

Micula
Student Materials

- Decided by the International Centre for the Settlement of Investment Disputes in 2013
- Key topics: investment (foreign investor rights, preserving state authority)

Learning Objectives

- Understand and apply:
 - legal remedies
 - treatment standards
- Analyze and evaluate:
 - ambiguity about “fair and equitable” treatment
 - limits to the police powers doctrine

Background Information

In late 1989, Romania began transitioning from a Communist autocracy into a democracy with a market economy. In 1995, Romania signed the Europe Agreement, in which it pledged to undertake various economic and political reforms in exchange for accession negotiations with the European Union (EU). In particular, Romania agreed to promote foreign investment by negotiating investment treaties with individual EU members, including a 2003 bilateral investment treaty with Sweden. Romania also agreed to align its own domestic policies with EU competition law by limiting government subsidies, which are called “state aid” by the EU.

To promote foreign investment, Romania issued Emergency Government Ordinance No. 24 (“EGO 24”) in 1998. This ordinance and its accompanying legislation created incentives for individuals and corporations to invest in regions that were designated by the government as being “disfavored” (underdeveloped) regions, including Bihor County in northwestern Romania. EGO 24 allowed investors to apply for Permanent Investor Certificates (PICs), which gave them various tax benefits in exchange for meeting certain criteria and obligations. Ioan and Viorel Micula were Swedish nationals who owned

multiple corporations that produced goods in Bihor County. They were granted PICs by the Romanian government to expand their existing investments.

In 2004, the Romanian government passed a new law that revoked the main tax benefit provided by EGO 24. The Micula brothers and their corporations jointly filed an arbitration case in 2005 with the International Centre for the Settlement of Investment Disputes, arguing that Romania failed to provide “fair and equitable treatment” (FET) to their investments by revoking the EGO 24 incentives. The Romanian government countered by arguing that it had the regulatory authority to change its laws to pursue EU membership.

Relevant Legal Texts

Europe Agreement of 1995¹

Article 74: Investment promotion and protection

1. [The European Community and Romania] shall aim to establish a favourable climate for private investment, both domestic and foreign, which is essential to economic and industrial reconstruction in Romania.

2. The particular aims of cooperation shall be:

- for Romania to establish and improve a legal framework which favours and protects investment,
- the conclusion by the member states and Romania of agreements for the promotion and protection of investment, ...
- to bring about better investment protection ...

Sweden—Romania Bilateral Investment Treaty

Preamble

¹ Long title: The Europe Agreement Establishing an Association between the European Economic Communities and Their Member States, of the One Part, and Romania, of the Other Part (signed on 1 February 1993; entered into force on 1 February 1995)

desiring to intensify economic cooperation to the mutual benefit of both States and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

recognizing that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives ...

Article 2: Promotion and Protection of Investments

(3) Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party ...

Award

Part I—Background

The Tribunal began by describing the business activities of the Micula brothers in Romania, both before and after Romania passed its EGO 24 policy. The brothers argued that the revocation of the EGO24 tax benefits harmed their business.

The Individual Claimants claim to be the majority shareholders of a group of companies ... engaged in food and beverage production in the disfavored region of ... Bihor County. The Corporate Claimants [are] owned directly or indirectly by the Individual Claimants.

The evolution of the Claimants' investments can be separated in two phases: their initial investments (principally in the beverage production business), allegedly made in reliance on the incentive programs that predated EGO 24, and their investments (in the food and beverage production business), allegedly made in reliance on the EGO 24 incentives ...

Specifically, the Claimants allege that, starting in 1998, they expanded their business under a ten-year plan to capitalize on the EGO 24 incentives with the objective of building an integrated food platform ... The first phase [of the ten-year plan] consisted in production of fast-moving consumer products ... The second phase of the Claimants' alleged expansion plan was to build a brewery ...

According to the Claimants, the construction and integration of the brewery consisted of 4 components:

- A state-of-the-art brewery ...
- A malt plant ...
- A canning plant [and] ...
- A co-generation plant ...

The Claimants allege that in 2001 they started construction of the brewery ... The Claimants claim that they had plans to build the [other brewery] components ..., but their completion was thwarted by cash-constraints caused by the revocation of the incentives. The Claimants further claim that the construction of these components began prior to the revocation of the [EGO 24] incentives, but that none of these components was ever completed ...

The panel then summarized the Micula brothers' arguments about why Romania had violated its legal obligation to provide fair and equitable treatment to Swedish investors. It also noted that the Micula brothers did not believe that acting in good faith excused or justified a violation of the investment treaty.

First, the Claimants contend that Romania breached the fair and equitable treatment standard by failing to provide a stable and predictable legal and business environment for the investment, and in particular by violating the Claimants' legitimate expectations with respect to that regulatory framework ... The Claimants argue that the fair and equitable treatment standard requires the state to protect the investor's legitimate expectations based on the legal framework at the time of the investment and on any undertakings and representations made explicitly or implicitly by the host state. The Claimants clarify that the obligation to accord fair and equitable treatment does not mean that a state must completely freeze its regulatory regime ... However, it does mean that, by entering into the BIT, Romania accepted limitations on its power to fundamentally alter the regulatory framework of the investment, particularly in ways that would be unfair, unreasonable and inequitable, including by undermining an investor's legitimate expectations ...

Second, the Claimants contend that Romania breached its obligation to accord them fair and equitable treatment by acting in a manner that was not transparent ...

Finally, the Claimants contend that Romania's responsibility for violation of the fair and equitable treatment standard arises regardless of its motives, and irrespective of any showing of

bad faith ... Consequently, the Claimants do not need to show that Romania acted with an improper motive in order to establish violation of the fair and equitable treatment standard. Conversely, a showing of good faith or legitimate cause on Romania's part does not excuse a violation of the fair and equitable treatment standard ... Accordingly, the Claimants submit that, no matter how laudable or justifiable Romania's motives might have been, they do not excuse the fact that Romania breached the fair and equitable treatment standard. Whether Romania withdrew the incentives for fiscal reasons, for reasons of international economic policy or for other reasons of public interest, is irrelevant ...

Part II—Identifying the Law

The arbitration panel then tried to determine the object and purpose of the investment treaty.

Both Parties agree that the fair and equitable treatment standard should be interpreted in the light of the object and purpose of the BIT as reflected in its Preamble ... The Respondent further argues that the standard should be interpreted in the broader context of EU accession ... The Parties agree that the Preamble reflects the BIT signatories' goal of intensifying economic cooperation between Romania and Sweden, but disagree on what interpretation of "fair and equitable treatment" is appropriate to achieve this goal. The Claimants do not suggest a specific interpretation of the fair and equitable treatment standard in this context, other than to argue that attracting investors through tax exemptions and other incentives that are promised for a certain period of time, and then withdrawing those incentives unilaterally, is not conducive to the intensification of economic cooperation or to the stimulation of investment initiatives.

The Respondent for its part contends that the Contracting Parties' intention was to intensify economic relations in the context of Romania's accession to the EU. The Respondent argues that the BIT was signed pursuant to Article 74 of the Europe Agreement, which prompted Romania to sign investment protection treaties with EU member states. As the goal of the Europe Agreement was to integrate Romania and the EU at a political level, which carried with it the obligation to harmonize Romanian law to EU law, the goal of the BIT between Romania and Sweden must be interpreted in this context. Therefore, Romania's obligation to afford fair and equitable treatment to Swedish investors must be interpreted in such a way that it is consistent with EU law.

It is undisputed that the Europe Agreement predated the BIT and, indeed, promoted the conclusion of BITs such as the Sweden-Romania BIT. Despite the lack of express reference in the BIT to EU accession or the EU, ... the general context of EU accession must be taken into account when interpreting the BIT.

That being said, the Tribunal cannot conclude in the abstract (as Romania seems to suggest) that the revocation of the incentives is fair and equitable solely because it was undertaken pursuant to Romania's obligation under the Europe Agreement to harmonize its law with EU law. As previously stated, whether the state's conduct is unfair and inequitable must be assessed in view of all the facts and surrounding circumstances.

The Tribunal must bear in mind that the goal of the BIT is the "intensif[ication of] economic cooperation to the mutual benefit of both States" and, in this context, "to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party", and that when the Contracting States set this goal they recognized "that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives." In this respect, the Claimants argue that the objective of the BIT was to help Romania raise its level of economic development so it could join the EU ...

In view of these considerations, the Tribunal favors a balanced view of the goals of the BIT ...

The Tribunal then described the meaning of various components of the fair and equitable treatment. In particular, it discussed the requirement that government actions be reasonable, in conformity with legitimate expectations, and transparent.

Both Parties appear to agree that "unreasonable" means lacking in justification or not grounded in reason (i.e., arbitrary), or not enacted in pursuit of legitimate objectives ... The Respondent also proposes the formulation used by the *Saluka* tribunal: for a state's conduct to be reasonable, it must "bear a reasonable relationship to rational policies [...]." Although the definition is rather circular, the Tribunal finds it appropriate, with the specification made by the *AES* tribunal, namely that the determination of whether the state's conduct is reasonable requires the analysis of two elements: "the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy" ... As noted by the *AES* tribunal, a policy is rational when the state adopts it

“following a logical (good sense) explanation and with the aim of addressing a public interest matter” ..., and an action is reasonable when there is “an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it” ... In other words, for a state’s conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state’s acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors ...

The Claimants argue that Romania’s obligation to afford them fair and equitable treatment means that Romania must ensure a stable and predictable legal and business environment, and must protect the Claimants’ legitimate expectations. In turn, the Respondent submits that “[t]he default position in international law is that a state is free to adopt, change, and repeal regulations as it sees fit -- so long as its actions are reasonably related to a legitimate public interest and are not discriminatory” ... However, the Respondent concedes that its regulatory sovereignty is limited by the legitimate expectations the state has validly created in investors, provided that these expectations arise from specific assurances entered into by the state, are reasonable, and were the predicate of the Claimants’ investments ...

The tribunal in *LG&E v. Argentina* stated that “the stability of the legal and business framework in the state party is an essential element in the standard of what is fair and equitable treatment”, and found that it “was an emerging standard of fair and equitable treatment in international law.” This Tribunal agrees as a general matter.

However, the fair and equitable treatment obligation is not an unqualified guarantee that regulations will never change. Investors must expect that the legislation will change from time to time ... The state may always change its legislation, being aware and thus taking into consideration that: (i) an investor’s legitimate expectations must be protected; (ii) the state’s conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state’s conduct must be procedurally proper (e.g., in compliance with due process and fair administration). If a change in legislation fails to meet these requirements, while the legislation may be validly amended as a matter of domestic law, the state may incur international liability ...

Whether a state has been unfair and inequitable by failing to be transparent with respect to its laws and regulations, or being ambiguous and inconsistent in their application, must be assessed

in light of all of the factual circumstances surrounding such conduct. For example, it would be unrealistic to require Romania to be totally transparent with the general public in the context of diplomatic negotiations. The question before the Tribunal is thus not whether Romania has failed to make full disclosure of or grant full access to sensitive information; it is whether, in the event that Romania failed to do so, Romania acted unfairly and inequitably with respect to the Claimants. The same applies to consistency: the question is not merely whether Romania has acted inconsistently; it is whether, in acting inconsistently, it has been unfair and inequitable with respect to the Claimants ...

Part III—Applying the Law

The Tribunal then began to apply the law to the specific details of this dispute. It began by examining whether Romania had violated the legitimate expectations of the Micula brothers.

(i) The standard to determine whether a legitimate expectation has been breached

In the Tribunal's view, the fair and equitable treatment standard does not give a right to regulatory stability *per se*. The state has a right to regulate, and investors must expect that the legislation will change, absent a ... specific assurance giving rise to a legitimate expectation of stability ...

Although the question of whether these legitimate expectations were breached is a factual one, an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation.

The Parties agree that, in order to establish a breach of the fair and equitable treatment obligation based on an allegation that Romania undermined the Claimants' legitimate expectations, the Claimants must establish that (a) Romania made a promise or assurance, (b) the Claimants relied on that promise or assurance as a matter of fact, and (c) such reliance (and expectation) was reasonable ...

In the Tribunal's view, elements (a) and (c) are related. There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability. It is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance. The element of reasonableness cannot be separated from the promise, assurance or representation, in particular if the promise is not contained in a contract or is otherwise stated explicitly. Whether a state has created a legitimate expectation in an investor is thus a factual assessment which must be undertaken in consideration of all the surrounding circumstances ...

This promise, assurance or representation may have been issued generally or specifically, but it must have created a specific and reasonable expectation in the investor. That is not to say that a subjective expectation will suffice; that subjective expectation must also have been objectively reasonable ...

The Claimants must also have relied on that expectation when they made their investments. However, it is not necessary for the entire investment to have been predicated solely on such expectation. Businessmen do not invest on the basis of one single consideration, no matter how important. In the Tribunal's view, that expectation must be a determining factor in an investor's decision to invest, or in the manner or magnitude of its investments ...

(ii) Did Romania make a promise or assurance that gave rise to a legitimate expectation?

EGO 24 created a general scheme of incentives available to investors who fulfilled certain requirements, which were later "granted" to qualifying investors through a specific administrative act (the [Permanent Investor Certificate]). In other words, the legislation created a generalized entitlement that could be claimed by qualifying investors, but this general entitlement was later crystallized with respect to qualifying investors through the granting of the PICs, becoming from that moment on a specified entitlement with respect to specified investors ... The legislative framework in Romania between the years 1998-2002 (taking into consideration EU law, as it applied to Romania at the time), together with the PICs, instilled in the Claimants a legitimate expectation that they would be entitled to the EGO 24 incentives ... until 1 April 2009. Specifically, the Tribunal finds that, through an interplay of the purpose behind the EGO 24

regime, the legal norms, the PICs, and Romania's conduct, Romania made a representation that created a legitimate expectation that the EGO 24 incentives would be available substantially in the same form as they were initially offered.

First, the purpose behind the EGO 24 regime was to attract investment in the disadvantaged areas, preferably long-term investment that created employment. In the context in which this legislation was passed, it is evident that Romania was eager to attract investment in order to boost its economy and work towards EU accession. If Romania had spelled out that it retained the right to eliminate the incentives at its discretion, despite the stated duration term for the incentives, Romania likely would not have achieved its objective of attracting investment. Investors require legal certainty, and Romania knew this full well, otherwise it would not have specified in several different documents that the incentives would be available during the period in which [Bihar County] was declared a disadvantaged area. Indeed, it is evident from Romania's conduct that it intended for the regime to remain in place until 1 April 2009 and, absent the EU's intervention, this is what would have happened ...

Second, the regime required a certain *quid pro quo* from the investors ... Investors had to fulfill certain requirements to obtain their PIC, and undertook certain obligations:

- Investors were required to create employment ...
- Investors were required to create new investments ...
- PIC holders had to undergo substantial monitoring to continue receiving the incentives under their PICs ...
- Investors were required to maintain their investments in the disadvantaged area for at least twice the time they benefitted from the incentives ...

Third, the Respondent did not merely "trim down" the incentives ... The incentives were virtually eliminated [in 2004] rather than simply modified or amended ... In turn, [Romania] left in place all remaining provisions of the regime, including its obligations ... This stripped EGO 24 of most of its practical content and reduced almost to nothing its advantages given that the purpose of the regime for disadvantaged areas was to attract investment in exchange for certain tax benefits ...

The Tribunal thus finds that Romania's representation that the EGO 24 incentives would be available to PIC holders until 1 April 2009 meant that the Claimants would continue to benefit from substantially the same incentives that were available when the Claimants obtained their PIC.

As stated above, the Tribunal considers that, in determining whether the Claimants had a legitimate expectation, it must take account of the accepted principle that Romania is free to amend its laws and regulations absent an assurance to the contrary. However, in this case the Tribunal finds that Romania's conduct had included an element of inducement that required Romania to stand by its statements and its conduct. Romania launched a program directed to attract investors to the disfavored regions. To obtain that investment, it offered certain tax benefits for a certain amount of time. In other words, Romania created the appearance of a ten-year tax holiday for investors who decided to invest in the disadvantaged area (and this appearance conformed to what Romania did in fact wish to enact) ... In the Tribunal's view, Romania thereby made a representation that gave rise to the PIC holders' legitimate expectation that during this tax holiday they would receive substantially the same benefits they were offered when they committed their investments.

What is at stake is not Romania's regulatory sovereignty, which is not to be questioned. However, it cannot be fair and equitable for a state to offer advantages to investors with the purpose of attracting investment in an otherwise unattractive region, require these investors to maintain their investments in that region for twice the period they receive the investments, and then maintain the formal shell of the regime but eviscerate it of all (or substantially all) content.

The record shows that Romania itself shared that belief. It did all it could to preserve the incentives regime through its accession negotiations ... Whether or not it felt committed to existing PIC holders, it certainly wished to maintain the regime for as long as possible and publicly stated so. Romania thereby created the legitimate expectation that the regime would not be repealed or fundamentally altered during the duration of each PIC.

Romanian officials also stated that investors would be compensated if the regime were repealed or fundamentally altered ... These statements confirm that Romania itself understood that the EGO 24 regime was to last for 10 years, and that in repealing it prematurely Romania was undermining PIC holders' legitimate expectations and causing them to suffer damages.

(iii) Was this expectation reasonable?

In broad terms, the Tribunal will analyze the reasonableness of the Claimants' expectation from two perspectives: (i) the legitimacy of the expectation in the context of Romania's accession to the EU, and (ii) the legitimacy of the expectation under Romanian law.

After a careful review of the record, the Tribunal has come to the conclusion that between 1998 and late 2003 it was reasonable for the Claimants to believe that the EGO 24 incentives were compatible with EU law ... As a result, the Tribunal concludes that the EGO 24 incentives could have reasonably been thought (both by the Romanian government and the Claimants) to be valid regional operating aid under EU law. Indeed, Romania itself appears to have believed that, at the time EGO 24 was enacted, the incentives were compatible with EU state aid requirements ... The Tribunal does not believe that investors should be held to a higher standard than the government. Investors are entitled to believe that the government is acting legally ...

Determining whether the Claimants' expectations were reasonable under Romanian law is less straightforward. On the one hand, the Claimants argue that the purpose of EGO 24 and its enacting legislation, as well as the issuance and content of the PICs, made their expectations reasonable ... On the other hand, Romania argues that the regulatory framework as it existed at the time of the Claimants' alleged investment in reliance on Romania's assurances ... contemplated the possibility that the incentives could be subject to repeal ...

Enacted rules are supposed to be valid and enforceable for so long as they have not been repealed or annulled. Law-abiding actors may not violate enacted laws or regulations because they question their validity or legality: they may know that such validity or legality is debatable, and seek appropriate relief in court or otherwise, but, in the meantime, they must obey the law. Romania has not argued that the incentives were illegal or that there were any doubts as to their legality. In other words, the possibility of cancellation of the incentives ... is in itself not a valid argument ...

In the Tribunal's view, ... it was reasonable for the Claimants to believe that the Government considered that such incentives were legitimate and intended to maintain them for the stated period ... In conclusion, the Tribunal finds that it was reasonable for the Claimants to believe that the incentives were legal under Romanian law and would be maintained for the full 10 year period.

(iv) Did the Claimants in fact rely on that expectation?

There is no dispute that the Claimants invested in Bihor County, and that they made use of the incentives. However, it is also evident from the record that their initial investments were not made in reliance on the EGO 24 incentives, because they began to invest in the early 90s, before these incentives were created ... It is clear that (i) not all of the Claimants' investments were predicated on the EGO 24 incentives; and (ii) even when the Claimants' took the EGO 24 incentives into account in making investment decisions, other factors also influenced the Claimants' decisions. However, the Tribunal is satisfied that a significant part of the Claimants' investments (from 2000 to 2004) were made in reliance on the incentives. In particular, the Tribunal is satisfied that the existence of the incentives was one of the reasons for the scale and manner of those investments ... Accordingly, the Tribunal is satisfied that the Claimants in fact relied on the incentives to build and develop their investment in the manner in which it stood at the date of the revocation of those incentives ...

For the reasons set out above, the majority of the Tribunal finds that Romania violated the Claimants' legitimate expectations with respect to the availability of the EGO 24 incentives ...

Next, the Tribunal examined the claim that Romania had acted unreasonably. Per its prior analysis of this area of law, the Tribunal first asked whether Romania had pursued a rational policy. And it then asked whether Romania's conduct was "appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors."

(i) Did Romania act in pursuit of a rational policy?

From the documentary and oral evidence ..., the Tribunal draws two broad conclusions. First, at the beginning of the accession negotiations Romania believed that the EGO 24 incentives were compatible [with EU rules]. This belief must have ended at least by 2002, when the Romanian government acknowledged in its report on the progress for accession that the EGO 24 regime constituted incompatible state aid and had to be converted into compatible state aid. However, only in mid-2003 did it become clear to Romania that the incentives must be revoked ... That being said, it appears that by as late as May 2004 Romania still believed that it could negotiate transitional periods or compensation packages ...

Second, it is plain that Romania revoked the incentives in order ... to obtain EU accession. Romania would not have been able to [join the EU] if it had not brought the incentives into compliance with EU competition law. Although it is true that there does not appear to have been an official determination from the European Commission that the incentives constituted incompatible state aid, by mid-2003 it should have been quite clear to the Romanian government that the EGO 24 incentives were impermissible state aid under EU standards ... The fact is that the EU (in particular, the Commission) wanted the EGO 24 regime terminated, and this termination was made a pre-condition for accession ...

Under those circumstances, it is clear that Romania was under considerable pressure from the EU to terminate the EGO 24 regime. Thus, there is no doubt in the Tribunal's mind that Romania's repeal of the EGO 24 incentives was motivated by the EU's demands.

(ii) The Claimants' specific allegations of unreasonable conduct

The Tribunal will now turn to the question of whether, in pursuit of its objective to join the EU, Romania acted reasonably and, in that context, will address the Claimants' specific allegations of unreasonable conduct ...

The Claimants ... argue that it was unreasonable for Romania to revoke the incentives regime prematurely without being required to do so by any competent legal authority, without attempting to negotiate with the EU or the Claimants to mitigate the damages caused by the revocation, and in contradiction of its repeated statements over the years that the regime was legal and satisfied EU requirements.

The Tribunal rejects this argument ... the Tribunal does not find that Romania acted unreasonably. Romania did not act arbitrarily; to the contrary: it is evident that Romania's repeal of the EGO 24 incentives was done in response to conditions imposed by the EU for accession ... However, ... the EU's demand must be interpreted as a request for termination of the incentives as a pre-condition for accession, and Romania understood that sometime in 2003. Thus, the repeal of the EGO 24 incentives was reasonably related to a rational public policy objective (i.e., EU accession), and there was an appropriate correlation between that objective and the measure adopted to achieve it (i.e., the repeal of the EGO 24 incentives). However, as will be seen, it does not follow of necessity that such repeal was fair and equitable to the Claimants.

As to the Claimants' argument that this termination was not ordered by a "competent legal authority", the demands were issued by the Commission on the behalf of the EU itself during accession negotiations. Given Romania's goal of accession, it was not unreasonable for Romania to comply with the EU's demands, even if such demands were not formally issued by a "competent legal authority" if that should have been the case. Even if the Claimants were correct as a matter of law that the termination was not ordered by a competent legal authority, it is not for this Tribunal to decide whether Romania properly understood the point at the time or whether it would have been opportune for Romania to raise the point in its negotiations with the EU ...

The Claimants also contend that it was unreasonable for Romania to revoke the incentives without attempting to negotiate with the EU or the Claimants to mitigate the damages caused by the revocation. It is true that there is no convincing evidence that Romania tried to negotiate alternative solutions with the EU, such as a delay in the revocation date, a transition period, or payment of compensation. However, as became abundantly clear at the hearing, it would have been extremely difficult (perhaps even impossible) to obtain agreement from the EU on any of these alternative solutions ...

Given Romania's uncertain chances to obtain any of these alternative arrangements, its lack or, at least, weakness of bargaining power before the Commission, and the Commission's inflexible stance, the Tribunal does not find that it was unreasonable for Romania to revoke the incentives without making more efforts to maintain them. In addition, a negotiation involves many considerations and trade-offs. It is not for a Tribunal subsequently to second-guess decisions which are within the realm of diplomatic bargaining if there are no objective circumstances allowing and requiring such an evaluation.

Finally, the Tribunal finds that any contradiction in Romania's statements as to the legitimacy of the EGO 24 regime or its compatibility with EU state aid regulations in the earlier years of the accession process was based on a good faith lack of knowledge and an overly optimistic initial assessment of its bargaining power *vis-à-vis* the EU ...

The Claimants argue that it was unreasonable for Romania to revoke the benefits of the incentives regime for investors like the Claimants, while preserving the investors' obligations under that regime, in particular the obligation to maintain the investments for twenty years.

There is some dispute among the parties as to the content and length of this obligation ... The Tribunal does not find that the duration of the Claimants' obligation makes in itself a difference for purposes of assessing the reasonableness of Romania's conduct. The point is that Romania repealed [EGO 24's main incentive] while at the same time maintaining all of the Claimants' obligations under the scheme ... The obligation to maintain investments had no rational justification after the incentives were terminated ...

(iii) Conclusion

For the reasons stated above, the Tribunal finds that, with one exception, Romania did not act unreasonably. Romania's decision to revoke the incentives was reasonably tailored to the pursuit of a rational policy (specifically, EU accession), and there was an appropriate correlation between that objective and the measure adopted to achieve it (i.e., the repeal of the EGO 24 incentives). The question is whether Romania could have negotiated a transition period for the incentives or their conversion into compatible aid. However, even if it could have done more, but failed to do so, objectively speaking the Tribunal does not find that it acted unreasonably. Even if Romania could have done more to maintain the incentives, its failure to negotiate transitional periods or compensation was not arbitrary, but appears justified under the specific circumstances of the accession negotiations.

The exception to this conclusion was Romania's decision to maintain the investors' obligations despite the repeal of the incentives. It is not for this Tribunal to say what would have been the right decision ..., but it was not reasonable for Romania to maintain as a whole the investors' obligations while at the same time eliminating virtually all of their benefits.

In other words, with the exception noted in the preceding paragraph, Romania's repeal of the incentives was a reasonable action in pursuit of a rational policy. That being said, this conclusion does not detract from the Tribunal's holding ... that Romania undermined the Claimants' legitimate expectations with respect to the continued availability of the incentives until 1 April 2009. As a result, Romania's actions, although for the most part appropriately and narrowly tailored in pursuit of a rational policy, were unfair or inequitable *vis-à-vis* the Claimants ...

Finally, the Tribunal examined the claim that Romania had not acted transparently.

In addition to failing to provide stability of the legal framework and violating their legitimate expectations, the Claimants argue that Romania breached its obligation to accord fair and equitable treatment by acting in a manner that was not transparent ...

It is evident from the record that, as the Respondent itself puts it, Romania was in a quandary whilst trying to balance two conflicting policies, i.e., first, the continuation of [EGO 24] and the protection of the interests of PIC holders in the disfavored regions, and, second, EU accession. The Tribunal ... finds that the manner in which Romania carried out that termination was not sufficiently transparent to meet the fair and equitable treatment standard ... Once it became clear to Romania that the incentives would have to be abolished ..., Romania should have made PIC holders aware of this fact ...

Romania argues that it was bound by confidentiality obligations imposed by the EU. However, there is no evidence of such requirements ... It seems unlikely that the EU would object to Romania informing affected parties of steps taken by Romania in order to align incompatible aid with [EU rules], when such alignment was exactly what the EU was requesting Romania to do since the conclusion of the Europe Agreement. Even if confidentiality was required, or Romania preferred to keep the negotiations with the EU confidential for other reasons, Romania then had to make a choice and accept the consequences of maintaining such confidentiality ...

Thus, the Tribunal finds that Romania should have alerted PIC holders reasonably soon after it became clear that the EGO 24 incentives would be abolished ... Given the importance of the EGO 24 program and how intensely it was discussed in the context of Romania's EU accession, it was reasonable to expect that the Government would have given to the participants a formal advance notice of the program's anticipated termination ...

As a result, the Tribunal finds that the Respondent breached the fair and equitable treatment obligation by failing to inform PIC holders in a timely manner that the EGO 24 regime would be ended prior to its stated date of expiry ...

In conclusion, the Tribunal summarized its main findings for the dispute.

The Tribunal concludes that, by repealing the EGO 24 incentives prior to 1 April 2009, Romania did not act unreasonably ... (except that the Respondent acted unreasonably by maintaining investors' obligations after terminating the incentives). The Tribunal, however, concludes by majority that Romania violated the Claimants' legitimate expectations that those incentives would be available, in substantially the same form, until 1 April 2009. Romania also failed to act transparently by failing to inform the Claimants in a timely manner that the regime would be terminated prior to its stated date of expiration. As a result, the Tribunal finds that Romania failed to "ensure fair and equitable treatment of the investments" of the Claimants in the meaning of Article 2(3) of the BIT.