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Intro

- New Year`s Resolutions

New Year`s Resolutions

Each January I say to myself: this new year is going to be a very special one, and this premonition came true about all the years Ţuca Zbârcea & Asociaţii has lived so far. Our debut year, the year in which the brand was consolidated, the year our position at the top was confirmed… – great memories and important achievements that we also dedicate to our beloved Andreea whom we hold dear in our hearts and so sadly miss to this day... and always will.

2009 was a memorable year. Not only for us but for everybody, as we have all struggled to meet the challenges of the global economic crisis. Nonetheless, 2009 was for us exceptional but I wouldn't go into a detailed inventory of our performances over the last 12 months... What I believe to be truly notable in this context is our power to adapt to the new realities. The turnover generated in a crisis-stricken year is certainly relevant in evaluating the performances of a firm like ours; it is also certain that an achievement like winning an ICSID international case is worthy of a headline; true also that carrying out pilot-projects in wind-energy, providing legal support for the biggest infrastructure public-private partnership project, and receiving international recognition such as the Financial Times prize would all deserve to be called exceptional. And the list could continue…

> "Great memories and important achievements that we dedicate to our beloved Andreea whom we hold dear in our hearts and so sadly miss to this day... and always will.

Above all these however I take pride in the exceptional reaction my colleagues had in front of last year's daunting challenges and nonetheless their flexibility in dealing with the market's new requirements. Adapting in real time to these requirements is key to our achievements in 2009 and is, in itself, a remarkable success.

The same realistic and flexible approach should be maintained in 2010 – a year that announces itself every bit as special. Recession seems to have been overcome, but the crisis continues… In addition, for us, this new year brings about ambitious and seductive projects: to be involved in the complexities of energy and infrastructure projects; to develop our →

business through our office in Madrid, a project born last December and ready to pass its first exams in the months to come; to develop our office in Cluj-Napoca and strengthen our other local partnerships in Romania and the Republic of Moldova; to intensify our presence in areas connected to law practice such as insolvency and taxation – and other surprise-projects I’d like to tell you more about in January 2011.
Because 2011 announces itself special, for sure…

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Focus

- Is the State Responsible for the Conduct of State Owned Enterprises?

Is the State Responsible for the Conduct of State Owned Enterprises?

"Every internationally wrongful act of a State entails the international responsibility of that State[1]"

This general principle represents the cornerstone for what is the general theory of international responsibility of States. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (i) is attributable to the State under international law; and (ii) constitutes a breach of an international obligation of the State[2].

> "A question arises on whether the agreements undertaken by State owned companies or other forms of State entities are binding for the State.

Therefore, the State's responsibility is generally limited to the acts or omissions of the State itself that amount to a breach of an international obligation undertaken by that State.

In the context of foreign investments however, the investors rarely deal directly with the State itself as most projects involve the conclusion of complex agreements such as concession agreements, power purchase agreements, and share sale purchase agreements with various Government-owned companies, individual government officials or State enterprises, agencies or other entities that do not expressly engage the host State itself.

A question arises on whether such agreements undertaken by State owned companies or other forms of State entities →

1. See Article 1 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Draft Articles"). The ILC Draft Articles were adopted by the International Law Commission in 2001. The ILC Draft Articles are not binding but have frequently been applied by courts and arbitral tribunals as declaratory of customary international law

2. See Article 2 of ILC Draft Articles

are binding for the State that created these entities and whether the actions taken by such entities can be attributed to the State when it comes to responsibility for the violation of the investors' rights. The rules of attribution under international law apply to determine when a State may be held responsible for acts or omissions of such entities.

This question is not a mere starting point for an academic debate but is in fact of utmost importance in practice both from the investor's perspective and from that of the host State. First, it is of particular interest to the State (who often is the respondent party in a dispute relating to the investor's rights) when defending itself by arguing that the acts of State companies or other forms of State entities cannot be attributed to the State. The question may be of relevance also for investors that are State owned entities, given that the State may try bringing up the argument that, in fact, the investor is only a State entity rather than a foreign private entity[3].

Generally speaking, the State is responsible for all its organs and for its territorial units such as provinces and municipalities, responsibility that extends to all components of the State, namely to the executive, the legislative and the judiciary[4].

The attribution test complicates when it comes to State owned companies or other kind of legal entities where the State`s involvement is highly diminished under a commercial nature of their activity.

State owned companies are autonomous legal entities whose assets or shares are owned exclusively by the State or in which the State has only partial ownership or has the controlling share (the "golden share"). It follows that, in principle, these entities are separate from the State and apparently their acts and actions should not be attributed to the State.

"Generally speaking, the State is responsible for all its organs and for its territorial units such as provinces and municipalities, responsability that extends to all components of the State.

Nevertheless, it has been recognized that circumstances may arise where the conduct of such entities is attributable to the State because there exists a specific factual or legal relationship between the entity engaging in the conduct subjected to litigation and the State itself. In this context, the rules of attribution as reflected in the ILC's Draft Articles highlight the existence of three main alternative criteria for assessing whether the conduct of a particular entity is attributable to the State, namely the *structural criterion*, the *functional criterion* and the *control criterion*[5].

The *structural criterion* regards the "core cases of attribution" and deals with the attribution to the State of the conduct of State organs covering all the individual or collective entities which make up the organization of the State and act on its behalf.

The *functional criterion* on the other hand, deals with the cases of entities that exercise governmental authority but do not satisfy the structural test (they are not State organs). These may include public corporations, semipublic entities, public agencies of various kinds and even private companies. To entail State`s responsibility, the entity should be empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity should relate to the exercise of the governmental authority concerned.

The *control criterion* is the most complex and sensitive one. According to this criterion, the conduct of a person or group of persons shall be considered an act of a State only if the State directed or controlled the specific operation and the conduct complained of was an integral part of that operation (the →

3. In one investment arbitration, the respondent State (i.e. the Slovak Republic) argued that the arbitral tribunal has no competence given that Claimant (a bank) was in fact a state agency of the Czech Republic discharging governmental activities and not an independent foreign commercial entity (See Československa obchodní banka, a.s. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction of 24 May 1999)

4. See Article 4.1 of ILC Draft Articles

5. See Articles 4, 5 and 8 of the ILC Draft Articles

State was using its control of a corporation specifically in order to achieve a particular result). Therefore, attribution to the State in this particular case requires both that: (i) the entity in question is generally controlled by the State; and (ii) the operation in question was effectively controlled by the State.

In practice, the position taken by tribunals has been consistent with the view that simply delegating the State's activities to separate entities is not sufficient in order to avoid State responsibility for violation of international law[6]. Particularly, in the field of investment disputes, arbitral tribunals have generally combined the three criteria mentioned above in order to assess whether the State is responsible for the acts committed by various entities.

One of the leading cases in the field of investment arbitration is that of Emilio Agustín Maffezini v. Kingdom of Spain[7]. That case involved the claims of Mr. Maffezini regarding his business relationships with Sociedad para el Desarrollo Industrial de Galicia (SODIGA), an entity owned by the regional government of Galicia and established to promote economic development in that region of Spain. One of the central questions that the Maffezini Tribunal had to decide upon was whether the acts of SODIGA are attributable to Spain. In doing so, the Maffezini Tribunal considered first whether SODIGA was a State entity, or a State organ by analyzing how SODIGA was classified as a matter of Spanish law and assessing SODIGA's legal structure and functions. The Maffezini Tribunal concluded that SODIGA was not a State organ but did find, however, that SODIGA was charged with certain public powers and that it thus acted with certain delegated authority. SODIGA's conduct was thus attributable to Spain only to that extent.

> “In a case involving the Romanian State, an ICSID tribunal decided that two entities having legal personality and implementing various privatization programmes under the control of the Romanian Government cannot be considered as State organs.

In another case, an ICSID[8] tribunal had to decide on the status of a Moroccan company, i.e. ADM, entrusted with the construction, maintenance, and operation of highways in which the Moroccan State held 89% of the shares[9]. Applying the structural criterion, the tribunal in that case held that ADM was in fact a commercial company, i.e. a limited liability company, having its own legal personality. Turning to the functional test, the tribunal held that ADM's object of activity, i.e. the construction and operation of highways, was the State's business. Moreover, given that ADM's Board of Directors included, as President, the Minister of Infrastructure, *de facto*, the State was in control of the company.

In a case involving the Romanian State, an ICSID tribunal had to decide on the status of two Romanian entities, having legal personality and being entrusted with the task of implementing various privatization programmes under the control of the Romanian Government, i.e. SOF (State Ownership Fund; *Romanian: Fondul Proprietatii de Stat*) and its successor, APAPS (Authority for Privatization and Management of the State Ownership; *Romanian: Autoritatea pentru Privatizarea si Administrarea Proprietatilor Statului*)[10]. The tribunal in that case decided that the two agencies cannot be considered as State organs since they were separate legal entities (therefore they did →

6. See for example the practice of the ICJ (e.g. Barcelona Traction, Light and Power Company, Limited - Belgium v. Spain). See also the practice of the Iran-US Claims Tribunal (e.g. Hyatt International Corporation v. The Government of the Islamic Republic of Iran, Foremost Tehran v. Iran). See also the practice of the International Tribunal for the Former Yugoslavia (e.g. Prosecutor v. Duško Tadic - Case IT-94-1-A)

7. Emilio Agustín Maffezini v. Kingdom of Spain ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000

8. International Centre for Settlement of Investment Disputes

9. Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001)

10. Noble Ventures Inc. v. Romania (ICSID Case No. ARB/01/11, Award of 12 October 2005). The dispute arose out of the privatization agreement concerning the acquisition of Combinat Siderurgic Resita, Romania's oldest steel plant

not satisfy the structural test). Nevertheless, the two entities were entitled by law to represent the Romanian Government and hence their actions were deemed attributable to the Romanian State (functional test). The Tribunal held that these agencies exercised the State's rights in the shareholder meetings, undertook the necessary measures for preparing the privatizations and ultimately sold the shares held by the Romanian Government. Moreover, the board of the agencies was appointed by the Prime Minister.

In the most recent investment arbitration involving the Romanian State, one ICSID tribunal had to decide on whether the actions of two companies, i.e. AIBO (The Bucharest Otopeni International Airport) and TAROM (The Romanian Airlines Company), are attributable to the Romanian State[11]. Both entities were State owned commercial companies.

The EDF Tribunal applied each of the three criteria, namely structural, functional and control in order to asses whether the Romanian State is responsible for the acts of the two State owned commercial companies.

Regarding the functional criterion, the EDF Tribunal held that neither AIBO nor TAROM may be considered as State organs given that they both possess legal personality under Romanian law separate and distinct from that of the State[12].

Turning to the structural criterion, the EDF Tribunal first emphasized that in order for the acts of AIBO and TAROM (independent entities) to be attributed to the State, what is decisive is (i) whether such entities were empowered by Romanian law to exercise elements of governmental authority, and (ii) whether the specific acts in questions were performed in the exercise of such governmental authority[13]. The EDF Tribunal however reached the conclusion that the acts complained of regarded the private property of the entities in question and, moreover, were purely commercial in nature. Hence, the two entities did not satisfy the functional criterion[14].

> “ When assessing the potential responsibility of a State for acts of State owned companies or other kinds of State enterprises, one should not be content with checking whether that entity is part of the state apparatus.

Arriving at the control criterion, the EDF Tribunal started its analysis by pointing out that such attribution is exceptional and that the State must exercise its control in order to achieve a particular result[15]. The arbitral tribunal considered first that given that the Ministry of Transportation issued instructions and directions to both AIBO and TAROM regarding the conduct of these companies, the Romanian State (through the Ministry of Transportation) exercised control of the two entities. Moreover, the tribunal reached the conclusion that the Romanian State has used its ownership rights in order to achieve a particular result, namely to bring to an end, or not to extend, the contractual arrangements with EDF[16]. Accordingly, the EDF Tribunal held that the actions in question of both AIBO and TAROM are attributable to the Romanian State. Therefore, when assessing the potential responsibility of a State for acts of State owned companies or other kinds of State enterprises, one should not be content with checking whether that entity is part of the state apparatus, but it should dig further to see what kind of control do the State exercise, what are the functions that such enterprise is entrusted with and whether the conduct in question was linked to such functions.

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11. EDF (Services) Limited v. Romania (ICSID Case No. ARB/05/13, Award of 8 October 2009)

12. Idem para. 190 | 13. Idem para. 194 | 14. Idem para. 195-198 | 15. Idem para. 200 | 16. Idem para. 201

Case by Case

- EDF Services Ltd. v. Romania - the Case, the Work and the Winner

EDF Services Ltd. v. Romania - the Case, the Work and the Winner

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In October 2009, an arbitral tribunal of the International Centre for Settlement of Investment Disputes (ICSID) has passed its decision in the case brought against Romania by EDF Services Limited, a company incorporated in the Bailiwick of Jersey, a Crown Dependency of the United Kingdom (EDF), for an alleged expropriation and unfair treatment of its investment in Romania in relation to its duty-free business. EDF sought compensation of over USD 132 million[1].

The request for arbitration was first submitted by EDF in July 2005 and, after 4 years of court battle, 9 written submissions by each party, 4 procedural orders by the tribunal and 5 days of oral hearings of 16 fact witnesses[2] and 7 experts, the ICSID tribunal dismissed EDF's request with prejudice, ordering it to pay Romania costs of USD 6 million.

The Case

Its sheer amount of factual and legal issues, let alone its intricacies, makes any attempt at summarizing this case a daunting task. To start with the beginning, EDF's accusation in a nutshell was that Romania expropriated →

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1. EDF (Services) Limited v. Romania (ICSID Case No. ARB/05/13, Award of 8 October 2009), available at http://ita.law.uvic.ca/documents/EDFAwardandDissent.pdf

2. Out of a total of 23 fact witnesses who submitted written statements in the case (2 for EDF and 21 for Romania)

its local duty-free business (located mainly in the Otopeni Airport) in retaliation for an EDF representative (Mr. Weil, EDF's chairman) refusing to deliver on an alleged USD 2.5 million bribe solicitation by high officials of the Romanian Government.

While the second part of the accusation (the unsatisfied bribe request pinpointed by EDF as the trigger of a fateful chain of events ultimately robbing EDF of its investment) made headlines in some local newspapers for a good couple of months in 2007 and then again, with a roar, in the spring of 2008, it was the first part of the claim, certainly less known and less spectacular in the eyes of the public but as certainly equally challenging and exciting for the lawyer, that constituted the actual core of the case: what rights did in fact EDF hold in the Otopeni Airport?

In EDF's own description – which suffered a new re-qualification, re-quantification, and re-characterization as the case progressed – its rights amounted to a perpetual and exclusive right to operate duty-free retail on Otopeni Airport's premises: a virtually ever-lasting right that, EDF eventually conceded, was to be punctured periodically by the mere formality of having to renew the lease agreements through a "preemption" mechanism. Similarly, EDF claimed rights to provide duty-free services onboard all of TAROM's international flights, exclusively, and virtually perpetually if so desired.

"Exclusive and perpetual rights" – such proposition will most certainly cause lawyers to raise a brow: What types of agreements were there in place? Under what laws were such agreements signed?

In fact, EDF developed its two-tier duty-free business in Romania through two limited liability companies (EDF ASRO and SKY Services)

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established under the laws of Romania together with two state-owned companies: the National Company Bucharest Otopeni International Airport (AIBO)[3] – which was a minority shareholder in EDF ASRO, and the Romanian Company for Air Transportation (TAROM) – holding equity in both EDF ASRO and SKY Services.

The main source of contention and the basis of most of EDF's claim (more than 90% of the damages EDF sought in the arbitration were related to it) was EDF ASRO, a company established in 1992 for a limited duration of 10 years to operate duty-free shops in Romanian airports. Its duty-free operations in Constanța and Timişoara airports dismal, EDF focused on the Otopeni Airport. Upon a great deal of argument shifting (claims ranging from outright property rights to an acquired right to use the outlets without further interventions from AIBO) EDF settled to claiming a perpetual right to lease the Otopeni Airport duty-free outlets from AIBO, on preemptive bases. In EDF's interpretation, the preemptive right to lease the outlets had been AIBO's contribution to EDF ASRO's share capital upon establishment[4]: therefore, it had become an integral part of EDF ASRO's "commercial asset" (*Romanian: fond comercial*), bound to exist for as long as the company itself existed.

As a proper interpretation of EDF ASRO's establishing papers demonstrated, AIBO's contribution to EDF ASRO consisted in a nothing more than a 10-year right to use the airport's duty-free venue (*Romanian: vad comercial*), while EDF ASRO's access to the actual outlets was based on individualized per-space lease agreements[5]. Should an extension of the company's duration beyond the 10 initial years have been decided – unanimity of the shareholders being required – EDF ASRO's right to do business in the airport's venue would not have been automatically →

3. Currently, the National Company Henri Coanda Bucharest International Airport ("AIHCB")

4. That a preemption right could form a shareholder's contribution to a company's share capital may sound striking to the most ingenuous professional; at least its nature, as well as the fact such contribution cannot be "paid" as law requires would oppose. Even though this particular point caused much debate, it formed only a small part of the range of legal issues that required the experts, the lawyers, and the tribunal's attention

5. In point of fact, such lease agreements were negotiated and concluded yearly between EDF ASRO and AIBO throughout the 10-year duration of the company, claims of a preemptive right, let alone property or a perpetual right to use without formality being never raised at the time

extended: if AIBO wished to prolong such right, a new capital contribution was required, with a corresponding increase of its equity. In addition, it was demonstrated that EDF ASRO did not have an actual "commercial asset" of which the alleged preemptive right of perpetual use to be a part, since EDF ASRO's entire commercial activity was subordinated, and completely dependant on AIBO's own activity: no passengers in the airport, no customers in the duty-free shops. EDF ASRO was a so-called "enclave" company, whose business depended entirely on AIBO's.

In parallel, in 1994, EDF and TAROM established SKY Services, its duration set to 15 years and its three projected business operations being: building and operating a transit hotel in the vicinity of the Otopeni Airport; setting up a taxi service to cater to the passengers' needs of local transportation; and providing duty-free services to travelers onboard international flights. TAROM's contribution consisted in cash – a significant amount at the time. Similarly with EDF ASRO, EDF's claim was that SKY's rights were to provide duty-free services onboard all TAROM's international flights, and exclusively. But SKY Services' establishing documents suggested nothing in the way of exclusivity: the reference to duty-free was made in connection with SKY's projected business (*Romanian: obiect de activitate*) and TAROM had no obligation to either surrender all its flights to SKY Services or refrain from competing with SKY Services – to the contrary, TAROM was under a legal obligation to ensure arm-length relations with its affiliate and do not hinder free competition[6].

EDF's claims to "perpetuity" and "exclusivity" of rights were largely based on the idea that the two companies' articles of incorporation were so-called "joint-venture" agreements, mere commercial agreements entirely governed by the free will of the parties (that itself opened to much debate and interpretation, with less than helpful wording of agreements concluded at the beginning of the '90s) without any reference to Romanian commercial companies' law. Indeed, without much reference to Romanian law in general. Under the Romanian law governing EDF's investments, lease may not be perpetual; contributions of rights of use to the share capital of a company must be time-limited at least in order to permit quantification; exclusivity in commercial relations was banned as early as 1996 (Competition Law No. 21/1996) etc.

Adjacent to such issues, governed mainly by Romanian law but always set against the background, and to be analyzed in light of the standards provided by the public international law, was the issue of "attribution": in order for EDF's claim of breach of an international treaty to be found grounded, EDF had to prove the unfair treatment and ultimate expropriation of its investments had been perpetrated by the Romanian state[7]. Much debate evolved around the status of AIBO and TAROM as alleged "organs", later alleged "agents" of the state: what were these companies' powers and activities; was there a different regime for the public, respectively private assets in their patrimony; what was the corporate decisional process consisting of; had the "corporate veil" been "pierced" or not by interventions from their shareholder, the State, through the Ministry of Transportation.

After a (3-page!) bird's-eye view of the legal side of the case, this author declares that any attempt at a comprehensive summary of the factual side of it – with its 10 years' worth of day-to-day operations, corporate decisions, contacts and correspondence between the parties or with others, authorities' inquiries etc. each relevant, each shedding a little bit more light on the matter – is impossible, hence will limit to sketching a few of the central pieces to the enormous puzzle.

It was EDF that ensured the management of the operations for both EDF ASRO and SKY Services. Even though EDF's professed experience in duty-free operations had constituted AIBO's and TAROM's main reason for having established a joint business with it in the first place, EDF was cashing in considerable fees for its management and know-how consultancy.

Suspicions of contraband and tax-avoidance →

6. Decision No. 63 of July 20, 1998 of the Competition Council

7. For the question of attribution as settled in this case, see infra "Is the state responsible for the conduct of State owned enterprises?", page 6

lead to EDF ASRO's shops in the Otopeni Aiport (along with the so-called "diplomatic duty-free shop" operated in Bucharest by another EDF affiliate) be closed down by the Customs authorities for almost two years, between 1998 and 1999, much to AIBO's loss in image and financial profit. Despite the ensuing media storm, AIBO and TAROM stood by their partner and as soon as the authorities allowed EDF ASRO was permitted to resume business in the airport for the remainder of the contractual term.

As for SKY Services, two years after its establishment in 1994, nothing had happened:

- The transit hotel never got beyond the initial plan-drawing stage;
- The taxi business smoldered with EDF acquiring an oversized, very expensive and soon-to-be-obsolete car fleet that investigations during the arbitration proved to have been bought at a sky-high price from an EDF affiliate, but no steps were taken to obtain the necessary taxi-license (soon the police was flooded with complaints by the taxi drivers' union against SKY's illegal operations while rows among drivers pestered the terminal);
- The duty-free business was undergoing long, inexplicable and fruitless preparations.

By the fall of 1996 TAROM's cash contribution was gone and EDF was requesting TAROM for a new infusion of capital. After much reluctance and procrastination, TAROM's insistence saw SKY Services begin duty-free services on its international flights at the end of 1996. But EDF's poor operational management, poor supply and passenger-hassling policies resulted soon in daily customer complaints, flight-attendants protests, and Customs fines for breach of rules and regulations.

In the spring of 2002, at the end of the 10-year duration of EDF ASRO, after the 1998-1999 meltdown and with the requirements of a new, modern terminal to attend to, AIBO decided against the extension of its partnership with EDF: AIBO was not to vote for the extension of EDF ASRO's duration. Auctions were to be held for the Otopeni Airport outlets: indeed, in April 2002, AIBO organized its first auction for the duty-free service in the Otopeni Airport. EDF ASRO's last lease agreements expired in March 2002 never to be renewed. Dissatisfied with its own experience with EDF in the SKY Services venture, TAROM decided the same. Soon after, upon discussion and consideration, wishing

> "Nonetheless, EDF alleged the ultimate conspiracy: everything, from AIBO`s and TAROM`s refusal to continue their partnership, to the termination of its leases, and culminating with GEO No. 104 was part of a concerted attack conducted against EDF by Romania.

not to harm EDF's business, AIBO and TAROM changed their mind: instead of voting against extension and thus letting EDF ASRO expire by its due term, they should rather sell their equity to EDF in advance to the expiry date, so that, left sole shareholder, EDF be free to decide to continue EDF ASRO's activity, and participate to the upcoming auctions. It came to be a regrettable act of generosity.

Without paying AIBO the price for its shares, EDF as sole shareholder proceeded to decide and register the extension of EDF ASRO's duration at the Trade Registry – a registration successfully contested by AIBO to the effect that the court found that, lacking a valid extension of its duration, was dissolved by expiry of the term for which it had been established.

Throughout the auction process that took, in successive phases and renewed procedures, from April to the end of 2002, the dissolved EDF ASRO, EDF itself, SKY Services and other EDF affiliates submitted their bids (most of the times disqualified as incomplete, usually lacking the necessary financial documents or resources). A rumor-and mail-campaign was lead by EDF claiming that it held exclusive rights over the spaces and therefore AIBO's auctions were illegal in an attempt to dissuade the other bidders from participating. Each and every auction and auction phase was contested by EDF and/or its affiliates in court – trying to stall the process – and each and every contestation was rejected by the courts.

In September 2002, as a necessary step in Romania's preparations for EU accession, Government Emergency Ordinance No. 104 (the "GEO No. 104") was passed, cancelling duty-free operations in airports; licensees →

had their license-fees refunded. Most importantly, at the time GEO No. 104 was issued, EDF ASRO had no duty-free license in place. With duty-free permits issued per space, its previous license had expired at the expiry of its lease agreements for the airport outlets, in March 2002. Moreover, EDF ASRO itself had been found dissolved by the courts.

Nonetheless, EDF alleged the ultimate conspiracy: everything, from AIBO's and TAROM's refusal to continue their partnership, to the termination of its leases, and culminating with GEO No. 104 was part of a concerted attack conducted against EDF by Romania (i.e., AIBO and TAROM, the Trade Registry, the Ministry of Transportation, the Financial Guard, the Customs authorities, ultimately the Romanian Cabinet and the Parliament that endorsed GEO No. 104) in retaliation for Mr. Weil's refusal to meet a bribe request allegedly made in 2001 by two Romanian officials. Accusations of anti-Semitism (Mr. Weil being Jewish) spiked the explosive cocktail for good measure.

The details of this corruption plot were initially very scarce. The (nameless at the time) accusation first appeared in foreign press in the fall of 2002 and prompted an ex-officio investigation by the Anti-corruption bureau in Bucharest to which EDF's representatives, and Mr. Weil himself refused to cooperate. A renewed complaint made in 2006, this time naming the alleged perpetrators, lead to a more comprehensive investigation and the Anti-Corruption bureau resolved, again, not to prosecute, for lack of sufficient index that a crime had been committed. The prosecutors' decision was maintained by the courts.

In its first submissions to the ISCID tribunal, EDF underlined that it is not within its intentions to base its claim too heavily on this particular part of the story – for which its only evidence were a bill from the Hilton Hotel Café on which Mr. Weil himself had scribbled the amount allegedly requested by the official whom he allegedly had just met in the hotel's parking lot, and a self-serving e-mail from an EDF executive to Mr. Weil (proved inauthentic, at best impossible to authenticate lacking the original server – unfortunately lost in Hong Kong).

Days before the hearing set initially for May 2008, EDF submitted to the tribunal a tape it claimed to have received from a journalist and which allegedly proved beyond doubt the corruption case against Romania: the tape was said to contain an audio recording of a conversation between an EDF executive (acting as witness for EDF in the arbitration) and a Romanian official in which the official allegedly requested the bribe[8]. EDF asked that the tape-recording be admitted as evidence. The tribunal postponed the hearings and invited the parties to state their position on the newly produced material. Experts were hired by each party to perform a forensic analysis of the tape-recording. Both experts concluded that the tape contained a recording made by the EDF executive himself, wearing a body-wire – which made the idea that EDF had become into the possession of the tape from some independent source appear (frankly) ludicrous, and the timing of its production of evidence at least suspicious. More importantly though, the tape was found to have been tempered with and both experts agreed that, lacking the original recording and the actual recorder of origin, the tape-recording remained impossible to authenticate.

> “ The tribunal unanimously dismissed all of EDF`s claims against Romania, noting that there was no evidence to support EDF`s claim.

The tribunal did not accept the tape as evidence, on the grounds that the circumstances surrounding its creation were uncertain, that it lacked authenticity, and it had been illegally obtained[9]. EDF's behavior and the circumstances surrounding the submission of the tape-recording were found “…contrary to the duty of fairness imposed upon the Parties to an →

8. Concomitantly with submitting the tape as proffered evidence to the tribunal, EDF renewed its complaint against the two officials at the Anti-corruption bureau: a new (the third) investigation ensued; upon analysis of the proffered new evidence, the prosecutors resolved again there had been no crime, and the courts irrevocably maintained this decision. Also, concomitantly with EDF's submission of the tape to the ICSID tribunal, the journalist (to buy into EDF's version) provided the tape to local newspapers. The news enjoyed much public attention, and its script much twisting and conveniently placed highlighting; in fact, the tape documented no bribe request

9. Procedural Order No. 3 in EDF (Services) Limited v. Romania is available at: http://ita.law.uvic.ca/documents/EDFPO3.pdf

international arbitration[10]", the tribunal noticing that EDF submitted the tape-recording only 12 days before a hearing scheduled two years in advance even though the tape itself indicated that EDF "was aware from the time the [tape]-recording was created of its existence[11]", and that, despite Romania's requests, EDF never provided the original of the tape-recording to permit authentication. In the tribunal's view, the tape was therefore unreliable and inadmissible as evidence.

By its final decision, the tribunal unanimously dismissed all of EDF's claims against Romania, noting that there was no evidence to support EDF's claim that "…a kind of "concerted attack" was organized and designed to bring about the taking and destruction of its investment in Romania[12]". To the contrary, "[a]ll of the entities involved – AIBO, the Trade Registry, the Financial Guard, the competent court – hav[e] acted, in the eyes of the Tribunal, in accordance with their respective duties[13]".

The Work

This case was not only unusually long from the point of view of the duration of its proceedings, with various procedural events interjecting and a hearing delayed, but – as a mere (6-page!) cursory look suggests, highly demanding in terms of work volume.

This author's heartfelt honest conviction (no doubt shared by all my colleagues) that this was a mammoth case if ever there was one is objectified by statistics.

For instance, the number of documents the legal team representing Romania collected, reviewed and processed exceeds 10,000.

Documents were collected from more than 15 entities. Romania's legal team prepared 9 sets of submissions, joined by over 24,000 pages of documents exhibited. There were 15 expert opinions produced by Romania in this case (provided by three Romanian law experts, one international law expert, one financial expert, one duty-free expert, one airport industry expert, one digital forensic expert, one audio forensic expert and one linguistic expert) and 35 witness statements.

The merits of the case covered events spreading over more than 10 years, starting in 1991 when EDF representatives first visited Romania and decided to invest in duty-free business.

The legal side of the case included domains as numerous as diverse as ranging from corporate law (contribution to share capital, company duration, decision-making), civil law (rental regime, preemption right, state property), commercial law, procedural law (effects of the extraordinary appeals, trade registry proceedings), criminal law and criminal procedure (the regime of bribe solicitation, the structure, role and power of the Anti-corruption authorities and the criminal courts, procedural guarantees, the regime of evidence, the admissibility of tape-recordings as evidence and the regime of legally obtaining such evidence), customs law, administrative law, competition, fiscal law. As such evolved in Romania throughout the 10-year period relevant for the case.

The Claimant EDF itself must be credited with an important albeit uncalled for addition to the work volume the case required anyway. By an array of actions in which one is tempted to suspect more than mere coincidence, accident, good or bad luck, EDF succeeded to cause excessive delays, and to bring forth extensive additional submissions outside the regular briefing schedule. For one, there were the burdensome document production requests. EDF changed its lawyers after Romania's submission of its Counter-Memorial. Without any intention to speculate on the circumstances, especially financial, of this separation, fact is the lawyers refused to relinquish the documents of the case back to →

10. Procedural Order No. 3 in EDF (Services) Limited v. Romania, par. 48

11. Procedural Order No. 3 in EDF (Services) Limited v. Romania. par. 46

12. EDF (Services) Limited v. Romania (ICSID Case No. ARB/05/13, Award of 8 October 2009), available at par. 285

13. Id.

EDF, or its new legal team. Romania was made to produce, again, thousands of documents, to replenish EDF's depleted database (on account of the idea that EDF had no other means available to reconstruct its own files). Finding a new legal team to represent it took EDF a long time, and required repeated postponements in the arbitration schedule.

Other over-burdening submissions were caused by EDF's insistence that Romania's legal team had uncensored access to the Anti-Corruption undergoing investigations (to which EDF representatives were participating), hence able, unlike EDF, not only to obtain any document and information (which we could not) but, in one remarkable instance of continued conspiracy accusation, to actually influence the investigation (which we neither could nor did).

Feeling itself free of such concerns as the secrecy of ongoing legal proceedings, however, EDF constantly disclosed confidential information from the arbitration file to the press, then called for special submissions of "new evidence" be permitted in order to submit the resulting press-articles to the tribunal. The tribunal felt compelled to issue an order forbidding further leakage of information to the media.

Lastly, EDF out staged itself by producing a tape-recording manifestly of its own production as "new evidence" days before the scheduled hearings. It required two rounds of written submissions, expert reports, and 4 months of additional procedural calendar for the issue to be exhausted, with the tribunal rendering a special procedural order dismissing the tape-recording from evidence.

...And the Winner

...is, of course, Romania. And the legal team made of lawyers from Ţuca Zbârcea & Asociaţii and White & Case, Washington D.C. office. It took the tribunal one long year to render its final award but here we are!

Our team included Florentin Ţuca, Levana Zigmund, Cristina Metea, Cornel Popa and Anca Puşcaşu. The White & Case team, lead by Abby Smutny-Cohen and Darryl Lew, included lawyers specialized in arbitration in general and in ICSID arbitration in particular.

The core of the legal team that represented Romania in this arbitration comprised some of the American, and all of the Romanian lawyers that in 2005 brought Romania's success in its first ICSID arbitration, Noble Ventures v. Romania.

Romania's success in the EDF case is not only to the credit of the lawyers' experience, talent and care for minutiae, or to their hundreds of hours of hard work. Tribute should be paid to the experts, too, especially here to our professors Corneliu Bîrsan, Lucian Mihai and Gheorghiţă Mateuţ (to whom we thank for their wonderful work, knowledge and support), and to the 21 fact witnesses who freely, resiliently, and generously spent tens of hours of their private time in interviews with the lawyers and in hearings (to whom we apologize for our own, and for our profession's tedium).

“ And the winner is Romania and the legal team made of lawyers from Ţuca Zbârcea & Asociaţii and White & Case, Washington D.C. office.

We thank to all involved for adding value to the lawyers' work by their contribution to preparing a strong and convincing defense for Romania.

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News and Views

- Crossing Spain: a Business Card from Madrid

Crossing Spain: a Business Card from Madrid

Spain welcomed 2010 under a new institutional framework, taking over the European Union`s rotating presidency, after only one month since the Lisbon Treaty came into force. This would be Spain`s fourth term in the European Union Presidency after 1989, 1995 and 2002.

During the first six months of the year, the Spanish Presidency will try to cope with the economic challenges of the European construction in order to consolidate Europe's position in the world. Its priorities will be related to the Europe of today as well as the Europe we want to build up for the future.

Besides making the Lisbon Treaty its top priority, Spain is to pursue its plans to tackle the effects of the crisis through a set of measures that will include: promoting economic recovery and finding solutions for solving the unemployment issue, promoting European citizenship in the 21st century as well as promoting gender equality.

2010 is, undoubtedly, a major transition year for many of the world's largest economies today. Knowing that a crisis always opens new windows of opportunity, we are personally looking with great confidence to the year ahead which is hopefully going to bring in actual signs of recovery and new growth impetus. Spanish enterprises are well aware of the many opportunities at hand: not only have they been one of the most dynamic investors in Romania but also pursued their investment plans despite the economic and financial crisis. In absolute figures, trade balance between Spain and Romania reached approximately 1.4 billion Euros in October 2009. Also, in April 2009, Spain ranked 8th among foreign capital investors in terms of the invested capital in Romania, with 3,632 registered companies and more than 700 million Euros worth of Spanish capital.

All those investments are the natural consequence of the many business opportunities presented by the Romanian market, and which are based not only on an economy which is very dynamic, but also on the external financial, legal and political support received from the European Union.

On the same note, various agreements between Romania and Spain in the field of economic relations are in force, such as the Agreement on economic and industrial cooperation and the Agreement for the reciprocal promotion and protection of investments. And, despite the general economic and financial climate which is not so conducive to massive foreign investments, Romania is still a country that presents a lot of opportunities for its Spanish investors. The main sectors that should trigger significant inflows in the near future are: energy (especially in renewable), infrastructure, agriculture, IT, tourism, automotive and aeronautic industries.

As part of a successful business plan with a maximized return-on-investment, investors →

need reliable advisory services and quick access to up-to-date and trustworthy market information and resources, including relevant data about the economic, social and political environment as well as accurate analysis and reports on specific market trends.

With an aim of matching the increasingly global needs of the Iberian investors and support them in finding new and interesting ways to do business in Romania, our advisory firm – Fúster García-Berdoy – teamed-up with Țuca Zbârcea & Asociații to offer integrated services in areas of interest to such prospective investors. For that reason, in December 2009, Țuca Zbârcea & Asociații has become the first Romanian law firm with presence in Spain. The representative office opened in Madrid serves as a local hub in helping Iberian investors do business in Romania, by acting as a point of contact for clients active internationally while also providing first-hand facts and information about key regulations and standards in Romania.

We are confident that our strategic alliance with Țuca Zbârcea & Asociații will foster stronger business relationships between Spain and Romania. Investors will, therefore, benefit from a potent mix of global outlook and local expertise and a powerful combination of the individual and collective expertise of our Spanish and Romanian teams. Țuca Zbârcea & Asociații and Fúster García-Berdoy will provide services in areas such as corporate and commercial, mergers and acquisitions, energy, banking and finance, infrastructure (PPP/PFI and concessions) and real estate. Also, we will act actively to support the Iberian and Romanian business community through a set of business events and networking opportunities.

As mentioned before, we consider 2010 to be a year of transition, a complex year that will encourage countries around the globe to reinforce mutually beneficial cooperation and jointly cope with the challenges posed by the spreading international financial crisis. Nonetheless, in today's complex world, business success comes from strong business relationships which are always built on strategic alliances and shared expertise. We are confident that our association with a well-known and very dynamic and innovative local Romanian will tremendously benefit our clients and in the same time, advance the already present strong business relationships between our country and Romania.

About Fúster García-Berdoy

Fúster García-Berdoy is an advisory firm that brings together the knowledge of its founding partners, Jaime Fúster Rufilanchas and Pablo García-Berdoy, in order to support the Iberian investors do business abroad.

The objective of Fúster García-Berdoy is to use their legal, institutional, economic and socio-political knowledge in Romania and other Central and Eastern European countries for the advantage of international investors that want to expand their businesses in those markets by focusing mainly on the shared European legal and institutional framework, the reliability of a solid net of local partners and the added value of a deep knowledge of the market. The scope of the consultancy activities goes from energy, environment and transport infrastructures to industry and finance.

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Jaime Fúster Rufilanchas

Jaime Fúster Rufilanchas is founding partner in Fúster García-Berdoy.

With 18 years of extensive legal expertise in the CEE region, Jaime Fúster Rufilanchas is a former Managing Partner for CEE at Garrigues. In this capacity, he has been involved in a variety of cross-border corporate transactions, mergers and acquisitions in Poland, Romania, Bulgaria and Russia. He acts as general counsel and legal advisor to banks, financial entities, investment funds and venture capital investing in CEE. He is also an expert in PPP/PFI and alternative energy financing and a pioneer in securing loans all around the CEE region combining different locations and jurisdictions.

He received impressive accolades from leading legal directories and publications and has been consistently ranked as a top lawyer in corporate/M&A by Chambers Europe, Legal 500, etc.

Jaime Fúster Rufilanchas graduated from Universidad Complutense de Madrid in 1991 and from the Law Practice School Universidad Pontificia Comillas (ICADE) in 1992. He was admitted to practice in Madrid in 1991.

Pablo Garcia-Berdoy

Pablo García-Berdoy is founding partner in Fúster García-Berdoy. He started his diplomatic career in 1987 as an Executive Officer in the Cabinet of the Minister of Foreign Affairs in Spain. Between 1991 and 1996, he advised the Spanish Government on EU enlargement into Central and Eastern Europe and acted as political advisor at the Embassy of Spain in Bonn. From 1996 until 2005, Pablo García-Berdoy took on various positions with the Spanish Ministry of Foreign Affairs, including Chief of Staff of the State Secretary for Foreign Affairs and the European Union and General Director for European Affairs. From 2005 until 2009, he was the Ambassador Extraordinary and Plenipotentiary of the Kingdom of Spain to Romania and Spain's Ambassador to the Republic of Moldova, having his residence in Bucharest.

/ **The materials included herein are prepared for the general information of our clients and other interested persons. They are not and should not be regarded as legal advice.**

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