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

IN THE PROCEEDING BETWEEN

SWISSLION DOO SKOPJE
(CLAIMANT)

AND

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA
(RESPONDENT)

(ICSID CASE NO. ARB/09/16)

AWARD

Members of the Tribunal:
H.E. Judge Gilbert Guillaume, *President*
Mr. Daniel M. Price, *Arbitrator*
Mr. J. Christopher Thomas, Q.C., *Arbitrator*

Secretary of the Tribunal:
Ms. Milanka Kostadinova

Date of Dispatch to the Parties: July 6, 2012

REPRESENTATIVES OF THE PARTIES

Representing the Claimant:

Mr. Risto Novakovski
Mr. Alexandar Godzo
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and
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Mr. Ben Juratowitch
Ms. Evgeniya Rubinina
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and
Dr. Goran Rafajlovski
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Representing the Respondent:

Dr. Sebastian Seelmann-Eggebert
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and
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I. PROCEDURE

1. On 9 July 2009, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received by e-mail from Swisslion DOO Skopje ("Swisslion" or the "Claimant") a Request for Arbitration ("Request") against The former Yugoslav Republic of Macedonia (the "Respondent"). The Request states that Swisslion is a company organised under the laws of The former Yugoslav Republic of Macedonia, owned by DRD Swisslion AG, a company incorporated under the laws of the Swiss Confederation, and by Mr. Rodoljub Draskovic, a dual national of the Swiss Confederation and of the Republic of Serbia. The Claimant's Request asserts claims under the Agreement between the Macedonian Government and the Swiss Federal Council on the Promotion and Reciprocal Protection of Investments, signed on 26 September 1996 (the "Treaty").

2. The Centre received the prescribed lodging fee on 30 July 2009 and the hard copies of the Request on 6 August 2009. On 7 August 2009, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("the ICSID Institution Rules"), the Centre acknowledged receipt of the Request and, on the same date, transmitted copies to The former Yugoslav Republic of Macedonia and to its Embassy in Washington, D.C.

3. The Request, as supplemented by the Claimant's letters of 20 and 21 August 2009, was registered on 21 August 2009, pursuant to Article 36(3) of the ICSID Convention. In the Notice of Registration, the Secretary-General invited the Parties, in accordance with Rule 7(d) of the Institution Rules, to proceed as soon as possible to constitute the Tribunal pursuant to Articles 37-40 of the ICSID Convention.

4. On 24 September 2009, the Parties agreed on the number of arbitrators and the method of their appointment. The Tribunal was to be composed of three arbitrators, one appointed by each Party and the third, presiding, arbitrator to be appointed by the Parties' agreement.

5. On 13 November 2009, the Claimant appointed Mr. Daniel M. Price, a U.S. national, as arbitrator in this case. On 1 December 2009, the Respondent appointed Mr. J. Christopher Thomas, Q.C., a national of Canada, as arbitrator. Following extensions of the initially agreed time limit for the appointment of the presiding arbitrator, on 26 February 2010, the Parties jointly appointed Judge Gilbert Guillaume, a national of France, to serve as President of the Tribunal.

6. All three arbitrators having accepted their appointments, on 18 March 2010, the Secretary-General of ICSID notified the Parties that the Tribunal was deemed to have been constituted and that the proceeding had begun as of that date, pursuant to Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("the ICSID Arbitration Rules"). By the same letter, the Secretary-General informed the Parties that Mr. Marat Umerov of the ICSID Secretariat would serve as Secretary of the Tribunal. He was later succeeded by Ms. Milanka Kostadinova, Senior Counsel of the ICSID Secretariat, who was appointed as Secretary of the Tribunal on 1 May 2010.

7. The first session of the Tribunal was held on 11 May 2010, at the offices of Latham & Watkins, LLP, in Paris, France. On that occasion, the Parties confirmed that the Tribunal was duly constituted. Various aspects of procedure were determined at the session, including the conditions to file and admit requests for production of documents, the production of evidence in relation to witnesses and experts, and a schedule for the submission of written pleadings, subject to the Respondent's right to make preliminary objections to jurisdiction.

8. On 7 October 2010, the Parties jointly requested an amendment to the procedural calendar. The proposed schedule provided that the Claimant's Memorial was to be filed by 5 November 2010, the Respondent's Counter-Memorial by 29 April 2011, the Claimant's Reply by 29 April 2011, and the Respondent's Rejoinder by 29 August 2011. The Tribunal approved the revised schedule.

9. Accordingly, the Claimant filed its Memorial on the merits on 5 November 2010.

10. By letter of 22 November 2010, the Claimant requested that the Respondent be ordered to produce documents relating to a voluntary document production request of 4 November 2010. The Respondent filed observations by letter of 24 November 2010. The Claimant filed observations in reply on 25 November 2010.

11. Having carefully considered the Parties' respective positions, the Tribunal concluded that no case had been made for the production of the requested documents at that time. Considering that the Memorial had already been filed, and that it could not be amended in the light of new evidence, the Tribunal saw no need to call upon the Respondent to produce the requested documents. It therefore declined the Claimant's request, but confirmed the Claimant's right to renew its request after it reviewed the Counter-Memorial, and in time for the filing of its Reply. The Tribunal's decision was communicated to the Parties by letter of 8 December 2010.

12. On 21 March 2011, following several exchanges of correspondence between the Tribunal and the Parties, and in consultation with the Centre, the Tribunal confirmed to the Parties its decision to hold the hearing in this case on 14-18 November 2011, in Paris, France.

13. On 11 April 2011, the Respondent applied to the Tribunal to order the Claimant to produce certain documents by 15 April 2011, in light of the time limit for filing the Counter-Memorial. The Claimant objected to the request on 13 April 2011. On 15 April 2011, having reviewed the Parties' respective submissions and the attached Redfern Schedule, the Tribunal declined the Respondent's request. The Tribunal noted that the Respondent's request was filed late and that most of the requested documents concerned damages issues and as such the documents could be produced at a later stage.

14. The Respondent filed its Counter-Memorial on jurisdiction and the merits on 29 April 2011.

15. By letter of 10 June 2011, the Claimant requested the Tribunal to call upon the Respondent to produce five categories of documents. The Respondent responded on 13 June 2011, asking the

Tribunal to reject the request, contending that by making the request the Claimant sought to modify the scope and/or the proffered justification for some of its earlier requests for voluntary document production.

16. By letter of 23 June 2011, the Claimant further requested: (i) a suspension of the procedural schedule pending an order on the document production request; and (ii) an extension of the time limit for submission of the Reply by one week from the date of the production of the documents. The Respondent objected to both requests on 24 June 2011.

17. On 24 June 2011, the Tribunal granted the Claimant's requests of 10 and 23 June 2011 in part. It ordered the Respondent to produce, by 30 June 2011, documents in three of the five categories described in the Claimant's letter of 10 June 2011. The Tribunal also granted the Claimant's request for an extension of the time limit for filing of the Reply. The Tribunal modified the calendar for submission of the Reply and the Rejoinder, fixing the dates 7 July 2011 for the Reply and 12 September 2011 for the Rejoinder.

18. The Claimant filed its Reply on 7 July 2011.

19. On 15 August 2011, the Respondent requested that the Claimant be ordered to produce documents concerning the Respondent's second request for document production, made as a Redfern Schedule of 29 July 2011. On 17 August 2011, the Claimant stated that it had no comments further to those already given in the Redfern Schedule and in its letter to the Respondent of 12 August 2011, a copy of which was attached. Having duly deliberated, on 24 August 2011, the Tribunal ordered the Claimant to produce, by 31 August 2011, documents in one of the categories listed in the Redfern Schedule. The Tribunal also reserved its right to ask for the production of any documents which it might consider necessary in the future. On 30 August 2011, the Claimant confirmed the production of the requested documents.

20. The Respondent filed its Rejoinder on 12 September 2011.

21. On 22 September 2011, the Claimant proposed the scheduling of a pre-hearing telephone conference call to discuss procedural aspects of the oral hearing scheduled for 14-18 November 2011.

22. On 26 September 2011, the Claimant applied to the Tribunal to either (i) strike the so-called Pelagonia Report from the record as inadmissible, or, alternatively, (ii) order that the principal author of the Pelagonia Report be made available for cross examination at the hearing. The Pelagonia Report had been submitted by the Respondent as Exhibit R-24 to its Counter-Memorial. The Claimant stated that Mr. Pecko Risteski appeared to be the principal author of the Report (given his signature on the Report).

23. On 29 September 2011, the Tribunal fixed 5 October 2011 as the date for a procedural meeting with the Parties and invited them to confer with a view to reaching agreement on the organisation of the hearing and to revert to the Tribunal by 4 October 2011.

24. By letter of 4 October 2011, the Claimant informed the Tribunal that the Parties encountered difficulties in reaching an understanding, but had agreed that the Claimant would set forth its proposals, and that the Respondent would comment on such proposals separately. The Respondent filed its counter-proposals on October 5, 2011. In its letter, the Respondent stated, *inter alia*, that it objected to the Claimant's challenge of the admissibility of the Pelagonia Report and to the Claimant's proposal to cross-examine its author. The Respondent reserved its rights to make further submissions on this issue and requested the Tribunal's urgent ruling rejecting the Claimant's applications of 29 September 2011.

25. The procedural meeting between the Parties' legal representatives and the Tribunal, also attended by the Tribunal Secretary, was held on October 5, 2011 by telephone conference call. Each Party made oral submissions on the proposals that had been made.

26. Having considered the Parties' written and oral submissions, on 12 October 2011 the Tribunal issued a Procedural Order Concerning the Hearing on 14-18 November 2011. The Tribunal decided on the outstanding matters which the Parties had left for its determination, and endorsed the matters of agreement between them. In particular, the Tribunal determined the hearing schedule; the procedures for the opening and closing submissions and witness examination; the presentation of documentary evidence at the hearing; transcription; and translation. The Tribunal also decided that the Pelagonia Report was admissible, subject to direct and cross examination of its author at the hearing. The Tribunal also ordered the Parties to prepare and submit an agreed chronology of events by 4 November 2011.

27. On 17 October 2011, the Respondent registered objections pursuant to Arbitration Rule 27 ("Waiver"), and requested that certain points of the Procedural Order of 12 October 2011 be clarified. The Respondent expressed concerns that the schedule for cross-examination, sequestration of factual witnesses, and the scope of direct examination of witnesses and experts, determined by the Tribunal could prejudice the Respondent's ability to present its case. It asked the Tribunal to clarify the basis of its order for the examination of Mr. Risteski, given that the Pelagonia Report was presented as documentary evidence and that Mr. Risteski was neither a witness nor an expert of the Respondent. The Respondent further asked the Tribunal for directions as to which Party would conduct the direct examination and which Party would conduct the cross examination of Mr. Risteski. The Respondent suggested that, since the Claimant had requested Mr. Risteski's presence at the hearing, it should be responsible for producing him, and that the time for the examination of Mr. Risteski shall be divided equally between the Parties. Finally, the Respondent requested the Tribunal's confirmation that, if Mr. Risteski failed to attend the hearing for reasons that were not attributable to the Respondent, the Pelagonia Report would continue to be admissible. In such a case, the Respondent requested that the Parties be permitted to make further submissions as to the Report's evidentiary value.

28. On 24 October 2011, the Claimant filed a response, asserting that Arbitration Rule 27 provided no basis for a Party's objections to a procedural order of the Tribunal. The Claimant also commented on the Procedural Order's stipulations concerning the cross-examination, sequestration of factual witnesses, and the scope of direct examination of witnesses and experts. In regard to the Pelagonia Report, the Claimant submitted that since the Respondent sought to rely upon the Report, the logistical and financial responsibilities for Mr. Risteski's testimony must be borne by it. The Claimant submitted further that the direct examination shall be by the Respondent and the cross examination by the Claimant. Finally, the Claimant asked the Tribunal to fix a date by which the Respondent must confirm whether Mr. Risteski would be available for examination.

29. By letter of 26 October 2011, the Respondent reiterated its concerns about what it considered to be the prejudicial implications to the Respondent of the Tribunal's Order of 12 October 2011. The Respondent noted that the Claimant intended to use the allocated longer period for direct examination to adduce new testimony from its witnesses, as indicated in the Claimant's letter of 24 October 2011. The Respondent requested that the Claimant be ordered to provide, by 7 November 2011, a detailed summary of any points the Claimant intended to elicit from its witnesses in direct examination which had not been covered in their witness statements. The Respondent submitted that this would be appropriate and fair in the circumstances.

30. On 27 October 2011, the Tribunal issued a Procedural Order to Supplement and Clarify the Procedural Order of 12 October 2011. Considering that the Pelagonia Report stated positions on legal and factual issues on which Parties had devoted much argument, the Tribunal confirmed its earlier decision to hear the testimony of its author. The Tribunal directed the Respondent make its best efforts to arrange for Mr. Risteski's examination at the hearing, and fixed a procedure to be followed to this end. The Tribunal was to be advised by 4 November 2011 whether Mr. Risteski was willing and able to testify. The Tribunal also decided that the direct examination shall be conducted by the Respondent and cross-examination by the Claimant. The Tribunal

indicated that it would take into account Mr. Risteski's attendance or non-attendance, as the case may be, when deciding on what weight, if any, to accord to the Report in light of the Tribunal's prior request.

31. The Procedural Order of 27 October 2011 was transmitted to the Parties under cover of a letter of the Secretary of the Tribunal of the same date. It was conveyed to the Parties that the Tribunal maintained its position on the items not explicitly addressed in the supplementary Order. The Parties were also informed of the Tribunal's decision declining to issue the order requested by the Respondent in its letter of 26 October 2011. The Tribunal noted in this regard that the scope of direct examination and the time allocated in the Procedural Order contemplated that the witnesses would have the opportunity to respond to any matters raised in the Respondent's last pleading.

32. On 3 November 2011, the Claimant applied to the Tribunal for leave to file additional documents. On 4 November 2011, the Respondent asked the Tribunal to either dismiss the request in its entirety or, if the documents were admitted, to acknowledge the Respondent's right to introduce further documents in rebuttal. By the same letter, the Respondent applied for leave to file a decision of the Bitola Basic Court of 20 October 2011.

33. On 4 November 2011, the Respondent informed the Tribunal of Mr. Risteski's availability to testify before the Tribunal on 12 November 2011, and of his request for the Tribunal's permission to testify jointly with Professor Aceski, who was said to have contributed to the Pelagonia Report's preparation. For reasons of procedural efficiency, the Tribunal decided to allow Mr. Risteski and Professor Aceski to testify jointly. The Tribunal ordered the Respondent to indicate by 11 November 2011 whether specific portions of the Report were prepared by one of the witnesses.

34. On 7 November 2011, the Parties submitted an agreed chronology of events in accordance with the Tribunal's Procedural Order of 12 October 2011.

35. On 8 November 2011, the Tribunal issued an order concerning the Parties' respective applications of 3 and 4 November 2011. The Tribunal granted leave to the Claimant to file part of the requested documents. The Tribunal also granted leave to the Respondent to supplement the record by filing the decision of the Bitola Basic Court of 20 October 2011.

36. By letter of 8 November 2011, the Respondent applied to the Tribunal for leave to file two additional documents, indicating that the Claimant did not object to the addition of these documents to the record.

37. On 9 November 2011, the Claimant objected to the Respondent's description of the Bitola Basic Court of 20 October 2011, and confirmed its consent to the filing of the two additional documents indicated in the Respondent's request for leave to file of 8 October 2011, subject to conditions. In addition, the Claimant provided an updated damages calculation dated 31 October 2011, by its damages expert, Mr. Anthony Charlton, which was said to correct an error in his second report. The Claimant also provided as an additional legal authority, a copy of the tribunal's award in *France Telecom v. Lebanon*. Finally, the Claimant requested a clarification of the hearing schedule.

38. By letter of 10 November 2011, the Respondent addressed the issues raised by the Claimant's letter of 9 November 2011, objecting, in particular, to the submission of three new appendices to Mr. Charlton's second expert report, which in the Respondent's view were intended to amend the quantum of damages claimed by the Claimant. By letter of the same date, the Claimant asserted, *inter alia*, that the updated calculations were not new evidence. In the Claimant's view, the only point of disagreement between the Parties was the filing of Appendix 3A to Mr. Charlton's second expert report.

39. On 11 November 2011, the Tribunal granted the Respondent's request for leave to file the documents mentioned in its letter of 8 November 2011, with accompanying notes, as requested by the Claimant. The Tribunal also accepted Appendices 2 and 3B to Mr. Charlton's expert report.

The Tribunal took note of the statement in the Respondent's letter of 10 November 2011 that it reserved the right to make additional representations or introduce new documents into the record in response to the new appendices. It also took note of the Respondent's objections to the filing of Appendix 3A to Mr. Charlton's report and of the Claimant's comment in this regard in its letter of 10 November 2011. The Tribunal stated that it would take its decision on the occasion of the hearing.

40. On 11 November 2011, the Respondent informed the Tribunal of its understanding of Mr. Risteski's and Professor Aceski's involvement in the preparation of the Pelagonia Report. The Respondent indicated that Professor Dr. Trajkovski, who was responsible for certain sections of the Report, was also willing to testify, but unable to travel to Paris for health reasons. The Respondent suggested that Professor Dr. Trajkovski be examined by video link regarding those sections of the Report for which he was responsible.

41. The hearing was held at the ICC Conference Centre in Paris, on 14-18 November 2011. The Parties were represented by their counsel who made presentations to the Tribunal.

42. During the hearing, the Tribunal issued a Procedural Order, dated 17 November 2011, directing the Parties to produce further documents, including an authenticated copy of the applicable bilateral investment treaty. In particular, in light of written and oral evidence given as to a meeting held in Resen on 15 February 2007 between Swisslion and Agroplod representatives, on the one hand, and three government officials, on the other, the Tribunal called on the Respondent to cause Agroplod to search for minutes of such meeting which two of the Claimant's witnesses recalled having been taken and filed in Agroplod's archives and for any other documents relating to such meeting. The Tribunal also called on the Claimant to state whether a copy of any such minutes was communicated to the Ministry of Economy and/or submitted or referred to in court proceedings and the Claimant was ordered to provide a copy of such communication, if any, to the Tribunal. The Respondent was further ordered to search its archives

and produce any documents: (i) analyzing or referring to the reports of the Public Revenue Office or the Ministry of Labor and Social Policy; (ii) recommending any course of action to the Ministry of Economy or State Attorney in light of those reports; (iii) relating or referring to the decision to terminate the Share Sale Agreement or to refer the matter to the State Attorney for termination; and (iv) any documents given to the State Attorney by the Ministry of Economy relating to the termination of the Share Sale Agreement.

43. Following the hearing, by letter of 2 December 2011, the Respondent produced documents pursuant to the Tribunal's Procedural Order of 17 November 2011. On 14 December 2011, the Claimant made comments in respect to the Respondent's letter of 2 December 2011, and made a request for the production of certain documents related to the Financial Police Report submitted by the Respondent as Exhibit R-98. By letter of 16 December 2011, the Respondent objected to the Claimant's comments and its request for additional documents.

44. On 21 December 2011, the Respondent produced documents it was able to locate related to three of the items of the Tribunal's Order of 17 November 2011.

45. On 23 December 2011, the Tribunal issued a Procedural Order ordering the Respondent to produce all documents annexed to the Financial Police Report (Exhibit R-98) that were not already on the record of this arbitration.

46. On 2 February 2012, the Respondent produced the requested documents. On 13 February 2012, the Claimant applied to the Tribunal for leave to respond to the new documents submitted in Respondent's Exhibits R-98 to R-119. Respondent objected to the Claimant's request by letter of 15 February 2012. On 24 February 2012, the Claimant reiterated its request to file a response to the documents submitted by the Respondent since the hearing. On 5 March 2012, the Tribunal invited the Claimant to precisely identify the issues it would wish to draw the Tribunal's attention to by 8 March 2012. The Claimant filed a nine-page submission on the due date. The Respondent

objected to the submission and requested a longer time limit for its reply. The Tribunal granted the request on 12 March 2012 and the Respondent filed its reply submission on 20 March 2012.

47. On 2 April 2012, the Tribunal invited the Parties to submit simultaneously their statements on costs by 24 April 2012 and rebuttal submissions on costs by 4 May 2012. The Tribunal indicated that each Party shall itemize and include its respective costs incurred in relation to SEC and criminal complaints proceedings.

48. The Parties filed their cost submissions on 24 April 2012. The Respondent argued, *inter alia,* that the Claimant could not recover any costs it may have incurred in the SEC and criminal complaints proceedings. The Respondent observed that the Tribunal's discretion under Article 61(2) of the ICSID Convention was not unlimited and that the Tribunal lacked jurisdiction to make any such ruling. The Respondent also argued that if the Tribunal awarded such costs as damages or compensation, the award would be *ultra petita* in light of Article 48(3) of the ICSID Convention. On 4 May 2012, the Parties filed their responses to each other's submissions on costs. In its reply the Claimant agreed with Respondent's interpretation of Article 61(2) of the ICSID Convention. However, the Claimant argued that the Tribunal was not restricted to award costs relating to the domestic proceedings as part of the compensation for breach of the Treaty.

49. On 23 May 2012, pursuant to ICSID Arbitration Rule 38(1), the Tribunal declared the proceeding closed.

50. Members of the Tribunal deliberated through various means of communication, including a meeting in Paris, France. The Tribunal has taken into account all pleadings, documents, and testimony in this case.

II. SUMMARY OF THE PARTIES' SUBMISSIONS

A. MEMORIAL

1. Factual Background

51. In its Memorial dated 5 November 2010, the Claimant first summarises its view of the factual background of the case. It states that DRD Swisslion Ltd (DRD Swisslion) is a Swiss company wholly owned by Mr. Rodoljub Draskovic, a Serbian national. In 1998, DRD Swisslion founded a Macedonian company called Swisslion DOO Skopje ("Swisslion") whose main business was the production of biscuit and snacks. In 2004 DRD Swisslion acquired Takovo, a Serbian food production company, and created Swisslion Takovo.

52. "After Swisslion had been operating independently in Macedonia for several years, DRD Swisslion began to consider repeating its Serbian success with the acquisition of Agroplod AD Resen (Agroplod)"[1], a former socially-owned enterprise which was nearly bankrupt. It was encouraged to do so by Macedonian local authorities who informed it that the Macedonian government was looking for "a strategic investor" to "take control of and revitalise Agroplod".[2]

53. In March and April 2006, Swisslion purchased 5,000 shares of Agroplod from the company's employees.[3] In June 2006, it acquired an additional 588 shares through the realisation of a mortgage right on securities. This gave Swisslion a 26.58% stake in Agroplod (the "First Tranche" of shares).[4]

54. On 3 May 2006, the Macedonian government adopted a decision to offer 5,339 shares in Agroplod that belonged to the Macedonian Pension and Disability Insurance Fund (the Pension Fund) for sale by public tender. The shares represented 25.39% of Agroplod's share capital. The

[1] Memorial paras. 16-18.

[2] *Id.*, para. 18.

[3] *Id.*, para. 20.

[4] *Id.*

tender "stipulated that prospective bidders were already to own at least 25% of the shares in Agroplod".[5] This criterion was satisfied only by Swisslion and by Mr. Georgi Kitinov who owned 31.45% of the shares at the time.

55. On 29 May 2006, Swisslion presented to all Agroplod shareholders a revitalisation programme for the business (the "Revitalisation Programme" or "Plan"), which in spite of the opposition of Mr. Giorgi Kitinov, was adopted by the majority of the shareholders (including the representative of the Pension Fund).[6]

56. On 5 June 2006, Swisslion submitted its bid to acquire the government's shares. As required, this bid was accompanied by a Business Plan developing the ideas already approved in the Revitalisation Programme. Swisslion proposed that Agroplod be fundamentally restructured. Under that proposal, three "new subsidiary companies" specialising in food, agriculture and tourism were to be created and "jointly owned by Swisslion and Agroplod".[7] "The new investments were to be made in the subsidiaries rather than in Agroplod itself".[8] The Business Plan also outlined Swisslion's proposed investment in the Agroplod group thus established. On 14 June 2006, the Ministry of Economy selected Swisslion as the winner of the public tender. That same day, the Ministry and Swisslion concluded an Agreement for Sale of Shares of the Pension Fund in Agroplod (the "Share Sale Agreement"). With this Second Tranche, Swisslion came to hold 10,927 shares.[9]

57. On 4 July 2006, Swisslion purchased a further 788 shares from a private party. This gave it 11,715 shares in total, representing 55.72 % of the total shares in Agroplod.[10]

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[5] *Id.*, paras. 21-22.

[6] *Id.*, para 23.

[7] *Id.*, para. 26.

[8] *Id.*, para. 27.

[9] *Id.*, para 35

[10] *Id.*, para 37.

58. On 5 July 2006, parliamentary elections in the former Yugoslav Republic of Macedonia brought to power UMRO-DPMNE, the opposition party. According to the Claimant "the often-hostile Agroplod shareholder Mr. Kitinov had previously warned Swisslion of his ability to use his connections to the new governing party" in order to make sure that Swisslion will be "disgraced by the institutions of State and in the media".[11]

59. "Undeterred by such threats, Swisslion turned to the business of resurrecting Agroplod as agreed with the government in the Share Sale Agreement and accompanying Business Plan"[12]. The three new subsidiary companies were established from April to September 2006. Agroplod concluded cooperation agreements with each of them. The Swisslion Group invested approximately €11 million in those companies, more than what was required by the Agreement and the Business Plan.[13] Most of Agroplod's employees were successfully transferred to the Subsidiaries and retained by them.[14] In 2006 and 2007, the Government approved Swisslion's investment contributions and the financial situation of Agroplod radically improved.[15]

60. However, once Swisslion had returned Agroplod to profitability, the Macedonian government began to take "radical steps" to take back its stake in the company.[16]

61. It first asked the Second Skopje Basic Court to impose provisional measures blocking Swisslion's enjoyment of the Agroplod shares. On 18 April 2008 this request was rejected by the Court in a decision later upheld by the Appellate Court on 12 June 2008.[17]

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[11] *Id*., para. 38.

[12] *Id*., para. 39.

[13] *Id*., paras. 42-47.

[14] *Id*., paras. 54-55.

[15] *Id*., paras. 56-62.

[16] *Id*., para. 64.

[17] *Id*., paras 64-65.

62. Just a week after the Basic Court's decision, the State Attorney launched proceedings against Swisslion before the Securities and Exchange Commission (SEC) to freeze the Second Tranche of shares. On 19 May 2008, the SEC "held that Swisslion's acquisition of the Second Tranche was contrary to Macedonian Law on takeovers". It "imposed a ban on the use (including voting), transfer or alienation"[18] of this Tranche. On 15 October 2008, however, the Macedonian Constitutional Court decided that the "SEC had lacked jurisdiction to grant the Ministry's request for provisional measures".[19]

63. In the meantime, the SEC issued another order dated 9 July 2008 "preventing Swisslion from voting or receiving dividend payments on the basis of 1,356 Agroplod shares, which formed part of the First Tranche".[20] This too was overturned by the Supreme Court on 20 January 2009.

64. The Ministry then returned to the Second Skopje Basic Court and requested the court to terminate the Agreement and to seize the Second Tranche for the State. On 20 January 2009, the court "granted the Ministry's request for provisional measures" and thus restricted "Swisslion's use or transfer of the Second Tranche – relief the court had refused in April 2008".[21] Then, on 15 October 2009, the court terminated the Share Sale Agreement and ordered that the Second Tranche be transferred to the Ministry of Economy, without any compensation. Those two decisions were affirmed on appeal.[22]

65. The Memorial asserted that as of the time of its filing "Swisslion's appeal to the Supreme Court is pending, but the shares have already been taken".[23] According to the Claimant, Mr.

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[18] *Id.*, para. 69.

[19] *Id.*, para. 74.

[20] *Id.*, para.75.

[21] *Id.*, para. 78.

[22] *Id.*, para. 82.

[23] *Id.*, para. 84.

Kitinov became the company's controlling shareholder. Then, "Mr. Kitinov and the government, acting together, quickly replaced Agroplod's board of directors and management".[24]

66. The Claimant moreover contends that the Respondent disrupted Swisslion's business activities by obtaining from the Second Skopje Basic Court on 2 April 2009 an order prohibiting Tutunska Banka from foreclosing on a mortgage on the Second Tranche. This order was upheld on appeal.[25]

67. The Claimant further submits that "Macedonia also launched criminal embezzlement proceedings against Swisslion's General Manager, Mr. Meskov, and Mr. Vasko Spirovski, then the Chief Executive Officer of Agroplod (a Swisslion appointee)".[26] The allegations were considered baseless by the public prosecutor. However, the new board of directors of Agroplod, controlled by Mr. Kitinov, then asked the Ministry of Internal Affairs "to bring further criminal charges against Mr. Meskov and the executive officers of the Subsidiaries. Criminal investigations against Mr. Meskov are currently ongoing".[27]

68. The Claimant concludes that as result of "Macedonia's campaign of harassment of Swisslion"[28] and of the judgment rendered by a Macedonian judiciary which "lacks independence"[29], Swisslion no longer controls the Agroplod group. It continues to own the First Tranche in Agroplod and its own shares in the subsidiaries. But those subsidiaries are dependent on Agroplod and "Mr. Kitinov, as the new President of the Board of Directors of Agroplod, has threatened to terminate the Cooperation Agreements, by which access to these crucial elements of

[24] *Id.*, para. 85.

[25] *Id.*, para. 86.

[26] *Id.*, para. 88.

[27] *Id.*, para. 90.

[28] *Id.*, para. 88.

[29] *Id.*, para 87.

the production process is ensured".[30] Notwithstanding those difficulties, in August 2010, Swisslion Agroplod, the key subsidiary, has formally confirmed to Agroplod it will continue to meet its obligations".[31] Given this precarious situation and the loss of control, "Swisslion has ceased making further investments in the Subsidiaries" because their capacity to continue production is "under serious threat". This significantly affects the value of Swisslion's remaining investments in the Agroplod group".[32]

2. Jurisdiction of the Tribunal

69. The Claimant submits that "the dispute arises under the Agreement between the Swiss Federal Council and the Macedonian government concerning the Promotion and Reciprocal Protection of Investments"[33] which was concluded on 26 September 1996 and entered into force on 6 May 1997.

70. It contends that Swisslion is a protected investor under the Treaty and that the shareholdings and other interests such as "rights given by law" and rights conferred "by contract" are protected investments thereunder.[34] It adds that the Tribunal has jurisdiction *ratione temporis* and that Article 25 of the ICSID Convention is satisfied.[35] It further notes that, on several occasions, the Claimant attempted to engage the Respondent in consultations concerning the dispute, as provided for in Article 10 of the BIT. "Macedonia having been unresponsive to those efforts, Swisslion commenced this arbitration on 9 July 2009".[36]

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[30] *Id.*, para. 92.

[31] *Id.*, para. 93.

[32] *Id.*, para. 94.

[33] *Id.*, para. 95.

[34] *Id.*, paras. 98-104.

[35] *Id.*, para. 105.

[36] *Id.*, para. 112.

3. Alleged Treaty Violations

71. The Claimant first submits that "Macedonia has unlawfully expropriated Swisslion's Second Tranche of shares in Agroplod in violation of Article 5 (1) of the Treaty.[37] It further contends that the Respondent has failed to observe its commitments to Swisslion and thus breached Article 12 of the Treaty. It adds that "Macedonia has unreasonably impaired Swisslion's enjoyment" of its investments in violation of Article 4(1) and that "Macedonia has treated Swisslion's investments unfairly and inequitably" contrary to Article 4(2).[38] The claimed breaches are elaborated at length in the Memorial.

4. Compensation

72. The Claimant submits that "financial compensation is necessary to make Swisslion whole".[39] It contends that "the appropriate method to determine compensation is a discounted cashflow".[40] Alternatively, it claims "for the value of actual investments plus interest".[41]

5. Submissions

73. For those reasons, Swisslion requests that the Tribunal :

(a) DECLARE that the Respondent has expropriated the Second Tranche of shares in Agroplod, in breach of Article 5 of the Treaty;

(b) DECLARE that the Respondent has failed to guarantee the observance of its commitments to the Claimant, in breach of Article 12 of the Treaty;

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[37] *Id.*, para. 114.

[38] *Id.*, para. 114..

[39] *Id.*, paras. 147-150. .

[40] *Id.*, paras. 151-160. .

[41] *Id.*, paras. 161-165.

(c) DECLARE that the Respondent has impaired the Claimant's management, use and enjoyment of its investments in breach of Article 4(1) of the treaty;

(d) DECLARE that the Respondent has treated the Claimant's investments unfairly and inequitably in breach of Article 4(2) of the Treaty;

(e) ORDER the Respondent to pay to the Claimant compensation of €19,013,000 (nineteen million and thirteen thousand Euros);

(f) ORDER the Respondent to pay to the Claimant additional prejudgment and post-judgment interest at a rate of 13.3% per annum, accruing on a compounded basis from 2 November 2010 to the date of payment of the Award;

(g) ORDER the Respondent to pay additional amounts, to be determined subsequently, to recognize the reputational and moral harm suffered by the Claimant due to the Respondent's unfair harassment of and use of criminal procedures against the Claimant and its General Manager;

(h) ORDER the Respondent to pay all of the costs reasonably incurred by the Claimant in preparing for and prosecuting these proceedings, together with the costs of the Centre and of the Tribunal; and

(i) ORDER such other relief as the Tribunal may consider appropriate or as the Claimant may subsequently request".[42]

[42] *Id*., para. 166.

B. COUNTER-MEMORIAL

1. Factual Background

74. In its Counter-Memorial dated 29 April 2011, the Respondent notes that "[t]he Claimant purchased shares in Agroplod in a series of transactions. These included a share sale agreement that the Claimant entered into with the Ministry of Economy on 14 June 2006".[43] Under Article 8 of that Agreement, the Claimant had "to make a direct investment contribution of €7,806,390 in Agroplod by the end of 2006".[44] The Business Plan of May 2006 added that "the investment which will be directly invested, mainly through the so much needed working capital, in Agroplod AD-Resen … will result in termination of the long term trend of losses in Agroplod AD-Resen and, even more importantly, in making profit".[45]

75. According to the Respondent, "the Claimant failed to comply with its investment obligations under the Share Sale Agreement (a) by failing to make investments in Agroplod (as opposed to in the Swisslion subsidiaries); (b) by failing to make investments with a value of € 7,806,390 by the end of 2006; and (c) since the majority of alleged investments were not made by the Claimant in any event".[46]

76. Referring to Article 10 of the Share Sale Agreement, the Respondent notes that Swisslion was obliged to "retain the existing number of employees in AD Agroplod Resen until the moment of signing of this Agreement, and shall employ an additional 32 employees by the end of 2007".[47] According to the Respondent, the Claimant also failed to comply with that obligation, as "the total number of employees of Agroplod fell from 596 in 2005 to 24 in 2009".[48]

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[43] Counter-Memorial para. 4.

[44] *Id.*, para. 44.

[45] *Id.*, para. 57.

[46] *Id.*, para. 94.

[47] *Id.*, para. 95.

[48] *Id.*, para. 100.

77. The Respondent further contends that, under Article 11 of the Share Sale Agreement, Claimant was obliged to "submit monthly reports to Ministry of Economy on the realization of the investment contribution".[49] According to the Respondent, the Claimant sent only two reports (and they were vague, misleading and incomplete) in October and December 2006 and thus failed to comply with its reporting obligations.[50]

78. The Respondent further submits that, contrary to Swisslion's allegation, the Ministry of Economy never approved the Claimant's alleged investment as being compliant with the Share Sale Agreement. Contrary to what is alleged by the Claimant, the Respondent did not establish a special Commission of "Government auditors" which "confirmed Swisslion's compliance with the Share Sale Agreement.[51] Indeed, on 1 March 2007, it reacted to the Claimant's reports by requesting further information from it and "following a complaint from minority shareholders in Agroplod, the Ministry of Economy asked the Public Revenue Office on 12 March 2007 to conduct a review of the nature and extent of the Claimant's investments contributions and the employment obligations under the Share Sale Agreement".[52]

79. The Respondent further contends that the Claimant stripped Agroplod of its valuable assets. In this respect it first recalls that "the Claimant's investment" was not made in Agroplod but in the Swisslion subsidiaries".[53] In doing so, Swisslion "acquired ownership and control of assets that formerly belonged to Agroplod's assets not only through its 80% equity holding in the Swisslion Subsidiaries, but also through the agreements for 'business and technical cooperation' and "through registering Agroplod's valuable trademarks … in the name of Swisslion Agroplod".[54] The Claimant transformed Agroplod into a loss-making shell company.

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[49] *Id*., para. 108

[50] *Id*., para. 129.

[51] *Id*., paras. 130-135.

[52] *Id*., para. 136.

[53] *Id*., para. 192.

[54] *Id*., para. 193.

80. The Respondent then recalls that on 20 February 2008, based on reports from the competent authorities, the Ministry of Economy asked the State Attorney to commence legal proceedings. The State Attorney did so and in March sought interim measures of protection from the Skopje Basic Court. Such measures were not granted at that time and the Attorney General on 6 May 2008 commenced proceedings before the Court to terminate the Share Sale Agreement. It again asked for interim measures to ensure the integrity of the Second Tranche Shares. On 20 January 2009, the Court first prohibited the Claimant from using, transferring and alienating this Tranche. [55] Then on 20 March 2009, it prohibited a creditor, Tutunska Bank, from foreclosing on a mortgage on the same tranche.[56] Finally, on 15 October 2009, the Court determined that the Claimant failed to fulfill its obligations under the Share Sale Agreement.

81. The Respondent then analyses the Claimant's arguments respecting the proceedings before the Securities and Exchange Commission (SEC). It recalls that the decisions taken by that Commission were overturned by the Supreme Court, stressing that this was done not on their merits, but for lack of jurisdiction. It adds that the Claimant's allegations of a conflict of interest of the President of the SEC are unfounded, as recognised by the State Commission for Prevention of Corruption.[57] It finally contends that the ongoing criminal investigation against Mr. Meskov and other former officers of Agroplod was initiated at the request of Agroplod's Board and must follow its proper course.[58]

2. Jurisdiction

82. The Respondent submits that the Tribunal should decline jurisdiction over this dispute.

[55] *Id*., para. 220.

[56] *Id*., paras. 222-223.

[57] *Id*., paras. 227-244.

[58] *Id*., paras. 245-254.

83. In this respect, it first contends that "the Claimant made its alleged investment unlawfully and in bad faith and consequently does not qualify for protection under the Treaty or the ICSID Convention".[59]

84. Second, it claims that the Tribunal lacks jurisdiction *ratione personae* both under Article 25 (2) (b) of the ICSID Convention and under Articles 2 (2) (c) (i) and 2 (2) (c) (ii) of the BIT.[60]

85. Third, it submits that the Request for Arbitration was a "considerable expansion on the notification of the dispute letter that the Claimant sent to the Respondent in 2008".[61] It adds that "the Claimant alleges in its Memorial for the first time that Macedonian Court expropriated its investments".[62] According to the Respondent, the Claimant thus introduced a new dispute over which the Tribunal has no jurisdiction.

3. Merits

86. The Respondent submits that in any event the Claimant's allegations relating to the violation of the BIT must be rejected.

87. In this respect, it first stresses that "the Claimant's alleged investment was undertaken unlawfully and in bad faith".[63.]

88. It then contends that the Claimant's noncompliance with the Share Sale Agreement is well established, is *res judicata*, and that the Claimant is estopped from raising this issue in these proceedings: "In line with general principles of law, endorsed in recent investment treaty

[59] *Id*., paras. 260-274.

[60] *Id*., paras. 275-293.

[61] *Id*., para. 297.

[62] *Id*., para. 299.

[63] *Id*., paras. 314-317.

jurisprudence, the Claimant is accordingly precluded from attempting to reopen issues that have been finally determined by the Macedonian courts under Macedonian Law".[64]

89. The Respondent adds that "the Claimant's allegations of a conspiracy between the Respondent and Mr. Kitinov are spurious and must be rejected".[65]

90. It submits that "[t]he steps taken by the Ministry of Economy to terminate the Share Sale Agreement were not carried out in the exercise of *puissance publique* and cannot give rise to a violation of the Treaty".[66]

91. The Respondent contends further that "the steps taken by the Ministry of Economy to terminate the Share Sale Agreement were a legitimate exercise of its contractual rights."[67] The matter was then put before the Macedonian courts and the courts ordered the contract's termination. The acts of the judiciary cannot amount to a violation of international law absent exceptional circumstances, notably a denial of justice under international law that the Claimant does not even allege in this case".[68] Accordingly, the steps taken by the Ministry of Economy to terminate the Share Sale Agreement cannot themselves be deemed to constitute an expropriation unless the Macedonian court are themselves disavowed at the international level[69] and the acts of the judiciary do not constitute an expropriation in violation of the Treaty.[70] The Claimant's allegation that the Respondent unlawfully expropriated the Claimant's Second Tranche of Agroplod shares must therefore be rejected.

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[64] *Id.*, para. 332.

[65] *Id.*, paras. 333-339.

[66] *Id.*, paras. 340-348.

[67] *Id.*, para. 350.

[68] *Id.*, para. 376.

[69] *Id.*, para. 361.

[70] *Id.*, paras. 362-371.

92. Turning to the "umbrella clause" claim, in the Respondent's view, this claim must be rejected because, in particular, the Claimant can point to no commitment entered into by the Respondent which it failed to observe".[71] Moreover, "umbrella clauses cannot operate to elevate breaches of ordinary commercial contracts to the status of treaty breach without the involvement of the State acting as a sovereign".[72] In the present case, the Share Sale Agreement did not contain "investment protection provisions contractually agreed by [the Respondent] as sovereign".[73] The allegation that the Respondent violated Article 12 of the Treaty "must be rejected for this reason alone".[74] In any event, the Respondent did not enter into any commitments with respect to the Claimant's alleged investment that it failed to observe.[75]

93. The Respondent then turns to the allegation that it "unreasonably impaired the Claimant's investments so as to breach Article 4 (1) of the Treaty".[76] It contends that "these allegations are misconceived and must be summarily dismissed".[77]

94. Finally, after reviewing the Claimant's allegations of breach of the fair and equitable treatment standard, the Respondent asserts that "none of the Claimant's allegations that the Respondent breached the fair and equitable standard in the Treaty can be sustained".[78]

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[71] *Id*., para. 377.

[72] *Id*., para. 381.

[73] *Id*., para. 385.

[74] *Id*., para. 385.

[75] *Id*., paras. 387-400.

[76] *Id*., para. 401.

[77] *Id.*, paras. 401-422.

[78] *Id*., para. 447.

4. Compensation

95. According to the Respondent, "[i]n the event that, contrary to the Respondent's submission, the Tribunal assumes jurisdiction over this dispute and finds that the Respondent has breached the Treaty, the Tribunal should in any event reject the Claimant's claim for compensation".[79]

96. In this respect it submits that the basis on which the Claimant has claimed compensation is "fundamentally flawed" with the result that the amount claimed is "absurdly exaggerated".[80] It asserts that if (contrary to its submissions), the Tribunal "determines that the Claimant is entitled to any compensation, such compensation should be assessed" not according to customary international law, but "in accordance with Article 5 of the Treaty".[81] In conformity with this Article, it should amount to the market value of the investment expropriated. However, given that "Agroplod no longer has any valuable assets", any compensation payable to the Claimant in respect of the Second Tranche "would be nil".[82]

97. The Respondent further contends that, since Agroplod did not have a proven record of profitability, the use of the discounted cash flow method to calculate the fair market value would be inappropriate in the present case.[83] In any event, the Claimant's application of this method is flawed. First, the Claimant claims for the value of shares in Agroplod, Swisslion Agroplod, Swisslion Agrar and Prespa Trust that it still owns.[84] Second, the valuation date proposed by the Claimant is wrong and it must be 4 May 2010, not 19 May 2008. [85] Third, the "Claimant's projection of lost future profits is speculative and indefensible".[86] Fourth, the "Claimant applies

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[79] *Id*., para. 448.

[80] *Id*., para. 449.

[81] *Id*., para. 457.

[82] *Id*., para. 458.

[83] *Id*., paras. 459-463.

[84] *Id*., paras. 467-471.

[85] *Id*., paras. 472-478.

[86] *Id*., paras. 479-486.

an inflated compound interest rate"[87], the WACC, instead of the LIBOR rate provided for in the Treaty.

98. The Respondent recalls that the Claimant, in the alternative, claims compensation based on "the investments that it has actually made in Agroplod and the subsidiaries, plus interest accrued at the WACC rate until payment of an eventual Award".[88] It submits that this alternative claim is also misconceived because the Claimant still owns approximately 80% of the equity in the companies. Moreover, the majority of the investments were made by Swisslion Takovo, not the Claimant, and the Claimant has not substantiated the investments that it claims to have made.[89]

5. Request for Relief

99. The Respondent finally requests the Tribunal to:

(i) "dismiss all of the Claimant's claims for lack of jurisdiction and/or as inadmissible"

in the alternative,

dismiss all of the Claimant's claims as unfounded";

in the alternative,

reject the Claimant's claim for compensation,

(ii) order the Claimant to bear the costs of this arbitration, including all fees and expenses of the Centre and the Tribunal as well as the Respondent's reasonable costs (including but not limited to its reasonable legal fees and expenses), with interest, payable forthwith".[90]

[87] *Id*., paras. 487-490.

[88] *Id*., para. 491.

[89] Id., paras. 496-503.

[90] *Id*., para. 513.

C. REPLY

1. Jurisdiction

100. In its Reply dated 7 July 2011, the Claimant submits that Respondent's jurisdictional objections should be rejected. It contends that the Tribunal has jurisdiction *ratione personae* both under the ICSID Convention and under the Treaty. It stresses that the Tribunal has jurisdiction *ratione materiae* over the entirety of the dispute, and in particular over the alleged breaches which took place after the registration of the Request for Arbitration. It adds that Respondent's allegations of bad faith cannot deprive the Tribunal of jurisdiction.[91]

2. Merits

101. The Claimant emphasises that its expropriation claim does not depend upon a finding that the contract was wrongfully terminated (which, it says, in any event was a breach of fair and equitable treatment). Rather, it rests primarily on the fact that the Macedonian courts ordered the transfer of Swisslion's Second Tranche of shares in Agroplod to the Ministry of Economy without any compensation to Agroplod.[92] The uncompensated taking constitutes an unlawful expropriation in breach of Article 5(1) of the Treaty".[93]

102. Turning to Article 4(1) of the Treaty, the Claimant submits that "[t]he Respondent has impaired by unreasonable measures Swisslion's management, use and enjoyment of its investments."[94] In this respect it recalls that in May 2008 and July 2008, the SEC took two decisions that unlawfully limited Swisslion's rights in complete lack of transparency and in "disregard of due process of law".[95] The Constitutional Court on 15 October 2008 set aside the

[91] Reply, paras. 10-56.

[92] *Id*., para. 58.

[93] *Id*., para.75.

[94] *Id*., para.76.

[95] *Id*., paras. 79-84.

first decision for lack of jurisdiction of the SEC and the Supreme Court, on 20 January 2009, upheld Swisslion's appeal concerning the second decision. However, during that period, the SEC's decisions resulted in the suspension of Swisslion's shareholder rights. Moreover, on the same day of the Supreme Court's decision, "the State Attorney applied once again to the Second Skopje Basic Court for a provisional measure" and it was granted immediately.[96] "The Constitutional Court decision in 2009 was ineffective to stop Macedonia's impairment of Swisslion's investment, and did nothing to restore the value lost as a result".[97] "Similarly ineffective was the decision of the Administrative Court in *March 2011* upholding Swisslion's appeal against the second SEC decision against the merits of the SEC's decision on the Second Tranche of *May 2008*".[98] [Emphasis in original.]. In both cases, no financial compensation was granted.

103. The Claimant adds that the "arbitrary nature of the SEC's impairment of Swisslion's use of shares was compounded by the similarly opaque conduct of the State Commission for the Prevention of Corruption"[99] with respect to Swisslion's complaint concerning a conflict of interest on the part of the President of the SEC. The Commission rejected that complaint by an unreasoned decision notified more than two years after its presentation, just days before the filing of the Memorial. Moreover, in the meantime, it had examined a request on the same subject presented by the President herself and taken a factually inaccurate decision on that request without informing the Claimant.[100]

104. The Claimant then contends that the Respondent has treated Swisslion's investments unfairly and inequitably[101] in violation of Article 4(2) of the Treaty. In this connection:

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[96] *Id*., para. 93.

[97] *Ibid*.

[98] *Id*., para. 94.

[99] *Id*., para. 95.

[100] *Id*., paras. 96-102.

[101] *Id*., para. 104.

A. It submits that Swisslion had a contractual right to maintain control of Agroplod.

B. It stresses that it was agreed between the Parties that investments would be made in subsidiaries. It explains that in any case, Swisslion did not have "the percentage of shares in Agroplod that would have been necessary for it to make the investment contributions in Agroplod itself".[102] By contrast, "[m]anagerial control of Agroplod was sufficient for Swisslion and Agroplod to create new subsidiaries together, and to make equity contributions to them"[103], as provided by the Business Plan.

C. It recalls that "Swisslion made substantial investments in the subsidiaries in reliance on Macedonia's promise of control of Agroplod".[104] It stresses that those subsidiaries cannot be categorised as "Swisslion subsidiaries" or "Agroplod subsidiaries" because Swisslion and Agroplod own equity in them in proportions which have changed over time. Swisslion and Swisslion Takovo contributed approximately €8.1 million to those subsidiaries before the end of 2006, in particular though intellectual property investments.[105] "Swisslion complied with its obligations concerning Agroplod's employees"[106] and the Respondent's allegations on that point are both inaccurate and irrelevant. The Claimant takes issue with the Respondent's reliance on the Pelagoniska Audit House report (the Pelagonia Report), asserting that the Respondent "cannot rely on the Pelagonia Report in support of its factual and legal allegations".[107] It requests that

[102] *Id*., para. 121.

[103] *Id*., para. 122.

[104] *Id*., paras. 123 *et seq*.

[105] *Id*., para. 126.

[106] *Id*., paras. 133-136.

[107] *Id*., paras. 137-146.

that report be "stricken from the record".[108] "Should the Tribunal allow it to remain on the record … Swisslion reserves its right to insist that both of its authors be called for cross-examination".[109]

D. The Claimant contends further that control of Agroplod was essential to the Group structure that Swisslion created. Cooperation agreements between Agroplod and each of the subsidiaries were crucial in this respect and they will expire in August and September 2011.[110]

E. According to the Claimant, the Respondent "caused Swisslion to lose control of its investments in Agroplod and in the Subsidiaries".[111] "The loss of the Second Tranche due to the Respondent's illegal actions has left Swisslion locked in as a minority share holder of Agroplod and as a majority shareholder in Subsidiaries that are essentially worthless without control over Agroplod".[112] In this situation, it is "extremely likely" that the Cooperation Agreements, which are necessary to the functioning of the Subsidiaries, will not be renewed.[113]

F. Swisslion then turns to the issue of its reports to the Ministry of Economy. It asserts that it regularly reported to the Government on the progress of the investment, in particular in 2006.[114] It recalls that, in this arbitration, it requested the Respondent to produce the documents by which it evaluated Swisslion's compliance with its obligations. The Respondent could not locate a single document. "The Tribunal should draw the obvious

[108] *Id*., para. 146.

[109] *Ibid*.

[110] *Id*., paras. 147-150.

[111] *Id*., paras. 151 *et seq*.

[112] *Id*., para. 156.

[113] *Ibid*.

[114] *Id*., para. 157.

inference: the Ministry did create such documents, but they were withheld or destroyed because they confirm Swisslion's compliance with the Share Sale Agreement."[115]

G. The Claimant asserts further that the Respondent "expressly confirmed that Swisslion had complied with its investment obligations".[116] On the basis of the evidence adduced by the Claimant and absent any probative evidence to the contrary, it "must be accepted as a fact that officials from the Ministry of Economy visited Agroplod in February 2007 and informed Swisslion that it had complied with its investment obligations".[117]

H. The Claimant then submits that the decision to commence Court proceedings against Swisslion was unfair and inequitable.[118]

I. It adds that the decisions of the Macedonian Courts were also unfair and inequitable. It notes in this respect that, according to the Respondent, "the court proceedings against Swisslion cannot be in breach of the Treaty unless they amount to denial of justice or were initiated in bad faith".[119] However, according to the Claimant, State responsibility for acts of the judiciary does not exhaust itself in the concept of denial of justice. Moreover, in the present case, there has been such a denial.[120]

J. Finally it concludes that all the measures taken by the SEC, the Ministry and the Courts "constitutes a government-wide attack on Swisslion".[121] It lists measures taken by the

[115] *Id*., para. 162.

[116] *Id*., paras. 163 *et seq*.

[117] *Id*. para. 166.

[118] *Id*., para. 167 *et seq*.

[119] *Id*., para. 180.

[120] *Id*., paras. 181 *et seq*.

[121] *Id*., para. 197.

> Respondent which individually and collectively amount to unfair and inequitable treatment in breach of the Treaty.[122]

105. Turning to Article 12 of the Treaty, the Claimant submits that the Respondent "has breached its commitments to provide Swisslion with the Swisslion shares and to thereby grant it control over Agroplod in contravention of that article.[123] According to the Claimant, "Macedonia appears to accept that a contractual breach constitutes a treaty breach when (a) the contract in question was concluded by the state in its sovereign capacity; or (b) the breach was perpetrated by the state through the use of its sovereign powers. Neither of these putative conditions appears in Article 12 of the Treaty … However, they are in any event met in the case at hand".[124] The Claimant adds that the arguments drawn by the Respondent from *res judicata* and collateral estoppel must be rejected.[125]

106. Turning to the issue of compensation, Swisslion maintains that the legal standard for compensation is full restitution. "For all breaches except expropriation, Macedonia suggests no other standard for compensation and Swisslion proceeds on the basis that the application of that standard is common ground for breaches of Articles 4 and 12 of the Treaty".[126] It stresses that "[h]aving carried out an unlawful expropriation, the Respondent cannot insist that it should be permitted to pay compensation at the level established in the Treaty as a prerequisite for lawful expropriation".[127] The Claimant must be put in the position it would have occupied had the wrongful action not been taken and the appropriate valuation method in the present case is a discounted cash flow model (DCF).[128] In this respect, "Swisslion does not seek an award to

[122] *Ibid*.

[123] *Id*., paras. 208 *et seq*.

[124] *Id*., para. 215.

[125] *Id*., paras. 221 *et seq*.

[126] *Id*., para. 235.

[127] *Id*., para. 238.

[128] *Id*., paras. 238 *et seq*.

compensate its lost profits as such. Swisslion seeks an award to compensate it for the loss in value caused to its business"[129], i.e. "the loss of management control over Agroplod, and associated reputational harm and lost sales".[130] It contends that the appropriate evaluation date is 19 May 2008.[131]

107. According to the Claimant, "[i]n this case, the actual investment contribution or 'sunk-costs' approach to damages yields a result broadly similar to the DCF method".[132] If that approach was to be followed by the Tribunal, additional compensation would need to added, to take account of the reputational harm caused and the lost sales resulting from it.[133]

108. Irrespective of the valuation method used, compound interest must be granted "at the rate of Swisslion's weighted average cost of capital, calculated from the valuation date until the date of eventual payment of the award".[134]

109. For those reasons, Swisslion requests that the Tribunal:

(a) "DECLARE that the Respondent has expropriated 5339 shares in Agroplod, in breach of Article 5 of the Treaty;

(b) DECLARE that the Respondent has impaired the Claimant's management, use and enjoyment of its investments, in breach of Article 4(1) of the Treaty;

(c) DECLARE that the Respondent has treated the Claimant's investments unfairly and inequitably, including by the unfair use of criminal procedures against the General Manager of Swisslion, in breach of Article 4 (2) of the Treaty;

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[129] *Id*., para. 254.

[130] *Id*., para. 259.

[131] *Id*., paras. 168 *et seq*.

[132] *Id*., para. 268.

[133] *Id*., paras. 280-281.

[134] *Id*. para. 285.

(d) DECLARE that the Respondent has failed to guarantee the observance of its commitments to the Claimant, in breach of Article 12 of the Treaty;

(e) ORDER the Respondent to pay to the Claimant compensation of not less than € 21,012,000 (twenty-one million twelve thousand Euros);

(f) ORDER the Respondent to pay to the Claimant additional pre-award and post-award interest at a rate of 14.3% per annum, accruing on a compounded monthly basis from 30 June 2011 to the date of payment of the Award;

(g) ORDER the Respondent to pay all of the costs reasonably incurred by the Claimant in preparing for and prosecuting these proceedings, together with the costs of the Centre and of the Tribunal; and

(h) ORDER such other relief as the Tribunal may consider appropriate or as the Claimant may subsequently request."[135]

D. REJOINDER

1. Factual Background

110. In its Rejoinder dated 12 September 2011, the Respondent takes issue with the Claimant's view of the facts and applicable legal principles. It asserts that, contrary to the Claimant's contention, the Ministry of Economy was entitled to sell to the Claimant the Second Tranche initially owned by the Pension and Disability Insurance Fund.[136] It stresses that "Article 8 of the Share Sale Agreement clearly referenced that the investment contribution was to be in Agroplod and neither the Share Sale Agreement nor the Business Plan provided that the Claimant would receive in return for its investment contributions shares of equivalent value".[137] It reaffirms its

[135] *Id*., Section VIII. Request for Relief.

[136] Rejoinder, para. 36 *et seq*.

[137] *Id*., para. 53.

position that the Claimant failed to comply with its obligations under the Agreement, as definitively ruled by the Macedonian courts.[138] It reaffirms that it did not approve the Claimant's alleged investment in Agroplod and asserts that, "as a result of Claimant's management of Agroplod and asset-stripping, Agroplod has no value and is on the verge of bankruptcy".[139] It submits that "the Claimant's misguided attempt to strike the Pelagonia Report from the record is revealing of the Claimant's serious misconduct *vis-à-vis* Agroplod"[140] and must be rejected. It contends that the decisions taken by the Ministry of Economy and the Macedonian courts were fully justified. It stresses that the Claimant lost the control of Agroplod only in 2010 and remains in control of Swisslion's subsidiaries. It adds that the judge in charge of the criminal investigations initiated at the request of the Agroplod Board of Directors concluded that there "is a grounded suspicion" that, *inter alia*, Agroplod's former directors "misused [their] authorizations" in order to reduce Agroplod's capital, transfer essential sales and marketing functions to the Claimant, entered into Business and Technical Cooperation Agreements to the detriment of Agroplod and sold "small inventory" to Swisslion Agroplod at an undervalue".[141]

2. Jurisdiction

111. The Respondent maintains and elaborates upon its objections to the jurisdiction of the Tribunal presented in the Counter-Memorial. It submits that the ICSID precedents invoked by the Claimant are not relevant and that, on the contrary, ICSID case law confirms its objections. It analyses the relevant provisions of the ICSID Convention and of the BIT, contends that Swisslion is not under the control of a Swiss investor, and concludes that the Tribunal has no jurisdiction *ratione personae*. It also maintains its objections to the jurisdiction *ratione materiae* of the

[138] *Id*., paras. 55 *et seq.*

[139] *Id*. para. 145 *et seq*.

[140] *Id*., para. 179 *et seq.*

[141] *Id*. para. 261.

Tribunal over the claims not presented in the Request for Arbitration and notes that, contrary to the Claimant's allegations, those claims have never been presented as ancillary claims.[142]

3. Merits

112. According to the Respondent, the Claimant's allegations that the Respondent violated the Treaty must be rejected for the following reasons:

113. First, the "Claimant undertook its investments unlawfully and in bad faith".[143]

114. Second, the "Claimant's distorted arguments on *res judicata* and collateral estoppel do not negate those doctrine's effect regarding the Claimant's non-compliance with the Share Sale Agreement".[144]

115. Third, the "Claimant's allegations that the Respondent impaired by unreasonable measures the Claimant's enjoyment of its investments must be rejected".[145] The Claimant's objections to the SEC proceedings lack any substantive merit and the Macedonian Law on Securities in respect of the Claimant's alleged investments does not give rise to a violation of the Treaty. The criticisms of the Anti-Corruption Commission have no basis and the Claimant's investment has not been impaired by the Respondent's actions relating to the Tutunska Bank Credit Facility. Moreover the Claimant has not proved that it suffered any prejudice in those respects.

116. Fourth, the Claimant's allegations that the Respondent treated the Claimant's investment unfairly and inequitably must be rejected.[146] More precisely, "[t]he actions of the Ministry of Economy leading up to its decision to commence legal proceedings do not violate the fair and

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[142] *Id*., para. 267 *et seq*.

[143] *Id*. para. 267 *et seq*.

[144] *Id*. para. 323 *et seq*.

[145] *Id*. para. 371 *et seq*.

[146] *Id*. para. 408 *et seq*.

equitable treatment standard".[147] "The Claimant was not denied justice before the Macedonian courts"[148] in breach of that standard. Neither the actions of the SEC nor those of the Macedonian authorities regarding the criminal investigations and proceedings constitute a violation of that standard.

117. Fifth, the Respondent submits that the claim that it failed to constantly guarantee the observance of its commitments must be rejected.[149]

4. Compensation

118. The Respondent maintains that, even if the Tribunal were to determine that there has been an expropriation of the Second Tranche, this would constitute a lawful expropriation. It maintains its position that the "use of the discounted cash flow methodology in this case is inappropriate".[150] It further contends that the Claimant's application of that methodology is seriously flawed: the proposed valuation date is wrong, the projection of lost future profits is speculative and indefensible and the Claimant applies an inflated compound interest rate. The relevant standard for purposes of compensation would be that provided in Article 5 of the BIT, "namely the market value of the investment adjusted for interest calculated on the annual LIBOR basis".[151]

119. The Respondent asserts further that "the Claimant's alternative claim for the value of its alleged investments must be rejected".[152] It does not approximate the situation that the Claimant would have been in had it never invested in Agroplod and contains numerous flaws.

120. For the reasons thus set out in the Counter-Memorial and the Rejoinder, the Respondent finally requests the Tribunal to grant the relief already requested in the Counter-Memorial.[153]

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[147] *Id*. para. 416.

[148] *Id*. para. 442 *et seq*.

[149] *Id*. para. 478 *et seq*.

[150] *Id*. para. 497.

[151] *Id*. para. 503.

[152] *Id*. para. 553 *et seq*.

E. HEARING

121. At the hearing, held from 14 to 18 November 2011, the Tribunal heard, as witnesses, Mr. Klime Meskov, Mr. Naume Petkovski, Mr. Ismael Ebipi, Mr. Slobodan Sajnoski, Professor Dr. Blagoja Aceski, Mr. Pesko Risteski, and Professor Dr. Branko Trajnovski as witnesses and Professor Dr. Milan Nedkov, Mr. Anthony Charlton, and Mr. Christopher Glover as experts. During the hearing, the Claimant and the Respondent confirmed and developed their submissions and arguments.

III. THE DECISION OF THE TRIBUNAL

A. JURISDICTION

122. The Respondent presents three objections to the Tribunal's jurisdiction.

123. It first contends that, in the Business Plan which Swisslion submitted with its bid to acquire the Second Tranche of shares in Agroplod in June 2006, the company committed itself to expand and enhance production in Agroplod and to retain hundreds of Agroplod employees. According to the Respondent, the Claimant intended to do neither and did neither.[154] Thus the alleged investment was made unlawfully and in bad faith.[155] As a consequence, it does not qualify for protection under the BIT and the Tribunal lacks jurisdiction.

124. The Claimant contends that the Respondent's allegations of illegality and bad faith cannot deprive the Tribunal of jurisdiction.[156] It adds that under the Business Plan it was allowed to make investments not only in Agroplod, but also in its other Macedonian subsidiaries. The Macedonian authorities were aware that Swisslion did not have a two-thirds majority in Agroplod and that

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[153] *Id*., para. 584.

[154] Transcript, Day 1, 198: 2-7.

[155] Transcript, Day 1, 197:17-22.

[156] Transcript, Day 1, 79:1-24.

consequently it could be necessary for it to make the bulk of its investments in the subsidiaries, which would employ the great majority of the personnel. The Claimant adds that it made those investments with the Respondent's consent. Thus, the investment was made and implemented legally and in good faith. In any event, the Tribunal has jurisdiction.

125. The Tribunal observes that, in most cases, ICSID tribunals have examined arguments that investments were made illegally or in bad faith only at the merits stage. It is only in exceptional circumstances that, for reason of judicial economy, ICSID tribunals have considered the question in a decision on jurisdiction.[157]

126. The Tribunal need not take position on the validity of the latter approach. It only observes that a complex debate opposes the Parties with respect to the interpretation and the application of the Share Sale Agreement and the Business Plan and it will enter into that debate when coming to the merits. At the present stage, it is enough for the Tribunal to note that illegality and bad faith are not *a priori* established. Thus, and in any event, the first objection to jurisdiction cannot be upheld.

127. The Respondent also stresses that the Claimant is under the control of a Serbian national, Mr. Draskovic, and not under the control of a Swiss entity. As a consequence, the Respondent submitted that the Tribunal lacks jurisdiction *ratione personae* to consider the case under the ICSID Convention and the BIT.

[157] See for instance *Phoenix Action Ltd v. Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, paras. 106-107. In *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case no ARB/06/5, Award, para. 127, the tribunal noted that: "…a distinction has to be drawn between (1) legality as at the *initiation* of the investment ("made") and (2) legality *during the performance* of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10." [Emphasis added.]

128. The Claimant submits that Swisslion is a Macedonian company owned by a Swiss company. Whatever may be the nationality of the owner of the Swiss company, the Tribunal has jurisdiction *ratione personae* under the Treaty.

129. The Tribunal notes that under Article 25 of the ICSID Convention:

> *(1)* The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre…
>
> *(2)* "National of another Contracting State" means:
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and, which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention"

130. Further to such provisions, Article 10 (5) of the bilateral Treaty provides:

> "A company which has been incorporated or constituted according to the laws in force in the territory of one Contracting Party and which before a dispute arises was under the control of investors of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention, be treated as a company of the other Contracting Party."

131. Article 2 of the Treaty adds that:

> "For the purpose of the Agreement…
>
> (2) The term "investor" shall refer with regard to either Contracting Party to…(c) juridical persons not established under the law of that Contracting Party:
>
> > (i) in which more than 50 per cent of the equity interest is beneficially owned by persons of that Contracting Party; or
> >
> > (ii) in relation to which persons of that Contracting Party have the power to name a majority of its directors or otherwise legally direct its actions."

132. The Tribunal observes that Swisslion is a Macedonian company. It is not disputed that more than 50% of its equity interest is beneficially owned by a Swiss company, DRD Swisslion, which has the power to legally direct Swisslion's action. The Claimant meets both conditions alternatively fixed by subparagraphs (i) and (ii) of Article 2 (2) (c) of the BIT and it is a Swiss

investor in Macedonia, whatever the nationality of the ultimate owner of DRD Swisslion may be. The Tribunal has jurisdiction *ratione personae.*

133. The Respondent recalls further that in its Request for Arbitration the Claimant complained of the decisions taken by the Securities and Exchange Commission on 19 May 2008 and of the initiation of proceedings by the Ministry of Economy for the termination of the Share Sale Agreement. It stresses that Swisslion alleged for the first time in its Memorial that the Macedonian courts expropriated its investment. In its submission, the Claimant may not "attempt unilaterally to expand the Tribunal's jurisdiction to extend to a new dispute which was not raised in the Request for Arbitration"[158] without previous consultations with the Respondent as provided for by Article 10 of the BIT. In the Respondent's view, the Tribunal should decline its jurisdiction over this new dispute.

134. The Claimant submits that "… not only do Swisslion's claims in relation to the Second Tranche of shares arise out of the same subject matter as the claims described in the Request for Arbitration, they follow directly from them. Accordingly, these claims are part of the same dispute",[159] and no further consultation was required. The Tribunal has jurisdiction *ratione materiae* over the entirety of the dispute, according to the Claimant.

135. The Tribunal recalls that, under Article 36 of the ICSID Convention, the request for arbitration "*shall contain information concerning the issues in dispute*". The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules") of ICSID specify in their Article 2(1) (e) that the request shall "*contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment"*.

[158] Counter-Memorial, para. 300.

[159] Reply, para. 43.

136. The ICSID Convention adds in its Article 46 that: "*Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre"*. The procedure to be followed in this respect is specified in Rule 40 of the Arbitration Rules.

137. The Tribunal notes that under those texts a distinction must be drawn between:

(a) the issues in dispute as presented in the Request for Arbitration; and

(b) the incidental or ancillary claims.

138. In the present case, in its Request for Arbitration, the Claimant complained of various breaches of the BIT due to acts and omissions "*undertaken by the Respondent and its entities, mainly SEC, but also the Basic and Appellate courts in Skopje"* and submitted that, as a result of those acts or omissions, it had suffered a *de facto* expropriation.[160] [Emphasis added.] It now also complains of decisions or judgments rendered since that time by the same bodies or courts which, according to Swisslion, violated the BIT, in particular its provisions relating to expropriation. Those claims are part of the issues presented in the Request for Arbitration, or, to take the words of the French and Spanish version of Article 36[161], enter within the subject matter of the original claim and are admissible as such[162] and may be presented without requiring further consultations between the Parties.

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[160] Request for Arbitration, para. 80.

[161] The French version, both in Article 36 and in Article 46, uses the words *"objet du différend"". (subject matter of the dispute).* The Spanish version uses the same expression "*objeto de la diferencia"* in Article 36. The same formulas appear in Article 2(1) (e) of the Institution Rules.

[162]The same kind of distinction has been made by the International Court of Justice (*Phosphate Lands in Nauru*, 26 June 1992, ICJ Rep., 1992, p.167), in ICSID case law (*CMS Gas Transmission v. Argentina*, ICSID Case No ARB/O1/8, 17 July 2003 para. 107) and in other arbitral awards (*Pope and Talbot Inc. v. Canada*, NAFTA/ UNCITRAL, 7 August 2000, paras. 24-25)

139. The objections raised by the Respondent to the jurisdiction of the Tribunal and the admissibility of the claims therefore cannot be upheld.

B. THE MERITS

140. Before addressing the claims, the Tribunal will set out its view of the key facts. It will not record every allegation made by the disputing Parties, but rather it will recount what the Tribunal finds to be the key facts for the purposes of making its determinations.[163]

1. The Facts

141. The Tribunal begins by taking note of the circumstances under which the investment at issue was made.

142. At the hearing, Mr. Klime Meskov, Swisslion's General Manager, testified that the decision to acquire a 25% shareholding in Agroplod was made by Swisslion DRO's controlling shareholder, Mr. Draskovic, at a meeting with the Mayor of Resen and some businessmen in April 2006. At the meeting, the Mayor explained Agroplod's importance to the local economy of Resen and the company's perilous condition. Mr. Meskov recalled the Mayor informing them that "the company is in very bad shape, its days are numbered, it is to stop, maybe it will work for another 10 days or maybe not even that long."[164]

143. The Mayor further informed the Swisslion representatives that the government was planning to sell its 25% shareholding interest in Agroplod to a strategic investor who could then revitalise the company and he asked Mr. Draskovic to rescue the company. Mr. Meskov testified in this regard:

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[163] Prior to the hearing, at the Tribunal's request, the Parties collaborated on the preparation of an Agreed Chronology. The Tribunal is grateful to the Parties for their collaboration which has assisted it in the review of the essential facts.

[164] Transcript, Day 2, 19: 6-8.

> *Mr Draskovic asked whether we could secure a controlling share, percentage of shares. He was told that there were shares in the hands of the employees who were willing to sell, and the state adopted a decision to declare Swisslion as the strategic investor and that it would publish a tender.*
>
> *Then Mr Draskovic said "agreed". Mr Draskovic wanted to say that he was omnipotent, that he could go into this investment without seeing anything and save this company, and he then gave me this responsibility.*[165]

144. On 16 March 2006, the government deemed Agroplod to be "a corporation of significance for the economy of the Republic of Macedonia".[166]

145. Swisslion then acquired its initial shareholding interest in Agroplod, purchasing the First Tranche of 4,180 shares on 30 March 2006 (and acquiring an additional 820 shares on 13 April 2006).

146. Mr. Meskov acknowledged that the investor did not even visit Agroplod before buying the shares, noting that "business logic shows something entirely different from what we had done".[167] It was only after the decision to acquire a 25% stake in Agroplod was taken that Mr. Meskov looked at the company's productive assets and the conditions of its operations. He testified that despite having been "warned of Agroplod's dire condition, and knowing that Agroplod was continuously running at a loss, when we inspected it I was still shocked by its condition".[168] Agroplod was in a far more serious state of disrepair and dysfunction than had been anticipated. However, it was considered to be "impossible" to withdraw, because "Draskovic had already given his word in front of so many businessmen in Skopje".[169]

147. Notwithstanding the circumstances in which it had placed itself when it acquired the First Tranche, Swisslion set about to make the best of its investment by seeking to put Agroplod on a

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[165] Transcript, Day 2, 19: 13-22.

[166] Exhibit R-1.

[167] Transcript, Day 2, 18: 11-13. During the hearing, Mr Meskov expressed the belief that no one else would win the tender and obtain management control of the company, "[b]ecause I saw Agroplod, I know what were Agroplod's performances and I know nobody else would be crazy enough to enter such craziness." The interpreter later corrected the word "craziness" to read "foolishness". Transcript, Day 2, 34: 14-18.

[168] Meskov first witness statement, para. 11.

[169] Transcript, Day 2, 20: 9-11.

better footing with its creditors, to reduce the very difficult financial constraints under which the company was operating, as well as to devise a plan for the company's revitalisation.[170] On 20 April 2006, approximately one month prior to the 29 May 2006 meeting at which the Revitalisation Plan was approved, a new company, Swisslion Agroplod, was incorporated with Agroplod holding an approximately 80% shareholding interest.[171]

148. On 3 May 2006, as anticipated, the Government issued a decision to offer for sale 5,339 shares in Agroplod (the Second Tranche). This decision was followed by the Ministry of Economy's submission to the Macedonian Government of an "Initiative" for the share sale and two days later by the public announcement of the call for bids.[172]

149. On 7 May 2006, Swisslion acquired a further 788 shares in Agroplod as a result of the exercise of a lien. This acquisition put Swisslion's existing shareholding (prior to its bidding for the Second Tranche) at over 25%.

150. It became clear as Swisslion became more involved with Agroplod, and before it opted to acquire control, that one major shareholder, Mr. Giorgi Kitinov, opposed the acquisition. Mr. Kitinov's opposition was manifested virtually from the outset. Mr. Meskov testified that notwithstanding his attempts to reason or negotiate with Mr. Kitinov, it was evident before the

[170] Transcript, Day 2, 3: 11-18: "I was greatly disappointed by what I saw, because we had started an investment of which we were not particularly informed, but the situation was as it was. We had a meeting with the executive directors. We presented our reviews and directions during the meeting. We said that since we already bought the shares, we were interested in Agroplod, so we would make maximum effort to improve the situation in Agroplod."

[171] On 31 May 2006, two days after the approval of the revitalisation platform, the Central Registry of the government of Macedonia recorded a non-monetary investment in Swisslion Agroplod by Agroplod of MKD 128,212,400 (€200,000). At this time, it appears that the share capital of Swisslion Agroplod was owned by Swisslion (8.01%), Swisslion Takovo (8.01%), and Agroplod (83.98%). The parties disputed the precise amount of equity held by the three shareholders. In any event, this was the high water-mark of Agroplod's equity interest in Swisslion-Agroplod. As monetary and non-monetary contributions were subsequently made by the Swisslion companies, Agroplod's interest was diluted.

[172] Exhibit R-38.

Second Tranche was acquired that he was opposed to Swisslion's acquiring control of the company.

151. On 29 May 2006, Swisslion made a presentation to Agroplod's Shareholder Assembly. Mr. Draskovic's plan proposed an economic revitalisation and organisational restructuring of Agroplod on the principle of "specialisation of the activity and creating profitable centres while respecting the principles of the contemporary economic practice and science." The plan went further to note that Agroplod should be divided into three legal entities or enterprises: one concerned with the food industry, the second with agricultural production, and the third with tourism.[173]

152. This meeting is noteworthy, not only for the fact that the plan was considered and approved by the shareholders, but also for the fact that Mr. Kitinov opposed the plan. He left the meeting after stating his opposition to the agenda. The Assembly then discussed and approved the Revitalisation Plan.[174]

153. Mr. Meskov testified that the Claimant was aware at least by the Shareholder Assembly of 29 May 2006 that Mr. Kitinov would block any capital increase in Agroplod:

> *Yes, yes, he blocked. He actually left it [the Shareholder Assembly]. He did not vote for the programme, for the revitalisation plan. The revitalisation plan was adopted by a simple majority and under this programme you could not do any changes to everything that would require two thirds majority, so you could not introduce status changes. This was a programme adopted by a simple majority and this is why we were limited in implementing the programme. That very limitation made us establish the daughter companies. That was a forced decision.*[175]

154. Having concluded after this meeting that it would not be possible to invest directly in Agroplod, Swisslion resolved to make investments in Swisslion Agroplod, and as events

[173] Exhibit C-15.

[174] Exhibit C-14.

[175] Transcript, Day 2, 26: 20-25; 27, 1-4.

transpired, in two other as yet unincorporated companies in which Swisslion would ultimately hold a substantial majority interest (namely, Swisslion Agrar and Prespa Turist).

155. Mr. Kitinov's opposition assumes importance in this case because it puts in question precisely how Swisslion would invest capital in Agroplod if it could not secure the required two-thirds majority of votes needed under Macedonian law to make a fundamental change to the capital structure of the company.[176] Mr. Meskov testified that Mr. Draskovic was unaware of this requirement of Macedonian law when he presented the Revitalisation Plan to the Shareholder Assembly.[177]

156. The evidence shows that Mr. Kitinov maintained a vociferous and active opposition to any reorganisation of Agroplod that involved an increase in the company's share capital, presumably because he did not want his shareholding to be diluted by new capital investment by Swisslion. From the outset, therefore, Swisslion faced significant shareholder opposition, and, as events transpired, Mr. Kitinov repeatedly complained about the Claimant's actions and petitioned the Government to take action against it.

157. Thus, in addition to buying a controlling interest in an important and well-known, but neglected and run-down, food processing company, Swisslion exposed itself to a corporate governance situation that can only be characterised as dysfunctional, with no guarantee that Swisslion could fundamentally change Agroplod's capital structure.

158. On 31 May 2006, two days after the Revitalisation Plan's approval, the Central Registry of the Government recorded a non-monetary investment in Swisslion Agroplod by Agroplod of MKD 128,212,400 (€200,000). At this time, the share capital of Swisslion Agroplod was

[176] Exhibit C-107, Article 421(4) of the Company Law of the Republic of Macedonia.

[177] Transcript, Day 2, pages 28: 24-25, 29: 1-5: "Mr Draskovic was not aware of our legislation. When he wrote this, he had in mind a situation where we would have two thirds majority. That was the kind of decision he had in mind. We did not receive that two thirds majority, so we had limitations regarding completion of capitalisation. And before that, we knew that Mr Kitinov would not allow such decision to be made."

approximately as follows: Swisslion (8.01%), Swisslion Takovo, a Serbian subsidiary of the Claimant's parent company (8.01%), and Agroplod (83.98%).[178]

159. The sale of the Pension Fund's 25% shareholding in Agroplod followed swiftly thereafter. On 1 June 2006 the Ministry of Economy appointed a Commission to consider bids for the Second Tranche. Four days later, Swisslion submitted its bid together with the Business Plan that would later form an integral part of the Share Sale Agreement.

160. Mr. Meskov testified that on 5 June 2006, after Swisslion had submitted its bid, a public meeting of the Tender Committee was held to open the bids. Only two bidders were eligible because they had to be already in possession of at least 25% of Agroplod shares. Mr. Meskov testified further that:

> *When the Tender Committee came to the envelope that Mr Kitinov had submitted, Mr Kitinov told the Committee that it was not to be opened by anyone other than the Minister. The Tender Committee stated that if the envelope was not opened at the public meeting, then it would not be a valid bid. Mr Kitinov took the envelope that he had submitted and left the meeting, stating that he was going to deliver it to the Minister himself. A government official was taking minutes of this meeting…*[179]

161. Two days later, on 7 June 2006, the Commission issued a favourable opinion on Swisslion's bid (in the end, it was the only bid received by the Commission).

162. While this process was underway, Mr. Kitinov sought to thwart it. He apparently wished to prevent Swisslion from acquiring the bloc of shares that he had been unable to hold, and he and DOO Likom (a company that he controlled) filed an application in the First Skopje Basic Court to annul the Government's call for bids for the Second Tranche. The application was refused on 9 June 2006 when the Basic Court ruled that it lacked jurisdiction to hear the claim.[180] This ruling cleared the way for the completion of the share sale.

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[178] The Parties disagree as to whether the value of the invested assets was correctly stated, but the approximate respective values are satisfactory for present purposes.

[179] Meskov first witness statement, para. 19.

[180] Exhibit C-112.

163. According to Mr. Meskov, Mr. Kitinov threatened that if Swisslion were to continue with the revitalisation programme, then once the political party to which he belonged, the Internal Macedonian Revolutionary Organisation, had won the elections, and the political party to which his son belonged, the New Social Democratic Party, had become a member of the ruling coalition, he would make sure that Swisslion was "disgraced" by the institutions of the State and in the media.[181] According to Mr. Meskov, Mr. Kitinov boasted of his ability to manipulate the government with a colourful metaphor: "He said, '[I]f you threw a pillow of feathers from the highest building in Skopje, can you collect these feathers?' And he said, 'I can do that with a thousand lies, and with a million truths, you will not be able to prove me wrong.' And I realised that this was the case, so the government fell for the lies of Mr. Kitinov."[182]

164. Mr. Kitinov is neither a Party to this proceeding nor a witness, and therefore he has had no opportunity to respond to allegations made against him. While this does not lead the Tribunal to doubt Mr. Meskov's description of his understanding of Mr. Kitinov's motivations, the fact is that the Tribunal has heard only one side of the shareholders' dispute, and this point is to be borne in mind in this proceeding.

165. On 14 June 2006, the Ministry of Economy accepted Swisslion's bid for the Second Tranche and the parties immediately signed a rather skeletal Share Sale Agreement drafted by the Government. The agreement was registered by the Ministry of Economy on 23 June 2006, the same date on which the Agroplod shares were paid for by and transferred to Swisslion.[183]

166. Having acquired managerial control over Agroplod, Swisslion then began to restructure the company's operations. As is evident from the Parties' pleadings, the way in which Swisslion restructured Agroplod's operations is a matter of contention between the Parties.

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[181] Meskov first witness statement, para. 18.

[182] Transcript, Day 2, 70: 12-18.

[183] Exhibit C-18.

167. For its part, the Claimant noted that the Business Plan expressly referred to Swisslion Agroplod and this company was part of the organisational restructuring and the revitalisation of the production process of Agroplod "through realisation of the principle of creating profit centres from technological units". In furtherance of that, the Plan contemplated that "*a major part of the new investment was planned to be invested in Swisslion Agroplod*" [emphasis added] and that the investment in this company would enable the company-founder Agroplod "to realise big financial profit from the profit of its company".[184]

168. In the present proceeding, the Claimant asserted that it restructured Agroplod in accordance with the Business Plan and the Revitalisation Plan, that it made all of the promised investments, and that the government approved its investment contributions.[185] With respect to the last assertion, Swisslion adverted to its written reports to the Ministry of Economy, to which the Ministry did not object, as well as a visit of a governmental Commission to Resen on 15 February 2007, during which a detailed presentation was made, after which the Commission's members "acknowledged orally that Swisslion had done more than envisaged in the business plan, and told Swisslion management that all of the obligations under the share purchase agreement had been met".[186] The Tribunal will revert to this meeting below.

169. The Respondent had a very different view, pointing out that the first page of the Business Plan referred to "... investments which will be directly invested, mainly through the so much-needed working capital, *in Agroplod* AD-Resen...", and that under Article 8 of the Share Sale Agreement, the buyer was obliged to invest *in Agroplod* by the end of 2006 and further that according to Article 10, the buyer was obliged to retain the existing number of employees *in*

[184] Exhibit C-16.

[185] Memorial, paras. 40-60.

[186] Memorial, para. 59.

Agroplod at the time of the signing of the agreement and further to employ an additional 32 employees by the end of 2007.[187] [Emphasis added in each instance.]

170. The Respondent emphasised that this issue had been put before the Skopje Basic Court and the court had resolved that Swisslion did not make the promised investments in Agroplod as required by Article 8 of the Share Sale Agreement or in accordance with the timeframe stipulated in the Agreement.[188]

171. The Respondent also emphasised the alacrity with which Swisslion moved to implement its plan to invest in Swisslion Agroplod and two other subsidiaries (which did not exist at the time of the execution of the Share Sale Agreement but which appeared to be contemplated in the Business Plan[189]) rather than "in Agroplod" itself.

172. In this respect, the Respondent referred to two documents that indicated that the day after the execution of the Share Sale Agreement, Agroplod wrote to its Skopje branch office informing it of its closure and the "taking over [by Swisslion Agroplod] of the entire production activity from Agroplod" and that "Agroplod AD Resen, as of 01.08.2006 will no longer have employees and wages".[190] The Respondent considered these documents to be inconsistent with the Claimant's representation in the Business Plan that "250 [employees] will be retained in AGROPLOD AD-Resen".[191] It also noted that Swisslion Agrar was incorporated on 14 July 2006 and that Prespa

[187] Exhibit C-18. Counter-Memorial, paras. 53-94.

[188] Counter-Memorial, para. 79 *et seq.*

[189] Exhibit C-16, the Business Plan, at pp. 16-17, referred to the organisational restructuring phase in Agroplod as having already started and refers to "separate legal entities started to be realised...", the implication being that additional legal entities would be created.

[190] Exhibits R-2 and R-3. Counter-Memorial, paras. 95-106.

[191] Exhibit C-16, page 3 of the English translation. A report prepared by the Military of Labour and Social Policy, dated 16 November 2007, recorded that the number of employees in Agroplod itself and by the end of 2007 fallen to 25. Exhibit C-36, p. 1 of the English translation.

Turist's incorporation followed on 20 July 2006.[192] Agroplod employees and assets were thus transferred to the three subsidiaries.[193]

173. The Respondent noted that the transfer of employees out of Agroplod was also later addressed by the Skopje Basic Court and was found not to have been consistent with Swisslion's contractual obligations.[194]

174. The Respondent asserted further that Swisslion also used its control of Agroplod to cause the company to transfer assets out of Agroplod and into the subsidiaries in which Swisslion then invested. The three subsidiaries were given further access to other Agroplod assets by means of three "Business and Technical Cooperation Agreements". Such agreements were entered into on 15 August 2006 (between Agroplod and Swisslion Agroplod and Agroplod and Prespa Turist[195]) and on 27 September 2006 (for Agroplod and Swisslion Agrar[196]) and the Respondent alleged that the agreements operated to the advantage of Swisslion, but not to Agroplod.[197]

175. The Respondent also asserted that the cash investments claimed to have been made by the Claimant and Swisslion Takovo in Swisslion Agrar and Prespa Turist in 2006 could not be regarded as investments in Agroplod or in the so-called "Agroplod group".[198] It pointed to what it considered to be a temporal impediment to the argument that Swisslion made a particular investment in Swisslion Agroplod, noting that the Claimant had alleged that its investment contribution obligation under the Share Sale Agreement was satisfied by the provision of

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[192] Exhibits C-86 and C-85, respectively.

[193] The decisions to move employees out of Agroplod at the execution of the Share Sale Agreement were not addressed by the Claimant's Reply, but at the hearing, Mr Petkovski disavowed the legal effect of one of the two documents on which the Respondent relied because it was an unsigned document; the other document to which the Respondent was not seriously contested. Transcript, Day 2, 110: 16-25, 111: 1-20.

[194] Counter-Memorial, paras. 104-105.

[195] Exhibits C-21 and C-22, respectively.

[196] Exhibit C-25.

[197] Counter-Memorial, paras. 139-146.

[198] Rejoinder, para. 84.

€400,000 as a capital contribution to Swisslion Agroplod in return for shares in May 2006. However, this contribution was made before the Share Sale Agreement was even entered into and could not therefore constitute performance of that agreement.[199]

176. These and other actions formed the basis for the Respondent's view that Swisslion had engaged in "asset-stripping" and thus had made an investment in bad faith.[200]

177. As already noted in the Tribunal's discussion of the Respondent's jurisdictional objections, a debate arose between the Parties with respect to the interpretation and the application of the Share Sale Agreement and the Business Plan. The precise meaning of the Business Plan, which formed an integral part of the Share Sale Agreement, was the central issue in subsequent national court proceedings as well as before the Tribunal.

178. There is little dispute that Swisslion did apply itself to revitalising the business which had previously been operated by Agroplod and that it did in fact make a series of monetary and non-monetary investments during the balance of 2006 and into 2007. Nor does it appear to be disputed that Mr. Meskov and his team devoted themselves to restructuring and modernizing the business. Rather, the dispute concerned the destination of those investments, in that they were made in the three subsidiaries rather than in Agroplod itself. As a result of the valuation of the shareholders' respective contributions to the three companies, Swisslion ended up with a substantial majority of shares in each (roughly 80% of the equity in each). In addition, as noted, employees were moved out of Agroplod to the various companies such that by 2007, Agroplod had essentially become a holding company – in the Respondent's view, a "shell". The Claimant rejected any allegation that it had engaged in asset-stripping, arguing that in investing in subsidiaries in a way that maintained Agroplod's value through its shareholding therein, albeit in a minority position, Swisslion acted consistently with the Business Plan and the contract of which it formed an integral part.

[199] Rejoinder, para. 85.

[200] Counter-Memorial, para. 146.

179. This difference in perspective was reflected in the lexicon of the Parties' pleadings, with the Claimant and its damages expert referring to the three subsidiaries as "Agroplod subsidiaries" and the Respondent, for its part, consistently referring to the same companies as the "Swisslion subsidiaries". Irrespective of the terminology employed, the fact is that after Swisslion caused investments to be made into the three companies, Agroplod's shareholding in each was approximately 20 to 22% during the relevant period.

180. Having regard to the terms of the Business Plan and the Share Sale Agreement, the Tribunal considers that there were ambiguities that could give rise to differing good faith interpretations. The Business Plan did contemplate dividing Agroplod's business into different legal entities. At the same time, the Share Sale Agreement spoke of investments and the retention (indeed an increase) of employees "in Agroplod". It is not difficult to conceive that, faced with Mr. Kitinov's resistance to fundamental change to Agroplod, Swisslion would seek to implement the Revitalisation Plan in another way. The Respondent appeared to insist that an investment directly into Agroplod was required even without any increase in the capital stock or adjustment of the shareholdings. When pressed on this point, counsel suggested that Claimant's investment be considered and recorded as a "gift."[201] The Tribunal did not find the suggestion that a significant capital investment be made in Agroplod in the form of a gift to be compelling – particularly where a large minority shareholder opposed Swisslion's involvement in the company. This would require Swisslion to enrich the very shareholder who opposed the investment. Yet the solution employed by Swisslion, which was apparently successful in rejuvenating the business formerly conducted by Agroplod, also raised questions about its consistency with the Share Sale Agreement.

181. The Tribunal therefore considers that it was possible for each contracting party to form a view as to what was permissible under the terms of their agreement, and further, that such views

[201] Transcript, Day 1, pp. 191-192.

could, in good faith, differ. This finding is of significance both for the Claimant's assertions that there was no lawful basis for the Ministry of Economy's decision to seek termination of the contract and for the Respondent's assertions that the investment was made in bad faith and tainted by illegality.

182. Article 11 of the Share Sale Agreement required Swisslion to make monthly reports to the Ministry of Economy as to its investment activities in Agroplod during the balance of 2006.[202] In addition, such investments were to be realised by 31 December 2006. With respect to the issue of monthly reports, the Parties agree that only two reports were prepared, one dated 6 October 2006 and the other 22 December 2006.[203] The failure to file monthly reports was later found to be in breach of the Share Sale Agreement.[204] The Parties also agree that certain investments were registered in early 2007 rather than by 31 December 2006.[205] Mr. Meskov testified that although certain investments were not recorded until February 2007, the Board decision to make such investments had been taken in August 2006 and that was the effective date of such investment contributions.[206]

183. Putting aside the failure to file monthly reports, on the substance of what was reported, the 6 October 2006 shows that Swisslion did advert to its difficulties with Mr. Kitinov when explaining why it was not investing at the level of Agroplod. Indeed, it appears that the report was prompted by Mr. Kitinov's complaints to the Ministry of Economy. Mr. Meskov testified in this regard that:

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[202] Exhibit C-18. Article 11 provides: "The control over the realisation and the complete investment contributions shall be performed by the Ministry of Economy. The buyer shall submit monthly reports to the Ministry of Economy on the realisation of the investment contribution."

[203] The Reply sought to excuse this on the basis that the Ministry of Economy "never requested more frequent written reports." Reply, para. 157.

[204] Exhibit C-74, page 12, Counter-Memorial, para. 215.

[205] The Respondent saw this as a breach of the obligation to make all investments by 31 December 2006. At the hearing Mr Meskov testified that although certain investments in Swisslion Agrar and Prespa Turist were not formally registered until 25 February 3002, the Board decision to make them had been taken in August 2006 and the decision took effect as of that date.

[206] Transcript, Day 2, 13:7-25; 14: 1-4.

> *What my report says, it was forced by the letter from Kitinov to the minister of economy where he claimed that we are not investing, that we invest in our own companies that we invest with old equipment, supposedly. We were representing an old Agroplod equipment as our own investments. This was again the letter to the Ministry of Economy. That is why on 6 October I did this, I had no reason to send the letter --*[207]

184. Mr. Meskov's report noted that:

> *Because of the obstruction from a share holder of possessing over 33% from the shares of Agroplod, the committee of shareholders has not been able to reach a decision for realisation of investment provided with the business plan. Because of that we were forced to realise the above mentioned investment to the capital and contract related companies of Agroplod.*[208]

185. His second report likewise adverted to difficulties of "obstruction from a shareholder possessing over 33%" of the company's capital.[209]

186. The reports' discussions of employees in Agroplod were capable of being misunderstood. The October report asserted that "the investments are within the facilities (objects) of Agroplod in which the existing employees have been employed"[210] (which appears to mean that the employees were working in the facilities previously operated by Agroplod, but they were no longer Agroplod employees). The December report was, in the Tribunal's view, not accurate in that it attached schedules listing investments that were said to have been made "in Agroplod", when they were in fact made in the other three companies.[211] The December report also represented that the "total of employees rises from 578 + 72 = 650"[212], but this did not specifically address how many were Agroplod employees.

187. At the hearing, Mr. Meskov was pressed on the investments' destinations and the number of employees and he conceded in cross-examination that labelling the investments as having been

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[207] Transcript, Day 2, 46: 9-16.

[208] Exhibit C-26.

[209] Exhibit C-27.

[210] Exhibit C-26.

[211] Likewise, Swisslion's 15 March 2007 response to the Ministry's request for further documentation contained tables that are described "invested monetary and non-monetary funds into Agroplod AD-Resen".

[212] Exhibit C-27.

made at the level of Agroplod was a "mistake".[213] He testified further that he and his team "considered everything to be Agroplod" and they "never mentioned the subsidiaries … we spoke only about Agroplod. That is probably why I put it down like this."[214]

188. In the Respondent's view, the report was more than a mere mistake; it was positively misleading[215], given that the Ministry's formal request for proof of the investments and employee numbers specifically sought documentation "at the level of Agroplod", a point which Mr. Meskov testified he did not appreciate at the time.[216]

189. However, the Tribunal cannot fully judge what impact, if any, the descriptions of the destination of the investments and the transfers of employees may have had on the Ministry of Economy because no witness with direct knowledge of the Ministry's consideration of the reports was produced by the Respondent.[217] The paucity of documentary and testimonial evidence pertaining to the Ministry's deliberations was a source of concern for the Tribunal at the hearing.

190. During the written phase of the proceeding, as well as at the hearing, evidence was tendered in respect of a meeting held in Resen on 15 February 2007. On that day, three government officials, Vencislav Arsov, Slobodan Sajnoski, and a third, unidentified official, travelled from Skopje to Resen for a meeting with Swisslion and Agroplod officers and Board members of Agroplod.

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[213] Transcript, Day 2, 57: 15-18.

[214] Transcript, Day 2, 58: 21-25, 59: 1.

[215] The Respondent took the position that since the Claimant "failed to provide accurate information regarding what the Claimant had actually done … therefore it could not now claim that the Ministry of Economy approved the Claimant's investment and was precluded from subsequently objecting to the Claimant's failure to comply with the agreement." Rejoinder, para. 132. See also the Counter Memorial, paras. 121-131.

[216] Counter-Memorial, paras. 130-131. Transcript, Day 2, 51: 23-25; 52: 1-5.

[217] There is evidence that Mr Arsov, the responsible official in the Ministry of Economy, to whom Mr Meskov testifies he reported, is no longer in the employ of the Ministry. A letter from Minister of Economy Valon Sarachini to Mrs. Olivera Kitanova, dated 16 December 2011, referred to Mr Arsov as a former Ministry employee. Exhibit R-109.

191. The Claimant's witnesses characterised this delegation as a "Commission" formally charged with determining Swisslion's compliance with the Share Sale Agreement.[218] Both Mr. Meskov and Mr. Naume Petkovski, the then-Chairman of the Board of Agroplod, testified that after receiving a detailed presentation of Swisslion's investments, including the companies in which the investments were made, the Commission members expressed their satisfaction and accepted that Swisslion had complied with the contract.

192. In his written witness testimony, Mr. Meskov recalled that the officials gave assurances as to the Ministry's satisfaction with Swisslion's investment activities:

> *... Mr Sajnoski said that the Ministry considered that all the investments that we had reported were investments in Agroplod in satisfaction of Swisslion's obligations under the agreement. He said that the intentions of the government in proclaiming Agroplod as a company of significant interest had been fulfilled. Mr Sajnoski then said that his Commission would write a report to the ministry confirming that the share purchase agreement had been fulfilled. In addition, Mr Arsov stated that if the agreement had not been fulfilled it would already have been unilaterally terminated, and since it had not been terminated, this meant that it had been fulfilled. We never received the report. I telephoned Mr Sajnoski to request a written record of Swisslion's compliance with the share purchase agreement. I visited Mr Sajnoski and Mr Arsov at the Ministry to repeat my request. On every occasion I was told that Swisslion had complied with its obligations, that the agreement did not envisage such a document, and that there was no need for one. No one from the government ever suggested, orally or in writing, that Swisslion had not complied with its investment contribution obligations, until court proceedings were commenced in March 2008...* [219]

193. Mr. Meskov also asserted in his written testimony that there was contemporaneous documentary evidence of what the Ministry officials said because minutes of the meeting had been taken and filed in Agroplod's corporate archive:

> *Minutes of the inspection of 15 February 2007 were taken by Mr Tomce Petkovski, an employee of Agroplod. I am no longer able to access these minutes, which I know were written and filed by Mr Petkovski, because I no longer have access to Agroplod's document archive.* [220]

194. In its Counter-Memorial, the Respondent did not present a statement from any witness with direct knowledge of the meeting. It did submit a witness statement from an official of the Ministry of Economy, Mr. Ismail Ebipi, who testified that it is standard practice for a Commission to be

[218] Memorial, para. 59, Meskov first witness statement, para. 45.

[219] Meskov first witness statement, para. 46.

[220] Meskov first witness statement, para. 47.

established by a "Decision" of the Minister. Mr. Ebipi stated further that he had caused a search to be performed of the Ministry's records and had been unable to find any such Decision to establish a Commission to determine the Claimant's compliance with the Share Sale Agreement.[221] He testified further that he had been unable to locate any report or official record of the alleged meeting and concluded therefore that no such official meeting occurred. He did not rule out the possibility that Mr. Sajnoski and Mr. Arsov may have visited Agroplod in February 2007, but given that he had been unable to locate any official report of the visit, he did not believe that such visit was an "official inspection to verify Swisslion's investments under the Share Sale Agreement".[222]

195. Messrs. Meskov and Naume Petkovski[223] then filed Reply witness statements affirming the former's prior testimony. In addition to generally comporting with Mr. Meskov's recollection about what was said and done at the meeting, Mr. Petkovski also recalled that an "Agroplod employee was also taking minutes of the meeting" and these were "stored in Agroplod's archives."[224]

196. The Respondent then filed a Rejoinder witness statement by Mr. Slobodan Sajnoski, one of the Ministry officials who did travel to Resen to meet with Swisslion and Agroplod officials. Mr. Sajnoski resigned from the Ministry of Economy in 2007 and is no longer employed by the Government.[225] His statement took issue with Mr. Meskov and Mr. Petkovski's recollection that contractual compliance was discussed in detail. Calling their testimony "simply incorrect", he denied that any formal Commission had been established to verify Swisslion's compliance with

[221] Ebipi first witness statement, paras. 10-11

[222] Ebipi first witness statement, para. 14.

[223] Petkovski witness statement, paras. 11-15.

[224] Petkovski witness statement, para. 14.

[225] It also appears that Mr Arsov is also no longer in the Government's employ.

the contract or that any assurances had been given as to the Ministry's satisfaction with Swisslion's contractual performance.[226]

197. Mr. Sajnoski noted further that he and Mr. Arsov had both been members of the Tender Committee that had approved the bid, and under Ministry policy and practice members of a tender committee cannot serve on a commission that determines whether the winning tenderer had complied with its obligations.[227] He also stated his belief that no formal commission was established.[228]

198. According to Mr. Sajnoski, he and his colleagues arrived in the late morning and had a meeting with several people with whom they drank tea and coffee. He did not recall any presentation or reviewing any documents at the meeting. He said that after the introductory meeting, they toured the biscuit production floor and apple orchard, during which management described the production activities. There was no discussion as to the destination of investments. After the plant and orchard visits, there was a lunch and thereafter they returned to Skopje.[229] In respect of the claims that confirmation of contractual compliance had been given and the promise of a written report was made, he said these were "untrue".[230]

199. At the hearing, Mr. Petkovski recalled that "the people had arrived at 9:00 AM", following which a detailed and lengthy meeting of three to four hours "at the least" was held, followed by a visit to the production facilities and a lengthy lunch.[231] He recalled that the Ministry officials

[226] Sajnoski witness statement, para. 8.

[227] Sajnoski witness statement, para. 11.

[228] Sajnoski witness statement, para. 12.

[229] Sajnoski witness statement, paras. 13-14.

[230] Sajnoski witness statement, paras. 15-18.

[231] Transcript, Day 2, 115: 24-25; 116: 1-2. This was consistent with his written testimony that the "inspection held by the Ministry of Economy lasted almost a whole day."

inadvertently left the documents given to them in Resen. As a result, the following day he instructed his driver to convey them to the Ministry's offices in Skopje.[232]

200. Mr. Meskov's oral testimony, although consistent with Mr. Petkovski's recollection of having a detailed discussion of contractual compliance with the government officials, suggested a somewhat more summary meeting. In particular, whereas Mr. Petkovski recalled Mr. Meskov making a "complete presentation", with "questions coming from managers" and the "managers also presented their reports on the implementation",[233] at the hearing, Mr. Meskov recalled that the government officials were not interested in looking at the documents and requested that they be presented to the Ministry of Economy in tabular form.[234] Mr. Meskov adhered to his position, previously expressed in his witness statements, however, that assurances were given. Mr. Petkovski likewise adhered to his prior testimony.[235]

201. Mr. Sajnoski's oral testimony stood in marked contrast to that of the Claimant's witnesses. He denied having given the oral assurances the Claimant's witnesses said he gave[236] or that he personally confirmed that Swisslion had satisfied the obligations under the contract and the Business Plan[237]. He also stated that they did not "directly" discuss Swisslion's compliance with the Share Sale Agreement.[238]

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[232] Transcript, Day 2, 87: 7-11.

[233] Transcript, Day 2, 86: 8-15; 115:7-20.

[234] Transcript, Day 2, 51: 7-22. He noted in particular: "We had prepared several folders of proofs for all investments, both regular and extraordinary. When the committee came, they said that did not want to look at those documents, but they will look at those materials in the Ministry. They asked us, since we are talking about a large volume of paperwork, they asked us to provide tabulated presentation of the investment and provide them with a chart that is easier to read…"

[235] Transcript, Day 2, 55: 24-25, 56: 1-6; Day 2, 86: 16-25.

[236] Transcript, Day 2, 129:7-17.

[237] Transcript, Day 2, 130: 2-9.

[238] Transcript, Day 2, 155:17-24.

202. His testimony suggested a rather prosaic meeting lasting about "half an hour to an hour"[239], that it was "a usual visit that the ministry is making within its efforts to help companies in transition"[240], and what he could "remember with certainty was that we discussed the obstacles that the company had in management terms" and this was mostly "regarding M.r Kitinov, as a minority shareholder".[241] He agreed with the Claimant's witnesses that they did visit the production plants and orchards, but "I wouldn't call it an inspection, it was just a walk-through".[242]

203. Faced with the witnesses' conflicting recollections of the meeting, at the hearing's conclusion, the Tribunal requested both Parties to provide further documentary evidence, if such was available, with respect to the meeting.[243]

204. For its part, with respect to the minutes of the meeting to which both Mr. Meskov and Mr. Petkovski referred, the Claimant was asked whether (i) it ever communicated a copy of the meeting's minutes to the Ministry of Economy; and (ii) whether it submitted a copy of such minutes to the court(s) or referred to them in its pleadings before the courts. If any such communication or submission existed, the Claimant was asked to provide a copy to the Tribunal.

205. As for the Respondent, it was requested to cause a search to be conducted of Agroplod's archives for any such minutes and any other contemporaneous documents that might relate or refer to that meeting and, if any such minutes or documents were located, to produce them. The Respondent was also requested to conduct another search of its archives for any records of any type that referred or related to the visit of 15 February 2007 and, if it found any such records, to produce them.

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[239] Transcript, Day 2, 155: 9.

[240] Transcript, Day 2, 147: 12-13.

[241] Transcript, Day 2, 156: 6-9.

[242] Transcript, Day 2, 157: 24-25.

[243] Tribunal Order, dated 17 November 2011.

206. Under Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules, the Tribunal "may, if it deems necessary at any stage of the proceedings" call upon the Parties to produce documents or other evidence. Such a power must be used with care when the parties have already produced what they consider to be the relevant documents and have submitted witness testimony and pleadings. However, the seminal importance attributed to the 15 February 2008 meeting by both Parties during the hearing led the Tribunal to exercise its powers under Article 43. It did so mindful of the need to ensure that if documents were located and produced by one Party, the other must be given an opportunity to review and comment on them.

207. After the hearing, in response to the Tribunal's question posed to it, Swisslion confirmed that it did not submit a copy of the minutes to the Ministry of Economy, nor did it submit copy of the minutes to the court(s) or refer to them in its pleadings before the courts.[244]

208. The Respondent was able to locate some additional documents as well as obtain a reporting letter from Agroplod, together with attachments, on matters relating to the archival search, as follows.

209. First, the Respondent located and produced the travel authorizations for the use of a government car and driver on which Mr. Sajnoski had been cross-examined.[245]

210. The requisition order mentions visits to Agroplod in Resen and another company called Eurkompozit in Prilep. The travel log records a "start date" of 8:30 AM on the morning of 15th February with the officials destined for Resen and Prilep.[246] (It does not say in which order.) Assuming the officials went directly to Resen, it takes some three hours to travel from Skopje to

[244] Letter dated 14 December 2011 to the Tribunal from Claimant's counsel.

[245] Transcript, Day 2, 131: 22-25, 132: 1-23.

[246] Exhibit R-109. The first document in this exhibit is a "travel order" for the driver of the government car located at the Department of Common and Joint Works. The second is a travel order for Mr Arsov to travel to Resen and Prilep.

Resen.[247] That would put the officials' arrival at some time after 11:00 AM, if they had driven directly to Resen. This arrival time was consistent with Mr. Sajnoski's written and oral testimony, in response to a question from the President of the Tribunal, that the meeting likely began no earlier than 11 AM and perhaps later.[248] The Tribunal thus considers that Mr. Petkovski's recollection of a virtually all day meeting in which the officials arrived at 9 AM, at which point a three to four hour business meeting was held[249] (prior to inspecting the plants and then proceeding to lunch) was in error.

211. The Respondent also located a summary record of what the officials did on 15 February 2007. Under cross-examination, Mr. Sajnoski had testified that he supposed that "in travel orders, there are notes about what we did there."[250] One of the documents contained in Exhibit R-109 is a one-page travel authorisation signed by the then-Minister of Economy authorising Mr. Arsov to "travel from Skopje to Resen and Prilep" with the aim of the travel stated to be: "Visiting the companies with difficulties".[251] Another document, signed by Mr. Arsov after the trip, states in summary terms:

> Agroplod Resen and Eurokompozit Prilep were visited. It was discussed with the management teams about the problems in the production.[252]

212. There was no mention of a stop in Prilep to visit Eurokompozit in the oral or written testimony, so the Tribunal is unable to determine whether the visit took place prior to or after the

[247] Transcript, Day, 146: 16-22.

[248] Transcript, Day 3, 158: 5-10.

[249] Transcript, Day 2, 115: 24-25, 116: 1-2.

[250] Transcript, Day 3, 148: 9-10.

[251] Exhibit R-109, p. 3.

[252] Exhibit R-109, p. 4. This is followed by a one-page receipt for paid travel and accommodation costs signed by the Chief Accountant.

visit to Resen.[253] The Minister's authorisation and the two sentence report just quoted obviously provide little insight as to what was said and done at Agroplod, but they refer neither to a Commission nor to an official inspection of Agroplod to determine Swisslion's compliance with the Share Sale Agreement. Cryptic though they may be, they nevertheless are contemporaneous documents not made in contemplation of legal proceedings and are consistent with Mr. Sajnoski's testimony that the visit was "a usual visit that the ministry is making within its efforts to help companies in transition".[254]

213. The Respondent also forwarded the response to the Tribunal's request for documents from Agroplod in which the company stated that no minutes of the 15 February 2006 meeting had been filed in its archive. It enclosed with its response a copy of the extract of the archival entries for 14-16 February 2007.[255] Agroplod also took the opportunity to advise that the individual whom Mr. Meskov recalled took minutes, Mr. Tomce Petkovski[256], was Mr. Naume Petkovski's son, and was not an Agroplod employee at the time. According to the letter and to documents enclosed therewith, Mr. Tomce Petkovski left Agroplod's employment to join Swisslion in the summer of 2006. Employment records in support of this contention were attached. Agroplod noted further that as a shareholder in Agroplod, Swisslion is entitled to have access to the company's archives. Examples of various Swisslion requests for documents from Agroplod's archives during the period after Swisslion lost control of Agroplod were provided in support of this point.[257]

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[253] Since this document was produced after the hearing, there was no opportunity to put questions to Mr Sajnoski about the visit to Prilep. On other matters pertaining to the actual visit itself, the Tribunal is satisfied that the Claimant was able to cross-examine Mr Sajnoski fully and to provide detailed comments on the Respondent's post-hearing production of documents that touched on the matters raised at the hearing.

[254] Transcript, Day 2, 147:12-14.

[255] R-109, letter dated 25 November 2011 from Agroplod to the State Attorney.

[256] Also spelled as "Tomche Petkovski".

[257] R-109, letter dated 25 November 2011, with attachments, from Agroplod to the State Attorney. Once again, since these documents were produced after the hearing, there was no opportunity to put them to the witnesses.

214. This evidence casts some doubt on the claim that Mr. Tomce Petkovski, said to have been an Agroplod employee at the time, took minutes which were subsequently filed in Agroplod's archives.

215. If the only documents produced after the hearing originated from Agroplod, the Tribunal would hesitate to place much reliance on Agroplod's response, given the poor relations between Agroplod's current management and Swisslion.[258] However, the Agroplod documents, taken together with the travel requisition and report, and equally importantly, having regard to the fact that Swisslion never referred to, nor sought to make use of minutes said to have recorded such concrete assurances of contractual compliance, raise doubts about the minutes' existence.

216. The Tribunal was struck by the following point arising from Swisslion's confirmation that it never referred to the minutes in its subsequent dealings with the Ministry or in the court proceedings that resulted in the termination of the Share Sale Agreement. Given Mr. Kitinov's insistent and regular complaints to the Ministry about Swisslion's alleged abuses of its control of Agroplod and asset-stripping, if assurances of such fundamental importance had been given by Ministry officials and recorded contemporaneously, i.e., to the effect that Swisslion had fully complied with the contract, it would be logical and to be expected that Swisslion would have relied upon contemporaneous records of the alleged assurances in its subsequent dealings with the Ministry and in the courts.

217. It is true that Mr. Meskov unsuccessfully attempted to require the attendance of Mr. Sajnoski and Mr. Arsov before the Basic Court as well as before the Appellate Court.[259] He testified that he believed that they would support his account of the meeting.[260] However, the fact

[258] The Claimant's submission on the Respondent's post-hearing document production did not comment on the minutes or Mr Tomce Petkovski's employment status (i.e. his apparent movement from being an employee of Agroplod to being an employee of Swisslion).

[259] Exhibit C-126, Minutes No 657/08 of an Oral Hearing before the Second Skopje Basic Court, 30 September 2009, pages 5-6.

[260] Transcript, Day 2, 55: 23-25, 56: 1-6.

is that no minutes have been produced by either Party, nor is there any record evidence of any reference to any such minutes in any contemporaneous document created by either Party.

218. It is impossible to reconcile the conflicting testimony and the Tribunal hesitates to make findings on credibility because it found the witnesses to be credible, although the Respondent's witnesses suffered from a comparative lack of direct knowledge as to some of the events to which they testified. Although the detailed recollection of the meeting given by Messrs. Meskov and Petkovski was impressive and Mr. Sajnoski seemed to have less commanding recollection of what occurred, what was subsequently produced or not produced, as the case may be, was consistent with Mr. Sajnoski's testimony about the timing of the meeting and what occurred. Faced with the conflict in the testimony, the Tribunal considers that this militates in favour of applying common sense and reliance on the contemporaneous documents when considering whether the Claimant has discharged the burden of proving that detailed assurances were given on 15 February 2007.

219. Having regard to the evidence, the Tribunal makes the following findings.

220. First, the Tribunal accepts that no formal "Commission" was established by the Ministry. There is no record evidence of any Decision establishing a Commission nor any letter advising Agroplod that a formal inspection would take place (nor for that matter is there any document emanating from the Ministry that referred to such a Commission). Indeed, Mr. Petkovski's evidence was that it was only the day before the visit that he was telephoned by Agroplod staff and informed that there would be a meeting the next day.[261]

221. Second, although no Commission was established, the Tribunal can readily appreciate that from Swisslion and Agroplod's perspective, the officials' visit to Resen could be seen to be a visit of a Commission. Indeed, there is one piece of contemporaneous evidence, namely Mr. Kitinov's 2 March 2007 letter to the Ministry of Economy, discussed below, which indicates that he had

[261] Transcript, Day 2, 85: 20-25.

been given to understand that a Commission had visited. But the letter also complains about the Ministry's failure to respond to his earlier communications[262] and it appears that he gleaned this information from sources other than the Ministry and may have thereby adopted the term used by such persons.[263]

222. Third, in the Tribunal's view the evidence shows that Swisslion sought to present its implementation of the Business Plan and that Swisslion's ongoing problems with Mr. Kitinov were discussed. It accords with common sense that having just completed the period within which the investment programme was to be implemented and in particular having regard to its fraught relationship with Mr. Kitinov, Swisslion would want to show Ministry officials that it had carried out the terms of the contract in full, even if, from its perspective, it had turned out to be impossible to make the investments in, and retain employees at the level of, Agroplod. It also accords with common sense that Mr. Kitinov's disenchantment with Swisslion would also be discussed and Mr. Sajnoski testified that this indeed was a topic of discussion. The Tribunal also accepts that Swisslion prepared folios of materials for presentation to the officials but, as Mr. Meskov acknowledged, the officials were not interested in looking at the documents, a point that accords with Mr. Sajnoski's recollection of the meeting.[264]

223. Mr. Meskov's oral testimony about the visit is telling. He noted that after the December 2006 report was filed:

> *… I don't know how many times I phoned the ministry and insisted on having a committee or a commission with an on-site assessment, so that we could start our normal operations and the development cycle. This meeting was postponed all the time.* [265]

[262] The letter refers to a series of prior complaints to which the Ministry had not responded.

[263] Mr Sajnoski testified that if this is what Mr Kitinov thought had occurred, he "misunderstood". Transcript, Day 2, 153: 9-25, 154:1-8.

[264] Transcript, Day 2, 69: 10-22.

[265] Transcript, Day 2, 68: 23-25; 69: 1-3.

224. He went on to note that when he heard that a visit was scheduled, he left Skopje early in the morning of the 15th, arriving at 9 AM, and that "piles of documents" were prepared by the people at Agroplod and his own documents from Skopje. We "all expected a visit from the Ministry of Economy to assess the investments."[266] At one point he testified that while Swisslion and Agroplod were "prepared to do an inspection control" and "had prepared several folders of proofs for all investments, both regular and extraordinary", when "the committee came, they said that they do not want to look at those documents, but they will look at those materials in the ministry".[267]

225. He later elaborated upon this aspect of the meeting:

> *The visit was announced for the 15th. Specially, I traveled from Skopje very early and arrived at 9 o'clock of this visit. The people from Agroplod were ready. They had piles of documents. I brought documents with me, and we all expected a visit from the Ministry of Economy to assess the investments.*
>
> *What happened next? Why they changed their mind? Well, we talked about the investments, the fulfillment of our obligations to invest. We visited the plants. We – afterwards we discussed all that was – all that had been done. They mentioned that I should give them a tabular breakdown. Then we went to lunch in Agroplod's hotel...*[268] *[Emphasis added.]*

226. This oral testimony thus suggests a less detailed and less formal presentation than had been described in the written testimony.

227. Fourth, insofar as the issue of assurances is concerned, the evidence suggests that the visit was a positive one and a convivial lunch ensued. It would be unsurprising if, during the meeting, the production facility and orchard visit and/or during the ensuing lunch, favourable comments were made by the officials as to the new atmosphere in Resen, the positive impact of the investments that had been made, irrespective of their destinations, and so on and that these could

[266] Transcript, Day 2, 69: 4-9.

[267] Transcript, Day 2, 51: 6-13.

[268] Transcript, Day 2, 69: 4-16.

be taken by Swisslion and Agroplod representatives as approval of what Swisslion had done under the contract.

228. At the same time, having regard to: (i) the emphasis placed in the Respondent's system of governance on documents[269]; (ii) Agroplod's status as a "corporation of significance for the economy of Macedonia"; (iii) Mr. Kitinov's vocal and seemingly relentless opposition; (iv) Mr. Meskov's acknowledgement that the officials did not want to look at the documents that had been assembled; (v) Mr. Sajnoski's evidence that he did not recall looking at any documents; (vi) the contemporaneous explanations of the timing and purpose of the officials' travel to Resen and Prilep; (vii) the absence of *any* documentary support for the claim that minutes recording the assurances were taken and filed in Agroplod's archives; (viii) the Ministry's request (noted below) two weeks after the meeting for further documentation pertaining to Swisslion's compliance with the contract; and (ix) the testimony that members of a Tender Committee (Messrs. Arsov and Sajnoski were such members for the purposes of the Agroplod tender) cannot thereafter serve on any commission that determines whether the tender was complied with – a point that seems eminently reasonable, the Tribunal is of the view that the Ministry officials would have been inclined towards caution in giving Swisslion oral assurances that all was in order, without further review of the documents.

229. To summarise, the Tribunal finds that: (i) a formal Commission did not attend the 15 February meeting; (ii) however, the three officials who did attend were briefed at least in general terms as to Swisslion's view that it had complied with the contract as well as its problems with Mr. Kitinov; and (iii) while favourable comments may have been made, no concrete assurances of contractual compliance were made.

230. Reverting to the chronology of the facts, approximately two weeks after the meeting, on 1 March 2007, the Ministry of Economy wrote to Swisslion requesting it to:

[269] Transcript, Day 3, 30: 7-9.

> *... please submit documented information to the Ministry of Economy of the Republic of Macedonia regarding the application of Article 8 of the Agreement at the level of 'Agroplod' JSC - Resen. It is also necessary to submit similar documentation regarding the application of Article 10 of the Agreement, again, at the level of 'Agroplod' JSC – Resen.* [270] *[Emphasis added.]*

231. This letter was sent one day before a letter dated 2 March 2007 was sent to the Ministry of Economy by Mr. Kitinov. This letter was entitled, "Subject: Annulment of the Decision made by the Commission of the Government of the RM for the privatisation of the Public announcement for AGROPLOD AD Resen and the annulment of the Contract no. 07-5142/1 from 23.06.2006 with Swisslion-Skopje".[271] Mr. Kitinov adverted to prior written requests sent to the Minister and the Government to which he had not received any answers, and stated:

> *Mr Minister, it has come to our knowledge that there was a certain Commission led by Vencislav Arsov in our company, probably in relation to the above-mentioned Contract, obviously with some kind of purpose, but absolutely inadequate for the insight into the factual condition regarding the fulfilment of the Contract obligations. Namely, in this case, we are talking about "sophisticated" investment and an opinion and expert qualification evaluation by competent persons from an independent audit company is required,* ***i.e. should there happen to be any kind of investment in Agroplod.***
>
> *We, as the biggest separate shareholders, and the Government of the RM that proclaimed Agroplod to be a company of special interest for the economy of the RM should be informed in details about the partial, i.e. full realisation of the investment.* ***In this case, there is an apparently big space for us to doubt the acts of the Ministry regarding this ground and all our legal requests as well****.* [272] *[Bolding in original.]*

232. On 12 March 2007, the Ministry of Economy wrote to the Ministry of Finance requesting it to "carry out control over the implementation of the Agreement, especially Articles 4, 8 and 10". The request for control referred to the request of the stockholders in Agroplod through their representative Mr. Kitinov.[273]

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[270] Exhibit R-9.

[271] Exhibit C-118.

[272] Exhibit C-118.

[273] Exhibit R-11.

233. On 15 March 2007, Swisslion responded to the Ministry of Economy's letter of 1 March 2007 setting out in detail the investments it had made, which it considered were consistent with the terms of the Business Plan and the Share Sale Agreement.[274]

234. There is no contemporaneous documentary evidence on the record to suggest that the Ministry of Economy responded to this explanation or otherwise indicated to Swisslion that there might be a difference of view as to whether it had complied with the Share Sale Agreement. What appears to have occurred is that prior to hearing from Swisslion, the Ministry requested the Ministry of Finance to conduct an assessment of the financial aspects of Swisslion's performance of the contract and to report back to it.[275] Later on in 2007, the Ministry also requested the Ministry of Labour and Social Policy to determine the number of persons employed by Agroplod, to assist in determining whether the number of employees had been retained and increased as contemplated in the contract. In October 2007, the State Attorney also requested the SEC to examine the securities aspects of Swisslion's stake-building in Agroplod.[276]

235. During 2007 Swisslion continued to develop the business of Agroplod as now reorganised in the three subsidiaries and relations between Swisslion and Mr. Kitinov continued to be poor. In addition to his letter of 2 March 2007 to the Ministry, by letter dated 10 April 2007, the law firm Mens Legis Cakmakova, acting on Mr. Kitinov's behalf, wrote to the Ministry of Economy complaining of Swisslion's treatment of Agroplod.[277] On 31 July 2007, Mr. Kitinov wrote to the

[274] Exhibit C-30.

[275] There appears to have been some consideration of the Agroplod situation by the government around this time. The draft minutes of a session of the government of the Republic of Macedonia held on 11 April 2007, reviewed a letter from the law firm of Mens Legis Cakmakova, sent on behalf of Mr Kitinov. This document, Exhibit R-113, which was produced to the Tribunal after the hearing, was also produced to the Claimant during the documents production phase of the proceeding but was not filed as part of its case. Letter, dated 20 March 2012, from Respondent's counsel to the Tribunal.

[276] Exhibit C-36.

[277] Exhibit R-113. This document, produced to the Tribunal after the hearing, was also produced to the Claimant during the documents production phase of the proceeding but was not filed as part of its case. Letter, dated 20 March 2012, from Respondent's counsel to the Tribunal.

Director of Financial Police in incendiary terms complaining about Swisslion's activities and laying blame on the former government of Macedonia.[278]

236. While there is no evidence that the Ministry directly conveyed any concerns to Swisslion during this period, Mr. Meskov seems to have inferred, at least through the visits of government officials to inspect Agroplod's operations, that the Ministry of Economy was considering the Agroplod situation.[279] On 24 August 2007, he sent a further report to the Ministry. The tables in this report differentiated between investments in Prespa Turist, Swisslion Agroplod, Agroplod, and Swisslion Agrar.[280]

237. The Public Revenue Office completed its review of the investment activities on 11 September 2006[281], and on 19 September 2007, the Public Revenue Office (General Directorate) reported back to the Ministry of Economy on its examination of Swisslion's investments.[282] Reference to the report indicates that it was of a factual nature, listing various investments made by Swisslion and the destinations of such investments. It found that the investments made "have not increased the capital of JSC – Agroplod – Resen".[283] It also examined the accounting records of the companies to determine the numbers of employees.[284]

238. After the hearing, in response to the Tribunal's request for a further search of relevant documents, the Respondent filed additional correspondence between the Ministry of Finance and the Ministry of Economy over the course of the autumn of 2007. It is evident that the Ministry of

[278] Exhibit C-120.

[279] Transcript, Day 2, 49: 17-25; 50: 1-24.

[280] Exhibit C-33.

[281] A copy of the report was shared with Agroplod.

[282] Exhibit C-36 and Exhibit R-98.

[283] Exhibit R-98. This document, produced to the Tribunal after the hearing, was also produced to the Claimant during the documents production phase of the proceeding but was not filed as part of its case. Letter from Respondent's counsel to the Tribunal dated 20 March 2012

[284] Exhibit C-36.

Finance did not purport to arrive at any kind of legal conclusion as to whether or not there had been compliance with the investment requirements of the contract. By letter dated 18 October 2007, the State Attorney referred to the Ministry's previous report and indicated that "we need to have a final opinion with regard to the implementation of the afore mentioned (sic) contract by the buyer".[285] It therefore appealed to the Ministry to inform the State Attorney "whether the buyer Swisslion LLC Skopje has implemented its obligations foreseen in articles 4 and 8 from the Contract..."[286] By letter dated 30 October 2007, the Ministry of Finance responded that it had performed the requested external control, but that its Public Revenue Office was "not competent to evaluate if the provisions of the Agreement are fulfilled or not, except the information for the condition found by the external control."[287]

239. By letter dated 5 November 2007, the State Attorney wrote to the Securities and Exchange Commission. The letter noted that on 26 October 2007, the Attorney General's Office had addressed the SEC, requesting it to present evidence on the structure of the equity in Agroplod. Noting that it needed such evidence "for the purpose of gathering evidence material for the case in the Attorney General Office the basis of which is re-examining the procedure for sale of government shares" to Swisslion, the State Attorney requested the SEC to submit data on whether Swisslion, at the moment that the public tender for the sale of shares of Agroplod was published, owned at least 25% of the total number of shares of Agroplod.[288]

240. Approximately one week later, on 30 November 2007, the SEC responded to the State Attorney, indicating that by 26 May 2006 Swisslion owned 24.901% of the voting shares of Agroplod and that on that date, on the basis of a non-trade transfer (exercising its rights under a lien), Swisslion acquired an additional 588 shares which, together with the other shares,

[285] Exhibit R-111.

[286] *Ibid*.

[287] Exhibit R-110 and repeated at Exhibit R-111, dated 30 October 2007. The English translation of the letter was incorrectly stated to be dated 17 September 2007; the Macedonian original is dated 30 October 2007.

[288] Exhibit R-12.

accounted for 27.834% of the voting shares of Agroplod. The SEC advised that in its view, when Swisslion acquired at least 25% in the company, it should have also commenced a procedure with the SEC for the taking over of Agroplod.[289] It appears that while the original request for information was simply directed at ascertaining whether Swisslion had owned the required 25% stake when it bid for the Second Tranche, the SEC replied that it had found evidence of an infringement of the securities laws.

241. On 19 November 2007, the Ministry of Labour and Social Policy sent its report on the employment aspects of Swisslion's performance of the contract to the Ministry of Economy.[290]

242. On 20 February 2008, the Deputy Minister of the Ministry of Economy, Mr. Kiro Spadziev, wrote a letter to the State Attorney, with a copy to the Deputy Prime Minister for Economic Affairs, entitled, "Subject: Opinion".[291] The Deputy Minister referred to inspections conducted by different institutions and noted that the investments had been made not only in Agroplod but also in the newly established entities of the buyer "which was not in accordance with the Contract" and that the obligation in relation to the employees had been fulfilled in the same manner, also "neither is in accordance with the stated Contract." The letter concluded:

> *For those reasons, the Ministry of Economy suggest that the State Attorney's Office of the Republic of Macedonia, within its jurisdiction, undertake all the activities for juridical protection with respect to the already performed privatisation of 'Agroplod' JSC – Resen.* [292]

243. The Respondent also produced what appears to be a memorandum of the Ministry of Economy addressed to the Government with the "date of materials" listed as 22 February 2008, describing the situation in Agroplod:

> "1. Government of the Republic of Macedonia to review and adopted (sic) the information on the situation in Agroplod JSC Resen after the privatisation.

[289] Exhibit R-13.

[290] Exhibit C-36.

[291] Exhibit R-15.

[292] *Ibid.*

2. Government of the Republic of Macedonia to recommend to the State Attorney Office of the Republic of Macedonia within its jurisdiction to take all action for judicial protection in the privatisation process (sic) in Agroplod JSC Resen".[293]

244. Thus, around 20-22 February 2008, the Ministry opined that Swisslion was not in compliance with the Share Sale Agreement and requested the State Attorney to commence legal proceedings.

245. The first step in legal proceedings against Swisslion was an application for provisional measures before the Second Skopje Court.[294] This application was rejected by the court on 18 April 2008.[295]

246. On 6 May 2008, the State Attorney commenced legal proceedings in the court in relation to the contract. The initial prayer for relief, which requested the contract's annulment, was abandoned on 18 September 2008 in favour of a request for the contract's termination.[296]

247. The following day, on 7 May 2008, the State Attorney wrote to the SEC.[297] The Parties disagreed as to the precise nature of this communication, with the Claimant characterising it as the filing of a claim against Swisslion and the Respondent characterising it as a written communication.[298] In any event, on 19 May 2006, the SEC banned Swisslion from "managing, burdening and alienating" or voting the Second Tranche of shares.[299]

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[293] Exhibit R-109. The timing of these two documents prompted debate between the Parties with the Claimant questioning how a memorandum to the Government recommending a course of action could be reconciled with an earlier document which had already commenced such action. The Respondent's position was that the memorandum, although submitted on 22 February 2008, i.e. two days after the Deputy Minister of the Ministry of Economy wrote to the State Attorney, was "consistent" with his opinion. The Tribunal does not consider the timing of these documents to be material to its disposition of the claims.

[294] Exhibit C-39.

[295] Exhibit C-41.

[296] Exhibits C-42 and C-53.

[297] Exhibit C-124.

[298] This disagreement is reflected in the Agreed Chronology.

[299] Exhibit C-43.

248. On 30 May 2008, Swisslion appealed the SEC's decision to the Securities Complaints Commission. It was dismissed on 8 July 2008 and a further challenge before the Administrative Court was likewise dismissed on 16 July 2008. This decision was in turn affirmed by the Supreme Court on 22 August 2008.[300] On 15 October 2008, however, the Constitutional Court ruled that the Second Skopje Basic Court, not the SEC, had jurisdiction relating to the restrictions on the Second Tranche and the SEC's ban was lifted.[301]

249. While proceedings relating to the Second Tranche were ongoing, on 9 July 2008, the SEC took action in relation to some of the shares that had formed part of the First Tranche acquired by Swisslion.[302] In particular, the SEC banned Swisslion from using its voting rights or receiving dividends on 1,356 shares. At the same time, the SEC imposed a ban on Mr. Kitinov which precluded him from using his voting rights or receiving dividends on certain Agroplod shares. The Respondent explained that these measures were taken in relation to the way in which both Swisslion and Mr. Kitinov had built their stakes in Agroplod shares, as both had exceeded the 25% trigger established under Macedonian securities law (i.e. the level of shareholding that requires the acquiring shareholder to make a public offer to acquire all other shares in the market).[303]

250. As noted above, the Constitutional Court held that the SEC lacked jurisdiction to issue the restrictions on the Second Tranche of shares. After that decision was rendered, on 5 December 2008, the State Attorney reverted to the Second Skopje Basic Court and applied for provisional

[300] Exhibit C-52.

[301] Exhibit C-54.

[302] Exhibits C-50 and R-17.

[303] As noted previously, for Swisslion, this fact appears to have been identified by the SEC in its letter of 30 November 2007 to the State Attorney. There were complaints made about an alleged conflict of interest on the part of the SEC's President. The tribunal finds it unnecessary to address this issue as it is considered to be of minor significance to the key facts.

measures to prohibit Swisslion from use or transfer of the Second Tranche.[304] This time, the Court granted the request for provisional measures.[305]

251. Whilst the legal proceedings in respect of the contract and the SEC proceedings were unfolding, Mr. Kitinov continued to agitate against Swisslion's stewardship of Agroplod. For example, on 6 June 2008, Mr. Kitinov wrote to Agroplod requesting that the upcoming Shareholders Assembly meeting consider the dismissal of the existing Board of Directors and the appointment of new directors and the selection of an auditing company to prepare "supervision of all operational activities of Agroplod" for the years 2006-2007.[306] His request was not approved and the Board appointed by Swisslion remained in office.

252. The dispute between Swisslion and the government garnered publicity. On 24 December 2008, the newspaper *Dvevnik* published an article entitled *Criminal Charges for Directors of 'Agroplod' and 'Swisslion'* which reported that, according to the Ministry of Internal Affairs, Mr. Meskov and another individual were suspected of having made a false contract for a loan in order to transfer property from one company to the other.[307] Some three months later, on 19 March 2009, the Public Prosecutor for Bitola dismissed the criminal complaint, finding that there was "no consummation of the essential features of the stated criminal offences", nor was there "any features of another criminal act they should be prosecuted for in accordance with the public official duty."[308] The decision not to prosecute was not publicised.

253. For reasons which will become apparent, it is unnecessary for the Tribunal to recount in detail the outcome of the legal proceedings before the Skopje Basic Court. It suffices to note that on 15 October 2009, after reviewing the evidence and the legal submissions of both Parties, the

[304] Exhibit C-60.

[305] *Ibid.*

[306] Exhibit C-45.

[307] Exhibit C-57.

[308] Exhibit C-97.

court terminated the Share Sale Agreement and ordered the Second Tranche of shares to be transferred to the Ministry of Economy.[309] Swisslion's appeal to the Skopje Appellate Court failed.[310] On the same day as the Appellate Court's decision was officially communicated to Swisslion, that is, 4 May 2010, the Second Tranche of shares was transferred to the Ministry of Economy.[311] A further appeal to the Supreme Court relating to the Share Sale Agreement's termination and the transfer of the Second Tranche failed.[312]

254. With the loss of Swisslion's control over Agroplod, it did not take long for the Shareholder Assembly to replace the Board of Directors. On 19 July 2010, a new slate of directors, including Mr. Kitinov and a representative of the Ministry of Economy, was elected.[313] There ensued a series of actions taken by Agroplod, two of which warrant mention.

255. Within weeks of its election, at Mr. Kitinov's proposal, the new Board retained the Pelagoniska Audit House to conduct an audit of Agroplod's financial situation whilst under Swisslion's control.[314] It is clear that Mr. Kitinov expected the audit report to demonstrate criminal acts on the part of Swisslion personnel because on 7 September 2010, while the audit was still underway, he wrote to both an attorney who he wished to represent Agroplod against Swisslion and to the Ministry of Interior Affairs, expressing the view that Swisslion engaged in criminal conduct and noting that Agroplod would be able to provide proof of such conduct.[315]

256. As Mr. Kitinov anticipated, on 8 October 2010, Pelagoniska Audit House issued a "Final Audit Report" on Agroplod for the period 1 July 2005 to 31 July 2010, which asserted that

[309] Exhibit C-74.

[310] Exhibit R-25.

[311] Exhibits C-80 and C-81.

[312] Exhibit R-25.

[313] Exhibit C-83.

[314] Exhibit C-131.

[315] Exhibit C-91.

Swisslion had not acted consistently with its legal obligations in making investments.[316] Agroplod followed up on this Report with a letter to the Representative of the State Capital, dated 13 October 2010, in which it discussed the audit report, Agroplod's financial condition and the related legal matters.[317] Mr. Kitinov also wrote to the Board on 17 November 2010 reporting on a meeting held on 9 November 2010 with government officials, including the State Attorney, at which the Agroplod-Swisslion matter was discussed. Mr. Kitinov stated that he had raised questions about the processing of criminal charges and reported that he sensed "some stalling" in that regard. He noted further that the State Attorney "added that she promises to talk, noting that she hopes for success, otherwise, we will seek a higher level of intervention." He concluded that it appeared that matters were "obviously out of their hands" and therefore if and "what sort of help we will receive remains for the government to decide".[318] Finally, on 20 December 2010, Mr. Kitinov wrote to the State Attorney urging further action against Swisslion.[319]

257. Criminal proceedings against certain persons involved in Swisslion and Swisslion-Agroplod ensued. On 9 March 2011 the Bitola Basic Court launched a criminal investigation against Mr. Meskov, Mr. Petkovski, and two other persons involved with Agroplod.[320] Mr. Meskov's appeal against this decision of the first instance court was dismissed on 29 March 2011[321] and the testimony of Mr. Meskov, which was not disputed by the Respondent, was that the criminal proceedings were ongoing at the time of the hearing.[322]

258. The Tribunal now turns to consider the claims.

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[316] Exhibit R-24.

[317] Exhibit C-133.

[318] Exhibit C-35.

[319] Exhibit C-137.

[320] Exhibit C-144.

[321] Exhibit R-28.

[322] Transcript, Day 2, 125: 12-15.

2. The Claims

259. The Claimant has alleged four breaches of the Treaty: (i) unlawful expropriation of Swisslion's Second Tranche of shares in Agroplod in breach of Article 5(1) of the Treaty; (ii) a failure on the part of the Respondent to observe its commitments to Swisslion in breach of Article 12; (iii) the unreasonable impairment of the Claimant's enjoyment of its investments in breach of Article 4(1); and (iv) a failure to accord fair and equitable treatment in breach of Article 4(2). The Tribunal finds it convenient to deal with the fair and equitable treatment claim first and then address the expropriation claim followed by the alleged failure to observe commitments, and finally, the alleged unreasonable impairment of the Claimant's enjoyment of its investments.

260. Before analysing the first claim, the Tribunal wishes to address at the outset an important juridical fact that affects the consideration of the claims generally, namely, the decisions of the Macedonian courts interpreting and applying the contract between Swisslion and the Ministry of Economy.

261. International courts and arbitral tribunals have often had to consider judgments rendered by national courts to determine what consequences they must draw from such judgments. In this respect, the Tribunal first notes that, under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary.[323] In many cases, the Permanent Court of International Justice[324],

[323] International Law Commission – Articles on Responsibility of States for internationally wrongful acts, annexed to General Assembly Resolution A/56/589 of 12 December 2001, Articles 1 and 6.

[324] Permanent Court of International Justice – See the *Judgment No 9 (The Lotus case)* stating that an error of a judicial authority "may affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice" (PCIJ Reports Series A No 9 p.24). Also see the *Advisory Opinion No 15, concerning the competence of the Danzig Courts*, reserving the right of Poland to contest the decision of those Courts, if they "go beyond the limits of their jurisdiction" or if they are "in any other manner... in conflict with the general principles of international law" or the applicable treaties (PCIJ Reports Series B No 15 p. 24).

the International Court of Justice[325] the Court of Justice of the European Union[326] and international arbitral tribunals[327] have recalled this rule and have examined the conformity of domestic judgments with international (or European Community) law. As a consequence, they have considered whether or not, through its judiciary, a State acted contrary to its international obligations. In a number of cases they exercised such authority by reference to the applicable treaties or to the principle according to which justice must not be denied.[328]

262. Those rules are applicable in international investment law and have been applied by ICSID arbitral tribunals. Bilateral investment treaties often contain the obligation to provide fair and equitable treatment. Some treaties are more specific and include within that standard the obligation not to deny justice and to respect the principle of due process.[329] But even in cases in which there is no clause of that type, ICSID tribunals have considered that fair and equitable treatment includes the prohibition against denial of justice.[330]

263. Not to deny justice implies at a minimum giving access to the courts. In a larger sense, denial of justice includes inadequate or unjust procedures incompatible with due process of

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[325] International Court of Justice – see the judgment in the Arrest warrant case finding that an arrest warrant issued by a Belgian judge against a Congolese Minister violated the international legal obligations of Belgium and deciding that that warrant must be cancelled (ICJ records 2002, p. 33). See also the *Advisory opinion on the status of a special rapporteur of the UN Human Rights Commission*, ICJ Reports 1999 p. 87, para. 62.

[326] Court of Justice of the European Union, see *Köbler v. Austria*, 30 September 2003 (aff C-224/01, rec. I-10239, paras 32-33); *Commission v. Italy*, 9 December 2003 (aff. C 129/00, rec. I-14637).

[327] *Décision de la commission de conciliation franco-italienne, n°196 du 7 décembre 1955*, United Nations Reports of International Arbitral Awards, Vol.XIII, p. 438 ; Award in *El Salvador v. United States – Claims of R. Gelbtrunk and Salvador Commercial Company*, 8 May 1902, United Nations Reports of International Arbitral Awards, Vol XV, p. 477.

[328] For an in depth analysis of the concept of denial of justice, see *Mexico / United States General Claims Commission, Chattin*, 23 July 1927, United Nations Reports of international Arbitral Awards, Vol. IV, p. 282. See also Jan Paulsson, Denial of Justice in International Law (Cambridge University Press) 2005, p. 84.

[329] See Article 5(2) a of the US Model BIT (2004).

[330] *Rumeli v. Kazakhstan*, ICSID Case No ARB/05/16, Award of 29 July 2008 para. 654; *Jan de Nul NV v. Egypt*, ICSID case ARB No 04/13, Award of 6 November 2008 para. 188.

law.[331] Some international tribunals have gone even further and have considered that if a judgment is "clearly improper and discreditable"[332], there is a substantive denial of justice.

264. ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice.

265. The Tribunal does not accept the Claimant's contention that "the courts ... reached decisions that were clearly contrary to the Share Sale Agreement and the Business Plan". This matter was governed by the law of Macedonia, it was submitted to the jurisdiction of its courts and it was finally resolved by them. The question is whether or not in taking their decision the Macedonian courts acted contrary to international law and in particular whether there has been denial of justice in the present case.[333]

266. Before considering that question, the Tribunal observes that, as recounted in the Facts, the Parties had contending views as to Swisslion's performance of the contract and to the interpretation of the Business Plan and the Share Sale Agreement. In the Tribunal's view, the interaction between those two documents was ambiguous and susceptible of different good faith interpretations. There was a basis for the Ministry of Economy to form the view that Swisslion

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[331] *Genin v. Estonia*, ICSID Case No ARB99/2, Award of 25 June 2001, para. 371; *Waste Management Inc. v. United Mexican States*, ICSID Case No ARB(AF) 00/3, Award of 30 April 2004, para. 98; *Rumeli v. Kazakhstan*, para. 652.

[332] In the context of Article 1105 (1) of the NAFTA and the minimum standard of customary international law, see *Mondev International Ltd v. United States of America*, Award of 11 October 2002 para 127. In the context of a BIT, see *Jan de Nut N.V. v. Egypt*, ICSID Case No ARB/04/13, Award of 6 November 2008, paras. 193-194.

[333] See *ADF Group Inc v. United States of America*, ICSID Case No ARB(AF)/00/1 Award, footnote 182, *Mondev International Ltd. v. United States of America*, para. 126, *Waste Management Inc. v. United Mexican States*, ICSID Case No ARB(AF)98/3, Decision on Hearing of Respondent's Objections to Competence and Jurisdiction, para. 47. The general point made by the tribunal has also been made in such cases as *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, paras. 106-107, *Rumeli v. Kazakhstan*, para. 641 and *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No V079/2005, Final Award, paras. 272, 275-276, 280, 446, 454, 489, 497, 518, 524, and 603.

had failed to comply with its contractual obligations and to seise the courts of the issue and to finally ask for termination of the contract. But the Tribunal also accepts that Swisslion, in good faith, could have concluded that, having been precluded from effecting fundamental change in Agroplod's share capital, it could effect the investment in other ways so long as it did not reduce Agroplod's overall value to the detriment of other shareholders (*i.e.* so long as the valuations of the shareholders' respective contributions in the three subsidiaries were proper). Accordingly, the Tribunal does not accept the Respondent's contention that, on the merits, the claim should be rejected due to illegality of the investment and bad faith of the investor.

267. It remains for the Tribunal to consider whether Macedonian courts acted contrary to international law.

268. Although in its Reply the Claimant attempted to impugn the court proceedings as a denial of justice[334], in the Tribunal's view, it failed to discharge its burden of proof to show that the courts failed to meet international law's requirements for the conduct of a civil proceeding. The Claimant was unable to point to any serious procedural unfairness in the conduct of the legal proceedings and, other than general evidence relating to the alleged lack of independence of the Macedonian courts not shown to be related to the facts of the present case, there was no evidence of a lack of judicial independence or other judicial misconduct in the litigation that Swisslion sought to impugn. Indeed, the Macedonian courts found in Swisslion's favour on certain occasions, such as in denying the initial request for provisional measures and finding against the measures taken by the SEC in respect of the First and Second Tranche of shares.

269. The Tribunal did not find the testimony of the Claimant's legal expert, Prof. Nedkov, to be compelling on the alleged defects arising from the courts' conduct of the litigation. At the hearing, Prof. Nedkov, himself a former member of the Constitutional Court, disavowed any suggestion that the members of the judiciary who were involved, at three levels, in the legal

[334] Reply, paras. 224-229.

proceedings concerning the contract, had acted corruptly: "I don't have such bad opinion of my former students, judges, today".[335] He was also unable to point to any act of the judiciary that would even come close to a denial of justice at international law. In the end, the Tribunal viewed his testimony as essentially taking a different view on the merits of decisions made by the courts, and nothing more.

270. The Tribunal also finds that, contrary to the Claimant's pleading, the Respondent did not breach its Treaty commitments by seising the courts in the first place.[336] This allegation was predicated upon the assumption that the Ministry "confirmed Swisslion's compliance with the Share Sale Agreement in February 2007" and that the commencement of court proceedings amounted to the government's reneging on its prior commitment.[337] As the Tribunal has already found, it does not consider that the Claimant has discharged the burden of proving that detailed assurances of contractual compliance were made at the 15 February 2007 meeting in Resen.

271. It follows from these findings that the Tribunal cannot accept the Claimant's contention that "the courts … reached decisions that were clearly contrary to the Share Sale Agreement and Business Plan…"[338] This conclusion necessarily affects the contours of the international claims.

a) Fair and Equitable Treatment

272. Turning to the balance of the fair and equitable treatment claim, the Treaty states that:

> *Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party...*

273. The Tribunal deems it unnecessary to engage in an extensive discussion of the fair and equitable treatment standard. However, it does subscribe to the view expressed by certain

[335] Transcript, Day 3, 66: 18-19.

[336] Reply, para. 222.

[337] *Id.*

[338] Reply, para. 222.

tribunals that the standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors.[339]

274. As with other provisions of the Treaty, Article 4 is to be read in light of the Contracting Parties' intentions stated in the Preamble to, *inter alia*, "create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party" and recognising "the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States."

275. While the Tribunal accepts that the issue of contractual compliance under Macedonian law has been definitively resolved by the competent judicial body, this is not the end of the matter. The Tribunal's concern lies with acts and omissions taken prior to the courts' determination of contractual non-compliance, in particular, measures taken or not taken by the Ministry of Economy and measures taken by other State organs prior to and during the legal proceedings. In the Tribunal's view, there was a series of measures that collectively amount to a composite act in breach of the fair and equitable treatment standard.[340]

276. In particular, the Tribunal considers that: (i) the Ministry's response, or more precisely, its lack of timely response, to successive requests by Swisslion for confirmation that its investments

[339] *See PSEG Global, The North American Coal Corporation, and Konya Ingin Electrik ve Ticaret Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 239: "Because the rule of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly does allow for justice to be done in the absence of more traditional breaches of international standards." This idea was referred to and approved by the tribunal in *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Award of 31 October 2011, para. 373.

[340] As noted in *Société Générale v. The Dominican Republic*, LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, para. 91: "While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation …" This was cited with approval in the recent award in *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, para. 516.

were being made or had been made in accordance with the Share Sale Agreement; (ii) the Ministry's approximately one-year long consideration of whether or not there had been contractual compliance, during which time Swisslion continued to operate the business without being formally advised of the Ministry's reservations; (iii) certain actions taken by the SEC; and (iv) the 24 December 2008 publication by the Ministry of the Interior of a criminal investigation initiated against Swisslion with no subsequent publication of the prosecutor's decision not to proceed with the investigation, collectively constitute a breach of the fair and equitable treatment standard.

277. With respect to the first element of the composite act, the record evidence is clear. Mr. Meskov's evidence was that virtually from the outset of its initial shareholding in Agroplod, and particularly after it acquired the Second Tranche, Swisslion applied itself vigourously to revitalising the food-processing business formerly conducted by Agroplod. He testified that in addition to the written reports that were submitted to the Ministry, he was in regular contact with Ministry officials to discuss Swisslion's investment activities.[341] The Respondent did not successfully rebut this aspect of Mr. Meskov's testimony and it is accepted.

278. It is common ground between the Parties that no written report was filed with the Ministry of Economy until 6 October 2006. Be that as it may, for the purposes of the fair and equitable treatment claim, the report assumes importance because it explicitly referred to the minority shareholders' resistance to making any change in the share capital of the company. It further informed the Ministry that Swisslion had therefore found it necessary to make the investments in the subsidiaries.

279. Mr. Meskov's oral testimony was that Swisslion's ownership of a simple majority of shares (as opposed to two-thirds majority) was the "very limitation [that] made us establish the daughter

[341] Meskov first witness statement, para. 44.

companies" and this was a "forced decision".[342] Likewise, the 6 October 2006 report to the Ministry noted that:

> *Because of the obstruction from a share holder of possessing over 33% from the shares of Agroplod, the committee of shareholders has not been able to reach a decision for realisation of investment provided with the business plan. Because of that we were forced to realise the above mentioned investment to the capital and contract related companies of Agroplod.*[343] *[Emphasis added.]*

280. Mr. Meskov's evidence and the phrasing of Swisslion's written communications at the time show that in 2006-2007 (and during this proceeding), Swisslion sought to justify a forced deviation from the idea that significant investments would be made at the level of Agroplod. It was found to be necessary to make most of the investments at the level of subsidiaries in which Swisslion (and/or its affiliate) and Agroplod would have a shareholding interest.

281. Considered together with Mr. Meskov's oral communications to Ministry officials, the 6 October 2006 report was, in the Tribunal's view, a clear attempt to explain the difficulties encountered by Swisslion and to justify the steps taken to resolve the impediment to making investments at the level of Agroplod.

282. In making this finding, the Tribunal does not interfere with the Basic Court's finding that Swisslion failed to make monthly reports. There is no doubt that it failed to do so and this was not seriously contested by Swisslion. Nor has the Tribunal lost sight of its earlier finding that the reports filed by Swisslion were not completely accurate and could be taken to be misleading.

283. Rather, the issue for the Tribunal is that the October report and the December report that followed it were sufficiently forthcoming so as to put the Ministry on notice of Swisslion's view that the investments contemplated by the agreement could not be made at the level of Agroplod.

284. The Tribunal is also mindful of the fact that although during this proceeding the Respondent contested certain of the investments made by Swisslion, for example, the value ascribed to the

[342] Transcript, Day 2, 27: 2-4.

[343] Exhibit C-26.

intellectual property contributed by it, there is no doubt that substantial monetary and non-monetary investments were committed to the revitalisation of the food processing businesses that up to July 2006 had been conducted exclusively by Agroplod. Contemporaneous documentary evidence of investments being made consistently (although in some cases recorded belatedly[344]) with the values committed to by Swisslion in the contractual documents was also adduced. While the Respondent challenged certain items of the investments made, such as the fact that used rather than new baking equipment was transferred to Swisslion-Agroplod and there may have been inflation in terms of the value of the intellectual property transferred to Swisslion-Agroplod[345], the evidence of monetary and non-monetary contributions, which was confirmed in September 2007 by the Ministry of Finance, is also accepted by the Tribunal.

285. Having regard to all of the facts, in the Tribunal's view, the Ministry had a duty to respond to Swisslion's oral and written communications which sought to justify its investment decisions. Although there was no cure provision in the contract, a legal issue had plainly arisen in relation to the investor's claimed inability to make investments in Agroplod, and the issue assumed acute importance for Swisslion given Mr. Kitinov's continued opposition to the Claimant's treatment of the Agroplod businesses. In the circumstances, the Tribunal considers that the Ministry should have responded to Swisslion on a timely basis.

286. This is not to be taken to mean that a State cannot form the view that there has been a failure to comply with the contract between it and a foreign investor and to act accordingly by taking such action as is contemplated by the contract. It is well established that States are entitled to act as contractual counterparties and to insist upon the observance of contractual commitments owed to them. They do not violate their international obligations by exercising such contractual rights

[344] Exhibits C-85, C-116 and C-117. Mr Meskov testified that the decision to recapitalise two companies was taken at the 15 August 2006 Board meeting even though the actual valuations were not performed until later. "So according to our law, the day of the decision of the board of directors is the fact of the day of the investment." Transcript, Day 2, 13: 10-25; 14: 1-4.

[345] Exhibit C-34.

as may accrue to them. As other investment treaty tribunals have concluded, the Executive of a State must be in a position to deal with disputable questions of local law without its automatically being deemed to be in breach of the State's international legal obligations.[346]

287. The situation is, however, somewhat different in the instant case. An issue of contractual compliance arose in which the investor sought to explain the basis for its performance of the terms of the contract with a view to persuading its counterparty that this was not a breach and then sought confirmation of its claimed compliance. In such circumstances, the State had a duty to deal fairly with the investor by engaging with it, in particular to advise it of any concerns it may have had that the investment might not be in compliance with the investor's contractual obligations. This was all the more the case where both Parties were aware of the dissident shareholder's allegations that Agroplod was being stripped of its assets to its detriment.

288. It was unfair for the Ministry not to respond to Swisslion, thereby effectively permitting it to continue to operate the business and make further investments while the Ministry caused other agencies of the government to conduct assessments of the Claimant's contractual compliance. Then, one year later, without prior notice, the Ministry commenced legal proceedings to annul the contract (a proceeding in which the prayer for relief was later amended to a request for termination of the contract).

289. The Tribunal therefore finds that, although the Ministry was within its rights to form a view that Swisslion had failed to comply with the terms of the Share Sale Agreement and to submit that dispute to the courts, and further that the courts did not themselves commit a breach of the Treaty in their treatment of the legal proceedings before them, nevertheless there was a failure on the Ministry's part to engage with Swisslion on a timely basis and deal forthrightly with it.

[346] See, for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, para. 155.

290. In view of the Tribunal's finding that Swisslion's reports were not fully accurate, it might be asked whether it is appropriate to make a finding of breach. It could be argued that the misleading aspects of the reports contributed to the Ministry's resolve to seek the contract's termination when it reviewed the finance and labour ministries' assessments. The Tribunal notes, however, that there was little contemporaneous evidence on the record showing what internal analysis was done by the Ministry when it obtained Swisslion's response to its 1 March 2009 request and indeed the other ministries' reports and such evidence as was produced was, it must be said, rather thin in terms of analysis. Nor did the Respondent adduce any witness with direct knowledge of the Ministry's analysis of the documentation. In the end, the Ministry did give a tersely worded "opinion" to the State Attorney on 20 February 2008, but evidently no detailed assessment of Swisslion's compliance with the Share Sale Agreement was prepared. The paucity of detailed analysis by the Ministry of Economy was a source of some concern to the Tribunal.[347]

291. While the Ministry's failure to engage Swisslion on the issue of compliance in and of itself might be insufficient to ground a breach of the fair and equitable treatment standard, when considered together with other measures attributable to the Respondent, the Tribunal is satisfied that a breach occurred.

292. The second element contributing to the finding of breach concerns the SEC proceedings. As noted in the Facts, on 15 March 2008, the State Attorney applied for provisional measures against Swisslion before the Second Skopje Basic Court. The measures sought were intended to prevent

[347] With the exception of Mr Sajnoski, the Respondent did not tender anyone with direct knowledge of the events at issue and even Mr Sajnoski was able to testify only as the events of 15 February 2007. There was no witness with direct knowledge of the internal evaluations of the contract's performance. This was one of the reasons why the Tribunal called upon the Respondent to renew its efforts to locate certain documents (and the Claimant to likewise produce minutes of the meeting of 15 February 2007 to which its witnesses had referred). The Respondent produced some documents that had been produced to the Claimant previously but not put on the record and located some additional documents (as well as various explanations relating thereto). For obvious reasons, the Claimant sought an opportunity to comment on the Respondent's post-hearing production and the Tribunal granted it such opportunity while also permitting the Respondent to comment on the Claimant's submissions. In the end, the Tribunal found a few of the documents and the parties' comments thereon to be of assistance, but they did not materially change its initial view of the facts arrived at after the hearing, having regard to the prior oral and written evidence.

Swisslion from using or transferring the Second Tranche of Agroplod shares. On 18 April 2008, the court refused the application.[348] One week later, the State Attorney launched proceedings against Swisslion before the Securities and Exchange Commission, requesting the same relief just rejected by the Basic Court. On 19 May 2008, the SEC held that Swisslion's acquisition of the Second Tranche was contrary to Macedonia's law on takeovers.[349]

293. Swisslion was not notified of the proceedings brought against it before the SEC.[350] When its counsel sought to inspect the records, he encountered resistance and was forced to make a hand written copy of the order instead of being able to photocopy it. This was an unduly obstructionist act on the SEC's part and does not reflect well on it. Swisslion subsequently unsuccessfully appealed the decision to the Commission on Complaints on the Exchange and Stock Market. It then appealed to the Administrative Court and further to the Supreme Court and in both instances the appeal was denied. Ultimately, Swisslion petitioned the Macedonian Constitutional Court, which held, on 15 October 2008, that the SEC was not permitted to issue provisional measures in respect of a matter which was then before the Second Skopje Basic Court.[351] They were accordingly lifted.

294. While Swisslion was pursuing its remedies against the SEC's decision in respect of the Second Tranche, on 9 July 2008, the SEC issued an order preventing Swisslion from voting on or receiving dividend payments on the basis of 1356 Agroplod shares which formed part of the First Tranche.[352] Appeals to the Commission on Complaints on the Exchange and Stock Market and to the Administrative Court were unsuccessful. Ultimately, an appeal to the Supreme Court

[348] Exhibit C-41.

[349] Exhibit C-43.

[350] Meskov first witness statement, para. 55.

[351] Exhibit C-54.

[352] Exhibit C-50.

succeeded, with a finding that the SEC did not have jurisdiction to restrict Swisslion's rights in relation to the First Tranche.[353]

295. The Respondent argued against the Claimant's fixing the date of breach as 19 May 2008 (i.e. as the date on which it lost control of Agroplod).[354] It observed that Swisslion did not lose control of Agroplod as of 19 May 2008, but rather in July 2010, when the shareholders elected a new Board of Directors after the Second Tranche was transferred to the Ministry of Economy. Thus, at most, there could be compensation for the impact of the SEC's orders only while they were in effect, according to the Respondent.[355]

296. The Tribunal has doubts that there was a basis for the SEC's determination that the Second Tranche in particular should be restricted. Reference to the applicable Macedonian law indicates that it did not apply to shares sold by the government in a privatisation.[356] The law was subsequently amended to apply to such transactions, but the amendment occurred in 2007 with the amendment taking effect on 23 March 2007, approximately nine months after Swisslion acquired the Second Tranche.[357] Quite apart from the apparently retroactive application of the law, the Tribunal's concern is that the State Attorney's applications to the SEC appear to be motivated to subject Swisslion to additional administrative proceedings outside of the contractual litigation.[358]

297. The third measure concerns the publication of a criminal investigation initiated against the Claimant's General Manager, Mr. Meskov, and Mr. Vasko Spirovski, the then-Chief Executive

[353] Exhibit C-59.

[354] Rejoinder, para. 238.

[355] Rejoinder, para. 235.

[356] Transcript, Day 5, 22: 8-25, 23:1-4.

[357] Transcript, Day 5, 137: 4-6.

[358] Transcript, Day 5, 21: 12-25, pp. 22-24. In their pleadings, the parties disputed whether the President of the SEC had been in a conflict of interest when she dealt with the Swisslion/Agroplod matter. The Tribunal does not find it necessary to address this issue.

Officer of Agroplod and a Swisslion appointee.[359] It was alleged that the Claimant and Agroplod had signed a sham loan agreement secured by a mortgage of Agroplod's property and that this was an attempt to strip Agroplod of its assets. This investigation was publicised in the newspaper article the following day under the headline "*Criminal Charges for Directors of 'Agroplod' and 'Swisslion'*.[360] As noted in the Facts, the public prosecutor issued a formal decision declaring that the allegations were without merit and declined to proceed with the prosecution.[361]

298. It appears that in contrast to the Ministry of the Interior's announcing the launching of the investigation, the results of the prosecutor's determination were not widely published. It could reasonably be expected that the announcement of this investigation could cause problems for the Claimant and its businesses in Macedonia. Given the seriousness of the allegations, it would have been expected that the Ministry of the Interior would have publicised the prosecutor's decision not to prosecute, not just the investigation's initiation.

299. In the Tribunal's view, the SEC and criminal investigation measures contributed to a general deterioration in Swisslion's prospects insofar as Agroplod was concerned. Mr. Meskov testified that there was "a lot of media attention, by the TV and the newspapers", "a number of pressures and various criminal charges, we were publicised in all the media" and this reflected significantly "on the production, on the working, and the trust that we enjoyed with our clients, providers, suppliers."[362]

300. In sum, the Tribunal finds a breach of Article 4(2) by virtue of measures taken or not taken prior to and on the margins of the judicial proceedings. The Tribunal has found this to be a close call; while it does not consider the breach to be *de minimis*, it also does not wish to overstate the

[359] Exhibit C-58.

[360] Exhibit C-57, *Dvevnik*, 24 December 2008. According to Mr Meskov, the police investigation was revealed by the police to the media and media reports identified him by his full name together with the accusations of criminality against him and Swisslion. First witness statement, para. 60.

[361] Exhibit C-97.

[362] Transcript, Day 2, 14:13-20.

finding. It notes moreover that on well-established principles, the State is not responsible for the acts of a private party like Mr. Kitinov. It was not unlawful for the Ministry to take his views into consideration when deciding whether the contract had been complied with. Collectively, however, the measures previously discussed fall below the level of treatment to which the investor was entitled.

301. This is the basis for the Tribunal's determination of breach. The Tribunal deems it appropriate to discuss two other issues before addressing the other claims.

302. Once the contract was terminated and the 25% Second Tranche shareholding was transferred to the Ministry, Swisslion's managerial control of Agroplod was eliminated and a change in the company's Board of Directors ensued.[363] This occurred in short order with the resulting exacerbation of relations between Agroplod and Swisslion.

303. During the hearing, the auditors retained by Agroplod to prepare the "Pelagonia Report" were cross examined by counsel for the Claimant. The report was prepared after the contract was terminated and although it did not figure in the Ministry's actions, it was cited by the Respondent in the present arbitration in support of the lawfulness of its actions under the Treaty. The report has also been used by Agroplod to petition the Ministry of the Interior to launch more criminal proceedings against Mr. Meskov and others. Swisslion, for its part, has filed a civil complaint with the auditor's professional standards body in Macedonia[364] and a criminal complaint against Mr. Kitinov, Mr. Risteski and the Pelagoniska Auditing House.[365]

304. The Tribunal was asked by the Claimant to express a view as to the objectivity of the Report.[366] This is not strictly speaking necessary for the Tribunal's decision, but the Tribunal was

[363] In addition, according to Mr Meskov, Mr Kitinov's son became the Chief Executive Officer of Agroplod. Meskov first witness statement, para. 62.

[364] Exhibits R-71 and C-136.

[365] Exhibit C-142.

[366] Transcript, Day 5, 57: 18-56, 58: 1-2.

troubled by the fact that while the report was being drafted, and before it was completed, its contents were apparently shared with Mr. Kitinov. As counsel for the Claimant noted, the resemblance between the final report and sections of Mr. Kitinov's prior letter to the Ministry of the Interior is striking and raises questions about the report's purpose and why the audit house could arrive at the conclusions cited in Mr. Kitinov's earlier letters when the report had yet to be completed.[367] In the end, however, these are the acts of private parties, not attributable to the State, and no State responsibility can be engaged by such acts.

305. Agroplod also petitioned the Ministry of Internal Affairs to bring further criminal charges against Mr. Meskov and others involved in the subsidiaries. It appears that throughout this international proceeding, these investigations have continued.[368] Mr. Meskov's evidence is that:

> *The organised crime police continue to investigate me and Swisslion concerning many of the same matters that they have already investigated. These investigations continue today with greater regularity and intensity than before. The number and intrusiveness of investigations and controls has increased since Swisslion commenced these international arbitration proceedings.*[369]

306. On the basis of the evidence before it, it is difficult for the Tribunal to form a view as to the merits of the criminal investigations launched at Agroplod's behest. The Respondent has drawn the Tribunal's attention to the investigating judge's determination that "there is a grounded suspicion" that Agroplod's former directors "misused [their] authorizations" in order to reduce Agroplod's capital, transfer sales and marketing functions to Swisslion, and enter into the Business and Technical Cooperation Agreements to Agroplod's detriment, etc.[370]

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[367] Transcript, Day 5, 26: 9-25; 27: 1-5, referring to Exhibits C-90 and 91.

[368] Meskov first witness statement, paras. 58-63.

[369] Meskov first witness statement, para. 63.

[370] Rejoinder, para. 261, referring to Exhibit C-144.

307. The Respondent noted in its Rejoinder (and at the hearing it appeared that the situation had not changed) that no formal criminal charges have yet been filed against Swisslion or its managers.[371]

308. The State is not responsible for the swearing of criminal complaints by private parties. Its duties arise in its response thereto. In the present circumstance, without having a fuller evidentiary record before it, and in the absence of concrete measures, the Tribunal refrains from making a finding in respect of these matters.

b) Expropriation

309. The Tribunal now turns to the allegation that as a result of the court proceedings, the Respondent unlawfully expropriated the Claimant's Second Tranche of shares without payment of compensation.

310. In its Memorial, the Claimant made the uncontroversial point that a State is responsible for an expropriation effected by any of its organs, including its judiciary. It went on to assert that an expropriation had been effected by the courts' terminating the contract "on the ostensible grounds that Swisslion had not fulfilled its obligations to make the requisite investment contributions during the second half of 2006…"[372] It added that even if it had been lawful to terminate the contract, Macedonian law and the Treaty would have required compensation for the repossession of the shares.[373] The Reply emphasised the latter point in particular, noting that the expropriation claim "does not depend upon a finding that the contract was wrongfully terminated. Rather, it rests primarily upon the fact that Swisslion received no compensation for the Second Tranche, for

[371] Rejoinder, para. 262.

[372] Memorial, paras. 117, 121.

[373] Memorial, para. 123.

which it had paid valuable consideration, when those shares were subjected to a 'compulsory transfer of property rights'."[374]

311. The Tribunal will address both elements of the expropriation claim.

312. With respect to the first element, the contract was terminated and the effect of this order was to transfer the shares back to the selling party. It has already been held that the Ministry was entitled to form the view that the contract had not been complied with and to put that view before the courts. The fact that the courts accepted that view and the judicial decisions have not been successfully challenged before this Tribunal means that the argument that the court effected an expropriation must fail.

313. One of the cases on which the Claimant placed reliance, *Saipem v. Bangladesh,* noted that the *c*laimant itself in that case recognized that a predicate for alleging a judicial expropriation is unlawful activity by the court itself.[375] The award recounts the claimant's acknowledgement that it is "*an illegal action of the judiciary* which has the effect of depriving the investor of its contractual or vested rights constitutes an expropriation which engages the State's responsibility".[376] This point, with which the respondent in that case agreed, was accepted by the tribunal, which noted that it concurred "with the parties that expropriation by the courts *presupposes that the courts' intervention was illegal*…"[377] [Emphasis added.]

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[374] Reply, para. 58.

[375] Cited at para. 118 of the Memorial.

[376] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, para. 127.

[377] *Id*., para. 180. It is true that that tribunal went on to hold that this does not mean that expropriation by a court necessarily presupposes a denial of justice evidently concerned about imposing a requirement to exhaust all local remedies before judicial action could be challenged. Be that as it may, in the event the tribunal found that that the courts decided the case on facts and points of law that had not been in dispute between the parties, the courts' intervention was "abusive", "grossly unfair", and that they "exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and this violated the internationally accepted principle of prohibition of abuse of rights." Award, para. 155-156, 161, and 187. The other case on which reliance was placed, *Rumeli v. Kazakhstan*, found liability on a different basis, namely, collusion between the State and the claimants' competitor, which collusion was then effected through court proceedings. It is not apposite to the facts of the present case.

314. In the Tribunal's view, the courts' determination of breach of the Share Sale Agreement and its consequential termination did not breach the Treaty and therefore was not unlawful. The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor's rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim is not established.

315. Turning to the second element, it is common ground that the courts did not order the Ministry to pay the Claimant for the purchase price when it resolved to terminate the contract. The question is whether, as the Claimant has alleged, this in itself amounts to an expropriation under the Treaty.

316. In his opening argument, counsel for the Claimant argued that a fundamental defect of the Macedonian courts' treatment of the contractual litigation was their failure to consider awarding compensation to Swisslion in the event that the Share Sale Agreement was terminated.[378] It was asserted that the failure to pay compensation for the taking of the shares and even to consider the issue was "either grossly incompetent or in bad faith".[379] The Respondent took issue with this contention and in its opening directed the Tribunal to the minutes of the hearing before the Skopje Basic Court hearing on 30 September 2009 where Swisslion touched on the "legal consequences from the termination" as well as to its arguments on appeal.[380] It asserted that while Swisslion

[378] Transcript, Day 1, pp. 38-42.

[379] Transcript, Day 1, 40: 3-6.

[380] Transcript, Day 1, 228: 2-25, 229: 1-20 with reference to Exhibits C-126 (in which Swisslion's legal representative commented in the course of argument that "[i]f the legal interest of the Claimant [i.e., the Ministry of Economy] lies in the termination of this Agreement, we ask the Court to take into account the legal consequences from the termination of the same") and C-76 (the company's appeal submission, where at para. 40, it posed the question "[w]hat about the money paid for these shares? How and by whom will the money paid as a purchase price under Article 3 of the disputed Agreement be refunded?"

alluded to the payment issue in argument before the courts, no request for the payment of compensation was advanced in the local proceedings.[381] Moreover, when it came to Prof. Nedkov's cross-examination, and he was asked whether, the Share Sale Agreement's having been terminated, it was open to Swisslion to commence a separate lawsuit to claim the return of the purchase price, he agreed that this was appropriate under Macedonian law.

317. In particular, when it was put to him that the Claimant did *not* make a formal claim to the Skopje Basic Court for a specific amount of compensation in accordance with Macedonian law, Prof. Nedkov testified:

> *It should not have done this. According to the provisions of law on obligation, an important fact is the termination of the contract by dissolution, while the relations after the dissolution are clarified. If there are any disputes, contentious issues, then you go to the court again. But these are new lawsuits, separate from the main issue if that had dealt with whether the conditions for dissolution of the contract had been met.*[382] *[Emphasis added.]*

318. Were such a lawsuit to be commenced, the court would examine whether there had been a change in the value of the shares between the time of their purchase and the time of their transfer back to the Ministry.[383] This latter point is of some importance; the evidence suggests that the value of the shares for the purposes of compensation when the contract was terminated was not fixed as the price originally paid for the share. That is, it did not automatically follow from the fact of termination that the purchaser would be entitled to a return of the purchase price.

319. Although counsel for the Claimant briefly adverted to his co-counsel's prior submissions on the compensation issue in his closing argument, he did not elaborate upon them in light of the oral testimony, a point noted by counsel for the Respondent in his closing argument.[384] The Tribunal has already found that the termination resulted from a contract dispute in which one Party, which happened to be a governmental entity, formed the view that its counterparty was in breach and put

[381] Transcript, Day 1, 229: 16-20.

[382] Transcript, Day 3, 64: 9-17.

[383] Transcript, Day 3, 43: 8-15; 63: 2-23.

[384] Transcript, Day 5, 74: 13-15, 133: 3-25, 134: 1-25, 135: 1-2.

the matter before the courts. On the evidence before the Tribunal, it was open to the counterparty to petition the court for compensation in the event of termination. In the circumstances of this case, the Tribunal considers that no expropriation of the moneys paid for the shares was effected by the fact that the courts terminated the Share Sale Agreement and did not order a return of the purchase price in the absence of a request for such relief. The Tribunal accepts the Respondent's submission that no claim for compensation was made in accordance with Macedonian civil procedure.[385]

320. The fact that the Tribunal notes that Claimant apparently never sought in the court proceeding, nor according to its legal expert would the court have been competent to award, a return of the purchase price should not to be seen as imposing an exhaustion requirement on the Claimant. Rather, the Tribunal is of the view that, in these circumstances the Claimant has not proven the juridical fact on which the second limb of its expropriation case is based, i.e., that it had a clear right to recover the purchase price in that proceeding such that the court's failure to so order constituted an expropriation.

321. In the end, the Tribunal finds that no claim for expropriation has been made out under Article 6 of the Treaty and the claim is dismissed.

c) Observance of Commitments

322. The Claimant argued further that the Respondent was in breach of Article 12 of the Treaty, Observance of commitments, which states that:

> Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.

[385] Transcript, Day 5, pp. 133-135.

323. In the Tribunal's view, this claim can be disposed of summarily and it is unnecessary for the Tribunal to consider the complex legal issues that can arise in respect of umbrella clauses. The fundamental weakness of the claim is that even if the Share Sale Agreement were to be considered to be a "commitment" entered into by the Respondent, the Tribunal has already found that the nature of the commitments *made by Swisslion* in the Business Plan and the contract itself were susceptible of different and conflicting interpretations and thus were disputable.

324. Given the ambiguity in the Parties' contractual relationship, the Tribunal cannot find that the Respondent failed to "constantly guarantee" the observance of its commitments. At the end of the day, there were issues pertaining to the investor's compliance with the contract on which reasonable persons could disagree. The Ministry did not unilaterally terminate the contract, but rather put the issue before the courts. The Tribunal is therefore unable to find that in resolving to seek the termination of the contract and in submitting the matter to the jurisdiction of the courts, as provided for in the contract, the Ministry breached any obligation to constantly guarantee the observance of its commitments.

325. The claim for breach of Article 12 is accordingly rejected.

d) Unreasonable Impairment

326. The final claim advanced by the Claimant is that the Respondent impaired the Claimant's investments by "unreasonable" measures. The Claimant identified five ways in which its investments were impaired through: (i) the restrictions imposed on the use of the Second Tranche of shares; (ii) the provisional measures restricting the Claimant's right to use the First Tranche; (iii) the prevention of the Claimant's enjoyment of its shareholdings in the subsidiaries by eliminating its control over Agroplod; (iv) a judicial order that the bank to which the Claimant had granted a mortgage of the Claimant' s shares in Agroplod was prohibited from foreclosing on

such mortgage which was said to have eliminated the security's value and impaired the Claimant's ability to maintain its financing arrangements; and (v) the victimising of the Claimant and its representatives in Macedonia through unjustified investigations and threats of prosecution.[386]

327. The Claimant argued further that the foregoing impairments were unreasonable in that: (i) the State Attorney sought relief before the SEC after its request for the same relief was rejected by the Basic Court and the relief granted by the SEC was eventually overturned; (ii) the Ministry of Economy's decision to terminate the contract was contrary to its express terms and those of the Business Plan and "contradicted the representations of the government auditors who confirmed the propriety of Swisslion's conduct in early 2007"; (iii) the Ministry sought to terminate the Share Sale Agreement without observing basic provisions of Macedonia law which require compensation to be paid in the case of termination of personally fulfilled contracts; (iv) the measures taken in respect of the mortgage eliminated the legal certainty between Swisslion and its lender and unreasonably impaired Swisslion's ability to use its investment, i.e. the shares over which it had granted a mortgage; and (v) the "perpetual" investigations against Swisslion and its General Manager are unreasonable because they are manifestly unfounded.

328. After careful consideration of all of the record evidence and the parties' pleadings, the Tribunal has concluded that the Respondent breached the obligation to accord fair and equitable treatment to the Claimant. Most of the measures complained of in the Article 4(1) claim are duplicative of the measures that have already been examined within the context of the breach of the fair and equitable treatment standard. Moreover, it is apparent that the Tribunal has a different view of the characterisation of certain alleged facts from those on which the unreasonable impairment claim is based. The Tribunal finds that the claim is better addressed under Article 4(2) and accordingly the Article 4(1) claim is dismissed.

[386] Memorial, para. 135.

329. In the end, it is the Tribunal's view that the claimed breach of Article 4(1) adds little to the Claimant's case, and would not in any event increase the measure of damages, and that the series of measures identified in the Tribunal's determination of a breach of Article 4(2) are those which engage the responsibility of the State. Accordingly, the claim of breach of Article 4(1) is rejected.

3. Evaluation of the Damages

330. The Claimant submitted two expert reports prepared by Mr. Anthony Charlton, who was instructed to assume that the Claimant's investment was taken from it and that it should be valued as of 19 May 2008, the date on which the SEC rendered its first decision freezing the Claimant's entitlement to vote on the Second Tranche of shares. On the Claimant's case, although the Respondent "began to interfere with the investments relatively soon after Swisslion had gained control of Agroplod, the company registered a sufficient track record of profitability for some projection purposes."[387] Accordingly, Mr. Charlton employed a discounted cash flow analysis based on the performance of the "Agroplod subsidiaries" during the period 2006-2008.[388] He also used the experience of the Claimant's affiliate in Serbia, Eurolion, as a proxy for the Agroplod group's probable future cash flows and compared the results of that analysis with his discounted cash flow analysis.[389]

331. Mr. Charlton's first report estimated that based upon Agroplod's performance in the two years after Swisslion acquired control and a comparison with Eurolion's performance over a longer period, the Claimant's investments in Agroplod and the subsidiaries in May 2008 would have been €15.95 million.

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[387] Memorial, para. 157.

[388] As noted previously, the parties differed over the use of this term. In the Respondent's view, the companies would be better regarded as "Swisslion subsidiaries".

[389] Memorial, para. 157.

332. Although the Claimant asserted that there was sufficient amount of information to enable a reliable discounted cash flow analysis to be employed, in the event that the Tribunal disagreed, it contended that the Claimant should be entitled to compensation equal to the value of the investments that it actually made in Agroplod and the subsidiaries.[390] This was estimated by Mr. Charlton to amount to a total of €11 million.[391] To this, the Claimant added the €1.1 million paid for the Second Tranche of shares and a total of €1.3 million for all of its other shares in Agroplod which, it was contended, "were bought in reliance on having control of the Agroplod group and are virtually worthless to Swisslion in the absence of that control." The total value of these investments amounted to €13.4 million, a figure which was then adjusted upwards using the Claimant's WAAC of 13.3% calculated by Mr. Charlton, with a resulting amount of compensation in the amount of €19.01 million said to be due as at the date of the Memorial's filing.

333. The Respondent adduced the expert reports of Mr. Christopher Glover, who took a different view of the damages claim. In the Respondent's submission, the Second Tranche, representing 25.4% of the shares in Agroplod, was purchased by the Claimant for consideration of €1.1 million, yet the claim now being brought sought approximately €20 million in compensation from losses allegedly incurred as a result of the loss of such shares.[392]

334. The Respondent argued further that since the termination of the Share Sale Agreement was not in breach of the Treaty's expropriation provision, there was no unlawful expropriation resulting from the termination of the contract. It argued further, in the alternative, that if the Tribunal did find an expropriation, compensation should be assessed in accordance with Article 5 which provided that it shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge.[393]

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[390] Memorial, para. 161.

[391] Charlton first report, paras. 165-171.

[392] Counter-Memorial, para. 450.

[393] Counter-Memorial, para. 457.

335. The Respondent also argued that since Agroplod no longer has any valuable assets, since they had been transferred to the "Swisslion subsidiaries", the market value of the Agroplod shares and consequently any compensation payable to the Claimant in respect of the Second Tranche, which were they only shares that the Claimant no longer owns, would be nil.[394]

336. The Respondent also took exception to the use of the discounted cash flow methodology, noting that Agroplod did not have a proven record of profitability and for that reason alone the use of the method was inappropriate in the facts of this case.[395] It was argued further in this regard that there were several flaws in the use of the DCF methodology, for example, in that the Claimant was claiming the value of the shares not only in Agroplod but also in the three subsidiaries in which the Claimant still owns majority interests.[396] The Respondent advanced a series of other objections to the Claimant's estimate of its damages, but it is unnecessary for the Tribunal to record them.

4. The Tribunal's Findings

337. The alleged expropriation and the other claims that were based upon a substantial interference with the investment have not been made out. The finding of breach is instead based on measures taken prior to or on the margins of the contractual litigation. This necessarily leads to a substantial reduction in the amount of damages that can be awarded.

338. The Respondent correctly observes that the Claimant retains ownership of the First Tranche of shares and its substantial majority ownership of the three subsidiaries. The conduct of the business of the three subsidiaries has become more difficult and conflict-ridden since the Claimant lost control of Agroplod. The August 2010 requests by Agroplod's Board for the

[394] Counter-Memorial, para. 458.

[395] Counter-Memorial, para. 463.

[396] Counter-Memorial, paras. 465-471.

initiation of a criminal investigation, which apparently continues, and the demand for the renegotiation of the Business and Technical Co-operation Agreements are evidence of that fact. Given the relations between the shareholders, this is unsurprising. At the same time, the fact is that the business interests of Agroplod, Swisslion and the three subsidiaries are now bound up together.[397]

339. Since the damages claim was predicated on an assumed unlawful expropriation or other breach of similar effect and impact, and this has been rejected, it follows that the expert evidence adduced in support of the expropriation claim is of little value to the Tribunal when it estimates damages for the breach that it has found.

340. Faced with a relatively minor breach and expert evidence that was aimed at valuing the effects of alleged breaches that have been found not to be substantiated, when it came to calling upon the Parties to submit their submissions on costs, the Tribunal requested both Parties to also provide evidence on what kinds of costs they incurred in connection with the SEC measures and the criminal investigation of Mr. Meskov and his colleague. The Respondent objected to the Tribunal's request for evidence on the costs incurred in the SEC and criminal investigations proceedings, arguing that the only material that could be filed at that stage of the proceedings was restricted to the costs incurred in respect of the arbitration itself.[398] It submitted that the Tribunal's discretion to award costs pursuant to Article 61(2) of the Convention and Rule 28(2) of the Arbitration Rules is not unlimited and is restricted only to the costs of the proceeding. It argued further that specific relief for the costs incurred in the SEC and criminal complaints proceedings has not been requested in this proceeding and therefore an award of such costs would be *ultra*

[397] That said, the Tribunal has noted the Claimant's comment in its letter of 8 March 2012 to the effect that counsel is instructed that Agroplod has terminated the lease to Prespa Turist dated 31 October 2011.

[398] Respondent's Submissions on Costs, 24 April 2012.

petita with the Respondent's being denied the opportunity to make submissions on any such damages. The result, in its submission, would be a denial of basic principles of due process.[399]

341. The Tribunal has a different view. The proceeding had not been declared closed pursuant to Rule 38 of the Arbitration Rules. The Tribunal has already discussed its powers under Article 43 of the Convention and Rule 34 of the Arbitration Rules and it is unnecessary to repeat the authority for the Tribunal's action. From the beginning of this proceeding, the SEC and criminal proceedings were both pleaded as breaches of the Treaty.[400] While it is true that a separate claim for relief against the SEC and criminal proceedings was not particularised, the two measures were expressly identified as giving rise to cognisable breach and were bound up in the larger expropriation claim. The Tribunal does not see how, its having found a breach of the Treaty, it can refrain from awarding damages that flow from the measures it has found to be inconsistent with the Respondent's international obligations.

342. As for the Respondent's objection based on due process concerns, the Respondent was given an opportunity to comment on the Claimant's Costs Submission and it availed itself of that opportunity. In the section of the Respondent's Response to Claimant's Submission on Costs on the SEC and criminal investigation proceedings, the Respondent took issue with the Claimant's assertion that its counsel in the international proceeding spent significant time on the SEC and criminal complaints issue in preparing this ICSID claim. The Respondent correctly observed that "it reasonably assumes that the Tribunal intended the Parties to identify those costs incurred before the Macedonian courts in the SEC and criminal investigation proceedings."[401] While the Respondent also challenged various fee arrangements between the Claimant and its Macedonian counsel and maintained its objections generally to the Tribunal's jurisdiction to decide costs of

[399] *Id.*, paras. 32, 35.

[400] Request for Arbitration, paras. 80-81, Memorial, paras. 69-76, 88-90, 135-136, and 143, and Reply, paras. 76-102, 204.

[401] Respondent's Response to Claimant's Submission on Costs, para. 25.

proceedings other than the present arbitration[402], it did not take issue with the Claimant's evidence of the legal costs incurred in connection with the two sets of proceedings in Macedonia.

343. The Claimant's filing dated 24 April 2012 states that it incurred a total of €34,000 in relation to the SEC and criminal proceedings.[403]

344. The Tribunal has concluded that it can arrive at an appropriate estimation of damages having regard to the professional fees incurred by Swisslion in the two local proceedings found to be part of the composite act, together with an estimate of the costs arising out of responding to the Ministry and other agencies of the Macedonian government and the impact of these various acts on the running of the business generally, bearing in mind that no damages can be awarded for losses flowing from the termination of the Share Sale Agreement and the fact that it is not the Tribunal's role to award punitive damages.

345. It is not possible to quantify the damages with certainty, but it is well established in international law that difficulty in ascertaining damages does not preclude their being awarded in the event of a breach. A typical comment is the following:

> … the claimant has the burden of proving the quantum of damages. Nevertheless, the failure of a claimant to prove its damages with certainty, or to establish its right to the full damages claimed, does not relieve the tribunal of its duty to assess damages as best it can on the evidence available, as"…it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred." (*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award, 20 May 1992, (1993) 32 I.L.M. 933-1038 at paragraph 215).[404]

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[402] *Id*., paras, 29-33.

[403] Claimant's Statement of Fees and Expenses paid to Freshfields Bruckhaus Deringer LLP and to ICSID, 24 April 2012. The Claimant also made submissions on the time that its counsel had spent relating the SEC and criminal proceedings to the international claim itself. This was not of interest to the Tribunal because such costs would already be encompassed by the legal fees incurred in relation to the Treaty claim. The Tribunal agrees with the Respondent's objection to this part of the Claimant's Submission.

[404] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States*, ICSID Case No. ARB(AF) 04/05, Decision on the Request for Correction, Supplementary Decision, and Interpretation, 10 July 2008, para. 38.

346. In addition to the legal fees incurred in opposing the SEC measures and responding to the first criminal investigation, the Tribunal considers that some damage was suffered by Swisslion during the period in which the Ministry failed to engage with it. On Mr. Meskov's testimony, which was un-contradicted, he regularly communicated orally with the Ministry.[405] Swisslion also prepared the two written reports in 2006, several folders of documents for the 15 February 2007 officials' visit to Resen and in response to the 1 March 2007 request for further documentation. It filed a further report to the Ministry of Economy in August 2007.

347. Its reports to the Ministry were met with silence until March 2008 when the petition to terminate the Share Sale Agreement was filed with the Skopje Basic Court.

348. During 2007, Swisslion responded to various inspections by different government agencies (the Ministry of Finance and the Ministry of Labour and Social Policy). According to Mr Meskov, during this period, "[n]ew and unusual controls on our business began to emerge in mid-2007". "We were subjected to all sorts of government inspections and controls."[406] The SEC proceedings and the first criminal investigation (later found to be without basis) at a time when the other legal proceedings were underway further diverted management's time and attention and reasonably could be expected to have had an effect on the investment's prospects.

349. The uncertainty that surrounded the investment as a result of the SEC procedures and criminal charges clouded its prospects. All of this unfolded in the context of a bitter dispute between the Agroplod shareholders. The State is not responsible for the acts of private persons, but its measures became linked with the ongoing shareholders' dispute and prompted Swisslion to take its own measures to contest Mr. Kitinov's efforts to enlist the government in aid of his side of the shareholders' dispute. The criminal and professional audit standards complaints against

[405] Meskov first witness statement, para. 44, Meskov second witness statement, para. 18.

[406] Transcript, day 2, 49: 19-21.

Pelagoniska Audit house are an example. All of this came at some cost to the Claimant.[407] At the same time, the Tribunal must exercise caution not to award damages for the seminal event which it has found does *not* give rise to State responsibility.

350. The Tribunal considers that Mr. Charlton's estimate of the impact of the reputational damages suffered in 2008 (which corresponds in time to the SEC measures, the publication of the initiation of the criminal investigation and the initiation of the contract litigation) is suitable for estimating part of the measures' impact on the Claimant. He estimated a loss of export sales not achieved at €0.3 million and a loss of domestic sales at €0.06 million.[408] These were losses suffered by Agroplod and the subsidiaries, not by Swisslion itself, so they would have to be discounted to reflect Swisslion's interests therein. Moreover, it is not possible to determine precisely how much of the losses were attributable to the Share Sale Agreement litigation initiated in May 2008 and how much were attributable to the SEC and criminal measures. In the end, the Tribunal considers that of a total of €360,000 in losses quantified by Mr. Charlton, two-thirds of the losses can be attributed to the measures found to have been contrary to the Treaty's fair and equitable treatment standard. In all the circumstances, having regard to the precise breach identified by the Tribunal and to: (i) the legal fees incurred by Swisslion contesting the SEC and criminal investigation measures; (ii) the diversion of management's time in responding to the heightened controls whilst the Ministry of Economy caused investigations to be conducted without advising Swisslion that its contractual performance was a potential legal dispute; and (iii) an allocation of the lost sales resulting from the reputational damage suffered in 2008, the Tribunal has concluded that it is appropriate to fix the Claimant's damages at €350,000.

[407] In its pleadings, the Claimant placed some emphasis on reputational harm and lost sales. Mr Charlton sought to quantify such loss in his first expert report. Reputational damage evidence was reflected in Mr Meskov's first witness statement, para. 56 as well as in Mr Charlton's first and second expert reports, at paras. 151 and 44, respectively.

[408] Charlton first report, para. 151.

C. INTEREST AND COSTS

351. Article 61(2) of the ICSID Convention and Rule 47(1) (j) of the ICSID Arbitration Rules empower the Tribunal to decide the apportionment of the expenses incurred by the disputing Parties in connection with the proceedings as well as of the fees and expenses of members of the Tribunal and the charges for the use of the facilities and services of this Centre.

352. The Claimant has quantified its costs of legal representation at €1,091,904 for Freshfields Bruckhaus Deringer LLP (subject to an upward adjustment of the average hourly fee depending upon the amount of damages awarded) and €595,500 for GKN. It has advanced $250,000 in advance fees and $25,000 in lodging fees to ICSID.

353. The Respondent has quantified its costs, inclusive of advance ICSID fees and expenses, in the amount of USD 3,675,211.23.[409]

354. Both the Convention and the Arbitration Rules give a tribunal broad discretion in the awarding of costs. The Tribunal has carefully considered the Parties' costs submissions and has concluded that the Respondent should bear part of the Claimant's costs of legal representation.

355. The Tribunal has borne in mind that although it has found State responsibility to be engaged, the Claimant's major claims were rejected, thus necessarily leading to a dramatic reduction on the amount of damages that could be awarded. The Claimant has partially prevailed, but its limited success does not justify awarding its full costs of legal representation.

356. The Claimant argued vigorously that the Respondent's jurisdictional objections were baseless and that this should be taken into account by the Tribunal when awarding costs.

[409] Respondent's Submissions on Costs, 24 April 2012.

Although the Tribunal rejected the objections, they cannot be said to have been frivolous and no adjustment is warranted by their having been raised.

357. In the circumstances of the present case, the Tribunal considers that it is appropriate that the Respondent pay €350,000 of the Claimant's costs of legal representation. Each Party shall otherwise bear its own costs connected with the proceedings as well as the fees and expenses of the arbitrators and charges for the use of the Centre's facilities and services. It is so ordered.

358. Since its claims encompassed a claim for expropriation, the Claimant requested an award of interest that would accrue at the rate of its WAAC, specified at 13.3%. The Tribunal did not accept the expropriation claim and considers that an interest award based on the Claimant's WAAC is not appropriate. The only provision of the Treaty that makes any reference to a rate of interest is, of course, Article 5, which deals with expropriation. Under that provision, interest is to be calculated on the annual LIBOR basis.

359. In the Tribunal's view, the Respondent's breach of the Treaty occurred as of 30 March 2007 when, having received the Claimant's response to the Ministry's letter of 1 March 2007, the Ministry began to initiate control proceedings without engaging with the Claimant as to the nature of its performance under the Share Sale Agreement. The Tribunal finds it appropriate to use the LIBOR rate of interest as specified in Article 5. Interest shall therefore run as of that date and is calculated on the basis of the annual LIBOR rate, compounded semi-annually. Interest shall run from 30 March 2007 until full payment of the amount due.

IV. DISPOSITIVE PART OF THE AWARD

360. For the foregoing reasons, the Tribunal decides as follows:

> The Respondent breached Article 4(2) of the Treaty by failing to accord fair and equitable treatment to the Claimant's investment.

Within 45 (forty-five) days of the dispatch to the parties of this Award, the Respondent shall pay to the Claimant compensation in the sum of €350,000 (three hundred and fifty thousand Euros), increased by semi-annually compounded interest on the amount at the rate of LIBOR applicable from 30 March 2007 until the date of payment in full of this Award.

The Respondent shall pay the sum of €350,000 (three hundred and fifty thousand Euros) to the Claimant as part of its legal costs and expenses.

Beyond the payment of the damages and the partial payment of the Claimant's legal costs, neither Party shall have recourse to the other.

The Parties shall share equally the costs and expenses of the Tribunal and ICSID.

All other claims by either Party are rejected.

[*Signed*]

H.E. Judge Gilbert Guillaume
President
Date:

[*Signed*]

Mr. Daniel M. Price
Arbitrator
Date:

[*Signed*]

Mr. J. Christopher Thomas, Q.C.
Arbitrator
Date: