International Centre for Settlement

for Investment Disputes

ICSID Case No. ARB/05/13

EDF (Services) Limited

Claimant

vs/

ROMANIA

Respondent

Procedural Order N° 3

Rendered by an Arbitral Tribunal composed of

Arthur W. Rovine, Arbitrator
Yves Derains, Arbitrator
Piero Bernardini, President

Procedural ORDER No. 3

I. CLAIMANT'S REQUEST

1. By letter dated April 23, 2008 Claimant requested the Tribunal to admit evidence obtained that same day from a journalist, Mr. Neil Barnett, relating to a corrupt payment allegedly requested from Mr. Henrique Weil, EDF's Chairman, by officials of the Respondent ("New Evidence"). The alleged request for a corrupt payment had been previously claimed by Claimant during this proceeding. The New Evidence consists of an audio tape and a transcript, both in the Romanian and English languages, of the recording of a conversation alleged to have been held on October 19, 2001 between Ms. Liana Iacob (member of the staff of the then Prime Minister, Adrian Nastase) and Mr. Marco Katz (Chief Operating Officer of ASRO), at Ms. Iacob's home in Bucharest.

2. Claimant has urged the Tribunal to admit the New Evidence in view of the exceptional circumstances under which it had been obtained and given the fact that this evidence was essential for Claimant to present its case. As mentioned in Procedural Order No. 2 (point 15), Claimant's request was filed only twelve days before the hearing that had been scheduled in Washington, D.C., on May 5-10, 2008, for the hearing of legal arguments and the taking of oral evidence. Following Respondent's comments of April 28, 2008, on Claimant's request, the Tribunal postponed the hearing to allow Respondent time to evaluate the New Evidence and submit such rebuttal evidence as may be warranted under the circumstances.

3. By decision of May 2, 2008, the Tribunal assigned time limits to the Parties for further submissions relating to the New Evidence and stated that the hearing would be reconvened in Washington, D.C., on September 22-27, 2008. Submissions were filed by the Parties as authorised by the Tribunal:
   - by Respondent, on June 2, 2008;
   - by Claimant, on July 7, 2008;
   - by Respondent, on July 30, 2008;
   - by Claimant, on August 12, 2008;

   all submissions being accompanied by experts' reports, legal opinions, witness statements and legal authorities.

II. THE PARTIES' POSITIONS

a) *Respondent's position*

4. Under ICSID Arbitration Rule 34(1) the Tribunal is "*the judge of the admissibility of any evidence adduced…*" . It is Respondent's contention that the New Evidence should not be admitted on at least three different grounds. Firstly, this evidence was available to Claimant from the time when it was obtained in October 2001, considering that the on-the-body recorder was worn by the male speaker, Mr. Marco Katz, who at the time was Claimant's representative or agent. Secondly, the proffered audio was obtained illegally having been made secretly in violation of the fundamental right to privacy of the person recorded. Lastly, the audio is not authenticated, is incomplete and is riddled with manipulations that rob it of all evidentiary value.

5. Regarding the first objection, namely that the New Evidence should be excluded because it was withheld without justification, Respondent maintains that forensic examination proves that the recording on the proffered audio has

been in the possession or control of Claimant since its creation. Claimant acted in bad faith by waiting almost seven years to produce a recording made in 2001, and for that reason alone the audio file should be excluded from the record. The integrity of international arbitration depends upon the parties' good faith undertakings to produce available evidence in support of their claims and any such evidence that is offered late without legitimate justification should not be admitted.

6. Respondent maintains further that, as confirmed by expert analysis, the proffered audio was created using an "on-the-body" recording device worn by the male speaker, the male voice being significantly louder than the other voices, thus indicating that the male voice on the audio was closest to the recording device's microphone. Claimant itself asserts that the male voice on the tape was that of its agent, Marco Katz, as stated in its submission to the Romanian Anti-Corruption Directorate (DNA) of April 24, 2008 for the reopening of the latter's investigation: "*we confirm that the voice on the audio file is of Mr. Katz*". According to the article published by Mr. Barnett in the Financial Times on May 2, 2008, Mr. Katz confirmed in an affidavit that "*the voice on the audio recording is his voice*". As also reported by Mr. Barnett, Mr. Liebscher, Claimant's counsel, said that "*the visitor is Marco Katz and EDF confirms that it is in fact Mr. Katz's voice on the recording*".

7. According to Respondent, Mr. Katz is Claimant's agent, representing Claimant's interests in Romania. He served as manager of ASRO and attorney-in-fact of Claimant, attended meetings in January 2002 with AIBO and TAROM concerning the extension of ASRO and with the third party valuator regarding the sale of AIBO's and TAROM's shares; he signed EDF's complaint alleging anti-Semitism by Romanian officials in the Ministry of Transport. He also signed three statements to the Romanian anti-corruption

prosecutor. Among the numerous circumstances evidencing that Mr. Katz acted as Claimant's representative is the testimony of Mr. Weil, EDF's Chairman, stating that Mr. Katz was EDF's representative at the time of ASRO's extension issue and of the purchase of AIBO's and TAROM's interests. The circumstance that Mr. Barnett delivered the audio file and transcripts to Claimant and not to Respondent and Mr. Barnett's personal acquaintance with Claimant's representative, Mr. J. Michael Mc Nutt, compel the conclusion that Claimant is at the origin of the audio recording.

8. According to Respondent, the sequence of events originated by Mr. Barnett's e-mail to Mr. Weil on April 23, 2008, including the presence in Bucharest that day of Mr. Mc Nutt and Mr. Katz, neither of them residing in Bucharest, to listen to the recording and to review its transcript, confirms that Claimant, directly or indirectly, orchestrated the delivery of the audio file and transcript through Mr. Barnett. Claimant is responsible for disclosing the audio file and for withholding it without justification. This circumstance is *per se* prejudicial to the integrity of the arbitration itself and constitutes a sufficient basis to exclude the New Evidence. It is not true that Respondent has not been prejudiced by the late production of such evidence, having had to confront the same so late in the process and having been prevented from organising its defence in an orderly and efficient manner.

9. Regarding the second objection, namely that the New Evidence should be excluded because it was obtained illegally, according to the legal opinion of Professor Mateut, Respondent's expert, a recording of a private conversation made without the consent of the speaker is unlawful and violates Article 26(1) of the Constitution of Romania, Article 12 of the Universal Declaration of Human Rights, and Article 8 of the European Convention on Human Rights. Furthermore, a recording is unlawful if, based on expert forensic examination,

the audio is found to have been manipulated through additions, deletions or re-ordering of sounds.

10. The Tribunal in the *Methanex v. United States* award of August 3, 2005, held with reference to evidence obtained in violation of a municipal ordinance that "*it would be wrong to allow Methanex to introduce this documentation into the proceedings in violation of a general duty of good faith imposed by the UNCITRAL Rules and, indeed, incumbent on all who participate in international arbitration, without which it cannot operate*" (par. 54). Nor is there support for Claimant's assertion that Ms. Iacob had no expectation of privacy due to her status as a government official in October 2001 since, as stated by Professor Mateut, Romanian privacy law applies equally to all Romanian citizens and in any case a private conversation is not an activity carried out in the exercise of public authority. Romanian criminal law permits authorised interceptions of private conversations if there are serious indications of a crime being perpetuated but such interceptions must be carried out in accordance with the law. Even if the proffered audio was made by an unknown person it would be deemed illegal under Romanian law since it would be impossible to ascertain whether it had been made in compliance with requisite legal standards.

11. According to Respondent, Claimant's contention that the audio is decisive in proving its corruption allegation has no merit since the weight of the evidence is a matter of substance, not of admissibility. Also Claimant's contention that admission into evidence of unlawfully obtained evidence is supported by international case law has no merit, considering that in the *Corfu Channel Case* relied upon by Claimant there was no objection raised on the issue of admissibility and, moreover, the International Court of Justice did not rely on the unlawfully obtained evidence. Further, the European Court of Human

Rights' decisions referred to by Claimant do not support the proposition that unlawfully obtained evidence may be admissible in arbitration proceeding based upon the principle of good faith consent since the relevant cases assume that evidence unlawfully obtained may be challenged by, among other things, cross-examination of those who produced the evidence.

12. Regarding the third objection, namely the lack of authenticity of the proffered audio, Claimant asserts that there is no ICSID rule of "*minimally acceptable evidence*", admissibility being in the Tribunal's discretion. Respondent replies that a fundamental rule of procedure requires that where authenticity of evidence is challenged, authenticity should be proven by the production by the party offering the evidence of the original or a duly certified copy of the documents relied upon. No original of the audio was submitted in this case. Nowhere in the respective reports does either of Claimant's experts conclude that the proffered audio is authentic or "genuine". Contrary to Claimant's assertion that its experts "*confirms that the recording has no digital editing*", Mr. Groninger has merely observed that "*he found no evidence of digital editing*", misleadingly since absence of evidence of digital editing does not mean that digital edits did not occur.

13. According to Professor Broeders, one of Respondent's experts, the fact that no indications of editing are found cannot be taken to imply that none has taken place, as acknowledged also by Professor French, one of Claimant's experts. In a sworn statement before the International Criminal Tribunal for the former Yugoslavia (ICTY), Professor French asserted that "*it would be possible to produce an edited recording which has defied forensic detection*". Therefore, the authenticity of the digital copy of the proffered audio is not influenced by the absence of evidence of editing. On his part, Mr. Groninger, another expert for Claimant, concedes that the beginning and ending of the audio were

removed. According to Respondent, this fact alone shows that the audio file was intentionally altered and for that reason cannot be accepted as evidence.

14. According to Respondent, and as shown by Professor Broeders, Professor French's methodology for conducting speaker comparison analysis is flawed in several respects, including his need to resort to Mrs. Flavia Kenyon, a native Romanian speaker linguist, as he does not personally speak Romanian. In any case, voice identification or comparison is not a substitute for proper authentication of an audio recording, Likewise, Professor French's remark on the "*coherence and continuity*" of certain portions of the audio is equally flawed and irrelevant since he reviewed only 20 sections on the recording. This type of assessment is not a substitute for a proper determination of authenticity.

15. The audio file is in any case heavily manipulated. In addition to the intentional deletions of the beginning and end of the conversation, as acknowledged by Claimant's audio expert, Mr. Groninger, the audio contains at least 20 discontinuances (*i.e.*, starts and stops in the recording) falsely attributed by Mr. Groninger to the operation of a voice activated recorder. Thus, the proffered audio is not a continuous recording of a conversation that occurred between Mr. Katz and Ms. Iacob but rather has been significantly manipulated. In his e-mail of October 20, 2001 (the authenticity of which Respondent contests) Mr. Katz contends that he met with Ms. Iacob for about 90 minutes. If so, at least two-thirds of the conversation has been omitted from the audio file.

16. For all the foregoing reasons, Respondent requests that the proffered audio and related transcripts not be admitted into the evidentiary record of this proceeding.

b) Claimant's position

17. Claimant emphasises the crucial importance to its case of the audio recording of a conversation between Marco Katz and Liana Iacob. It is a contemporaneous piece of evidence confirming the request that Claimant pay a bribe to be permitted to continue its business in Romania. It confirms Mr. Katz's e-mail of October 20, 2001 and other evidence proving that members of the Romanian Government asked Claimant for a US$2.5 million bribe in exchange for continuation of its business in Romania. The recording also proves that Liana Iacob's witness statements are unreliable, inconsistent and contradictory since she can no longer maintain her previous statements. In her latest witness statement she claims that the audio does not "*accurately reflect*" the conversation she "*recalls*" having had with Mr. Katz, making any of her statements regarding requests for money, Mr. Tesu or the Prime Minister contradictory and unreliable. Not admitting into the proceedings this piece of evidence would deprive Claimant from fully presenting its case, the probative value being a matter of substance not to be addressed at this stage of admissibility.

18. Claimant maintains that it did not intentionally withhold the evidence to gain an unfair advantage. Claimant submitted this piece of evidence immediately after it had obtained it from a journalist working on an article for the Financial Times. The source of the audio recording is not anonymous, "*Claimant's source was the Financial Times*" (Response of August 12, 2008, point 6). An established procedural timetable should not prevent a party from submitting additional relevant evidence if submission at a later stage is not the party's fault. The submitted evidence is obviously decisive and would even warrant the reopening of this proceeding.

19. Acknowledging the importance of the new evidence, the Tribunal postponed the previously scheduled oral hearing and permitted the Parties to make further submissions. Respondent's right to be heard was fully respected since it was given ample opportunity to comment on Claimant's new evidence and submit rebuttal evidence. No additional delay or expense would be caused by admitting the audio recording, its probative value being left to the Tribunal's appreciation. International arbitration, including ICSID arbitration, is not governed by formal rules of evidence, the admissibility and weight of any evidence being in the arbitral tribunal's discretion under ICSID Arbitration Rule 34(1) and Article 9(1) of the IBA Rules, the latter being referred to by the Tribunal as guidelines. Respondent has not provided any arguments why the submitted audio recording should not be admitted under the applicable Article 9(2) of the IBA Rules.

20. The audio recording was not in Claimant's possession or control from its creation nor was it created or unlawfully obtained by Claimant, as wrongly contended by Respondent. As stated in his supplemental witness statement, Mr. Katz was unaware of the existence of the audio recording. Contrary to Respondent's assertion, he is not Claimant's representative in this arbitration. Mr. Katz was ASRO's logistical and operational director from September 1998 onwards. His employment contract was terminated in September 2004, being employed by other firms thereafter. He is one of Claimant's witnesses in this proceeding.

    Mr. Katz did not create, possess or control the audio recording before Claimant obtained it from the Financial Times. Claimant is unaware of how the submitted recording was created. It may only speculate about the circumstances of its creation. Ms. Iacob was counsellor to the Prime Minister and involved in NATO and Israeli relations. She may have been of interest for Romanian or foreign intelligence services.

21. Claimant maintains that the audio recording was not obtained unlawfully under Romanian law. As admitted by Professor Mateut, audio recording are admissible in criminal proceedings, and Respondent's contention that Romanian law was violated since the "*identity of the person or persons who recorded the proffered audio is unknown*" is wrong. Article 91 of the Criminal Procedure Code in force in 2001 reads that "*recording presented by the parties may serve as evidence means if they are not forbidden by the law*". What matters is that the recording was presented by the parties, and was not obtained by them as Professor Mateut appears to assume. Audio recordings are also admissible in Romania in civil proceedings. Professor Mateut fails to consider that the Romanian Civil Code of 1864 could not contemplate newly developed technical means, such as fax, email or magnetic recordings.

22. Decisive evidence should in any case be admitted since the Tribunal is not bound by strict rules of evidence applicable in municipal courts. In the *Corfu Channel Case*, the International Court of Justice did not exclude evidence that it had characterized as obtained in violation of international law. Likewise, in several of its decisions, the European Court of Human Rights determined that even evidence unlawfully obtained is admissible if the judgment is not based solely on the unlawfully obtained evidence.

23. Romanian privacy law does not apply in any case to public officers, such as Liana Iacob. The latter had the status of a public officer under law 188/1999 and Law 7/2004 as counsellor to the then Prime Minster, involved in NATO and Israeli relations. Under those laws, principles of transparency and priority of public interest apply. The conversation between Mr. Katz and Ms. Iacob is of the highest public interest since it involved EDF's business at Romania's largest airport and, more importantly, a request for a bribe on behalf of the

Prime Minister was involved, so that the matters discussed are by no means of a private nature even if the conversation occurred at Ms. Iacob's house. It cannot be considered a "private conversation", Professor Mateut's interpretation of this notion was striking and "*would considerably contribute to the immense corruption problems Romania claims to be fighting*" (Response of August 12, 2008, point 12).

24. According to Claimant, the submitted recording is a genuine audio recording that does not show any sign of manipulation. As stated by Mr. Groninger, Claimant's expert on authentication of audio and video recordings, the recording in question was made by an analogue microcassette recorder together with a body-worn microphone on the male speaker located around the chest area. The entire recording appears to have been produced in the same environment and all segments are most likely in the correct temporal order as presented in the recording. There is no evidence of digital editing and apart from the first segment and the end of the last segment having been removed, it appears to be continuous. According to Professor French, the other expert for Claimant, one of the most renowned forensic phonetic experts, the male and female voices on the recording are "*highly distinctive*" to those respectively of Mr. Katz and Ms. Iacob, and there is nothing to suggest that the recording is "*anything other than a unitary and coherent interaction between the parties involved*". Professor Broeders, who has negatively commented upon Professor French's speaker comparison method, has himself used for many years a similar method. In his Reply Report of August 12, 2008, Professor French confirms his previous conclusion that nothing appeared in other areas of the material suggesting that this is anything other than a unitary interaction.

25. Claimant maintains further that there is no rule of "*minimally acceptable evidence*" in ICSID arbitration, it being within the Tribunal's discretion which

evidence to admit. It would violate the parties' fundamental right to be heard if vital evidence is excluded on the basis of an anticipated evaluation of the evidence without examining its substance. As stated by the President of the International Court of Justice in the *South-West Africa Cases*, the admission of evidence does not preclude the free appreciation of that evidence by the Tribunal. Only under certain limited circumstances may Tribunals determine that evidence is not admissible, for example in case it is unduly burdensome, duplicative or obviously irrelevant. The audio recording is neither burdensome, duplicative or obviously irrelevant, nor did Respondent suffer from any procedural disadvantage.

26. For all the foregoing reasons, Claimant maintains its request that the submitted audio recording be admitted into the evidence of this arbitration.

III THE TRIBUNAL'S FINDINGS

27. In the Tribunal's view, each Party has had a full opportunity to present its case on the admissibility of the New Evidence. The filing of four full submissions authorised by the Tribunal (*supra*, para. 3), along with fact and expert witness statements, has made it possible for both Parties to develop fully their arguments and to produce evidence regarding the various issues involved in Claimant's request. No useful purpose would be served by having the same issues debated again at the hearing, the Tribunal being in a position to render its decision on the basis of the Parties' arguments and evidence.

28. Proving corruption is a challenging task in the absence of admission of liability by the accused person. It is therefore required that every effort be made by the party raising a charge of corruption to substantiate its claim. The party raising the charge has, indisputably, the burden of proof.

The seriousness of a corruption charge also requires that the utmost care and sense of responsibility be taken to ascertain the truthfulness and genuine character of the evidence that the party intends to offer in support of its claim.

It is the Tribunal's considered opinion that Claimant failed to adhere to this standard of conduct when requesting the admission of the New Evidence. In the Tribunal's view, Claimant has failed to sustain its burden of proving to the Tribunal the truthfulness and genuine character of the New Evidence.

i) Regarding the lack of authenticity of the evidence

29. The lack of authenticity of the New Evidence constitutes by itself sufficient ground for rejecting Claimant's request.

Considering that today's sophisticated technology may permit easy manipulation of audio recordings, proven authenticity is in fact an essential condition for the admissibility of this kind of evidence. As mentioned by Mr. Koenig, Respondent's expert in conducting forensic examination of audio and video media to authenticate recordings, "[r]*ecordings cannot be authenticated without the original medium and sometimes the original recorder*" (Reply Report of July 30, 2008, point 3(ii), on page 3).

Respondent requested from the very beginning, in its comments on Claimant's application, that the original tape be produced "*forthwith*" (letter of April 28, 2008, page 4), underlining that "*Claimant has the obligation to produce the original audio material if it is to be accepted as "evidence*", as provided by ICSID Administrative Regulation 30 and the IBA Rules of Evidence in Article 3 (11) (*ibidem,* footnote 7). As agreed in the First Session of this proceeding, "*for purposes of the ICSID Administrative and Financial Regulation No. 30 authenticity of documents and/or translations provided by the Party would be presumed, unless challenged by the other Party*" (item 13). In the presence of Respondent's challenge there is no presumption of authenticity of the audio

recording, with the burden of proving such authenticity thus being Claimant's responsibility.

30. In his Report of June 2, 2008 Mr. Koenig, after stating that the audio file (to which he refers as "Qc1"), "*cannot be scientifically authenticated because it is a copy*" (page 3), concludes (on the same page) that Qc1, among other things:

- was converted from analog to digital format;
- is an incomplete copy of the original recording since it does not contain the beginning and the end;
- includes 20 "discontinuities";
- includes nine instances of transient sounds and two irregular discontinuities in the 50 Mz electric network frequency signal, both indicative of possible digital edits;
- indicates a number of other possible "*undetectable digital manipulations, such as deletions, relocations and additions of segments as well as additions of sounds to cover up such edits*";
- "*because of the absence of the original recording(s) and recording equipment the presence of such digital manipulations cannot be verified or excluded*".

31. In his Report of July 2008 Mr. Groninger, Repondent's expert in the field, proceeds on the basis that (as stated in the "Introduction") "*No information has been provided relating to the producer of the recording, the machine type used, the location of the recorder or any supporting equipment that may have been used (such as an external microphone, radio link, remote control, etc.)*" (para. 4.1.) As made manifest by its content, the Report proceeds in its analysis and reply to Mr. Koenig's report with a certain number of reservations, as indicated for example by para 6.7:

"*Mr. Koenig identified two 50Hz events at time 3:53.681 and 4:33.335. The first of these occur fractionally before analogue Event W6 and as this appears to be an* [sic] *stop and start to the recording it would seem an unlikely spot for any tampering. The feature W6 also makes analysis difficult about this point, and additionally because of the speed variations noted earlier it would be difficult to analyse mains* [sic] *supply frequency variations. I was not able to reproduce Mr. Koenig's results and would need more specific details covering how the spectral measurements were take [*sic*] including exact timings, sample duration, filtering used, etc.*"

In the "Comparative Analysis" section Mr. Groninger repeats that no information regarding the original recording machine was received (para. 7.1), and then (in the "Conclusion", on page 10) points to the fact that "*My examination has been constrained by the short time scale available and the unavailability of the original machine or the original recording"*, although he maintains that "*in the absence of the original material it is still possible to conduct an analysis*". He then draws a number of conclusions in reply to Mr. Koenig's Report. On the critical question of the digital editing suggested by Mr. Koenig the answer is not straightforward: "*the ease of concealment of digital editing depends to a large part on the nature of the recording and the background signal present on this recording would make masking the effects of editing difficult*" (para. 8.5). He confirms the removal of the beginning and the end of the recording (para. 8.12).

In his Report of July 6, 2008, Professor French, another expert for Claimant, confirms that the speakers are Marco Katz and Liana Iacob, information already available thanks to these two persons' direct confirmation. He cites "*the coherence and continuity of the questioned conversation*" (para. 8).

32. In his Expert Reply Report of July 30, 2008, Mr. Koenig notes that Mr. Groninger has agreed with many of his findings and has not contested basic

principles of audio science set forth in his Report, including the fact that recordings cannot be authenticated without the original medium, and sometimes the original recorder, and that changes to digital audio files can be virtually impossible to detect in the absence of the original audio recording (and in some cases the original recording device).

In other respects, including the reason for the 20 discontinuities and whether Qc1 was originally recorded using an analog or a digital recorder, Mr. Groninger's conclusions are, in Mr. Koenig's view, unsupported (Reply Report, para. 4).

Regarding Professor French's Report, Mr. Koenig remarks that, even accepting the coherence and continuity of the conversation, this "*does not mean that the recording has not been audited and is authentic*" (para. 5, end of page 4).

In this last regard Mr. Koenig confirms his previous explanation that "*today's technology can be used to make digital edits that are undetectable in a copy of an edited recording*" and that "*even a manipulated recording may contain a conversation that sounds completely 'unitary and coherent'*" (para. 57).

33. In his Reply Report of August 12, 2008, Professor French replies to questions raised by Mr. Koenig, including the fact that Mrs. Kenyon's impression of the recording as representing a unitary conversation does not necessarily mean that the recording has not been edited (para. 21). However, the reply appears to be limited to considering that having a native speaker listening to the recording (what Mr. Koenig did not do) is "*a useful adjunct to Mr. Groninger's authenticity examination*" (*ibidem*).

In reply to Mr. Koenig, in his Response of August 2008, Mr. Groninger confirms his opinion that the audio recording was made in a voice operated mode using an analog recorder (point 3A), that regarding the nine transients identified by Mr. Koenig he found no evidence "*to indicate that any of the nine transients result from digital editing*" (point 3F) and that he maintains that

"*there appears to be no evidence of the manipulation or re-ordering of sound or other digital editing*" (point 3G), confirming his original report conclusions.

The Tribunal notes that no comment has been offered by Mr. Groninger regarding Mr. Koenig's statement that digital edits may be undetectable in a copy of an edited recording.

34. The Tribunal has carefully reviewed and fully considered both Parties' experts' analysis and conclusions. It is of the opinion that what matters in these circumstances is not whether the views of one particular expert should prevail over those of the other. The dialogue among the experts in this case was very full and might continue without their differences of opinions being narrowed. It is this divergence of views on essential technical questions that makes the further confrontation among forensic experts of both sides, as requested by Claimant, of no avail in the absence of the original audio recording. Only the original would in fact permit the Tribunal to establish with confidence the authenticity of the recording and the absence of digital edits.

    Even leaving aside the many questions left open by the experts' debate, it is undisputed that both the beginning and the end of the recording have been removed, making the same incomplete. It is also to be noted that while the conversation had about a 90-minute duration according to Mr. Katz (e-mail of October 19, 2001: "*Today between 18:30 and 20:00 I met FL in her house*", where FL stands for "Fat Lady", i.e., Ms. Liana Iacob, as confirmed by Mr. Katz's Witness Statement of July 2, 2007, point 33), the recording is only 26 minutes, 41 seconds and 151 milliseconds in length (Koenig Report, para. 23). Thus, more than two-thirds of the conversation has either not been recorded or, if recorded, has been removed from the proffered audio recording.

35. The absence in the recording of a substantial part of the conversation between Mr. Katz and Ms. Iacob and the possibility that the recorded part was

manipulated make the audio file unreliable in the absence of its authentication through the original recording.

An obvious condition for the admissibility of evidence is its reliability and authenticity. It would be a waste of time and money to admit evidence that is not and cannot be authenticated.

As mentioned before (at para. 29), Claimant had the burden of satisfying Respondent's legitimate request for the production of the original audio recording. Having failed to do so, it must bear the consequences.

ii) Regarding the unlawful creation of the evidence

36. Other aspects of Claimant's request demonstrate additional grounds for the conclusion that the New Evidence should not be admitted.

It has been contended by Respondent, based on the legal opinion of Professor Mateut, that the audio recording should not be accepted since it was obtained unlawfully under Romanian law.

As will be further mentioned (at para. 47), the principles applicable to the admissibility of evidence in international arbitration are to be found in public international law, not in municipal law. The leading case on the subject in international litigation, to which both Parties have made reference, is the *Corfu Channel Case* between the United Kingdom and Albania. In its judgment of April 9, 1949 (ICJ Reports 1949), the ICJ did not exclude the evidence obtained by the United Kingdom through an act that the Court had characterized as a violation of international law. The violation consisted in the UK's intervention to secure possession of evidence in the territory of another State in order to submit it to an international tribunal. The Court held that "*the action of the British Navy constituted a violation of Albanian sovereignty*" (*ibid*, at 35). There was no discussion by the Court whether the evidence would

have been admissible since Albania had not raised an objection in that regard. In its Judgment, the Court did not rely on this evidence[1].

The circumstances of the present case are different, Respondent having vigorously objected to the admissibility of the New Evidence by reason also of it having been obtained unlawfully.

37. Contrary to Claimant's assertion that in its decisions the European Court of Human Rights has determined that unlawfully obtained evidence is admissible, one of these decisions reviewing the Court's role in such matters (*P.G. and J.H.v. United Kingdom* of December 25, 2001) indicates that its role is not "*to determine, as a matter of principle, whether a particular type of evidence – for example unlawfully obtained evidence – may be admissible*" (at 76). In another decision (*Shenk v. Switzerland* of July 12, 1988), also relied upon by Claimant, the Court indicated that Article 6 of the Convention "*does not lay down any rules on the admissibility of evidence*", so that the latter "*is primarily a matter for regulation under national laws*" (at 45-46).

In the present case, as convincingly shown by Professor Mateut, the New Evidence was obtained illegally according to Romanian law. Regarding in particular Claimant's contention that Romanian privacy law does not apply to public officers such as Liana Iacob, no comment has been provided by Claimant in response to Professor Mateut's reference in that respect to the Constitution of Romania which provides (in Article 53) that all citizens (whether or not public officers) enjoy equal rights and liberties.

Respondent has also referred in the same context to the award of August 3, 2005 in the case *Methanex Corp v. United States*. The award held that, in the presence of evidence unlawfully obtained by Claimant, "*it would be wrong to allow Methamex to introduce this documentation into the proceedings in violation of a general duty of good faith imposed by the UNCITRAL Rules and*

[1] Kazazi, *Burden of Proof and Related Issues - A Study on Evidence before International Tribunals*, 1996 (Respondent's ILA–18)

indeed incumbent on all who participate in international arbitration, without which it cannot operate" (at 54). Claimant has offered no comment on this decision in its two Submissions.

38. The Tribunal believes that admissibility of unlawfully obtained evidence is to be evaluated in the light of the particular circumstances of the case, as in the case of the ICJ Judgment in the *Corfu Channel Case*.

    Admitting the evidence represented by the audio recording of the conversation held in Ms. Iacob's home, without her consent in breach of her right to privacy, would be contrary to the principles of good faith and fair dealing required in international arbitration. In that regard, the Tribunal shares the position of the *Methanex* award.

    On that basis as well, the New Evidence is not admissible in the instant case.

(iii) <u>Regarding the availability of the evidence from its creation</u>

39. The circumstances under which the New Evidence was obtained, as told by Claimant, are contradicted by other evidentiary material offered by Claimant itself.

    In its application of April 23, 2008 Claimant stated to the Tribunal that it had been contacted that same day by a journalist who informed Claimant that he was in possession of an audio tape of a conversation between Ms. Liana Iacob and Mr. Marco Katz, both witnesses in this arbitration, held (as subsequently specified) on October 19, 2001. The conversation allegedly confirmed the request for a corrupt payment from Mr. Weil by Mr. Tesu and Ms. Iacob.

    The journalist was said by Claimant to have provided Claimant with the audio recording and the relevant transcript in the Romanian and English languages.

Having enclosed them with its application, Claimant requested the Tribunal to admit this evidence, stressing its relevance to prove its case.

40. Being accused by Respondent of having had available the submitted audio recording since its creation in October 2001 and as having delayed its production to gain an unfair advantage, Claimant repeatedly denied this charge by contending (in its Submission of July 7, 2008) that it "*did not possess or control this evidence beforehand*" (para. 52) and that it "*did not create or unlawfully obtain the audio recording*" (para. 54).

    By the same Submission Claimant produced a witness statement by Mr. Marco Katz in which the latter, having listened to the audio and the transcript, states: "*I am unaware of how this recording was created. I did not make this recording nor did I provide it to anybody, including EDF*" (Witness Statement of July 7, 2008, point 3).

    Based on this testimony, but going even beyond its literal tenor, Claimant avers straightforwardly: "*Mr. Katz did not create, possess or otherwise control the audio recording*"(Submission of July 7, 2008, para. 57).

41. This story is hardly credible. It contradicts the expert evidence produced by Claimant itself with its Submission of July 7, 2008.

    According to Mr. Groninger, Claimant's expert in the authentication of audio and video recording, "*this recording was made using a microcassette recorder with a microphone placed in contact with clothing, probably around the chest area*" (Report of July 2008, para 8.9) and "*it appears that the microphone at least must have been fixed to the person of the male*" (*ibidem*, para. 5.6.).

    According to the other expert for Claimant, Professor French, "*the voice and speech patterns of the questioned speaker are <u>consistent</u> with those of Mr. Katz in all significant phonetic, acoustic and linguistic respects*" (Report of July 6, 2008, point 5, end of page 6).

42. In its Submission of July 7, 2008, Claimant refers to the two experts' reports stating that, according to Mr. Groninger, "*An analogue microcassette recorder was used together with a body-worn microphone on the male speaker located around the chest area*", and that Professor French confirms that "*the male voice on the recording is "highly distinctive" to that of Marco Katz*" (para. 10, on page 5)

    In his turn, Mr. Katz himself, in his Supplemental Witness Statement of July 7, 2008, states: "*I confirmed to EDF that the male voice on the recording was in fact mine*" (point 2).

43. Based on Claimant's experts' reports and Mr. Katz's Witness Statement, all produced by Claimant in annexes to its Submission of July 7, 2008, as well as on Mr. Katz's e-mail of October 19, 2001 (C-69), the story may be reconstructed as follows.

    At 18.30 hrs. on October 19, 2001, Mr. Katz arrives at Ms. Liana Iacob's home in Bucharest. He wears on his body a microcassette recorder with a microphone located around the chest area. The intent is to record the conversation that would follow, during which, either on his own initiative or on the initiative of Ms. Iacob, the subject of the bribe allegedly requested from Mr. Weil might have been discussed. The recording of the conversation would have served as evidence of the corrupt payment request for any future useful purpose.

44. Claimant has stated that Ms. Iacob might have been of interest to Romanian and foreign intelligence services (*supra*, para. 20), implying by that that the audio recording might have been created by a third person. However, no evidence is offered regarding who that person might have been or how the audio recording could have been present in Ms. Iacob's home on October 19,

2001. Mr. Katz has not given any indication in his Witness Statement of such presence. On the other hand, it is hardly credible that Ms. Iacob would have taken the initiative of organising the recording of a conversation which, as alleged by Claimant, offers evidence against her. The only remaining possibility would therefore be for that person to be there without any knowledge by either Ms. Iacob or Mr. Katz. This remains a mere conjecture, devoid of any support or credibility.

45. The close relations of Mr. Katz with EDF, specifically with its Chairman Mr. Weil, in October 2001 and thereafter, are clearly shown in the file. In its July 7, 2008 Submission, Claimant refers to Mr. Katz's relations with EDF as follows: " *Mr. Katz was ASRO's logistical and operational director from September 1999 onwards. His employment contract was terminated in September 2004*" (para. 56).

As shown by Respondent (Submissions of June 2, 2008, para 19, and of July 30, 2008, paras. 21-23), Mr. Katz's relations with EDF, and personally with Mr. Weil, were much closer than those normally resulting from an employment contract.

Claimant has not commented in its two Submissions on these relations as described by Respondent, except questioning Respondent's characterization of Mr. Marco Katz as EDF's "agent". Whether Mr. Katz was EDF's agent, as contended by Respondent in order to impute his actions directly to EDF (Reply of July 30, 2008, para. 39), is in the Tribunal's view of minor importance. It defies common sense to think that Mr. Katz's initiative in recording his conversation with Ms. Iacob had been taken without the knowledge and consent of EDF. Mr. Katz had no interest of his own, not being involved in the corrupt payment request alleged by Claimant, in creating evidentiary material on this issue at the risk that his recording of the conversation with Ms. Iacob might be detected by the latter, with all the ensuing possible consequences.

46. Based on the available evidence and the inferences that may be logically drawn therefrom, it may be concluded that:

a) Mr. Katz was the source of the audio recording of the conversation he held with Ms. Iacob on October 19, 2001. His statements that he did not know of the existence of the audio until he heard the recording on April 23, 2008, (Supplemental Witness Statement, point 3) and that he did not know how it was created are not credible, being contradicted by the evidence offered by Claimant itself;

b) Likewise, EDF's assertion that "*Mr. Katz did not create, possess or otherwise control the audio recording*" (*supra*, para. 40) is not credible, being contradicted by the evidence offered by Claimant itself;

c) EDF, through its Chairman Mr. Weil, was aware from the time the audio recording was created of its existence, considering EDF's direct interest in collecting evidence regarding the corrupt payment request and its close relations with Mr. Katz, as confirmed by the e-mail sent by Mr. Katz to Mr. Weil immediately after the meeting with Ms. Iacob on October 19, 2001 (C-69), so that Claimant's statement that it "*did not possess or control this evidence beforehand*" (Submission of July 7, 2008, para. 52) is not credible, being contradicted by its own evidence.

47. Admission of evidence in an ICSID arbitration is a procedural matter, not governed by municipal law but only by international law, in this case the Washington Convention of 1965 and such principles of public international law as may be applicable.

Under the system of the Convention, specifically ICSID Arbitration Rule 34 (7), the Tribunal is "*the judge of the admissibility of any evidence adduced…*".

The Parties agree that under this provision the Tribunal has discretion to decide questions concerning the admissibility of evidence.

Generally, international tribunals take a liberal approach to the admissibility of evidence. The Tribunal is of the view, however, that such discretion is not absolute. In the Tribunal's judgment, there are limits to its discretion derived from principles of general application in international arbitration, whether pursuant to the Washington Convention or under other forms of international arbitration. Good faith and procedural fairness being among such principles, the Tribunal should refuse to admit evidence into the proceedings if, depending on the circumstances under which it was obtained and tendered to the other Party and the Tribunal, there are good reasons to believe that those principles of good faith and procedural fairness have not been respected.

The foregoing finds confirmation in the IBA Rules on the Taking of Evidence, to which reference may be made as guidelines. Article 9(2)(g) of the Rules provides that evidence may be excluded in the presence of "*considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*".

48. The Tribunal believes that Article 9(2) of the Rules offers guidance in the present circumstances. It is not for the Tribunal to speculate on the reasons why the audio recording was not submitted earlier by Claimant as evidence in this proceeding. It is the Tribunal's view that Claimant's conduct, by its late proffering of the tape under pretext of its availability only on April 23, 2008 through the intermediary of a journalist, in contradiction with its own evidence, reveals a procedural behaviour contrary to the duty of fairness imposed upon the Parties to an international arbitration. In the Tribunal's view, the duty of fairness is so compelling within the meaning of Articles 9(2)(g) as to prevent, under the present circumstances, admitting the New Evidence into the proceedings.

49. The conclusion of the foregoing is inevitable. Claimant's request of April 23, 2008 that the New Evidence be admitted is rejected.

Date: August 29, 2008

____[Signed]____
Arthur Rovine

___[Signed]__
Yves Derains

____[Signed]__
Piero Bernardini
(Chairman)