorial, dated 31 March 1946, p. 9; **Exhibit C-015**, Agreement between Melik Sukyas and Vahram Sukyas re Astoria Film, dated 11 September 1946, p. 1; **Exhibit C-016**, Agreement between Melik Sukyas and Vahram Sukyas re Astoria Film, dated 11 September 1946, p.1.

19 SoC, para. 97; **CE-1**, Report of Professor Lavinia Stan, para. 13.

20 SoC, para. 111; **Exhibit C-007**, Vahram Sukyas Securitate File, dated 12 February 2013, p. 6.

91. Claimant alleges that, in January 1948, Romania effectively shut Astoria down.[21] Claimant avers that with the safety of his family in mind, and hoping to forestall a seizure of CIRO, Vahram approached the Romanian Ministry of Information to try to smooth relations with the authorities. The Ministry allegedly requested Vahram to sell CIRO to the government and to propose a sale price.[22]

92. Claimant avers that, Vahram suggested a symbolic price of USD 166.000 hoping to salvage something of his and his brother's business, but the offer was rejected. Instead, on or about 15 February 1948, Romanian officials (the General Audit Directorate of the Ministry of Industry and Commerce) came to CIRO's offices to inspect its books.[23]

93. Claimant posits that on 19 February 1948, Romanian secret police stormed Vahram's home without a warrant or formal charges to arrest him for crimes ostensibly relating to the "inspection" that took place a few days prior.[24]

94. According to Claimant, from the moment of his detention, agents of the state continually interrogated and psychologically tortured Vahram, making him believe that they would inflict harm upon himself, his family, and his co-workers if he did not capitulate to the state's "suggestion" that he relinquish CIRO on the state's terms.[25]

95. Claimant submits that on 20 March 1948, after having been "arrested and imprisoned" on charges of economic sabotage and illegal speculation (based on a piece of legislation —Law No. 351/1945— introduced by the communist regime on 2 May 1945), a court convicted Vahram and ordered him to pay a 30.000 lei fine, which he paid on the same day.[26] According to Claimant, although the court did not sentence Vahram to jail, Romania continued to detain him after he paid the penalty.[27]

---

[21] **Exhibit C-047**, Vahram Sukyas Affidavit re Astoria Films in Support of Foreign Claims Settlement Commission Statement of Claim, dated 11 September 1956, pp. 2-3.

[22] SoC, para. 116; **Exhibit C-046**, Vahram Sukyas Affidavit in Support of Foreign Claims Settlement Commission Statement of Claim, dated 11 September 1956, p. 3; **Exhibit C-008**, Vahram Sukyas Letter to the American Legation, dated 10 July 1948, p. 3.

[23] SoC, paras. 117-119; **Exhibit C-008**, Vahram Sukyas Letter to the American Legation, dated 10 July 1948, p. 3; WS of Mr. Jak Sukyas, paras. 1.8.9.

[24] SoC, para. 119; WS of Mr. Jak Sukyas, paras. 1.8.9-1.8.10; **Exhibit C-008**, Vahram Sukyas Letter to the American Legation, dated 10 July 1948, p. 3.

[25] SoC, para. 122. WS of Mr. Jak Sukyas, para. 1.8.11; WS of Mr. Edward Sukyas, paras. 1.5.11.

[26] SoC, paras. 124-127; WS of Mr. Jak Sukyas, paras. 1.8.10-1.8.13; **Exhibit C-064**, Arrest Warrant No. 731 A/946 for Vahram Sukyas from the Ministry of Industry and Commerce dated 2 March 1948, p. 2; **Exhibit C-008**, Vahram Sukyas Letter to the American Legation, dated 10 July 1948, p. 3.

[27] SoC, para. 129; WS of Mr. Jak Sukyas, para. 1.8.14.

96. On 27 March 1948, Romania released Vahram from the Vacaresti Penitentiary allegedly only after he agreed to cooperate in CIRO's "sale".[28]

97. Claimant submits that after Vahram's release on 27 March 1948, the latter met with the Ministry of Information and, acting on the "coerced" promise he had made in the Vacaresti Penitentiary, proposed to give CIRO to Romania for USD 66,666. Vahram's only condition was that he and his family would not be harmed but given exit visas to leave Romania. Claimant further avers that the Ministry of Information dictated to Vahram that he had to accept only a tenth of the proposed amount, which was, in any event, never paid.[29]

98. According to Claimant, on 14 April 1948, the Ministry of Information (under which the Secret Police operated) "forced" Vahram to place his signature on the following minutes (the "**1948 Minutes**"):[30]

> "MINUTES
> Of the Extraordinary General Meeting of
> CINEGRAFIA ROMANA Company with CIRO FILM logo of
> April 14, 1948
>
> Today, April 14, 1948, at 10 a.m., an extraordinary general meeting took place in the central office, consisting of the following officers:
>
> President Vahram Sukyas, secretary Attorney M. Savulescu, and secretaries Tudor Posmantir and Engineer C. C. Craciunescu.
>
> It turns out that all the shares are the property of the 'National Cinematography Office' Business Administration, which is represented at the meeting by its Manager, Mr. Ion Vaida.
>
> Following the items on the agenda of the extraordinary general meeting, it is decided unanimously:
>
> 1) The dissolution of the company in liquidation today, April 14, 1948.

---

[28] SoC, paras. 130-131; WS of Mr. Jak Sukyas, para. 1.8.13-1.8.14; **Exhibit C-008**, Vahram Sukyas Letter to the American Legation, dated 10 July 1948, pp. 3-4.; **Exhibit C-069**, Release Certificate No. C12764 re Vahram Sukyas on 27 March 1948.

[29] SoC, para. 132; WS of Mr. Jak Sukyas, para. 1.8.15; **Exhibit C-046**, Vahram Sukyas Affidavit in Support of Foreign Claims Settlement Commission Statement of Claim, dated 11 September 1956, p. 3; **Exhibit C-008**, Vahram Sukyas Letter to the American Legation, dated 10 July 1948, pp. 3-5.

[30] SoC, para. 135; **Exhibit C-046**, Vahram Sukyas Affidavit in Support of Foreign Claims Settlement Commission Statement of Claim, dated 11 September 1956, p. 4; **Exhibit C-031**, George Posmantir Affidavit dated 11 June 1959, p. 3; **Exhibit C-075**, Minutes of CIRO Extraordinary Meeting of 14 April 1948.

2) Attorney M. Savulescu is appointed as liquidator and will be in charge of all the legal formalities and the deregistration of the company

3) All the assets and liabilities resulted from the liquidation shall be taken over by the Business Operations.

4) The entire personnel of the company shall be taken over by the 'National Cinematography Office' Business Administration.

As the agenda was completed, the meeting was adjourned.

[…]

The sole shareholder present at the meeting, the 'National Cinematography Office' Business Administration".[31]

99. On 21 April 1948, CIRO sent a letter to the President of the court of Ilfov county in Bucharest, acting as Trade Register for CIRO, to request the approval and registration of the resolutions in the 1948 Minutes.[32]

"CINEGRAFIA ROMANA S.A.R.
CIRO-FILM
Registered in the Trade Register with no. 76/936 Company CINEMATOGRAPHY STUDIO AND LABORATORY Bucharest Soseaua Mogosoaia without number warehouse next to 'Distributia'
Telegraph: CIROFILM)

[stamp:] ILFOV, DIVISION [illegible]
9108 of 04/21/1948
INGOING [illegible handwriting]

[stamp:] [NATIONAL ARCHIVES]

-2-

MISTER PRESIDENT,

The undersigned S.A.R. CINEGRAFIA ROMANA (Ciro-Film), with address for service at the Ministry of Arts and Information National Cinematography Office in Bucharest, str. Wilson. No. 8, has the honor to ask you to deliver a decision of approval of the dissolution of our company, which was decided by the Extraordinary General Assembly on April 14, 1948, as well as the deregistration of the company by the Trade Register Office in Bucharest. [illegible handwriting]

[31] **Exhibit C-075**, Minutes of CIRO Extraordinary Meeting of 14 April 1948.
[32] SoC, para. 151.

> The National Cinematography Office, upon buying all the shares of the company at the stock exchange on April 12, 1948, decided, in its capacity as sole shareholder in the Extraordinary General Assembly of April 14, 1948, to dissolve the company ant to enter it to liquidation on the same date. All the assets and liabilities as well as the entire personnel of the dissolved and liquidated company shall be taken over by the National Cinematography Office.
>
> We attach the approval by the Ministry of Commerce as well as the approval of the Prosecutor at the Prosecutor's Office of the Ilfov Tribunal.
>
> We also attach the minutes of the Extraordinary General Assembly of April 14, 1948.
>
> Sincerely,
> CIROFILM CINEGRAFIA ROMANA S.A.R. [signature]
> TO THE PRESIDENT OF THE ILFOV COURT, 2ND CIVIL COMMERCIAL DIVISION".[33]

100. The judge approved the registration request. The Official Gazette published the approval on 23 April 1948, formally dissolving CIRO. On 29 April 1948, ONC formally took over CIRO's Laboratory.[34]

101. Two weeks after ONC definitively took possession of CIRO's Laboratory, on 11 May 1948, a criminal panel in Bucharest acquitted Vahram, his co-workers, and CIRO of any wrongdoing or criminal charges.[35]

102. In the 1980s, ONC changed its name to "Centrul Național al Cinematografiei" ("CNC"). After the revolution and fall of communism in Romania, in 1991, the Romanian government created *Regia Autonomă de Distribuție și Exploatare a Filmelor România Film* by Government Decision No. 530 of 1 August 1991 ("**RADEF**"). RADEF is wholly owned by the Romanian government. In 1991, RADEF took over from CNC the Laboratory, which operated in the same building complex that CIRO was in when it was owned by Melik and Vahram.[36]

---

[33] **Exhibit C-073**, Letter from CIRO to Ilfov Tribunal, dated 21 April 1948.

[34] SoC, para. 158; WS of Mr. Jak Sukyas, paras. 1.8.20-1.8.21; **Exhibit C-073**, Letter from CIRO to Ilfov Tribunal, dated 21 April 1948, p. 2; **Exhibit C-077**, Decision No. 6587 from 29 September 2011 in case 26916/3/2008 (Court of Cassation, Civil and Intellectual Property Division), p. 4; **Exhibit C-078**, Letter from National Office of Cinematography to CIRO (No. 186) dated 29 April 1948.

[35] SoC, para. 165; **Exhibit C-080**, Ruling No. 4541 from 11 May 1948 in case 2400/948 (Bucharest Court of Appeal).

[36] SoC, paras. 171-172; **Exhibit C-092**, Excerpt from the Official Gazette of Romania (Part I) No. 178 for 2 September 2011, pp. 1-2; **Exhibit C-093**, History - CNC - National Cinematography Center, dated 10 February 2016, p. 2; **Exhibit C-023**, U.S. Action Deposition Transcript of Dana Marie Georgescu, dated 14 December 2016, pp. 30-31, 117-118, 128-129, 138.

Section V. The Compensation Treaties Entered into by Romania between 1951 and 1971

103. Romania concluded settlement treaties, *inter alia,* with the following countries: (i) the United States, on 30 March 1960 ("**1960 US-Romania Compensation Treaty**"); (ii) Turkey, on 22 June 1965; and (iii) Canada, on 13 July 1971.[37]

104. Prior to the conclusion of the 1960 US-Romania Compensation Treaty, the United States put in place a domestic claims programme to address claims against Romania, which was based on the 1949 International Claims Settlement Act, as amended in 1955 by Public Law 285 ("**ICSA**"). ICSA created the Foreign Claims Settlement Commission ("**FCSC**"), which was vested with the power to adjudicate *inter alia* the legal claims under both the domestic claims programme and the 1960 US-Romania Compensation Treaty and created the Romanian Claims Fund ("**RCF**").[38]

105. Under the 1960 US-Romania Compensation Treaty, Romania paid to the United States a lump sum amount of USD 24.5 million to settle all outstanding war and nationalisation claims against Romania.[39] Articles I and III of the US-Romania Compensation Treaty provide as follows:

> "(1) The Government of the United States of America and the Government of the Rumanian People's Republic agree that the lump sum of $24,526,370, as specified in Article III, will constitute full and final settlement and discharge of the claims described below:
>
> (a) Claims for the restoration of, or payment of compensation for, property, rights and interests of nationals of the United States of America, as specified in Articles 24 and 25 of the Treaty of Peace with Rumania which entered into force on September 15, 1947.[]
> (b) Claims for the nationalization, compulsory liquidation; or other taking, prior to the date of this Agreement of property, rights and interests of nationals of the United States of America in Rumania; […]
>
> The sum of $24,526,370 referred to in Article I of this Agreement shall be made up as follows:

---

[37] **Exhibit CL-070**, 1960 US-Romania Agreement, 371 UNTS 163 (UNTS Reg. No. 5278), dated 30 March 1960; **Exhibit RL-082**, Agreement between the Government of the Romanian People's Republic and the Government of the Republic of Turkey for the settlement of pending financial issues, dated 22 June 1965; **Exhibit CL-072**, 1971 Canada-Romania Agreement, dated 13 July 1971.

[38] J&A Memorial, para. 56; Counter-Memorial on J&A, para. 20; **Exhibit CL-219**, Pub. L. No. 84-285 (1955), 22 U.S.C. 1631 et seq., dated 9 August 1955.

[39] J&A Memorial, para. 55.

(a) The proceeds resulting from the liquidation of assets in the United States of America which were subject to wartime blocking controls and which belonged to the Rumanian Government and its nationals, other than natural persons, amounting in value to $22,026,370.

(b) A sum of $2,500,000 which shall be paid by the Government of the Rumanian People's Republic to the Government of the United States of America in five installments, each of which shall be in the amount of $500,000. The first installment shall be paid on July 1, 1960. The four remaining installments shall be paid on July 1, 1961, July 1, 1962, July 1, 1963, and July 1, 1964, respectively".[40]

Section VI. The Alleged Compensation towards Mr. Melik Sukyas by the U.S. and his Succession

106. By a Final Decision of 17 July 1959, the FCSC awarded Melik Sukyas[41] USD 49,500 in compensation and USD 17,340.42 in interests (according to Respondent, in August 2022's currency, about USD 600,000[42]). Of the compensation amount, just a little over half (USD 25,000) was provided specifically for the alleged nationalisation of CIRO ("**FCSC Final Decision**").[43] Whether this claim fell within the domestic claims programme, or within the international claims programme under the US-Romania Compensation Treaty is a disputed issue between the Parties.[44]

107. Melik Sukyas passed away on 9 April 1959, shortly before the FCSC Final Decision. As a result, the four payments for a total of USD 18,583.45 made pursuant to this decision (two in 1960, one in 1968, and a last one in 1972) went to Melik's sole heir and legatee: his brother Vahram, the father of the Sukyas Brothers.[45]

108. The Parties seem to agree that, just like other successful claimants against Romania before the FCSC, Melik (respectively his successor Vahram, as explained above)

---

40 **Exhibit RL-003**, Articles I, and III, 1960 US-Romania Compensation Treaty.

41 The Tribunal notes that it is undisputed that the claims Melik submitted to the FCSC were for *inter alia*, 100% of the shares of CIRO and the property located at 10 Strada Herastrau. J&A Memorial, para. 79. See also, **Exhibit C-046**, Vahram Sukyas Affidavit in Support of Foreign Claims Settlement Commission Statement of Claim, dated 11 September 1956, p. 1; **Exhibit C-271**, Foreign Claims Settlement Commission Final Decision dated 17 July 1959.

42 J&A Memorial, para. 120.

43 **Exhibit C-271**, Foreign Claims Settlement Commission Final Decision dated 17 July 1959.

44 SoC, para. 510, Footnote No. 758; Counter-Memorial on J&A, para. 28; J&A Memorial, paras. 58, 76.

45 SoC, Footnote No. 758; Counter-Memorial on J&A, paras. 23, 33; J&A Memorial, para. 77; **Exhibit C-273**, Statement of Account re Award of the Foreign Claims Settlement Commission to the estate of Melik Jacques Soukias; **Exhibit R-006**, Last Will and Testament of Melik Soukyas, dated 12 January 1957; **Exhibit R-007**, Petition to the Surrogate's Court of the County of New York attaching Melik's Last Will and Testament, dated 9 April 1959; **Exhibit R-008**, Release document signed by Vahram Sukyas, dated 24 July 1962; **Exhibit C-345**, American Foreign Service, Report of the Death of an American Citizen; Last will of Melik Sukyas, dated May 4, 1959. The Tribunal notes that the Parties have used the terms "heir" and "legatee" interchangeably throughout their submissions.

would have received only a percentage of his award, based on the amount of funds available for distribution.[46]

Section VII. The Various Proceedings Initiated by the Sukyas Brothers before Romanian Courts

I. The Proceedings Brought by the Sukyas Brothers under Law 10 of 2001

A. The Administrative Proceedings under Law 10 of 2001

109. In 2001, Romania adopted Law 10 of 2001 ("**Law 10/2001**"). The most relevant articles of Law 10/2001 are transcribed below.

110. Articles 1, 3, and 4 of Law 10/2001 provide as follows:

> "Article 1.
> (1) The immovable property abusively taken over by the state, cooperatives or any other legal entity during 6 March 1945 - 22 December 1989, and those taken by the State under Law no. 139/1940 on requisitions and not restituted, shall be restituted in kind, as a general rule, under the conditions of the present law […]
>
> Article 3.
> (1) There are entitled to reparatory measures consisting of restitution in kind or, by equivalent, as the case may be, within the meaning of this law:
>
> a) individuals, owners of immovable property on the date of the abusive takeover […]
>
> Article 4 […]
> (2) The heirs of the entitled persons also benefit from the provisions of this law".[47]

111. Article 2(h) of Law 10/2001 reads as follows:

> "[…] For the purposes of this law, abusively taken over immovable property means: […]
>
> h) any other immovable property taken without valid title or without the observance of the legal provisions in force on the date of the taking over, as well as the ones taken without legal grounds by acts of disposition of the local bodies of power or state administration".[48]

---

[46] SoC, Footnote No. 758; J&A Memorial, para. 124.
[47] **Exhibit CL-10**, Articles 1, 3, and 4 of Law 10/2001.
[48] **Exhibit CL-10**, Article 2(h) of Law 10/2001.

112. Article 7 of Law 10/2001 provides that:

> "(1) As a general rule, immovable property abusively taken over will be restituted in kind.
>
> (2) If restitution in kind is possible, the entitled person may not choose reparatory measures by equivalent except for the cases expressly provided by this law".[49]

113. Article 20 of Law 10/2001 reads as follows:

> "(1) Abusively taken over immovable properties – land and buildings –, regardless of the destination, which are owned on the date of entry into force of this law by an autonomous regie, a national company or enterprise, a commercial company in which the state or an authority of the central or local public administration is a majority shareholder or associate, by a cooperative organization or by any other legal person, will be restituted in kind to the entitled person, by a grounded decision or disposition of the management bodies of the holding unit, as the case may be […]".[50]

114. Article 23 of Law 10/2001 provides that:

> "(1) Within 60 days from the registration of the notification or from the date of submission of the underlying documents as per art. 22, as the case may be, the holding unit must decide on the request for restitution in kind, by reasoned decision or disposition, as the case may be […]".[51]

115. Finally, Article 1(e) of the Methodological Norms for the Uniform Application of Law 10/2001 ("**Methodological Norms**") reads as follows:

> "(e) the burden of proof of ownership and legal possession at the time of the abusive takeover shall lie with the person claiming to be entitled, in accordance with the provisions of Articles 3(a) and 22 of the Law. If formal proof of the taking of the property by the State cannot be provided (e.g. the administrative decision is not found and the property is in the State's ownership after the date claimed as the date of the taking of the property), the notification will also be decided on the basis of this element - the fact that the property is in the State's ownership constitutes a relative presumption of wrongful taking - i.e. without title".[52]

---

[49] **Exhibit CL-10**, Article 7 of Law 10/2001.
[50] **Exhibit CL-10**, Article 20 of Law 10/2001.
[51] **Exhibit CL-10**, Article 23 of Law 10/2001.
[52] **Exhibit CL-12**, Article 23 of the Methodological Norms for the Uniform Application of Law 10/2001.

116. On 23 October 2001, the Sukyas Brothers filed an application requesting the restitution of the plot of land (3,000 m²) and the Laboratory's building on that plot of land against RADEF.[53]

117. After some exchanges, on 21 August 2002, RADEF requested the Sukyas Brothers to provide a list of documents to assess their application.[54] According to Claimant, the Sukyas Brothers filed with RADEF all the relevant documents between March and May 2003.[55]

118. In late 2003, the Sukyas Brothers requested the courts to compel RADEF to comply with its obligations under Article 23(1) of Law 10/2001 to issue a decision on the request for restitution. On 20 January 2004, RADEF replied that it had no legal standing since the Laboratory had been transferred to CNC on 3 December 2003. On 20 May 2004, the Sukyas Brothers requested to join CNC to the abovementioned court proceedings. On 30 May 2005, the court issued Decision 5382 granting the Sukyas Brothers' motion and ordering CNC to issue a decision on their restitution request.[56]

119. According to Claimant, CNC did not comply with the court's decision and instead transferred the control of the Laboratory back to RADEF.[57]

120. On 6 February 2007, the Sukyas Brothers filed a further request with the Bucharest Tribunal to order RADEF to issue a decision on the request for restitution. On 9 March 2007, the Bucharest Tribunal ordered RADEF to issue a decision.[58]

121. On 1 July 2008, RADEF issued Decision 102, denying restitution on the ground that the Sukyas Brothers had failed to prove the abusive taking of the assets ("**Decision 102**"). Decision 102 reads as follows:

> "The General Manager of RADEF Romania Film
>
> DECIDES

---

53 **Exhibit C-110**, Notification from Jak and Edward Sukyas to the Authority for Privatization and Management of the State Participations (No. 4189), dated 23 October 2001.

54 SoC, paras. 220-221; **Exhibit C-116**, Letter from RADEF to Jak and Edward Sukyas (No. 3849) dated 21 August 2002.

55 SoC, para. 221; **CE-2**, Report of Professor Baias, para. 53.

56 **Exhibit C-120**, Statement of Defense RADEF (File no. 4412/2003), dated 13 January 2004; **Exhibit C-125**, Ruling No. 5382 from 30 May 2005 in case 6002/2004 (Bucharest District 1 Court), dated 30 May 2005; SoC, paras. 225-230.

57 SoC, paras. 231-233; **CE-2**, Report of Professor Baias, para. 59.

58 **Exhibit C-144**, Claim against RADEF (File no. 4214/3/2007), dated 6 February 2007; **Exhibit C-145**, Decision no. 354 from 9 March 2007 in case 4214/3/2007 (Bucharest Tribunal), dated 9 March 2007.

> Art.1. Rejects the claim for restitution in kind of a part of the real estate 'Laboratorul de prelucrare a peliculei Mogosoaia' located in Sos, Straulescti no. 3-5 (former Mogosoaia Road), 1st district, Bucharest, submitted by Mr. Jak Sukyas and Edvard Sukyas through notification no. 4190/23.10/2001, to which the plaintiffs have referred to in notifications no: No. 4191/23.10.2001, 4189/23.10.2001, 946/21.04.2001 and 947/21.04.2004, based on the ground that the latters have not proved that according to the law, the undertaking of the real estate from their predecessors, respectively Melik Soukias and Vahram Sukyas, has been done abusively […]".[59]

B. The Judicial Review of RADEF's Decision under Law 10/2001

122. On 10 July 2008, the Sukyas Brothers challenged Decision 102 before the Bucharest Tribunal acting as a first instance court. On 6 April 2009, the Bucharest Tribunal dismissed the Sukyas Brothers' request. The most relevant parts of the decision are transcribed below:[60]

> "The opponents proved the capacity as person entitled, by the rules of Law 10/2001, but the tribunal holds that they did not prove, pursuant to Law 10/2001 that the immovable property composed of a plot of land and a construction whose restitution is requested was transferred to the state abusively.
>
> From the evidence submitted in the case file the tribunal holds that the immovable property composed of a construction and a plot of land with an area of 3,000 sqm situated in 3-5 Straulesti (former Mogosoaia Road) district 1, Bucharest, identified as a part of Mogosoaia Film Processing Laboratory belonged to [CIRO] and became a national property on 14 April 1948 by the unanimous decision of the extraordinary general meeting of said company' [sic] shareholders, formed of the claimants' predecessors.
>
> Thus, since 14 April 1948 the immovable property […] has become the property of the Romanian state, who used it effectively by various institutions and is now managed by R.A.D.E.F. 'Romania Film' - autonomous administration of national interest.
>
> Tribunal rejects the allegations of claimants that the immovable property […] became a national property abusively based on Law 119/1948 since on the date of coming into effect of said regulation, i.e. 11 June 1948, the immovable property had already become a national property and on 14 April 1948 by the unanimous decision of the extraordinary general meeting of the shareholders of said company, formed of claimants' predecessors, i.e. Melik Soukias and Vahram Sukyas.

[59] **Exhibit C-146**, Decision RADEF No. 102, dated 1 July 2008.
[60] SoC, para. 248.

> Thus, the predecessors of claimants, Melik Soukias and Vahram Sukyas, as former associates of [CIRO], who owned the immovable property, decided in the extraordinary general meeting dated 14 April 1948 to dissolve the company and transfer all the assets and liabilities deriving from the liquidation to the Commercial Administration [ONC], as recorded both in the archives of the Chamber of Commerce and Industry of Bucharest […]".[61] [emphases added].

123. According to Claimant, the Bucharest Tribunal held that the Sukyas Brothers had discharged their burden of proof under Law 10/2001, but then instead of requiring RADEF to discharge theirs and show how the Romanian state acquired CIRO's shares, it continued to state that the Sukyas Brothers had not made a showing that the claimed real estate was transferred to the state abusively – a burden that was legally placed on RADEF to discharge, not on the Sukyas Brothers.[62]

124. On 27 May 2009, the Sukyas Brothers filed an appeal to the Bucharest Court of Appeal ("**BCA**").[63] On 22 March 2010, the BCA rendered its decision. The most relevant parts of the decision are reproduced below:

> "[…] the application filed to the Ilfov County from 04.21.1948 (hence previous to the nationalization of the stock exchange on 11 June 1948) […] the National Film Office on 12/04/1948 bought through the stock exchange all shares of [CIRO], thus becoming the sole shareholder […]
>
> According to the content of this application, based on this stock transaction, becoming the sole shareholder of the company Ciro Film, the National Film Office convened the general meeting of shareholders on 04.14.1948 and decided to liquidate the company, transferring all assets to the sole shareholder. […]
>
> The Court Ilfov certified the legality of the measures taken under this general meeting, and thus the legality of the ownership structure, without which the judge at the Trade Registry could not take note of the modifications […]
>
> The Court is unable to endorse the appellant's critics that in fact Vahram Sukyas was forced to preside over the general assembly and that in fact, that was the moment when the expropriation by the communist state took place amid his unlawful arrest, because as previously shown, the shares' transfer was carried out previously by purchasing them on the stock market on 04.12.1948, any pressure exerted afterwards being irrelevant. As on 04.14.1948, the national office was already the main shareholder and as the immovable asset in dispute belonged to the company, it is obvious that the decision dated 14.04.1948 could not operate the transfer of ownership, the mention contained in paragraph 3 of the minute assigning only the destination of the assets after the liquidation of the

[61] **Exhibit C-148**, Ruling No. 488 from 6 April 2009 in case 26916/3/2008 (Bucharest Tribunal).
[62] SoC, para. 256.
[63] **Exhibit C-153**, Appeal against decision 488 / 6 April 2009 file no. 26916/3/2008, dated 26 May 2009.

> company and nothing more. On the other hand, the arrest of the appellants' father was performed in a pending criminal trial, his release being executed prior to trading shares on the stock market and prior to the general meeting, hence the causal link invoked by the appellants could not be established on the basis of the evidence. Moreover, if indeed the criminal trial was oriented towards an abusive takeover of the company, then buying any stock under the conditions of the free market and any subsequent acquittal of Vahram Sukyas wouldn't be justified".[64] [emphases added].

125. According to the Claimant, "[t]he Court then made the absurd and nothing short of cynical conclusion that if the state had purchased the shares on the stock exchange on 12 April 1948, Vahram must not have been under duress 2 days later when he voluntarily signed the 1948 Minutes, thereby consenting to the dissolution. In making this conclusion the Court entirely ignored the allegations of torture and abuse prior to 12 April 1948 (not to mention the additional facts of confiscation of the Sukyases' home during the same time which the Romanian court had acknowledged) and failed to inquire about what were the terms of this sale, was any consideration paid, and if so, what was its amount".[65]

126. On 18 August 2010, the Sukyas Brothers filed a recourse against the decision of the BCA to the High Court of Cassation and Justice ("**Court of Cassation**").[66]

127. Claimant submits that on 22 September 2011, before the set hearing date in the Court of Cassation (on 29 September 2011), the Sukyas Brothers' lawyers received a document from the National Archives of Romania indicating that CIRO "was not included in the list of companies listed on the BUCHAREST STOCK ECHANGE, SHARES AND EXCHANGES and did not appear in any transactions on the stock exchange in 1948", which they submitted to the Court of Cassation.[67]

128. On 29 September 2011, the Court of Cassation issued Decision No. 6587 denying the Sukyas Brothers' cassation appeal and affirming the decision of the BCA ("**Decision No. 6587**").[68]

---

64 **Exhibit C-187**, Decision No. 212A from 22 March 2010 in case 26916/3/2008 (Bucharest Court of Appeal).

65 SoC, para. 289.

66 **Exhibit C-194**, Second appeal filed by Jak and Edward Sukyas dated 18 August 2010 in case 26916/3/2008 (Bucharest Court of Appeal).

67 **Exhibit C-79**, Letter from National Archives dated 12 April 2011 re CIRO was not in transactions on the stock exchange in 1948. The Tribunal notes that the date of the document appears to be 12 April 2011.

68 **Exhibit C-077**, Decision No. 6587 from 29 September 2011 in case 26916/3/2008 (Court of Cassation, Civil and Intellectual Property Division).

129. On 10 October 2011, the Sukyas Brothers filed an extraordinary recourse of annulment against the decision of the Court of Cassation.[69] On 12 November 2012, the Court of Cassation denied the annulment.[70]

II. The Proceedings Brought by the Sukyas Brothers under Law 221 of 2009

130. In June 2009, Romania enacted the law on politically motivated convictions and administrative measures pronounced between 6 March 1945 and 22 December 1989 ("**Law 221/2009**"). The purpose of Law 221/2009 was to make it significantly easier for victims of takings that occurred through politically motivated convictions or as a matter of the effect of administrative measures to prove their claims.[71]

131. Article 1 of Law 221/2009 reads as follows:

> "(1) There shall constitute a political conviction any conviction ordered by means of a final judgment, rendered during the timeframe 6 March 1945 – 22 December 1989, for acts committed before the date of 6 March 1945, or after that date, whose purpose was the opposition to the totalitarian regime established on 6 March 1945.
>
> (2) There shall constitute de jure political convictions, the convictions rendered for the deeds provided by: […] of the Criminal Code of 1936, republished in the Official Gazette, Part I, no. 48 of 2 February 1948, as subsequently amended and completed […]".[72]

132. Article 3 of Law 221/2009 provides:

> "There shall constitute an administrative measure of a political nature any measure taken by the former militia or security bodies, having as object the deployment and establishment of forced domicile, the internment in labour units and labour colonies, the establishment of a mandatory workplace, if these measures were based on one or more of the following legal provisions: […]".[73]

133. Article 5 of Law 221/2009 reads as follows:

> "(1) Any individual having suffered a political conviction during the timeframe 6 March 1945 – 22 December 1989, or who has been subject of administrative measures of a political nature, as well as, after the death of this individual, the spouse or the descendants up to the second degree inclusively, may request the

---

69 **Exhibit C-199**, Objection for Annulment by Jak and Edward Sukyas from 10 October 2011 (Court of Cassation).
70 **Exhibit C-201**, Decision No. 6893 from 12 November 2012 in case no. 8033/1/2011 (Court of Cassation).
71 **CE-2**, Report of Professor Baias, para. 171.
72 **Exhibit CL-135**, Article 1 of Law 221/2009.
73 **Exhibit CL-135**, Article 3 of Law 221/2009.

> court within a timeframe of three years from the entry into force of this law, to order the State to:
>
> a) grant compensation for the moral damage suffered through the conviction. […];
>
> b) grant compensation representing the equivalent value of the assets confiscated through the conviction decision, or as an effect of the administrative measure […]".[74]

134. On 25 May 2012, the Sukyas Brothers filed an action pursuant to Law 221/2009 with the Bucharest Tribunal, requesting the court to ascertain the political nature of the conviction of Vahram Sukyas in 1948. The complaint requested compensation for the value of CIRO's shares and the value of the business of Astoria as well as moral damages in the amount of EUR 10,000.[75]

135. On 21 May 2014, the Bucharest Tribunal rejected the Sukyas Brothers' request for damages under Law 221/2009, concluding that the conviction of Vahram Sukyas in 1948 was not politically motivated ("**Decision 611/2014**"). The Bucharest Tribunal added that, even if it were to find that the conviction was political in nature, it would have still rejected the claims based on the Court of Cassation's earlier holding in the Law 10/2001 action that the transfer of CIRO's shares resulted from a consensual sale transaction on the stock exchange, which was *res judicata*.[76]

136. On 25 May 2015, the Sukyas Brothers filed an appeal against Decision 611/2014. On 22 September 2015, the BCA rejected the appeal and upheld the Bucharest Tribunal's Decision 611/2014 ("**Decision 871 R/2015**"). It is undisputed that this was the final recourse available to the Sukyas Brothers on their Law 221/2009 claims.[77]

III. The Civil Proceedings Brought by the Sukyas Brothers under Articles 480-482 of the Romanian Civil Code

137. On 24 August 2011, the Sukyas Brothers filed a revindication claim with the Bucharest Tribunal against the Romanian government, Bucharest Municipality, and

---

74 **Exhibit CL-135**, Article 5 of Law 221/2009.

75 **Exhibit C-203**, Claim of Jak and Edward Sukyas against the Romanian state political conviction dated 25 May 2012 in case 19192/3/2012 (Bucharest Tribunal).

76 **Exhibit C-211**, Decision No. 611 from 21 May 2014 in case 19192/3/2012 (Bucharest Tribunal), pp. 8-9.

77 SoC, para. 326; **Exhibit C-213**, Decision No. 871 R from 22 September 2015 in case 19192/3/2012 (Bucharest Court of Appeal).

the General Council of the Bucharest Municipality under Articles 480 and 481[78] of the Romanian Civil Code, as well as the European Convention on Human Rights ("**ECHR**") and Article 1 of Additional Protocol No. 1 to the ECHR ("**Revindication Action**"). The Revindication Action sought: (i) relief in the form of an order for the restitution in kind of the Laboratory (the building and the plot of land); and (ii) the granting of moral damages in the amount of EUR 2 million.

138. In a supplemental complaint filed on 19 March 2013, the Sukyas Brothers requested the Bucharest Tribunal to ascertain the absolute nullity of the 1948 Minutes.[79] The relevant part of the supplemental complaint reads as follows:

> "We are the owners of the real estate located in Bucharest, Str. Straulesti 3, sector 1, as heirs of our father and uncle, Vahram Sukyas and Melik J. Soukias, based on the ownership deeds that we enclosed as evidence (Annex 1) and on our right of succession (Annex 2).
>
> We point out that, by forging the official documents that we request to be declared null and void, we were robbed of our property by the communist regime during 1948 and we are entitled to have our property returned, because during the communist period the properties were confiscated or nationalized by law. In our case, being protected by our status as foreign shareholders, the property could not be nationalized, therefore they resorted to forging official documents as well as to register as true, some facts that were false such as 'the shares were bought through the stock exchange' which is completely untrue, because we have the proof that the shares of that company were not even listed on the stock exchange. Also, the company stamp and logo were used to forge the documents and up to publishing them in the Official Gazette of that time".[80]

139. On 4 February 2014, the Bucharest Tribunal declared certain claims inadmissible, as follows:

> "Given the considerations retained in Decision no. 27/2011 and in Decision no. 33/2008 ruled by the HCCJ in the interest of the law, the Tribunal allows the plea of inadmissibility of the heads of the main claim aimed at finding the absolute nullity of the minutes of the Extraordinary General Meeting of the company 'Cinegrafia Romana', of the petition formulated by Cinegrafia Romana of

---

78 Claimant's translation of Articles 480-481 of the Romanian Civil Code reads "the right to enjoy and dispose of an asset exclusively and absolutely, but within the limits determined by law". "[n]o one may be compelled to hand over its estate, except for a public utility cause and on receipt of fair and prior compensation". **Exhibit CL-171**, Romanian Civil Code of 1864.

79 **Exhibit C-225**, Claim for restitution of property against the state from 24 August 2011 in case 57922/3/2011 (Bucharest Tribunal); **Exhibit C-279**, Supplemental Claim with Bucharest Tribunal against Romania, Mayor of Bucharest, General Council of Bucharest (File no. 57922/3/2001), dated 19 March 2013.

80 **Exhibit C-279**, Supplemental Claim with Bucharest Tribunal against Romania, Mayor of Bucharest, General Council of Bucharest (File no. 57922/3/2001), dated 19 March 2013, pp. 3-4.

> deregistration of this company, of the other subsequent deeds, as well as of the head of the claim regarding the restitution in kind of the building located in Bucharest, 3 Straulesti street, sector 3.
>
> Even if the main claim has as object not only the restitution in kind of the real estate, but also the finding of the absolute nullity of the previously mentioned deeds, this last aspect is a component part of the analysis of the restitution claim under law no. 10/2001, necessary in order to assess the state of 'property abusively taken over' (art. 2). By HCCJ decisions, it was established that the direct revendication proceedings based on common law are inadmissible, as they breach the principle '*specialia generalibus derogant*'. The solution of regulating these proceedings by a special law does not violate [ECtHR] jurisprudence either, considering the wide margin of appreciation enjoyed by the states in establishing the method of compensation for nationalized real estate (the cases Paduraru vs. Romania, Maria Atanasiu and others vs. Romania).
>
> In the present case, the plaintiffs formulated an action in restitution based on Law no. 10/2001, which was the subject of the case file no. 26916/3/2008, being irrevocably dismissed by decision no. 6587 / 29.09.2011, ruled by the high court of cassation and justice in the mentioned case file, the legality of the transmission of the share of Cirofilm company to the state on 12 April 1948 was established and, implicitly, of the subsequent deeds. This decision has the res judicata force, not being possible to change those upheld by an irrevocable decision".[81] [emphases added].

140. On 10 June 2014, the Bucharest Tribunal confirmed its decision dated 4 February 2014 and dismissed the Sukyas Brothers' claims for moral damages.[82] On 16 September 2014, the Sukyas Brothers filed an appeal with the BCA against the Bucharest Tribunal's decision of 10 June 2014.[83]

141. On 14 January 2015, the BCA upheld the Bucharest Tribunal's decision. It ruled as follows:

> "The present claim registered with the Court on 24.08.2011, after exhausting all the administrative and judicial procedures provided by Law no. 10/2001, is inadmissible.
>
> The claim is inadmissible because it violates the principles '*Lex specialis derogat legi generali*' and '*electa una via*' […]

---

[81] **Exhibit C-227**, Decision from 4 February 2014 in case 57922/3/2011 (Bucharest Tribunal), p. 2. The Tribunal notes that Claimant's translation uses the acronym "HCCJ" when referring to Romania's High Court of Cassation and Justice, which had been defined by the Tribunal above as "Court of Cassation".

[82] **Exhibit C-228**, Decision No. 685 from 10 June 2014 in case 57922/3/2011 (Bucharest Tribunal).

[83] **Exhibit C-229**, Appeal by Jak and Edward Sukyas against Decision No. 685 in case 57922/2011 (Bucharest Tribunal), dated 16 September 2014.

> The claim lodged by the plaintiffs has been registered with the Court on 24.08.2011, after the enactment of the special law, Article 6 of Law no. 213/1998 restricting the scope of the common law, given that there are special laws on reparation, which Law no. 10/2001 is by definition and after the irrevocable settlement of the complaint grounded on the provisions of Law no. 10/2001. […]
>
> It is correct that, in the content of the special law in questions, there are no provisions that expressly prohibits the possibility to lodge a claim for the recovery of property grounded on the common law, namely Article 480 of the Civil code, in order to recognize the right of property claimed by the plaintiffs against a third party and in order to obtain the possession of the asset.
>
> The inapplicability of the common law derives from a fundamental law principle, namely '*specialia generalibus derogant*' ('The special law derogates from general law'). According to this principle, where the scope of the general law overlaps with the scope of the special law, the special law shall be applied, the provisions of the general law being removed. […]
>
> In the present case, the plaintiffs have chosen and used the procedure enshrined by Law no. 10/2001, procedures which ended with a decision that acquired the authority of a final decision stating that 'the 12.04.1948 acquisition by the State of the shares of the Company Ciro Film, through the Stock Exchange, is included in the scope of the private legal act and, as a result, it falls outside the scope defined by Article 1 paragraph 1 letter h of the Law no. 10/2001.' […]
>
> However, for the reasons stated above, the present claim cannot be successfully lodged by the plaintiffs considering the fact that their right has already been examined from the perspective and in the light and under the Law no.10/2001".[84]

142. On 1 April 2015, the Sukyas Brothers filed a recourse against the BCA's decision.[85] On 22 October 2015, the Court of Cassation held that the BCA erred in rejecting the Sukyas Brothers' claims as inadmissible.[86]

143. On 23 November 2016, the BCA (on remand) dismissed the Sukyas Brothers' revindication claim for lack of standing:

> "In relation to the above, the Court notes that the proof of shareholder status of the claimants' predecessors, regardless of the proportion held in the share capital, cannot replace the lack of title to the property, which was never owned by the claimants, whose assets could have been confused with that of the company [CIRO], the sole owner of the property. Thus, the Court finds that the claimants do not justify their standing to sue in their claim. The conclusion on the objection

[84] **Exhibit C-230**, Decision No. 6A from 14 January 2015 in case 57922/3/2011 (Bucharest Court of Appeal), pp. 15-18.
[85] **Exhibit C-231**, Second appeal by Jak and Edward against Decision 6A in case 57922/3/2011 (Bucharest Court of Appeal), dated, 1 April 2015.
[86] **Exhibit C-232**, Decision No. 2308 from 22 October 2015 in case 57922/3/2011 (Court of Cassation).

> of the lack of standing to sue is, moreover, reflected in the jurisprudence of the High Court of Cassation and Justice which, in a case […], held that it did not justify its standing to sue, given that it was not the claimant's predecessor who owned the property right, but the company in which it was a shareholder, and the latter's patrimony is not to be confused with that of the shareholders".[87]

144. On 30 March 2017, the Court of Cassation confirmed the BCA's decision.[88]

Section VIII. The Proceedings Initiated by the Sukyas Brothers before U.S. Courts

145. On 16 March 2015, the Sukyas Brothers filed a lawsuit against Romania and RADEF under the Foreign Sovereign Immunities Act of 1976 ("**FSIA**") for expropriation of and tortious interference with CIRO.[89]

146. Under the FSIA, U.S. courts have exclusive jurisdiction over foreign nations and their agencies and instrumentalities in specific circumstances, such as when the action involves a commercial activity, or when rights in property taken in violation of international law are at issue, as long as a sufficient nexus with the U.S. exists.[90]

147. In March 2016, Romania appeared in the proceedings and requested the court to dismiss the case on several grounds.[91]

148. On 21 September 2017, the U.S. Federal Court declared its lack of jurisdiction on the basis that the Sukyas Brothers did not demonstrate that RADEF had sufficient recent commercial links with the U.S.[92]

149. The Sukyas Brothers appealed and on 19 March 2019, the Ninth Circuit Court of Appeal reversed the lower court's decision.[93]

150. On 12 November 2020, the U.S. District Court of Central California held that Mr. Jak Sukyas' claim regarding the alleged 1948 expropriation was time-barred.[94]

---

87 **Exhibit C-233**, Decision No. 813A from 23 November 2016 in case 57922/3/2011 retrial (Bucharest Court of Appeal).
88 **Exhibit C-234**, Decision No. 624 from 30 March 2017 in case 57922/3/2011 retrial (Court of Cassation).
89 **Exhibit C-235**, U.S. Action Complaint, dated 16 March 2015.
90 **Exhibit CL-028**, 28 U.S.C. § 1605 (General exceptions to the jurisdictional immunity of a foreign state).
91 **Exhibit C-241**, U.S. Action Defendants' 15 March 2016 Notice of Motion to Dismiss, dated 15 March 2016.
92 **Exhibit CL-34**, Sukyas v. Romania, No. 2:15-cv-01946 (FMO), 2017 WL 6550588 (C.D. Cal. 21 September 2017), dated 21 September 2017.
93 **Exhibit CL-35**, Sukyas v. Romania, 765 F. App'x 179, 180 (9th Cir. 2019), dated 19 March 2019.
94 **Exhibit R-17**, Jak Sukyas v. Romania, et al., Decisions of US District Court for Central California, dated 12 November 2020.

Section IX. The Proceedings Initiated by the Sukyas Brothers before the European Court of Human Rights

151. On 6 March 2012, after the issuance of Decision No. 6587 by the Court of Cassation on 29 September 2011, the Sukyas Brothers filed an application with the European Court of Human Rights ("**ECtHR**") concerning the proceedings brought under Law 10/2001.[95]

152. On 31 May 2012, the ECtHR ruled that the application was inadmissible.[96]

153. On 12 October 2017, after the issuance of the Court of Cassation's decision dated 30 March 2017, the Sukyas Brothers filed another application with the ECtHR regarding the Revindication Action.[97]

154. On 19 April 2018, the ECtHR ruled that the application was inadmissible.[98]

CHAPTER VI. THE PARTIES' REQUESTS FOR RELIEF

Section I. Claimant's Requests for Relief

155. In his SoC, Claimant requested as follows:

> "As a result, Claimant[] respectfully request[s] the Tribunal to issue an award:
>
> i. declaring that the dispute is within the jurisdiction and competence of the Tribunal and Claimant['s] claims are admissible;
>
> ii. allowing Claimant['s] claims arising out of the Turkey-Romania BIT (2008) be heard in the present arbitration proceeding;
>
> iii. declaring that Respondent violated the applicable BITs with respect to Claimant['s] investment;
>
> iv. ordering Respondent to pay damages to Claimant[] for [its] losses from the breaches of the applicable BITs and incremental expenditure/loss in an amount no less than US $ 2,060,145,997.43;
>
> v. ordering Respondent to pay a pre- and post-award interest at the rate of US Treasury / LIBOR + 2% compounded semi-annually until the date of

[95] **Exhibit C-258**, Sukyas v. Romania, ECtHR, App no. 18467/12, Application of 6 March 2012.
[96] **Exhibit C-260**, Sukyas v. Romania, ECtHR, App no 18467/12, Letter Decision (Admissibility), dated 31 May 2012.
[97] **Exhibit C-259**, Sukyas v. Romania, ECtHR, App no. 74426/17, Application, dated 12 October 2017.
[98] **Exhibit C-261**, Sukyas v. Romania, ECtHR, App no. 74426/17, Decision (Admissibility), dated 19 April 2018.

Respondent's full and effective payment starting from the relevant dates as described in Section VI.C;

vi. ordering Respondent to pay all of Claimant['s] costs of the present arbitration proceedings inclusive of all of its attorneys' fees and expenses; and

vii. ordering such other relief that the Tribunal may deem just and proper".[99]

156. In his Counter-Memorial on J&A and SoRj, Claimant requested as follows:

"Wherefore, (sic) Claimant[] respectfully request an award from the Tribunal with the following relief:

i. dismissing Respondent's Jurisdictional and Admissibility Objections;

ii. declaring that it has jurisdiction to hear Claimant['s] claims under the US-Romania BIT (1992), Canada-Romania BIT (1996), Canada-Romania BIT (2009) and Turkey-Romania BIT (2008);

iii. declaring that Claimant['s] claims (including Claimant['s] Turkey BIT Claims) are admissible;

iv. awarding an immediate costs order against Respondent in respect of the costs incurred by Claimant[] to address Respondent's out-of-schedule and untimely Application of 28 May 2022 and Respondent's Jurisdictional and Admissibility Objections".[100]

Section II. Respondent's Requests for Relief

157. In its J&A Memorial and SoR, Respondent requested as follows:

"Romania hereby requests that:

1) The Tribunal find that the Claimant['s] attempt to submit a claim with a basis of jurisdiction as the 2008 Romania-Turkey BIT must be rejected;

2) The Tribunal has no jurisdiction to apply the 1996 Romania-Canada BIT, which has been terminated;

3) The Tribunal find the dispute and claims are outside the Tribunal's jurisdiction and/or inadmissible;

[99] SoC, para. 727. The Tribunal notes that these requests for relief are made by Messrs Jak Sukyas and Edward Sukyas jointly, with respect to the two proceedings initiated against Romania.

[100] Counter-Memorial on J&A, para. 355; SoRj, para. 147.

4) The Tribunal award Romania all of its costs in these arbitrations".[101]

CHAPTER VII. THE ISSUES TO BE DETERMINED BY THE TRIBUNAL

158. The Tribunal has relied on the entire record before it, including the Parties' written submissions and oral pleadings. To the extent that some arguments included in the Parties' submissions are not reproduced in this Award, they must be considered subsumed in the Tribunal's analysis.

159. The Tribunal notes that Respondent has raised the following objections to the Tribunal's jurisdiction and the admissibility of Claimant's claims ("**Preliminary Objections**"): (i) the Tribunal lacks jurisdiction to decide the Turkey-Romania BIT Claims; (ii) the Tribunal lacks jurisdiction *ratione materiae* to decide Claimant's claims under the US-Romania BIT; (iii) the Tribunal lacks jurisdiction *ratione temporis* under any of the relevant BITs; (iv) Claimant's claim has been settled and there is no dispute with Respondent; (v) Claimant has not established that he has continuously held the relevant nationality to bring his claims; (vi) Claimant's claim does not satisfy the legality requirement under any of the BITs; (vii) Claimant's claim under the US-Romania BIT fails to respect the fork-in-the-road requirement; and (viii) the Tribunal does not have jurisdiction over Claimant's claims, or those claims should be deemed inadmissible pursuant to the abuse of rights doctrine.[102]

160. In the Tribunal's view, it is sufficient, for reasons of judicial economy, to address only the determinative Preliminary Objections that exclude the Tribunal's jurisdiction or the admissibility of the claims under each of the two BITs invoked.

161. Against this background, and having considered the Parties' positions, the Tribunal finds that it needs to address the following key issues:

- Issue No. 1: Whether the Tribunal has jurisdiction to decide the Turkey-Romania BIT Claims

- Issue No. 2: Whether the Tribunal has jurisdiction *ratione materiae* to decide Claimant's claims under the US-Romania BIT

- Issue No. 3: Whether the Tribunal has jurisdiction *ratione temporis* to decide Claimant's claims under the US-Romania BIT

[101] J&A Memorial, para. 430; SoR, para. 186.
[102] J&A Memorial, Sections VI to VII. SoR, Sections III to X.

- Issue No. 4: Whether Claimant's claim has been settled

- Issue No. 5: Whether Claimant has failed to respect the rule of customary international law of continuous nationality to bring his claims under the US-Romania BIT

- Issue No. 6: Whether Claimant's claim satisfies the legality requirement under the US-Romania BIT

- Issue No. 7: Whether Claimant's claim under the US-Romania BIT respects the fork in the road requirement

- Issue No. 8: Whether the Tribunal has jurisdiction over Claimant's claims, and whether those claims should be deemed inadmissible pursuant to the abuse of rights doctrine

- Issue No. 9: If and how to allocate the arbitration costs.

162. In the following sections of this Award, whenever applicable, the text under the headings "Claimant's Position" and "Respondent's Position" is a summary of the submissions made by the Parties. The Tribunal's analysis and decisions are set out under the heading "Decision".

Section I. – Issue No. 1 - Whether the Tribunal Has Jurisdiction to Decide the Turkey-Romania BIT Claims

I. Respondent's Position

163. According to Respondent, the Tribunal does not have jurisdiction over the Turkey-Romania BIT Claims.[103]

164. Respondent avers that, months after the Notice of Arbitration was filed on 18 February 2020, Claimant attempted to submit his Turkey-Romania BIT Claims by filing his SoC in the present proceedings on 1 April 2022, instead of initiating a separate arbitration proceeding.[104]

[103] J&A Memorial, para. 108; SoR, para. 97.
[104] J&A Memorial, para. 99.

165. In Respondent's view, the Tribunal's jurisdiction needs to be assessed as of the date of the commencement of the arbitration proceedings, *i.e.*, as of 18 February 2020.[105]

166. In this regard, Respondent submits that: (i) Claimant accepted Romania's offer to arbitrate set out in Article VI of the US-Romania BIT on 18 February 2020; and (ii) Claimant only accepted Romania's offer to arbitrate under the Turkey-Romania BIT when he filed his SoC on 1 April 2022. Accordingly, the Tribunal cannot exercise jurisdiction pursuant to an arbitration agreement that was formed later in the course of the proceedings.[106]

167. In its view, given that the Tribunal's jurisdiction derives from the consent of the Parties, it is not possible to alter the jurisdictional basis (absent the express consent of the Parties) after the Tribunal has been constituted.[107] Instead, in Respondent's view, Claimant's belated invocation of the Turkey-Romania BIT Claims is "an abuse of process in that it puts the investment arbitration system to improper use",[108] *inter alia*, because it is "the latest iteration of the Claimant[']s endless forum shopping, which has been extremely wasteful of judicial resources".[109]

168. Furthermore, Respondent argues that Claimant is not allowed to introduce the Turkey-Romania BIT Claims pursuant to Article 22 of the UNCITRAL Arbitration Rules since these "new claims" are manifestly outside of the Tribunal's jurisdiction.[110]

169. Finally, Respondent contends that in any event the Tribunal should not entertain the Turkey-Romania BIT Claims *inter alia* because: (i) the pre-arbitration requirements found in Article 6 of the Turkey-Romania BIT were not respected; and (ii) the

---

[105] Hearing Transcript, Respondent's Opening Statement, Day 1, p. 103, lines 2-4. **Exhibit RL-254**, *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08/AA629, Award dated 7 October 2020, para. 263; **Exhibit RL-119**, Christoph Schreuer and others, The ICSID Convention: a Commentary, 2nd ed, Excerpts, dated 2009, paras. 37-39.

[106] J&A Memorial, paras. 102, 385; Hearing Transcript, Respondent's Opening Statement, Day 1, p. 103, line 2 to p. 106, line 23.

[107] J&A Memorial, para. 102.

[108] SoR, para. 76. See further J&A Memorial, paras. 374-381.

[109] J&A Memorial, para. 427.

[110] J&A Memorial, para. 106. Article 22 of the UNCITRAL Arbitration Rules reads as follows: "During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal".

Turkey-Romania BIT Claims are outside the Tribunal's mission as set out in the Terms of Appointment, which may lead to the annulment of the award.[111]

II. Claimant's Position

170. According to Claimant, by filing the SoC, he accepted Respondent's offer to arbitrate disputes arising under the Turkey-Romania BIT. Thus, an arbitration agreement in respect of the Turkey-Romania BIT Claims was formed between Claimant and Respondent at the time of the submission of the SoC, *i.e.*, on 1 April 2022.[112]

171. Claimant submits that the arbitration agreement formed between the Parties under the Turkey-Romania BIT grants jurisdiction to UNCITRAL tribunals (as well as to ICSID tribunals) constituted by the Parties to hear the Turkey-Romania BIT Claims. There is therefore no question that the present Tribunal—a tribunal constituted by the Parties under the UNCITRAL Arbitration Rules—has jurisdiction over the Turkey-Romania BIT Claims. In Claimant's view, the "undeniable fact that an agreement was formed between the Parties as to the submission of the [Turkey-Romania BIT Claims] to UNCITRAL or ICSID arbitration when Claimant accepted Respondent's offer to arbitrate under the [Turkey-Romania BIT] puts it beyond doubt that there is no issue with the Parties' consent to the jurisdiction of the present [] Tribunal over the [Turkey-Romania BIT Claims]".[113]

172. It is Claimant's case that Respondent has not been able to identify any single rule or principle which could possibly preclude Claimant from bringing the Turkey-Romania BIT Claims in these proceedings.[114]

173. On the contrary, in Claimant's view, Respondent is committing an abuse of process by trying to prevent the Claimant from having these claims heard in the present proceeding. Claimant contends that "[i]t is abuse of process by Respondent to maintain its objections to Turkey BIT Claims knowing that these objections may, if successful, trigger the initiation of another arbitration based on the very same facts and causes of action. […] it should be obvious to Respondent that there is no point in forcing Claimant[] to initiate separate parallel arbitration proceedings against

[111] J&A Memorial, paras. 366-373, 382-385; SoR, paras. 78-91, 92-97.
[112] Counter-Memorial on J&A, para. 63.
[113] Counter-Memorial on J&A, para. 64.
[114] Hearing Transcript, Claimant's Opening Statement, Day 1, p. 210, lines 3-18.

Romania in respect of the very same breaches and the very same damage incurred by Claimant[]".[115]

174. Moreover, Claimant submits that he is entitled to introduce the Turkey-Romania BIT Claims pursuant to Article 22 of the UNCITRAL Arbitration Rules.[116]

175. Finally, Claimant contends that: (i) the pre-arbitration requirements set out in Article 6 of the Turkey-Romania BIT were satisfied; and (ii) the Turkey-Romania BIT Claims are not outside the Tribunal's mission.[117]

III. Decision

176. The Tribunal needs to determine whether it has jurisdiction to rule over the Turkey-Romania BIT Claims.

177. As mentioned in paragraph 12 above, the relevant excerpts of Article 6 of the Turkey-Romania BIT read as follows:

> "ARTICLE 6
> Settlement of Investment Disputes
>
> (1) For the purposes of this Article, an investment dispute is defined as a dispute involving:
>
> (a) 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.
>
> (2) 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 amicably by consultations and negotiations between the parties to the dispute.
>
> (3) If the dispute cannot be settled by consultations and negotiations within six months from the date of request for settlement then the dispute shall be submitted to, as the investor may, choose to:

[115] Counter-Memorial on J&A, para. 353.
[116] Counter-Memorial on J&A, para. 76.
[117] Counter-Memorial on J&A, paras. 79-106, 115-127; SoRj, paras. 50-68, 69-81.

> (a) the International Center for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and Nationals of other States' done at Washington, on March 16, 1965, in case both Contracting Parties become signatories of this Convention.
>
> (b) an ad hoc court of arbitration laid down under the Arbitration Rules or Procedure of the United Nations Commission for International Trade Law (UNCITRAL). […]".[118]

178. The Tribunal recalls that on 18 February 2020, Claimant filed a Notice of Arbitration, pursuant to Article VI of the US-Romania BIT. The relevant extracts of the Notice of Arbitration provide:

> "According to Article 3(3)(d) of the 1976 Rules, this submission to arbitration is made pursuant to the Treaty between the Government of the United States of America and the Government of Romania concerning the Reciprocal Encouragement and Protection of Investment dated 28 May 1992 ('US-Romania BIT').[] The US-Romania BIT entered into force on 15 January 1994. […]
>
> Pursuant to Article 3(3)(c) of the 1976 Rules, the arbitral tribunal's jurisdiction over Mr J. Sukyas' claims arises from the US-Romania BIT. Article VI of the US-Romania BIT contains the arbitration agreement and is set out below: […]
>
> As indicated in the consent enclosed herewith,[] and in accordance with Article VI(3)(a) of the US-Romania BIT, Mr J. Sukyas consents to submit this dispute to arbitration".[119] [emphases added].

179. Romania's offer to arbitrate disputes set out in Article VI of the US-Romania BIT was accepted by Claimant on 18 February 2020.[120] These are the instruments of consent that form the basis of the Tribunal's jurisdiction as recorded in the Terms of Appointment. On this date, the arbitration agreement—pursuant to which this Tribunal was constituted—was formed.

180. The most relevant passages of the Terms of Appointment read as follows:

> "2.1. The present proceedings have been initiated by Mr. Jak Sukyas, a national of the United States of America, on the one hand, against Romania, on the other hand. The Claimant claims to hold a series of assets, rights, or both that qualify as an investment in Romania, and that there is a dispute relating to that investment between the Disputing Parties.

[118] **Exhibit CL-58**, Turkey-Romania BIT, Article 6.
[119] Claimant's Notice of Arbitration dated 18 February 2020, paras. 5-6, 9.
[120] Claimant's Notice of Arbitration dated 18 February 2020, para. 9.

> 2.2. By Request for Arbitration dated 18 February 2020, the Claimant commenced arbitration proceedings against the Respondent pursuant to Article VI of the Treaty between the Government of the United States of America and the Government of Romania concerning the Reciprocal Encouragement and Protection of Investment dated 28 May 1992, which entered into force on 15 January 1994 ('**US-Romania BIT**' or '**Treaty'**). […]
>
> 5.1. The Disputing Parties agreed by correspondence dated 8 and 17 August 2020, that the 2010 UNCITRAL Rules shall govern the proceedings. Thus, the proceedings shall be governed by Article VI of the Treaty, the mandatory laws of the place of arbitration, and the 2010 UNCITRAL Rules. […]
>
> 16.1. By the Disputing Parties' agreement, the proceedings initiated by Mr. Jak Sukyas and Mr. Edward Sukyas against Romania are legally distinct but shall be procedurally coordinated. In this sense, both proceedings shall follow identical procedural timetables, and the Disputing Parties will file a single set of pleadings addressing both claims".[121] [bold in the original; other emphases added].

181. It is a well-established principle that the Tribunal's jurisdiction must be assessed with reference to the date on which the proceedings commenced.[122]

182. In the words of Professor Schreuer:

> "It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met. It also means that events taking place after that date will not affect jurisdiction".[123] [emphases added].

183. This principle has been recognised by both ICSID and UNCITRAL investment tribunals. For instance, the tribunal in *CSOB v. Slovakia* ruled as follows:

> "In assessing the effect of the June 25, 1998 assignment (and of the April 24, 1998 assignment it superseded) on the Centre's jurisdiction to hear this dispute, the Tribunal notes, in the first place, that the Request for Arbitration in the instant case was filed on April 17, 1997 and that the case was registered on April 25, 1997. Hence, at the time when these proceedings were instituted, neither of these assignments had been concluded. Second, it is generally recognized that the

[121] Terms of Appointment, dated 13 January 2021, paras. 2.1, 2.2, 5.1, 16.1.

[122] **Exhibit RL-254**, *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08/AA629, Award dated 7 October 2020, para. 263; **Exhibit RL-119**, Christoph Schreuer and others, The ICSID Convention: a Commentary, 2nd ed, Excerpts, dated 2009, para. 39(citing *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 31); see also, **Exhibit RL-119**, Christoph Schreuer and others, The ICSID Convention: A Commentary, 2nd ed, Excerpts, dated 2009, para. 37 (citing *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, I.C.J. Reports 2002, p. 1).

[123] **Exhibit RL-119**, Christoph Schreuer and others, The ICSID Convention: a Commentary, 2nd ed, Excerpts, dated 2009, paras. 36-40.

> determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case".[124] [emphasis added].

184. Similarly, the Tribunal in the *Spółdzielnia Pracy Muszynianka v. Slovak Republic* case, decided that:

> "It is a well-settled principle that jurisdiction is determined at the time of the institution of the proceedings,[] here on 18 August 2016 when the Notice of Arbitration was filed".[125] [emphasis added].

185. Pursuant to Article 3(2) of the UNCITRAL Arbitration Rules, this arbitration commenced on the date on which the Notice of Arbitration was received by Respondent, *i.e.*, 18 February 2020.[126]

186. As recorded in the Terms of Appointment set out in paragraph 180 above, at that point in time, however, the Tribunal did not have, and could not have had jurisdiction to rule on the Turkey-Romania BIT Claims because the Claimant had not yet accepted Respondent's offer to arbitrate under Article 6 of the Turkey-Romania BIT. As Claimant has candidly admitted throughout the proceedings, the relevant arbitration agreement under the Turkey-Romania BIT was formed only approximately twenty-five months later, on 1 April 2022, when Claimant filed his SoC.[127]

187. In this regard, the Tribunal refers to Claimant's SoC, which reads as follows:

> "In [his] Notice[] of Arbitration, Claimant[] brought [his] claims under the Canada-Romania BITs (1996) and (2009) and the US-Romania BIT (1992). Claimant[] now further wish[es] to rely on the Turkey-Romania BIT (2008) in addition to the aforementioned BITs, on the basis of [his] Turkish nationality.[] For reasons of procedural economy, instead of initiating a separate arbitration

---

[124] **Exhibit RL-119**, Christoph Schreuer and others, The ICSID Convention: a Commentary, 2nd ed, Excerpts, dated 2009, para. 37. Citing *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, para. 31.

[125] **Exhibit RL-254**, *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08/AA629, Award dated 7 October 2020, para. 263.

[126] 2010 UNCITRAL Arbitration Rules, Article 3(2).

[127] SoC, paras. 451, 458; Counter-Memorial on J&A, paras. 63, 70; SoRj, para. 46; See also, Hearing Transcript, Claimant's Opening Statement, Day 1, p. 209 line 6 to p. 210, line 6.

> proceeding for the same dispute, Claimant[] hereby submit [his] claims under the Turkey-Romania BIT (2008) in the present arbitration proceedings. […]
>
> [] Claimant[] being [a] Turkish national[] now also accept[s] Romania's offer to arbitrate investment treaty disputes under the Turkey-Romania BIT (2008)".[128] [emphases added].

188. Moreover, in his SoRj, Claimant conceded that:

> "By filing [his] Memorial, Claimant[] submitted [his] Turkey BIT Claims under the Turkey-Romania BIT (2008) in the present arbitration proceedings,[] and thereby accepted Respondent's offer to arbitrate disputes arising out of the Turkey-Romania BIT (2008). That is to say, an arbitration agreement in respect of Claimant['s] Turkey BIT Claims was formed between Claimant[] and Respondent at the time of the submission of Claimant['s] Memorial".[129] [emphases added].

189. Therefore, at the point in time when these proceedings commenced, the Tribunal did not have jurisdiction to rule over the Turkey-Romania BIT Claims.

190. The Tribunal further disagrees with Claimant's proposition according to which:

> "It follows that the arbitration agreement formed between the Parties under the Turkey-Romania BIT (2008) grants jurisdiction to UNCITRAL tribunals (as well as to ICSID tribunals) constituted by the Parties to hear Claimant['s] Turkey BIT Claims. There is therefore no question that the present Tribunal—an UNCITRAL tribunal constituted by the Parties under the UNCITRAL Arbitration Rules—has jurisdiction over Claimant['s] Turkey BIT Claims. The undeniable fact that an agreement was formed between the Parties as to the submission of Claimant['s] Turkey BIT Claims to UNCITRAL or ICSID arbitration when Claimant[] accepted Respondent's offer to arbitrate under the Turkey-Romania BIT (2008) puts it beyond doubt that there is no issue with the Parties' consent to the jurisdiction of the present UNCITRAL Tribunal over the Turkey BIT Claims".[130] [emphases added].

191. The acceptance of Romania's offer to arbitrate set forth in the Turkey-Romania BIT would grant jurisdiction to a specific tribunal constituted pursuant to that arbitration agreement to rule over the Turkey-Romania BIT Claims. It does not, as Claimant suggests, grant jurisdiction to just about any tribunal constituted on the basis of a different instrument of consent simply because it is an UNCITRAL tribunal constituted for a different dispute between the same Parties. Claimant's argument

[128] SoC, paras. 451, 458.
[129] SoRj, para. 46.
[130] Counter-Memorial on J&A, para. 64.

simply assumes that Respondent would appoint the same arbitrator, and agree to the appointment of the same presiding arbitrator, in an arbitration under the Turkey-Romania BIT as it did in the case of the present arbitration, thereby essentially depriving Respondent of the choice for its party-appointed arbitrator and participation in the appointment of the presiding arbitrator. Such an outcome cannot be accepted.

192. As mentioned above, this Tribunal was constituted pursuant to Romania's offer to arbitrate set out in Article VI of the US-Romania BIT which was accepted by Claimant on 18 February 2020.[131] Since this Tribunal is not a standing body with its own independent existence or powers, it cannot simply enlarge its jurisdiction on the basis of an arbitration agreement that was formed after its own constitution on the basis of an entirely different BIT, except if the Parties agree otherwise. Such agreement, however, is missing, since Romania has repeatedly indicated that it does not consent to the Turkey-Romania BIT Claims being heard in these proceedings.[132]

193. On the basis of the above, the Tribunal concludes that it does not have jurisdiction to decide the Turkey-Romania BIT Claims.

194. Bearing in mind that the instruments of consent are entirely different, the Turkey-Romania BIT Claims should have commenced with a Notice of Arbitration, followed by the constitution of an arbitral tribunal pursuant to that instrument of consent. Instead, Claimant attempted to avoid these steps and introduce new claims in an already pending arbitration.

195. The Tribunal's jurisdiction can also not be based, as argued by Claimant, on the right to amend or supplement a claim or defence during the course of the arbitral proceedings laid down in Article 22 of the UNCITRAL Arbitration Rules, which reads as follows:

> "During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented

[131] Claimant's Notice of Arbitration dated 18 February 2020, para. 9.
[132] Respondent's letter dated 28 May 2022; J&A Memorial, paras. 99-110, 366-385; SoR, paras. 77-97.

claim or defence falls outside the jurisdiction of the arbitral tribunal".[133] [emphasis added].

196. Contrary to Claimant's contention, the Tribunal is of the view that Article 22 of the UNCITRAL Arbitration Rules does not allow Claimant to introduce the Turkey-Romania BIT Claims into these proceedings by means of amending or supplementing its claim because, as explained above, the Turkey-Romania BIT Claims fall outside the Tribunal's jurisdiction, which derives solely from the Parties' agreement to arbitrate based on the US-Romania BITs. Such claims are thus for a tribunal that is properly constituted under the Turkey-Romania BIT to decide.

197. In this context, the Tribunal notes that its jurisdiction can also not be based on the consideration that Respondent is committing an abuse of right or process by refusing its consent to the Turkey-Romania BIT Claims being brought by Claimant together with his claim for breach of the Canada-Romania BITs. Although Respondent has argued that bringing the Turkey-Romania BIT Claims is part of a larger scheme of forum-shopping that Respondent considers to be abusive under international law, the Tribunal is of the view that Respondent's refusal to consent is not an abuse of right or process. Respondent's refusal to consent is not "tainted by an ulterior motive to evade its duty to arbitrate [Claimant's] claims", which is, as stated by the tribunal in *Renco v Peru*, in a comparable situation relating to the respondent's insistence on receiving a waiver that complies with certain formal requirements under the applicable treaty, the relevant test to apply to determine the existence of an abuse of right or process in respect of objections to jurisdiction.[134]

198. Having established that the Tribunal does not have jurisdiction to rule on the Turkey-Romania BIT Claims, it is not necessary to address the additional arguments raised by Respondent in paragraph 169 above.

Section II. – Issue No. 2 - Whether the Tribunal Has Jurisdiction *ratione materiae* to Decide Claimant's Claims under the US-Romania BIT

I. Respondent's Position

199. According to Respondent, Claimant bears the burden of showing that he has made a protected "investment" under Article I.1(a) of the US-Romania BIT. Respondent's

[133] Article 22 of the UNCITRAL Arbitration Rules.

[134] **Exhibit RL-160**, *The Renco Group Inc v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) paras. 185-186 (quote at para 186).

position is that Claimant has not shouldered this burden, and therefore the Tribunal must dismiss the claims for lack of jurisdiction *ratione materiae*.[135]

200. In Respondent's view, Claimant brought these "investment" claims in 2020 not because he thought of himself as an "investor", but simply because he had exhausted all other avenues for legal recourse in Romania and beyond. Domestic courts in Romania and the United States, and twice the ECtHR, consistently dismissed all of Claimant's CIRO-related claims for the past fifteen years.[136]

201. Respondent submits that for any investment treaty tribunal to find jurisdiction, the claim must be about an investment that meets the inherent characteristics of an investment.[137] These characteristics include: (i) an active contribution of money or assets; (ii) a certain duration; (iii) the assumption of risk; and (iv) contribution to economic development. Respondent argues that these characteristics are "co-extensive" with the long-standing so-called *Salini* test and are not limited to ICSID arbitrations.[138] In Respondent's view, Claimant's alleged investment does not meet these characteristics.[139]

202. It is Respondent's case that Claimant's assertion according to which the economic activity by his ancestors in the 1930s would somehow be an "investment" under the BIT is simply flawed. In this regard, Respondent argues *inter alia* that: (i) there is no evidence that Vahram made a contribution of assets or money to acquire the CIRO shares; and that (ii) CIRO was not "what it is presented to have been as an investment", it was actually a "modest operation", which has been "grossly overstated" by Claimant.[140]

203. According to Romania, the proper description of the Claimant's alleged "investment" is a "claim to performance" or a "claim to money". Romania asserts that Claimant agrees with the characterization of its investment being a "claim to money" concerning CIRO (see paragraph 206 below). On the other hand, it is not clear that it could be a "claim to performance" since, although Claimant requested restitution before the Romanian courts, he is no longer requesting restitution in these arbitration proceedings. In any event, Respondent refers to the wording "associated with an investment" in Article I.1(a)(iii) of the BIT and links it with the term

[135] J&A Memorial, paras. 219, 320.
[136] J&A Memorial, para. 223.
[137] J&A Memorial, paras. 227-228, 236.
[138] J&A Memorial, paras. 233, 240; SoR, paras. 119-122.
[139] J&A Memorial, paras. 269-305; SoR, paras. 119-122.
[140] J&A Memorial, paras. 306-3019.

"associated activities" under Article I.1(e) of the BIT. On this basis, Respondent submits that "a claim to money, as a protected investment, may proceed within the scope of an investment treaty tribunal, only if it is related to an active business".[141]

204. In any event, according to Respondent, any investment that existed in 1948 was extinguished, such that Claimant no longer owns or controls it.[142] Moreover, Claimant never had any residual rights that would qualify as a claim to money or performance within the meaning of the BIT. Claims to money or performance "are not just allegations made by somebody that somebody else owes him or her money or performance".[143] Respondent submits that, in all cases relied upon by Claimant, "the residual right or claim was not only connected and associated with a proper investment, they were also established and had crystallized, in the sense that their well-founded character had been recognized through process, in particular through legal and judicial process".[144] Respondent relies in particular on *Nagel v. Czech Republic* for the statement that "a claim can normally have a financial value only if it appears to be well-founded or at the very least creates a legitimate expectation of performance in the future".[145] This means, according to Respondent, that "a claim to money is more than just a possibility to have recourse to a procedure and remedies in order to get something", but must be "an established well-founded claim, right or expectation".[146] Respondent maintains that this was never the case for Claimant, who never had an automatic right to restitution or compensation, but only unfounded allegations that were all dismissed by the courts.[147]

205. Finally, Respondent argues that "[i]t is simply not true that Romanian law, including the 2001 newly introduced laws on restitutions, establishes an automatic right to restitution or compensation for all victims of the socialist Romanian regime. It only creates a potential entitlement, subject to a number of conditions, requirements, and specific remedies to a certain [sic] and crystallize these entitlements. It cannot be sufficient for Claimant[] to self-proclaim that [he] [has] satisfied all requirements to consider [himself] purely unilaterally as owner of an asset or monetary compensation".[148]

---

[141] J&A Memorial, paras. 246, 254; Hearing Transcript, Respondent's Opening Statement, Day 1, p. 96.
[142] SoR, para. 116; Hearing Transcript, Respondent's Closing Statement, Day 4, p. 734. The Tribunal understands that Respondent has implicitly relied on Article XIII of the US-Romania BIT, to argue that the BIT would not be applicable to an investment that was not "existing at the time of entry into force" of the BIT.
[143] Hearing Transcript, Respondent's Closing Statement, Day 4, p. 736, lines 1-3.
[144] Hearing Transcript, Respondent's Closing Statement, Day 4, p. 739, lines 1-6.
[145] William Nagel v. The Czech Republic (SCC Case No. 049/2002), Final Award, 9 September 2003, para. 301.
[146] Hearing Transcript, Respondent's Closing Statement, Day 4, p. 738, lines 17-22.
[147] Hearing Transcript, Respondent's Closing Statement, Day 4, p. 740, lines 3-18.
[148] Hearing Transcript, Respondent's Closing Statement, Day 4, p. 740, lines 2-14.

II. Claimant's Position

206. In essence, Claimant submits that his investment consisted of "[t]he investment made by Claimant['s] predecessors starting from the 1930s, Claimant['s] right to claim the restitution of the Laboratorul Mogoşoaia, and their right to claim the enterprise value of CIRO under Romanian law".[149] In his SoRj, Claimant contended that his investment also included "the right under domestic law to claim damages for the difference to the enterprise value of CIRO".[150] In Claimant's view, his rights to restitution and compensation constitute residual rights and, as such, are protected under the BIT.[151]

207. Claimant first argues that both the *Salini* test and the case law developed under the ICSID Convention are concerned with the interpretation of the notion of "investment" under the particular provision of Article 25(1) of the ICSID Convention. Given that the present Tribunal is not constituted under the ICSID Convention, neither the *Salini* test, nor the case law developed under the ICSID Convention carries any relevance to the establishment of the present Tribunal's jurisdiction *ratione materiae*.[152]

208. In any event, Claimant further contends that his investment satisfies all the requirements under the *Salini* test.[153] He argues that Respondent cannot possibly deny that CIRO constituted an "investment" in the 1930s which met all the intrinsic characteristics of an "investment" since there is no doubt that CIRO was engaged in substantive business operations in Romania with a view to creating economic benefit. Notably, Respondent's reference to CIRO's business as a "modest operation" has no impact on the existence of an investment under the BIT.[154]

209. In Claimant's view, "the abusive taking of CIRO transformed the investment into a right to a claim, choses in action or lawsuits encompassing immovable property and monetary claims for damages".[155] The residual rights originating from the investment were then crystallized in the predecessors' and Claimant's right to claim restitution and compensation under the general rules of Romanian civil law, and the

---

[149] SoC, para. 483; *See also*, Counter-Memorial on J&A, para. 167.
[150] SoRj, para. 88.
[151] Hearing Transcript, Claimant's Opening Statement, Day 1, pp. 155-164.
[152] Counter-Memorial on J&A, para. 178; SoRj, para. 103.
[153] Counter-Memorial on J&A, paras. 180-184; SoRj, paras. 103-109.
[154] SoC, para. 487; Counter-Memorial on J&A, para. 165; Hearing Transcript, Claimant's Opening Statement, Day 1, p. 156 lines 14-19.
[155] Hearing Transcript, Claimant's Opening Statement, Day 1, p. 157 lines 10-13.

more specific rules set out in the modern-day legislations envisaging remedies for the victims of abusive takings during the communist era.[156]

210. Claimant considers that if CIRO had the inherent characteristics of an "investment" under the BIT, this is the end of the inquiry.[157] He posits that "[t]he restitutionary right to a property that constituted an investment is, by its very nature, a residual or a subsisting right arising out of or related to an investment".[158] Claimant submits that, for purposes of the BIT, these residual rights constitute "movable and immovable property and tangible and intangible property" and "a claim to money or a claim to performance having economic value, and associated with an investment".[159] As support for his position, Claimant refers to case law such as *Mondev v. United States*, *Saipem v. Bangladesh*, *Chevron I*, *Chevron II*, and *White Industries v. India*.[160]

211. In the present case, Claimant submits, as the rightful holder of the residual rights stemming from the original investment, Claimant continues to hold his status as investor and his residual rights constitute an investment for the purposes of the Tribunal's jurisdiction *ratione materiae*. In other words, the residual rights originating from the investment were crystalized in the Claimant's right to claim restitution and compensation under Romanian law. The Claimant thus contests Romania's assertion (see paragraph 204 above) that his rights over the investment were "extinguished"; these rights have continued to exist under Romanian civil law since 1948.[161]

III. Decision

212. Claimant argues that his investment consisted of "[t]he investment made by Claimant['s] predecessors starting from the 1930s, Claimant['s] right to claim the

---

156 SoC, para. 487; SoRj, para. 90; Hearing Transcript, Claimant's Opening Statement, Day 1, p. 157, lines 9-21.
157 Hearing Transcript, Claimant's Opening Statement, Day 1, p. 158, lines 7-10.
158 Hearing Transcript, Claimant's Opening Statement, Day 1, p. 158, lines 11-14.
159 Hearing Transcript, Claimant's Opening Statement, Day 1, p. 157 line 19 to p. 156, line 1.
160 **Exhibit CL-78**, *Mondev International Ltd v USA*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002; **Exhibit CL-64**, *Chevron Corporation and Texaco Petroleum Corporation v Republic of Ecuador (Chevron I)*, UNCITRAL Arbitration Rules, Interim Award, 1 December 2008; **Exhibit CL-66**, *Chevron Corporation and Texaco Petroleum Corporation v Republic of Ecuador (Chevron II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012; **Exhibit CL-63**, *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007; **Exhibit CL-65**, *White Industries Australia Limited v Republic of India*, UNCITRAL Arbitration Rules, Final Award, 30 November 2011.
161 SoC, paras. 484-488; Counter-Memorial on J&A, para. 139; SoRj, paras. 90-93. The Tribunal also understands that this line of argument relates to Article XIII of the US-Romania BIT, which reads as follows: "[The Treaty] shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter".

restitution of the Laboratorul Mogoşoaia, and [his] right to claim the enterprise value of CIRO under Romanian law".[162] In his SoRj, Claimant also argued that his investment also included "the right under domestic law to claim damages for the difference to the enterprise value of CIRO".[163] Claimant considers that his rights to restitution and compensation constitute residual rights within the meaning of case law such as *Mondev v. United States*, *Chevron I, Chevron II*, *Saipem v. Bangladesh* and *White Industries v. India*.[164] Claimant submits that, as residual rights, his right to claim restitution and his right to claim compensation are protected investments under the BIT.[165]

213. Respondent, for its part, has argued that any investment that existed in 1948 was extinguished and ceased to exist, such that Claimant no longer owns or controls it.[166] As for Claimant's other alleged rights, according to Respondent, they do not constitute an investment because they do not possess the inherent characteristics of an investment. Moreover, according to Respondent, Claimant never had any residual rights as Claimant never had anything more than allegations, whereas claims to money or performance must be established, and their existence must be certain, in order to qualify as residual rights.[167]

214. For the reasons presented in more detail below, the Tribunal has decided to join Respondent's objection to jurisdiction *ratione materiae* to the merits of the case.

215. The Tribunal's analysis is structured as follows. As a first step, the Tribunal will analyse the meaning of the term "investment" under the BIT and will determine what are protected "investments" under this instrument. Thereafter, the Tribunal will, first, look into whether the investment made by Claimant's predecessors in the 1930s and 1940s qualifies for protection under the BIT and, subsequently, examine whether Claimant had any residual rights to restitution and/or compensation for the alleged abusive taking of CIRO that *prima facie* qualify for protection under the BIT.

216. The Tribunal will make these determinations on a *pro tem* basis—that is, based on how the Claimant presented its case to the Tribunal. Adopting such a perspective in respect of the Tribunal's jurisdictional analysis is the appropriate perspective. As

[162] SoC, para. 483; *See also*, Counter-Memorial on J&A, para. 167.
[163] SoRj, para. 88.
[164] See *supra* n 160 for reference to the decisions.
[165] Hearing Transcript, Claimant's Opening Statement, Day 1, pp. 155-164.
[166] SoR, para. 116; Hearing Transcript, Respondent's Closing Statement, Day 4, p. 734.
[167] Hearing Transcript, Respondent's Closing Statement, Day 4, pp. 735-740.

the International Court of Justice held in *Oil Platforms*, the test at the jurisdictional stage is to "ascertain whether the violations of the Treaty […] pleaded by [applicant] do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant [to that Treaty]."[168] Drawing on *Oil Platforms*, investment treaty tribunals apply the same test.[169]

1. The Meaning of the Term "Investment" under the BIT

217. The Tribunal considers that the starting point for its analysis must be the text of the BIT, as interpreted in accordance with the principles of treaty interpretation set out in the Vienna Convention on the Law of Treaties (the "**VCLT**").[170] The decisions rendered by various international investment tribunals which sought to interpret the meaning of the term "investment" are of limited assistance, first, because there is no principle of *stare decisis* in international investment arbitration, and second, because those interpretations are based on treaty texts that are different from the BIT applicable in the present case.

218. Article VI.1(c), read in conjunction with Article VI.4 of the US-Romania BIT, provides that the Tribunal has jurisdiction over "an investment dispute", which is a "dispute between a Party and a national or company of the other Party arising out of or relating to […] (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment". In other words, in order for the Tribunal to have jurisdiction over the present dispute (where Claimant brings forth claims for denial of justice, "judicial expropriation", violation of the fair and equitable treatment, full protection and security, and the effective means standard), the Tribunal must be satisfied that Claimant had an "investment" within the meaning of

---

[168] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment (12 December 1996), ICJ Reports 1996, 803, 810, para 16.

[169] See, for example, *SGS Société Générale de Surveillance v Philippines,* Decision on Jurisdiction (29 January 2004) para 26 (stating that "[i]t is not enough that the Claimant raises an issue under one or more provisions of the BIT which the Respondent disputes. To adapt the words of the International Court in the *Oil Platforms* case, the Tribunal 'must ascertain whether the violations of the [BIT] pleaded by [the Claimant] do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain'", quoting *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment (12 December 1996), ICJ Reports 1996, 803, 810, para 16). Cf. also, including further reference, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018) paras 201-213.

[170] The VCLT does not directly apply to the BIT because Romania is not party to the VCLT. However, the VCLT's principles of treaty interpretation are widely considered to reflect and codify the rules on treaty interpretation under customary international law and are applied by the Tribunal on this basis. See, for example, *Jadhav Case (India v Pakistan)*, Judgment (17 July 2019), ICJ Reports 2019, 418, 437-438, para 71; *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia*, ICSID Case No ARB/05/10, Decision on the Application for Annulment (16 April 2009) para 56.

the BIT and that the investment is covered by the BIT, in the light of Article XIII.1 thereof, which provides that the Treaty "shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter".

219. For its part, Article I.1(a) of the US-Romania BIT contains the following definition of the term "investment":

> "(a) 'investment' means every kind of investment in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other party, such as equity, debt, and service and investment contracts; and includes:
>
> (i) movable and immovable property and tangible and intangible property, including rights such as mortgages, liens and pledges;
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> (iv) intellectual and industrial property which includes, inter alia, […]
>
> (v) any right conferred by law or contract, including concessions to search for, extract, or exploit natural resources, and any licenses and permits pursuant to law".

220. In interpreting Article I.1(a) of the BIT, the Tribunal will follow the methodology prescribed by Article 31(1) of the VCLT, *i.e.*, it will seek to interpret the various BIT terms "in good faith", "in accordance with [their] ordinary meaning", seen "in their context", and in the light of the "object and purpose" of the BIT.

221. The Tribunal begins by looking at the ordinary meaning of the terms employed in the BIT's definition of the term "investment", interpreted in good faith.

222. In doing so, the Tribunal first notes the circularity of the BIT definition of the term "investment", which provides that "'investment' means every kind of investment" [emphasis added]. While this definition is broad and non-exhaustive ("every kind of investment […] and includes"), the Tribunal considers it significant that the BIT drafters opted to use the term "investment" instead of the more commonly employed term "asset" in order to define what an "investment" under the BIT is. The Tribunal considers that this choice of wording must necessarily be taken into account when interpreting Article I.1(a) of the BIT. Indeed, pursuant to Article 31(1) of the VCLT,

each term in the BIT must be ascribed a meaning, in good faith, starting from its ordinary meaning.

223. The Parties have discussed at great length whether the so-called *Salini* criteria, which were developed in the context of arbitration under the ICSID Convention, are likewise applicable in this UNCITRAL arbitration. The Tribunal does not consider it necessary to wade into this debate, which is of limited assistance, and will limit its analysis to the terms of the BIT applicable in this particular case.

224. In view of the language employed in the *chapeau* of Article I.1(a) of the BIT, and the use of the word "investment" instead of the word "asset" by the Contracting Parties, the Tribunal considers that a mere asset, without more, does not necessarily constitute an "investment". Indeed, the ordinary meaning of the term "investment" is not identical to the ordinary meaning of the term "asset". In the case of the former, various dictionaries define the term "investment" as "the act of putting money or effort into something to make a profit or achieve a result"[171] or "the outlay of money usually for income or profit".[172] In the case of the latter, the same dictionaries define the term "asset" as "something valuable belonging to a person or organization that can be used for the payment of debts",[173] or "an item of value owned".[174] In other words, while the ordinary meaning of the term "asset" is focused on the ownership of something of value, in the case of the term "investment", something of value (money or assets) is used in the expectation of making a profit. Simply holding an asset without any expectation of profit would not meet the ordinary meaning of the term "investment". For instance, the owner of a winning lottery ticket does not own or control an investment, since to have a winning lottery ticket is simply to have an asset, but there is no expectation, by virtue of that, of making any profit.

225. Furthermore, Article I.1(a) of the BIT specifies that, in order for an investment to be qualified as an "investment" under the BIT (*i.e.*, for it to be a protected "investment"), it must be "owned or controlled directly or indirectly" by an investor of the home State ("nationals or companies of the other party"). The Tribunal considers that the terms "owned or controlled" necessarily imply that there must be certainty with respect to the investor's title over the investment. An investor cannot "own" an investment if it is uncertain if the investor actually *has* any right over the investment. Equally, an investor cannot "control" an investment if the existence of its right over the investment is uncertain. Moreover, in order for the "investment" to

[171] https://dictionary.cambridge.org/dictionary/english/investment.
[172] https://www.merriam-webster.com/dictionary/investment.
[173] https://dictionary.cambridge.org/dictionary/english/asset.
[174] https://www.merriam-webster.com/dictionary/asset.

be protected, the investor that owns or controls it must be from the home State (the Contracting Party to the BIT other than the Contracting Party in which the investment was made), as opposed to being from the host State (the Contracting Party in which the investment was made).

226. The Tribunal further considers that the above-described characteristics of an "investment" must be present regardless of whether something is listed as a potential investment under points (i) through (v) of Article I.1(a) of the BIT or not. Indeed, the use of the words "and includes" at the end of Article I.1(a) of the BIT shows that non-listed assets could still qualify as investments as long as they meet the conditions in Article I.1(a) of the BIT. Consequently, this requirement also applies to those assets already listed. For instance, shares or other interests in a company, listed under item (ii), would not constitute a protected investment if they were owned or controlled by a national or a company of the host State.

227. In answer to Claimant's argument that his investment consists of "a claim to money or a claim to performance having economic value, and associated with an investment" (Article I.1(a)(iii) of the BIT), Respondent has submitted that "a claim to money, as a protected investment, may proceed within the scope of an investment treaty tribunal, only if it is related to an active business".[175] The Tribunal is not persuaded that one can derive the conclusion put forward by Respondent by referring to the defined BIT term "associated activities". The term "associated activities" has a specific definition and is used in the BIT in this particular phrasing (*see*, the following language in Article II.1: "Each Party shall permit and treat investment, and activities associated therewith"). The juxtaposition of the terms "investment" and "activities associated therewith" in Article II.1 shows that the two terms have complementary, but distinct, meanings. Moreover, the terms "investment" and "associated activities" have separate definitions in the BIT, which underscores the Contracting Parties' understanding that they are distinct concepts. Since "claims to money" and "claims to performance" are listed as distinct categories of "investment" (subject to meeting certain conditions), it follows that they too are complementary, but distinct, from "investment activities".

228. Further, the Tribunal considers that the word *investment* as used in the phrase "associated with an *investment*" in Article I.1(a)(iii) of the BIT must be understood in its ordinary meaning and not as a defined BIT term (*i.e.*, not as a "protected investment" pursuant to Article I.1(a) of the BIT). To do otherwise would render the

[175] J&A Memorial, para. 254.

BIT definition entirely circular. Moreover, it would create inconsistencies as the term *investment* would be employed with two different meanings within the BIT's definition despite the absence of any indications that such a conclusion is warranted: in its ordinary meaning in the *chapeau* ("'investment' means every kind of *investment*") and in a special, defined meaning in one of the listed items ("a claim to money or a claim to performance having economic value, and associated with an *investment*").

229. The above has important consequences. Indeed, since the term "investment" in Article I.1(a)(iii) of the BIT ("associated with an *investment*") is to be understood in its ordinary meaning, it follows that a claim to money and/or performance can represent a protected "investment" as long as it is associated with something that is an *investment* in the ordinary sense of the word, but may not necessarily meet the conditions set out in the BIT in order to be protected. For instance, a claim to money can be protected under the BIT as an "investment" in the sense of Article I.1(a)(iii), even if it is associated with an investment in the ordinary sense of the word that is not protected because it no longer exists.

230. Article I.1(a)(iii) of the BIT also requires that "claims to money" and "claims to performance", in order to qualify for BIT protection, have "economic value", *i.e.*, they must be quantifiable. The Tribunal considers that claims to money or claims to performance have economic value if they are shown to be well-founded, as opposed to being a mere assertion. For instance, a frivolous claim to money, even if filed in court, would not meet this condition.

231. Claimant has at times also defined his alleged "investment" as "movable and immovable property and tangible and intangible property" (Article I.1(a)(i) of the BIT).[176] The Tribunal considers that, in this case too, there must be certainty with respect to the investor's title over the "property". One cannot "own or control" "property" if there is uncertainty with respect to the investor's title over said property.

232. Pursuant to Article 31(1) of the VCLT, a further detail in the interpretation of the term "investment" in Article I.1(a) of the BIT results from the context in which this provision is situated (*i.e.*, the text of the BIT, its preamble, and annexes). In particular, Article XIII.1 of the BIT specifies, in its third sentence, that "[the BIT] shall apply to investments existing at the time of entry into force as well as to

[176] Hearing Transcript, Claimant's Opening Statement, Day 1, p. 155, lines 19-24.

investments made or acquired thereafter". In other words, the BIT protects both investments made after its entry into force and investments made prior to this moment in time, but in the latter case only if the investment at issue continued to exist when the BIT entered into force. If, for whatever reason, the investment ceased to exist before the BIT entered into force, it will not be protected under the BIT.

233. On the basis of the above, the Tribunal concludes that, for an investment to qualify for protection under the BIT, it must: (i) involve the use of an asset with the expectation of making a profit; (ii) be owned or controlled by the investor, which means that there must be certainty with respect to the investor's title over the investment; (iii) the investor must be a national or company of the home State, as opposed to the host State; and (iv) the investment must exist when the BIT entered into force or be made thereafter. As regards claims to money or claims to performance specifically, they must also have economic value and must be associated with an *investment* in the ordinary sense of the word. These claims must either exist when the BIT entered into force or be acquired thereafter.

234. The Tribunal will now turn to what Claimant argues constitutes his investment: (i) the original investment made by his predecessors starting from the 1930s and 1940s; and (ii) the alleged subsisting residual rights originating in that investment, consisting of Claimant's right to restitution and to compensation under domestic law. The Tribunal will address these in turn.

2. Whether the Investment Made by Claimant's Predecessors in the 1930s and 1940s Qualifies for Protection under the BIT

235. For the reasons set out in more detail below, the Tribunal finds that the original investment made by Claimant's predecessors in the 1930s and 1940s does not, and cannot, constitute a protected "investment" under the BIT.

236. The Tribunal notes that the investment made by Claimant's predecessor consisted of shares in CIRO, a Romanian joint-stock company. In turn, CIRO owned a film production and post-production studio called Laboratorul Mogoşoaia. Through their ownership of the CIRO shares, Claimant's predecessors controlled CIRO's assets.

237. The record shows that, on 14 April 1948, CIRO's Extraordinary General Meeting decided to dissolve the company.[177] A few days later, the registration judge with the

[177] SoC, para. 135; **Exhibit C-046**, Vahram Sukyas Affidavit in Support of Foreign Claims Settlement Commission Statement of Claim, dated 11 September 1956, p. 4; **Exhibit C-031**, George Posmantir Affidavit dated 11 June 1959, p. 3; **Exhibit C-075**, Minutes of CIRO Extraordinary Meeting of 14 April 1948.

court of Ilfov county in Bucharest decided to approve CIRO's request to register the minutes of the Extraordinary General Meeting. The judge's decision was published in the Official Gazette on 23 April 1948, and ONC formally took over the Laboratory on 29 April 1948.[178]

238. The Parties have vigorously debated in these arbitration proceedings the issue whether CIRO's dissolution was valid or not under Romanian law. In particular, Claimant has taken the position that, because CIRO's dissolution was null and void, the company was never dissolved.

239. The Tribunal considers that the question of the validity, under Romanian law, of CIRO's dissolution is not determinative. At the moment, CIRO has no factual existence as a company under Romanian law. It is not registered with the trade registry, it has no assets, no shareholders, third parties cannot enter into legal relationships with it. Whether the dissolution can be invalidated, and CIRO be made to exist again in the future, is another matter. However, the fact remains that, up until the date of the present Award, nobody has attempted to reverse CIRO's dissolution or approached the competent Romanian authorities for that purpose. And nobody has approached this Tribunal either to determine that the dissolution of CIRO constitutes a breach of an international obligation that could potentially have as a consequence CIRO's resuscitation.[179]

240. The Tribunal therefore finds that, rightly or wrongly, CIRO was dissolved on 23 April 1948, and that, at that moment, Claimant's predecessors completely lost ownership and control over CIRO. As of this date, CIRO ceased to exist as a company. The shares allegedly owned by Claimant's predecessors in CIRO, as a natural consequence, also ceased to exist. Moreover, since Claimant's predecessors had an interest in CIRO's assets by virtue of their shareholding in CIRO, as a result of the dissolution of the company, their indirect rights over what were formally CIRO's assets also ceased to exist.

241. The reality of the total loss of ownership and control over the original investment is confirmed by Claimant's own Statement of Claim, where Claimant acknowledged, with respect to the Romanian domestic legal proceedings, that "[his] original

[178] SoC, para. 158; WS of Mr. Jak Sukyas, paras. 1.8.20-1.8.21; **Exhibit C-073**, Letter from CIRO to Ilfov Tribunal, dated 21 April 1948, p. 2; **Exhibit C-077**, Decision No. 6587 from 29 September 2011 in case 26916/3/2008 (Court of Cassation, Civil and Intellectual Property Division), p. 4; **Exhibit C-078**, Letter from National Office of Cinematography to CIRO (No. 186) dated 29 April 1948.

[179] Certainly, in the appropriate circumstances, the invalid dissolution of a company by domestic authorities can potentially represent the breach of an international obligation and can give rise to damages or restitution in kind.

intention […] was to regain control over this key asset" and to "reclai[m] their ownership".[180] This confirms that even in Claimant's view the investment made by his predecessors in the 1930s and 1940s had ceased to exist by 1994 when the BIT entered into force

242. The Tribunal thus considers that the original investment made by Claimant's predecessors, and their indirect rights over CIRO's assets, ceased to exist on 23 April 1948. This investment consequently was not "existing at the time of entry into force" of the BIT, *i.e.*, 15 January 1994, as required under Article XIII.1 of the BIT, and therefore is not a protected investment under the BIT.

243. A different question is whether the Claimant has any residual rights to restitution or compensation that arise under Romanian law as a consequence of the allegedly abusive taking of CIRO and whether those residual rights can qualify as protected investments under the BIT. It is to this question that the Tribunal now turns.

3. Whether Claimant Has Any Rights to Restitution and/or Compensation for the Alleged Abusive Taking of CIRO, Which Are Protected as "Investments" under the BIT

244. Claimant argues that "the abusive taking of CIRO transformed the investment into a right to a claim, choses in action or lawsuits encompassing immovable property and monetary claims for damages", and, in this way, "the residual and subsisting rights originating from the investment were crystallized in the Claimant's right to claim restitution and compensation under the general rules of Romanian civil law and the more specific rules set out in the special laws providing remedies for the victims of the abusive taking by Romania in the communist era, here Law 10/2011, and Law 221/2009".[181] Claimant considers that "[t]he restitutionary right to a property that constituted an investment is, by its very nature, a residual or a subsisting right arising out of or related to an investment".[182] Claimant submits that, for purposes of the BIT, these residual rights constitute "movable and immovable property and tangible and intangible property" (Article I.1.(a)(i) of the BIT) and "a claim to money or a claim to performance having economic value, and associated with an investment" (Article I.1.(a)(iii) of the BIT).[183] As support for his position,

[180] SoC, para. 481.
[181] Hearing Transcript, Claimant's Opening Statement, Day 1, p. 157, lines 9-21.
[182] Hearing Transcript, Claimant's Opening Statement, Day 1, p. 158, lines 11-14.
[183] Hearing Transcript, Claimant's Opening Statement, Day 1, p. 157 line 19 to p. 156, line 1.

Claimant refers to caselaw such as *Mondev v. United States*, *Saipem v. Bangladesh*, *Chevron I*, *Chevron II*, and *White Industries v. India*.[184]

245. For its part, Respondent takes the position that Claimant never had any residual rights, understood as a claim to money or performance within the meaning of the BIT. According to Respondent, claims to money or performance "are not just allegations made by somebody that somebody else owes him or her money or performance".[185] Respondent submits that, in all cases relied upon by Claimant, "the residual right or claim was not only connected and associated with a proper investment, they were also established and had crystallized, in the sense that their well-founded character had been recognized through process, in particular through legal and judicial process".[186] Respondent relies in particular on *Nagel v. Czech Republic* for the statement that "a claim can normally have a financial value only if it appears to be well-founded or at the very least creates a legitimate expectation of performance in the future".[187] This means, according to Respondent, that "a claim to money is more than just a possibility to have recourse to a procedure and remedies in order to get something", but must be "an established well-founded claim, right or expectation".[188] Respondent maintains that this was never the case for Claimant, who never had an automatic right to restitution or compensation, but only unfounded allegations that were all dismissed by the courts.[189]

246. The Tribunal notes that both Parties have relied upon an abundance of case law in support of their respective positions on the issue of the doctrine of residual rights. The Tribunal recalls that there is no principle of *stare decisis* in international law. While the Tribunal can refer to previous decisions by other tribunals in comparable cases, it has no obligation to follow such decisions, and this is particularly the case if such decisions are based on treaty texts that differ from the one applicable in this case. Moreover, the Tribunal's task is not to apply international investment arbitration jurisprudence, no matter how persuasive, but to apply an international treaty – the BIT. The Tribunal's task is therefore to interpret the terms of the BIT in order to determine what protection, if any, it accords to so-called residual rights and under what circumstances.

---

184 See *supra* n 160 for reference to the decisions.
185 Hearing Transcript, Respondent's Closing Statement, Day 4, p. 736, lines 1-3.
186 Hearing Transcript, Respondent's Closing Statement, Day 4, p. 739, lines 1-6.
187 William Nagel v. The Czech Republic (SCC Case No. 049/2002), Final Award, 9 September 2003, para. 301.
188 Hearing Transcript, Respondent's Closing Statement, Day 4, p. 738, lines 17-22.
189 Hearing Transcript, Respondent's Closing Statement, Day 4, p. 740, lines 3-18.

247. The Tribunal recalls that Article XIII.1, third sentence, of the BIT provides that "[i]t shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter" [emphasis added]. This provision sets out two conditions. First, that the BIT applies to "investments". Since the term "investment" is a defined term in the BIT (Article I.1(a)), it follows that the BIT only applies to investments that meet that definition. By necessary implication, it does not apply to anything that does *not* meet that definition. Second, the BIT only applies to such "investments" that are "existing" when the BIT entered into force or were made/acquired after this moment in time.

248. The Tribunal has set out in great detail in paragraphs 224 to 233 above the requirements under the BIT in order for an investment to be protected, namely that it must: (i) involve the use of an asset in the expectation of making a profit; (ii) be owned or controlled by the investor, which means that there must be certainty with respect to the investor's title over the investment; and (iii) the investor must be a national or company of the home State, as opposed to the host State. As regards claims to money or claims to performance specifically, they must also have economic value and must be associated with an investment (in the ordinary sense of the word).

249. Based on the above, in order for whatever residual rights Claimant alleges he had following the loss of the original investment to be protected under the BIT, said alleged residual rights: (i) must meet the above BIT definition of "investment"; and (ii) must either exist when the BIT entered into force, *i.e.*, on 15 January 1994, or have been acquired thereafter.

250. Claimant appears to accept this interpretative premise. Indeed, Claimant argues that the original investment of his predecessors was transformed into the residual right to claim restitution and compensation and, in this form, the investment continued to exist when the BIT entered into force. Claimant contends that his alleged residual right to restitution and/or compensation is protected as a "claim to money or a claim to performance" under Article I.1(a)(iii) of the BIT, or, alternatively, as "movable and immovable property and tangible and intangible property" under Article I.1(a)(i) of the BIT. In other words, Claimant accepts that, in order for his alleged residual right to qualify for protection under the BIT, it must meet the BIT definition of "investment".

251. Before analyzing in detail Claimant's submissions, the Tribunal makes some preliminary observations.

252. The first is on terminology. In these proceedings, Claimant has argued that "the abusive taking of CIRO transformed the investment into a right to a claim, choses in action or lawsuits", and, in this way, "the residual and subsisting rights originating from the investment were crystallized in the Claimant's right to claim restitution and compensation" [emphases added].[190]

253. The Tribunal considers that the "right to claim" something is not a protected investment. Indeed, the BIT protects "claims" to money or performance, not the right to claim for money or performance. While the latter can be protected as part of a standard of treatment, or as part of the right of access to justice, it would not be protected as an investment. Nevertheless, because Claimant has also referred to Article I.1(a)(i) and I.1(a)(iii) of the BIT, the Tribunal will proceed with its analysis under the assumption that Claimant considers its investment to be a claim to money or claim to performance, not the right to claim for money or for performance.

254. The second observation is on burden of proof. The Tribunal considers that, as the Party asserting that this Tribunal has jurisdiction, it is for Claimant to show that he has made an investment which is protected under the BIT. While Respondent, as an objecting Party, has the burden to show that its jurisdictional objection has merit, ultimately it is for Claimant to demonstrate that a protected investment exists (and continues to exist until the alleged treaty violations took place) and that the Tribunal has jurisdiction *ratione materiae*. Moreover, the Tribunal considers that the existence of a protected investment must be established with a sufficient degree of certainty. A tribunal cannot assert jurisdiction if it has doubts that a protected investment exists. At the same time, a tribunal has to adopt, as explained in paragraph 216 above, a *pro tem* perspective and base the determination of its jurisdiction on the case as pleaded by the Claimant.

255. For the reasons outlined below, the Tribunal has decided to join to the merits of the case Respondent's objection to the Tribunal's jurisdiction *ratione materiae*, in its dimension that pertains to the existence of Claimant's residual right to restitution and/or compensation under Romanian law. In reaching this conclusion, the Tribunal has first looked into whether the alleged right to restitution or compensation for the abusive taking of an investment can constitute in principle a protected "investment" under the BIT. Thereafter, the Tribunal has examined whether Claimant has demonstrated that he had an actual right to such restitution or compensation. Since the Tribunal has reached the conclusion that no such examination can take place

[190] Hearing Transcript, Claimant's Opening Statement, Day 1, p. 157, lines 9-21.

without prejudging the merits of the case, the Tribunal has decided to join to the merits the question whether Claimant had an actual right to restitution or compensation under Romanian law, and whether this constitutes a protected investment under the BIT.

(i) Whether Claimant's alleged right to restitution or compensation can meet the BIT definition of "investment"

256. Respondent considers that a right to restitution or compensation does not qualify as an investment because it lacks the characteristics of an investment, or the so-called *Salini* criteria. Claimant, for his part, disputes that the *Salini* criteria are in any way relevant to this arbitration, which is not conducted under the ICSID Convention.

257. The Tribunal has explained in paragraph 222 above that it will not refer to the *Salini* criteria in its analysis, as it is of limited assistance, and will base its decision strictly on the terms of the BIT. In that same section of its analysis, the Tribunal found that, in order for an asset to represent an investment (in its ordinary sense), and thus potentially also constitute a protected "investment" under the BIT, the respective asset must be used in some way with the expectation of making a profit. This applies both to assets listed at points (i) through (v) of Article I.1(a) of the BIT, as well as to assets which, although not listed, would meet the definition of "investment" included in the *chapeau*.

258. At the same time, in so far as claims to money and/or performance are concerned, the Tribunal finds that for them to qualify as an investment: (i) they must be associated with something that is an *investment* in the ordinary sense of the word; and (ii) they must have economic value, meaning that they must be well-founded. The Tribunal will address the second condition in paragraphs 261 to 270 below. For purposes of this section of the analysis, the Tribunal will examine whether Claimant's alleged right to restitution and/or compensation under Romanian law meets the definition in the *chapeau* of Article I.1(a) of the BIT and whether it is associated with something that is an *investment* in the ordinary sense of the word as laid down in Article I.1(a)(iii) of the BIT. The Tribunal considers that these last two questions are closely linked. If a claim to money and/or performance is associated with an *investment* in the ordinary sense of the word, then the claim to money and/or performance is not a simple asset that one owns or controls, but forms part of a larger operation the purpose of which is to make profit. It is because of this association with an *investment* that the claim to money/or performance is connected

with the expectation of making a profit, and thus meets the conditions set out in the *chapeau* of Article I.1(a) of the BIT.

259. In the present case, Claimant's alleged right to restitution and/or compensation under Romanian law is associated with an *investment* in the ordinary sense of the word, namely the investment made by Claimant's predecessors in the 1930s and 1940s in CIRO, a Romanian joint-stock company. Indeed, the existence of that original investment up until 1948 represents the very premise of Claimant's allegation that he has claims to restitution and/or compensation for its unlawful taking under Romanian law, more specifically under Articles 480 and 481 of the Romanian Civil Code, as well as Law 10/2001 and Law 221/2009. The fact that the investment made by Claimant's predecessors in CIRO no longer existed at the time of entry into force of the BIT is immaterial. It is not that original investment that is protected by the BIT, as the Tribunal has amply demonstrated in paragraphs 234 to 241 above. What can be protected under the BIT is a claim to money and/or performance associated with that original (and long gone) investment (provided that such a claim has economic value).

260. Claimant's alleged right to restitution and/or compensation under Romanian law thus meets the following conditions for being protected under the BIT: (i) it is associated with an *investment* in the ordinary sense of the word; and (ii) for this reason, it is part of an overall operation the purpose of which was to turn a profit (which distinguishes it from a mere asset, such as, for instance, the claim to payment by the winner of a lottery).

261. The Tribunal will now turn to the question whether this alleged right to restitution and/or compensation under Romanian law has economic value, *i.e.*, whether it is well-founded. As will be explained below, the Tribunal has concluded that it cannot assess this issue without prejudging the merits of the case, which is why the Tribunal has decided to join this aspect of Respondent's objection to the Tribunal's jurisdiction *ratione materiae* to the merits of the case.

(ii) Whether Claimant had an actual right to restitution and/or compensation when the BIT entered into force

262. The Tribunal recalls that, in order for an "asset" to qualify for BIT protection as an "investment", the asset must be "owned or controlled" by the investor. This means that there must be certainty with respect to the investor's title over the asset. One cannot "own or control" a hypothetical right. This conclusion holds true whether

one refers to the *chapeau* of Article I.1(a) of the BIT, to Article I.1(a)(i) (if one has a hypothetical right, it is not established that one owns or controls "property") or Article I.1(a)(iii) (a hypothetical right does not have "economic value", as it is more akin to a mere assertion than to a well-founded claim).

263. The Tribunal further recalls that, as the Party asserting that this Tribunal has jurisdiction, it is for Claimant to show that he has made an investment which is protected under the BIT. The existence of a protected investment must be established with a sufficient degree of certainty. A tribunal cannot assert jurisdiction if there are doubts that a protected investment exists.

264. In these proceedings, Claimant has maintained that he was entitled to restitution and/or compensation under Romanian law for the alleged abusive taking of the original investment in 1948. Claimant contends that: "the residual and subsisting rights originating from the investment were crystallized in the Claimant['s] right to claim restitution and compensation under the general rules of Romanian civil law and the more specific rules set out in the special laws providing remedies for the victims of the abusive taking by Romania in the communist era, here Law 10/2001, and Law 221/2009".[191]

265. For its part, Respondent, argues that "[i]t is simply not true that Romanian law, including the 2001 newly introduced laws on restitutions, establishes an automatic right to restitution or compensation for all victims of the socialist Romanian regime. It only creates a potential entitlement, subject to a number of conditions, requirements, and specific remedies to a certain [sic] and crystallize these entitlements. It cannot be sufficient for Claimant[] to self-proclaim that [he] [has] satisfied all requirements to consider [himself] purely unilaterally as owner of an asset or monetary compensation".[192]

266. The record shows that Claimant did not obtain *any* confirmation of his alleged right to restitution and/or compensation under Romanian law from any competent authority. To the contrary, all of his claims were consistently denied by Romanian courts and other authorities as explained in **Chapter V / Section VII**.

267. The Tribunal notes that, at the hearing, Claimant's counsel Mr. Parvanov, stated that

[191] Hearing Transcript, Claimant's Opening Statement, Day 1, p. 157, lines 13-21.
[192] Hearing Transcript, Respondent's Closing Statement, Day 4, p. 740, lines 2-14.

> "Each of Claimant['s] cases under Law No. 10, Law No. 221 and the Civil Code revendication [sic] action were filed, admitted – I can have some argument with Mr Müller if there were claims that they just put in and the court clerk told them, 'What is that? It's not admissible'. Some very basic admissibility hyper-mandatory procedural rules, then we can talk about this and entertain the notion. But that is categorically not the case here. Filed, admitted and adjudicated, all three. They went through the system. The system that failed, that's why we're here. How the Romanian administration and courts treated these claims is a question on the merits".[193]

268. Whatever the crux of the argument above, the Tribunal considers that Claimant has certainly not abandoned his stance that the Romanian courts wrongly dismissed his claims under the various restitution regimes in violation of his rights under the US-Romania BIT. Indeed, in this very statement, Claimant argues that the judicial system in Romania failed.

269. Since all of the claims filed by Claimant were rejected by the competent authorities, it would appear that Claimant has not successfully established that his alleged right to restitution and/or compensation under Romanian law had merit, *i.e.*, that it had economic value.

270. However, the crux of Claimant's case on the merits is that he could not show that he had such an entitlement under Romanian law because he was denied justice by Romania in violation of his rights under the US-Romania BIT. Since these proceedings have been bifurcated and the Tribunal has not been briefed on the merits of the case, the Tribunal is not able at this stage of these proceedings and on the basis of an incomplete record to determine to which extent Claimant was entitled to restitution and/or compensation under Romanian law. To find in this manner would be to essentially prejudge the question of whether denial of justice occurred, and thus the merits of the case.

271. The Tribunal has therefore decided to join to the merits of the case Respondent's objection to jurisdiction *ratione materiae* insofar as it concerns the existence of Claimant's residual right to restitution and/or compensation under Romanian law, and whether this constitutes a protected "investment" under the US-Romania BIT The Tribunal will also address in the subsequent phase of the proceedings Respondent's argument that Claimant has not shown that he inherited any rights from his predecessors.

[193] Hearing Transcript, Claimant's Closing Statement, Day 4, p. 815, lines 9-24.

Section III. – Issue No. 3 – Whether the Tribunal Has Jurisdiction *ratione temporis* to Decide Claimant's Claims under the US-Romania BIT

I. Respondent's Position

272. According to Respondent, the case submitted to the Tribunal is actually about the "Crucial Events of 1948", which fall outside the scope of the Tribunal's jurisdiction *ratione temporis*.[194]

273. Respondent submits that, in accordance with the general rules of international law, the provisions of a treaty create obligations on a contracting party only from the date of the entry into force of that treaty with respect to that party. Respondent relies *inter alia* on Article 28[195] of the VCLT and Articles 13 and 14[196] of the 2001 International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**").[197]

274. Respondent notes that the US-Romania BIT entered into force on 15 January 1994,[198] and that the Protocol to the BIT contains a specific provision recalling the general principle of non-retroactivity.[199] Therefore, the Tribunal's jurisdiction *ratione temporis* does not cover acts or facts that took place, or any situation which ceased to exist, before 15 January 1994.[200]

275. Respondent's objection is divided into two cumulative arguments set out below.

---

194 J&A Memorial, para. 135.

195 **Exhibit CL-071**, Article 28 of the VCLT reads as follows: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

196 **Exhibit CL-142**, Articles 13 and 14.1 of ARSIWA reads as follows: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue".

197 J&A Memorial, paras. 142-145.

198 J&A Memorial, paras. 149-150.

199 J&A Memorial, paras. 146-147. **Exhibit RL-1**, US-Romania BIT, Protocol, Article 4 reads as follows: "The Parties confirm their mutual understanding that the provisions of this Treaty do not bind either Party in relation to any act or fact which took place, or any situation which ceased to exist, before the date of the entry into force of this Treaty".

200 J&A Memorial, para. 150.

1. The US-Romania BIT Does Not Cover Disputes That Arose Prior to the Treaty's Entry into Force

276. Respondent contends that the US-Romania BIT does not cover disputes that arose prior to the treaty's entry into force, regardless of whether the specific measures complained of concern acts that took place after the treaty's entry into force.[201]

277. The nature of the dispute must be determined by the Tribunal after an objective analysis of the facts in the case.[202] In its view, the identification of the claims and the definition of the dispute, as set out by Claimant in the SoC, show that the case submitted to this Tribunal is actually about the alleged "expropriation" or "confiscation" of CIRO in 1948.[203]

278. Respondent submits that Claimant brought the same claims aiming at obtaining compensation for the same acts of 1948, before various Romanian agencies, Romanian courts, U.S. courts, the ECtHR, and before this investment tribunal. The substitution of the *causa petendi*, tailored each time to meet the jurisdictional requirements before the various judicial fora, does not change the substance of the *petitum* and the nature of the dispute.[204]

279. As support for its position, Respondent relies on the following cases, in which the tribunals held that they did not have jurisdiction to entertain disputes that had arisen before the relevant treaties entered into force: (i) *Lucchetti v. Peru*,[205] (ii) *Vieira v. Chile*,[206] (iii) *ATA v. Jordan*,[207] (iv) *EuroGas v. Slovakia*,[208] and (v) *MCI v. Ecuador*.[209]

---

[201] J&A Memorial, paras. 136, 152; SoR, paras. 140-152, 155-156; Hearing Transcript, Respondent's Opening Statement, Day 1, p. 37, line 3 to p. 38, line 11.
[202] SoR, para. 140.
[203] J&A Memorial, para. 152.
[204] SoR, para. 143.
[205] **Exhibit RL-239**, *Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, dated 5 February 2005.
[206] **Exhibit RL-241**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award dated 21 August 2007.
[207] **Exhibit RL-238**, *ATA Construction v. Jordan*, ICSID Case No. ARB/08/02, Award, 18 May 2010.
[208] **Exhibit RL-242**, *Eurogas v. Slovakia*, ICSID Case No, ARB/14/17, Award, 18 August 2017.
[209] **Exhibit RL-99**, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award, para. 61.

2. The Alleged Acts Committed by the Romanian Administration and Local Courts Do Not Constitute Independent Actionable Breaches

280. Referring to *Mondev v. United States,*[210] *Spence v. Costa Rica*,[211] and *Carrizosa v. Colombia,*[212] Respondent argues that, pursuant to the principle of non-retroactivity of treaties, whenever a tribunal is confronted with acts or facts that took place both before and after a treaty entered into force, it has jurisdiction *ratione temporis* only over post-treaty conduct, and only insofar as those acts or facts could constitute independent actionable breaches.[213]

281. Respondent submits that, in this case, the "real issue" in dispute does not concern, as Claimant contends, any autonomous measures by RADEF or the Romanian administrative and judicial authorities, but the very conclusions reached by those authorities on the claims for compensation for the allegedly abusive taking of CIRO in 1948. According to Respondent, in this arbitration, Claimant simply seeks to obtain a different conclusion on the merits of its claims for compensation relating to the 1948 acts than the ones reached by the Romanian authorities. For instance, as part of Romania's impugned measures:[214]

- Claimant challenges the conclusions reached by RADEF and the domestic courts with regard to the "abusive nature of the change of property in 1948".[215]
- Claimant challenges the conclusions of the domestic courts in relation to the 1948 events: "Romanian courts concluded that the alleged sale of the shares on 12 April 1948 was an arm's length transaction […]"; Claimant contends that there was "one single question that Claimant['s] entire case revolved around, namely whether the shares in CIRO were purchased by ONC on the Bucharest Stock Exchange on 12 April 1948".[216]

---

[210] **Exhibit RL-115**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, dated 11 October 2002.

[211] **Exhibit RL-117**, *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal on Jurisdiction, dated 25 October 2016.

[212] **Exhibit RL-108**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, dated 19 April 2021.

[213] J&A Memorial, paras. 143-161, 172-184; SoR, paras. 149-162; Hearing Transcript, Respondent's Opening Statement, Day 1, p. 40, line 10 to p. 43, line 22.

[214] SoR, paras. 145, 150.

[215] Respondent cites SoC, paras, 568, 571, The Tribunal notes that the general points are indeed made in these paragraphs of the SoC. However, the Tribunal was unable to find the exact quote that Respondent claims to be a reproduction of Claimant's SoC in those paragraphs or elsewhere within the SoC.

[216] SoC, paras. 577, 591.

- Claimant refers to the fact that he "brought the Law 221/2009 Action, requesting the Bucharest Tribunal to ascertain the political nature of the conviction of Mr. Vahram Sukyas in 1948 and […] to award compensation for the value of the assets confiscated by Romania […]".[217]
- Under the heading "Romanian Courts' Failure to Examine the Evidence Adduced in the Case Record as to the Impossibility of a Sale of Shares in CIRO on the Stock Exchange in 1948 Breached the Fair and Equitable Treatment Standard"[218] challenges the conclusion with respect to the same 1948 events.
- Claimant alleges that a wrongful act of the Romanian court is that it "rejected outright Claimant['s] claims for the war damages suffered by CIRO, the deprivation of use of the company's assets, the value of shares in CIRO, and the goodwill of CIRO as groundless".[219]
- Claimant alleges that another wrongful act of the Romanian court is that it rejected Claimant's action "requesting an order granting the restitution in kind of the Laboratorul Mogoşoaia […]".[220]

282. Respondent argues that the alleged wrongful acts of the Romanian authorities from 2000 onwards only consist in rejecting Claimant's claims for compensation relating to Romania's alleged 1948 conduct. There is nothing "autonomous" in those acts and the Tribunal cannot appreciate their lawfulness without appreciating the lawfulness of the 1948 measures.[221] The claims referring to the domestic courts' decisions are not detached, but intrinsically linked, to the 1948 acts. Furthermore, the measures "since [the] 2000s onwards" did not in and of themselves change in any way Claimant's legal situation.[222]

283. Finally, Claimant's categorization of the damages and the amount claimed undoubtedly shows that he seeks redress for losses allegedly suffered by his ancestors, not by himself due to any autonomous violations by domestic courts. In essence, Claimant requests compensation for the value of CIRO as of the day of the alleged confiscation in 1948.[223]

---

[217] SoC, para. 593.
[218] SoC, p. 313.
[219] SoC, para. 626.
[220] SoC, para. 630.
[221] J&A Memorial, para. 160; SoR, para. 153.
[222] J&A Memorial, para. 183; SoR, para. 158.
[223] J&A Memorial, paras. 162-166.

II. Claimant's Position

284. Claimant contends that: (i) the present dispute arose out of the internationally wrongful acts of the Romanian administration and judiciary in the proceedings pursued by himself in the 2000s and onwards;[224] and that such acts (ii) constitute independent actionable breaches that were committed after the entry into force of the US-Romania BIT.[225]

285. According to Claimant, the main assumption on which Respondent builds its objection *ratione temporis* is that the case submitted to this Tribunal is truly about the alleged "expropriation" or "confiscation" conducted in the "crucial year 1948", against Claimant's ancestors.[226]

286. In Claimant's view, this is an attempt to misguide the Tribunal as to the true nature of the present dispute. Claimant explains that the present dispute arose out of the internationally wrongful acts of Romania in the proceedings he pursued in the 2000s and onwards. The present Tribunal has been constituted to decide on the compatibility of said acts in these proceedings with the standards of treatment envisaged in the US-Romania BIT.[227]

287. Claimant submits that it is not the date of the events forming the factual background that are relevant for purposes of jurisdiction *ratione temporis*, but the date of the challenged acts giving rise to Respondent's international responsibility.[228]

288. Claimant further argues that, according to the principle of non-retroactivity, as long as there is an independently actionable breach that has arisen after the entry into force of an investment treaty, a tribunal has jurisdiction *ratione temporis* to hear claims in relation to such breach. Accordingly, facts or events pre-dating the entry into force of the applicable investment treaty, which form part of the factual background to the dispute, do not preclude a tribunal's jurisdiction *ratione temporis* over the independent actionable breaches that were committed after the entry into force of the treaty.[229]

---

[224] Counter-Memorial on J&A, para. 268; SoRj, paras. 132, 136.
[225] Counter-Memorial on J&A, paras. 282-306; SoRj, paras. 135-138.
[226] Counter-Memorial on J&A, para. 266.
[227] Counter-Memorial on J&A, para. 268; SoRj, paras. 132, 136.
[228] Counter-Memorial on J&A, para. 271.
[229] Counter-Memorial on J&A, para. 282.

289. As support for his position, Claimant refers to the decisions of the *ad hoc* committee in *Duke Energy*,[230] and of the tribunals in *MCI v. Ecuador*[231] and *Jan de Nul v. Egypt*. In the latter case, the tribunal unanimously held that the claimant's claims were covered by the temporal scope of the applicable BITs, drawing a distinction between the investment treaty dispute submitted to it and the domestic law dispute pre-dating the entry into force of the BIT, which had been submitted before the Egyptian courts.[232] The relevant part of the decision reads as follows:

> "Moreover, the claims regarding the judgment and the manner in which the Egyptian courts dealt with the dispute address the actions of the court system as such, and are thus separate and distinct from the conduct which formed the subject matter of the domestic proceedings. Hence, they do not coincide with the conduct examined in the course of the dispute brought under domestic law. The fact that the most important part of the Claimants' SoC is devoted to alleged BIT violations in connection with the very facts that founded the claim before the Ismaïlia court (and only a minor part to the alleged wrongdoing of the court system) does not change the situation".[233]

290. Claimant considers that there is a clear distinction between, on the one hand, the acts committed in 1948, which formed the subject matter of domestic proceedings, and, on the other hand, the acts committed in the course of these domestic proceedings, which form the subject matter of the present investment treaty dispute. The investment treaty dispute before this Tribunal concerns the alleged unlawfulness of the way the local proceedings were conducted, at a time when the US-Romania BIT was in force.[234]

291. Claimant stresses that all the challenged acts were committed by Respondent after the entry into force of the US-Romania BIT. He refers to *Carrizosa v. Colombia*, a case cited by Respondent, in which the tribunal held that "if post-treaty conduct can constitute an independent cause of action under the treaty, it will come under the treaty tribunal's jurisdiction, irrespective of whether such conduct may pertain to a broader pre-treaty dispute".[235] In Claimant's view, where there is an actionable breach that arises in the course of domestic proceedings, an investment treaty

---

230 **Exhibit RL-98**, *Energy International Peru Investments No. 1 Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the Ad Hoc Committee, 1 March 2011, para. 173.

231 **Exhibit RL-99**, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 136.

232 Counter-Memorial on J&A, para. 290; SoRj, para. 125.

233 **Exhibit CL-231**, *Jan de Nul NV & Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 119.

234 Counter-Memorial on J&A, paras. 292, 304; SoRj, para. 132.

235 **Exhibit RL-108**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, para. 143.

tribunal has jurisdiction *ratione temporis* over such breach, even if the events or conduct underlying the domestic proceedings pre-date the entry into force of the treaty.[236]

292. Finally, Claimant submits that Respondent's argument in paragraph 281 above, according to which it is not possible to "appreciate" the lawfulness of the challenged acts without assessing the lawfulness of the 1948 measures, is inapposite. According to Claimant, Respondent fails to understand that the Tribunal's function is entirely different from the function of an appellate court. It is not for the Tribunal to review and correct the errors in the application of substantive law by Romanian courts. Instead, the Tribunal has to determine "whether in reaching their decisions and judgments the Romanian administration and courts acted in breach of Respondent's investment treaty obligations by, for instance, rendering arbitrary decisions, disregarding the clear provisions of procedural and substantive laws, failing to observe the requirements of judicial propriety, or violating Claimant['s] due process rights".[237]

III. Decision

293. For the reasons presented in more detail below, the Tribunal has decided to join Respondent's objection to jurisdiction *ratione temporis* to the merits of the case.

1. The Principle of Non-Retroactivity of Treaties

294. At the outset, the Tribunal recalls that Article 28 of the VCLT, which codifies the principle of non-retroactivity of treaties, provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".[238]

295. Article 4 of the Protocol of the US-Romania BIT confirms the United States' and Romania's understanding that the principle of non-retroactivity of treaties is applicable:

---

[236] Counter-Memorial on J&A, para. 298; SoRj, para. 125.
[237] Counter-Memorial on J&A, para. 306; SoRj, para. 135; Claimant's Closing Statement, Day 4, p. 774, line 2 to p. 779, line 25.
[238] **Exhibit CL-071**, Article 28 of the VCLT.

> "4. The Parties confirm their mutual understanding that the provisions of this Treaty do not bind either Party in relation to any act or fact which took place, or any situation which ceased to exist, before the date of the entry into force of this Treaty".[239]

296. The US-Romania BIT entered into force on 15 January 1994. Therefore, pursuant to Article 4 of the Protocol, actions that "took place" or situations "which ceased to exist" before this date do not constitute a breach of the BIT. This is agreed by the Parties. [240]

297. This conclusion is confirmed by Articles 13 and 14 of ARSIWA, which provide in relevant part:

> "*Article 13*
> *International obligation in force for a State*
>
> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.
>
> *Article 14*
> *Extension in time of the breach of an international obligation*
>
> The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."[241]

298. The Tribunal, like numerous other tribunals before it,[242] considers that the principle of non-retroactivity of treaties, enshrined in Article 28 of the VCLT and in Article 4 of the Protocol of the US-Romania BIT, entails the following:

- A State can only be internationally responsible for the breach of a treaty obligation if the obligation was in force for that State at the time of the conduct that is alleged to constitute a breach of the treaty;

- Events or conduct prior to the entry into force of an obligation for the State may be relevant in determining whether the State has subsequently committed a breach of the obligation, but it must still be necessary to point

[239] **Exhibit CL-57 / RL-1**, US-Romania BIT, Protocol, Article 4.
[240] J&A Memorial, paras. 132-184; SoR, paras. 134-162; Counter-Memorial on J&A, paras. 281-306; SoRj, paras. 125-138.
[241] **Exhibit CL-142**, Articles 13 and 14.1 of ARSIWA.
[242] **Exhibit RL-115**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, dated 11 October 2002; **Exhibit RL-117**, *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal on Jurisdiction, dated 25 October 2016; **Exhibit RL-108**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, dated 19 April 2021.

to conduct of the State after that date which itself constitutes a breach of the treaty;

- In such cases, it will be necessary to assess whether the post-treaty conduct can be sufficiently detached from pre-treaty conduct, so as to be independently justiciable. In other words, unless the post-treaty conduct is itself capable of constituting a breach of the treaty, independently from the question of unlawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct will also fall outside the tribunal's jurisdiction *ratione temporis*; and

- The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.

299. A seminal case which set out the above principles is *Mondev v. United States*, where the tribunal held as follows:

> "The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties[] and in the ILC's Articles on State Responsibility,[] and has been repeatedly affirmed by international tribunals.[] There is nothing in NAFTA to the contrary. Indeed Note 39 to NAFTA confirms the position in providing that 'this Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter'. Thus, as the *Feldman* Tribunal held, conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA. […]
>
> [E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in

> the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility".[243] [emphases added].

300. In *Spence v. Costa Rica*, at issue were environmental regulations for the protection of sea turtles, which allegedly resulted in the expropriation of claimant's property. The regulatory measures pre-dated the entry into force of the Central America-United States Free Trade Agreement ("**CAFTA**"), while the judicial decisions that determined the compensation due were issued after it had entered into force. Building on the reasoning in *Mondev*, the tribunal ruled as follows:

> "In common with the approach taken in a NAFTA context by the tribunals in *Mondev*,[] *Grand River*[] and *Clayton*,[] the Tribunal considers that CAFTA Article 10.1.3 does not preclude it from having regard to pre-CAFTA entry into force conduct for purposes of determining whether there was a post-entry into force breach of a justiciable obligation. In this regard, however, the Tribunal emphasises, reflecting its analysis above on the question of breach under Article 10.18.1, that pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. […]
>
> Second, the 1 January 2009 entry into force date has implications for the operation of the later-in-time 10 June 2010 critical limitation date. Even in circumstances in which a claimant will be able to point to a post-10 June 2010 cause of action, it will be necessary to assess whether the claim that is alleged can be sufficiently detached from pre-entry into force acts and facts so as to be independently justiciable, even if it may be appropriate to have regard to pre-1 January 2009 conduct for purposes of determining whether there was a subsequent post-entry into force breach. […]. An alleged breach will not come within the jurisdiction of the Tribunal if the Tribunal's adjudication would necessarily and unavoidably require a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time. […]. To be justiciable, a breach that is alleged to have taken place within the permissible period, from a limitation perspective, must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be *independently* actionable".[244] [emphases added].

301. The tribunal in *Carrizosa v. Colombia* was faced with a similar issue when interpreting Article 28 of the VCLT and Article 10.1.3 of the 2006 US-Colombia

[243] **Exhibit RL-115**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award, dated 11 October 2002, paras. 68-70.

[244] **Exhibit RL-117**, *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal on Jurisdiction, dated 25 October 2016, paras. 217-222.

Trade Promotion Agreement ("**TPA**")[245] to determine its own jurisdiction.[246] At issue in this case were a series of fiscal and administrative measures adopted in 1998. Prior to the TPA's entry into force, the claimant had challenged the measures before the local courts and had had some measure of success, but ultimately an unfavourable decision was rendered against it in 2011 by the Constitutional Court. The TPA entered into force after the claimant had filed for the annulment of this decision, on 15 May 2012. Ultimately, in June 2014, the 2011 decision was confirmed by the Constitutional Court and the claimant lost the case.[247]

302. The relevant question before the *Carrizosa* tribunal was whether the 2014 decision represented an independently actionable claim that could form a separate treaty breach in its own right. Endorsing the principles set out in *Mondev v. United States* and *Spence v. Costa Rica*, the *Carrizosa* tribunal found as follows:

> "The Tribunal recalls that its jurisdiction under Article 12.1.2(b) of the TPA is limited to claims of violations of a specific set of substantive provisions of Chapter 10 of the TPA. Those provisions in turn are temporally limited to post-treaty acts and facts pursuant to Article 10.1.3 of the TPA. The cumulative result of these two limitations is that the Tribunal has no jurisdiction to assess the lawfulness of the Respondent's pre-treaty conduct, […]. It follows that, unless the post-treaty conduct (i.e. the 2014 Order) is itself capable of constituting a breach of the TPA, independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would also fall outside the Tribunal's jurisdiction." [248] [emphasis added]

303. Ultimately, the tribunal concluded that it did not have jurisdiction *ratione temporis* over the 2014 decision, as it was not sufficiently separable from pre-treaty conduct and the claimant had not put forward criticisms against the 2014 decision that were distinct from their critiques of pre-treaty conduct:

> "In the present case, the single post-treaty conduct of which the Claimant complains fails to meet this test. The Parties and their legal experts extensively debated various points of disagreement in respect of the legal nature of the 2014 Order. […] [T]he legal effect of the 2014 Order was to leave unaltered the outcome of the 2011 Decision, which in turn had annulled the 2007 Judgment.

---

[245] The Tribunal notes that Article 10.1.3 of the 2006 US-Colombia Trade Promotion Agreement is almost identical to Article 4 of the Protocol of the US-Romania BIT: "For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement".

[246] **Exhibit RL-108**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, dated 19 April 2021.

[247] **Exhibit RL-108**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, dated 19 April 2021, paras. 74-104.

[248] **Exhibit RL-108**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, dated 19 April 2021, para. 153.

> As discussed earlier, the Tribunal lacks jurisdiction to assess the lawfulness of the Respondent's pre-TPA conduct. The mere fact that in 2014 the Constitutional Court did not annul or otherwise redress the outcome of the pre-treaty measures does not place those measures within the scope of the Tribunal's jurisdiction. [...]
>
> The Claimant did assert that the 2014 Order 'coincided with the end of all judicial labor in Colombia concerning the Claimant's investment' and that her 'claims arise from Order 188/14, the Constitutional Court's June 25, 2014 denial of the motion for annulment of its May 26, 2011 opinion.'[], but nowhere did [the claimant] raise any specific allegations that impugn the lawfulness of the 2014 Order separately from her complaints about the 1998 Measures and the 2011 Decision".[249] [emphases added].

304. Having set out above the main implications of the non-retroactivity principle, the Tribunal will now analyse whether Claimant's claims comprise independent breaches of the US-Romania BIT.

2. Whether Claimant's Claims Comprise Independent Breaches of the US-Romania BIT

305. Respondent argues that Claimant's case is truly about "acts of alleged expropriation or confiscation" that took place in 1948.[250] In its view, the core of Claimant's case, which stands as the basis for his claims "before all the other courts and tribunals […] concern the supposed force[d] sale which would have taken place in the 'crucial year of 1948'".[251] According to Respondent, Claimant is requesting the Tribunal to review the conclusion of RADEF and the local Romanian courts set out in **Chapter V / Section VII** above, which are intrinsically linked to the lawfulness of the 1948 events. This means that the Tribunal cannot uphold Claimant's claims without concluding that Romania's alleged conduct in 1948 was unlawful.[252]

306. At the hearing, Respondent's counsel went through a "selection" of Claimant's claims from the table of contents of the SoC and argued that the so-called autonomous breaches that Claimant puts forward were actually the conclusions reached by RADEF and the local courts, and in particular, their failure to acknowledge that the "taking" of CIRO in 1948 was abusive.[253]

---

[249] **Exhibit RL-108**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, dated 19 April 2021, paras. 156-158.
[250] J&A Memorial, para. 152.
[251] J&A Memorial, para. 154.
[252] J&A Memorial, paras. 181-184; SoR, paras. 145-146, 149-150, 153-156.
[253] Hearing Transcript, Respondent's Opening Statement, Day 1, p. 40, line 10 to p. 43, line 22.

307. On the other hand, Claimant contends that his claims relate to the wrongful acts of the Romanian administration and judiciary in the 2000s and onwards, which constitute independent actionable breaches that were committed after the entry into force of the US-Romania BIT.[254] Claimant clarifies that:

> "It is not for the present Tribunal to review and correct the errors in the application of substantive law by the Romanian courts. What Claimant[] ask[s] from the Tribunal is to determine whether in reaching their decisions and judgments the Romanian administration and courts acted in breach of Respondent's investment treaty obligations by, for instance, rendering arbitrary decisions, disregarding the clear provisions of procedural and substantive laws, failing to observe the requirements of judicial propriety, or violating Claimant['s] due process rights. Contrary to what Respondent seems to suggest, this task certainly does not require the Tribunal to make an assessment of legality of the 1948 events under the laws in force in 1948".[255]

308. The Tribunal has carefully reviewed the Parties' written submissions and oral pleadings,[256] and understands that Claimant argues that Romania breached several provisions of the US-Romania BIT, *inter alia*, through the following measures relating to RADEF:

> "- RADEF's failure to render its decision within the mandatory statutory period of 60 days as envisaged in Law 10/2001: RADEF's rendering of its decision in seven years caused undue delay;
>
> - RADEF's repeated and unwarranted requests for unnecessary documentation, which constitute an arbitrary conduct that goes beyond the framework provided under Law 10/2001;
>
> - The purported designation of the claimed property as a cultural establishment in a bad faith effort to prevent the restitution in kind despite the explicit provision in Law 10/2001 stipulating that the cultural establishment exception does not apply to immovable property taken over without a valid title;
>
> - RADEF's and CNC's bad faith 'ping pong' game of transferring the claimed property with a view to avoiding the jurisdiction of the courts that Claimant[] filed an injunction application with;

[254] Counter-Memorial on J&A, para. 268, 282-306; SoRj, paras. 132, 135-138; Claimant's Closing Statement, Day 4, p. 774, line 2 to p. 779, line 25.

[255] Counter-Memorial on J&A, para. 306.

[256] The Tribunal clarifies that the list of breaches / measures, which Claimant complains of, as set out in the paragraphs below, is not intended to be comprehensive. For instance, the Tribunal is aware that Claimant also argues that Respondent breached the full protection and security and non-impairment clauses in the US-Romania BIT, which are not referenced below.

> - RADEF's repeated failures to comply with two separate Romanian court injunctions finding RADEF in default of the 60 days mandatory statutory period and ordering RADEF to issue its decision on Claimant['s] application immediately;
>
> - Contradictory statements of RADEF's personnel as to the expected decision, which demonstrates the arbitrary approach of the administration and the lack of transparency in the procedure followed by RADEF;
>
> - RADEF's unlawful and arbitrary decision, shifting of the burden of proof to Claimant[] and requiring them to demonstrate that the taking of the claimed property was abusive in a patent disregard of not only the applicable provisions of Law 10/2001 but also the instructions of the central authority for property restitution (ANRP), which RADEF had itself requested the assistance of; and
>
> - RADEF's failure to issue a reasoned decision explaining on which basis it denied the restitution of the claimed property and required Claimant[] to produce evidence that the taking was abusive despite the contrary provision in Law 10/2001".[257]

309. Furthermore, Claimant contends that Romania breached several provisions of the US-Romania BIT through conduct of its agencies and local courts, *inter alia*, by: (i) engaging in undue delay; (ii) shifting the burden of proof against Claimant; (iii) disregarding express provisions of Romanian laws; (iv) "arbitrarily finding that the state held valid title" over CIRO; (v) ignoring conclusive evidence that "CIRO was never listed on the stock exchange and that CIRO's shares could not have been sold on the stock exchange"; (vi) "rendering a decision on the basis of insufficient evidence […] without providing any reasoning"; and (vii) failing to consider certain of Claimant's claims concerning Law 221/2009.[258] Moreover, Claimant contends that Romania "deprived" him of his right to restitution of the Laboratory, "as a result of a mockery of administrative and judicial proceedings in which [the] Romanian administration and judiciary blatantly disregarded the clear and express provisions of Romanian law, including the rebuttable and non-rebuttable presumptions created by Romanian law".[259]

310. On a *prima facie* basis, at least several of the measures challenged by Claimant could potentially be analyzed as independent breaches of the US-Romania BIT pursuant to the test set out in paragraph 298 above. However, at this jurisdictional stage of the proceedings, when the Parties have not yet fully briefed it with respect to each challenged measure, and with an incomplete record, the Tribunal is unable to reach

[257] SoC, para. 568.
[258] SoC, paras. 579, 586, 589, 595, 613, 638-652.
[259] SoC, para. 658.

a definitive conclusion whether all, some, or none of the measures challenged by Claimant meet the conditions listed in paragraph 298 above. For this reason, the Tribunal has decided to join Respondent's objection to jurisdiction *ratione temporis*[260] to the merits of the case.

311. In the subsequent phase of this arbitration, the Parties are instructed to analyze each challenged measure separately (and to the extent necessary, collectively) and to precisely set out whether they meet the conditions listed by the Tribunal in paragraph 298 above.

Section IV. – Issue No. 4 – Whether Claimant's Claims Have Been Settled

I. Respondent's Position

312. According to Respondent, there is no "dispute" since the present claims concern alleged rights that have been settled a long time ago and therefore ceased to exist. In its view, the Tribunal has no jurisdiction over these claims, which are otherwise inadmissible.[261]

313. Respondent's position is that all "outstanding debts" and "issues" relating to the alleged "expropriation" of CIRO in 1948 were entirely and fully resolved both under international law, through the 1960 US-Romania Compensation Treaty and the 1965 US-Turkey Compensation Treaty, and under Romanian law through the effect of those treaties. In its view, the "domestic" / "international" distinction made by Claimant (see, paragraph 324 below) is inapposite. The question is whether the rights pertaining to certain alleged assets continued to exist between the 1960s, following the 1960 and 1965 treaties, and the 2000s, when legislation in Romania was adopted to allow for certain claims for historical compensation to be made.[262]

314. Regarding the 1960 US-Romania Compensation Treaty, Respondent submits that the manner in which the compensation was awarded to U.S. nationals was out of the ordinary since such compensation was actually awarded before the treaty was signed on 30 March 1960. This is confirmed both by a contemporaneous article authored by a U.S. State Department official, by the Compensation Treaty's *travaux*

[260] The Tribunal clarifies that this includes the issue raised by Respondent, concerning whether or not the US-Romania BIT covers disputes "that arose prior to the treaty's entry into force", regardless of whether the specific measures complained of concern "acts that took place after the treaty's entry into force".
[261] J&A Memorial, para. 119; SoR, para. 32.
[262] SoR, paras. 37-39.

préparatoires, and contemporaneous meeting notes between the U.S. and Romania, in advance of the conclusion of the treaty.[263]

315. The intention of both Romania and the U.S. was that compensation to U.S. nationals granted in 1959 would constitute compensation within the scope of the 1960 US-Romania Compensation Treaty, which extinguished all U.S. claims for alleged "expropriations" of U.S. nationals in Romania during World War II and up until 30 March 1960. As support for its position, Respondent refers to a decision by Romania's "High Constitutional Court of Justice" as well as the expert report of Professor Dincă.[264]

316. Respondent points out that the FCSC Final Decision dated 17 July 1959 awarded Melik USD 49,500 in compensation and USD 17,340.42 in interest. Of this amount, a little over a half (USD 25,000) was specifically for the alleged nationalisation of CIRO. Respondent notes that in the papers submitted by Melik, he stated that he was the sole owner of all property for which compensation was claimed, in particular the shares of CIRO.[265]

317. Contrary to Claimant's position, Respondent contends that the payment made pursuant to the FCSC Final Decision was made under the 1960 US-Romania Compensation Treaty regime. Respondent refers for support to the expert report of Professor Dincă and the *travaux préparatoires*.[266]

318. Respondent adds that Melik passed away in 1959, shortly before the FCSC Final Decision. As a result, the four payments made pursuant to this decision went to Melik's "sole heir and legatee"[267]: his brother Vahram. When Vahram and his wife eventually passed away, Claimant and his brother, Edward Sukyas, appear to have become "the sole heirs" of Vahram's estate, as they allege. That means that the benefits of the FCSC Final Decision, including the payments made thereunder, can be directly traced to Claimant.[268] Respondent clarifies that just like every other

---

[263] J&A Memorial, para. 58; **Exhibit RL-83**, Gordon A. Christenson, "The United States-Romanian Claims Settlement Agreement of March 30, 1960", University of Cincinnati College of Law Scholarship and Publications, Faculty Articles and Other Publications, Paper 166, dated 1 January 1961; **Exhibit R-48**, Verbatim report of the sitting, dated 17 October 1956.

[264] J&A Memorial, para. 75; Expert Report of Professor Dincă, dated 5 August 2022, para. 103, citing the Romanian Constitutional Court, Decision No. 841, dated 10 December 2015, para. 37.

[265] J&A Memorial, paras. 76, 121.

[266] SoR, paras. 45-47; Expert Report of Professor Dincă, dated 5 August 2022, paras. 69, 32, 294.

[267] J&A Memorial, para. 77.

[268] J&A Memorial, paras. 65, 77.

successful claimant against Romania before the FCSC, Melik would have received 37% of his award, based on the amount of funds available for distribution.[269]

319. Respondent further contends that Claimant's claims have also been settled on the basis of the 1965 US-Turkey Compensation Treaty.[270]

320. In essence, in Respondent's view, since the claims asserted in the 1950s by Melik before the FCSC "fully overlap with the claims advanced by […] Jak Sukyas in the present arbitration[], such claims have simply ceased to exist as a matter of international law since the entry into force of the [relevant compensation treaties]".[271]

II. Claimant's Position

321. According to Claimant, there continues to be an existing dispute between the Parties which has not been settled.[272]

322. Claimant argues that the present dispute is an international investment treaty dispute which arises out of Respondent's breaches of the investment treaty standards in the US-Romania BIT in the proceedings pursued by Claimant under Romanian law after the 2000s. Claimant considers that a distinction must be drawn between Claimant's claims based on international investment law, on the one hand, and the domestic law claims of the Sukyas family members, on the other. In his view, once this distinction is drawn, it becomes apparent that the present dispute is not a dispute which could have been settled in 1950s or 1960s upon the issuance of the FCSC Final Decision or of the entry into force of the relevant compensation treaties.[273]

323. Irrespective of this distinction, Claimant maintains that the domestic law claims in relation to the abusive taking of CIRO were not settled by the FCSC, nor were they settled under the 1960 US-Romania Compensation Treaty.[274]

324. First, Claimant explains that the amendments introduced by Public Law 285 of 1955 to ICSA envisage that the Romanian assets that had been blocked and seized would be sold or otherwise liquidated in accordance with Article 27 of the 1947 Peace

[269] J&A Memorial, para. 124.
[270] J&A Memorial, para. 129; SoR, paras. 32-72.
[271] J&A Memorial, para. 129.
[272] Counter-Memorial on J&A, paras. 14-61; SoRj, para. 11.
[273] Counter-Memorial on J&A, paras. 16-17; SoRj, paras. 13-14.
[274] Counter-Memorial on J&A, para. 19.

Treaty with Romania, which came into force on 15 September 1947. Public Law 285 of 1955 created the RCF and granted jurisdiction to the FCSC to hear U.S. nationals' claims in respect of war damages, nationalization, or other takings, and to award compensation against, among others, Romania.[275]

325. Claimant argues that the compensation awarded in the FCSC Final Decision was granted under ICSA as amended by Public Law 285 of 1955, according to which the awarded payments were to be made from the proceeds of the vesting and liquidation of assets formerly owned by Romania and not from the payment received from the Romanian Government under the 1960 US-Romania Compensation Treaty. Claimant also points out that contrary to Respondent's suggestion (see paragraph 319 above), this is a matter which is outside of the scope of Professor Dincă's expertise.[276]

326. Claimant submits that, after the conclusion of the 1960 US-Romania Compensation Treaty, a second Romanian claims program was instituted, which should be distinguished from the first program. In his view, Respondent's position according to which any compensation awarded under the first program was done in anticipation of the conclusion of the 1960 US-Romania Compensation Treaty is incorrect. The U.S. federal government did not adopt federal laws and started adjudicating and distributing funds under an international treaty it had not yet begun to negotiate.[277]

327. Second, Claimant argues that the express language of the FCSC Final Decision and ICSA confirm that the payment of the awarded sum (*i.e.*, USD 25,000 for the taking of CIRO), of which Respondent admits, only 37% were actually paid to the Sukyas family should "not be construed to have divested [Melik] […] of any rights against [Romania] for the unpaid balance of the claim".[278]

328. Third, Claimant avers that the sum of USD 25,000 was not determined based on any form of investigation or evidence as to the actual value of CIRO at the time of the taking. This sum was awarded entirely on a discretionary basis and was not the product of actual objective scrutiny. Therefore, the sum awarded by the FCSC was not compensatory in nature. The awarded sum cannot be construed as anything but

[275] Counter-Memorial on J&A, para. 20.
[276] Counter-Memorial on J&A, para. 22; SoRj, para. 22.
[277] Counter-Memorial on J&A, paras. 24, 28; SoRj, para. 18.
[278] Counter-Memorial on J&A, paras. 31, 33.

a "grace" sum or a good faith gesture by the U.S. to its citizens in recognition of the dramatic events leading up to the illegal confiscations of their property.[279]

329. Fourth, the domestic law claims were not settled upon the conclusion of the 1960 US-Romania Compensation Treaty as none of the surviving members of the Sukyas family had U.S. nationality at the time of the conclusion of the compensation treaty. Pursuant to Melik's will, the entirety of his claims in relation to the abusive taking of CIRO passed at the instant of his death on 9 April 1959 to Vahram. Vahram was a Turkish national and held only Turkish nationality in his entire lifetime. Consequently, at the time of the conclusion of the US-Romania Compensation Treaty (30 March 1960), Vahram was a Turkish national who had claims against Romania in relation to the abusive taking of CIRO, not a U.S. national. Claimant submits that the U.S. could not have extinguished Vahram's claims by entering into a treaty with Romania.[280]

330. Claimant further contends that the domestic law claims in relation to the abusive taking of CIRO were also not settled by the 1965 US-Turkey Compensation Treaty and that the Sukyas Brothers' ancestors did not bring a claim or receive any compensation under this treaty.[281]

III. Decision

331. Respondent contends that "[s]ince the claims asserted in the 1950s by Melik […] before the Foreign Claims Settlement Commission fully overlap with the claims advanced by […] Jak Sukyas in the present arbitration[], such claims have simply ceased to exist as a matter of international law since the entry into force of the [relevant compensation treaties]".[282]

332. The crux of this objection lies on the Parties' general disagreement concerning the object of the dispute in these proceedings. As held in **Chapter VII / Section III** above, the Tribunal's jurisdiction *ratione temporis* is limited to independent acts or facts that took place after 15 January 1994, the date on which the US-Romania BIT entered into force.

[279] Counter-Memorial on J&A, para. 34.
[280] Counter-Memorial on J&A, paras. 36-39.
[281] Counter-Memorial on J&A, paras. 53-57; SoRj, paras. 37-44.
[282] J&A Memorial, para. 129.

333. The Tribunal is well aware that there has been a long-lasting dispute between Claimant (including his ancestors) and Romania regarding the alleged taking of CIRO in 1948. However, as explained in **Chapter VII** / **Section III** above, the Tribunal cannot determine at this stage of the proceedings, and on the basis of an incomplete record, whether, in this arbitration, Claimant is only asserting a claim regarding the alleged taking of CIRO in 1948 or whether he is bringing forth claims that are actionable in their own right and post-date the entry into force of the US-Romania BIT. It appears at least on a *prima facie* basis that some of Claimant's claims could potentially fall under the second category. If that turns out to be confirmed in the subsequent phase of the arbitration, it would naturally follow that a dispute concerning independent breaches to the US-Romania BIT based on acts or facts that took place after 15 January 1994 could not have been settled in 1960 or 1965 through the compensation treaties referred to by Respondent. Indeed, it would have been impossible to do so.

334. However, and for the same reasons that have prompted the Tribunal to join to the merits Respondent's objection to jurisdiction *ratione temporis*, the Tribunal decides to likewise join this objection to the merits of the case, to be decided in the subsequent phase of this arbitration.

Section V. – Issue No. 5 – Whether Claimant Has Failed to Respect the Rule of Customary International Law of Continuous Nationality to Bring his Claims under the US-Romania BIT

I. Respondent's Position

335. According to Respondent, Claimant's claims are outside of the Tribunal's jurisdiction because they fail to respect the customary international law rule of continuous nationality.[283]

336. Respondent submits that the rule of continuous nationality, as a rule of customary international law, applies alongside the treaty rules found in investment treaties, except if such rule is explicitly displaced by the treaty. There is nothing in the US-Romania BIT that does so.[284]

337. Respondent relies on the continuous nationality rule as set out in Article 5 of the International Law Commission's Draft Articles on Diplomatic Protection ("**ILC**

[283] J&A Memorial, para. 203.
[284] J&A Memorial, para. 204.

Draft Articles on Diplomatic Protection")[285] and applied in *Loewen v. US.*[286] Following this rule, a claimant must hold the relevant nationality from the date of the events giving rise to the claim until at least the filing of the claim.[287]

338. In Respondent's view, between the initial injury in 1948 and the filing of the claim in 2020, many breaks of nationality occurred.[288] The first person to have allegedly suffered injury was Melik, who was a U.S. national from 1919 until his death in 1959. His claim was allegedly transferred to his brother Vahram in 1959, who was a national of Turkey at the time and until his death in 1977. In 1977, the claim would then have been transferred to Claimant and his brother Edward Sukyas. In 1977, Claimant was only a national of Turkey and did not acquire U.S. nationality until 1990, which he also held at the time his claims were presented in 2020.[289]

339. In Respondent's view, "because of the break of continuous nationality regarding any claim concerning any alleged injury suffered in the 1940s, the Tribunal has simply no jurisdiction and/or the claim is inadmissible. Indeed, there is a clear break in any US claim, between at least 1959 [when Melik passed away] and 1990 [when Claimant acquired his U.S. nationality]".[290]

II. Claimant's Position

340. Claimant does not dispute that the Tribunal should apply the customary international law rule of continuous nationality, set out in Article 5 of the ILC Draft Articles on Diplomatic Protection.[291]

341. According to Claimant, however, Respondent's objection results from its failure to distinguish between Claimant's claims based on the violation of an international investment treaty and his domestic law claims.[292]

---

[285] **Exhibit RL-126**, ILC, Draft Articles on Diplomatic Protection with Commentaries, 2006, Article 5: "Article 5. Continuous nationality of a natural person. 1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates".

[286] **Exhibit RL-122**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 225.

[287] J&A Memorial, paras. 204-211.

[288] J&A Memorial, paras. 204, 218; SoR, para. 104.

[289] J&A Memorial, paras. 204, 216.

[290] J&A Memorial, para. 218.

[291] J& Counter-Memorial on J&A, paras. 131-136; SoRj, paras. 82-85.

[292] Counter-Memorial on J&A, para. 129; SoRj, para. 82.

342. Claimant explains that the present dispute arose out of the acts committed by Respondent in breach of the US-Romania BIT in the course of the administrative and judicial proceedings pursued by Claimant from the 2000s onwards. In contrast, Respondent purportedly applies the continuous nationality requirement to the domestic law claims arising out of the 1948 events.[293]

343. Claimant contends that in the present case, he has held U.S. nationality since 1990, thus, at all relevant dates referred to in Article 5 of the ILC Draft Articles on Diplomatic Protection. Therefore, the continuous nationality rule referred to by Respondent is fully satisfied.[294]

III. Decision

344. The Tribunal notes that the US-Romania BIT does not contain any provision setting out at what specific point(s) in time an investor should hold the nationality of one of the Contracting Parties.

345. Both Parties agree that, in the absence of such requirements, the Tribunal should apply the customary international law rule of continuous nationality, which is codified in Article 5 of the ILC Draft Articles on Diplomatic Protection:[295]

> "Article 5. Continuous nationality of a natural person.
>
> 1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.
>
> 2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law. […]".[296] [emphasis added].

[293] Counter-Memorial on J&A, paras. 130-131; SoRj, para. 84.
[294] Counter-Memorial on J&A, para. 136; SoRj, para. 86; WS of Mr. Jak Sukyas, para. 1.1.2.
[295] J&A Memorial, paras. 216-217; Counter-Memorial on J&A, paras. 131-136; SoRj, paras. 82-85. See also, **Exhibit RL122**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 225.
[296] **Exhibit RL-126**, ILC, Draft Articles on Diplomatic Protection with Commentaries, 2006, Article 5.

346. Respondent argues that in this case continuous nationality should be assessed from the time of the alleged damage in 1948, whereas Claimant contends that it should be reviewed only as of the acts of the Romanian administration and judiciary in the proceedings pursued by Claimant in the 2000s and onwards.[297]

347. The crux of this objection is the Parties' general disagreement concerning the essence of the alleged breaches and damages requested by Claimant in these proceedings. As stated in **Chapter VII** / **Section III** above, the Tribunal's jurisdiction *ratione temporis* is limited to independent acts or facts that took place after 15 January 1994, the date on which the US-Romania BIT entered into force. However, the Tribunal cannot determine at this jurisdictional stage of the proceedings, and on the basis of an incomplete record, whether, in this arbitration, Claimant is only asserting a claim regarding the alleged taking of CIRO in 1948 or whether he is bringing forth claims that are actionable in their own right and relate to the conduct of Romania that post-dates the entry into force of the US-Romania BIT.

348. For the same reasons that have prompted the Tribunal to join to the merits Respondent's objection to jurisdiction *ratione temporis*, the Tribunal decides to likewise join this objection to the merits of the case, to be decided in the subsequent phase of this arbitration.

Section VI. – Issue No. 6 – Whether Claimant's Claims Are Outside of the Tribunal's Jurisdiction Pursuant to the Legality Requirement under the US-Romania BIT

I. Respondent's Position

349. According to Respondent, Claimant's claims are outside of the Tribunal's jurisdiction because they fail to satisfy the legality requirement which is implied under the US-Romania BIT.[298]

350. In Respondent's view, the US-Romania BIT implicitly extends its benefits only to those investments made "in accordance with" the laws of the host State.[299] Respondent submits that this is the case, regardless of whether there is an explicit legality requirement in the treaty. In its view, the rationale is based on a *quid pro quo*: when States consent to investment arbitration and thereby waive their

[297] J&A Memorial, paras. 207, 208, 216; SoR, para. 104; Counter-Memorial on J&A, para. 130; SoRj, paras. 82-85.
[298] J&A Memorial, paras. 322-365; SoR, paras. 127-133.
[299] J&A Memorial, paras. 324-326.

immunity from jurisdiction, that consent and waiver does not extend to investments made in disregard of their domestic laws.[300] Respondent relies, *inter alia*, on *Saur v. Argentina*, *Phoenix v. Czech Republic, Inceysa v. El Salvador, Fraport v. Philippines*, *Minnotte v. Poland*, and *Mamidoil v. Albania*.[301]

351. Furthermore, concerning the temporal dimension of the legality requirement, Respondent submits that: (i) since Claimant's claims are allegedly based on rights created by Law 10/2001 and related legislation, it is therefore when Claimant started vindicating such rights that the legality requirement would have become applicable;[302] and (ii) because the US-Romania BIT is silent on the question of when the legality requirement applies, it applies both at the time of the making of the investment, and thereafter.[303]

352. Respondent argues that Claimant has not shown that: (i) the Late Sukyas Brothers acted "in accordance with" Romanian laws when they acquired CIRO's shares, as there is no evidence that they complied with the legal requirements to do so at that time, or that they observed the rules from the Romanian Commercial Code on the shareholding composition of joint-stock companies like CIRO at that time (regarding the number of shareholders and the presence of Romanian nationals); or that (ii) Claimant acted in accordance with Article 5 of Law No. 10/2001 when presenting his claim under that law.[304]

353. Concerning the second point, Respondent contends that under Article 5 of Law 10/2001, any claimants applying for restitution of real property should have submitted an affidavit confirming that they had not been awarded compensation for the property claimed pursuant to Romania's settlement agreements. Article 5 of Law 10/2001 reads as follows:[305]

> "The persons who received compensation according to international treaties concluded by Romania regarding the settlement of outstanding financial issues,

---

300 J&A Memorial, paras. 327-329; SoR, para. 129.

301 **Exhibit RL-138**, *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction, dated 6 June 2012, para. 308. See also, **Exhibit RL-112**, *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No ARB/06/5, Award, dated 15 April 2009, para. 104; **Exhibit RL-132**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, dated 2 August 2006, paras. 182-207; **Exhibit RL-133**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II),* ICSID Case No. ARB/11/12, Award, dated 10 December 2014, para. 328; **Exhibit RL-134**, *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, dated 16 May 2014, para. 131; **Exhibit RL-135**, *Mamidoil Jetoil Greek Petroleum Products Société S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, dated 30 March 2015, para. 359.

302 SoR, paras. 131-132.

303 Respondent's Opening Statement, Day 1, p. 124, lines 20-24.

304 J&A Memorial, para. 332.

305 J&A Memorial, para. 336.

> which are listed in annex no. 1 of this law, are not entitled to restitution in kind or other compensatory measures by equivalent".[306]

354. Respondent submits that, on 20 February 2010, Claimant filed an affidavit affirming he was awarded no compensation whatsoever under the listed international settlement treaties for the value of CIRO.[307]

355. Respondent argues that Claimant failed to mention that Melik had made a claim for 100% of the value of CIRO in the late 1950s before the FCSC and that, by a Final Decision dated 17 July 1959, he had been awarded USD 49,500 in compensation and USD 17,340.42 in interest.[308]

356. According to Respondent, the compensation awarded to Melik and actually paid to Vahram precluded any action by Claimant under Law 10/2001.[309]

II. Claimant's Position

357. According to Claimant, it is well-established in investment treaty case law that the legality requirement applies only in circumstances where an investment treaty envisages such requirement as a condition for the applicability of the treaty.[310] In this respect, Claimant relies, *inter alia*, on *Metal-Tech v. Uzbekistan* and *Stati v. Kazakhstan.*[311]

358. Contrary to Respondent's submissions, the US-Romania BIT does not envisage the legality requirement in its definition of "investment" as a condition for the applicability of the BIT.[312]

359. Claimant also disagrees with Respondent's contentions set out in paragraph 355 above.

360. Regarding the first issue—whether Claimant's ancestors acted in accordance with Romanian law when they acquired CIRO's shares—Claimant argues that Respondent seeks to shift the burden of proof concerning its own illegality

---

306 **Exhibit CL-10**, Article 5 of Law 10/2001.
307 J&A Memorial, paras. 339-340.
308 J&A Memorial, para. 341.
309 J&A Memorial, paras. 346-359.
310 Counter-Memorial on J&A, para. 195; SoRj, para. 118.
311 **Exhibit CL-226**, *Metal-Tech Ltd. v The Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, dated 4 October 2013, para.127. See also, **Exhibit CL-227**, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan*, SCC Arbitration V (116/2010), Award, dated 19 December 2013, para. 812.
312 Counter-Memorial on J&A, para. 196.

objection. It is not Claimant who has to demonstrate that CIRO's shares were acquired "in accordance with" Romanian law by his predecessors. Instead, it is Respondent who must demonstrate the opposite for its objection to prevail. In any event, Claimant has already submitted the documents establishing that the shareholding structure of CIRO was compliant with Romanian law at all relevant times.[313]

361. Concerning the second issue—whether Claimant breached Article 5 when he initiated the domestic proceedings under Law 10/2001—Claimant contends that it is settled case law that in cases where the "legality requirement" is applicable, the legality of an investment should be tested at the time of the making of an investment. Claimant relies, *inter alia*, on *Kim v. Uzbekistan*.[314] However, Respondent's submissions on its legality objection relate to the question whether Claimant's claims under Law 10/2001 were barred under Article 5, not whether the original investment was made "in accordance with" Romanian law.[315]

362. In any event, Claimant submits that his sworn affidavit filed in the Law 10/2001 proceedings reflect the best of his knowledge both at the time of the filing of the affidavits and at the present time, and that he did not breach Article 5 of Law 10/2001.[316]

III. Decision

363. Article I.1 of the US-Romania BIT contains the following definition of the term "investment":

> "(a) 'investment' means every kind of investment in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other party, such as equity, debt, and service and investment contracts; and includes:
>
> (i) movable and immovable property and tangible and intangible property, including rights such as mortgages, liens and pledges;

[313] Counter-Memorial on J&A, paras. 201-204.

[314] **Exhibit CL-229**, *Vladislav Kim, et al. v The Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, dated 8 March 2017, para. 374. See also, **Exhibit RL-138**, *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction, dated 6 June 2012, para. 308. See also, **Exhibit RL-133**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II),* ICSID Case No. ARB/11/12, Award, dated 10 December 2014, para. 328; **Exhibit RL-134**, *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, dated 16 May 2014, para. 131; **Exhibit RL-135**, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, dated 30 March 2015, para. 359.

[315] Counter-Memorial on J&A, paras. 198-200.

[316] Counter-Memorial on J&A, paras. 207-258.

> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> (iv) intellectual and industrial property which includes, inter alia, […]
>
> (v) any right conferred by law or contract, including concessions to search for, extract, or exploit natural resources, and any licenses and permits pursuant to law.
>
> (b) 'company' of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled; […]".

364. The US-Romania BIT does not contain an express legality requirement in the definition of the term "investment", as opposed to other treaties entered into by Romania, such as the Turkey-Romania BIT or the 2009 Canada-Romania BIT.

365. The Parties disagree on whether an investment treaty must include an express legality requirement for such requirement to apply or, conversely, whether such requirement applies even if the treaty contains no express legality clause, as it is the case here.[317]

366. Claimant relies *inter alia*, on *Metal-Tech v. Uzbekistan*, which ruled as follows:

> "The Tribunal does not share the view expressed for instance in *Phoenix* pursuant to which compliance with the laws of the host State and respect of good faith are elements of the objective definition of investment under Article 25(1) of the ICSID Convention.[] In the Tribunal's view, the Contracting Parties to an investment treaty may limit the protections of the treaty to investments made in accordance with the laws and regulations of the host State. Depending on the wording of the investment treaty, this limitation may be a bar to jurisdiction, i.e. to the procedural protections under the BIT, or a defense on the merits, i.e. to the application of the substantive treaty guarantees".[318] [emphases added].

[317] J&A Memorial, paras. 324-326; Counter-Memorial on J&A, para. 195; SoRj, para. 118.

[318] **Exhibit CL-226**, *Metal-Tech Ltd. v The Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, dated 4 October 2013, para.127.

367. On the other hand, Respondent invoked several cases to support its proposition according to which the legality requirement could be applied regardless of whether there is an express provision in the applicable treaty.[319] Respondent refers to the ruling in *Saur v. Argentina*:

> "However, the Tribunal also agrees in part with the argument put forward by the Argentine Republic. It understands that the purpose of the investment arbitration system is to protect only lawful and *bona fide* investments. The fact that the APRI between France and Argentina does not mention the requirement that the investor act in accordance with domestic law is not a relevant factor. The condition of not committing a serious breach of the legal order is a tacit condition, specific to any APRI, because in any event, it is incomprehensible that a state would offer the benefit of protection through investment arbitration if the investor, in order to obtain this protection, has acted contrary to the law".[320] [emphases added].

368. The crux of the issue is not whether a legality requirement should be read into the US-Romania BIT, but whether a tribunal should assume that a State would have consented to arbitration to protect investments that breached its own law. The Tribunal is of the view that this question should be answered in the negative as held in *Phoenix v. Czech Republic:*

> "There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction".[321]

369. The Tribunal further notes that this conclusion was also reached in *Inceysa v. El Salvador:*

> "Having specified the above guidelines, it is necessary to concretely examine the arguments on which EI Salvador bases its objection, maintaining that disputes arising from an investment made illegally are not subject to the jurisdiction of

---

[319] J&A Memorial, paras. 327-329; Respondent's Opening Statement, Day 1, p. 123, line 18 to p. 124, line 19.

[320] **Exhibit RL-138**, *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction, dated 6 June 2012, para. 308. The Tribunal notes that this is Respondent's own translation of the original French and Spanish decisions. See also, **Exhibit RL-133**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II),* ICSID Case No. ARB/11/12, Award, dated 10 December 2014, para. 328; **Exhibit RL-134**, *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, dated 16 May 2014, para. 131; **Exhibit RL-135**, *Mamidoil Jetoil Greek Petroleum Products Société S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, dated 30 March 2015, para. 359.

[321] **Exhibit RL-112**, *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No ARB/06/5, Award, dated 15 April 2009, para. 104.

> the Centre because they are not included within the premises for which the consent was given [...]
>
> Based on the foregoing arguments, this Arbitral Tribunal considers that the consent granted by Spain and EI Salvador in the BIT is limited to investments made in accordance with the laws of the host State of the investment. Consequently, this Tribunal decides that the disputes that arise from an investment made illegally are outside the consent granted by the parties and, consequently, are not subject to the jurisdiction of the Centre, and that this Tribunal is not competent to resolve them".[322]

370. The Tribunal agrees. The absence of an express legality requirement in the US-Romania BIT does not preclude the Tribunal from declining jurisdiction if it determines that Claimant's investment was made in breach of the laws of Romania.

371. The Tribunal understands Respondent's position concerning the alleged illegalities to be as follows:

> "In particular, the Claimant[] ha[s] not shown that (i) the [Late] Sukyas Brothers acted 'in accordance with' Romanian laws when they acquired CIRO shares, as there is no evidence that they—the [Late] Sukyas Brothers—complied with the legal requirements to do so at that time, or that they—the [Late] Sukyas Brothers—observed the rules from the Romanian Commercial Code on the shareholding composition of joint-stock companies like CIRO at that time (regarding, notably, the number of shareholders and the presence of Romanian nationals); (ii) nor [has he] shown that [he]—the Claimant[]—acted in accordance with Article 5 of Law No. 10/2001. Therefore, the Claimant[] [has] failed to meet the legality requirement in the BITs and [his] claims must be dismissed for lack of jurisdiction".[323]

372. Regarding the first point, the Tribunal recalls its decision on **Chapter VII / Section II**, according to which CIRO is not a protected investment under the US-Romania BIT. In any event, the Tribunal would have agreed with Claimant in that Respondent has not met the burden of proof for its illegality objection regarding the first alleged illegality.

373. Concerning the second alleged illegality, the Tribunal notes that any potential breach by Claimant of Article 5 of Law 10/2001 would have occurred many decades after the original (albeit unprotected) investment was made.

---

[322] **Exhibit RL-132**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, dated 2 August 2006, paras. 182, 207.

[323] Counter-Memorial on J&A, para. 332.

374. However, illegalities occurring during the life of an investment may also have an impact on the adjudication of a claimant's claims. Specifically, while any such illegalities may be analysed as part of the merits of a claim, particularly serious and pervasive illegalities may, in certain circumstances, have the effect of barring the admissibility of a claimant's claims.

375. The Tribunal is not yet taking a position on whether Claimant has breached Article 5 of Law 10/2001. However, the Tribunal has not been properly briefed on whether this alleged second breach by Claimant of Romanian law could amount to an illegality of such a "serious nature" that would warrant dismissing Claimant's claims as inadmissible. For this reason, the Tribunal has decided to join the second part of this objection to the merits of the case, to be decided in the subsequent phase of this arbitration.

Section VII. – Issue No. 7 – Whether Claimant Is Precluded from Bringing his Claims in These Proceedings Because he Failed to Respect the "Fork in the Road" Provision under the US-Romania BIT

I. Respondent's Position

376. According to Respondent, Claimant is precluded from bringing his claims under the US-Romania BIT because he failed to respect the treaty's "fork in the road" provision in Article VI.[324]

377. Respondent relies, *inter alia*, on *Occidental v. Ecuador*[325] and *Pey Casado v. Chile*[326] to submit that arbitral tribunals apply the triple identity test to assess the investor's choice of jurisdiction under a "fork in the road" clause: (i) same dispute (object); (ii) same cause of action; and (iii) same parties.[327]

---

[324] J&A Memorial, para. 393; SoR, para. 178. **Exhibit RL-1**, Article VI of the 1992 US-Romania BIT reads as follows: "Article VI […] 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation, which may include the use of non-binding third-party procedures such as conciliation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3 [investor-state arbitration]. 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration […]".

[325] **Exhibit RL-148**, *Occidental Exploration and Production Company v. The Republic of Ecuador,* LCIA Case No. UN 3467, UNCITRAL, Final Award, dated 1 July 2004, para. 52.

[326] **Exhibit RL-100**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, dated 8 May 2008, para. 483.

[327] J&A Memorial, para. 395.

378. In Respondent's view, before starting this arbitration, Claimant had submitted the exact same dispute now submitted to arbitration—for restitution, compensation or damages over the alleged unlawful "expropriation" of CIRO—to the courts of Romania and to the ECtHR. Respondent argues that this is the same dispute: the same parties (Claimant and Romania); the same relief requested (restitution, compensation, or damages for the alleged "expropriation" of CIRO); and the same legal basis (compensation in the case of "expropriation"). Hence, Respondent submits, all the claims submitted in the present case are barred under the "fork in the road" clause in the US-Romania BIT.[328]

II. Claimant's Position

379. Claimant argues that the "fork in the road" provision in Article VI of the US-Romania BIT does not preclude his claims from being heard by the present Tribunal because the present dispute does not concern the alleged "expropriation" of CIRO, and the international investment treaty dispute before the present Tribunal differs substantially from the domestic law dispute.[329]

380. Claimant explains once again that the present dispute arose out of the acts committed by Respondent in breach of the US-Romania BIT in the course of the administrative and judicial proceedings pursued by Claimant from the 2000s onwards.[330]

381. For instance, the causes of action that Claimant invokes in the present arbitration are rooted in the international law obligations envisaged in the US-Romania BIT. In none of the proceedings referred to by Respondent did Claimant invoke denial of justice, "judicial expropriation", violation of fair and equitable treatment, full protection and security, or the effective means standard.[331]

III. Decision

382. Article VI of the US-Romania BIT reads as follows:

> "Article VI
>
> […] 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation, which may include the use of non-binding third-party procedures such

[328] J&A Memorial, para. 406.
[329] Counter-Memorial on J&A, paras. 339, 341; SoRj, para. 143.
[330] Counter-Memorial on J&A, paras. 130-131, 339; SoRj, para. 84.
[331] Counter-Memorial on J&A, para. 340.

> as conciliation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
>
> (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
> (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
> (c) in accordance with the terms of paragraph 3 [investor-state arbitration].
>
> 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration […]".[332] [emphases added].

383. Pursuant to Article VI of the US-Romania BIT, the investor may submit "the dispute" to the "courts" or "administrative tribunals" of the host State party to "the dispute" (paragraph 2). However, instead of doing so, the investor may also choose to go to arbitration with "the dispute" (paragraph 3).

384. If "the dispute" has been submitted to the "courts" or "administrative tribunals" of the host State, an investor is precluded from submitting "the same dispute" to arbitration. On the contrary, if "the disputes" are different, the two options mentioned above are not mutually exclusive.

385. The Tribunal recalls that in *Occidental v. Ecuador*, the following test was applied to determine the application of the "fork in the road" provision in the 1993 US-Ecuador BIT, and specifically, to assess whether or not the disputes at issue were the same:

> "In part, the distinction between these different types of claims has relied on the test of triple identity. To the extent that a dispute might involve the same parties, object and cause of action it might be considered as the same dispute and the 'fork in the road' mechanism would preclude its submission to concurrent tribunals".[333]

[332] **Exhibit CL-57 / RL-1**, US-Romania BIT, Article VI.

[333] **Exhibit RL-148**, *Occidental Exploration and Production Company v. The Republic of Ecuador,* LCIA Case No. UN 3467, UNCITRAL, Final Award, dated 1 July 2004, para. 52. The Tribunal notes that the "fork in the road" provision in 1993 US-Ecuador BIT, is identical to the one in the US-Romania BIT. See also, **Exhibit RL-100**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, dated 8 May 2008, para. 483.

386. A dispute is characterized by three elements: (i) the parties to the dispute; (ii) the object of the dispute; and (iii) the cause of action. As mentioned above, the "fork in the road" provision in Article VI of the US-Romania BIT will only be triggered insofar as the two disputes (*i.e.*, the dispute submitted before the local courts and tribunals and the dispute submitted to investment arbitration) are the same. This means that the three elements of the triple identity test must be present for the "fork in the road" clause to bar a BIT claim. Conversely, if one element is absent, the "disputes" will not be identical, and the "fork in the road" provision will not be applicable.

387. As mentioned in **Chapter V** / **Section VII**, above, the Claimant and his brother Edward Sukyas initiated multiple local proceedings before Romanian courts: (i) proceedings under Law 10/2001; (ii) proceedings under Law 221/2009; and (iii) a Revindication Action under Articles 480 and 481 of the Romanian Civil Code. The Parties do not seem to dispute that the object of the disputes brought by Claimant before the Romanian courts was compensation for the alleged "expropriation" of CIRO in 1948.[334] The causes of action in all of these proceedings were based on Romanian law.

388. In the present arbitration proceedings, Claimant asserted multiple claims against Romania. The cause of action in these proceedings is based on international law, and not Romanian law. Specifically, Claimant is seeking compensation for breach of the US-Romania BIT. Claimant contends that Respondent breached multiple treaty standards, including the prohibition of denial of justice, fair and equitable treatment, and full protection and security. Notably, while the Tribunal may need to look into whether or not Romanian law was complied with, this will be part of its factual inquiry. Ultimately, its legal analysis and decisions will be carried out pursuant to international law, and specifically, the US-Romania BIT.

389. Therefore, "the disputes" before the Romanian courts and the one in the present arbitration proceedings are distinct, as they are not based on the same causes of action. Notably, as the tribunal in *Occidental Exploration and Production Company v. Ecuador* held: "To the extent that the nature of the dispute submitted to arbitration is principally, albeit not exclusively, treaty-based, the jurisdiction of the arbitral

[334] J&A Memorial, para. 406; SoR, para. 179; Counter-Memorial on J&A, para. 339; Claimant's Opening Statement, Day 1, p. 235, line 18 to p. 236, line 14.

tribunal is correctly invoked".[335] Consequently, the triple identity test is not met and thus, Claimant has not failed to respect the "fork in the road" provision in the US-Romania BIT.

390. On the basis of the above, the Tribunal holds that Claimant is not precluded from bringing his claims in these proceedings under the US-Romania BIT because of the operation of the "fork in the road" provision in Article VI of the BIT.

Section VIII. – Issue No. 8 – Whether the Tribunal Has Jurisdiction over Claimant's Claims, and Whether Those Claims Should Be Deemed Inadmissible Pursuant to the Abuse of Rights Doctrine

I. Respondent's Position

391. According to Respondent, the Tribunal does not have jurisdiction over Claimant's claims, or the claims should be deemed inadmissible, pursuant to the abuse of rights doctrine.[336]

392. Respondent argues that a finding of abuse of rights or of abuse of process is based on the particular facts of a case. Respondent submits that abuse of process has been found: (i) where investors transferred investments to another entity to gain access to an investment treaty when there was a "reasonable prospect" that a dispute would arise; or (ii) in cases where a claimant initiates multiple proceedings against a respondent for the same economic harm.[337]

393. During the written phase of the proceedings, Respondent averred that Claimant's claims constituted an abuse of rights for the following reasons:

394. First, Claimant is trying to resurrect a claim, which is 74 years old.[338]

395. Second, Claimant is trying to bring a claim that has been settled through the application of Melik to the U.S. authorities for compensation in the 1950s.[339]

---

[335] **Exhibit RL-148**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, dated 1 July 2004, para. 57.
[336] J&A Memorial, para. 420; SoR, para. 184.
[337] J&A Memorial, paras. 422-423. **Exhibit RL-164**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, UNCITRAL, Award on Jurisdiction and Admissibility, dated 17 December 2015, paras. 585-588; **Exhibit RL-55**, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, dated 31 May 2017, paras. 542-543.
[338] J&A Memorial, para. 425.
[339] J&A Memorial, para. 426.

396. Third, Claimant's exact same claims have been addressed by the Romanian administration, judiciary, the ECtHR, and the U.S. federal courts.[340]

397. Fourth, Claimant has received double compensation regarding the property located at 10 Strada Herastrau. In this regard, Respondent submits that Claimant's predecessors received compensation concerning this property in the late 1950s before the FCSC, which was later restituted in kind in 2008, in the course of domestic proceedings in Romania.[341]

398. During the hearing, Respondent also argued that Claimant's claims constituted an abuse of rights because: (i) Claimant has increased the amount of damages claimed so that his claim would be easier to fund by a third-party funder; and (ii) Claimant breached Article 5 of Law No. 10/2001.[342]

II. Claimant's Position

399. According to Claimant, Respondent seeks to discredit and downplay his investment treaty claims by characterizing them as an abuse of rights.[343]

400. In Claimant's view, this is a desperate attempt on the part of Respondent to hinder Claimant's efforts to seek justice under the law applicable to the claims submitted to the Tribunal. Given the manifest injustice that the Romanian administration and judiciary caused Claimant to suffer, it was Claimant's right to try to access justice in any available fora.[344]

401. Claimant explains that in this arbitration he pursues his international law claims arising out of the breaches of the US-Romania BIT allegedly committed by Respondent, including, *inter alia*, manifest and palpable injustices, grave violations of due process, profound arbitrariness, and "judicial expropriation". In Claimant's view, the pursuit of these claims cannot even be remotely associated with the notion of abuse of rights.[345]

402. Claimant further notes that the receipt of compensation for the Herastrau property (through settlement with the Romanian official occupying the residence after failure

[340] J&A Memorial, para. 427.
[341] J&A Memorial, para. 428.
[342] Hearing Transcript, Respondent's Opening Statement, Day 1, p. 132, line 18 to p. 134, line 19.
[343] Counter-Memorial on J&A, para. 349.
[344] SoC, para. 506.
[345] Counter-Memorial on J&A, para. 350; SoRj, para. 145.

of the Romanian judicial and administrative claims), does not create any double recovery issue for the purposes of the present arbitration. Claimant explains that he does not bring any claim in relation to the Herastrau property in the present proceedings.[346]

III. Decision

403. The doctrine of abuse of rights is a general principle of law "founded upon the notion that a party may have a valid right, including a procedural right, and yet exercise it in an abnormal, excessive or abusive way, with the sole purpose of causing injury to another or for the purpose of evading a rule of law, so as to forfeit its entitlement to rely upon it".[347]

404. Both academics and investment tribunals agree that the party raising the objection bears the burden of demonstrating an abuse of rights, which is subject to a high threshold and is therefore extremely rarely applied in practice.[348] In the words of the *Philip Morris v. Australia* tribunal:

> "539. As a preliminary matter, it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse does not imply a showing of bad faith […]
>
> 552. The requirement of a high threshold was articulated by the *Chevron (I)* tribunal in the following terms:
>
> 143. [I]n all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the *Oil Platforms* case, there is 'a general agreement that the graver the charge the more confidence must there be in the evidence relied on'".[349] [emphases added].

---

346 SoC, para. 506.

347 Emmanuel Gaillard, 'Abuse of Process in International Arbitration', 31(1) ICSID Review—Foreign Investment Law Journal 17 (2017), p. 32.

348 **Exhibit RL-160**, *The Renco Group Inc. v. Republic of Peru (I),* ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, dated 15 July 2016, para. 177; Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals', 20 Australian Year Book of International Law 191 (1999), at. pp. 202-203.

349 **Exhibit RL-164**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, UNCITRAL, Award on Jurisdiction and Admissibility, dated 17 December 2015, paras. 539, 552.

405. Respondent correctly asserts that the doctrine of abuse of rights has been applied in investment arbitration proceedings, *inter alia*: (i) when an investor has changed its corporate structure to gain access to an investment treaty at a point in time where a dispute was already "foreseeable"; and (ii) in cases where a claimant initiates multiple proceedings against a respondent for the same economic harm.[350] The tribunal in *Orascom v. Algeria* ruled as follows concerning the latter:

> "In particular, an investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state.[] It goes without saying that structuring an investment through several layers of corporate entities in different states is not illegitimate. Indeed, the structure may well pursue legitimate corporate, tax, or pre-dispute BIT nationality planning purposes. In the field of investment treaties, the existence of a vertical corporate chain and of treaty protection covering 'indirect' investments implies that several entities in the chain may claim treaty protection, especially where a host state has entered into several investment treaties. In other words, several corporate entities in the chain may be in a position to bring an arbitration against the host state in relation to the same investment. This possibility, however, does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm".[351] [emphases added].

406. However, Respondent has not referred to a single case in which a tribunal has recognized the existence of an abuse of rights for the reasons Respondent is invoking in this arbitration. Notably, this is neither a case involving the restructuring of an investment, nor a case in which various entities in the corporate chain are bringing the same claim against the same respondent. The Tribunal is unable to draw a clear analogy from any of the factual scenarios set out in the cases submitted by Respondent and apply it to the current situation complained of by Respondent in these proceedings. In particular, it is not an abuse of right or process if a claimant uses different fora to bring claims for breach of different causes of action, such as claims for breach of domestic law before domestic courts, claims for breach of the ECHR before the ECtHR, and claims for breach of an investment treaty before a tribunal established pursuant to the dispute settlement provisions of that treaty. In other words, Respondent has failed to meet the high threshold required to

---

[350] **Exhibit RL-164**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, UNCITRAL, Award on Jurisdiction and Admissibility, dated 17 December 2015, paras. 585-588; **Exhibit RL-55**, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, dated 31 May 2017, paras. 542-543.

[351] **Exhibit RL-55**, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, dated 31 May 2017, para. 542.

demonstrate an abuse of process. In the Tribunal's view, Respondent is merely reframing some of its objections to the Tribunal's jurisdiction into an allegation of abuse of rights.

407. In any event, Respondent has failed to demonstrate the existence of an abuse of rights for the following reasons:

408. First, whether or not Claimant received double compensation regarding the property located at 10 Strada Herastrau would be irrelevant to find an abuse of rights in this arbitration in circumstances where Claimant is not bringing claims regarding this property. Notably, Claimant's unconnected actions in separate proceedings would have no bearing on whether he has abused his rights by initiating the present proceedings.

409. Second, the Tribunal notes that Claimant has increased the valuation of his claims from the Notice of Arbitration (USD 200 million) to the SoC (USD 2 billion). However, Respondent has failed to explain how this could constitute an abuse of process and preclude Claimant from bringing his claims altogether in these proceedings. The Tribunal will carefully examine the quantum of Claimant's claims, if, and to the extent required, at the appropriate stage. For the time being, suffice it to say that an increase in Claimant's valuation of his claims, without more, does not constitute an abuse of rights.

410. On the basis of the above, the Tribunal dismisses Respondent's abuse of rights objection.

Section IX. – Issue No. 9 – If and How to Allocate Arbitration Costs

411. Each Party requests the Tribunal to award full compensation for the costs incurred in these proceedings.[352]

412. Article 40 of the UNCITRAL Arbitration Rules provides:

> "1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.
>
> 2. The term "costs" includes only:

[352] Claimant's Costs Submission, dated 15 September 2023, pp. 1-8; Respondent's Costs Submission, dated 15 September 2023, pp. 1-3. Respondent's Reply Costs Submission, dated 29 September 2023, pp. 1-4; Claimant's Reply Costs Submission, dated 6 October 2023.

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA. […]".[353]

413. In turn, Article 42 of the UNCITRAL Arbitration Rules reads as follows:

"1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs".[354]

414. In circumstances in which not all of Respondent's Preliminary Objections prevailed, the Tribunal considers that it will be more appropriate to reserve its decision on how to allocate the arbitration costs to a later stage of the proceedings.

CHAPTER VIII. DECISIONS

415. On the basis of the above, the Tribunal:

i. Decides that it does not have jurisdiction to rule over the Turkey-Romania BIT Claims;

[353] 2010 UNCITRAL Arbitration Rules, Article 40.
[354] 2010 UNCITRAL Arbitration Rules, Article 42.

ii. Decides to join Respondent's objection to the Tribunal's jurisdiction *ratione materiae* under the US-Romania BIT to the merits of the case, and to reserve judgment on the issue whether Claimant has shown that he has an "investment" that is protected under the BIT;

iii. Decides to join Respondent's objection to the Tribunal's jurisdiction *ratione temporis* under the US-Romania BIT to the merits of the case;

iv. Decides to join Respondent's objection that Claimant's claims have been settled to the merits of the case;

v. Decides to join Respondent's objection that Claimant has failed to respect the customary international law rule of continuous nationality to bring his claims under the US-Romania BIT, to the merits of the case;

vi. Decides to join the second tranche of Respondent's objection that Claimant's claims are outside of the Tribunal's jurisdiction pursuant to the legality requirement under the US-Romania BIT due to Claimant's alleged breach of Article 5 of Law 10/2001, to the merits of the case;

vii. Decides to dismiss all of Respondent's other objections to the Tribunal's jurisdiction or the admissibility of the claim under the US-Romania BIT; and

viii. Decides to reserve its judgment on how to allocate the arbitration costs to a later stage of the proceedings.

Place of arbitration: Paris, France

Date: 6 November 2024

The Tribunal:

Professor Dr. Stephan W. Schill
Arbitrator

Ms. Loretta Malintoppi
Arbitrator

Professor Bernard Hanotiau
President