EXHIBIT C-104

2. It is for the institutions competent in matters of common agricultural policy to adopt the measures necessary to correct this incompatibility.

Kutscher Sørensen Bosco Donner Pescatore

Mertens de Wilmars Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 19 October 1977.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 22 SEPTEMBER 1977 [1]

Mr President,
Members of the Court,

1. The opinion which I have to deliver today is concerned with six cases (Joined Cases 64 and 113/76, Joined Cases 117/76 and 16/77 and Joined Cases 124/76 and 20/77) relating to agriculture and they have one important feature in common: they all raise the issue of observance of the principle of non-discrimination by the Community legislature. More specifically, the central issue is whether and under what conditions the principle of non-discrimination must be considered to have been breached when, by means of regulations, the Community authorities decide to abolish aids granted for a time to particular products while maintaining aids already granted to a product in competition with them.

I should state at once that the products which in the present case no longer benefit from aids (in the form of 'production refunds') are 'quellmehl' and 'gritz'; the product which continues to benefit from them is starch. Quellmehl, which is produced by the processing of maize, wheat or broken rice by means of a heat treatment helps to keep dough damp in the breadmaking process and is traditionally used in Germany and Denmark as an additive in the manufacture of rye bread. Gritz is meal which is made from maize by means of a purely mechanical operation and is mainly used in the brewing of beer. For the main purpose for which they are used, each of the two products can, technically speaking, be replaced by starch.

During the stage at which the common organization of the market in cereals was being progressively established, the similar treatment of starch and quellmehl in the matter of production refunds was the outcome, in particular, of

1 — Translated from the Italian.

Regulations Nos 141 and 142/64/EEC of the Council of 21 October 1964. Article 17 (1) of Regulation No 141 instituted a system of production refunds 'in respect of maize and common wheat used by the starch and 'quellmehl' industry... Regulation No 142, which was intended to provide a provisional solution of the problem for the period 1 November 1964 to 31 March 1965, left the Member States free to grant production refunds for maize, soft wheat and broken rice used in the manufacture of starch and quellmehl, and, in Article 1 (1) (e) provided as follows: 'For quellmehl, the refund in respect of maize, common wheat and broken rice used for the manufacture of this product shall be equal to that allowed on the same cereal when used for starch manufacture'. In this connexion it should be noted that the condition under which the amount of the refunds was the same had been applied in Germany since 1930 to maize used both for the manufacture of starch and for the production of quellmehl.

Regulation No 11/65/EEC of the Council of 26 January 1965 gave the Member States the right to grant a production refund on gritz on a temporary basis. In the preamble to the regulation, the reason given for that measure was that 'the application of the levy system... has on the one hand caused maize groats and meal to increase in cost and has on the other hand given rise to difficulties as regards their use in the brewing industry, by reason of the competition from products with a similar use'.

Regulation No 120/67/EEC of the Council of 13 June 1967 introduced a compulsory production refund both for maize and common wheat used by the starch industry for the manufacture of starch and quellmehl and for maize used in the maize industry for the manufacture of maize groats and meal (gritz) used by the brewing industry (Article 11 (1) (a) and (c)). There is in the tenth recital of the preamble to the regulation a clear indication of the circumstances calling for the production refund for starch and also of the grounds justifying the extension of the grant to quellmehl and to gritz. On the first aspect there is a reference to 'the special situation on the market in starches and, in particular, *the need for that industry to keep prices competitive with those for substitute products*'. On the second aspect there is a reference to 'similar reasons... because of the interchangeability of starches with quellmehl and maize groats and meal'. In essence, therefore, Community aid was given to starch producers to enable them to meet competition from synthetic substitute products: at the same time, aid was granted to quellmehl and gritz producers in order to prevent starch, which benefited from the production refund, from being used instead of quellmehl in baking and instead of gritz in the manufacture of beer.

On the matter of the amount of the refund, Regulations Nos 138/67/EEC of 13 June 1967 and 367/67/EEC of 25 July 1967 adhered to the principle that the level fixed for starch should be the same as that applicable to gritz and Regulations Nos 178/67 of 27 June 1967 and 371/67 of 25 July 1967 provided likewise in the case of quellmehl. In the sole recital in the preamble to Regulation No 138, which was substantially reproduced in the recital in Regulation No 367, it is stated that 'the production refund on maize used by the maize industry for the manufacture of groats and meal for the brewery industry... should be fixed at such a level as to achieve a balance between the cost of supplying the brewing industry with maize starch on the one hand and with maize groats and meal... on the other' and that 'this object will be achieved by fixing the refund on maize for the manufacture of groats and meal *at the same level* as the refund on maize for the manufacture of starch'. Article 1 of the regulations in question provided

accordingly. In turn, Regulations Nos 178 and 371 of 1967 provided for a single level of production refund for maize and common wheat for the manufacture of starch and quellmehl.

These identical arrangements for the three products with which we are concerned, which, as we have seen, go back to 1964 in the case of quellmehl and to 1965 in the case of gritz, were maintained for about ten years, that is to say until the adoption of Regulation (EEC) No 1125/74 of the Council of 29 April 1974, which introduced certain amendments to Regulation No 120/67/EEC on the common organization of the market in cereals. In particular, it amended the wording of the above mentioned paragraph (1) of Article 11 by abolishing the grant of a production refund for maize and common wheat used in the Community for the manufacture of quellmehl while maintaining the refunds for maize and common wheat for the production of starch and for maize for the manufacture of gritz used in the Community by the brewing industry. On the same date, 29 April 1974, another regulation of the Council (No 1132/74) consolidated in a single instrument the provisions on production refunds for cereals and rice and was naturally to the same effect as Regulation (EEC) No 1125. A few months later, however, gritz suffered the same fate as quellmehl: Regulation (EEC) No 665/75 of 4 March 1975, in fresh amendments applied to Regulation No 120/67/EEC (in particular to Article 11 (1) thereof), ceased to provide for any production refund in respect of maize for the manufacture of gritz used by the brewery industry while merely making the refunds granted for maize and common wheat used in the manufacture of starch optional instead of compulsory, without abolishing them. The latter refund, however, again became compulsory by virtue of Regulation (EEC) No 1955/75 of the Council of 22 July 1975 which fixed them at a lower amount than previously.

What grounds did the Council give for changing its attitude on the subject of aids for quellmehl and gritz? In the third and fourth recitals in the preamble to Regulation (EEC) No 1125/74, it is stated that 'the production refund for quellmehl was initially granted with a view to promoting certain specific uses of quellmehl as a food for human consumption, account being taken of the possibility of its competing with a number of other products' and that 'experience has shown that the opportunity for such substitution is economically slight, if not non-existent' with the result that 'the production refund for quellmehl should therefore be abolished'. As for gritz the second recital to the said Regulation (EEC) No 665/75 merely states that 'it no longer appears necessary to grant a refund for the production of maize groats and meal for use by the brewing industry in the manufacture of beer'.

It should be noted in this connexion that less than a year earlier the Council, in the fourth recital to Regulation (EEC) No 1132/74, indicated that it still believed that the level of the production refund for maize used in the manufacture of gritz for use by the brewing industry should be 'such as to achieve a balance between the cost of supplying the brewing industry with maize starch, on the one hand, and with maize groats and meal and broken rice, on the other' (these words being repeated from the sole recital in the preamble to Regulations Nos 138 and 367 of 1967). I ought also to add that the Commission on two occasions proposed to the Council that it should continue to grant the same type of aid and at the same level for maize used in the production of starch and for maize used in the manufacture of gritz for use by the brewing industry. I refer to the proposal for a regulation of 8 February 1975 and that of the following 20 June which, in its statement of the reasons on which it was based repeated the considerations set out in the preamble, referred to above, to

Regulation (EEC) No 1132/74. Despite this, the Council decided to limit the production refund for maize and common wheat used in the manufacture of starch and this attitude was confirmed by Article 11 (1) of Regulation (EEC) No 2727/75 of 29 October 1975 the preamble to which again refers to the 'special market situation for ... starch'. A more recent regulation (No 1862/76) dated 27 July 1976, raised the amount of the refund for starch from 10 to 14 units of account.

2. The proceedings which are the subject of this opinion fall into three groups, each containing two cases. The first group comprises Joined Cases 64 and 113/76, which arise from applications for damages brought against the Council by the two French undertakings Dumortier Frères and Maïseries du Nord, who are gritz producers. The second group comprises Joined Cases 124/76 and 20/77, which arise from requests for a preliminary ruling submitted to the Court by the Tribunaux Administratifs of Nancy and Châlons-sur-Marne in connexion with the cases of *Moulins Pont-à-Mousson* v *ONIC* and *Providence Agricole de la Champagne* v *ONIC*, which, too, raise the question of the abolition of Community aids for gritz. Finally, the third group comprises Joined Cases 117/76 and 16/77, which arise from requests for a preliminary ruling submitted by the Finanzgericht Hamburg in connexion with the cases of *Ruckdeschel and Hansa-Lagerhaus Ströh*, v *Hauptzollamt Hamburg* and *Diamalt* v *Hauptzollamt Itzehoe*, which are concerned with the question of the discontinuance of the aids for quellmehl.

As regards the cases in the first group, it must be borne in mind that, in addition to the applications for damages before this Court, the Dumortier and Maïseries du Nord undertakings have brought two actions before the Tribunal Administratif of Lille against the rejection by the French intervention agency for cereals (ONIC) of their applications for a production refund for maize used as from 1 August 1975 for the production of gritz for use by the brewing industry. They also contend, however, that the damage they have suffered includes the reduction in the quantities of gritz which they have been able to sell off during the 1975/76 marketing year and the concomitant loss of customers. In their applications, they seek accordingly an order that the Council should be ordered to pay compensation both for the financial loss arising from the absence of the grant of the refund which the undertakings concerned declare that they have been unable to claim from the purchasers and for the damage arising from the reduction in sales and outlets.

As regards the cases in the second group, the proceedings pending before the Tribunaux Administratifs of Nancy and Châlons-sur-Marne were brought by other French undertakings which are producers of gritz on the basis of applications against the rejection by the said national intervention agency of their applications for the production refund in respect of the maize used by them.

In connexion with those proceedings the Tribunal Administratif, Nancy, by order of 25 November 1976, and the Tribunal Administratif for Châlons-sur-Marne, by order of 1 February 1977, seek a preliminary ruling from the Court of Justice under Article 177 of the Treaty 'on the validity of Regulations Nos 665/75 of 4 March 1975 and 2727/75 of 29 October 1975 of the Council of the European Communities in so far as they abolish the production refund established previously for manufacturers of maize meal intended for use by the brewing industry'.

Finally, *as regards the cases in the third group*, it should be noted that certain German producers of quellmehl requested the competent national institution to continue to pay them the production refund in respect of maize

used in the manufacture of quellmehl and that, after their request was rejected, they brought proceedings before the Finanzgericht Hamburg against the decision refusing their request. By orders of 8 November 1976 and of 18 January 1977 the Finanzgericht referred to the Court under Article 177 of the EEC Treaty a request for a preliminary ruling on the following questions:

'1. Do Article 11 of Regulation No 120/67/EEC as last amended by Regulation (EEC) No 665/75 of 4 March 1975 (OJ L 72 of 20. 3. 1975, p. 14) and Article 1 of Regulation (EEC) No 1955/75 of 22 July 1975 (OJ L 200 of 31. 7. 1975, p. 1) or does Article 11 of Regulation (EEC) No 2727/75 of 29 October 1975 (OJ L 281 of 1. 11. 1975, p. 1) infringe the prohibition of discrimination contained in Article 40 (3) of the EEC Treaty and are they invalid in so far as they do not grant a production refund of the same amount on maize for the manufacture of quellmehl as they do for the processing of this product into starch?

2. If the answer to Question 1 is in the affirmative, have manufacturers of quellmehl a direct claim to the same production refund as the manufacturers of pre-gelatinized starch or is a legal measure adopted by the Council required for this?'

It is clear therefore that the issue as to the validity of the regulations of the Council which put an end to production refund arrangements for gritz and quellmehl arises in all the cases to which I have referred. However the grounds of the alleged invalidity are not quite the same in the different groups of cases. The applicants in the actions for damages have argued that there has been a breach of the principles of freedom of trade and industry and of freedom of competition as well as of the principle of equality of treatment (adding a procedural ground which they did not however pursue in their oral submissions). The Finanzgericht Hamburg specifically referred to the prohibition of discrimination enshrined in Article 40 (3) of the EEC Treaty, whereas the French administrative courts went no further than to seek a ruling from this Court on the validity of the regulations concerned. If is of course true that the provisions and matters of fact involved concern two different products, in the context of different procedures, so that it is essential to bear in mind the features distinguishing each group of cases. On the other hand there van be no doubt that the central issue raised by the six cases is, as I pointed out at the beginning of this opinion, that of observance of the principle of non-discrimination. Because of this I regard my first task as being to consider the scope of that principle in Community law in the light of the precedents established by the Court.

3. In so far as it is concerned with public authority whether in the form of the Member States or of the Community institutions, the principle of non-discrimination is the counterpart of the principle of equality of treatment of individuals who are subject to that authority. In national law, it is in the first place an essential item in any catalogue of human rights and because of this it generally has constitutional force. But step by step with the development of State or Community intervention in the economy the principle has also been applied for the benefit of undertakings in the context of law in the economic field. The prohibition of discrimination in the economic field first became important in American case-law towards the end of the last century, especially in connexion with the principles safeguarding freedom of competition. But the concept was later widened so as to restrict the freedom of public authorities to intervene in the economic field, with the object of protecting undertakings from unwarranted differences in treatment.

The prohibition contained in Article 4 (b) of the ECSC Treaty of any

discrimination between producers, between purchasers or between consumers also applies, without doubt, to the Community institutions, as, in relation to the subject of concentrations, is clear from the provisions of the second subparagraph of Article 66 (2), which lays down that when the High Authority is assessing whether it should authorize a concentration, it must take account of the size of like undertakings in the Community, to the extent it considers justified *in order to avoid or correct disadvantages resulting from unequal competitive conditions.* As we are aware, the EEC Treaty in the second subparagraph of Article 40 (3) requires the Community, specifically in respect of agriculture, in creating a common organization of the market in pursuit of the objectives set out in Article 39, to 'exclude any discrimintation between producers or consumers within the Community'. In addition to contributing to the establishment of healthy conditions of competition, in so far as this is compatible with requirements inherent in the pursuit through the intervention by the authorities on the market of the objectives of Article 39, the second subparagraph of Article 40 (3) is mainly intended to ensure equality of treatment for individuals affected by exercise of the Community's power to intervene in the organization of agriculture.

The case-law of the Court of Justice clarifies the Community concept of discrimination and throws light on three essential aspects, laying it down that (a) discrimination consists of the dissimilar treatment of comparable situations; (b) Community measures which provoke disturbances in the competitive capacity of undertakings must be considered discriminatory; and (c) differentiation based on objective criteria is permissible but any unjustified difference of treatment constitutes discrimination.

As regards (a) above, reference must above all be made to the judgment of 17 December 1959 in Case 14/59, *Société des Fonderies de Pont-à-Mousson* v *High Authority of the European Coal and Steel Community* (Rec. 1958 and 1959, p. 445, *et seq.*). As part of the grounds of its judgment with regard to the second complaint, (b), the Court declared *inter alia* that discrimination consists in the dissimilar treatment of comparable situations; it therefore declared that there was no discrimination on the part of the High Authority in exempting certain foundries (the so-called integrated steel foundries) from the payment of compulsory contributions whilst at the same time refusing to grant a similar exemption to other foundries of a different type (foundries engaged in pre-melt) since the categories of undertakings involved did not operate with the same production plant or use the same raw materials, with the result that the competitive positions of the two were not comparable.

Subsequently, in the judgment of 10 May 1960 in Joined Cases 3 to 18, 25 and 26/58, *Barbara Erzbergbau AG and Others* v *High Authority of the European Coal and Steel Community* the Court declared that the meaning of the concept of discrimination 'is primarily that unequal conditions are laid down for comparable cases'. In that judgment two important matters are clarified: on the one hand, the Court rejected the view that any comparison between several undertakings must take into account all the circumstances in which they are placed (observing that this 'would lead to the result that an undertaking is only comparable with itself, and thus the concept 'comparably placed' and, therefore, that of 'discrimination' would become devoid of all meaning'); on the other hand, the Court declared that 'the concept of discrimination does not imply, by definition, the fact that direct damage is caused' whilst recognizing that 'the application of such unequal conditions may, it is true, bring about damage, which can then be considered as the

consequence by which that discrimination may be detected'.

The same reasoning underlies the judgment of 17 July 1963 in Case 13/63, *Government of the Italian Republic* v *Commission of the European Economic Community* [1963] ECR 165 in which it was declared *inter alia* that 'the different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination' and that discrimination in substance consists 'in treating either similar situations differently, or different situations identically'.

To recapitulate therefore: in order to determine whether provisions which introduce a difference in treatment are discriminatory, it is first of all necessary that the conditions and situations in which undertakings are placed shall be comparable in the sector to which the rules in question apply. Clearly the concept of comparability of situations does not mean that they should be exactly alike. Comparability must be determined against the backround of competition (see the above mentioned judgment of 17 December 1959, *Société des Fonderies de Pont-à-Mousson)* and in each case in the light of the objectives of the measures at issue; it is principally in the light of those objectives that it is possible to determine whether certain differences existing between undertakings are sufficient to make it impossible to treat them as comparable cases and, in consequence, to subject them to different treatment. In other words, the principle of non-discrimination must, in the case of intervention by a public authority affecting the economy, be regarded as violated where two situations which are comparable are treated differently in terms of the objectives pursued by such intervention. This was the view expressed by Mr Advocate-General Lagrange in his opinion in Case 13/63, referred to above, *Government of the Italian Republic* v *Commission* [1963] ECR 190.

As regards (b) above, reference must be made to the judgment of 17 July 1959 in Joined Cases 32 and 33/58, *Société Nouvelle des Usines de Pontlieue, Aciéries du Temple (SNUPAT)* v *High Authority of the European Coal and Steel Community* (Rec. 1958 and 1959, p. 275 *et seq.).* In that judgment the Court, in a reference to the second paragraph of Article 2 and Articles 3 (b), 60 and 67 of the ECSC Treaty, held *inter alia:* '... there may be considered as discriminatory in principle and, accordingly, prohibited by the Treaty, *inter alia,* measures or interventions, even those emanating from the High Authority, which are calculated, by substantially increasing differences in production costs otherwise than through changes in productivity, to give rise to an appreciable disequilibrium in the competitive position of the undertakings concerned. In other words, any intervention attempting to distort or actually distorting competition artificially and significantly must be regarded as discriminatory and incompatible with the Treaty'.

Finally, as regards (c) above, reference should be made to the judgments of 29 November 1956 in Case 9/55, *Société des Charbonnages de Beeringen* (Rec. 1955 and 1956, p. 317 *et seq.)* of 24 October 1973 in Case 43/72, *Merkur* v *Commission* [1973] ECR 1055, of 2 July 1974, in Case 153/73, *Holtz & Willemsen* [1974] ECR 675, of 11 July 1974 in Case 11/74, *Union des Minotiers de la Champagne* v *France* [1974] ECR 877, and of 12 July 1977 in Case 2/77, *Hoffmann's Stärkefabriken AG* v *Hauptzollamt Bielefeld.* The first of those decisions rejected the argument that the adjustment of equalization according to the situation of individual undertakings constituted a prohibited discrimination under the ECSC Treaty and declared that a contention to that effect would be valid 'only if the High Authority had not applied an objective and uniform criterion in order to check whether the individual situation of the

undertakings satisfied the conditions fixed for the award of equalization'. In its judgment in *Merkur,* the Court had occasion to emphasize that different treatment 'would not be a violation of the principle of non-discrimination unless it appeared to be arbitrary'. The judgment in *Holtz & Willemsen,* after recalling that the objectives set out in Article 40 of the EEC Treaty 'presuppose the adoption of common rules and criteria' in respect of farmers and consumers of agricultural products continues: 'In this light various factors in the common organization of the markets, protective measures, aids, subsidies, etc. may be distinguished according to the areas and other conditions of production or consumption only in terms of criteria of an objective nature which ensure a proportionate distribution of advantages and disadvantages for those concerned without distinguishing between the territory of Member States'. Even though in that case the question of discrimination was looked at mainly from the standpoint of the nationality and the location of the undertakings, it is important that the Court recognized, in general terms, the need to abide by objective criteria in differentiating between Community aids in agriculture and in each case to ensure that the distribution of advantages and disadvantages is equally balanced. In the decision in *Union des Minotiers de la Champagne* it was reiterated that 'Difference in treatment cannot be regarded as constituting discrimination which is prohibited unless it appears arbitrary'. And very recently, in the case of *Hoffmann's Stärkefabriken AG* that principle was again applied when the Court held that a difference in treatment (between potato-starch producers and maize-starch producers) which was objectively justified did not constitute discrimination.

4. I now come to the cases before the Court. I shall deal first with the issues raised in the proceedings for a preliminary ruling in Cases 117/76 and 16/77 in respect of quellmehl both because Community aids were cut off in the case of that product before those in the case of gritz and because the questions referred to the Court by the Finanzgericht Hamburg have the advantage of being clearcut and detailed.

The facts relating to the proceedings before the national courts in connexion with which the German court considered it necessary to refer to this Court, are on all material points the same. The only difference to be noted is that the case which gave rise to proceedings for a preliminary ruling in Case 117/76 is concerned with the validity of the Council regulations adopted in respect of the 1974/75 marketing year whereas the case which gave rise to the proceedings in Case 16/77 is concerned only with the regulations adopted in respect of the 1975/76 marketing year, in particular Regulations (EEC) No 665 and 2727/75, to which the Finanzgericht Hamburg expressly refers. However, this difference is one which does not affect the burden of the questions submitted by the German court; it does not in any way change the basic terms of the issues to be considered; which are the same in both cases.

As we have seen, the producers of quellmehl contend that they have been discriminated against ever since the Community aid (production refund) which they previously enjoyed was withdrawn whilst the aid was continued for the benefit of starch producers. According to the Council experience has shown that the opportunity for replacing quellmehl by pre-gelatinized starch for use as a food for human consumption is 'economically slight, if not non-existent'. I have already quoted from this recital which appears in the preamble to Regulation No 1125/74; it expressly refers to the experience acquired which can only be that in the period in which quellmehl enjoyed the same refund as that granted for starch. However, in order to justify the difference in treatment

introduced by the regulation referred to, the recital must continue to be valid in the new situation created by the abolition of the refund for quellmehl and its continuation for starch.

The Council and the Commission contend that the reduced pressure of competition both from industrial products used as substitutes for starch and from maize-starch from third countries, due to the increase in the world prices for raw materials, has resulted in starch becoming a less formidable competitor of quellmehl. There is therefore less likelihood of pre-gelatinized starch being offered at lower prices than quellmehl. This, together with the inherent difference in cost between the two products combine to justify the abolition of the refund previously granted for quellmehl. On the same lines the Commission points out that, compared with the quellmehl industry, the starch industry requires more sophisticated plant and heavier investment and that it would therefore be more vulnerable to cost increases affecting labour and energy.

The applicants in the main actions recognize that, in the absence of action by a public authority which is liable to distort competition, quellmehl can be manufactured and sold at a lower price than pregelatinized starch because the yield from the raw material is greater in the manufacture of quellmehl than in that of starch. They point out, however, that in the baking process the efficacy of starch, that is to say its capacity to absorb and retain water, is greater than that of quellmehl. For this purpose starch is, accordingly, able to compete with quellmehl even though it is sold at a higher price. On the other hand, the cost advantage of quellmehl is in any case lower than the amount of the production refund granted for starch, so that the abolition of the refund for quellmehl producers put the producers of 'pre-gelatinized starch' made from maize in a position to establish their product which, because it benefits from the refund, can now be offered at lower prices than quellmehl on the market for the manufacture of rye bread.

The plaintiff undertakings add that, whilst it is true that, notwithstanding the competition from pre-gelatinized starch, quellmehl had maintained the position it had long gained on that market, this was precisely because of the equal treatment of the two products which has lasted in Germany without interruption for no less than 44 years. This balanced situation changed with the advent of different treatment in respect of Community aid.

The Commission agrees that the result of the abolition of the refund for quellmehl may be that this product does not succeed in wholly maintaining the position it had previously gained in comparison with starch as far as bread manufacture is concerned. Notwithstanding this it maintains that there is no reason to fear that quellmehl will no longer be able to stand up to the competition with starch, and draws attention both to the reductions made by Regulation (EEC) No 1955/75 in the level of the aids granted for starch and to the fact that in the production of quellmehl it is possible to use lower quality raw materials which can thus be obtained at an advantageous price. However, the plaintiff undertakings strongly deny that there is any truth in this statement.

Finally, according to the Commission, the only effect of the abolition of the refund for quellmehl was to reduce or at most to cancel out the price advantage of approximately 20 % which quellmehl enjoyed compared with starch. Because of this the Commission contends that the contested provision merely established conditions of equality of competition between the two products and did not therefore infringe the prohibition of discrimination in Article 40 (3) of the Treaty of Rome.

5. In order to establish whether this prohibition has in fact been infringed it is first of all necessary to make this clear: the two products involved are manufactured from the same raw materials (maize, common wheat or broken rice) and compete with each other in the sense that starch or, to be more exact, a particular type of starch called 'pre-gelatinized starch' (Quellstärke) (Quellstärke) has amongst its numerous outlets the much more limited number available to quellmehl. Moreover, the fact that starch can be substituted for quellmehl was expressly recognized in the tenth recital to Regulation No 120/67/EEC of the Council, referred to above.

As regards the statement of reasons on which that regulation is based I have already pointed out that the extension to quellmehl of the refund provided for in respect of starch was intended to protect quellmehl from the competition which, as a result of Community aid, it would have had to face pre-gelatinized starch in the sector where it was traditionally used (baking). Clearly if one product can be substituted for another and there is in consequence competition between them this undoubtedly raises the issue of equality of treatment. Nor is it reasonable to object, as the Council has done, that the fact that the two competing products are not identical rules out any possibility of discrimination. There is no support for this argument in the judgment of the Court, referred to by the Council, in Case 5/73, *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* (judgment of 24 October 1973, [1973] ECR 1091, especially paragraph 26 of the decision), where the Court had merely to make it clear that Article 40 prohibits only discrimination between producers or between consumers but does not deal with the question of the balance to be held between the conflicting interests of those groups. But under the terms of Article 40 a comparison may very well be made between producers of different products. If products competing with each other are involved, there is nothing to prevent the principle of non-discrimination from being applied. In a case where two commercially different products are put to the same use the principle of equality of treatment means that the producers concerned must not be subjected to rules which are so different that their competitive relationship is distorted.

Nor, in my opinion, is it possible to argue that the difference in treatment between starch and quellmehl is justified by the difference in cost between the two products. Normally, in applying the Community Treaties a difference between the production costs of undertakings in respect of identical or competing products cannot amount to a differentiation factor capable, in itself, of making it impossible to compare the position of the undertakings in question and accordingly to permit differences of treatment. This does not, of course, affect the application of particular rules designed to enable less productive undertakings to meet the requirements of competition within the Common Market (see the judgment of 29 November 1956 in Case 9/55, *Charbonnages Belges* v *High Authority* (Rec. 1955 and 1956, p. 323) or of protective measures exceptionally allowed under specific derogative provisions (in this connexion, reference may be made to the judgment in Case 13/63, *Italian Government* v *Commission* already mentioned).

In so far as two different products are interchangeable, the same principle must apply both when the differences in the costs of production in each case are attributable to the way in which the undertakings are run and where they are due to the greater or lesser complexity of the techniques which the undertakings have to use in the manufacture of one product or the other. This is the effect of the general rule in Article 3 (f) of the Treaty of Rome, under the terms of which any measure liable to distort

competition in the Common Market is incompatible with the Treaty. Moreover, as regards agriculture in particular, it is important to bear in mind the need to increase agricultural productivity by ensuring the rational development of agricultural production in accordance with the first of the objectives laid down in Article 39 (1) of the Treaty. In circumstances in which two different products are equally suitable for a particular purpose whilst one is intrinsically dearer than the other it would clearly conflict with that objective if the costs were artificially equalized by subsidies at the expense of the Community.

It is true that in certain circumstances preference may be given not to the pursuit of the objective indicated but to the satisfaction of other pressing requirements such as, for example, ensuring a fair standard of living for the agricultural community, stabilizing markets or ensuring the availability of supplies; for one of these purposes there might conceivably be preferential treatment of certain categories of producers who were in a less favourable position than others. But in the absence of specific reasons capable of justifiying such a difference of treatment, the provision in Article 40 prohibiting discrimination stands in the way of any measure the effect of which is to place one group of producers in a privileged position compared with another group of undertakings which are their competitors. By virtue of the principle of non-discrimination the Community authorities must be regarded as prevented from taking action on the market which distorts the conditions of competition, and the Court gave a clear ruling to that effect in the above mentioned judgment of 17 July 1959 in *Société Nouvelle des Usines de Pontlieue, Aciéries du Temple.*

The Council further argues that there is no discrimination in any case since quellmehl is of no economic importance in the sector in which it is mainly used within the Common Market, namely in the food industry. I cannot however attach any importance to this argument in view of the concept of discrimination embodied in the decisions of the Court which are essentially based on qualitative and not quantitative considerations; the fact is that the principle of equality of treatment must hold good regardless of the magnitude of the economic operation involved.

Finally the contentions of the Council and of the Commission do not, in my view, succeed in refuting the decisive consideration that, for the purposes of the system of production refunds, producers of starch and producers of quellmehl are in a comparable position and now receive different treatment although there are no objective reasons to justify their being subject to different rules. The situation of the two products is comparable as a result not only of the technical possibility that quellmehl can be used instead of starch and that, in consequence, the two products compete with each other on the market but also because of their absolutely parallel treatment over ten years, in the rules on refunds for starch and for quellmehl and of the fact, expressly recognized by Regulation No 120/67/EEC, that the grounds on which the refunds were granted to each product were the same. The difference in the manufacturing processes did not affect this parallel treatment, nor have the two institutions been in a position to demonstrate that, since 1974, there has been such a change in production and marketing conditions for starch and quellmehl as to make it no longer possible to compare the situations of those who produce them, notwithstanding that they use the same raw materials. I ought to add, however, that even if it were true that the amount of the refund to starch producers merely made up for the inherent cost difference as compared with quellmehl, the unfavourable economic effect which this would produce contrary to the first objective, referred to above, of Article 39

would be acceptable only if there were weighty reasons, based on other objectives of that article, justifying the advantage granted to starch producers. An intention to relieve the Community budget by removing an item of expense would certainly not suffice since it is clear that such an intention cannot be carried out at the expense of a specific group in competition with starch producers.

6. According to the Council and the Commission the alleged increase in the use of quellmehl for animal feeding-stuffs represents a new development which is sufficient to justify the abolition of the aid to quellmehl producers. In this connexion it is well to bear in mind what was stated in the third recital to Regulation (EEC) No 1125/74 of the Council, which is that the production refund for quellmehl was initially granted 'with a view to promoting certain specific uses of quellmehl as a food for human consumption ...'. The Council argues that there has been an 'unreasonable' use of quellmehl, which costs less than pre-gelatinized starch because its production is less complicated, has been able to make increasing headway on the market in animal feeding-stuffs at the expense both of skimmed-milk powder and of starch. Thus, the refund granted for quellmehl in order that it should not, as regards food for human consumption, be placed at a disadvantage compared with starch resulted in enabling quellmehl producers to invade one of the market outlets for starch, at the expense of that product, and placed the quellmehl industry in an artificially privileged position compared with starch.

The plaintiffs strongly deny that quellmehl has been increasingly used for animal feed. They state that, while large quantities of maize-based starch is in fact put to this use, German quellmehl producers, who belong to a group of manufacturers of ingredients of products for baking have never sold quellmehl for animal feed, and that this has been established by the association. In Germany only one or two unimportant undertakings producing quellmehl do not form part of the group referred to; accordingly, even supposing that those undertakings did carry out sales of quellmehl for animal feed, no large quantities could have been involved. There are no quellmehl producers in the other Member States except for one undertaking in Denmark and one or two undertakings in the Netherlands all of which, however, have a relatively small output.

Towards the end of last May, some weeks before the hearing, the Court asked the Council and the Commission to supply information in support of their statements relating to the use of quellmehl for animal feed.

The Council has not replied on this point. The Commission went no further than to produce a telex message from the Federal German Minister of Food, dated 7 June 1977, in which the information is given that the German association of animal feed producers had protested against the abolition of the refund previously granted for quellmehl. This communication was not however accompanied by any information concerning the volume of quellmehl sales for animal feed.

The Council and the Commission have not therefore been in a position to provide the information requested of them by the Court. In the circumstances the conclusion must be drawn that there is no evidence of the facts to which the two institutions attached importance in explaining why quellmehl was no longer treated, as it had been hitherto, on an equal footing with starch.

In any case the fact that the use of quellmehl for animal feed is a departure from its traditional use is insufficient to justify describing that use as 'unreasonable'. It is not unusual for a

product to find new markets and outlets where this is consistent with economic and rational criteria. Even if we assume it to be a fact that it was only on account of the refund that quellmehl was able to impose itself on the market in animal feed, it would have to be regarded as all the more unreasonable to encourage, by means of the refund, the use of starch for the same purpose since the latter costs more to manufacture than quellmehl and is of less nutritional value.

As a matter of fact if the Community legislature had wished to discourage the use of quellmehl for animal feed it ought, from the beginning, to have confined aid to quellmehl used for human consumption. If, subsequently, there had been a desire to pursue a wider objective, namely to follow a policy of restraint regarding Community expenditure by abolishing the refund in respect of quellmehl, it would have been necessary to adopt the same course both for starch used for animal feed and for starch used in place of quellmehl in the manufacture of rye bread. On this point, since the object of the refund for starch is to maintain its competitiveness against chemical substitutes which cannot be used for food, Community aid must be regarded as unnecessary in so far as starch is intended for use in food. In this connexion the undertakings concerned referred to the Community rules governing the production refund for sugar in order to argue that, as has already been done in the case of sugar, there would be no difficulty in restricting the refund for starch to cases where it was in competition with substitute chemical products. If, however, on grounds which lie within its discretion, the Council considered it necessary to continue to grant the refund for starch, regardless of the purpose to which it was put, it would have been necessary to maintain parity between that product and quellmehl to satisfy the requirement of equality of treatment which was the basis of the original grant of the refund for quellmehl.

7. The foregoing considerations lead to the conclusion that the difference in treatment between quellmehl producers and starch producers which arose as a result of discontinuance of Community aid for the first of these two products is not based on any general objective criterion. It accordingly constitutes discrimination which is incompatible with the second subparagraph of Article 40 (3) of the EEC Treaty.

This makes it necessary to consider which Community provisions, if any, must be held to be invalid for infringement of Article 40 of the Treaty of Rome. In its first question, the Finanzgericht Hamburg envisaged the possibility that the provisions of three regulations might be invalid: Article 11 of Regulation No 120/67/EEC as amended by Regulation (EEC) No 665/75 of 4 March 1975, Article 1 of Regulation (EEC) No 1955/75 of 22 July 1975 and Article 11 of Regulation (EEC) No 2727/75 of 29 October 1975. But it must be borne in mind that none of those provisions does more than *omit* any reference to the production refund for quellmehl; they are silent on the subject and consequently the refund is provided solely in respect of other products, which are specified. In particular, Article 11 (1) of Regulation No 120/67/EEC, as amended by Regulation (EEC) No 665/75, provides that a production refund may be granted for maize and common wheat use for the manufacture of starch, for potato starch, and maize meal (gritz) used for the manufacture of glucose by direct hydrolysis; Article 1 of Regulation (EEC) No 1955/75 is concerned with production refunds for starches, and Article 11 of Regulation (EEC) No 2727/75 provides for refunds to be available in the same terms as those used in Regulation (EEC) No 665/75. On the other hand the first provision in a regulation which, by amending Article 11 (1) of Regulation No. 120/67/EEC, abolished the production refund for quellmehl, was Article 5 of Regulation

(EEC) No 1125/74 of the Council of 29 April 1974. In this case too, the new text of Article 11 (1) merely provided for a production refund for the benefit of certain products (starch from maize and common wheat, potato starch, and gritz used for the manufacture of glucose or beer) and consequently affected the previous refund for quellmehl only in the sense of *no longer making provision therefor,* but two clear indications of the intention to rescind the provision by virtue of which the refund had been introduced are provided by the fact that Article 11 (1) was amended for the first time and the express reference in the fourth recital to the regulation to the intention that 'the production refund for quellmehl should therefore be abolished'. This intention was carried out by substituting the words 'for maize and common wheat used in the Community for the manufacture of starch' for the words, in Article 11 (1) (a), 'for maize and common wheat used by the starch industry for the manufacture of starch *and quellmehl*'. It seems to me therefore that it is above all Article 5 of Regulation (EEC) No 1125/74 which, *as the provision which rescinded* the provision instituting the production refund for quellmehl, must be regarded as invalid as a direct consequence of its established incompatibility with the second subparagraph of Article 40 (3) of the Treaty of Rome.

Its invalidity must be recognized within strict limits and as having specific consequences. It arises from the unlawful difference in treatment as between starch and quellmehl and clearly, therefore, cannot apply to the products which formed no part of this comparison (for example potato starch or gritz, subject to what I shall have to say shortly concerning gritz used in the manufacture of beer).

But from the point of view of both form and of substance, it would be going too far to regard as also illegal the provision which continued to grant the aid to starch producers. It is true that the aid granted only to them constitutes discrimination against the producers of quellmehl but the discrimination lies in the fact that simultaneous aid to the producers of quellmehl is abolished and all the criticisms have been directed to that aspect or rather to that effect of the Community rules of 1974 in the amendement which they made. I shall accordingly refer to Article 5 of Regulation (EEC) No 1125/74 as invalid in so far as, in replacing Article 11 of Regulation No 120/67/EEC, it has abolished Community aid for quellmehl producers. To put this in another way: in Article 5 of Regulation (EEC) No 1125/74 it is the provision implying abrogation which is invalid. On the other hand, in my view the provisions of the article which had the *positive* effect of ensuring that the refund was granted to producers of starch, potato starch and gritz (in particular, gritz used for the manufacture of glucose) are not invalid. As for the subsequent regulations referred to by the Finanzgericht Hamburg they can be described as invalid only in so far as they maintain and confirm by implication the absence of a Community aid for quellmehl while confirming the production refund for starch.

8. In its second question, which clearly assumes that the answer to the first question will be that the provision in regulations under which the aid to manufacturers of quellmehl ceased is invalid, the Finanzgericht Hamburg asks whether the latter have an automatic claim to the same production refund as the manufacturers of puffed starch or whether a fresh measure of the Council is required to give them that right.

Clearly consideration must first be given to the comments I made concerning the limits and effects of the invalidity of Regulation (EEC) No 1125/74. If those comments were correct and if, therefore, the repeal in part of Article 11 (1) of Regulation No 120/67/EEC is without

effect, the inevitable conclusion is that the provision which placed manufacturers of starch and manufacturers of quellmehl on an equal footing for the purposes of the refund has never ceased to apply. However this does not, in my view, mean that those concerned can automatically claim a refund of the same amount as that granted to manufacturers of starch. In the first place, while Regulation No 120/67/EEC certainly conferred a right to the refund on manufacturers of quellmehl as well as on the manufacturers of starch, the regulation itself did not fix the size of the refund or lay down that it must be the same for the two categories of manufacturer or that it should be calculated on the same basis. Secondly, it must be borne in mind that the system of production refunds for maize and common wheat has, since 1974, undergone important changes even on the subject of whether it should be compulsory or optional. These changes are unaffected. Consequently manufacturers of quellmehl cannot be recognized as having that right to refunds, provided for under Article 11 (1) of Regulation No 120/67/EEC, which formed part of a system of compulsory refunds which was later abolished, nor however, can they automatically be subject to all the Community provisions which have governed the treatment of starch manufacturers since 1974. Automatic and comprehensive action along these lines would in my view be an unjustified extension of te invalidation of the provisions under which manufacturers of quellmehl were deprived of the benefit of Comunity aid.

I take the view, therefore, that a fresh measure is required from the Council in order to lay down the amount of the production refund due to those concerned and the way in which it should be applied. Obviously the measure must be based on the principle of equality of treatment of the two categories of manufacturer with which we have been concerned so far. In conclusion, it should be noted that whereas, so far as the past is concerned, the application of the principle must be based on the refunds which starch producers have already enjoyed there is nothing to prevent the Council as far as the future is concerned from introducing specific changes in the machinery for refunds in respect of either of the two products or of both. (I have already referred to the possibility that Community aid might be withheld both from quellmehl and from maize starch used for food and it is conceivable that starch and quellmehl used for animal feed should both be denied the benefit of the refund).

9. Consideration must now be given to the question raised by the changes in the Community rules concerning gritz for use by the brewing industry. We have seen that, in this case too, Regulation (EEC) No 665/75 marked the abandonment of the principle of equality of treatment as compared with starch in respect of refunds which had been applied since 1965 and until then.

In support of the contention that the said regulation was invalid, the gritz producers first claimed that there had been a failure to comply with essential procedural requirements in that the Commission's proposal had been amended by the Council otherwise than in the prescribed form.

It appears however that in the course of the Council's consideration of the text, the Commission agreed to amend its original proposal. Moreover the Council's decision was unanimous; there was, accordingly, nothing to prevent it from altering the Commission's proposal as provided for in Article 149 of the EEC Treaty.

Another procedural impropriety was attributed to Regulation (EEC) No 665/75 inasmuch as the Parliament had not been consulted on the amended wording.

In this connexion I would recall that in the judgment of 15 July 1970 in Case 41/69, *ACF Chemiefarma* v *Commission* [1970] ECR 661, in particular at page 702, the Court dismissed a similar objection of illegality raised against another regulation of the Council on the ground that, while the draft on which the European Parliament had expressed an opinion had been subsequently amended, the substance had not, considered as a whole, been altered.

In the present case the essential part of the proposal submitted by the Commission to the Council on 14 December 1974 (and published in the Official Journal of 8 February 1975) consisted of a change from a compulsory system to an optional system of refunds benefiting starch produced from cereals, potato starch and gritz. The Council adopted this change of system in the case of starch, potato starch and gritz for use by the glucose industry; only in the case of gritz for use by the brewing industry was the change extended so as to abolish the refund. In terms of production refunds no doubt the proposed regulation was mainly concerned with the arrangements in respect of starch, to which the arrangements for gritz have always been subsidiary. The alteration of the Commission's original proposal may therefore be regarded as not affecting its essentials and as not constituting one of those fundamental changes which, in consequence of the precedents established by the Court, and referred to above, require the Parliament to be freshy consulted.

10. In order to establish whether the abolition of the refund in respect of gritz for use in the brewing industry gives rise to an infringement of the prohibition of discrimination is must first of all be ascertained whether, in terms of the Community provisions for cereals, gritz is on the same footing as starch.

In this connexion it must be borne in mind that in France the production of beer presents the principal use for gritz. In that context gritz can, technically speaking, be replaced by starch. The interchangeability of starches, on the one hand, and maize groats and meal on the other was expressly recognized in the tenth recital, referred to above, to Regulation No 120/67/EEC; moreover, Regulation No 11/65/EEC of the Council, which for the first time authorized the Member States to grant a production refund for gritz, had already been adopted because starch and gritz for use in the manufacture of beer were in competition with each other and the market position of gritz had undergone a change for the worse as a result of the aid granted to starch since 1962. But, on the subject of the formula to be applied in fixing the level of the production refund to be granted on gritz, particular attention must be paid to the preambles to Regulations No 138 and 367/1967 and to Regulation (EEC) No 1132/74 in which there is a reference to the need to achieve a balance between the cost of supplying the brewing industry with maize starch, on the one hand, and with maize groats and meal and broken rice, on the other. This clearly implied that the brewing industry was in a position to accept supplies of either of the two products.

According to the Council, the technical adjustments which are necessary in order to change from the use gritz to the use of starch in the production of beer seriously interfere with competition between the two products in the industry concerned. But there is no question of technical problems which are difficult to solve but rather of a matter of sheer economic expediency. In a situation where, because of the refund, starch is available at a much more satisfactory price than gritz it is reasonable to assume that the brewers will find a way of replacing the dearer raw material with the cheaper one. If this entailed a change in the colour or in other characteristics of the beer we can rest assured that publicity would be used to adjust the consumer's taste accordingly.

In reply to the questions put to it by the Court in the proceedings in Cases 124/76, and 20/77, the Commission stated that when it submitted to the Council the draft regulation of 20 June 1975, in which provision was made for the restoration of the refund for gritz which had been abolished three months earlier, it considered that, if there were no refund, the result would have been to reinforce the competitive position of starch compared with gritz to such an extent as to entail the complete replacement of gritz by starch in the manufacture of beer. The Commission supplied statistical data from which it appears that the unit cost of gritz is higher than of starch, so much so that, assuming equality of treatment for gritz and starch in terms of the refunds, the cost of a tonne of starch would amount to 194·78 u.a. whereas a tonne of gritz would cost 217·76 u. a. (allowance being made for the higher coefficient for the conversion of maize into gritz compared with that of maize into starch).

This factual information undermines the argument put forward by the Council that starch can only with difficulty compete with gritz. It must be borne in mind that the Council has itself recognized that starch is more efficient than gritz. Again, as regards the information relating to the trend in gritz sales before and after the abolition of the refund, on which the Council dwelt at some length, it may assume importance when consideration is given to the existence or otherwise of the damage claimed by the plaintiffs, represented by reduced sales and lost customers, and to the possibility of establishing a causal link between such damage and the contested measures. At this stage, however, since we are concerned merely with establishing whether the measures at issue infringe the prohibition of discrimination, this information would be material only if it demonstrated that there was no competitive relationship between starch and gritz. This is manifestly not the case. The only conclusion which the Council draws from its inquiry is that the competition which starch provides for gritz in the brewing industry is not overwhelming but it does not deny that the competition exists.

11. Clearly starch and gritz are in comparable positions: they were considered to be so for more than ten years by the Community authorities when they laid down that they should be treated in parallel for the express reasons which I have described, and so they remain as a matter of economic fact. The difference in treatment which has occurred with effect from Regulation (EEC) No 665/75 would be lawful only if it were justified by new economic or technical developments which have been assessed on the basis of objective considerations. The question is whether it is possible to discern developments of this kind.

The Council has argued that, as the Community starch industry is no longer exposed to the pressure of strong competition from the chemical substitute industries and has found other outlets, it no longer exercises on manufacturers of gritz and on the maizeprocessing industry in general such pressure as to make it necessary for this industrial sector to continue to receive a production refund. But if, despite the reduced pressure on starch by competition from artificial substitutes, it was considered necessary that it should continue to receive the refund, it is not easy to understand why the same course was not followed in the case of gritz, since the improved position of starch on the market, together with Community aid, has obviously increased its competitiveness compared both with synthetic products and with gritz for use in the brewing industry.

There has also been reference to the increase which has taken place in recent years in maize prices on the world market. Since, however, this did not

result in the abolition of the refund for starch it does not afford any explanation for its abolition in the case of gritz. As the undertakings producing gritz have rightly stated, the refund was granted to them not in order to enable their industry to take advantage of world prices but solely in order that they should be in a position to meet competition from the starch industry on the brewing market and so as to ensure that the support measures granted to starch manufacturers should not upset the balance.

I mentioned earlier that, simultaneously with the abolition of Community aid for gritz, the refund system for starch became discretionary instead of compulsory and the amount of the refund was reduced. It was the declared intention of the Council that, in the case of starch also, aid should be progressively abolished. But this did not happen; on the contrary, the amount of the refund for starch has been increased as a result of Regulation (EEC) No 1862/76. In this way, the difference in treatment between starch and gritz which might at the beginning have appeared to be merely a transitional stage of the change of policy regarding production refunds was compounded and has remained in operation without any justification.

Credit must certainly be given to the Commission for having realized in time, as is clear from its draft regulations of 8 February and 20 June 1975, referred to above, that this difference of treatment was undesirable, if not illegal. For example it may be seen from the minutes of the 330th meeting of the Council held in Brussels on 10 and 11 February 1975 that the member of the Commission responsible for agriculture stated that it did not seem to him to be consistent to keep up the price of beer by means of Community refunds granted for maize, amounting to approximately 20 million u. a., while beer on the other hand was still subject to national charges. This comment was made in support of the proposition to make the refund compulsory instead of discretionary as a step towards the abolition of any refund at all not only for gritz but also for starch in so far at it is used in the manufacture of beer. If, for practical reasons, it had not been possible to abolish the refund for gritz it would have been possible to avoid the risk of distorting competition between gritz and starch in that industry by imposing a levy on starched-based products for use in the manufacture of beer. This was pointed out by a member of the European Parliament during the debate on the subsequent proposal of the Commission to reintroduce the refund for gritz (see OJ Debates of the European Parliament No 194, September 1975, p. 293).

This is not the place for detailed consideration of such alternatives. It suffices to refer to them to show that neither the pursuit of the objectives of the Common Agricultural Policy nor the understandable need to avoid unnecessary burdens on the Community budget can justify the difference in treatment described between starch producers and gritz producers at the latter's expense.

No am I able to agree with the assertion of the Council that the prohibition of discrimination recorded in the second subparagraph of Article 40 (3) of the EEC Treaty might be 'modified' in view of the need to pursue one of the objectives of Article 39. This assertion must in all probability be taken to mean that, in the light of the requirements associated with the pursuit of specific general objectives of the agricultural policy, the positions of undertakings which are manufacturers of different products may objectively assume a different aspect and thus lend themselves to a different assessment and to different treatment. But, as I have stated, the fact remains that such difference in treatment in relation to the grant by the Community of an advantage which affects the competitive ability of undertakings would be justified only if

reference could be made to objective criteria. It is not a question therefore of introducing exceptions to or limitations of the prohibition of discrimination but merely of determining in what circumstances and to what extent discrimination can be said to exist. On this point, I believe that the case-law reviewed in the first part of this opinion provides clear and adequate guidance.

The fact is that, in the present case, the difference in treatment between starch and gritz was introduced, after a long period in which they were treated on the same basis, without Regulation (EEC) No 665/75 providing any explanation other than the sentence 'It no longer appears necessary to grant a refund for the production of maize groats and meal for use by the brewing industry in the manufacture of beer'. In this connexion, the Council and the Commission have, in my view, adduced no convincing evidence that there are objective reasons to justify the different system of aids provided since 1975 for the two competing products. For this reason I consider that Article 3 of Regulation (EEC) No 665/75 must be considered invalid as infringing the prohibition of discrimination on account of the implied repeal of Article 11 (1) of Regulation No 120/67/EEC, as amended by Regulation (EEC) No 1125/74, in respect only of the part which referred to a production refund for maize used in the Community by the maize industry for the manufacture of maize groats and meal (gritz) used in the brewing industry. The effect of such invalidity is that the said part of Article 11 (1) of Regulation No 120/67/EEC must be regarded as being still in force and that the manufacturers of gritz for use in the brewing industry must, in consequence, be allowed to receive the Community aid in the same way as starch manufacturers but under the conditions and to an extent to be determined by a special measure of the Council. Finally, in view of the fact that Regulation (EEC) No 665/75 of the Council has infringed the prohibition of discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty and that the provision embodies a general rule of law underlying the Common Market, its infringement involves the Community in liability for damage thereby incurred by individuals whose rights are directly protected by that rule.

12. In conclusion I propose that the Court should:

(a) as far as Cases 117/76 and 16/77 are concerned, answer the questions of interpretation submitted, by orders of 8 November 1976 and 18 January 1977, by the Finanzgericht Hamburg to the effect that the Community provisions which abolished and have continued to withhold the production refund in respect of maize for use in the manufacture of quellmehl whilst maintaining it for maize for processing into starch are incompatible with the prohibition of discrimination contained in Article 40 (3) of the EEC Treaty and are therefore invalid within the limits, indicated above, of their rescissory effect: that, accordingly, the provision in Article 11 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 in so far as it granted, in the form of a production refund, entitlement to Community aid both to manufactures of starch and to manufacturers of quellmehl, must be regarded as being still in force without prejudice to subsequent amendments other than those held to be

invalid; and that it is the duty of the Council to adopt a special measure laying down the amount and the rules for the application of the production refund for manufacturers of quellmehl for the period subsequent to the entry into force of Regulation (EEC) No 1125/74 of 29 April 1974;

(b) as so far as Cases 124/76 and 20/77 are concerned, answer the questions of interpretation submitted, by orders of 25 November 1976 and 1 February 1977, by the Tribunaux Administratifs of Nancy and Châlons-sur-Marne respectively to the effect that the Community provisions which abolished and continued to withhold the production refund from manufacturers of maize meal (gritz) for use in the manufacture of beer, whilst maintaining it for maize to be processed into starch, are incompatible with the prohibition of discrimination contained in Article 40 (3) of the Treaty of Rome and are therefore invalid within the limits, indicated above, of their rescissory effect; that, accordingly, the provision in Article 11 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967, as amended by Regulation (EEC) No 1125/74 of 29 April 1974, in so far as it granted, in the form of a production refund, entitlement to Community aid both to manufacturers of starch and to manufacturers of maize groats and meal (gritz) for use by the brewing industry must be regarded as being still in force without prejudice to subsequent amendments other than those held to be invalid; and that it is the duty of the Council to adopt a special measure laying down the amount and the rules for the application of production refunds for manufacturers of gritz for the period subsequent to the entry into force of Regulation (EEC) No 665/75 of 4 March 1975;

(c) as far as Cases 64 and 113/76 are concerned, rule that subject to proof of the existence of damage suffered by the plaintiff undertakings and the causal link between infringement of the said Article 40 and such damage, the Community is liable for the damage which the plaintiff undertakings may have incurred through the abolition of the production refund for manufacturers of maize meal (gritz) used in the manufacture of beer, on the ground that the Community provisions bringing into force and maintaining such abolition, whilst retaining the production refund for maize for processing into starch, have infinged the prohibition of discrimination contained in Article 40 (3) of the Treaty of Rome, which represents the expression of a superior rule of law intended for the direct protection of individuals.

3. In the particular circumstances of the case, this finding of illegality does not inevitably involve a declaration that a provision of Regulation (EEC) No 1125/74 is invalid. The illegality of Article 5 of Regulation (EEC) No 1125/74 cannot be removed merely by the fact that the Court, in proceedings under Article 177, rules that the contested provision was in part or in whole invalid. As the situation created, in law, by Article 5 of Regulation (EEC) No 1125/74 is incompatible with the principle of equality, it is for the competent institutions of the Community to adopt the measures necessary to correct this incompatibility.

In Joined Cases 117/76 and 16/77,

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg for a preliminary ruling in the actions pending before that court, in Case 117/76 between

The consortium of:

1. ALBERT RUCKDESCHEL & Co., Kulmbach (Germany),

2. HANSA-LAGERHAUS STRÖH & Co., Hamburg,

and

HAUPTZOLLAMT HAMBURG-ST. ANNEN

and, in Case 16/77, between

DIAMALT AG, Munich,

and

HAUPTZOLLAMT ITZENHOE,

on the validity of Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ English Special Edition 1967, p. 33) as last amended by Regulation (EEC) No 665/75 of 4 March 1975 (OJ L 72, p. 14) and of Article 1 of Regulation (EEC) No 1955/75 of the Council of 22 July 1975 on production refunds in the cereals and rice sectors (OJ L 200, p. 1) and, if need be, of Article 11 of Regulation (EEC) No 2727/75 of 29 October 1975 on the common organization of the market in cereals (OJ L 281, p. 1) in so far as these measures make no provision for a production refund for maize used in the manufacture of quellmehl of an amount equivalent to that of the refund granted for the processing of this product into starch,

THE COURT

composed of: H. Kutscher (President), M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner, P. Pescatore, J. Mertens de Wilmars, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Quellmehl, a product processed from maize, common wheat or broken rice, and pre-gelatinized starch, which is processed from the same basic products, are to some extent in competition with each other, their common feature being that they are both used as an aid to baking, more specifically as leavening in the making of rye bread.

2. Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of the common organization of the market in cereals (JO of 20. 4. 1962, p. 933), introduced a system of levies for certain cereal products. Article 24 of the regulation provided however that the Council might adopt measures derogating from those provisions.

Such measures had been adopted by Regulation No 55 of the Council of 30 June 1962 relating to the system in respect of processed products based on cereals (JO of 2. 7. 1962, p. 1583). Article 17 of that regulation had established the system of discretionary refunds for certain starches. The thirteenth recital in the preamble to the regulation reads as follows:

'Whereas because of the special situation on the market in starches and in particular the need for that industry to keep prices competitive with those for substitute products, it is necessary by way of derogation from the provisions ... of Regulation No 19 of the Council, to ensure by means of a production refund that the basic products used by the industry are made available to it, at a lower price than that which would result from applying the system of levies...'

Regulation No 141/64/EEC of the Council of 21 October 1964 concerning the rules applying to processed products derived from rice and other cereals (JO of 27. 10. 1964, p. 2666) had continued the system of discretionary production

refunds. It had however established for the first time a production refund for maize and common wheat used in the quellmehl industry.

Regulation No 142/64/EEC of the Council of 21 October 1964 providing for the extension and adjustment to 31 March 1965 of the limitations on the production refunds for cereal and potato starch (JO of 27. 10. 1964, p. 2673) and fixing the refunds provided for under Regulation No 141/64/EEC accordingly provided in Article 1 (1) (e) thereof that:

'In the case of quellmehl the refund for maize, common wheat and broken rice used in the manufacture of that product shall be the same as that granted for the same cereals used for starch manufacture.'

The system established by the definitive basic Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ English Special Edition 1967, p. 33) made the grant of the production refund compulsory. In the tenth recital in the preamble to that regulation it is *inter alia* stated

'Whereas ... because of the interchangeability of starches with quellmehl and maize groats and meal, production refunds should also be granted in respect of the latter products;'

Article 11 (1) of the regulation reads:

'1. A production refund shall be granted:
(a) for maize and common wheat used by the starch industry for the manufacture of starch and quellmehl;
(b) for potato starch;
(c) for maize used in the maize industry for the manufacture of maize groats and meal (gritz) used by the brewing industry.'

Regulations Nos 178/67/EEC of 27 June 1967, 371/67/EEC of 25 July 1967 of the Council, fixing the production refunds for starch, potato starch and quellmehl (JO of 28. 6. 1967, p. 2617 and of 31. 7. 1967, p. 40) maintained this parity between starch and quellmehl.

The production refund for quellmehl was maintained until 1 August 1974 with effect from which date it was abolished by Regulation (EEC) No 1125/74 of the Council of 29 April 1974 amending Regulation No 120/67/EEC (OJ L 128 of 10. 5. 1974, p. 12). However the refunds for maize, common wheat and broken rice used for the manufacture of starch and consequently pre-gelatinized starch continued to be granted.

The third and fourth recitals in the preamble to the latter regulation stated that:

'the production refund for quellmehl was initially granted with a view to promoting certain specific uses of quellmehl as a food for human consumption, account being taken of the possibility of its competing with a number of other products;'

and that

'experience has shown that the opportunity for such substitution is economically slight, if not non-existent; ... the production refund for quellmehl should therefore be abolished;'

Regulation (EEC) No 1132/74 of the Council of 29 April 1974 on production refunds in the cereal and rice sectors (OJ L 128 of 10. 5. 1974, p. 24), which fixed the refunds provided for by Regulation (EEC) No 1125/74, resulted in the reduction of the production refund for maize and common wheat used for the manufacture of starch to 24.60 units of account per metric ton [hereinafter called 'tonne']. In order to give a reason for the maintenance of the refund for starch manufacture, the second recital in the preamble to the regulation states *inter alia* that

'a precise assessment of the situation resulting from the level of common prices and from the competition between, on the one hand, maize starch, rice starch, potato starch and, on the other, the substitute chemical products, indicates that the refund should be fixed at such a figure that the price of maize used in starch manufacture is brought down to 8·20 u. a. per 100 kg . . .;'

Regulation (EEC) No 3113/74 of the Council of 9 December 1974 amending Regulation (EEC) No 1132/74 on production refunds in the cereals and rice sectors (OJ L 332, p. 1) resulted in a subsequent reduction (to 15.55 u. a. per tonne) of the refund granted for maize for the manufacture of starch.

Regulation (EEC) No 665/75 of the Council of 4 March 1975 amending Regulation (EEC) No 120/67/EEC (OJ L 72 of 20. 3. 1975, p. 14) which entered into force on 1 August 1975 made, *inter alia*, the production refund for cereals used in the manufacture of starch no longer compulsory. Moreover the regulation abolished the production refund for maize groats and meal (gritz) used by the brewing industry.

In Regulation (EEC) No 1955/75 of the Council of 22 July 1975 on production refunds in the cereals and rice sectors (OJ L 200 of 31. 8. 1975. p. 1) which also entered into force on 1 August 1975, the production refund on, *inter alia*, maize for the manufacture of starch was once more reduced and fixed at 10 u. a. per tonne.

3. The respective plaintiffs in the main actions, who are producers of quellmehl, applied to the respective defendants in the main actions on 22 July (Case 117/76) and 15 August (Case 16/77) 1975 for a permit relating to the grant of a production refund for maize used for the manufacture of quellmehl. These applications were rejected on the ground that Community regulations no longer provided for the grant of production refunds for quellmehl.

The plaintiffs in the main actions brought the present proceedings before the Finanzgericht Hamburg against these decisions rejecting the applications.

Before that court, the plaintiffs in the main actions urged in particular that the prohibition of discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty has been infringed in so far as a production refund was granted only for pre-gelatinized starch and not for quellmehl, a product which is in competition with starch.

The defendants in the main actions contended that the applications should be dismissed.

4. Holding that the cases raised questions of interpretation of Community law the Finanzgericht Hamburg, by orders of 8 November 1976 and 18 January 1977, stayed the proceedings and requested the Court of Justice under Article 177 of the EEC Treaty to give a preliminary ruling on the following questions:

'1. Do Article 11 of Regulation No 120/67/EEC as last amended by Regulation (EEC) No 665/75 of 4 March 1975 (OJ L 72 of 20. 3. 1975, p. 14) and Article 1 of Regulation (EEC) No 1955/75 of 22 July 1975 (OJ L 200 of 31. 8. 1975, p. 1) or does Article 11 of Regulation (EEC) No 2727/75 of 29 October 1975 (OJ L 281 of 1. 11. 1975, p. 1) infringe the prohibition of discrimination contained in Article 40 (3) of the EEC Treaty and are they invalid in so far as they do not grant a production refund of the same amount on maize for the manufacture of quellmehl as they do for the processing of this product into starch?
2. If the answer to Question 1 is in the affirmative, have manufacturers of quellmehl a direct claim to the same

production refund as the manufacturers of pre-gelatinized starch or is a legal measure adopted by the Council required for this?'

5. In the grounds for the orders making the reference the Finanzgericht Hamburg made, *inter alia,* the following comments:

'The determination of this dispute turns on the question whether the abolition of the production refund on maize for the manufacture of quellmehl is invalid because it infringes the prohibition of discrimination in Article 40 (3) of the EEC Treaty.

'There might under Community law be prohibited discrimination if — as the plaintiff maintains — quellmehl and pre-gelatinized starch are interchangeable as aids to baking in the baking industry and if as a result of the abolition of the production refund for quellmehl on the one hand and the retention of the production refund for pre-gelatinized starch on the other hand quellmehl is no longer competitive and has been ousted from its former market. The recitals in the preamble to Regulation No 120/67/EEC state that a production refund should be granted because of the inter-changeability of starches with quellmehl. Accordingly if the purpose of the production refund is the interchangeability of the products, there might be discrimination against the plaintiff in connexion with the manufacture of quellmehl if and in so far as a production refund is granted on the raw materials used in the manufacture of pre-gelatinized starch, because from the point of view of technology, economics and price quellmehl and pre-gelatinized starch are interchangeable. The plaintiff submits that the recital in the preamble to Regulation (EEC) No 1125/74, which states that the production refund for the manufacture of quellmehl should be abolished, because experience has shown that the opportunity for such substitution is economically slight, if not non-existent, does not correspond to the facts.

'The adjudicating Senate finds that it is unable to ascertain and review the actual prerequisites for the abolition of the production refund in connexion with the manufacture of quellmehl, in order to be able to decide accordingly whether there is any prohibited discrimination against the plaintiff and other similar undertakings. The recitals in the preamble to Regulation (EEC) No 1125/74 disclose that those responsible for the regulation were in possession of information, which is not available to the court, to the effect that quellmehl as a substitute product in fact was not or was only to an economically insignificant extent in competition in the territory of the EEC with products containing starch. Since the plaintiff contests this, with supporting evidence, the question arises whether Regulation (EEC) No 1125/74 is valid in so far as it relates to the abolition of the production refund on quellmehl, since it may infringe Article 40 (3) of the EEC Treaty. The adjudicating Senate therefore considers that a ruling by the European Court of Justice is necessary in the interest of a uniform application of Community law.

If the Court of Justice should come to the conclusion that the abolition of the production refund on quellmehl is invalid, then there remain doubts as to the legal basis upon which the plaintiff can satisfy its claim and as to the formal conditions which have to be fulfilled. For this reason it has been necessary to refer Question 2.'

6. The orders making the references were registered at the Court Registry on 10 December 1976 and 31 January 1977 respectively.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs in the main actions, the plaintiff in Case 117/76

being represented by the Chambers of Fritz Modest, Hamburg, the plaintiff in Case 16/77 being represented by E. Eckelt, A. Kallenbach and K.-D. Rathke, Advocates, of Augsburg, and by the Council, represented by Daniel Bignes, Director of its Legal Service, assisted, in Case 16/77, by Felix Van Craeyenest, Principal Administrator of the said service and by the Commission, represented by its Legal Advisers Peter Kalbe and Götz zur Hausen, acting as Agents.

By order of 25 May 1977 the Court decided to join the cases for the purposes of the procedure.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

Nevertheless the Court requested the parties, the Council and the Commission to give certain explanations in writing either before or during the hearing.

II — Written observations submitted to the Court

The first question

1. (a) The *plaintiffs in the main actions* point out first of all that quellmehl does not have the same importance in the other Member States as in Germany. On the other hand it is not correct to claim, as the defendants in the main actions have done, that quellmehl is of importance only in Germany.

(b) From the technical point of view quellmehl and pre-gelatinized starch are interchangeable and equal from the point of view of their use as aids to the baking of products made from rye flour.

(c) Where there is free competition as regards prices, quellmehl has a slight advantage over pre-gelatinized starch. This advantage amounts to less than the production refund paid in respect of maize starch. On the other hand the advantage is so marked that in the first place, the baking industry and bakers prefer quellmehl-based aids to baking and, secondly, the starch industry no longer disputes that advantage because it has other ways of selling its starch. The grant of a production refund of the same amount as for maize and rice processed into quellmehl or starch has enabled quellmehl to retain intact its competitive advantage over pre-gelatinized starch.

(d) The reasons advanced to justify the abolition of the production refund granted for the manufacture of quellmehl and the retention of the refund for starch are untrue.

(e) It is only because the allocation of a production refund of an equivalent amount enables the natural competitive situation between pre-gelatinized starch and quellmehl to be maintained that pre-gelatinized starch has not ousted quellmehl from the market in baking aids for rye-flour-based products.

(f) The abolition of the production refund for quellmehl created a fundamental change in the competitive situation which naturally exists between quellmehl and pre-gelatinized starch; after it was abolished pre-gelatinized starch could be offered on the market at a lower price than quellmehl.

According to the plaintiff in the main action in Case 117/76 it is because the manufacturers of quellmehl and of ingredients of quellmehl-based baking products paid the production refund out of their own pockets that they have been able, in the main, to maintain their position on the market.

The plaintiff in the main action in Case 16/77 considers that the level of prices subsequent to the abolition of the

production refund led to a reducation of more than 70 % in the turnover in quellmehl-based products. It adds that the selling price of quellmehl cannot, on the most conservative estimate, be less than DM 100 per 100 kg. On the other hand pre-gelatinized starch made from maize or wheat is at present already being offered at from DM 85 per 100 kg free at destination. The two biggest manufacturers of quellmehl-based ingredients of baking products have suffered a reduction in their turnover in one case of 7·5 % in 1975, compared with 1974, in the other case of 40 % in 1976, compared with 1974. In the case of the two undertakings referred to this reduction in sales has, apart from the abolition of the production refund, resulted in a substantial reduction in the cover for overheads (Deckungsbeiträgen). The plaintiff in the main action in Case 16/77 points out that, until the spring of 1975, the two manufacturers still held their stocks of maize for which production refunds had been granted before entry into force of the contested regulation. The result is that the reduction in the cover for overheads (Deckungsbeiträgen) has become more marked. The manufacturers of quellmehl are suffering losses or, according to circumstances, a considerable reduction in their income and the sole reason for this is to be found in the fact that a production refund is paid for the manufacture of pre-gelatinized starch, whereas, in contrast to this, none is paid for the manufacture of quellmehl.

(g) According to the official statement of the grounds, a production refund for maize, rye and potato starch appears to be required only to enable the starch industry to compete with chemical substitute products. This is an admisssion that it is not necessary in so far as starch is sold for use in connexion with food for human consumption. Despite this, the production refund is granted for products used in the manufacture of starch without regard to the sector in which the starch is sold.

According to the plaintiffs in the main actions it is possible to restrict the allocation of a production refund for the processing of maize, rice and potatoes used in the manufacture of starch inasmuch as this starch is intended for the industrial sector and is in competition with chemical substitute products.

(h) There is also an unofficial reason for the abolition of the production refund for quellmehl: that a great deal of quellmehl based on maize and rice is sold for animal feed and its use for this purpose is an abuse which must be redressed by abolishing the production refund.

The plaintiffs in the main actions dispute this statement. The association of manufacturers of ingredients for baking products has declared that its members have never sold quellmehl for animal feed. There still exist in the Federal Republic of Germany one or two small undertakings which do not belong to the association of manufacturers of ingredients for baking products but their output is not very great. Outside Germany, there is an undertaking manufacturing quellmehl in Denmark and there are one or two in the Netherlands, but their output is insignificant. But even if these undertakings were to have sold quellmehl for use as animal feed such sales would still have been of comparatively little importance.

They go on to say that the Community regulations on production refunds for the two products in question did not prohibit sale of those products for animal feed. Nor is the production refund restricted to quellmehl or starch used for human consumption or for chemical products.

Unlike quellmehl, large quantities of maize starch are in fact sold for animal feed. But a production refund continues to be granted even for starch used in the animal feed industry.

(i) In the same way as the production refund can be restricted to starch used in industry for chemical purposes, it can, in the case of quellmehl or starch, be restricted exclusively to cases where these products are used for human consumption.

It is not difficult for control to be effectively exercised. The unofficial reason for the abolition of the production refund does not therefore stand up to scrutiny on any count.

(j) The plaintiff in the main action in Case 16/77 refers furthermore to the fact that the need to reduce the budget of the Community was also used as an excuse to justify the abolition of the production refund for quellmehl. It finds this argument unconvincing: in the first place the production refund granted hitherto for the manufacture of quellmehl is of little importance compared with the total volume of production refunds and also with the production refund for the manufacture of starch. Secondly, there is no doubt that it is perfectly possible to abolish the production refunds. Nevertheless, when account is taken of the principle of non-discrimination, this could only lead to the abolition of the production refund both for the manufacture of quellmehl and for the manufacture of pre-gelatinized starch. Finally, it would not be possible to effect any saving in the budget of the Community for the simple reason that, as is shown by the state of the market, after the abolition of the refund for quellmehl, pre-gelatinized starch, for the manufacture of which a production refund is granted, would be used in its place.

(k) Finally the plaintiffs in the main actions contend that there is no substantial ground for abolishing the natural disparity between the competitiveness of the two products in question. Contrary to the contention of the defendant in the main action, it is not true that there is discrimination only if quellmehl is of economic importance in the food industry throughout the Common Market. There are in the Community production refunds which benefit only the undertakings in certain Member States such as the aid to durum wheat, colza and olive oil.

(l) Moreover, in the case of the quellmehl manufacturers concerned, discrimination is appreciable and substantial and even if discrimination were minimal the *de facto* situation would not justify it.

The plaintiffs in the main actions accordingly request the Court to answer the first question of the Finanzgericht to the effect that the provisions mentioned therein are contrary to the prohibition of discrimination laid down in Article 40 (3) of the Treaty and are null and void in so far as they make no provision for a production refund for maize used in the manufacture of quellmehl up to the same amount as that of the refund granted for the processing of this product into starch.

2. (a) The *Council and the Commission* point out in the first place that, in Case 117/76, the plaintiff in the main action lodged its application on 22 July 1975, that is to say, during the 1974/75 marketing year, while in Case 16/77 the application was lodged on 15 August 1975 and therefore during the 1975/76 marketing year.

In consequence, any entitlement to the refunds and the amounts of the refunds depend, in Case 117/76, on Regulations (EEC) Nos 1125/74, 1132/74 and 3113/74 of the Council and on Regulation (EEC) No 2518/74 of the Commission of 4 October 1974 (OJ L 270, p. 1) and, in Case 16/77, on Regulations (EEC) Nos 1125/74, 665/75 and 1955/75 of the Council.

(b) According to the *Council,* quellmehl and pre-gelatinized starch are to some extent interchangeable in particular when used as baking materials in the manufacture of rye bread. However

because of its different properties quellmehl is more useful than pre-gelatinized starch. It has a greater capacity to absorb water; apart from starch it contains other raw material constituents which are of nutritional value; the process enabling it to be extracted from the raw material is a relatively simple physical operation whereas the manufacture of starch employs a technique which involves relatively more work; and the raw material extraction level is higher. The effect of these advantages is to make quellmehl from 15 to 20 % cheaper than pre-gelatinized starch, which is far more than the amount of the refund which pre-gelatinized starch continued to receive until the 1975/76 marketing year.

Thus the abolition of the subsidy would not have abolished the advantages as regards price and quality which quellmehl enjoys in terms of the manufacture of cooking agents.

(c) As the result of the oil crisis, prices of products competing with starch went up and in consequence did not compete so strongly against starch which, in turn, became a weaker competitor against quellmehl. The competitive pressure of imported processed products was also weaker. Moreover the maize market itself felt the repercussions of the world increase in the prices of cereals and there was less need to protect the processing industries of the Community. Again, the fact that the manufacture of starch is much more costly and complex than that of quellmehl also resulted in making the production costs of starch markedly more sensitive to the increase in investment costs and in labour costs. Finally, the Community realized that quellmehl was no longer put solely to its traditional use, baking, but that, owing to the refund, it was used as a constituent of animal feed. But these developments, which arose from the refund, do not fall within the objectives of the common agricultural policy for the purposes of which the refund was introduced.

It was because it was aware of this state of affairs that the Council reduced the refund for starch (in Regulations (EEC) Nos 1132/74, 3113/74 and 1955/75), made it discretionary (in Regulation (EEC) No 665/75) and abolished it for quellmehl (in Regulations (EEC) Nos 1125/74 and 1132/74).

(d) To grant a refund for starch is consistent with the provisions of Article 39 (1) (c) and (d) of the Treaty. Conversely, because of the use of quellmehl as animal feed, the abolition of the refund for this product furthers the objective designed to limiting the common agricultural policy 'to pursuit of the objectives set out in Article 39' (second subparagraph of Article 40 (3) of the Treaty).

(e) With regard to the alleged infringement of the rule against discrimination, the Council contends that to treat dissimilar situations differently does not amount to discrimination. The grant of a production refund for starch is justified by the state of the market in this product and by its key position between the common agricultural market and the common industrial market. Quellmehl, however, is in a different position. The grant of a refund for quellmehl is in the first place unnecessary as protection for its traditional outlets since the refund granted for pre-gelatinized starch has on several occasions been considerably reduced and, secondly, unjustified inasmuch as it helps to create an unintended outlet by way of animal feed. This different position justifies different treatment despite the fact that the two products concerned are to some extent in competition.

(f) The Council also states that even if, in the past, quellmehl and starch have in general received the same treatment this does not constitute a right to the same treatment, as claimed by the plaintiffs in the main actions. In this connexion the Council refers to the various grounds

which it has already given and which, it declares, have now ceased to exist, however much they may have justified this identity of treatment in the past.

This is clear from the fourth recital in the preamble to Regulation (EEC) No 1125/74 which gives grounds for the abolition of the payment of a refund for quellmehl and begins to reduce it for starch. The reduction to 10 u.a. per tonne of the refund for starch restored the natural superiority of quellmehl as a cooking agent.

(g) In terms of law, the Council refers to the decisions of the Court since its judgment of 17 July 1963 in Case 13/63 *Italy* v *Commission* [1963] ECR 165 which laid down that it is not discriminatory to treat dissimilar situations differently. The Council also refers to paragraph 22 of the judgment of the Court of 11 July 1974 in Case 11/74, *Union des Minotiers de la Champagne* v *France* [1974] ECR 877, according to which difference in treatment cannot be regarded as constituting discrimination which is prohibited unless it appears arbitrary.

In the Council's view it appears to be clear from the facts which it has set out, especially from those relating to the natural superiority of quellmehl from the competitive point of view and its use in the manufacture of animal feed, which is contrary to the original object of the subsidy, that it was not guilty of arbitrary discrimination in Regulation (EEC) No 1125/74 (1974/75 marketing year, Case 117/76) or in Regulations (EEC) Nos 665/75 and 1955/75 (1975/76 marketing year, Case 16/77). The same applies to Regulation (EEC) No 2727/75, which was effective only from 1 November 1975.

3. (a) The *Commission* states that the abolition of the production refund for quellmehl is only one aspect of the comprehensive change in the Community's subsidies policy in the case of products processed from cereals, one of the consequences of which is the reduction of refunds for starch. A charge of discrimination cannot therefore be based on the abolition *per se* of refunds in the case of quellmehl but at most on the fact that the refund granted for pre-gelatinized starch was not abolished in its entirety.

(b) From the legal standpoint Commission contends that an economic decision of the same kind as the contested measure cannot be discriminatory unless it was based on considerations which are manifestly erroneous; judgment of the Court of 24 October 1973 in Case 43/72, *Merkur* v *Commission* [1973] ECR 1055.

(c) The Commission accordingly sets forth the considerations on which the contested measures were based: the financial burdens of the common agricultural policy had to be reduced; price arrangements under the system of production refunds had to be adjusted to economic realities: the supply price (the basis of calculation of the production refund, which represents the difference between this price and the Community threshold price) had not followed the trend of market and threshold prices, which was steadily rising and the refunds were, in consequence, pratically doubled; and, because of the increase in the price of synthetic products which are in competition with cereal-based starch as the result of the rise in price of oil products, consideration was being given to the need for a fundamental reappraisal of the policy of granting refunds.

(d) Because starch was in competition with synthetic substitute products, the Council did not abolish production refunds for starch but merely reduced the relevant amounts.

(e) In consequence the question arose whether the timing of the reduction in the production refund for quellmehl should be the same as in the case of starch.

An analysis of the competitive position of these two products disclosed vital differences which made it unnecessary to keep the regulations governing the refund so completely in parallel as they had been hitherto. The explanation why quellmehl and starch are treated alike in Article 11 of Regulation No 120/67/EEC lies in the political argument of the 'preservation of the acquired rights' of quellmehl manufacturers rather than in economic necessity and the similarity of economic conditions. In this connexion it must be borne in mind that the manufacture of quellmehl has benefited from a German internal subsidy since 1930.

(f) The amount of the refunds is based on the overall assumption that 161 kg of maize are required for the manufacture of 100 kg of starch. On the other hand the extraction rate for quellmehl is, at most, between 102 and 110 kg and the manufacture of quellmehl involves much less work and requires much less technical knowhow than the manufacture of starch.

Furthermore, cereals themselves need not necessarily serve as raw material for quellmehl. All the other cheaper starch-producing products of the milling industry can be used.

(g) The interchangeability of the two products in question has, in practice, been hitherto of little importance.

On this point the Commission quotes the plaintiff in the main action in Case 16/77 as follows:

'... quellmehl has better technical qualities. The capacity to absorb water in particular ... is higher in the case of quellmehl; ... quellmehl has better qualities from the nutritional point of view . . .;'

'... In the end, however, the choice between the two products is only a matter of price since the use of a greater quantity of pre-gelatinized starch makes it possible to obtain absolutely the same capacity to absorb water ...'

Given that the cost price of the raw material is the same, the refund, adapted to the needs of starch manufacture, has over-subsidized the already cheaper production of quellmehl. This difference in price, together with the ability to use cheaper low grade flour, makes it possible for the quellmehl industry to invade the market in animal feed.

It is for this reason that the Community institutions reached the conclusion that there was no compelling reason to adhere to the principle of strict equality of treatment between the manufacturers of quellmehl and manufacturers of starch.

In view of the substantial reductions which took place in the production refunds for starch simultaneously with the abolition of the refund for quellmehl, there is no reason to suppose that great and irreparable harm would be done to the competition with pre-gelatinized starch.

In the animal feed industry, the higher prices of maize as a raw material could have been easily offset by the use of lower-grade flours which are cheaper.

Similarly, there is little reason to suppose that pre-gelatinized starch is forcing rye-flour cooking agents out of the traditional market. Pre-gelatinized starch is certainly coming to supersede quellmehl but not specific cooking agents because it does not possess their qualities.

(h) Nor is there any reason to fear that the natural advantage possessed by quellmehl-based products in terms of competition will be reversed as a result of the undue advantage granted to pre-gelatinized starch in terms of price.

The increase in the price of raw material caused by the abolition of the refund is

not reflected fully but only in part in the price of quellmehl, which is also considerably influenced by other factors. The effect of this increase on the price of cooking agents ready to be marketed, like those manufactured by the plaintiffs in the main actions, is even less significant.

Similarly the reduction, owing to the maintenance of refunds, in the price of maize as a raw material compared with the cost price of quellmehl has only a partly favourable effect on the price of pre-gelatinized starch as the finished product.

Price fluctuations due to changes in the amount of the refunds amount to discrimination only if they cause the price of quellmehl to rise appreciably above that of starch.

Like quellmehl producers, the starch manufacturing industry had to bear substantial price increases for maize as its raw material. The advantage which that industry enjoyed in terms of price compared with quellmehl manufacturers lay only in the maintenance of a lower production refund. The amount of the refund which, in the beginning, was as much as 20·40 units of account per tonne fell to 18·45 units of account per tonne in July 1975 and, after August 1975, to 10 units of account per tonne. This was not enough even to come within reach of the advantage of at least DM 100 which quellmehl previously enjoyed as a finished product.

Nor has experience gained in the meantime supplied any evidence of competition which makes it possible for pre-gelatinized starch to replace quellmehl because of the refunds it receives.

Second question

1. The *plaintiff in the main action* in Case 117/76 states that, in the present case, discrimination can be eliminated retroactively by granting, with retroactive effect, the production refund for the manufacture of quellmehl from maize and rice up to an amount equal to that granted for the manufacture of starch from maize and rice during the same period.

The plaintiff in the main action in Case 16/77 adds that if Regulation (EEC) No 1125/74 is annulled it will mean that Article 11 of Regulation No 120/67/EEC, as it was worded before the entry into force of Regulation (EEC) No 1125/74, is again valid in so far as it governs the production refund for maize used in the manufacture of quellmehl.

The second paragraph of Article 215 of the Treaty has the same legal effect. The principle that the person responsible for the damage should, in the first place, restore the situation to what it would have been if the event causing the damage had not taken place is one of the general principles relating to the liability of the Community for damage caused by its institutions. The same principle is illustrated by the right to have the consequences made good, which is recognized in administrative law and is also common to the legal systems of the Member States.

The plaintiffs in the main actions accordingly request the Court to give an affirmative answer to the second question.

2. The *Council* contends that, even if the Court finds that a set of regulations is legally invalid, it may not put itself in the place of the Community legislature in the exercise of the powers of discretion conferred upon the latter and promulgate a positive rule since a whole range of alternative courses is open to the legislature.

Moreover, the aim of the second question is to have an issue concerning the application of the law settled by the Court, and this is not possible.

3. The *Commission* points out that, even if quellmehl were reentered on the list in Article 11 of Regulation No 120/67/EEC of the products entitled to a refund, the Council is not bound to grant a refund for quellmehl. Regulation (EEC) No 665/75 abolished the compulsory refund which existed previously and left the decision whether a refund should be granted for one of the listed products to the discretion of the Council.

A finding that there had been a misuse of powers would mean that the measures taken were invalid and would oblige the Council to replace them with a non-discriminatory measure coming within the scope of its discretionary power.

There could be an exception only if the Council's margin of discretion was confined to one decision only: that of restoring unchanged and with retroactive effect the right to the refund. In this case, there is, in any event, a choice of several possible solutions.

III — The written reply to a question put by the Court

In response to the Court's request for evidence to prove that quellmehl has been used for animal feed, the Commission produced a telex from the Federal Ministry of Food.

According to this telex the trade association for the animal feed production industry ('Fachverband der Futtermittelindustrie') is one of the groups which has got into touch with the Ministry concerning the abolition of the production refund for quellmehl because its abolition placed quellmehl at a disadvantage compared with pre-gelatinized starch in the production of milk substitute foods for calves and pigs. It also appears from the telex that the Ministry of Food is in possession of a report which shows that, at that time, quellmehl was being offered on the market in animal feed components at a price of from DM 65 to DM 70 per 100 kg compared with starch products fetching from DM 80 to DM 85 per 100 kg and was thus selling at from about 80 % to 82 % of the price of starch-based and glucose-based products.

The Commission has not been able to see the original documents or to place them at the disposal of the Court because they contained certain confidential matter.

IV — Oral procedure

At the hearing on 21 June 1977, oral observations were made by the plaintiff in the main action in Case 117/76, represented by Fritz Modest, the plaintiff in the main action in Case 16/77, represented by K.-D. Rathke, the Council, represented by the Director of its Legal Service, Daniel Vignes, acting as Agent, and the Commission, represented by its Legal Adviser, Götz zur Hausen, acting as Agent.

The *plaintiff in the main action in Case 117/76* states that, according to information which it is unable to prove beyond doubt, only one undertaking in the Federal Republic of Germany, Interquell, has processed some 5 000 tonnes of maize into quellmehl, half of its output, or 2 500 tonnes, being sent to the animal feed industry, while the quellmehl industry as a whole processes from about 40 000 to 50 000 tonnes of maize into quellmehl.

It does not understand how pre-gelatinized starch can replace quellmehl but not the particular baking aids which have different properties; like quellmehl, pre-gelatinized starch can be used as the basic ingredient of an aid for bakery products.

The cost price of quellmehl is DM 98·79 per 100 kg while starch was, owing to the refund, on offer at DM 98 per 100 kg.

The *plaintiff in the main action in Case 16/77* states that, while quellmehl, like starch, is largely used as a component of food products other than cooking agents, the ways in which the two products can be used are much the same. The production costs of pre-gelatinized starch and of quellmehl are the same.

It is not true that quellmehl is from 15 to 20 % cheaper to produce than starch. In the foodstuffs industry the price relationship is the opposite: prices are from 20 % higher in the case of quellmehl than in the case of pre-gelatinized starch. Prices mentioned in the telex of the German Federal Ministry of Food referred only to animal feed.

Referring to the statement of the plaintiff in the main action that pre-gelatinized starch was on sale at DM 98 per 100 kg, the *Commission* states that this figure relates to the present position whereas the comparison of prices made by the Commission refers to the time when the abolition of the refund was being discussed.

The fact that quellmehl was used in the animal feed industry was not merely an unofficial ground: there was a reference, though rather vague, to this effect in the third recital in the preamble to the regulation.

The Court invited the Commission to develop its arguments at the hearing on the following point:

'The difference between Cases 117/76 and 16/77 arising from the fact that the application for grant of a refund in the first case was submitted on the date when Article 11, as amended, of Regulation No 120/67/EEC made the grant of a refund for the products covered by the article compulsory (refund shall be granted), whereas the application in the second case was submitted on a date when the wording in force of Article 11 provided for the refund in respect of the products covered to be discretionary (refund may be granted).'

The Commission's reply was that, in neither case, was quellmehl any longer mentioned by the aforesaid provision. This is therefore a question which would arise only if the abolition of the refund for quellmehl were to be declared invalid by the Court. If that occurred, quellmehl would, as a finished product, once more come under the regulation concerning the basic product in respect of which a production refund is granted in the first case and may be granted in the second case.

Even if a basic regulation lays down that a refund shall be granted this does not confer any right to it on the party concerned. A right would be conferred on the party concerned only by the fixing of the amount of the refund. Nor, against this, could it be objected that the amount of the refund had already been fixed for pre-gelatinized starch and that a now legislative measure was not therefore necessary to introduce the refund; this would amount to saying that the Council had exercised its discretion irrevocably, once and for all, because it had fixed the refund at a specific sum for starch. In the Commission's view such a contention would be difficult to justify: the act of simply transferring to quellmehl the refund which had originally been fixed for starch is not the only way to achieve this equality of treatment. It is equally possible to confine the refunds to food for human consumption or to restrict the level of the refund for the two products. That, too, can ensure equality of treatment. In the case of the 1975/76 marketing year, equality is a matter for decision by the legislature and could even consist of the total abolition of the refund for pre-gelatinized starch because at the material time the refund was not compulsory.

The Advocate-General delivered his opinion at the hearing on 22 September 1977.

Decision

1 By two orders dated respectively 8 November 1976 and 18 January 1977, which reached the Court on 10 December 1976 and 31 January 1977, the Finanzgericht Hamburg has referred to the Court under Article 177 of the EEC Treaty two questions concerning the validity of certain provisions of Community regulations on the subject of refunds for the manufacture of products derived from maize.

2 Since the questions referred in both cases are identical and have essentially the same object, it is proper to join the cases for the purposes of judgment.

3 The substance of the first question is whether the provisions of Article 11 of Regulation No 120/67/EEC of the Council on the common organization of the market in cereals, as subsequently amended, are invalid in so far as they do not grant a production refund of the same amount on maize for the manufacture of quellmehl as they do for the processing of this product into starch.

The second question is whether, in the event of the reply being in the affirmative, manufacturers of quellmehl can lay direct claim to the same production refund as that granted to manufacturers of pre-gelatinized starch or whether a legal measure adopted by the Council is required for this.

4 These questions were referred in connexion with proceedings for the payment of a production refund for quellmehl brought against the competent national authorities by the manufacturers of this product, who claim that the provisions which abolished this refund while maintaining it for starch constitute discrimination contrary to the second subparagraph of Article 40 (3) of the Treaty.

5 The production refund for quellmehl extracted from maize, which has been granted in Germany since 1930, was introduced into the common organization of the market in cereals, first as discretionary by Regulation No 142/64/EEC of the Council of 21 October 1964 (JO of 27. 10. 1964, p. 2673) and subsequently as compulsory by Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967 (JO English Special Edition 1967, p. 33).

These arrangements were identical with those established by the same regulations for the grant of production refunds for starch and the amount of the refunds was also the same for the two products.

Although the reason for the grant of production refunds for starch was the need to keep prices competitive compared with the prices of substitute products derived principally from oil, the reason for the grant of production refunds for quellmehl was, as is made clear in particular by the tenth recital in the preamble to Regulation No 120/67/EEC, the interchangeability of starch and quellmehl.

6 The situation remained the same until 1 August 1974, the date of the entry into force of Regulation (EEC) No 1125/74 of the Council of 29 April 1974 (OJ L 128 of 10. 5. 1974, p. 12), whereby Article 11 of Regulation No 120/67/EEC was superseded by a new text providing for the grant of production refunds for starch but not for quellmehl.

The recitals in the preamble to Regulation (EEC) No 1125/74 stated that the reason for abolishing the production refund for quellmehl was that experience had shown that the opportunity for substituting quellmehl for starch for certain specific uses as food for human consumption was 'economically slight, if not non-existent'.

7 The second subparagraph of Article 40 (3) of the Treaty provides that the common organization of agricultural markets 'shall exclude any discrimination between producers or consumers within the Community'.

Whilst this wording undoubtedly prohibits any discrimination between producers of the same product it does not refer in such clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products.

This does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.

This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.

8 It must therefore be ascertained whether quellmehl and starch are in a comparable situation, in particular in the sense that starch can be substituted for quellmehl in the specific use to which the latter product is traditionally put.

In this connexion it must first be noted that the Community regulations were, until 1974, based on the assertion that such substitution was possible.

However, the plaintiffs in the main actions on the one hand, and the Council and the Commission on the other are not in agreement concerning the continued existence of that situation.

The plaintiffs in the main actions contend that the opportunities for substitution are the same as previously, with the result that, since the abolition of the refund for quellmehl, trade in the latter has fallen off in favour of starch.

While the Council and the Commission have given detailed information on the manufacture and sale of the products in question, they have produced no new technical or economic data which appreciably change the previous assessment of the position.

It has not therefore been established that, so far as the Community system of production refunds is concerned, quellmehl and starch are no longer in comparable situations.

Consequently, these products must be treated in the same manner unless differentiation is objectively justified.

9 With regard to this latter aspect, the Council and the Commission contend that the abolition of the refund for quellmehl is justified by the fact that quellmehl has been to a great extent diverted from its specific use in food for human consumption in order to be sold as animal feed.

Although this ground, the correctness of which is moreover disputed by the plaintiffs in the main actions, is referred to in the statement which accompanied the proposal submitted by the Commission to the Council and later adopted as Regulation (EEC) No 1125/74, it does not appear in the recitals to that regulation.

During the proceedings, the Commission was requested by the Court to produce evidence to show that quellmehl had been used for animal feed but it was unable to comply with this request.

Even if adequate proof had been forthcoming that it was put to such use and that subsidized starch had not been put to similar use this could have justified the abolition of the refund only in respect of the quantities put to such use and not in respect of the quantities of the products used in food for human consumption.

10 In view in particular of the length of time during which the two products were given equality of treatment with regard to production refunds, it has not been established that there are objective circumstances which could have justified altering the previous system as was done by Regulation (EEC) No 1125/74, which put an end to this equality of treatment.

It is clear from the foregoing that the abolition, as a result of Regulation (EEC) No 1125/74, of the refund for quellmehl, while the refund was maintained for maize-based starch, amounts to a disregard of the principle of equality.

11 In the particular circumstances of the case, however, this finding of illegality does not inevitably involve a declaration that a provision of Regulation (EEC) No 1125/74 is invalid.

12 It must first of all be borne in mind that the amendment of Article 11 of Regulation No 120/67/EEC effected by Article 5 of Regulation (EEC) No 1125/74 took the form not of the deletion of that part of the text which relates to quellmehl but of the replacement of the previous wording by a new wording in which there is no mention of that product.

Thus the provision is unlawful because of something for which it makes no provision rather than on account of any part of its wording.

13 However, this unlawfulness cannot be removed merely by the fact that the Court, in proceedings under Article 177, rules that the contested provision is in part or in whole invalid.

On the other hand the conclusion must be drawn that, in law, the situation created by Article 5 of Regulation (EEC) No 1125/74, whereby the previous text was replaced by a new wording of Article 11 of Regulation No 120/67/EEC, is incompatible with the principle of equality and that it is for the competent institutions of the Community to adopt the measures necessary to correct this incompatibility.

The need for a reply to this effect to the questions asked is borne out by the existence of several courses of action which would enable the two products in question once again to be treated equally and to make good any damage sustained by those concerned and by the fact that it is for the institutions responsible for the common agricultural policy to assess the economic and political considerations on which this choice of action depends.

Costs

14 The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Finanzgericht Hamburg by orders of 8 November 1976 and 18 January 1977, hereby rules:

1. **The provisions of Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967, as worded with effect from 1 August 1974 following the amendment made by Article 5 of Regulation (EEC) No 1125/74 of the Council of 29 April 1974, and repeated in subsequent regulations, are incompatible with the principle of equality in so far as they provide for quellmehl and pre-gelatinized starch to receive different treatment in respect of production refunds for maize used in the manufacture of these two products.**

2. It is for the institutions competent in matters of common agricultural policy to adopt the measures necessary to correct this incompatibility.

Kutscher Sørensen Bosco Donner Pescatore

Mertens de Wilmars Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 19 October 1977.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 22 SEPTEMBER 1977 [1]

Mr President,
Members of the Court,

1. The opinion which I have to deliver today is concerned with six cases (Joined Cases 64 and 113/76, Joined Cases 117/76 and 16/77 and Joined Cases 124/76 and 20/77) relating to agriculture and they have one important feature in common: they all raise the issue of observance of the principle of non-discrimination by the Community legislature. More specifically, the central issue is whether and under what conditions the principle of non-discrimination must be considered to have been breached when, by means of regulations, the Community authorities decide to abolish aids granted for a time to particular products while maintaining aids already granted to a product in competition with them.

I should state at once that the products which in the present case no longer benefit from aids (in the form of 'production refunds') are 'quellmehl' and 'gritz'; the product which continues to benefit from them is starch. Quellmehl, which is produced by the processing of maize, wheat or broken rice by means of a heat treatment helps to keep dough damp in the breadmaking process and is traditionally used in Germany and Denmark as an additive in the manufacture of rye bread. Gritz is meal which is made from maize by means of a purely mechanical operation and is mainly used in the brewing of beer. For the main purpose for which they are used, each of the two products can, technically speaking, be replaced by starch.

During the stage at which the common organization of the market in cereals was being progressively established, the similar treatment of starch and quellmehl in the matter of production refunds was the outcome, in particular, of

1 — Translated from the Italian.

EXHIBIT C-105

C-105

61979J0810

Judgment of the Court of 8 October 1980. - Peter Überschär v Bundesversicherungsanstalt für Angestellte. - Reference for a preliminary ruling: Bundessozialgericht - Germany. - German voluntary insurance. - Case 810/79.

European Court reports 1980 Page 02747
Greek special edition Page 00043
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Keywords

1 . SOCIAL SECURITY FOR MIGRANT WORKERS - VOLUNTARY INSURANCE - SPECIAL WAYS OF GIVING EFFECT TO CERTAIN LAWS - FEDERAL REPUBLIC OF GERMANY - PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 - CONDITION OF RETROGRESSIVE BUYING-IN LAID DOWN BY NATIONAL LEGISLATION - SCOPE - GERMAN NATIONAL WHO HAS PAID CONTRIBUTIONS TO OLD-AGE PENSION INSURANCE IN ANOTHER MEMBER STATE

(PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 OF THE COUNCIL , AS AMENDED BY REGULATION NO 1392/74)

2 . SOCIAL SECURITY FOR MIGRANT WORKERS - VOLUNTARY INSURANCE - SPECIAL WAYS OF GIVING EFFECT TO CERTAIN LAWS - FEDERAL REPUBLIC OF GERMANY - PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 - CONDITION OF RETROGRESSIVE BUYING-IN LAID DOWN BY NATIONAL LEGISLATION - DISCRIMINATION AGAINST GERMAN WORKERS AND FOREIGNERS RESIDING IN THE FEDERAL REPUBLIC OF GERMANY - NONE

(PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 OF THE COUNCIL , AS AMENDED BY REGULATION NO 1392/74)

3 . COMMUNITY LAW - PRINCIPLES - EQUAL TREATMENT - CONCEPT

Summary

1 . IT FOLLOWS FROM THE OBJECTS AND THE WORDING OF PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 (AS AMENDED BY REGULATION NO 1392/74) THAT THOSE PROVISIONS AND IN PARTICULAR THE FIRST SENTENCE OF PARAGRAPH 9 ARE INTENDED TO ENABLE THE REQUIREMENT OF RETROGRESSIVE BUYING-IN SET FORTH IN ARTICLE 49A (2) OF THE ANGESTELLTENVERSICHERUNGS-NEUREGELUNGSGESETZ (CLERICAL STAFF PENSION REFORM LAW), AS AMENDED BY THE RENTENREFORMGESETZ (PENSION REFORM LAW) OF 16 OCTOBER 1972 , TO CONTINUE TO EXIST IN THE LEGISLATION OF THE FEDERAL REPUBLIC OF GERMANY EVEN THOUGH THE MOST RECENT PERIODS CORRESPOND TO PERIODS IN WHICH CONTRIBUTIONS WERE COMPULSORY IN ANOTHER MEMBER STATE . WHENEVER A GERMAN NATIONAL OR A NATIONAL OF ANOTHER MEMBER STATE RESIDING IN THE FEDERAL REPUBLIC OF GERMANY CLAIMS THE BENEFIT OF ARTICLE 49A (2) THE CONTRIBUTION PERIODS IN OTHER MEMBER STATES ARE NOT THEREFORE REGARDED AS '' COVERED '' BUT MUST BE BOUGHT IN FIRST IF THEY ARE MORE RECENT THAN NATIONAL PERIODS WHICH ARE IN FACT NOT COVERED . ON THE OTHER HAND , THAT REQUIREMENT MAY NOT BE APPLIED AGAINST THE PERSONS REFERRED TO IN PARAGRAPH 8 (B) AND (C) WHO , MOREOVER , ARE NOT IN ANY EVENT ALLOWED TO BUY-IN PERIODS COMPLETED IN OTHER MEMBER

STATES .

CONSEQUENTLY A GERMAN NATIONAL WHO HAS PAID CONTRIBUTIONS TO OLD-AGE PENSION INSURANCE IN ANOTHER MEMBER STATE AND WHO SUBSEQUENTLY WISHES TO PAY A POSTERIORI , BUT WITH RETROACTIVE EFFECT WITHIN THE MEANING OF ARTICLE 49A (2) OF THE CLERICAL STAFF PENSION REFORM LAW GERMAN PENSION CONTRIBUTIONS IN RESPECT OF PREVIOUS PERIODS , MAY BE REQUIRED TO PAY GERMAN CONTRIBUTIONS IN RESPECT OF PERIODS COVERED BY CONTRIBUTIONS IN ANOTHER MEMBER STATE .

2 . THE DIFFERENCE IN TREATMENT WHICH IS INDISPUTABLY APPLIED BY PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 (AS AMENDED BY REGULATION NO 1392/74) BETWEEN , ON THE ONE HAND , GERMAN WORKERS AND FOREIGNERS RESIDING IN THE FEDERAL REPUBLIC OF GERMANY - REFERRED TO IN THE FIRST SENTENCE OF PARAGRAPH 9 - AND , ON THE OTHER HAND , WORKERS FROM OTHER MEMBER STATES - REFERRED TO IN THE SECOND SENTENCE OF PARAGRAPH 9 - DOES NOT CONSTITUTE DISCRIMINATION AGAINST THE FORMER .

AN EXAMINATION OF THE ADVANTAGES AND DRAWBACKS OF THE TWO LEGAL SITUATIONS WHICH HAVE TO BE COMPARED SHOWS IN FACT THAT THEY CANNOT BE REGARDED AS BEING MORE FAVOURABLE TO ONE THAN TO THE OTHER CATEGORY OF WORKERS CONCERNED .

3 . THE GENERAL PRINCIPLE OF EQUALITY , OF WHICH THE PROHIBITION OF DISCRIMINATION ON GROUNDS OF NATIONALITY IS MERELY A SPECIFIC ENUNCIATION , IS ONE OF THE FUNDAMENTAL PRINCIPLES OF COMMUNITY LAW . THIS PRINCIPLE REQUIRES THAT SIMILAR SITUATIONS SHALL NOT BE TREATED DIFFERENTLY UNLESS DIFFERENTIATION IS OBJECTIVELY JUSTIFIED .

Parties

IN CASE 810/79

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE BUNDESSOZIALGERICHT (FEDERAL SOCIAL COURT) FOR A PRELIMINARY RULING IN THE CASE PENDING BEFORE THAT COURT BETWEEN

PETER UBERSCHAR , HASSELT , BELGIUM ,

PLAINTIFF AND RESPONDENT IN THE APPEAL ON A POINT OF LAW ,

AND

BUNDESVERSICHERUNGSANSTALT FUR ANGESTELLTE (FEDERAL INSURANCE INSTITUTION FOR CLERICAL STAFF), BERLIN ,

DEFENDANT AND APPELLANT IN THE SAID APPEAL ,

Subject of the case

UPON THE INTERPRETATION OF ANNEX V TO REGULATION NO 1408/71 OF THE COUNCIL OF 14 JUNE 1971 ON THE APPLICATION OF SOCIAL SECURITY SCHEMES TO EMPLOYED PERSONS AND THEIR FAMILIES MOVING WITHIN THE COMMUNITY (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1971 (II), P . 416) AS AMENDED BY REGULATION NO 1392/74 OF THE COUNCIL OF 4 JUNE 1974 (OFFICIAL JOURNAL L 152 , P . 1)

Grounds

1 BY AN ORDER DATED 12 OCTOBER 1979 WHICH WAS RECEIVED AT THE COURT ON 7 DECEMBER 1979 THE BUNDESSOZIALGERICHT (FEDERAL SOCIAL COURT) REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY A QUESTION FRAMED AS FOLLOWS :

' ' MUST THE FIRST SENTENCE OF PARAGRAPH 9 OF PART C OF ANNEX V TO REGULATION (EEC) NO

1408/71 , AS AMENDED BY REGULATION (EEC) NO 1392/74 , BE INTERPRETED TO MEAN THAT A GERMAN NATIONAL WHO HAS PAID CONTRIBUTIONS TO THE PENSION INSURANCE OF ANOTHER MEMBER STATE AND WHO SUBSEQUENTLY WISHES TO BUY-IN GERMAN CONTRIBUTIONS FOR EARLIER PERIODS IN RESPECT OF WHICH CONTRIBUTIONS HAVE NOT YET BEEN PAID , (ART . 49A (2) OF PART 2 OF THE CLERICAL STAFF PENSION REFORM LAW (ANGESTELLTENVERSICHERUNGS-NEUREGELUNGSGESETZ), AS AMENDED BY THE PENSION REFORM LAW (RENTENREFORMGESETZ) OF 16 OCTOBER 1972 , MUST FIRST PAY GERMANY CONTRIBUTIONS FOR THE PERIODS COVERED BY CONTRIBUTIONS IN ANOTHER MEMBER STATE OR IS THIS UNNECESSARY UNDER COMMUNITY LAW?

' '

2 THAT QUESTION HAS BEEN SUBMITTED IN THE CONTEXT OF A DISPUTE BETWEEN A GERMAN NATIONAL , THE PLAINTIFF IN THE MAIN ACTION , AND THE BUNDESVERSICHERUNGSANSTALT FUR ANGESTELLTE (FEDERAL INSURANCE INSTITUTION FOR CLERICAL STAFF). THE PLAINTIFF PAID CONTRIBUTIONS TO GERMAN INSURANCE FOR CLERICAL STAFF FROM APRIL 1948 TO JUNE 1969 , AND THEN FROM 1973 TO 1974 . IN THE INTERVENING PERIOD (1969 TO 1973) HE WAS EMPLOYED IN BELGIUM AND COMPULSORILY INSURED UNDER THE BELGIAN INSURANCE SCHEME FOR CLERICAL STAFF . IN HIS FIRST GERMAN INSURANCE PERIOD THERE WERE SOME INTERRUPTIONS , NAMELY FOUR MONTHS IN 1956 AND 41 MONTHS BETWEEN 1964 AND 1967 , DURING WHICH HE WAS NOT INSURED EITHER IN ANOTHER MEMBER STATE OR UNDER ANY OTHER OLD-AGE PENSION INSURANCE SCHEME IN THE FEDERAL REPUBLIC OF GERMANY .

3 THE APPLICANT EXPRESSED THE DESIRE TO MAKE USE OF THE FACILITIES AVAILABLE TO PERSONS IN HIS SITUATION UNDER ARTICLE 49A (2) OF THE ANGESTELLTENVERSICHERUNGS-NEUREGELUNGSGESETZ (CLERICAL STAFF PENSION REFORM LAW , HEREINAFTER REFERRED TO AS ' ' THE 1957 LAW ' '), AS AMENDED BY ARTICLE 2 (2) 14 OF THE RENTENREFORMGESETZ (PENSION REFORM LAW , HEREINAFTER REFERRED TO AS ' ' THE 1972 LAW ' ') OF 16 OCTOBER 1972 . ACCORDING TO THAT PROVISION : ' ' PERSONS WHO ARE ENTITLED TO BECOME VOLUNTARILY INSURED PURSUANT TO ARTICLE 10 OF THE CLERICAL STAFF INSURANCE LAW MAY , AT THEIR REQUEST , IN DEROGATION FROM THE PROVISIONS OF ARTICLE 140 OF THAT LAW , VOLUNTARILY BUY-IN CONTRIBUTIONS IN RESPECT OF PERIODS FROM 1 JANUARY 1956 TO 31 DECEMBER 1973 WHICH ARE NOT YET COVERED BY CONTRIBUTIONS TO STATUTORY PENSION INSURANCE , PROVIDED THAT A CONTRIBUTION RELATING TO ANY MONTH MAY NOT BE PAID UNLESS THE CONTRIBUTIONS COVERING ALL SUBSEQUENT MONTHS HAVE FIRST BEEN PAID . A CONTRIBUTION RELATING TO ANY MONTH MAY NOT EXCEED THE SMALLEST CONTRIBUTION PAID IN RESPECT OF A LATER MONTH ' ' .

4 RELYING ON THAT TEXT THE APPLICANT APPLIED TO PAY IN THAT WAY THE CONTRIBUTIONS WHICH HE WOULD HAVE PAID HAD HE BEEN INSURED IN THE FEDERAL REPUBLIC OF GERMANY BETWEEN 1948 AND 1969 (45 MONTH IN ALL). WHILST NOT CONTESTING THAT THE PLAINTIFF SATISFIES THE CONDITIONS FOR THE EXERCISE OF THE OPTION OF MAKING BACK-PAYMENTS , THE DEFENDANT INSTITUTION REFERS TO THE SENTENCE IN ARTICLE 49A (2) WHICH SAYS THAT SUCH ENTITLEMENT SHALL EXIST ' ' PROVIDED THAT A CONTRIBUTION RELATING TO ANY MONTH MAY NOT BE PAID UNLESS THE CONTRIBUTIONS COVERING ALL SUBSEQUENT MONTHS HAVE FIRST BEEN PAID ' ' , ARGUING THAT THE APPLICANT MUST START BY PAYING THE GERMAN CONTRIBUTIONS IN RESPECT OF THE PERIOD CORRESPONDING TO THAT IN WHICH HE WAS COMPULSORILY INSURED AND PAID CONTRIBUTIONS IN BELGIUM . IT IS THAT REQUIREMENT WHICH IS THE SUBJECT-MATTER OF THE MAIN ACTION . THE APPLICANT HAS AN INTEREST IN CHALLENGING IT OWING TO THE FACT THAT THE ' ' BUYING-IN ' ' OF RECENT MISSING PERIODS , IN THIS CASE FROM 1969 TO 1973 , IS MORE EXPENSIVE THAN THAT FOR PERIODS FURTHER BACK , NAMELY 45 MONTHS BETWEEN 1956 AND 1967 .

5 THE PARTIES TO THE MAIN ACTION ARE AGREED THAT THE APPLICANT DOES COME UNDER ARTICLE 49A (2) AND THAT THE REQUIREMENT LAID DOWN BY THE INSURANCE INSTITUTION OF PAYING FIRST THE CONTRIBUTIONS FOR THE PERIODS BETWEEN 1969 AND 1973 , NOTWITHSTANDING THE FACT THAT THEY CORRESPOND TO COMPULSORY INSURANCE PERIODS IN BELGIUM , DERIVES FROM A PROPER CONSTRUCTION OF THE RELEVANT PROVISIONS OF THE GERMAN LEGISLATION IN THE MATTER . THEY ARE AGREED THAT THE OBLIGATION UNDER GERMAN VOLUNTARY INSURANCE TO BUY-IN THE PERIODS CORRESPONDING TO INSURANCE PERIODS IN ANOTHER MEMBER STATE MAY BE IMPOSED ONLY ON GERMAN NATIONALS AND ON WORKERS FROM OTHER MEMBER STATES WHO LIVE IN THE FEDERAL REPUBLIC OF GERMANY AND THAT IT CANNOT BE IMPOSED ON WORKERS FROM OTHER MEMBER STATES LIVING OUTSIDE GERMANY .

6 ACCORDING TO THE DEFENDANT INSTITUTION THE CONFORMITY OF THAT REQUIREMENT WITH COMMUNITY LAW IS APPARENT FROM THE TEXT OF PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 OF THE COUNCIL . ON THE OTHER HAND THE PLAINTIFF IN THE MAIN ACTION CONTESTS THAT INTERPRETATION OF THOSE PROVISIONS . HE FURTHER MAINTAINS , AS HIS PRIMARY CONTENTION , THAT IF THE INTERPRETATION PUT FORWARD BY THE DEFENDANT WERE

CORRECT , THE DISPUTED PROVISIONS WOULD CONSEQUENTLY BE TAINTED WITH DISCRIMINATION AND WOULD THEREFORE BE ILLEGAL OWING TO THE DIFFERENT TREATMENT IMPOSED ON GERMAN NATIONALS AND ON NATIONALS OF OTHER MEMBER STATES LIVING IN GERMANY BY COMPARISON WITH WORKERS FROM OTHER MEMBER STATES HAVING ACCESS TO THE GERMAN VOLUNTARY INSURANCE SCHEME AND TO THE '' BUYING-IN '' SCHEME , UPON WHOM SUCH AN OBLIGATION TO BUY-IN PERIODS CORRESPONDING TO A PERIOD OF INSURANCE IN ANOTHER MEMBER STATE CANNOT BE IMPOSED .

7 CONSEQUENTLY THE QUESTION REFERRED TO THE COURT PRIMARILY SEEKS TO DETERMINE WHETHER PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V MUST INDEED BE CONSTRUED IN THE MANNER SUGGESTED BY THE DEFENDANT INSTITUTION AND , SECONDLY , SHOULD THE PROVISIONS IN QUESTION HAVE THAT EFFECT , WHETHER THEY ARE NOT THEREFORE INVALID BY REASON OF THE DIFFERENT TREATMENT OF TWO CATEGORIES OF WORKERS BOTH OF WHOM ARE ALLOWED ACCESS TO VOLUNTARY INSURANCE WITH THE OPTION OF MAKING BACK-PAYMENTS IN RESPECT OF EARLIER PERIODS .

8 THE PROVISIONS WHICH REQUIRE CONSIDERATION ARE ARTICLE 89 OF REGULATION NO 1408/71 AND PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO THE SAME REGULATION . THOSE PROVISIONS READ AS FOLLOWS :

ARTICLE 89

'' SPECIAL PROCEDURES FOR IMPLEMENTING THE LEGISLATIONS OF CERTAIN MEMBER STATES ARE SET OUT IN ANNEX V . ''

PARAGRAPH 8 OF PART C OF ANNEX V

'' ARTICLE 1233 OF THE INSURANCE CODE (RVO) AND ARTICLE 10 OF THE CLERICAL STAFF INSURANCE LAW (AVG), AS AMENDED BY THE PENSION REFORM LAW OF 16 OCTOBER 1972 , WHICH GOVERN VOLUNTARY INSURANCE UNDER GERMAN PENSION INSURANCE SCHEMES , SHALL APPLY TO NATIONALS OF THE OTHER MEMBER STATES AND TO STATELESS PERSONS AND REFUGEES RESIDING IN THE TERRITORY OF THE OTHER MEMBER STATES , ACCORDING TO THE FOLLOWING RULES :

WHERE THE GENERAL CONDITIONS ARE FULFILLED VOLUNTARY CONTRIBUTIONS TO THE GERMAN PENSION SCHEME MAY BE PAID :

(A) IF THE PERSON CONCERNED HAS HIS DOMICILE OR RESIDENCE IN THE TERRITORY OF THE FEDERAL REPUBLIC OF GERMANY ;

(B) IF THE PERSON CONCERNED HAS HIS DOMICILE OR RESIDENCE IN THE TERRITORY OF ANOTHER MEMBER STATE AND AT ANY TIME PREVIOUSLY BELONGED COMPULSORILY OR VOLUNTARILY TO A GERMAN PENSION INSURANCE SCHEME ;

(C) IF THE PERSON CONCERNED IS A NATIONAL OF ANOTHER MEMBER STATE , HAS HIS DOMICILE OR RESIDENCE IN THE TERRITORY OF A THIRD STATE AND HAS PAID CONTRIBUTIONS FOR GERMAN PENSION INSURANCE FOR AT LEAST 60 MONTHS , OR WAS ELIGIBLE FOR VOLUNTARY INSURANCE UNDER THE TRANSITIONAL PROVISIONS PREVIOUSLY IN FORCE AND IS NOT COMPULSORILY OR VOLUNTARILY INSURED UNDER THE LEGISLATION OF ANOTHER MEMBER STATE . ''

PARAGRAPH 9 OF PART C OF ANNEX V

'' THE REGULATION SHALL NOT AFFECT ARTICLE 51A (2) OF THE MANUAL WORKERS PENSION REFORM LAW (ARVNG) OR ARTICLE 49A (2) OF THE CLERICAL STAFF PENSION REFORM LAW (ANVNG), AS AMENDED BY THE PENSION REFORM LAW OF 16 OCTOBER 1972 . THE PERSONS WHO , UNDER PARAGRAPH 8 (B) AND (C), MAY JOIN VOLUNTARY INSURANCE , MAY PAY CONTRIBUTIONS ONLY IN RESPECT OF PERIODS FOR WHICH THEY HAVE NOT YET PAID CONTRIBUTIONS UNDER THE LEGISLATION OF ANOTHER MEMBER STATE . ''

THE CONSTRUCTION OF PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71

9 WHEN ARTICLE 49A INCLUDING PARAGRAPH (2) THEREOF WAS ADDED TO THE 1957 LAW IN 1972 THE BENEFIT OF '' BUYING-IN '' WHICH IT INTRODUCED WAS RESTRICTED TO GERMAN NATIONALS AND TO FOREIGNERS LIVING IN THE FEDERAL REPUBLIC OF GERMANY . IN THE CASE OF THOSE PERSONS THREE CONDITIONS ARE IMPOSED ON THE RIGHT TO '' BUY-IN '' :

(A) BUYING-IN IS RESTRICTED TO A PERIOD BETWEEN 1 JANUARY 1956 AND 31 DECEMBER 1973 ;

(B) IT MAY BE EFFECTED ONLY IN RESPECT OF PERIODS FOR WHICH THE PERSON CONCERNED PAID CONTRIBUTIONS TO STATUTORY INVALIDITY AND OLD-AGE PENSION INSURANCE (PRINCIPLE OF THE PROHIBITION ON OVERLAPPING INSURANCE) - THAT PROVISION , AS HAS JUST BEEN INDICATED ,

BEING UNDERSTOOD AND IMPLEMENTED BY THE COMPETENT INSTITUTIONS AS REFERRING ONLY TO PERIODS OF CONTRIBUTION TO INSURANCE IN THE FEDERAL REPUBLIC OF GERMANY - AND ,

(C) BUYING-IN MUST START WITH THE MOST RECENT MISSING PERIODS AND GO PROGRESSIVELY FURTHER BACK IN THE PAST (PRINCIPLE OF RETROGRESSIVE BUYING-IN).

10 FOLLOWING THE INTERVENTION OF THE COMMISSION THE FEDERAL REPUBLIC OF GERMANY ACCEPTED THAT THE BENEFIT OF THAT PROVISION SHOULD BE EXTENDED TO THE NATIONALS OF OTHER MEMBER STATES WHO DID NOT RESIDE IN THE FEDERAL REPUBLIC OF GERMANY PROVIDED THAT THEY HAD PREVIOUSLY BEEN COMPULSORILY OR VOLUNTARILY INSURED UNDER THE GERMAN OLD-AGE PENSION INSURANCE SCHEME . THAT IS THE OBJECT OF PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V , AMENDED TO THAT END IN 1974 .

11 THOSE TWO PROVISIONS ARE CLOSELY LINKED AND MUST BE CONSTRUED IN CONJUNCTION WITH ONE ANOTHER . THEY DISTINGUISH BETWEEN , ON THE ONE HAND , WORKERS WHO DERIVE THEIR RIGHT TO AVAIL THEMSELVES OF ARTICLE 49A (2) DIRECTLY FROM THE GERMAN LEGISLATION , NAMELY GERMAN NATIONALS WHATEVER THEIR PLACE OF RESIDENCE AND NATIONALS OF OTHER MEMBER STATES RESIDING IN THE FEDERAL REPUBLIC OF GERMANY WHO ARE REFERRED TO IN PARAGRAPH 8 (A) AND IN THE FIRST SENTENCE OF PARAGRAPH 9 , AND , ON THE OTHER HAND , WORKERS ENTITLED TO APPLY TO '' BUY-IN '' ONLY BY VIRTUE OF COMMUNITY LAW , WHO ARE REFERRED TO IN PARA- GRAPH 8 (A) AND (B) AND IN THE SECOND SENTENCE OF PARAGRAPH 9 .

12 ACCORDING TO THE SECOND SENTENCE OF PARAGRAPH 9 PERSONS IN THE SECOND CATEGORY , THAT IS TO SAY THOSE REFERRED TO IN PARAGRAPH 8 (B) AND (C), MAY '' PAY CONTRIBUTIONS ONLY IN RESPECT OF PERIODS FOR WHICH THEY HAVE NOT YET PAID CONTRIBUTIONS UNDER THE LEGISLATION OF ANOTHER MEMBER STATE '' . IN OTHER WORDS , THEY ARE BARRED FROM '' BUYING-IN '' PERIODS WHICH , FROM THE POINT OF VIEW OF THE GERMAN LEGISLATION , ARE ACTUALLY MISSING , WHILST THEY CORRESPOND TO CONTRIBUTION PERIODS IN ANOTHER MEMBER STATE , EVEN THOUGH IT MAY BE IN THEIR INTERESTS TO DO SO BECAUSE , FOR INSTANCE , THEY DO NOT HAVE ANY OTHER PERIODS TO BE BOUGHT IN . IT IS THEREFORE SELF-EVIDENT THAT THE COMPETENT GERMAN INSTITUTIONS CANNOT REQUIRE THEM TO '' BUY-IN '' THOSE PERIODS EVEN THOUGH THEY ARE MORE RECENT THAN THE PERIODS TO BE '' BOUGHT-IN '' .

13 ON THE OTHER HAND , IN THE CASE OF WORKERS IN THE FIRST CATEGORY WHO DERIVE THE RIGHT TO '' BUY-IN '' DIRECTLY FROM THE GERMAN LEGISLATION , THE SITUATION PRIOR TO THE AMENDMENT OF PART C OF ANNEX V MAINTAINED . THEY MAY BUY-IN EVEN PERIODS COVERED BY CONTRIBUTIONS IN OTHER MEMBER STATES - WHICH MAY IN FACT BE TO THEIR ADVANTAGE - BUT THE COUNTERPART OF THAT OPTION IS THAT THEY MAY BE REQUIRED TO BUY-IN THOSE PERIODS BEFORE THE GERMAN PERIODS LYING FURTHER BACK IN TIME . THAT IS CLEARLY EXPRESSED AT THE BEGINNING OF PARA- GRAPH 9 WHICH STATES : '' REGULATION (NO 1408/71) SHALL NOT AFFECT . . . ARTICLE 49A (2) OF THE CLERICAL STAFF PENSION REFORM LAW . '' THE COMMISSION HAS STATED THAT IT HAS ACCEPTED THE SPECIAL SITUATION OF THOSE WORKERS , NOW IN DISPUTE , OWING TO THE CLOSE AND LEGITIMATE LINK , PARTICULARLY FROM THE FINANCIAL VIEWPOINT , WHICH THE GERMAN LEGISLATURE HAS PLACED BETWEEN A RIGHT TO BUY-IN , WHICH WAS GENEROUSLY EXTENDED TO COVER A WIDE CATEGORY OF PERSONS , AND AN OBLIGATION INTENDED TO PREVENT INSURED PERSONS FROM BEING ABLE TO BUY-IN SYSTEMATICALLY THE LEAST EXPENSIVE PERIODS , IN THIS CASE THOSE FURTHER BACK IN TIME .

14 IT THUS FOLLOWS FROM THE OBJECTS AND THE WORDING OF PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V THAT THOSE PROVISIONS , AND IN PARTICULAR THE FIRST SENTENCE OF PARAGRAPH 9 , ARE INTENDED TO ENABLE THE REQUIREMENT OF RETROGRESSIVE BUYING-IN SET FORTH IN ARTICLE 49A (2) OF THE 1957 LAW TO CONTINUE TO EXIST IN THE LEGISLATION OF THE FEDERAL REPUBLIC OF GERMANY EVEN THOUGH THE MOST RECENT PERIODS CORRESPOND TO PERIODS IN WHICH CONTRIBUTIONS WERE COMPULSORY IN ANOTHER MEMBER STATE . WHENEVER A GERMAN NATIONAL OR A NATIONAL OF ANOTHER MEMBER STATE RESIDING IN THE FEDERAL REPUBLIC OF GERMANY CLAIMS THE BENEFIT OF ARTICLE 49A (2) THE CONTRIBUTION PERIODS IN OTHER MEMBER STATES ARE NOT THEREFORE REGARDED AS '' COVERED '' BUT MUST BE BOUGHT-IN FIRST IF THEY ARE MORE RECENT THAN NATIONAL PERIODS WHICH ARE IN FACT NOT COVERED . ON THE OTHER HAND , THAT REQUIREMENT MAY NOT BE APPLIED AGAINST THE PERSONS REFERRED TO IN PARAGRAPH 8 (B) AND (C) WHO , MOREOVER , ARE NOT IN ANY EVENT ALLOWED TO '' BUY-IN '' PERIODS COMPLETED IN OTHER MEMBER STATES .

BREACH OF THE PRINCIPLE OF NON-DISCRIMINATION

15 IT IS NOW APPROPRIATE TO EXAMINE THE QUESTION WHETHER THE DIFFERENCE IN TREATMENT WHICH IS INDISPUTABLY APPLIED BY PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V BETWEEN , ON THE ONE HAND , GERMAN WORKERS AND FOREIGNERS RESIDING IN THE FEDERAL REPUBLIC OF

GERMANY - REFERRED TO IN THE FIRST SENTENCE OF PARAGRAPH 9 - AND , ON THE OTHER HAND , WORKERS FROM OTHER MEMBER STATES - REFERRED TO IN THE SECOND SENTENCE OF PARAGRAPH 9 - DOES NOT CONSTITUTE DISCRIMINATION AGAINST THE FORMER .

16 ACCORDING TO THE ESTABLISHED CASE-LAW OF THE COURT THE GENERAL PRINCIPLE OF EQUALITY , OF WHICH THE PROHIBITION ON DISCRIMINATION ON GROUNDS OF NATIONALITY IS MERELY A SPECIFIC ENUNCIATION , IS ONE OF THE FUNDAMENTAL PRINCIPLES OF COMMUNITY LAW . THIS PRINCIPLE REQUIRES THAT SIMILAR SITUATIONS SHALL NOT BE TREATED DIFFERENTLY UNLESS DIFFERENTIATION IS OBJECTIVELY JUSTIFIED .

17 AN EXAMINATION OF THE ADVANTAGES AND DRAWBACKS OF THE TWO LEGAL SITUATIONS WHICH HAVE TO BE COMPARED LEADS TO THE CONCLUSION THAT THE OBJECTION AS TO DISCRIMINATION CANNOT BE SUSTAINED IN REGARD TO EITHER OF THOSE SITUATIONS SINCE THEY CANNOT BE REGARDED AS BEING MORE FAVOURABLE TO ONE THAN TO THE OTHER CATEGORY OF WORKERS CONCERNED . THE FINANCIAL BURDEN OF THE BUYING-IN TRANSACTION WILL IN FACT BE HEAVIER OR LIGHTER FOR EITHER CATEGORY DEPENDING ON WHETHER THE PERIODS TO BE BOUGHT-IN ARE MORE RECENT OR FURTHER BACK IN TIME SO THAT THE FINANCIAL EFFECT OF THE RULES IN QUESTION IS NOT IN GENERAL MORE UNFAVOURABLE TO ONE THAN TO THE OTHER OF THE TWO CATEGORIES . THE VARIATIONS IN THAT FINANCIAL BURDEN FROM ONE INDIVIDUAL CASE TO ANOTHER ARE IN FACT EXCLUSIVELY THE RESULT OF THE OBJECTIVELY DIFFERENT FACTUAL SITUATIONS IN WHICH THE INSURED PERSONS CONCERNED MAY FIND THEMSELVES DEPENDING ON THE CHANGES AND CHANCES OF THEIR WORKING LIFE .

18 THE REPLY TO THE QUESTION SUBMITTED SHOULD THEREFORE BE THAT PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 , AS AMENDED BY REGULATION NO 1392/74 , MUST BE INTERPRETED TO MEAN THAT A GERMAN NATIONAL WHO HAS PAID CONTRIBUTIONS TO OLD-AGE PENSION INSURANCE IN ANOTHER MEMBER STATE AND WHO SUBSEQUENTLY WISHES TO PAY A POSTERIORI , BUT WITH RETROACTIVE EFFECT WITHIN THE MEANING OF ARTICLE 49A (2) ADDED TO THE ANGESTELLTENVERSICHERUNGS-NEUREGELUNGSGESETZ BY THE RENTENREFORMGESETZ OF 16 OCTOBER 1972 , GERMAN PENSION CONTRIBUTIONS IN RESPECT OF PREVIOUS PERIODS MAY BE REQUIRED TO PAY GERMAN CONTRIBUTIONS IN RESPECT OF PERIODS COVERED BY CONTRIBUTIONS IN ANOTHER MEMBER STATE AND THAT CONSIDERATION OF THE SAID PARAGRAPHS 8 AND 9 , AS THUS CONSTRUED , HAS DISCLOSED NO FACTOR OF SUCH A KIND AS TO AFFECT THEIR VALIDITY .

Decision on costs

19 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . SINCE THE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESSOZIALGERICHT BY AN ORDER OF 12 OCTOBER 1979 RECEIVED AT THE COURT ON 7 DECEMBER 1979 , HEREBY RULES :

PARAGRAPHS 8 AND 9 OF PART C OF ANNEX V TO REGULATION NO 1408/71 OF THE COUNCIL OF 14 JUNE 1971 ON THE APPLICATION OF SOCIAL SECURITY SCHEMES TO EMPLOYED PERSONS AND THEIR FAMILIES MOVING WITHIN THE COMMUNITY , AS AMENDED BY REGULATION NO 1392/74 OF THE COUNCIL OF 4 JUNE 1974 , MUST BE INTERPRETED TO MEAN THAT A GERMAN NATIONAL WHO HAS PAID CONTRIBUTIONS TO OLD-AGE PENSION INSURANCE IN ANOTHER MEMBER STATE AND WHO SUBSEQUENTLY WISHES TO PAY A POSTERIORI , BUT WITH RETROACTIVE EFFECT WITHIN THE MEANING OF ARTICLE 49A (2) ADDED TO THE ANGESTELLTENVERSICHERUNGS-NEUREGELUNGSGESETZ BY THE RENTENREFORMGESETZ OF 16 OCTOBER 1972 , GERMAN PENSION CONTRIBUTIONS IN RESPECT OF PREVIOUS PERIODS , MAY BE REQUIRED TO PAY GERMAN CONTRIBUTIONS IN RESPECT OF PERIODS COVERED BY CONTRIBUTIONS IN ANOTHER MEMBER STATE

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. CONSIDERATION OF THE SAID PARAGRAPHS 8 AND 9 , AS THUS CONSTRUED , HAS DISCLOSED NO FACTOR OF SUCH A KIND AS TO AFFECT THEIR VALIDITY .

EXHIBIT C-106

DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 31 March 2004

on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) and Article 55 and Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Having regard to the opinion of the Committee of the Regions [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4], in the light of the joint text approved by the Conciliation Committee on 9 December 2003,

Whereas:

(1) On the occasion of new amendments being made to Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [5], 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [6] and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [7], which are necessary to meet requests for simplification and modernisation made by contracting authorities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996, the Directives should, in the interests of clarity, be recast. This Directive is based on Court of Justice case law, in particular case law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2.

(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

(3) Such coordinating provisions should comply as far as possible with current procedures and practices in each of the Member States.

(4) Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.

(5) Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

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[1] OJ C 29 E, 30.1.2001, p. 11 and OJ C 203 E, 27.8.2002, p. 210.
[2] OJ C 193, 10.7.2001, p. 7.
[3] OJ C 144, 16.5.2001, p. 23.
[4] Opinion of the European Parliament of 17 January 2002 (OJ C 271 E, 7.11.2002, p. 176), Council Common Position of 20 Mars 2003 (OJ C 147 E, 24.6.2003, p. 1) and Position of the European Parliament of 2 July 2003 (not yet published in the Official Journal). Legislative Resolution of the European Parliament of 29 January 2004 and Decision of the Council of 2 February 2004.
[5] OJ L 209, 24.7.1992, p. 1. Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1).
[6] OJ L 199, 9.8.1993, p. 1. Directive as last amended by Commission Directive 2001/78/EC.
[7] OJ L 199, 9.8.1993, p. 54. Directive as last amended by Commission Directive 2001/78/EC.

(6) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.

(7) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) [1], approved in particular the WTO Agreement on Government Procurement, hereinafter referred to as the 'Agreement', the aim of which is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade.

In view of the international rights and commitments devolving on the Community as a result of the acceptance of the Agreement, the arrangements to be applied to tenderers and products from signatory third countries are those defined by the Agreement. This Agreement does not have direct effect. The contracting authorities covered by the Agreement which comply with this Directive and which apply the latter to economic operators of third countries which are signatories to the Agreement should therefore be in conformity with the Agreement. It is also appropriate that those coordinating provisions should guarantee for Community economic operators conditions for participation in public procurement which are just as favourable as those reserved for economic operators of third countries which are signatories to the Agreement.

(8) Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition.

(9) In view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards. The decision to award contracts separately or jointly must be determined by qualitative and economic criteria, which may be defined by national law.

(10) A contract shall be deemed to be a public works contract only if its subject matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, insofar as such works are incidental to the principal subject matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a public works contract.

(11) A Community definition of framework agreements, together with specific rules on framework agreements concluded for contracts falling within the scope of this Directive, should be provided. Under these rules, when a contracting authority enters into a framework agreement in accordance with the provisions of this Directive relating, in particular, to advertising, time limits and conditions for the submission of tenders, it may enter into contracts based on such a framework agreement during its term of validity either by applying the terms set forth in the framework agreement or, if all terms have not been fixed in advance in the framework agreement, by reopening competition between the parties to the framework agreement in relation to those terms. The reopening of competition should comply with certain rules the aim of which is to guarantee the required flexibility and to guarantee respect for the general principles, in particular the principle of equal treatment. For the same reasons, the term of the framework agreements should not exceed four years, except in cases duly justified by the contracting authorities.

(12) Certain new electronic purchasing techniques are continually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non discrimination and transparency. To that extent, a tender submitted by a tenderer, in particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used, may take the form of that tenderer's electronic catalogue if the latter uses the means of communication chosen by the contracting authority in accordance with Article 42.

[1] OJ L 336, 23.12.1994, p. 1.

(13) In view of the rapid expansion of electronic purchasing systems, appropriate rules should now be introduced to enable contracting authorities to take full advantage of the possibilities afforded by these systems. Against this background, it is necessary to define a completely electronic dynamic purchasing system for commonly used purchases, and lay down specific rules for setting up and operating such a system in order to ensure the fair treatment of any economic operator who wishes to take part therein. Any economic operator which submits an indicative tender in accordance with the specification and meets the selection criteria should be allowed to join such a system. This purchasing technique allows the contracting authority, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to take part, to have a particularly broad range of tenders as a result of the electronic facilities available, and hence to ensure optimum use of public funds through broad competition.

(14) Since use of the technique of electronic auctions is likely to increase, such auctions should be given a Community definition and governed by specific rules in order to ensure that they operate in full accordance with the principles of equal treatment, non discrimination and transparency. To that end, provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts. With the same objective, it must also to be possible to establish the respective ranking of the tenderers at any stage of the electronic auction. Recourse to electronic auctions enables contracting authorities to ask tenderers to submit new prices, revised downwards, and when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices. In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of the tenders which imply an appreciation of non quantifiable elements should not be the object of electronic auctions. Consequently, certain works contracts and certain service contracts having as their subject matter intellectual performances, such as the design of works, should not be the object of electronic auctions.

(15) Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing. Provision should therefore be made for a Community definition of central purchasing bodies dedicated to contracting authorities. A definition should also be given of the conditions under which, in accordance with the principles of non discrimination and equal treatment, contracting authorities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.

(16) In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive.

(17) Multiplying the number of thresholds for applying the coordinating provisions complicates matters for contracting authorities. Furthermore, in the context of monetary union such thresholds should be established in euro. Accordingly, thresholds should be set, in euro, in such a way as to simplify the application of such provisions, while at the same time ensuring compliance with the thresholds provided for by the Agreement which are expressed in special drawing rights. In this context, provision should also be made for periodic reviews of the thresholds expressed in euro so as to adjust them, where necessary, in line with possible variations in the value of the euro in relation to the special drawing right.

(18) The field of services is best delineated, for the purpose of applying the procedural rules of this Directive and for monitoring purposes, by subdividing it into categories corresponding to particular headings of a common classification and by bringing them together in two Annexes, II A and II B, according to the regime to which they are subject. As regards services in Annex II B, the relevant provisions of this Directive should be without prejudice to the application of Community rules specific to the services in question.

(19) As regards public service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is

taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information.

(20) Public contracts which are awarded by the contracting authorities operating in the water, energy, transport and postal services sectors and which fall within the scope of those activities are covered by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [1]. However, contracts awarded by the contracting authorities in the context of their service activities for maritime, coastal or river transport must fall within the scope of this Directive.

(21) In view of the situation of effective market competition in the telecommunications sector following the implementation of the Community rules aimed at liberalising that sector, public contracts in that area should be excluded from the scope of this Directive insofar as they are intended primarily to allow the contracting authorities to exercise certain activities in the telecommunications sector. Those activities are defined in accordance with the definitions used in Articles 1, 2 and 8 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sector [2], such that this Directive does not apply to contracts which have been excluded from the scope of Directive 93/38/EEC pursuant to Article 8 thereof.

(22) Provision should be made for cases in which it is possible to refrain from applying the measures for coordinating procedures on grounds relating to State security or secrecy, or because specific rules on the awarding of contracts which derive from international agreements, relating to the stationing of troops, or which are specific to international organisations are applicable.

(23) Pursuant to Article 163 of the Treaty, the encouragement of research and technological development is a means of strengthening the scientific and technological basis of Community industry, and the opening up of public service contracts contributes to this end. This Directive should not cover the cofinancing of research and development programmes: research and development contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority, are not therefore covered by this Directive.

(24) In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of public procurement rules inappropriate.

(25) The awarding of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception must therefore be made for public service contracts for the purchase, development, production or co production of off the shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme and contracts concerning broadcasting times. However, this exclusion should not apply to the supply of technical equipment necessary for the production, co production and broadcasting of such programmes. A broadcast should be defined as transmission and distribution using any form of electronic network.

(26) Arbitration and conciliation services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules.

(27) In accordance with the Agreement, the financial services covered by this Directive do not include instruments of monetary policy, exchange rates, public debt, reserve management or other policies involving transactions in securities or other financial instruments, in particular

[1] See p. 1 of this Official Journal.

[2] OJ L 199, 9.8.1993, p. 84. Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1).

transactions by the contracting authorities to raise money or capital. Accordingly, contracts relating to the issue, purchase, sale or transfer of securities or other financial instruments are not covered. Central bank services are also excluded.

(28) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.

(29) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements, and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in eco labels, such as the European Eco label, (multi)national eco labels or any other eco label providing the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties. Contracting authorities should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover.

(30) Additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document.

(31) Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make up of which cannot be defined in advance. To the extent that use of open or restricted procedures does not allow the award of such contracts, a flexible procedure should be provided which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate. However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous.

(32) In order to encourage the involvement of small and medium sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.

(33) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long term job seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

(34) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law. In cross border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1] lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

(35) In view of new developments in information and communications technology, and the simplifications these can bring in terms of publicising contracts and the efficiency and transparency of procurement processes, electronic means should be put on a par with traditional means of communication and information exchange. As far as possible, the means and technology chosen should be compatible with the technologies used in other Member States.

(36) To ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto. Improved visibility should therefore be ensured for public notices by means of appropriate instruments, such as standard contract notice forms and the Common Procurement Vocabulary (CPV) provided for in Regulation (EC) No 2195/2002 of the European Parliament and of the Council [2] as the reference nomenclature for public contracts. In restricted procedures, advertisement is, more particularly, intended to enable contractors of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions.

(37) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [3] and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') [4] should, in the context of this Directive, apply to the transmission of information by electronic means. The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. To this end, use of electronic signatures, in particular advanced electronic signatures, should, as far as possible, be encouraged. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.

(38) The use of electronic means leads to savings in time. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Community level.

(39) Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.

(40) A contracting authority may limit the number of candidates in the restricted and negotiated procedures with publication of a contract notice, and in the competitive dialogue. Such a reduction of candidates should be performed on the basis of objective criteria indicated in

[1] OJ L 18, 21.1.1997, p. 1.
[2] OJ L 340, 16.12.2002, p.1.
[3] OJ L 13, 19.1.2000, p. 12.
[4] OJ L 178, 17.7.2000, p. 1.

the contract notice. These objective criteria do not necessarily imply weightings. For criteria relating to the personal situation of economic operators, a general reference in the contract notice to the situations set out in Article 45 may suffice.

(41) In the competitive dialogue and negotiated procedures with publication of a contract notice, in view of the flexibility which may be required and the high level of costs associated with such methods of procurement, contracting authorities should be entitled to make provision for the procedure to be conducted in successive stages in order gradually to reduce, on the basis of previously indicated contract award criteria, the number of tenders which they will go on to discuss or negotiate. This reduction should, insofar as the number of appropriate solutions or candidates allows, ensure that there is genuine competition.

(42) The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.

(43) The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of res judicata. If national law contains provisions to this effect, non compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct. Non observance of national provisions implementing the Council Directives 2000/78/EC [1] and 76/207/EEC [2] concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

(44) In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required. Environmental management schemes, whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001 [3] (EMAS), can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

(45) This Directive allows Member States to establish official lists of contractors, suppliers or service providers or a system of certification by public or private bodies, and makes provision for the effects of such registration or such certification in a contract award procedure in another Member State. As regards official lists of approved economic operators, it is important to take into account Court of Justice case law in cases where an economic operator belonging to a group claims the economic, financial or technical capabilities of other companies in the group in support of its application for registration. In this case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of

[1] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

[2] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, p. 40). Directive amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

[3] Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing a voluntary participation by organisations in a Community eco management and audit scheme (EMAS) (OJ L 114, 24.4.2001, p. 1).

the registration. For the purposes of that registration, a Member State may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another company in the group, it may require that that company be held liable, if necessary jointly and severally.

(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender'.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.

In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

(47) In the case of public service contracts, the award criteria must not affect the application of national provisions on the remuneration of certain services, such as, for example, the services performed by architects, engineers or lawyers and, where public supply contracts are concerned, the application of national provisions setting out fixed prices for school books.

(48) Certain technical conditions, and in particular those concerning notices and statistical reports, as well as the nomenclature used and the conditions of reference to that nomenclature, will need to be adopted and amended in the light of changing technical requirements. The lists of contracting authorities in the Annexes will also need to be updated. It is therefore appropriate to put in place a flexible and rapid adoption procedure for this purpose.

(49) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1].

(50) It is appropriate that Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits [2] should apply to the calculation of the time limits contained in this Directive.

(51) This Directive should not prejudice the time limits set out in Annex XI, within which Member States are required to transpose and apply Directives 92/50/EEC, 93/36/EEC and 93/37/EEC,

HAVE ADOPTED THIS DIRECTIVE:

[1] OJ L 184, 17.7.1999, p. 23.
[2] OJ L 124, 8.6.1971, p. 1.

TABLE OF CONTENTS

TITLE I

DEFINITIONS AND GENERAL PRINCIPLES

Article 1

Definitions

1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2. (a) 'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) 'Public works contracts' are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

(c) 'Public supply contracts' are public contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.

A public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a 'public supply contract'.

(d) 'Public service contracts' are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

A public contract having as its object both products and services within the meaning of Annex II shall be considered to be a 'public service contract' if the value of the services in question exceeds that of the products covered by the contract.

A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract.

3. 'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

4. 'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

5. A 'framework agreement' is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

6. A 'dynamic purchasing system' is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

7. An 'electronic auction' is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Consequently, certain service contracts and certain works contracts having as their subject matter intellectual performances, such as the design of works, may not be the object of electronic auctions.

8. The terms 'contractor', 'supplier' and 'service provider' mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term 'economic operator' shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

An economic operator who has submitted a tender shall be designated a 'tenderer'. One which has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue shall be designated a 'candidate'.

9. 'Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A 'body governed by public law' means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.

10. A 'central purchasing body' is a contracting authority which:

— acquires supplies and/or services intended for contracting authorities, or

— awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

11. (a) 'Open procedures' means those procedures whereby any interested economic operator may submit a tender.

(b) 'Restricted procedures' means those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender.

(c) 'Competitive dialogue' is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

For the purpose of recourse to the procedure mentioned in the first subparagraph, a public contract is considered to be 'particularly complex' where the contracting authorities:

— are not objectively able to define the technical means in accordance with Article 23(3)(b), (c) or (d), capable of satisfying their needs or objectives, and/or

— are not objectively able to specify the legal and/or financial make up of a project.

(d) 'Negotiated procedures' means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.

(e) 'Design contests' means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes.

12. 'Written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means.

13. 'Electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

14. The 'Common Procurement Vocabulary (CPV)' shall designate the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002, while ensuring equivalence with the other existing nomenclatures.

In the event of varying interpretations of the scope of this Directive, owing to possible differences between the CPV and NACE nomenclatures listed in Annex I, or between the CPV and CPC (provisional version) nomenclatures listed in Annex II, the NACE or the CPC nomenclature respectively shall take precedence.

15. For the purposes of Article 13, Article 57(a) and Article 68(b), the following phrases shall have the following meanings:

(a) 'public telecommunications network' means the public telecommunications infrastructure which enables signals to be conveyed between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means;

(b) a 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to, and efficient communication through, that public network;

(c) 'public telecommunications services' means telecommunications services the provision of which the Member States have specifically assigned, in particular, to one or more telecommunications entities;

(d) 'telecommunications services' means services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of broadcasting and television.

Article 2

Principles of awarding contracts

Contracting authorities shall treat economic operators equally and non discriminatorily and shall act in a transparent way.

Article 3

Granting of special or exclusive rights: non-discrimination clause

Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non discrimination on the basis of nationality.

TITLE II

RULES ON PUBLIC CONTRACTS

CHAPTER I

General provisions

Article 4

Economic operators

1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of public service and public works contracts as well as public supply contracts covering in addi tion services and/or siting and installation operations, legal persons may be required to indicate in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

Article 5

Conditions relating to agreements concluded within the World Trade Organisation

For the purposes of the award of contracts by contracting authorities, Member States shall apply in their relations condi tions as favourable as those which they grant to economic operators of third countries in implementation of the Agree ment on Government Procurement (hereinafter referred to as 'the Agreement'), concluded in the framework of the Uruguay Round multilateral negotiations. Member States shall, to this end, consult one another within the Advisory Committee for Public Contracts referred to in Article 77 on the measures to be taken pursuant to the Agreement.

Article 6

Confidentiality

Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35(4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential as pects of tenders.

CHAPTER II

Scope

Section 1

Thresholds

Article 7

Threshold amounts for public contracts

This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 162 000 for public supply and service contracts others than those covered by point (b), third indent, awarded by contracting authorities which are listed as central government authorities in Annex IV; in the case of public supply contracts awarded by contracting authorities operating in the field of defence, this shall apply only to contracts involving products covered by Annex V;

(b) EUR 249 000

— for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV,

— for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by Annex V,

— for public service contracts awarded by any contracting authority in respect of the services listed in Category 8 of Annex IIA, Category 5 telecommunications services the positions of which in the CPV are equivalent to CPC reference Nos 7524, 7525 and 7526 and/or the ser vices listed in Annex II B;

(c) EUR 6 242 000 for public works contracts.

Article 8

Contracts subsidised by more than 50 % by contracting authorities

This Directive shall apply to the awarding of:

(a) contracts which are subsidised directly by contracting authorities by more than 50 % and the estimated value of which, net of VAT, is equal to or greater than EUR 6 242 000,

— where those contracts involve civil engineering activities within the meaning of Annex I,

— where those contracts involve building work for hospi tals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes;

(b) service contracts which are subsidised directly by contract ing authorities by more than 50 % and the estimated value of which, net of VAT, is equal to or greater than EUR 249 000 and which are connected with a works contract within the meaning of point (a).

Member States shall take the necessary measures to ensure that the contracting authorities awarding such subsidies ensure compliance with this Directive where that contract is awarded by one or more entities other than themselves or comply with this Directive where they themselves award that contract for and on behalf of those other entities.

Article 9

Methods for calculating the estimated value of public contracts, framework agreements and dynamic purchasing systems

1. The calculation of the estimated value of a public con tract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

Where the contracting authority provides for prizes or pay ments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.

2. This estimate must be valid at the moment at which the contract notice is sent, as provided for in Article 35(2), or, in cases where such notice is not required, at the moment at which the contracting authority commences the contract awarding procedure.

3. No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive.

4. With regard to public works contracts, calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting authorities.

5. (a) Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 7, this Directive shall apply to the awarding of each lot.

However, the contracting authorities may waive such application in respect of lots the estimated value of which net of VAT is less than EUR 80 000 for services or EUR 1 million for works, provided that the aggregate value of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

(b) Where a proposal for the acquisition of similar supplies may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 7(a) and (b).

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 7, this Directive shall apply to the awarding of each lot.

However, the contracting authorities may waive such application in respect of lots, the estimated value of which, net of VAT, is less than EUR 80 000, provided that the aggregate cost of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

6. With regard to public supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:

(a) in the case of fixed term public contracts, if that term is less than or equal to 12 months, the total estimated value for the term of the contract or, if the term of the contract is greater than 12 months, the total value including the estimated residual value;

(b) in the case of public contracts without a fixed term or the term of which cannot be defined, the monthly value multi plied by 48.

7. In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;

(b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.

The choice of method used to calculate the estimated value of a public contract may not be made with the intention of excluding it from the scope of this Directive.

8. With regard to public service contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:

(a) for the following types of services:

(i) insurance services: the premium payable and other forms of remuneration;

(ii) banking and other financial services: the fees, commis sions, interest and other forms of remuneration;

(iii) design contracts: fees, commission payable and other forms of remuneration;

(b) for service contracts which do not indicate a total price:

(i) in the case of fixed term contracts, if that term is less than or equal to 48 months: the total value for their full term;

(ii) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multi plied by 48.

9. With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agree ment or the dynamic purchasing system.

Section 2

Specific situations

Article 10

Defence procurement

This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty.

Article 11

Public contracts and framework agreements awarded by central purchasing bodies

1. Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it.

Section 3

Excluded contracts

Article 12

Contracts in the water, energy, transport and postal services sectors

This Directive shall not apply to public contracts which, under Directive 2004/17/EC, are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are awarded for the pursuit of those activities, or to public contracts excluded from the scope of that Directive under Article 5(2) and Articles 19, 26 and 30 thereof.

However, this Directive shall continue to apply to public contracts awarded by contracting authorities carrying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, insofar as the Member State concerned takes advantage of the option referred to in the second subparagraph of Article 71 thereof to defer its application.

Article 13

Specific exclusions in the field of telecommunications

This Directive shall not apply to public contracts for the principal purpose of permitting the contracting authorities to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications ser vices.

Article 14

Secret contracts and contracts requiring special security measures

This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires.

Article 15

Contracts awarded pursuant to international rules

This Directive shall not apply to public contracts governed by different procedural rules and awarded:

(a) pursuant to an international agreement concluded in con formity with the Treaty between a Member State and one or more third countries and covering supplies or works intended for the joint implementation or exploitation of a work by the signatory States or services intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Commit tee for Public Contracts referred to in Article 77;

(b) pursuant to a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;

(c) pursuant to the particular procedure of an international organisation.

Article 16

Specific exclusions

This Directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

(b) the acquisition, development, production or co production of programme material intended for broadcasting by broad casters and contracts for broadcasting time;

(c) arbitration and conciliation services;

(d) financial services in connection with the issue, sale, pur chase or transfer of securities or other financial instru ments, in particular transactions by the contracting autho rities to raise money or capital, and central bank services;

(e) employment contracts;

(f) research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.

Article 17

Service concessions

Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).

Article 18

Service contracts awarded on the basis of an exclusive right

This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

Section 4

Special arrangement

Article 19

Reserved contracts

Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees con cerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupa tions under normal conditions.

The contract notice shall make reference to this provision.

CHAPTER III

Arrangements for public service contracts

Article 20

Service contracts listed in Annex II A

Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.

Article 21

Service contracts listed in Annex II B

Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Arti cle 35(4).

Article 22

Mixed contracts including services listed in Annex II A and services listed in Annex II B

Contracts which have as their object services listed both in Annex II A and in Annex II B shall be awarded in accordance with Articles 23 to 55 where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B. In other cases, contracts shall be awarded in accordance with Article 23 and Article 35(4).

CHAPTER IV

Specific rules governing specifications and contract documents

Article 23

Technical specifications

1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent';

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting authorities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4. Where a contracting authority makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

5. Where a contracting authority uses the option laid down in paragraph 3 to prescribe in terms of performance or functional requirements, it may not reject a tender for works, products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer must prove to the satisfaction of the contracting authority and by any appropriate means that the work, product or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi) national eco labels, or by and any other eco label, provided that:

— those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,

— the requirements for the label are drawn up on the basis of scientific information,

— the eco labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and

— they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

7. 'Recognised bodies', within the meaning of this Article, are test and calibration laboratories and certification and inspection bodies which comply with applicable European standards.

Contracting authorities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words 'or equivalent'.

Article 24

Variants

1. Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.

2. Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.

3. Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

4. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

In procedures for awarding public supply or service contracts, contracting authorities which have authorised variants may not reject a variant on the sole ground that it would, if successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Article 25

Subcontracting

In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

This indication shall be without prejudice to the question of the principal economic operator's liability.

Article 26

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Article 27

Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

The first subparagraph shall be without prejudice to the application of the provisions of Article 55 concerning the examination of abnormally low tenders.

CHAPTER V

Procedures

Article 28

Use of open, restricted and negotiated procedures and of competitive dialogue

In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.

Article 29

Competitive dialogue

1. In the case of particularly complex contracts, Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this Article.

A public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender.

2. Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.

3. Contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

4. Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.

5. The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

These tenders may be clarified, specified and fine tuned at the request of the contracting authority. However, such clarification, specification, fine tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 53.

At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

8. The contracting authorities may specify prices or payments to the participants in the dialogue.

Article 30

Cases justifying use of the negotiated procedure with prior publication of a contract notice

1. Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

(a) in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with Articles 4, 24, 25, 27 and Chapter VII, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered.

Contracting authorities need not publish a contract notice where they include in the negotiated procedure all of, and only, the tenderers which satisfy the criteria of Articles 45 to 52 and which, during the prior open or restricted procedure or competitive dialogue, have submitted tenders in accordance with the formal requirements of the tendering procedure;

(b) in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing;

(c) in the case of services, *inter alia* services within category 6 of Annex II A, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted proce dures;

(d) in respect of public works contracts, for works which are performed solely for purposes of research, testing or devel opment and not with the aim of ensuring profitability or recovering research and development costs.

2. In the cases referred to in paragraph 1, contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender in accordance with Article 53(1).

3. During the negotiations, contracting authorities shall en sure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

4. Contracting authorities may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice or the specifications. The con tract notice or the specifications shall indicate whether re course has been had to this option.

Article 31

Cases justifying use of the negotiated procedure without publication of a contract notice

Contracting authorities may award public contracts by a nego tiated procedure without prior publication of a contract notice in the following cases:

(1) for public works contracts, public supply contracts and public service contracts:

(a) when no tenders or no suitable tenders or no applica tions have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract are not substantially al tered and on condition that a report is sent to the Commission if it so requests;

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

(c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice as referred to in Article 30 cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

(2) for public supply contracts:

(a) when the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to re cover research and development costs;

(b) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire mate rial having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years;

(c) for supplies quoted and purchased on a commodity market;

(d) for the purchase of supplies on particularly advanta geous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with cred itors, or a similar procedure under national laws or regulations;

(3) for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotia tions;

(4) for public works contracts and public service contracts:

(a) for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:

— when such additional works or services cannot be technically or economically separated from the ori ginal contract without major inconvenience to the contracting authorities,

or

— when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works or services may not exceed 50 % of the amount of the original contract;

(b) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure.

As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7.

This procedure may be used only during the three years following the conclusion of the original contract.

Article 32

Framework agreements

1. Member States may provide that contracting authorities may conclude framework agreements.

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

— by application of the terms laid down in the framework agreement without reopening competition, or

— where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

(b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders;

(c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;

(d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

Article 33

Dynamic purchasing systems

1. Member States may provide that contracting authorities may use dynamic purchasing systems.

2. In order to set up a dynamic purchasing system, contracting authorities shall follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system. All the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification. With a view to setting up the system and to the award of contracts under that system, contracting authorities shall use solely electronic means in accordance with Article 42(2) to (5).

3. For the purposes of setting up the dynamic purchasing system, contracting authorities shall:

(a) publish a contract notice making it clear that a dynamic purchasing system is involved;

(b) indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;

(c) offer by electronic means, on publication of the notice and up to the expiry of the system, unrestricted, direct and full access to the specification and to any additional documents and shall indicate in the notice the internet address at which such documents may be consulted.

4. Contracting authorities shall give any economic operator, throughout the entire period of the dynamic purchasing system, the possibility of submitting an indicative tender and of being admitted to the system under the conditions referred to in paragraph 2. They shall complete evaluation within a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime.

The contracting authority shall inform the tenderer referred to in the first subparagraph at the earliest possible opportunity of its admittance to the dynamic purchasing system or of the rejection of its indicative tender.

5. Each specific contract must be the subject of an invitation to tender. Before issuing the invitation to tender, contracting authorities shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, in accordance with paragraph 4, within a time limit that may not be less than 15 days from the date on which the simplified notice was sent. Contracting authorities may not proceed with tendering until they have completed evaluation of all the indicative tenders received by that deadline.

6. Contracting authorities shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end they shall set a time limit for the submission of tenders.

They shall award the contract to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system. Those criteria may, if appropriate, be formulated more precisely in the invitation referred to in the first subparagraph.

7. A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases.

Contracting authorities may not resort to this system to prevent, restrict or distort competition.

No charges may be billed to the interested economic operators or to parties to the system.

Article 34

Public works contracts: particular rules on subsidised housing schemes

In the case of public contracts relating to the design and construction of a subsidised housing scheme the size and complexity of which, and the estimated duration of the work involved require that planning be based from the outset on close collaboration within a team comprising representatives of the contracting authorities, experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team.

In particular, contracting authorities shall include in the contract notice as accurate as possible a description of the works to be carried out so as to enable interested contractors to form a valid idea of the project. Furthermore, contracting authorities shall, in accordance with the qualitative selection criteria referred to in Articles 45 to 52, set out in such a contract notice the personal, technical, economic and financial conditions to be fulfilled by candidates.

Where such a procedure is adopted, contracting authorities shall apply Articles 2, 35, 36, 38, 39, 41, 42, 43 and 45 to 52.

CHAPTER VI

Rules on advertising and transparency

Section 1

Publication of notices

Article 35

Notices

1. Contracting authorities shall make known, by means of a prior information notice published by the Commission or by themselves on their 'buyer profile', as described in point 2(b) of Annex VIII:

(a) where supplies are concerned, the estimated total value of the contracts or the framework agreements by product area which they intend to award over the following 12 months, where the total estimated value, taking into account Arti cles 7 and 9, is equal to or greater than EUR 750 000.

The product area shall be established by the contracting authorities by reference to the CPV nomenclature;

(b) where services are concerned, the estimated total value of the contracts or the framework agreements in each of the categories of services listed in Annex II A which they intend to award over the following 12 months, where such estimated total value, taking into account the provi sions of Articles 7 and 9, is equal to or greater than EUR 750 000;

(c) where works are concerned, the essential characteristics of the contracts or the framework agreements which they intend to award, the estimated value of which is equal to or greater than the threshold specified in Article 7, taking into account Article 9.

The notices referred to in subparagraphs (a) and (b) shall be sent to the Commission or published on the buyer profile as soon as possible after the beginning of the budgetary year.

The notice referred to in subparagraph (c) shall be sent to the Commission or published on the buyer profile as soon as possible after the decision approving the planning of the works contracts or the framework agreements that the con tracting authorities intend to award.

Contracting authorities who publish a prior information notice on their buyer profiles shall send the Commission, electroni cally, a notice of the publication of the prior information notice on a buyer profile, in accordance with the format and detailed procedures for sending notices indicated in point 3 of Annex VIII.

Publication of the notices referred to in subparagraphs (a), (b) and (c) shall be compulsory only where the contracting autho rities take the option of shortening the time limits for the receipt of tenders as laid down in Article 38(4).

This paragraph shall not apply to negotiated procedures with out the prior publication of a contract notice.

2. Contracting authorities which wish to award a public contract or a framework agreement by open, restricted or, under the conditions laid down in Article 30, negotiated procedure with the publication of a contract notice or, under the conditions laid down in Article 29, a competitive dialogue, shall make known their intention by means of a contract notice.

3. Contracting authorities which wish to set up a dynamic purchasing system shall make known their intention by means of a contract notice.

Contracting authorities which wish to award a contract based on a dynamic purchasing system shall make known their intention by means of a simplified contract notice.

4. Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

In the case of framework agreements concluded in accordance with Article 32 the contracting authorities are not bound to send a notice of the results of the award procedure for each contract based on that agreement.

Contracting authorities shall send a notice of the result of the award of contracts based on a dynamic purchasing system within 48 days of the award of each contract. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 48 days of the end of each quarter.

In the case of public contracts for services listed in Annex II B, the contracting authorities shall indicate in the notice whether they agree to its publication. For such services contracts the Commission shall draw up the rules for establishing statistical reports on the basis of such notices and for the publication of such reports in accordance with the procedure laid down in Article 77(2).

Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforce ment or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic opera tors, public or private, or might prejudice fair competition between them.

Article 36

Form and manner of publication of notices

1. Notices shall include the information mentioned in Annex VII A and, where appropriate, any other information deemed useful by the contracting authority in the format of standard forms adopted by the Commission in accordance with the procedure referred to in Article 77(2).

2. Notices sent by contracting authorities to the Commis sion shall be sent either by electronic means in accordance with the format and procedures for transmission indicated in Annex VIII, paragraph 3, or by other means. In the event of recourse to the accelerated procedure set out in Article 38(8), notices must be sent either by telefax or by electronic means, in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII.

Notices shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex VIII.

3. Notices drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be published no later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be published not later than 12 days after they are sent, or in the case of accelerated procedure referred to in Article 38(8), not later than five days after they are sent.

4. Contract notices shall be published in full in an official language of the Community as chosen by the contracting authority, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

The costs of publication of such notices by the Commission shall be borne by the Community.

5. Notices and their contents may not be published at national level before the date on which they are sent to the Commission.

Notices published at national level shall not contain informa tion other than that contained in the notices dispatched to the Commission or published on a buyer profile in accordance with the first subparagraph of Article 35(1), but shall mention the date of dispatch of the notice to the Commission or its publication on the buyer profile.

Prior information notices may not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall mention the date of that dispatch.

6. The content of notices not sent by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, shall be limited to approximately 650 words.

7. Contracting authorities must be able to supply proof of the dates on which notices are dispatched.

8. The Commission shall give the contracting authority confirmation of the publication of the information sent, men tioning the date of that publication. Such confirmation shall constitute proof of publication.

Article 37

Non-mandatory publication

Contracting authorities may publish in accordance with Arti cle 36 notices of public contracts which are not subject to the publication requirement laid down in this Directive.

Section 2

Time limits

Article 38

Time limits for receipt of requests to participate and for receipt of tenders

1. When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article.

2. In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.

3. In the case of restricted procedures, negotiated proce dures with publication of a contract notice referred to in Article 30 and the competitive dialogue:

(a) the minimum time limit for receipt of requests to partici pate shall be 37 days from the date on which the contract notice is sent;

(b) in the case of restricted procedures, the minimum time limit for the receipt of tenders shall be 40 days from the date on which the invitation is sent.

4. When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders under paragraphs 2 and 3(b) may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days.

The time limit shall run from the date on which the contract notice was sent in open procedures, and from the date on which the invitation to tender was sent in restricted proce dures.

The shortened time limits referred to in the first subparagraph shall be permitted, provided that the prior information notice has included all the information required for the contract notice in Annex VII A, insofar as that information is available at the time the notice is published and that the prior informa tion notice was sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

5. Where notices are drawn up and transmitted by electro nic means in accordance with the format and procedures for transmission indicated in point 3 of Annex VIII, the time limits for the receipt of tenders referred to in paragraphs 2 and 4 in open procedures, and the time limit for the receipt of the requests to participate referred to in paragraph 3(a), in restricted and negotiated procedures and the competitive dialo gue, may be shortened by seven days.

6. The time limits for receipt of tenders referred to in paragraphs 2 and 3(b) may be reduced by five days where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice in accordance with Annex VIII, specifying in the text of the notice the internet address at which this documentation is accessible.

This reduction may be added to that referred to in paragraph 5.

7. If, for whatever reason, the specifications and the sup porting documents or additional information, although re quested in good time, are not supplied within the time limits set in Articles 39 and 40, or where tenders can be made only after a visit to the site or after on the spot inspection of the documents supporting the contract documents, the time limits for the receipt of tenders shall be extended so that all econom ic operators concerned may be aware of all the information needed to produce tenders.

8. In the case of restricted procedures and negotiated pro cedures with publication of a contract notice referred to in Article 30, where urgency renders impracticable the time limits laid down in this Article, contracting authorities may fix:

(a) a time limit for the receipt of requests to participate which may not be less than 15 days from the date on which the contract notice was sent, or less than 10 days if the notice was sent by electronic means, in accordance with the format and procedure for sending notices indicated in point 3 of Annex VIII;

(b) and, in the case of restricted procedures, a time limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender.

Article 39

Open procedures: Specifications, additional documents and information

1. In open procedures, where contracting authorities do not offer unrestricted and full direct access by electronic means in accordance with Article 38(6) to the specifications and any supporting documents, the specifications and supplementary documents shall be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time before the deadline for the submission of tenders.

2. Provided that it has been requested in good time, addi tional information relating to the specifications and any sup porting documents shall be supplied by the contracting autho rities or competent departments not later than six days before the deadline fixed for the receipt of tenders.

Section 3

Information content and means of transmission

Article 40

Invitations to submit a tender, participate in the dialogue or negotiate

1. In restricted procedures, competitive dialogue procedures and negotiated procedures with publication of a contract notice within the meaning of Article 30, contracting authori ties shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate or, in the case of a competitive dialogue, to take part in the dialogue.

2. The invitation to the candidates shall include either:

— a copy of the specifications or of the descriptive document and any supporting documents, or

— a reference to accessing the specifications and the other documents indicated in the first indent, when they are made directly available by electronic means in accordance with Article 38(6).

3. Where an entity other than the contracting authority responsible for the award procedure has the specifications, the descriptive document and/or any supporting documents, the invitation shall state the address from which those specifica tions, that descriptive document and those documents may be requested and, if appropriate, the deadline for requesting such documents, and the sum payable for obtaining them and any payment procedures. The competent department shall send that documentation to the economic operator without delay upon receipt of a request.

4. The additional information on the specifications, the descriptive document or the supporting documents shall be sent by the contracting authority or the competent department not less than six days before the deadline fixed for the receipt of tenders, provided that it is requested in good time. In the event of a restricted or an accelerated procedure, that period shall be four days.

5. In addition, the invitation to submit a tender, to partici pate in the dialogue or to negotiate must contain at least:

(a) a reference to the contract notice published;

(b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;

(c) in the case of competitive dialogue the date and the address set for the start of consultation and the language or languages used;

(d) a reference to any possible adjoining documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with Article 44, or to supple ment the information referred to in that Article, and under the conditions laid down in Articles 47 and 48;

(e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if they are not given in the contract notice, the specifications or the descriptive docu ment.

However, in the case of contracts awarded in accordance with the rules laid down in Article 29, the information referred to in (b) above shall not appear in the invitation to participate in the dialogue but it shall appear in the invitation to submit a tender.

Article 41

Informing candidates and tenderers

1. Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the con tract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or imple ment a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

2. On request from the party concerned, the contracting authority shall as quickly as possible inform:

— any unsuccessful candidate of the reasons for the rejection of his application,

— any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 23, paragraphs 4 and 5, the reasons for its decision of non equivalence or its decision that the works, supplies or services do not meet the performance or functional require ments,

— any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken may in no circumstances exceed 15 days from receipt of the written request.

3. However, contracting authorities may decide to withhold certain information referred to in paragraph 1, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

Section 4

Communication

Article 42

Rules applicable to communication

1. All communication and information exchange referred to in this Title may be by post, by fax, by electronic means in accordance with paragraphs 4 and 5, by telephone in the cases and circumstances referred to in paragraph 6, or by a combi nation of those means, according to the choice of the con tracting authority.

2. The means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.

3. Communication and the exchange and storage of infor mation shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting autho rities examine the content of tenders and requests to partici pate only after the time limit set for submitting them has expired.

4. The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non discriminatory, generally available and interoperable with the information and communication technology products in gen eral use.

5. The following rules are applicable to devices for the electronic transmission and receipt of tenders and to devices for the electronic receipt of requests to participate:

(a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, shall be available to interested parties. Moreover, the devices for the electronic receipt of tenders and requests to participate shall conform to the require ments of Annex X;

(b) Member States may, in compliance with Article 5 of Directive 1999/93/EC, require that electronic tenders be accompanied by an advanced electronic signature in con formity with paragraph 1 thereof;

(c) Member States may introduce or maintain voluntary ac creditation schemes aiming at enhanced levels of certifica tion service provision for these devices;

(d) tenderers or candidates shall undertake to submit, before expiry of the time limit laid down for submission of tenders or requests to participate, the documents, certifi cates and declarations referred to in Articles 45 to 50 and Article 52 if they do not exist in electronic format.

6. The following rules shall apply to the transmission of requests to participate:

(a) requests to participate in procedures for the award of public contracts may be made in writing or by telephone;

(b) where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt;

(c) contracting authorities may require that requests for parti cipation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit for sending confirmation by post or electronic means, must be stated by the contracting authority in the contract notice.

Section 5

Reports

Article 43

Content of reports

For every contract, framework agreement, and every establish ment of a dynamic purchasing system, the contracting autho rities shall draw up a written report which shall include at least the following:

(a) the name and address of the contracting authority, the subject matter and value of the contract, framework agree ment or dynamic purchasing system;

(b) the names of the successful candidates or tenderers and the reasons for their selection;

(c) the names of the candidates or tenderers rejected and the reasons for their rejection;

(d) the reasons for the rejection of tenders found to be abnormally low;

(e) the name of the successful tenderer and the reasons why his tender was selected and, if known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;

(f) for negotiated procedures, the circumstances referred to in Articles 30 and 31 which justify the use of these proce dures;

(g) as far as the competitive dialogue is concerned, the circum stances as laid down in Article 29 justifying the use of this procedure;

(h) if necessary, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system.

The contracting authorities shall take appropriate steps to document the progress of award procedures conducted by electronic means.

The report, or the main features of it, shall be communicated to the Commission if it so requests.

CHAPTER VII

Conduct of the procedure

Section 1

General provisions

Article 44

Verification of the suitability and choice of participants and award of contracts

1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract.

These minimum levels shall be indicated in the contract notice.

3. In restricted procedures, negotiated procedures with pub lication of a contract notice and in the competitive dialogue procedure, contracting authorities may limit the number of suitable candidates they will invite to tender, to negotiate or to conduct a dialogue with, provided a sufficient number of suitable candidates is available. The contracting authorities shall indicate in the contract notice the objective and non discrimi natory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appro priate, the maximum number.

In the restricted procedure the minimum shall be five. In the negotiated procedure with publication of a contract notice and the competitive dialogue procedure the minimum shall be three. In any event the number of candidates invited shall be sufficient to ensure genuine competition.

The contracting authorities shall invite a number of candidates at least equal to the minimum number set in advance. Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities. In the context of this same procedure, the contracting authority may not include other economic operators who did not request to participate, or candidates who do not have the required capabilities.

4. Where the contracting authorities exercise the option of reducing the number of solutions to be discussed or of tenders to be negotiated, as provided for in Articles 29(4) and 30(4), they shall do so by applying the award criteria stated in the contract notice, in the specifications or in the descriptive document. In the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates.

Section 2

Criteria for qualitative selection

Article 45

Personal situation of the candidate or tenderer

1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA ([1]);

(b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 ([2]) and Article 3(1) of Council Joint Action 98/742/JHA ([3]) respectively;

(c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities ([4]);

(d) money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering ([5]).

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

([1]) OJ L 351, 29.12.1998, p. 1.
([2]) OJ C 195, 25.6.1997, p. 1.
([3]) OJ L 358, 31.12.1998, p.2.
([4]) OJ C 316, 27.11.1995, p. 48.
([5]) OJ L 166, 28.6.1991, p. 77. Directive as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (OJ L 344, 28.12.2001, p. 76).

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

(a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the 'judicial record' or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

(b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned.

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

Article 46

Suitability to pursue the professional activity

Any economic operator wishing to take part in a public contract may be requested to prove its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade registers or to provide a declaration on oath or a certificate as described in Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts.

In procedures for the award of public service contracts, insofar as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

Article 47

Economic and financial standing

1. Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of balance sheets or extracts from the balance sheets, where publication of the balance sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.

Article 48

Technical and/or professional ability

1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(a) (i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority direct;

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:

— where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,

— where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator;

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

(c) a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities;

(d) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;

(e) the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work;

(f) for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(g) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

(h) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

(i) an indication of the proportion of the contract which the services provider intends possibly to subcontract;

(j) with regard to the products to be supplied:

(i) samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests;

(ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards.

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

4. Under the same conditions a group of economic operators as referred to Article 4 may rely on the abilities of participants in the group or in other entities.

5. In procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

6. The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.

Article 49

Quality assurance standards

Should they require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting authorities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators.

Article 50

Environmental management standards

Should contracting authorities, in the cases referred to in Article 48(2)(f), require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.

Article 51

Additional documentation and information

The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.

Article 52

Official lists of approved economic operators and certification by bodies established under public or private law

1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Articles 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50. Member States shall also adapt them to Article 47(2) and Article 48(3) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list and that throughout the same period these companies continue to fulfil the qualitative selection requirements laid down in the Articles referred to in the second subparagraph on which operators rely for their registration.

2. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the competent certification body. The certificates shall state the references which enabled them to be registered in the list/to obtain certification and the classification given in that list.

3. Certified registration on official lists by the competent bodies or a certificate issued by the certification body shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability except as regards Articles 45(1) and (2)(a) to (d) and (g), Article 46, Article 47(1)(b) and (c), and Article 48(2)(a)(i), (b), (e), (g) and (h) in the case of contractors, (2)(a)(ii), (b), (c), (d) and (j) in the case of suppliers and 2(a)(ii) and (c) to (i) in the case of service providers.

4. Information which can be deduced from registration on official lists or certification may not be questioned without justification. With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is offered.

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only in favour of economic operators established in the Member State holding the official list.

5. For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to in paragraph 1, no further proof or statements can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 45 to 49 and, where appropriate, Article 50.

However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

6. Economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

7. The certification bodies referred to in paragraph 1 shall be bodies complying with European certification standards.

8. Member States which have official lists or certification bodies as referred to in paragraph 1 shall be obliged to inform the Commission and the other Member States of the address of the body to which applications should be sent.

Section 3

Award of the contract

Article 53

Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service and technical assistance, delivery date and delivery period or period of completion, or

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.

Article 54

Use of electronic auctions

1. Member States may provide that contracting authorities may use electronic auctions.

2. In open, restricted or negotiated procedures in the case referred to in Article 30(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in the second indent of the second subparagraph of Article 32(4) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 33.

The electronic auction shall be based:

— either solely on prices when the contract is awarded to the lowest price,

— or on prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender.

3. Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice.

The specifications shall include, *inter alia*, the following details:

(a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

4. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

5. When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 53(2).

The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic rerank ings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria fixed to determine the most economically advanta geous tender, as indicated in the contract notice or in the specifications; for that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

6. Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifica tions. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

7. Contracting authorities shall close an electronic auction in one or more of the following manners:

(a) in the invitation to take part in the auction they shall indicate the date and time fixed in advance;

(b) when they receive no more new prices or new values which meet the requirements concerning minimum differ ences. In that event, the contracting authorities shall state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before they close the electronic auction;

(c) when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

When the contracting authorities have decided to close an electronic auction in accordance with subparagraph (c), possi bly in combination with the arrangements laid down in subparagraph (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

8. After closing an electronic auction contracting authorities shall award the contract in accordance with Article 53 on the basis of the results of the electronic auction.

Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject matter of the contract, as put up for tender in the published contract notice and defined in the specification.

Article 55

Abnormally low tenders

1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, the manufac turing process or the services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circum stances, it shall inform the Commission of that fact.

TITLE III

RULES ON PUBLIC WORKS CONCESSIONS

CHAPTER I

Rules governing public works concessions

Article 56

Scope

This Chapter shall apply to all public works concession con tracts concluded by the contracting authorities where the value of the contracts is equal to or greater than EUR 6 242 000.

The value shall be calculated in accordance with the rules applicable to public works contracts defined in Article 9.

Article 57

Exclusions from the scope

This Title shall not apply to public works concessions which are awarded:

(a) in the cases referred to in Articles 13, 14 and 15 of this Directive in respect of public works contracts;

(b) by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of Directive 2004/17/EC where those concessions are awarded for carrying out those activities.

However, this Directive shall continue to apply to public works concessions awarded by contracting authorities car rying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, insofar as the Member State concerned takes advantage of the option referred to in the second sub paragraph of Article 71 thereof to defer its application.

Article 58

Publication of the notice concerning public works concessions

1. Contracting authorities which wish to award a public works concession contract shall make known their intention by means of a notice.

2. Notices of public works concessions shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission pursuant to the procedure in Article 77(2).

3. Notices shall be published in accordance with Article 36(2) to (8).

4. Article 37 on the publication of notices shall also apply to public works concessions.

Article 59

Time limit

When contracting authorities resort to a public works conces sion, the time limit for the presentation of applications for the concession shall be not less than 52 days from the date of dispatch of the notice, except where Article 38(5) applies.

Article 38(7) shall apply.

Article 60

Subcontracting

The contracting authority may either:

(a) require the concessionaire to award contracts representing a minimum of 30 % of the total value of the work for which the concession contract is to be awarded, to third parties, at the same time providing the option for candi dates to increase this percentage, this minimum percentage being specified in the concession contract, or

(b) request the candidates for concession contracts to specify in their tenders the percentage, if any, of the total value of the work for which the concession contract is to be awarded which they intend to assign to third parties.

Article 61

Awarding of additional works to the concessionaire

This Directive shall not apply to additional works not included in the concession project initially considered or in the initial contract but which have, through unforeseen circumstances, become necessary for the performance of the work described therein, which the contracting authority has awarded to the concessionaire, on condition that the award is made to the economic operator performing such work:

— when such additional works cannot be technically or eco nomically separated from the initial contract without major inconvenience to the contracting authorities, or

— when such works, although separable from the perfor mance of the initial contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works may not exceed 50 % of the amount of the original works concession contract.

CHAPTER II

Rules on contracts awarded by concessionaires which are contracting authorities

Article 62

Applicable rules

Where the concessionaire is a contracting authority as referred to in Article 1(9), it shall comply with the provisions laid down by this Directive for public works contracts in the case of works to be carried out by third parties.

CHAPTER III

Rules applicable to contracts awarded by concessionaires which are not contracting authorities

Article 63

Advertising rules: threshold and exceptions

1. The Member States shall take the necessary measures to ensure that public works concessionaires which are not contracting authorities apply the advertising rules defined in Article 64 when awarding works contracts to third parties where the value of such contracts is equal to or greater than EUR 6 242 000.

Advertising shall not, however, be required where a works contract satisfies the conditions listed in Article 31.

The values of contracts shall be calculated in accordance with the rules applicable to public works contracts laid down in Article 9.

2. Groups of undertakings which have been formed to obtain the concession or undertakings related to them shall not be considered third parties.

'Related undertaking' shall mean any undertaking over which the concessionaire can exert a dominant influence, whether directly or indirectly, or any undertaking which can exert a dominant influence on the concessionaire or which, as the concessionaire, is subject to the dominant influence of another undertaking as a result of ownership, financial participation or the rules which govern it. A dominant influence on the part of an undertaking is presumed when, directly or indirectly in relation to another undertaking, it:

(a) holds a majority of the undertaking's subscribed capital;

(b) controls a majority of the votes attached to the shares issued by the undertaking; or

(c) can appoint more than half of the undertaking's administrative, management or supervisory body.

The exhaustive list of such undertakings shall be included in the application for the concession. That list shall be brought up to date following any subsequent changes in the relationship between the undertakings.

Article 64

Publication of the notice

1. Works concessionaires which are not contracting authorities and which wish to award works contracts to a third party shall make known their intention by way of a notice.

2. Notices shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the works concessionaire, in accordance with the standard form adopted by the Commission in accordance with the procedure in Article 77(2).

3. The notice shall be published in accordance with Article 36(2) to (8).

4. Article 37 on the voluntary publication of notices shall also apply.

Article 65

Time limit for the receipt of requests to participate and receipt of tenders

In works contracts awarded by a works concessionaire which is not a contracting authority, the time limit for the receipt of requests to participate, fixed by the concessionaire, shall be not less than 37 days from the date on which the contract notice was dispatched and the time limit for the receipt of tenders not less than 40 days from the date on which the contract notice or the invitation to tender was dispatched.

Article 38(5), (6) and (7) shall apply.

TITLE IV

RULES GOVERNING DESIGN CONTESTS

Article 66

General provisions

1. The rules for the organisation of design contests shall be in conformity with Articles 66 to 74 and shall be commu nicated to those interested in participating in the contest.

2. The admission of participants to design contests shall not be limited:

(a) by reference to the territory or part of the territory of a Member State;

(b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.

Article 67

Scope

1. In accordance with this Title, design contests shall be organised by:

(a) contracting authorities which are listed as central govern ment authorities in Annex IV, starting from a threshold equal to or greater than EUR 162 000;

(b) contracting authorities not listed in Annex IV, starting from a threshold equal to or greater than EUR 249 000;

(c) by all the contracting authorities, starting from a threshold equal to or greater than EUR 249 000 where contests concern services in category 8 of Annex II A, category 5 telecommunications services, the positions of which in the CPV are equivalent to reference Nos CPC 7524, 7525 and 7526 and/or services listed in Annex II B.

2. This Title shall apply to:

(a) design contests organised as part of a procedure leading to the award of a public service contract;

(b) design contests with prizes and/or payments to partici pants.

In the cases referred to in (a) the threshold refers to the estimated value net of VAT of the public services contract, including any possible prizes and/or payments to participants.

In the cases referred to in (b), the threshold refers to the total amount of the prizes and payments, including the estimated value net of VAT of the public services contract which might subsequently be concluded under Article 31(3) if the contract ing authority does not exclude such an award in the contest notice.

Article 68

Exclusions from the scope

This Title shall not apply to:

(a) design contests within the meaning of Directive 2004/17/EC which are organised by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are organised for the pursuit of such activities; nor shall it apply to contests excluded from the scope of this Directive.

However, this Directive shall continue to apply to design contests awarded by contracting authorities carrying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, insofar as the Member State concerned takes advantage of the option referred to in the second subparagraph of Article 71 thereof to defer its application;

(b) contests which are organised in the same cases as those referred to in Articles 13, 14 and 15 of this Directive for public service contracts.

Article 69

Notices

1. Contracting authorities which wish to carry out a design contest shall make known their intention by means of a contest notice.

2. Contracting authorities which have held a design contest shall send a notice of the results of the contest in accordance with Article 36 and must be able to prove the date of dispatch.

Where the release of information on the outcome of the contest would impede law enforcement, be contrary to the public interest, prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or might prejudice fair competition between service providers, such information need not be published.

3. Article 37 concerning publication of notices shall also apply to contests.

Article 70

Form and manner of publication of notices of contests

1. The notices referred to in Article 69 shall contain the information referred to in Annex VII D in accordance with the standard model notices adopted by the Commission in accord ance with the procedure in Article 77(2).

2. The notices shall be published in accordance with Article 36(2) to (8).

Article 71

Means of communication

1. Article 42(1), (2) and (4) shall apply to all communica tions relating to contests.

2. Communications, exchanges and the storage of informa tion shall be such as to ensure that the integrity and the confidentiality of all information communicated by the partici pants in a contest are preserved and that the jury ascertains the contents of plans and projects only after the expiry of the time limit for their submission.

3. The following rules shall apply to devices for the electro nic receipt of plans and projects:

(a) the information relating to the specifications which is necessary for the presentation of plans and projects by electronic means, including encryption, shall be available to the parties concerned. In addition, the devices for the electronic receipt of plans and projects shall comply with the requirements of Annex X;

(b) the Member States may introduce or maintain voluntary arrangements for accreditation intended to improve the level of the certification service provided for such devices.

Article 72

Selection of competitors

Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

Article 73

Composition of the jury

The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a parti cular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification.

Article 74

Decisions of the jury

1. The jury shall be autonomous in its decisions or opi nions.

2. It shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

3. It shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points which may need clarification.

4. Anonymity must be observed until the jury has reached its opinion or decision.

5. Candidates may be invited, if need be, to answer ques tions which the jury has recorded in the minutes to clarify any aspects of the projects.

6. Complete minutes shall be drawn up of the dialogue between jury members and candidates.

TITLE V

STATISTICAL OBLIGATIONS, EXECUTORY POWERS AND FINAL PROVISIONS

Article 75

Statistical obligations

In order to permit assessment of the results of applying this Directive, Member States shall forward to the Commission a statistical report, prepared in accordance with Article 76, sepa rately addressing public supply, services and works contracts awarded by contracting authorities during the preceding year, by no later than 31 October of each year.

Article 76

Content of statistical report

1. For each contracting authority listed in Annex IV, the statistical report shall detail at least:

(a) the number and value of awarded contracts covered by this Directive;

(b) the number and total value of contracts awarded pursuant to derogations to the Agreement.

As far as possible, the data referred to in point (a) of the first subparagraph shall be broken down by:

(a) the contract award procedures used; and

(b) for each of these procedures, works as given in Annex I and products and services as given in Annex II identified by category of the CPV nomenclature;

(c) the nationality of the economic operator to which the contract was awarded.

Where the contracts have been concluded according to the negotiated procedure, the data referred to in point (a) of the first subparagraph shall also be broken down according to the circumstances referred to in Articles 30 and 31 and shall specify the number and value of contracts awarded, by Mem ber State and third country of the successful contractor.

2. For each category of contracting authority which is not given in Annex IV, the statistical report shall detail at least:

(a) the number and value of the contracts awarded, broken down in accordance with the second subparagraph of paragraph 1;

(b) the total value of contracts awarded pursuant to deroga tions to the Agreement.

3. The statistical report shall set out any other statistical information which is required under the Agreement.

The information referred to in the first subparagraph shall be determined pursuant to the procedure under Article 77(2).

Article 77

Advisory Committee

1. The Commission shall be assisted by the Advisory Com mittee for Public Contracts set up by Article 1 of Decision 71/306/EEC ([1]) (hereinafter referred to as 'the Com mittee').

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, in compliance with Article 8 thereof.

3. The Committee shall adopt its rules of procedure.

Article 78

Revision of the thresholds

1. The Commission shall verify the thresholds established in Article 7 every two years from the entry into force of this Directive and shall, if necessary, revise them in accordance with the procedure laid down in Article 77(2).

The calculation of the value of these thresholds shall be based on the average daily value of the euro, expressed in SDRs, over the 24 months terminating on the last day of August preced ing the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euro so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDRs, are observed.

2. At the same time as the revision under paragraph 1, the Commission, in accordance with the procedure under Arti cle 77(2), shall align:

(a) the thresholds established in (a) of the first subparagraph of Article 8, in Article 56 and in the first subparagraph of Article 63(1) on the revised threshold applying to public works contracts;

(b) the thresholds established in (b) of the first subparagraph of Article 8, and in Article 67(1)(a) on the revised thresh old applying to public service contracts concluded by the contracting authorities referred to in Annex IV;

(c) the threshold established in Article 67(1)(b) and (c) on the revised threshold applying to public service contracts awarded by the contracting authorities not included in Annex IV.

3. The value of the thresholds set pursuant to paragraph 1 in the national currencies of the Member States which are not participating in monetary union is normally to be adjusted every two years from 1 January 2004 onwards. The calculation of such value shall be based on the average daily values of those currencies expressed in euro over the 24 months termi nating on the last day of August preceding the revision with effect from 1 January.

4. The revised thresholds referred to in paragraph 1 and their corresponding values in the national currencies referred to in paragraph 3 shall be published by the Commission in the *Official Journal of the European Union* at the beginning of the month of November following their revision.

Article 79

Amendments

1. In accordance with the procedure referred to in Arti cle 77(2), the Commission may amend:

(a) the technical procedures for the calculation methods set out in the second subparagraph of Article 78(1) and in Article 78(3);

([1]) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

(b) the procedures for the drawing up, transmission, receipt, translation, collection and distribution of the notices referred to in Articles 35, 58, 64 and 69 and the statistical reports provided for in the fourth subparagraph of Article 35(4), and in Articles 75 and 76;

(c) the procedures for specific reference to specific positions in the CPV nomenclature in the notices;

(d) the lists of bodies and categories of bodies governed by public law in Annex III, when, on the basis of the notifications from the Member States, these prove necessary;

(e) the lists of central government authorities in Annex IV, following the adaptations necessary to give effect to the Agreement;

(f) the reference numbers in the nomenclature set out in Annex I, insofar as this does not change the material scope of this Directive, and the procedures for reference to particular positions of this nomenclature in the notices;

(g) the reference numbers in the nomenclature set out in Annex II, insofar as this does not change the material scope of this Directive, and the procedures for reference in the notices to particular positions in this nomenclature within the categories of services listed in the Annex;

(h) the procedure for sending and publishing data referred to in Annex VIII, on grounds of technical progress or for administrative reasons;

(i) the technical details and characteristics of the devices for electronic receipt referred to in points (a), (f) and (g) of Annex X.

Article 80

Implementation

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 81

Monitoring mechanisms

In conformity with Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1], Member States shall ensure implementation of this Directive by effective, available and transparent mechanisms.

For this purpose they may, among other things, appoint or establish an independent body.

Article 82

Repeals

Directive 92/50/EEC, except for Article 41 thereof, and Directives 93/36/EEC and 93/37/EEC shall be repealed with effect from the date shown in Article 80, without prejudice to the obligations of the Member States concerning the deadlines for transposition and application set out in Annex XI.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XII.

Article 83

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

[1] OJ L 395, 30.12. 1989, p. 33. Directive as amended by Directive 92/50/EEC.

Article 84

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 31 March 2004.

For the European Parliament
The President
P. COX

For the Council
The President
D. ROCHE

ANNEX I

LIST OF THE ACTIVITIES REFERRED TO IN ARTICLE 1(2), POINT (b) [1]

NACE [1]					
CPV code			SECTION F		CONSTRUCTION
Division	Group	Class	Subject	Notes	
45			Construction	This division includes: construction of new buildings and works, restoring and common repairs	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	This class includes: — demolition of buildings and other structures — clearing of building sites — earth moving: excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc. — site preparation for mining: — overburden removal and other development and preparation of mineral properties and sites This class also includes: — building site drainage — drainage of agricultural or forestry land	45110000
		45.12	Test drilling and boring	This class includes: — test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes This class excludes: — drilling of production oil or gas wells, see 11.20 — water well drilling, see 45.25 — shaft sinking, see 45.25 — oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20	45120000
	45.2		Building of complete constructions or parts thereof; civil engineering		45200000

[1] In the event of any difference of interpretation between the CPV and the NACE, the NACE nomenclature will apply.

NACE (1)					
CPV code			SECTION F		CONSTRUCTION
Division	Group	Class	Subject	Notes	
		45.21	General construction of buildings and civil engineering works	This class includes: construction of all types of buildings construction of civil engineering constructions: bridges, including those for elevated highways, viaducts, tunnels and subways long distance pipelines, communication and power lines urban pipelines, urban communication and power lines; ancillary urban works assembly and erection of prefabricated constructions on the site This class excludes: service activities incidental to oil and gas extraction, see 11.20 erection of complete prefabricated constructions from self manufactured parts not of concrete, see divisions 20, 26 and 28 construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23 building installation, see 45.3 building completion, see 45.4 architectural and engineering activities, see 74.20 project management for construction, see 74.20	45210000
		45.22	Erection of roof covering and frames	This class includes: erection of roofs roof covering waterproofing	45220000
		45.23	Construction of high ways, roads, airfields and sports facilities	This class includes: construction of highways, streets, roads, other vehicular and pedestrian ways construction of railways construction of airfield runways construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations painting of markings on road surfaces and car parks This class excludes: preliminary earth moving, see 45.11	45230000

NACE (1)					
CPV code			SECTION F		CONSTRUCTION
Division	Group	Class	Subject	Notes	
		45.24	Construction of water projects	This class includes: construction of: waterways, harbour and river works, pleasure ports (marinas), locks, etc. dams and dykes dredging subsurface work	45240000
		45.25	Other construction work involving special trades	This class includes: construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment: construction of foundations, including pile driving water well drilling and construction, shaft sinking erection of non self manufactured steel elements steel bending bricklaying and stone setting scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms erection of chimneys and industrial ovens This class excludes: renting of scaffolds without erection and dismantling, see 71.32	45250000
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	This class includes: installation in buildings or other construction projects of: electrical wiring and fittings telecommunications systems electrical heating systems residential antennas and aerials fire alarms burglar alarm systems lifts and escalators lightning conductors, etc.	45310000

NACE (1)					
CPV code			SECTION F		CONSTRUCTION
Division	Group	Class	Subject	Notes	
		45.32	Insulation work activities	This class includes: installation in buildings or other construction projects of thermal, sound or vibration insulation This class excludes: waterproofing, see 45.22	45320000
		45.33	Plumbing	This class includes: installation in buildings or other construction projects of: plumbing and sanitary equipment gas fittings heating, ventilation, refrigeration or air conditioning equipment and ducts sprinkler systems This class excludes: installation of electrical heating systems, see 45.31	45330000
		45.34	Other building installation	This class includes: installation of illumination and signalling systems for roads, railways, airports and harbours installation in buildings or other construction projects of fittings and fixtures n.e.c.	45340000
	45.4		Building completion		45400000
		45.41	Plastering	This class includes: application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials	45410000
		45.42	Joinery installation	This class includes: installation of non self manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials interior completion such as ceilings, wooden wall coverings, movable partitions, etc. This class excludes: laying of parquet and other wood floor coverings, see 45.43	45420000

NACE [1]					
CPV code			SECTION F		CONSTRUCTION
Division	Group	Class	Subject	Notes	
		45.43	Floor and wall covering	This class includes: laying, tiling, hanging or fitting in build ings or other construction projects of: ceramic, concrete or cut stone wall or floor tiles parquet and other wood floor coverings carpets and linoleum floor coverings, in cluding of rubber or plastic terrazzo, marble, granite or slate floor or wall coverings wallpaper	45430000
		45.44	Painting and glazing	This class includes: interior and exterior painting of buildings painting of civil engineering structures installation of glass, mirrors, etc This class excludes: installation of windows, see 45.42	45440000
		45.45	Other building comple tion	This class includes: installation of private swimming pools steam cleaning, sand blasting and similar activities for building exteriors other building completion and finishing work n.e.c. This class excludes: interior cleaning of buildings and other structures, see 74.70	45450000
	45.5		Renting of construction or demolition equip ment with operator		45500000
		45.50	Renting of construction or demolition equip ment with operator	This class excludes: renting of construction or demolition ma chinery and equipment without operators, see 71.32	

[1] Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community (OJ L 293, 24.10.1990, p. 1). Regulation as amended by Commission Regulation (EEC) No 761/93 of 24 March 1993 (OJ L 83, 3.4.1993, p. 1).

ANNEX II

SERVICES REFERRED TO IN ARTICLE 1(2)(d)

ANNEX II A ([1])

Category No	Subject	CPC Reference No ([1])	CPV Reference No
1	Maintenance and repair services	6112, 6122, 633, 886	From 50100000 to 50982000 (except for 50310000 to 50324200 and 50116510 9, 50190000 3, 50229000 6, 50243000 0)
2	Land transport services ([2]), including armoured car services, and courier services, except transport of mail	712 (except 71235), 7512, 87304	From 60112000 6 to 60129300 1 (except 60121000 to 60121600, 60122200 1, 60122230 0), and from 64120000 3 to 64121200 2
3	Air transport services of passengers and freight, except transport of mail	73 (except 7321)	From 62100000 3 to 62300000 5 (except 62121000 6, 62221000 7)
4	Transport of mail by land ([3]) and by air	71235, 7321	60122200 1, 60122230 0 62121000 6, 62221000 7
5	Telecommunications services	752	From 64200000 8 to 64228200 2, 72318000 7, and from 72530000 9 to 72532000 3
6	Financial services: (a) Insurance services (b) Banking and investment services ([4])	ex 81, 812, 814	From 66100000 1 to 66430000 3 and from 67110000 1 to 67262000 1 ([4])
7	Computer and related services	84	From 50300000 8 to 50324200 4, From 72100000 6 to 72591000 4 (except 72318000 7 and from 72530000 9 to 72532000 3)
8	Research and development services ([5])	85	From 73000000 2 to 73300000 5 (except 73200000 4, 73210000 7, 7322000 0)
9	Accounting, auditing and bookkeeping services	862	From 74121000 3 to 74121250 0
10	Market research and public opinion polling services	864	From 74130000 9 to 74133000 0, and 74423100 1, 74423110 4
11	Management consulting services ([6]) and related services	865, 866	From 73200000 4 to 73220000 0, From 74140000 2 to 74150000 5 (except 74142200 8), and 74420000 9, 74421000 6, 74423000 0, 74423200 2, 74423210 5, 74871000 5, 93620000 0

([1]) In the event of any difference of interpretation between the CPV and the CPC, the CPC nomenclature will apply.

Category No	Subject	CPC Reference No (1)	CPV Reference No
12	Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services	867	From 74200000 1 to 74276400 8, and from 74310000 5 to 74323100 0, and 74874000 6
13	Advertising services	871	From 74400000 3 to 74422000 3 (except 74420000 9 and 74421000 6)
14	Building cleaning services and property management services	874, 82201 to 82206	From 70300000 4 to 70340000 6, and from 74710000 9 to 74760000 4
15	Publishing and printing services on a fee or contract basis	88442	From 78000000 7 to 78400000 1
16	Sewage and refuse disposal services; sanitation and similar services	94	From 90100000 8 to 90320000 6, and 50190000 3, 50229000 6, 50243000 0

(1) CPC Nomenclature (provisional version), used to define the scope of Directive 92/50/EEC.
(2) Except for rail transport services covered by category 18.
(3) Except for rail transport services covered by category 18.
(4) Except financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services.
Also excluded: services involving the acquisition or rental, by whatever financial procedures, of land, existing buildings, or other immovable property or concerning rights thereon; nevertheless, financial services supplied at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive.
(5) Except research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.
(6) Except arbitration and conciliation services.

ANNEX II B

Category No	Subject	CPC Reference No	CPV Reference No
17	Hotel and restaurant services	64	From 55000000 0 to 55524000 9, and from 93400000 2 to 93411000 2
18	Rail transport services	711	60111000 9, and from 60121000 2 to 60121600 8
19	Water transport services	72	From 61000000 5 to 61530000 9, and from 63370000 3 to 63372000 7
20	Supporting and auxiliary transport services	74	62400000 6, 62440000 8, 62441000 5, 62450000 1, From 63000000 9 to 63600000 5 (except 63370000 3, 63371000 0, 63372000 7), and 74322000 2, 93610000 7
21	Legal services	861	From 74110000 3 to 74114000 1
22	Personnel placement and sup ply services (1)	872	From 74500000 4 to 74540000 6 (except 74511000 4), and from 95000000 2 to 95140000 5
23	Investigation and security ser vices, except armoured car services	873 (except 87304)	From 74600000 5 to 74620000 1
24	Education and vocational education services	92	From 80100000 5 to 80430000 7
25	Health and social services	93	74511000 4, and from 85000000 9 to 85323000 9 (except 85321000 5 and 85322000 2)
26	Recreational, cultural and sporting services	96	From 74875000 3 to 74875200 5, and from 92000000 1 to 92622000 7 (except 92230000 2)
27	Other services (2)		

(1) Except employment contracts.
(2) Except contracts for the acquisition, development, production or co-production of programmes by broadcasting organisations and contracts for broadcasting time.

ANNEX III

LIST OF BODIES AND CATEGORIES OF BODIES GOVERNED BY PUBLIC LAW AS REFERRED TO IN THE SECOND SUBPARAGRAPH OF ARTICLE 1(9)

I — BELGIUM

Bodies

A

— Agence fédérale pour l'Accueil des demandeurs d'Asile — Federaal Agentschap voor Opvang van Asielzoekers

— Agence fédérale pour la Sécurité de la Chaîne alimentaire — Federaal Agentschap voor de Veiligheid van de Voedselketen

— Agence fédérale de Contrôle nucléaire — Federaal Agentschap voor nucleaire Controle

— Agence wallonne à l'Exportation

— Agence wallonne des Télécommunications

— Agence wallonne pour l'Intégration des Personnes handicapées

— Aquafin

— Arbeitsamt der Deutschsprachigen Gemeinschaft

— Archives générales du Royaume et Archives de l'Etat dans les Provinces — Algemeen Rijksarchief en Rijksarchief in de Provinciën Astrid

B

— Banque nationale de Belgique — Nationale Bank van België

— Belgisches Rundfunk und Fernsehzentrum der Deutschsprachigen Gemeinschaft

— Berlaymont 2000

— Bibliothèque royale Albert Ier — Koninklijke Bilbliotheek Albert I

— Bruxelles Propreté — Agence régionale pour la Propreté — Net–Brussel — Gewestelijke Agentschap voor Netheid

— Bureau d'Intervention et de Restitution belge — Belgisch Interventie — en Restitutiebureau

— Bureau fédéral du Plan — Federaal Planbureau

C

— Caisse auxiliaire de Paiement des Allocations de Chômage — Hulpkas voor Werkloosheidsuitkeringen

— Caisse auxiliaire d'Assurance Maladie Invalidité — Hulpkas voor Ziekte — en Invaliditeitsverzekeringen

— Caisse de Secours et de Prévoyance en Faveur des Marins — Hulp — en Voorzorgskas voor Zeevarenden

— Caisse de Soins de Santé de la Société Nationale des Chemins de Fer Belges — Kas der geneeskundige Verzorging van de Nationale Maatschappij der Belgische Spoorwegen

— Caisse nationale des Calamités — Nationale Kas voor Rampenschade

— Caisse spéciale de Compensation pour Allocations familiales en Faveur des Travailleurs occupés dans les Entreprises de Batellerie — Bijzondere Verrekenkas voor Gezinsvergoedingen ten Bate van de Arbeiders der Ondernemingen voor Binnenscheepvaart

— Caisse spéciale de Compensation pour Allocations familiales en Faveur des Travailleurs occupés dans les Entreprises de Chargement, Déchargement et Manutention de Marchandises dans les Ports, Débarcadères, Entrepôts et Stations (appelée habituellement «Caisse spéciale de Compensation pour Allocations familiales des Régions maritimes») — Bijzondere Verrekenkas voor Gezinsvergoedingen ten Bate van de Arbeiders gebezigd door Ladings — en Lossingsondernemingen en door de Stuwadoors in de Havens, Losplaatsen, Stapelplaatsen en Stations (gewoonlijk genoemd „Bijzondere Compensatiekas voor Kindertoeslagen van de Zeevaartgewesten")

— Centre d'Etude de l'Energie nucléaire — Studiecentrum voor Kernenergie

— Centre de recherches agronomiques de Gembloux

— Centre hospitalier de Mons

— Centre hospitalier de Tournai

— Centre hospitalier universitaire de Liège

— Centre informatique pour la Région de Bruxelles Capitale — Centrum voor Informatica voor het Brusselse Gewest

— Centre pour l'Egalité des Chances et la Lutte contre le Racisme — Centrum voor Gelijkheid van Kansen en voor Racismebestrijding

— Centre régional d'Aide aux Communes

— Centrum voor Bevolkings en Gezinsstudiën

— Centrum voor landbouwkundig Onderzoek te Gent

— Comité de Contrôle de l'Electricité et du Gaz — Controlecomité voor Elekticiteit en Gas

— Comité national de l'Energie — Nationaal Comité voor de Energie

— Commissariat général aux Relations internationales

— Commissariaat Generaal voor de Bevordering van de lichamelijke Ontwikkeling, de Sport en de Openluchtrecreatie

— Commissariat général pour les Relations internationales de la Communauté française de Belgique

— Conseil central de l'Economie — Centrale Raad voor het Bedrijfsleven

— Conseil économique et social de la Région wallonne

— Conseil national du Travail — Nationale Arbeidsraad

— Conseil supérieur de la Justice — Hoge Raad voor de Justitie

— Conseil supérieur des Indépendants et des petites et moyennes Entreprises — Hoge Raad voor Zelfstandigen en de kleine en middelgrote Ondernemingen

— Conseil supérieur des Classes moyennes

— Coopération technique belge — Belgische technische Coöperatie

D

— Dienststelle der Deutschprachigen Gemeinschaft für Personen mit einer Behinderung

— Dienst voor de Scheepvaart

— Dienst voor Infrastructuurwerken van het gesubsidieerd Onderwijs

— Domus Flandria

E

— Entreprise publique des Technologies nouvelles de l'Information et de la Communication de la Communauté française

— Export Vlaanderen

F

— Financieringsfonds voor Schuldafbouw en Eenmalige Investeringsuitgaven

— Financieringsinstrument voor de Vlaamse Visserij en Aquicultuursector

— Fonds bijzondere Jeugdbijstand

— Fonds communautaire de Garantie des Bâtiments scolaires

— Fonds culturele Infrastructuur

— Fonds de Participation

— Fonds de Vieillissement — Zilverfonds

— Fonds d'Aide médicale urgente — Fonds voor dringende geneeskundige Hulp

— Fonds de Construction d'Institutions hospitalières et médico sociales de la Communauté française

— Fonds de Pension pour les Pensions de Retraite du Personnel statutaire de Belgacom — Pensioenfonds voor de Rustpensioenen van het statutair Personeel van Belgacom

— Fonds des Accidents du Travail — Fonds voor Arbeidsongevallen

— Fonds des Maladies professionnelles — Fonds voor Beroepsziekten

— Fonds d'Indemnisation des Travailleurs licenciés en cas de Fermeture d'Entreprises — Fonds tot Vergoeding van de in geval van Sluiting van Ondernemingen ontslagen Werknemers

— Fonds du Logement des Familles nombreuses de la Région de Bruxelles Capitale — Woningfonds van de grote Gezinnen van het Brusselse hoofdstedelijk Gewest

— Fonds du Logement des Familles nombreuses de Wallonie

— Fonds Film in Vlaanderen

— Fonds national de Garantie des Bâtiments scolaires — Nationaal Warborgfonds voor Schoolgebouwen

— Fonds national de Garantie pour la Réparation des Dégâts houillers — Nationaal Waarborgfonds inzake Kolen mijnenschade

— Fonds piscicole de Wallonie

— Fonds pour le Financement des Prêts à des Etats étrangers — Fonds voor Financiering van de Leningen aan Vreemde Staten

— Fonds pour la Rémunération des Mousses — Fonds voor Scheepsjongens

— Fonds régional bruxellois de Refinancement des Trésoreries communales — Brussels gewestelijk Herfinancierings fonds van de gemeentelijke Thesaurieën

— Fonds voor flankerend economisch Beleid

— Fonds wallon d'Avances pour la Réparation des Dommages provoqués par des Pompages et des Prises d'Eau souterraine

G

— Garantiefonds der Deutschsprachigen Gemeinschaft für Schulbauten

— Grindfonds

H

— Herplaatsingfonds

— Het Gemeenschapsonderwijs

— Hulpfonds tot financieel Herstel van de Gemeenten

I

— Institut belge de Normalisation — Belgisch Instituut voor Normalisatie

— Institut belge des Services postaux et des Télécommunications — Belgisch Instituut voor Postdiensten en Tele communicatie

— Institut bruxellois francophone pour la Formation professionnelle

— Institut bruxellois pour la Gestion de l'Environnement — Brussels Instituut voor Milieubeheer

— Institut d'Aéronomie spatiale — Instituut voor Ruimte — aëronomie

— Institut de Formation permanente pour les Classes moyennes et les petites et moyennes Entreprises

— Institut des Comptes nationaux — Instituut voor de nationale Rekeningen

— Institut d'Expertise vétérinaire — Instituut voor veterinaire Keuring

— Institut du Patrimoine wallon

— Institut für Aus und Weiterbildung im Mittelstand und in kleinen und mittleren Unternehmen

— Institut géographique national — Nationaal geografisch Instituut

— Institution pour le Développement de la Gazéification souterraine — Instelling voor de Ontwikkeling van ondergrondse Vergassing

— Institution royale de Messine — Koninklijke Gesticht van Mesen

— Institutions universitaires de droit public relevant de la Communauté flamande — Universitaire instellingen van publiek recht afangende van de Vlaamse Gemeenschap

— Institutions universitaires de droit public relevant de la Communauté française — Universitaire instellingen van publiek recht afhangende van de Franse Gemeenschap

— Institut national d'Assurance Maladie Invalidité — Rijksinstituut voor Ziekte — en Invaliditeitsverzekering

— Institut national d'Assurances sociales pour Travailleurs indépendants — Rijksinstituut voor de sociale Verzekeringen der Zelfstandigen

— Institut national des Industries extractives — Nationaal Instituut voor de Extractiebedrijven

— Institut national de Recherche sur les Conditions de Travail — Nationaal Onderzoeksinstituut voor Arbeidsom standigheden

— Institut national des Invalides de Guerre, anciens Combattants et Victimes de Guerre — Nationaal Instituut voor Oorlogsinvaliden, Oudstrijders en Oorlogsslachtoffers

— Institut national des Radioéléments — Nationaal Instituut voor Radio Elementen

— Institut national pour la Criminalistique et la Criminologie — Nationaal Instituut voor Criminalistiek en Crimi nologie

— Institut pour l'Amélioration des Conditions de Travail — Instituut voor Verbetering van de Arbeidsvoorwaarden

— Institut royal belge des Sciences naturelles — Koninklijk Belgisch Instituut voor Natuurwetenschappen

— Institut royal du Patrimoine culturel — Koninklijk Instituut voor het Kunstpatrimonium

— Institut royal météorologique de Belgique — Koninklijk meteorologisch Instituut van België

— Institut scientifique de Service public en Région wallonne

— Institut scientifique de la Santé publique — Louis Pasteur — Wetenschappelijk Instituut Volksgezondheid — Louis Pasteur

— Instituut voor de Aanmoediging van Innovatie door Wetenschap en Technologie in Vlaanderen

— Instituut voor Bosbouw en Wildbeheer

— Instituut voor het archeologisch Patrimonium

— Investeringsdienst voor de Vlaamse autonome Hogescholen

— Investeringsfonds voor Grond en Woonbeleid voor Vlaams Brabant

J

— Jardin botanique national de Belgique — Nationale Plantentuin van België

K

— Kind en Gezin

— Koninklijk Museum voor schone Kunsten te Antwerpen

L

— Loterie nationale — Nationale Loterij

M

— Mémorial national du Fort de Breendonk — Nationaal Gedenkteken van het Fort van Breendonk

— Musée royal de l'Afrique centrale — Koninklijk Museum voor Midden Afrika

— Musées royaux d'Art et d'Histoire — Koninklijke Musea voor Kunst en Geschiedenis

— Musées royaux des Beaux Arts de Belgique — Koninklijke Musea voor schone Kunsten van België

O

— Observatoire royal de Belgique — Koninklijke Sterrenwacht van België

— Office central d'Action sociale et culturelle du Ministère de la Défense — Centrale Dienst voor sociale en culturele Actie van het Ministerie van Defensie

— Office communautaire et régional de la Formation professionnelle et de l'Emploi

— Office de Contrôle des Assurances — Controledienst voor de Verzekeringen

— Office de Contrôle des Mutualités et des Unions nationales de Mutualités — Controledienst voor de Ziekenfondsen en de Landsbonden van Ziekenfondsen

— Office de la Naissance et de l'Enfance

— Office de Promotion du Tourisme

— Office de Sécurité sociale d'Outre Mer — Dienst voor de overzeese sociale Zekerheid

— Office for Foreign Investors in Wallonia

— Office national d'Allocations familiales pour Travailleurs salariés — Rijksdienst voor Kinderbijslag voor Werknemers

— Office national de l'Emploi — Rijksdienst voor Arbeidsvoorziening

— Office national de Sécurité sociale — Rijksdienst voor sociale Zekerheid

— Office national de Sécurité sociale des Administrations provinciales et locales — Rijksdienst voor sociale Zekerheid van de provinciale en plaatselijke Overheidsdiensten

— Office national des Pensions — Rijksdienst voor Pensioenen

— Office national des Vacances annuelles — Rijksdienst voor jaarlijkse Vakantie

— Office national du Ducroire — Nationale Delcrederedienst

— Office régional bruxellois de l'Emploi — Brusselse gewestelijke Dienst voor Arbeidsbemiddeling

— Office régional de Promotion de l'Agriculture et de l'Horticulture

— Office régional pour le Financement des Investissements communaux

— Office wallon de la Formation professionnelle et de l'Emploi

— Openbaar psychiatrisch Ziekenhuis Geel

— Openbaar psychiatrisch Ziekenhuis Rekem

— Openbare Afvalstoffenmaatschappij voor het Vlaams Gewest

— Orchestre national de Belgique — Nationaal Orkest van België

— Organisme national des Déchets radioactifs et des Matières fissiles — Nationale Instelling voor radioactief Afval en Splijtstoffen

P

— Palais des Beaux Arts — Paleis voor schone Kunsten

— Participatiemaatschappij Vlaanderen

— Pool des Marins de la Marine marchande — Pool van de Zeelieden der Koopvaardij

R

— Radio et Télévision belge de la Communauté française

— Régie des Bâtiments — Regie der Gebouwen

— Reproductiefonds voor de Vlaamse Musea

S

— Service d'Incendie et d'Aide médicale urgente de la Région de Bruxelles Capitale — Brusselse hoofdstedelijk Dienst voor Brandweer en dringende medische Hulp

— Société belge d'Investissement pour les pays en développement — Belgische Investeringsmaatschappij voor Ontwikkelingslanden

— Société d'Assainissement et de Rénovation des Sites industriels dans l'Ouest du Brabant wallon

— Société de Garantie régionale

— Sociaal economische Raad voor Vlaanderen

— Société du Logement de la Région bruxelloise et sociétés agréées — Brusselse Gewestelijke Huisvestingsmaatschappij en erkende maatschappijen

— Société publique d'Aide à la Qualité de l'Environnement

— Société publique d'Administration des Bâtiments scolaires bruxellois

— publique d'Administration des Bâtiments scolaires du Brabant wallon

— Société publique d'Administration des Bâtiments scolaires du Hainaut

— Société publique d'Administration des Bâtiments scolaires de Namur

— Société publique d'Administration des Bâtiments scolaires de Liège

— Société publique d'Administration des Bâtiments scolaires du Luxembourg

— Société publique de Gestion de l'Eau

— Société wallonne du Logement et sociétés agréées

— Sofibail

— Sofibru

— Sofico

T

— Théâtre national

— Théâtre royal de la Monnaie — De Koninklijke Muntschouwburg

— Toerisme Vlaanderen

— Tunnel Liefkenshoek

U

— Universitair Ziekenhuis Gent

V

— Vlaams Commissariaat voor de Media

— Vlaamse Dienst voor Arbeidsbemiddeling en Beroepsopleiding

— Vlaams Egalisatie Rente Fonds

— Vlaamse Hogescholenraad

— Vlaamse Huisvestingsmaatschappij en erkende maatschappijen

— Vlaamse Instelling voor technologisch Onderzoek

— Vlaamse interuniversitaire Raad

— Vlaamse Landmaatschappij

— Vlaamse Milieuholding

— Vlaamse Milieumaatschappij

— Vlaamse Onderwijsraad

— Vlaamse Opera

— Vlaamse Radio en Televisieomroep

— Vlaamse Reguleringsinstantie voor de Elektriciteit en Gasmarkt

— Vlaamse Stichting voor Verkeerskunde

— Vlaams Fonds voor de Lastendelging

— Vlaams Fonds voor de Letteren

— Vlaams Fonds voor de sociale Integratie van Personen met een Handicap

— Vlaams Informatiecentrum over Land en Tuinbouw

— Vlaams Infrastructuurfonds voor Persoonsgebonden Aangelegenheden

— Vlaams Instituut voor de Bevordering van het wetenschappelijk en technologisch Onderzoek in de Industrie

— Vlaams Instituut voor Gezondheidspromotie

— Vlaams Instituut voor het Zelfstandig ondernemen

— Vlaams Landbouwinvesteringsfonds

— Vlaams Promotiecentrum voor Agro en Visserijmarketing

— Vlaams Zorgfonds

— Vlaams Woningsfonds voor de grote Gezinnen

II — DENMARK

Bodies

Danmarks Radio

Det landsdækkende TV2

Danmarks Nationalbank

Sund og Bælt Holding A/S

A/S Storebælt

A/S Øresund

Øresundskonsortiet

Ørestadsselskabet I/S

Byfornyelsesselskabet København

Hovedstadsområdets Sygehusfællesskab

Statens og Kommunernes Indkøbsservice

Post Danmark

Arbejdsmarkedets Tillægspension

Arbejdsmarkedets Feriefond

Lønmodtagernes Dyrtidsfond

Naviair

Categories

— De Almene Boligorganisationer (social housing organisations),

— Lokale kirkelige myndigheder (local church administrations),

— Andre forvaltningssubjekter (other public administrative bodies).

III — GERMANY

1. **Categories**

Authorities, establishments and foundations governed by public law and created by Federal, State or local authorities particularly in the following fields:

1.1. *Authorities*

— Wissenschaftliche Hochschulen und verfasste Studentenschaften (universities and established student bodies),

— berufsständige Vereinigungen (Rechtsanwalts , Notar , Steuerberater , Wirtschaftsprüfer , Architekten , Ärzte und Apothekerkammern) [professional associations representing lawyers, notaries, tax consultants, accountants, architects, medical practitioners and pharmacists],

— Wirtschaftsvereinigungen (Landwirtschafts , Handwerks , Industrie und Handelskammern, Handwerksinnungen, Handwerkerschaften) [business and trade associations: agricultural and craft associations, chambers of industry and commerce, craftmen's guilds, tradesmen's associations],

— Sozialversicherungen (Krankenkassen, Unfall und Rentenversicherungsträger) [social security institutions: health, accident and pension insurance funds],

— kassenärztliche Vereinigungen (associations of panel doctors),

— Genossenschaften und Verbände (cooperatives and other associations).

1.2. *Establishments and foundations*

Non industrial and non commercial establishments subject to State control and operating in the general interest, particularly in the following fields:

— Rechtsfähige Bundesanstalten (Federal institutions having legal capacity),

— Versorgungsanstalten und Studentenwerke (pension organisations and students' unions),

— Kultur , Wohlfahrts und Hilfsstiftungen (cultural, welfare and relief foundations).

2. **Legal persons governed by private law**

Non industrial and non commercial establishments subject to State control and operating in the general interest, including kommunale Versorgungsunternehmen (municipal utilities), particularly in the following fields:

— Gesundheitswesen (Krankenhäuser, Kurmittelbetriebe, medizinische Forschungseinrichtungen, Untersuchungs und Tierkörperbeseitigungsanstalten) [health: hospitals, health resort establishments, medical research institutes, testing and carcase disposal establishments],

— Kultur (öffentliche Bühnen, Orchester, Museen, Bibliotheken, Archive, zoologische und botanische Gärten) [culture: public theatres, orchestras, museums, libraries, archives, zoological and botanical gardens],

— Soziales (Kindergärten, Kindertagesheime, Erholungseinrichtungen, Kinder und Jugendheime, Freizeiteinrichtungen, Gemeinschafts und Bürgerhäuser, Frauenhäuser, Altersheime, Obdachlosenunterkünfte) [social welfare: nursery schools, children's playschools, rest homes, children's homes, hostels for young people, leisure centres, community and civic centres, homes for battered wives, old people's homes, accommodation for the homeless],

— Sport (Schwimmbäder, Sportanlagen und einrichtungen) [sport: swimming baths, sports facilities],

— Sicherheit (Feuerwehren, Rettungsdienste) [safety: fire brigades, other emergency services],

— Bildung (Umschulungs , Aus , Fort und Weiterbildungseinrichtungen, Volkshochschulen) [education: training, further training and retraining establishments, adult evening classes],

— Wissenschaft, Forschung und Entwicklung (Großforschungseinrichtungen, wissenschaftliche Gesellschaften und Ver eine, Wissenschaftsförderung) [science, research and development: large scale research institutes, scientific societies and associations, bodies promoting science],

— Entsorgung (Straßenreinigung, Abfall und Abwasserbeseitigung) [refuse and garbage disposal services: street clean ing, waste and sewage disposal],

— Bauwesen und Wohnungswirtschaft (Stadtplanung, Stadtentwicklung, Wohnungsunternehmen soweit im Allgemein interesse tätig, Wohnraumvermittlung) [building, civil engineering and housing: town planning, urban development, housing, enterprises (insofar as they operate in the general interest), housing agency services],

— Wirtschaft (Wirtschaftsförderungsgesellschaften) (economy: organizations promoting economic development),

— Friedhofs und Bestattungswesen (cemeteries and burial services),

— Zusammenarbeit mit den Entwicklungsländern (Finanzierung, technische Zusammenarbeit, Entwicklungshilfe, Ausbil dung) [cooperation with developing countries: financing, technical cooperation, development aid, training].

IV — GREECE

Categories

a) Public enterprises and public entities

b) Legal persons governed by private law which are State owned or which regularly receive at least 50 % of their annual budget in the form of State subsidies, pursuant to the applicable rules, or in which the State has a capital holding of at least 51 %.

c) Legal persons governed by private law which are owned by legal persons governed by public law, by local authorities of any level, including the Greek Central Association of Local Authorities (Κ.Ε.Δ.Κ.Ε.), by local associations of 'communes', (local administrative areas) or by public entreprises or entities, or by legal persons as referred to in b) or which regularly receive at least 50 % of their annual budget in the form of subsidies from such legal persons, pursuant to the applicable rules or to their own articles of association, or legal persons as referred to above which have a capital holding of at least 51 % in such legal persons governed by public law.

V — SPAIN

Categories

— Bodies and entities governed by public law which are subject to the «Ley de Contratos de las Administraciones Públicas», [Spanish State legislation on procurement]other than those which are part of the Administración General del Estado (general national administration).

— Bodies and entities governed by public law which are subject to the «Ley de Contratos de las Administraciones Públicas», — other than those which are part of the — l'Administración de las Comunidades Autónomas (administration of the autonomous regions).

— Bodies and entities governed by public law which are subject to the «Ley de Contratos de las Administraciones Públicas», — other than those which are part of the — Corporaciones Locales (local authorities).

— Entidades Gestoras y los Servicios Comunes de la Seguridad Social (administrative entities and common services of the health and social services).

VI — FRANCE

Bodies

— Collège de France

— Conservatoire national des arts et métiers

— Observatoire de Paris

— Institut national d'histoire de l'art (INHA)

— Centre national de la recherche scientifique (CNRS)

— Institut national de la recherche agronomique (INRA)

— Institut national de la santé et de la recherche médicale (INSERM)

— Institut de recherche pour le développement (IRD)

— Agence nationale pour l'emploi (ANPE)

— Caisse nationale des allocations familiales (CNAF)

— Caisse nationale d'assurance maladie des travailleurs salariés (CNAMTS)

— Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS)

— Compagnies et établissements consulaires: chambres de commerce et d'industrie (CCI), chambres des métiers et chambres d'agriculture

— Office national des anciens combattants et victimes de guerre (ONAC)

Categories

1. *National public bodies*

— Agences de l'eau (water supply agencies)

— Écoles d'architecture (schools of architecture)

— Universités (universities)

— Instituts universitaires de formation des maîtres (IUFM) (Higher Education Teacher Training Institutes)

2. *Administrative public bodies at regional, departmental and local level*

— collèges (secondary schools)

— lycées (secondary schools)

— établissements publics hospitaliers (public hospitals)

— offices publics d'habitations à loyer modéré (OPHLM) (public offices for low cost housing)

3. *Groupings of territorial authorities*

— établissements publics de coopération intercommunale (public establishments for cooperation between local authorities)

— institutions interdépartementales et interrégionales (institutions common to more than one Département and interregional institutions)

VII — IRELAND

Bodies

Enterprise Ireland [Marketing, technology and enterprise development]

Forfás [Policy and advice for enterprise, trade, science, technology and innovation]

Industrial Development Authority

Enterprise Ireland

FÁS [Industrial and employment training]

Health and Safety Authority

Bord Fáilte Éireann [Tourism development]

CERT [Training in hotel, catering and tourism industries]

Irish Sports Council

National Roads Authority

Údarás na Gaeltachta [Authority for Gaelic speaking regions]

Teagasc [Agricultural research, training and development]

An Bord Bia [Food industry promotion]

An Bord Glas [Horticulture industry promotion]

Irish Horseracing Authority

Bord na gCon [Greyhound racing support and development]

Marine Institute

Bord Iascaigh Mhara [Fisheries Development]

Equality Authority

Legal Aid Board

Categories

Regional Health Boards

Hospitals and similar institutions of a public character

Vocational Education Committees

Colleges and educational institutions of a public character

Central and Regional Fisheries Boards

Regional Tourism Organisations

National Regulatory and Appeals bodies [such as in the telecommunications, energy, planning etc. areas]

Agencies established to carry out particular functions or meet needs in various public sectors [e.g. Healthcare Materials Management Board, Health Sector Employers Agency, Local Government Computer Services Board, Environmental Protection Agency, National Safety Council, Institute of Public Administration, Economic and Social Research Institute, National Standards Authority, etc.]

Other public bodies falling within the definition of a body governed by public law in accordance with Article 1(7) of this Directive.

VIII — ITALY

Bodies

Società 'Stretto di Messina'

Ente autonomo mostra d'oltremare e del lavoro italiano nel mondo

Ente nazionale per l'aviazione civile — ENAC

Ente nazionale per l'assistenza al volo — ENAV

ANAS S.p.A

Categories

— Enti portuali e aeroportuali (port and airport authorities),

— Consorzi per le opere idrauliche (consortia for water engineering works),

— Università statali, gli istituti universitari statali, i consorzi per i lavori interessanti le università (State universities, State university institutes, consortia for university development work),

— Istituzioni pubbliche di assistenza e di beneficenza (public welfare and benevolent institutions),

— Istituti superiori scientifici e culturali, osservatori astronomici, astrofisici, geofisici o vulcanologici (higher scientific and cultural institutes, astronomical, astrophysical, geophysical or vulcanological observatories),

— Enti di ricerca e sperimentazione (organizations conducting research and experimental work),

— Enti che gestiscono forme obbligatorie di previdenza e di assistenza (agencies administering compulsory social security and welfare schemes),

— Consorzi di bonifica (land reclamation consortia),

— Enti di sviluppo e di irrigazione (development and irrigation agencies),

— Consorzi per le aree industriali (associations for industrial areas),

— Comunità montane (groupings of muncipalities in mountain areas),

— Enti preposti a servizi di pubblico interesse (organisations providing services in the public interest),

— Enti pubblici preposti ad attività di spettacolo, sportive, turistiche e del tempo libero (public bodies engaged in entertainment, sport, tourism and leisure activities),

— Enti culturali e di promozione artistica (organisations promoting culture and artistic activities).

IX — LUXEMBOURG

Categories

— Établissements publics de l'État placés sous la surveillance d'un membre du gouvernement (public establishments of the State placed under the supervision of a member of the Government),

— Établissements publics placés sous la surveillance des communes (public establishments placed under the supervision of the 'communes') (local authorities),

— Syndicats de communes créés en vertu de la loi du 23 février 2001 concernant les syndicats de communes (associations of local authorities created under the law of 23 February 2001 on associations of 'communes').

X — NETHERLANDS

Bodies

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Ministry of the Interior and Kingdom Relations)

— Nederlands Instituut voor Brandweer en rampenbestrijding (NIBRA) (Netherlands Institute for the Fire Service and for Combating Emergencies)

— Nederlands Bureau Brandweer Examens (NBBE) (Netherlands Fire Service Examination Board)

— Landelijk Selectie en Opleidingsinstituut Politie (LSOP) (National Institute for Selection and Education of Policemen)

— 25 afzonderlijke politieregio's (25 individual police regions)

— Stichting ICTU (ICTU Foundation)

Ministry of Economic Affairs

— Stichting Syntens (Syntens)

— Van Swinden Laboratorium B.V. (NMi van Swinden Laboratory)

— Nederlands Meetinstituut B.V. (Nmi Institute for Metrology and Technology)

— Instituut voor Vliegtuigontwikkeling en Ruimtevaart (NIVR) (Netherlands Agency for Aerospace Programmes)

— Stichting Toerisme Recreatie Nederland (TRN) (Netherlands Board of Tourism)

— Samenwerkingsverband Noord Nederland (SNN) (Cooperative Body of the provincial governments of the Northern Netherlands)

— Gelderse Ontwikkelingsmaatschappij (GOM) (Gelderland Development Company)

— Overijsselse Ontwikkelingsmaatschappij (OOM) (OOM International Business Development)

— LIOF (Limburg Investment Development Company LIOF)

— Noordelijke Ontwikkelingsmaatschappij (NOM) (NOM Investment Development)

— Brabantse Ontwikkelingsmaatschappij (BOM) (Brabant Development Agency)

— Onafhankelijke Post en Telecommunicatie Autoriteit (Independent Post and Telecommunications Authority)

Ministry of Finance

— De Nederlandse Bank N.V. (Netherlands Central Bank)

— Autoriteit Financiële Markten (Netherlands Authority for the Financial Markets)

— Pensioen & Verzekeringskamer (Pensions and Insurance Supervisory Authority of the Netherlands)

Ministry of Justice

— Stichting Reclassering Nederland (SRN) (Netherlands Rehabilitation Agency)

— Stichting VEDIVO (VEDIVO Agency, Association for Managers in the (Family) Guardianship)

— Voogdij en gezinsvoogdij instellingen (Guardianship and Family Guardianship Institutions)

— Stichting Halt Nederland (SHN) (Netherlands Halt (the alternative) Agency)

— Particuliere Internaten (Private Boarding Institutions)

— Particuliere Jeugdinrichtingen (Penal Institutions for Juvenile Offenders)

— Schadefonds Geweldsmisdrijven (Damages Fund for Violent Crimes)

— Centraal orgaan Opvang Asielzoekers (COA) (Agency for the Reception of Asylum Seekers)

— Landelijk Bureau Inning Onderhoudsbijdragen (LBIO) (National Support and Maintenance Agency)

— Landelijke organisaties slachtofferhulp (National Victim Compensation Organisations)

— College Bescherming Persoongegevens (Netherlands Data Protection Authority)

— Stichting Studiecentrum Rechtspleging (SSR) (Administration of Justice Study Centre Agency)

— Raden voor de Rechtsbijstand (Legal Assistance Councils)

— Stichting Rechtsbijstand Asiel (Asylum Seekers Legal Advice Centres)

— Stichtingen Rechtsbijstand (Legal Assistance Agencies)

— Landelijk Bureau Racisme bestrijding (LBR) (National Bureau against Racial Discrimination)

— Clara Wichman Instituut (Clara Wichman Institute)

— Tolkencentra (Interpreting Centres)

Ministry of Agriculture, Nature Management and Fisheries

— Bureau Beheer Landbouwgronden (Land Management Service)

— Faunafonds (Fauna Fund)

— Staatsbosbeheer (National Forest Service)

— Stichting Voorlichtingsbureau voor de Voeding (Netherlands Bureau for Food and Nutrition Education)

— Universiteit Wageningen (Wageningen University and Research Centre)

— Stichting DLO (Agricultural Research Department)

— (Hoofd) productschappen (Commodity Boards)

Ministry of Education, Cultural Affairs and Science

A. General descriptions

— public schools or publicly funded private schools for primary education within the meaning of the Wet op het primair onderwijs (Law on Primary Education)

— public or publicly funded schools for special education, secondary special education or institutions for special and secondary education within the meaning of the Wet op de expertisecentra (Law on Resource Centres)

— public schools or publicly funded private schools or institutions for secondary education within the meaning of the Wet op het Voortgezet Onderwijs (Law on Secondary Education)

— public institutions or publicly funded private institutions within the meaning of the Wet Educatie en Beroepsonder wijs (Law on Education and Vocational Education)

— public schools or publicly funded private schools within the meaning of the Experimentenwet Onderwijs (Law on Experimental Education)

— publicly funded universities and higher education institutions, the Open University, and the university hospitals, within the meaning of the Wet op het hoger onderwijs en wetenschappelijk onderzoek (Law on Higher Education and Scientific Research), and institutions for international education where more than 50 % of their budget comes from public funds

— schools advisory services within the meaning of the Wet op het primair onderwijs (Law on Primary Education) or the Wet op de expertisecentra (Law on Resource Centres)

— national teachers' centres within the meaning of the Wet subsidiëring landelijke onderwijsondersteunende activiteiten (Law on Subsidies for National Educational Support Activities)

— broadcasting organisations within the meaning of the Mediawet (Media Law)

— funds within the meaning of the Wet op het Specifiek Cultuurbeleid (Law on Specific Cultural Policy)

— national bodies for vocational education

— foundations within the meaning of the Wet Verzelfstandiging Rijksmuseale Diensten (Law on Privatisation of National Museum Services)

— other museums which receive more than 50 % of their funds from the Ministry of Education, Cultural Affairs and Science

— other organisations and institutions in the field of education, culture and science which receive more than 50 % of their funds from Ministry of Education, Cultural Affairs and Science

B. List of names

— Informatie Beheer Groep

— Stichting Participatiefonds voor het Onderwijs

— Stichting Uitvoering Kinderopvangregelingen/Kintent

— Stichting voor Vluchteling Studenten UAF

— Koninklijke Nederlandse Academie van Wetenschappen

— Nederlandse organisatie voor internationale samenwerking in het hoger onderwijs (Nuffic)

— Stichting Nederlands Interdisciplinair Demografisch Instituut

— Nederlandse Organisatie voor Wetenschappelijk Onderzoek

— Nederlandse Organisatie voor toegepast natuurwetenschappelijk onderzoek

— College van Beroep voor het hoger Onderwijs

— Vereniging van openbare bibliotheken NBLC

— Koninklijke Bibliotheek

— Stichting Muziek Centrum van de Omroep

— Stichting Ether Reclame

— Stichting Radio Nederland Wereldomroep

— Nederlandse Programma Stichting

— Nederlandse Omroep Stichting

— Commissariaat voor de Media

— Stichting Stimuleringsfonds Nederlandse Culturele Omroepproducties

— Stichting Lezen

— Dienst Omroepbijdragen

— Centrum voor innovatie en opleidingen

— Bedrijfsfonds voor de Pers

— Centrum voor innovatie van opleidingen

— Instituut voor Toetsontwikkeling (Cito)

— Instituut voor Leerplanontwikkeling

— Landelijk Dienstverlenend Centrum voor Studie en Beroepskeuzevoorlichting

— Max Goote Kenniscentrum voor Beroepsonderwijs en Volwasseneneducatie

— Stichting Vervangingsfonds en Bedrijfsgezondheidszorg voor het Onderwijs

— BVE Raad

— Colo, Vereniging kenniscentra beroepsonderwijs bedrijfsleven

— Stichting kwaliteitscentrum examinering beroepsonderwijs

— Vereniging Jongerenorganisatie Beroepsonderwijs

— Combo Stichting Combinatie Onderwijsorganisatie

— Stichting Financiering Struktureel Vakbondsverlof Onderwijs

— Stichting Samenwerkende Centrales in het COPWO

— Stichting SoFoKles

— Europees Platform

— Stichting mobiliteitsfonds HBO

— Nederlands Audiovisueel Archiefcentrum

— Stichting minderheden Televisie Nederland

— Stichting omroep allochtonen

— Stichting multiculturele Activiteiten Utrecht

— School der Poëzie

— Nederlands Perscentrum

— Nederlands Letterkundig Museum en documentatiecentrum

— Bibliotheek voor varenden

— Christelijke bibliotheek voor blinden en slechtzienden

— Federatie van Nederlandse Blindenbibliotheken

— Nederlandse luister en braillebibliotheek

— Federatie Slechtzienden en Blindenbelang

— Bibliotheek Le Sage Ten Broek

— Doe Maar Dicht Maar

— ElHizjra

— Fonds Bijzondere Journalistieke Projecten

— Fund for Central and East European Book Projects

— Jongeren Onderwijs Media

Ministry of Social Affairs and Employment

— Sociale Verzekeringsbank (Social Insurance Bank)

— Arbeidsvoorzieningsorganisatie (Employment Service)

— Stichting Silicose Oud Mijnwerkers (Foundation for Former Miners suffering from Silicosis)

— Stichting Pensioen & Verzekeringskamer (Pensions and Insurance Supervisory Authority of the Netherlands)

— Sociaal Economische Raad (SER) (Social and Economic Council in the Netherlands)

— Raad voor Werk en Inkomen (RWI) (Council for Work and Income)

— Centrale organisatie voor werk en inkomen (Central Organisation for Work and Income)

— Uitvoeringsinstituut werknemersverzekeringen (Implementing body for employee insurance schemes)

Ministry of Transport, Communications and Public Works

— RDW Voertuig informatie en toelating (Vehicle information and administration service)

— Luchtverkeersbeveiligingsorganisatie (LVB) (Air Traffic Control Agency)

— Nederlandse Loodsencorporatie (NLC) (Netherlands maritime pilots association)

— Regionale Loodsencorporatie (RLC) (Regional maritime pilots association)

Ministry of Housing, Planning and the Environment

— Kadaster (Public Registers Agency)

— Centraal Fonds voor de Volkshuisvesting (Central Housing Fund)

— Stichting Bureau Architectenregister (Architects Register)

Ministry of Health, Welfare and Sport

— Commissie Algemene Oorlogsongevallenregeling Indonesië (COAR)

— College ter beoordeling van de Geneesmiddelen (CBG) (Medicines Evaluation Board)

— Commissies voor gebiedsaanwijzing

— College sanering Ziekenhuisvoorzieningen (National Board for Redevelopment of Hospital Facilities)

— Zorgonderzoek Nederland (ZON) (Health Research and Development Council)

— Inspection bodies under the Wet medische hulpmiddelen (Law on Medical Appliances)

— N.V. KEMA/Stichting TNO Certification (KEMA/TNO Certification)

— College Bouw Ziekenhuisvoorzieningen (CBZ) (National Board for Hospital Facilities)

— College voor Zorgverzekeringen (CVZ) (Health Care Insurance Board)

— Nationaal Comité 4 en 5 mei (National 4 and 5 May Committee)

— Pensioen en Uitkeringsraad (PUR) (Pension and Benefit Board)

— College Tarieven Gezondheidszorg (CTG) (Health Service Tariff Tribunal)

— Stichting Uitvoering Omslagregeling Wet op de Toegang Ziektekostenverzekering (SUO)

— Stichting tot bevordering van de Volksgezondheid en Milieuhygiëne (SVM) (Foundation for the Advancement of Public Health and Envireonment)

— Stichting Facilitair Bureau Gemachtigden Bouw VWS

— Stichting Sanquin Bloedvoorziening (Sanquin Blood Supply Foundation)

— College van Toezicht op de Zorgverzekeringen organen ex artikel 14, lid 2c, Wet BIG (Supervisory Board of Health Care Insurance Committees for registration of professional health care practices)

— Ziekenfondsen (Health Insurance Funds)

— Nederlandse Transplantatiestichting (NTS) (Netherlands Transplantation Foundation)

— Regionale Indicatieorganen (RIO's) (Regional bodies for Need Assessment).

XI — AUSTRIA

All bodies under the budgetary control of the „Rechnungshof" (Court of Auditors) except those of an industrial or commercial nature.

XII — PORTUGAL

Categories

— Institutos públicos sem carácter comercial ou industrial (public institutions without commercial or industrial character),

— Serviços públicos personalizados (public services having legal personality)

— Fundações públicas (public foundations),

— Estabelecimentos públicos de ensino, investigação científica e saúde (public institutions for education, scientific research and health),

XIII — FINLAND

Public or publicly controlled bodies and undertakings except those of an industrial or commercial nature.

XIV — SWEDEN

All non commercial bodies whose public contracts are subject to supervision by the National Board for Public Procurement.

XV — UNITED KINGDOM

Bodies

— Design Council

— Health and Safety Executive

— National Research Development Corporation

— Public Health Laboratory Service Board

— Advisory, Conciliation and Arbitration Service

— Commission for the New Towns

— National Blood Authority

— National Rivers Authority

— Scottish Enterprise

— Scottish Homes

— Welsh Development Agency

Categories

— Maintained schools

— Universities and colleges financed for the most part by other contracting authorities

— National Museums and Galleries

— Research Councils

— Fire Authorities

— National Health Service Strategic Health Authorities

— Police Authorities

— New Town Development Corporations

— Urban Development Corporations

ANNEX IV

CENTRAL GOVERNMENT AUTHORITIES [1]

BELGIUM

— l'Etat	— de Staat	— the State
— les communautés	— de gemeenschappen	— the communities
— les commissions communautaires	— de gemeenschapscommissies	— the community commissions
— les régions	— de gewesten	— the regions
— les provinces	— de provincies	— the provinces
— les communes	— de gemeenten	— the communes
— les centres publics d'aide sociale	— de openbare centra voor maatschappelijk welzijn	— public centres for social assistance
— les fabriques d'églises et les organismes chargés de la gestion du temporel des autres cultes reconnus	— de kerkfabrieken en de instellingen die belast zijn met het beheer van de temporaliën van de erkende erediensten	— church councils and organisations responsible for managing the assets of other recognised religious orders
— les sociétés de développement régional	— de gewestelijke ontwikkelingsmaatschappijen	— regional development companies
— les polders et wateringues	— de polders en wateringen	— the polders and water boards
— les comités de remembrement des biens ruraux	— de ruilverkavelingscomités	— land consolidation committees
— les zones de police	— de politiezones	— police zones
— les associations formées par plusieurs des pouvoirs adjudicateurs ci dessus.	— de verenigingen gevormd door een of meerdere aanbestedende overheden hierboven.	— associations formed by several of the above awarding authorities.

DENMARK

1. Folketinget — The Danish Parliament	Rigsrevisionen — The National Audit Office
2. Statsministeriet — The Prime Minister's Office	
3. Udenrigsministeriet — Ministry of Foreign Affairs	
4. Beskæftigelsesministeriet — Ministry of Employment	5 styrelser og institutioner — 5 agencies and institutions
5. Domstolsstyrelsen — The Court Administration	
6. Finansministeriet — Ministry of Finance	5 styrelser og institutioner — 5 agencies and institutions
7. Forsvarsministeriet — Ministry of Defence	Adskillige institutioner — Several institutions
8. Indenrigs og Sundhedsministeriet — Ministry of the Interior and Health	Adskillige styrelser og institutioner, herunder Statens Serum Institut — Several agencies and institutions, including Statens Serum Institut
9. Justitsministeriet — Ministry of Justice	Rigspolitichefen, 2 direktorater samt et antal styrelser — Commissioner of Police, 2 directorates and a number of agencies
10. Kirkeministeriet — Ministry of Ecclesiastical Affairs	10 stiftsøvrigheder — 10 diocesan authorities
11. Kulturministeriet — Ministry of Culture	Departement samt et antal statsinstitutioner — A department and a number of institutions
12. Miljøministeriet — Ministry of the Environment	6 styrelser — 6 agencies

[1] For the purposes of this Directive 'central government authorities' means the authorities that are listed by way of indication in this Annex and, insofar as corrections or amendments have been made at national level, their successor entities.

13. Ministeriet for Flygtninge, Invandrere og Integration — Ministry for Refugee, Immigration and Integration Affairs	1 styrelse — 1 agency
14. Ministeriet for Fødevarer, Landbrug og Fiskeri — Ministry of Food, Agriculture and Fisheries	9 direktorater og institutioner — 9 directorates and institutions
15. Ministeriet for Videnskab, Teknologi og herunder Udvikling — Ministry of Science, Technology and Innovation	Adskillige styrelser og institutioner, Forskningscenter Risø og Statens uddannelsesbygninger — Several agencies and institutions, including Risoe National Laboratory and Dan ish National Research and Education Buildings
16. Skatteministeriet — Ministry of Taxation	1 styrelse og institutioner — 1 agency and several institu tions
17. Socialministeriet — Ministry of Social Affairs	3 styreler og institutioner — 3 agencies and several institutions
18. Trafikministeriet — Ministry of Transport	12 styrelser og institutioner, herunder Øresundsbrokonsortiet — 12 agencies and institutions, including Øresundsbrokonsortiet
19. Undervisningsministeriet — Ministry of Education	3 styrelser, 4 undervisningsinstitutioner og 5 andre insti tutioner — 3 agencies, 4 educational establishments, 5 other institutions
20. Økonomi og Erhvervsministeriet — Ministry of Eco nomic and Business Affairs	Adskillige styrelser og institutioner — Several agencies and institutions

GERMANY

Auswärtiges Amt	Federal Ministry for Foreign Affairs (Federal Foreign Of fice)
Bundesministerium des Innern (nur zivile Güter)	Federal Ministry of the Interior (only civil goods)
Bundesministerium der Justiz	Federal Ministry of Justice
Bundesministerium der Finanzen	Federal Ministry of Finance
Bundesministerium für Wirtschaft und Arbeit	Federal Ministry of Economics and Labour
Bundesministerium für Verbraucherschutz, Ernährung und Landwirtschaft	Federal Ministry of Consumer Protection, Food and Agri culture
Bundesministerium der Verteidigung (keine militärischen Güter)	Federal Ministry of Defence (no military goods)
Bundesministerium für Familie, Senioren, Frauen und Ju gend	Federal Ministry for Family Affairs, Senior Citizens, Wo men and Youth
Bundesministerium für Gesundheit und Soziale Sicherheit	Federal Ministry for Health and Social Security
Bundesministerium für Verkehr, Bau und Wohnungs wesen	Federal Ministry of Transport, Building and Housing
Bundesministerium für Umwelt, Naturschutz und Reaktor sicherheit	Federal Ministry for the Environment, Nature Conserva tion and Nuclear Safety
Bundesministerium für Bildung und Forschung	Federal Ministry of Education and Research
Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung	Federal Ministry for Economic Cooperation and Develop ment

GREECE

1. Υπουργείο Εσωτερικών, Δημόσιας Διοίκησης και Αποκέν τρωσης	Ministry of the Interior, Public Administration and Decen tralization
2. Υπουργείο Εξωτερικών	Ministry of Foreign Affairs
3. Υπουργείο Οικονομίας και Οικονομικών	Ministry of Economy and Finance
4. Υπουργείο Ανάπτυξης	Ministry of Development
5. Υπουργείο Δικαιοσύνης	Ministry of Justice
6. Υπουργείο Εθνικής Παιδείας και Θρησκευμάτων	Ministry of Education and Religion
7. Υπουργείο Πολιτισμού	Ministry of Culture

8. Υπουργείο Υγείας – Πρόνοιας	Ministry of Health and Welfare
9. Υπουργείο Περιβάλλοντος, Χωροταξίας και Δημοσίων Έργων	Ministry of Environment, Physical Planning and Public Works
10. Υπουργείο Εργασίας και Κοινωνικών Ασφαλίσεων	Ministry of Labour and Social Security
11. Υπουργείο Μεταφορών και Επικοινωνιών	Ministry of Transport and Communications
12. Υπουργείο Γεωργίας	Ministry of Agriculture
13. Υπουργείο Εμπορικής Ναυτιλίας	Ministry of Merchant Marine
14. Υπουργείο Μακεδονίας Θράκης	Ministry of Macedonia and Thrace
15. Υπουργείο Αιγαίου	Ministry of the Aegean
16. Υπουργείο Τύπου και Μέσων Μαζικής Ενημέρωσης	Ministry of Press
17. Γενική Γραμματεία Νέας Γενιάς	General Secretariat for Youth
18. Γενική Γραμματεία Ισότητας	General Secretariat of Equality
19. Γενική Γραμματεία Κοινωνικών Ασφαλίσεων	General Secretariat for Social Security
20. Γενική Γραμματεία Απόδημου Ελληνισμού	General Secretariat for Greeks Living Abroad
21. Γενική Γραμματεία Βιομηχανίας	General Secretariat for Industry
22. Γενική Γραμματεία Έρευνας και Τεχνολογίας	General Secretariat for Research and Technology
23. Γενική Γραμματεία Αθλητισμού	General Secretariat for Sports
24. Γενική Γραμματεία Δημοσίων Έργων	General Secretariat for Public Works
25. Γενική Γραμματεία Εθνικής Στατιστικής Υπηρεσίας Ελλάδος	National Statistical Service
26. Εθνικός Οργανισμός Κοινωνικής Φροντίδας	National Welfare Organisation
27. Οργανισμός Εργατικής Κατοικίας	Workers' Housing Organisation
28. Εθνικό Τυπογραφείο	National Printing Office
29. Γενικό Χημείο του Κράτους	General State Laboratory
30. Ταμείο Εθνικής Οδοποιίας	Greek Highway Fund
31. Εθνικό Καποδιστριακό Πανεπιστήμιο Αθηνών	University of Athens
32. Αριστοτέλειο Πανεπιστήμιο Θεσσαλονίκης	University of Thessaloniki
33. Δημοκρίτειο Πανεπιστήμιο Θράκης	University of Thrace
34. Πανεπιστήμιο Αιγαίου	University of Aegean
35. Πανεπιστήμιο Ιωαννίνων	University of Ioannina
36. Πανεπιστήμιο Πατρών	University of Patras
37. Πανεπιστήμιο Μακεδονίας	University of Macedonia
38. Πολυτεχνείο Κρήτης	Polytechnic School of Crete
39. Σιβιτανίδειος Δημόσια Σχολή Τεχνών και Επαγγελμάτων	Sivitanidios Technical School
40. Αιγινήτειο Νοσοκομείο	Eginitio Hospital
41. Αρεταίειο Νοσοκομείο	Areteio Hospital
42. Εθνικό Κέντρο Δημόσιας Διοίκησης	National Centre of Public Administration
43. Οργανισμός Διαχείρισης Δημοσίου Υλικού Α.Ε.	Public Material Management Organisation
44. Οργανισμός Γεωργικών Ασφαλίσεων	Farmers' Insurance Organisation
45. Οργανισμός Σχολικών Κτιρίων	School Building Organisation

46. Γενικό Επιτελείο Στρατού (1)	Army General Staff
47. Γενικό Επιτελείο Ναυτικού (1)	Navy General Staff
48. Γενικό Επιτελείο Αεροπορίας (1)	Airforce General Staff
49. Ελληνική Επιτροπή Ατομικής Ενέργειας	Greek Atomic Energy Commission
50. Γενική Γραμματεία Εκπαίδευσης Ενηλίκων	General Secretariat for Further Education

(1) Non-warlike materials covered by Annex V.

SPAIN

Presidencia del Gobierno	Office of the Prime Minister
Ministerio de Asuntos Exteriores	Ministry of Foreign Affairs
Ministerio de Justicia	Ministry of Justice
Ministerio de Defensa	Ministry of Defence
Ministerio de Hacienda	Ministry of Finance
Ministerio de Interior	Ministry of the Interior
Ministerio de Fomento	Ministry of Internal Development
Ministerio de Educación, Cultura y Deportes	Ministry of Education, Culture and Sport
Ministerio de Trabajo y Asuntos Sociales	Ministry of Labour and Social Affairs
Ministerio de Agricultura, Pesca y Alimentación	Ministry of Agriculture, Fisheries and Food
Ministerio de la Presidencia	Ministry of the Office of the Prime Minister
Ministerio de Administraciones Públicas	Ministry of Public Administration
Ministerio de Sanidad y Consumo	Ministry of Health and Consumer Affairs
Ministerio de Economía	Ministry of Economic Affairs
Ministerio de Medio Ambiente	Ministry of the Environment
Ministerio de Ciencia y Tecnología	Ministry of Science and Technology

FRANCE

1. **Ministries**

— Services du Premier ministre	— Office of the Prime Minister
— Ministère des affaires étrangères	— Ministry of Foreign Affairs
— Ministère des affaires sociales, du travail et de la solidarité	— Ministry of Social Affairs, Labour and Solidarity
— Ministère de l'agriculture, de l'alimentation, de la pêche et des affaires rurales	— Ministry of Agriculture, Food, Fisheries and Rural Affairs
— Ministère de la culture et de la communication	— Ministry of Culture and Communication
— Ministère de la défense (1)	— Ministry of Defence
— Ministère de l'écologie et du développement durable	— Ministry of Ecology and Sustainable Development
— Ministère de l'économie, des finances et de l'industrie	— Ministry of Economic Affairs, Finance and Industry

— Ministère de l'équipement, des transports, du logement, du tourisme et de la mer	— Ministry of Infrastructure, Transport, Housing, Tourism and the Sea
— Ministère de la fonction publique, de la réforme de l'Etat et de l'aménagement du territoire	— Ministry of the Civil Service, State Reform and Regional Planning
— Ministère de l'intérieur, de la sécurité intérieure et des libertés locales	— Ministry of the Interior, Internal Security and Local Freedoms
— Ministère de la justice	— Ministry of Justice
— Ministère de la jeunesse, de l'éducation nationale et de la recherche	— Ministry of Youth, Education and Research
— Ministère de l'outre mer	— Ministry of Overseas Territories
— Ministère de la santé, de la famille et des personnes handicapées	— Ministry of Health, the Family and Disabled Persons
— Ministère des sports	— Ministry of Sport

(1) Non-warlike materials.

2. **National public establishments**

— Académie de France à Rome	— Academy of France in Rome
— Académie de marine	— Naval Academy
— Académie des sciences d'outre mer	— Overseas Academy of Sciences
— Agence centrale des organismes de sécurité sociale (ACOSS)	— Central Agency for Social Security Bodies
— Agence nationale pour l'amélioration des conditions de travail (ANACT)	— National Agency for the Improvement of Working Conditions
— Agence nationale pour l'amélioration de l'habitat (ANAH)	— National Agency for the Improvement of the Habitat
— Agence nationale pour l'indemnisation des français d'outre mer (ANIFOM)	— National Agency for Compensation of French Overseas Nationals
— Assemblée permanente des chambres d'agriculture (APCA)	— Permanent Assembly of the Regional Chambers of Agriculture
— Bibliothèque nationale de France	— National Library of France
— Bibliothèque nationale et universitaire de Strasbourg	— National and University Library of Strasbourg
— Bibliothèque publique d'information	— Public Information Library
— Caisse des dépôts et consignations	— Deposits and Consignments Fund
— Caisse nationale des autoroutes (CNA)	— National Highways Fund
— Caisse nationale militaire de sécurité sociale (CNMSS)	— National Social Security Fund for the Military
— Centre des monuments nationaux (CMN)	— National Monuments Centre
— Caisse de garantie du logement locatif social	— Social Housing Guarantee Fund
— Casa de Velasquez	— Casa de Velázquez
— Centre d'enseignement zootechnique	— Centre for Zootechnical Studies
— Centre d'études du milieu et de pédagogie appliquée du ministère de l'agriculture	— Ministry of Agriculture's Centre for Environmental Studies and Applied Teaching
— Centre d'études supérieures de sécurité sociale	— Centre for Higher Social Security Studies

— Centres de formation professionnelle agricole	— Agricultural Training Centres
— Centre national d'art et de culture Georges Pompidou	— Georges Pompidou National Centre of Art and Culture
— Centre national de la cinématographie	— National Cinematography Centre
— Centre national d'études et de formation pour l'enfance inadaptée	— National Study and Training Centre for Professionals working with Children with Adaptation Difficulties
— Centre national d'études et d'expérimentation du machinisme agricole, du génie rural, des eaux et des forêts (CEMAGREF)	— National Institute for Agricultural and Environmental Engineering
— Centre national des lettres	— National Literary Arts Centre
— Centre national de documentation pédagogique	— National Teaching Documentation Centre
— Centre national des oeuvres universitaires et scolaires (CNOUS)	— National Centre for Assistance to School and University Students
— Centre hospitalier des Quinze Vingts	— Quinze Vingts Hospital
— Centre national de promotion rurale de Marmilhat	— Marmilhat National Rural Development Centre
— Centres d'éducation populaire et de sport (CREPS)	— Adult Education and Sports Centres
— Centres régionaux des œuvres universitaires (CROUS)	— Regional Centres for Assistance to University Students
— Centres régionaux de la propriété forestière	— Regional Forest Property Centres
— Centre de sécurité sociale des travailleurs migrants	— Social Security Centre for Migrant Workers
— Commission des opérations de bourse	— Stock Exchange Operations Commission
— Conseil supérieur de la pêche	— Fisheries Council
— Conservatoire de l'espace littoral et des rivages lacustres	— Coast and Lakeshore Conservation Agency
— Conservatoire national supérieur de musique de Paris	— Paris Higher National Music Conservatoire
— Conservatoire national supérieur de musique de Lyon	— Lyon Higher National Music Conservatoire
— Conservatoire national supérieur d'art dramatique	— National Drama School
— École centrale — Lyon	— National College of Engineering and Research, Lyon
— École centrale des arts et manufactures	— National College of Engineering and Science, Paris
— Ecole du Louvre	— Ecole du Louvre Art
— École française d'archéologie d'Athènes	— French School of Archaeology in Athens
— École française d'Extrême Orient	— French School of Far East Studies
— École française de Rome	— French School in Rome
— École des hautes études en sciences sociales	— College of Advanced Studies in Social Sciences
— École nationale d'administration	— National Public Administration College
— École nationale de l'aviation civile (ENAC)	— National Civil Aviation College
— École nationale des Chartes	— Chartres National College
— École nationale d'équitation	— National Equitation College
— École nationale du génie rural des eaux et des forêts (ENGREF)	— National College of Rural, Water and Forestry Engineering

— Écoles nationales d'ingénieurs	— National Engineering Colleges
— École nationale d'ingénieurs des techniques des industries agricoles et alimentaires	— National College for Agro Food Industry Engineers
— Écoles nationales d'ingénieurs des travaux agricoles	— National College of Agricultural Engineers
— Ecole nationale du génie de l'eau et de l'environnement de Strasbourg	— Strasbourg National College of Water and Environmental Engineering
— École nationale de la magistrature	— National College for the Judiciary
— Écoles nationales de la marine marchande	— National Merchant Navy Colleges
— École nationale de la santé publique (ENSP)	— National Public Health College
— École nationale de ski et d'alpinisme	— National Skiing and Mountaineering College
— École nationale supérieure agronomique — Montpellier	— Montpellier National Higher College of Agronomy
— École nationale supérieure agronomique — Rennes	— National Higher College of Agronomy, Rennes
— École nationale supérieure des arts décoratifs	— National Higher College of the Decorative Arts
— École nationale supérieure des arts et industries — Strasbourg	— National Higher College of Arts and Industries, Strasbourg
— École nationale supérieure des arts et industries textiles — Roubaix	— National Higher College of Arts and Textile Industries, Roubaix
— Écoles nationales supérieures d'arts et métiers	— National Higher Colleges of Engineering
— École nationale supérieure des beaux arts	— National Higher College of Fine Arts
— École nationale supérieure des bibliothécaires	— National Higher College for Librarians
— École nationale supérieure de céramique industrielle	— National Higher College of Industrial Ceramics
— École nationale supérieure de l'électronique et de ses applications (ENSEA)	— National Higher College of Electronics and Electrical Engineering
— École nationale supérieure des industries agricoles alimentaires	— National Higher College for the Agri Food Industries
— École nationale supérieure du paysage	— National Higher College of Landscape Design
— Écoles nationales vétérinaires	— National Colleges of Veterinary Medicine
— École nationale de voile	— National Sailing College
— Écoles normales nationales d'apprentissage	— National Teacher Training Colleges
— Écoles normales supérieures	— Higher Teacher Training Colleges
— École polytechnique	— Polytechnical College
— École technique professionnelle agricole et forestière de Meymac (Corrèze)	— Meymac Agricultural and Forrestry Training College (Corrèze)
— École de sylviculture — Crogny (Aube)	— Crogny Forrestry College (Aube)
— École de viticulture et d'oenologie de la Tour Blanche (Gironde)	— Tour Blanche College of Viticulture and Oenology (Gironde)
— École de viticulture — Avize (Marne)	— Avize Viticulture College (Marne)
— Hôpital national de Saint Maurice	— Saint Maurice National Hospital
— Établissement national des invalides de la marine (ENIM)	— National Social Security Institute for Disabled Sea Workers

— Établissement national de bienfaisance Koenigswarter	— Koenigswarter National Charitable Organisation
— Établissement de maîtrise d'ouvrage des travaux cul turels (EMOC)	— Corporation for Supervision of Work on State Owned Buildings of Cultural or Educational Interest
— Établissement public du musée et du domaine national de Versailles	— Public Corporation for the Museum and National Domain of Versailles
— Fondation Carnegie	— Carnegie Foundation
— Fondation Singer Polignac	— Singer Polignac Foundation
— Fonds d'action et de soutien pour l'intégration et la lutte contre les discriminations	— Action and Support Fund for Integration and the Fight against Discrimination
— Institut de l'élevage et de médecine vétérinaire des pays tropicaux (IEMVPT)	— Institute for Stockfarming and Veterinary Medicine in Tropical Countries
— Institut français d'archéologie orientale du Caire	— French Eastern Archaeology Institute in Cairo
— Institut français de l'environnement	— French Environmental Institute
— Institut géographique national	— National Geographical Institute
— Institut industriel du Nord	— Industrial Institute of the Nord Region
— Institut national agronomique de Paris Grignon	— Paris Grignon National Agronomics Institute,
— Institut national des appellations d'origine (INAO)	— National Institute for Designations of Origin
— Institut national d'astronomie et de géophysique (INAG)	— National Astronomy and Geophysics Institute
— Institut national de la consommation (INC)	— National Consumption Institute
— Institut national d'éducation populaire (INEP)	— National Adult Education Institute
— Institut national d'études démographiques (INED)	— National Institute of Demographic Studies
— Institut national des jeunes aveugles — Paris	— National Institute for Young Blind People, Paris
— Institut national des jeunes sourds — Bordeaux	— National Institute for Young Deaf People, Bordeaux
— Institut national des jeunes sourds — Chambéry	— National Institute for Young Deaf People, Chambéry
— Institut national des jeunes sourds — Metz	— National Institute for Young Deaf People, Metz
— Institut national des jeunes sourds — Paris	— National Institute for Young Deaf People, Paris
— Institut national du patrimoine	— French National Heritage Institute
— Institut national de physique nucléaire et de physique des particules (I.N2.P3)	— National Institute of Nuclear Physics and Particle Physics
— Institut national de la propriété industrielle	— National Intellectual Property Institute
— Institut national de recherches archéologiques préven tives	— National Institute for Preventive Archaeological Re search
— Institut national de recherche pédagogique (INRP)	— National Institute for Educational Research
— Institut national des sports et de l'éducation physique	— National Institute for Sport and Physical Education
— Instituts nationaux polytechniques	— National Polytechnical Colleges
— Instituts nationaux des sciences appliquées	— National Institutes of Applied Sciences
— Institut national supérieur de chimie industrielle de Rouen	— Rouen Higher National Institute of Industrial Chem istry

— Institut national de recherche en informatique et en automatique (INRIA)	— National Institute for Computer Science and Control Research
— Institut national de recherche sur les transports et leur sécurité (INRETS)	— National Institute for Transport and Safety Research
— Instituts régionaux d'administration	— Regional Public Administration Colleges
— Institut supérieur des matériaux et de la construction mécanique de Saint Ouen	— Saint Ouen Higher Institute of Materials and Mechan ical Construction
— Musée Auguste Rodin	— Auguste Rodin Museum
— Musée de l'armée	— Military Museum
— Musée Gustave Moreau	— Gustave Moreau Museum
— Musée du Louvre	— Louvre Museum
— Musée du quai Branly	— Quai Branly Museum
— Musée national de la marine	— Naval Museum
— Musée national J. J. Henner	— National J.J. Henner Museum
— Musée national de la Légion d'honneur	— National Museum of the Legion of Honour
— Muséum national d'histoire naturelle	— National Natural History Museum
— Office de coopération et d'accueil universitaire	— University Cooperation and Reception Office
— Office français de protection des réfugiés et apatrides	— French Office for the Protection of Refugees and Stateless Persons
— Office national de la chasse et de la faune sauvage	— National Office for Hunting and Wild Fauna
— Office national d'information sur les enseignements et les professions (ONISEP)	— National Office for Information on Higher Education and Careers
— Office des migrations internationales (OMI)	— International Migration Office
— Office universitaire et culturel français pour l'Algérie	— French University and Cultural Office for Algeria
— Palais de la découverte	— Discovery Museum
— Parcs nationaux	— National Parks
— Syndicat des transports parisiens d'Ile de France	— Ile de France and Paris Transport Authority
— Thermes nationaux — Aix les Bains	— National Thermal Baths at Aix les Bains

3. **Autre organisme public national Other national public body**

— Union des groupements d'achats publics (UGAP)	— Public Procurement Department

IRELAND

President's Establishment

Houses of the Oireachtas [Parliament] and European Parliament

Department of the Taoiseach [Prime Minister]

Central Statistics Office

Department of Finance

Office of the Comptroller and Auditor General

Office of the Revenue Commissioners

Office of Public Works

State Laboratory

Office of the Attorney General

Office of the Director of Public Prosecutions

Valuation Office

Civil Service Commission

Office of the Ombudsman

Chief State Solicitor's Office

Department of Justice, Equality and Law Reform

Courts Service

Prisons Service

Office of the Commissioners of Charitable Donations and Bequests

Department of the Environment and Local Government

Department of Education and Science

Department of Communications, Marine and Natural Resources

Department of Agriculture and Food

Department of Transport

Department of Health and Children

Department of Enterprise, Trade and Employment

Department of Arts, Sports and Tourism

Department of Defence

Department of Foreign Affairs

Department of Social and Family Affairs

Department of Community, Rural and Gaeltacht [Gaelic speaking regions] Affairs

Arts Council

National Gallery.

ITALY

1. **Purchasing bodies**

1. Presidenza del Consiglio dei Ministri	Presidency of the Council of Ministers
2. Ministero degli Affari Esteri	Ministry of Foreign Affairs
3. Ministero dell'Interno	Ministry of Interior
4. Ministero della Giustizia	Ministry of Justice
5. Ministero della Difesa	Ministry of Defence [1]
6. Ministero dell'Economia e delle Finanze	Ministry of Economy and Finance (former Ministry of Treasury and Ministry of Finance)
7. Ministero delle Attività Produttive	Ministry of Productive Activities (former Ministry of In dustry, trade, handicraft tourism and Ministry of foreign trade)
8. Ministero delle Comunicazioni	Ministry of Communications (former Ministry of posts and telecommunications)
9. Ministero delle Politiche agricole e forestali	Ministry of Agricultural and Forestal Policies (former Ministry of agricultural resources)
10. Ministero dell'Ambiente e tutela del Territorio	Ministry of Environment and defence of Territory (former Ministry of environment)
11. Ministero delle Infrastrutture e Transporti	Ministry of Infrastructures and Transports (former Minis try of transports and Ministry of Public works)
12. Ministero del Lavoro e delle politiche sociali	Ministry of Employment and social policies (former Min istry of employment and social security)
13. Ministero della Salute	Ministry of Health
14. Ministero dell'Istruzione, Università e Ricerca	Ministry of Education, University and scientific Research
15. Ministero per i Beni e le attività culturali	Ministry for Cultural heritage and activities

[1] Non-warlike materials.

2. **Other national public body**

ONSIP SPA (Concessionnaire of Public Informatic Ser vices) [1]	CONSIP (Concessionaria Servizi Informatici Pubblici)

[1] Acts as the central purchasing entity for all the Ministries and, at request, for other public entities on the basis of a concession or framework agreement.

LUXEMBOURG

1. Ministère de l'Agriculture, de la Viticulture et du Développement rural: Administration des services techniques de l'agriculture.	1. Ministry of Agriculture, Viticulture and Rural Devel opment: Administration of Agricultural Technical Departments
2. Ministère des Affaires étrangères, du Commerce ex térieur, de la Coopération et de la Défense: Armée.	2. Ministry of Foreign Affairs, Foreign Trade, Coopera tion and Defence: Army
3. Ministère de l'Education nationale, de la Formation professionnelle et des Sports: Lycées d'enseignement secondaire et d'enseignement secondaire technique.	3. Ministry of Education, Vocational Training and Sport: Secondary Schools and Secondary Technical Schools
4. Ministère de l'Environnement: Administration de l'en vironnement.	4. Ministry of the Environment: Environment Admi nistration
5. Ministère d'Etat, département des Communications: Entreprise des P et T (Postes seulement).	5. Ministry of the State, Communications Department: Postal Services and Telecommunications Company (Post division only)
6. Ministère de la Famille, de la Solidarité sociale et de la Jeunesse: Maisons de retraite de l'Etat, Homes d'enfants.	6. Ministry of the Family, Social Solidarity and Youth: State retirement homes, children's homes

7. Ministère de la Fonction publique et de la Réforme administrative: Centre informatique de l'Etat, Service central des imprimés et des fournitures de bureau de l'Etat.

8. Ministère de la Justice: Etablissements pénitentiaires.

9. Ministère de l'Intérieur: Police grand ducale, Service national de la protection civile.

10. Ministère des Travaux publics: Administration des bâtiments publics; Administration des ponts et chaussées.

7. Ministry of the Civil Service and Administrative Re form: State Computer Science Centre, Central De partment for State Printed Matter and Office Sup plies

8. Ministry of Justice: Penitentiary Institutions

9. Ministry of the Interior: National Police Service, National Civil Protection Office

10. Ministry of Public Works: Public Buildings Ad ministration; Bridges and Roads Administration

NETHERLANDS

Ministerie van Algemene Zaken (Ministry of General Affairs)

— Bestuursdepartement (Central policy and staff departments)

— Bureau van de Wetenschappelijke Raad voor het Regeringsbeleid (Advisory Council on Government Policy)

— Rijksvoorlichtingsdienst: (The Netherlands Government Information Service)

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Ministry of the Interior)

— Bestuursdepartement (Central policy and staff departments)

— Agentschap Informatievoorziening Overheidspersoneel (IVOP) (Agency for Government Personnal Information)

— Centrale Archiefselectiedienst (CAS) (Central Records Selection Service)

— Algemene Inlichtingen en Veiligheidsdienst (AIVD) (General Intelligence and Security Service)

— Beheerorganisatie GBA (Personnel Records and Travel Documents Agency)

— Organisatie Informatie en communicatietechnologie OOV (ITO) (Information and Communication Technology Organisation)

— Korps Landelijke Politiediensten (National Police Services Agency)

Ministerie van Buitenlandse Zaken (Ministry of Foreign Affairs)

— Directoraat Generaal Regiobeleid en Consulaire Zaken (DGRC) (Directorate General for Regional Policy and Consular Affairs)

— Directoraat Generaal Politieke Zaken (DGPZ) (Directorate General for Political Affairs)

— Directoraat Generaal Internationale Samenwerking (DGIS) (Directorate General for International Cooperation)

— Directoraat Generaal Europese Samenwerking (DGES) (Directorate General for European Cooperation)

— Centrum tot Bevordering van de Import uit Ontwikkelingslanden (CBI) (Centre for the Promotion of Imports from Developing Countries)

— Centrale diensten ressorterend onder P/PlvS (support services falling under the Secretary General and Deputy Secretary General)

— Buitenlandse Posten (ieder afzonderlijk) (the various Foreign Missions)

Ministerie van Defensie (Ministry of Defence)

— Bestuursdepartement (Central policy and staff departments)

— Staf Defensie Interservice Commando (DICO) (Staff Defence Interservice Command for Support Services)

— Defensie Telematica Organisatie (DTO) (Defence Telematics Organisation)

— Centrale directie van de Dienst Gebouwen, Werken en Terreinen (Defence Infrastructure Agence, Central Directorate)

— De afzonderlijke regionale directies van de Dienst Gebouwen, Werken en Terreinen (Defence Infrastructure Agency, Regional Directorates)

— Directie Materieel Koninklijke Marine (Directorate of Material Royal Netherlands Navy)

— Directie Materieel Koninklijke Landmacht — Directorate of Material Royal Netherlands Army)

— Directie Materieel Koninklijke Luchtmacht (Directorate of Material Royal Netherlands Air Force)

— Landelijk Bevoorradingsbedrijf Koninklijke Landmacht (LBBKL) (Royal Netherlands Army National Supply Agency)

— Defensie Pijpleiding Organisatie (DPO) (Defence Pipeline Organisation)

— Logistiek Centrum Koninklijke Luchtmacht (Logistic Centre Royal Netherlands Air Force)

— Koninklijke Marine, Marinebedrijf (Royal Netherlands Navy, Maintenance Esthablishment)

Ministerie van Economische Zaken (Ministry of Economic Affairs)

— Bestuursdepartement (Central policy and staff departments)

— Centraal Bureau voor de Statistiek (CBS) (Netherlands Central Bureau of Statistics)

— Centraal Planbureau (CPB) (Central Plan Bureau)

— Bureau voor de Industriële Eigendom (BIE) (Industrial Property Office)

— Senter (Senter)

— Staatstoezicht op de Mijnen (SodM) (State Supervision of Mines)

— Nederlandse Mededingingsautoriteit (NMa) (Netherlands Competition Authority)

— Economische Voorlichtingsdienst (EVD) (Netherlands Foreign Trade Agency)

— Nederlandse Onderneming voor Energie en Milieu BV (Novem) (Agency for Energy and Environment)

— Agentschap Telecom (Telecom Agency)

Ministerie van Financiën (Ministry of Finance)

— Bestuursdepartement (Central policy and staff departments)

— Belastingdienst Automatiseringscentrum (Tax and Custom Computer and Software Centre)

— Belastingdienst (Tax and Customs Administration)

  — de afzonderlijke Directies der Rijksbelastingen (the various Divisions of the Tax and Customs Administration throughout the Netherlands)

  — Fiscale Inlichtingen en Opsporingsdienst (incl. Economische Controle dienst (ECD)) (Fiscal Information and Investigation Service (the Economic Investigation Service included))

  — Belastingdienst Opleidingen (Tax and Customs Training Centre)

— Dienst der Domeinen (State Property Service)

Ministerie van Justitie (Ministry of Justice)

— Bestuursdepartement (Central policy and staff departments)

— Dienst Justitiële Inrichtingen (Correctional Institutions Agency)

— Raad voor de Kinderbescherming (Child Care and Protection Agency)

— Centraal Justitie Incasso Bureau (Central Fine Collection Agency)

— Openbaar Ministerie (Public Prosecution Service)

— Immigratie en Naturalisatiedienst (Immigration and Naturalisation Service)

— Nederlands Forensisch Instituut (Netherlands Forensic Institute)

— Raad voor de Rechtspraak (Judicial Management and Advisory Board)

Ministerie van Landbouw, Natuurbeheer en Visserij (Ministry of Agriculture, Nature Management and Fish eries)

— Bestuursdepartement (Central policy and staff departments)

— Agentschap Landelijke Service bij Regelingen (LASER) (National Service for the Implementation of Regulations (Agency))

— Agentschap Plantenziekte kundige Dienst (PD) (Plant Protection Service (Agency))

— Algemene Inspectiedienst (AID) (General Inspection Service)

— De afzonderlijke Regionale Beleidsdirecties (Regional Policy departments)

— Agentschap Bureau Heffingen (Levies Office (Agency))

— Dienst Landelijk Gebied (DLG) (Government Service for Sustainable Rural Development)

— De afzonderlijke Regionale Beleidsdirecties

Ministerie van Onderwijs, Cultuur en Wetenschappen (Ministry of Education, Culture and Science)

— Bestuursdepartement (Central policy and staff departments)

— Inspectie van het Onderwijs (Inspectorate of Education)

— Inspectie Cultuurbezit (Inspectorate of cultural heritage)

— Centrale Financiën Instellingen (Central Funding of Institutions Agency)

— Nationaal archief (National Archives)

— Rijksdienst voor de archeologie (State inspectorate for archaeology)

— Rijksarchiefinspectie (Public Records Inspectorate)

— Adviesraad voor Wetenschaps en Technologiebeleid (Advisory Council for Science and Technology Policy)

— Onderwijsraad (Education Council)

— Rijksinstituut voor Oorlogsdocumentatie

— Instituut Collectie Nederland (Netherlands Institute for Cultural Heritage)

— Raad voor Cultuur (Council for Culture)

— Rijksdienst voor de Monumentenzorg (Netherlands Department for Conservation of Monuments)

— Rijksdienst Oudheidkundig Bodemonderzoek (National Service for archaeological heritage)

Ministerie van Sociale Zaken en Werkgelegenheid (Ministry of Social Affairs and Employment)

— Bestuursdepartement (Central policy and staff departments)

Ministerie van Verkeer en Waterstaat (Ministry of Transport, Public Works and Watermanagement)

— Bestuursdepartement (Central policy and staff departments)

— Directoraat Generaal Luchtvaart (Directorate General for Civil Aviation)

— Directoraat Generaal Goederenvervoer (Directorate General for Freight Transport)

— Directoraat Generaal Personenvervoer — Directorate General for Passenger Transport)

— Directoraat Generaal Rijkswaterstaat (Directorate General of Public Works and Water Management)

— Hoofdkantoor Directoraat Generaal Rijks Waterstaat (Public Works and Water Management Head Office)

— De afzonderlijke regionale directies van Rijkswaterstaat (Each individual regional department of the Directorate General of Public Works and Water Management)

— De afzonderlijke specialistische diensten van Rijkswaterstaat (Each individual specialist service of the Directorate General of Public Works and Water Management)

— Directoraat Generaal Water (Directorate General for Water Affairs)

— Inspecteur Generaal, Inspectie Verkeer en Waterstaat (Inspector General, Transport and Water Management Inspecto rate)

— Divisie Luchtvaart van de Inspecteur Generaal, Inspectie Verkeer en Waterstaat (Civil Aviation Authority of the Inspector General, Transport and Water Management Inspectorate)

— Divisie Vervoer van de Inspecteur Generaal, Inspectie Verkeer en Waterstaat (Transport Inspectorate of the Inspector General, Transport and Water Management Inspectorate)

— Divisie Scheepvaart van de Inspecteur Generaal, Inspectie Verkeer en Waterstaat (Shipping Inspectorate Netherlands of the Inspector General, Transport and Water Management Inspectorate)

— Centrale Diensten (Central Services)

— Koninklijk Nederlands Meteorologisch Instituut (KNMI) (Royal Netherlands Meteorological Institute)

Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Ministry for Housing, Spatial Planning and the Environment)

— Bestuursdepartement (Central policy and staff departments)

— Directoraat Generaal Wonen (Directorate General for Housing)

— Directoraat Generaal Ruimte (Directorate General for Spatial Policy)

— Directoraat General Milieubeheer (Directorate General for Environmental Protection)

— Rijksgebouwendienst (Government Buildings Agency)

— VROM inspectie (Inspectorate)

Ministerie van Volksgezondheid, Welzijn en Sport (Ministry of Health, Welfare Sports)

— Bestuursdepartement (Central policy and staff departments)

— Inspectie Gezondheidsbescherming, Waren en Veterinaire Zaken (Inspectorate for Health Protection and Veterinary Public Health)

— Inspectie Gezondheidszorg (Health Care Inspectorate)

— Inspectie Jeugdhulpverlening en Jeugdbescherming (Youth Services and Youth Protection Inspectorate)

— Rijksinstituut voor de Volksgezondheid en Milieu (RIVM) (National Institute of Public Health and Environment)

— Sociaal en Cultureel Planbureau (Social and Cultural Planning Office)

— Agentschap t.b.v. het College ter Beoordeling van Geneesmiddelen (Medicines Evaluation Board Agency)

Tweede Kamer der Staten Generaal (Second Chamber of the States General)

Eerste Kamer der Staten Generaal (First Chamber of the States General)

Raad van State (Council of State)

Algemene Rekenkamer (Netherlands Court of Audit)

Nationale Ombudsman (National Ombudsman)

Kanselarij der Nederlandse Orden (Chancellery of the Netherlands Order)

Kabinet der Koningin (Queen's Cabinet)

AUSTRIA

1. Bundeskanzleramt	Federal Chancellery
2. Bundesministerium für auswärtige Angelegenheiten	Federal Ministry for Foreign Affairs
3. Bundesministerium für Bildung, Wissenschaft und Kultur	Federal Ministry for Education, Science and Culture
4. Bundesministerium für Finanzen	Federal Ministry of Finance
5. Bundesministerium für Gesundheit und Frauen	Federal Ministry of Health and Women
6. Bundesministerium für Inneres	Federal Ministry of Internal Affairs
7. Bundesministerium für Justiz	Federal Ministry of Justice
8. Bundesministerium für Landesverteidigung	Federal Ministry of Defence
9. Bundesministerium für Land und Forstwirtschaft, Umwelt und Wasserwirtschaft	Federal Ministry for Agriculture and Forestry, the Environment and Water Management
10. Bundesministerium für soziale Sicherheit, Generationen und Konsumentenschutz	Federal Ministry for Social Security, Generations and Consumer Protection
11. Bundesministerium für Verkehr, Innovation und Technologie	Federal Ministry for Transport, Innovation and Technology
12. Bundesministerium für Wirtschaft und Arbeit	Federal Ministry for Economic Affairs and Employment
13. Bundesamt für Eich und Vermessungswesen	Federal Office for Calibration and Measurement
14. Österreichische Forschungs und Prüfzentrum Arsenal Gesellschaft m.b.H	Austrian Research and Test Centre Arsenal Ltd
15. Bundesprüfanstalt für Kraftfahrzeuge	Federal Testing Institute for Automobiles
16. Bundesbeschaffung G.m.b.H	Federal Procurement Ltd
17. Bundesrechenzentrum G.m.b.H	Federal Data Processing Centre Ltd

PORTUGAL

— Presidência do Conselho de Ministros;	Presidency of the Council of Ministers
— Ministério das Finanças;	Ministry of Finance
— Ministério da Defesa Nacional; ([1])	Ministry of Defence

— Ministério dos Negócios Estrangeiros e das Comunidades Portuguesas;	Ministry of Foreign Affairs and Portuguese Communities
— Ministério da Administração Interna;	Ministry of Internal Affairs
— Ministério da Justiça;	Ministry of Justice
— Ministério da Economia;	Ministry of Economy
— Ministério da Agricultura, Desenvolvimento Rural e Pescas;	Ministry of Agriculture, Rural Development and Fishing
— Ministério da Educação;	Ministry of Education
— Ministério da Ciência e do Ensino Superior;	Ministry of Science and University Education
— Ministério da Cultura;	Ministry of Culture
— Ministério da Saúde;	Ministry of Health
— Ministério da Segurança Social e do Trabalho;	Ministry of Social Security and Labour
— Ministério das Obras Públicas, Transportes e Habitação;	Ministry of Public Works, Transports and Housing
— Ministério das Cidades, Ordenamento do Território e Ambiente.	Ministry of Cities, Land Management and Environment

(1) Non-warlike materials covered by Annex V.

FINLAND

OIKEUSKANSLERINVIRASTO – JUSTITIEKANSLERSÄMBETET	OFFICE OF THE CHANCELLOR OF JUSTICE
KAUPPA JA TEOLLISUUSMINISTERIÖ – HANDELS OCH INDUSTRIMINISTERIET	MINISTRY OF TRADE AND INDUSTRY
Kuluttajavirasto – Konsumentverket	Finnish Consumer Agency
Kilpailuvirasto – Konkurrensverket	Finnish Competition Authority
Kuluttajavalituslautakunta – Konsumentklagonämnden	Consumer Complaint Board
Patentti ja rekisterihallitus – Patent och registerstyrelsen	National Board of Patents and Registration
LIIKENNE JA VIESTINTÄMINISTERIÖ – KOMMUNIKATIONSMINISTERIET	MINISTRY OF TRANSPORT AND COMMUNICATIONS
Viestintävirasto – Kommunikationsverket	Finnish Communications Regulatory Authority
MAA JA METSÄTALOUSMINISTERIÖ – JORD OCH SKOGSBRUKSMINISTERIET	MINISTRY OF AGRICULTURE AND FORESTRY
Elintarvikevirasto – Livsmedelsverket	National Food Agency
Maanmittauslaitos – Lantmäteriverket	National Land Survey of Finland
OIKEUSMINISTERIÖ – JUSTITIEMINISTERIET	MINISTRY OF JUSTICE
Tietosuojavaltuutetun toimisto – Dataombudsmannens byrå	Office of the Data Protection Ombudsman
Tuomioistuimet – domstolar	Courts of Law
Korkein oikeus – Högsta domstolen	Supreme Court
Korkein hallinto oikeus – Högsta förvaltningsdomstolen	Supreme Administrative Court
Hovioikeudet – hovrätter	Courts of Appeal
Käräjäoikeudet – tingsrätter	District Courts
Hallinto oikeudet –förvaltningsdomstolar	Administrative Courts

Markkinaoikeus Marknadsdomstolen	Market Court
Työtuomioistuin – Arbetsdomstolen	Labour Court
Vakuutusoikeus – Försäkringsdomstolen	Insurance Court
Vankeinhoitolaitos – Fångvårdsväsendet	Prison Service
OPETUSMINISTERIÖ – UNDERVISNINGSMINISTERIET	MINISTRY OF EDUCATION
Opetushallitus – Utbildningsstyrelsen	National Board of Education
Valtion elokuvatarkastamo – Statens filmgranskningsbyrå	Finnish Board of Film Classification
PUOLUSTUSMINISTERIÖ – FÖRSVARSMINISTERIET	MINISTRY OF DEFENCE
Puolustusvoimat (1) – Försvarsmakten	Finnish Defence Forces
SISÄASIAINMINISTERIÖ – INRIKESMINISTERIET	MINISTRY OF THE INTERIOR
Väestörekisterikeskus – Befolkningsregistercentralen	Population Register Centre
Keskusrikospoliisi – Centralkriminalpolisen	National Bureau of Investigation
Liikkuva poliisi – Rörliga polisen	National Traffic Police
Rajavartiolaitos (1) – Gränsbevakningsväsendet	Frontier Guard
SOSIAALI JA TERVEYSMINISTERIÖ	MINISTRY OF SOCIAL AFFAIRS AND HEALTH
Työttömyysturvalautakunta – Arbetslöshetsnämnden	Unemployment Appeal Board
Tarkastuslautakunta – Prövningsnämnden	Appeal Tribunal
Lääkelaitos – Läkemedelsverket	National Agency for Medicines
Terveydenhuollon oikeusturvakeskus – Rättsskyddscentralen för hälsovården	National Authority for Medicolegal Affairs
Tapaturmavirasto – Olycksfallsverket	State Accident Compensation Office
Säteilyturvakeskus – Strålsäkerhetscentralen	Radiation and Nuclear Safety Authority
TYÖMINISTERIÖ – ARBETSMINISTERIET	MINISTRY OF LABOUR
Valtakunnansovittelijain toimisto – Riksförlikningsmännens byrå	National Conciliators' Office
Valtion turvapaikanhakijoiden vastaanottokeskukset – Statliga förläggningar för asylsökande	Reception Centres
Työneuvosto – Arbetsrådet i Finland	Labour Council
ULKOASIAINMINISTERIÖ – UTRIKESMINISTERIET	MINISTRY FOR FOREIGN AFFAIRS
VALTIOVARAINMINISTERIÖ – FINANSMINISTERIET	MINISTRY OF FINANCE
Valtiontalouden tarkastusvirasto – Statens revisionsverk	State Audit Office
Valtiokonttori – Statskontoret	State Treasury
Valtion työmarkkinalaitos – Statens arbetsmarknadsverk	State Employer's Office
Verohallinto – Skatteförvaltningen	Tax Administration
Tullilaitos – Tullverket	Customs
Valtion vakuusrahasto – Statsgarantifonden	Government Guarantee Fund
YMPÄRISTÖMINISTERIÖ – MILJÖMINISTERIET	MINISTRY OF ENVIRONMENT

(1) Non-warlike materials.

SWEDEN

A	
Akademien för de fria konsterna	Royal Academy of Fine Arts
Alkoholinspektionen	National Alcohol Board
Alkoholsortimentsnämnden	Alcoholic Beverages Product Range Board
Allmänna pensionsfonden	National Swedish Pension Fund
Allmänna reklamationsnämnd	National Board for Consumer Complaints
Ambassader	Embassies
Arbetsdomstolen	Labour Court
Arbetsgivarverk, statens	National Agency for Government Employers
Arbetslivsfonden	Working Lives Fund
Arbetslivsinstitutet	National Institute for Working Life
Arbetsmarknadsstyrelsen	National Labour Market Board
Arbetsmiljöfonden	Work Environment Fund
Arbetsmiljöinstitutet	National Institute of Occupational Health
Arbetsmiljönämnd, statens	Board of Occupational Safety and Health for Government Employees
Arbetsmiljöverket	Swedish Work Environment Authority
Arkitekturmuseet	Swedish Museum of Architecture
Arrendenämnder (12)	Regional Tenancies Tribunals (12)
B	
Banverket	National Rail Administration
Barnombudsmannen	Office of the Children's Ombudsman
Beredning för utvärdering av medicinsk metodik, statens	Swedish Council on Technology Assessment in Health Care
Besvärsnämnden för rättshjälp	Legal Aid Appeals Commission
Biografbyrå, statens	National Board of Film Censors
Biografiskt lexikon, svenskt	Dictionary of Swedish Biography
Birgittaskolan	Birgitta School
Blekinge tekniska högskola	Blekinge Institute of Technology
Bokföringsnämnden	Swedish Accounting Standards Board
Bostadskreditnämnd, statens (BKN)	National Housing Credit Guarantee Board
Boverket	National Board of Housing, Building and Planning
Brottsförebyggande rådet	National Council for Crime Prevention
Brottsoffermyndigheten	Criminal Victim Compensation and Support Authority
Brottsskadenämnden	Criminal Injuries Compensation Board
Byggforskningsrådet	Council for Building Research

C	
Centrala försöksdjursnämnden	Central Committee for Laboratory Animals
Centrala studiestödsnämnden	National Board of Student Aid
Centralnämnden för fastighetsdata	Central Board for Real Estate Data
D	
Danshögskolan	University Collage of Dance
Datainspektionen	Data Inspection Board
Delegationen för utländska investeringar Sverige, ISA	Invest in Sweden Agency
Departementen	Ministries (Government Departments)
Domstolsverket	National Courts Administration
Dramatiska institutet	University Collage of Film, Radio, Television and Theatre
E	
Ekeskolan	Eke School
Ekobrottsmyndigheten	Economic Crimes Bureau
Ekonomistyrningsverket	National Financial Management Authority
Elsäkerhetsverket	National Electrical Safety Board
Energimyndigheten, statens	Swedish National Energy Administration
EU/FoU rådet	Swedish EU R&D Council
Exportkreditnämnden	Export Credits Guarantee Board
Exportråd, Sveriges	Swedish Trade Council
F	
Fastighetsmäklarnämnden	Board of Supervision of Estate Agents
Fastighetsverk, statens	National Property Board
Fideikommissnämnden	Entailed Estates Council
Finansinspektionen	Financial Supervisory Authority
Fiskeriverket	National Board of Fisheries
Flygmedicincentrum	Aero Medical Centre
Flygtekniska försöksanstalten	Aeronautical Research Institute
Folkhälsoinstitut,statens	Institute of Public Health
Fonden för fukt och mögelskador	National Organisation for Aid to Owners of Private Small Houses
Forskningsrådet för miljö, areella näringar och samhälls byggande, Formas	Swedish Research Council for Environment, Agricultural Sciences and Spatial Planning
Fortifikationsverket	National Fortifications Administration
Förlikningsmannaexpedition, statens	National Conciliators' Office
Försvarets forskningsanstalt	National Defence Research Establishment
Försvarets materielverk	Defence Matériel Administration
Försvarets radioanstalt	National Defence Radio Establishment
Försvarshistoriska museer, statens	National Swedish Museums of Military History

Försvarshögskolan	National Defence College
Försvarsmakten	Swedish Armed Forces
Försäkringskassorna (21)	Social Insurance Offices (21)
G	
Genteknikнämnden	Swedish Gene Technology Advisory Board
Geologiska undersökning, Sveriges	Geological Survey of Sweden
Geotekniska institut, statens	Swedish Geotechnical Institute
Giftinformationscentralen	Swedish Poisons Information Centre
Glesbygdsverket	National Rural Area Development Agency
Grafiska institutet och institutet för högre kommunikation och reklamutbildning	Graphic Institute and the Graduate School of Communications
Granskningsnämnden för radio och TV	Swedish Broadcasting Comission
Göteborgs universitet	Göteborg University
H	
Handelsflottans kultur och fritidsråd	Swedish Government Seamen's Service
Handelsflottans pensionsanstalt	Merchant Pensions Institute
Handikappombudsmannen	Office of the Disability Ombudsman
Handikappråd, statens	National Council for the Disabled
Haverikommission, statens	Board of Accident Investigation
Historiska museer, statens	National Historical Museums
Hjälpmedelsinstitutet	Swedish Handicap Institute
Hovrätterna (6)	Courts of Appeal (6)
Hyresnämnder (12)	Regional Rent Tribunals (12)
Häktena (30)	Remand Prisons (30)
Hälso och sjukvårdens ansvarsnämnd	Committee on Medical Responsibility
Högskolan Dalarna	Dalarna University College
Högskolan i Borås	University College of Borås
Högskolan i Gävle	University College of Gävle
Högskolan i Halmstad	University College of Halmstad
Högskolan i Kalmar	University College of Kalmar
Högskolan i Karlskrona/Ronneby	University College of Karlskrona/Ronneby
Högskolan i Kristianstad	Kristianstad University College
Högskolan i Skövde	University College of Skövde
Högskolan i Trollhättan/Uddevalla	University College of Trollhättan/Uddevalla
Högskolan på Gotland	Gotland University College
Högskoleverket	National Agency for Higher Education
Högsta domstolen	Supreme Court

I	
Idrottshögskolan i Stockholm	Stockholm University College of Physical Education and Sports
Inspektionen för strategiska produkter	National Inspectorate of Strategic Products
Institut för byggnadsforskning, statens	Council for Building Research
Institut för ekologisk hållbarhet, statens	Swedish Institute for Ecological Sustainability
Institut för kommunikationsanalys, statens	Swedish Instiute for Transport and Communications Analysis
Institut för psykosocial miljömedicin, statens	National Institute for Psycho Social Factors and Health
Institut för särskilt utbildningsstöd	Swedish National Attendants' Service
Institutet för arbetsmarknadspolitisk utvärdering	Office of Labour Market Policy Evaluation
Institutet för rymdfysik	Swedish Institute of Space Physics
Institutionsstyrelse, Statens	National Board of Institutional Care
Insättnigsgarantinämnden	Deposit Guarantee Board
Integrationsverket	Swedish Integration Board
Internationella adoptionsfrågor, Statens nämnd för	National Board for Intercountry Adoptions
Internationella programkontoret för utbildningsområdet	International Programme Office for Education and Train ing
J	
Jordbruksverk, statens	Swedish Board of Agriculture
Justitiekanslern	Office of the Chancellor of Justice
Jämställdhetsombudsmannen	Office of the Equal Opportunities Ombudsman
K	
Kammarkollegiet	Legal, Financial and Administrative Services Agency
Kammarrätterna (4)	Administrative Courts of Appeal (4)
Karlstads universitet	Karlstad University
Karolinska Institutet	Karolinska Institutet
Kemikalieinspektionen	National Chemicals Inspectorate
Kommerskollegium	National Board of Trade
Koncessionsnämnden för miljöskydd	National Franchise Board for Environment Protection
Konjunkturinstitutet	National Institute of Economic Research
Konkurrensverket	Swedish Competition Authority
Konstfack	College of Arts, Crafts and Design
Konsthögskolan	College of Fine Arts
Konstmuseer, statens	National Art Museums
Konstnärsnämnden	Arts Grants Committee
Konstråd, statens	National Art Council
Konsulat	Consulates
Konsumentverket	Swedish Consumer Agency
Kriminaltekniska laboratorium, statens	National Laboratory of Forensic Science
Kriminalvårdens regionkanslier (4)	Correctional Region Offices (4)

Kriminalvårdsanstalterna (35)	National/ Local Institutions (35)
Kriminalvårdsstyrelsen	National Prison and Probation Administration
Kristinaskolan	Kristina School
Kronofogdemyndigheterna (10)	Enforcement Services (10)
Kulturråd, statens	National Council for Cultural Affairs
Kungl. Biblioteket	Royal Library
Kungl. Konsthögskolan	Royal University Collage of Fine Arts
Kungl. Musikhögskolan	Royal University Collage of Music in Stockholm
Kungl. Tekniska högskolan	Royal Institute of Technology
Kustbevakningen	Swedish Coast Guard
Kvalitets och kompetensråd, statens	National Council for Quality and Development
Kärnkraftinspektion, statens	Swedish Nuclear Power Inspectorate
L	
Lagrådet	Council on Legislation
Lantbruksuniveritet, Sveriges	Swedish University of Agricultural Sciences
Lantmäteriverket	National Land Survey
Linköpings universitet	Linköping University
Livrustkammaren, Skoklosters slott och Hallwylska museet	Royal Armoury
Livsmedelsverk, statens	National Food Administration
Ljud och bildarkiv, statens	National Archive of Recorded Sound and Moving Images
Lotteriinspektionen	National Gaming Board
Luftfartsverket	Civil Aviation Administration
Luleå tekniska universitet	Luleå University of Technology
Lunds universitet	Lund University
Läkemedelsverket	Medical Products Agency
Länsarbetsnämnderna (20)	County Labour Boards (20)
Länsrätterna (23)	County Administrative Courts (23)
Länsstyrelserna (21)	County Administrative Boards (21)
Lärarhögskolan i Stockholm	Stockholm Institute of Education
M	
Malmö högskola	Malmö University
Manillaskolan	Manilla School, Special School for Deaf and Hard of Hearing Children
Marknadsdomstolen	Market Court
Medlingsinstitutet	National Mediation Office
Meteorologiska och hydrologiska institut, Sveriges	Swedish Meteorological and Hydrological Institute
Migrationsverket	Swedish Migration Board
Militärhögskolor	Military Academies
Mitthögskolan	Mid Sweden University
Moderna museet	Modern Museum

Museer för världskultur, statens	National Museums of World Culture
Musiksamlingar, statens	Music Library of Sweden
Myndigheten för kvalificerad yrkesutbildning	Swedish Agency for Advanced Vocational Education
Myndigheten för Sveriges nätuniversitet	Swedish Agency for Distance Education
Mälardalens högskola	University Collage of Mälardalen
N	
Nationalmuseum	National Museum of Fine Arts
Nationellt centrum för flexibelt lärande	National Agency for Flexible Learning
Naturhistoriska riksmuseet	Museum of Natural History
Naturvårdsverket	Swedish Environmental Protection Agency
Nordiska Afrikainstitutet	Nordic Africa Institute
Notarienämnden	Recorders Committee
Nämnden för offentlig upphandling	National Board for Public Procurement
O	
Ombudsmannen mot diskriminering på grundav sexuell läggning	Office of the Ombudsman against Discrimination on the grounds of Sexual Orientation
Ombudsmannen mot etnisk diskriminering	Office of the Ethnic Discrimination Ombudsman
Operahögskolan i Stockholm	University Collage of Opera, Stockholm
P	
Patent och registreringsverket	Patents and Registration Office
Patentbesvärsrätten	Court of Patent Appeals
Pensionsverk, statens	The National Government Employee Pensions Board
Person och adressregisternämnd, statens	Co ordinated Population and Address Register
Pliktverk, Totalförsvarets	National Service Administration
Polarforskningssekretariatet	Swedish Polar Research Secretariat
Polismyndigheter (21)	Police authorities (21)
Post och telestyrelsen	National Post and Telecoms Agency
Premiepensionsmyndigheten	Premium Pension Authority
Presstödsnämnden	Press Subsidies Council
R	
Radio och TV verket	Radio and TV Authority
Regeringskansliet	Government Offices
Regeringsrätten	Supreme Administrative Court
Revisorsnämnden	Supervisory Board of Public Accountants
Riksantikvarieämbetet	Central Board of National Antiquities
Riksarkivet	National Archives
Riksbanken	Bank of Sweden

Riksdagens förvaltningskontor	Administration Department of the Swedish Parliament
Riksdagens ombudsmän	The Parliamentary Ombudsmen
Riksdagens revisorer	The Parliamentary Auditors
Riksförsäkringsverket	National Social Insurance Board
Riksgäldskontoret	National Debt Office
Rikspolisstyrelsen	National Police Board
Riksrevisionsverket	National Audit Bureau
Riksskatteverket	National Tax Board
Rikstrafiken	The National Public Transport Agency
Riksutställningar, Stiftelsen	Travelling Exhibitions Service
Riksåklagaren	Office of the Prosecutor General
Rymdstyrelsen	National Space Board
Råd för byggnadsforskning, statens	Council for Building Research
Rådet för grundläggande högskoleutbildning	Council for Renewal of Undergraduate Education
Räddningsverk, statens	Swedish Rescue Services Agency
Rättshjälpsmyndigheten	National Legal Aid Authority
Rättsmedicinalverket	National Board of Forensic Medicine

S

Sameskolstyrelsen och sameskolor	Sami School Board and Sami Schools
Sametinget	Sami Parliament
Sjöfartsverket	Swedish Maritime Administration
Sjöhistoriska museer, statens	National Maritime Museums
Skattemyndigheterna (10)	Tax Offices (10)
Skogsstyrelsen	National Board of Forestry
Skolverk, statens	National Agency for Education
Smittskyddsinstitutet	Swedish Institute for Infectious Disease Control
Socialstyrelsen	National Board of Health and Welfare
Specialpedagogiska institutet	Swedish Institute for Special Needs Education
Specialskolemyndigheten	National Agency for Special Schools for the Deaf and Hard of Hearing
Språk och folkminnesinstitutet	Institute for Dialectology, Onomastics and Folklore Research
Sprängämnesinspektionen	National Inspectorate of Explosives and Flammables
Statens personregisternämnd, SPAR nämnden	Swedish Population Address Register Board
Statistiska centralbyrån	Statistics Sweden
Statskontoret	The Swedish Agency for Public Management
Stockholms universitet	Stockholm University
Strålskyddsinstitut, statens	Swedish Radiation Protection Authority
Styrelsen för ackreditering och teknisk kontroll	Swedish Board for Accreditation and Conformity Assessment
Styrelsen för internationell utvecklings samarbete, SIDA	Swedish International Development Cooperation Authority

Styrelsen för psykologiskt försvar	National Board of Psychological Defence
Svenska institutet	Swedish Institute
Säkerhetspolisen	Swedish Security Service
Södertörns högskola	University College of South Stockholm
T	
Talboks och punktskriftsbiblioteket	Library of Talking Books and Braille Publications
Teaterhögskolan	University College of Acting
Tekniska museet, stiftelsen	National Museum of Science and Technology
Tingsrätterna (72)	District and City Courts (72)
Tjänsteförslagsnämnden för domstolsväsendet	Judges Nomination Proposal Committee
Totalförsvarets forskningsinstitut	Swedish Defence Research Agency
Transportforskningsberedningen	Transport Research Board
Transportrådet	Board of Transport
Tullverket	Customs Administration
Turistdelegationen	Swedish Tourist Authority
U	
Umeå universitet	Umeå University
Ungdomsstyrelsen	National Board for Youth Affairs
Uppsala universitet	Uppsala University
Utlänningsnämnden	Aliens Appeals Board
Utsädeskontroll, statens	Swedish Seed Testing and Certification Institute
V	
Valmyndigheten	Election Authority
Vatten och avloppsnämnd, statens	National Water Supply and Sewage Tribunal
Vattenöverdomstolen	Water Rights Court of Appeal
Verket för högskoleservice (VHS)	National Agency for Higher Education
Verket för innovationssystem (VINNOVA)	Swedish Agency for Innovation Systems
Verket för näringslivsutveckling (NUTEK)	Swedish Business Development Agency
Vetenskapsrådet	Swedish Research Council
Veterinärmedicinska anstalt, statens	National Veterinary Institute
Vägverket	Swedish National Road Administration
Vänerskolan	Väner School
Växjö universitet	Växjö University
Växtsortnämnd, statens	National Plant Variety Board

Å

Åklagarmyndigheterna	Regional Public Prosecution Offices (6)
Åsbackaskolan	Åsbacka School

Ö

Örebro universitet	Örebro University
Östervångsskolan	Östervång School
Överbefälhavaren	Supreme Commander of the Armed Forces
Överstyrelsen för civil beredskap	Swedish Agency for Civil Emergency Planning

UNITED KINGDOM

— Cabinet Office

Civil Service College

Office of the Parliamentary Counsel

— Central Office of Information

— Charity Commission

— Crown Prosecution Service

— Crown Estate Commissioners (Vote Expenditure Only)

— HM Customs and Excise

— Department for Culture, Media and Sport

British Library

British Museum

Historic Buildings and Monuments Commission for England (English Heritage)

Imperial War Museum

Museums and Galleries Commission

National Gallery

National Maritime Museum

National Portrait Gallery

Natural History Museum

Royal Commission on Historical Manuscripts

Royal Commission on Historical Monuments of England

Royal Fine Art Commission (England)

Science Museum

Tate Gallery

Victoria and Albert Museum

Wallace Collection

— Department for Education and Skills

Higher Education Funding Council for England

— Department for Environment, Food and Rural Affairs

Agricultural Dwelling House Advisory Committees

Agricultural Land Tribunals

Agricultural Wages Board and Committees

Cattle Breeding Centre

Countryside Agency

Plant Variety Rights Office

Royal Botanic Gardens, Kew

Royal Commission on Environmental Pollution

— Department of Health

Central Council for Education and Training in Social Work

Dental Practice Board

National Board for Nursing, Midwifery and Health Visiting for England

National Health Service Strategic Health Authorities and Trusts

Prescription Pricing Authority

Public Health Service Laboratory Board

UK Central Council for Nursing, Midwifery and Health Visiting

— Department for International Development

— Department for National Savings

— Department for Transport

Maritime and Coastguard Agency

— Department for Work and Pensions

Disability Living Allowance Advisory Board

Independent Tribunal Service

Medical Boards and Examining Medical Officers (War Pensions)

Occupational Pensions Regulatory Authority

Regional Medical Service

Social Security Advisory Committee

— Department of the Procurator General and Treasury Solicitor

Legal Secretariat to the Law Officers

— Department of Trade and Industry

Central Transport Consultative Committees

Competition Commission

Electricity Committees

Employment Appeal Tribunal

Employment Tribunals

Gas Consumers' Council

National Weights and Measures Laboratory

Office of Manpower Economics

Patent Office

— Export Credits Guarantee Department

— Foreign and Commonwealth Office

Wilton Park Conference Centre

— Government Actuary's Department

— Government Communications Headquarters

— Home Office

Boundary Commission for England

Gaming Board for Great Britain

Inspectors of Constabulary

Parole Board and Local Review Committees

— House of Commons

— House of Lords

— Inland Revenue, Board of

— Lord Chancellor's Department

Circuit Offices and Crown, County and Combined Courts (England and Wales)

Combined Tax Tribunal

Council on Tribunals

Court of Appeal — Criminal

Immigration Appellate Authorities

Immigration Adjudicators

Immigration Appeals Tribunal

Lands Tribunal

Law Commission

Legal Aid Fund (England and Wales)

Office of the Social Security Commissioners

Pensions Appeal Tribunals

Public Trust Office

Supreme Court Group (England and Wales)

Transport Tribunal

— Ministry of Defence

Meteorological Office

Defence Procurement Agency

— National Assembly for Wales

Higher Education Funding Council for Wales

Local Government Boundary Commission for Wales

Royal Commission for Ancient and Historical Monuments in Wales

Valuation Tribunals (Wales)

Welsh National Health Service Authorities and Trusts

Welsh Rent Assessment Panels

Welsh National Board for Nursing, Midwifery and Health Visiting

— National Audit Office

— National Investment and Loans Office

— Northern Ireland Assembly Commission

— Northern Ireland Court Service

Coroners Courts

County Courts

Court of Appeal and High Court of Justice in Northern Ireland

Crown Court

Enforcement of Judgements Office

Legal Aid Fund

Magistrates Courts

Pensions Appeals Tribunals

— Northern Ireland, Department for Employment and Learning

— Northern Ireland, Department for Regional Development

— Northern Ireland, Department for Social Development

— Northern Ireland, Department of Agriculture and Rural Development

— Northern Ireland, Department of Culture, Arts and Leisure

— Northern Ireland, Department of Education

— Northern Ireland, Department of Enterprise, Trade and Investment

— Northern Ireland, Department of the Environment

— Northern Ireland, Department of Finance and Personnel

— Northern Ireland, Department of Health, Social Services and Public Safety

— Northern Ireland, Department of Higher and Further Education, Training and Employment

— Northern Ireland, Office of the First Minister and Deputy First Minister

— Northern Ireland Office

Crown Solicitor's Office

Department of the Director of Public Prosecutions for Northern Ireland

Forensic Science Agency of Northern Ireland

Office of Chief Electoral Officer for Northern Ireland

Police Service of Northern Ireland

Probation Board for Northern Ireland

State Pathologist Service

— Office of Fair Trading

— Office for National Statistics

National Health Service Central Register

Office of the Parliamentary Commissioner for Administration and Health Service Commissioners

— Office of the Deputy Prime Minister

Rent Assessment Panels

— Paymaster General's Office

— Postal Business of the Post Office

— Privy Council Office

— Public Record Office

— Royal Commission on Historical Manuscripts

— Royal Hospital, Chelsea

— Royal Mint

— Rural Payments Agency

— Scotland, Auditor General

— Scotland, Crown Office and Procurator Fiscal Service

— Scotland, General Register Office

— Scotland, Queen's and Lord Treasurer's Remembrancer

— Scotland, Registers of Scotland

— The Scotland Office

— The Scottish Executive Corporate Services

— The Scottish Executive Education Department

National Galleries of Scotland

National Library of Scotland

National Museums of Scotland

Scottish Higher Education Funding Council

— The Scottish Executive Development Department

— The Scottish Executive Enterprise and Lifelong Learning Department

— The Scottish Executive Finance

— The Scottish Executive Health Department

Local Health Councils

National Board for Nursing, Midwifery and Health Visiting for Scotland

Scottish Council for Postgraduate Medical Education

Scottish National Health Service Authorities and Trusts

— The Scottish Executive Justice Department

Accountant of Court's Office

High Court of Justiciary

Court of Session

HM Inspectorate of Constabulary

Lands Tribunal for Scotland

Parole Board for Scotland and Local Review Committees

Pensions Appeal Tribunals

Scottish Land Court

Scottish Law Commission

Sheriff Courts

Scottish Criminal Record Office

Scottish Crime Squad

Scottish Fire Service Training Squad

Scottish Police College

Social Security Commissioners' Office

— The Scottish Executive Rural Affairs Department

Crofters Commission

Red Deer Commission

Rent Assessment Panel and Committees

Royal Botanic Garden, Edinburgh

Royal Commission on the Ancient and Historical Monuments of Scotland

Royal Fine Art Commission for Scotland

— The Scottish Executive Secretariat

— The Scottish Parliamentary Body Corporate

— Scottish Record Office

— HM Treasury

— Office of Government Commerce

— The Wales Office (Office of the Secretary of State for Wales)

ANNEX V

LIST OF PRODUCTS REFERRED TO IN ARTICLE 7 WITH REGARD TO CONTRACTS AWARDED BY CONTRACTING AUTHORITIES IN THE FIELD OF DEFENCE [1]

Chapter 25: Salt, sulphur, earths and stone, plastering materials, lime and cement

Chapter 26: Metallic ores, slag and ash

Chapter 27: Mineral fuels, mineral oils and products of their distillation, bituminous substances, mineral waxes

except:

ex 27.10: special engine fuels

Chapter 28: Inorganic chemicals, organic and inorganic compounds of precious metals, of rare earth metals, of radioactive elements and of isotopes

except:

ex 28.09: explosives

ex 28.13: explosives

ex 28.14: tear gas

ex 28.28: explosives

ex 28.32: explosives

ex 28.39: explosives

ex 28.50: toxic products

ex 28.51: toxic products

ex 28.54: explosives

Chapter 29: Organic chemicals

except:

ex 29.03: explosives

ex 29.04: explosives

ex 29.07: explosives

ex 29.08: explosives

ex 29.11: explosives

ex 29.12: explosives

ex 29.13: toxic products

ex 29.14: toxic products

ex 29.15: toxic products

ex 29.21: toxic products

ex 29.22: toxic products

ex 29.23: toxic products

ex 29.26: explosives

ex 29.27: toxic products

ex 29.29: explosives

[1] The only text applicable for the purpose of this Directive is that within Annex 1, point 3 of the Agreement.

Chapter 30:	Pharmaceutical products
Chapter 31:	Fertilisers
Chapter 32:	Tanning and dyeing extracts, tannings and their derivatives, dyes, colours, paints and varnishes, putty, fillers and stoppings, inks
Chapter 33:	Essential oils and resinoids, parfumery, cosmetic or toilet preparations
Chapter 34:	Soap, organic surface active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing and scouring preparations, candles and similar articles, modelling pastes and 'dental waxes'
Chapter 35:	Albuminoidal substances, glues, enzymes
Chapter 37:	Photographic and cinematographic goods
Chapter 38:	Miscellaneous chemical products, except: ex 38.19: toxic products
Chapter 39:	Artificial resins and plastic materials, celluloses esters and ethers, articles thereof, except: ex 39.03: explosives
Chapter 40:	Rubber, synthetic rubber, factice, and articles thereof, except: ex 40.11: bullet proof tyres
Chapter 41:	Raw hides and skins (other than furskins) and leather
Chapter 42:	Articles of leather, saddlery and harness, travel goods, handbags and similar containers, articles of animal gut (other than silk worm gut)
Chapter 43:	Furskins and artificial fur, manufactures thereof
Chapter 44:	Wood and articles of wood, wood charcoal
Chapter 45:	Cork and articles of cork
Chapter 46:	Manufactures of straw of esparto and of other plaiting materials, basketware and wickerwork
Chapter 47:	Paper making material
Chapter 48:	Paper and paperboard, articles of paper pulp, of paper or of paperboard
Chapter 49:	Printed books, newspapers, pictures and other products of the printing industry, manuscripts, type scripts and plans
Chapter 65:	Headgear and parts thereof
Chapter 66:	Umbrellas, sunshades, walking sticks, whips, riding crops and parts thereof
Chapter 67:	Prepared feathers and down and articles made of feathers or of down, artificial flowers, articles of human hair
Chapter 68:	Articles of stone, of plaster, of cement, of asbestos, of mica and of similar materials
Chapter 69:	Ceramic products
Chapter 70:	Glass and glassware

Chapter 71: Pearls, precious and semi precious stones, precious metals, rolled precious metals, and articles thereof; imitation jewellery

Chapter 73: Iron and steel and articles thereof

Chapter 74: Copper and articles thereof

Chapter 75: Nickel and articles thereof

Chapter 76: Aluminium and articles thereof

Chapter 77: Magnesium and beryllium and articles thereof

Chapter 78: Lead and articles thereof

Chapter 79: Zinc and articles thereof

Chapter 80: Tin and articles thereof

Chapter 81: Other base metals employed in metallurgy and articles thereof

Chapter 82: Tools, implements, cutlery, spoons and forks, of base metal, parts thereof,

except:

ex 82.05: tools

ex 82.07: tools, parts

Chapter 83: Miscellaneous articles of base metal

Chapter 84: Boilers, machinery and mechanical appliances, parts thereof,

except:

ex 84.06: engines

ex 84.08: other engines

ex 84.45: machinery

ex 84.53: automatic data processing machines

ex 84.55: parts of machines under heading No 84.53

ex 84.59: nuclear reactors

Chapter 85: Electrical machinery and equipment, parts thereof,

except:

ex 85.13: telecommunication equipment

ex 85.15: transmission apparatus

Chapter 86: Railway and tramway locomotives, rolling stock and parts thereof, railway and tramway tracks fixtures and fittings, traffic signalling equipment of all kinds (not electrically powered),

except:

ex 86.02: armoured locomotives, electric

ex 86.03: other armoured locomotives

ex 86.05: armoured wagons

ex 86.06: repair wagons

ex 86.07: wagons

Chapter 87: Vehicles, other than railway or tramway rolling stock, and parts thereof,

except:

ex 87.08: tanks and other armoured vehicles

ex 87.01: tractors

ex 87.02: military vehicles

ex 87.03: breakdown lorries

ex 87.09: motorcycles

ex 87.14: trailers

Chapter 89: Ships, boats and floating structures,

except:

ex 89.01A: warships

Chapter 90: Optical, photographic, cinematographic, measuring, checking, precision, medical and surgical instruments and apparatus, parts thereof,

except:

ex 90.05: binoculars

ex 90.13: miscellaneous instruments, lasers

ex 90.14: telemeters

ex 90.28: electrical and electronic measuring instruments

ex 90.11: microscopes

ex 90.17: medical instruments

ex 90.18: mechano therapy appliances

ex 90.19: orthopaedic appliances

ex 90.20: X ray apparatus

Chapter 91: Manufacture of watches and clocks

Chapter 92: Musical instruments, sound recorders or reproducers, television image and sound recorders or reproducers, parts and accessories of such articles

Chapter 94: Furniture and parts thereof, bedding, mattresses, mattress supports, cushions and similar stuffed furnishings,

except:

ex 94.01A: aircraft seats

Chapter 95: Articles and manufactures of carving or moulding material

Chapter 96: Brooms, brushes, powder puffs and sieves

Chapter 98: Miscellaneous manufactured articles

ANNEX VI

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

1. (a) 'technical specification', in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These characteristics shall include levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling and production processes and methods. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;

   (b) 'technical specification', in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures;

2. 'standard' means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

   — international standard: a standard adapted by an international standards organisation and made available to the general public,

   — European standard: a standard adopted by a European standards organisation and made available to the general public,

   — national standard: a standard adopted by a national standards organisation and made available to the general public;

3. 'European technical approval' means a favourable technical assessment of the fitness for use of a product for a particular purpose, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State;

4. 'Common technical specification' means a technical specification laid down in accordance with a procedure recognised by the Member States which has been published in the *Official Journal of the European Union*;

5. 'technical reference': any product produced by European standardisation bodies, other than official standards, according to procedures adopted for the development of market needs.

ANNEX VII

INFORMATION TO BE INCLUDED IN NOTICES

ANNEX VII A

INFORMATION WHICH MUST BE INCLUDED IN PUBLIC CONTRACT NOTICES

NOTICE OF THE PUBLICATION OF A PRIOR INFORMATION NOTICE ON A BUYER PROFILE

1. Country of the contracting authority
2. Name of the contracting authority
3. Internet address of the 'buyer profile' (URL)
4. CPV Nomenclature reference No(s)

PRIOR INFORMATION NOTICE

1. The name, address, fax number and email address of the contracting authority and, if different, of the service from which additional information may be obtained and, in the case of services and works contracts, of the services, e.g. the relevant governmental internet site, from which information can be obtained concerning the general regulatory framework for taxes, environmental protection, employment protection and working conditions applicable in the place where the contract is to be performed.
2. Where appropriate, indicate whether the public contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes.
3. In the case of public works contracts: the nature and extent of the works and the place of execution; if the work is to be subdivided into several lots, the essential characteristics of those lots by reference to the work; if available, an estimate of the range of the cost of the proposed works; Nomenclature reference No(s).

   In the case of public supply contracts: the nature and quantity or value of the products to be supplied, Nomenclature reference No(s).

   In the case of public services contracts: the total value of the proposed purchases in each of the service categories in Annex II A; Nomenclature reference No(s).
4. Estimated date for initiating the award procedures in respect of the contract or contracts, in the case of public service contracts by category.
5. Where appropriate, indicate whether a framework agreement is involved.
6. Where appropriate, other information.
7. Date of dispatch of the notice or of dispatch of the notice of the publication of the prior information notice on the buyer profile.
8. Indicate whether the contract is covered by the Agreement.

CONTRACT NOTICES

Open and restricted procedures, competitive dialogues, procedures, negotiated procedures:

1. Name, address, telephone and fax number, email address of the contracting authority.
2. Where appropriate, indicate whether the public contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes.
3. (a) The award procedure chosen;

   (b) Where appropriate, the reasons for use of the accelerated procedure (in restricted and negotiated procedures);

   (c) Where appropriate, indicate whether a framework agreement is involved;

(d) Where appropriate, indicate whether a dynamic purchasing system is involved;

(e) Where appropriate, the holding of an electronic auction (in the event of open, restricted or negotiated procedures, in the situation covered by Article 30(1)(a)).

4. Form of the contract.

5. Place of execution/performance of the works, for delivery of products or of the provision of services.

6. (a) Public works contracts:

— nature and extent of the works and general nature of the work. Indication in particular of options concerning supplementary works, and, if known, the provisional timetable for recourse to these options as well as the number of possible renewals, if any. If the work or the contract is subdivided into several lots, the size of the different lots; Nomenclature reference number(s),

— information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects,

— in the event of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the works for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded.

(b) Public supply contracts:

— nature of the products to be supplied, indicating in particular whether tenders are requested with a view to purchase, lease rental, hire or hire purchase or a combination of these, nomenclature reference number. Quantity of products to be supplied, indicating in particular options concerning supplementary purchases and, if known, the provisional timetable for recourse to these options as well as the number of renewals, if any. Nomenclature reference number(s),

— in the case of regular or renewable contracts during the course of a given period, indicate also, if known, the timetable for subsequent contracts for purchase of intended supplies,

— in the event of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the supplies for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded.

(c) Public service contracts:

— category and description of service. Nomenclature reference number(s). Quantity of services to be provided. Indicate in particular options concerning supplementary purchases and, if known, the provisional timetable for recourse to these options as well as the number of renewals, if any. In the case of renewable contracts over a given period, an estimate of the time frame, if known, for subsequent public contracts for purchase of intended services,

in the event of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the services for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded,

— indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.

Reference to the law, regulation or administrative provision.

— indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.

7. If the contracts are subdivided into lots, indication of the possibility of tendering for one, for several or for all the lots.

8. Any time limit for completion of works/supplies/services or duration of the works/supply/services contract; where possible any time limit by which works will begin or any time limit by which delivery of supplies or services will begin.

9. Admission or prohibition of variants.

10. Where applicable particular conditions to which the performance of the contract is subject.

11. In the case of open procedures:

(a) name, address, telephone and telefax number and electronic address of the service from which contract documents and additional documents can be requested;

(b) where appropriate, time limit for submission of such requests;

(c) where appropriate, cost of and payment conditions for obtaining these documents.

12. (a) Time limit for receipt of tenders or indicative tenders where a dynamic purchasing system is being used (open procedures);

(b) time limit for receipt of request to participate (restricted and negotiated procedures);

(c) address where these have to be transmitted;

(d) the language or languages in which they must be drawn up.

13. In the case of open procedures:

(a) persons authorised to be present at the opening of tenders;

(b) date, time and place for such opening.

14. Where appropriate any deposit and guarantees required.

15. Main terms concerning financing and payment and/or references to the texts in which these are contained.

16. Where applicable, the legal form to be taken by the grouping of economic operators to whom the contract is to be awarded.

17. Selection criteria regarding the personal situation of economic operators that may lead to their exclusion, and required information proving that they do not fall within the cases justifying exclusion. Selection criteria and information concerning the economic operators' personal situation, information and any necessary formalities for assessment of the minimum economic and technical standards required of the economic operator. Minimum level(s) of standards possibly required.

18. Where there is a framework agreement: the number and, where appropriate, proposed maximum number of economic operators who will be members of it, the duration of the framework agreement provided for, stating, if appropriate, the reasons for any duration exceeding four years.

19. In the case of a competitive dialogue or a negotiated procedure with the publication of a contract notice, indicate, if appropriate, recourse to a staged procedure in order gradually to reduce the number of solutions to be discussed or tenders to be negotiated.

20. In the case of a restricted procedure, a competitive dialogue or a negotiated procedure with the publication of a contract notice, when recourse is had to the option of reducing the number of candidates to be invited to submit tenders, to engage in dialogue or to negotiate: minimum and, if appropriate, proposed maximum number of candidates and objective criteria to be used to choose that number of candidates.

21. Time frame during which the tenderer must maintain its tender (open procedures).

22. Where appropriate, names and addresses of economic operators already selected by the contracting authority (negotiated procedures).

23. Criteria referred to in Article 53 to be used for award of the contract: 'lowest price' or 'most economically advantageous tender'. Criteria representing the most economically advantageous tender as well as their weighting shall be mentioned where they do not appear in the specifications or, in the event of a competitive dialogue, in the descriptive document.

24. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning deadlines for lodging appeals, or if need be the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

25. Date(s) of publication of the prior information notice in accordance with the technical specifications of publication indicated in Annex VIII or statement that no such publication was made.

26. Date of dispatch of the notice.

27. Indicate whether the contract is covered by the Agreement.

SIMPLIFIED CONTRACT NOTICE FOR USE IN A DYNAMIC PURCHASING SYSTEM

1. Country of contracting authority.

2. Name and e mail address of contracting authority.

3. Publication reference of the contract notice for the dynamic purchasing system.

4. E mail address at which the technical specification and additional documents relating to the dynamic purchasing system are available.

5. Subject of contract: description by reference number(s) of 'CPV' nomenclature and quantity or extent of the contract to be awarded.

6. Time frame for submitting indicative tenders.

CONTRACT AWARD NOTICES

1. Name and address of the contracting authority.

2. Award procedures chosen. In the case of negotiated procedure without prior publication of a contract notice (Article 28), justification.

3. Public works contracts: nature and extent of the contract, general characteristics of the work.

   Public supply contracts: nature and quantity of products supplied, where appropriate, by the supplier; nomenclature reference number.

   Public service contracts: category and description of the service; nomenclature reference number; quantity of services bought.

4. Date of contract award.

5. Contract award criteria.

6. Number of tenders received.

7. Name and address of the successful economic operators.

8. Price or range of prices (minimum/maximum) paid.

9. Value of the tender (tenders) retained or the highest tender and lowest tender taken into consideration for the contract award.

10. Where appropriate, value and proportion of contract likely to be subcontracted to third parties.

11. Date of publication of the tender notice in accordance with the technical specifications for publication in Annex VIII.

12. Date of dispatch of the notice.

13. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals, or if need be the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

ANNEX VII B

INFORMATION WHICH MUST APPEAR IN PUBLIC WORKS CONCESSION NOTICES

1. Name, address, fax number and email address of the contracting authority
2. (a) Place of execution
   (b) Subject of the concession; nature and extent of the services
3. (a) Time limit for the submission of applications
   (b) Address to which they must be sent
   (c) Language(s) in which they must be written
4. Personal, technical and financial conditions to be met by the candidates
5. Criteria which will be applied in the award of the contract
6. If appropriate, the minimum proportion of the works which will be contracted out
7. Date of dispatch of the notice
8. Name and address of the body responsible for appeal and, where appropriate, mediation procedures. Precise information concerning the deadline for lodging appeals, or if need be the name, address, telephone number, fax number and email address of the service from which this information may be obtained.

ANNEX VII C

INFORMATION WHICH MUST APPEAR IN WORKS CONTRACT NOTICES OF CONCESSIONNAIRES WHO ARE NOT CONTRACTING AUTHORITIES

1. (a) Place of execution
   (b) Nature and extent of the services, general characteristics of the works
2. Any time limit for completion imposed
3. Name and address of the body from whom the specifications and the additional documents may be requested
4. (a) Time limit for the receipt of applications to participate and/or the receipt of tenders
   (b) Address to which they must be sent
   (c) Language(s) in which they must be written
5. Any deposits or guarantees required
6. Economic and technical conditions to be met by the contractor
7. Criteria which will be applied in the award of the contract
8. Date of dispatch of the notice

ANNEX VII D

INFORMATION WHICH MUST APPEAR IN DESIGN CONTEST NOTICES

CONTEST NOTICES

1. Name, address, fax number and email address of the contracting authority and those of the service from which the additional documents may be obtained
2. Description of the project
3. Type of contest: open or restricted
4. In the event of an open contest: time limit for the submission of projects
5. In the event of a restricted contest:
   (a) number of participants contemplated
   (b) names of the participants already selected, if any
   (c) criteria for the selection of participants
   (d) time limit for requests to participate
6. If appropriate, indicate that the participation is restricted to a specified profession
7. Criteria which will be applied in the evaluation of the projects
8. Names of any members of the jury who have already been selected
9. Indicate whether the jury's decision is binding on the contracting authority
10. Number and value of any prizes
11. Payments to be made to all participants, if any
12. Indicate whether any contracts following the contest will or will not be awarded to the winner or winners of the contest
13. Date of dispatch of the notice

NOTICE OF THE RESULTS OF A CONTEST

1. Name, address, fax number and email address of the contracting authority
2. Description of the project
3. Total number of participants
4. Number of foreign participants
5. Winner(s) of the contest
6. Any prizes
7. Reference of the contest notice
8. Date of dispatch of the notice

ANNEX VIII

FEATURES CONCERNING PUBLICATION

1. **Publication of notices**

(a) Notices referred to in Articles 35, 58, 64 and 69 are sent by the contracting authorities to the Office for Official Publications of the European Communities in the format required by Commission Directive 2001/78/EC of 13 September 2001 on the use of standard forms in the publication of public contract notices [1]. The prior information notices referred to in Article 35(1), first subparagraph, published on a buyer profile as described in point 2(b), must also use that format, as must the notice of such publication.

(b) Notices referred to in Articles 35, 58, 64 and 69 are published by the Office for Official Publications of the European Communities or by the contracting authorities in the event of a prior information notice published on a buyer profile in accordance with Article 35(1), first subparagraph.

In addition, contracting authorities may publish this information on the Internet on a 'buyer profile' as referred to in point 2(b).

(c) The Office for Official Publications of the European Communities will give the contracting authority the confirmation referred to in Article 36(8).

2. **Publication of complementary or additional information**

(a) Contracting authorities are encouraged to publish the specifications and the additional documents in their entirety on the Internet.

(b) The buyer profile may include prior information notices as referred to in Article 35(1), first subparagraph, information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e mail address.

3. **Format and procedures for sending notices electronically**

The format and procedure for sending notices electronically are accessible at the Internet address 'http://simap.eu.int'.

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[1] OJ L 285, 29.10.2001, p. 1.

ANNEX IX

REGISTERS

ANNEX IX A [1]

PUBLIC WORKS CONTRACTS

The professional registers and corresponding declarations and certificates for each Member State are:

— in Belgium, the 'Registre du commerce'/'Handelsregister';

— in Denmark, the 'Erhvervs og Selskabsstyrelsen';

— in Germany, the 'Handelsregister' and the 'Handwerksrolle';

— in Greece, the 'Μητρώο Εργοληπτικών Επιχειρήσεων' – ΜΕΕΠ of the Ministry for Environment, Town and Country Planning and Public Works (ΥΠΕΧΩΔΕ);

— in Spain, the 'Registro Oficial de Empresas Clasificadas del Ministerio de Hacienda';

— in France, the 'Registre du commerce et des sociétés' and the 'Répertoire des métiers';

— in Ireland, the contractor may be requested to provide a certificate from the Registrar of companies or the Registrar of Friendly Societies or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name;

— in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato';

— in Luxembourg, the 'Registre aux firmes' and the 'Rôle de la chambre des métiers';

— in the Netherlands, the 'Handelsregister';

— in Austria, the 'Firmenbuch', the 'Gewerberegister', the 'Mitgliederverzeichnisse der Landeskammern';

— in Portugal, the 'Instituto dos Mercados de Obras Públicas e Particulares e do Imobiliário' (IMOPPI)(CAEOPP);

— in Finland, the 'Kaupparekisteri'/ 'Handelsregistret';

— in Sweden, 'aktiebolags , handels eller föreningsregistren';

— in the United Kingdom, the contractor may be requested to provide a certificate from the Registrar of Companies or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name.

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[1] For the purposes of Article 46, 'professional and trade registers' means those listed in this Annex and, where changes have been made at national level, the registers which have replaced them.

ANNEX IX B

PUBLIC SUPPLY CONTRACTS

The relevant professional or trade registers and the corresponding declarations and certificates are:

— in Belgium, the 'Registre du commerce/Handelsregister';

— in Denmark, 'Erhvers og Selskabsstyrelsen';

— in Germany, the 'Handelsregister' and 'Handwerksrolle';

— in Greece, the 'Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο';

— in Spain, the 'Registro Mercantil' or, in the case of non registered individuals, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question;

— in France, the 'Registre du commerce et des sociétés' and 'Répertoire des métiers';

— in Ireland, the supplier may be requested to provide a certificate from the Registrar of companies or the Registrar of Friendly Societies that he is certified as incorporated or registered or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name and under a specific trading name;

— in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato', and 'Registro delle commissioni provinciali per l'artigianato';

— in Luxembourg, the 'Registre aux firmes' and 'Rôle de la chambre des métiers';

— in the Netherlands, the 'Handelsregister';

— in Austria, the 'Firmenbuch', the 'Gewerberegister', the 'Mitgliederverzeichnisse der Landeskammern';

— in Portugal, the 'Registo Nacional das Pessoas Colectivas';

— in Finland, the 'Kaupparekisteri' and 'Handelsregistret';

— in Sweden, 'aktiebolags , handels eller föreningsregistren';

— in the United Kingdom, the supplier may be requested to provide a certificate from the Registrar of Companies stating that he is certified as incorporated or registered or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name and under a specific trading name.

ANNEX IX C

PUBLIC SERVICE CONTRACTS

The relevant professional and trade registers or declarations or certificates are:

— in Belgium, the 'Registre du commerce/Handelsregister' and the 'Ordres professionels/Beroepsorden';

— in Denmark, 'Erhvervs og Selskabsstyrelsen';

— in Germany, the 'Handelsregister', the 'Handwerksrolle', the 'Vereinsregister', 'Partnerschaftsregister' and the 'Mit gliedsverzeichnisse de Berufskammern der Ländern';

— in Greece, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in the cases provided for by existing national legislation, for the provision of research services as mentioned in Annex I A, the professional register 'Μητρώο Μελετητών' and 'Μητρώο Γραφείων Μελετών';

— in Spain, the 'Registro Oficial de Empresas Clasificadas del Ministerio de Hacienda';

— in France, the 'Registre du commerce' and the 'Répertoire des métiers';

— in Ireland, the service provider may be requested to provide a certificate from the Registrar of companies or the Registrar of Friendly Societies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name and under a specific trading name;

— in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato', the 'Registro delle commissioni provinciali per l'artigianato' or the 'Consiglio nazionale degli ordini professionali';

— in Luxembourg, the 'Registre aux firmes' and the 'Rôle de la chambre des métiers';

— in the Netherlands, the 'Handelsregister';

— in Austria, the 'Firmenbuch', the 'Gewerberegister', the 'Mitgliederverzeichnisse der Landeskammern';

— in Portugal, the 'Registo nacional das Pessoas Colectivas';

— in Finland, the 'Kaupparekisteri' and 'Handelsregistret';

— in Sweden, 'aktiebolags , handels eller föreningsregistren';

— in the United Kingdom, the service provider may be requested to provide a certificate from the Registrar of Companies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name.

ANNEX X

REQUIREMENTS RELATING TO DEVICES FOR THE ELECTRONIC RECEIPT OF TENDERS, REQUESTS FOR PARTICIPATION AND PLANS AND PROJECTS IN CONTESTS

Devices for the electronic receipt of tenders, requests for participation and plans and projects in contests must at least guarantee, through technical means and appropriate procedures, that:

(a) electronic signatures relating to tenders, requests to participate and the forwarding of plans and projects comply with national provisions adopted pursuant to Directive 1999/93/EC;

(b) the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;

(c) it may be reasonably ensured that, before the time limits laid down, no one can have access to data transmitted under these requirements;

(d) if that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;

(e) only authorised persons may set or change the dates for opening data received;

(f) during the different stages of the contract award procedure or of the contest access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;

(g) simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;

(h) data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

ANNEX XI

DEADLINES FOR TRANSPOSITION AND APPLICATION (Article 80)

Directives	Deadlines for transposition and application
92/50/CEE (OJ L 209, 24.7.1992, p. 1) Austria, Finland, Sweden (*)	1 July 1993 1 January 1995
93/36/EEC (OJ L 199, 09.08.93, p. 1) Austria, Finland, Sweden (*)	13 June 1994 1 January 1995
93/37/EEC (OJ L 199, 09.08.93, p. 54) consolidation of directives:	
— 71/305/EEC (OJ L 185, 16.08.71, p. 5):	
— EC of 6	30 July 1972
— DK, IRL, UK	1 January 1973
— Greece	1 January 1981
— Spain, Portugal	1 January 1986
— Austria, Finland, Sweden (*)	1 January 1995
— 89/440/EEC (OJ L 210, 21.07.1989, p. 1):	
— EC of 9	19 July 1990
— Greece, Spain, Portugal	1 March 1992
— Austria, Finland, Sweden (*)	1 January 1995
97/52/EC (OJ L 328, 28.11.97, p. 1)	13 October 1998

(*) EEA: 1 January 1994.

ANNEX XII

CORRELATION TABLE [1]

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 1, par.1	Art. 1, first line, adapted	Art. 1, first line, adapted	Art. 1, first line, adapted		
Art. 1, par. 2, point (a)	Art. 1, point (a), first part of sentence	Art. 1, point (a), first and last parts of first sentence	Art. 1, point a)		Amended
Art. 1, par. 2, point (b)	Art. 1, point (a) and point (c), adapted	—	—		
Art. 1, par. 2, point (c), first subparagraph	—	Art. 1, point (a), sec ond part of the first sentence and second sentence, adapted	—		
Art. 1, par. 2, point (c), second subparagraph	—	Art. 1, point (a), adapted	—		
Art. 1, par. 2, point (d), first subparagraph	—	—	—		New
Art. 1, par. 2, point (d), second subparagraph	—	—	Art. 2, adapted		
Art. 1, par. 2, point (d), third subparagraph	—	—	16th recital adapted		
Art. 1, par. 3	Art. 1, point (d)	—	—		
Art. 1, par. 4	—	—	—		New
Art. 1, par. 5	—	—	—		New
Art. 1, par. 6	—	—	—		New
Art. 1, par. 7	—	—	—		New
Art. 1, par. 8, first sub paragraph	—	—	Art. 1, point (c), first sentence adapted		
Art. 1, par. 8, second subparagraph	—	—	—		New
Art. 1, par. 8, third subparagraph	Art. 1, point h)	Art. 1, point (c)	Art. 1, point (c), sec ond sentence		Amended

[1] 'Adapted' means that the wording of the text was changed, while the meaning of the repealed directives was preserved. Changes to the meaning of the provisions of the repealed directives are indicated by the term 'amended'. This term appears in the last column when the amendment concerns the provisions of the three repealed directives. When the amendment affects only one or two of these directives, the term 'amended' is included in the column of the directives concerned.

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 1, par. 9	Art. 1, point (b), adapted	Art. 1 point (b), adapted	Art. 1, point (b), adapted		
Art. 1, par. 10	—	—	—		New
Art. 1, par. 11, first subparagraph	Art. 1, point (e), adapted	Art. 1, point (d), adapted	Art. 1, point (d), adapted		
Art. 1, par. 11, second subparagraph	Art. 1, point (f), adapted	Art. 1, point (e), adapted	Art. 1, point (e), adapted		
Art. 1, par. 11, third subparagraph	—	—	—		New
Art. 1, par. 11, fourth subparagraph	Art. 1, point g), adapted	Art. 1, point (f), adapted	Art. 1, point (f), adapted		
Art. 1, par. 11, fifth subparagraph	—	—	Art. 1, point g), adapted		
Art. 1, par. 12	—	—	—		New
Art. 1, par. 13	—	—	—		New
Art. 1, par. 14	—	—	—		New
Art. 1, par. 15	—	—	—		New
Art. 2	Art. 6, par. 6	Art. 5, par. 7	Art. 3, par. 2		Amended
Art. 3	—	Art. 2, par. 2	—		
Art. 4, par. 1	New	New	Art. 26, par. 2 and 3, adapted		
Art. 4, par. 2	Art. 21 amended	Art. 18 adapted	Art. 26, par. 1 amended		
Art. 5	Art. 33a adapted	Art. 28 amended	Art. 38a adapted		
Art. 6	—	Art. 15, par. 2	—		Amended
Art. 7, points (a) and (b)	—	Art. 5, par. 1, point (a), adapted	Art. 7, par. 1, point (a), adapted		
Art. 7, point (c)	Art. 6, par. 1, point (a), adapted	—	—		
Art. 8	Art. 2 and Art. 6, par. 1, point (b), adapted	—	Art. 3, par. 3 and Art. 7, par. 1, point (a), adapted		
Art. 9, par. 1, first sub paragraph	—	Art. 5, par. 5	Art. 7, par. 2 and 7		Amended

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 9, par. 1, second subparagraph	—	—	—		New
Art. 9, par. 2	—	Art. 5, par. 1, point (b)	—		Amended
Art. 9, par. 3	Art. 6, par. 4	Art. 5, par. 6	Art. 7, par. 3, second clause		
Art. 9, par. 4	Art. 6, par. 5, adapted				
Art.9, par. 5, point (a)	Art. 6, par. 3, adapted	—	Art. 7, par. 4, third subparagraph, adapted		
Art. 9, par. 5, point (b)	—	Art. 5, par. 4	—		Amended
Art. 9, par. 6	—	Art. 5, par. 2	—		
Art. 9, par. 7	—	Art. 5, par. 3	Art. 7, par. 6		
Art. 9, par. 8, point (a)	—	—	Art. 7, par. 4,		Amended
Art. 9, par. 8, point (b)	—	—	Art. 7, par. 5,		Amended
Art. 9, par. 9	—	—	—		New
Art. 10	New	Art. 3 adapted	Art. 4, par. 1 adapted		
Art. 11	—	—	—		New
Art. 12	Art. 4, point (a)	Art. 2, point (a)	Art. 1, point (a) (ii)		Amended
Art. 13	—	—	—		New
Art. 14	Art. 4, point (b)	Art. 2, par. 1, point (b)	Art. 4, par. 2		
Art. 15, point (a)	Art. 5, point (a) adapted	Art. 4, point (a) adapted	Art. 5, point (a) adapted		
Art. 15, points (b) and (c)	Art. 5, points (b) and (c)	Art. 4, points (b) and (c)	Art. 5, points (b) and (c)		
Art. 16	—	—	Art. 1, point (a), (iii) to (ix), adapted		
Art. 17	—	—	—		New
Art. 18	—	—	Art. 6		Amended
Art. 19	—	—	—		New
Art. 20	—	—	Art. 8		
Art. 21			Art. 9		

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 22	—	—	Art. 10		
Art. 23	Art. 10	Art. 8	Art. 14		Amended
Art. 24, par. 1 to 4, first subparagraph	Art. 19	Art. 16, par. 1,	Art. 24, par. 1		Amended
Art. 24, par. 4, second subparagraph	—	Art. 16, par. 2, adapted	Art. 24, par. 2, adapted		
Art. 25, first paragraph	Art. 20, first para graph	Art. 17, first para graph	Art. 25, first para graph		Amended
Art. 25, second para graph	Art. 20, second para graph	Art. 17, second para graph	Art. 25, second para graph		
Art. 26	—	—	—		New
Art. 27, first paragraph	Art. 23, par. 1	—	Art. 28, par. 1		Amended
Art. 27, second and third paragraphs	Art. 23, par. 2	—	Art. 28, par. 2		
Art. 28, first paragraph	Art. 7, par. 1 adapted	Art. 6, par. 1 adapted	Art. 11, par. 1 adapted		
Art. 28, second para graph	Art. 7, par. 4	Art. 6, par. 4	Art. 11, par. 4		Amended
Art. 29	—	—	—		New
Art. 30, par. 1, point (a)	Art. 7, par. 2, point (a)	Art. 6, par. 2	Art. 11, par. 2, point (a)		
Art. 30, par 1, point (b)	Art. 7, par. 2, point (c)	New	Art. 11, par. 2, point (b)		
Art. 30, par. 1, point (c)		—	Art. 11, par. 2, point (c)		
Art. 30, par. 1, point (d)	Art. 7, par. 2, point (b)	—	—		
Art. 30, paragraphs 2, 3 and 4	—	—	—		New
Art. 31, point (1), point (a)	Art. 7, par. 3 point (a)	Art. 6, par. 3, point (a)	Art. 11, par. 3, point (a)		
Art. 31, point (1), point (b)	Art. 7, par. 3, point (b)	Art. 6, par. 3, point (c)	Art. 11, par. 3, point (b)		
Art. 31, point (1), point (c)	Art. 7, par. 3, point (c)	Art. 6, par. 3, point (d)	Art. 11, par. 3, point (d)		
Art. 31, point (2), point (a)	—	Art. 6, par. 3, point (b)	—		

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 31, point (2), point (b)	—	Art. 6, par. 3, point (e)	—		
Art. 31, point (2), point (c)	—	New	—		
Art. 31, point (2), point (d)	—	New	—		
Art. 31, point (3)	—	—	Art. 11, par. 3, point (c)		
Art. 31, point (4), point (a)	Art. 7, par. 3, point (d)	—	Art. 11, par. 3, point (e)		
Art. 31, point (4), point (b)	Art. 7, par. 3, point (e)	—	Art. 11, par. 3, point (f)		
Art. 32	—	—	—		New
Art. 33	—	—	—		New
Art. 34, first and sec ond paragraphs	Art. 9, first and sec ond paragraphs	—	—		
Art. 34, third paragraph	Art. 9, third paragraph				Amended
Art. 35, par. 1, first subparagraph, point (a), first subparagraph	—	Art. 9, par. 1, first subparagraph	—		
Art. 35, par. 1, first subparagraph, point (a), second subparagraph	—	Art. 9, par. 1, second subparagraph, first sentence	—		Amended
Art. 35, par. 1, first subparagraph, point (b)	—	—	Art. 15, par. 1		
Art. 35, par. 1, first subparagraph, point (c)	Art. 11, par. 1	—	—		
Art. 35, par. 1, second subparagraph	—	Art. 9, par. 5, second subparagraph	Art. 17, par. 2, sec ond subparagraph		Amended
Art. 35, par. 1, third subparagraph	Art. 11, par. 7, second subparagraph	—	—		Amended
Art. 35, par. 1, fourth, fifth and sixth subpara graphs	—	—	—		New
Art. 35, par. 2	Art. 11, par. 2	Art. 9, par. 2	Art. 15, par. 2		Amended
Art. 35, par. 3	—	—	—		New

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 35, par. 4, first subparagraph	Art. 11, par. 5, first sentence	Art. 9, par. 3, first sentence	Art. 16, par. 1		Amended
Art. 35, par. 4, second and third subparagraphs	—	—	—		New
Art. 35, par. 4, fourth subparagraph			Art. 16, par. 3 and 4		
Art. 35, par. 4, fifth subparagraph	Art. 11, par. 5, second sentence	Art. 9, par. 3, second sentence	Art. 16, par. 5		Amended
Art. 36, par. 1	Art. 11, par. 6, first subparagraph, adapted	Art. 9, par. 4, first sentence, adapted	Art. 17, par. 1, first sentence, adapted		
Art. 36, par. 2, first subparagraph	Art. 11, par. 7, first sentence	Art. 9, par. 5, first subparagraph	Art. 17, par. 2, first subparagraph		Amended
Art. 36, par. 2, second subparagraph	—	—	—		New
Art. 36, par. 3	Art. 11, par. 10	Art. 9, par. 8	Art. 17, par. 5		Amended
Art. 36, par. 4	Art. 11, par. 8 and 13	Art. 9, par. 6 and 11	Art. 17, par. 4 and 8		Amended
Art. 36, par. 5	Art. 11, par. 11, adapted	Art. 9, par. 9, adapted	Art. 17, par. 6, adapted		
Art. 36, par. 6	Art. 11, par. 13, sec ond sentence	Art. 9, par. 11, second sentence	Art. 17, par. 8, sec ond sentence		Amended
Art. 36, par. 7, first subparagraph	Art. 11, par. 12	Art. 9, par. 10	Art. 17, par. 7		
Art. 36, par. 7, second subparagraph	—	—	—		New
Art. 37	Art. 17	Art. 13	Art. 21		Amended
Art. 38, par. 1	—	—	—		New
Art. 38, par. 2	Art. 12, par. 2, adapted	Art. 10, par. 1, adapted	Art. 18, par. 1, adapted		
Art. 38, par. 3	Art. 13, par. 1 and 3, adapted	Art. 11, par. 1 and 3, adapted	Art. 19, par. 1 and 3, adapted		Amended
Art. 38, par. 4	Art. 12, par. 2 and Art. 13, par. 4, adapted	Art. 10, par. 1a and Art. 11, par. 3a, adapted	Art. 18, par. 2 and Art. 19, par. 4, adapted		
Art. 38, par. 5 and 6	—	—	—		New
Art. 38, par. 7	Art. 12, par. 5	Art. 10, par. 4	Art. 18, par. 5		Amended

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 38, par. 8	Art. 14, par. 1	Art. 12, par. 1	Art. 20, par. 1		Amended
Art. 39	Art. 12, par. 3 and 4, Art. 13, par. 6, and Art. 14, par. 2 adapted	Art. 10, par. 2 and 3, Art. 11, par. 5, and Art. 12, par. 2 adapted	Art. 18, par. 3 and 4, Art. 19, par. 6 and Art. 20, par. 2 adapted		
Art. 40	Art. 13, par. 2, and Art. 14, par. 3	Art. 11, par. 2, and Art. 12, par. 3	Art. 19, par. 2, and Art. 20, par. 3		Amended
Art. 41, par. 1	Art. 8, par. 2, first sentence, adapted	Art. 7, par. 2, first sentence, adapted	Art. 12, par. 2, first sentence, adapted		
Art. 41, par. 2	Art. 8, par. 1, first subparagraph, adapted	Art. 7, par. 1, first subparagraph, adapted	Art. 12, par. 1, first subparagraph, adapted		
Art. 41, par. 3	Art. 8, par. 1, second subparagraph, adapted	Art. 7, par. 1, second subparagraph, adapted	Art. 12, par. 1, sec ond subparagraph, adapted		
	Art. 8, par. 2, last sen tence	Art. 7, par. 2, last sen tence	Art. 12, par. 2, last sentence		Deleted
Art. 42, par. 1, 3 and 6	Art. 13, par. 5, and Art. 18, par. 2	Art. 11, par. 4, and Art. 15, par. 3	Art. 19, par. 5, and Art. 23, par. 2		Amended
Art. 42, par. 2, 4 and 5	—	—	—		New
Art. 43	Art. 8, par. 3	Art. 7, par.3	Art.12, par. 3		Amended
Art. 44, par. 1	Art. 18, par. 1 adapted	Art. 15, par. 1 adapted	Art. 23, par. 1 adapted		Amended
Art. 44, par. 2	—	—	—		New
Art. 44, par. 3	Art. 22	Art. 23, par. 3	Art. 32, par. 4		Amended
Art. 44, par. 4	—	—	—		New
Art. 45, par. 1	—	—	—		New
Art. 45, par. 2, first subparagraph	Art. 24, first para graph, adapted	Art. 20, par. 1, adapted	Art. 29, first para graph, adapted		
Art. 45, par. 2, second subparagraph	—	—	—		New
Art. 45, par. 3	Art. 24, second and third paragraphs, adapted	Art. 20, par. 2 and 3 adapted	Art. 29, second and third paragraphs, adapted		
Art. 45, par. 4	Art. 24, fourth para graph	Art. 20, par. 4	Art. 29, fourth para graph		Amended
Art. 46, first paragraph	Art. 25, first sentence amended	Art. 21, par. 1 and par. 2, first sentence, adapted	Art. 30, par. 1 and 3, first sentence, adapted		

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 46, second paragraph	—	—	Art. 30, par. 2		
Art. 47, par. 1, points (a) and (b)	Art. 26, par. 1, points (a) and (b), adapted	Art. 22, par. 1, points (a) and (b), adapted	Art. 31, par. 1, points (a) and (b), adapted		
Art. 47, par. 1, point (c)	Art. 26, par. 1, point (c)	Art. 22, par. 1, point (c)	Art. 31, par. 1, point (c)		Amended
Art. 47, par. 2 and 3	—	—	—		New
Art. 47, par. 4 and 5	Art. 26, par. 2 and 3, adapted	Art. 22, par. 2 and 3, adapted	Art. 31, par. 2 and 3, adapted		Amended
Art. 48, par. 1 and par. 2, points (a) to (e) and (g) to (j)	Art. 27, par. 1, adapted	Art. 23, par. 1, adapted	Art. 32, par. 2, adapted		
Art. 48, par. 2, point (f)	—		—		New
Art. 48, par. 3 and 4	—	—	—		New
Art. 48, par. 5	New	New	Art. 32, par. 1, adapted		
Art. 48, par. 6	Art. 27, par. 2	Art. 23, par. 2	Art. 32, par. 3		
Art. 49	New	New	Art. 33		Amended
Art. 50	—	—	—		New
Art. 51	Art. 28	Art. 24	Art. 34		
Art. 52	Art. 29	Art. 25	Art. 35		Amended
Art. 53, par. 1	Art. 30, par. 1 adapted	Art. 26, par. 1 adapted	Art. 36, par. 1 adapted		
Art. 53, par. 2	Art. 30, par. 2	Art. 26, par. 2	Art. 36, par. 2		Amended
	Art. 30, par. 3	—	—		Deleted
Art. 54	—	—	—		New
Art. 55	Art. 30, par. 4, first and second subparagraphs	Art. 27, first and second paragraphs	Art. 37, first and second paragraphs		Amended
—	Art. 30, par. 4, third subparagraph	Art. 27, third paragraph	Art. 37, third paragraph		Deleted
—	Art. 30, par. 4, fourth subparagraph	—	—		Deleted
—	Art. 31	—	—		Deleted

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
—	Art. 32	—	—		Deleted
Art. 56	Art. 3, par. 1, adapted				
Art. 57	—				New
Art. 58	Art. 11 par. 3, par. 6 to 11 and par. 13				Amended
Art. 59	Art. 15	—	—		
Art. 60	Art. 3, par. 2	—	—		
Art. 61	New	—	—		
Art. 62	Art. 3, par. 3				
Art. 63	Art. 3, par. 4				Amended
Art. 64	Art. 11, par. 4, par. 6, first subparagraph, par. 7, first subpara graph, and par. 9	—	—		Amended
Art. 65	Art. 16				
Art. 66	—	—	Art. 13, par. 3 and 4		
Art. 67, par 1	—	—	Art. 13, par. 1, first subparagraph and par. 2, first subpara graph		
Art. 67, par.2			Art. 13, par. 1, in dents 1 to 3 and par. 2, indents 1 to 3		Amended
Art. 68	—	—	New		
Art. 69, par. 1	—	—	Art. 15, par. 3		
Art. 69, par. 2, first subparagraph	—	—	Art. 16, par. 1 and par. 2, second indent		Amended
Art. 69, par. 2, second subparagraph and par. 3	—	—	New		
Art. 70	—	—	Art. 17, par. 1, par. 2, first and third subpar agraphs, par. 3 to 6 and par. 8		Amended
Art. 71	—	—	New		
Art. 72	—	—	Art. 13, par. 5		

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 73	—	—	Art. 13, par. 6, first subparagraph		
Art. 74	—	—	Art. 13, par. 6, sec ond subparagraph		Amended
	Art. 33	Art. 30	Art. 38		Deleted
Art. 75	Art. 34, par. 1, adapted	Art. 31, par. 1, adapted	Art. 39, par. 1, adapted		
Art. 76	Art. 34, par. 2	Art. 31, par. 2	Art. 39, par. 2		Amended
			Art. 39, par. 2, point (d), second subpara graph		Deleted
Art. 77, par. 1	—	Art. 32, par. 1	Art. 40, par. 1		
Art. 77, par. 2	Art. 35, par. 3	Art. 32, par. 2	Art. 40, par. 3		Amended
	—	—	Art. 40, par. 2		Deleted
Art. 77, par. 3	—	Art. 32, par. 3	Art. 40, par. 4		Amended
Art. 78, par. 1 and 2					New
Art. 78, par. 3 and 4	Art. 6, par. 2, point (a),	Art. 5, par. 1, point (d)	Art. 7, par. 1, point (c)		Amended
Art. 79, point (a)	Art. 6, par. 1, point (b), adapted	Art. 5, par. 1, point (c), second sub paragraph, adapted	Art. 7, par. 1, point (b), second subpara graph, adapted		
Art. 79, point (b)	Art. 35, par. 2	—	Art. 16, par. 4		Amended
Art. 79, point c)	—	—	—		New
Art. 79, point (d)	Art. 35, par. 1, adapted	—	—		
Art. 79, point (e)		Art. 29, par. 3, adapted	—		
Art. 79, point (f)	Art. 35, par. 2 adapted	—	—		New
Art. 79, point (g)	—	—	—		
Art. 79, points (h) and (i)	—	—	—		New
Art. 80					
Art. 81					
Art. 82					
Art. 83					

This Directive	Directive 93/37/EEC	Directive 93/36/EEC	Directive 92/50/EEC	Other acts	
Art. 84					
Annex I	Annex II				Amended
Annexes II A and II B	—	—	Annexes IA and IB		Amended
Annex III	Annex I	—	—	Acts on the accession of Austria, Finland and Sweden	Adapted
Annex IV	—	Annex I	—	Acts on the accession of Austria, Finland and Sweden	Adapted
Annex V	—	Annex II	—		Amended
Annex VI	Annex III	Annex III	Annex II		Amended
Annex VII A, B, C and D	Annexes IV, V and VI	Annex IV	Annexes III and IV		Amended
Annex VIII	—	—	—		New
Annex IX					Adapted
Annex IX A	—	Art. 21, par. 2	—	Acts on the accession of Austria, Finland and Sweden	Adapted
Annex IX B	—	—	Art. 30, par. 3	Acts on the accession of Austria, Finland and Sweden	Adapted
Annex IX C	Art. 25, adapted	—	—	Acts on the accession of Austria, Finland and Sweden	Adapted
Annex X					New
Annex XI					New
Annex XII					New

EXHIBIT C-107

International Centre for Settlement of Investment Disputes

Burlington Resources Inc.

The Claimant

v.

Republic of Ecuador

The Respondent

ICSID Case No. ARB/08/5

DECISION ON LIABILITY

Rendered by an Arbitral Tribunal composed of

Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal
Marco Tulio Montañés-Rumayor

Assistant to the Tribunal
Gustavo Laborde

Date: 14 December 2012

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TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or the Treaty	Bilateral Investment Treaty; specifically "Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investments" of 11 May 1997
CPHB	Burlington's Post-Hearing Brief of 6 May 2011
CSM	Burlington's Supplemental Memorial on Liability of 29 September 2010
COSS	Claimant [Burlington]'s Opening Statement Slides for the liability hearing
DJ	Decision on Jurisdiction of 2 June 2010
ER	Expert Report
Exh. C-	Claimant [Burlington]'s Exhibits
Exh. CL-	Claimant [Burlington]'s Legal Exhibits
Exh. E-	Respondent [Ecuador]'s Exhibits
Exh. EL-	Respondent [Ecuador]'s Legal Exhibits
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
Mem.	Initial Claimants' Memorial of 20 April 2009
LET	Ley de Equidad Tributaria
PO1	Procedural Order No. 1 of 29 June 2009
PO2	Procedural Order No. 2 of 29 October 2009
PSC	Production Sharing Contract
RA or Request	Burlington's Request for Arbitration of 21 April 2008
RCM	Ecuador's Counter-Memorial on Liability of 17 January 2011
ROSS	Respondent [Ecuador]'s Opening Statement Slides for the liability hearing
RPHB	Ecuador's Post-Hearing Brief of 6 May 2011
Tr. [page:line]	Transcript of the hearing on liability of 8-11 March 2011, as revised by the parties on 6 May 2011.
WS	Witness Statement

I. FACTS

A. THE PARTIES

1. The Claimant

1. The Claimant, Burlington Resources Inc. ("Burlington" or the "Claimant"), is a corporation existing under the laws of the State of Delaware, United States of America, founded in 1988, and active in the exploitation of natural resources. On 31 March 2006, Burlington was acquired by ConocoPhillips, a multinational energy company with headquarters in the State of Texas, United States of America.

2. The Claimant is represented in this arbitration by Jan Paulsson, Nigel Blackaby, Alexander Yanos, Christopher Pugh, Noiana Marigo, Jessica Bannon Vanto, Viren Mascarenhas, Sam Prevatt and Ruth Teitelbaum of FRESHFIELDS BRUCKHAUS DERINGER US LLP; by Prof. James Crawford of Matrix Chambers, Gray's Inn, London; and by Javier Robalino-Orellana of PAZ HOROWITZ, Quito.

2. The Respondent

3. The Respondent is the Republic of Ecuador ("Ecuador" or the "Respondent").

4. The Respondent is represented in this arbitration by Dr. Diego García Carrión, Álvaro Galindo Cardona (until March 2011), Francisco Larrea, and Christel Gaibor from the PROCURADURÍA GENERAL DEL ECUADOR; and Eduardo Silva Romero, Pierre Mayer, José Manuel García Represa, Maria Claudia Procopiak, Philip Dunham, Ella Rosenberg, George Foster and Ana Carolina Simoes e Silva of DECHERT (Paris) LLP. Dr. Galindo joined DECHERT in March 2011.

B. ECUADOR'S OIL INDUSTRY: THE PRODUCTION-SHARING CONTRACT MODEL

5. This Section summarizes the facts of this dispute insofar as they bear relevance to rule on Respondent's purported liability under the Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investment" (the "Treaty" or "BIT").

6. This dispute arose in the wake of the oil price spike that began in 2002 and that, though with some intermittence, continues to this date. The Parties are in dispute as to how the economic benefits of this oil price spike must be distributed between them. At the heart of this dispute lie the production sharing contracts ("PSCs") for Blocks 7 and 21, entered into between a Burlington wholly-owned subsidiary and Ecuador. Before

entering into the specifics of the dispute, a review of the recent history of Ecuador's hydrocarbons industry is warranted to place the dispute in proper context.

7. Along its history, Ecuador has adopted different contract models for the exploration and exploitation of its hydrocarbon resources. In the 1980s, the prevalent contract model for the exploitation of hydrocarbons in Ecuador was the so-called service contract. Under the service contract model, the government remained the sole owner of any oil produced in the exploration area (the "Block") awarded to the private contractor. If the contractor discovered oil reserves, it had the right to a reimbursement of its costs and to a fee. If it found no oil reserves within a four-year period, the contractor lost its exploration investment and the contract was terminated.[1]

8. The service contract model appeared ill-suited to meet the interests of the State or the investors alike. The State often incurred losses on oil-producing blocks operated under service contract models, in part because the contractor's costs frequently spiraled out of control and the State was contractually bound to reimburse the full measure of these costs.[2] The model was thus unfit to curb cost inefficiencies.[3] On the other hand, investors showed little interest in the service contract model, in part because the profit margins under this model, albeit steady, were fixed. Investors seemingly preferred to shoulder part of the exploration and exploitation risk in exchange for a share of the oil produced. Tellingly, no service contract was executed in the five-year period between 1989-1993. In a nutshell, with the service contract model, Ecuador's hydrocarbons industry remained stagnant.

9. Beginning in 1992, the newly-elected Ecuadorian President Durán Ballén set out to impart new vigor to the sluggish national oil industry. To bring that goal to fruition, the legal regime applicable to hydrocarbons was overhauled. In October 1993, in the context of a general program of economic reforms designed to increase the role of the private sector, President Durán Ballén submitted a bill to Congress calling for the adoption of a new contract model for the exploration and exploitation of hydrocarbons: the so-called production-sharing contract (or "PSC"). Under this contract model, the contractor would assume the entire risk of oil exploration and exploitation, and would in exchange receive a share of the oil produced in accordance with the allocation formulas specified in each contract.

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1 Mem., ¶ 41 n. 42.

2 Mem., ¶¶ 50, 62.

3 Tr. 590:15-591:10.

10. The new PSC model was expected to redress the problems that emerged under the service contract model. It would shift the exploration and exploitation risks from the State to the contractor and would thus put an end to the problem of excessive and inefficient costs incurred at the State's expense. In the letter to the Ecuadorian National Congress (the "Ecuadorian Congress") enclosing the bill, President Durán Ballén observed that:

> "[T]he limited financial resources that the country has […] do not justify PetroEcuador's assumption of all the risk involved in exploration activities; such risk must be shared with international petroleum companies. […] [T]he stipulation for mandatory reimbursement of the contractor's investments, costs and expenditures has significantly reduced the participation of the State in the economic benefits of oil exploration and production in medium and small fields."[4]

11. In addition, the new PSC would help to attract foreign investment. In the letter to the Ecuadorian Congress, President Durán Ballén noted that "the current [service contract model] has exhausted its possibilities of attracting foreign capital."[5] One of the reasons why the service contract model failed to attract foreign investment was that it did not allow contractors to receive a share of the oil production. In the words of President Durán Ballén:

> "[T]he service contract does not permit the contracting company to have a production flow of its own. This characteristic goes against the interest and *raison d'être* of international petroleum companies, for the majority of whom the availability of production is an essential aspect of marketing in international markets. […] The new contract […] will allow Ecuador to position itself at an internationally competitive level for attracting venture capital […]."[6]

12. The overall purpose of the proposed shift from service contracts to PSCs was, in sum, to increase Ecuador's competitiveness in the global oil industry. On 29 November 1993, the Ecuadorian Congress approved the bill authorizing the State to enter into PSCs with private companies. In passing this amendment to the Hydrocarbons Law, the Ecuadorian Congress underlined that it was "indispensable to introduce in the Ecuadorian legislature contractual models that make the exploration and exploitation of hydrocarbons competitive."[7] In conjunction with this amendment, Ecuador issued Decree 1417 which regulated in detail various aspects of the Hydrocarbons Law (collectively, the Law and the Decree will be referred to in this award as the "Hydrocarbons Legal Framework").

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4 Exh. C-78, pp. 2-4 (Claimant's translation); Mem., ¶ 63.

5 Exh. C-78, at p. 3 (Claimant's translation); COSS, # 3; Tr. 16:8-10.

6 Exh. C-78, at p. 4 (Claimant's translation); Mem., ¶ 64.

7 Exh. C-15, Preamble (Tribunal's translation).

13. Subsequently, Ecuador opened international bidding rounds aimed at concluding PSCs with private companies. The purpose of this bidding process was to "promote foreign investment in the Country and expand the hydrocarbons reserves."[8] On 20 March 1995, Ecuador awarded the production sharing contract for the exploration and exploitation of Block 21 to foreign investors.[9] Furthermore, on 23 March 2000, Ecuador converted the existing service contract for the exploration and exploitation of Block 7 into a production sharing contract.[10]

C. BURLINGTON'S INTERESTS IN THE PSCS FOR BLOCKS 7 AND 21

14. Beginning in mid-2001, Burlington acquired interests in the PSCs executed by the Ecuadorian State for the exploration and exploitation of Blocks 7 and 21. Burlington acquired these interests through its wholly-owned subsidiary Burlington Oriente (or the "Burlington subsidiary"). Burlington also acquired interests in the PSCs for Blocks 23 and 24. While Burlington originally asserted claims against Ecuador in relation to Blocks 23 and 24, which were not yet in production, the Parties have since settled these claims. Therefore, this decision is confined to Burlington's outstanding claims in relation to Blocks 7 and 21, which were in production at the time this dispute arose.

15. Burlington is the minority partner of Blocks 7 and 21. The Blocks are located in the Ecuadorian Amazon Region, and each covers an area of 200,000 hectares. Burlington holds a 42.5% interest in the PSC for Block 7[11], and a 46.25% interest in the PSC for Block 21.[12] The majority partner and operator of the Blocks, the French oil company Perenco, holds the remaining interests in the Blocks. Under an Ecuadorian tax regulation issued on 23 September 2005, partners in PSCs for the exploration and exploitation of hydrocarbons must form a consortium for the joint payment of taxes. In accordance with this regulation, Burlington Oriente and Perenco established a consortium in late 2005, which became effective on 1 January 2006 (the "Tax Consortium" or simply the "Consortium").

16. The PSCs for Blocks 7 and 21 regulated at length the parties' rights and obligations in relation to the exploration and exploitation of hydrocarbons in the Blocks. The PSC for

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8 Exh. C-90, Preamble, 4th paragraph (Claimant's translation); Mem., ¶74.

9 Exh. C-2.

10 Exh. C-1.

11 With respect to Block 7, Burlington Oriente acquired a 25% interest on 25 September 2001, a 5% interest on 13 December 2001, and a 12.5% interest in September 2006. Each of these transactions was followed by the requisite government approvals and registrations.

12 With respect to Block 21, Burlington Oriente acquired a 32.5% interest in September 2001, a 5% interest on 7 December 2011, and a 8.75% interest on 7 September 2005. Each of these transactions was followed by the requisite government approvals and registrations.

Block 7 was set to expire in 2010; the PSC for Block 21 in 2021. In particular, the PSCs (i) contained participation formulas allocating the oil produced between the State and the contractors, (ii) included choice of law provisions in favor of Ecuadorian law and, (iii) of pivotal importance to this case, incorporated certain tax clauses whose meaning is considerably disputed by the Parties.

17. First, the PSCs contained participation formulas allocating the oil produced between Ecuador, on the one hand, and the contractors (Burlington and Perenco), on the other. The PSCs allocated oil production on the basis of the volumes of oil produced, with a possible upward or downward adjustment based on the quality of the oil.[13] The Parties vigorously disagree over whether these participation formulas were also linked to the price of oil at the time the PSCs were concluded. Burlington submits that the participation formulas were grounded solely on the volume and quality of oil produced. Ecuador, on the other hand, claims that the participation formulas were also premised on the price of oil at the time of the PSCs, which would yield a specific internal rate of return ("IRR") for the contractor.

18. The PSC for Block 7 established the following participation formula:

Block 7[14]	
Daily average production per year (barrels)	**Contractor's Participation**
< 5,000	76.2%
5,000 – 10,000	74.2%
> 10,000	65%

19. The PSC for Block 21 stipulated the following participation formula:

Block 21[15]	
Daily average production per year (barrels)	**Contractor's Participation**
< 30,000	67.5%
30,000 – 60,000	60%
> 60,000	60%

20. Second, the PSCs included choice of law provisions in favor of Ecuadorian law. The Parties are in dispute as to whether or not these provisions are legal stabilization

13 Exhs. C-1 and C-2, at clause 8.1.

14 Exh. C-1, at clause 8.1; Mem., ¶ 103.

15 Exh. C-2, at clause 8.1; Mem., ¶ 103.

clauses, *i.e.* clauses whereby the contract is governed by the laws in force at the time of its execution, as opposed to laws as subsequently modified. Clause 22.1 of the PSCs for Blocks 7 and 21 provide that:

> "Applicable Legislation: This Contract is governed exclusively by Ecuadorian legislation, and *laws in force at the time of its signature are understood to be incorporated by reference*."[16] (emphasis added)

21. Third, the PSCs incorporated tax clauses regulating the tax treatment that would be afforded to the contractor. Thus, the PSCs stipulated an employment contribution of 15%, an income tax of 25%[17], and exempted the contractor from the payment of royalties or other additional fees. Moreover, the PSCs contained tax modification clauses, that is, clauses calling for the application of a "correction factor" whenever tax changes – be it tax increases or decreases – had an impact on the economy of the contract. The Parties strongly disagree about the import of these clauses: for Burlington, these are tax stabilization clauses; for Ecuador, these are merely renegotiation clauses. Until it has reached a conclusion about their nature, the Tribunal will refer to these clauses as the "tax modification clauses", for it is undisputed that they regulate the parties' conduct in the event of a modification to the tax system. The tax modification clause of the PSC for Block 7 provides:

> "Modification to the tax system: In the event of a modification to the tax system or the creation or elimination of new taxes not foreseen in this Contract or of the employment contribution, in force at the time of the execution of this Contract and as set out in this Clause, which have an impact on the economy of this Contract, a correction factor will be included in the production sharing percentages to absorb the impact of the increase or decrease in the tax or in the employment contribution burden. This correction factor will be calculated between the Parties and will be subject to the procedure set forth in Article thirty-one (31) of the Regulations for Application of the Law Reforming the Hydrocarbons Law."[18]

22. For its part, the tax modification clause of the PSC for Block 21 states:

> "Modification to the tax system and to the employment contribution: In the event of a modification to the tax system, the employment contribution or its interpretation, which have an impact on the economics of this Contract, a correction factor will be included in the production sharing percentages to absorb the increase or decrease in

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16 Exhs. C-1 and C-2 at clause 22.1.

17 The combined tax burden of the employment contribution (15%) and the income tax (25%) is 36.25% and not 40% (Exh. C-1, at 11.2.4; Exh. C-2, at 11.2.2). This is because the employment contribution applies to the gross profits, but the income tax applies only to the lower amount that results following the application of the employment contribution.

18 Exh. C-1, clause 11.12 (Tribunal's translation).

> the tax. This adjustment will be approved by the Administrative Board on the basis of a study that the Contractor will present to that effect."[19]

D. ORIGIN OF THE DISPUTE: OIL PRICE INCREASES AND ECUADOR'S RESPONSE

23. As noted above, Burlington initially acquired interests in the PSCs for Blocks 7 and 21 in September 2001.[20] The crude oil produced in Block 7 is called Oriente crude and it is a high-quality crude, with a gravity ranging between 26°-29° API[21]; the crude oil produced in Block 21 is known as Napo crude and is of somewhat lower quality, with a gravity oscillating between 17°-19° API. Thus, the market price of Oriente crude is higher than the market price of Napo crude. In September 2001, when Burlington acquired its initial interests in the PSCs for the Blocks, the price of Oriente crude was USD 20.15 per barrel.[22] Block 21 was not in production at that time, and would not be in production until late 2003.[23]

24. Beginning in 2002, oil prices began to rise. In 2005, the price of a barrel of oil had more than doubled, exceeding USD 50/bbl for Oriente crude between August and October 2005. By 2006, the price of Oriente crude reached over USD 60/bbl, and Napo crude went over USD 50/bbl. Towards the end of 2007, Oriente crude was trading at around USD 80/bbl and Napo crude at around USD 74/bbl. By 2008, the price of oil surpassed the USD 100/bbl landmark for both Oriente and Napo crude from May to July, reaching USD 121.66/bbl for Oriente crude in June 2008[24] – that is, more than USD 100/bbl above its September 2001 price. Thereafter, oil prices fell sharply to below USD 30/bbl at the end of 2008 and beginning of 2009, only to increase again and stabilize in the range of USD 60-70/bbl for most of 2009 and 2010.[25]

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19 Exh. C-2, clause 11.7 (Tribunal's translation).

20 See *supra*, notes 11 and 12.

21 API is a scale developed by the American Petroleum Institute (API): the higher the API, "the lighter – and hence, more valuable – the crude becomes" (Mem., ¶ 42 n.44.)

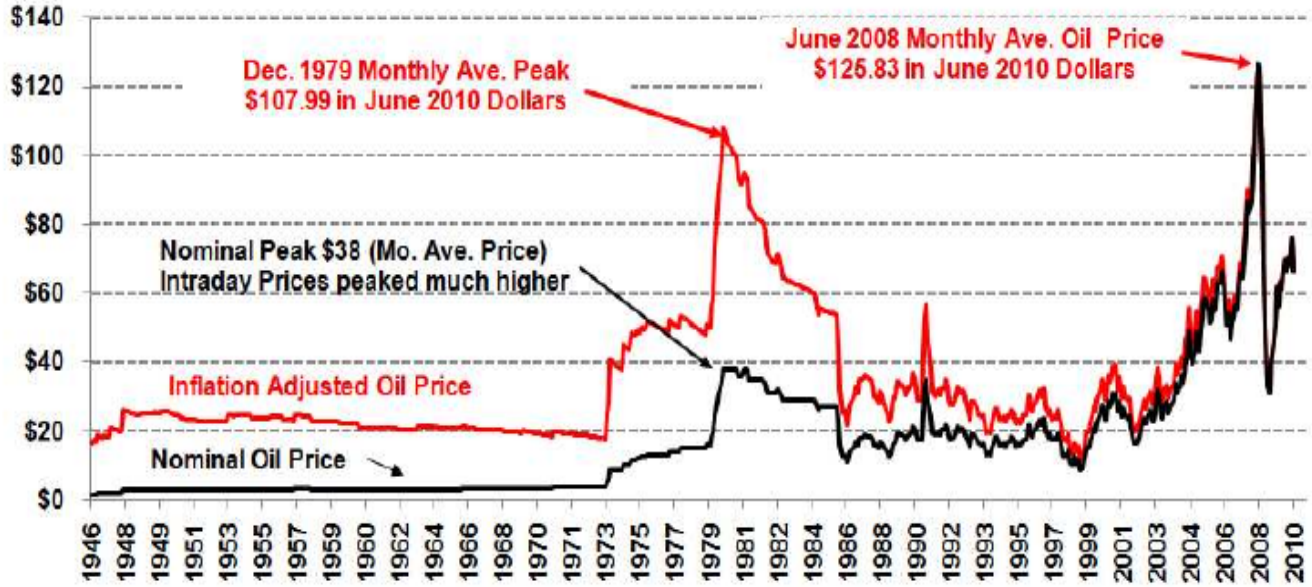
22 Martinez Direct Examination binder, Oil Prices tab (hereinafter "Martinez, Oil Prices tab").

23 *Id*.; also, Mem., ¶ 161 ("Production in Block 21 began in 2003").

24 Napo crude reached a peak of USD 114.67/bbl in June 2008.

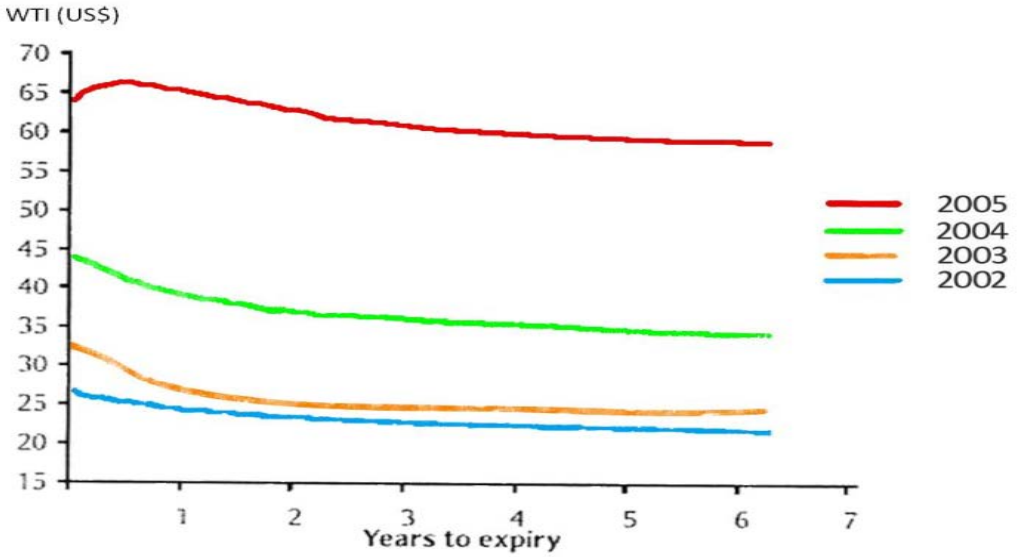
25 See *supra* note 22.

25. The Parties disagree on whether the increase in oil prices was foreseeable or not. Burlington argues that the parties foresaw the possibility that oil prices would increase. Moreover, as illustrated in the graph below[26], in the late 1970s oil prices had experienced the same type of increase as in 2008.



[26] Ecuador has noted that the graph fails to specify what kind of oil it refers to: "[T]here are different kinds of crude oils with different prices. The Ecuadorian crude oil has one price, the WTI has another, the Brent crude oil has another price." (Tr. 619:11-19; also RPHB, ¶ 39). WTI stands for West Texan Intermediate. (Martinez, Oil Prices tab). The WTI is an international benchmark for oil prices. Ecuadorian crude oil prices are lower than WTI prices (RCM, ¶ 176 n.113) but nonetheless "follow the evolution of WTI" (Dávalos, Tr. 620:5-10). Counsel for Burlington assumed that the graph referred to WTI prices (Tr. 620:11-17).

26. Ecuador, on the other hand, maintains that the increase in oil prices was "completely unforeseen and unforeseeable."[27] Oil prices remained stable from the mid-1980s to the beginning of the 2000s. Ecuador claims that the oil price increases of the 1970s were brought about by specific events, to wit, "the Arab world's tightening of oil production"[28] following the Yom Kippur War, and the Iranian revolution together with the Iran-Iraq war.[29] The graph below illustrates how oil price forecasts evolved from 2002 to 2005.[30]



27. According to Ecuador, this price increase "destroyed the economic stability" of the PSCs, including the PSCs for Blocks 7 and 21.[31] More generally, Ecuador believed that the allocation of oil production under the PSCs was no longer fair in view of the remarkable increase in oil prices. It considered that, because the State is the owner of the oil, it should benefit from the increase in oil prices to a greater extent than the contractor; however, under the terms of the PSCs, which allocated the majority of oil production to the contractor, the contractor would benefit from the increase in oil prices to a greater extent than the State.[32]

28. In November 2005, at a time when the prices of Oriente and Napo crude were about USD 40/bbl, Ecuador invited Burlington to renegotiate the terms of the PSCs. Ecuador

27 RCM, ¶ 179.

28 RCM, ¶ 178.

29 RCM, ¶¶ 176-181.

30 Expert Report of Fair Links, January 2011 (hereinafter "Fair Links ER"), ¶ 65, Figure 6; RPHB, ¶ 59.

31 RCM, ¶ 172.

32 RCM, ¶ 188; RPHB, ¶ 246.

wished to increase its share of participation from around 22% to 50%.[33] Burlington, however, rejected this proposal.[34] According to Burlington, the allocation of oil production was independent of the price of oil. In addition, while the PSCs could be amended under certain circumstances, these circumstances did not "include a change in oil prices or the perceived inequity of the production participations to which the parties agreed."[35] As a result, Ecuador's proposed renegotiations failed.

29. On 1 March 2006, following the breakdown of the renegotiations, Ecuadorian President Palacio submitted a bill to Congress proposing an additional participation for the State of "at least 50%"[36] on so-called extraordinary profits, *i.e.* profits resulting from oil prices in excess of the price of oil as it stood when the PSCs were executed. In the letter explaining the purposes of the bill, President Palacio stated that the PSCs "breach the principle of equity" insofar as there is no clause that allows for a modification of the oil participation share in favor of the State in case of an increase in oil prices.[37] The overall purpose of the bill was "to restore equity" in favor of the State.[38] In the meantime, ConocoPhillips acquired Burlington on 31 March 2006.[39]

30. On 19 April 2006, Congress approved President Palacio's bill and enacted Law 42, which amended the Hydrocarbons Law as follows:

> "**Participation of the State over non agreed or unforeseen surpluses from oil selling contracts. Contracting companies** having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of execution of the agreement expressed at constant rates for the month of payment, **shall grant the Ecuadorian State a participation of at least 50%**

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33 Mem., ¶ 207; First Supplemental Witness Statement of Alex Martínez, 17 April 2009 (hereinafter "Martinez Second WS"), ¶ 14.

34 *Id*.

35 Mem., ¶ 104 n. 141.

36 RCM, ¶ 215; Exh. E-130.

37 Exh. C-174, Explanatory Memorandum enclosed with letter of 1 March 2006, p. 2, first paragraph (Tribunal's translation).

38 *Id*., pp. 2-3 (Tribunal's translation).

39 According to Ecuador, this was a very important event because ConocoPhillips "knew about the negotiation of the contracts. They knew that Ecuador wanted to do that [renegotiate the PSCs]. They bought Burlington. They knew that Windfall Profits Taxes could be enacted. They had the China experience. And they also knew that Law 42 could be enacted. Why? Because President Palacio had already submitted the draft law, the bill, to Congress on the 1st of March 2006." (Tr. 1360:21-1361:11).

> **over the extraordinary revenues caused by such price difference** […]."[40] (emphasis added).

31. As the Tribunal previously concluded, Law 42 is a tax measure for purposes of this Treaty dispute.[41] While Ecuador has argued that Law 42 is a "levy" rather than a "tax" under its domestic law, it has conceded that "for the purposes of the present case, any dispute as to the legal nature of Law 42 under Ecuadorian law is irrelevant."[42] Any such dispute would be irrelevant because the Parties agree that, be it a tax or a levy, Law 42 is part of Ecuador's "tax system" within the meaning of the PSCs and its tax modification clauses.[43] Therefore, for purposes of this decision, the Tribunal deems that Law 42 created a tax.

32. Under the Law 42 tax, oil companies had to pay 50% of the amount, if any, by which the market price of oil exceeds the price of oil at the time the PSCs were executed.[44] In order to calculate the tax, it is necessary to determine:

> (i) First, the current market price of oil, defined as the actual monthly average oil spot prices (the "market price");
>
> (ii) Second, the market price of oil at the time the PSCs were executed adjusted for inflation (the "statutory reference price");
>
> (iii) Third, the tax which is equivalent to 50% of the difference, if any, between the market price and the statutory reference price.

33. The statutory reference price was about USD 25/bbl[45] for Block 7 and USD 15/bbl[46] for Block 21. This statutory reference price was adjusted for inflation and crude quality.[47] In July 2006, for instance, the market price of Oriente crude from Block 7 was USD 66.56/bbl and the adjusted statutory reference price was USD 30.01/bbl. Therefore, the Law 42 tax was USD 18.28 per barrel of oil produced in Block 7 (50% of the difference between USD 66.56/bbl and USD 30.01/bbl).[48] The market price of Napo

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40 Exh. C-7, Article 2.

41 DJ, ¶ 167.

42 RCM, ¶ 287.

43 Mem., ¶¶ 369-370; RCM, ¶ 287.

44 The Law 42 tax applies to the oil company's gross income. Once other taxes and levies envisaged in the PSCs are deducted from this gross income, the base income is obtained. The employment contribution and the income tax are then assessed on this base income to determine the oil company's net income or profits (RCM, ¶ 219).

45 The exact initial statutory reference price for Block 7 was USD 25.111383 (Mem., ¶ 219; Exh. C-178).

46 The exact initial statutory reference price for Block 21 was USD 15.358274 (Mem., ¶ 219; Exh. C-178).

47 RCM, ¶¶ 218, 342, 500, 502.

48 RPHB, ¶ 299; ROSS # 118.

crude from Block 21 at that time was USD 57.43/bbl[49] and the statutory reference price about USD 18/bbl.[50] Accordingly, the Law 42 tax was roughly USD 19.72 per barrel of oil produced in Block 21 (50% of the difference between USD 57.43/bbl and USD 18/bbl).

34. On 6 September 2006, the Ecuadorian Constitutional Court declared that Law 42 was constitutional.[51] Burlington paid the Law 42 tax under protest.[52] By letters dated 18 December 2006, the Tax Consortium requested PetroEcuador to apply a correction factor that would absorb the effects of Law 42, allegedly in accordance with the tax modification clauses contained in the PSCs. Ecuador did not reply to these requests, allegedly on the ground that Burlington had failed to present evidence that Law 42 had an impact on the economy of the PSCs – an essential prerequisite for the application of the tax modification clauses.[53]

35. In November 2006, Rafael Correa won the presidential elections, taking office in January 2007 and replacing President Palacio. On 18 October 2007, Ecuador issued Decree 662, which increased the Law 42 tax rate from 50% to 99% ("Decree 662" or "Law 42 at 99%"). In November 2007, for instance, the market price for Oriente crude from Block 7 was USD 83.20/bbl and the statutory reference price was USD 30.85/bbl. Thus, the Law 42 at 99% tax was USD 51.83/bbl (99% of the difference between USD 83.20/bbl and USD 30.85/bbl).[54] In that month, the market price of Napo crude was USD 79.09/bbl[55] and the statutory reference price of about USD 18/bbl.[56] It follows that the Law 42 at 99% tax was roughly USD 60.48/bbl (99% of the difference between USD 79.09/bbl and USD 18/bbl).

36. Burlington paid the Law 42 at 99% tax under protest.[57] By letters of 28 November 2007, the Tax Consortium again requested PetroEcuador to apply a correction factor to

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49 Martinez, Oil Prices tab.

50 As there appears to be no evidence of the adjusted statutory reference price for Block 21 in July 2006, the Tribunal has applied to the Block 21 statutory reference price the same adjustment rate that was applied to the Block 7 statutory reference price, *i.e.* 20%. This computation is thus meant to be approximate and not exact.

51 RCM, ¶ 217; Exh. CL-62.

52 Mem., ¶ 220; Exh. C-9.

53 Witness Galo Chiriboga, then Executive President of PetroEcuador, testified that the Consortium's requests were mistimed in light of the looming change of administration (Tr. 782:15-783:8).

54 RPHB, ¶ 299; ROSS # 118.

55 Martinez, Oil Prices tab.

56 See *supra* note 50.

57 Mem., ¶ 225; Exh. C-42.

its oil participation share that would absorb the effects of Law 42 at 99%, allegedly in accordance with the tax modification clauses of the PSCs. As was the case with Law 42 at 50%, Ecuador did not respond to these requests, allegedly because Burlington had failed to prove that Law 42 at 99% had affected the economy of the PSCs and therefore that the requirements for the application of the tax modification clauses were met.

37. In December 2007, Ecuador passed the *Ley de Equidad Tributaria* ("LET"), whose purported goal was to open a "new avenue for negotiations with the oil companies"[58] which would allow "them to avoid the application of Law 42"[59] at 99%. According to Ecuador, the LET allowed the State and the oil companies to agree "fairer terms"[60] for the allocation of oil revenues. The LET presented the following three differences with respect to Law 42 at 99%: (i) its tax rate was 70%; (ii) the statutory reference price was not fixed by Ecuador but was subject to negotiation on a case-by-case basis; and (iii) it would apply only to those oil companies that agreed to enter into so-called "transitory agreements" – in the absence of such agreements, Law 42 would continue to apply.[61]

38. On 26 January 2008, in the wake of the enactment of Law 42 at 99% and the LET, President Rafael Correa gave a public radio address where he declared that oil companies had the following three options:

> "We are renegotiating the oil contracts. Oil companies have three options:
>
> [1] either they comply with the 99-1 Decree, that is, of the extraordinary profits, extraordinary! […] Out of the extraordinary gains: 99 percent for the state and 1 percent for the company because the resource is ours. If they disagree, that's the first option, perfect.
>
> [2] We can renegotiate the contract into a services contract which always should have been the preponderant model in the oil industry. Why? Because if the oil is ours we hire somebody to take our oil out, right? We pay for the job, $10 for each barrel of oil extracted, but the rest is for us. So, that's the contract to which we want to go, which was in force at the beginning of the'90s [...]. What does "participation contract" mean? They exploit 100 barrels, they take out 100 barrels of our oil, the private and transnational oil companies, and they give us a little piece and the rest they take away [...]. And there are people who defend this. How shameful. They want to take us back into that opprobrious past, when they took away with no shame the resources of our country. This revolutionary, patriot and citizen government is renegotiating oil contracts and we want to go to such special service

58 RCM, ¶ 221.

59 *Id*.

60 *Id.*, ¶ 223.

61 *Id.*, ¶¶ 222-224.

> contracts, that's how they are called, where we pay $10 per each barrel of oil, whatever they consider appropriate...negotiating obviously, but the rest is for us, the owner of the resource. So that's the second option.
>
> [3] And the third option: If they are not happy, no problem. We don't want to rip-off anybody here. How much have they spent in investments? $200 million? Here, have your $200 million and have a nice day, and PetroEcuador will exploit that field. But we will not allow! My compatriots, for them to keep taking away our oil. […] We have to put a limit: 45 days, or if not, they have to continue to comply with the 99-1."[62]

39. Spurred on by the LET and the new government policy, PetroEcuador, on behalf of Ecuador, and Perenco, on behalf of the Consortium, began renegotiations to reallocate oil revenues following the increase in oil prices, though this time against the background of Law 42 at 99%. In March 2008, PetroEcuador and Perenco reached a preliminary agreement to reallocate oil revenues from Blocks 7 and 21. The March 2008 Transitory Agreement provided that: (a) the Blocks would be operated under the PSC model for a period of five years and then would be migrated to another contract model (presumably service contracts); (b) the contract, whatever its modality, would be extended until 2018; (c) the State's oil participation share would be increased for the period 2008-2010, and then would be linked to oil prices for the period 2010-2018; (d) finally, the Law 42 statutory reference price would be increased to USD 42.5/bbl.[63]

40. Burlington complains that it was excluded from these negotiations because Ecuador requested to negotiate exclusively with Perenco. At the hearing, Alex Martinez, the Manager of Latin American Operations for ConocoPhillips and member of the Board of Directors of Burlington Oriente[64], testified that "the [PetroEcuador] negotiation team wants only the operator at the table, and they only want one person – one voice at the table. They don't want Burlington at the table, and they don't want Burlington to talk."[65] Burlington argues, however, that although Perenco was the operator of the Block, it could not by itself renegotiate Burlington's rights under the PSCs.[66]

41. According to Ecuador, on the other hand, Burlington has wrongly sought to create the impression that it was left out of the negotiation table and that Perenco failed to apprise it of the status of the negotiations. Ecuador claims that, by virtue of the Joint

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62 Exh. C-183; Mem., ¶¶ 20, 231, 416; CPHB ¶¶ 53, 83. (Tribunal's translation)..

63 *Id.*, ¶ 228; RCM, ¶ 228; Exh. E-133.

64 Witness Statement of Alex Martinez, 20 February 2009 (hereinafter "Martinez First WS"), and Martinez Second WS; ¶1.

65 Tr. 367:4-8; CPHB, ¶ 225.

66 CPHB, ¶ 226.

Operations Agreement, Perenco, as the operator of the Block, was "to conduct negotiations with the State on behalf of the Consortium."[67] In addition, whether Perenco apprised Burlington or not of the progress on the contract renegotiations was an internal matter for the Block partners to which Ecuador was alien.[68]

42. At any rate, in April 2008, when Burlington was still "in the midst of evaluating"[69] the terms of the March 2008 Transitory Agreement, Ecuador adopted a new "single model"[70] policy with respect to the renegotiation of oil contracts. Under this new policy, all transitory agreements, including the March 2008 Transitory Agreement, would only be valid for a year, after which the parties would have to migrate to a service contract. In a public radio address delivered in mid-April, President Correa explained the rationale for this new policy and, referring back to his January public address, stated:

> "I said 45 days, I think in January, for the renegotiation of the [oil] contracts… We were close to a deal, but I stopped it, because even though we've secured major benefits, I think that we can do better.
>
> [....]
>
> I believe that one of the best alternatives is to reach a transitory agreement, removing a series of absurd clauses from the current contracts, by which we practically surrendered our national sovereignty. It wasn't business being subjected to the country's sovereignty, but rather the country's sovereignty being subjected to business, [which] we cannot admit [...].
>
> So it seems that the best alternative is to sign a transitory agreement until there is a new Constitution, and move toward a single contractual model for all of the [oil] companies. Basically, what was being done was to modify existing contracts, and we've improved a lot, but we think it is better to move toward this definitive solution of a "single model"[71] (emphasis added).

43. As Ecuador itself acknowledged, the decision to migrate to service contracts within a year "suspended the negotiations with all oil companies, including Perenco and Burlington, for a few weeks."[72] This decision would have even broader consequences in the case of Burlington, which filed a Request for Arbitration within days of President Correa's announcement of the new "single model" policy.[73] According to Burlington, the decision to migrate to service contracts "meant that Ecuador would reap the benefits of

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67 RPHB, ¶ 202.

68 *Id.*, ¶¶ 202-203.

69 Tr. 369:8; CPHB, ¶ 229.

70 Exh. C-184; CPHB, ¶ 229.

71 Exh. C-184.

72 RCM, ¶ 229.

73 Mem., ¶ 233; RCM, ¶ 230.

Burlington's substantial investment in and development of the Blocks, and at the same time would be the sole beneficiary of then-existing high oil prices and any future oil price increases."[74]

44. Negotiations were resumed in May 2008. Consistent with President Correa's announcement, Ecuador submitted to Burlington a new draft Transitory Agreement by virtue of which (a) the Parties would make their "best efforts" to migrate to a service contract within 120 days[75], (b) Burlington would maintain the levels of investment initially proposed for 2008[76], and (c) it would suspend the ICSID proceedings against Ecuador.[77] Burlington did not accept the terms of this May 2008 Transitory Agreement.[78]

45. On 10 July 2008, Ecuador proposed still another draft Transitory Agreement whereby Perenco and Burlington would undertake to migrate to a service contract within one year of its execution.[79] In a joint letter dated 16 July 2008, Burlington and Perenco replied that the terms of this new draft Transitory Agreement, which were "substantially similar"[80] to those of the May 2008 Transitory Agreement, were "unacceptable."[81] On 20 August 2008, Roy Lyons, Burlington's Vice-President, wrote to Galo Chiriboga, Minister of Mines and Oil, to inform that Burlington "would prefer to proceed with the divestment of its assets in Ecuador, rather than migrating its current Production Sharing Contracts positions into the model of a Services Contract."[82]

46. According to Ecuador, from that point on, Burlington blocked every attempt to renegotiate the terms of the PSCs. Since Burlington's consent was indispensable for renegotiating the PSCs for Blocks 7 and 21, this effectively forestalled an agreement between Ecuador and Perenco.[83] In October 2008, Ecuador and Perenco recommenced negotiations and reached a preliminary agreement with respect to both Blocks 7 and 21. Perenco "agreed to the principle of migrating to a services

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74 Mem., ¶ 233.

75 Exh. C-448, §§ 4.2, 4.3.

76 *Id*., at § 4.1.

77 *Id*., at § 4.3. While Ecuador alleges that no transitory agreement contained an obligation "to suspend" the ICSID arbitration (RPHB, ¶ 208), the May 2008 Transitory Agreement appears to contain just such an obligation at § 4.3.

78 CPHB, ¶ 231; Tr. 372:8-375:22.

79 Exh. E-135, § 8.

80 Exh. E-136.

81 *Id*.

82 Exh. E-138.

83 RCM, ¶ 236.

contract"[84], a higher statutory reference price (USD 42.5/bbl for Block 7 and USD 48/bbl for Block 21), and the application of the LET tax rate (70%) instead of Law 42 at 99%. The agreement also required the investor to commit to make a USD 110 million investment and to back up that commitment with a parent company guarantee.[85]

47. Perenco was "keen"[86] to have its minority partner in the Blocks sign these preliminary agreements (the "November 2008 Transitory Agreements"). Accordingly, in early November, Perenco provided Burlington with copies of the November 2008 Transitory Agreements[87] and, on 27 November 2008, Perenco wrote to Burlington:

> "In the continued spirit of keeping you apprised of developments between Perenco and the Government of Ecuador, I write to inform you that after extensive negotiations we have a draft transitory agreement that is acceptable to both Perenco on the one hand, and the Government of Ecuador and PetroEcuador on the other [...]. Perenco believes that the attached agreement is the best present alternative regarding Blocks 7 and 21.
>
> The transitory agreement cannot become effective as to the consortium without Burlington's participation in it. We invite you to consider joining this agreement. If Burlington refuses to do so, there may be adverse consequences for both our companies and Perenco will be compelled to explore all possible means of preserving the value of its investments."[88]

48. Burlington, however, stated that it would "not sign the draft transitory agreements" because it was not "interested in replacing the PSCs with Service Contracts."[89] By letter dated 22 December 2008, Burlington replied to Perenco as follows:

> "Our clear position has been and continues to be that Law 42 is unlawful and that we are entitled to recover all payments made to Ecuador in connection with Law 42 [...]. Similarly, as we look to the future, we expect to enjoy the benefits of the economics promised to us under the PSCs and the BITs [...]. As a result, we see no point in comparing the economics of the Transitory Agreement to the economics in place after Law 42 was initially implemented. The evaluation we have made, for our purposes, is how this agreement compares to the contracts, as written. In our view, it fails that test."[90]

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84 RCM, ¶ 242.

85 CPHB, ¶ 232; Exh. C-422; clauses 3.3 and 5.

86 Tr. 482:12-14.

87 Exh. C-422.

88 Exh. C-423, p. 1.

89 Exh. C-46; Exh. C-425.

90 Exh. C-425. At the hearing, Mr. Martinez testified that under the November 2008 Transitory Agreements "basically I'm giving up my Contract [the PSC]" (Tr. 380:8-9). Mr. Martinez stated that "unless you sign a Service Contract, by [the way] which I don't know what it looks like […] you get liquidated based on your nonamortized investments […]. How can I sign that? No businessman will sign that" (Tr. 380:5-13).

49. On 23 December 2008, Derlis Palacios, Minister of Mines and Oil, invited Perenco, the operator of the Blocks, to designate a negotiating team to begin the reversion process of Block 7 – whose PSC was set to expire in August 2010 – and to "terminate ahead of time and by mutual agreement"[91] the PSC for Block 21, as it was not possible to reach a final agreement due to the "unchanging position of your partner Burlington Resources."[92] On 7 January 2009, Burlington wrote to Minister Palacios requesting compensation for what was, in its understanding, the intended cancellation of the PSCs for Blocks 7 and 21.[93] On 21 January 2009, Minister Palacios reportedly stated that negotiations with Burlington and Perenco "are 'practically impossible'"[94] and the PSCs are "headed toward 'termination'."[95]

50. In sum, the renegotiation process failed again. According to Ecuador, Burlington's refusal to accept the terms of the November 2008 Transitory Agreements "only shows its complete bad faith and lack of true intention to find an amicable solution, agreeable to both sides."[96] Burlington, on the other hand, argues that "[r]enegotiating in good faith does not imply an obligation to accept *any* proposal by Ecuador"[97] (emphasis in original), and that it had valid reasons not to accept Ecuador's offers[98]; in the meantime, the terms of the PSCs should have been respected under the *pacta sunt servanda* principle.[99]

51. The Parties disagree on the number of oil companies that agreed to enter into transitory agreements to migrate from PSCs into service contracts. According to Ecuador, almost all major oil producers which were invited to negotiate entered into transitory agreements with Ecuador. Out of a total of twenty-three contracts, fifteen were migrated to service contract.[100] Burlington, by contrast, maintains that most oil

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91 Exh. C-49 (Tribunal's translation).

92 *Id*. (Tribunal's translation); Mem., ¶ 234; CSM, ¶ 34;

93 Exh. C-47; Mem., ¶ 235; CSM, ¶ 35; RCM, ¶ 245.

94 Exh. C-50.

95 *Id*.

96 RCM, ¶ 242.

97 CPHB, ¶ 236.

98 Burlington argued *inter alia* that the terms of the service contracts to which the PSCs would have been migrated were unknown (CPHB, ¶ 227; Martinez, Tr. 379:4-9; 380:10-12).

99 CPHB, ¶ 236.

100 RPHB, ¶¶ 227-230. The record is slightly inconsistent on this point, partly on account of technical difficulties with the video link examination at the hearing. In the English transcript, Mr. Pastor Morris appears as testifying that 14 out of 24 contracts were migrated to services contract (Tr. 952:11-14). In the Spanish transcript, Mr. Pastor Morris appears as testifying that 15 out of 23 contracts were migrated to services contracts (Spanish Tr. 940:4-8), although it later testified that only 14 out of 23 were so migrated (Spanish Tr. 986:21-987:3). The variations, nevertheless, are of little consequence.

companies did not accept the new service contract proposed by Ecuador. Of the fourteen PSCs in force when Law 42 at 50% was enacted in April 2006, only four were successfully converted into service contracts; the remaining oil companies either settled their claims before signing transitory agreements or signed transitory agreements but no service contracts.[101]

E. *COACTIVA* PROCEEDINGS, INTERVENTION IN THE BLOCKS AND *CADUCIDAD* DECREES

52. While the contract renegotiations were ongoing, Burlington continued to pay the Law 42 tax. Burlington paid the Law 42 tax to Ecuador for two consecutive years, from April 2006 to May 2008. In June 2008, however, Burlington stopped paying the Law 42 tax to Ecuador. By that time, the Tax Consortium, which had paid around USD 400 million in Law 42 taxes, grew "concerned about the exponential increase in the amounts in dispute and the lack of a clear path to reach a negotiated solution."[102] Therefore, on 19 June 2008, the Tax Consortium wrote to Ecuador to propose that future Law 42 payments be made "into an escrow account, maintained by an independent escrow agent in a neutral location, pending resolution of our dispute either by settlement or award."[103]

53. At the time, Ecuador did not respond to the Tax Consortium's request.[104] At the hearing, Germánico Pinto, who would simultaneously become Minister of Non-Renewable Resources and President of the Board of Director of PetroEcuador and PetroAmazonas for a ten-month stint[105], testified that no country in the world would accept the Tax Consortium's proposal.[106] In the same vein, former Minister of Mines and Oil Galo Chiriboga stated that "tax laws in Ecuador, and I think in many parts of the world, are mandatory", for which reason accepting the Tax Consortium's proposal would not be "possible anywhere in the world."[107]

54. Having commenced this arbitration and received no answer from Ecuador on its escrow account proposal, the Tax Consortium decided to make future Law 42 payments into a segregated account. From June 2008 to April 2009, Burlington paid around USD 150 million into this segregated account located in the United States. Ecuador referred to this decision as a "blatant and unlawful act of defiance on the

101 CPHB, ¶¶ 237-244.

102 Mem., ¶ 229 (quotation marks omitted); Exh. C-48.

103 Exh. C-48, pp. 3-4.

104 Mem., ¶ 229.

105 Witness Statement of Germanico Pinto, 17 January 2011 (hereinafter "Pinto WS"), ¶¶ 11-12.

106 Tr. 724:8-12.

107 Tr. 802:4-12.

Consortium's part."[108] At the hearing, Minister Pinto gave evidence to the effect that the Consortium's decision to stop paying the Law 42 tax to Ecuador "was creating a challenging situation."[109] Similarly, Minister Chiriboga testified as follows:

> "[C]itizens [..] do not have the power to decide whether they pay a tax or not. We do have the option to discuss--pay the tax, and discuss before a court whether this is legal or not, but we cannot accept that tomorrow a taxpayer will tell an authority "I am not going to pay to the State. I am going to deposit this money in an account, and whenever the judge or the court that is hearing the case decides on this, we'll see what we do."[110]

55. On 14 February 2009, following the breakdown of the renegotiations, President Correa stated at a press conference that:

> "[T]wo companies, Perenco and Repsol, with which Burlington is also allied, have wasted our time. When an agreement was near, they backed out. I believe, I fear, that they thought they were still dealing with previous administrations. Which, gentlemen, we will not permit
>
> [....]
>
> [S]ince they have not paid their taxes on extraordinary profits, I have ordered enforcement actions against Repsol and Perenco, and these companies can go wherever they like. This country will not pay attention to extra-regional authorities that attempt to tell us what to do or not to do."[111]

56. On 19 February 2009, Ecuador began *coactiva* proceedings against the Consortium to enforce outstanding taxes in the amount of USD 327.3 million. In accordance with this proceeding, the Executory Tribunal of PetroEcuador (the "Executory Tribunal") sent three *coactiva* notices to Perenco, the operator of the Blocks, ordering payment of the overdue tax within three days, failing which assets would be attached. On 3 March 2009, the Executory Tribunal ordered the seizure of the crude production and cargo from Blocks 7 and 21, appointing a judicial custodian of the crude. This decision was confirmed on 9 March 2009 by an Ecuadorian judicial court.[112]

57. On 6 March 2009, upon the application of Burlington Oriente[113], this Tribunal recommended "that the Respondents [Ecuador and PetroEcuador[114]] refrain from

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108 RCM, ¶ 13.

109 Tr. 743:3-14.

110 Tr. 802:16-803:3.

111 Exh. C-51, pp. 2-3 (Claimant's translation); Mem., ¶ 237; CSM, ¶ 37.

112 Exh. C-60.

113 Originally one of the claimants in this arbitration, Burlington Oriente ceased to be a party to these proceedings after the contract claims were withdrawn (DJ, ¶¶ 53, 78-80).

114 PetroEcuador was initially one of the two respondents to the case, along with Ecuador (DJ, ¶ 53).

engaging in any conduct that aggravates the dispute between the Parties and/or alters the *status quo* until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first."[115] Despite this recommendation, Ecuador held the first auction of seized crude on 15 May 2009, but no bids were submitted and the seized oil remained unsold.[116]

58. On 29 June 2009, the Tribunal issued Procedural Order No. 1 on provisional measures, wherein it generally ordered that the Parties "refrain from any conduct that may lead to an aggravation of the dispute."[117] In order to carry out this objective, the Tribunal specifically directed the Parties to "make their best efforts"[118] to open a joint escrow account into which Law 42 payments would be made, and the Respondents to "discontinue"[119] the *coactiva* proceedings pending against Burlington Oriente. Procedural Order No. 1 notwithstanding, a second auction was conducted in early July 2009: PetroEcuador, the sole bidder on this occasion, acquired the seized crude at 50% of its market value – as allowed under Ecuadorian law.[120]

59. At subsequent auctions, PetroEcuador, still the sole bidder, acquired the seized oil in the first round for about two-thirds of its value – again in conformity with Ecuadorian law. The Parties present diverging accounts on why PetroEcuador was the sole bidder at the auctions. Burlington conjectures that "potential bidders were aware that ownership of the cargoes was in dispute and subject to the provisional measures rulings of the *Burlington* and *Perenco* tribunals."[121] Ecuador retorts that this explanation is misleading, and that the real reason why there were no bidders other than PetroEcuador is that the Consortium threatened legal action against any company that would acquire the seized crude.[122]

60. Although Burlington stopped paying the Law 42 tax in June 2008, it was not until February 2009 that Ecuador took enforcement action. The Parties disagree on the reasons behind this timing. Burlington claims that this delayed enforcement of the law

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115 Tribunal's recommendation of 6 March 2009, ¶ 13; Mem., ¶ 246; CSM, ¶ 43.

116 CSM, ¶ 47.

117 PO1, *Order* at 8.

118 *Id*., at 1-6.

119 *Id*., at 7.

120 CSM, ¶ 53. In accordance with the Ecuadorian Code of Civil Procedure, offers in the first auction round may not be lower than two-thirds of the appraised value of the auctioned asset; if there are no bidders in the first round, a new round is to be organized and the minimum offer this time may not be lower than 50% of the appraised value of the auctioned asset (RCM, ¶ 539).

121 CSM, ¶ 53.

122 RCM, ¶ 548.

is evidence that the *coactiva* process was nothing but retaliation for its refusal to surrender its rights under the PSCs during the renegotiation process, which essentially ended in December 2008.[123] For its part, Ecuador denies this as a complete mischaracterization of the facts. Ecuador argues that it did not take enforcement action before because the Law 42 tax was liquidated on an annual basis and also to avoid a "heavy-handed"[124] environment that could have marred the negotiations.[125]

61. The seizures of the Consortium's crude stretched from March to July 2009. All in all, by the time the last recorded auction was held in April 2010, Ecuador had auctioned 3,960,000 barrels of crude Oriente from Block 7 and 3,640,000 barrels of crude Napo from Block 21.[126] The following chart[127] summarizes the outcome of eight auction rounds of the Consortium's crude, covering most of the crude seized from the Consortium and acquired by PetroEcuador.

	Block 7 Crude Oriente				Block 21 Crude Napo				
	Amount (Barrels)	Bidding Price (US$)	Valuation (US$)	**Benefit to the State** (US$)	**Amount** (Barrels)	Bidding Price (US$)	Valuation or Nominal Price (US$)	**Benefit to the State** (US$)	**Discount**
1	**720,000**	20,962,441	41,924,880	**20,962,439**	**720,000**	20,052,361	40,104,720	**20,052,359**	**50%**
2	**720,000**	27,980,642	41,970,960	**13,990,318**	**360,000**	13,382,641	20,073,960	**6,691,319**	**33%**
3	**360,000**	14,455,201	21,682,800	**7,227,559**	**360,000**	13,975,201	20,962,800	**6,987,599**	**33%**
4	**360,000**	16,044,001	24,066,000	**8,021,999**	**360,000**	16,044,001	21,546,000	**5,501,999**	**33%**
5	**360,000**	16,620,001	24,930,000	**8,309,999**	**400,000**	14,737,601	22,106,400	**7,368,799**	**33%**
6	**360,000**	16,140,001	24,210,000	**8,069,999**	**360,000**	14,472,001	21,708,000	**7,235,999**	**33%**
7	**360,000**	18,300,001	27,450,000	**9,149,999**	**360,000**	17,712,001	26,568,000	**8,855,999**	**33%**
8	**360,000**	18,369,601	27,554,400	**9,184,799**	**360,000**	17,827,201	26,740,800	**8,913,599**	**33%**
Total per Block	**3,600,000**	148,871,899	233,789,040	**84,917,151**	**3,280,000**	128,203,008	199,810,680	**71,607,672**	

62. On account of the *coactiva* seizures and auctions, the Consortium decided to cease operations in the Block. By letter of 13 July 2009, the Consortium informed the Ministry of Mines and Oil (the "Ministry") that "[u]nder the circumstances, […] we are left with no choice but to suspend" operations in Blocks 7 and 21.[128] The Consortium noted that it planned to "commence suspension of activities at noon July 16th, 2009" unless Ecuador

123 CSM, ¶¶ 87, 90; CPHB, ¶¶ 88-106.
124 Tr. 842:6-11.
125 RPHB, ¶¶ 365-375.
126 CSM, ¶ 76.
127 CPHB, ¶ 104.
128 Exh. C-208, p. 3.

and PetroEcuador "remedy their current breaches and deliver back to the Consortium the entirety of the seized crude volumes, or pay a cash equivalent market value."[129]

63. On 15 July 2009, the Consortium sent a new letter to the Ministry detailing a schedule of the planned suspension.[130] On the same date, the Ministry replied to the Consortium that this decision was "illegal"[131] and "would cause serious technical and economic losses to the government of Ecuador."[132] On 16 July 2009, after the suspension was scheduled to occur, Ecuador entered the Blocks, without using force, to ensure their continued operation.[133] On the same day, PetroEcuador passed a resolution declaring the state of emergency in the Blocks, and authorizing PetroAmazonas to adopt any measure necessary to guarantee the continuity of operations.[134] Ever since, Ecuador has been in possession of the Blocks.[135]

64. The Parties differ on how the Consortium's decision to discontinue operations in the Blocks should be characterized. Burlington refers to this decision as a "suspension" of operations, because the Consortium could have "resume[d] normal operations in relatively short order should Ecuador [have] cease[d] its unlawful actions."[136] At the hearing, Mr. Martinez testified on direct examination that the Consortium had not contemplated suspending operations prior to the seizures.[137] Ecuador, on the other hand, describes the Consortium's decision as an "abandonment" of the Blocks.[138] At the hearing, Mr. Martinez conceded that the suspension could have lasted for the entire duration of the *Perenco* and the *Burlington* arbitrations.[139]

65. In September 2009, at PetroEcuador's request, the Minister of Non-Renewable Natural Resources initiated the so-called *caducidad* process to terminate the PSCs for Blocks 7 and 21. Perenco, on behalf of the Consortium, opposed the initiation of the process, albeit to no effect: the Minister did not accept the Consortium's objections.[140] Thus, on 20 July 2010, one year after Ecuador's entry into the Blocks, the Minister of Non-

129 *Id.*; CSM, ¶¶ 59-60; RCM, ¶ 571.
130 Exh. C-213; CSM, ¶ 62; RCM, ¶ 572.
131 Exh. C-214.
132 *Id*.
133 CSM, ¶ 65; RCM, ¶¶ 578-579.
134 CSM, ¶ 65; RCM, ¶ 580.
135 CSM, ¶¶ 66-67;
136 *Id.,*, ¶ 62.
137 Tr. 547:3-5.
138 RCM, ¶¶ 572, 578, 588.
139 Tr. 519:7-13.
140 Exhs. C-244 and C-245.

Renewable Natural Resources declared the termination – or *caducidad* – of the PSCs for Blocks 7 and 21.[141]

66. On 27 July 2010, one week after the termination of the PSCs for Blocks 7 and 21, the Ecuadorian Congress passed an amendment to the Hydrocarbons Law and Tax Law. Pursuant to this amendment, all PSCs had to be migrated to service contracts within a 120-day period – *i.e.* by the end of November 2010; if the PSCs were not migrated within that time period, they would be unilaterally terminated – albeit through a process other than *caducidad* – and the Ministry of Hydrocarbons would at that point "determine the value and method of payment for each contract."[142]

141 CSM, ¶¶ 77-78.

142 Exh. C-246 (Claimant's translation); CSM, ¶ 79; CPHB, ¶¶ 120, 142; RPHB, ¶ 167.

II. PROCEDURAL HISTORY

A. INITIAL PHASE

67. On 21 April 2008, Burlington and the Burlington Subsidiaries (collectively, the "Initial Claimants"), filed a Request for Arbitration (the "Request") with the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") against Ecuador and PetroEcuador (the "Initial Respondents"), enclosing forty-five exhibits.[143] In the Request, the Initial Claimants asked for the following relief:

> "(a) DECLARE that Ecuador has breached:
>
> (i) Article III of the Treaty by unlawfully expropriating and/or taking measures tantamount to expropriation with respect to Burlington's investments in Ecuador;
>
> (ii) Article II of the Treaty by failing to treat Burlington's investments in Ecuador on a basis no less favorable than that accorded [to] nationals; by failing to accord Burlington's investments fair and equitable treatment, full protection and security and treatment no less than that required by international law; by implementing arbitrary and discriminatory measures against Burlington's investments; and by failing to observe its obligations with regard to Burlington's investments; and
>
> (iii) Each of the PSC;
>
> (b) ORDER Ecuador: (i) to pay damages to Burlington for its breaches of the Treaty in an amount to be determined at a later stage in these proceedings, including payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages for the breach of the Treaty; and/or (ii) to specific performance of its obligations under the PSCs and pay damages for its breaches of the PSCs in an amount to be determined at a later stage in the proceedings, including interest at such a rate as the Tribunal considers just and appropriate until the complete payment of all damages for breach of the PSCs.
>
> (c) AWARD such other relief as the Tribunal considers appropriate; and
>
> (d) ORDER Ecuador and PetroEcuador to pay all of the costs and expenses of this arbitration, including Burlington's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs."[144]

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143 Exhs. C-1 to C-45.

144 Request, ¶ 136.

68. On 25 April 2008, the Centre transmitted a copy of the Request to Ecuador and to PetroEcuador in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"). On 2 June 2008, the Acting Secretary-General of the Centre registered the Request pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or the "Convention") and dispatched the Notice of Registration to the Parties, inviting them to proceed to constitute the arbitral tribunal.

69. Since the Parties did not agree on a different procedure within the meaning of Rule 2(3) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), the Initial Claimants opted to constitute the arbitral tribunal pursuant to the formula established in Article 37(2)(b) of the ICSID Convention. Under this formula, "the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties."

70. On 4 August 2008, the Initial Claimants appointed as arbitrator Prof. Francisco Orrego Vicuña, a Chilean national. On 22 September 2008, the Respondent appointed as arbitrator Prof. Brigitte Stern, a French national. On 27 October 2008, the Parties agreed to appoint Prof. Gabrielle Kaufmann-Kohler, a Swiss national, as President of the Arbitral Tribunal. All three arbitrators accepted their appointments. In addition, the Centre selected Mr. Marco Tulio Montañés-Rumayor to serve as Secretary of the Tribunal. On 18 November 2008, the Arbitral Tribunal (the "Tribunal") was deemed to be constituted and the proceedings to have begun.

71. On 20 January 2009, the Tribunal held a first procedural session at the World Bank's office in Paris. At the first session, the Parties agreed that the Tribunal had been properly constituted and raised no objection to the appointment of the members of the Tribunal. Furthermore, the Parties and the Tribunal agreed on a number of procedural issues. The first session was audio-recorded and transcribed in both English and Spanish. Minutes of the first session were drafted, signed by the President and the Secretary of the Tribunal, and transmitted to the Parties on 18 February 2009. Later that month, the Parties also expressed their consent to the procedural calendar proposed by the Tribunal.

72. On 20 February 2009, Burlington Oriente, the subsidiary holding Claimant's ownership interests in Blocks 7 and 21, filed a Request for Provisional Measures (the "RPM"),

together with a request for a temporary restraining order with immediate effect (the "TRO Request"), asking that the Initial Respondents refrain from (i) enforcing payments allegedly due under Law 42; (ii) affecting the legal situation or terminating the Block 7 and 21 PSCs; and (iii) engaging in any conduct that may aggravate the dispute between the Parties. The RPM was accompanied by twelve exhibits[145], thirteen legal exhibits[146], and the witness statement of Alex Martinez. On 4 March 2009, Ecuador filed a Preliminary Reply to Burlington Oriente's RPM, enclosing three exhibits[147] and nineteen legal exhibits.[148]

73. On 6 March 2009, the Arbitral Tribunal recommended "that the [Initial] Respondents refrain from engaging in any conduct that aggravates the dispute between the Parties and/or alters the *status quo* until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first."[149] On 17 March 2009, Ecuador filed a Reply to Burlington Oriente's RPM and a request for reconsideration of the Tribunal's 6 of March 2009 recommendation, along with five exhibits[150] and seven legal exhibits.[151] Eight days later, Burlington Oriente objected to Ecuador's request for reconsideration of the Tribunal's 6 of March 2009 recommendation. On 27 March 2009, Burlington Oriente filed its Response to Ecuador's Reply to the RPM, accompanied by eleven exhibits[152] and eight legal exhibits.[153]

74. On 3 April 2009, the Tribunal denied Ecuador's request for reconsideration of its 6 March 2009 recommendation on the double ground that there were no changed circumstances that would warrant such reconsideration, and that the hearing on provisional measures would take place shortly thereafter. On 6 April 2006, Ecuador filed its Rejoinder to Burlington Oriente's RPM, enclosing six exhibits[154] and fifteen legal exhibits.[155] On 17 April 2009, the Arbitral Tribunal held the hearing on provisional measures in Washington D.C., at which counsel for the Parties presented oral

145 Exhs. C-46 to C-57.
146 Exhs. CL-1 to CL-13.
147 Exhs. E-3 to E-5.
148 Exhs. EL-1 to EL-19.
149 Tribunal's recommendation of 6 March 2009, ¶13 (emphasis added).
150 Exhs. E-6 to E-10.
151 Exhs. EL-20 to EL-26.
152 Exhs. C-58 to C-68.
153 Exhs. CL-14 to CL-21.
154 Exhs. E-11 to E-16.
155 Exhs. EL-27 to EL-41.

arguments and answered questions from the Tribunal. The hearing was transcribed in English and Spanish and copies of the transcript were distributed to the Parties.

75. On 29 June 2009, the Tribunal issued Procedural Order No. 1 on provisional measures. It ordered the Parties to "refrain from any conduct that may lead to an aggravation of the dispute."[156] In order to implement this general objective, it specifically ordered that the Parties "make their best efforts"[157] to open a joint escrow account into which Law 42 payments would be made, and that the Respondent "discontinue"[158] the *coactiva* proceedings then pending against Burlington Oriente.[159] This order replaced the Tribunal's recommendation of 6 March 2009.

76. On 18 September 2009, the Initial Claimants withdrew their contract claims (the "Contract Claims") on the alleged ground that Ecuador had physically occupied the Blocks, bringing "to completion the expropriation that began with the enactment of Law 42."[160] Burlington was to continue to pursue its claims under the Treaty (the "Treaty Claims"). The Initial Claimants wrote:

> "In this context, and as announced at the First Session, the Claimants respectfully inform the Tribunal that the Contract Claimants [the Burlington Subsidiaries] hereby withdraw their contractual claims, including those relating to Block 23 and 24, without prejudice, and confirm that Burlington maintains its claims under the Treaty [the "Treaty Claims"]".[161]

77. On 22 September 2009, the Initial Respondents denied that it had expropriated Blocks 7 and 21, but agreed to the withdrawal of the Contract Claims provided that the withdrawal was "with prejudice".[162] The Initial Respondents also requested that the Tribunal withdraw Procedural Order No. 1 because Burlington Oriente had abandoned operations in Blocks 7 and 21.[163]

78. On 10 October 2009, the Initial Claimants "accept[ed] that any withdrawal of the contractual claims should be with prejudice" because they saw "no reason to preserve

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156 PO1, *Order* at 8.

157 *Id*., at 1-6.

158 *Id*., at 7.

159 The Tribunal's order notwithstanding, a second auction was conducted in early July 2009: PetroEcuador, the sole bidder on this occasion, acquired the seized crude at 50% of its market value – as allowed under Ecuadorian law. (CSM, ¶ 53).

160 The Initial Claimants' letter of 18 September 2009, Exh. C-189, p. 2.

161 *Id*.

162 Exh. E-118, p. 2

163 Exh. C-189, p. 3

[the] right to re-file the contractual claims in the future."[164] By the same token, they agreed that Procedural Order No. 1 be withdrawn as "[m]aintaining the Order would therefore serve no purpose."[165] Subsequently on 20 October 2009, the Initial Claimants confirmed that "PetroEcuador is no longer a party to these proceedings" following the withdrawal of the Contract Claims.[166]

79. On 29 October 2009, the Arbitral Tribunal issued Procedural Order No. 2, which reads in pertinent part as follows:

> "1. Provided that the [Initial] Respondents make no objection by 6 November 2009, the Contract Claims will be deemed withdrawn with prejudice as of that date. Consequently, as of 6 November 2009, PetroEcuador and, subject to the [Initial] Claimants' confirmation by 2 November 2009, [the Burlington Subsidiaries] will cease to be parties to this dispute. As a result, this arbitration will deal solely with Burlington's Treaty Claims against Ecuador.
>
> 2. Procedural Order No. 1 is hereby revoked. Any funds in the escrow account are therefore released to the [Initial] Claimants." [The Tribunal nonetheless "specified that the Parties remain under a duty not to further aggravate the dispute"].[167]

80. In accordance with such order, the Initial Claimants confirmed on 2 November 2009 that the Burlington Subsidiaries were no longer parties to these proceedings and that the Contract Claims were withdrawn. For their part, the Initial Respondents did not object to the withdrawal with prejudice of the Contract Claims by the specified date. Accordingly, as of 6 November 2009, the Contract Claims were withdrawn with prejudice and PetroEcuador and the Burlington Subsidiaries ceased to be parties to these proceedings. From that time on, this arbitration is confined to Burlington's Treaty Claims against Ecuador.

B. JURISDICTIONAL PHASE

81. On 20 April 2009, the Initial Claimants submitted their Memorial, accompanied by one hundred and twenty exhibits[168], one hundred and six legal exhibits[169], the witness statements of Taylor Reid and Herb Vickers, and the first supplemental witness statement of Alex Martinez. In addition, the Initial Claimants submitted complete

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164 The Initial Claimants' letter of 10 October 2009, Exh. C-190, pp. 1 and 2.

165 *Id*., at 2.

166 The Initial Claimants' letter of 20 October 2009, Exh. E-121, p. 1.

167 PO2, *Order* at 1-2 and ¶ 29.

168 Exhs. C-69 to C-188.

169 Exhs. CL-22 to CL-127.

versions of the PSCs for Blocks 7, 21, 23 and 24[170], with authorizations, annexes and English translations.

82. On 20 May 2009, Ecuador and PetroEcuador announced in separate correspondence that they would object to the jurisdiction of the Arbitral Tribunal. On 20 July 2009, Ecuador and PetroEcuador filed separate Objections to Jurisdiction. Ecuador filed its Objections to Jurisdiction together with ninety-nine exhibits[171], fourteen legal exhibits[172], the witness statement of Dr. Christian Dávalos, and the expert reports of Prof. Juan Pablo Aguilar and Prof. Luis Parraguez Ruiz.

83. On 20 October 2009, Burlington filed a Counter-Memorial on Jurisdiction, enclosing ten exhibits[173] and twenty-one legal exhibits.[174] Burlington did not append any witness statement of expert opinion to its submission. Because the Burlington Subsidiaries would soon cease to be parties to this arbitration, only Burlington filed a Counter-Memorial on Jurisdiction.[175]

84. On 30 October 2009, the Tribunal and the Parties held a pre-hearing telephone conference to organize the hearing on jurisdiction. Shortly thereafter, the Tribunal circulated Procedural Order No. 3 addressing a number of procedural issues related to the impending hearing. The hearing on jurisdiction took place on 22 January 2010 at the World Bank's offices in Paris. On 2 June 2010, the Arbitral Tribunal dispatched the Decision on Jurisdiction to the Parties.

85. In the Decision on Jurisdiction, the Tribunal declared that: (i) it had jurisdiction over the expropriation claim; (ii) it lacked jurisdiction over the fair and equitable treatment claim, the arbitrary impairment claim, and the full protection and security claim; (iii) it would join to the merits the issue of whether it had jurisdiction over Burlington's Law 42 first umbrella clause claim and over the first limb of its third umbrella clause claim; (iv) Burlington's second umbrella clause claim and the second limb of its third umbrella clause claim had lapsed on their own terms; and (v) Burlington's full protection and security claims for Blocks 23 and 24 were inadmissible.[176]

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170 Exhs. C-1 to C-4.

171 Exhs. E-17 to E-115.

172 Exhs. EL-41 to EL-55.

173 Exhs. C-189 to C-198.

174 Exhs. CL-128 to CL-148.

175 See *supra*, ¶¶ 80-81.

176 DJ, ¶ 342, A-E.

C. LIABILITY PHASE AND COUNTERCLAIMS

86. From the time Burlington began this arbitration in April 2008, significant new events took place – most notably, the *coactiva* proceedings, Ecuador's intervention in the Blocks, and the termination of the PSCs for Blocks 7 and 21. For this reason, the Parties agreed that Burlington would have the opportunity to file a supplemental memorial. Thus, on 29 September 2010, Burlington submitted a Supplemental Memorial on Liability, together with fifty-two exhibits[177], eighteen legal exhibits[178], and the second supplemental witness statement of Alex Martinez.

87. On 17 January 2011, Ecuador presented its Counter-Memorial on Liability (the "Counter-Memorial"), accompanied by seventy exhibits[179], ninety-seven legal exhibits[180], and the witness statements of Wilson Pastor, Germánico Pinto, Derlis Palacios, Galo Chiriboga, Celio Vega, Pablo Luna, the second witness statement of Christian Dávalos, the expert reports of Fair Links, RPS, IEMS, and the second expert report of Juan Pablo Aguilar. In the Counter-Memorial, Ecuador asserted counterclaims against Burlington for damage to the environment and the infrastructure in Blocks 7 and 21.[181]

88. On 20 January 2011, the Tribunal and the Parties held a telephone conference to discuss various procedural matters in connection with the forthcoming hearing on liability. On 28 January 2011, the Tribunal issued Procedural Order No. 4, deciding that, while the hearing on liability would be devoted solely to Burlington's claims, the Tribunal and the Parties would hold a procedural discussion at the end of the hearing to address Ecuador's counterclaims. The Tribunal also issued directions with respect to various matters related to the organization of the hearing, and proposed the appointment of Mr. Gustavo Laborde as assistant to the Tribunal.

89. On 7 February 2011, the Tribunal circulated Procedural Order No. 5 granting in part Ecuador's request for document disclosure. On 21 February 2011, Burlington objected to Ecuador's planned cross-examination of Herb Vickers on the ground that this examination would exceed the scope of Mr. Vickers' witness statement. On 2 March 2011, the Tribunal issued Procedural Order No. 6 allowing Ecuador to cross-examine Mr. Vickers on limited and specified topics. Furthermore, having received the consent

177 Exhs. C-199 to C-250.

178 Exhs. CL-149 to CL-166.

179 Exhs. E-117 to E-186.

180 Exhs. EL-64 to EL-162 (with two exhibits intentionally left blank).

181 RCM, § 9.

of both Parties, the Tribunal confirmed the appointment of Mr. Gustavo Laborde as assistant to the Tribunal.

90. The hearing on liability was held from 8 to 11 March 2011 at the World Bank offices in Paris. At the hearing, both Parties submitted new exhibits into the record. Burlington submitted two hundred and five new exhibits[182] and sixty-eight legal exhibits[183]. Ecuador submitted fifty-seven new exhibits[184] and ten legal exhibits.[185]

91. In addition to the members of the Arbitral Tribunal, the ICSID secretary and the assistant to the Tribunal, the following individuals were in attendance at the hearing:

(i) <u>On behalf of Burlington:</u>

- Ms. Janet Kelly, CONOCOPHILLIPS
- Mr. Clyde Lea, CONOCOPHILLIPS
- Mr. Jason Doughty, CONOCOPHILLIPS
- Ms. Laura Robertson, CONOCOPHILLIPS
- Ms. Kelli Jones, CONOCOPHILLIPS
- Mr. Fernando Avila, CONOCOPHILLIPS
- Ms. Ann Morgan, CONOCOPHILLIPS
- Prof. James Crawford, MATRIX CHAMBERS
- Mr. Jan Paulsson, FRESHFIELDS BRUCKHAUS DERINGER LLP ("FRESHFIELDS")
- Mr. Nigel Blackaby, FRESHFIELDS
- Mr. Alex Yanos, FRESHFIELDS
- Ms. Noiana Marigo, FRESHFIELDS
- Ms. Jessica Bannon Vanto, FRESHFIELDS
- Mr. Viren Mascarenhas, FRESHFIELDS
- Ms. Ruth Teitelbaum, FRESHFIELDS

182 Exhs. C-251 to C-455.

183 Exhs. CL-167 to CL-234.

184 Exhs. E-187 to E-243. With leave of the Tribunal, Ecuador submitted six additional exhibits on 21 March 2011, after the hearing (Exhs. E-245 to E-250).

185 Exhs. EL-163 to EL-172.

- Mr. Sam Prevatt, FRESHFIELDS
- Mr. Javier Robalino-Orellana, PEREZ BUSTAMANTE & PONCE
- Mr. Rodrigo Jijón, PEREZ BUSTAMANTE & PONCE
- Mr. Juan González, PEREZ BUSTAMANTE & PONCE

(ii) On behalf of Ecuador:

- Dr. Diego García Carrión, ATTORNEY GENERAL OF ECUADOR
- Dr. Álvaro Galindo Cardona, HEAD OF INTERNATIONAL AFFAIRS
- Ms. Gianina Osejo, ATTORNEY GENERAL'S OFFICE
- Mr. Francisco Paredes-Balladares, ATTORNEY GENERAL'S OFFICE
- Mr. Agustín Acosta, ATTORNEY GENERAL'S OFFICE
- Ms. Cristina Viteri, ATTORNEY GENERAL'S OFFICE
- Prof. Pierre Mayer, DECHERT (PARIS) LLP ("DECHERT")
- Mr. Eduardo Silva Romero, DECHERT
- Mr. Philip Dunham, DECHERT
- Mr. José Manuel García Represa, DECHERT
- Ms. Maria Claudia De Assis Procopiak, DECHERT
- Ms. Ella Rosenberg, DECHERT
- Ms. Ana Carolina Simoes e Silva, DECHERT
- Mr. Eliot Walker, DECHERT

92. The hearing on liability was interpreted to and from English and Spanish. It was also sound-recorded and transcribed verbatim, in real time, in both English and Spanish. Copies of the sound recordings and the transcripts were delivered to the Parties. At the end of the hearing, the Tribunal and the Parties held a procedural discussion in relation to the post-hearing briefs and the procedural treatment of Ecuador's counterclaims.

93. On 15 March 2011, the Tribunal issued Procedural Order No. 7, where (i) it took note of the discontinuance of the proceedings in relation to Burlington's pending claims for Blocks 23 and 24 following settlement agreements; (ii) fixed the date for the simultaneous submission of post-hearing briefs; and (iii) set a date by which Burlington

would inform whether it intended to raise jurisdictional objections to Ecuador's counterclaims. On 6 May 2011, the Parties simultaneously filed their post-hearing briefs. On 27 May 2011, Burlington advised the Tribunal that it would raise no jurisdictional objections in respect of Ecuador's counterclaims, in accordance with an agreement executed the previous day.[186]

94. On 21 July 2011, after consulting the Parties, the Tribunal released Procedural Order No. 8, whereby it established a procedural calendar for Ecuador's counterclaims, and laid down the procedural rules applicable to these claims. In accordance with this procedural calendar, on 30 September 2011, Ecuador submitted a Supplemental Memorial on Counterclaims, enclosing fifty-one exhibits[187], nine legal exhibits[188], the witness statements of Diego Montenegro, Marco Puente, Manuel Solis, the second witness statement of Pablo Luna, the expert report of Prof. Ricardo Crespo Plaza, and the second expert report of IEMS.

95. On 13 February 2012, the Claimant wrote to the Centre to inform that the Parties had reached an agreement to amend the procedural calendar for Ecuador's counterclaims, subject to the Tribunal's approval. On 15 February, the Tribunal approved the Parties' amendment to the procedural calendar, subject to Ecuador's approval.

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186 This agreement was entered into between Burlington Resources, Burlington Oriente, and Burlington Resources International, on the one hand, and Ecuador, on the other hand (*see* Exh. E-251).

187 Exhs. E-251 to E-301.

188 Exhs. EL-173 to EL-181.

III. POSITIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. BURLINGTON'S POSITION

96. Following the Decision on Jurisdiction, Burlington's case can essentially be summarized as follows:

> (i) The Tribunal has jurisdiction over Burlington's umbrella clause claims; with respect to the merits, Ecuador has failed to observe its obligations, contained both in laws and regulations and in the PSCs, with respect to Burlington's investments (the "umbrella clause claim");
>
> (ii) Ecuador unlawfully expropriated Burlington's investment; specifically, Ecuador's measures, to wit, (i) Law 42, (ii) the coactiva process and seizures, (iii) the physical occupation of Blocks 7 and 21, and (iv) the termination of the PSCs in the caducidad process, individually and in the aggregate, effected an unlawful expropriation of Burlington's investment (the "expropriation claim");
>
> (iii) As a result of the foregoing Treaty breaches, Ecuador must pay damages to Burlington in an amount to be determined in the quantum phase of these proceedings.

1. Burlington's Umbrella Clause Claim

97. Burlington presents claims under the observance of obligations clause of Article II(3)(c) of the Treaty, *i.e.* the so-called umbrella clause. Burlington alleges that the Tribunal has jurisdiction over these claims (1.1) and that Ecuador breached the umbrella clause by failing to observe its obligations with regard to Burlington's investment (1.2).

1.1. Jurisdiction over the umbrella clause claims

98. Burlington submits that (i) Ecuador's obligations to Burlington arise not only from the PSCs but also from its hydrocarbons-related laws and regulations; (ii) that the withdrawal of the contract claims under the PSCs does not preclude it from pursuing Treaty claims under the umbrella clause; and (iii) that, for purpose of the umbrella clause claims based on the PSCs, the Treaty does not require privity of contract between Burlington and Ecuador.

99. First, Ecuador's obligations to Burlington are not limited to contractual obligations under the PSCs, but also encompass the Hydrocarbons Legal Framework. Unilateral commitments made with respect to a reasonably specific class of investors are within

the scope of application of the umbrella clause. Support for this broad construction of umbrella clauses is to be found in *Noble Energy*, *Continental Casualty*, *Revere Copper* and *Noble Ventures*. Investors such as Burlington rely on these unilateral commitments to plan and make their investments.[189]

100. Second, Ecuador's argument that there is no underlying contractual obligation that could be elevated to the Treaty level because of the withdrawal of the contract claims is flawed. In fact, contract and Treaty claims have "separate lives."[190] When Ecuador breached the PSCs, two separate and independent sets of claims arose; one under the contracts, another under the Treaty. These sets of claims involve different parties and different legal sources. Burlington may pursue one set of rights without pursuing the other. The Tribunal's Decision on Jurisdiction already confirmed that these two sets of claims are independent; yet, an undaunted Ecuador reiterates its objections at the merits phase.[191]

101. Third, the Treaty's umbrella clause does not require privity between Burlington and Ecuador. This follows from the plain language of the Treaty. The umbrella clause applies to (i) "any obligation" (ii) that Ecuador "may have entered into with regard to" (iii) Burlington's "investments." All three elements are met in this case. The PSCs contain legal obligations. Ecuador has indisputably assumed the obligations contained in the PSCs, *i.e.* it has "entered into" these obligations. These obligations have been entered into "with regard to [Burlington's] investments." This is all the Treaty requires.

102. The umbrella clause refers to obligations entered into with regard to "investments", not with regard to "investors." This choice of words is significant. The Contracting Parties to the Treaty – Ecuador and the United States – could have used a narrower formulation incorporating a privity element, but instead "deliberately chose the broader term."[192] Additionally, Ecuador's allegation that there is a "series of consistent cases"[193] requiring privity for purposes of the umbrella clause is belied by the decision in *Continental Casualty*. Further, a privity component would be contrary to the spirit of

189 CPHB, ¶¶ 266-278; Tr. 1314:17-1315:16.

190 CPHB, ¶ 262.

191 Tr. 151:11-153:21, Tr. 1294:2-1296:16. Counsel for Burlington further added that "Ecuador is surely estopped as a matter of good faith from alleging that […] Burlington's treaty claim, which had been there from the beginning and was quite visibly not being withdrawn, somehow evaporated" as a result of the subsidiary's withdrawal of the contract claims (Tr. 1294:18-22).

192 Tr. 148:4-6.

193 Tr. 199:2-3.

the Treaty, which in accordance with Article I of the Treaty is also to protect indirect investments.[194]

1.2. Ecuador breached its obligations with regard to Burlington's investments

103. According to Burlington, Ecuador breached the umbrella clause because it failed to observe its obligations with respect to Burlington's investment. First, Ecuador failed to absorb the effects of Law 42 on Burlington. While Ecuador denies being under such obligation, Burlington argues that its share of oil production was independent of the price of oil – the rationale behind Law 42 – and that Ecuador was bound to indemnify Burlington for any tax having an impact on the economy of the PSCs. Second, Ecuador failed to deliver to Burlington its share of oil production according to the formulas set out in the PSCs.[195] These breaches are not excused under the principle *rebus sic stantibus*[196], upon which Ecuador denies relying despite referring to the requirements for its application.[197]

104. Burlington had the right to receive the upside of any oil price increase.[198] Under the PSCs, its share of oil production was not dependent on the price of oil. It follows that Burlington was entitled to receive the full market value of its share of oil production, subject only to the payment of the taxes and employment contributions specified in the PSCs. In addition, in the event that a tax had an impact on the economy of the contract, a correction factor would have to be applied in order to absorb the effect of that tax. In this case, Law 42 had an impact on the economy of the PSCs, and Ecuador was therefore under an obligation to absorb its effects.[199]

105. The *rebus sic stantibus* principle has no application to this case.[200] On the one hand, both the fact of the oil price increase and the magnitude of the increase were foreseeable. The negotiating history shows that the original parties to the PSC expressly contemplated the possibility that oil prices could increase, but ultimately

194 CSM, ¶¶ 125-131, 135.

195 Mem., ¶ 369; CSM, ¶ 123.

196 A party invoking the *rebus sic stantibus* principle must show (i) that an extraordinary and unforeseeable or unforeseen event caused an imbalance in the obligation of the parties; (ii) that the imbalance is such that performance of the contract would be excessively burdensome for one of the parties; and (iii) that the event causing the imbalance should not be a consequence of the actions or omissions of the party invoking the principle (CPHB, ¶ 203).

197 Burlington claims that Ecuador refers to the requirements underlying the principle *rebus sic stantibus* in its submissions and expert reports (CPHB, ¶ 201).

198 Mem., ¶ 354; CSM, ¶ 19; Tr. 24:17-25:15; CPHB, ¶ 323.

199 Tr. 31:18-19.

200 Mem., ¶¶ 386-391; CPHB, ¶ 204.

decided not to include a price adjustment factor.[201] Further, the magnitude of the oil price increase was not unprecedented, but was actually similar to that of the 1970s.[202] On the other hand, the oil price increase did not render Ecuador's performance of the PSCs more burdensome.[203] Thus, Ecuador does not meet the requirements *of the rebus sic stantibus* principle.[204]

2. Burlington's Expropriation Claim

106. Burlington claims that Ecuador has expropriated its investment (2.1) in breach of the Treaty requirements for expropriation, *i.e.* unlawfully (2.2).

2.1. Ecuador expropriated Burlington's investment

107. According to Burlington, Ecuador has deprived Burlington of the use and enjoyment of its investments by adopting the following measures which, both individually and in the aggregate, run afoul of Article III of the Treaty:

(i) Enactment of Law 42 (at the 50% rate as of April 2006, and at the 99% rate as of October 2007);

(ii) Seizure and auctioning – at below market prices – of the Consortium's share of crude oil production through the *coactiva* proceedings;

(iii) Physical takeover of Blocks 7 and 21;

(iv) Termination of the PSCs for Blocks 7 and 21 through the *caducidad* process.

2.1.1. Law 42

108. Burlington claims that the application of Law 42 to its investment was an expropriatory measure. While Burlington agrees that the power to tax is part of a State's regulatory power, it observes that the sovereign power to tax might also entail the power to destroy. As Professor Ian Brownlie explained, a tax is unlawful when it has the "precise object and effect of confiscation."[205] The Treaty itself accepts the possibility that a tax may be expropriatory; thus, contrary to what Ecuador alleges, tax measures are not entitled to any special deference.[206] Accordingly, a tax that substantially

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201 CPHB, ¶¶ 209-210.

202 *Id*., at ¶ 213.

203 *Id*., at ¶ 216.

204 *Id*., at ¶ 219.

205 *Id.*, ¶ 187.

206 *Id*., at ¶ 188.

deprives an investor of the value of its investment is expropriatory.[207] Whether a tax results in a substantial deprivation and is thus expropriatory is ultimately a fact-specific question.[208]

109. Law 42 was "a measure tantamount to expropriation".[209] Its effect was to transfer virtually all of Burlington's revenues to Ecuador, and to deprive Burlington of practically all of the profits to which it was entitled under the PSCs. At the 50% rate, Law 42 had a devastating impact on Burlington's investment: Burlington was unable to recover past investments and forced to scale back its development plans, and operations in Block 21 became uneconomic.[210] At the 99% rate, Law 42 had a destructive impact on Burlington's investment: Burlington operated at a loss in 2008 and ceased to make any new investment in the Blocks – even in the Oso field where it did make additional investments with Law 42 at 50%.[211]

110. In the words of counsel for Burlington, Law 42 at 99% transformed operations in the Blocks "into a form of subsistence farming, hand-to-mouth, day-to-day operation."[212] Law 42 at 99% diminished the Consortium's share of total revenues from 38.3% to 9.9% in Block 7, and from 48.6% to 8.3% in Block 21.[213] In July 2008, for example, Napo crude had a market price of USD 122 per barrel. Under Law 42 at 99%, Burlington had to pay a Law 42 tax of over USD 107 per barrel.[214] Therefore, according to Burlington, the evidence shows that Law 42 was a measure tantamount to expropriation both at the 50% and at the 99% rates.

111. Ecuador claims that under international law a tax is expropriatory only if (i) the State acts with expropriatory intent, and (ii) the tax is discriminatory. Yet, Burlington counters that there is no basis in the Treaty for these requirements. In any event, Burlington meets the requirements of expropriation even under Ecuador's own standard. In fact, as further elaborated below, the intent behind Law 42 was to deprive Burlington of its valuable rights under the PSCs. There was also a discriminatory application of the tax rates, because a lower tax rate of 70% applied to those oil companies who signed transitory agreements with Ecuador.

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207 Mem., ¶ 441; CSM, ¶ 82.

208 CPHB, at ¶ 189.

209 CSM, ¶ 82.

210 CPHB, ¶¶ 162-163, 165-168.

211 *Id*., at ¶¶ 173, 175-176.

212 Tr. 45:21-46:3.

213 COSS, ## 37 and 40 ("Overview and Legal Framework"); CPHB, ¶ 312, pp. 180-181.

214 Mem., ¶ 432.

112. Contrary to what Ecuador argues, the purpose of Law 42 was *not* to restore the economic equilibrium of the PSCs.[215] Had that been Ecuador's real intention, it would have conducted an analysis of each individual PSC in order to determine what the equilibrium point was. No such analysis was conducted. On the contrary, Ecuador imposed across the board tax rates that applied on a general basis and could thus not be tailored to the specificities of each individual PSC.[216] In addition, Ecuador imposed three different tax rates at different points in time – 50, 99 and 70 –, thereby showing that its intent was not to restore the economic equilibrium of the PSCs.[217]

113. In actuality, the purpose of Law 42 was to force Burlington to surrender its rights under the PSCs. President Correa himself characterized Law 42 as a "pressuring measure"[218] that would prompt oil companies to negotiate with Ecuador.[219] Likewise, President Correa stated that the oil companies had three options: to pay the Law 42 tax – at that point at the 99% rate –, to renegotiate the PSC into a service contract, or else to receive the sunk costs of their investment and leave the country.[220] Further evidence on record supports a similar conclusion. Accordingly, the purpose of Law 42 was to compel Burlington to relinquish its rights under the PSCs, not to restore the economic equilibrium of the PSCs.

114. After passing Law 42, Ecuador had a contractual duty to apply the tax stabilization clauses under the PSCs. Pursuant to these clauses, Ecuador was bound to readjust Burlington's oil participation share in order to absorb the impact of the tax increase. However, Ecuador ignored Burlington's requests that its oil participation share be readjusted. This is consistent with Ecuador's goal of unilaterally changing the economic terms of the PSCs.[221] By ignoring Burlington's request for a readjustment, Ecuador extinguished Burlington's rights to its participation share under the terms of the PSCs.[222] As a result, Ecuador's enactment of Law 42 and its subsequent refusal to absorb the effects of this tax effected a taking of Burlington's contract rights.[223]

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215 CPHB, ¶ 201.

216 *Id.*, ¶ 221.

217 *Id*., at ¶ 222-223.

218 Exh. C-182.

219 CSM, ¶ 28.

220 Mem., ¶¶ 231, 416.

221 CPHB, ¶ 82.

222 *Id*., at ¶¶ 128-130.

223 *Id*., at ¶ 127.

115. Finally, Ecuador wrongly seeks to create the impression that Burlington was an unreasonable partner. It is not true that Burlington failed to renegotiate the PSCs in good faith following the surge in oil prices. In reality, Burlington was unable to accept Ecuador's renegotiation proposals simply because they were unreasonable. These proposals required Burlington to forgo its rights under the PSCs without even knowing what it would receive in return.[224] In addition, Ecuador's allegation that all other oil companies accepted to renegotiate their contracts is disingenuous.[225] In fact, most initiated arbitration proceedings against Ecuador after Law 42 was passed, and only four out of the fourteen PSCs in force when Law 42 was enacted were successfully converted into service contracts.[226]

2.1.2. The *coactiva* process, seizures and auctions

116. Burlington maintains that the *coactiva* process, seizures and auctions constituted a direct and complete taking because they had the effect of destroying the value of its investment.[227] Ecuador carried out the *coactiva* process in breach of both the PSCs and this Tribunal's provisional measures order. Under the PSCs, a share of oil production had to be allocated to Burlington. Under the Tribunal's provisional measures order, Ecuador had to discontinue the *coactiva* process. Notwithstanding the PSCs and the provisional measures order, Ecuador continued to seize and auction Burlington's share of oil production.[228]

117. The *coactiva* process was commenced in retaliation for Burlington's refusal to accept Ecuador's renegotiation proposals.[229] In June 2008, the Consortium began making the disputed Law 42 payments into a segregated account. Ecuador raised no protest to this course of action for the next eight months.[230] It was only after the renegotiation process broke down in December 2008 that Ecuador commenced the *coactiva* process.[231] Ecuador had discretion to decide whether and when to start this process. Therefore, both the discretionary nature and the timing of the *coactiva* process show

224 *Id*., at ¶ 227.
225 *Id*., at ¶ 237.
226 *Id*., at ¶¶ 239-240, 244.
227 CSM, ¶ 88.
228 *Id*.
229 CSM, ¶ 87.
230 CPHB, ¶ 247.
231 *Id*., at ¶ 93.

that it was initiated to retaliate against Burlington's opposition to surrender its rights under the PSCs.[232]

118. Burlington submits that the *coactiva* process was an expropriatory measure.[233] As an initial matter, Burlington notes that the auction process was a failure because there were no bidders other than PetroEcuador. This allowed PetroEcuador to acquire the seized oil at discounts of 33% and 50% below market prices, harming Burlington in the process as the auctions resulted in reduced offsets of the alleged Law 42 debts.[234] Moreover, by dint of the *coactiva* process, Burlington was deprived of the right to earn a revenue, and hence of the economic benefits of its investment.[235] All in all, the *coactiva* process effected a "complete taking" because it destroyed the value of Burlington's investment.[236]

2.1.3. The physical takeover of Blocks 7 and 21

119. Burlington asserts that Ecuador's physical takeover of Blocks 7 and 21 completely expropriated its investment.[237] This physical occupation was the culmination of Ecuador's chain of expropriatory measures. As a consequence of the *coactiva* process, Burlington's investment became uneconomic to the point where the Consortium had no rational choice other than to suspend operations in the Blocks.[238] Using as a pretext the alleged risks that this suspension would bring about, Ecuador physically took over the Blocks. Accordingly, Ecuador's arbitrary takeover of the Blocks was a complete and direct expropriation of Burlington's investment.

120. Burlington's decision to suspend operations in Blocks 7 and 21 was justified both from an economic and a legal standpoint. From an economic standpoint, Burlington could not reasonably be expected to continue to fund an investment from which it no longer obtained any revenues.[239] With the *coactiva* process, Burlington found itself in a position where it was liable for the entire costs and risks of oil production, but received

232 *Id.*, at ¶¶ 90, 93.
233 CSM, ¶¶ 88, 90-91.
234 *Id.*, at ¶¶ 53-54, 74; CPHB, ¶¶ 103-104.
235 CSM, ¶¶ 90-92.
236 *Id.*, ¶ 88.
237 *Id.*, ¶ 93.
238 *Id.*, ¶ 96; CPHB, ¶¶ 71-73.
239 CSM, ¶ 89.

no revenues in exchange.[240] In those circumstances, Burlington had no rational course of action other than to suspend operations and to reduce costs to the minimum.[241]

121. From a legal standpoint, Burlington's suspension found justification in the principle of *exceptio non adimpleti contractus*, by virtue of which a party to a contract may suspend performance in the event that the other party is in breach.[242] Burlington could rely on this principle as a matter of both Ecuadorian and international law. Under Ecuadorian law, Burlington could invoke this principle because, contrary to what Ecuador alleges, hydrocarbons production is not a public service and thus there is no need to guarantee its continued operation.[243] Under international law, ICSID tribunals have held that an investor may suspend operations when it would be unreasonable to continue operating in light of State measures.[244]

122. Additionally, Ecuador's takeover of the Blocks was not justified because there was no real risk of damage to the Blocks.[245] The risks of damage on which Ecuador has focused are unsubstantiated and theoretical. They are unsubstantiated because the RPS study at the root of Ecuador's allegations is based on admittedly incomplete and partial information.[246] They are theoretical because the RPS study draws no meaningful conclusions as to the likelihood that these risks may actually come to pass.[247] As a matter of fact, Burlington's suspension plan was meant to follow a well-developed protocol, based on the experience of previous suspensions, which would have mitigated the risks identified in the RPS report.[248]

123. Since there was no proper justification for this measure, Ecuador's physical takeover of Blocks 7 and 21 was a complete and direct expropriation of Burlington's investment. The physical takeover of the Blocks was the last of a series of expropriatory measures prompted by Burlington's refusal to abandon its rights under the PSCs.[249] It culminated Ecuador's campaign to migrate to a contract model more beneficial to the State in a

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240 CPHB, ¶ 10.
241 Tr. 59:19-22.
242 Tr. 64:17-65:14.
243 Tr. 1292:14-15.
244 Tr. 65:7-66:12; COSS, ## 61, 64 ("Overview and Legal Framework").
245 CPHB, ¶ 107.
246 *Id*., at ¶¶ 25, 28.
247 *Id*., at ¶ 107.
248 *Id*., at ¶¶ 108-109.
249 *Id*., at ¶ 120.

period of high oil prices.[250] Through this measure, Ecuador took possession of Burlington's entire investment.[251]

124. For the foregoing reasons, Ecuador's measures – namely, Law 42, the *coactiva* process, and the physical takeover of the Blocks – both individually and cumulatively expropriated Burlington's investment.

2.1.4. The *caducidad* process

125. According to Burlington, the termination of the PSCs for Blocks 7 and 21 in the context of the *caducidad* process was merely "symbolic" because its investment had already been fully expropriated with the physical occupation of the Blocks.[252] With this measure, Ecuador "foreclosed any possibility of Burlington returning to the legal and fiscal regime it had been guaranteed prior to Ecuador's expropriation."[253] For its part, Ecuador first submitted that "*caducidad* is simply not part of this case",[254] and then raised jurisdictional and admissibility objections against the Tribunal entertaining *caducidad*-related claims. While Burlington has not specifically answered these submissions, it is apparent from its argumentation that it opposes them.

2.2. Ecuador's expropriation of Burlington's investment was unlawful

126. Ecuador's expropriation of Burlington's investment was unlawful because it failed to meet the requirements of Article III(1) of the BIT. First, under the BIT, compensation is an absolute requirement for a lawful expropriation. An expropriation cannot be lawful except upon payment of "prompt, adequate and effective compensation."[255] Therefore, Ecuador's failure to offer Burlington any compensation for the expropriation renders it unlawful. Second, Ecuador carried out the expropriation in contravention of the general principles of treatment articulated in Article II(3) of the Treaty – fair and equitable treatment, freedom from arbitrary measures and observance of obligations.[256] The Tribunal has jurisdiction over these principles, which are expressly referred to in Article III(1)[257] and are thus part of Burlington's expropriation claim.[258]

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250 *Id.*, at ¶ 94.
251 *Id*., at ¶¶ 81 and 93.
252 *Id.*, ¶ 80.
253 *Id*.
254 Tr. 301:20-21
255 Exh. C-6, Article III(1); CSM, ¶¶ 99-101.
256 CSM, ¶¶ 108-122.
257 *Id*.,at ¶¶ 102-103.

B. BURLINGTON'S REQUEST FOR RELIEF

127. On the basis of this position, Burlington requests that the Tribunal grant the following relief:

> "(a) DECLARE that this Tribunal has jurisdiction over Burlington's claims under Article II(3)(c) of the Treaty;
>
> (b) DECLARE that Ecuador has breached:
>
> (i) Article II(3)(c) of the Treaty by failing to observe its obligations with regard to Burlington's investments; as well as
>
> (ii) Article III of the Treaty by unlawfully expropriating Burlington's investments in Ecuador;
>
> (c) ORDER Ecuador to pay damages for its breaches of the Treaty, in an amount to be determined during the Quantum phase of these proceedings […] including payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages;
>
> (c) [sic] AWARD such other relief as the Tribunal considers appropriate; and
>
> (d) ORDER Ecuador to pay all of the costs and expenses of this arbitration, including Burlington's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, and ICSID's other costs."[259]

C. ECUADOR'S POSITION

128. Following the Decision on Jurisdiction, Ecuador's case can essentially be summarized as follows:

> (i) The Tribunal has no jurisdiction over the (a) umbrella clause claims, (b) the fair and equitable treatment and arbitrary impairment claims that Burlington seeks to reintroduce through the back door, and (c) any claim related to the *caducidad* decrees. In addition, any *caducidad* claim is inadmissible;
>
> (ii) Law 42 was necessary and appropriate under the circumstances. In particular, Law 42 did not modify or breach the PSCs and, at any rate, any alleged contract breach cannot amount to a Treaty breach;
>
> (iii) Ecuador did not expropriate Burlington's investment in Blocks 7 and 21, whether (a) through Law 42, (b) the

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258 *Id*., at ¶¶ 104-107, 121. Burlington specifically stated: "Finding that the expropriation was carried out contrary to the principles articulated in Article II(3) does not depend on a stand-alone violation of Article II(3) and thus does not contravene this Tribunal's determination that it does not have jurisdiction under Article X to assess whether tax measures violated Article II(3) of the Treaty" (*Id*., at ¶ 106).

259 *Id*., at ¶ 137; CPHB, ¶339.

> *coactiva* process, or (c) Ecuador's necessary intervention following Burlington's abandonment of the Blocks. At any rate, Ecuador did not unlawfully expropriate Burlington's investment in Blocks 7 and 21.

1. Burlington Pursues Claims over which the Tribunal has no Jurisdiction

129. Ecuador objects to the jurisdiction of the Tribunal over Burlington's surviving umbrella clause claims, over Burlington's fair and equitable treatment and arbitrary impairment claims, which Burlington is seeking to reintroduce "through the back door"[260], and over the c*aducidad* decrees. It adds that the *caducidad* claims are inadmissible.

1.1. The Tribunal has no jurisdiction over Burlington's surviving umbrella clause claims

130. Ecuador objects to the Tribunal's jurisdiction over Burlington's surviving umbrella clause claims because (i) there is no "obligation" that could be elevated to the Treaty level, and (ii) if *par impossible* there were any such obligation, Burlington is not privy to it. The ordinary meaning of "obligation" involves a *ratione personae* element, a relationship between an obligee and an obligor, between a creditor and a debtor.[261]

131. Here there is no obligation that could be elevated to treaty level either in the PSCs or under the Ecuadorian Hydrocarbons Law ("EHL"). There is none in the PSCs because the Burlington Subsidiaries withdrew the Contract Claims with prejudice. Therefore, Burlington has waived the rights underlying these claims and there is thus no corresponding obligation.[262] In addition, Burlington may not invoke the EHL to elevate an "obligation" to treaty level because (i) Ecuador has not "entered into" any obligation in enacting the EHL, (ii) the EHL is of a general nature, and is not related to any specific investment, and (iii) at any rate, the EHL imposes no obligation upon Ecuador.[263]

132. Moreover, if there were nevertheless any "obligations" that could be elevated to treaty level, Burlington could not rely on them for lack of privity. The principle of privity is "essential to contractual obligations."[264] An obligation implies an obligor and an obligee, a creditor and a debtor. In short, privity is part of the ordinary meaning of the term "obligation." The *CMS* annulment decision, other ICSID decisions, and commentators confirm this analysis. Burlington simply disregards the ordinary

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260 RCM, ¶¶ 26, 141, § 2.2.

261 *Id*., ¶¶ 43-45.

262 *Id*., ¶¶ 48-97.

263 *Id*., ¶¶ 99-112.

264 *Id*., ¶ 123.

meaning of "obligation" and focuses on the expression "with regard to investments". However, this expression is intended to narrow the scope of the umbrella clause, not to broaden it.[265]

1.2. The Tribunal has no jurisdiction over Burlington's *caducidad* claims (if any) nor over claims in relation to fair and equitable treatment and arbitrary impairment

133. Ecuador also objects to the jurisdiction over and admissibility of the c*aducidad* claims. As a preliminary matter, Ecuador understands that Burlington does not contest the validity of the *caducidad* decrees. Indeed, Burlington alleges that these decrees are of "symbolic" value and that the expropriation would in any event have occurred "well before" these decrees were issued. However, if Burlington does contest the validity of the *caducidad* decrees or the procedure leading up to them, then Ecuador objects to the jurisdiction over and admissibility of these claims.

134. The *caducidad* claims do not fall within the jurisdiction of the Tribunal for several reasons. Initially, because the PSCs for Blocks 7 and 21 exclude *caducidad* from the scope of their arbitration clauses. In addition, because the PSCs also exclude Treaty claims from the *ratione materiae* scope of the Tribunal's jurisdiction: that is what the parties to the PSCs intended, and the PSCs were concluded after the Treaty entered into force.[266] Lastly, the *caducidad* claims are not admissible because Burlington has not made a reasonable attempt to pursue redress in relation to these measures before the Ecuadorian administrative courts.[267]

135. Finally, Ecuador also objects to the Tribunal's jurisdiction over Burlington's already dismissed fair and equitable treatment and arbitrary impairment claims. Although Article III(1) of the Treaty refers to Article II(3), Burlington abuses this reference to surreptitiously put before the Tribunal, once again, its fair and equitable treatment and arbitrary impairment claims, over which the Tribunal has already held that it lacks jurisdiction. Thus, Ecuador requests that Section III(B)(2) of Burlington's Supplemental Memorial on Liability (¶¶ 102-122) be struck from the record.[268]

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265 *Id*., ¶¶ 101, 113-137.

266 *Id*., ¶¶ 155-162.

267 *Id*., ¶¶ 163-168.

268 *Id*., ¶¶ 142-147.

2. Ecuador Did not Breach its PSCs' Obligations Towards Burlington

2.1. Law 42 was necessary and appropriate under the circumstances

136. Contrary to what Burlington alleges, Law 42 was not passed simply to capture a larger share of the revenues generated by increased oil prices. It was passed in a context marked by an unexpected and unprecedented increase in oil prices between 2002 and 2008. Neither Burlington nor Ecuador foresaw or could foresee this course of events. Such unprecedented price increase affected the economic equilibrium of the PSCs, which are based on the reasonably foreseeable expectations of the parties at the time of contract negotiations.[269]

137. When an unforeseen increase in prices affects the economics of the contract, the contract must be readjusted, taking into account the widely accepted assumption that the State, as the owner of the non renewable resource, is to be the main beneficiary of extra revenues resulting from high oil prices.[270] Numerous other countries have acted just like Ecuador in similar circumstances. In 1980, the United States enacted an Oil Windfall Profit Tax in response to the oil price spike of the 1970s. And since 2002, no less than 16 countries, including developed countries such as the United States, the United Kingdom and Canada, have adopted similar measures. Tellingly, ConocoPhillips, Burlington's parent company, has been subject to tax adjustments in the United Kingdom and Norway. Therefore, Burlington's portrayal of Ecuador as a "renegade State" is misguided.[271]

138. The PSCs were predicated upon economic models prepared by Engineer Celio Vega, Member of the Board of Directors of PetroEcuador and Financial Head of the Petroleum Contract Administration Unit.[272] These models are mathematical formulas that take into account the economic variables of the contract at the time of contracting, such as the risk assumed by the investor and the reasonable income that the investor would make. One of the principal variables of these formulas was the oil market price. For Blocks 7 and 21, the market price taken into account at the time of contracting was US$ 15/bbl, and the projections of the reciprocal benefits for the investor and the State during the whole life of the contract was based on this price. At a market price of US$

269 *Id*., ¶¶ 171-183.

270 *Id*., ¶ 188.

271 *Id*., ¶¶ 7, 190-194.

272 Vega WS, ¶ 9.

15/bbl, the investor could cover its expenses and obtain a reasonable return on its investment.[273]

139. The unprecedented increase in oil prices affected the economic equilibrium on which the contract was based. While Ecuador initially attempted to redress this economic disequilibrium through negotiations, this attempt was unsuccessful. In point of fact, Burlington refused outright Ecuador's request for a fairer distribution of the oil production.[274]

140. As a result, Ecuador sought to restore the economic equilibrium of the PSCs via the enactment of Law 42. The original proposals discussed were for a State participation of 80% of the extraordinary revenues. Eventually, Congress approved the bill with a State participation of 60%. However, President Palacio vetoed this bill and recommended that the formula "at least 50%" be used. With this modification, Law 42 was enacted on 19 April 2006. On 6 September 2006, the Ecuadorian Constitutional Court declared Law 42 constitutional.[275]

141. However, Law 42 proved to be insufficient to attain the equilibrium point. Therefore, in October 2007, a year and a half after Law 42 was passed, Decree 662 increased the State's participation in extraordinary revenues from 50% to 99%.[276]

142. Two months later, Ecuador passed the *Ley de Equidad Tributaria* ("LET"), aimed to open a new avenue of negotiations with oil companies. Under the LET, the State's participation on extraordinary revenues would be 70%, and the reference price could be increased on a case-by-case basis. Except for Burlington and Perenco, all major companies operating in Ecuador took advantage of the LET. In April 2008, Ecuador announced that these transitory agreements would be in force for a maximum of a year before they would be migrated to service contracts. In the same month, on 21 April 2008, Burlington started arbitration proceedings against Ecuador.[277]

143. In August 2008, Burlington revealed its plan to leave Ecuador. From that point on, Burlington blocked all of Ecuador's attempts to reach an agreement in relation to the PSCs. In fact, Perenco and PetroEcuador reached an agreement on terms that were fair and reasonable. However, Burlington, displaying both bad faith and a lack of a

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273 RCM, ¶¶ 195-200.

274 *Id*., ¶¶ 201-208.

275 *Id*., ¶¶ 209-217.

276 *Id*., ¶ 220.

277 *Id*., ¶¶ 221-230.

genuine intention to reach a negotiated solution, refused to accept this agreement. This was in marked contrast with Ecuador's attitude, which was always open to dialogue and willing to reach an amicable solution.[278]

2.2. Law 42 did not modify or breach the PSCs and, at any rate, any alleged contract breach cannot amount to a Treaty breach

144. Ecuador advances the following six propositions. First, Law 42 did not modify the PSCs. Second, Law 42 did not breach the PSCs' clause ensuring Burlington a fixed participation in crude production. Third, Law 42 is not a "royalty" and thus Burlington has no right to be exempt from its application. Fourth, the renegotiation clauses have not been triggered nor breached. Fifth, clauses 3.1 and 22.1 of the PSCs are of no assistance to Burlington. Sixth and alternatively, if the Tribunal were to find that Ecuador somehow breached the PSCs, these contract breaches could not amount to a Treaty breach.[279]

145. First, Law 42 did not modify the PSCs. Law 42 deals only with oil prices. The PSCs, in turn, deal only with oil volumes and contain no provisions on oil prices. Thus, Law 42 simply cannot modify the PSCs. This is the conclusion which the Constitutional Court of Ecuador also reached. The Constitutional Court ruled that Law 42 did not modify the PSCs.[280]

146. Second, Law 42 did not breach the PSCs' clause ensuring Burlington a fixed participation in crude production. It is undisputed that Law 42 did not hinder Burlington's right to dispose of its share of crude production. However, Burlington self-servingly reads into this clause a right to not be subject to any measures the effect of which would be to reduce its revenues. Yet, if Burlington had this right – it does not – there would be no purpose in the renegotiation clauses, which apply precisely when there is a modification of the tax regime.

147. Third, and although it appears that Burlington has abandoned this argument following the Decision on Jurisdiction, Law 42 is not a "royalty" and thus Burlington has no right to be exempt from its application. Law 42 is not a royalty because it is part of Article 55 of the EHL, not of Article 54, where royalties are mentioned, and because, if it were a royalty, there would have been no need to amend Article 44 of the EHL, which already

278 *Id*., ¶¶ 235-250.

279 *Id*., ¶¶ 255-260.

280 *Id.,* at ¶¶ 268-272

included the term royalties. Moreover, Law 42 does not have the characteristics of a royalty. It is a levy and, as such, is governed by the renegotiation clauses.[281]

148. Fourth, the renegotiation clauses have been neither triggered nor breached by the application of Law 42. Indeed, Law 42 had no "impact on the economy" of the PSCs, which is an indispensable requirement for the application of these clauses. The "economy" of a PSC, under Ecuadorian law, is determined "as of the date it was executed"[282] (emphasis in the original). At that time, the Parties agreed to use the economic model prepared by Eng. Celio Vega (the "Vega Model"). Amid other variables, the Vega Model included a constant oil price of US$ 15/bbl for the entire life of the PSCs. Yet, crucially, Law 42 applied only to oil prices higher than the US$ 15/bbl mark upon which the Vega Model was predicated. Thus, Law 42 did not impact the economy of the PSCs.[283]

149. On the other hand, if the Tribunal found that Law 42 did affect the economy of the PSCs, Ecuador has not breached the renegotiation clauses because "an obligation to negotiate does not imply an obligation to reach an agreement."[284] Ecuador was always available to negotiate with Burlington; if no agreement was reached, it was due to Burlington. Moreover, this Tribunal does not have the power to rewrite the terms of the PSCs in case the Parties failed to negotiate or to reach an agreement. It would not even have jurisdiction to do so, because this would not be a "legal" dispute under Article 25 of the ICSID Convention.[285]

150. Fifth, Clauses 3.1 and 22.1 of the PSCs are of no assistance to Burlington. These are not stabilization clauses. Clause 3.1 merely incorporates the principle of *pacta sunt servanda.* Law 42 does not affect this principle because it addresses a matter – extraordinary revenues – which was not regulated in the PSCs. Nor is Clause 22.1 a stabilization clause because (i) it does not expressly exclude the application of future laws and regulations; (ii) it is a mere rule of contract interpretation which does not preclude the application of subsequent laws and regulations; (iii) it operates as a choice of law provision; (iv) other clauses in the PSCs fail to distinguish between laws

281 *Id*., ¶¶ 304-315.
282 *Id*., ¶ 329.
283 *Id*., ¶¶ 320-343.
284 *Id*., at ¶ 349; Exh. EL-102, at 116.
285 *Id*., ¶¶ 344-363.

enacted before the entry into force of the PSCs and thereafter; (v) otherwise the renegotiation clauses would serve no purpose.[286]

151. Sixth and alternatively, if the Tribunal found that Ecuador somehow breached the PSCs, these purported contract breaches could not amount to a treaty breach. As explained by the *Vivendi ad hoc* annulment Committee, not every breach of contract amounts to a breach of treaty.[287] A contract breach amounts to a treaty breach if there is an "effective repudiation of the right [...] which has the effect of preventing its exercise entirely or to a substantial extent."[288]

3. Ecuador did not expropriate Burlington's investment

3.1. Law 42 did not expropriate Burlington's investment in Blocks 7 and 21

152. Burlington's expropriation claim does not stand. As a threshold matter, Burlington bears a high burden of proof. Since Burlington is challenging a tax measure, it must prove, in accordance with *EnCana*, that Law 42 was "extraordinary, punitive in amount or arbitrary in its incidence",[289] and that its effects amount to expropriation of its investment. Burlington has failed to establish that these elements are met.[290]

153. In any event, Law 42 (i) was a legitimate and *bona fide* exercise of its sovereign tax powers, and (ii) it did not expropriate Burlington's investment.[291]

154. First, Law 42 was a legitimate and *bona fide* exercise of Ecuador's tax powers. Under international law, legitimate and *bona fide* State regulatory measures, such as Law 42, do not constitute expropriation and, consequently, are non compensable. Specifically, Law 42 must be presumed to be a valid measure not entitling Burlington to compensation unless proven otherwise. To rebut this presumption, Burlington must show with clear and convincing evidence that Ecuador's exercise of its sovereign power was illegitimate or abusive. However, Burlington has made no such showing.[292]

155. Law 42 was a legitimate and *bona fide* exercise of Ecuador's tax power because its goal was to remedy the imbalance caused by the massive and unforeseen increase in oil prices. As a result of this imbalance, Burlington had an obligation to renegotiate the

286 *Id*., ¶¶ 365-376.
287 *Id.*, ¶¶ 386-388.
288 *Id*., ¶ 388.
289 *Id.*, ¶ 397
290 *Id*., ¶¶ 394-398.
291 *Id*., ¶ 399.
292 *Id*., ¶¶ 400-437.

PSCs in good faith and Ecuador had a duty to legislate to obtain a fair allocation of oil revenues. Nevertheless, Burlington "obstinately refused" to renegotiate the PSCs.[293] In view of the failed renegotiations, Ecuador was under a constitutional mandate to seek a fair allocation of the revenues derived from its hydrocarbons. Law 42 was an appropriate means of furthering that mandate.[294]

156. Second, even if the Tribunal were to find that Law 42 is an illegitimate regulatory measure, Law 42 did not expropriate Burlington's investment. Law 42 has not expropriated Burlington's investment, whether directly or indirectly. Law 42 did not directly expropriate Burlington's investment because it did not physically seize Burlington's investment, nor did it revoke, cancel or repudiate Burlington's rights under the PSCs.[295] Likewise, Law 42 did not indirectly expropriate Burlington's investment. There is an indirect expropriation when the effects of the challenged measure are equivalent to a taking. In particular, the investor must show that the challenged measure caused a total and permanent loss of value or control of the investment. Burlington has shown neither.[296]

157. Burlington has failed to show that Law 42 at 50% expropriated its investment. The following evidence in fact proves that there was no expropriation: (i) the Consortium's tax reports show that, even with the Law 42 payments, 2006 and 2007 were more profitable than 2005; (ii) the Fair Links expert report concludes that Burlington's operations were not "uneconomic" as alleged by Burlington; (iii) the Consortium submitted an amended plan for additional developments in Block 7, demonstrating that, even with the Law 42 payments, it made economic sense to invest additional capital (the "Oso Development Plan"); (iv) ConocoPhillip's annual reports for the years 2006-2008 show no losses in Ecuador.

158. In addition, as previously demonstrated, Law 42 did not breach the PSCs. Hence, there can be no expropriation, since Burlington claims precisely the value of its rights under the PSCs. Finally, Law 42 cannot constitute expropriation because it does not cause a *permanent* deprivation of Burlington's investment: it applies if and only if the market price of Ecuadorian crude exceeds the reference price. In fact, contrary to the impression that Burlington seeks to create, oil market prices have not always been

293 *Id*., ¶ 449.

294 *Id*., ¶¶ 440-460.

295 *Id*., ¶¶ 464-469.

296 *Id*., ¶¶ 464-477.

above the reference price, *e.g.* January and February 2009. In sum, Law 42 at the 50% rate did not expropriate Burlington's investment.[297]

159. Similarly, Law 42 at the 99% rate did not expropriate Burlington's investment. Law 42 at the 50% rate was insufficient to induce oil companies operating in Ecuador to negotiate a new contractual framework. Decree 662, which increased the rate to 99%, had the effect of prompting companies to sign new service contracts, with the exception of Burlington and Perenco[298]. Burlington has submitted no evidence that Law 42 at 99% deprived its investment of value. In actuality, Law 42 at 99% did not produce effects tantamount to expropriation, as shown by the same facts as those referred in connection with Law 42 at 50%.[299] In particular, Fair Links concluded that Decree 662 "did not alter the global trend of positive cash flows."[300]

3.2. Ecuador's enforcement of Law 42 through the c*oactiva* process was not an expropriatory measure under Article III of the Treaty

160. Contrary to Burlington's allegations, the *coactiva* process did not constitute an expropriation. Ecuador resorted to the *coactiva* process to enforce its laws and in doing so, it did not expropriate Burlington's investment.

161. PetroEcuador is an agency authorized to use the *coactiva*, a process whereby an administrative agency may enforce obligations without the need for an order or authorization from State courts. In particular, PetroEcuador was entitled to collect Law 42 payments. In the *coactiva* process, if the debtor does not pay his debt after being notified on two occasions, his assets are seized and eventually auctioned off. In the first auction round, offers may not be lower than two thirds of the appraised value of the asset. If no bids are submitted during the first round, a second round is convened, at which offers may not be lower than 50% of the appraised value of the auctioned asset.[301]

162. The *coactiva* process did not expropriate Burlington's investment. Burlington seeks to create the appearance that PetroEcuador benefitted from the auction process by acquiring the Consortium's oil at a "steep discount." However, PetroEcuador simply purchased the seized production at the discounts authorized under Ecuadorian law. Moreover, it was only in the first auction that PetroEcuador waited until the second

297 *Id*., ¶¶ 478-507.

298 *Id*., ¶¶ 511-512.

299 *Id*., ¶¶ 508-529.

300 Fair Links ER, ¶ 94; RCM, ¶ 517.

301 RCM, ¶¶ 532-540.

round to present its offer, for it was unaware that no other company would take part in the auctions. After the first auction, PetroEcuador always submitted its bids during the first round, offering a price slightly above the minimum authorized by law. Other companies were dissuaded from participating in these auctions because the Consortium threatened to take legal action against any prospective buyer of the seized crude.[302]

163. Further, the *coactiva* process did not constitute a direct expropriation of Burlington's investment because Ecuador did not intend to deprive Burlington of its investment but merely to enforce a legitimate credit. In any event, the effect of this process was neutral since, as recognized by the Tribunal in Procedural Order No. 1, every time oil was seized, previous Law 42 payments were extinguished. Finally, Burlington fails to explain how Ecuador's non-compliance with the Tribunal's recommendation in Provisional Order No. 1 can be deemed an expropriation.[303]

3.3. Ecuador's intervention following Burlington's abandonment of Blocks 7 and 21 in July 2009 neither completed the alleged expropriation nor effected a direct expropriation

164. Ecuador's intervention in Blocks 7 and 21 did not constitute an expropriation of Burlington's investment. It was provoked by Burlington's unilateral decision to suspend operations and aimed at preventing significant harm to the Blocks. Hence, Ecuador's intervention was necessary, adequate, proportionate under the circumstances, and meant to be temporary.[304] Ultimately, Burlington's decision to suspend operations was a "calculated act" intended to force Ecuador to act in order to avoid damage to the Blocks.[305]

165. Burlington adopted active steps to suspend operations in the Blocks even though (i) this course of action was not economically justified, as Burlington had the financial resources to continue operating the Blocks, *e.g.* the Law 42 payments made into the segregated bank account; (ii) the suspension would have resulted in the breach of both the PSCs and Ecuadorian law; and (iii) the suspension would have caused significant economic loss and serious damage to the Blocks. As part of its self-expropriation

302 *Id*., ¶¶ 541-552.
303 *Id*., ¶¶ 553-559.
304 *Id*., ¶¶ 560-561.
305 *Id*., ¶ 565.

strategy, Burlington knew that this would prompt Ecuador to act in order to prevent damage to the Blocks.[306]

166. Burlington announced that the suspension would take place at noon on 16 July 2009. Ecuador, in turn, indicated that, if the Consortium suspended operations, It would take appropriate measures to prevent the suspension. On 16 July 2009, Ecuadorian government officials entered the Blocks at 2:00 PM. Contrary to what Burlington has alleged, the entry was amicable, not by force. In fact, the Blocks were still in operation at that time because the Consortium's employees had decided to ignore Perenco's instructions. Furthermore, on the same day, PetroEcuador issued a Resolution declaring the state of emergency in the Blocks and authorizing PetroAmazonas – PetroEcuador's subsidiary – to adopt the necessary measures to ensure the continuity of operations.[307]

167. Burlington's decision to unilaterally suspend operations in the Blocks was not economically justified. Burlington had the funds necessary to continue operating the Blocks, as shown by the Law 42 payments it had made into a segregated off-shore account. After the enactment of Law 42 and Decree 662, it had also made minimum investments in the Blocks and, if the seized oil was auctioned at below market prices, this was due to the Consortium's active hostility against potential bidders.[308]

168. Burlington's unilateral suspension of operations was in breach of Ecuadorian law and of the PSCs. Under the Ecuadorian Constitution, suspension of public services, which expressly include "hydrocarbon production", is forbidden. In addition, Burlington had no justification to suspend operations because the principle *exceptio non adimpleti contractus* finds almost no application under Ecuadorian administrative law. Accordingly, Burlington was bound to perform its obligations despite any alleged breach on Ecuador's part.[309]

169. Ecuador intervened in the Blocks to enforce its laws within its police powers and to avoid the significant economic loss and damage to the Blocks that the Consortium's unilateral suspension of operations would have caused. Barring intervention, the Consortium's abandonment of the Blocks would have caused reservoir, mechanical and environmental damage to the Blocks, and significant economic loss to the State.

306 *Id*., ¶¶ 562-565.
307 *Id*., ¶¶ 566-580.
308 *Id*., ¶¶ 589-595.
309 *Id*., ¶¶ 596-606.

Burlington suspended operations only to induce Ecuador to intervene in the Blocks, in furtherance of its self-expropriation strategy.[310]

170. Ecuador's intervention in the Blocks was appropriate. Burlington was duly informed of the consequences that the suspension of operations would carry, whereas Ecuador entered the Blocks amicably and expressly assured Burlington that its rights under the PSCs would remain unaffected.[311] Ecuador's intervention was a means proportionate to the goal of avoiding damage to the Blocks.[312] Finally, expropriation requires permanent deprivation. This requirement is not met in this case because Ecuador's intervention was a temporary measure meant to cease once the Consortium resumed operations.[313]

3.4. In any event, Ecuador did not unlawfully expropriate Burlington's investment in Blocks 7 and 21

171. In the event that the Tribunal were nevertheless to conclude that the measures discussed in the previous sections constituted an expropriation of Burlington's investment, such expropriation was a lawful one. Ecuador submits that the failure to pay compensation pursuant to Article III(1) of the Treaty does not render the expropriation unlawful if the expropriation is disputed. Moreover, the expropriation was not unfair and inequitable, arbitrary or in contravention of Ecuador's obligations to Burlington.[314]

172. First, Ecuador's failure to compensate Burlington does not render the expropriation unlawful, because the expropriation is disputed. The expropriation must occur *before* compensation is offered. This case is first and foremost about whether *there is expropriation* in the first place. Compensation becomes a relevant question only after it is established that there is expropriation. Were it otherwise, every single case of indirect expropriation would almost invariably become a case of unlawful expropriation.[315]

173. Second, had there been expropriation, it was not unfair and inequitable because Law 42 sought to restore the "economy" of the PSCs. Law 42 was a *bona fide*, legitimate exercise of Ecuador's sovereign tax powers, which did not cause Burlington to

310 *Id*., ¶ 620.
311 *Id*., ¶¶ 654-657.
312 *Id*., ¶¶ 658-661.
313 *Id*., ¶¶ 662-665.
314 *Id*., ¶¶ 667-675.
315 *Id*., ¶¶ 676-697.

surrender any right under the PSCs. In addition, the alleged expropriation would not have been arbitrary because Ecuador has submitted itself to the jurisdiction of this Tribunal, never interfering with its authority; nor were the *coactiva* measures arbitrary for they merely enforced Ecuador's Law 42 tax. Finally, the expropriation would not have been in breach of Ecuador's obligations as the PSCs were neither modified nor breached.[316]

D. ECUADOR'S REQUEST FOR RELIEF

174. On the basis of this position, Ecuador requests the Tribunal to render an award:

> "**10.1 Declaring**
>
> **10.1.1 On jurisdiction**
>
> 793. that it lacks jurisdiction over Burlington's (i) Law 42 first umbrella clause claim and (ii) the first limb of its third umbrella clause claim under Article II(3)(c) of the Treaty as defined in the Tribunal's Decision on Jurisdiction;
>
> 794. that, to the extent that Burlington seeks to reintroduce its Law 42 fair and equitable treatment claim and Law 42 arbitrary impairment of the investment claim, Section III(B)(2), paragraphs 102 to 122, pages 56 to 68 of Burlington's Supplemental Memorial are struck off the record;
>
> 795. that it lacks jurisdiction over Burlington's claims regarding the *Caducidad* decrees and all matters related thereto;
>
> **10.1.2 On admissibility**
>
> 796. alternatively, that Burlington's claims regarding the *Caducidad* decrees and all matters related thereto are inadmissible;
>
> **10.1.3 On liability**
>
> 797. that Law 42 did not modify the Participation Contracts and all of Burlington's claims related thereto are therefore dismissed;
>
> 798. that Ecuador's enactment of Law 42 did not breach the Participation Contracts and all of Burlington's claims related thereto are therefore dismissed;
>
> 799. that the Renegotiation Clauses were not triggered nor breached by Ecuador's enactment of Law 42 and all of Burlington's claims related thereto are therefore dismissed;
>
> 800. that, given that the Participation Contracts have not been breached, the Treaty has not been breached either and all of Burlington's Treaty claims related thereto are therefore dismissed;
>
> 801. alternatively to the finding on jurisdiction requested above, that Ecuador has not breached the Umbrella Clause in Article II(3)(c)

316 *Id*., ¶¶ 698-721.

of the Treaty and all of Burlington's claims related thereto are therefore dismissed;

802. that Law 42 was a legitimate and *bona fide* exercise by Ecuador of its sovereign taxation powers;

803. that Ecuador's enactment of Law 42 does not amount to an expropriation under Article III of the Treaty and all of Burlington's claims related thereto are therefore dismissed;

804. that Ecuador's institution of the *coactiva* procedures does not amount to an expropriation under Article III of the Treaty and all of Burlington's claims related thereto are therefore dismissed;

805. that Ecuador's assumption of operations in Blocks 7 and 21 does not amount to an expropriation under Article III of the Treaty and all of Burlington's claims related thereto are therefore dismissed;

806. that, in any event, the measures in dispute do not amount to an unlawful expropriation under Article III of the Treaty;

807. that Burlington is liable towards Ecuador for the costs of remedying the environmental damages in areas within Blocks 7 and 21 of the Ecuadorian Amazon Region; and

808. that Burlington is liable towards Ecuador for the costs required to bring back the infrastructure of Blocks 7 and 21 into good working condition in accordance with the best standards and practices generally accepted in the international hydrocarbons industry.

10.2 Ordering

809. Burlington to bear the full costs of the remaining environmental studies for Blocks 7 and 21;

810. Burlington to remedy any and all environmental damage in Blocks 7 and 21 or pay the full costs of remedying the environmental damage, in an amount to be determined in the Quantum phase of this arbitration;

811. Burlington to pay damages for its breaches of the Participation Contracts for Blocks 7 and 21 and Ecuadorian law in an amount to be determined in the Quantum phase of this arbitration;

812. Burlington to pay all the costs and expenses of this arbitration, including Ecuador's legal and experts fees and ICSID's other costs; and

813. Burlington to pay compound interest at an adequate commercial interest rate on the amounts stated in the two preceding paragraphs from the date of disbursement thereof until the date of full payment.

10.3 Award

814. Such other relief as the Tribunal considers appropriate."[317]

[317] *Id*., ¶¶ 793-814. In RPHB, ¶ 589, the Respondent incorporated these requests for relief.

IV. ANALYSIS

175. The Arbitral Tribunal has deliberated and considered the Parties' written and oral submissions and arguments. To the extent that these arguments have not been referred to expressly, they must be deemed to be subsumed in the analysis. This analysis addresses Ecuador's outstanding jurisdictional and admissibility defenses and Burlington's Treaty claims on the merits.[318] If Ecuador is found liable to Burlington, a quantum phase will be held at a later stage of the proceedings. In parallel to Burlington's claims, this arbitration will also deal with Ecuador's counterclaims.

176. At the outset of the analysis, the Tribunal will consider some preliminary matters, including the law applicable to the merits and the relevance of previous decisions of international courts and tribunals (A); subsequently, it will examine Ecuador's outstanding jurisdictional and admissibility objections (B) and Burlington's claims on the merits (C). Finally, the Tribunal will set forth its decision (Section V).

A. PRELIMINARY MATTERS

1. Law Applicable to the Merits

177. Burlington's claims are based upon the United States - Ecuador BIT, which is thus the primary source of law for this Tribunal. With respect to matters not covered by the BIT, the latter contains no choice of law. The Tribunal must thus resort to Article 42 (1) of the ICSID Convention, which provides that:

> "(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

178. Except for the undisputed application of the BIT, the Parties to this dispute have not agreed on the rules of law that govern the merits of this dispute in the sense of Article 42(1), first sentence. Therefore, according to the second sentence of Article 42(1), the Tribunal must "apply the law of the Contracting State party to the dispute [...] and such rules of international law as may be applicable." Indeed, the Parties have made their submissions under the correct assumption that both Ecuadorian law and international law govern the merits of this dispute.

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318 The Tribunal has already determined that it has jurisdiction over Burlington's expropriation claims, but must still ascertain whether it has jurisdiction over the umbrella clause claims (DJ, ¶ 342).

179. As a result, the Tribunal will apply (i) first and foremost the BIT and, if need be, (ii) Ecuadorian law and those rules of international law "as may be applicable". In this latter respect, the Tribunal is of the view that the second sentence of Article 42(1) of the ICSID Convention does not allocate matters to either law. It is thus for the arbitrators to determine whether an issue is subject to national or international law. In this context, it should be noted that the PSCs include a choice of Ecuadorian law.[319] It should further be noted that a party may not rely on its internal law to avoid an obligation under international law.

2. Ecuador's Request that Section III(B)(2) of Burlington's Supplemental Memorial on Liability be Struck From the Record

180. Ecuador requests that Section III(B)(2) of Burlington's Supplemental Memorial on Liability be struck from the record on the ground that it reintroduces, under the guise of its surviving expropriation claim, the fair and equitable treatment and arbitrary impairment claims over which the Tribunal has already ruled that it has no jurisdiction. Ecuador argues that, whereas Article III(1) of the Treaty undoubtedly refers to the principles of treatment of Article II(3), Burlington improperly relies on this reference to establish that there was expropriation. However, the principles of treatment of Article II(3) of the Treaty only become relevant once it has been established that there was expropriation to begin with.[320]

181. Article III(1) of the Treaty provides that "*investments shall not be expropriated except [...] in accordance with the general principles of treatment provided for in Article II(3).*" The Tribunal agrees that this provision is only triggered if it is established that there is an expropriation. If there is an expropriation, it must be effected in accordance with the principles of treatment spelled out in Article II(3) of the Treaty. If there is no expropriation, this provision is inapposite.

182. Burlington's submissions do not suggest a different interpretation of this provision. In the Tribunal's understanding, Burlington relies on the principles of treatment of Article

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319 Clause 22.1 of the PSC for Block 7 provides that "[t]his Contract is governed exclusively by Ecuadorian legislation, and laws in force at the time of its signature are understood to be incorporated by reference" (Exh. C-1). Likewise, clause 22.1 of the PSC for Block 21 sets forth that "[t]his Contract is governed exclusively by Ecuadorian legislation, and laws in force at the time of its signature are understood to be incorporated by reference" (Exh. C-2).

320 Tr. 210:2-213:7. In particular, Ecuador's assertion that "realizing that it's not easy for [Burlington] to characterize Law 42 as an expropriation, they in fact rely on Article II [of the Treaty] to characterize it as an expropriation, and that they cannot do. The Treaty does not permit that" (Tr. 213:3-7).

II(3) of the Treaty merely to establish that the purported expropriation of its investment was effected unlawfully:

> "Article X of the Treaty and this Tribunal's ruling in its Decision on Jurisdiction do not affect the applicability of the principles of Article II(3) to assess the lawfulness of Ecuador's measures as an expropriation under Article III. This Tribunal has jurisdiction over Burlington's Article III expropriation claim under Article X of the Treaty. As a result, once it finds that an expropriation has occurred, it has jurisdiction to assess the lawfulness of the expropriation by determining whether, as Article III(1) requires, the expropriation was consistent with the principles of treatment enunciated in Article II(3). Finding that the expropriation was carried out contrary to principles articulated in Article II(3) does not depend on a stand-alone violation of Article II(3) and thus does not contravene this Tribunal's determination that it does not have jurisdiction under Article X to assess whether tax measures violated Article II(3) of the Treaty.
>
> […]
>
> In sum, Ecuador has expropriated Burlington's investments through means contrary to the principles of fair and equitable treatment, the obligation not to impair investment through arbitrary treatment and the duty to observe obligations. Ecuador has offered no compensation whatsoever for its unlawful expropriation. Ecuador is therefore liable under the *Chórzow* standard for an unlawful expropriation in violation of the Treaty and in violation of general principles of international law."[321] (emphasis added).

183. On this basis, the Tribunal sees no reason to strike Section III(B)(2) of Burlington's Supplemental Memorial on Liability from the record.

3. Undisputed Matters

184. Most of the facts of this case are not in dispute. At the hearing, counsel for the Claimant noted that this "case [...] is relatively simple on the facts because[,] for the most part, the facts are not in dispute."[322] While there are a few disputed issues of fact, the Claimant and the Respondent agree on most of the facts that gave rise to this dispute – their disagreement being, at its core, about how the petroleum rent should be allocated between them.

185. In particular, the Parties do not dispute that (i) beginning in 2002, oil prices rose well above the prevailing oil price at the time when the PSCs for Blocks 7 and 21 were executed; (ii) in November 2005, Ecuador sought to renegotiate the PSCs with Burlington (and its partner Perenco) for the first time; (iii) after those renegotiations failed, Ecuador passed sequentially Law 42 in April 2006, Decree 662 in October 2007,

321 CSM, ¶¶ 106, 122.

322 Tr. 14:4-6.

and the LET in December 2007; (iv) Burlington made Law 42 payments to Ecuador under protest from the time they were first imposed in mid-2006 until May 2008; (v) in June 2008, Burlington stopped making Law 42 payments to Ecuador, and instead began making Law 42 payments into a segregated account located in the United States.

186. It is further common ground that, following a new round of failed renegotiations in 2008, (vi) Ecuador initiated *coactiva* proceedings against Burlington in February 2009 and began to seize Burlington's share of oil production the following month; (vii) from March 2009 to around mid-2010, PetroEcuador auctioned and, being the sole bidder, acquired Burlington's share of oil production at below market prices in the context of the *coactiva* proceedings; (viii) on 16 July 2009, Burlington and Perenco ceased to operate Blocks 7 and 21; (ix) on that same day, Ecuador took possession of Blocks 7 and 21; (x) in July 2010, Ecuador terminated the PSCs for Blocks 7 and 21 pursuant to the so-called *caducidad* process.

4. Relevance of Decisions of Other International Courts and Tribunals

187. As stated in the Decision on Jurisdiction, the Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.

B. JURISDICTIONAL AND ADMISSIBILITY OBJECTIONS

1. Does the Tribunal Have Jurisdiction over Burlington's Umbrella Clause Claims under Article II(3)(c) of the Treaty?

188. In the Decision on Jurisdiction, the Tribunal joined to the merits "the determination of whether it has jurisdiction over Burlington's Law 42 first umbrella clause claim and over the first limb of its third umbrella clause claim under Article II(3)(c) of the Treaty"[323] (the "umbrella clause claims"). It did so, on the ground that the Parties had not sufficiently

[323] DJ, ¶ 342 (B).

discussed Ecuador's lack of privity objection, which had been raised for the first time at the hearing on jurisdiction[324]. As the Parties have since then argued this point at length, the issue is now ripe for the Tribunal's determination.

189. Ecuador maintains that the Tribunal has no jurisdiction over Burlington's umbrella clause claims for the following three reasons: (i) by withdrawing the Contract Claims "with prejudice", Burlington waived its rights under the PSCs and thus the umbrella clause has no object; (ii) Burlington has no independent rights deriving from the so-called Hydrocarbons Legal Framework; and (iii) contrary to what the Treaty requires, there is no privity of contract between Burlington and Ecuador. The Tribunal will address Ecuador's objections sequentially.

1.1. Is the umbrella clause without "object" as a result of the withdrawal of the Contract Claims with prejudice?

1.1.1. Positions of the Parties

190. Ecuador alleges that the Treaty's umbrella clause is of no avail to Burlington because there is no surviving contractual obligation that could be elevated to the Treaty level via the umbrella clause. In point of fact, the Burlington Subsidiaries withdrew their contract claims against Ecuador "with prejudice."[325] This amounts to a waiver of all underlying rights and obligations under the PSCs. Support for this conclusion is to be found in decisions by ICSID tribunals in *Cementownia v. Republic of Turkey* (*Cementownia*)[326] and *Waste Management v. United Mexican States* (*Waste Management II*).[327] Hence, Burlington may not elevate extinct contractual obligations to the Treaty level through the umbrella clause.[328] This argument is submitted as a jurisdictional objection or, alternatively, as a defense on the merits. In addition, Ecuador assumed no independent obligations vis-à-vis Burlington under the Hydrocarbons Law.[329] For these reasons, the Treaty's umbrella clause has "no object."[330]

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324 *Id*., ¶ 197.

325 Letter from Burlington and the Burlington Subsidiaries to the Tribunal dated 10 October 2009; Exh. C-190.

326 *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (hereinafter "*Cementownia*"), Award of 17 September 2009 (Exh. EL-66).

327 *Waste Management, Inc. v. United Mexican States*, (hereinafter "*Waste Management II*"), Award of 30 April 2004 (Exh. EL-67).

328 RCM, ¶¶ 30-98.

329 *Id.*, ¶¶ 99-112.

330 Tr. 191:20 and 1326:8.

191. Burlington argues that the Tribunal already dismissed this objection in its Decision on Jurisdiction.[331] In any event, Ecuador's objection is flawed insofar as Contract and Treaty Claims have "separate lives."[332] Once the PSCs were breached, two sets of claims arose: a set of Contract Claims and a set of Treaty Claims. It is entirely possible to pursue one set of claims without pursuing the other. These independent sets of claims involve different Parties – Burlington Resources as opposed to Burlington Oriente – and different sources of rights – the Treaty as opposed to the PSCs.[333] Moreover, Ecuador also assumed obligations towards Burlington through the specific regulatory regime embodied in the Hydrocarbons Legal Framework.[334]

1.1.2. Analysis

192. In its submissions on the merits, Ecuador raised the argument of the waiver of the contract rights. To the extent that it deals with jurisdiction, this objection would be barred because the jurisdictional phase was closed but for the privity issue. Indeed, in the Decision on Jurisdiction, the Tribunal held that "the Parties may not re-argue or present new arguments on any jurisdictional issue other than the privity objection with respect to Burlington's outstanding umbrella clause claims."[335]

193. Be this as it may, Ecuador has also submitted this argument as one on the merits. At the hearing on liability, counsel for Ecuador stated: "[I]f the Tribunal was to decide that this is not an admissible jurisdictional objection at this stage, we deal with it as a defense on the merits […]."[336] As a defense on the merits, Ecuador's argument is not precluded by the terms of the Tribunal's Decision on Jurisdiction. It raises an issue that bears an obvious connection to the merits, to wit, whether Burlington has any umbrella clause rights at all. Hence, the Tribunal will entertain Ecuador's new argument as a defense on the merits.

194. Ecuador's defense is based on the premise that a withdrawal of claims with prejudice results in a waiver of the rights underlying those claims. In this way, the Burlington Subsidiaries' withdrawal of their contract claims with prejudice waived the underlying

331 Tr. 151:19-21.

332 CPHB, ¶ 262.

333 *Id.*, ¶¶ 260-262; Tr. 152:4-10.

334 Tr. 1295:3-16.

335 DJ, ¶ 199.

336 Tr. 189:11-14. Counsel for Ecuador also pointed out: "Where does the Umbrella Clause stand in that context [of substantive and jurisdictional clauses]? They [umbrella clauses] can reasonably achieve two objectives, and that's reflected in Mr. Vandevelde's commentary which both Jan Paulsson and I mentioned in the opening." (Tr. 1336:22-1337:4).

contractual rights. Ecuador finds support for this argument in two ICSID decisions: *Cementownia* and *Waste Management II*. In *Cementownia*, the tribunal quoted the following passage from the *Waste Management II* decision:

> "In international litigation the withdrawal of a claim does not, *unless otherwise agreed*, amount to a waiver of any underlying rights of the withdrawing party."[337] (emphasis added).

195. On the basis of *Cementownia* and *Waste Management II*, Ecuador argues that a withdrawal with prejudice amounts to an agreement to waive the rights underlying those claims. Applied to this case, the withdrawal of the Contract Claims with prejudice would be the equivalent of a waiver of the underlying rights. The Tribunal cannot follow this argument for the following reasons.

196. First, it arises from the two cases referred to by Ecuador that the rule is that a withdrawal of claims does not amount to a waiver of rights. It further arises that as an exception to the rule, the parties may agree otherwise, in which case the withdrawal of claims operates as a waiver of substantive rights. Albeit not directly applicable to the withdrawal of claims in this arbitration, Ecuadorian procedural law seems to apply the same rule. Specifically, Article 377 of the Ecuadorian Code of Civil Procedure provides that the party who withdraws a claim "cannot re-file" this claim against the same person or against its legal representative.

197. Thus, the question here is whether the Tribunal should apply the exception rather than the rule, that is whether the Parties intended the withdrawal of the Subsidiaries' Claims to operate as a waiver of the underlying substantive rights. The evidence on record suggests the contrary. By letter of 10 October 2009, counsel for the Initial Claimants confirmed that the Burlington Subsidiaries would withdraw their contract claims "with prejudice" because they saw "no reason to preserve [their] right to re-file the contractual claims in the future."[338] In other words, the avowed purpose of the withdrawal with prejudice was to renounce the possibility to "re-file the contractual claims in the future,"[339] it was not to waive contractual rights for purposes of this proceeding. Therefore, no intent to waive the contract rights may be inferred from the letter of 10 October 2009 confirming the withdrawal with prejudice.

198. More generally, Burlington's continuing prosecution of the umbrella claim under the Treaty belies an intent by its Subsidiaries to waive their rights under the PSCs. As

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337 Exh. EL-141, ¶ 36; *Cementownia* Award, at ¶ 109 (Exh. EL-66)..

338 Exh. C-190, p. 2.

339 *Id.*

counsel for the Claimant stressed at the hearing, Burlington's umbrella clause claims were "present from the beginning of this arbitration and were never waived."[340] The Treaty's umbrella clause can only become operative if underlying rights arising from another source do exist. Considering that the umbrella clause claim was pending at the time of withdrawal of the Subsidiaries' claims, one cannot understand the Burlington Subsidiaries to have intended to waive the very rights on which Burlington's umbrella clause claim was predicated.

199. In sum, the Burlington Subsidiaries have waived the possibility of ever re-filing their claims under the PSCs in any form in the future. They have not waived the underlying rights and Burlington may thus rely on these underlying rights to pursue its Treaty claims in this arbitration.

1.2. May Burlington rely on the Treaty's umbrella clause to enforce its purported rights under the Hydrocarbons Legal Framework?

1.2.1. Positions of the Parties

200. According to Ecuador, Burlington may not rely on the Treaty's umbrella clause to enforce its purported rights under the Hydrocarbons Legal Framework because (i) Ecuador has not "entered into" any obligation in enacting the Hydrocarbons Legal Framework, (ii) the Hydrocarbons Legal Framework is of a general nature and unrelated to any specific investment, and (iii) in any event, the Hydrocarbons Legal Framework imposes no obligation upon Ecuador. On the other hand, Burlington submits that the Treaty's umbrella clause covers the specific, unilateral commitments Ecuador made to oil companies under the Hydrocarbons Legal Framework. In particular, Ecuador committed to indemnify oil companies for any increase in the tax burden and to adjust the oil participation formulas.

1.2.2. Analysis

201. Article II(3)(c) of the Treaty, the so-called umbrella clause, provides the following:

> "Each Party shall observe any obligation it may have entered into with regard to investments."

202. The umbrella clause only becomes operative to the extent that a State party to the BIT has entered into an "obligation." Burlington contends that, by enacting the Hydrocarbons Legal Framework, Ecuador entered into (i) an obligation to absorb the effects of any tax increase pursuant to Article 16 of Decree of No. 1417 and (ii) an

[340] Tr. 1294:2-6.

obligation to ensure that Burlington would receive its fixed participation of monthly crude production according to Article 4 of Law No. 1993-44.

203. Article 16 of Decree No. 1417 ("Article 16") lays down the following:

> "Economic stability: The parties' production shares in the contract area will be adjusted when the tax system applicable to the contract has been modified, in order to restore the economics of the contract in place before the tax modification"[341] (emphasis added).

204. Article 4 of Law No. 1993-44 ("Article 4") provides in its relevant part that:

> "Once production is initiated, the contractor will have the right to a share of production in the contract area, which will be calculated in accordance with the production shares offered and agreed upon therein, based upon the volume of hydrocarbons produced"[342] (emphasis added).

205. Both legal provisions presuppose the existence of a "contract." Without a contract, these provisions are inoperative. Thus, Article 16 refers to "production shares *in the contract*"[343] and to "the tax system applicable *to the contract*."[344] For its part, Article 4 provides that the "*contractor* will have the right to a share of production *in the contract area*."[345] This prerequisite "contract" that would trigger the application of these provisions is naturally one that would be executed in the future. This explains why Article 4 states that the contractor "will have the right" – that is, the contractor has no vested right at that point, but "will have the right" once the PSC containing such "right" is executed.

206. Under these legal provisions, Ecuador bound itself to include certain rights in the PSCs to be executed in the future. Hence, the purpose of these provisions was to guarantee future contractors certain contractual rights. But once these contractual rights were effectively incorporated into the actual PSCs, the purpose of these legal provisions would be exhausted. No "obligation" under the legal provisions would survive beyond that point. In this case, it appears that the purpose of these provisions was fulfilled: Ecuador entered into PSCs with the Burlington Subsidiaries, and these PSCs did reproduce the terms of Article 16 and of Article 4. As counsel for Ecuador pointed out at the hearing on liability:

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341 Exh. C-89, p. 23 in the original pagination (Tribunal's translation).

342 Exh. C-15, p. 3 in the original pagination (Tribunal's translation).

343 *Supra,* at note 341 (emphasis added).

344 *Id*. (emphasis added).

345 *Supra,* note 342 (emphasis added).

> "Suppose there was no [production sharing] contract or [that we] plac[e] ourselves before there is a contract. What is promised by this Article [16] and to whom? One could argue, well, it's a promise to offer that to a foreign investor and to accept a contract containing a clause more or less reproducing this. All right. Let's admit that, and then we shall see. We do see that the promise was kept. The Participation Contracts contained this undertaking. And from the moment the Participation Contracts are signed, there is an undertaking but it is a contractual undertaking"[346] (emphasis added).

207. In fact, the purpose of these legal provisions was exhausted when the promises made under law were turned into contractual obligations. Accordingly, these provisions no longer contain an "obligation" independent of the PSCs upon which Burlington may rely for purposes of the umbrella clause.[347] For these reasons, Burlington may not avail itself of the umbrella clause to bring claims based solely on Ecuador's Hydrocarbons Legal Framework. On account of this finding, the Tribunal does not need to examine Ecuador's remaining objections to Burlington's umbrella clause claim based on Ecuador's laws and regulations.

1.3. May Burlington rely on the Treaty's umbrella clause to enforce its subsidiary's rights under the PSCs despite the alleged absence of privity between Burlington and Ecuador?

1.3.1. Positions of the Parties

208. Ecuador alleges that Burlington may not rely on the umbrella clause to enforce its subsidiaries' rights under the PSCs because, contrary to the requirement of the umbrella clause, there is no privity of contract between Burlington and Ecuador. Privity between a creditor and a debtor is part of the ordinary meaning of the term "obligation" in the umbrella clause. The expression "with regard to investments" narrows down the scope of the "obligations" and thus of the umbrella clause. "Not being a creditor under the [PSCs], Burlington Resources cannot become a creditor under the umbrella clause, the scope of which must reflect the scope of the contractual obligations."[348] In support of its position, Ecuador relies primarily on the ICSID decisions in *Azurix*, *Siemens* and the *CMS* annulment. It also invokes *Gustav Hamester v. Ghana*. Hence, there is a "series of consistent cases" which construe the umbrella clause as requiring privity.[349]

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346 Tr. 208:12-22.

347 This is not to say, however, that the provisions of the Hydrocarbons Law upon which Burlington relies serve no purpose whatsoever. Since the PSCs were to reproduce these provisions – which they did as Ecuador has admitted – they may assist in construing those provisions that were incorporated into the PSCs pursuant to the promises made in the Hydrocarbons Legal Framework.

348 Tr. 193:18-21.

349 Tr. 199:2-3.

Finally, Ecuador states that the decisions upon which Burlington relies, *Continental Casualty* and *Duke Energy*, are of no assistance on this issue.

209. Burlington, on the other hand, submits that the Treaty's umbrella clause requires no privity. The umbrella clause applies to "any obligation [...] entered into with regard to investments."[350] The reference to "*any* obligation" shows that the clause is meant to be broad and cover all obligations. The choice of the word "investment" is telling. The Treaty only requires that the obligations be entered "with regard to [Burlington's] investments", and not the investor, *i.e.* Burlington. In accordance with Article I of the Treaty, "investments" covers both direct and indirect investments. Thus, the plain language of the Treaty does not require privity. A narrower formulation calling for privity could have been used, but Ecuador and the United States "deliberately chose the broader term in the Umbrella Clause."[351] In addition, Ecuador's interpretation of the umbrella clause is contrary to the purpose of the Treaty, which protects both direct and indirect investments. Burlington denies that there is a "series of consistent cases" requiring privity and points to the decision in *Continental Casualty*.

1.3.2. Analysis

210. The Tribunal will focus on the Treaty's umbrella clause and its interpretation under international law (i), and then turn to the ICSID case law dealing with the issue of the umbrella clause's scope (ii).

(i) The interpretation of the Treaty's umbrella clause

211. The Treaty's umbrella clause reads as follows:

> "Each Party shall observe any obligation it may have entered into with regard to investments."

212. In application of the Vienna Convention on the Law of Treaties, the Tribunal will interpret the umbrella clause in accordance with the ordinary meaning of the terms in their context and in light of the object and purpose of the Treaty. To avoid any ambiguity in the context of the debate on the significance of umbrella clauses, the Tribunal stresses that the interpretation question it faces is not whether the term "obligation" comprises commitments deriving from laws and regulations in addition to contract as some tribunals have found.[352] Here, there is no doubt that the obligations at

350 *Supra*, ¶ 201.

351 Tr. 148:4-6.

352 *Noble Energy Inc. and MachalaPower Cia. Ltda. v. Ecuador and Consejo Nacional de Electricidad*, Decision on Jurisdiction dated 5 March 2008, at ¶ 157 (Exh. CL-32); *Continental*

issue arise out of a contract. Nor is the question whether obligations resulting from a commercial contract should be protected under the umbrella clause, or in other words whether a distinction should be made depending on the State's acting as a sovereign or as a merchant.[353] Here, if the hurdle of the contract partner is overcome, there is no question that Ecuador entered into the PSCs as a sovereign.[354] The question at hand is exclusively whether the umbrella clause protection applies to obligations entered into not between the State and the investor and Claimant, but between the State and an affiliate of the investor.

213. Bearing these delimitations in mind, the Tribunal first notes that the Treaty's umbrella clause imposes an obligation on the Contracting States ("shall observe"). Their obligation consists in observing "any obligation", which terms are further specified by the words "entered into" and "with regard to investments."

214. The word "obligation" is thus the operative term of the umbrella clause. The Treaty does not define "obligation". The Parties agree – and rightly so – that the clause refers to legal obligations. This is of little assistance, however, to resolve the question of privity. To answer this question, the Tribunal relies primarily on two elements which in its view inform the ordinary meaning of "obligation." First, in its ordinary meaning, the obligation of one subject is generally seen in correlation with the right of another. Or, differently worded, someone's breach of an obligation corresponds to the breach of another's right.[355] An obligation entails a party bound by it and another one benefiting from it, in other words, entails an obligor and an obligee. Second, an obligation does not exist in a vacuum. It is subject to a governing law. Although the notion of obligation is used in an international treaty, the court or tribunal interpreting the treaty may have to look to municipal law to give it content. This is not peculiar to "obligation"; it applies to other notions found in investment treaties, *e.g.* nationality, property,

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Casualty Company v. Argentine Republic, (hereinafter "*Continental Casualty")*, Award of 5 September 2008, at ¶ 297 (Exh. EL-74).

353 *El Paso Energy International Company v. Argentine Republic*, Decision on Jurisdiction dated 27 April 2007, at ¶ 79 (Exh. CL-40); *Joy Mining Mach. Ltd. v. The Arab Republic of Egypt,* Award on Jurisdiction dated 6 August 2004, at ¶ 72 (Exh. CL-73).

354 While the Decision on Jurisdiction held that the PSCs did not qualify as "investment agreements" under Art. VI(1)(a) and X(2)(c) of the BIT, it did so only because there was no privity between the Claimant and the Respondent, not because the PSCs were commercial contracts (DJ, ¶ 235).

355 *E.g.* with respect to the notion of obligation under international law, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10); *Yearbook of the International Law Commission, 2001,* vol. II, Part Two (Exh. CL-127).

exhaustion of local remedies to name just these.[356] In this case, the PSCs are governed by Ecuadorian law. It is that law that defines the content of the obligation including the scope of and the parties to the undertaking, *i.e.* the obligor and the obligee.

215. Applying these two elements to this case, one cannot but conclude that the umbrella clause does not protect obligations arising from the PSCs. Whose right is correlated to the obligation? The answer is found in the law governing the obligation, here Ecuadorian law. Burlington has not alleged, not to speak of established, that under Ecuadorian law the non-signatory parent of a contract party may directly enforce its subsidiary's rights.

216. The context of the term "obligation" confirms this conclusion. Although not conclusive in and of themselves, the words "entered into" can be regarded as reinforcing the idea of privity. As to the terms "with regard to investments" also employed by the relevant treaty provision, they denote a "link between the obligation and the investment" as Burlington argued at the hearing. This is certainly in keeping with the object and purpose of the Treaty, which are to encourage and protect investments. However, as Ecuador pleaded, this link "does not replace but qualifies" the notion of obligation.

217. If there is no obligation in the first place, there is nothing to qualify. Nor can these qualifications create an "obligation" where there is none to begin with. Burlington argues that, because the definition of investment in Article I of the Treaty covers both direct and indirect investment, it is a co-obligee of Ecuador's obligations under the PSCs. Broad as the definition of investment in the Treaty may be, it cannot compensate for the absence of an "obligation."

218. The object and purpose of the Treaty lead to no different conclusion. Burlington claims that reading a privity component into the umbrella clause would be "contrary to the spirit of the Treaty"[357] which, by virtue of the definition of investment in Article I, seeks to protect both direct and indirect investments. The Tribunal cannot agree. The umbrella clause is only one of the various substantive protections that the Treaty

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356 *E.g.*, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* (hereinafter "*SGS*"), ¶ 126; (Exh. EL-73). *Nottebohm Case (second phase), Judgment of April 6th, 1955 : I.C.J. Reports 1955, p.4; and Case concerning certain German interests in Polish Upper Silesia (The Merits), Judgment of 25 May 1926, PCIJ, Series A – No. 27.* BROWNLIE, Ian. *Principles of Public International Law.* Oxford University Press, Seventh Edition (2008), p. 36; and WEERAMANTRY, J. Romesh. *Treaty Interpretation in Investment Arbitration*, Oxford University Press (2012), *at* 6.36, p. 167.

357 CSM, ¶ 135.

bestows upon investors, with the scope of protection depending on the terms of each specific provision. Other Treaty provisions unquestionably protect both direct and indirect investments, such as for instance the expropriation clause. The object and purpose of the Treaty do not impose that all standards of protection have the same scope.

219. Burlington further maintains that it would be ironic for it to not be able to rely on the umbrella clause on the ground that it did not sign the PSCs, when Ecuador has asserted counterclaims precisely on the basis of the PSCs.[358] Here again, the Tribunal cannot follow this argument for the reason that its jurisdiction over the counterclaims is based on a specific submission agreement.

220. As a result, the Tribunal holds that, Burlington may not rely on the Treaty's umbrella clause to enforce against Ecuador its subsidiary's contract rights under the PSCs for Blocks 7 and 21. This conclusion is supported by ICSID case law, the import and meaning of which has been heavily debated by the Parties. Arbitrator Orrego Vicuña disagrees with these findings for the reasons explained in the attached dissenting opinion.

(ii) ICSID case law

221. Before examining the specific cases upon which the Parties rely, the Tribunal must address a threshold matter concerning the precedential value of ICSID cases. Burlington has sought to diminish the relevance of some of the cases upon which Ecuador relies on the ground that statements which Ecuador cites are *obiter dicta*. Ecuador for its part has argued that in the context of investment arbitration, "[e]verything counts."[359] The Tribunal tends to agree with Ecuador. It is correct that there is no formal rule of *stare decisis* in international investment arbitration. At the same time, the Tribunal considers that it should "contribute to the harmonious development of investment law" and promote a predictable legal order.[360] In this light, there is no reason to distinguish between *obiter dicta* and holding. Whether peripheral or central to the decision*,* the statements of an international investment tribunal may provide guidance to investors and host States alike, and may serve to predict the decisions of future tribunals.

358 CPHB, ¶ 307.

359 Tr. 198:12.

360 DJ, ¶ 100.

222. The decisions in *Azurix*, *Siemens* and the *CMS* annulment proceedings appear to require privity of contract between the investor and the host State for purposes of the umbrella clause. In an award rendered in July 2006, the *Azurix* tribunal dealt with an umbrella clause contained in the United States-Argentina BIT, the wording of which is identical to the u*mbrella clau*se under examination here. The *Azurix* tribunal held as follows:

> "As already stated by the Tribunal in affirming its jurisdiction within the limits permitted by the Convention and the BIT, the Tribunal finds that none of the contractual claims as such refer to a contract between the parties to these proceedings; neither the Province [of Buenos Aires] nor ABA are parties to them. While Azurix may submit a claim under the BIT for breaches by Argentina, there is no undertaking to be honored by Argentina to Azurix other than the obligations under the BIT. Even if for argument's sake, it would be possible under Article II(2)(c) to hold Argentina responsible for the alleged breaches of the Concession Agreement by the Province, it was ABA and not Azurix which was the party to this Agreement."[361] (emphasis added).

223. The implication of this reasoning is evident. The parties to the underlying agreement were the Province of Buenos Aires and ABA, Azurix's subsidiary. Azurix itself was not a party to the agreement. For this reason, even assuming *arguendo* that Argentina had been bound by the agreement, Azurix could not have relied on the treaty's umbrella clause to bring claims based on that contract against Argentina. The unstated but obvious premise is that the umbrella clause required privity between the investor and Argentina.[362]

224. Some time later, the tribunal in *Siemens*[363] dealt with an umbrella clause contained in the Germany-Argentina BIT. This umbrella clause provided that "[e]ach Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory." In its award of February 2007, the *Siemens* tribunal stated as follows:

> "The Tribunal considers that Article 7(2) has the meaning that its terms express, namely, that failure to meet obligations undertaken by one of the Treaty parties in respect to any particular investment is converted by this clause into a breach of the Treaty. Whether an arbitral tribunal is the tribunal which has jurisdiction to consider that

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361 *Azurix Corp. v. The Argentine Republic* (hereinafter "*Azurix*"), Award of 14 July 2006, at ¶ 384 (Exh. CL-121).

362 The contract between ABA and the Province of Buenos Aires was governed by Argentine law. The *Azurix* Tribunal held that, while its inquiry on the merits was governed by the ICSID Convention, by the BIT and by applicable international law, the law of Argentina would assist its inquiry "into the alleged breaches of the Concession Agreement to which Argentin[e] law applies". *Azurix* Award, at ¶ 67 (Exh. CL-121).

363 The *Azurix* and the *Siemens* Tribunals were both chaired by the same arbitrator, Andrés Rigo Sureda.

> breach or whether it should be considered by the tribunals of the host State of the investor is a matter that this Tribunal does not need to enter. The Claimant is not a party to the Contract and SITS is not a party to these proceedings."[364] (emphasis added).

225. Just like in *Azurix*, the implication is clear. The parties to the underlying contract were Argentina and SITS, Siemens' subsidiary.[365] Siemens itself was not a party to the contract. Therefore, Siemens could not invoke the treaty's umbrella clause in order to bring contract claims against Argentina. Once again, the implicit premise is that the umbrella clause requires privity.

226. In September 2007, the CMS *ad hoc* Committee issued its decision. While this Tribunal stated in the Decision on Jurisdiction that "no general rule"[366] on privity could be extrapolated from the *CMS* annulment decision, it joined the issue to the merits because the Parties had not sufficiently discussed it in the course of the jurisdictional phase.[367] Now with the benefit of the Parties' extensive submissions and legal authorities, the Tribunal is better poised to construct the scope of the Treaty's umbrella clause.

227. In the *CMS* annulment proceedings, Argentina alleged that the tribunal had manifestly exceeded its powers because it had allowed CMS to bring claims against Argentina under the umbrella clause even though CMS "was not a party to any of the applicable instruments."[368] As in *Azurix*, the applicable umbrella clause was that of the United States-Argentina BIT, which is identical to the present one. Although the *ad hoc* Committee annulled the award for failure to state reasons and not for manifest excess of powers, it made the following observation in the context of its umbrella clause analysis:

> "The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.*, the persons bound by it and entitled to

364 *Siemens A.G. v. Argentine Republic*, Award and Separate Opinion of 6 February 2007, at ¶ 204 (Exh. CL-79).

365 Once again, Argentine law governed the Contract – that is, the underlying obligation that Siemens was seeking to enforce via the umbrella clause.

366 DJ, ¶ 195. The reason being that the *ad hoc* Committee annulled the tribunal's award for failure to state reasons, not for manifest excess of powers. *CMS Gas Transmission Company v. Argentine Republic* (hereinafter "*CMS*"), Annulment Proceeding, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic of 25 September 2007 (Exh. CL-72, ¶¶ 97-98).

367 DJ, ¶¶ 197-198.

368 *Id.*, ¶ 46.

> rely on it) are likewise not changed by reason of the umbrella clause"[369] (emphasis in original).

228. The *CMS ad hoc* Committee expressed the premise which the *Azurix* and the *Siemens* tribunals had left unstated. First, in keeping with this Tribunal's analysis, the *ad hoc* Committee stated that an obligation has an obligor ("the person bound by it") and an obligee ("the person […] entitled to rely on it"). Second, still in conformity with the Tribunal's view, the *ad hoc* Committee stated that the obligation remains governed by its proper law and that the parties to the obligation are not changed by reason of the umbrella clause. Thus, the umbrella clause does not expand the universe of obligees who may rely on the underlying obligation.

229. Burlington has sought to distinguish the *CMS* annulment decision on the ground that CMS was a minority shareholder, whereas in this case Burlington wholly owns the special investment vehicle party to the PSCs – Burlington Oriente. The Tribunal does not see why this is a distinguishing factor. Both the *CMS* annulment Committee and this Tribunal held that the notion of "obligation" presupposes a person entitled to rely on it or an obligee. Not being a party to the PSCs, Burlington is not an obligee and cannot become one for the reason that it owns all the shares of a signatory party.

230. Burlington also submits that the *CMS* tribunal – as opposed to the *ad hoc* Committee – indicated that there is "no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned"[370] and that it went on to note that "[w]hether the protected investor is in addition a party to a concession agreement or a license agreement with the host State is immaterial for the purpose of finding jurisdiction under those treaty provisions, since there is a direct right of action of shareholders."[371] Although counsel for the Claimant argued that "[a]d hoc committees are not inherently superior to [a]rbitral [t]ribunals, whether in their composition or in their entitlement to create jurisprudence",[372] one cannot disregard that the ICSID Convention entrusts *ad hoc* committees with the power to annul awards and that this *ad hoc* Committee annulled this award on this very point.[373]

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369 *CMS* Annulment Decision, at ¶ 95(c) (Exh. CL-72).

370 *CMS* Decision on Jurisdiction, at ¶ 48 (Exh. CL-180); CPHB, ¶ 300.

371 *CMS* Decision on Jurisdiction, at ¶ 65 (Exh. CL-180); CPHB, ¶ 301.

372 Tr. 1303:9-12.

373 *CMS* Annulment Decision, at ¶ 97 (Exh. CL-72).

231. In support of the requirement of privity, Ecuador also invokes *Gustav Hamester v. Ghana.*[374] The facts of that case were different because the contract at issue was between the investor and a State entity, as opposed to a contract between a subsidiary of the investor and the State. In spite of this difference, this case equally confirms the need for privity. The *Gustav Hamester* tribunal observed that the *CMS* annulment decision "made it clear that […] a contractual obligation between a public entity distinct from the State and a foreign investor cannot be transformed by the magic of the so-called "umbrella clause" into a treaty obligation of the State towards a protected investor[.]"[375] By the same token, the umbrella clause cannot transform a contract obligation of the State towards an investor's subsidiary into an obligation to the investor itself.

232. Finally, Burlington relies on *Continental Casualty,* a decision of September 2008.[376] Construing the umbrella clause of the United States-Argentina BIT invoked in *Azurix* and *CMS*, the *Continental Casualty* tribunal stated that it was "conscious that the interpretation of umbrella clauses […] remains controversial and that there is a lack of consistency" with respect to its scope.[377] It eventually dismissed all umbrella clause claims because the underlying obligations were either too general or covered by the necessity defense.[378] It also mentioned that the obligations covered by the umbrella clause "may have been entered with persons or entities other than foreign investors themselves."[379]

233. It is debatable whether the *Azurix*, *Siemens,* and *CMS* annulment decisions constitute a "series of consistent cases" stating that the umbrella clause requires privity. Indeed, the views expressed in these cases are supported by few reasons, if any, and a different opinion is adopted in *Continental Casualty*.[380] Be this as it may, it is certain

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374 *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (hereinafter "*Gustav Hamester*"), Award, 18 June 2010 (Exh. EL-150); RPHB, ¶ 580.

375 *Gustav Hamester*, at ¶ 346.

376 Burlington also relied on *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, Award of 18 August 2008 (Exh. CL-41). However, as Ecuador noted, there was no privity issue in *Duke Energy* because the investor's majority-owned subsidiary - Electroquil - was a party to the case and jurisdiction was premised on both an arbitration agreement and an investment treaty (*Id*. ¶¶ 119, 170). ¶

377 *Continental Casualty*, at ¶ 296.

378 *Id*., ¶¶ 302-303.

379 *Id*., ¶ 297.

380 Burlington has also cited the Reader's Guide to the Energy Charter Treaty to buttress its argument that the umbrella clause in the Treaty must cover both direct and indirect investments (CSM, ¶ 132). First, as the Claimant conceded, the umbrella clause's formula in the Energy Charter Treaty is "broader" than in the Treaty under examination (*Id*.). Second, there is no

that the majority of the ICSID cases law supports the Tribunal's conclusion that the protection granted under the umbrella clause requires privity between the investor and the host State.

234. For these reasons, the majority concludes that the Tribunal has no jurisdiction over Burlington's umbrella clause claims according to which Ecuador would have failed to adjust the contractor's oil production share and to guarantee the contractor's participation in oil production.

2. Are the *Caducidad* Decrees Part of Burlington's Case?

235. The Tribunal issued its Decision on Jurisdiction on 2 June 2010. Only a few weeks later, on 20 July 2010, Ecuador's Minister of Non-Renewable Natural Resources declared the termination of the PSCs for Blocks 7 and 21 by issuing the so-called *caducidad* decrees. The *caducidad* decrees thus post-date the Tribunal's Decision on Jurisdiction, as a consequence of which neither Party had the opportunity to address the *caducidad* decrees in its jurisdictional pleadings. In this Section, the Tribunal will examine (i) whether Burlington has challenged the *caducidad* decrees; if so, (ii) whether the Tribunal has jurisdiction over the *caducidad* decrees, and (iii) whether the allegations based on the *caducidad* decrees are admissible.

2.1. Has Burlington challenged the *caducidad* decrees?

236. Ecuador argues that "*caducidad* is simply not part of this case."[381] It submits that Burlington contests neither the *caducidad* decrees nor the procedures leading up to their declaration.[382] Burlington has portrayed the *caducidad* decrees as being merely "symbolic" because the purported expropriation of its investment had already been consummated at the time those decrees were issued. Burlington has not specifically answered Ecuador's allegations that Burlington has not challenged the *caducidad* decrees and that, as a result, the *caducidad* decrees are not part of this case. Therefore, the Tribunal will have to determine whether Burlington has challenged the *caducidad* decrees on the basis of the whole record.

237. As part of the factual background to the case, Burlington alleged that Ecuador terminated the PSCs for Blocks 7 and 21 via the *caducidad* process.[383] Subsequently,

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similar explanatory guide to the Treaty showing that the United States and Ecuador intended the umbrella clause to cover both direct and indirect investments.

381 Tr. 301:20-21.

382 RCM, ¶ 153.

383 CSM, § II(C)(4), ¶¶ 77-78.

at the very outset of its legal discussion in the same memorial, Burlington argued that "Ecuador's *measures* have deprived [it] of the use and enjoyment of its investments"[384] (emphasis added). Burlington then listed six measures which, "both individually and in the aggregate"[385], allegedly expropriated its investment: the last measure includes the termination of the PSCs via the *caducidad* decrees. While Burlington remarked that this termination was "symbolic"[386] because its "investment already had been expropriated",[387] it also claimed that "[w]ith this action [...] Ecuador foreclosed any possibility of Burlington returning to the legal and fiscal regime it had been [previously] guaranteed […]."[388]

238. In other words, in the Supplemental Memorial, Burlington (i) characterized the *caducidad* decrees as one of the measures which both individually and in combination with other measures allegedly expropriated its investment, and (ii) argued that the *caducidad* decrees made it impossible to revert to the *status quo* which it had enjoyed before the measures of which it complains in this arbitration were adopted. In the view of the Tribunal, these allegations show that Burlington does challenge the *caducidad* decrees.

239. Similarly, Burlington devoted some attention to the *caducidad* decrees at the hearing. First, counsel for Burlington cross-examined Minister Wilson Pástor Morris extensively on the subject of the *caducidad* decrees.[389] Second, counsel for Burlington referred to the *caducidad* decrees as follows during the Parties' closing statements:

> "Next, proceedings were commenced for *caducidad*, a contract termination method that sought to excuse Ecuador. The allegation was a breach of Article 74(4) of the Hydrocarbons Law which allegedly did not permit suspension of operations without ["*justa causa*"], without just cause.
>
> [….]
>
> Now, of course, the *caducidad* Decision – let's not be under any illusions – was reverse-engineered so that Ecuador sought to escape from its contractual obligations with the Claimant. The idea that there could have been any fair consideration of the Claimants' position in a process whereby the Minister has to judge acts of the Government that appointed him has no logic, particularly where he was being advised by Government lawyers whose very description of this Tribunal's order used the verb "*recomendar*" in just the description of

384 CSM, ¶ 80.

385 *Id*.

386 *Id*., last bullet point.

387 *Id*.

388 *Id*.

389 Tr. 874:17-902:5.

> the document when that verb appears nowhere in your order. He was a judge in his own cause assisted by lawyers to his own cause."[390] (emphasis added).

240. According to Burlington, Ecuador's goal in enacting the *caducidad* decrees was to "escape from its contractual obligations with the Claimant" and the *caducidad* process could not be "fair", as the Minister who issued the decrees was a "[j]udge in his own cause."[391] These statements show once again that Burlington contests both the process leading to, and the substance of, the *caducidad* decrees.

241. In sum, the Tribunal cannot but conclude that Burlington has challenged the *caducidad* decrees, which are thereby part of this case. In light of this conclusion, the Tribunal must address Ecuador's jurisdictional and admissibility objections to the *caducidad* decrees.

2.2. Does the Tribunal have jurisdiction over the *caducidad* decrees?

242. Ecuador contends that the Tribunal has no *ratione materiae* jurisdiction over the *caducidad* decrees for Blocks 7 and 21. While Burlington has not specifically countered these jurisdictional objections, it is clear from its argumentation on the merits that it considers that there is jurisdiction over the *caducidad* decrees. Therefore, the Tribunal will address these objections on the basis of Ecuador's arguments and relevant elements on record.

243. Ecuador argues that the Tribunal has no contractual or Treaty jurisdiction over the *caducidad* decree for Block 7. The Tribunal has no contractual jurisdiction over the *caducidad* decrees because clauses 21.2.3[392] and 21.2.4[393] of the PSC for Block 7 carve out this form of contract termination from the contractual jurisdiction of the Tribunal. Furthermore, the Tribunal has no Treaty jurisdiction over the *caducidad* decree for Block 7 under these clauses because (i) the PSC for Block 7 was signed after the Treaty was signed, and (ii) that is what the parties to the contract intended to achieve through the language of clause 20.4.

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390 Tr. 1288:10-15 and 1291:13-1292:3.

391 Tr. 1291:13-1292:3.

392 Clause 21.2.3 of the PSC for Block 7 states that when " the Contract is terminated for reasons other than *caducidad*, the procedures to which the Parties have agreed in Clause [20] will be followed." (RCM, ¶ 156); (Exh. C-1).

393 Clause 21.2.4 of the PSC for Block 7 sets forth that "for purposes of caducidad and other sanctions, the provisions of Chapter IX of the Hydrocarbons Law will apply." (Exh. C-1); (RCM, ¶ 156).

244. In the same vein, Ecuador maintains that the Tribunal has no contractual or Treaty jurisdiction over the *caducidad* decree for Block 21. The Tribunal has no contractual jurisdiction over *caducidad* because this is a "legal matter" excluded from the scope of the arbitration agreement pursuant to clause 20.2 of the contract. In addition, the Tribunal has no Treaty jurisdiction over the *caducidad* decrees because (i) the PSC for Block 21 was signed two years after the Treaty was signed, and (ii) that is what the parties to the contract intended to achieve through the language of clause 20.2.20.

245. In other words, Ecuador argues that the original parties to the PSCs for Blocks 7 and 21 intended to carve out *caducidad* not only from the scope of the PSC, but also from the scope of the Treaty. Since the jurisdiction of the Tribunal is premised exclusively on the Treaty, the Tribunal does not need to address *per se* the question of whether the original parties intended to remove *caducidad* from the scope of the PSCs. It must, however, address the Treaty-based objections.

246. Ecuador argues that the original parties to the PSC for Block 7 intended to remove *caducidad* from the scope of the Treaty, and thus from the scope of the Treaty's jurisdiction. They did so by inserting clause 20.4 into the PSC, which reads as follows:

> "In addition and without prejudice to the provisions of clauses [20.2][394] and [20.3][395] of this participation contract, the Parties also agree to submit any investment-related dispute to the Treaties, Conventions, Protocols and other international law agreements signed and ratified by Ecuador in accordance with the law."[396]

247. This clause does not appear to reflect an intent by the original parties to the PSC for Block 7 to remove *caducidad* from the scope of the Treaty. The *caducidad* process is not specifically mentioned in this clause. Far from signalling an intent to remove *caducidad* from the scope of the Treaty, this clause underscores the will of the original parties to the contract to submit "any investment-related dispute" to international treaties, of which the United States-Ecuadorian BIT is undoubtedly one. This clause

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394 Clause 20.2 of the PSC for Block 7 provides that "all controversies arising from this Participation Contract will be settled by arbitration of law in accordance with the provisions of Article 10 of the Hydrocarbons Law as amended, the Arbitration and Mediation Law […] and the rules and procedures laid down in this clause" (Tribunal's translation). There is no mention of *caducidad* in clause 20.2 of the PSC for Block 7 (Exh. C-1).

395 Clause 20.3 of the PSC for Block 7 provides that "[n]otwithstanding the foregoing, from the date on which the [ICSID Convention] (the "Convention"), signed by the Republic of Ecuador, be ratified by the Ecuadorian Congress, the Parties commit to submit the controversies or disputed relating to or arising from the execution of this Participation Contract to the jurisdiction and competence of the [ICSID] so that they may be settled and resolved in conformity with the provisions of that Convention […]" (Tribunal's translation). There is no mention of *caducidad* in clause 20.3 of the PSC for Block 7 (Exh. C-1).

396 Exh. C-1 (Tribunal's translation).

appears to reinforce, not to undermine, the Tribunal's Treaty jurisdiction. Even assuming that the original parties to the PSC for Block 7 intended to remove *caducidad* from the scope of the contract's arbitration agreement, there is no evidence that they intended to remove *caducidad* from the scope of the Treaty. Therefore, the Tribunal finds that it has jurisdiction over the *caducidad* decree for Block 7.

248. Ecuador similarly argues that the original parties to the PSC for Block 21 intended to remove *caducidad* from the scope of the Treaty. According to Ecuador, this follows from clause 20.2.20 of the PSC, which provides that:

> "In the event that the Ecuadorian State or PETROECUADOR enter or have entered into an international treaty which, in accordance with the law, provides for the resolution of technical or economic disputes by a different arbitration mechanism, or if so allowed by Ecuadorian law, the Parties agree that they will be able to submit the issue in dispute to that arbitration."[397]

249. This clause does not suggest that the original parties to the PSC for Block 21 intended to remove *caducidad* from the scope of the Treaty, nor does it signal an intent to diminish the scope of Treaty jurisdiction. It rather shows an intent "to submit"[398] to Treaty arbitration "technical or economic disputes."[399] There is no reason to infer that the terms "technical or economic disputes"[400] aim to remove *caducidad*-related disputes from the scope of Treaty arbitration – especially since the termination of a PSC has evident economic implications. On the contrary, this clause aims to bolster, not to weaken, Treaty arbitration. Even assuming that the original parties to PSC for Block 21 intended to remove *caducidad* from the scope of the contract's arbitration agreement, there is no evidence that they intended to remove *caducidad* from the scope of the Treaty.[401] Thus, the Tribunal finds that it has jurisdiction over the *caducidad* decree for Block 21.

250. For these reasons, the Tribunal finds that it has *ratione materiae* jurisdiction under the Treaty over the *caducidad* decrees relating to the PSCs for Blocks 7 and 21.

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397 Exh. C-2 (Tribunal's translation).

398 *Id*.

399 *Id*.

400 *Id*.

401 Ecuador also argues that the original parties to the PSC for Block 21 intended to remove *caducidad* from the scope of the US-Ecuador BIT because the contract was executed after the Treaty was signed. Indeed, while the Treaty was signed on 27 August 1993, the PSC for Block 21 was signed on 20 March 1995, – but only entered into force on 11 May 1997, after the execution of the PSC. At any rate, the conclusion that clause 20.2.20 of the PSC for Block 21 does not remove *caducidad* from the scope of the Treaty is unaffected by this chronology.

2.3. Are the allegations based on the *caducidad* decrees admissible?

251. Ecuador argues that Burlington's allegations relating to *caducidad* are premature because Burlington has not challenged the *caducidad* decrees before the Ecuadorian administrative courts. It notes that, whereas Burlington was not required to exhaust local remedies before commencing this arbitration, it was required to make a reasonable attempt to seek redress before domestic courts. Hence, Burlington's allegation relating to the *caducidad* decrees is inadmissible. Although Burlington has not specifically answered this objection, its argumentation shows that it opposes it. The Tribunal will thus address it on the basis of Ecuador's arguments and other relevant elements in the record.

252. In the Supplemental Memorial on Liability, Burlington made the following allegations in relation to the *caducidad* decrees:

> "On September 28, 2009, PetroEcuador petitioned the Minister of Non-Renewable Natural Resources to terminate the PSCs for Blocks 7 and 21. PetroEcuador took the position that the Consortium had abandoned the Blocks 7 and 21 operations and that this was sufficient cause to terminate the PSCs under the Hydrocarbons Legal Framework. Perenco, on behalf of the Consortium, immediately objected to the initiation of the *caducidad* process, because the determination of the legality of Law No. 2006-42 payments and the physical occupation of Blocks 7 and 21 were pending before the *Burlington* and *Perenco* tribunals"[402] (emphasis added).

253. Ecuador has not disputed these allegations. It therefore appears that Perenco "immediately objected to the initiation of the *caducidad* process" and that it did so "on behalf of the Consortium." In fact, Ecuador has expressly admitted that, as the operator of the Block, Perenco was contractually bound to "deal with the government" on behalf of the Consortium.[403] Hence, Perenco's objection to the *caducidad* process was raised on behalf of both Consortium partners, including Burlington Oriente. Under the facts of this case, this constituted a reasonable enough attempt to seek local redress. Thus, the Tribunal sees no reason to declare Burlington's allegations relating to the *caducidad* decrees inadmissible.

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402 CSM, ¶ 77.

403 "[T]here is a specific provision saying very clearly that only the operator should deal with the government. So the operator of this Consortium, as you know, Members of the Tribunal, was Perenco. This is a simple application of a contractual provision." Tr. 1349:18-22; *see* also RPHB, ¶ 202.

C. EXPROPRIATION

254. The Tribunal must now address the merits of the claim over which it has jurisdiction, the expropriation claim. The nub of Burlington's case is that each of Ecuador's measures individually[404] (the Law 42 tax, the *coactiva* seizures and the takeover of the Blocks) and all of them collectively constituted an unlawful expropriation of its investment. Ecuador denies that any of these measures expropriated Burlington's investment, whether considered individually or collectively. In the alternative, Ecuador argues that, if there was expropriation, it was lawful under the circumstances.

255. The Treaty contains the following provision on expropriation:

> "Article III
>
> 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (3) [transcribed below]. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable and be freely transferable."[405]

Article II (3) to which Article III refers reads as follows:

> "Article II
>
> 3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
>
> (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

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404 Specifically, Burlington measure-by-measure case is that the Law 42 tax (at both 50% and 99%) constituted an indirect expropriation of its investment ("a measure tantamount to expropriation" (CSM, ¶ 82)); and that the *coactiva* seizures and the physical takeover of the Blocks constituted a direct expropriation of its investment ("a direct confiscation", "a direct taking" and "a direct expropriation"; CSM, ¶¶ 90, 91 and 94).

405 The Treaty at Article III (Exh. C-6).

> (c) Each Party shall observe any obligation it may have entered into with regard to investments."[406]

256. The Treaty thus establishes a general prohibition against expropriation of investments unless certain specified requirements are cumulatively met, in which case the expropriation is lawful. In order to adjudicate Burlington's expropriation claim, the Tribunal must first determine what Burlington's investment was (Section 1) and in particular what rights Burlington had under the PSCs (Section 2). In so doing, the Tribunal does not act as a contract judge but exclusively as a treaty judge, addressing contract matters as preliminary issues insofar as it is necessary to rule on a Treaty claim. Subsequently, the Tribunal's task will be to decide whether Ecuador expropriated Burlington's investment (Section 3) and, if there was expropriation, whether the expropriation was unlawful (Section 4).

1. Burlington's Investment in Ecuador

257. The Treaty provides that "investments shall not be expropriated." The Tribunal understands from this formulation that the focus of the expropriation analysis must be on the investment as a whole, and not on discrete parts of the investment. Other international tribunals have adopted the same approach. The tribunal in *Telenor v. Hungary*, for instance, stated that in the context of a claim for expropriation "the investment must be viewed as a whole […]."[407] Likewise, the tribunal in *Merrill v. Canada* noted that "the business of the investor has to be considered as a whole […]."[408] In the same vein, the tribunal in *Feldman v. Mexico* held that a State measure that effectively extinguished an entire line of the investor's business – cigarette exports – did not amount to an expropriation of its investment as a whole.[409]

258. The Parties seem, however, to have focused on a narrower view of investment. In its initial Memorial, for instance, Burlington alleged that Ecuador's measures had injured its "investments" in Ecuador, defining these "investments" as the "rights in the four contracts [at the time the PSCs for Blocks 23 and 24 were still part of the dispute] for the exploration and exploitation of crude reserves in Ecuador."[410] Burlington claimed to

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406 The Treaty at Article II (Exh. C-6).

407 *Telenor Mobile Communications A.S. v. Republic of Hungary*, Award of 13 September 2006, ¶ 67 (Exh. EL-112)

408 *Merrill & Ring Forestry L.P. v. Canada*, NAFTA/UNCITRAL, Award of 31 March 2010, ¶ 144 (Exh. CL-155).

409 *Marvin Roy Feldman Karpa v. United Mexican States*, (hereinafter "*Feldman"*), Award on Merits of 16 December 2002, ¶ 152 (Exh. EL-80).

410 Mem., ¶ 299.

possess those rights "[t]hrough its ownership of [Burlington Oriente]."[411] Hence, according to Burlington, the rights under the PSCs constituted in and of themselves the investment. Consistent with this submission, counsel for Burlington expressed the following view at the hearing:

> "Well, surely the nexus between the PSCs and Burlington's investment is undeniable: Not only were the PSCs linked to Burlington's investments, no, they were Burlington's investments"[412] (emphasis added).

259. Ecuador neither explicitly accepted Burlington's definition of investment, nor did it challenge it as unduly narrow but it made its arguments within the framework of that definition. For instance, in its Counter-Memorial on Liability, Ecuador submitted that the Law 42 tax did not expropriate Burlington's investment because it was not in breach of the PSCs, noting at the same time that "the investment Burlington alleges is precisely the value of those contract rights".[413]

260. Nevertheless, in line with the cases referred to above, the Tribunal considers that a broader view of investment must be adopted, a view that encompasses Burlington's investment "as a whole." Burlington's investment is not composed solely of the rights of its subsidiary under the PSCs, even if those rights constituted the most valuable portion of Burlington's investment. Burlington's investment included its shares in Burlington Oriente, the infrastructure and equipment employed to exploit oil reserves, any other tangible property related to the project, the monetary and asset contributions made to carry out its operations, and the physical possession of the Blocks.[414]

2. The Rights under the PSCs

261. Without being *per se* investments, the contract rights under the PSCs represented a key component of Burlington's investment. It is by virtue of these contract rights that, through its subsidiary, Burlington had access to a share of the oil produced. These contract rights have a direct incidence on the economic value of Burlington's

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411 Mem., ¶ 303.

412 Tr. 145:17-20. Admittedly, Burlington also invoked its rights derived from the Hydrocarbons Legal Framework. However, as the Tribunal previously concluded, the Hydrocarbons Legal Framework contains no existing "obligation" (*see supra*, Section IV(B)(1.2)).

413 RCM, ¶ 501.

414 The Tribunal finds its understanding confirmed by other decisions, such as *Saipem S.p.A v. Bangladesh*, (hereinafter "*Saipem"*), Decision on Jurisdiction of 21 March 2007, ¶ 31 (Ex. CL-14) and the very first ICSID Decision on Jurisdiction of 12 May 1974 in *Holidays Inns v. Morocco*, reported in Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco"), - Some Legal Problems*, 1 ICSID Reports 645 (1993) at p. 680 in the original pagination (Exh. CL-137).

investment. For this reason, the Parties have devoted considerable attention to the identification of Burlington's rights under the PSCs. Thus, the Tribunal will start by identifying the rights which the PSCs conferred upon Burlington's subsidiary.

262. The disagreement of the Parties with respect to the meaning of the PSCs is confined to two main issues. First, the Parties disagree on the meaning of the term "economy" of the PSC, a term of crucial importance to understand the economic bargain at the heart of the contracts. Second, under the assumption that the economy of the PSC is affected by a given State measure, they disagree on whether the application of the so-called "correction factor" to re-establish the economy is mandatory or not.

2.1. Burlington's position

263. Burlington claims (i) that it had the contractual right to receive the full economic value of its oil production share *regardless* of the price of oil, and (ii) that if the economy of the PSCs was affected, the parties were bound to apply a correction factor..

264. First, Burlington claims that under the PSCs it had a right to enjoy the upside of any price increase. Otherwise stated, it claims that it had the right to realize the full economic value of its oil production share without regard to the price of oil – and subject only to the employment contributions and income tax agreed upon in the PSCs.[415] Contrary to what Ecuador argues, the participation formulas were *not* based on the price of oil. The participation formulas were subject to change solely on the basis of increased oil production, quality of the oil, or changes in the tax system. By contrast, the participation formulas were not subject to change because of oil price increases. As counsel for Burlington indicated at the hearing:

> "So, these [participation] percentages would change, amongst other things, with regard to the application of new taxes or with regard to volume [or quality[416]], but nowhere is any mention made of price as a factor to determine such [oil] share.
>
> And consistently, Burlington and the State never agreed that the State's participation would change as the price of oil increased. That was simply part of the risk and reward of the original terms of the Contract. […] This is entirely consistent with industry practice. Price is not normally included as a factor to determine production share in PSCs. Essentially price is one of the elements of risk and reward that the oil companies insist is not part of any kind of limitation" (emphasis added).[417]

415 CSM, ¶ 19.

416 "[T]here may be an adjustment [of the oil share] for the quality of the crude found – that's another aspect" (Tr. 24:8-9).

417 Tr. 24:17-25:15.

265. As a result, Burlington's income was not fixed but entirely contingent on the price of oil. If the price of oil increased, Burlington was entitled to the higher revenues resulting from such increase. There was no mathematical-economic equation included in the PSCs:

> "[T]he agreed, fixed equilibrium of the PSCs defined by a mathematical formula simply does not exist. These were risk contracts, which are at odds with any concept of fixed equilibrium, let alone a fixed (therefore guaranteed) rate of return."[418]

266. The participation formulas constituted the entire agreement between the parties, with each party entitled to realize the full economic value of its oil share regardless of price:

> "[T]he PSCs struck a particular balance between [Ecuador] and private investors, with those investors carrying the risk associated with developing the projects, but also enjoying any potential upside regarding price (and, at the same time, suffering from any downside)."[419]

267. In sum, for Burlington, the economy of the PSCs meant that it was entitled to realize the full economic value of its oil production share without regard to the price of oil, and subject only to those income and other taxes specifically provided for in the PSCs.

268. Second, if a tax measure affected the economy of the PSCs, the parties were under an obligation to apply a correction factor that would absorb the effects of the tax. This followed from the language of the PSCs. The contracts stated that "if a triggering event occurs, a correction factor will be included."[420] The terms "will be included" implied that the application of a correction factor was mandatory, and not, as argued by Ecuador, merely subject to renegotiation. Thus, the PSCs contained tax stabilization provisions.

2.2. Ecuador's position

269. According to Ecuador, (i) the term economy of the PSCs meant that Burlington only had the right to the price projections upon which the original parties to the PSCs had allocated oil production, that is a price of USD 15 per barrel and a resultant IRR of 15%; and (ii) even assuming that the economy of the PSCs was affected, the contracts merely imposed upon the parties an obligation to renegotiate a correction factor, there being no mandatory adjustment of the parties' participations nor tax stabilization clauses.

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418 CPHB, ¶ 323.

419 Mem., ¶ 354.

420 Tr. 31:18-19.

270. First, Burlington had no right to windfall profits under the PSCs and thus no right to extraordinary profits resulting from unexpectedly high prices. The PSCs merely allocated oil production volumes between Ecuador and the contractor. This oil allocation was based on the so-called "Vega model", a precise mathematical-economic equation upon which the economy of the PSCs was calculated. In other words, the oil participation percentages were but a reflection of the Vega model calculations on the date of conclusion of the PSCs.[421]

271. Under the Vega model, the contractor's income ("R") was calculated on the basis of the following three variables: the production of the Block ("Q"); the contractor's participation percentage ("X"); and the oil price projections estimated over the life of the contract ("P"). In short: $R = Q \times X \times P$. Once the contractor's income was calculated, it was possible to determine the internal rate of return ("IRR") by factoring in costs, employment contribution and income tax.[422]

272. The PSCs were based on an oil price projection of USD 15 per barrel, and an IRR of 15%. The price projection based on a price per barrel of USD 15 is part of the Vega model formula. The application of this formula would then yield an IRR of 15% for the contractor. Hence, these two key considerations – the oil price projections and the contractor's IRR – were incorporated in the calculation of the contractor's oil participation share. Moreover, in the case of Block 7, the parties' oil price projections over the life of the contract were reflected in Annex V of the PSC. At the hearing, counsel for Ecuador stated:

> "The equation [the Vega model] in the contracts factors among other things the reserves figures and production profile, how much it would cost to get those reserves [from] the ground, revenues – and this is the important part. I was telling you before we would get to speak about revenues – here we are – the revenues that the Parties considered in negotiating this agreement were based on a projection of a price per barrel of $15. This projection, along with the other projections, resulted in an internal rate of return for the Contractor of about 15 percent, and I say about 15 percent because, depending on the Contracts and the risk involved, the figure was more or less around 15.
>
> [….]
>
> Well, as we know, the assumption at the time of contracting was that as long as the price per barrel remained at or around $15 a barrel, obviously adjusted for inflation […] the Contractor would be able to recover its costs and make a reasonable profit on the basis of an

421 RCM, ¶¶ 335-337.

422 RCM, ¶¶ 338-340; see also Celio Vega WS, ¶¶ 27-28.

> internal rate of return of 15 percent throughout the life of the Contract."[423]

273. In sum, Burlington had *no* contractual right to revenues stemming from oil prices in excess of the parties' price assumptions at the time the PSCs were executed, *i.e.* in excess of an inflation-adjusted USD 15 per barrel. The economy of the PSCs meant that Burlington *only* had the right to USD 15 per barrel, which would yield an internal rate of return of 15% – anything above this oil price was a windfall profit not envisaged by the contracting parties.

274. Second, even assuming that the economy of the PSCs were affected, the contracts merely provided for renegotiation. The PSC for Block 7 states that any correction factor "will be calculated by agreement of the Parties."[424] The PSC for Block 21, in turn, provides that any adjustment to the participation formulas "shall be approved by the Administrative Council […]."[425] It follows from such language that these are merely renegotiation clauses. The Tribunal has no jurisdiction to decide what the parties would have agreed to pursuant to these clauses. In short, even if the economy of the PSCs is affected, the contracts do not impose an obligation to apply a correction factor but merely to renegotiate.[426]

2.3. Analysis

275. In light of the Parties' positions, the Tribunal must determine (a) what the economy of the PSCs was, and (b) whether the tax modification clauses calling for the application of a correction factor are mandatory or not, *i.e.* whether they are tax stabilization or renegotiation clauses.

2.3.1. The economy of the PSCs

276. In order to determine what the economy of the PSCs was, the Tribunal will analyze (a) the letter of the PSCs; (b) Annex V of the PSC for Block 7; (c) the Tarapoa contract; (d) Ecuador's conduct; (e) Ecuador's Hydrocarbons Law; and (f) the purpose of the shift from service contracts to production sharing contracts.

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423 Tr. 266:1-13, 267:6-17.

424 Exh. C-1, clause 11.12.

425 Exh. C-2, clause 11.7.

426 RCM, ¶¶ 345-364.

a. The letter of the PSCs

277. Clause 8.1 of the PSC for Block 7 provides the following in respect of the calculation of the contractor's oil production share:

> "Calculation of the Contractor's Production Share:
>
> The Contractor's share will be calculated using the following formula:
>
> $$\mathbf{PC = \frac{X \,.\, Q}{100}}$$ [427]
>
> Where:
>
> PC = Contractor's Production Share
>
> Q = Measured Production
>
> X = Average factor, expressed as a percentage rounded to the third decimal place, corresponding to the Contractor's Share of Production. [...]"[428] (emphasis added).

278. Likewise, Clause 8.1 of the PSC for Block 21 sets forth the following:

> "Calculation of the Contractor's Share of Production:
>
> The Contractor's share will be calculated pursuant to the parameters agreed to in this Contract, in accordance with the following formula:
>
> **PC = X . Q**[429]
>
> Where:
>
> PC = Contractor's Share of Production
>
> Q = Inspected annual production in the Contract Area
>
> X = average factor, as a percentage, corresponding to the Contractor's share of production [...]."[430] (emphasis added).

279. For Ecuador, the contractor's production share is to be calculated in accordance with the following formula: PC = X x Q x P, where "X" (contractor's share of production in percentage terms) and "Q" (total measured production) coincide with the definitions of clauses 8.1 transcribed above. In addition, Ecuador argues that the contractor's share of production includes the "P" factor, *i.e.* the oil price projections estimated over the life of the contract, which would yield an IRR of 15%. However, there is no mention of any

427 The period signifies multiplication.

428 Exh. C-1, clause 8.1.

429 The period signifies multiplication.

430 Exh. C-2, clause 8.1.

such "P" factor in clauses 8.1 of the PSCs. Similarly, these clauses do not mention any link between the formula for calculating the contractor's production share and the purported IRR.

280. More generally, the formula "PC = X x Q x P" – or the Vega model – appears nowhere in the PSCs (subject to Annex V of the PSC for Block 7 which will be examined separately), nor is there any mention of the contractor's purported IRR anywhere in the PSCs. This is telling, especially considering how detailed and lengthy the PSCs are. Without counting authorizations and annexes, the PSC for Block 7 contains over 120 pages, and the PSC for Block 21 over 80 pages. If authorizations and annexes are included, both contracts run into the several hundreds of pages – over 400 pages for the PSC for Block 7 and over 600 pages for the PSC for Block 21. In these circumstances, it is hard to conceive how the original parties to the contract would have left unstated such pivotal aspect of the PSCs, had they intended to include it.

281. Accordingly, the letter of the PSCs suggests that the economy of the PSCs was linked neither to a price assumption of USD 15 per barrel nor to an IRR of 15%. Instead, it tends to show that the contractor was entitled to the economic value of its oil participation share irrespective of the price of oil or of the contractor's internal rate of return – subject to the contract's tax provisions examined below.

b. Annex V of the PSC for Block 7

282. Ecuador argues that Annex V of the PSC for Block 7 contains the mathematical-economic equation upon which the original parties to the contract purportedly determined the contractor's oil production share, *i.e.* the so-called Vega model. In accordance with clause 24.2,[431] Annex V is an integral part of the PSC. Ecuador points in particular to Tables 15, 22 and 27 A of Annex V.[432] At the hearing, counsel for Ecuador stated as follows:

> "[T]he economy [of the PSCs] referred to the mathematical and economic equation agreed at the time of the Contract, and you will find such equation, for example, at Annex V of the Block 7 Participation Contract [...]. Well, I think the Contract [for Block 7] is both the text [...] but also its Annexes [...], so I would invite you to keep an eye on Annex V […]."[433]

283. The Tribunal will examine the purpose of Annex V, whether there is evidence of the Vega Model in Annex V, and whether the notion of the economy of the PSC

431 RPHB, ¶ 110 at n. 119.

432 Exh. C-1, Annex V (pp. 005212, 005218-005224 in the original pagination).

433 Tr. 265:12-21.

purportedly arising from Annex V is consistent with the other elements on record, particularly with Law 42.

284. First, Annex V is an internal memorandum from Ecuador's Negotiation Commission for the modification of the Block 7 PSC (the "Negotiation Commission") to the President and the Board of Directors of PetroEcuador, dated 3 November 1999. Block 7 was subject to a service contract and thus, unlike blocks such as Block 21, was not part of an international bidding process. At the hearing, counsel for Burlington offered the following explanation in this respect:

> "[T]here needs to be some kind of review by the State as best they can at that moment to work out whether or not it's in the interest of the State to make that migration [to the PSC]. So, Article 10 [of the Hydrocarbons Law] stated, if it's convenient to the interests of the State, the contracts for the exploration and exploitation of hydrocarbons may be modified by agreement of the Contracting Parties. […] Annex V is simply the memorandum to the PetroEcuador board [which] provides the basis for the approval of the new [PSC] Contract"[434] (emphasis added).

285. This explanation finds support in the letter of Annex V and in Article 10 of the Hydrocarbons Law.[435] Indeed, the Negotiation Commission concluded that, in accordance with Article 10 of the Hydrocarbons Law, modifying the Block 7 service contract into a PSC would "suit the interests of the State."[436] On this basis, the Commission recommended to the President and the Board of PetroEcuador, the addressees of the internal memorandum, to approve the modification of the Block 7 service contract into a PSC if they "deem[ed] it appropriate."[437] Hence, Annex V was not intended to set out the terms of the prospective PSC, but merely to establish whether it would be in Ecuador's interest to enter into a PSC in lieu of a service contract from an economic standpoint.

286. In order to determine whether a PSC was in Ecuador's interest, the Negotiation Commission sought to determine whether the value of a PSC, on a net present value basis, was greater than that of a service contract. To carry out this calculation, it had to assume the price of oil over the life of the contract, expected to run from 2000 to 2010. It used a price assumption of USD 15 per barrel, which explains the price of USD 15 per barrel in Tables 15, 22 and 27 A, upon which Ecuador has focused. Under this price assumption, it concluded that the net present value of a PSC would be greater

434 Tr. 168:15-22, 169:18-20, 172:6-7.

435 Exh. C-15, p. 4 in the original pagination, Art. 10.

436 Exh. C-1, Annex V, p. 005155 in the original pagination (Tribunal's translation).

437 *Id*.

than that of a service contract for Ecuador, whereas the net present value would be the same for the contractor.[438] The price of USD 15 per barrel was thus used to assess whether the modification of the Block 7 services contract was in Ecuador's interest – *not* to determine the Contractor's participation share or its IRR.

287. Second, there appears to be no evidence of the Vega Model in Annex V. While the Commission used a price assumption of USD 15 per barrel, there is no evidence that this assumption was applied in connection with the Vega Model. As seen above, under the Vega Model, the contractor's participation share is based on its percentage ("X") of total oil production ("Q") under a specific price assumption ("P"). However, Annex V contains no evidence linking "P" to "Q" or to the contractor's participation share. There is likewise no formula similar to that of clause 8.1 of the contract ($PC = X \times Q/100$) that would suggest a connection between the contractor's participation share and the Commission's price assumption of USD 15 per barrel.

288. On the contrary, Annex V contains indications that the contractor's participation share was *not* linked to the price of oil. As part of its description of the negotiation with the contractor, the Negotiation Commission states:

> "As an alternative, it was proposed that an average of USD 17 per barrel be set, with the parties equitably sharing the surplus at 50% each. This proposal was not accepted by the [contractor] either [...]"[439]

289. From the Negotiation Commission's memorandum, it appears that the original parties to the contract specifically discussed the possibility of sharing equally the oil revenues in case the price of oil were to exceed USD 17 per barrel. However, Annex V suggests that the contractor rejected this proposal. The fact that no agreement to this effect was reproduced in the PSC for Block 7 that was concluded about five months after the date of the Annex V suggests that parties did not reconsider this matter, or, if they did, reached no agreement on sharing excess profits.[440] In conclusion, Annex V contains no evidence of the Vega Model. On the contrary, it shows that the contractor's participation share was *not* linked to the price of oil.

290. Third, the economy of the PSC for Block 7 as it allegedly results from Annex V appears inconsistent with the remaining evidence on record as to how the economy of the PSCs is to be ascertained. Under Annex V, the economy of the PSC for Block 7 would be

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438 *Id*., at pp. 005176-005177 in the original pagination.

439 *Id*., at p. 005153 in the original pagination (Tribunal's translation); Mem., ¶ 102.

440 The Annex V memorandum is dated 3 November 1999. The PSC for Block 7 was concluded on 23 March 2000 – that is, nearly five months after the date of the Annex V memorandum.

tied to a price of USD 15 per barrel. At the same time, Ecuador has argued that the economy of the PSCs was determined on the date of execution. In the words of counsel for Ecuador:

> "Well, Ecuador's submission, Members of the Tribunal, is that the starting point [...] in this case is the economy of the participation contracts as defined on the date of their execution.[441]
>
> [....]
>
> [Ecuador's witnesses] all established very clearly that the economy of the Participation Contract – and it couldn't be otherwise – is to be established on the date of execution of the Participation Contract"[442] (emphasis added).

291. On the date when the PSC for Block 7 was executed *i.e.*, on 23 March 2000, the price of Block 7 oil was USD 25.11 per barrel. In keeping with Ecuador's submission, Law 42 also operates on the basis that the relevant price is the one on the date of execution. This is why Law 42 regards as "extraordinary" only those revenues resulting from oil prices in excess of the price of oil on the date the PSCs were executed. As counsel for Ecuador stated:

> "Law 42 takes the price of oil from the market at the time of execution of the Participation Contracts and the extraordinary revenues above that price as corrected by the inflation pursuant to American figures, is to be allocated between the State and the Contractor.
>
> [....]
>
> [T]he Law 42 [reference] price was always above the $15 a barrel price agreed to define the economy of the participation contracts. In fact [...] the [reference] price for Block 7 was $25.11 as of March 2000 – that is, the date of execution of the Block 7 Participation Contract [...]" (emphasis added).[443]

292. Therefore, there would be two different ways to ascertain the economy of the PSC for Block 7: one based on Annex V, with a price of USD 15, and the other one based on the date of execution of the PSC, with a price of about USD 25. In other words, the economy of the contract purportedly arising from Annex V is inconsistent with Ecuador's submission that the economy of the PSCs is determined on the date of execution, which is the basis upon which Law 42 operates. These inconsistencies reinforce the previous conclusions that Annex V contains no evidence of the Vega model.

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441 Tr. 262:22-263:4.

442 Tr. 1354:22-1355:3.

443 Tr. 237:5-10, 269:14-20.

293. In summary, Annex V does not show that the economy of the PSC for Block 7 was a function of either a price projection of USD 15/bbl or a 15% internal rate of return for the contractor. Thus, Annex V does not appear to set a limit on the revenues that the contractor could derive from its oil participation share.

c. The Tarapoa Contract

294. On 25 July 1995, Ecuador and City Investing Company concluded a PSC for the exploration and exploitation of the Tarapoa Block. Under clause 8.1 of the so-called Tarapoa Contract, the contractor's participation share is a function of its percentage ("X") over total oil production ("Q"). The Tarapoa Contract is thus premised on the participation formula "*PC = X.Q",* as were the PSCs for Blocks 7 and 21. Yet, at the end of clause 8.1, the Tarapoa Contract adds the following:

> "If the price of crude oil in the Block exceeds USD 17 per barrel, the surplus of the benefit brought about by the price increase in real terms (calculated at constant values of [1995]) will be distributed between the Parties in equal shares."[444]

295. This language creates a link between the economic benefits the contractor may draw from the contract and the price of oil. If the price of oil exceeds USD 17 per barrel, the additional revenues are apportioned between Ecuador and the contractor on a 50/50 basis. This apportionment does not affect the contractor's participation share in terms of oil volumes, but it does affect the economic benefits the contractor may draw from that share by conferring on the State half of the revenues stemming from oil prices in excess of USD 17 per barrel. No such Tarapoa-like clause was included in the PSCs for Blocks 7 and 21. This is particularly enlightening if one remembers that the PSC for Block 21 and the Tarapoa Contract were negotiated at the same time.[445]

296. Christian Dávalos represented Ecuador in the contemporaneous negotiations of hydrocarbons PSCs for the Tarapoa Block and Block 21. On cross-examination, Mr. Dávalos confirmed that the Tarapoa Contract contained a clause that adjusted the allocation of oil revenues when the price of oil exceeded the USD 17 per barrel threshold:

> "**[Mr Blackaby]:** And you […] said that a [price adjustment] clause had been included in the Tarapoa Contract; correct?
> **[Mr Dávalos]:** I mentioned that the Tarapoa contract was being negotiated at the same time [as Block 21], and that [in] the Tarapoa Contract, at the request of the Contractor, the possibility was included for the price to be over the price that was being negotiated [as] the

444 Exh. C-95, clause 8.1 *in fine* (Tribunal's translation).

445 Tr. 597:9-14 and 614:18-19.

> ["economy"] of the Contract. [...] They [the contractors] had agreed on $17 [per barrel as] the ["economy"] of the Contract [...]. So, over [USD] 17 [per barrel], they [the contractors] said okay, you can include whatever you want, and so it was decided that this be done on a 50/50 basis, this in the Tarapoa Contract"[446] (emphasis added).

297. At the same time, Mr. Dávalos acknowledged on cross-examination that, despite his own suggestion during the contract negotiations, no Tarapoa-like price adjustment clause was included in the PSC for Block 21:

> "**[Mr Blackaby]:** When you were involved in the negotiation of Block 21, you suggested the possibility of including in the Contract a clause to have a share for the State in the event that the price of crude oil rose to 17 or $18 a barrel; correct?
> **[Mr Dávalos]:** Yes, sir.
> [....]
> **[Mr Blackaby]:** So, in the Block 21 Contract, the negotiating group rejected your idea of including that clause in Block 21.
> **[Mr Dávalos]:** Yes [...] They [the contractors] said let's not talk about scenarios, scenarios that will only be scenarios"[447] (emphasis added).

298. By the same token, Mr. Vega, who negotiated the Block 7 PSC on behalf of Ecuador, conceded on cross-examination that, despite his suggestion in the course of the contract negotiations, no Tarapoa-like clause was included in the PSC for Block 7:

> "**[Mr Blackaby]:** You suggested, in the context of Block 7, that a correction clause be included based on the price.
> **[Mr Vega]:** Yes, that's right.
> **[Mr Blackaby]:** But at the end of the day, that wasn't done in Block 7. It was rejected by the Contractor.
> **[Mr Vega]:** Yes, that's right" (emphasis added).[448]

299. These exchanges lend support to the following two propositions. First, while the Tarapoa Contract parties accepted a clause linking the distribution of oil revenues to the price of oil, the Block 7 and 21 contract parties did *not* accept such a clause. Second, the possibility of linking the distribution of oil revenues to oil prices was specifically discussed during the negotiations for the Block 7 and 21 PSCs. On the basis of these premises, it is safe to conclude that the non-inclusion of a Tarapoa-like clause in the PSCs for Blocks 7 and 21 was not the product of inadvertence but a deliberate choice of the contracting parties.

300. As the product of a deliberate choice, the non-inclusion of an adjustment clause in the PSCs for Blocks 7 and 21 suggests that the economy of the contracts was not a function of either oil price projections or of a specific IRR. By contrast, this choice

446 Tr. 614:16-615:20.

447 Tr. 614:10-15 and 615:21-616:7.

448 Tr. 685:7-13.

suggests that the economy of the contract was one where the contractor was entitled to the economic value of its oil participation share without regard to either the price of oil or its IRR.

d. Ecuador's conduct

301. Ecuador's conduct may also help to elucidate the meaning of the economy of the PSCs. The Tribunal will focus its attention on Ecuador's initial requests to renegotiate the PSCs for Blocks 7 and 21; the deliberations relating to the passage of Law 42; and the reaction to Burlington's requests for adjustment of the "X" factors following the enactment of Law 42 and Decree 662.

302. First, Ecuador invited Burlington to renegotiate the PSCs for Blocks 7 and 21 in November 2005.[449] It alleges that, through these renegotiations, it intended to restore the economic equilibrium of the PSCs. However, there is no indication that Ecuador relied on the PSCs in these renegotiations or that it invoked clause 8.1 of the PSCs, which allegedly reflected the price projections upon which the parties allocated the petroleum rent.[450] This suggests that Ecuador did not believe at that time in the notion of economy of the PSCs it now propounds.

303. Second, following the failure of these renegotiations, the then President of Ecuador, Palacio González, submitted to the Ecuadorian Congress a bill that eventually became Law 42. In the course of the legislative deliberations relating to this bill, an Ecuadorian congressman expressed:

> "What does this clause [from the Tarapoa PSC] say? 'If the price of crude oil in the Block exceeds USD 17 per barrel, the surplus of the benefit brought about by the price increase in real terms, calculated at constant values of 1995, will be distributed between the parties in equal shares.' Look, it's as if it were copied, that is the proposal that the Government is making, what is already envisaged in one contract [the Tarapoa contract], and we want that this, which is already envisaged in one contract, be incorporated in the rest of the contracts"[451] (emphasis added).

304. At a later stage of the deliberations, another Ecuadorian congressman added:

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449 Exh. C-173.

450 Ecuador alleged that the oil price projections that the parties would have taken into account to allocate the petroleum rent are "reflected in the participation percentages in clauses 8 of the Participation Contracts" (RPHB, ¶ 43). Likewise, Ecuador maintained that the "economy of the Participation Contracts is reflected in the participation percentages in Clause 8" (internal quotations omitted) (*Id*., at ¶ 73). In the same vein, Ecuador stated that the economy of the PSCs "includes the internal rate of return for the contractor and translates into the participation percentages" of clause 8 (*Id*., at ¶ 105).

451 Exh. C-177, p. 73 (Tribunal's translation).

> "By virtue of this Law [42] various [oil] contracts were renegotiated. One of the contracts that was renegotiated in the first place was [that of] the Tarapoa block, and that renegotiation was so well done that it included [the clause] that the [first congressman] read out, by which, when the barrel of oil exceeds USD 17, [the revenues] are shared between the State and the contractor on a 50/50 basis. Then there were other renegotiations [...], and in those renegotiations, strangely, the clause that exists in the [Tarapoa] contract was not included. Now, faced with the bill sent by the President of the Republic, we have discussed whether or not we can by law unilaterally modify oil contracts with retroactive effect. That and no other is the legal issue" [452] (emphasis added).

305. By calling attention to this congressional debate, the Tribunal does not intend to attribute responsibility to Ecuador for the statements of individual congressmen. However, in the overall assessment of the facts and the evidence on record, these statements shed light on the manner in which at least some members of Congress understood the context leading to the enactment of Law 42. The understanding of these congressmen was not that Law 42 gave effect to the terms of the PSCs. On the contrary, these congressmen were aware that Law 42 would modify the PSCs which included no Tarapoa-like clause like those of Blocks 7 and 21.

306. Third, Burlington requested from Ecuador an upward readjustment of its participation share, or X factor, following the enactment of Law 42 and Decree 662.[453] Ecuador did not respond to these requests, allegedly because Burlington had failed to submit the economic studies required for such readjustment.[454] Yet, had Ecuador believed that Burlington had no right to a readjustment, it could simply have responded by stating as much. Ecuador's failure to give any answer to Burlington tends to demonstrate once again that Ecuador did not at the time embrace the notion of economy of the PSCs which it now advocates.

307. In sum, Ecuador's actions and omissions reveal that it did not believe in the notion of economy of the PSCs it has proffered in this arbitration. This intimates that the economy of the PSCs was not based either upon a price assumption of USD 15/bbl or upon an IRR of 15% for the contractor.

e. Ecuador's Hydrocarbons Law

308. As concluded in the discussion of the umbrella clause obligations, Ecuador's Hydrocarbons Law contains no surviving obligation upon which Burlington may directly rely. This does not mean, however, that it is wholly without relevance in order to

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452 *Id*., at p. 103 (Tribunal's translation).

453 Exhs. C-11, C-12 and C-43; CPHB, ¶¶ 130, 311, 315-320.

454 RPHB, ¶¶ 10, 174-179, 187-190 and 304

ascertain the scope of the contract obligations. Indeed, as Ecuador itself noted, the PSCs reproduced some of the provisions of the Hydrocarbons Law on which Burlington relies. Thus, these legal provisions may shed light on the meaning of the contract by the very reason that they were to be replicated in the PSCs. Specifically, the Hydrocarbons Law may serve to establish the meaning of the "economy" of the contracts in the tax modification clauses.

309. Article 4 of Law No. 1993-44, which according to Ecuador contains the "legal definition of participation contracts",[455] provides the following:

> "Once production is initiated, the contractor will have the right to a share of production in the contract area, which will be calculated in accordance with the production shares offered and agreed-upon therein, based upon the volume of hydrocarbons produced. This share, valued at the selling price of hydrocarbons in the contract area, which in no case will be lower than the reference price, will constitute the contractor's gross income, from which [the contractor] will make deductions and pay income tax in accordance with the rules envisaged in the Internal Tax System Law"[456] (emphasis added).

310. In accordance with this provision, the contractor's share of production constitutes its "gross income."[457] According to Ecuador, the contractor's share under the PSCs would be a function of oil price projections and a specific internal rate of return. The legal provision just quoted contains, however, no indication that the gross income – the equivalent of the oil participation shares – would be calculated on the basis of oil price projections or a specific internal rate of return. These indications would have been expected if they were to be replicated in the PSCs. Therefore, this provision of the Hydrocarbons Law tends to confirm that the economy of the PSCs was not a function of oil prices or an internal rate of return.

f. The purpose of the shift to production sharing contracts

311. In 1982, Ecuador introduced the so-called service contract model. Under this model, Ecuador reimbursed oil companies for their costs and expenses and paid a service fee. By 1993, however, the then President Durán Ballén submitted a bill to Congress where he noted that "the current [service contract model] ... has exhausted its possibilities of

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455 RCM, ¶ 111.

456 Exh. C-15, p. 3 in the original pagination (Tribunal's translation).

457 *Id*. Ecuador has also argued that the PSCs did not "limit the deductions, contributions, or taxes that could be levied or applied such as Law 42" (Tr. 254:1-3). It is common ground that Law 42 is part of Ecuador's "tax system" within the meaning of the tax modification clauses. Accordingly, the Tribunal will address this argument in the context of its analysis of the tax modification clauses (*infra* section 2.4).

attracting foreign capital."[458] In support of this conclusion, the bill stated that, "[i]n the last five years, no contract for the exploration and exploitation of hydrocarbons has been executed under the service contract model introduced by the reforms of 1982."[459] The bill explained that the service contract model was on the decline for the following three main reasons:

> "[1] The evolution of the international conditions of the oil industry has created more competitive models for attracting the ever scarcer available capitals, such as for instance those that are being implemented in the countries of Eastern Europe and the former Soviet Union. [...]
>
> [2] The Service Contract model [...] has become an extremely complicated contract in terms of management and control. On the other hand, the mandatory reimbursement provisions of the contractor's investments, costs and expenses, has significantly reduced the State's participation in the economic benefits of oil exploration and exploitation in medium-sized and small blocks.
>
> [3] Finally, the Service Contract model does not allow the contracting company to have a production flow of its own. This feature militates against the interest and *raison d'être* of international oil companies, for most of which it is essential to be able to market [oil] production in international markets"[460] (emphasis added).

312. With respect to the contractor's participation share, the bill, which would be passed into law and amend the Hydrocarbons Law,[461] further noted that:

> "With regard to the availability of production, the contractor will freely dispose of the production percentage submitted in the bidding, so that it may be traded in the domestic or external market; but in no case may the selling price be lower than the price PetroEcuador receives for its external sales"[462] (emphasis added).

313. While it is not for this Tribunal to judge what type of contract was preferable from a policy standpoint or would have brought about a fairer allocation of the oil rent, it is its role to determine the intent of the parties to the PSCs to the extent that such intent plays a role for the resolution of this Treaty claim. One of the elements that may assist in this determination concerns the reason why Ecuador abandoned the service contract in favour of the PSC.

314. The purpose of the shift from the service contract model to the production sharing model was, according to the text of the bill, to "allow Ecuador to position itself at an

458 Exh. C-78, p. 3 (Claimant's translation).

459 *Id*., at 2 (Tribunal's translation).

460 *Id*., at 3-4 (Tribunal's translation).

461 Exh. C-15.

462 Exh. C-78, at 4 (Tribunal's translation).

internationally competitive level for attracting venture capital."[463] It is difficult to see how a PSC could be more attractive than a service contract, knowing that the former imposes all costs, exploration and exploitation risks on the investor and the latter does not, if both models set an apparently similar maximum limit on revenues – revenues which are guaranteed under a service contract but not under a PSC.

315. For all the foregoing reasons, the Tribunal finds that the economy of the PSCs was not a function of either a projected oil price of USD 15/bbl or of a contractor's IRR of 15%. Rather, the economy of the PSCs entitled the contractor to receive its oil participation share, dispose of it on the market irrespective of price, and thus to obtain its oil share's market value – subject to the applicable taxes and to the contract provisions on new taxes examined below.

2.3.2. The tax modification clauses

316. The Parties disagree on whether the tax modification clauses, which call for the application of a correction factor when the economy of the contracts is affected, are mandatory or not. Burlington claims that the tax modification clauses were mandatory and, therefore, that they amounted to tax stabilization clauses. Ecuador contends that the tax modification clauses were not mandatory and constituted mere renegotiation clauses. The Tribunal will examine each PSC separately in order to determine whether or not the application of a correction factor was mandatory.

a. The tax modification clause of the PSC for Block 7

317. The tax modification clause included in clause 11.12 of the PSC for Block 7 provides as follows:

> "Modification to the tax system: In the event of a modification to the tax system or the creation or elimination of new taxes not foreseen in this Contract or of the employment contribution, in force at the time of the execution of this Contract and as set out in this Clause, which have an impact on the economics of this Contract, a correction factor will be included in the production sharing percentages to absorb the impact of the increase or decrease in the tax or in the employment contribution burden. This correction factor will be calculated between the Parties and will be subject to the procedure set forth in Article thirty-one (31) of the Regulations for Application of the Law Reforming the Hydrocarbons Law"[464] (emphasis added).

318. This clause must be interpreted in conjunction with clauses 8.6 and 15.2 of the Contract. Clause 8.6 states:

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463 *Supra* ¶11.

464 Exh. C-1, clause 11.12 (Tribunal's translation).

> "Economic stability: In the event that, by the action of the Ecuadorian State or PetroEcuador, any of the events described below were to occur and have an impact on the economy of this Contract, a correction factor will be applied to the production sharing percentages in order to absorb the increase or decrease in the economic burden: a) Modification of the tax system as described in clause [11.12] […]"[465] (emphasis added).

319. Clause 15.2 in turn provides that:

> "Contract amendments: There shall be negotiation and execution of contract amendments, with prior agreement of the Parties, particularly in the following cases:[…] c) When the tax system [...] applicable to this type of Contract in the country is modified, in order to restore the economy of the Contract in accordance with clause [11.12[466]]"[467] (emphasis added).

320. In order to determine whether the application of a correction factor is mandatory or not, the Tribunal will examine the language of these clauses, their purpose, and the relevant provision of the Hydrocarbons Legal Framework which these clauses are meant to replicate, that is, Article 16 of Decree No. 1417.

321. First, all the three provisions transcribed above contain mandatory language calling for the parties to apply a correction factor in order to absorb the impact of a tax increase or decrease on the economy of the Contract. Under clause 11.12, a correction factor will be included if there is a modification to the tax system which has an impact on the economy of the Contract; under clause 8.6, a correction factor will apply if there is a modification to the tax system which has an impact on the economy of the Contract; under clause 15.2, if there is a modification to the tax system, the parties shall negotiate and execute a contract amendment with a view to re-establishing the economy of the Contract. Those formulations show that the application of a correction factor is not optional. In the event of a modification to the tax system impacting the economy of the Contract, there must be a correction.

322. At the same time, both parties to the PSC are to agree on the implementation of this correction factor. According to clause 11.12, the correction factor "will be calculated between the Parties." According to clause 15.2(c), a contract amendment for the application of such correction factor shall be negotiated and executed "with prior

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465 *Id*., at clause 8.6 (Tribunal's translation).

466 Clause 15.2(c) in fact refers to clause 11.11 – not to clause 11.12. As Ecuador's reliance on this clause indicates, this is a mistake. Clause 11.11 refers to the "amortization of investments" and not to modifications to the tax system, which is what clause 15.2(c) addresses. Thus, it is to be understood that the reference in clause 15.2(c) to clause 11.11 was intended to be a reference to clause 11.12.

467 Exh. C-1, at clause 15.2 (Tribunal's translation).

agreement of the Parties." In the Tribunal's reading, this requirement does not make the application of a correction factor optional. Otherwise, the content of the clause would be inherently contradictory, with mandatory language being followed in short order by contrary optional language.

323. The provision that the parties must jointly calculate the readjustment does not address *whether* a correction factor will be applied. The contract already provides that such a factor "will be included" for the purpose of absorbing the impact of the tax. Rather, this provision assists in determining *how* the correction factor will be calculated. The apparent purpose of this provision is to prevent a situation where a party unilaterally imposes its computation of the share of oil production needed to offset the effect of a tax increase or decrease, an admittedly complex calculation.[468] This joint calculation notwithstanding, the parties remain under an obligation to apply a correction factor that will counterbalance the effects of a tax change on the economy of the contract.

324. Second, pursuant to the relevant clauses, the purpose of the correction factor is "to absorb the impact of the increase or decrease in the tax"[469] and "to restore the economy of the Contract."[470] The purpose is to avoid that tax increases or decreases alter the economic foundation upon which the parties entered into the contract.[471] This purpose would be defeated if a party could simply refuse to apply a correction factor in the event of a tax increase or decrease. Hence, the purpose of the tax modification clause suggests that the parties intended the application of a correction factor to be mandatory.

325. Finally, this interpretation finds confirmation in the Hydrocarbons Legal Framework. As Ecuador itself recognizes,[472] the tax modification clause of the PSCs reflects the content of Article 16 of Decree No. 1417, which states:

> "Economic stability: The parties' production shares in the contract area will be adjusted when the tax system applicable to the contract has

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468 At the hearing, counsel for Ecuador stated that "if the economy of the Participation Contract was affected, the Parties need to negotiate, among others, how the different factors, X-factors in this clause [8.1] should be adjusted. And as I said to you, these negotiations are very complex" (emphasis added) (Tr. 261:13-17).

469 Exh. C-1, at clauses 11.2 and 8.6.

470 *Id*., at clause 15.2 (Tribunal's translation).

471 At the hearing, counsel for Burlington indicated that the right to a share of oil production "in itself [] could be meaningless because if the State did not provide protection against changes in a tax and royalty regime, the State could simply neutralize the income realizable from a share in production at will" (Tr. 29:2-8).

472 Tr. 208:12-22.

> been modified, in order to restore the economics of the contract in place before the tax modification"[473] (emphasis added).

326. The language of this provision is also mandatory: the parties' oil production shares "will be adjusted" in the event of a change in the tax system. And the purpose of the adjustment is to "restore the economics of the contract in place before the tax modification." Thus, Article 16 provides for a mandatory adjustment clause to be inserted into production sharing contracts.

327. In sum, the Tribunal is of the view that the tax modification provision contained in clause 11.12 of the PSC for Block 7 calls for the application of a mandatory correction factor that absorbs any impact of a tax increase or decrease on the economy of the Contract.

b. The tax modification clause of the PSC for Block 21

The tax modification clause of the PSC for Block 21

328. The tax modification clause of the PSC for Block 21 is set forth in clause 11.7:

> "Modification to the tax system and to the employment contribution: In the event of a modification to the tax system, the employment contribution or its interpretation, which have an impact on the economics of this Contract, a correction factor will be included in the production sharing percentages to absorb the increase or decrease in the tax. This adjustment will be approved by the Administrative Board on the basis of a study that the Contractor will present to that effect"[474] (emphasis added).

329. In addition, clause 15.2 of the PSC for Block 21 provides as follows:

> "Contract amendments: There shall be negotiation and execution of contract amendments, with prior agreement of the Parties, particularly in the following cases:[…] c) When the tax system [...] applicable to this type of Contract in the country is modified, in order to restore the economy of the Contract [...]"[475] (emphasis added).

330. As with the analysis of the tax modification clause in the PSC for Block 7, the Tribunal will focus on the language, the purpose and the relevant part of the Hydrocarbons Legal Framework.

331. First, clause 11.7, first sentence, provides that a correction factor "will be included" in the event of a modification to the tax system. In addition, the second sentence of this clause states that this adjustment "will be approved" by the Administrative Board ("the

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473 Exh. C-89, p. 23 in the original pagination (Tribunal's translation).

474 Exh. C-2, at clause 11.7 (Tribunal's translation).

475 *Id.,* at clause 15.2 (Tribunal's translation).

Board"). This approval requirement means that the Board may verify and eventually suggest modifications to the correction factor proposed by the contractor. However, the Board has no discretion to refuse the application of a correction factor, which "will be included." Clause 15.2, in turn, stipulates that a contract amendment "shall" be negotiated and executed in order to restore the economy of the contract in the event of a tax change. Like for the PSC for Block 7, this language suggests that the application of a correction factor is mandatory.

332. Second, the purpose of the application of this correction factor is "to absorb the increase or decrease in the tax"[476] in order "to restore the economy of the Contract."[477] This purpose would be defeated if a party could simply refuse to apply a correction factor. While the computations required for the application of the correction factor are subject to the "prior agreement of the Parties",[478] this does not mean that the application of a correction factor is optional. As Mr. Dávalos, Ecuador's head negotiator for the Block 21 PSC, acknowledged on examination by the Tribunal, "if the [p]arties do not agree on a correction factor", this disagreement "could be subject to international arbitration", *i.e.* resolved by a third-party adjudicator.[479]

333. All in all, both the language and the purpose of these contractual provisions show that the tax modification clause of the PSC for Block 21 is mandatory. This conclusion is confirmed by Article 16 of Decree No. 1417, reproduced in the tax modification of the PSC for Block 21, the language of which calls for the mandatory adjustment of the parties' oil production shares "in order to restore the economics of the contract in place before the tax modification."[480]

334. For the foregoing reasons, the Tribunal deems that the application of a correction factor is mandatory when a tax affects the economy of the PSCs for Blocks 7 or 21. This correction factor must be of such extent as to wipe out the effects of the tax on the economy of the PSC. Otherwise stated, the correction factor must restore the economy of the PSC to its pre-tax modification level.

335. In conclusion, and for the sole purpose of the resolution of the Treaty claim before it, the Tribunal considers that the PSCs provided for the following rights: (i) the right to receive and sell the contractor's share of oil production irrespective of the price of oil

476 *Id.*, at clause 11.7 (Tribunal's translation).

477 *Id.*, at clause 15.2 (Tribunal's translation).

478 *Id*.

479 Tr. 640:12-15.

480 Exh. C-89, p. 23 in the original pagination (Tribunal's translation).

and its internal rate of return, subject to the payment of the taxes and employment contributions specified in the PSCs; and (ii) the right to the application of a mechanism that would absorb the effects of any tax increase affecting the economy of the PSCs, *i.e.* a right to tax absorption under certain conditions.[481]

3. Did Ecuador Expropriate Burlington's Investment?

3.1. What is the proper approach to examine Burlington's expropriation claim?

336. The Parties disagree on the approach which the Tribunal should adopt to analyze Burlington's expropriation claim. While it argues that the measures are expropriatory whether taken separately or together, Burlington favors a creeping expropriation approach. By contrast, Ecuador alleges that the Tribunal must first determine whether Law 42 is expropriatory or not. The Tribunal must therefore determine under which approach it must review Burlington's expropriation claim.

3.1.1. Positions of the Parties

337. Burlington alleges that Ecuador expropriated its investment through the following series of measures: (i) the enactment of Law 42 (initially at the 50% rate and subsequently at the 99% rate); (ii) the initiation of *coactiva* proceedings, which lead to the seizure and auction of Burlington's share of oil production; (iii) the physical takeover of Blocks 7 and 21; and (iv) the termination of the PSCs for Blocks 7 and 21 through the *caducidad* process.[482] Burlington maintains that these measures constituted an unlawful expropriation of its investment "both individually and in the aggregate."[483]

338. At the hearing and in its post-hearing brief, Burlington stressed that Ecuador's measures, taken collectively, constituted a creeping expropriation of its investment.[484] Burlington relied on the definition of creeping expropriation adopted in *Generation Ukraine Inc. v. Ukraine*:

> "Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a

481 The term tax absorption clause hereinafter supersedes the locutions "tax indemnification clause" (DJ, ¶ 18 n. 1) and "tax modification clause" (*supra* ¶¶ 21-22) previously employed to refer to these clauses.

482 CSM, ¶ 80.

483 CSM, ¶¶ 80, 86, 98.

484 Tr. 70:7-12, 73:16-22, 81:9-14, 110:10-15,

> period of time culminate in the expropriatory taking of such property"[485] (emphasis in original).

339. Without a creeping expropriation approach, "Ecuador will receive a discount for having destroyed much of the value of [Burlington's] investment prior to the physical takeover [of the Blocks]."[486] This would create "perverse incentives" that would reward a State "for measures that it takes to progressively diminish the value and rights underlying an asset prior to the final step in the expropriation."[487] As a result, "[u]nder international law, the Tribunal should consider the acts of Ecuador in the aggregate and judge the final toll on the Claimants' investments based on all the measures."[488] In brief, Burlington favors a creeping expropriation approach over a step-by-step approach.[489]

340. Ecuador argues that Burlington's case "has evolved at [the] hearing."[490] Prior to the hearing, Burlington's case was that Law 42 was a measure tantamount to expropriation – an indirect expropriation – and that the *coactiva* seizures and the takeover of the Blocks constituted a direct expropriation. In a nutshell, Burlington's case was one of indirect and direct expropriation. Yet, for Ecuador, Burlington "radically changed its case" at the hearing and adopted a new creeping expropriation theory in lieu of the expropriation theories it previously advocated.[491] For this reason, Ecuador has "reserve[d] all its rights in this regard."[492] In any event, Ecuador contends that Burlington's creeping expropriation theory is wrong because Law 42 was the initial cause of the subsequent chain of events:

> "We cannot analyze this very case as a creeping expropriation case. This is intellectually incorrect. And it's intellectually incorrect because here what we have is different events that are related in a cause-effect relationship.[493] [...] The facts of this case happened in a way that Law 42 should be the cause of the rest of the events, so any theory on cumulative events going towards something is simply against simple logic.[494]
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> [...]

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485 *Generation Ukraine Inc. v. Ukraine*, Award of 15 September 2003, at ¶ 20-22 (Exh. CL-145); Tr. 74:7-14.

486 Tr. 75:14-18.

487 Tr. 74:15-19,

488 Tr. 1264:21-1265:2.

489 CPHB, ¶¶ 55-59.

490 Tr. 217:3-4.

491 RPHB, ¶ 5.

492 *Id*.

493 Tr. 1343:1-6.

494 Tr. 217:9-13.

> Burlington's cumulative indirect [creeping] expropriation case is nonsense, in our opinion. It is a question of logic. The Tribunal cannot overlook the cause-effect relationship between Law 42, the *coactiva*, the abandonment of the fields, and the declaration of *caducidad*. You need to deal with the first event, which is Law 42, and the effects of Law 42 on the economics of the deal between the Contractor and Ecuador."[495]

341. Ecuador further asserts that "Law 42 [was] not an internationally wrongful act."[496] Law 42 did not modify or breach the PSCs. Thus, "Burlington had to comply with [Law 42]."[497] It was Burlington's failure to comply with Law 42 that set in motion the remaining events of the case: "[T]he subsequent events of this case, the *coactiva*, the abandonment of the fields by the Consortium, and the declaration of *caducidad*, are consequences of [...] [Burlington's] breach of both Ecuadorian law and the [PSCs] for Blocks 7 and 21."[498] In short, a proper analysis of Burlington's expropriation claim must begin with Law 42 and a cumulative approach is inapposite under the facts of this case.

3.1.2. Analysis

342. As a preliminary matter, the Tribunal wishes to address Ecuador's allegation that Burlington "radically changed"[499] its case at the hearing by endorsing a creeping expropriation theory. According to Ecuador, Burlington "brought up an entirely new case premised on a 'creeping expropriation' theory."[500] While Burlington did place greater emphasis on a creeping expropriation theory from the hearing onwards, the record does not support Ecuador's allegation that this was a "new" theory. Already in the Supplemental Memorial on Liability, Burlington alleged that Ecuador's measures "both individually *and in the aggregate*"[501] (emphasis added) constituted an expropriation of its investment. Burlington's reference to measures "in the aggregate" encompasses, albeit with a different label, the creeping expropriation theory favored from the hearing on.

343. In its post-hearing brief, Burlington continued to allege that Ecuador's measures individually, and all of them collectively, were expropriatory – again, as at the hearing, with an emphasis on a collective approach. Hence, while Burlington shifted the

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495 Tr. 246:5-13.

496 Tr. 217:16-18.

497 Tr. 217:18.

498 Tr. 217:18-218:2.

499 RPHB, ¶ 5.

500 *Id*.

501 CSM, ¶ 80 (with similar allegations at ¶¶ 86, 98).

emphasis of its case, it does not appear that it has changed its case at the hearing.[502] Furthermore, Ecuador has had the opportunity to refute Burlington's creeping expropriation theory and has in fact availed itself of such opportunity.[503]

344. The Tribunal will now turn its attention to the two competing analytic approaches according to which it is possible to examine Burlington's expropriation claims. Under the individualized approach, the evidence of an expropriation is examined measure-by-measure while under a collective approach all measures are considered together.

345. In the view of the Tribunal, when the investor puts forward both an individualized and a collective case of expropriation, one should begin the analysis with the measure-by-measure approach; the reason being that a collective or creeping approach is typically employed only when no single measure is in itself expropriatory. This proposition finds supports both in literature and in previous cases. Michael Reisman and Robert Sloane, for instance, approvingly refer to an arbitrator's view to the effect that "a creeping expropriation is comprised of a number of elements, *none of which can – separately – constitute the international wrong*"[504] (emphasis added). By contrast, these authors note that "if one or two events in [a] series [of measures] can readily be identified as those that destroyed the investment's value, then to speak of a creeping expropriation may be misleading."[505]

346. Arbitral awards confirm this view. In *Vivendi II*, upon which Burlington has heavily relied, the tribunal stated that "[i]t is well-established under international law that *even if* a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can"[506] (emphasis added). The term "even if" implies that the collective approach is to be applied only after an individualized analysis has resulted in a finding of no expropriation. The tribunal in *Santa Elena* made the point even more explicitly when it held, in a passage quoted in

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502 *E.g.* COSS, Expropriation Part, ## 45 ff.; Tr. 73:6-110:6.

503 RPHB, ¶¶ 481-493.

504 W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 THE BRITISH YEARBOOK OF INTERNATIONAL LAW 115, (2004), at 123 in the original pagination, quoting the dissenting opinion of Keith Highet in *Waste Management v. Mexico*, Award of 2 June 2000 (Exh. CL-177).

505 *Id*..

506 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, (hereinafter "*Vivendi II*"), Award of 20 August 2007, ¶ 7.5.31 (Exh. CL-123).

Vivendi II, that "a measure or series of measures *can still eventually amount to a taking*, though the individual steps in the process do not [...]"[507] (emphasis added).

347. Finally, Burlington has submitted that "[i]t is well established under international law that tribunals must assess whether the cumulative effect of measures constitute an expropriation."[508] At the same time, Burlington has admitted that, when it is simultaneously argued that "each and every measure analyzed individually constitute[s] an expropriation",[509] a focus on the cumulative effect of measures is but a "possibility."[510] In other words, Burlington has *not* submitted that, when both an individualized and a collective approach to expropriation are advanced, the collective approach *must* be adopted first.[511]

348. Accordingly, the Tribunal will first analyze each of the challenged measures individually. In particular, the Tribunal will successively examine (i) Law 42 (both at 50% and 99%), (ii) the *coactiva* proceedings, (iii) the physical occupation of the Blocks, and (iv) the *caducidad* decrees. In the event that none of these measures individually were found to be expropriatory, it would then consider their cumulative effect.

3.2. Were the application of Law 42 and the failure to absorb its effects measures tantamount to expropriation?

349. The Tribunal must determine whether Law 42 and Ecuador's subsequent failure to absorb its effects was a measure tantamount to expropriation at the rate of 50% and 99%.

3.2.1. Burlington's position

350. Burlington argues that Law 42, together with Ecuador's failure to absorb its effects, was "a measure tantamount to expropriation."[512] In other words, Law 42 had the effects of an expropriation. Law 42 transferred virtually all of Burlington's revenues to Ecuador.[513] Thus, Law 42 permanently deprived Burlington of practically all of the

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507 *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, Award of 17 February 2000, ¶ 76 (Exh. CL-175).

508 CPHB, ¶ 57.

509 *Id*., at ¶ 121.

510 *Id*.

511 Burlington has made the argument that "a State should not be rewarded for measures that it takes to progressively diminish the value and rights underlying an asset prior to the final step in the expropriation." (Tr. 74:15-19). However, this argument does not assist in the determination of whether an individualized or a creeping approach should initially be adopted; rather, it may help for *quantum* purposes in case a creeping approach were finally adopted.

512 CSM, ¶ 82.

513 Mem., ¶ 432.

profit to which it was entitled under the PSCs.[514] By way of example, in July 2008, the price of Napo crude oil was over USD 122 per barrel. Under Law 42 at 99%, Burlington had to pay to Ecuador over USD 107 per barrel. By 2008 Burlington was operating at a loss. Hence, Law 42 has substantially deprived Burlington of its revenue and expropriated its investment.[515]

351. More specifically, a State's power to tax may devolve into the power to destroy. As Ian Brownlie wrote, "[t]axation which has the precise object and effect of confiscation is unlawful."[516] Although the Treaty does not define the term expropriation, it recognizes the possibility that a tax may be expropriatory. Any government measure which results in a substantial deprivation of an investor's property is a taking.[517] Whether a tax causes a substantial deprivation and is thus expropriatory is ultimately a fact-specific question.[518]

352. There is no basis for arguing, as Ecuador does, that under the Treaty a tax is expropriatory only if (i) it is discriminatory, and (ii) intended to confiscate property rights – a test based on the Restatement of the Law (Third) of Foreign Relations of the United States.[519] At the same time, Burlington conceded at the hearing that it did "not object to that [Restatement] standard."[520] It added that if this standard were applied, it would be met in this case.[521]

353. Furthermore, a tax that is contrary to a tax stabilization provision is expropriatory: "[i]t is clear that a tax measure will make the leap from a *bona fide* [g]overnment regulation to an expropriatory measure when the tax measure violates specific commitments [made to] a foreign investor."[522] In support of this proposition, Burlington relies on the decisions in *Revere Copper*, *Benvenuti*, and *Methanex*, which held that tax measures can effect a taking if they impair contract rights.

354. In this case, the purpose of Law 42 was to force Burlington to abdicate its rights under the PSCs. There is ample evidence to this effect. President Correa characterized Law

514 CSM, ¶ 82.
515 Mem., ¶ 432.
516 CPHB, ¶ 187; Exh. CL-105.
517 CSM, ¶ 82; Mem., ¶ 441.
518 CPHB, ¶ 189.
519 Tr. 1269:19-1270:6
520 *Id.*
521 CPHB, ¶¶ 190-195.
522 Tr. 1266:10-13.

42 as a "pressuring measure"[523] that would prompt oil companies to "sit down to negotiate."[524] Furthermore, in a public radio address, President Correa stated that oil companies had the following "three options"[525]: (i) continue paying the 99% tax, (ii) renegotiate the contract into a service contract, or (iii) receive the sunk costs of the investments and leave the country.[526] That this was the purpose of Law 42 was also confirmed by Celio Vega at the hearing:

> "But when the State calls on companies to renegotiate [the PSCs], the companies don't heed the call. They don't sit down to negotiate because they obviously wanted to continue taking in those high profits. And so the State basically felt obligated to issue Law 42, and the contractors at that moment just at that point realized they needed to negotiate with the State [...]. Some did not sit down to negotiate, and well, you know better than me what happened there."[527] (Burlington's emphasis).

355. In carrying out this purpose, Ecuador stepped out of its role as an ordinary commercial partner, using its sovereign power to contravene the specific commitments it had made to Burlington and, in particular, the tax stabilization clauses contained in the PSCs. These clauses were "crucial [...] as an inducement to long-term investment"[528] because they ensured that the value of the contractor's share of oil would not be "eroded by future Government action […]."[529] They required Ecuador to adjust the contractor's share of oil production in order to absorb the effects of tax increases having an impact on the economy of the PSCs.

356. However, when Law 42 was passed and Burlington requested a readjustment of its share of oil pursuant to the PSCs, Ecuador ignored these requests. This was no accident but the fruition of the purpose of Law 42. Compliance with the tax stabilization clauses would have been incompatible with Ecuador's goal of unilaterally changing the economic terms of the PSCs.[530] Thus, in passing Law 42 and then ignoring the requests for readjustment, Ecuador extinguished Burlington's right to the participation share to which it was entitled under the PSCs.[531] In this way, Ecuador effected a taking of Burlington's contract rights, a conclusion that finds support in the *Revere*

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523 Exh. C-182; CSM, ¶ 28.

524 *Id*.

525 Mem. ¶¶ 231, 416.

526 *Id*.

527 CPHB, ¶¶ 77 Tr. 695:18-696:7.

528 Mem., ¶ 69.

529 CPHB, ¶ 309.

530 *Id.*, ¶ 82.

531 *Id.*, ¶¶ 128-130.

Copper and *Benvenuti* decisions, where the tribunals held that tax measures that impair contract rights can effect a taking.[532]

357. Contrary to what Ecuador claims, the goal of Law 42 was *not* to restore the economic equilibrium of the PSCs.[533] First, Ecuador conducted no analysis of each individual PSC in order to determine what its equilibrium point was, an exercise that would have been required taking into account that the different PSCs were "all signed at different moments in time and had different production levels and different reference prices […]."[534] In these circumstances, a general across the board measure could not have served to re-establish an equilibrium point that had not been established in the first place. Second, Ecuador imposed three different tax rates: 50, 99 and 70. This is strong evidence that the goal of this tax was not to re-establish the economic equilibrium of the PSCs. Upon examination by the Tribunal, Mr. Vega conceded that "a fixed percentage may be able to re-establish [the] equilibrium [point] for some contracts and not for others."[535]

358. Although Ecuador denies relying on the *rebus sic stantibus* principle (or *théorie de l'imprévision*), its own submissions and the expert evidence refer to the requirements underlying this principle.[536] The party invoking the *clausula rebus sic stantibus* must show that (i) an extraordinary and unforeseeable or unforeseen event caused an imbalance in the obligations of the parties; (ii) this imbalance must be such that performance of the contract would be too burdensome for one of the parties; and (iii) the event causing the imbalance should not be a consequence of actions or omissions of the party invoking the principle. Ecuador, however, cannot meet the first two requirements of the *rebus sic stantibus* principle.[537]

359. Even before the enactment of Law 42, Ecuador was receiving the majority of the benefits of the oil production. Ecuador claims that it enacted Law 42 because the oil companies "were even benefitting *more* than Ecuador from the surge of oil prices"[538] (emphasis in original). This is incorrect as a matter of fact. With respect to Block 7, Ecuador received a total take on oil revenues of 51.1 percent, whereas the Consortium's share of oil production was 38.3 percent and its operating costs 10.6

532 *Id.*, ¶ 127.
533 *Id.*, ¶¶ 201, 220-223.
534 *Id.,* ¶ 221.
535 *Id.*, ¶ 223 (quoting from Tr. 700:12-19).
536 *Id.*, ¶ 201.
537 *Id.*, ¶ 204.
538 *Id.*, ¶ 205 (quoting from RCM, ¶ 440).

percent.[539] With respect to Block 21, Ecuador's total take on oil revenues was 42.6 percent; whereas the Consortium's share was 48.6 percent and its operating costs 8.8 percent.[540]

360. Furthermore, the increase in oil prices was foreseeable.[541] The parties foresaw the possibility that oil prices could increase and discussed the possibility of including a price adjustment clause. Such a clause was included in the Tarapoa Contract, where the parties agreed that oil revenues resulting from oil prices in excess of USD 17 per barrel would be shared on a 50/50 basis.[542] Ecuador secured this clause in the Tarapoa negotiations because it offered in return "an extension of the term of the contract in relation to a highly profitable and productive Block."[543] In this case, however, a Tarapoa-like clause was discussed and rejected, as documented in Annex V of the PSC for Block 7:

> "As an alternative, it was proposed that an average of USD 17 per barrel be set, with the parties equitably sharing the surplus at 50% each. This proposal was not accepted by the [contractor] either [...]."[544]

361. Contrary to Ecuador's allegation, the magnitude of the price increase was also foreseeable. Ecuador's view is belied by the evolution of oil prices in the twenty-year period preceding the conclusion of the PSCs. Since the term of the PSCs was twenty years, it was logical to look at the evolution of oil prices over the twenty-year period *prior* to the conclusion of the PSCs. This evolution shows that crude oil prices experienced the same type of increase in the 70s as they did in the years 2000, *i.e.* over USD 100 per barrel in real terms.[545]

362. Finally, the oil price increase did not render the performance of the PSCs more burdensome for Ecuador. On the contrary, Ecuador was receiving more benefits from the PSCs than expected at the time when the contracts were executed. Ecuador's participation share was more valuable than expected and it was receiving higher income taxes than anticipated. As a result, Ecuador has not met the requirements to invoke the doctrine of *rebus sic stantibus*. Furthermore, it is doubtful that the PSCs are

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539 *Id.*, ¶¶ 206-207.

540 *Id.*, ¶ 208.

541 *Id.*, ¶¶ 209-210.

542 *Id*., at ¶ 210.

543 *Id*., at ¶ 211.

544 Exh. C-1, Annex V, at p. 005153 in the original pagination (Tribunal's translation); Mem., ¶ 102.

545 CPHB, ¶ 213.

public service contracts entitled to the protection of this doctrine in the first place. But even if they were, Ecuador has failed to meet the relevant requirements.

363. Moreover, Ecuador's allegation that Burlington refused to renegotiate in good faith is untrue.[546] The reason why Burlington was ultimately unable to accept Ecuador's renegotiation proposals is that they were unreasonable, as they required Burlington to abandon its rights under the PSCs without even knowing what it would receive in return.[547] In March 2008, after the opening of renegotiations two months earlier, Burlington was evaluating a Draft Partial Agreement that contemplated continuing operations under the PSCs for up to five years, a proposal that was "particularly interesting"[548] for Block 7. However, President Correa suddenly announced that Ecuador "could do better"[549], and Ecuador submitted a new draft agreement which called for a migration to an undetermined service contract within 120 days. Burlington could not agree to this proposal or to the similar proposal that ensued, and legitimately stood on its rights.[550]

364. Ecuador portrays Burlington as an unreasonable partner because almost all other companies renegotiated their PSCs. This allegation is disingenuous.[551] Most investors commenced arbitration proceedings against Ecuador following the enactment of Law 42, including Petrobras, Repsol, City Oriente, Murphy, and Perenco.[552] Of the fourteen PSCs in effect when Law 42 was enacted, only four were successfully converted into service contracts. Most companies either settled their claims or signed transitory agreements but no service contracts.[553] At the end of the day, Ecuador successfully renegotiated PSCs into service contracts with only two consortia out of ten.[554]

365. With respect to the standard for expropriation, Ecuador wrongly argues that Law 42 is entitled to a presumption that it is a *bona fide* taxation measure under international law.[555] If a tax measure were entitled to a presumption of validity, Article X would have stated so.[556] By contrast, Article X makes clear that a tax may be expropriatory. Thus,

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546 *Id.*, ¶ 227.
547 *Id*.
548 *Id.*, ¶ 228 n. 300.
549 Exh. C-184; CPHB, ¶ 229.
550 CPHB, ¶¶ 87, 93.
551 *Id*., at ¶ 237.
552 *Id*., at ¶ 239.
553 *Id*., at ¶ 240.
554 *Id*., at ¶ 244.
555 *Id*., at ¶ 185.
556 *Id*., at ¶ 188.

tax measures are entitled to no special deference under the Treaty. Similarly, there is no basis for Ecuador's claim that there is expropriation only if (i) the State intends that the tax be expropriatory, and (ii) the tax is discriminatory. Because the Treaty provides no definition of expropriation, the inquiry is a fact specific one.[557]

366. At any rate, the tax measures would be expropriatory even under Ecuador's own standard. The evidence shows that the purpose behind Law 42 was expropriatory, for it was intended to force Burlington and other investors to surrender their rights under the PSCs. Law 42 was also discriminatory because a lower 70% tax rate would apply to those who signed a transitory agreement, as opposed to the higher 99% tax rate applicable to others. Ecuador also relies on *EnCana v. Ecuador* for the proposition that a tax is expropriatory only if it is "extraordinary, punitive in amount or arbitrary."[558] The evidence shows that this standard is met. President Correa himself called Law 42 at the 99% rate "an exaggeration."[559] Fair Links, for its part, conceded on cross-examination that no other country had enacted measures as severe as Law 42 at the 99% rate.[560]

367. Law 42 at the 50% rate had a devastating impact on Burlington's investment.[561] First, it prevented Burlington from recovering past investments, as 2006 was the year in which it would begin to recoup those investments.[562] Second, it forced Burlington to scale back its development plans, thereby diminishing its ability to exploit the Blocks during the contract term.[563] Third, Burlington submitted the Oso Plan despite Law 42 at 50% because the PSC for Block 7 was to expire in 2010, thus leaving a "short time frame to develop the reserves available."[564] Fourth, Block 21 was no longer viable with Law 42 at the 50% rate. At that point, Block 7 "carried the Consortium."[565] Finally, as illustrated below, Law 42 at 50% had a significant impact on Burlington's total take on oil revenues.[566]

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557 *Id*., at ¶¶ 188-189, 200.

558 Exh. EL-45, ¶ 177; CPHB, ¶ 195.

559 Exh. C-179 (Claimant's translation); Mem., ¶¶ 223, 350; CPHB, ¶¶ 79, 148, 152 and 195..

560 CPHB, ¶ 195.

561 *Id*., at ¶ 162.

562 *Id*., at ¶ 163.

563 *Id.*, ¶¶ 165-168.

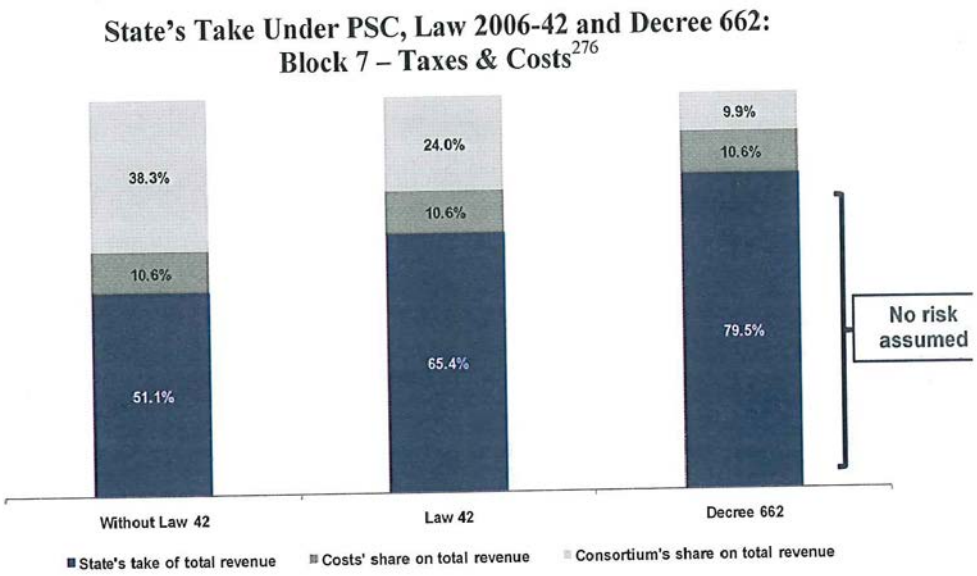
564 *Id*., at ¶ 167 (quoting from Tr. 356:15-16; Burlington's emphasis omitted.)

565 *Id*., at ¶ 171 (quoting from Tr. 544:5-6).

566 The "total take" includes taxes and other mandatory contributions.

368. Law 42 at the 99% rate destroyed the value of Burlington's investment.[567] First, the financial statements show that in 2008 Burlington sustained a loss of slightly over USD 60 million in Blocks 7 and 21. Although both Blocks sustained losses, the impact on Block 7 was of lesser magnitude.[568] Second, the Consortium did not undertake any new investment, not even in the Oso field.[569] Finally, as the graph below shows, Law 42 at 99% destroyed the value of Burlington's investment. It turned the operation of the Blocks "into a form of subsistence farming, hand-to-mouth, day-to-day operation, no capital expenditure, trying to deal with past CAPEX [capital expenditures]."[570]

369. The following graph shows the effects of Law 42 on Block 7 at both the 50% and 99% rates: [571]



567 CPHB, at ¶ 173.

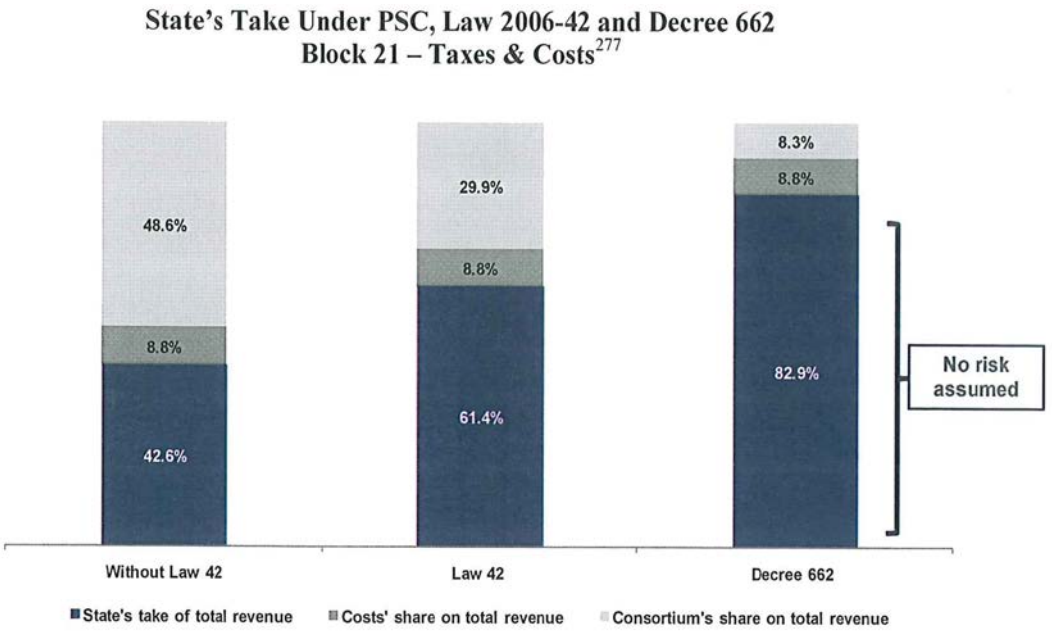
568 *Id*., at ¶ 175.

569 *Id*., at ¶ 176.

570 Tr. 45:21-46:3.

571 CPHB, at ¶ 207

370. Likewise, the graph below shows the effects of Law 42 on Block 21 at both the 50% and 99% rates:[572]



371. Finally, the Fair Links analysis about the impact of Law 42 is flawed. First, Fair Links improperly excluded from its analysis the Consortium's capital expenditures – USD 60 million worth of past investments.[573] Second, Fair Links gave an inaccurate version of the Consortium's IRR because (i) it considered outdated cost projections instead of actual costs, and (ii) it undervalued the magnitude of the Consortium's investment. Finally, Fair Links provided an inaccurate picture of the Consortium's profitability as it did not consider (i) the time value of money, (ii) the deterrent effect of Law 42, and (ii) a cash flow analysis for the entire life of the PSCs instead of one ending in July 2009.[574]

372. For these reasons, Burlington submits that Law 42 was a measure tantamount to expropriation both at the 50% and at the 99% rates.

3.2.2. Ecuador's position

373. Ecuador argues that Law 42 did not expropriate Burlington's investment, be it at the 50% rate or at the 99% rate. On the contrary, Law 42 was a legitimate and *bona fide* exercise of Ecuador's police powers.[575]

572 CPHB, at ¶ 208

573 CPHB, at ¶¶ 178-180.

574 *Id*., ¶¶ 177-184.

575 RCM, ¶ 392.

374. Taxation is part of the State's regulatory powers and in principle does not give rise to a duty to compensate as a matter of public international law. Ecuador refers to Ian Brownlie's observation that, absent special facts, tax measures are in principle "not unlawful and do not constitute expropriation."[576] In conformity with this principle, the tribunals in *Saluka, Sedco*, *Tecmed* and *Telenor* stated that the State was not liable for economic injury resulting from the exercise of its regulatory powers. Taxation is one of the most important aspects of the State's sovereign powers;[577] as such, it is in a "special category" with respect to expropriation claims.[578]

375. Because taxes are in a special category, only in exceptional circumstances will a tax be expropriatory. Case law and doctrinal writings suggest that a tax measure may be tantamount to expropriation if (i) it produces the effects required for any indirect expropriation and (ii) in addition, it is discriminatory, arbitrary, involves a denial of due process or an abuse of rights. Thus, in *EnCana*, the tribunal held that "[o]nly if a tax is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised."[579] In short, only in "extreme" cases will a tax be expropriatory.[580]

376. Under the Restatement of the Law (Third) of Foreign Relations of the United States, a tax will be "extreme" and thus expropriatory only if it is "discriminatory [and] designed to cause the alien to abandon the property to the state or sell it at a distress price."[581] Expressly invoking this principle, the tribunal in *Emanuel Too v. Greater Modesto* held that the seizure of the claimant's liquor license, home and bank account for failure to pay tax obligations was not expropriatory.[582] Similarly, in *Paushok v. Mongolia*, the tribunal stated that an investor had no immunity from windfall profit taxes in the absence of a tax stabilization clause.[583]

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576 *Id*., ¶¶ 404-405; Exh. EL-121, p. 509 in original pagination.

577 RCM, ¶¶ 412-413.

578 Tr. 226:6-7.

579 RCM, ¶ 416; Exh. EL-45, ¶ 177.

580 RCM, ¶ 421; Exh. EL-45, ¶ 173.

581 Exh. EL-164; ROSS, # 84.

582 RCM, ¶ 427; *Emanuel Too v. Greater Modesto Insurance Associates and the United States of America*, Iran – United States Claims Tribunal, Award of 29 December 1989 (Exh. EL-114 at ¶ 26). The Respondent has also relied on the decision in *Feldman* for the proposition that a tax measure is not expropriatory unless it entails an "unreasonable interference with an alien's property." Under this test, the tribunal found that there was no expropriation (*Feldman* Award, at ¶ 106. Exh. EL-80).

583 Because this decision was made on 28 April 2011, it was not fully available at the time Ecuador submitted its Post-Hearing Brief on Liability. However, Ecuador has relied on reports of the case.

377. Law 42 was a necessary and appropriate measure under the circumstances. As of 2002, there was an unprecedented and unforeseen rise of oil prices. This unforeseen increase in the price of oil destroyed the economic equilibrium of the PSCs. This economic equilibrium must reflect the oil industry's widely accepted assumption that the State, as the owner of the non-renewable resource, "is to be the main beneficiary of extra revenue resulting from high oil prices."[584] However, the PSCs have limited price elasticity, *i.e.* the State's participation share remains the same even though prices increase. With the massive and unforeseen increase of oil prices, Ecuador was no longer the main beneficiary of the oil revenues. As a result, the PSCs no longer reflected a fair division of extractive oil rent between the State and the contractor.[585]

378. Ecuador's adoption of Law 42 was unexceptional. Since 2002, as many as sixteen States have adopted measures similar to Law 42 in the wake of soaring oil prices, including countries such as the United Kingdom and Norway.[586] In particular, ConocoPhillips, Burlington's parent company, has likely been subject to measures similar to Law 42 in various other States, such as Algeria, China or Alaska. Thus, Ecuador's attempt to restore the economy of the PSCs was in accordance with industry practice. Initially, Ecuador sought to restore the economy of the PSCs through negotiations.[587] But Burlington obstinately refused to do so, even though it was under a good faith duty to renegotiate in light of the changed circumstances.[588] Faced with Burlington's intransigence, Ecuador had a constitutional duty to pass Law 42, which granted the State a participation of "at least 50%" over the oil companies' extraordinary revenues.[589]

379. Law 42 at the 50% rate was, however, insufficient to restore the economic equilibrium of the PSCs. That is why, in October 2007, Decree 662 increased the Law 42 rate from 50% to 99%.[590] Shortly thereafter, in December 2007, Ecuador passed the *Ley de Equidad Tributaria* ("LET"), which set the tax rate on extraordinary profits at 70% and allowed for a new reference price to be negotiated on a case-by-case basis.[591] Ecuador reached an agreement with all major oil companies except Burlington and

584 RCM, ¶ 188.
585 *Id*., at ¶¶ 171-188.
586 *Id*., at ¶¶ 10, 191.
587 *Id*., at ¶¶ 206-209.
588 *Id*., at ¶¶ 442-449.
589 *Id*., at ¶¶ 188-194 and 206-216.
590 *Id*., at ¶ 220.
591 *Id*., at ¶ 221.

Perenco. Despite Ecuador's continuing efforts, Burlington simply refused to negotiate fairer terms for the PSCs.[592]

380. Contrary to what Burlington alleges, Ecuador does not rely on the *rebus sic stantibus* doctrine or *théorie de l'imprévision*.[593] Rather, Ecuador alleges that the massive and unforeseen increase of oil prices altered the economic premises upon which the parties entered into the PSCs.[594] Under these economic premises, which were incorporated into participation percentages in the PSCs, the price of oil was projected to be around USD 15 per barrel over the life of the contract and the contractor's IRR at 15%.[595] Because subsequent events disproved these economic premises, the PSCs had to be renegotiated.[596]

381. Law 42 did not modify the PSCs. Law 42 deals solely with oil prices while the PSCs allocate oil volumes and nowhere refer to oil prices.[597] Law 42 cannot modify the PSCs because it addresses an issue not covered by the PSCs. The Ecuadorian Constitutional Court (the "Constitutional Court"), the country's highest court, reached this conclusion.[598] Because the PSCs are governed by Ecuadorian law, the Tribunal cannot disregard or overrule the Constitutional Court's decision, for this would be contrary to international law.[599] In particular, the Constitutional Court held that Law 42:

> "[C]reates obligations over matters that have not been the subject of contractual stipulation, that have not been agreed upon or foreseen, situations that were impossible to foresee, and had they been foreseeable, by the very nature of the contract, could not have been part of the [parties'] understanding, and therefore they did not affect or influence the consent of the parties." [600]

382. Likewise, Law 42 did not breach the renegotiation clauses in the PSCs.[601] Under Ecuadorian law, Law 42 is a "levy" and, as such, part of the tax system referred to in the renegotiation clauses.[602] Yet, Law 42 did not breach these clauses. To begin with, Law 42 did not affect the economy of the PSCs. This is because Law 42 only applied

592 *Id*., at ¶¶ 220-250.

593 RPHB, ¶¶ 4 and 104.

594 RCM, ¶¶ 195-204.

595 RPHB, ¶¶ 73, 107-109.

596 RCM, ¶¶ 205-207.

597 *Id*., at ¶¶ 267-271.

598 *Id*., ¶¶ 265-279.

599 *Id*.

600 Exh. EL-19, p. 25 (Tribunal's translation).

601 Clause 11.12 of the PSC for Block 7 (Exh. C-1) and clause 11.7 of the PSC for Block 21 (Exh. C-2).

602 RCM, ¶¶ 283-289.

above the price assumption of USD 15 per barrel upon which the PSCs were based.[603] Moreover, even if the economy had been affected, Ecuador did not breach its obligation to renegotiate the PSCs, as it was in fact always willing to negotiate with Burlington. The Parties, however, failed to reach an agreement. In light of this failure, the Tribunal has neither the jurisdiction nor the power to fill in the gap and determine what the Parties would have agreed to.[604]

383. Moreover, not every contract breach amounts to a treaty breach. Even if Law 42 breached the PSCs, this purported contract breach would not amount to a treaty breach. As the tribunal in *Waste Management v. Mexico* held, "the mere non-performance of a contractual obligation is not to be equated with a taking of property […]."[605] A contract breach amounts to expropriation only if there is "an effective repudiation of the [contractual] right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent."[606] Burlington has not met this standard.

384. With respect to the expropriation claim, Burlington bears a heavy burden. The standard for expropriation is high when the challenged measure is a tax.[607] A State's regulatory measure is to be presumed valid and Burlington has failed to rebut this presumption. Contrary to Burlington's arguments, Law 42 was a legitimate and *bona fide* exercise of Ecuador's regulatory power.[608] The purpose of Law 42 was to "remedy a disequilibrium caused by a massive and unforeseen increase in oil prices."[609] As a result of the inelasticity of the PSCs, oil companies were drawing more benefits than Ecuador from this price increase.[610] Law 42 was ultimately intended to ensure a "fair allocation" of the revenues stemming from the exploitation of Ecuador's natural resources.[611]

385. In particular, the tribunal in *EnCana v. Ecuador* noted that, in the context of expropriation, "taxation is in a special category."[612] It is only in an "extreme case" that a tax of general application may become expropriatory. Specifically, the *EnCana*

603 *Id.*, ¶¶ 323-344.
604 *Id.*, ¶¶ 345-364.
605 *Waste Management II* Award, at ¶ 174 (Exh. EL-67).
606 *Id.*, ¶ 175.
607 RCM, ¶¶ 397-398.
608 *Id.*, at ¶ 400, § 5.1.3.
609 RCM, ¶ 440.
610 *Id.*
611 RCM, ¶ 453.
612 Tr. 226:3-7; Exh. EL-45, ¶ 177.

tribunal held that a tax may be expropriatory only if it is "extraordinary, punitive in amount or arbitrary in its incidence."[613] A tax measure is "extreme" when the State acts "with a discriminatory intention [and] with a designated purpose to confiscate the property rights of the investor."[614] However, Burlington has failed to submit evidence that would meet this standard.[615]

386. At any rate, Law 42 was not expropriatory, whether at the 50% or at the 99% rate. First, as shown above, Law 42 did not breach the PSCs. Therefore, Law 42 could not, by definition, expropriate Burlington's rights under the PSCs. Second, Law 42 did not constitute a *permanent* deprivation of Burlington's investment. This is because Law 42 applies if and only if the price of oil is above the reference price. Since Law 42 has been enacted, the price has not always been above the reference price, such as for instance in January and February 2009. Third, as specified below, Burlington's rights under the PSCs did not become worthless.

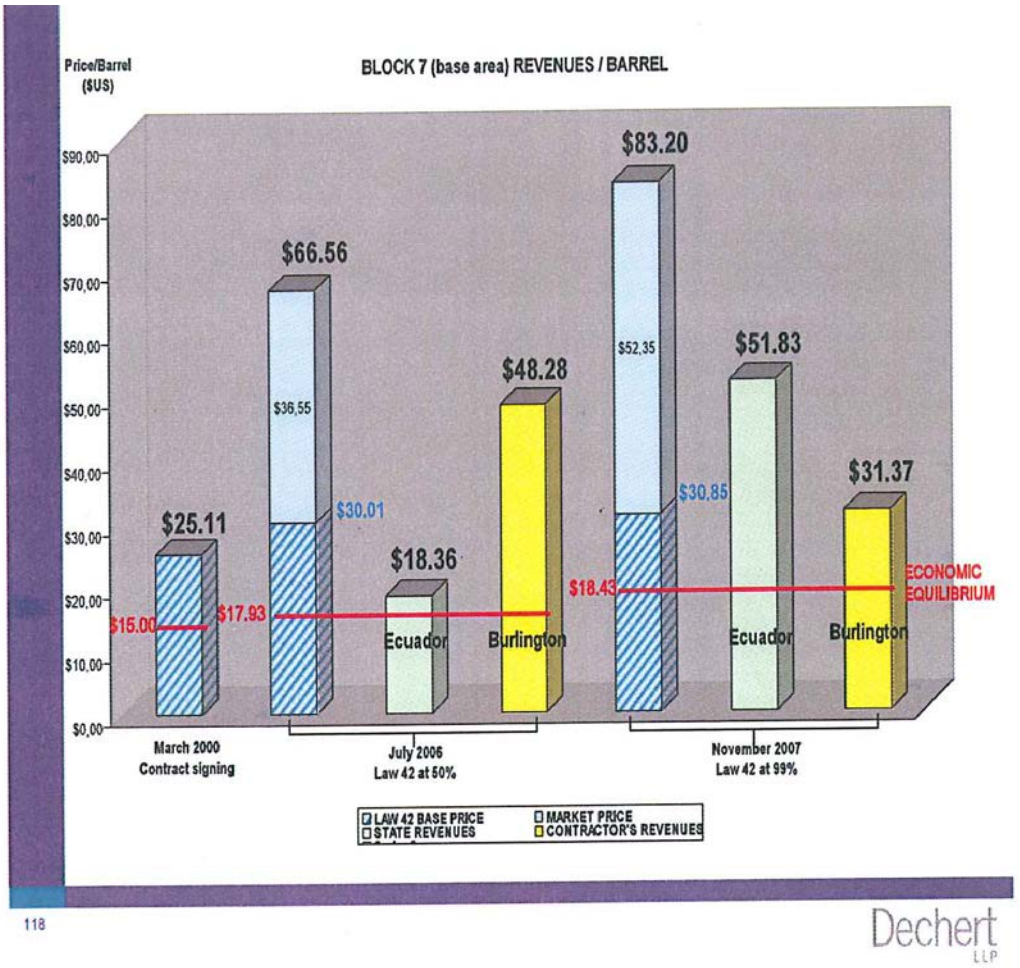
387. Law 42 at the 50% rate did not cause Burlington's rights to become worthless.[616] The Consortium's tax returns show that its gross and after-Law 42-tax profits in 2006 and 2007 were higher than its gross and after-tax profits in 2005.[617] The Fair Links experts also concluded that Burlington's operations were not "uneconomic."[618] In November 2006, the Consortium submitted the Oso Plan in order to make additional investments for USD 100 million.[619] The purpose of the Oso Plan was to show that these additional investments were "economically viable" both for Ecuador and the contractor.[620] Finally, ConocoPhillips' annual reports for the period 2006-2008 show no impairment of its Ecuadorian assets.[621]

388. Likewise, Law 42 at the 99% rate did not render Burlington's rights worthless. Fair Links confirmed that Law 42 at 99% "did not alter the global trend of positive cash flows."[622] The Consortium's Oso Plan shows that the increase from 50% to 99% did not substantially alter the economic viability of the project.[623] Again, ConocoPhillips'

613 Exh. EL-45, ¶ 177.
614 Tr. 232:12-15.
615 RCM, ¶¶ 391-399.
616 *Id.*, ¶ 480.
617 *Id*., at ¶¶ 481-482.
618 Fair Links ER, ¶ 90; RCM, ¶ 483.
619 RCM, ¶¶ 484-494.
620 *Id*., at ¶ 486.
621 *Id*., at ¶¶ 495-497.
622 Fair Links ER, ¶ 94.
623 RCM, ¶¶ 519-521.

annual reports for the period 2006-2008 show no impairment of its Ecuadorian assets. There is an impairment for the year 2009, but only because the Consortium decided to suspend operations in that year.[624]

389. Burlington has centred its case around the percentages of the Law 42 tax rates, in order to convey an image that the take of the State was significant. However, what Burlington does not show is its revenues per barrel in absolute terms.[625] In July 2006, when Law 42 applied for the first time at the 50% rate, Burlington was realizing USD 48.28 per barrel of oil.[626] And in November 2007, when Law 42 first applied at the 99% rate, Burlington was realizing USD 31.37 per barrel of oil.[627] As shown by the graph below[628], these figures are significantly above the equilibrium point the parties agreed to in the PSCs, and allowed Burlington to make a reasonable profit.



624 *Id.*, at ¶¶ 522-523.

625 Tr. 274:4-11.

626 Tr. 272:22-273:7.

627 Tr. 274:6-11.

628 RPHB, ¶ 299.

390. In sum, Ecuador alleges that Law 42, be it at the rate of 50% or of 99%, did *not* expropriate Burlington's investment.

3.2.3. Analysis

a. Standard for expropriatory taxation

391. Taxation is an essential prerogative of State sovereignty. By virtue of this sovereign prerogative, States may tax not only their own nationals but also aliens, including foreign investors, if they effectuate investments in those States.[629] A tax is by definition an appropriation of assets by the State.[630] It is also by definition non-compensable. In the well-known phrase of Judge Oliver Wendell Holmes, taxes are "the price we pay for civilized society."[631] In other words, general taxation is the result of a State's permissible exercise of regulatory powers. It is not an expropriation.

392. There are, however, limits to the State's power to tax. There are limits that arise from customary international law on taxation and limits that arise from the protections granted under international law to foreign investments, the only relevant one for present purposes being the protection against expropriation under the Treaty. In the absence of guidance in the Treaty as to the relationship between taxation and expropriation, the Tribunal will consider the limits existing under customary international law recognizing that "[i]n interpreting a treaty, account has to be taken of any relevant rules of international law applicable in the relations between the parties – a requirement which the International Court of Justice ("ICJ") has held includes relevant rules of general customary international law."[632]

393. Customary international law imposes two limitations on the power to tax. Taxes may not be discriminatory and they may not be confiscatory.[633] Confiscatory taxation essentially "takes too much from the taxpayer."[634] The determination of how much is too much constitutes a fact specific inquiry.[635] Among the factors to be considered one

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629 "Taxation is, in a sense, a partial confiscation." A.R. Albrecht, *The Taxation of Aliens under International Law*, (hereinafter "Albrecht"), 29 THE BRITISH YEARBOOK OF INTERNATIONAL LAW 145, (1952) at p. 173 in the original pagination (Exh. EL-124).

630 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (hereinafter "Newcombe & Paradell"), Kluwer (2009), pp. 321-398, at 360.

631 J. Holmes, dissenting opinion in Compañia General de Tabaco de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, at 100 (1927).

632 *Saluka Investments BV v. The Czech Republic*, (hereinafter "*Saluka*"), UNCITRAL, Partial Award of 17 March 2006, ¶ 254 (Exh. CL-100; internal quotation marks omitted).

633 Albrecht, *supra* note 629, at 169 and ss. (Exh. EL-124).

634 *Id*., at 173.

635 Newcombe & Paradell, *supra* note 630, at 366.

counts first and foremost the tax rate and the amount of payment required.[636] If the amount required is so high that taxpayers are forced to abandon the property or sell it at a distress price, the tax is confiscatory.

394. The concept of confiscatory taxation appears to correspond to that of expropriatory taxation. The US Restatement Third of the Law of Foreign Relations provides that states are responsible for "expropriation [...] when it subjects alien property to taxation [...] that is confiscatory […]."[637] Under the Harvard Draft Convention, the execution of tax laws is not wrongful provided that the tax "is not an abuse of [...] powers [...] for the purpose of depriving an alien of his property."[638] Similarly, in an article on the interface between investment protection and fiscal powers, Thomas Wälde and Abba Kolo, for instance, refer to the concepts of "confiscatory taxation" and "expropriatory taxation" interchangeably.[639] Consequently, the notion of confiscatory taxation under customary international law may inform the Tribunal's understanding of unlawful expropriation by way of taxes under the Treaty.

395. The most important factor to distinguish permissible from confiscatory taxation is the effect of the tax.[640] The effects required for a tax to be deemed confiscatory do not appear to be different from those required to assess the existence of an indirect expropriation. In other words, confiscatory taxation constitutes an expropriation without compensation and is unlawful.[641] The Parties have also attached importance to the effects of the tax. Burlington alleged that Law 42 was a measure tantamount to expropriation because it "resulted in a substantial deprivation."[642] Ecuador has in turn submitted that a tax measure may be tantamount to expropriation only if it causes "the effects required for any indirect expropriation."[643]

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636 Albrecht, *supra* note 629, at 174-175 (Exh. EL-124).

637 *Restatement Third of the Law of Foreign Relations of the United States*, American Law Institute (1987), p. 200 in the original pagination (Exh. EL-164).

638 Louis B. Sohn and Richard R. Baxter, (hereinafter "Sohn & Baxter"), *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AMERICAN JOURNAL OF INTERNATIONAL LAW 545, 554 (1961) (Exh. CL-161).

639 Thomas Wälde and Abba Kolo, *Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty*, Intertax, vol. 35, Issue 8/9, p. 441 (2007). These authors also refer to the concept of "confiscatory expropriation" to explain that investment treaties often concern themselves only with extreme fiscal measures (p. 424).

640 Albrecht, *supra* note 629, at 173-175 (Exh. EL-124).

641 *Id*., at 172-173; s*ee also RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. ARB V079/2005, Final Award of 12 September 2010, ¶ 629(e) (Exh. CL-168).

642 Mem., ¶ 441; CSM, ¶ 82.

643 Emphasis omitted. RCM, ¶ 426.

396. When assessing the evidence of an expropriation, international tribunals have generally applied the sole effects test and focused on substantial deprivation. By way of example, one may cite *Pope & Talbot v. Canada*, where the tribunal stated that "under international law, expropriation requires a 'substantial deprivation'"[644], or *Occidental v. Ecuador*, where in relation to tax measures, the tribunal referred to the same "criterion of 'substantial deprivation' under international law […]."[645] In *Archer Daniels v. Mexico*, the tribunal noted that "expropriation occurs if the interference is substantial."[646]

397. When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. In this sense, some tribunals have focused on the use and enjoyment of property.[647] The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment.

398. Most tribunals apply the test of expropriation, however it is phrased, to the investment as a whole.[648] Applied to the investment as a whole, the criterion of loss of the economic use or viability of the investment implies that the investment as a whole has become unviable. The measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return.[649]

399. The inquiry under the test of loss of economic use or viability goes beyond the issue of whether the challenged measure caused a reduction or loss of profits. In *Archer Daniels*, for instance, the tribunal concluded that a "loss of benefits or expectation [...]

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644 *Pope & Talbot v. The Government of Canada*, UNCITRAL (NAFTA), Interim Award of 26 June 2000, ¶ 102 (Exh. EL-138).

645 *Occidental Exploration and Production Company v. Ecuador*, London Court of International Arbitration Case No. UN3467, Final Award of 1 July 2004, ¶ 89 (Exh. CL-86).

646 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, (hereinafter "*Archer Daniels*"), Award of 21 November 2007, ¶ 240.

647 *Middle East Cement Shipping and Handling Co. S.A. v. The Arab Republic of Egypt*, (hereinafter "*Middle East Cement"*), Award of 12 April 2002, ¶107 (Exh. EL-91).; *Parkerings-Compagniet AS v. Republic of Lithuania*, (hereinafter "*Parkerings*), Award of 11 September 2007, ¶ 437 (Exh. CL-119).

648 See cases cited in n. 407, 408 and 409.

649 *Metalclad Corporation v. the United Mexican States*, (hereinafter "*Metalclad*"), Award of 30 August 2000, ¶¶104-108 (Exh. CL-110); *S.D. Myers v. Canada*, UNCITRAL (NAFTA), Partial Award of 13 November 2000, ¶ 283. (Exh. EL-127).

is not a sufficient criterion for an expropriation."[650] In the same vein, the tribunal in *Paushok v. Mongolia* held that "a loss of that size [around USD 1 million] for one year is not a matter leading to the destruction of an ongoing enterprise."[651] While losses in one year may indicate that the investment has become unviable and will not return to profitability, this is not necessarily so and a finding of expropriation would need to assess the future prospects of earning a commercial return. It must be shown that the investment's continuing capacity to generate a return has been virtually extinguished.

400. Having circumscribed the test applicable to expropriation by way of taxation, additional questions arise in respect of the role of the State's intent, the discriminatory character of the tax and the weight of contractual stabilization clauses.

401. In addition to the impact of the tax, the State's intent is another factor that tribunals sometimes consider to draw the line between permissible and confiscatory taxation.[652] Therefore, a finding that a State measure is designed to "depriv[e]"[653] the investor of its property or to cause it to "abandon [...] or sell it at a distress price"[654] would tend to support a finding of expropriation. However, it is clear that the intent plays a secondary role relative to the effects test. In *Tippetts*, the tribunal held that "the intent of the government is less important than the effects of the measures [...]."[655] Thus, evidence of intent may serve to confirm the outcome of the effects test, but does not replace it.

402. Under general international law, a tax is illegal not only if it is confiscatory but also if it is discriminatory.[656] This does not mean, however, that a discriminatory tax amounts *per se* to an expropriation. To reach the level of an expropriation, the discriminatory tax must still meet the test of substantial deprivation discussed above.

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650 *Archer Daniels* Award, at ¶ 251.

651 *Sergei Paushok et al. v. the Government of Mongolia*, (hereinafter "*Paushok*"), UNCITRAL arbitration, Award on Jurisdiction and Liability of 28 April 2011, ¶ 334.

652 *Petrobart Ltd. v. Kyrgyzstan*, Stockholm Chamber of Commerce, Award of 29 March 2005, p. 55. ("Nor does it appear that the measures taken by the Kyrgyz Government and state authorities [...] were directed specifically against Petrobart's investment [...].") (Exh. CL-98). *See also RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. ARB V079/2005, Final Award of 12 September 2010 at ¶ 620(e) (the State measure "fitted into the obvious general pattern and obvious intention of the totality of the scheme to deprive Yukos of its assets") (Exh. CL-168).

653 Sohn & Baxter, *supra* note 638.

654 *Restatement Third of the Law of Foreign Relations of the United States*, American Law Institute (1987), § 712 (Exh. EL-164).

655 *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-U.S. C.T.R. 219, (hereinafter "*Tippetts*"), at 225.

656 Albrecht, *supra* note 633, at 170-171 (Exh. EL-124).

403. Relying on *Revere Copper,*[657] Burlington has also argued that a tax that is contrary to a tax stabilization or similar clause amounts to expropriatory. According to Burlington, such a tax would "make the leap from a *bona fide* government regulation to an expropriatory measure." [658] It is unquestionable that such a tax would amount to a breach of contract. However, to determine whether it constitutes an expropriation, the question remains whether the tax causes a substantial deprivation of the investment as a whole.

404. A final comment is in place in this context in connection with the nature of the tax at issue. The Law 42 tax is a so-called windfall profits tax, *i.e.* a tax applying to oil revenues exceeding the ones prevailing at the time the PSCs were executed. By definition, such a tax would appear not to have an impact upon the investment as a whole, but only on a portion of the profits. On the assumption that its effects are in line with its name, a windfall profits tax is thus unlikely to result in the expropriation of an investment. A definitive conclusion, however, may only be reached after taking into account the specific circumstances of the case, which the Tribunal will do in the subsequent sections.

b. Did Law 42 and Ecuador's failure to absorb its effects breach the tax absorption clauses in the PSCs?

405. The tax absorption clauses contained in the PSCs were part and parcel of the value of Burlington's investment. In order to determine the effects of Law 42, the Tribunal must first determine whether Ecuador's measures were in breach of these clauses and thus affected the value of Burlington's investment. Although this analysis involves an issue of breach of contract, it is carried out for the sole purpose of deciding whether there has been an expropriation.

406. As an initial matter, the Parties disagree on whether Ecuador relies or not on the doctrine of *rebus sic stantibus*.[659] According to Burlington, Ecuador relies on this

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657 In *Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, (hereinafter "*Revere Copper*"), Award of 24 August 1974, the majority of the tribunal held that, although the effects of the tax – the "Bauxite Levy" – were "not confiscatory", the tax was nonetheless "expropriatory" because it amounted to a repudiation of the contractual commitment to tax stability that had deprived the investor of effective control over its investment. (Exh. CL-104 at pp. 45, 52-55 and 57-60).

658 Tr. 1266:10-13.

659 The *rebus sic stantibus* doctrine has three requirements: (i) an extraordinary and unforeseeable or unforeseen event must cause an imbalance in the obligations of the parties; (ii) this imbalance must be severe enough as to render performance of the contract by one of the parties too burdensome; and (iii) the event in question should not be a consequence of the actions or omissions of the party invoking the doctrine (CPHB, ¶ 203, citing to Aguilar Second ER, ¶¶ 27-28).

doctrine, because it refers to the requirements underlying this doctrine. This is evidenced, for instance, in the reports of Ecuador's experts, Fair Links and Juan Pablo Aguilar. Ecuador, on the other hand, expressly denies relying on the *rebus sic stantibus* doctrine, retorting that Burlington has pushed the wrong "door."[660]

407. The Tribunal notes that certain documents on record contain references to the *rebus sic stantibus* doctrine. Notably, the bill that President Palacio submitted to the Ecuadorian Congress and which subsequently became Law 42 stated that the PSCs were executed "considering the *rebus sic stantibus* clause."[661] Further, Ecuador's legal expert Mr. Aguilar stated, in the section of his report entitled "economic equilibrium of the contract", that supervening events can affect this economic equilibrium; when they occur, he explains, "[w]e are faced with the *rebus sic stantibus* principle."[662] Finally, Fair Links devoted a section of its report to describe how substantial price changes between 2002 and 2008 affected the economy of the PSCs. These would support Burlington's contention that Ecuador relies on the *rebus sic stantibus* doctrine.

408. In its post-hearing brief, however, Ecuador expressly disclaimed reliance on the *rebus sic stantibus* doctrine in this arbitration. It is true that it alleged that "a massive and unforeseen increase in oil prices"[663] affected the economy of the PSCs. While this coincides with one of the elements of the *rebus sic stantibus* doctrine, Ecuador does not argue that these events subjected it to a burdensome imbalance of obligations, but rather that they invalidated the economic premises upon which the allocation of oil production in the PSCs was based. Because these economic premises were, according to Ecuador, an integral part of the PSCs, they could be relied upon directly as a matter of contract interpretation. Therefore, the Tribunal comes to the conclusion that Ecuador does not invoke the *rebus sic stantibus* doctrine, and that there is thus no need to examine the requirements of this doctrine.

409. The Tribunal's next task is to review whether Law 42 modified or breached the PSCs. Ecuador argues that Law 42 did neither. According to Ecuador, Law 42 did not modify the PSCs because it dealt solely with oil prices, an issue the PSCs left unaddressed. The Tribunal is of a different opinion. As was discussed in Section IV(C)(iii) above, the possibility of including a price adjustment factor similar to the one included in the Tarapoa Contract was expressly discussed and rejected at the time of the negotiation

660 RPHB, ¶¶ 3-4.

661 Exh. C-174, p. 3 (Tribunal's translation).

662 Aguilar Second ER, ¶¶ 18, 20 (Tribunal's translation).

663 RCM, ¶ 440.

of the PSCs. The non-inclusion of such an adjustment clause in the PSCs was the product of a deliberate choice by the contracting parties. Thus, the issue *was covered* in the PSCs: the parties agreed that oil production would be allocated irrespective of oil prices.[664] By introducing an oil price factor to allocate oil revenues, Law 42 modified the parties' choice to exclude such a factor.

410. Ecuador notes that the Ecuadorian Constitutional Court has already decided that Law 42 did not modify the PSCs, and submits that this Tribunal cannot overrule or disregard such decision.[665] However, while international tribunals should certainly consider decisions rendered by national courts, they are not bound by them. The purpose of investment arbitration is neutral adjudication of a dispute by a tribunal independent from both parties. If the international tribunal adjudicating the dispute were bound by the decision of an organ that forms part of one of the parties to the dispute, this purpose would be seriously jeopardized, if not defeated.

411. Ecuador subsequently argues that Law 42 did not breach the PSCs and the renegotiation clauses, because Law 42 did not affect the economy of the PSCs and, even if it did, the application of a correction factor was not mandatory. In Section IV(C) the Tribunal concluded, however, that the economy of the PSCs meant that the contractor was entitled to its share of oil production regardless of the price of oil and of its internal rate of return. The Tribunal considers that in allocating to the State a large part of oil revenues to which Burlington was entitled under the PSCs, Law 42 had an impact on the economy of the PSCs.

412. The impact of Law 42 on the economy of the PSCs was not in and of itself a breach of the PSCs. As Ecuador has noted, the PSCs expressly contemplated the possibility that taxes could be increased or decreased. But Law 42 did trigger the contractual mechanism applicable in the event of a modification to the tax system. As the Tribunal concluded in Section IV(C), these clauses provided for the mandatory application of a correction factor in the event of a modification of the tax system. Accordingly, Ecuador

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664 The distinction between oil volumes and oil revenues would, from an economic point of view, be artificial. The contractor's interest is in the economic value of its share – whether in the form of oil or cash. This is apparent from the text of Article 4 of Law 1993-44, which provides that "[t]he contractor's participation share may be received in cash, subject to prior agreement with PetroEcuador" (Exh. C-15, p. 3 in the original pagination; Tribunal's translation).

665 The Ecuadorian Constitutional Court held that Law 42 "[c]reates obligations over matters that have not been the subject of contractual stipulation, that have not been agreed upon or foreseen […] and therefore that did not affect or influence the consent of the parties [in concluding the PSCs]." (Exh. EL-19, p. 25; RCM, ¶ 280).

was under an obligation to apply a correction factor that would absorb the effects of Law 42, which had an impact on the economy of the contract.

413. The record shows that Burlington twice requested Ecuador to comply with this obligation: once after Law 42 at 50% was passed, and once after the rate was increased to 99%. In a letter dated 18 December 2006, Burlington first requested Ecuador to apply a correction factor absorbing the effects of Law 42 at 50%.[666] After Decree 662 increased the rate to 99%, Burlington again requested Ecuador to apply a correction factor that would absorb the effects of Law 42 at 99%.[667] It is undisputed that Ecuador did not respond to Burlington's requests that the effects of Law 42 be absorbed.

414. Ecuador explains its silence by the fact that Burlington did not provide an "economic analysis demonstrating that Law 42 had affected the economy of the Participation Contracts, nor did it put forward what the appropriate adjustment should have been to re-establish that 'economy'."[668] The explanation is unpersuasive. No economic analysis was required to show that the economy of the PSCs was affected: Law 42 deprived Burlington of an important portion of oil revenues from its oil participation share to which it was entitled under the PSCs – oil revenues which were redirected to the State in the form of taxes. The impact of Law 42 on the economy of the PSCs was therefore evident.

415. Additionally, Ecuador's explanation that it failed to respond to the requests for adjustment because Burlington did not "put forward what the appropriate adjustment should have been"[669] is no more persuasive. After all, the chief purpose of these letters was to request the opening of the administrative procedure for the application of a correction factor.[670] The Consortium's pledge to submit "the figures"[671] in order to calculate the correction factor – a pledge made only in the December 2006 letters and

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666 Exhs. C-11 and C-12; CPHB, ¶¶ 82, 130, 317.

667 Letter of 28 November 2007, Exh. C-43; CPHB, ¶¶ 82, 130, 317.

668 RPHB, ¶ 189.

669 *Id*.

670 On 18 December 2006, the Consortium's representative wrote to PetroEcuador to request "the opening of the applicable administrative proceeding for the parties to analyze the economic impact on the contract of […] the aforementioned taxes and fees for which the Consortium shall present the figures" (Exh. C-11 and C-12). On 28 November 2007, Burlington's representative – as opposed to the Consortium's representative – wrote to the Attorney General of Ecuador and to PetroEcuador to request that PetroEcuador agree "to engage forthwith in the process of calculating and implementing a correction factor pursuant to" the tax absorption clauses in the PSCs for Blocks 7 and 21 (Exh. C-43).

671 Exh. C-11, p. 17.

not repeated in the November 2007 letters[672] – was not intended to act as a condition precedent for the opening of such procedure. Rather, those figures were supposed to be submitted *in the context* of that administrative procedure.

416. In the same vein, Dr. Galo Chiriboga, who was the Chief Executive Officer of PetroEcuador at the time the Consortium sent the requests for readjustment of the oil participation shares in December 2006, further explained that Ecuador failed to respond to these requests because of their inappropriate timing, considering the forthcoming year end holidays and change of administration. In the words of Dr. Galo Chiriboga:

> "We are talking about the last weeks of December; in Ecuador and, I think, in the rest of the world as well, well, these are very complicated weeks, not only because of Christmas but also because of New Year's. And also, added to that, there was a new administration that was going to take office. [...] To submit a document such as this [the requests for adjustment] to a Government that ended its administration, I think it's a very inappropriate moment to submit that kind of document, in my modest opinion."[673]

417. This explanation, however, does not appear to be any more persuasive than the previous one. Even if the timing of the request had not been appropriate, nothing prevented Ecuador from responding at a later time. Moreover, Burlington reiterated its requests for readjustment in November 2007, after Law 42 at 99% was passed, and still received no response. In sum, Ecuador's failure to respond to Burlington's requests for readjustment demonstrates its unwillingness to even entertain the possibility of applying a correction factor. It was this refusal to absorb the effects of Law 42 that ultimately breached the PSCs.

418. Ecuador finally argues that, even if the PSCs were breached, these breaches do not amount to a Treaty breach because they do not amount to "an effective repudiation of the right [...] which has the effect of preventing its exercise entirely or to a substantial extent."[674] However, by enacting Law 42 and then refusing to absorb its effect pursuant to the tax absorption clauses, Ecuador has in effect nullified Burlington's right

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672 Indeed, no similar pledge was made in Burlington's letters of 28 November 2007, which make no reference to the submission of "figures" and solely request the immediate opening of the process to calculate and implement a correction factor. Thus, Ecuador's argument that it did not react to the requests for application of a correction factor because it was awaiting the figures cannot apply with respect to Burlington's letters of 28 November 2007 (Exh. C-43). At any rate, it is clear from both sets of letters – those of December 2006 and those of November 2007 – that the gist of the request was the opening of the process that would allow for the calculation of a correction factor.

673 Tr. 782:19-783:8.

674 *Waste Management II* Award, at ¶ 175 (Exh. EL-67).

to a correction factor by preventing the exercise of this right. Moreover, this nullification was made possible through the use of Ecuador's sovereign powers. While both parties to the PSCs may invoke the tax absorption clauses, only Ecuador, as a sovereign State, may increase taxes and disregard this clause.[675]

419. For these reasons, the Tribunal concludes that Law 42 affected the economy of the PSCs and that Ecuador failed to apply a correction factor pursuant to the tax absorption clauses. Accordingly, Ecuador breached the tax absorption clauses of the PSCs. This is a relevant, although by no means decisive, consideration for purposes of the expropriation analysis, which entails a broader inquiry into the investment's overall capacity to generate commercial returns for the benefit of the investor. The Tribunal must next determine whether Law 42, first at 50% and then at 99%, amounted to an expropriation of Burlington's investment.

c. The effects and purpose of Law 42 at 50%

420. The Parties disagree on the effects of Law 42 at 50%. Burlington claims that Law 42 at 50% had a "devastating" impact on Burlington's investment; specifically, it contends that Law 42 at 50% "had a significant negative impact on the economics of Block 7 and destroyed the economics of Block 21."[676] Ecuador counters that Law 42 at 50% is not a measure tantamount to expropriation because (i) it did not effect a "permanent" deprivation of Burlington's investment, (ii) nor did it cause Burlington a near total loss of the value of its PSCs rights.

421. With respect to the first objection, Ecuador contends that there is no permanent deprivation because Law 42 only applied when the price of oil was above the reference price, which was not always the case. In January and February 2009, for instance, the price of oil was below the reference price. This suffices, according to Ecuador, to conclude that Law 42 is not expropriatory. The Tribunal is unable to follow this line of argument. Law 42 permanently applies to "non agreed or unforeseen surpluses,"[677] that is, windfall profits as defined in the law. Just like an income tax is not temporary because it does not apply in a period in which the taxpayer has no income, the fact that

675 In the Decision on Jurisdiction, the Tribunal observed that the tax absorption clauses may be invoked by both parties to the contract and thus work "symmetrically" (DJ, ¶¶ 182-183). Thus, for the sake of accuracy, it should be noted that these clauses are symmetrical only in the sense that both the State and the contractor may *invoke* their application. The State, however, is the only party to the PSC that may increase and decrease taxes and therefore trigger the application of these clauses. In this other sense, the clauses are asymmetrical.

676 CPHB, ¶ 172.

677 Exh. C-7, at Article 2.

there may be a period without windfall profits does not turn Law 42 into a temporary measure.

422. In other words, while the windfall profits may not be permanent, the application of Law 42 to those profits is permanent. Whenever the price of oil was above the reference price, half of the revenues in excess of the reference price would be reallocated to the State. Ecuador's subsequent failure to absorb the effects of Law 42, in accordance with the tax absorption clauses in the PSCs, confirmed the permanent effects of this tax. Therefore, Law 42 at 50% effected a permanent deprivation.

423. In connection with Ecuador's second objection and the substantial loss of the value of Burlington's investment, Burlington's case is that Law 42 at 50% was "devastating" because (i) it prevented Burlington from recovering past investments, (ii) it forced it to scale back its development plans, which would adversely affect its ability to seek an extension of the PSCs, and (iii) it rendered Block 21 economically non-viable. Burlington has provided no expert evidence to buttress these allegations. Ecuador replies that Law 42 at 50% did not cause a near total loss of the value of Burlington's rights under the PSCs. It bases its reply on the Consortium's tax returns for the years 2005 to 2007, the Fair Links report, the Consortium's Oso Development plan, and ConocoPhillips' annual reports for 2006 to 2008.

424. Law 42 at the 50% rate applied between April 2006 and October 2007. From April to December 2006, Burlington made Law 42 payments in the amount of USD 15.85 million for Block 7 (42.5% of total Law 42 payments of USD 37.303 for Block 7),[678] and USD 23.04 million for Block 21 (46.25% of total Law 42 payments of USD 49.814 million for Block 21).[679] In the aggregate, Burlington made Law 42 payments for a total of USD 38.89 million in 2006. The real impact of Law 42 is, however, lower than what the total Law 42 payments reflect: had Law 42 payments not been made, the corresponding amounts would have become additional income for Burlington, to which the ordinary income tax and employment contributions would have applied. As the income tax (25%) and the employment contribution (15%) alone add up to about

678 As previously noted, Burlington's ownership interest in Block 7 is 42.5% and the total Law 42 payments are reflected in its financial statements for 2006 (Exh. C-419, p. 6).

679 Burlington's ownership interest in Block 21 is 46.25% and the total Law 42 payments are reflected in its financial statements for 2006 (Exh. C-419, p. 9).

40%[680], the real impact of Law 42 is approximately 60% of the total Law 42 payments, *i.e.* about USD 23 million.[681]

425. Still in 2006, Burlington made net profits of USD 30.85 million in Block 7 (42.5% of total net profits of USD 72.579 for Block 7)[682] and USD 13.33 million in Block 21 (46.25% of total net profits of USD 28.821 for Block 21).[683] In the aggregate, Burlington made net profits of USD 44.18 million in 2006. However, since Law 42 only applied for three-fourths of the year, the impact of Law 42 in 2006 must be measured on three-quarters of the total profits (or 75% of USD 44.18 million), which equal USD 33.14 million. Had Law 42 not applied, Burlington's three quarter profits of USD 33.14 million would have been USD 56.14 million (USD 33.14 million + USD 23 million). Thus, Law 42 at 50% reduced Burlington's net profits by around 40% (USD 23 million out of a total of USD 56.14 million).

426. In 2007, Law 42 at 50% applied for the ten-month period spanning from January to October 2007. As of November 2007, Burlington was subject to the higher 99% rate. The overall impact of Law 42 on Burlington's investment was greater in 2007 than in 2006. Burlington's Law 42 payments in 2007 totalled USD 87.74 million (42.5% of USD 98.128 million for Block 7 plus 46.25% of USD 99.552 million for Block 21).[684] The real impact of these payments (taking into account the taxes that Burlington would have paid had it not been subject to Law 42) was of approximately USD 52.64 million. Burlington's profits, in turn, totalled USD 30.95 million (42.5% of USD 57.28 million for Block 7 plus 46.25% of USD 14.3 million for Block 21).[685] Thus, Law 42 diminished Burlington's net profits by around 62.9 % in 2007 (USD 52.64 million out of USD 83.6 million).[686] However, because Burlington's financial statements do not appear to distinguish between Law 42 payments at the 50% rate from those at the 99% rate, it is not possible to precisely determine the impact of Law 42 at 50% in 2007. This impact is certainly lower than 62.9%, since Law 42 applied at the 99% rate during November and December 2007. The figures for 2006 appear therefore more reliable to evaluate the impact of Law 42 at 50%.

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680 As explained *supra* at note 17, the combined impact of the income tax and the employment contribution is 36.5%, not 40%. However, since municipal taxes and reinvestment obligation must also be taken into account, it appears reasonable to round it up at 40% for computation purposes.

681 The exact figure is USD 23.33 million.

682 Exh. C-419, p. 6.

683 *Id*., at 9.

684 Exh. C-420, pp. 6 and 9.

685 *Id*.

686 *Id*.

427. Another way to appreciate the effects of Law 42 on Burlington's investment is to focus on the distribution of the proceeds from the sale of a barrel of oil.[687] From the proceeds of a barrel of Oriente crude oil from Block 7, the market value of which was USD 66.56 in July 2006, Burlington would have received USD 48.28 and would have made Law 42 payments at 50% for USD 18.36. The Law 42 tax would amount to 27.6% of the total value of the Oriente crude oil barrel, or slightly more than one-fourth.

428. The impact would have been greater for a barrel of Napo crude from Block 21. Although the price of Napo oil from Block 21 was lower (in July 2006 it was USD 57.43 per barrel; Oil Prices tab at the end of Martinez's direct examination bundle), the Law 42 reference price was also lower (USD 15 in April 2006). Assuming that the reference price of Law 42, adjusted for inflation, had been USD 20 per barrel in Block 21, the impact of Law 42 would have been close to one-third (the Law 42 payment would have been USD 18.715 per barrel of Napo oil, or 32.6% of the value of a Napo oil barrel).

429. In relative terms, Law 42 at 50% reduced Burlington's take on the total oil revenues (after taxes and including operating costs) produced by the Blocks from 48.9% to 34.6% in Block 7 (a 29.2% reduction), and from 57.4% to 38.6% in Block 21 (a 32.8% reduction). If Burlington's operating costs are subtracted from its revenues, Law 42 at 50% reduced Burlington's take on total oil revenues from 38.3% to 24% in Block 7 (a 37.3% reduction), and from 48.6% to 29.9% (a 38.5% reduction) in Block 21.

430. On the basis of these figures, the Tribunal is of the opinion that the effects of Law 42 at 50 % do not amount to a substantial deprivation of the value of Burlington's investment. Arbitrator Orrego Vicuña disagrees with this finding for the reasons explained in the attached dissenting opinion.

431. This conclusion is reinforced by the following facts. First, despite the enactment of Law 42 at 50%, the Consortium submitted a plan for additional investments of USD 100 million in the Oso field, which according to Burlington's own description was the "largest field in Block 7 and the center of the Block's development plans."[688] As Ecuador noted, in submitting the Oso plan, the Consortium implicitly conceded that Block 7 was economically viable even with Law 42 at the 50% rate. Second, Burlington's allegation that Block 21 was "not viable" with Law 42 at 50% is not supported by the record. As Fair Links pointed out, Burlington's financial statements

687 Law 42 applied whether there was an actual sale or not. Hence, actual proceeds were not a prerequisite for the application of Law 42.

688 Mem., ¶ 174.

for Block 21 do not show a loss but a "positive figure."[689] Third, Burlington acknowledged that there were bidders willing to acquire its interest in the Blocks despite the effects of Law 42 at 50%.[690]

432. The Parties disagree on the purpose of Law 42 at 50%. According to Burlington, the purpose of Law 42 at 50% was to force it to abdicate its rights under the PSCs and was thus expropriatory. Ecuador maintains that the purpose of Law 42 was to restore the economics of the PSCs, to prompt oil companies to negotiate with the State, and ultimately to strike a fair allocation of the oil revenues. The record does not support Burlington's allegation that the purpose behind Law 42 at 50% was expropriatory. The purpose seems rather to have been to replicate in the PSCs the effects that the price adjustment clause in the Tarapoa Contract would produce in a scenario of high oil prices, *i.e.* to share the windfall profits resulting from the higher prices on a 50/50 basis between the State and the oil company. As one Ecuadorian congressman observed in the context of the discussions of President Palacio's bill that would later become Law 42:

> "Look, it's as if it were copied, that is the proposal that the Government is making, what is already envisaged in one contract [the Tarapoa contract], and we want that this, which is already envisaged in one contract, be incorporated in the rest of the contracts."[691]

433. These facts corroborate the Tribunal's earlier conclusion that Law 42 at 50% did not substantially deprive Burlington of the value of its investment, and was therefore *not* a measure tantamount to expropriation.

d. The effects and purpose of Law 42 at 99%

434. The Parties also disagree on the effects of Law 42 at 99%. Burlington asserts that Law 42 at 99% "destroyed" the value of its investment. As a result of Law 42 at 99%,

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689 At the hearing, Mr. Mélard de Feuardent, testifying on behalf of Fair Links, explained the following in connection with the Consortium's 2006 financial statement for Block 21: "On these figures you will see the profit and loss account for Block 21. What do we see? Total income is 171.9 million […]. Total cost, 117.8 million, which leads you to a result before tax of [USD] 54 million and after tax of [USD] 28.8 million. That is not a taxable income loss. That is a positive figure. Costs are less than revenues" (Tr. 1170:5-12; Exh. C-419, p. 9). A similar analysis and conclusion would result from the 2007 financial statement for Block 21 (Exh. C-420, p. 9). Law 42 at 50% was in force from April 2006 to October 2007; thus, the 2006 and 2007 financial statements cover the entire period in which the 50% tax was applicable. This evidence appears to belie Mr. Martinez's testimony to the effect that Law 42 at 50% "effectively made Block 21 go negative in income" (Tr. 339:6-8).

690 Burlington's specifically alleged that when Law 42 at 99% was enacted, "prospective purchasers" of its Ecuadorian assets "rescinded their offers" (Mem., ¶ 261; CSM, ¶ 31.). This presupposes that these offers were valid before the Law 42 rate was increased to 99%, that is, when Law 42 at 50% was in effect.

691 Exh. C-177, at 73.

Burlington claims that it sustained a loss of USD 60 million in 2008, and it made no additional investments in either Block 7 or Block 21. In contrast, Ecuador essentially argues that Burlington sustained no loss in 2008 because Law 42 at 99% "did not alter the global trend of positive cash flows", that the Oso plan shows that Law 42 at 99% did not substantially alter the viability of Burlington's investment, and that ConocoPhillips' annual reports for 2006 to 2008 show no impairment of its Ecuadorian assets.[692]

435. Law 42 at the 99% rate applied from November 2007 to around March 2009. In 2008, the only year in which Law 42 at 99% applied for the entire year, Burlington made Law 42 payments in the amount of USD 102.33 million (42.5% of total Law 42 payments of USD 240.78 million) for Block 7,[693] and USD 100.76 million (46.25% of total Law 42 payments of USD 217.86 million) for Block 21.[694] In combination, in 2008, Burlington made Law 42 payments for a total of USD 203.09 million. The real impact of Law 42, considering that Burlington would in any event have had to pay income tax (25%) and employment contributions (15%) over this amount, amounts to USD 121.85 million.

436. The Parties specifically disagree on whether Burlington sustained losses or made profits in 2008. Their disagreement appears to stem from the different analytical tools on which they rely to value Burlington's operations. Burlington relies on its financial statements, which include amortizations for USD 106.29 million in 2008. Ecuador, by contrast, argues that financial statements and amortizations present a distorted picture of the economic reality of Burlington's operations, and that the correct analysis should focus on cash flows.

437. According to Burlington, amortization helps to assess the impact of Law 42 at 99% on its investment. In order to properly ascertain this impact, the Consortium's past investments must be taken into account, *i.e.* amortized. Burlington maintains that Fair Links wrongly excluded from its analysis the impact of the Consortium's capital expenditures. On direct examination, Mr. Martinez explained that amortization meant that a dollar spent in a given year for capital investments did not need to be accounted for in that particular year, but could be spread out over the next three to five years depending on the type of asset and the amortization rate. Mr. Martinez testified that the financial statements properly include the amortization of past investments because:

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692 Ecuador also argues that Law 42 at 99% was not expropriatory because it did not cause Burlington a "permanent" deprivation. That objection has already been disposed of in the context of Law 42 at 50% for reasons that apply with the same force here as well.

693 Fair Links ER, Appendix 11; CPHB, Annex 3.

694 Fair Links ER, Appendix 11.

> "You have to account for your capital. You have to account for the investment that you made in order to [...] generate the income. And it's, you know. If you're going to go out and buy a car, you don't buy a car with nothing. You have to account for that price, and you have to account for that investment.
>
> The amortization is just a countermeasure to account for that investment. If you summed up all the amortizations and you looked at the total investment, they'll sum up, so you have to account for that capital investment that you made, and accounting-wise that's how you do it."[695]

438. Upon examination by the Tribunal, Mr. Martinez testified that Fair Links failed to account for USD 60 million worth of capital expenditures made by the Consortium:

> "[T]he Fair Links Report [is] inaccurate. It doesn't have about $60 million worth of investment accounted for in that table [...]. When you look at what the full investments are, they don't account for it all. I can't tell you where they missed it, but they missed it. [...] [W]e spent quite a bit of money in Block 21 in 2006. We drilled, I believe, almost 11 wells, and that's not – it doesn't get reflected enough [in the Fair Links Report]"[696] (emphasis added).

439. According to Ecuador, the tool to evaluate Burlington's economic operations is a cash flow analysis, because it is not affected by accounting conventions, such as amortization, which "may distort the economic understanding" of a project.[697] On direct examination, Mr. Mélard de Feuardent of Fair Links defined cash flows, annual cash flows and cumulative cash flows:

> "What are cash flows? A very simple process. This is what you take out of your pocket when you [make] an investment, what you take out of your pocket to finance the [investment's] operation, and then what you get into your pocket as revenue for operation. The sum of these three out-of-pocket issues are what constitutes the annual cash flows. [In the graphs below], the annual cash flows are represented by the gray bars. [...].
>
> Annual cash flow will not help you to look at the overall profitability of the project [...]. The profitability of the long-term project is to be considered as the sum of the annual cash flows over the whole life of the project [...]. This sum is represented in our graph by the red line, which represent[s the] cumulative cash flow of the project starting [from] 2000 onwards"[698] (emphasis added).

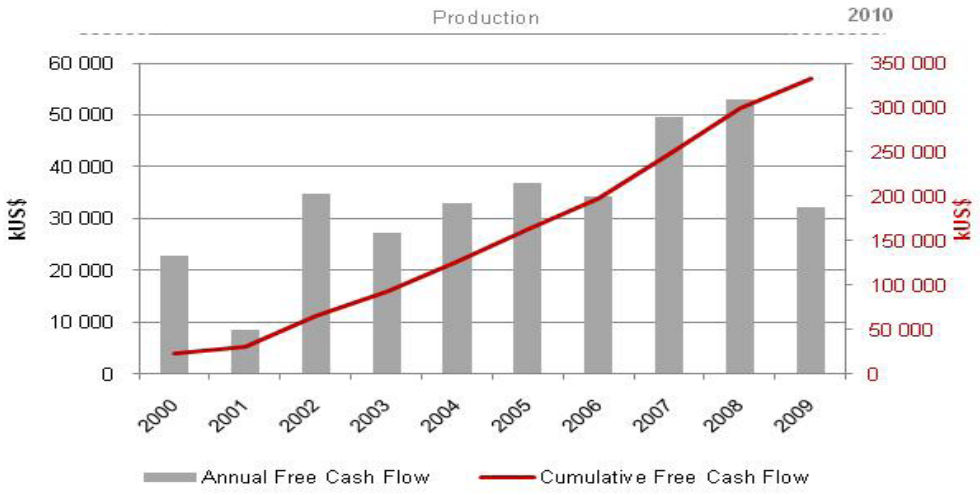
695 Tr. 346:8-20.

696 Tr. 540:10-541:8.

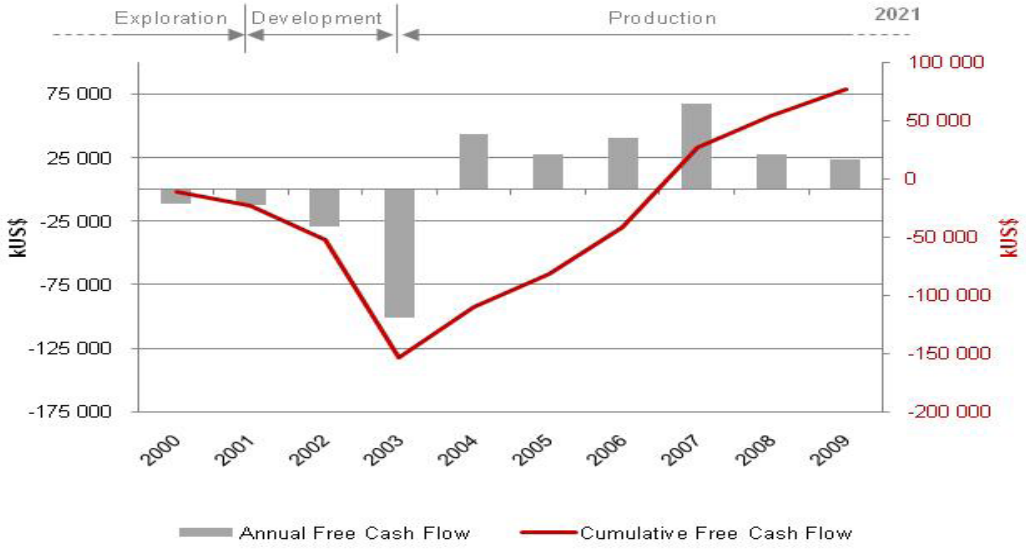
697 Fair Links ER, ¶¶ 92-93; Tr. 1163:9-16.

698 Tr. 1159:10-1161:21.

440. According to the Fair Links report,[699] the annual and cumulative free cash flows for Block 7 were as follows:



441. With respect to Block 21, the annual and cumulative free cash flows were the following:



442. On the basis of this cash flow analysis, Fair Links concluded that:

> "Law 42 and Decree 622 did not alter the global trend of positive cash flows. In fact, for both Blocks the most significant annual cash contributions over the life of the Projects are either in 2007 (Block 21) or 2008 (Block 7), i.e. when Law 42 then Decree 622 were fully applicable"[700] (emphasis added).

443. Ecuador additionally argues that Burlington's financial statements evince an excessive amortization rate. By 2008, the financial statements report an accumulated

699 Fair Links ER, p. 32

700 Fair Links ER, ¶ 94.

amortization for both Blocks of approximately 80%.[701] Fair Links further observed that by 2006, only two years after Block 21 started to produce, the amortization was at 42%. Since the PSC's life did not end until 2021, this "clearly shows that [...] there is an overburden of [] amortization."[702] As a result, Fair Links concludes that this is "a good illustration why financial statements such as [the Consortium's] are not the [right] approach to understand the profitability of a long-term contract."[703]

444. The Tribunal agrees that past investments must be accounted for and that it thus appears fair to consider amortization. At the same time, the Tribunal notes that the cumulative rate of amortization is considerable, reaching about 80% in Block 21 by 2008 – even though the Consortium was entitled to operate this Block until 2021. Even if the amortization rates used were required by Ecuadorian law, as Burlington has alleged[704], and/or are in conformity with accounting standards, this does not mean that the Tribunal must necessarily rely on those rates to determine whether there was expropriation under the Treaty.

445. It appears that the loss Burlington suffered in 2008 was attributable to such high rate of amortization.[705] Indeed, before amortization, the Consortium made profits of USD 62.3 million in 2008,[706] paying nearly USD 10 million in income taxes for that year.[707] Thus, the Tribunal considers that even if Burlington sustained an accounting loss in 2008, this

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701 Tr. 441:7-442:19.

702 Tr. 1171:1-13.

703 Tr. 1171:13-16.

704 Investments were amortized in accordance with a distinction between pre-production and production investments. Pre-production investments were amortized on a linear basis over a five-year period. Production investments, on the other hand, were amortized on a unit-of-production basis, *i.e.* seemingly as a function of the level of production, although there is no clear indication on record of how this method is to be applied (CPHB, ¶179 n. 221; Exhs. C-258 and C-259; Notes 3(f) and (g); Exhs. C-260 to C-263, Notes 3(f) and (h)).

705 Indeed, Burlington made virtually no investments in the Blocks in 2008: it invested USD 1.39 million in Block 7 and made no investment in Block 21 (CPHB, ¶ 50; Exhs. C-258 to C-260 and C-418 to C-419). Yet, its financial statements reflect amortizations for a total of USD 106.29 million. This does not allow to properly assess the effects of Law 42 at 99% in 2008, because of the weight of previous capital expenditures. In fact, in 2008, the Consortium's amortizations account for nearly 50% of the Consortium's total expenses – USD 106.29 million out of USD 224.66 million (Fair Links ER, Appendix 11; CPHB, Annex 2).

706 In 2008, the Consortium's gross profits totaled USD 180.7 million; its total costs before amortization amounted to USD 118.369. Thus, before amortization, the Consortium made profits of USD 62.3 million (Fair Links ER, Appendix 11; CPHB, Annex 2).

707 The Consortium paid income taxes for USD 9.78 million and employment contributions for USD 6.9 million. Fair Links ER, Appendix 11; CPHB, Annex 2.

is not in itself sufficient evidence that Law 42 at 99% caused a substantial deprivation of the value of its investment.[708]

446. Furthermore, the Fair Links cash flow approach, which did not disregard the Consortium's past capital expenditures but rather took them into account in the year in which they were incurred,[709] leads to the conclusion that, despite Law 42 at 99%, the Consortium was still experiencing a "global trend of positive cash flows",[710] both annual and cumulative, in each of the Blocks.[711] At the hearing, Mr. Mélard de Feuardent testified, on behalf of Fair Links, that "the cash flow was positive in 2008 [...] which mean[s] that the company was not getting money out of its pocket during operation [but] was getting money in its pocket."[712] This evidence tends to disprove Burlington's allegation of substantial deprivation.

447. Burlington has relied on the Consortium's 2008 five-year plan as evidence of its future earning projections following the enactment of Law 42.[713] The five-year plan shows that Burlington would seemingly not make new investments, that total annual oil production would decline year after year, and that as a result the production cost per barrel of oil extracted would increase.[714] The five-year projection, however, does not show that the investment would lose its capacity to generate a commercial return for Burlington in the future.[715]

448. On the other hand, the effects of Law 42 at 99% on Burlington's investment may also be evaluated by focusing on how the proceeds of a barrel of oil allocated to Burlington Oriente pursuant to the PSCs would have been distributed. For Block 7, the proceeds of a barrel of Oriente crude oil priced at USD 83.20 in November 2007, at which time the reference price adjusted for inflation was of USD 30.85,[716] would have been

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708 The Tribunal finds a similar conclusion in *Paushok*, where the tribunal made the following observation: "[A] loss of that size for one year is not a matter leading to the destruction of an ongoing enterprise […]", *Paushok*, at ¶ 334.

709 Fair Links ER, ¶ 92.

710 Fair Links ER, ¶¶ 94, 96.

711 *Id*.

712 Tr. 1228:22-1229:4.

713 Exh. C-187; Tr. 547:8-548:4, where, in response to a question from the Tribunal as to earning projections, counsel for Burlington referred to the five-year plan.

714 Exh. C-187, pp. 13, 22, 27 and 34.

715 Alex Martinez testified that, on account of the declining production and the increased production costs per barrel shown in the five-year plan, "you get to the point where you can see where it's going to cross", *i.e.* presumably where costs would exceed revenues (Tr. 547:22-548:4). On the basis of this document alone, however, it is not possible to reach the conclusion that production costs per oil barrel would have exceeded revenues in that five-year time frame.

716 RPHB, p. 89; ROSS, # 118.

allocated as follows: USD 31.37 per barrel to Burlington (USD 30.85 plus one percent of USD 52.35), and USD 51.83 per barrel to Ecuador.[717] Hence, Law 42 at 99% deprived Burlington of 62.3% of the value of each barrel of Oriente crude oil allocated to its subsidiary under the PSCs.

449. For Block 21, the original reference price as of March 1995 was USD 15.36.[718] There does not appear to be evidence on record of the statutory reference price of a barrel of Napo crude oil, adjusted for inflation, in November 2007. Assuming that the reference price was USD 19 at the time,[719] the proceeds of a barrel of Napo oil priced at USD 79.09 in November 2007[720] would have been apportioned as follows: USD 20.6 per barrel for Burlington (USD 20 plus one percent of USD 59.09) and USD 58.5 per barrel for Ecuador. Consequently, Law 42 at 99% deprived Burlington of approximately 73.9% of the value of each barrel of Napo crude oil allocated to its subsidiary under the PSCs.

450. Yet another approach to ascertain the effects of Law 42 at 99%, one that Burlington has favored in presenting its case, is to consider the percentage reduction of Burlington's total oil revenues as a result of the tax. Law 42 at 99% reduced Burlington's take on the total oil revenues produced by the Blocks – after taxes but including operating costs – from 48.9% to 20.5% in Block 7[721] (a 58% reduction), and from 57.4% to 17.1% in Block 21[722] (a 70.2% reduction). This approach confirms that Law 42 at 99% considerably diminished Burlington's profits, but does not prove that Burlington's investment became unprofitable or worthless.

451. Additionally, Ecuador has relied on the Consortium's Oso Plan and on ConocoPhillips' annual reports to show that Law 42 at 99% was not expropriatory. However, Burlington submitted the Oso Plan when the Law 42 rate was at 50% and as such this consideration is of little assistance for the 99% tax rate inquiry. Further, the fact that ConocoPhillips' annual reports show no impairment for the 2006-2008 periods tends to suggest that the group did not consider that Law 42 at 99% had substantially deprived

717 *Id*.

718 Tr. 270:1-4.

719 The evidence shows that the reference price for Block 21 was USD 19.06 in April 2008 (COSS, Overview, ## 39-40). Thus, it may be assumed that the reference price for Block 21 would have been approximately USD 19 in November 2007.

720 Fair Links ER, Exhs. 4.3.1 and 4.3.2, also included at the end of Martinez, Oil Prices tab.

721 CPHB, p. 180; COSS (Overview), # 36.

722 CPHB, p. 181; COSS (Overview), # 39.

it of its investment in Ecuador at the time.[723] On the other hand, the lack of impairment report in the annual accounts may have other explanations: the group could have considered, for instance, that it could still be compensated for the tax pursuant to the terms of the PSCs, or that it could reach a settlement with Ecuador. Thus, these considerations do not appear to be dispositive of the issue under examination.

452. With respect to the purpose of Law 42 at 99%, the Parties have presented diverging views. Burlington argues that the purpose of Law 42 was to force it to abdicate its rights under the PSCs. Ecuador, by contrast, contends that the purpose of Law 42 was threefold: (i) to restore the economic equilibrium of the PSCs; (ii) to achieve a fair allocation of the petroleum rent between the oil companies and the State; and (iii) to prompt oil companies to negotiate with the State.

453. Ecuador's allegation that Law 42 was intended to restore the economic equilibrium of the PSCs is unsupported by the record. As examined in Section IV(C)(iv), Ecuador did not invoke the PSCs when it sought to renegotiate terms with Burlington. Similarly, Ecuador applied the same tax rate to all PSCs, which suggest that such tax rate was not calibrated to restore the specific economic equilibrium of each PSC. Furthermore, when the Ecuadorian Congress discussed the bill that eventually became Law 42, an Ecuadorian congressman noted that the issue was whether the PSCs could be modified:

> "By virtue of this Law [44] various [oil] contracts were renegotiated. One of the contracts that was renegotiated in the first place was [that of] the Tarapoa block, and that renegotiation was so well done that it included the [clause] that the [first congressman] read out, by which, when the barrel of oil exceeds USD 17, [the revenues] are shared between the State and the contractor on a 50/50 basis. Then there were other renegotiations [...], and in those renegotiations, strangely, the clause that exists in the [Tarapoa] contract was not included. Now, faced with the bill sent by the President of the Republic, we have discussed whether or not we can by law unilaterally modify oil contracts with retroactive effect. That and no other is the legal issue"[724] (emphasis added).

454. Ecuador further claims that it passed Law 42 to achieve a fair allocation of the petroleum rent. The record indeed supports the proposition that Ecuador perceived the significant increase in oil prices as having created an inequitable situation where oil companies obtained undeserved windfall profits to the detriment of the State. The Tribunal acknowledges that a fair sharing of the rent may well have been Ecuador's

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723 By contrast, ConocoPhillips' annual reports for 2009, the year in which Ecuador intervened in the Blocks, do show an impairment.

724 Exh. C-177, p. 103 (Tribunal's translation).

general and indeed legitimate goal. However, under the specific facts of this case, Ecuador had an obligation to respect the tax absorption clauses included in the PSCs.

455. Finally, Ecuador argues that Law 42 was intended to prompt oil companies to negotiate with the State. While this goal may have been related to Ecuador's view that the allocation of oil revenues under the PSCs was unfair, it provides no ground to disregard Burlington's rights under the PSCs. Ecuador appears to have passed Law 42 without intending to apply the correction factor required by the tax absorption clauses of the PSCs. This course of action lends credence to Burlington's allegation that Law 42 was intended to force Burlington to abdicate its rights under the PSCs. At any rate, as the tribunal in *Tippetts* stated, "the intent of the government is less important than the effects of the measures [...]."[725] In particular, the State's intent alone cannot make up for the lack of effects amounting to a substantial deprivation of the investment.

456. Having considered all the evidence, the Tribunal is not persuaded that Law 42 at 99% substantially deprived Burlington of the value of its investment. While Law 42 at 99% diminished Burlington's profits considerably, Burlington's allegations that its investment was rendered worthless and unviable have not been substantiated. Rather, the evidence shows that, notwithstanding the enactment of Law 42 at 99%, the investment preserved its capacity to generate a commercial return. Finally, although the evidence shows that Ecuador passed Law 42 without intending to comply with the tax absorption clauses, there can be no expropriation in the absence of substantial deprivation.

457. For the foregoing reasons, the Tribunal concludes that the effects of Law 42 at 99% were not tantamount to expropriation and, accordingly, that Law 42 at 99% did not expropriate Burlington's investment. Arbitrator Orrego Vicuña disagrees with this finding for the reasons explained in the attached dissenting opinion.

3.3. Did Ecuador expropriate Burlington's investment by enforcing Law 42 through the *coactiva* process, seizures and auctions?

3.3.1. Burlington's position

458. Burlington argues that the *coactiva* seizures and auctions constituted a direct and complete taking because they had the effect of destroying the value of its investment.[726] Specifically, Burlington alleges that (i) the *coactiva* process was in breach of the PSCs and the Tribunal's provisional measures order; (ii) the *coactiva*

725 *Tippetts*, *supra* note 655.

726 CSM, ¶ 88.

process was a retaliation for Burlington's refusal to abdicate its rights under the PSCs; and (iii) the *coactiva* process was an expropriatory measure.[727]

459. First, the *coactiva* process breached the PSCs, which established that a percentage of the oil production would be allocated to Burlington. The process was also contrary to the Tribunal's provisional measures order.[728] On 14 February 2009, President Correa stated at a press conference that his country would "not pay attention to extra-regional authorities that attempt to tell us what to do or what not to do."[729] In line with this policy, Ecuador paid no heed whatsoever to the Tribunal's order that the *coactiva* process be discontinued.[730]

460. Second, Burlington submits that the *coactiva* process was a retaliation for its refusal to abandon its rights under the PSCs.[731] In June 2008, the Consortium began paying the Law 42 dues into a segregated account. For eight months, Ecuador voiced no objection against that practice. It did not register any complaint, place Burlington on notice of forfeiture, or make any effort to enforce Law 42.[732] It was only after Burlington stood its ground during the renegotiations, which broke down in December 2008, that Ecuador initiated the *coactiva* process.[733] The timing and discretionary nature of this process demonstrate that it was used as a retaliatory measure against Burlington following the breakdown of the renegotiations.[734]

461. Third, Burlington contends that the *coactiva* process was an expropriatory measure.[735] It notes that the auction process was a failure because no entity other than PetroEcuador was willing to participate in the auctions. Potential bidders were apparently dissuaded from participating because ownership over the oil cargoes was disputed.[736] This allowed PetroEcuador to acquire the auctioned oil at steep discounts ranging from 33% to 50%. The failed auction process prejudiced Burlington in that it resulted in reduced offsets of the alleged Law 42 debts. PetroEcuador, by contrast,

727 *Id*., at ¶ 87-88.
728 *Id*., at ¶ 88.
729 Exh. C-51, p. 2; Mem., ¶ 237; CSM, ¶ 37.
730 CPHB, ¶¶ 94, 97, 99.
731 CSM, ¶ 87.
732 CPHB, ¶ 247.
733 *Id*., at ¶ 93.
734 *Id*., at 90, 93.
735 CSM, ¶¶ 88, 90-91.
736 *Id*., at ¶ 53.

benefited from this failed process as it could acquire the oil at below-market prices, only to resell it at market prices.[737]

462. The *coactiva* process was a "complete taking" because it had the effect of destroying the value of Burlington's investment.[738] The *coactiva* process deprived Burlington of any income.[739] As a result, Burlington had to fund an investment from which it derived no revenue. Like the investors in *Benvenuti v. Congo* and *Starrett Housing v. Iran*, Burlington was deprived of the "right to earn revenue from the receipt of its production share."[740] Thus, the *coactiva* process was a direct taking of Burlington's tangible assets and of the economic benefits of its investment.[741] In addition, as it was found in *Saipem*, the *coactiva* process also expropriated Burlington's right to have this dispute adjudicated by an ICSID tribunal, as it was in breach of the Tribunal's provisional measures order.[742]

3.3.2. Ecuador's position

463. Ecuador states that the *coactiva* process merely enforced Law 42.[743] This process was the normal legal consequence of Burlington's failure to make its Law 42 payments.[744] Contrary to Burlington's allegations, (i) Ecuador duly considered the Tribunal's provisional measures before commencing the *coactiva* process; (ii) the *coactiva* process was initiated in application of Ecuadorian law and not in retaliation for Burlington's decision not to sign the transitory agreements; and (iii) the *coactiva* process was not an expropriatory measure.

464. First, it is not true, as Burlington would have the Tribunal believe, that Ecuador ignored the provisional measures. At the hearing, Ministers Pastor, Palacios and Pinto testified that they had given serious consideration to the Tribunal's recommendations.[745] Minister Pinto testified that Ecuador examined with great "caution the statements made by the Tribunal."[746] Under Ecuadorian law, public officials were under a duty to enforce Law 42, the breach of which would have resulted in civil and criminal liability. The

737 *Id.*, ¶¶ 54, 74; CPHB, ¶¶ 103-104; Tr. 738:10-739:2.
738 CSM, ¶ 88.
739 CPHB, ¶ 8.
740 CSM, ¶ 92.
741 *Id*., at ¶ 90-91.
742 CPHB, ¶ 137.
743 RCM, ¶ 531.
744 RPHB, § 3.1.
745 RPHB, ¶ 359.
746 Tr. 728:6-8.

enforcement of Law 42 was therefore not a matter of discretion under Ecuadorian law.[747]

465. Second, Ecuador argues that the *coactiva* process was intended to enforce Law 42, not to retaliate against Burlington. Under Ecuadorian law, PetroEcuador was empowered to collect outstanding Law 42 payments.[748] In connection with the alleged eight-month delay in initiating the *coactiva* process, Ecuador claims that it did not want to hamper the ongoing negotiations with Burlington and that Law 42 dues were calculated and liquidated annually. Thus, Ecuador had to await the end of 2008 before enforcing Law 42.[749]

466. Third, Ecuador counters Burlington's argument that the *coactiva* process was expropriatory because PetroEcuador purchased the seized production at a "steep discount." [750] At the first auction, no bids were submitted; thus, a second auction round was arranged. At this second auction, PetroEcuador submitted a bid for 50% of the appraised value of the oil, as allowed under Ecuadorian law. In all subsequent auctions, PetroEcuador submitted bids at the first round for slightly more than two-thirds of the appraised value of the oil, again in conformity with Ecuadorian law.[751]

467. PetroEcuador submitted bids only because there were no other bidders due to the Consortium's fault. In fact, the Consortium threatened legal action against any company that would acquire the seized oil. Dissuaded by these threats, no other company submitted bids.[752] This interference with the auctions harmed both the State and the Consortium, as it delayed the settlement of the outstanding Law 42 payments. Therefore, Burlington and Perenco have only themselves to blame if the auction process resulted in "reduced offsets" of the overdue Law 42 payments.[753]

468. At any rate, Burlington has failed to show that the *coactiva* process had the effect of destroying the value of its entire investment. The *coactiva* process was economically neutral, since Burlington's Law 42 debts were extinguished as its oil was seized.[754] Additionally, Burlington has wrongly argued, relying on *Saipem*, that Ecuador's decision

747 RPHB, ¶¶ 361-364.
748 RCM, ¶¶ 531-532, 536.
749 RPHB, ¶¶ 372-375.
750 RCM, ¶¶ 541-544.
751 *Id*., at ¶¶ 545-546.
752 *Id*., at ¶¶ 547-549.
753 *Id*., at ¶¶ 550-551.
754 *Id*., at ¶ 556; PO1, ¶ 84.

not to comply with the Tribunal's recommendation amounted to expropriation. *Saipem's* broad interpretation of the term investment, expressly dismissed in *GEA v. Ukraine*, is inapplicable to provisional measures the goal of which is merely to prevent an aggravation of the dispute.[755] In short, Burlington has not shown that the *coactiva* process was expropriatory.[756]

3.3.3. Analysis

a. Standard for expropriation

469. Burlington argues that the *coactiva* measures constituted a direct and complete expropriation of its investment. Relying on *LG&E v. Argentina*, Ecuador has alleged that direct expropriation is the "forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action."[757] Burlington has not taken issue with this definition, and rightly so.

470. In this investment dispute, the "property" protected by the Treaty's expropriation clause is Burlington's entire investment in Ecuador ("[i]nvestments shall not be expropriated [...]"). The forcible appropriation or taking, however, only concerned the oil that was seized and not the entire investment as it was defined above. Thus, under the Treaty, there can be no direct expropriation of the investment as a result of the seizures *per se*.

471. This being so, Burlington's submission goes further in the sense that it argues that the effect of the *coactiva* measures was not only to deprive it of the oil seized and the related revenue but more generally to destroy the economic value of its investment. In the Tribunal's view, such an effect comes closer to indirect expropriation than to a direct taking. As a result, it will resort to the same test as the one applied to the alleged expropriation by way of Law 42. In fact, Ecuador has argued – and Burlington has not objected – that the following requirements needed to be met:

(i) a substantial deprivation of the value of the whole investment ("Burlington has [] failed to demonstrate how the *coactiva* procedure has the alleged effect of destroying the value of [its] entire investment";

(ii) a permanent measure ("[a]n ephemeral taking is not expropriation"); and

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755 RPHB, ¶¶ 382-390.

756 RCM, ¶ 559.

757 RCM, ¶ 466; *LG&E v. Argentina*, Decision on Liability of 3 October 2006, at ¶ 187 (Exh. EL-140).

(iii) a measure not justified under the police power doctrine ("a State may justify deprivations of private property on the basis of its police powers in order to promote the general welfare and enforce its laws on its territory.")[758]

b. Did the *coactiva* measures enforcing Law 42 expropriate Burlington's investment?

472. The first *coactiva* seizure took place on or around 27 March 2009, when the Consortium received notice from the *coactiva* judge that an oil shipment had been seized and valued by an expert.[759] On 16 July 2009, Ecuador took possession of the fields, a new measure which, although it is part of a continuous causal chain, is analytically independent from the *coactiva* measures.[760] Thus, the *coactiva* measures proper, *i.e.* those *coactiva* measures not overlapping with Ecuador's intervention in the Blocks, only took place between 27 March and 15 July 2009. It is this three-and-a-half month period that the Tribunal will address here.

473. Pursuant to the standard set forth above, the Tribunal must ascertain whether the *coactiva* measures were a "forcible appropriation" that (i) substantially deprived Burlington of the value of its investment, (ii) on a permanent basis, and (iii) found no justification in the police powers doctrine.

474. The Tribunal must first ascertain whether the *coactiva* measures caused a substantial deprivation of the value of Burlington's investment. In principle, the economic impact of the *coactiva* measures should have been no greater than the economic impact of the tax they were designed to enforce, *i.e.* Law 42 at 99%. As Ecuador has submitted, the economic effect of the *coactiva* measures should be "economically neutral"[761]: for every dollar of oil seized and auctioned off, a dollar of Law 42 debt would have been extinguished. After all, in its letter of 2 July 2009, Ecuador had vouched to confine the *coactiva* measures to the "oil equivalent in value to the outstanding debt."[762]

475. In reality, the *coactiva* measures did not prove to be "economically neutral." They compounded the effects of the Law 42 tax at 99%. This happened because there were no bidders other than PetroEcuador during the various auction rounds held. As the sole bidder, PetroEcuador consistently made below market price bids, as is allowed under Ecuadorian law in those circumstances. The end result was that the auction

758 RCM ¶ 556, ¶ 662 and ¶ 626.

759 CSM, ¶ 45.

760 *Id*., ¶ 65; RCM, ¶ 578.

761 RCM, ¶ 556.

762 Ecuador's letter to ICSID of 2 July 2009, p. 4 (Exh. C-202).

proceeds from the oil seized were consistently lower than the actual market value of that oil.[763] Consequently, more oil than the "oil equivalent in value to the outstanding debt" would have to be seized and auctioned off to cancel that Law 42 debt. In short, the *coactiva* procedure as a matter of fact aggravated the economic impact of Law 42 at 99%.

476. The Tribunal must thus ascertain whether the compounded economic effects of the *coactiva* measures, over and above the effects of Law 42 at 99%, were attributable to Ecuador. This boils down to determine whether the absence of bidders other than PetroEcuador during the multiple auction rounds was attributable to Ecuador. Burlington initially conjectured that the reason for the absence of other bidders was that "ownership of the [oil] cargoes was in dispute and subject to the provisional measure rulings of the *Burlington* and *Perenco* tribunals."[764] Apart from the witness statement of Alex Martinez,[765] there is no evidence in support of this assertion.

477. For its part, Ecuador countered, with evidentiary support, that the reason why no other bidders participated in the auctions was that "the Consortium threatened to take legal action against any company that would purchase the [seized] oil."[766] Burlington has not denied this allegation, nor submitted evidence that would offer a different explanation for the way in which the auctions unfolded.[767] Accordingly, there is no proper evidentiary basis to attribute to Ecuador the absence of bidders other than PetroEcuador during the auction rounds. For this reason, the Tribunal finds that the compounded effects of the *coactiva* measures, over and above the effects of Law 42 at 99%, are not attributable to Ecuador.

478. Burlington claims that the *coactiva* measures were expropriatory insofar as they had "the effect of destroying the value of [its] investments."[768] These measures would have destroyed the value of Burlington's investment because they deprived it of the right to

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763 CSM, ¶¶ 53, 57, 74-76; RCM, ¶¶ 543-547.

764 CSM, ¶ 53.

765 Second Supplemental Witness Statement of Alex Martinez, 29 September 2010 (hereinafter Martinez Second Supp. WS), ¶ 10.

766 RCM, ¶ 548.

767 Burlington did argue that "private parties submitted higher bids than PetroEcuador" at the last recorded auction of 16 April 2010, but these bids "were invalidated by the *coactiva* judge" (CSM, ¶ 75). The Tribunal notes that this occurred only at the last auction in April 2010, that is, well beyond the March-July 2009 period under analysis herein. In addition, Burlington has not alleged that the invalidated bids were wrongly invalidated. Thus, this allegation is insufficient to demonstrate that the reason why there were no bidders other than PetroEcuador during the various auction rounds was attributable to Ecuador.

768 CSM, ¶ 88.

earn a revenue. The Tribunal cannot agree. Barring the issue of the absence of bidders at the auctions – which is not attributable to Ecuador –, the economic effects of the *coactiva* measures were coterminous with those of Law 42 at 99%. Since Law 42 at 99% did not deprive Burlington of the right to earn a revenue from its investment, the same conclusion must hold true with respect to the *coactiva* measures. It is true that oil seizures appear to be a more intrusive form of deprivation than tax liabilities, but from an economic standpoint the impact of the *coactiva* measures is indistinguishable from that of Law 42 at 99%.[769]

479. Burlington specifically argues that it was deprived of the right to earn a revenue, like the investors in *Benvenuti v. Congo* ("*Benvenuti*") and in *Starrett Housing v. Iran* ("*Starret Housing*").[770] Indeed, Ecuador's *coactiva* measures seized Burlington's entire oil participation share – and hence its entire revenues – for the period in which they were in place. But this was simply because they were enforcing the sum total of Burlington's unpaid Law 42 taxes for 2008.[771] Once these overdue taxes had been collected, Burlington would have continued to receive its share of oil production – with its economic value diminished by any new Law 42 taxes. At the end of the day, the economic effect of the *coactiva* measures would have been no greater than that of the Law 42 tax itself.

480. In addition, neither *Benvenuti* nor *Starret Housing* are entirely apposite to this case. While the tribunal in *Benvenuti* "held Congo liable for confiscating the first shipment of bottled water" produced by the joint venture between Benvenuti and Congo, it did not hold that such measure was expropriatory.[772] In *Starrett Housing*, on the other hand,

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769 In PO1, the Tribunal noted that Respondent's argument that the *coactiva* measures were economically neutral relative to the Law 42 tax "misse[d] the point" (PO1, ¶ 84). The context in which the Tribunal made this statement bears little resemblance to the present one. The purpose of PO1 was to provisionally forestall an aggravation of the dispute on the basis of the Tribunal's *prima facie* acquaintance with the case. Because oil seizures are more intrusive than tax liabilities, they posed a greater risk of "deteriorat[ing] the relationship" between the Parties and thus of aggravating the dispute.

770 CSM, ¶¶ 91-92.

771 Burlington did not pay the Law 42 tax to Ecuador, but rather placed the monies directly into a segregated account (CSM, ¶ 33; RCM, ¶¶ 562, 590).

772 CSM, ¶ 91; *S.A.R.L. Benvenuti & Bonfant v. Government of the People's Repulic of Congo*, Award of 8 August 1980 (Exh. CL-21). In reality, Congo did not "confiscate[] the first shipment of bottled water", as argued by Burlington. Rather, Siacongo, a State corporation, simply failed to pay for the 800,000 bottles delivered by Plasco, the joint venture between Benvenuti and Congo (*Id.,* at ¶¶ 2.17, 4.38-4.40). Specifically, Benvenuti complained that "[t]he Government did not fulfil its contractual economic obligations with respect to Plasco […] [as it did not] take steps to force Siacongo, a State company, to perform its contract with Plasco" (*Id.,* at ¶ 4.8(3)). The issue was thus one of contract performance, not of expropriation. While there was an expropriation claim, this claim concerned Benvenuti's shares in Plasco, not a shipment of bottled water) (*Id.,* at ¶¶ 4.61-62, 4.73).

the tribunal held that Iran had expropriated the claimants' right to "collect the proceeds of the [apartment] sales",[773] but only after finding that the claimants had been deprived of the "effective use and control"[774] of its property rights in the investment – a finding this Tribunal has not made at this juncture. Despite the *coactiva*, Burlington kept effective use and control over the Blocks, the oil wells and its subsidiary. These cases are thus of limited assistance for purposes of this case.

481. Furthermore, relying on *Saipem v. Bangladesh,* Burlington contends that the continuation of the *coactiva* process despite the Tribunal's provisional measures "constituted an expropriation of Burlington's right under the PSCs to have this dispute resolved by an ICSID tribunal."[775] While the Tribunal certainly does not condone Ecuador's failure to abide by the provisional measures, it cannot agree with Burlington's contention. Even assuming Burlington had a right to ICSID arbitration under the PSCs, *quod non*, the non-compliance with an order for provisional remedies, which only creates procedural rights during the arbitration (the situation here) cannot be assimilated to a court's decision to annul a final award (the situation in *Saipem*).[776] In any event, the very fact that Burlington continues to pursue this arbitration condemns this argument.

482. With respect to the purpose of the *coactiva* measures, Burlington also argues that the timing and discretion of the *coactiva* measures show that they were in retaliation for its adopting self-protective measures and insisting on preserving its contractual rights.[777] Ecuador objects that it did not wish to create a heavy-handed environment during negotiations with Burlington and that the Law 42 payments were calculated and liquidated annually, so that enforcement action could not have started in 2008.[778] The Tribunal finds that both Parties' explanations are plausible and certainly not mutually exclusive. In any event, the Tribunal regards the effects of the measures, rather than their underlying motivation, as the dispositive consideration.

483. Having reached the conclusion that the *coactiva* measures did not effect a substantial deprivation of Burlington's investment, it is unnecessary to review whether these measures were permanent or not. In point of fact, what must be permanent for

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773 *Starrett Housing Corporation v. Islamic Republic of Iran*, Iran-US CTR 122, Interlocutory Award of 19 December 1983, p. 29 (Exh. CL-20).

774 *Id*., at p. 27.

775 CPHB, ¶ 137.

776 *Saipem*, Award of 30 June 2009. (Exh. CL-159).

777 CPHB, ¶¶ 90-93.

778 RPHB, ¶¶ 365-375.

purposes of expropriation is the substantial deprivation. If there is no substantial deprivation, the question of whether such deprivation is permanent becomes moot. This is why Burlington's reliance on *Tecmed v. Mexico* ("*Tecmed*") and *Metalclad v. Mexico* ("*Metalclad*") is not entirely germane to the facts of this case.

484. Burlington relies on *Tecmed* and *Metalclad* to argue that ICSID tribunals "have not countenanced a State's confiscation of the fruit that is an investor's reward for its efforts."[779] But in *Tecmed*, the tribunal held that measures are expropriatory only if they are "irreversible and permanent"[780] and so deprive the investor of the "use and enjoyment"[781] of its investment *as if the right to earn revenue "had ceased to exist."*[782] For its part, the *Metalclad* tribunal stated that Mexico's measure "permanently prevented"[783] the use of the investment and negated "the possibility of any meaningful return", as a result of which the investor had "*completely lost its investment.*"[784] By contrast, it cannot here be affirmed that Burlington's right to earn revenue ceased to exist or that its investment was completely lost.

485. In sum, the Tribunal finds that the *coactiva* measures did not substantially deprive Burlington of the value of its investment. In these circumstances, there is no need to examine whether the effects of these measures were permanent or whether they were justified under the police powers doctrine. For these reasons, the Tribunal cannot but conclude that the *coactiva* measures did not constitute an expropriation of Burlington's investment. Arbitrator Orrego Vicuña disagrees with this finding for the reasons explained in the attached dissenting opinion.

3.4. Did Ecuador expropriate Burlington's investment by taking possession of Blocks 7 and 21?

3.4.1. Burlington's position

486. Ecuador's physical takeover of Blocks 7 and 21 in July 2009 completely expropriated Burlington's investment. This was the final step in a series of expropriatory measures.[785] As in *Vivendi II*, Ecuador's measures rendered the investment so unprofitable that Burlington was left with no rational choice other than to suspend

779 Mem., ¶¶ 446-449.

780 *Tecnicas Medioambientales TECMED S.A. v. The United Mexican States*, Award of 29 May 2003, ¶ 116 (Exh. CL-88).

781 *Id*., at ¶ 115.

782 *Id*. (emphasis added).

783 *Metalclad*,at ¶ 96

784 *Id*., at ¶ 113 (emphasis added).

785 CSM, ¶ 93.

operations.[786] Burlington submits (i) that its decision to suspend operations in the Blocks was legally and economically justified; (ii) that Ecuador's takeover of the fields was arbitrary as there is no evidence that there was a real risk of damage to the Blocks; and (iii) that Ecuador's takeover of the Blocks constituted a complete and direct expropriation of Burlington's investment.

487. First, Burlington argues that the suspension of operations was legally justified. It "was a direct consequence of Ecuador's violations of its international law obligations, including the violation of this Tribunal's Provisional Measures Order."[787] In these circumstances, Burlington could rely on the *exceptio non adimpleti contractus*, "whereby a party to a contract may suspend performance in the event that the other party is in breach […]."[788]

488. Burlington may rely on this exception under both Ecuadorian and international law. Ecuador wrongly alleges that, as a matter of Ecuadorian law, this exception does not apply to administrative contracts such as the PSCs. However, "Ecuador's own legal expert, Dr. Aguilar [...] recognizes that there is no decision or legislation in Ecuador [...] to support this."[789] Moreover, it is clear "from any logical analysis [that] hydrocarbons production is not a public service"[790] and there is thus no need to guarantee its continuous operation.[791] Thus, Burlington argues that "the Consortium's suspension was justified under Ecuadorian law."[792]

489. Burlington also relies on the *exceptio non adimpleti contractus* as a matter of international law.[793] International tribunals have held that this exception does apply "when the continued operation of services becomes unreasonable in light of State measures."[794] In *Azurix*, the tribunal stated that it would take this exception "into

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786 *Id.,* at ¶ 96; CPHB, ¶¶ 71-73.

787 Tr. 63:1-4; see also Tr. 63:5-8.

788 Tr. 64:17-20.

789 Tr. 65:2-6.

790 Tr. 1292:14-15.

791 Tr. 1292:8-18. Burlington acknowledges that hydrocarbons production may be an activity "in the public interest as a revenue generator for the State", but argues that it is not a public service by noting that one does not usually receive a "monthly bill from [the] local hydrocarbons producer" (Tr. 1292:16-18).

792 CSM, ¶ 78 n. 134.

793 Burlington states that the legality of its decision to suspend operations cannot be negated "as purely a question of Ecuadorian law", for that would "deny Burlington the autonomous protection of international law and frustrate the purpose of the Treaty" (Tr. 64:9-14). It further maintained that it is well-established that "international law prevails over domestic law" (Tr. 64:4-7).

794 Tr. 65:12-14.

account" despite the respondent's allegations that it did not apply.[795] In *Vivendi II*, the tribunal held that the State had undermined the investment to the point where it was "utterly unrealistic to suggest that" the investor "should simply have stayed put, continuing to provide services for which it was not being paid and accepting ever increasing losses."[796]

490. At any rate, the Hydrocarbons Law itself allowed the suspension of operations "for up to 30 days without just cause"[797] and "indefinitely for just cause"[798] before the State could consider terminating the PSCs. Here, Burlington's suspension was for "just cause" because "the only reason for the suspension"[799] was Ecuador's breach of the Tribunal's order. On the other hand, Ecuador's reliance on its 2008 Constitution is self-serving and should be rejected.[800] The 2008 Constitution, which declared that hydrocarbons production was a "public service" and hence not subject to suspension, only entered into effect *after* foreign investors brought international claims against Ecuador based on Law 42.[801]

491. Burlington further maintains that the suspension of operations was economically justified. It was unreasonable to expect that Burlington should have continued to fund an investment from which it could no longer derive any revenue.[802] As a result of the *coactiva*, the Consortium was responsible for all the costs and risks of production, but received zero revenue in return.[803] At the hearing, counsel for Burlington stated that, "despite reducing operational costs to the minimum"[804], the Consortium's "costs still totalled some $ 15 million from the first seizure of crude until the physical takeover of the Blocks."[805] In these circumstances, Burlington had no rational choice other than to suspend operations in the Blocks.[806]

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795 Tr. 65:14-66:12; COSS, # 61 ("Overview and Legal Framework").

796 Tr. 68:17-69:6; COSS, # 64 ("Overview and Legal Framework").

797 Tr. 67:18-19.

798 Tr. 67:16-18.

799 Tr. 1289:7-9.

800 CPHB, ¶ 119.

801 *Id*.

802 CSM, ¶ 89.

803 CPHB, ¶ 10.

804 Tr. 59:19-20.

805 Tr. 59:20-22.

806 CPHB, ¶ 10.

492. Second, Burlington submits that Ecuador's physical takeover of the fields was arbitrary as there was no real risk of damage to the Blocks.[807] Ecuador's evidence only shows a theoretical risk of damage following a shut-in. However, there is also a theoretical risk of damage when the wells are in operation. Specifically, the RPS report draws no meaningful conclusion on the likelihood that such theoretical risks would actually materialize.[808] The report is, moreover, based on incomplete information,[809] and its conclusions regarding the risks of damage to the Blocks following suspension are unsubstantiated.[810]

493. The Consortium planned to suspend operations using a well-developed protocol to minimize the risk of harm. This protocol was based on the Consortium's historical experience of suspending well operation for routine reasons.[811] Isolation tools would have prevented cross-flow, and there were no concerns of solids migrating into the reservoir or of water incompatibility.[812] As Mr. Martinez declared, "it was in the best interest of the Consortium to ensure that suspension was conducted in a proper way."[813] Thus, the theoretical risks of damage mentioned in the RPS report did not apply to Blocks 7 and 21.[814]

494. The following facts belie Ecuador's alleged fears of economic and environmental damage: (i) six months prior to the scheduled suspension, Ecuador itself asked Burlington and Ecuador to suspend operations in response to OPEC restrictions; (ii) recent field suspensions due to power failures showed no negative effects on either production or the environment; and (iii) the day of the suspension Ecuador's Minister left the country to attend celebrations in Bolivia.[815] In reality, Ecuador has raised concerns about the risks of suspension for the first time in this arbitration only to justify its takeover and final expropriation of Blocks 7 and 21.[816]

495. Third and last, Burlington argues that Ecuador's physical takeover of the Blocks was a complete and direct expropriation of Burlington's investment. This was the final step in

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807 *Id*., at ¶ 107.
808 *Id*.
809 *Id*., at ¶¶ 22, 28.
810 *Id*., at ¶¶ 25, 28.
811 *Id*., at ¶¶ 108-109.
812 *Id*., at ¶¶ 112-114.
813 *Id*., at ¶ 108; Martinez Second Supp. WS, ¶ 16.
814 CPHB, at ¶ 112.
815 *Id*., at ¶ 11.
816 *Id*., at ¶ 118.

Ecuador's series of unlawful expropriatory measures[817] and the inevitable consequence of Burlington's refusal to abdicate its rights under the PSCs.[818] It culminated Ecuador's campaign to force Burlington to migrate to a legal regime that was more beneficial to the State in times of high oil prices. As a result of this measure, Ecuador is in possession of Burlington's entire investment.[819] Thus, although no formal decree of expropriation was issued, the takeover was a complete and direct expropriation of Burlington's investment.[820]

3.4.2. Ecuador's position

496. Ecuador alleges that its intervention in the Blocks was not expropriatory.[821] On the contrary, Burlington's illegal decision to suspend operations was a "cynical gamble" designed to force Ecuador to intervene and thus create the appearance of direct expropriation.[822] Specifically, Ecuador submits (i) that Burlington's threatened suspension of operations in the Blocks was illegal[823] and not economically justified;[824] (ii) that Burlington's decision threatened significant economic loss to Ecuador and other serious harm to the Blocks;[825] and (iii) that the intervention was not expropriatory but was a temporary measure adopted in response to Burlington's unlawful conduct – as such, it was necessary, appropriate and proportionate under the circumstances. [826]

497. First, Ecuador submits that Burlington's decision to suspend operations in the Blocks was in breach of Ecuadorian law and the PSCs.[827] Under Ecuadorian law, the suspension of operations was contrary to the Constitution and to the Hydrocarbons Law.[828] Under the PSCs, Burlington committed to comply with Ecuadorian laws and regulations; further, the PSC for Block 7 specifically provided that the contractor had to continuously "perform operations in the Contract Area."[829] In accordance with

817 CSM, ¶ 93.
818 CPHB, ¶ 120.
819 CSM, ¶ 81.
820 *Id*., at ¶ 93.
821 RCM, § 7.
822 *Id*., at ¶¶ 565, 620.
823 *Id*., at ¶¶ 596-602.
824 *Id*., at ¶¶ 589-595.
825 *Id.,*at ¶ 560.
826 *Id*., at ¶ 561.
827 *Id.,* at 560; RPHB, ¶ 425.
828 RCM, at ¶¶ 597-600.
829 *Id*., at ¶¶ 601-602.

Ecuadorian administrative law, Burlington was bound to perform its obligations despite any alleged breach on the part of Ecuador.[830]

498. Burlington had no legal justification to suspend operations in the Blocks.[831] Whether as a matter of Ecuadorian or international law, it may not rely on the *exceptio non adimpleti contractus*. As a matter of Ecuadorian law, Burlington cannot rely on this exception because this exception does not apply to administrative contracts such as the PSCs and because Ecuador did not breach the PSCs.[832] As a matter of international law, the cases upon which Burlington relies are distinguishable from this case. Unlike Burlington, the investors in *Azurix* and *Vivendi II* sought to terminate their contract with the State and did not suspend operations because they were a party to a public service contract.[833]

499. In addition, Burlington did not have "just cause" to suspend operations within the meaning of the Hydrocarbons Law. Ecuador's non-compliance with the Tribunal's recommendations could not constitute "just cause" for suspension. In fact, "the recommendations were 'recommendations', *i.e.* not legally binding on Ecuador." [834] At the hearing, Ministers Palacios, Pastor and Pinto all testified that, in Ecuador's understanding, the Tribunal's provisional measures were recommendations and therefore non-binding. In the *caducidad* decrees, Minister Pastor specifically dismissed the Consortium's argument that there was "just cause" for suspension under the Hydrocarbons Law.[835]

500. Nor was Burlington's decision to unilaterally suspend operations economically justified. The *coactiva* did not leave Burlington with the "crippling prospect of continuing to operate the Blocks for the exclusive benefit of Ecuador."[836] On the contrary, as confirmed by Fair Links, Burlington had the financial wherewithal to continue operating the Blocks. The Consortium placed USD 327.4 million into a segregated account after it illegally stopped making Law 42 payments in June 2008. Those funds could have been used to keep the Blocks in operation.[837] And as Burlington itself conceded, only

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830 *Id*., at ¶¶ 604-605.

831 RPHB, ¶ 408.

832 *Id*., at ¶¶ 415-420.

833 *Id*., at ¶¶ 422-424.

834 *Id*., at ¶¶ 409-410 (internal parentheses omitted).

835 *Id*., at ¶¶ 411-412; Witness Statement of Wilson Pastor Morris of 17 January 2011, Annex 4 (p. 20) and Annex 5 (p. 20).

836 RCM, at ¶ 589.

837 *Id*., at ¶¶ 590-592; Tr. 461:17-466:12.

minimum investment was necessary to keep operating the Blocks after Law 42 was passed.[838]

501. Second, Burlington's decision to suspend operations in the Blocks threatened significant economic loss to Ecuador and other serious and permanent harm to the Blocks. As explained by RPS, Burlington's decision to shut down the oil wells created four types of risk: risk of economic loss to Ecuador, and risk of reservoir, mechanical and environmental damage.[839] As RPS observed, the shut-in of oil production would have caused economic loss to Ecuador "as a result of the deferment of production and the associated revenue."[840] The extent of this loss would be a function of the length of the shut-in and of the production rate of the wells that are shut in.[841]

502. The shut-in also threatened to cause serious and permanent reservoir, mechanical and environmental damage to Blocks 7 and 21.[842] Reservoir damage is the deterioration of flow capacity and/or the physical loss of oil reserves. This risk was significant in Blocks 7 and 21, as most of their reservoirs are water driven.[843] Mechanical damage is corrosion to the production stream of the wells, such as the wellbore tubular and pumps.[844] RPS concluded that there is "little doubt"[845] that this damage will occur to the wells in Blocks 7 and 21. Finally, environmental damage can be caused by leaks and spills related to the shut-in.[846]

503. Third, Ecuador submits that its intervention was not expropriatory but was rather a temporary measure adopted in response to Burlington's unlawful conduct – as such, it was necessary, appropriate and proportionate under the circumstances.[847] In *Saluka v. Czech Republic*, the tribunal held that "a deprivation can be justified if it [...] [is] aimed at the maintenance of public order."[848] The *Saluka* tribunal determined that the context of the impugned measure was "critical"[849] to determine its validity. As the

838 *Id*., at ¶¶ 593-595.
839 *Id*., at ¶¶ 613, 618-619.
840 RPS ER, ¶ 144 (4th bullet point).
841 *Id*.; RCM, ¶ 618.
842 *Id.,* at ¶¶ 610-613.
843 *Id*., at ¶¶ 614-615.
844 *Id*., at ¶ 616.
845 *Id*.; RPS ER, ¶ 55.
846 RCM, ¶ 617; RPS ER, ¶ 56.
847 RCM, ¶ 624.
848 *Saluka*, at ¶ 254 (Exh. CL-100.); RCM, ¶ 628.
849 *Saluka*, at ¶ 264 (Exh. CL-100.); RCM, ¶ 628

State's measure in *Saluka*, Ecuador's intervention was permissible regulatory action because it enforced Ecuadorian law.[850]

504. The intervention in the Blocks merely enforced Ecuadorian law in light of Burlington's "manifestly illegal" decision.[851] In similar circumstances, the tribunal in *Payne v. Iran* recognized that a State's decision to take control of a company could be justified on the ground that the claimant had "abandoned or […] ceased"[852] its activities. Additionally, Ecuador's measure was necessary to avoid significant economic loss and the risk of permanent damage to the Blocks. It was also appropriate because Ecuador entered the Blocks without using force. It was equally proportionate as the means employed were suited to the ends of protecting the Blocks.[853]

505. Likewise, Ecuador's intervention did not expropriate Burlington's investment because it was intended to be temporary.[854] In *Motorola v. Iran*, the tribunal held that if a State measure is temporary and necessary on account of claimant's actions or omissions, it cannot constitute expropriation.[855] As in *Motorola*, Ecuador's intervention would have ceased once the Consortium resumed operations.[856] The goal of this measure was not to permanently transfer the investor's property to the State. Accordingly, Ecuador's intervention in the Blocks cannot constitute expropriation.[857]

3.4.3. Analysis

a. Standard for expropriation

506. Burlington argues that the takeover of the Blocks constituted a direct expropriation of its investment. Ecuador does not object to reviewing the takeover under the standard applicable to direct expropriation and the Tribunal agrees. Accordingly, a State measure constitutes expropriation under the Treaty if (i) the measure deprives the investor of his investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine. The Tribunal will examine these elements in reverse order.

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850 *Id.,* at ¶¶ 632-661.

851 *Id.,* at ¶ 633.

852 *Thomas Earl Payne v. The Government of the Islamic Republic of Iran*, Iran-U.S. Cl. Tribunal, Award of 28 June 1988, ¶ 21 (Exh. EL-153); RCM, ¶ 645.

853 RCM, ¶¶ 647-661.

854 *Id.,* at ¶ 624.

855 *Motorola Inc. v. Iran National Airlines Corporation and The Government of the Islamic Republic of Iran*, Iran-U.S. Cl. Tribunal, Award of 28 June 1988, at ¶ 59 (Exh. EL-154); RCM, ¶ 645.

856 RCM, ¶¶ 663-666.

857 *Id.,* at ¶ 662.

b. Did Ecuador's taking of possession of Blocks 7 and 21 expropriate Burlington's investment?

507. On 16 July 2009, Ecuador entered and took possession of Blocks 7 and 21 after Burlington had announced, three days earlier, that operations in the Blocks would be suspended. The Tribunal must determine whether Ecuador's taking of possession of Blocks 7 and 21 constituted an expropriation of Burlington's investment. To that end, the Tribunal will first review whether Ecuador's measure was justified under the police powers doctrine. This review raises two sub-issues, namely, (i) the conditions under which Ecuador could intervene in Blocks 7 and 21 as a result of the Consortium's decision to suspend operations in Blocks 7 and 21, and (ii) the nature of the risks that the Consortium's decision to suspend operations posed to Ecuador and to the Blocks. Thereafter, the Tribunal will address (iii) the effects of Ecuador's measure on Burlington.

(i) *The conditions under which Ecuador could intervene in Blocks 7 and 21*

508. The Tribunal agrees with Ecuador's submission that, as held in *Saluka*, the context of a State measure is "critical"[858] to determine the nature of the resulting deprivation. In this case, the context of Ecuador's intervention revolves around the legality of Burlington's decision to suspend operations. According to Burlington, the decision to suspend operations was legally justified under Ecuadorian and international law; according to Ecuador, the decision was in breach of Ecuadorian law, international law and the PSCs.

509. Ecuadorian law governed the PSCs, which regulated in detail the rights and obligations of Ecuador and of Burlington's subsidiary, Burlington Oriente. The Tribunal therefore considers that Ecuadorian law should at least initially govern the question of whether the suspension was legal. In keeping with this opinion, both Parties have expressly relied on Ecuadorian law to argue for or against the legality of Burlington's suspension of operations.

510. It is true that Burlington has *also* relied on the *exceptio non adimpleti contractus* under international law. In the words of counsel for Burlington, this exception means that "a party to a contract may suspend performance in the event that the other party is in breach […]."[859] However, when that contract is, as the PSCs are here, specifically

858 *Saluka*, at ¶ 264. ("[I]nternational tribunals must consider the circumstances in which the question [of whether there is expropriation] arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.") (Exh. CL-100).

859 Tr. 64:17-20.

governed by the law of the host State, the issue of whether a party is in breach and, consequently, whether the other party may suspend performance, are to be answered initially by reference to that law.

511. Under Ecuadorian law, the most relevant provision on the issue of suspension of operations is Article 74 of the Hydrocarbons Law ("Article 74"). This provision spells out the circumstances under which the Ministry of Non-Renewable Resources (formerly the Ministry of Energy and Mines) may terminate a hydrocarbons contract by way of a *caducidad* declaration. As counsel for Ecuador explained at the hearing, "*[c]aducidad* is such an important element in the participation contracts in Ecuador that the [contracting] [p]arties expressly incorporated Article 74 [...] into the [PSCs]. It wasn't enough to say [that] the Hydrocarbons Law applies to the [c]ontract."[860] Although *caducidad* and the taking of possession are two different measures – one *de facto*, one *de jure* –, the conditions under which *caducidad* may be declared are also relevant to examine whether Ecuador was entitled to intervene in the Blocks by reason of an unlawful suspension.

512. In its relevant part, Article 74 of the Hydrocarbons Law provides the following:

> "Article 74. The Ministry of [Non-Renewable Natural Resources] may declare the *caducidad* of contracts provided that the contractor:
>
> […]
>
> 4. Suspends exploitation operations for more than thirty days without just cause, previously determined by the Ministry to be so, except for force majeure or act of God, which shall be notified to PETROECUADOR within a ten-day period […]"[861] (emphasis added).

513. Ecuador argues that the Consortium was under a legal and contractual duty to continuously operate the Blocks. The Tribunal is not convinced that this was the case. Under the plain terms of Article 74, the Ministry may not terminate a PSC if there is no suspension "for more than thirty days", regardless of whether there is "just cause" for the suspension or not. Nor may the Ministry terminate a PSC if the suspension is longer than thirty days but there is "just cause." In brief, the Hydrocarbons Law authorizes contractors to suspend operations without incurring the risk of *caducidad* for up to 30 days, regardless of "just cause", and for more than 30 days with "just cause."

860 Tr. 303:15-20.

861 Exh. EL-92, p. 25 (Tribunal's translation).

514. The 2008 Ecuadorian Constitution does not lead to a different conclusion. It prohibits the "suspension of [...] hydrocarbons production"[862] *qua* public service, but it also provides that "the law shall establish the limits"[863] to ensure the operation of these services. In the case of hydrocarbons production, these limits are those set in Article 74. Ecuador has not alleged that the 2008 Constitution somehow amended the scope of the pre-existing Article 74.

515. According to Article 74, Ecuador has the power to declare the *caducidad* of a PSC by reason of the suspension of operations, and hence eventually to intervene in the face of a an unlawful suspension, if the suspension of operations lasts for more than 30 days.[864] This condition is not met here.

516. Ecuador took possession of the Blocks on 16 July 2009, the very day on which suspension was scheduled to begin: "on 16 July 2009 – 2 hours after the scheduled suspension [...] government officials entered the Blocks and took the necessary measures [...] to guarantee the continuance of operations […]."[865] By Ecuador's own admission, the Blocks were still operating at that moment: "Blocks 7 and 21 were [] still operating at 2 pm, on 16 July 2009."[866] Ecuador submits that the suspension did not go into effect at the scheduled time because the Consortium's employees ignored the instructions to suspend operations.[867] Whatever the exact cause, the fact remains that the operations were not suspended before Ecuador took possession of the Blocks. The Consortium merely "threatened suspension",[868] as Ecuador conceded in its submissions. This is manifestly insufficient to justify *caducidad* and intervention under the terms of Article 74 of the Hydrocarbons Law.

517. Moreover, even if the suspension of operations had occurred and lasted more than 30 days,[869] the Tribunal would have concluded that the Consortium had "just cause". This

862 Exh. P-12 (exhibit submitted by PetroEcuador when it was still part of this case), Art. 326, para. 15.

863 *Id*.

864 This is an essential but not a sufficient condition for a *caducidad* declaration. In addition to a more than 30-day suspension, the contractor must have no "just cause" for suspension. Hence, the contractor can suspend operations for more 30 days without being subject to *caducidad* on condition that it has "just cause" to do so.

865 RCM, ¶ 578.

866 *Id*.

867 *Id*., at ¶ 577.

868 RCM, ¶¶ 560, 564, 566, 567, 569, 572, 575, 576, 589, 607 and 617.

869 At the time the Consortium took the decision to suspend operations, it was unclear how long the suspension would last. The evidence suggests, however, that the Consortium was prepared to suspend operations for a period longer than 30 days (Tr. 519:7-22).

follows from a review of the events preceding the suspension: Ecuador enacted the Law 42 tax, failed to absorb its effects as it should have done pursuant to its commitments under the PSCs, and eventually collected the tax by way of seizures and auctions. Hence, even if the suspension had lasted more than 30 days, Ecuador would not have been entitled to intervene in the Blocks.

518. Having reached the conclusion that the conditions for an intervention under Article 74 of the Hydrocarbons Law were not fulfilled, the Tribunal can dispense with analyzing whether Burlington could also rely on the *exceptio non adimpleti contractus* under Ecuadorian or international law. Nor is it necessary to establish whether Burlington's decision to suspend was economically justified for purposes of this analysis.

(ii) *Risks resulting from the suspension of operations*

519. The Tribunal must now examine the nature of the risks that Burlington's *decision* to suspend operations posed to Ecuador and to the Blocks. Ecuador claims that it intervened in the Blocks in order to avoid incurring significant economic losses and serious and permanent *dama*ge to the Blocks. Burlington, on the other hand, submits that Ecuador's allegations are not properly substantiated and that the theoretical risks of damage identified in the RPS report did not apply to Blocks 7 and 21. The Tribunal is not persuaded that the suspension posed such a significant risk of damage as to justify Ecuador's immediate intervention.

520. The Tribunal notes that (i) RPS did not conclude that there was a significant risk of damage, but rather a "potentially" significant risk of damage; (ii) RPS's conclusions are admittedly based on incomplete information; (iii) the evidence suggests that the risks of reservoir and mechanical damage required an extended suspension, such that an immediate intervention in the Blocks would not have been warranted; (iv) the evidence does not show that there was a significant risk of environmental damage; and (v) the evidence does not suggest that the risk of economic loss was such as to justify the intervention. These considerations are expanded upon below.

521. First, RPS did not conclude that the Consortium's suspension would have caused significant risk of damage, but rather "potentially" significant risk of damage. In its conclusions, RPS stated that shutting in producing wells caused a "potentially significant"[870] risk of reservoir and well damage. Furthermore, at the hearing, Mr. Gene Wiggins, testifying on behalf of RPS, emphasized the potential nature of the risk:

[870] RPS ER, ¶ 144 (5th bullet point).

> "**[Mr Yanos]:** Now, you sum up all your thinking on the issue of the significance of these risks [of suspension] in the last bullet [of the RPS Report], and your conclusion, as I understand it, is that each of the four categories of risks that we went through in the previous bullets [...] add up to a significant risk, is that correct?
> **[Mr Wiggins]:** Potentially a significant risk, yes.
> **[Mr Yanos]:** Potentially, right"[871] (emphasis added).

522. Second, the Tribunal notes that the RPS report is based on incomplete information. Specifically, it contains the following caveat with respect to the risk of reduced oil recovery owing to the encroachment from aquifer water: "Further study beyond the scope of this report is necessary to quantify the damage that will occur as a result of this phenomenon [...]."[872] Similar caveats are included in connection with other risks of reservoir, mechanical and environmental damage.[873] On cross-examination, Mr. Wiggins acknowledged that the word "potentially" was used because, in order to reach a more conclusive opinion, he would have to "look at the complete dataset and develop a more comprehensive understanding about what's going on."[874]

523. Similarly, there was some uncertainty about the reliability of the tests employed for the report. Ecuador submitted evidence of a trend showing a lower oil production rate in the Mono fields 1, 4 and 11 following a community strike between 27 October and 12 November 2006.[875] The Tribunal notes that the descending trend in Mono field 1 appears to be the continuation of a trend that predated the shut-in; in Mono 4, the production rate dropped to approximately 2004-2005 levels; and in Mono 11, the production rate actually increased immediately after the shut-in, before plummeting shortly thereafter to approximately 2003 production levels.[876] Referring to this evidence, Mr. Wiggins stated on direct examination that:

> "[I]nherent inaccuracies [] may exist in the data set that we deal with. We do not have flow gauges on the wells measuring production. The way the process works is [...] operators conduct intermittent tests; and, then on the basis of those tests, production is allocated to a well for a given month. So, it's--there can be some error that comes about by virtue of the tests, how they were performed, whether they were performed properly, whether they were representative"[877] (emphasis added).

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871 Tr. 1111:18-1112:4.

872 RPS ER, ¶ 43.

873 *Id*., at ¶¶ 43, 46, 48, 50, 52, 53, 55 and 65.

874 Tr. 1112:7-9.

875 Tr. 1086:5-8.

876 G. Wiggins Direct Testimony Binder, Documents 26-28.

877 Tr. 1088:3-14.

524. Third, the evidence suggests that the risks of reservoir and mechanical damage would not have materialized before an extended suspension, so that an immediate intervention in the Blocks would not have been warranted. With respect to the risk of reservoir damage due to aquifer water encroachment, the RPS report refers to a study which states that this type of damage may occur after "a *prolonged* production shutdown"[878] (emphasis added). This bolsters Mr. Martinez's testimony to the effect that the risk of aquifer water encroachment "takes a very long time"[879] to come to pass. The RPS report appears to echo this when it concludes that the extent of this damage will "depend on the duration of the shut-in period."[880] Likewise, in relation to another risk of reservoir damage, another study quoted by RPS notes that "scale commonly forms after long periods of well shut-in […]."[881]

525. RPS's evidence props up a similar conclusion with respect to the risk of mechanical damage. On direct examination, Mr. Wiggins explained that he was familiar with oil fields which were shut-in and experienced corrosion "after a period of years".[882] He concluded that if, after a shut-in, the oil well equipment is "left down-hole for *an extended period of time*, there are just very much limits to what [one] can do from a corrosion inhibition standpoint"[883] (emphasis added). Thus, the evidence does not support the proposition that the suspension of operations would have caused an immediate risk of reservoir and mechanical damage.

526. Fourth, the evidence does not suggest that there was a significant risk of environmental damage. As stated in the RPS report and readily admitted by Mr. Wiggins on cross-examination, two factors create a risk of environmental damage: naturally flowing wells and lack of supervision that could cause leaks or spills.[884] However, at the time of the scheduled suspension, only 2 of the 88 active wells in Blocks 7 and 21 were naturally flowing wells. In addition, the evidence shows that the Consortium was to keep personnel on the ground throughout the suspension.[885] The Tribunal is thus unconvinced that the suspension would have created a significant risk of environmental damage.

878 RPS ER, ¶ 40.
879 Tr. 517:15-16.
880 RPS ER, ¶ 43.
881 RPS ER, ¶ 52; Tr. 1065:3-6.
882 Tr. 1058:20-1059:3.
883 Tr. 1080:9-12.
884 RPS ER, ¶¶ 62, 66, 144 (12th bullet point); Tr. 1110:12-22.
885 Tr. 1111:5-10; Exhs. C-200 and C-213.

527. Finally, Ecuador also relies on a risk of economic loss.[886] It is true that a suspension of operations will generally produce a loss of revenues. Yet, there is no evidence of its magnitude nor of the period during which it would have accrued. Moreover, at the beginning of its direct examination, RPS qualified its conclusion that economic loss will "invariably result"[887] from a suspension of operations by noting that this conclusion "assumed a fairly constant oil price."[888] This clarification was an implicit acceptance of Mr. Martinez's testimony to the effect that the economic consequences of a shut-in depend "on the economics of the future price of crude."[889] In conclusion, the Tribunal is not persuaded that this risk was significant enough to justify the takeover.

528. Therefore, the evidence does not persuasively establish that the suspension of operations would have created a significant risk of damage. Accordingly, the Tribunal finds that Ecuador's immediate intervention in the Blocks may not be justified on the ground that it was necessary to prevent serious and permanent damage to the Blocks.

529. For these reasons, the Tribunal deems that Ecuador's entry and taking of possession of the Blocks was not justified under the police powers doctrine because (i) At the time of the taking of possession of the Blocks, Burlington's decision to suspend operations was legally justified as a matter of Ecuadorian law and (ii) the evidence does not show that Ecuador's immediate intervention in the Blocks was necessary to prevent serious and significant damage to the Blocks. The next question is to gauge the effects of Ecuador's occupation of the Blocks on Burlington.

(iii) *The effects of Ecuador's intervention in the Blocks*

530. As a purely factual matter, Ecuador's entry into and occupation of Blocks 7 and 21 dispossessed Burlington of the oil fields. Such dispossession deprived Burlington not only of its oil production share – and thus of its revenues – but also of the means of production that made those revenues possible. In a nutshell, the occupation of the Blocks deprived Burlington of all the tangible property embodying its investment in Ecuador. While Burlington still had its subsidiary's rights in the PSCs as well as the subsidiary's shares, these rights and shares had no value without possession of the oil fields and access to the oil.

886 RPS ER, ¶ 144 (4th bullet point).

887 *Id*., at ¶ 144 (last bullet point).

888 Tr. 1050:6-11.

889 Tr. 396:21-397:18.

531. Therefore, once Ecuador entered the oil fields, Burlington could no longer be deemed to exercise "effective use and control" over its investment. Ecuador argues that the takeover was not expropriatory because it was intended to be a temporary measure which would have ceased once the Consortium accepted to resume operations. The Consortium, however, was under no obligation to resume operations. On the contrary, as previously concluded, Burlington – and hence the Consortium – was entitled to suspend operations for 30 days without cause and had "just cause" to suspend operations for more than 30 days.

532. It is nevertheless true that Ecuador's occupation of the Blocks was not a permanent measure from the outset. Indeed, in the weeks following the occupation of the Blocks, Ecuador continued to communicate with the Consortium with a view to handing back possession of the Blocks on condition that the Consortium were to resume operations. At that time, there still appeared to be – in the words of the tribunal in *Sedco v. Iran* – a "reasonable prospect" that the investor could "return [to] control"[890] its investment. As long as there was such prospect, Ecuador's occupation could not be deemed to be a permanent measure.

533. On 19 August 2009, little over a month after Ecuador's occupation of the Blocks, the Minister of Mines and Oil, Germánico Pinto, sent a letter to the Consortium urging it to resume operations "within a maximum period of ten (10) days."[891] However, this demand was inconsistent with Burlington's right to suspend operations with "just cause" on account of Ecuador's breaches of the PSCs and of provisional measures order. As Ecuador had by that time neither cured those breaches nor expressed an intent to do so, Burlington still had "just cause" to suspend operations. In other words, the *status quo* at the time of this demand was no different from that which had given rise to Burlington's right to suspend operations with "just cause" to begin with. Therefore, Burlington had no obligation to accept Ecuador's demand.

534. On 28 August 2009, the Consortium answered that it "would be prepared to resume"[892] operations provided that Ecuador came "into full compliance"[893] with its legal and contractual obligations. There is no evidence that Ecuador responded to this letter or further communicated with the Consortium in relation to the possible resumption of

890 *Sedco, Inc. v. national Iranian Oil Company and the Islamic Republic of Iran*, Interlocutory Award of 28 October 1985, p. 23 (Exh. CL-160).

891 Letter from the Ministry of Mines and Oil of 19 August 2009, p.2 (Exh. C-223; Tribunal's translation.)

892 Letter from the Consortium of 28 August 2009, p.2 (Exh. C-224).

893 *Id*.

operations. Thus, Minister Pinto's letter of 19 August 2009, with its 10-day time limit, is the last evidence on record showing that Ecuador still entertained the possibility that the Consortium could regain possession of the Blocks.

535. On this basis, the Tribunal deems that, by the end of the 10-day period mentioned in Minister Pinto's letter of 19 August 2009, the possibility that the Consortium could resume operations, and hence that Burlington could regain control of the Blocks, had vanished altogether. Accordingly, the Tribunal considers that Ecuador's takeover of the Blocks became a permanent measure on 30 August 2009. As of this date, Ecuador deprived Burlington of the effective use and control of Blocks 7 and 21 on a permanent basis, and thus expropriated its investment.

536. Ecuador argues that the takeover of the Blocks did not affect the rights of Burlington's subsidiary under the PSCs. Even though these contract rights were still nominally in force after the takeover – as *caducidad* would not be declared until almost a year later, in July 2010 –, they were bereft of any real value from the moment Burlington permanently lost effective use and control of its investment. The termination of the PSCs for Blocks 7 and 21 through the *caducidad* process in July 2010 merely formalized an already prevailing state of affairs, but is otherwise irrelevant for purposes of the expropriation analysis. As a result, the Tribunal will dispense with reviewing the specific submissions and arguments made in relation to *caducidad.*

537. For the foregoing reasons, the Tribunal concludes that Ecuador's physical occupation of Blocks 7 and 21 expropriated Burlington's investment as of 30 August 2009. This being so, the next question that arises is whether this expropriation was unlawful. But prior to the examination of this question, the Tribunal will briefly address Burlington's submission that this is a case of creeping expropriation.

538. In light of the conclusion that the physical occupation effected an expropriation, the Tribunal does not believe that Ecuador's measures taken together constituted a creeping expropriation. As previously noted, creeping expropriation only exists when "none" of the challenged measures separately constitutes expropriation. In this case, the physical takeover of the Blocks does constitute expropriation in and of itself. In *Vivendi II*, for instance, no single measure was deemed to be individually expropriatory; specifically, there was no physical takeover of the investor's operations. *Vivendi II* is thus distinguishable from this case. Hence, the definition of creeping expropriation does not appear to fit the facts of this case.

539. Burlington has relied on *Revere Copper* to suggest that finding expropriation at the time of the physical takeover was too late, since the expropriation had commenced at an earlier stage. In *Revere Copper*, the tribunal held that it would be too "narrow"[894] an interpretation to require physical impact to make a finding of expropriation. On the basis of this precedent, counsel for Burlington argued at the hearing that:

> "What is significant for our purposes is the Tribunal's recognition that the cumulative impact of the inability to make rational decisions related to an investment can be as harmful to an investor as a physical, outright, troops-in weapons-out expropriation. An investor should not have to operate under conditions that substantially deprive it of the benefit of its investment before crying foul."[895]

540. The Tribunal takes no issue with this general statement, but considers that it has no application to this case. As was previously concluded, Burlington was not operating under conditions of substantial deprivation *before* Ecuador physically occupied the Blocks. Nor is it possible to conclude that before that point Burlington had lost its ability to "make rational decisions." By way of example, Burlington's decision to place the contested Law 42 payments into a segregated account while continuing to negotiate with Ecuador is but one token that such ability had not been annihilated. Accordingly, the Tribunal does not believe that this is a case of creeping expropriation.

4. Was Ecuador's Expropriation Unlawful?

4.1. Positions of the Parties

541. According to Burlington, Ecuador's expropriation was unlawful because it failed to meet the requirements of Article III(1) of the Treaty.[896] It was unlawful because Ecuador failed to offer Burlington any compensation for the expropriation[897] and because Ecuador contravened the general principles of treatment articulated in Article II(3) of the Treaty.[898] In effect, Ecuador carried out the expropriation in a manner that was

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894 The full passage reads as follows: "if physical impact on a substantial portion or all of the property or on the operation of the enterprise is needed to trigger [the expropriation clause in the contract], one must ask at what point, if ever, in a complex industrial operation such as we have here, involving large investments, will the cumulative impact of the inability to make rational decisions in fact trigger this subsection? Must one wait until there has occurred something akin to the troops coming in, little by little or all at once, in a nineteenth century sense? Must there be some physical impact? In our view such narrow interpretation of the contract of insurance does not fit the realities of today and was not intended by the [contract] framers […]", *Revere Copper* Award, at p. 60 (Exh. CL-104).

895 Tr. 79:3-10.

896 CSM, § III(B).

897 *Id*., at ¶¶ 99-101.

898 *Id*., at ¶¶ 102-107.

unfair and inequitable, arbitrary, and in contravention of Ecuador's specific obligations to Burlington – in particular, the tax absorption clauses.[899]

542. According to Ecuador, if there was expropriation, it was not unlawful.[900] First, Ecuador's failure to pay compensation does not render the alleged expropriation unlawful because it is disputed whether there was an expropriation in the first place. If it is not first established that there was in fact expropriation, there is no duty to offer compensation.[901] In *Goetz v. Burundi*, the tribunal refused to characterize the taking as unlawful because, in Ecuador's words, the State "had not yet been given an opportunity to fulfill the condition of compensation."[902] Second, at any rate, the alleged expropriation was *not* carried out in a manner that was unfair and inequitable, arbitrary, or in contravention of Ecuador's obligations to Burlington.[903]

4.2. Analysis

543. It is undisputed that Ecuador has neither paid nor offered compensation to Burlington. Many tribunals have held that the lack of payment is sufficient for the expropriation to be deemed unlawful.[904] Ecuador asserts that it offered no compensation to Burlington because it was disputed whether there was expropriation at all. While this may have been true at the time of Law 42 and the *coactiva*, there can be no legitimate dispute that Ecuador appropriated for itself the benefits of Burlington's investment from the time of the physical takeover. There can be no dispute either that Ecuador was aware that compensation was due, for it offered to pay compensation to other oil companies when it took over their operations.[905]

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899 *Id*., at ¶¶ 108-120. As per the Tribunal's previous analysis, these are in reality tax absorption clauses (see *supra* ¶ 335).

900 RCM, § 8.

901 *Id*., at ¶¶ 680-697.

902 *Id*., at ¶ 685.

903 *Id*., at ¶¶ 698-721.

904 *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. The Republic of Hungary*, Award of 2 October 2006, at ¶ 444 (Exh. CL-101); *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, Award of 22 April 2009, at ¶¶ 106-107 (Exh. CL-150); *Rumeli Telekom and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, Award of 29 July 2008, at ¶ 706 (Exh. CL-158); *Vivendi II,* at ¶ 7.5.21.

905 At the hearing, counsel for Burlington stated that "in this one case, in this one case alone and that of Burlington's partner Perenco, Ecuador claims that no compensation needs to be paid. It argues that it may […] benefit a hundred percent from the future sales of oil produced as a consequence of the massive investments […] whilst at the same time in the most recent law, the law of [July] 2010 [], those other Contractors who have had their contracts terminated because they refused to move to a Service Contract recognized that compensation is to be payable." (Tr. 69:13-70:6; *see also* Tr. 120:3-7).

544. In spite of these considerations, Ecuador made no offer of compensation. The fact thus remains that Ecuador made no "prompt, adequate and effective" payment to compensate for the expropriation of Burlington's investment. Ecuador's reliance on *Goetz v. Burundi*,[906] in which the Tribunal gave the State the option between paying compensation or withdrawing the expropriatory measure, does not change this fact. At any rate, nothing prevents Ecuador from making an offer after this decision, and possibly reaching a settlement with Burlington which would put an end to this arbitration.

545. Accordingly, the Tribunal cannot but conclude that Ecuador's expropriation was unlawful.

[906] *Antoine Goetz and others v. Republic of Burundi*, Award of 10 February 1999 (Exh. EL-22). Ecuador relied on this precedent in its original pleading; it did not insist on its application either at the hearing or in its post-hearing brief.

V. DECISION

546. For the reasons set forth above, the Arbitral Tribunal:

A. Denies Ecuador's request that Section III(B)(2) of Burlington's Supplemental Memorial on Liability be struck from the record;

B. On the outstanding jurisdictional and admissibility issues:

1. Declares that it lacks jurisdiction over Burlington's umbrella clause claims under Article II(3)(c) of the Treaty;

2. Declares that it has jurisdiction over the *caducidad* decrees in relation to the PSCs for Blocks 7 and 21;

3. Declares that Burlington's submissions in relation to the *caducidad* decrees are admissible;

C. On liability:

1. Declares that Ecuador breached Article III of the Treaty by unlawfully expropriating Burlington's investment in Blocks 7 and 21 as of 30 August 2009;

2. Declares that all different or contrary requests for relief in connection with Ecuador's liability are dismissed;

D. On further procedural steps:

1. Will take the necessary steps for the continuation of the proceedings toward the quantum phase;

2. Reserves the decision on costs for adjudication at a later stage of the proceedings.

Done on 14 December 2012

[*singed*]

Prof. Brigitte Stern

[*signed*]

Prof. Francisco Orrego Vicuña
(with dissenting opinion)

[*singed*]

Prof. Gabrielle Kaufmann-Kohler

EXHIBIT C-108

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

In the Proceeding Between

JOSEPH CHARLES LEMIRE
(Claimant)

and

UKRAINE
(Respondent)

(ICSID CASE NO. ARB/06/18)

DECISION ON JURISDICTION AND LIABILITY

Members of the Tribunal:

Professor Juan Fernández-Armesto, *President*
Mr. Jan Paulsson, *Arbitrator*
Dr. Jürgen Voss, *Arbitrator*

Secretary of the Tribunal:

Mr. Ucheora Onwuamaegbu

Representing Claimant:

Dr. Hamid G. Gharavi
Mr. Julien Fouret
Ms. Nada Sader
Derains & Gharavi
Paris, France

Representing Respondent:

Mr. John S. Willems
Mr. Michael A. Polkinghorne
Ms. Olga Mouraviova
White & Case LLP
Paris, France

Mr. Sergii Svyryba
Ms. Marta Khomyak
Ms. Olha Yaniutina
Magisters
Kyiv, Ukraine

I N D E X

GLOSSARY

2000 Award	Award dated September 18, 2000 finalizing the First Arbitration
Arbitration Clause	Dispute resolution provision contained in the Settlement Agreement which provides that all the disputes arising from or in connection with the Settlement Agreement shall be resolved through arbitration
BIT	Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment which entered into force on November 16, 1996
Centre	International Centre for Settlement of Investment Disputes
Claimant	Mr. Joseph Charles Lemire
FET	Fair and Equitable Treatment
First Arbitration	An investment arbitration proceeding filed with ICSID on November 14, 1997 between Claimant and Respondent, which was finalized by the 2000 Award
Gala	CJSC "Radiocompany Gala"
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on March 18, 1965.
Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
LNC	Law on National Television and Radio Council of Ukraine last amended in 2006
LTR	Ukrainian Law on Television and Radio Broadcasting last amended in 2006
Mirakom	CJSC "Mirakom Ukraina"
NAFTA	North American Free Trade Agreement entered into force in 1994
National Council	Ukrainian National Council for Television and Radio Broadcasting
Request	Claimant's request for arbitration against Respondent dated September 6, 2006
Respondent	Ukraine
Settlement Agreement	Agreement dated March 20, 2000 between Claimant and Respondent on the settlement of the First Arbitration
State Centre	Ukrainian State Centre of Radio Frequencies
State Committee	Ukrainian State Committee on Communications and Information Technology
UCRF	Ukrainian State Centre of Radio Frequencies
Umbrella Clause	Clause contained in Article II.3 (c) of the US-Ukraine BIT which permits a breach of contract to be characterized as a breach of the BIT
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	Principles of International Commercial Contracts adopted by UNIDROIT

I. PROCEDURE

1. On September 11, 2006, the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") received from Joseph Charles Lemire ("Mr. Lemire" or "Claimant"), a citizen of the United States, a request for arbitration (the "Request") dated September 6, 2006, against Ukraine ("Respondent").

2. On September 12, 2006, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules") acknowledged receipt of the Request and on the same day transmitted a copy thereof to Ukraine with a copy to its Embassy in Washington, D.C.

3. The Request, as supplemented by Claimant's letter of November 14, 2006, was registered by the Centre on December 8, 2006, pursuant to Article 36(3) of the ICSID Convention. By letter of the same day, the Secretary-General of ICSID, in accordance with Rules 6 and 7 of the Institution Rules, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4. The parties not having reached agreement on the number of arbitrators and the method of their appointment more than 60 days after the registration of the Request, Claimant invoked Article 37(2)(b) of the ICSID Convention by letter of February 8, 2007. Article 37(2)(b) prescribes a Tribunal consisting of three arbitrators, one appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties.

5. On February 22, 2007, Claimant appointed Mr. Jan Paulsson of France as arbitrator and on March 7, 2007, Respondent appointed Dr. Jürgen Voss of Germany as arbitrator, each of whom the parties had also appointed in the earlier concluded ICSID Additional Facility case *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1).

6. The Tribunal not having been constituted 90 days after the registration of the request, Claimant requested by letters of March 9, 2007, and March 20, 2007, that the Chairman of the ICSID Administrative Council designate an arbitrator to be the President of the Tribunal, pursuant to ICSID Arbitration Rule 4(1).

7. On June 6, 2007, the Chairman of the ICSID Administrative Council, in consultation with the parties, designated Professor Juan Fernández-Armesto, a national of Spain, as the presiding arbitrator.

8. All three arbitrators having accepted their appointments, the Secretary-General of ICSID, by letter of June 14, 2007, informed the parties that a Tribunal consisting of Professor Juan Fernández-Armesto, Mr. Jan Paulsson and Dr. Jürgen Voss, had been constituted and that the proceeding was deemed to have commenced on that day, pursuant to ICSID Arbitration Rule 6(1).

9. At the time of the filing of the Request, Claimant was represented by the law firm of Salans. From December 2008 to December 2009, Claimant was represented by the law firm of Derains Gharavi & Lazareff in Paris, France, and, subsequently, by the law firm of Derains & Gharavi.

10. By letters of June 25, 2007 and July 9, 2007, Respondent notified the Centre of the appointment of the law firm of White & Case LLP in Paris, France, and of the law firm of Magisters in Kyiv, Ukraine, as its legal representatives in this matter.

11. The first session of the Tribunal was held on July 23, 2007, at the World Bank's offices in Paris, and various aspects of procedure were determined at the session. Present at the session were:

Members of the Tribunal

Prof. Juan Fernández-Armesto, *President*
Mr. Jan Paulsson, *Arbitrator*
Dr. Jürgen Voss, *Arbitrator*

Secretary of the Tribunal

Mr. Ucheora Onwuamaegbu (*by video conference*)

Attending for Claimant

Mr. Joseph C. Lemire, *Claimant*
Mr. Sergey Denisenko, *Executive at Gala*
Ms. Julia Tumash, *Executive at Gala*
Mr. Hamid G. Gharavi, *Salans*
Ms. Brenda Horrigan, *Salans*
Mr. William Kirtley, *Salans*

Attending for Respondent

Mr. Sergiy Beketov, *Ministry of Justice of Ukraine*
Mr. John S. Willems, *White & Case LLP*
Mr. Michael Polkinghorne, *White & Case LLP*
Ms. Olga Mouraviova, *White & Case LLP*
Ms. Anna-Marta Khomyak, *Magisters*

12. On November 12, 2007, Claimant filed its Memorial on the Merits.

13. On February 25, 2008, Respondent filed a Memorial in Support of Its Objections to Jurisdiction and, on February 26, 2008, Respondent filed its Counter-Memorial on the Merits, dated February 25, 2008.

14. On March 17, 2008, Claimant filed observations on Respondent's Memorial in Support of its Objections to Jurisdiction.

15. On March 26, 2008, the Tribunal notified the parties that it had decided to join the issue of jurisdiction to the merits.

16. Also on March 26, 2008, the parties filed their respective requests for production of documents and, on April 18, 2008, exchanged responses on their respective requests for production of documents. On May 13, 2008, the Tribunal issued Procedural Order No. 1 concerning the requests for production of documents.

17. On July 31, 2008, Respondent filed a further request for production of documents. On August 8, 2008, Claimant filed observations on Respondent's request, and on August 13, 2008, Respondent filed a response to Claimant's observations of August 8, 2008. Claimant answered Respondent's request on August 28, 2008.

18. On August 15, 2008, Claimant filed a request for provisional measures, concerning Ukraine's decision to charge a certain fee for the renewal of Gala's broadcasting licence.

19. On August 20, 2008, Claimant filed its Reply on the Merits.

20. On August 29, 2008, Respondent filed a proposal for the disqualification of Mr. Jan Paulsson as arbitrator, and the proceeding was suspended in accordance with ICSID Arbitration Rule 9(6). Existing deadlines and schedule of the proceeding remained in effect and continued to run during the period of suspension of the proceeding.

21. On September 2, 2008, Respondent filed observations on Claimant's request for provisional measures.

22. On September 10, 2008, Claimant filed a response to Respondent's observations on Claimant's request for provisional measures.

23. On September 23, 2008, the Centre notified the parties that in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4), the proposal for the disqualification of Mr. Jan Paulsson had been decided by the other members of the Tribunal, Prof. Juan Fernández-Armesto and Dr. Jürgen Voss. The proposal for disqualification of Mr. Paulsson was dismissed and the suspension of the proceeding was lifted as of the date of the notification. The reasoned Decision on Respondent's proposal for the disqualification was communicated to the parties on September 29, 2008.

24. On October 22, 2008, Claimant withdrew the request for provisional measures of August 15, 2008.

25. On November 6, 2008, Respondent filed a Rejoinder on the Merits.

26. On November 13 and November 18, 2008, Claimant filed requests for production of witnesses**,** and on November 14, 2008, the parties filed witness statements.

27. On November 19, 2009, the President of the Tribunal held a pre-hearing conference by telephone with the parties.

28. On November 25, 2008, Respondent filed observations on Claimant's requests of November 13 and 18, 2008, for production of witnesses.

29. On December 1, 2008, the parties filed rebuttal witness statements and on December 3, 2008, the President of the Tribunal held a further pre-hearing conference by telephone with the parties.

30. The hearing on jurisdiction and the merits was held from December 8, 2008 to December 12, 2008, at the at the World Bank's offices in Paris. Present at the hearing were:

Members of the Tribunal

Prof. Juan Fernández-Armesto, *President*
Mr. Jan Paulsson, *Arbitrator*
Dr. Jürgen Voss, *Arbitrator*

Assistant to the Tribunal

Ms. Deva Villanúa Gómez

Attending for Claimant

Mr. Joseph C. Lemire, *Claimant's witness*
Mr. Hamid G. Gharavi, *Derains Gharavi & Lazareff*
Mr. Nabil Lodey, *Derains Gharavi & Lazareff*
Mr. Julien Fouret, *Derains Gharavi & Lazareff*
Ms. Nada Sader, *Derains Gharavi & Lazareff*
Mr. Sergiy Koziakov, *Derains Gharavi & Lazareff*
Mr. Eric Degand, *witness*
Mr. Viktor Petrenko, *Claimant's witness*
Mr. Paval Shylko, *witness*
Mr. Piotr Jalowiec, *witness*
Mr. Sergey Denisenko, *witness*
Dr. Andre Wiegand, *expert*
Dr. Klaus Goldhammer, *expert*

Attending for Respondent

Mr. John S. Willems, *White & Case LLP*
Mr. Michael Polkinghorne, *White & Case LLP*
Ms. Olga Mouraviova, *White & Case LLP*
Mr. Sergii Svyryba, *Magisters*
Ms. Nathalie Makowski, *White & Case LLP*
Ms. Olga Boltenko, *White & Case LLP*
Ms. Olga Glukhovska, *Magisters*
Ms. Olga Ianiutina, *Magisters*
Mr. Markiian Kliuchkovskyi, *Magisters*
Ms. Tuuli Timonen, *White & Case LLP*
Ms. Renee Bissell, *White & Case LLP*
Ms. Ludmila Zaporozhets, *National Television and Radio Broadcasting Council of Ukraine*
Mr. Vitaliy Shevchenko, *witness*
Mr. Ihor Kurus, *witness*

Mr. Volodymyr Kirichenko, *witness*
Mr. Iulian Leliukh, *witness*
Mr. Viktor Petrenko, *Respondent's witness*
Mr. Vladyslav Lyasovskyi, *witness*
Ms. Olena Volska, *expert*

31. As decided at the hearing, the parties filed their respective post-hearing briefs on March 4, 2009 and their respective statements of costs on March 20, 2009.

32. Members of the Tribunal deliberated using various means of communication.

II. BASIC FACTS

33. This dispute was submitted to ICSID by Claimant against Respondent under (1) the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, done in Kyiv on October 17, 1996 (the "BIT") and (2) an agreement between Claimant and Respondent on the settlement of a dispute, dated March 20, 2000 (the "Settlement Agreement"), which was recorded as an award on agreed terms on September 18, 2000 (ICSID No. ARB (AF) 98/1 (the "2000 Award").

34. Article VI of the BIT entitles any national of a State party to the BIT to submit to ICSID any dispute with the other State party to the BIT relating to either *"an investment agreement between that Party and such national"* or *"an alleged breach of any right conferred or created by this Treaty with respect to an investment"*.

35. On November 14, 1997, Claimant filed with ICSID a first arbitration request (the "First Arbitration") against Respondent, with regard to the same investments that underlie the present arbitration. This First Arbitration eventually led to the Settlement Agreement, which was then recorded in the 2000 Award. Paragraph 31 of the Settlement Agreement provides for the resolution of all disputes arising from or in connection with the Agreement by ICSID Arbitration in accordance with the ICSID Additional Facility Arbitration Rules.

III. THE PARTIES

36. Claimant, Mr. Joseph Charles Lemire, is a national of the United States of America residing at 91 Saksagansko St., Office 8,01032 Kiev, Ukraine. Claimant is a majority shareholder, through CJSC "Mirakom Ukraina" ("Mirakom") of CJSC "Radiocompany Gala" ("Gala"), a closed joint stock company constituted in 1995 under the laws of Ukraine with its principal office located at the same address as Mr. Lemire's residence. Gala is a music radio station in Ukraine currently licenced to broadcast on various frequencies in Ukraine.

37. Respondent is the State of Ukraine. With respect to the events giving rise to the present arbitration, Respondent has acted through its President, Prime Minister, Parliament, Ministry of Defence, the National Council for Television and Radio Broadcasting (the "National Council"), the Ukrainian State Centre of Radio Frequencies (the "State Centre"), the State Committee on Communications and Information Technology (the "State Committee"), all of which are organs for which Ukraine is responsible under international law.

IV. RELIEF SOUGHT

38. Claimant seeks relief for alleged breaches of the Settlement Agreement/2000 Award and for alleged breaches of the BIT following the 2000 Award. More specifically, Claimant seeks[1]:

a) a decision declaring that Respondent has breached the 2000 Award and the BIT;

39. b) a decision ordering Respondent to pay Claimant damages in the amount of 55,173 million USD on account of its breaches of the 2000 Award and the BIT which had the effect of preventing Claimant from developing Gala into a full national network as of January 1, 2001 and from establishing two other national networks (an FM radio network as of January 1, 2002 and an AM network as of July 1, 2004); or

- alternatively ordering Respondent to pay Claimant damages in the amount of 51,277 million USD on account of its breaches of the 2000 Award and the BIT which blocked Claimant from developing Gala into a full national network as of January 1, 2004 and developing a second FM national network as of January 1, 2002; or

- alternatively ordering Respondent to pay Claimant damages in the amount of 34,732 million USD on account of its breaches of the 2000 Award and the BIT which blocked Claimant from developing Gala into a full national network as of January 1, 2001;

c) a decision ordering Respondent to pay Claimant damages in the amount of one million USD for Respondent's failure to take reasonable measures to correct interference with Gala's 100 FM frequency, in breach of the Award and the BIT from the year 2000 to August 2008;

d) a decision ordering Respondent to pay Claimant damages in the amount of 958,000 USD representing loss of profits for Respondent's enactment of the Law on Television and Radio Broadcasting (the "LTR") and/or application thereof in breach of the BIT;

e) a decision ordering Respondent to pay Claimant moral damages in the amount of three million USD for Respondent's harassment of Claimant, in breach of the BIT;

f) the costs of this arbitration, including all expenses that Claimant has incurred, legal counsel, experts and consultants, as well as Claimant's internal costs in pursuing this arbitration, all of the fees and expenses of the arbitrators, fees for use of the facilities of the Centre;

[1] Claimant's Post-Hearing Memorial, para. 151.

g) compound interest at a rate of LIBOR + 3, compounded semi-annually, to be established on the above amounts as of the date these amounts are determined to have been due to Claimant; and

h) any such other and further relief as the Arbitral Tribunal shall deem appropriate.

40. Respondent seeks[2]:

a) a decision dismissing all Claimant's claims, or a substantial part thereof, for lack of jurisdiction;

b) a decision dismissing Claimant's claims in their entirety; and

c) a decision awarding to Respondent its fees, costs and expenses in connection with this proceeding.

[2] Respondent's Rejoinder, para. 252; Respondent's Post-Hearing Memorial, para. 653.

V. JURISDICTION

41. The Tribunal has decided to join Respondent's objections on jurisdiction to the merits of the dispute, in accordance with Article 41(2) of the ICSID Convention.

V.1. POSITIONS OF CLAIMANT AND RESPONDENT

42. Claimant's basic allegations in this arbitration are twofold:

- first, that Respondent's actions constitute a breach of the Settlement Agreement; and
- second, that Respondent has breached the BIT by subjecting Claimant to unfair, inequitable, arbitrary and discriminatory treatment, harassment and creeping expropriation and by enacting a new law in violation of Article II.6 of the BIT.

43. Respondent raises a number of jurisdictional objections[3]:

- that the Centre lacks jurisdiction for claims arising out of the Settlement Agreement;
- that there is no investment underlying the claims related to the tenders for additional frequencies;
- that Claimant's capital invested did not emanate from abroad as required;
- that Claimant has not made out a *prima facie* case of expropriation.

44. Claimant denies these jurisdictional objections and affirms the Centre's jurisdiction and the Tribunal's competence to decide all claims raised.

V.2. DECISION OF THE TRIBUNAL

45. In order for the Centre to have jurisdiction and for the Tribunal to have competence with regard to these claims, four well known conditions must be met, three deriving from Article 25 of the ICSID Convention and a fourth resulting from the general principle of law of non-retroactivity:

- first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State;
- second, a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment;
- third, a condition *ratione voluntatis*: the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration;
- fourth, a condition *ratione temporis*: the ICSID Convention must have been applicable at the relevant time.

[3] Respondent's Memorial in Support of its Objections to Jurisdiction; Respondent's Rejoinder, paras. 146-256.

46. The jurisdictional requirements of Article 25 of the ICSID Convention must be read in conjunction with those of the BIT. The relevant provisions are Article VI.1 and VI.4 of the BIT, which read as follows:

> *"VI.1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.*
> *[…]*
> *VI.4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:*
>
> > *(a) written consent of the parties to the dispute for purposes of chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and*
> >
> > *(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958."*

47. In addition, Article I.1(a) of the BIT defines the term "investment":

> "*I.1. For the purposes of this Treaty,*
> *(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly of indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; ..."*

48. Jurisdiction *ratione temporis* has not been challenged and the Tribunal will not analyze it. It will focus on jurisdiction *ratione personae* (V.3), *materiae* (V.4) and *voluntatis* (V.5).

V.3. JURISDICTION *RATIONE PERSONAE*

49. Claimant is, and at all relevant times has been, a national of the United States and thus a *"national of another Contracting State"* under Article 25 of the ICSID Convention as well as a "*national of a Party*" under the BIT. Ukraine, since July 7, 2000, is a State Party to both the ICSID Convention and to the BIT.

50. The requirements for ICSID jurisdiction *ratione personae* are hence satisfied.

V.4. JURISDICTION *RATIONE MATERIAE*

51. Article 25(1) of the ICSID Convention further requires a "*legal dispute arising directly out of an investment*". Claimant submits that he has made investments in Gala Radio and that he is Gala's major shareholder. It is undisputed that the present dispute is a legal dispute and that it arose directly out of these investments.

Claimant's investment

52. Gala was not founded by Mr. Lemire – in fact, Ukrainian legislation requires that radio broadcasters be founded by Ukrainian nationals[4]. The law however authorizes foreign investments in the broadcasting sector (Article 12.3 of LTR). Mr. Lemire bought participations in Gala, an existing company, which already had a radio licence, and which had been promoted by a Ukrainian citizen, Mr. Glieb Maliutin[5], and founded by a Ukrainian company called Provisen. On June 8, 1995, two Investment Agreements were signed by Mr. Lemire providing (somewhat diffusely) for contributions in cash and in kind amounting to 290,000 USD plus 3,000,000 USD[6].

53. The actual amount contributed by Mr. Lemire is disputed. Respondent's expert acknowledges that at least 141,000 USD were invested by Mr. Lemire[7] and Respondent has accepted an investment of 236,000 USD[8]. Claimant himself states that his investment amounts to well over 5,000,000 USD[9]. This number seems to include real estate held in Mr. Lemire's name, and let rent free to Gala, and payments made directly by him on behalf of the company[10]. No document has actually been produced in this arbitration, giving a precise breakdown of Mr. Lemire's contributions. It seems, moreover, that for accounting purposes, the expenditures made directly by Mr. Lemire on behalf of Gala are not recorded in Gala's books[11].

54. Summing up the evidence, the Tribunal has no doubt that Mr. Lemire actually made an investment in Ukraine, although the undisputed total amount is only 236,000 USD. Respondent has not challenged that Mr. Lemire is – at least since 2006 – indirect owner of 100% of the share capital of Gala. The evidence shows that Mr. Lemire has made payments with his own moneys on behalf of Gala. But the record of the actual amounts paid has not been produced, and that the total exceeds 5,000,000 USD is nothing more than affirmation[12].

[4] Article 13 of the 1993 Law on Television and Broadcasting
[5] Respondent has presented a Witness Statement from Mr. Maliutin.
[6] Annex F of EBS Expert Report.
[7] EBS Expert Report, p. 5.
[8] Respondent's Exhibit at the hearing RH-1, p. 23.
[9] Mr. Lemire, Hearing Transcript 1, p. 279, at 10.
[10] Mr. Lemire, Hearing Transcript 1, p. 281, at 14.
[11] Mr. Lemire, Hearing Transcript 1, p. 286, at 23.
[12] Mr. Lemire, Hearing Transcript, p. 285, para. 20 and p. 304, para. 9.

55. It is immaterial that Claimant holds his controlling stake in Gala through Mirakom. Article I.1(a) of the BIT accords treaty protection to "*every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals…of the other Party*".

Transfer of funds from abroad

56. Respondent further submits that Claimant has failed to prove the transfer of his invested funds into Ukraine from abroad. However, neither the BIT nor the ICSID Convention includes an origin-of-capital requirement. Nor is such a requirement to be inferred from the purposes of the BIT and/or the ICSID Convention.

57. In setting out the purposes of the BIT, the Preamble emphasises the promotion of investments of nationals of one party in the territory of the other, without any reference to the origin of the funds invested; and Article I.3 of the BIT implies that reinvested earnings qualify as investments under the BIT; these earnings by definition originate within the host country.

58. Moreover, Claimant's certificate of registration dated September 18, 1995 shows that at least part of his investment capital originates from abroad; this suffices for jurisdictional purposes.

59. Hence, the requirements for ICSID jurisdiction are also satisfied *ratione materiae.*

V.5. JURISDICTION *RATIONE VOLUNTATIS*

60. A singular feature of this arbitration is that consent to ICSID arbitration was formalized in two different legal instruments: the Settlement Agreement and the BIT. Each will be analyzed separately.

A) Jurisdiction With Respect to Claims Based on an Alleged Breach of the Settlement Agreement/2000 Award

61. The Settlement Agreement contains the following dispute resolution provision in clause 31 (the "Arbitration Clause"):

> *"All the disputes arising from or in connection with this Agreement shall be settled by negotiations. In the event no solution is achieved within 60 days from the date of beginning of negotiations, either party may address to the ICSID its application for settlement under the ICSID Additional Facility Arbitration Rules."*

62. Respondent however objects to the Tribunal's jurisdiction for alleged claims under the Settlement Agreement on two grounds, namely the fact that (a) the Settlement Agreement was recorded as an award, and (b) the Arbitration Clause refers, for settlement of disputes under the Agreement, to the ICSID Additional Facility Arbitration Rules, rather than the ICSID Arbitration Rules.

a) Settlement Agreement as an award

63. Respondent argues that the parties voluntarily transformed the Settlement Agreement into an enforceable award, in order to benefit from the jurisdictional effect of such measure. Claimant thus waived his right to the dispute resolution mechanism contained in the original accord[13]. Awards under the ICSID Additional Facility must be enforced through the New York Convention – there is no scope for enforcement through the arbitration clause inserted in the Settlement Agreement.

64. The Tribunal disagrees with Respondent's theory. It is not supported by the text of the ICSID Convention or applicable arbitration rules, and it is based on a misunderstanding of the differences between disputes arising out of a contract and enforcement of an award.

65. The Settlement Agreement is first and foremost a contract, product of consent expressed by both parties. Settlement agreements, like all contracts, may give rise to disputes. In the Settlement Agreement Mr. Lemire and Ukraine agreed that disputes arising "*from or in connection*" with this contract should be settled by arbitration.

66. After executing the Settlement Agreement both parties requested, and the Tribunal in the First Arbitration agreed that "the Tribunal shall record the settlement in the form of an award" (as authorized by Article 49(2) of the ICSID Additional Facility Arbitration Rules).

67. The precise text of the 2000 Award is as follows:

> *"Accordingly the Tribunal orders unanimously that the said agreement between the Parties as set forth below shall be recorded verbatim as an award on agreed terms"*.

And then the award copies *ad pedem literae* the full text of the Settlement Agreement, including the Arbitration Clause.

68. Respondent's basic argument is that, by accepting that the Settlement Agreement be recorded as an award, Claimant was waiving his right to the Arbitration Clause.

69. The Tribunal disagrees. There is no hint that, by requesting the Tribunal to issue the consent award, Claimant proposed and Respondent accepted neutralisation of the Arbitration Clause.

70. It is very telling that the 2000 Award reproduces the complete text of the Settlement Agreement, including the Arbitration Clause. The parties could have requested that the Arbitration Clause be excluded from the 2000 Award. They did not. What the 2000 Award proves is that as of the date of the request of its issuance, each party reiterated its consent that all disputes arising from or in connection with the Settlement Agreement be solved by arbitration.

[13] Respondent's Rejoinder, para. 155.

71. In fact, the purpose and meaning of the consent award is very transparent. What the parties were seeking when they asked for the 2000 Award was twofold:

- on the one hand, they wished to have the possibility of recognition and enforcement of the Settlement Agreement through the New York Convention; i.e. that a Court recognise the legal force and effect of the award and ensure that it is carried out in accordance with its terms;
- on the other, if any dispute arose from or in connection with the Settlement Agreement, the parties reiterated their agreement that disputes should be resolved by arbitration.

72. With regard to the Settlement Agreement, the relief sought by Claimant in this arbitration is a declaration that Respondent has breached its obligations and an order for payment of damages. The thrust of Claimant's argument is that during the execution of the Settlement Agreement, Respondent has defaulted. Respondent denies such accusation. Consequently, a dispute regarding the execution of the Settlement Agreement has arisen.

73. This dispute can and must be submitted to arbitration in accordance with Clause 31 of the Settlement Agreement:

- first, because that is what the parties bargained for in the Arbitration Clause; and
- second, because a procedure under the New York Convention before a national Court can only result in the recognition and enforcement of the award, not in resolving a dispute related to the breach of obligations and the determination of damages; if Claimant had submitted the relief sought in this procedure to a national Court, Respondent could have validly raised the defence of Article II.3 of the New York Convention[14], and requested that the judge refer the dispute to arbitration.

b) Reference to ICSID Additional Facility Arbitration Rules

74. The Arbitration Clause provides for "*settlement under the ICSID Additional Facility Arbitration Rules*" of "*all the disputes arising from or in connection with this Agreement*".

75. When the Settlement Agreement was signed on March 20, 2000 Ukraine had not ratified the ICSID Convention, and consequently the Centre could only administer arbitrations involving Ukraine under the Additional Facility Rules (Article 2(a)). Things moved quickly thereafter. On July 7, 2000 the ICSID Convention entered into force in Ukraine. With the effectiveness in Ukraine of the ICSID Convention, the Additional Facility became unavailable and was superseded by arbitration under ICSID Rules. Notwithstanding this fact, the

[14] Article II.3 of the New York Convention provides that: "*The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*".

parties requested, and on September 18, 2000 the Tribunal in the First Arbitration issued the 2000 Award, with an unchanged Arbitration Clause.

76. Claimant argues that the reference to the Additional Facility in the Arbitration Clause implicitly includes a reference to ICSID proper, once it became available[15].

77. Respondent objects and refers to the clear, unambiguous terms of the Arbitration Clause[16].

78. On this issue the Tribunal sides with Claimant.

79. The Arbitration Clause states that *"either party may address to the ICSID its application for settlement"*, and then adds *"under the ICSID Additional Facility Arbitration Rules"*. These Rules were available when the Clause was signed, but no longer once the Clause was incorporated into the 2000 Award, and since then they have ceased to be available. They have been superseded by the ICSID Arbitration Rules.

80. Imprecise arbitration clauses are a frequent occurrence in commercial arbitration. They must be interpreted by the arbitrators, in order to restore the true intention of the parties, distorted by the parties' ignorance of the mechanics of arbitration, error in designating the correct institution or rules, or, as here, supervening legal developments[17].

81. In our case, the true intent of the parties is very clear: the Arbitration Clause explicitly says that "*either party may address to ICSID its application for the settlement*" of the dispute. The very wording of the Arbitration Clause evidences the parties' wish that disputes arising from the Settlement Agreement be settled through arbitration administered by ICSID, and not through any other dispute settlement mechanism, nor by any national Court.

82. Where the parties were unclear is not in the description of the dispute settlement mechanism which they preferred, but in an ancillary point: the precise rules which the institution entrusted with the administration of the arbitration should apply. The parties correctly referred to the Rules which were applicable at the time the Settlement Agreement was executed – the ICSID Additional Facility Arbitration Rules. And when the Settlement Agreement was recorded as an award a couple of months later, they did not take into account that in the meantime Ukraine had ratified the ICSID Convention, that the applicable arbitration rules now were the ICSID Arbitration Rules, and that the rules which they were referring to– the ICSID Additional Facility Rules – were in fact no longer available.

[15] Claimant's letter dated March 17, 2008, paras. 13 and 14; Claimant's Reply Memorial, paras. 39-43.
[16] Respondent's Memorial in Support of its Objections to Jurisdiction, para. 19.
[17] This is not controversial: see e.g. Fouchard/Gaillard/Goldman, "International Commercial Arbitration" (1999), p. 263.

83. The ambiguity elided by the parties when they recorded the Settlement Agreement as an award is purely technical and ancillary, and cannot distort the real intent: that any dispute arising from or in connection with the Settlement Agreement be settled by arbitration administered by ICSID, and governed by the appropriate rules approved by the Centre: before Ukraine had ratified the ICSID Convention, the ICSID Additional Facility Arbitration Rules; thereafter, the ordinary ICSID Arbitration Rules.

B) Jurisdiction With Respect to Claims Based on an Alleged Violation of the BIT

84. By Article VI.3 of the BIT, Ukraine agreed that investment disputes with American investors be submitted to arbitration administered by the Centre. Claimant accepted the offer by filing this arbitration. Respondent objects to the Centre's jurisdiction and the Tribunal's competence, but not with regard to the claims *in toto*, but only with regard to some specific claims.

85. These claims, and the reasons for objecting to jurisdiction, are explained in the following paragraphs.

a) Claims related to tenders for frequencies and broadcasting licences

86. Respondent objects to the Tribunal's competence with respect to claims arising out of Claimant's failure in tenders for additional frequencies on the ground that such tenders precede investments and that pre-investment activities fall outside the ICSID Convention. Respondent, however, seems to concede that such pre-investment activities are within the scope of the BIT[18].

87. Claimant disagrees[19], arguing that Mr. Lemire established investments in radio networks in Ukraine, and that they were harmed by Respondent's acts and omissions.

88. The Tribunal sides with Claimant.

Pre-investment activities

89. Mr. Lemire's claim related to tenders for frequencies and broadcasting licences does not refer to, and cannot be considered as, a pre-investment activity. Pre-investment activities are those which precede the actual investment. Whether pre-investment activities merit treaty protection is debatable. But it is irrelevant for the purpose of adjudicating Claimant's claims in this arbitration, since the Tribunal has already established that Mr. Lemire has made investments in Gala Radio and is Gala's sole shareholder, and that these investments qualify for protection under the BIT.

90. If an investor claims that his investment, once made, was subsequently denied frequencies and broadcasting licences in violation of Ukraine's obligations as assumed in the BIT, this claim constitutes an "investment dispute" for the

[18] Respondent's Rejoinder, para. 184.
[19] Claimant's Reply Memorial, para. 52.

purposes of Article VI of the BIT; the Centre has jurisdiction and the Tribunal competence to adjudicate it.

91. This conclusion is confirmed by the text of the BIT. The BIT expressly extends protection to "*associated activities*" which include "*access to …licences, permits and other approvals….*" (see Articles I.1 (e) and II.11 (b) of the BIT). Article II.3 (b) moreover provides that "*Neither Party shall in any way impair by arbitrary or discriminatory measures the . . . expansion . . . of investments"*. The allocation of frequencies was a condition for Claimant's ability to expand his investment. Claimant's allegations related to tenders for frequencies and licences thus fall within the scope of the BIT.

Article 25(1) of the ICSID Convention

92. Respondent submits that disputes related to the allocation of new frequencies, while arguably within the ambit of the BIT, do not arise "*directly*" out of an investment and therefore fall short of the requirements of Article 25(1) of the ICSID Convention. In Respondent's view, moreover, the narrower definition in the ICSID Convention prevails over the broader definition in the BIT.

93. The Tribunal sees the force in Respondent's submission that bilateral treaties cannot extend the scope of the multilateral ICSID Convention. However, where the ICSID Convention is open to interpretation, such interpretation should seek compatibility rather than contradiction.

94. The Tribunal must therefore determine whether disputes related to the allocation of frequencies and issuance of broadcasting licences may be considered as "*arising directly out of an investment*" within the meaning of Article 25(1) of the ICSID Convention. For this purpose, Claimant's case must be distinguished from the scenario where an applicant intends to enter a market for the first time. In such scenario, the application for frequencies and licences indeed is a step towards facilitating a planned investment, because no investment exists at the time of the allocation process.

95. In the present case, Claimant had already invested in Gala Radio; and Gala was a going concern at the time of the tenders. The applications for additional frequencies and licences formed an integral part of Gala's business operations. They were intended to defend and expand Gala's market share against growing competition and thus enhance the sustainability and profitability of Claimant's investment. Disputes affecting these objectives thus are directly related to Claimant's investment as controlling shareholder of Gala.

96. In accordance with the purposes of the ICSID Convention and consistent with its wording, the Tribunal therefore affirms its jurisdiction for disputes arising out of Gala's treatment in tender proceedings for additional frequencies and licences.

97. For this conclusion, it is immaterial whether the receipt of additional frequencies had already been envisaged in Claimant's initial business plan and whether Respondent had made any commitment to support such a business

plan. It suffices that the additional frequencies were sought by Gala as part of its strategy to defend and/or expand its market share.

98. It is furthermore immaterial whether additional frequencies were sought to extend the reach of Gala's existing program or to access new audiences with newly designed programs. In either case, the applications were part of Gala's business strategy to maintain and enhance its position in the Ukrainian market. They formed an integral part of Gala's overall business operation. The Tribunal's assumption of competence thus extends to applications by Gala for frequencies with a view to creating new networks for young and mature audiences[20].

b) Claimant has failed to establish a *prima facie* case of expropriation

99. Respondent has raised the issue that there is an initial threshold that must be crossed by any claimant arguing expropriation: that the facts adduced show at least *prima facie* the legal requirements of expropriation under international law[21]. And in Ukraine's opinion, the very facts alleged by Claimant are not capable of constituting expropriation, and consequently the Tribunal should dismiss this claim for lack of jurisdiction – as did the Tribunal in the *Telenor v. Hungary* case[22].

100. Claimant countered Respondent's objection arguing that for jurisdictional purposes the *prima facie* test was in fact easily met. As Claimant explained[23], he was presenting claims for:

- expropriation of a beauty salon;
- expropriation of the rights to the Energy trademark; and
- creeping expropriation of the Gala Radio network, a process that yet has to be completed but which, in Claimant's submission, appears imminent.

101. In the course of the procedure, Claimant has however dropped the claims for expropriation of the beauty salon and of the Energy trademark[24], and the creeping expropriation of the Gala Radio network is subsumed in the allegation of harassment and a request for moral damages (see paragraph 500 below).

102. Respondent's allegation consequently has become moot.

[20] Respondent's Rejoinder, paras.189 and 202.
[21] Respondent's Rejoinder, para. 239.
[22] *Telenor Mobile Communication A.S. v. The Republic of Hungary*, ICSID Case No.ARB/04/15, Award of 13 September 2006.
[23] Respondent's Rejoinder, para. 88.
[24] See Claimant's Post-Hearing Memorial.

VI. ALLEGED BREACHES OF THE SETTLEMENT AGREEMENT

103. In the Settlement Agreement of March 20, 2000, Respondent assumed the following obligations:

- Clause 13(a):
  "*By April 15, 2000 the Commission of experts, appointed by the Respondent, shall examine the quality of broadcasting within the radio frequencies band of FM 100-108. Based on the conclusions of the Commission, the Respondent will take necessary, reasonable among others, technical measures to remove the obstacles (if any) for radio broadcasting of Gala Radio on FM 100 in Kiev by June 1, 2000*".

- Clause 13(b):
  "*By May 15, 2000 the Respondent in person of the State Committee on Communications and Information Technology, agrees to use its best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licences for radio frequencies (provided there are free frequencies bands) in the following cities: […]*
  The Claimant can apply for the radio channels in the above cities to the National Council for TV and Radio Broadcasting (hereinafter called "the National Council") in a due course in accordance with the current legislation after the National Council has been fully personally formed under the existing law of Ukraine. The Respondent, within the limits of its powers, will assist for the positive consideration of this issue at the National Council.
  The granting of licences for radio frequencies and broadcasting channels will be made in accordance with the requirements of Ukrainian legislation upon payment of the licence fees".

104. Claimant alleges that Respondent has defaulted on both sets of obligations. Respondent's position, on the contrary, is that it has fully complied with these obligations.

105. Before analysing the parties' allegation, it is necessary to establish the law applicable to the Settlement Agreement (VI.1), and the criteria to be applied in its construction (VI.2).

VI.1. APPLICABLE LAW

106. Clause 30 of the Settlement Agreement provides that the applicable law shall be that determined by "*Article 55 of the ICSID Additional Facility Arbitration Rules*". The relevant article in the Additional Facility Rules is in fact Article 54. The mistake is an obvious typographical error, and the Tribunal has no doubt that the common intent of the parties was to refer to Article 54. In accordance with this rule the Tribunal shall apply *"(a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable"*.

107. Should the Tribunal make use of this authorization to apply not only a municipal law, determined through conflict of laws rules, but also the "*rules of international law … the Tribunal considers applicable*"?

108. The Settlement Agreement contains an extensive chapter called "*Principles of Interpretation and Implementation of the Agreement*", which includes Clauses 20 through 26. These Clauses were reproduced, with very light linguistic adjustments, from the 1994 UNIDROIT Principles[25].

109. It is impossible to place the UNIDROIT Principles – a private codification of civil law, approved by an intergovernmental institution – within the traditional sources of law. The UNIDROIT Principles are neither treaty, nor compilation of usages, nor standard terms of contract. They are in fact a manifestation of transnational law.

110. As the Preamble to the Principles states, they "*shall be applied when the parties have agreed that their contract be governed by them*" and they "*may be applied when the parties have agreed that their contract be governed by 'general principles of law', the 'lex mercatoria' or the like*".

111. When negotiating the Settlement Agreement, the parties evidently gave thought to the issue of applicable law, and were apparently unable to reach an agreement to apply either Ukrainian or US law. In this situation, what the parties did was to incorporate extensive parts of the UNIDROIT Principles into their agreement, and to include a clause which authorises the Tribunal either to select a municipal legal system, or to apply the rules of law the Tribunal considers appropriate. Given the parties' implied negative choice of any municipal legal system, the Tribunal finds that the most appropriate decision is to submit the Settlement Agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles.

VI.2. INTERPRETATION

112. The parties have discussed the principles of interpretation to be applied to the Settlement Agreement. This issue is extensively dealt with in Clauses 20 through 26 of the Agreement.

113. Claimant has emphasized Clauses 20 ("*good faith and fair dealing in international* business"), 22 ("*common intent of the Parties* "), 23 (especially reference to "*preliminary negotiations*") and 26 (non-performance to include "*improper performance or late performance*") as well as Articles 1.7 and 4.1 of the 1994 UNIDROIT Principles. Respondent has referred to Clause 27 of the Settlement Agreement, pursuant to which the Settlement Agreement "*constitutes the entire agreement between the Parties on the subject matter hereof and supersedes all prior correspondence, negotiations and understandings between them with respect to the matters covered herein*". Ukraine also relies on Article 5.5 of the 1994 UNIDROIT Principles ("*the way*

[25] The 1994 UNIDROIT Principles have now been superseded by the 2004 edition.

in which the obligation is expressed in the contract") as the primary factor in determining the scope of an obligation.

114. The Tribunal agrees with Claimant that the "common intent" of the parties determines the scope of contractual obligations. However, the analysis of the common intent must start from the wording of the contract; and it must be presumed that the wording, as understood by a reasonable impartial person, properly reflects the common intent. While this presumption may be rebutted, the party doing so bears the burden of proof that the common intent differs from the wording. "Good faith" and "fairness in the market place" arguments are appropriate for interpreting ambiguous wording and filling lacunae in the text, but they can scarcely prevail against the clear wording of a contractual provision.

115. In accordance with Clause 23 of the Settlement Agreement, preliminary negotiations must – among other factors - be taken into account "for interpreting this Agreement". But Clause 27 provides that the Settlement Agreement "supersedes all prior correspondence, negotiations and understandings". Read together, these Clauses require that expectations raised during the negotiations of the Settlement Agreement must be reflected in the text of the Agreement. The text of the Settlement Agreement is the only source of obligations. The fact that an undertaking was discussed, or even orally agreed to during the negotiation phase, is not enough. The obligation must have been recorded in the Settlement Agreement. If the Settlement Agreement does include an obligation, then the scope of the undertaking can be construed in accordance with the expectations of the parties during the negotiation. Without support in the text, expectations nurtured by Claimant do not give rise to contractual obligations of Respondent.

*** * ***

116. Claimant argues that Respondent has breached its obligations under the Settlement Agreement to correct interferences (VI.3.) and to award 11 FM frequencies (VI.4). Each allegation will be examined separately.

VI.3. RESPONDENT'S FAILURE TO CORRECT INTERFERENCES

117. Clause 13(a) of the Settlement Agreement sets out Respondent's undertaking on this matter as follows:

> *"By April 15, 2000 the Commission of experts, appointed by the Respondent, shall examine the quality of broadcasting within the radio frequencies band of FM 100-108. Based on the conclusions of the Commission, the Respondent will take necessary, reasonable among others, technical measures to remove the obstacles (if any) for radio broadcasting of Gala Radio on FM 100 in Kiev by June 1, 2000".*

118. Claimant argues that Respondent defaulted on its obligations under the above provision by failing to[26]:

- appoint a Commission of experts;
- examine the quality of broadcasting on FM 100 between March 20, 2000 (execution of the Settlement Agreement) and April 15, 2000; and
- cure interference with Gala's FM 100 frequency by June 1, 2000.

119. According to Claimant, such interference "*has continued unabated from prior to the time of the Settlement Agreement until today*[27]" (August 2008), and "*there was ongoing work between UCRF personnel and engineers from Gala Radio to attempt to cure the problem and Claimant had indeed continually complained about the existing interference on Gala's 100 FM frequency*[28]".

120. Respondent counters that the function of the "Commission of Experts" was performed by the State Centre, which under Ukrainian law was in charge of detecting interferences with radio frequencies and was adequately equipped for that task. Between January 1999 and March 2000, the State Centre carried out a series of measurements and tests regarding alleged interference with FM 100; and tests on March 9 and 10, 2000 showed that no interference existed at that time with Gala's FM 100.

121. According to Respondent, there was no interference with FM 100 between March 20 (the date of the execution of the Settlement Agreement) and June 1, 2000 (the final date for remedial measures against any interference under Clause 13(a))[29]. Only a total of seven complaints about interferences were received from Claimant, the first on January 30, 2002 and the other between July 2004 and June 2007; no complaint was received in 2000 and 2001. The complaints in January 2002 and thereafter related to incidents that had arisen long after June 2000 and were thus outside the scope of the Settlement Agreement. Claimant consistently cooperated with the State Centre on the matter of interference and, before the institution of the present arbitral proceedings, Claimant never insisted on the appointment of an *ad hoc*-expert commission for examining interferences with Gala's FM 100.

122. Claimant has presented three specific breaches by Respondent of its obligations under Clause 13(a):

- the State Centre is not the appropriate "Commission of Experts" (A);
- the interferences were not examined as provided for in the Settlement Agreement (B); and
- insufficient measures were taken to correct interferences (C).

123. These contentions will be analysed in the following sections.

[26] Claimant's Post-Hearing Memorial, para. 54.
[27] Claimant's Reply Memorial, para.125.
[28] Claimant's Post-Hearing Memorial, para. 46.
[29] Respondent's Rejoinder, para. 291.

A) The State Centre as the "Commission of Experts"

124. Clause 13(a) of the Settlement Agreement entrusts the duty to examine the interferences to "*the Commission of experts, appointed by the Respondent*". It does not require that the commission be constituted *ad hoc*.

125. Furthermore, Clause 13(a) clearly states that the Commission be appointed exclusively by Respondent, without participation of Claimant in the appointment process. The provision does not include any requirements for the composition of the commission, such as a representation of several agencies, or the inclusion of independent experts. Respondent was therefore free to entrust the tasks under Clause 13(a) to any group of experts with the technical skills to do the job.

126. Respondent chose the State Centre as the "Commission of Experts" with the duty to perform the examinations required under Clause 13(a). Claimant has not pleaded that the State Centre was unfit to examine the alleged interferences. In fact, the State Centre is the public entity which in accordance with Ukrainian legislation supervises interferences in radio frequencies, and it is adequately equipped to perform this task. To the Tribunal, the choice of the State Centre is appropriate, given the wording of the Settlement Agreement, and reasonable, given its experience and scope of activity.

127. There is one further argument: the record shows that Claimant never challenged the State Centre's role as expert commission before instituting this arbitration, i.e. for some seven years. To the contrary, he has co-operated with the State Centre and addressed his complaints to it. He has thus acquiesced to the role of the State Centre.

128. The Tribunal can hence not find a violation of Clause 13(a) in Respondent's assignment of the State Centre as expert commission.

B) Examination of Interferences

129. Pursuant to Clause 13(a), the examination of interferences should have taken place by April 15, 2000. In fact, such examinations were carried out between January 1999 and March 10, 2000, i.e. before execution of the Settlement Agreement on March 20, 2000. Claimant argues that these pre-agreement examinations are not sufficient to comply with the undertaking assumed by Ukraine in Clause 13(a) of the Settlement Agreement.

130. In Respondent's opinion, the March 2000 tests proved the absence of any interference with Gala's FM 100, so that any further tests were pointless. The Settlement Agreement had been negotiated since November 1999, and during these negotiations, and as a sign of goodwill, Respondent carried out the examinations required by Clause 13(a), even before the Settlement Agreement was signed and came into force. The Settlement Agreement signed on March 20, 2000 provided that the examination of the quality of broadcasting be performed "*by April 15, 2000*". In fact, the examination had thus already been performed, before the signing of the Settlement Agreement.

131. Does this pre-agreement examination imply a default of Clause 13(a)?

132. One begins with the literal wording of the Clause, which requires that the examination be performed "*by April 15, 2000*". An examination on March 10, 2000 evidently meets that requirement. But a literal interpretation is just a first approach. In accordance with Clauses 20 and 22 of the Agreement, the guiding principles of any interpretation shall be the common intent of the parties and good faith.

133. Did the common intent of the parties require that the examination be carried out after the signature of the Settlement Agreement? There is a very revealing fact: Claimant never requested that a second examination be performed after the signature of the Settlement Agreement. If he had, good faith would have precluded Respondent from refusing the request. But Mr. Lemire never did so. He accepted, at least tacitly, that the pre-agreement examination complied with the requirements of the Settlement Agreement.

134. Article 1.8 of the 2004 UNIDROIT Principles prohibits inconsistent behaviour:

> "*A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment*".

135. Mr. Lemire did not require a second examination, and Ukraine reasonably understood that Claimant felt satisfied with the first examination, and consequently did not carry out a second one. Mr. Lemire cannot now reversetrack and argue that Respondent defaulted on its contractual obligations.

C) Adoption of Technical Measures To Remove Interferences

136. Clause 13(a) of the Settlement Agreement obliges Respondent to "*take … technical measures to remove the obstacles (if any) for radio broadcasting of Gala Radio on FM 100 … by June 1, 2000*". This language clearly limits the scope of the obligation to obstacles that existed before June 1, 2000; obstacles that might have arisen after this date fall outside the scope of the Settlement Agreement. (As to Respondent's alleged duty to cure such obstacles under the BIT, see paragraph 493 below).

137. To find a breach of the Settlement Agreement, it is therefore crucial that interferences with Gala's FM 100 preexisted June 1, 2000. Claimant has pleaded this by alleging that interference "*has continued unabated from prior to the time of the Settlement Agreement until today*[30]". Respondent, on the other hand, argues that no interference occurred between March 10 and June 1, 2000 and that any interference which occurred long after June 1, 2000 was isolated and cannot be traced back to a cause pre-existing on June 1, 2000[31].

[30] Claimant's Reply Memorial, para. 125.
[31] Respondent's Rejoinder, para. 291-293.

138. As evidence for his assertion, Claimant presented a DVD of July 30, 2008[32] and witness statements on interferences of Messrs. Lemire[33] and Denisenko[34] (a manager of Gala). The witness statements, while confirming several interferences after June 2000, do not prove that the cause of such interferences pre-dated June 2000.

139. Claimant has submitted seven letters to the State Centre or the National Council complaining about interferences with FM 100[35]. However, these letters date from January 2002 to June 2007; they do not offer any indication, let alone evidence, that the cause pre-dated June 2000. Respondent, on the other hand, has submitted some eighty documents with test results showing that at different times after June 2000, there was no interference with Gala's FM 100[36].

140. If interferences with FM 100 had been observed between March and June 2000, Claimant could at that time have requested the examinations and remedial measures foreseen in Clause 13(a) of the Settlement Agreement. Yet, there is no record of any complaint or other action of Claimant in this respect during the period March 2000 through January 30, 2002.

141. On the basis of the above record and in light of the language of Clause 13(a), the Tribunal concludes that Claimant has failed to prove a violation of the Settlement Agreement in this respect.

VI.4. ALLOCATION OF FREQUENCIES

142. The second allegation presented by Claimant refers to the granting of frequencies to Gala. Under Clause 13(b) of the Settlement Agreement, Respondent assumed several obligations with respect to the allocation of radio frequencies and broadcasting licences to Gala in 11 cities. The Clause reads as follows:

> *"By May 15, 2000 the Respondent, in the person of the State Committee on Communications and Information Technology, agrees to use its best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licences for radio frequencies (provided there are free frequencies bands) in the following cities: Kharkiv, Lviv, Donetsk, Zaporizhya, Lugansk, Simpheropol, Dniepropetrovsk, Odessa, Vynnitsa, Kryviy Rog, Uzhgorod.*
>
> *The Claimant can apply for the radio channels in the above cities to the National Council for TV and Radio Broadcasting (hereinafter called "the National Council") in a due course in accordance with the current*

[32] Claimant's Exhibit CM-96.
[33] Claimant's Witness Statement of Mr. Joseph Lemire dated 14 November 2008, p. 18 *et seq.*
[34] Claimant's Witness Statement of Mr. Sergey Denisenko dated 14 November 2008, pp. 7 and 8.
[35] Claimant's Exhibits CM-24, CM-63, CM-88, CM-114, CM-115 and CM-154; Respondent's Exhibit R-82.
[36] See Respondent's Exhibits R-29, R-63, R-87, R-88, R-104, R-140, R-141, R-146, R-149, R-155, R-205, R-314, R-315, R-316, R-317, R-318, R-322, R-326, R-347, R-369 and R-396.

legislation after the National Council has been fully personally formed under the existing law of Ukraine. The Respondent, within the limits of its powers, will assist for the positive consideration of this issue at the National Council.

The granting of licences for radio frequencies and broadcasting channels will be made in accordance with the requirements of Ukrainian legislation upon payment of the licence fees".

Summary of facts

143. Under Ukrainian law, broadcasting requires both (i) a "radio frequency licence" from the State Committee on Communications and Information Technology and (ii) a "broadcasting licence" from the National Council. The National Council is a regulatory body established directly by law[37], independent of the Government and reporting to both the President and the Parliament of Ukraine.

Delivery of the licences required

144. Claimant obtained all the licences mentioned in Clause 13(b) by October 9, 2002, i.e. within a period of some thirty months from the date of the Settlement Agreement.

145. The 11 radio frequency licences from the State Committee were obtained relatively expeditiously – two of them prior to the Settlement Agreement, four on April 14, 2000, another four on June 13, 2000, and the last on September 1, 2000.

146. The broadcasting licences suffered longer delays: two were received prior to the Settlement Agreement, seven on September 18, 2001, one on March 26, 2002, and the last on October 9, 2002.

147. Two broadcasting licences had already been awarded by the National Council prior to the Settlement Agreement. Thereafter, the National Council was temporarily inoperative. It was reconstituted in June 2000. After building the necessary administrative capacities, it resumed issuance of broadcasting licences in January 2001. Under the Ukrainian Law on Television and Radio Broadcasting, such licences were awarded on the basis of competitive tenders.

148. At its first meeting after its reconstitution on January 1, 2001, the National Council focused on issuing broadcasting licences to companies which were broadcasting on frequencies allocated to them by the State Committee during the time when the National Council was inoperative. Claimant was excluded from this tender. Shortly thereafter, on March 22, 2001, the National Council announced a tender, including eight of the nine frequencies still expected by Claimant under Clause 13(b) of the Settlement Agreement. The broadcasting licences for seven of these frequencies were granted to Gala on September 18,

[37] Article 5, Law on Television and Radio Broadcasting dated December 21, 1993.

2001. In March and October 2002, Claimant received the last two outstanding broadcasting licences.

149. Four of the 11 frequencies allocated to Claimant under the Settlement Agreement were subsequently contested by the Armed Forces of Ukraine. These challenges were eventually resolved in 2008.

Violations asserted by Claimant

150. Claimant alleges seven violations of Clause 13(b) of the Settlement Agreement:

- late issuance of frequency licences by the State Committee (A);
- late constitution of the National Council (B);
- award of licences to other companies at National Council's first meeting in January 2001 (C);
- failure of National Council promptly to acknowledge the Settlement Agreement as binding (D);
- late award of broadcasting licences by National Council (E);
- allocation of low powered frequencies (F); and
- allocation of four frequencies which were contested by the Armed Forces of Ukraine (G).

151. Respondent denies all of the alleged violations.

152. Each alleged breach will be analysed *seriatim*.

A) Issuance of Radio Frequencies by the State Committee

153. Under Clause 13(b), paragraph 1 of the Settlement Agreement, "*by May 15, 2000 the Respondent, in the person of the State [Committee] agrees to use its best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licences for [11] radio frequencies […]*". In accordance with the express terms of this contractual provision, Respondent undertook only to apply its best efforts, so that the applications from Gala to the State Committee would be granted by May 15, 2000 – not to achieve that result.

154. Article 5.1.4 of the 2004 UNIDROIT Principles defines the duty of best efforts in the following terms:

> "*[…] To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances*".

155. For Claimant to establish a violation of this best efforts obligation, it is not sufficient to prove that by May 15, 2000 the 11 radio frequency licences had not been granted – the required test is that he produce evidence showing that

Ukraine has failed to make such efforts as would be made by a reasonable government in the same circumstances.

156. What is the factual situation?

157. In accordance with the Settlement Agreement Ukraine had to use its best efforts to grant the frequency licences within two months of signature (signature was on March 20, and the deadline was May 15). Of the 11 licences envisaged, six were granted by the State Committee before the May 15, 2000 deadline, another four by June 13, 2000 (i.e. within one month of May 15) and the last one on September 1, 2000 (within 2 ½ months of the deadline).

158. Ukraine's efforts to induce its State Committee to grant the licences resulted in 11 of the 12 licences being issued within one month of the deadline. One licence was then granted with 2 ½ months delay.

159. In the Tribunal's opinion, these delays do not amount to a violation of Ukraine's best efforts obligation. There is often a gap between political decision and bureaucratic compliance. Paragraph 3 of Clause 13(b) explicitly requires that "*the granting of licences … will be made in accordance with the requirements of Ukrainian legislation*". There is no evidence that Ukraine abated its pressure on the State Committee to perform. The State Committee issued the licences within time limits which are not unreasonable in the context of Ukrainian administrative practices.

B) Late Constitution of the National Council

160. It is undisputed that the National Council – which had been founded in 1993 – became inoperative in March 1999, because its members were not appointed. It remained inoperative until it was reconstituted in June 2000.

161. Claimant argues that the time period while the National Council was inoperative was abnormal and could not legitimately be expected[38]. This constitutes, in Claimant's opinion, a violation of the Settlement Agreement, and specifically of Respondent's obligation of good faith and fair dealing (Clause 20 of the Settlement Agreement).

162. The Tribunal is unconvinced.

163. The Settlement Agreement lacks any obligation to reconstitute the National Council, nor even an indication of when this could happen. To the contrary, Clause 13(b), paragraph 2, specifically states that applications for broadcasting licences must be made "*after the National Council has been fully personally formed*", without referring to any time frame – an explicit acceptance by Claimant that he was aware that the National Council was not operative at the time, and that the political decision to designate new members had to be implemented before the granting of the licences.

[38] Claimant's Post-Hearing Memorial, para. 57.1.

164. The National Council was in fact reconstituted in June 2000, three months after the signature of the Settlement Agreement. Nothing in the Settlement Agreement legitimizes an expectation on the part of Claimant of a faster rehabilitation of the National Council. The absence of any time frame, and the explicit warning in Clause 13(b), paragraph 2, that Gala's applications will have to wait for the reconstitution of the National Council, point to the contrary.

C) Failure of National Council To Promptly Acknowledge the Settlement Agreement as Binding

165. When the National Council was eventually reconstituted in June 2000, Claimant immediately made numerous attempts to contact its members and to establish the process for obtaining the frequencies. In Claimant's opinion, the National Council's lack of reaction violated Ukraine's duties to act in good faith (Clause 20) and to cooperate (Clause 24)[39].

166. Claimant's argument is not totally accurate.

167. It is undisputed that on March 20, 2001 the National Council adopted its Resolution No. 36 in which it decided to "*recognize priority position of CJSC Radio Company Gala*" in the allocation of broadcasting licences for the cities listed in Clause 13(b). It is immaterial whether the National Council's decision thus acknowledged a legal obligation, or whether it followed political considerations. In any case, it implies an acknowledgement of the Settlement Agreement and it granted Claimant the best position that he could expect.

168. Was this acknowledgement by the National Council unduly late?

169. The National Council had just started in January 2001 the process of organizing tenders for broadcasting licences. Given the complexities surrounding the Gala decision (reconciling "*positive consideration*" of Claimant's interests under the Settlement Agreement with the independence of the National Council and competing interests of other applicants), the March 20, 2001 decision cannot be considered as unduly late.

D) Award of Licences to Other Companies at National Council's First Meeting in January 2001

170. The Settlement Agreement regulates the issuance of broadcasting licences by the National Council in subparagraphs II and III of Clause 13(b) (reproduced *above*). These provisions create an obligation by Ukraine to "*assist [Claimant] for the positive consideration of this issue [the awarding of licences] by the National Council*". This obligation is not absolute, but subject to important caveats:

[39] Claimant's Post-Hearing Memorial, para. 57.3.

- first of all, there is no time limit for the awarding of the licences (the May 15, 2000 deadline only works for the licences from the State Committee);
- second, Ukraine's obligation to assist is qualified with the words "*within the limits of [Respondent's] power*" – thus acknowledging that, in accordance with the law, the National Council is an independent public entity;
- third, Claimant could apply "*in a due course … after the National Council has been fully personally formed*";
- fourth, application and granting of the licences were to be "*in accordance with the requirements of Ukrainian legislation*"; Clause 16 specifically added that "*the Agreement shall not be treated as a document granting any rights, benefits or privileges which are different or additional to the ordinary rights and obligations of a foreign investor in Ukraine in accordance with the Ukrainian laws and international treaties to which Ukraine is a party"*.

171. The National Council held its first tender in January 2001, i.e. some six months after its reconstitution. This time was used by the National Council to build the logistics and administrative capacities for proper tender procedures. No fault can be found in the fact that the National Council gave first priority to creating the enabling logistics and administrative capacities for such proceedings.

172. In its first tender in January 2001, the National Council did not include any of the frequencies for which Gala had received frequencies from the State Committee. Rather, the National Council focused only on frequencies on which radio stations had been broadcasting without a valid broadcasting licence at that time.

173. Claimant submits that the organization of this first tender, from which Gala was excluded, implied a breach of the Settlement Agreement on two different counts:

- first, the National Council should have taken the opportunity of the first meeting to act on the licences for Gala; and
- second, the very existence of the first tender proves that radio stations existed which were broadcasting only with a licence from the State Committee, but without a licence from the National Council; since Gala already had licences from the State Committee, it should have been authorized to broadcast straight away.

174. The Tribunal disagrees with Claimant's first argument. Nothing in the Settlement Agreement implies that the National Council was bound to give first priority to Claimant. The National Council decided first to regularize broadcasting outside the law, which had developed during the time when it had been inoperative. This prioritization cannot be challenged under the Settlement Agreement. (As to the claim for violation of the Fair and Equitable Treatment ("FET") standard defined in the BIT, see paragraph 410 below).

175. The second argument merits a more in-depth analysis. Respondent itself has acknowledged that during the period when the National Council became inoperative, "*the State [Committee] became the central authority of the executive power, administering communications and radio frequencies of Ukraine and it developed the practice of granting licences for use of radio frequencies before the tenders for frequencies were announced*[40]". What happened was illegal: under Ukrainian law, a radio station could not start broadcasting until it had obtained the necessary authorization from the National Council. Notwithstanding the legal requirements, during the 15-month period when the National Council was inoperative, certain Ukrainian companies were *de facto* awarded frequencies and authorized to broadcast, although they had only received the authorization from the State Committee.

176. Given this factual situation, Claimant argues that it could and should have been awarded frequencies and authorized to broadcast, once it had obtained the authorization from the State Committee in the summer of 2000, without having to wait for the reconstitution of the National Council and its formal tender procedure. And that, by not having done so, Ukraine violated its obligations under the Settlement Agreement.

177. After due consideration and some hesitation, the Tribunal rejects Claimant's argument. In the Settlement Agreement, Ukraine could not undertake to perform acts contrary to Ukrainian law nor to authorise Claimant to operate new frequencies without the licence from the National Council; this would have violated the LTR. And Clause 13(b) specifically refers to the need for the National Council to be reconstituted and to issue the necessary licences.

178. But while it was agreed between Claimant and Respondent to act as required by Ukrainian law, Ukraine *de facto* authorized domestic radio companies to start broadcasting without the necessary authorizations. This situation was then cured in the first tender organized by the National Council after its reconstitution. While these actions do not constitute a violation of the Settlement Agreement, their status under the BIT will be analysed as such *below* at paragraph 410.

E) Late Award of Broadcasting Licences by National Council

179. The facts regarding the issuance of the broadcasting licences by National Council can be summarized as follows.

Facts

180. On March 1, 2000 (i.e. before the Settlement Agreement had actually been signed), the Minister of Economy of Ukraine wrote a proposal to the Cabinet of Ministers in order to "*entrust the [State Committee] and the [National Council] to allocate to CJSC RC "Gala" the following frequency assignments* …[41]". The frequencies referred to were five of those mentioned in the Settlement Agreement. Respondent has not provided any similar proposal for

[40] Respondent's Post-Hearing Memorial, para. 207.
[41] Respondent's Exhibit R-27.

the remaining six frequencies promised in the Settlement Agreement, nor has Respondent submitted any decision from the Cabinet of Ministers approving the proposal of the Minister of Economy.

181. The record shows no further documents relating to the National Council, before a letter dated February 22, 2001 sent by Mr. Lemire to the Ministry of the Economy[42]. In the meantime, the State Committee had issued its licences, and the National Council had been reconstituted. Mr. Lemire's letter starts by stating that "*we have practically reached finalization of performance of the terms of the Dispute settlement Agreement*". This recital is important, because it shows that, at that moment, Claimant was convinced that Ukraine had not breached its obligations. Mr. Lemire then goes on, stating that a "*serious problem*" has arisen with the National Council because "*now this authority says that our frequencies are subject to a tender that will begin in some weeks*". He adds "*we understand that such situation has arisen due to the fact that the National Council is not properly informed*" and asks the Ministry of the Economy to intervene.

182. The record does not show the actions adopted by the Ministry of the Economy, but some advice must have been transmitted from the Ministry of the Economy because it is a fact that three weeks later, on March 20, 2001, the National Council decided to "*recognize priority position of CJSC Radio Company Gala*" in the allocation of broadcasting licences for the cities listed in Clause 13(b)[43].

183. Claimant has argued that in a meeting on March 19, 2001 the Chairman of the National Council, Mr. Kholod, did not consider the Settlement Agreement as binding, stating that the National Council is a "*constitutional independent body, not subordinated to the government*" and "*that the government cannot adopt any act influencing the development of TV/radio broadcasting in Ukraine*". Claimant has produced a transcript of the meeting, which Mr. Lemire prepared at that time[44]. Mr. Kholod's statement has not been challenged and the Tribunal is inclined to accept it as true. But what is undeniable is that one day after the meeting, the National Council approved an official decision recognizing Gala's priority position to receive the frequencies promised in the Settlement Agreement.

184. Not only that, on March 22, 2001, i.e. only two days after this decision in favour of Gala, the National Council announced a new tender for frequencies, which included eight of the 11 frequencies mentioned in Clause 13(b) of the Settlement Agreement. In meetings in June and July 2001, the National Council decided to allocate seven of these frequencies to Gala; and the seven broadcasting licences were issued on September 18, 2001. Two other licences had already been issued on October 9, 1997 (long before the Settlement Agreement)[45]. Two remained pending – those in Dniepropetrovsk and Lviv - and were eventually issued on March 26 and October 9, 2002, respectively.

[42] Respondent's Exhibit R-39.
[43] Respondent's Exhibit R-40.
[44] Claimant's Exhibit CM-101.
[45] In Kryviy Rog and Uzhgorod.

185. The frequency in Dniepropetrovsk was put to tender on July 26, 2001, but because of accumulated workload of the National Council, it was not approved until March 2002. As regards Lviv, the frequency under discussion had already been granted to other radio companies, whose rights had first to be cancelled, and this justifies the delay.

186. Summing up, in the end the National Council eventually granted to Gala all 11 broadcasting licences mentioned in Clause 13(b). Two had been issued before the Settlement Agreement, seven were issued in September 2001, one in March 2002 and the final one in October 2002.

187. Claimant alleges that this late performance of the Settlement Agreement is tantamount to non-performance, and asks the Tribunal to declare that Ukraine has breached the terms of the Settlement Agreement.

Ukraine's alleged breach

188. The Tribunal acknowledges that there were delays in the issuance of the broadcasting licences by the National Council. But this is not really the point under discussion. What is relevant is whether Ukraine has breached the terms of the Settlement Agreement and for this, it is paramount to look at the actual text of what was agreed.

189. As noted above, Clause 13(b) of the Settlement Agreement does not establish obligations of the National Council, nor does it create a deadline for the National Council to issue its decisions. It simply states Ukraine's commitment to "*assist for the positive consideration of this issue at the National Council*".

190. The difference between Clause 13(a) and Clause 13(b) is striking. The first Clause creates a best efforts obligation to issue the State Committee's authorization within an agreed time frame. It proves that when the parties wanted to establish obligations and time limits, they were perfectly capable of doing so in clear and unambiguous terms. Clause 13(b), however, lacks any specific time frame, and only refers to Ukraine's commitment to "*assist*" Mr. Lemire in his endeavours vis-à-vis the National Council.

191. Did Ukraine comply with its part of the bargain, assisting Claimant "*within the limits of its power*" and "*in accordance with the requirements of Ukrainian legislation*" in the obtaining of the licences?

192. The record suggests that the Ministry of the Economy's assistance was helpful indeed. Mr. Lemire wrote for the first time complaining on February 22, 2001. The National Council's initial attitude had been rather negative, as proven by the meeting with its Chairman. This was overcome, undoubtedly because of advice from the Government. On March 19, 2001 – one month after Mr. Lemire's first complaint – the National Council reversed its opinion and acknowledged Claimant's rights to the licences. Two days later, the first

tender was launched and nine of the 11 frequencies were duly awarded by September 2001 – not bad a record for an agency which had been recently reconstituted. The two other licences were delayed – one just because of bureaucratic delays, the other because of underlying problems with the entitlement to the frequency.

193. The facts proven in this arbitration do not substantiate Claimant's claim that Ukraine failed to assist Claimant in his endeavour to obtain the broadcasting licences required from the National Council. In hindsight, it is unfortunate for Claimant that he only bargained for such a weak commitment from the counterparty. But the terms agreed are *lex contractus*, and it is those terms which the Tribunal must apply.

F) Allocation of Low-Powered Frequencies

194. The power of frequencies allocated to Gala ranged from 0.1 to 4kW with an average of 1,17 kW. On all its frequencies combined, Gala reaches some 22% of the population of Ukraine.

195. Claimant complains that the power of the frequencies allocated to Gala under the Settlement Agreement was far below his legitimate expectations and failed to meet his business purposes[46]. He alleges that in the negotiations of the Settlement Agreement as well as in pre-settlement communications with the National Council and other agencies of Respondent, much higher powers had been envisaged. In this respect, Claimant refers to correspondence between the National Council and State Inspection of Electric Communication of July 18 and October 18, 1995 which suggested the availability of much higher powered frequencies for Claimant[47].

196. The Settlement Agreement, in any case, is silent on the power of frequencies sought by Claimant. Nor does it include any reference to Claimant's business purposes – e.g. his desire to cover the whole territory of Ukraine - from which a minimum power could be inferred. While the preliminary negotiations between the parties and the purpose of the Settlement Agreement are to be taken into account in determining the common intent of the parties (per Clauses 23(a) and (d) of the Settlement Agreement), Clause 27 provides that the Settlement Agreement "*constitutes the entire agreement between the Parties on the subject matter hereof and supersedes all prior correspondence, negotiations and understandings*…". This disqualifies prior correspondence and negotiations as a basis of obligations deliberately not mentioned in the Settlement Agreement. Claimant can therefore not derive a claim from pre-Settlement Agreement correspondence and negotiations.

197. Furthermore, the power of the frequencies awarded to Claimant was not abnormally low. Claimant has acknowledged that the average power of the frequencies allocated to him matched that of frequencies allocated to major competitors[48]. If Mr. Lemire felt that he was entitled to higher powered

[46] Claimant's Post-Hearing Memorial, para. 57.12.
[47] Claimant's Exhibits CM-1 and CM-2.
[48] Claimant's Post-Hearing Memorial, para. 57.12.

frequencies than his competitors, he would have had to include such entitlement in the Settlement Agreement. That has not happened.

198. Finally, Claimant learned the actual power of the frequencies allocated to him by September 1, 2000, when Gala received the licences from the State Committee. He thus knew the power of the frequencies on September 20, 2000 when the Settlement Agreement was recorded as the 2000 Award. Claimant did not seek any amendment of the Settlement Agreement, nor did he reserve his position.

199. The power of the frequencies was specified in the announcement of the tenders by the National Council. Claimant applied for these frequencies without complaining about the power. Thus, even if Claimant had been entitled to higher powered frequencies (which in the Tribunal's opinion does not derive from the Settlement Agreement), he acquiesced with the power of the allocated frequencies. To claim now that this lack of power gives rise to a breach of the Settlement Agreement denotes inconsistent behaviour, contrary to Article 1.8 of the 2004 UNIDROIT Principles.

G) Allocation of Four Frequencies Which Were Contested by the Armed Forces of Ukraine

200. Claimant finally complains that four of the frequencies allocated to him were contested by the Armed Forces of Ukraine[49]. In Claimant's opinion, Ukraine failed to de-conflict with the Army the frequencies awarded to Gala.

201. Respondent counters that the contests were prompted by Gala itself, which decided to change the location of its radio transmitters in three cities, by a distance of between 4.6 and 1.87 km, and increased the height of its antenna from 55 to 70 m in another[50]. These changes require the approval of the State Centre, which issues such authorization only with the approval by the General Headquarters of the Armed Forces. What happened in these four cases is that the General Headquarters of the Armed Forces refused to approve the changes. Refusal however did not mean that the frequencies became contested – Gala Radio in fact continued to broadcast on them. Gala was required only to change the locations and/or parameters of the transmitters following the recommendations of the State Centre, and obtained all required permits in 2008.

202. In the Tribunal's opinion, the difficulties incurred by Claimant with regard to these four frequencies do not constitute a breach of Respondent's obligations under the Settlement Agreement.

203. Under Clause 13(b) paragraph 2 Ukraine is bound to "*assist*" Claimant "*within the limits of its powers*" to obtain the authorization of the National Council. There is no express reference to the Armed Forces. But in an interpretation based on good faith, and bearing in mind that Clause 24 creates an obligation for each party to cooperate with the other, the Tribunal is prepared to admit

[49] Claimant's Post-Hearing Memorial, para. 57.13.
[50] Respondent's Post-Hearing Memorial, para. 271.

that the obligation to assist should be extended to encompass not only the National Council, but also any other institution controlled by Ukraine. Consequently, in accordance with the Settlement Agreement, Respondent was under an obligation to assist Mr. Lemire in obtaining or maintaining the necessary authorizations from the Armed Forces.

204. Did Respondent fail to do so?

205. Claimant has argued that a senior manager of the State Centre admitted that Ukraine failed to de-conflict the four frequencies and apologized for the mistake by stating that "*unfortunately we failed to coordinate with military department*[51]". An analysis of the evidence submitted by Claimant to prove this allegation does not support the conclusion. Claimant has presented a summary, prepared by his own officers, of a meeting on February 21, 2005 with Mr. Zhebrodski, a senior manager of the State Centre[52]. The exact exchange of words which, in accordance with that summary, took place between the officer of Gala and Mr. Zhebrodski is the following:

> *"[…] Dima: Also, we have had interferences for the past few months and we have uncertain situation with Donetsk…*
> *Zhebrodski: I am going to call military department in Donetsk, what happened is back in 2000 we had a straight order to give you licence in Donetsk (107,2 fm) and unfortunately we failed to coordinate it with military dpt. Are they complaining?*
> *Dima: No complaints so far, we have been working there for quite awhile.*
> *Zhebrodski: Good. I am sure we can sort it out at least I am gonna try […]".*

206. The exchange of words between the officer of Gala and the senior manager of the Centre does not prove a breach by Ukraine of its obligation to assist Claimant. Quite to the contrary. What it shows is that, up to that moment (2005), the Army had not complained about the changes in Donetsk, that Gala was broadcasting there and that the State Centre was offering its help if a problem with the Army eventually arises. The problem afterwards materialized, and it was then, it appears, satisfactorily settled by 2008.

207. Summing up, the Tribunal is of the opinion that the problems which Gala encountered with the Army regarding four frequencies, which were eventually solved, do not amount to a default by Ukraine of its obligations under the Settlement Agreement.

* * *

208. For the reasons explained above, the Tribunal concludes that, although Claimant encountered difficulties and delays in the obtaining of the frequencies expected under the Settlement Agreement, and although the end

[51] Claimant's Post-Hearing Memorial, para. 57.13.
[52] Claimant's Exhibit CM-143.

result may not have satisfied all the expectations harboured by Claimant, Respondent did not breach any of the obligations it had assumed in that Agreement.

VII. ALLEGED VIOLATIONS OF THE BIT

209. The Tribunal will first summarize Claimant's general allegations (VII.1), then Respondent's (VII.2), before analyzing and deciding the claims:

- in first instance, the Tribunal will study the alleged violation of the FET standard in the awarding of frequencies, and will effectively come to the conclusion that certain actions of Respondent are not compatible with this standard (VII.3);
- a second section will be devoted to the alleged continuous harassment of Claimant, and his request for moral damages (VII.4);
- in the next sections the Tribunal will reject Claimant's additional allegations, regarding an alleged violation of the FET standard by other actions performed by Ukraine (VII.5) and the applicability of the "Umbrella Clause" (VII.6); and
- the Tribunal will then decide whether the 2006 amendment of the LTR and in particular the 50% Ukrainian music requirement amounts to a violation of the BIT (VII.7), and finally devote a short section to other allegations submitted by Claimant (VII.8).

VII.1. CLAIMANT'S GENERAL ALLEGATIONS

210. Claimant's starting point is that, after having made the investment in Gala Radio, he had a legitimate expectation that he would be authorized to increase the size and audience of his radio company, and to establish three radio networks in Ukraine aimed at three different age groups. This plan had been discussed with the National Council members and encouraged by them.

211. As evidence of his expectations, Claimant especially relies on three documents, namely:

- a letter of July 18, 1995 from the Chairman of the National Council to the Chairman of the State Inspection on Electric Communications. This letter advises that "*the National Council…considers possibility to issue a licence to radio company GALA*" and requests the State Inspection "*to consider a possibility to give the company the frequency channels"* in 13 cities *"up to"* a specified power[53];
- a letter from the Chairman of the State Inspection on Electronic Communications to Claimant of October 18, 1995 informing of the availability of high power frequencies in the cities concerned and advising that the requisite permissions would be issued after Gala had received the pertinent broadcasting licences from the National Council[54]; and

[53] Claimant's Exhibit CM-1; the English translation by mistake does not include the words "*up to*" which appear in the Ukrainian original.
[54] Claimant's Exhibit CM-2.

- a "Plan of Measures" negotiated between Claimant and the National Council in 1997 envisaging the allocation of frequencies to set up the Gala networks.

212. The main thrust of Claimant's submission is that his legitimate expectations were thwarted by Ukraine's actions in violation of the BIT. Claimant divides his allegations regarding these violations into four different sections[55].

213. (i): In the first section, Claimant argues that Ukraine has violated the FET standard applicable to protected investments, and the prohibition of arbitrary and discriminatory measures, established in Article II.3. (a) and (b) of the BIT. Respondent's specific actions, which have resulted in violation, can be divided in two groups:

- denial by the National Council of nearly 300 applications for frequencies submitted by Gala or Energy (a company also owned by Claimant), and illegal award of frequencies to companies other than Gala, during the period when the National Council was not operative; and
- other actions performed by Respondent, like failure to correct the interferences on Gala's 100 FM frequency, failure of the National Council to acknowledge its obligations under the Settlement Agreement; allocation of low powered frequencies to Gala; allocation of frequencies contested by the Army.

214. Of the alleged violations, the first one, the systematic denial of applications, is by far the most important one. Claimant argues that the Ukrainian legal procedure for allocation of frequencies is in itself unfair, inequitable, discriminatory and arbitrary. The procedure was moreover applied by the National Council in an unfair, inequitable and discriminatory fashion. It was tainted by interferences from other political organs of Respondent, including the President of Ukraine. The National Council's aim was to preclude Gala from establishing multiple networks with national coverage. And it was successful in achieving this.

215. Claimant specifically refers to six tenders for frequencies, from 2002 through 2008, which in his view demonstrate Respondent's practice in breach of the BIT.

216. (ii): In the second section, Claimant asserts that Respondent is submitting Gala to continuous harassment, in violation of Article II.3 (a) of the BIT. Respondent attempted to rely on the "founder" principle to deny Gala Radio an extension of its licence beyond the expiry date of September 18, 2008. Furthermore, there have been concerted efforts by the National Council to force Claimant out of the radio industry through ongoing actions of harassment and the issuance of unlawful warnings.

217. Claimant acknowledges that Respondent, after a few years of costly and lengthy litigation, ultimately cancelled the warnings, renewed the broadcasting

[55] Claimant's Post-Hearing Memorial, para. 64.

licence and applied the correct fee. But this eventual acceptance of Claimant's rights does not provide Ukraine with immunity from paying damages. Claimant alleges that Respondent's harassment since the Award has inflicted significant moral harm for which Respondent should be held liable in an amount of three million USD.

218. (iii): In the third section, Claimant submits that the 50% local music requirement in the LTR implies a violation of Article II.6 of the BIT, namely of the prohibition to *"impose performance requirements … which specify that goods and services must be purchased locally, or which impose any other similar requirements"*. Respondent has tried to justify the local music requirement on public policy grounds. In Claimant's opinion, the argument can at best justify an expropriation subject to the payment of the corresponding damages. The abnormal high level of the requirement and its abrupt incorporation caused Claimant to suffer loss for 2008 of advertising revenue, and such loss will continue until the expiration of the licence in 2015.

219. (iv): Finally, Claimant submits that, as a consequence of the Umbrella Clause contained in Article II.3 (c) of the BIT, all the contractual breaches of the Settlement Agreement have also been transformed into violations of the BIT, which entitle Claimant to be compensated for the damages suffered.

VII.2. RESPONDENT'S GENERAL ALLEGATIONS

220. Respondent submits that its legal procedures for tenders involving radio frequencies are consistent with the requirements of the BIT; the implementation of these procedures also conforms with the BIT requirements.

221. The procedures for allocation of frequencies meet the standards of due process and procedural fairness, including the right to be heard. Frequencies are awarded by means of tenders announced in the press; prospective participants may submit their applications within one month of the notice. Such applications must include an information package. Thereafter, the National Council reviews the requests applying statutory criteria, and especially valuing the programming content proposed by each applicant. The meetings of the National Council are public, and the National Council holds briefings with representatives of the radio industry. A frequency is awarded to a radio company if the application receives at least five of the votes of the eight members of the National Council. All decisions of the National Council are published on the National Council's official website. Finally, the decisions of the National Council are subject to judicial review.

222. The National Council is an independent body. Each of its members exercises his or her judgment without external pressure, and Claimant's allegations of corruption and undue pressure are unsupported by any evidence. Furthermore, the LTR was amended in 2006, and since then members may be removed from their functions only by a joint decision from the Parliament and the President. Claimant's allegations of political influence were not corroborated during the hearing. No member of the National Council has been impeached, no one

associated with the National Council has been prosecuted for corruption, and no one has been convicted of wrongdoing.

223. Gala Radio was treated in a fair and equitable manner and was not discriminated against during the tenders. Claimant lost the four tenders which were analyzed during the hearing for objective reasons. There is no proof of unfair, inequitable, arbitrary and discriminatory treatment against Claimant.

224. Respondent also addresses Claimant's allegations regarding harassment. In Respondent's opinion, the procedure and practice of monitoring radio companies is consistent with Ukraine's obligations under the BIT. The results of any inspection are reviewed in a meeting of the National Council, where its members listen to a presentation of one of them, review a set of documents, listen to oral explanations from the representative of the radio company, and only thereafter take a decision.

225. All radio stations are continuously monitored. Those inspected and sanctioned are publicly mentioned in the Annual Report of the National Council. None of Gala's inspections was conducted in an unfair, inequitable or abusive manner. The warning issued against Gala on October 5, 2005 sanctioned Gala's refusal to produce documents and materials required for the inspection. This warning was successfully challenged before the Ukrainian Courts. On November 23, 2005 a second warning was issued for violating the quota of broadcasting in Ukrainian, the law on advertising, and the terms of its licence. The second warning was also cancelled by the Kiev Court. In May 2006 a third inspection was carried out. Since Gala had significantly improved its business activities, compared to previous periods, the National Council decided not to issue a third warning. There were subsequent inspections in March and June 2008, but they did not lead to any sanction, although Gala Radio admitted that by accident it had committed violations of the election legislation.

226. Other radio companies have also been inspected and received warnings - some of them three, and the National Council has started court proceedings in five cases in order to cancel the broadcasting licence.

227. The 2006 LTR had been debated by members of Parliament for more than three years, and its purpose was to make Ukrainian Law comply with European requirements. In Respondent's opinion, the LTR must be considered as part of the State's legitimate right to organize broadcasting. The 50% Ukrainian music requirement, which requires that either the author, the composer and/or the performer of 50% of the music broadcast be Ukrainian, was neither abrupt, nor excessive nor unfair. Gala Radio signed in August 2006 a Memorandum proposed by the National Council for the progressive implementation of the 50% requirement, and Gala Radio and all its competitors are presently in compliance. There is no link between the 50% Ukrainian music quota and the decline in Gala Radio's ratings.

228. Respondent finally makes three additional allegations:

- Claimant did not behave as a diligent businessman;

- Gala Radio did not take advantage of available remedies; and
- Claimant abused his position as a foreign investor.

VII.3. CLAIMANT'S FIRST ALLEGATION: THE VIOLATION OF THE FET STANDARD IN THE AWARDING OF FREQUENCIES

229. The main thrust of Claimant's allegation is that Ukraine has failed to provide fair and equitable treatment to its investment in Gala, and subjected it to arbitrary or discriminatory measures. Ukraine rejects both allegations. The Tribunal will analyze this dispute – which is the basic issue submitted to its adjudication - in a short introduction and three separate sections:

- the first devoted to the concept of FET standard, as defined in the BIT (VII.3.2);
- the second to the procedures for awarding frequencies under Ukrainian law (VII.3.3); and
- the third to the facts surrounding Gala's applications for frequencies (VII.3.4).

VII.3.1. INTRODUCTION

Claimant

230. Claimant, Mr. Joseph Charles Lemire, is an American citizen residing in Ukraine. By profession, Mr. Lemire is a lawyer, although he also has experience in accounting. He is the owner and chairman of Gala, a closed joint stock company constituted in 1995 under the laws of Ukraine. His participation in Gala is held through another Ukrainian company, Mirakom. He initially purchased 30% of Gala, but since 2006 he indirectly owns 100% of the company[56]. The proven amount of his investment is 236,000 USD. There is circumstantial evidence that Mr. Lemire has made payments with his own monies on behalf of Gala. But the record of the actual amounts paid has not been produced, and Mr. Lemire's statement that the total exceeds 5,000,000 USD[57] has not been locked up with hard evidence. The personal assets of Mr. Lemire and those of Gala appear to some extent commingled[58].

Gala

231. Gala is a company which since 1995 operates a contemporary music radio station. It holds a licence to broadcast on two frequencies in Kyiv and on 12 other frequencies in nine areas of Ukraine. Gala Radio applied for and received a licence recognizing its status as a national broadcaster on October 17, 2007[59]. In the late 1990's, Gala ranked amongst the most popular radio stations in Ukraine. Claimant acknowledges that its market share has declined – and attributes this decline to Respondent's actions.

[56] Mr. Lemire, Hearing Transcript 1, p. 283, at14.
[57] Mr. Lemire, Hearing Transcript 1, p. 285, at 20 and p. 304, at 9.
[58] Mr. Lemire, Hearing Transcript 1, p. 288, at 25.
[59] Respondent's Exhibit R-153.

232. Gala has been a reasonably successful company. Its revenues have gone up from 600,000 USD in the year 2000 to 1.369,000 USD in the year 2007 (with a profit of 121,000 USD)[60]. As Respondent's expert witness says, *"while being small business in a competitive market and risky environment, it is obvious that Gala has become a successful national radio station, and as investor, Joseph Charles Lemire has achieved reasonably good results and revenue growth*[61]*"*.

233. On a qualitative basis, Claimant has alleged and Respondent has accepted that Gala won the Radio Company of the year award for brand recognition in 1999, won an award for the best radio program on Olympic News from the Golden Pen competition organized by journalists and that four of the top 10 disk jockeys in Ukraine work for Gala, including the well-known DJ Pascha (the alias of Mr. Pavel Shylko), who testified in this arbitration[62].

Mr. Lemire's relationship with the National Council

234. Respondent has insisted, throughout the procedure, that Mr. Lemire abused his position as foreign investor and harassed the National Council with rude, disrespectful and to some extent even aggressive conduct[63]. Respondent argues that Mr. Lemire has sent scores of hostile letters to the National Council, copying the former President of Ukraine, the current President of Ukraine, the Vice President of the United States, the US Ambassador and others. He also video-recorded meetings of the National Council.

235. The relation between Mr. Lemire and the National Council was not always tense. At the outset of the investment, in 1995, the relationship seems to have been friendly, and the National Council supported Mr. Lemire's efforts to invest in the Ukrainian radio sector. Suddenly the relationship soured in 1996, for no obvious reason. Asked by the Tribunal why his relationships with the National Council became hostile, Mr. Lemire has declared under oath that the reason was that *"at one point I was asked for a bribe and I said I would not pay*[64]*"*. No further evidence of this alleged request for bribes has been produced.

236. What is undisputed is that in 1996 Gala Radio sued the National Council before the Ukrainian Courts, because Gala had been removed from the air by a decision of the National Council. On February 26, 1997, the Supreme Arbitration Court of Ukraine ruled in Gala's favor[65]. In 1997, Mr. Lemire initiated the First Arbitration against Ukraine, which eventually led to the Settlement Agreement and 2000 Award. In 2006 Gala challenged before the

[60] EBS Expert Report, p. 6.
[61] EBS Expert Report, p. 5.
[62] Claimant's Memorial, para. 117.
[63] Respondent's Counter Memorial, para. 83.
[64] Mr. Lemire, Hearing Transcript 1, p. 309, at 3.
[65] Mr. Lemire, Hearing Transcript 1, p. 166, at 5.

Ukrainian Courts, and again successfully, two decisions of the National Council to issue warnings[66]. Finally, Mr. Lemire of course started this arbitration, accusing the National Council of having treated him in *"an unfair, inequitable, arbitrary and discriminatory manner in breach of its BIT obligations"*.

237. The fact that Mr. Lemire challenged a number of decisions of the National Council before the Ukrainian Courts and filed two successive investment arbitrations against Ukraine cannot have helped to improve the climate between Gala Radio, a company acting in a highly regulated and supervised legal environment, and the National Council, its regulator and supervisor. The existence of successive court actions may have been one of the reasons for deterioration of the relationship. The Tribunal is also convinced that on certain occasions, Mr. Lemire felt threatened, and that he was afraid that Gala would be taken off the air by the authorities. There were at least two incidents – the third inspection, which could have led to a third warning and revocation of the licence, and the difficulties in obtaining a renewal of Gala Radio's licence – where Mr. Lemire's reaction shows real worry. Mr. Lemire's tactics vis-à-vis Gala's regulator and supervisor may seem high handed and sometimes even aggressive, but they may have been the only method available to a small, private radio company in Ukraine owned by a foreigner, to draw attention to its situation.

Respondent

238. Respondent in this arbitration is the Republic of Ukraine. The actions and omissions on which Claimant bases his claims were carried out by the National Council, the State Centre and the State Committee, all of which are organs of Ukraine, for which under international law the Republic is responsible.

239. As Respondent has explained to the Tribunal, Ukraine became an independent State on August 24, 1991, and after independence its political, economic and legal systems underwent a substantial transformation[67]. Ukraine has acknowledged that in the initial years of independence, constant political battles and economic instability caused a lack of coordination in the activities of state bodies and hampered their ability to create an effective system of government.

240. Ukraine is an independent and sovereign state, governed by a Constitution, which entrusts to Parliament, elected by general democratic vote, the task of promulgating laws. The Arbitral Tribunal naturally respects the legislative function or the Ukrainian Parliament. It certainly is not the task of this Arbitral Tribunal, constituted under the ICSID Convention, to review or second-guess the rules which the representatives of the Ukrainian people have promulgated. The powers of this Tribunal are much more limited: they only encompass the authority to decide on a case-by-case basis whether Ukraine has violated

[66] Claimant's Exhibit CM-50 and Respondent's Exhibit R- 353.
[67] Respondent's Memorial, para.18.

certain guarantees, offered to American investors under the BIT, and to establish the appropriate remedies.

241. The respect for Ukraine's sovereignty is reinforced by the sector in which Claimant made his investment: radio broadcasting. In all jurisdictions, Radio and TV are special sectors subject to specific regulation. There are two reasons for this:

- first, radio frequencies are by technical nature scarce assets, and consequently the law must articulate systems for allocating licences to prospective bidders;
- but there is also a second reason: when regulating private activity in the media sector, States can, and frequently do, take into consideration a number of legitimate public policy issues; thus, media companies can be subject to specific regulation and supervision in order to guarantee transparency, political and linguistic pluralism, protection of children or minorities and other similar factors.

242. The exceptional character of media companies, and specifically of radio broadcasting companies, is accepted in the BIT itself. In its Annex, both the United States and Ukraine reserve the right to make or maintain limited exceptions to the national treatment principle (provided for in Article II.1 of the BIT) with regard to radio broadcasting stations. The exception does not affect the principles which are being pleaded by Claimant in this procedure, but it proves the special sensitivity towards the media shown by both States when approving the BIT.

VII.3.2. THE FET STANDARD AS DEFINED IN THE BIT

243. The purpose of this section is to determine the general scope and meaning of the FET standard defined in the BIT.

244. Article II.3 (a) and (b) of the BIT reads as follows:

> "*3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.*
>
> *(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party*".

245. The origin of Article II.3 (a) and (b) can be traced to the 1992 and 1994 US Model BIT, which proposed the following wording:

> "*Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded*

> *treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments"*[68].

246. Article II.3 of the BIT was thus taken literally from the US Model BIT which was in force at the time when the BIT was negotiated, with only the addition of the phrase referring to judicial review. It is a rule of Delphic economy of language, which manages in just three sentences to formulate a series of wide ranging principles: FET standard, protection and security standard, international minimum standard and prohibition of arbitrary or discriminatory measures.

A) Customary International Law Minimum Standard and FET Standard

247. A classic debate in investment arbitration law is whether the FET standard established by bilateral or multilateral investment treaties coincides with or differs from the international minimum standard of protection for aliens imposed by customary international law.

248. The starting point of this debate is the very definition of the international minimum standard – a question which is fraught with difficulties[69]. For claims arising from administrative or legislative acts of Governments – which are the type of claims typically submitted in investment disputes – the historic leading case seems to be *Roberts*[70], issued by the United States – Mexico General Claims Commission in 1926, which defined the minimum treatment as that required *"in accordance with ordinary standards of civilization"*. Mr. Roberts, a US citizen, had been imprisoned in Mexico in what he held to be inhumane conditions. Mexico had argued that Mexicans were held in identical conditions. And the Tribunal decided:

> *"Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment"*.

249. *Roberts* is understood to stand for the propositions that a certain treatment may give rise to international responsibility notwithstanding that it affects citizens and aliens alike, and that administrative and legislative actions may amount to

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[68] As quoted in I. Tudor, "The Fair and Equitable Standard in the International Law of Foreign Investment" (2008) p. 28.

[69] For a *status quaestionis* see Paulsson/Petrochilos: "*Neer*-ly Misled?" ICSID Review: Foreign Investment Law Journal (2007), vol.22.2, pp. 242-257.

[70] *Harry Roberts (U.S.A.) v. United Mexican States;* November 2, 1926; U.N. Report of International Arbitral Awards, IV, p. 71.

a violation of the customary minimum treatment even if the State did not act in bad faith or with willful neglect of duty[71].

250. The relationship between FET and customary minimum standard has been the subject of much debate, especially in NAFTA based arbitrations, and has led the NAFTA Free Trade Commission to issue a binding interpretation on July 31, 2001. According to this interpretation:

> *"2. Minimum Standard of Treatment in Accordance with International Law*
>
> *1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.*
>
> *2. The concept of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that, which is required by the customary international law minimum standard of treatment of aliens. […]".*

251. The same proposition, that the FET standard should be reduced to the customary international law minimum standard, was afterwards adopted in the new 2004 US Model BIT. Article 5 of this model provides[72]:

> *"Article 5: Minimum Standard of Treatment*[73]
>
> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments".*

252. Is this principle of assimilation between customary minimum standard and FET standard also applicable to the US – Ukraine BIT?

253. The answer must be in the negative. The BIT was adopted in 1996, and was based on the standard drafting then proposed by the US. The words used are clear, and do not leave room for doubt: *"Investments shall at all times be accorded fair and equitable treatment … and shall in no case be accorded treatment less than that required by international law"*. What the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of

[71] While for claims based on denial of justice, aggravating circumstances like outrage, bad faith, willful neglect of duty or other egregious behavior are required; see *L.F.H. and P.E. Neer (U.S.A) v. United Mexican States*; October 7, 1926; U.N. Report of International Arbitral Awards, IV, p. 60

[72] Quoted in I. Tudor, "The Fair and Equitable Standard in the International Law of Foreign Investment" (2008) p. 57.

[73] Footnote omitted.

protection could and should be transcended if the FET standard provided the investor with a superior set of rights[74].

254. In view of the drafting of Article II.3 of the BIT, the Tribunal finds that actions or omissions of the Parties may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith.

255. This leads to the next question: what is the exact meaning of the FET standard acknowledged by the BIT?

B) Meaning of Article II.3 of the BIT

256. The words used by the Article II.3. are the following: *"Investments shall at all times be accorded fair and equitable treatment […] Neither party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments"*.

257. These general principles require interpretation in order to give them specific content and this interpretation must comply with the requirements of Article 31.1. of the Vienna Convention – it must be done *"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[75]"*.

a) Ordinary meaning

258. An inquiry into the ordinary meaning of the expression "fair and equitable treatment" does not clarify the meaning of the concept. "Fair and equitable treatment" is a term of art, and any effort to decipher the ordinary meaning of the words used only leads to analogous terms of almost equal vagueness.

259. The literal reading of Article II.3 of the BIT is more helpful. In accordance with the words used, Ukraine is assuming a positive and a negative obligation: the positive is to accord FET to the protected foreign investments, and the negative is to abstain from arbitrary or discriminatory measures affecting such investments. Any arbitrary or discriminatory measure, by definition, fails to be fair and equitable. Thus, any violation of subsection (b) seems *ipso iure* to also constitute a violation of subsection (a). The reverse is not true, though. An action or inaction of a State may fall short of fairness and equity without being discriminatory or arbitrary[76]. The prohibition of arbitrary or discriminatory measures is thus an example of possible violations of the FET standard.

260. The literal interpretation also shows that for a measure to violate the BIT it is sufficient if it is either arbitrary or discriminatory; it need not be both.

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[74] In agreement: I. Tudor, "The Fair and Equitable Standard in the International Law of Foreign Investment" (2008) p. 29.
[75] Emphasis added.
[76] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No.ARB/02/1, Decision on Liability of 3 October 2006, para. 162.

261. Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification[77]; a measure must be "*discriminatory and expose[s] the claimant to sectional or racial prejudice*[78]"; or a measure must "*target[ed] Claimant's investments specifically as foreign investments*[79]".

262. Arbitrariness has been described as "*founded on prejudice or preference rather than on reason or fact*[80]"; "*…contrary to the law because…[it] shocks, or at least surprises, a sense of juridical propriety*[81]"; or "*wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety*[82]"; or conduct which "*manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination*[83]". Professor Schreuer has defined (and the Tribunal in *EDF v. Romania*[84] has accepted) as "arbitrary":

> "*a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
> *b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;*
> *c. a measure taken for reasons that are different from those put forward by the decision maker;*
> *d. a measure taken in wilful disregard of due process and proper procedure.*"

263. Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.

b) Context

264. Words used in treaties must be interpreted through their context. The context of Article II.3 is to be found in the Preamble of the BIT, in which the contracting parties state "*that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment…*". The FET standard is thus closely tied to the notion of legitimate expectations - actions or omissions by Ukraine are contrary to the FET standard if they frustrate

[77] *Saluka Investments BV v. Czech Republic PCA*, UNCITRAL, Partial Award of 17 March 2006, para. 313.
[78] *Waste Management Inc. v. United Mexican States*, ICSID Case No.ARB (AF)/00/3, Award of 30 April 2004, para. 98, confirmed in *Methanex Corporation v. United States of America*, UNCITRAL, Award of 3 August 2005, para. 274.
[79] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina,* ICSID Case No.ARB/02/1, Decision on Liability of 3 October 2006, para. 147.
[80] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award of 3 September 2001, para. 221.
[81] *Tecnicas Medioambientales Tecmed SA v. United Mexican States,* ICSID Case No. ARB(AF)/00/2, 29 May 2003, para. 154.
[82] *Loewen Group Inc and Raymons L. Loewen v. United States of America,* ICSID Case No. ARB(AF)98/3, Award of 26 June 2003, para. 131.
[83] *Saluka Investments BV v. Czech Republic,* UNCITRAL, Partial Award of 17 March 2006, para. 307.
[84] See *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award of 8 October 2009, para. 303; Professor Schreuer acted as expert and his opinion was quoted and accepted by the Tribunal.

legitimate and reasonable expectations on which the investor relied at the time when he made the investment[85].

Legitimate expectations

265. Which were the legitimate expectations of Claimant at the time he made his investment?

266. It must be recalled that when in 1995 Mr. Lemire made his first investment and acquired a controlling stake in Gala Radio, this was a small company in a nascent industry. Historically, before independence and political change, the radio industry in Ukraine had been in the hands of the State. In the mid 1990s the sector began to be privatized, a first Law on TV and Radio having been approved on December 21, 1993. All these factors had a bearing on Claimant's legitimate expectations.

267. On a general level, Claimant could expect a regulatory system for the broadcasting industry which was to be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions. It is true that Ukraine and the United States, when accepting the BIT, had reserved their right to make or maintain limited exceptions to the national treatment in the radio sector[86]. Under this exception, Ukraine could e.g., validly require that the founders of broadcasting companies be Ukrainian nationals. But Mr. Lemire could equally expect that, once he had been awarded the necessary administrative authorization to invest in the Ukrainian radio sector, there would be a level playing field, and the administrative measures would not be inequitable, unfair, arbitrary or discriminatory.

268. And on a more specific and personal level, Mr. Lemire undoubtedly had the legitimate expectation that Gala, which at that time was only a local station in Kyiv, would be allowed to expand, in parallel with the growth of the private radio industry in Ukraine.

269. The actual level of anticipated expansion has been the object of much discussion by the parties. Mr. Lemire has submitted that his intention at that time was to create three radio networks, two in FM, and one in AM, centered around three different age groups[87]. Respondent has challenged this statement, and has referred to the absence of any formal business plan setting out the intended business structure.

270. In the Tribunal's opinion, the available evidence shows that what Mr. Lemire had in mind when he bought into Gala Radio in June 1995, was to convert Gala into a national broadcaster and to create a second AM channel. The idea to create a third radio network – called "Energy" – seems to have been an

[85] The relationship between FET and legitimate expectations has been established in a number of decisions: *Saluka Investments BV v. Czech Republic PCA*, UNCITRAL, Partial Award of.March 17, 2006, para. 302 which then quotes *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, *CME v. Czech Republic* and *Waste Management v. United Mexican States*.
[86] See Annex to BIT.
[87] Mr. Lemire, Hearing Transcript 1, p. 121, at 17.

afterthought. At the time of the acquisition of Gala, Claimant must have approached the National Council, and asked whether a national licence for Gala and an AM licence could be obtained. The National Council reacted in positive terms, as proven by a letter addressed to the State Centre, in which the National Council states that it is *"considering the possibility"* of issuing to Gala licences for a nationwide FM channel and for a second AM Band, and enquires whether the frequencies would be available. There is no reference to a third channel[88]. The State Centre reacted positively[89].

271. Respondent has insisted that Claimant has not been able to produce a formal business plan[90]. That is true. But the Tribunal does not attach too much weight to this omission. Formal business plans are customary in sizeable investments in settled economic and business environments. None of these characteristics applied to Mr. Lemire's investment in Gala Radio: a small amount was involved and the situation of Ukraine was anything but settled.

c) Object and purpose

272. The object and purpose of the BIT - the third interpretive criterion - is defined in its Preamble: the parties *"desir[e] to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party"* and recognize that the BIT *"will stimulate the flow of private capital and the economic development of the Parties"*. The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital.

273. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.

C) Pursuit of Local Remedies

274. Respondent has submitted that Gala Radio, although it asserts a list of errors concerning the tenders, never challenged any of the decisions before the Ukrainian Courts[91]. In Respondent's opinion, Claimant should have taken advantage of the available local remedies that would have been capable of correcting the alleged administrative wrong. Claimant did so when confronted with the warnings issued by the National Council, and successfully challenged two decisions before the Ukrainian Courts. Respondent draws the Tribunal's attention to the *Generation Ukraine* award, which stressed the need for the

[88] Claimant's Exhibit CM-1.
[89] Claimant's Exhibit CM-2.
[90] Claimant's Post-Hearing Memorial, para. 90.
[91] Respondent's Post-Hearing Memorial, para. 625.

investor to make a reasonable effort to obtain the legal correction of an administrative fault:

> *"[…]In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction*[92]*".*

275. The question which the Tribunal must answer is whether, given the fact that Gala Radio has not challenged the decisions of the National Council, it is now precluded from presenting its claim in this arbitration.

276. The starting point of the Tribunal's analysis must be the text of the BIT. The BIT – unlike other Treaties – does not include any clause requiring the initiation or exhaustion of local remedies before the filing of an investment arbitration. Quite the contrary: Article II.3 deviates from the standard US Model BIT in only one point, the insertion of the following phrase:

> *"[…] For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party*".

277. The literal meaning of this phrase could not be clearer: even if a party has had (and has not exercised), or has exercised (with whichever outcome) the right to judicial review, such action or omission is irrelevant in an investment arbitration deciding whether the measure is arbitrary or discriminatory. The consequence is that in an arbitration under the US-Ukrainian BIT, the possibility to file a claim against a specific measure, is not burdened by any requirement to previously appeal to the national Courts.

278. This does not mean that an investor can come before an ICSID tribunal with any complaint, no matter how trivial, about any decision, no matter how routine, taken by any civil servant, no matter how modest his hierarchical place. In this case, however, the claim is raised against the conduct of the National Council, that is to say the highest regulatory organ for the broadcasting industry. On this basis, the Tribunal considers that there should be no impediment to Claimant seeking to hold Ukraine accountable for an alleged breach of the BIT.

279. Given the clear language of the BIT, the Tribunal rejects Respondent's submission that Claimant is precluded from pursuing his claims in the present arbitration, due to his failure to appeal the tender decisions of the National Council.

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[92] *Generation Ukraine Inc. v. Ukraine,* ICSID Case No. ARB/00/9, Award of 16 September 2003, para. 20.30.

Generation Ukraine

280. The Tribunal would like to add that – even if Article II.3 of the BIT had lacked a specific reference to local remedies – the present case has significant differences with *Generation Ukraine*. In *Generation Ukraine*, the claim filed by Claimant was based on expropriation, and the appropriate level of compensation - a type of claim which could have been submitted to and decided by the local Courts. In the present arbitration, the situation is quite different: the claim is for damages arising from the violation of the BIT standards, and such claim can only be filed before an international arbitration tribunal.

281. It is true that under Article 30.4 of the LTR, Gala Radio would have had the opportunity to challenge the decisions of the National Council awarding frequencies to other companies. But those claims would only have succeeded in setting aside the National Council's decision, and forcing that the tender be repeated. Gala Radio would never be certain that in this repeat tender it would be successful. The practical result of an appeal against a tender decision of the National Council is very limited – if the procedure is unfair or the administrative body biased, it could again decide to grant the licence to another contender and not to Gala. The effect is quite different from that of an appeal against a warning – in this case the Court's decision provokes the immediate setting aside of the measure.

282. The test proposed by *Generation Ukraine* is based on reasonableness. Claimant is only required to put in a reasonable effort to obtain correction of the wrong decision. In the circumstances of the present case, it would have been unreasonable to require Claimant to have fought in the Ukrainian Courts the National Council's decisions adjudicating frequencies.

283. The Tribunal is not thereby suggesting that a breach occurs if the National Council makes a decision which is different from the one the arbitrators would have made if they were the regulators. The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal's sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is materially wrong will not suffice. It must be proven that the State organ acted in an arbitrary or capricious way. A regulatory organ charged with the attribution of licences on a competitive basis plainly violates essential notions of fairness if it refuses to consider the information provided by a qualified applicant, or if it engages in favouritism. And the State itself breaches its obligations under the treaty if it exercises undue influence over the decision-making of regulatory bodies.

D) Summary

284. The FET standard defined in the BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis. It requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm. The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including among others the following:

- whether the State has failed to offer a stable and predictable legal framework;
- whether the State made specific representations to the investor;
- whether due process has been denied to the investor;
- whether there is an absence of transparency in the legal procedure or in the actions of the State;
- whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State;
- whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent.

285. The evaluation of the State's action cannot be performed in the abstract and only with a view of protecting the investor's rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred:

- the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors;
- the legitimate expectations of the investor, at the time he made his investment;
- the investor's duty to perform an investigation before effecting the investment;
- the investor's conduct in the host country.

* * *

286. Once the scope and meaning of the FET standard has been defined in the abstract, the Tribunal must establish the facts and decide whether they constitute a violation of such standard. This will be achieved by reviewing the legal procedure created by Ukrainian law for the awarding of licences in the broadcasting sector (VI.3.3), then by analyzing in detail the facts surrounding the allocation of frequencies which affected Gala (VI.3.4).

VII.3.3. PROCEDURE FOR THE AWARDING OF LICENCES IN THE BROADCASTING SECTOR UNDER UKRAINIAN LAW

287. Two fundamental laws regulate the Ukrainian radio sector:

- the Law on National Television and Radio Council of Ukraine ("LNC"), originally issued on September 30, 1998[93], amended on a number of occasions, the last on January 12, 2006; the scope of this law is the designation and scope of responsibilities of the National Council;
- the Law on Television and Radio Broadcasting ("LTR"), originally issued on December 21, 1993, amended significantly a number of times, lastly on March 1, 2006[94], and which provides the general rules regarding the functioning of radio and TV in Ukraine.

A) The National Council

288. The LNC establishes the National Council as a "*constitutional permanent collegiate agency*[95]". Its activities "*shall be based upon the principles of legality, independence, impartiality, transparency…*[96]". The eight members of the National Council are appointed in parity by the President and the Parliament respectively, for five-year terms with the possibility of a single reappointment[97]. Until 2006, the President and the Parliament could at any time disqualify any of their appointees from office. That was no empty threat: on February 2, 2004 the Parliament's Committee on Freedom of Speech and Information approved a resolution, recommending that Parliament carry out a "*credibility impeachment*" of all the members of the National Council[98].

289. Since 2006 the situation has improved because the LNC has been amended, and the National Council *in toto* can be dismissed only upon a vote of no confidence carried by Parliament and confirmed by the President[99].

290. The National Council derives its status and mandate directly from a constituent law. Its independence and impartiality is expressly guaranteed by that law. Formally, it thus is independent. The appointment of independent regulators by Parliament and/or the Head of State follows wide-spread practice. Before 2006, the power of the President and the Parliament, respectively, to remove their appointees from office indeed represented a threat to Council members' independence. With the requirement of a concurring decision of both the President and the Parliament for removing the Council *in toto* from office, a safeguard against undue political pressure was introduced.

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[93] Claimant's Exhibit CM-2; the Tribunal used Claimant's translation, to which Respondent has not made any objection.
[94] Claimant's Exhibit CM-3; the Tribunal will quote from the translation prepared by Claimant, to which Respondent has made no objection.
[95] Article 1 of the LNC.
[96] Article 3.1 of the LNC.
[97] Article 4 of the LNC.
[98] See Claimant's Exhibit CM-31.
[99] Article 16.5 of the LNC.

291. The level of political interference with the decisions of the National Council is difficult to gauge from the outside. The only incident which is proven beyond any doubt is the interference of the President of Ukraine with the tender of October 19, 2005, which was awarded to the bidder mentioned in the President's letter to the National Council (which will be analyzed in detail below). During the hearing, Mr. Lyasovsky, a member of the National Council, was directly asked whether National Council members follow the instructions of the political establishment. His answer, under oath, was the following[100]:

> "*Well, we're very accustomed to hearing this kind of language, I'll be honest and frank. Yes, there have been – there are attempts at putting pressure on the council. However, due to the specifics of how the council is formed, such attempts are ineffective, especially since recently, since amendments were made, passed in 2006. Indeed, we now are an independent body and we're not subject, or rather we're immune to pressure*".

292. The answer acknowledges that pressure has been exercised on the National Council, but expresses the contention that since 2006 – when the LNC was amended and the Council was given a higher level of independence – the situation has been improving.

B) The Administrative Procedure for the Issuances of Licences

293. The LTR is an extensive law, comprising 75 articles, regulating the creation, licensing, functioning, supervision and sanctioning of companies operating in the TV and radio sectors. Section III of the Law, as it now stands, is devoted to the rules governing the tender procedure and the issuance of broadcasting licences.

294. From a historical perspective, the system for granting radio licences has gone through four phases:

- in a first phase, between 1993 and 1995, licences were issued by the National Council under Article 14 of the 1993 LTR, upon individual application of persons interested in setting up a radio station;
- after 1995, radio frequencies were awarded by means of tender announced in the press[101];
- the third phase began on December 15, 1998, when the National Council became inoperative because it ceased to have five duly designated members, and consequently could not validly carry decisions; during this interregnum, radio frequencies were awarded directly by the State Committee, in clear violation of the LTR[102]. The situation was solved in June 2000, when the National Council regained all its members, and a

[100] Mr. Lyasovsky, Hearing Transcript 2 p. 73, at 24.
[101] Mr. Petrenko, Hearing Transcript 4, p. 81, at 25.
[102] See Claimant's Exhibit CM-11, letter of National Council member S. Aksenenko to the Vice Prime Minister of Ukraine.

first tender in accordance with the LTR was then organized on January 1, 2001;
- since January 2001, licences have all been awarded by way of tenders supervised by the National Council.

295. The LTR contains detailed rules with regard to the organization of tenders. The decision to launch a tender for new frequencies is adopted by the National Council, then published in the press. Prospective bidders have a one-month period to present their applications, which must include information required by Article 24 of the LTR. Applications are then reviewed by the individual members of the National Council. The criteria of review are now those established in Article 25.14 of the LTR:

> "*While considering the applications the National Council shall prefer TV/radio organization that:*
>
> *a) is capable to fulfill the licence conditions to the best extent;*
> *b) prefers socially important programs (informational, social and political, children, etc.), satisfies informational needs of national minorities and secures freedom of speech;*
> *c) has an advantage in financial and economical as well as professional and technical capabilities for TV/radio broadcasting;"*

296. The system for deciding the winner of the tender is simple: the National Council holds a formal meeting, the various applications for each frequency are presented, each member of the National Council expresses a vote and the licence is awarded to the applicant supported by at least five members of the National Council[103]. If no applicant reaches this threshold, the frequency is not awarded, although it may be put again to tender on a future occasion.

297. The voting system gives rise to three different issues:

a) <u>Publicity of the vote</u>

298. The first is the publicity of the vote.

299. The LTR contains no provision regarding the formal requirements of the National Council's decision. Practices seem to have developed. It is undisputed that in an initial phase, the votes would be cast in a private meeting of the Council, behind closed doors, and that there was no transparency of how each member of the National Council had voted. The parties have debated when this phase ended. Claimant has submitted that the change occurred in 1995[104]; while Respondent's position is that this happened in 2000[105]. The evidence submitted by Respondent in order to support its position are minutes of National Council meetings which took place from December 24, 2003 onwards. These minutes list representatives of participating radio companies as "invited persons" present during the discussions.

[103] This is not controversial; see Respondent's Post-Hearing Memorial, para. 350.
[104] Claimant's Reply Memorial, para.104.
[105] Respondent's Rejoinder, para. 511.

300. The Tribunal concludes that from the end of 2003 onwards, the practice of the National Council has been to "invite" interested parties to attend its meetings. This constitutes a significant improvement in the transparency of the decision procedure.

b) Reasoning of the vote

301. The second issue is the reasoning underlying the votes.

302. The LTR does not require that the votes of each member of the National Council, or the National Council's decision as such, be reasoned. This derives clearly from the drafting of Article 25 of the LTR.

303. In paragraph 8 of this provision, the law specifically establishes that if the National Council is to exclude a person from participating in a tender, such decision must be "*reasoned*". In the documents presented in this arbitration there is at least one example of a decision excluding a participant in the tender, and that decision is duly reasoned[106].

304. The situation is different as regards decision for the awarding of frequencies. Paragraph 13 of the same article describes the procedure for awarding the licence to the winner of the tender:

> "*A decision on the winner of a tender and on broadcast licence issuance shall be made by the National Council within a 30-day period after application period is finished*".

305. It is very telling that for this decision of awarding frequencies the law omits the requirement that it be *"reasoned"* – a requirement which the same article of the Law specifically requires for exclusion of applicants.

306. The administrative practice of the National Council when awarding frequencies adhered to the principle established in the LTR. Respondent has presented a great number of minutes of decisions taken by the National Council. These minutes simply state in favour of whom each member is casting his vote. And if a participant received five votes, the frequency was awarded to him. The minutes do not include any discussion among the members or the reasoning of the decision.

307. The evidence presented in this arbitration does not indicate that before the National Council's meeting, either the administrative staff of the Council, or its members, prepared a reasoned and researched report with a valuation and ranking of the applications submitted. This is surprising, since Article 25.14 of the LTR orders that in considering the application, the National Council *"shall prefer"* radio organizations that offer socially important programs, satisfy minorities, secure freedom of speech, have better financial resources or professional or technical capabilities. The evidence submitted seems to show

[106] See Respondent's Exhibit R-350, regarding the exclusion of NBCU from two tenders.

that the National Council made no formal effort to measure to what extent each application complied with the requirements of the Law[107].

308. Respondent has acknowledged that "*the members of the National Council are not obliged by the existing legislation to explain the details of their reasoning during the voting process*[108]". But Respondent has added that in practice the members of the National Council did explain their reasoning at the meeting, during debates with the candidates and during the discussions with other members of the National Council, and after the meetings at briefings with the press. In the opinion of the Arbitral Tribunal, these informal explanations, which started in 2004, although certainly a step forward, do not off-set the absence of any reasoning justifying the vote of each Council Member, and the corporate decision of the National Council as a body.

309. The absence of reasoning of the decision represents a significant weakness in the administrative procedure for the issuance of licences.

310. Thus, a participant who has lost cannot ascertain why his application was rejected, how he was ranked with regard to other participants, and what he could do to improve his chances to be successful in the next bidding.

311. The absence of reasoning also jeopardizes the possibilities of public scrutiny and of judicial review. A Court cannot judge the reasonableness of the National Council's decision to award the tender to one participant or the other, if there is no formal explanation of the reasons which prompted the decision. Absence of reasoning *de facto* reduces the causes of judicial review to procedural irregularities during the tender.

312. In April 2007, three Deputies from the parliamentary majority proposed to Parliament the creation of an Investigating Committee centred on the activities of the National Council, including the "*transparency and publicity of broadcasting licences issuing and renewal*[109]". Although the proposal of the three Deputies may also have had political motivations, the mere fact that it was presented – it is unclear from the record if the Committee was actually set up[110] - proves the existence of significant unease with the degree of transparency and publicity of the procedure for awarding broadcasting licences.

[107] Respondent has submitted that in order to help members of the National Council, an "informational passport" for each region of Ukraine was prepared by National Council Staff (Post-Hearing Memorial, para. 347); but this passport did not include any valuation of the various applications submitted.
[108] Respondent's Rejoinder, para. 512.
[109] Claimant's Exhibit CM-86.
[110] In Claimant's Post-Hearing Memorial, para. 71.3, Claimant submits that it was created; in Claimant's Memorial, para. 32 and Claimant's Reply Memorial, para. 170, the assertion is that it was proposed.

c) Lack of knowledge of ultimate owners

313. A third characteristic of the system for allocation of frequencies is that participants were under no obligations to disclose the ultimate owners of their companies. While the direct controlling owners of companies bidding for frequencies were registered with the National Council, the owners of the owners were not. The Council members, who deposed as witnesses, when asked on several occasions by counsel to Claimant and by the Tribunal, were not able to provide any information regarding the beneficial owners of the radio companies to whom they had awarded significant numbers of licences[111].

314. Politically influential individuals are thus able to beneficially own radio stations, which participate in tenders for new frequencies, and to hide behind "ownership chains", so that their interest in the decision remains undisclosed. This lack of transparency clearly represents a shortcoming of the system. The LTR does not require information about ultimate owners, and the National Council apparently never asked any of the participants to disclose the names of their controlling shareholders. This is especially troubling, since the legal criteria which National Council should apply when selecting the winner must include freedom of speech and financial and economic capability of the applicants – criteria difficult to apply if there is no transparency regarding beneficial owners of radio stations. It also makes it difficult for the public – and for judicial bodies – to determine whether there has been undue influence.

* * *

315. The Tribunal has already stated its respect for Ukraine's sovereignty and for Ukraine's right to promulgate the laws which its Parliament deems are best suited to further the Nation's public interest. The powers of this Tribunal are limited to judging whether Respondent has acted in ways that affect Claimant and breach the FET standard enshrined in the BIT. But in order to value specific measures, the Tribunal must analyze the general legal framework within which specific conduct took place. That analysis has revealed that the procedure presents some shortcomings, which in essence affect:

- the independence of members of the National Council;
- the existence of an interregnum, during which licences were awarded without tender procedure;
- the absence of formal valuation of the applications for licences against clearly established criteria;
- the absence of reasoning for National Council decisions, whether collectively or for individual votes; and
- the lack of transparency of ultimate owners of radio companies.

316. While none of the above features alone stigmatizes the entire tender process as arbitrary, there is a risk that the shortcomings may end up mutually reinforcing each other. Members of the National Council, by virtue of the designation

[111] Mr. Lyasovski, Hearing Transcript 2, p. 52, at 17; Mr. Shevchenko, Hearing Transcript 3, p. 13, at 1; Mr. Kurus, Hearing Transcript 4, p. 7.

system, tend to have political affiliations and interests. Deficient disclosure and transparency requirements ease the misuse of discretionary powers by Council members to accommodate political or personal interests. In sum, the procedure for allocating frequencies by the National Council is fraught with shortcomings that facilitate arbitrary decision making.

317. A final note is important: Ukraine gained its independence only in 1991 and still is in the process of developing its institutional framework. During this formative period, legal imperfections are to be expected. Ukrainian law has improved, and after the 2006 amendments of the LTR, a significant number of weaknesses have been ameliorated.

VII.3.4 GALA'S APPLICATIONS FOR ADDITIONAL FREQUENCIES

318. In the preceding section the Tribunal has concluded that the tender procedure for the issuance of licences presents certain shortcomings, which although falling short of disqualifying the entire system as arbitrary, remain relevant for the assessment of the National Council's measures. In this section the Tribunal will establish the facts surrounding Gala's applications for additional frequencies, and will decide whether the actions or omissions of Respondent amount to a violation of the FET standard guaranteed in the BIT to protected investors.

A) Overview of Gala's Participation in Tenders for Additional Frequencies

319. It is undisputed that between 2001 and 2007 Gala Radio participated in a great number of tenders for broadcasting licences, additional to those that were awarded to Gala pursuant to the Settlement Agreement. The exact number of frequencies for which Gala applied, however, is debated. Claimant states that the number of applications amounts to more than 200 for Gala, plus 100 more for Energy (a second chain of radio stations which Claimant tried to create)[112]. Respondent accepts 180 applications for Gala[113] and 71 for Energy[114].

320. What is not disputed is that all those applications were unsuccessful – with one exception: Claimant was awarded the frequency in Chechelnik, a village of 5,000 inhabitants without any satellite receiver (which implies that the station cannot be linked to Gala's network). It is undisputed that the business relevance of this frequency is minimal. Claimant adds that the National Council's decision to reward Gala's continuing efforts with the awarding of this local frequency in a remote, unconnected village was intended to rub salt in the wound[115].

[112] Respondent's Reply, para. 167; see also Claimant's Exhibit CM-99 with a list of the applications.
[113] Respondent's Exhibit R 344-A.
[114] Respondent's Post-Hearing Memorial, paras. 434 and 453.
[115] Claimant's Reply, para. 168.

Claimant's argument

321. Claimant argues that Gala's dismal record in receiving frequencies stands in stark contrast with that of its competitors, all controlled by powerful and well-connected personalities. Claimant gives the following examples[116]:

- Radio Era applied for 93 frequencies and was awarded 38 (41% success rate); the station is allegedly owned by Mr. Derkach, who is said to be a supporter of the current President of Ukraine;
- Hit Radio applied for 139 frequencies and was awarded 42 (30%); Claimant alleges that it is owned by Mr. Bagrayev, a Deputy (i.e. member of Parliament) and member of the National Council 2000-2002;
- NBM Radio applied for 205 frequencies and was awarded 56 (27%); it is allegedly owned by Mr. Poroshenko, also an ally of the current President;
- Russkoe Radio applied for 111 and was awarded 31 (28%); allegedly also owned by Mr. Bagrayev[117].

322. Claimant has produced circumstantial evidence to substantiate that these radio chains are actually owned by the above-mentioned individuals[118]. During the hearing, Claimant asked the members of the National Council who deposed, to clarify the ownership structure of these radio stations. They all declined, in essence arguing that information regarding beneficial owners is not available to the National Council. The Tribunal also notes that Respondent has not produced any evidence contradicting Claimant's allegations.

Respondent's arguments

323. Respondent's main argument is that Claimant cannot assert a breach of the BIT while remaining at a "macro-statistical" level. Each tender is different from the next, and each applicant is different from the rest. As regards the statistics themselves, Respondent submits that of the 180 frequencies Gala applied for, only 68 were destined for broadcasting a music format that could be similar to Gala Radio's program concept[119]. Respondent also states that in some tenders which it eventually lost, Gala received the favourable votes of some of the Council members – but it never received the five votes necessary for the awarding of the licence.

324. The main thrust of Respondent's argument is that Gala Radio did not win tenders because it "*is an average radio station*[120]" and that it is not at the top level of the overall Ukrainian broadcasting market. Its programming concept is no longer as popular and innovative as it used to be. This would, in Respondent's assertion, justify the National Council's decision to deny new licences to Gala.

[116] Claimant's Exhibit CM-129.
[117] Claimant's Post-Hearing Memorial, para.106.
[118] Claimant's Exhibits CM-105, CM-116 and CM-124 and Mr. Lemire's Witness Statement, para. 123.
[119] Respondent's Post-Hearing Memorial, para. 438.
[120] Respondent's Post-Hearing Memorial, para. 447.

The Tribunal's position

325. The Tribunal agrees with Respondent that mere statistics are insufficient for maintaining a claim for violation of the FET standard. But on the other side, statistics do give an overview of how the facts have developed and may provide valuable insight into patterns of behaviour.

326. If an impartial bystander looks at the gross, macro-statistical numbers, an impact cannot be avoided. In six years Gala Radio, a radio company in good standing, although it tried insistently, has not been able to obtain additional frequencies (except in a small village in rural Ukraine and except for the frequencies allocated pursuant to the Settlement Agreement). Whether one takes Claimant's numbers (200 applications for all types of frequencies) or Respondent's (68 applications for music format frequencies similar to Gala's) is really irrelevant. Respondent's number is in fact even more striking, because it refers to cases where the National Council denied Gala an additional frequency for the type of programming it was already offering, and with good success.

327. It is undisputed that Gala's main competitors – Era, Hit, NMB, Russkoe – were much more successful than Gala: they received between 38 and 56 frequencies. Respondent has tried to justify this differential treatment stating that Gala "*is an average radio station*", that its programming concept is stale and that other competitors offer better broadcasting.

328. The problem with Respondent's argument is that, since the National Council does not reason or explain its decisions, it is totally impossible for a third party (be it a local judge or this Tribunal) to verify whether Gala's applications were rejected because its programming concept was worse than that of its competitors (as Respondent now submits), or due to some other cause, and whether this cause was good, arbitrary or discriminatory.

329. A suspicion in any case remains: if Gala, as Respondent readily admits, *"is an average radio station"*, the natural consequence would seem to be that Gala should have had an average success rate in its tenders. And the record shows that it had a success rate which was much below average.

330. Summing up, the Tribunal feels that the macro-statistical analysis cannot provide conclusive evidence that Respondent has violated the FET standard; but the overall numbers, the absence of any reasonable explanation, the strikingly different success rates of Gala and of its competitors, the impossibility of verifying the reasons why Gala was rejected, are all factors which cast doubts on the decisions of the National Council.

331. In order to substantiate these doubts, it is necessary that the Tribunal analyze each of the tenders in particular. This will be done in the next sections.

B) The Tender of October 19, 2005 and the Interference of the President of Ukraine

Undisputed facts

332. On July 2004 the National Council announced a tender for 15 frequencies, with the special condition that the channel thus created be used solely for "informational broadcasting". Radio channels which exclusively or predominantly broadcast music, like Gala or Kiss, are of limited political relevance. Informational channels, however, are politically more sensitive, since they represent important elements for the formation of public opinion.

333. It is an undisputed fact that on July 20, 2004, i.e. four days after the announcement of the tender, the President of Ukraine sent a "Doruchennya" to Mr. Shevchenko, the Chairman of the National Council, which literally stated as follows[121]:

> *"DORUCHENNYA OF THE UKRAINIAN PRESIDENT*
> *...*
> *To: O. SHEVCHENKO*
> *O. GAJDUK*
>
> *In accordance with the set procedure to consider the matter relating to the allocation of the frequency resource to "Radio Era" and "Radio Kokhannya"*
> *Signed V. YUSCHENKO"*.

334. The "Doruchennya" included a further paragraph, addressed to top officials of the Ukrainian Government and the City of Kiev, asking for support for the activities of TRC "Era" and "Radio Era".

335. Radio Era was an already existing talk radio, broadcasting informational programs. Claimant has alleged that Radio Era (and Radio Kokhannya) are widely reported to be owned by Mr. Derkach, a political ally and supporter of the current President of the Ukraine.

336. There has been some discussion about the precise translation of the word "Doruchennya". During the hearing the Chairman of the National Council Mr. Shevchenko was questioned regarding the precise meaning, and it was agreed that the best English translation would be "instruction", not "order"[122].

337. The "Instruction" was followed up by a letter sent on August 2, 2005, in which the "First Deputy State Secretary of Ukraine" asked Chairman Shevchenko to "*inform the Secretariat of the President of Ukraine of status of the task commissioned by the Head of the State*[123]".

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[121] Claimant's Exhibit CM-45.
[122] Mr. Shevchenko, Hearing Transcript 3, p. 161, at 19; Claimant has accepted the translation; see Claimant's Post-Hearing Memorial, fn. 271.
[123] Claimant's Exhibit CM-108.

338. The record shows no letter from either Mr. Shevchenko or the National Council reacting either to the "Instruction" or to the Secretariat's reminder.

339. On October 19, 2005 the National Council decided to award the 15 frequencies on tender to Radio Era. It is undisputed that during the discussion which led to the Council's decision, a deputy of the Ukrainian Parliament called Derkach attended the meeting. Radio Kokhannya was later on awarded 12 frequencies more.

Claimant's position

340. In Claimant's view, Gala lost the tender to Radio Era due to the President's intervention and then later due to the physical presence of a Parliamentary Deputy at the tender meeting itself. The tender was procedurally improper, and the outcome was unfair, inequitable, arbitrary and discriminatory. As a consequence of these measures, Claimant lost the opportunity to establish a separate talk radio format in an FM format that solely focused on news, informational programs, culture, education and sports[124].

Respondent's position

341. Respondent asserts[125] that the channel was awarded to Radio Era in view of the latter's supremacy in information broadcasting. The message of the President, in Respondent's view, did not constitute an order. Deputy Derkach does not own Radio Era and did not intervene in the National Council's deliberation. Thus, no undue influence was exercised on the National Council's tender decision.

The Tribunal's position

342. The National Council was established by the LNC as a *"constitutional permanent collegiate agency"*; and its activities *"shall be based on the principles of legality, independence, impartiality, transparency..."* (Articles 1 and 3 of the LNC). Decisions on the allocation of radio frequencies in particular are to be made in accordance with a tender process and tender evaluation criteria prescribed by law (see Article 25 of the LTR). Independence and impartiality of National Council members from other State bodies is pivotal to the integrity of the system.

343. Any interference by a State body in the statutory tender process and the supposedly independent and impartial evaluation of tenders must therefore be considered as violating both the LNC and the LTR. This applies especially to any interference by the President, who appoints and reappoints half of the members of the National Council. It must also be remembered that at the time of the Instruction, members of the National Council could be removed by a decision of the President.

[124] Claimant's Post-Hearing Memorial, para. 92.
[125] Respondent's Post-Hearing Memorial, para. 398.

344. Taken literally, the "Instruction" of the President only states that the Chairman of the National Council shall *"in accordance with the set procedure [...] consider the matter relating to the allocation of the frequency resource to "Radio Era" and "Radio Kokhannya"*. Respondent, supported by the deposition of Messrs. Shevchenko and Kurus, tries to depict the message as a routine call by the President on the National Council to do its job.

345. The Tribunal does not have to decide whether the message qualified as a Presidential order which must be obeyed. As noted before, it is sufficient if it constituted an interference with the independent and impartial decision-making process of the National Council, i.e. an indication of the President's expectations with respect to the pertinent decisions.

Impact of the "Instruction"

346. Did the "Instruction" from the President amount to interference?

347. Respondent submits that the "Instruction" should be construed exclusively on the basis of its plain language, and that it amounts to no more than an admonition to the National Council to do its job. No explanation has, however, been given why the National Council needs such an admonition. In the hearings of the present case, National Council members Shevchenko and Kurus could not refer to any similar action of the President, before or after this incident. Its singularity draws attention to the Presidential message and heightens its potential to influence decision making.

348. Moreover, the message was written in the context of an instruction to other State officials to *"remove obstacles"* to Radio Era's activities and *"report on the measures taken"* within seven days. The different language used for addressing these officials, who do not enjoy independence guaranteed by law, and the National Council Chairman, respectively, shows the President's awareness of the National Council's independence. Yet, it also reflects the President's standing in support of Radio Era.

349. An additional factor to be borne in mind is that within two weeks of the Presidential "Instruction", but before the pertinent tender decision, the Secretariat enquired on the status of the *"task commissioned"* by the President. This letter is a clear indication of the President's support of Radio Era's offer and his expectation that his message would be duly taken into account in the process.

350. In these circumstances, the attendance at the decisive National Council meeting on October 19, 2005 by Deputy Derkach is clearly more than a routine participation of a deputy in a Council meeting. It appears as a demonstration of vigilance, intended to remind Council members that their decisions are watched.

Deputy Derkach

351. It has proven impossible for the Tribunal to ascertain whether Mr. Derkach actually owns or is somehow connected to Era Radio, as alleged by Claimant. Specifically asked by the Tribunal, Chairman Shevchenko could not confirm whether Mr. Derkach was the owner of Era Radio, nor could he give any information regarding the person or persons who controlled this radio station[126]. It is highly implausible that the Chairman of the National Council, who had been twice elected as a Parliamentary Deputy, who had received an "Instruction" from the President to consider Era's application favourably, and who voted in favour of awarding Era the licences to strengthening it as a leading broadcaster in Ukraine, should remain completely unaware of the ownership structure of this company.

352. In any case, for present purposes it suffices to record that, as documented by Claimant, Mr. Derkach has been reported in the media as being associated with Era Radio[127], so that his presence at the National Council meeting must have been perceived as a supporter of this radio station. It can also remain open whether he has expressed his support by his body language, as maintained by Claimant. His mere attendance at this meeting in conjunction with his publicly reported association with Radio Era constitutes an action in support of this applicant.

Respondent's counter-argument

353. Respondent has asserted that the President's "Instruction" was inconsequential, because the channel of frequencies in question had been reserved for informational broadcasting and Radio Era was the national champion in this market segment. Even Claimant concedes that according to a market survey (the so-called "SIREX Report") Radio Era was the national leader on information broadcasting, with an established track record, while Gala intended to set up a new "talk format radio network" in order to satisfy the tender condition. Claimant adds, however, that in accordance with the SIREX Report Gala was number two (after Radio Era) in news broadcasting, and Radio Era's closest competitor[128].

354. The Arbitral Tribunal is again confronted with the impossibility of reviewing the reasons underlying the National Council's decision. A decision in favour of the established leader in the relevant field over a newcomer may under certain circumstances be appropriate. But Article 25.14 (b) of the LTR also orders the National Council to take into account the objective of "*secur[ing] freedom of speech*". Since Radio Era already had a radio network, pluralism could arguably be better served if the new channel was awarded to a different company. Gala had a realistic prospect of winning this tender against Radio Era, and such opportunity was taken away by the Presidential interference.

[126] Mr. Shevchenko, Hearing Transcript 3, p. 172.
[127] Claimant's Exhibits CM 105 and CM 124; Claimant's Post-Hearing Memorial, para. 81.
[128] Claimant's Post-Hearing Memorial, para. 91.

355. The President's "Instruction" referred not only to the tender applications of Radio Era, but also to those of Radio Kokhannya. It is undisputed that radio Kokhannya received 12 frequencies from July 2005 through January 2006[129], in tenders in which Gala also participated.

Decision

356. In light of the aforementioned circumstances, the Tribunal concludes that the President's "Instruction" amounted to interference with the independent and impartial decision of the National Council in favour of two of Claimant's competitors – Radio Era and Radio Kokhannya. It thus constituted a violation of applicable Ukrainian legislation, namely the LNC and LTR, which meets the *Saluka* test, since it *"manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination"* and thus amounts to an *"arbitrary or discriminatory measure"* within the meaning of Article II.3 (b) of the BIT. Furthermore, the apparently politically motivated preference for one competitor represents a discrimination against Claimant, who was applying in the same tender processes for the same frequencies.

357. In conclusion, the Tribunal determines that when the National Council at the meeting of October 19, 2005 granted 15 frequencies for an information broadcasting channel to Radio Era, and subsequently awarded 12 frequencies to Radio Kokannya, such decisions violated the FET standard established by Art II.3 of the BIT.

C) The Tender of May 26, 2004 for an AM Frequency

358. In May 2004 Gala applied for an AM frequency for Kiev, together with two competitors (Odessa Legal Academy and Charity Public Fund Radio). In the National Council meeting on May 26, 2004, the two competitors received each four votes and Gala secured one vote. As no application was supported by the requisite five votes, the National Council cancelled this tender, convened a new tender and awarded the frequency to NART TV.

359. Gala has been broadcasting on FM frequencies, which are appropriate for a program based fundamentally on music. The AM frequency is not suitable for music programs but only for talk and information programs.

Claimant's position

360. Claimant submits that with the AM frequency for which it was applying, Gala had intended to establish a new talk radio format[130]. Gala was the only qualified applicant in the May 26, 2004 tender, as its competitors lacked the necessary financial resources, radio experience and management capability. Notwithstanding Gala's qualifications, in an arbitrary and *discriminatory* decision the National Council decided not to award the frequency to Claimant, to retender it and to issue to NART TV, a company which had the correct political connections.

[129] See Mr. Lyasovski, Hearing Transcript 2, p. 81, at 23.
[130] Claimant's Post-Hearing Memorial, para. 114.

Respondent's position

361. Respondent contests Gala's assertion that it was the only qualified applicant in the May 26, 2004 tender[131]. In Respondent's view, Gala's competitors did have adequate resources and capabilities and Gala's failure can be explained by the lack of experience in informational talk programs and the perception by Council members that Gala was a music channel, without an information broadcasting concept.

The Tribunal's position

362. The Tribunal has already established (see paragraph 271 *above*) that Mr. Lemire's expectations, when in 1995 he started his investments in the Ukrainian radio sector, were to create two channels, one in FM and the other in AM. The concepts for both programs would have been different: the FM channel would be based on music, the AM channel structured as a talk radio (because AM technically is not appropriate to broadcast music in a quality format).

363. In May 2006 the National Council put to tender an AM frequency in Kiev with 50 kW. This was an important tender, since AM frequencies are powerful and have an extensive range of coverage. Claimant has asserted[132] that the frequency to be awarded actually covered a radius of 800 to 1000 km around Kyiv, i.e. the entire Ukrainian territory. Whoever won the tender for this frequency would be able to create a talk radio network, and broadcast news and information to the entire nation.

364. It is undisputed that the only participants in the tender, in addition to Gala, were the Odessa Legal Academy (a University) and Charity Fund Radio. In its meeting of May 26, 2006 the National Council rejected all three applications. The reasons for the Tribunal's decision have never been made public. The only document in the file referring to the decision is the minutes (not the transcript) of the meeting of the National Council[133]. These minutes state only that the two other applicants received four votes each and Gala only one. There is no explanation of the decision, not even a summary of the presentations made by the applicants.

365. During the hearing Chairman Schevchenko was expressly asked about the reasons underlying the National Council's decision. His explanation was very vague[134]:

> *"But in this particular case, I must say that Gala Radio had fewer chances to become a winner of this contest because in many indicators was lagging behind the other contestants. Therefore the results of this voting is not accidental. I can explain to you my motives in voting this way, but it did not win this competition due to objective reasons".*

[131] Respondent's Post-Hearing Memorial, para. 460.
[132] Claimant's Memorial, para. 173.
[133] Respondent's Exhibit R-79.
[134] Mr. Shevchenko, Hearing Transcript 3, p. 102, at 18.

366. In its Post-Hearing Memorial, Respondent justifies the National Council's decision by saying that the National Council was under the impression that Gala intended to broadcast music on the AM frequency, since Gala never presented to the National Council a different concept. As evidence of this assertion, Respondent only relies on a statement from Chairman Shevchenko. Claimant has submitted that it presented a talk radio proposal for the AM channel[135]. In the Tribunal's opinion, Claimant's position is more plausible. It makes no business sense to broadcast a music program through an AM channel, and it seems unlikely that Mr. Lemire, an experienced radio operator, would be proposing such a business plan. Unfortunately, with the evidence presented by Respondent in this procedure, it is impossible to ascertain what Mr. Lemire actually told the National Council with regard to his plans. Mr. Lemire had the opportunity to speak at the Council's meeting, but Respondent has only produced the minutes, not the transcripts of this meeting.

367. Summing up, the Tribunal accepts as proven that Gala proposed to create a radio channel with talk radio format, and that for reasons which have not been explained, the National Council decided not to award the frequency to Claimant.

368. There is a second important factual element: the National Council decided, in the same meeting in which it rejected Gala's bid, to retender the same frequency (and this decision was carried unanimously). Only four months thereafter, in September 2004, the new tender was announced. The frequency was awarded on December 21, 2004 to NART TV, through a tender in which Gala did not participate. Claimant has asserted, and has presented circumstantial evidence[136] proving that NART TV is associated with Mr. Tretwakov, the head of financial affairs in the campaign of President Yuschenko[137]. After obtaining the frequency, NART TV never used it. The National Council cancelled it and announced new tenders in 2007 and 2008, in which Gala did not participate.

Decision

369. The Tribunal must decide whether the National Council's decision in May 26, 2004, denying Gala the AM frequency in Kyiv, and then immediately thereafter retendering the frequency, and awarding it in December 2004 to NART TV, violates the FET standard, by constituting an arbitrary or discriminatory measure. After due consideration, and not without some hesitation, the Tribunal comes to the conclusion that there is a preponderance of evidence showing that the National Council's decisions indeed were arbitrary and discriminatory.

370. The decisions of the National Council in May/December 2004, to reject Claimant's application and award the frequency to NART TV, must be viewed together with the decision of October 2005, denying Gala's application for a FM channel, and granting it to Radio Era. Both decisions affected talk radio

[135] Claimant's Reply Memorial, para. 204.
[136] Claimant's Exhibit CM-106.
[137] Claimant's Reply Memorial, para. 206.

channels devoted to information. In both, Claimant was denied the licence, and in both the licence was awarded to radio companies which – in accordance with circumstantial evidence – are owned by or associated with persons closely connected with the Government. The Tribunal has already decided that the October 2005 decision, in which 15 FM frequencies were granted to Radio Era, violated the FET standard. The same consideration must be extended to the decision of the National Council affecting the AM frequency and adopted in the period May/December 2004.

371. The *Saluka* test requires that the National Council's decision "*manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination*". The Tribunal finds that the National Council's decisions to award the AM frequency to NART TV and to deny it to Gala, meets these requirements. In reaching this conclusion, the Tribunal relies on the following factors:

- Claimant's expectation that it would be awarded an AM licence and that it would be granted the possibility of setting up a talk radio channel;
- the utter absence of any reasoning justifying why the National Council denied Claimant's request to be awarded the AM frequency in the initial tender;
- the immediate decision of the National Council of retendering of the frequency, the announcement of the new tender four months thereafter and the subsequent issuance of the licence in favour of NART TV; and
- the total lack of official information regarding the ultimate ownership of NART TV.

372. The findings of the Tribunal are not affected by Claimant's failure to participate in the second tender. In his deposition, Mr. Lemire explained that he had decided not to participate, because he deemed the effort futile[138]. The justification is reasonable. Given that Gala had been unsuccessful in the first tender, in which the other participants were weak and inexperienced operators, its chances of succeeding in the retender, in which a high profile company like NART TV participated, were likely nonexistent. The arbitrary and discriminatory nature of the Council's decisions arises from the rejection of Claimant's initial application, the immediate retender and the awarding of the channel to a politically influential applicant. Whether Claimant participated or not in the second tender is immaterial for the Tribunal's decision.

D) The Tender of February 6, 2008 With 40% Ukrainian Language Requirement

373. The tender of February 6, 2008 had a singular characteristic: the frequencies to be awarded were subject to an additional language requirement, namely that 40% of the program had to be in the Ukrainian language (this being in addition to the 50% Ukrainian music requirement under the 2006 LTR).

[138] Mr. Lemire, Hearing Transcript 1, p. 273, at 25.

Claimant's position

374. Claimant submits that Gala competed with Kiss FM radio (the station whose ultimate owner allegedly is Mr. Bagrayev) for a number of frequencies in this tender[139]. At that time, Gala was broadcasting 37% of its program in Ukrainian language and thus fell 3% short of the tender condition. (Additionally Gala was meeting a second requirement introduced by the 2006 amendment to the LTR: in more than 50% of the music broadcast, the author, the composer or the performer were Ukrainian). When in the February 6, 2008 meeting of the National Council Mr. Lemire tried to explain how Gala would reach compliance with the 40% tender condition, he was cut off by Council member Kurus with the words: *"It's very straightforward, I must say. According to the tender requirements, you must have no less than 40 percent"*. Mr. Lemire was not allowed to give any further explanation.

375. During the same meeting, a member of the National Council Secretariat reported the corresponding figures of Kiss: share of songs in Ukrainian language 1%, share of music by Ukrainian authors and performers 11%. Nevertheless, Kiss received three frequencies in the February 6, 2008 tender, and Gala received none.

376. When National Council Chairman Shevchenko, in the December 8 – 12, 2008 hearings of the present case, was confronted with the transcript of the February 6, 2008 Council meeting, he explained that applicants were not required to comply before the tender with the 40% Ukrainian language condition, but that they had to demonstrate how they would meet this condition in the future (*"what they had before the competition doesn't matter")*. In Claimant's interpretation, Mr. Shevchenko, who voted for Kiss FM, has admitted that his decision was pre-determined before the National Council meeting discussed the case.

Respondent's position

377. Respondent, without refuting Claimant's allegations in detail, argues that Mr. Shevchnenko's testimony as relied on by Claimant with respect to the February 8, 2008 tender *"is of no probative value*[140]*"*. In Respondent's view, Claimant confused Mr. Shevchenko by referring him to parts of the transcript relating to tenders other than those won by Kiss. Kiss FM had won the tender for the frequency 89.0 for Ternopil against 14 competitors, while Mr. Shevchenko had been referred to the discussions of the tenders for frequencies for Sumy and Ivano-Frankivsk. Notably the record of Kiss FM was reported in the context of Ivano-Frankivsk. As Mr. Shevchenko's testimony did not relate to the discussion of a tender won by Kiss FM, it cannot provide the basis for a comparison of the treatment of Kiss and Gala, respectively.

[139] Claimant's Post-Hearing Memorial, para.105.
[140] Respondent's Post-Hearing Memorial, para. 433.

378. Respondent does not, however, explicitly refute Claimant's allegation that all tenders discussed in the February 8, 2008 meeting were equally subject to the 40% Ukrainian language condition.

The Tribunal's position

379. Since there are divergencies between the parties regarding the facts, it is important that, as a preliminary step, the Tribunal establish as precisely as possible what actually happened.

380. On February 6, 2008 the National Council met, in order to award a large number of frequencies. Mr. Kurus, a member of the National Council, has deposed during the hearing that every frequency to be issued during that meeting was subject to the requirement that at least 40% of its programming be broadcast in Ukrainian[141].

381. An official transcript of the meeting, prepared by the National Council itself, and consequently of high probative value[142], reveals the following incidents:

- Mr. Lemire was asked to speak during the tender for the frequencies in Sumy Oblast; although Gala had applied for a number of frequencies, the transcript shows that not all participants were invited to speak at each of the tenders; this tender was the only occasion when Mr. Lemire was authorized to speak; he explained that Gala Radio was complying with the 50% Ukrainian music requirement, and that the Ukrainian language percentage was 37%. He was interrupted by Mr. Kurus, a member of the National Council, who said: *"It is very straight forward, I must say. According to the tender requirements you must have no less than 40%"*;
- during the tender for Ivano-Frankivsk – in which Gala, Kiss and many other radio stations participated – President Shevchenko requested Mr. Sokur, a civil servant from the National Council, to provide the relevant statistics for Kiss (the official name of which is Utar TV and Radio Broadkasting UC); his answer was the following: *"We have statistics for Utar TV and Radio Broadcasting UC as a competitor. And the figures are the worst. The share of music by national authors and performers is only 11% and the share of songs in Ukrainian 1%"*;
- during the hearing, Chairman Shevchenko was cross examined with regard to this statement; he accepted that statistic prepared by National Council staff were correct[143] and that if it were proven that Kiss was only broadcasting 11% Ukrainian music, this would constitute a violation of the law[144]; as regards the 1% Ukrainian language content, his explanation was that the percentage before the tender was irrelevant,

[141] Mr. Kurus, Hearing Transcript 4, p 42, at 12; Mr. Shevchenko, when asked the same question, answered that there "*could be different conditions for different frequencies*" (Tr. 3, p. 138, 6); the Tribunal, after reviewing the transcript of the National Council meeting, coincides with Mr. Kurus' opinion, because references to the 40% requirement appear repeatedly when discussing various frequencies.
[142] Respondent's Exhibits R-351 and R-352.
[143] Mr. Shevchenko, Hearing Transcript 3, p 81, at 16.
[144] Mr. Shevchenko, Hearing Transcript 3, p. 89, at 11.

> what was important was that the bidder had a good program concept, and in future could reach the 40% threshold[145].

382. There has been some discussion among the parties regarding which radio company won which frequencies during the February 6, 2008 National Council meeting. It is undisputed that Kiss won the frequency for Ternopil with seven of the eight votes, because a copy of the official transcript clearly states so[146]. Claimant submits that Kiss won two additional tenders. Respondent has not provided clear evidence for this fact (because the transcript is not complete). It is undisputed that Gala was awarded no frequency.

383. At the core of Claimant's grievance is the unequal treatment of Gala and Kiss with respect to the Ukrainian language tender condition. This condition applied to all tenders – including the tender for Ternopil won by Kiss FM and all the tenders lost by Gala. But it was interpreted in a completely different way when applied to Gala as compared to Kiss. Respondent has tried to defend the National Council's record, stressing that the different interpretations were voiced in different tenders. The argument is unconvincing, because all tenders had the same basic requirement. And the fact remains that Kiss has been awarded (at least) a frequency, despite its nearly nil Ukrainian language record and its violation of the 50% Ukrainian music requirement (known to the National Council), while Gala has been disqualified on the basis of a much stronger record.

384. As noted before, a measure violates Article II.3 (b) of the BIT if it is either *"discriminatory"* or *"arbitrary"*. It is readily apparent from the record that Gala and Kiss were treated differently in a similar case (i.e. on the same issue in the same tender proceeding, although not necessarily for the same frequency) without justification and, worse, in violation of applicable tender conditions. According to Article 25.14 (a) of the LTR, in its tender decisions the National Council must prefer applicants *"capable to fulfil the licence conditions to the best extent"*. The Ukrainian language requirement was a highly relevant condition for all the tenders, and Gala's capability of fulfilling that condition was far superior to that of Kiss. While Kiss won at least a tender, Gala's record was pretextually discounted in order to exclude it from further consideration.

385. Although not every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET standard, in the Tribunal's view a blatant disregard of applicable tender rules, distorting fair competition among tender participants, does. In conclusion, the Tribunal considers that when the National Council at its meeting of February 6, 2008 decided to award at least a frequency to Kiss, and to deny all applications submitted by Gala, such decision violated the FET standard required by Article II.3 of the BIT.

[145] Mr. Shevchenko, Hearing Transcript. 3, p. 82, at 23
[146] Respondent's Exhibit R-352, p. 10.

E) The Tender of November 20, 2002 in Which Claimant Was the Only Applicant

386. On November 20, 2002, the National Council denied Gala's application for a frequency for the city of Zhytomir, although Gala was the only applicant in this tender. The National Council's decision to reject Claimant's application for Zhytomir was not reasoned. Without providing further specifics, Claimant regards this decision as a violation of the FET standard[147].

The Tribunal's position

387. Claimant is only alleging two circumstances in order to prove the arbitrary or discriminatory character of the National Council's decision to reject the Zhytomir application:

- that Gala was the only applicant; and
- that the decision was not reasoned.

Factual situation

388. Before analyzing these circumstances in more detail, it is important to stress that the factual situation asserted by Claimant with respect to this tender was quite different from that pleaded and decided in section C). In the case of the AM channel, what happened was that Claimant's application was denied, and immediately thereafter the same frequency was assigned to a competitor, who apparently enjoyed privileged political connections. In the Zhytomir decision there is no allegation that the channel was afterwards retendered and awarded to a third party, in circumstances which could represent a violation of applicable rules. Nor does Claimant make any other indication of impropriety with regard to the actions of the National Council.

389. The starting point of the Tribunal's analysis must be whether the Zhytomir decision violated Ukrainian Law. In accordance with the practice of the National Council, which conforms with the LNC (Article 26.4), every allocation of a broadcasting licence required the affirmative vote of a majority of members, i.e. five. The same rule applied for tenders with only one participant. The single applicant had to secure five supportive votes in order to win the tender; otherwise the frequency was not allocated at all.

390. The lack of reasoning does not by itself constitute a violation of the LTR. As has already been explained (see paragraph 303 above), the LTR only requires reasoning for the National Council's decisions not to allow a company to participate in a tender (Article 25.8) – but not for the decision to award or deny the frequency (Article 25.13).

391. Against these rules, Gala's position as the single applicant did not *ipso iure* entitle it to the Zhytomir frequency, but only to an unbiased consideration of the application in accordance with the statutory guidelines. The burden of

[147] Claimant's Post-Hearing Memorial, para. 118.

proof that the decision was discriminatory or arbitrary (or otherwise violated the FET standard) lies with Claimant.

The National Council's decision

392. The National Council's decision denying Gala's application could never be considered discriminatory, because in this case no third party existed which benefited from it.

393. It could nevertheless be arbitrary.

394. After due consideration, the Tribunal rejects Claimant's assertion, for want of sufficient evidence. Under Ukrainian law, the National Council was entitled to deny a licence, even if the applicant was the only entity applying, and Ukrainian law does not require that decisions be reasoned. The Tribunal has already indicated that the absence of reasoning represents a significant weakness in the administrative procedure for the issuance of licences (see paragraph 312 above). But this weakness does not imply *ipso iure* that all unreasoned decisions of the National Council are arbitrary. For a decision to be considered arbitrary, an additional element of lack of probity must have been pleaded and proven. Claimant has not succeeded to do so in the case of the Zhytomir frequency, and consequently Claimant's challenge to the National Council's decision fails.

F) The Tender of October 19, 2005 in Favour of NMB Radio

395. On July 16, 2005 the National Council announced a tender for 29 frequencies grouped in a channel, which was to broadcast in Ukrainian only, with 100% Ukrainian language content. On October 19, 2005, NBM Radio was awarded this channel in a tender with 14 applicants, including Gala.

Claimant's position

396. According to Claimant, NBM Radio is owned by Mr. Poroshenko, a friend and political ally of the President. Claimant asserts[148] that the outcome of the tender was pre-determined and that the channel of 29 frequencies was specifically calculated for NBM Radio, as evidenced by the fact that NBM Radio was the only one of the 14 applicants for this channel that had no overlap in its coverage with the frequencies allocated for tender. Claimant has also produced minutes of a meeting in Gala on February 21, 2003 where Mr. Zhebrodki, a manager of the State Centre, allegedly stated that the State Centre had received applications for frequencies from NBM and had "*to do something about it, since Mr. Poroshenko has become a National Security Advisor*[149]".

[148] Claimant's Post-Hearing Memorial, para. 98.
[149] Claimant's Exhibit CM-143.

Respondent's position

397. Respondent pleads ignorance regarding Mr. Poroshenko's ownership of NBM Radio[150] and submits that some 15 companies had participated in the tender (rather than 14 as alleged by Claimant), that these applications were discussed in meetings of the National Council during October 19 – 26, 2005, and that Radio NBM was awarded the channel because it best promised compliance with a key tender condition. This condition was to broadcast in Ukrainian language only with a 100% "Ukrainian content". While Claimant in the hearing of the National Council had criticized this tender condition, NBM Radio had promised full compliance and referred to its already superior record in this respect.

The Tribunal's position

398. Claimant submits that the October 19, 2005 National Council decision awarding 29 frequencies in favour of NMB Radio was arbitrary and discriminatory; the evidence presented is the following:

- (i) NMB Radio is owned by Mr. Poroshenko, a close ally of the President;
- (ii) the channel was specifically calculated to fit with NMB's present coverage;
- (iii) a statement from Mr. Zhebrodki, Manager of the State Centre; and
- (iv) a threat of prosecution from the National Council against Mr. Lemire.

399. The Tribunal will analyse each piece of evidence separately.

Valuation of the evidence

400. (i): As regards the ownership of NMB Radio, the Tribunal has again been unable to ascertain the ultimate owner because all the members of the National Council have deposed that they lack this information[151]. The deposition is so implausible, that the Tribunal – in the absence of any convincing evidence to the contrary - is prepared to accept the circumstantial evidence presented by Claimant and assume that Mr. Pereshenko is indeed the owner of NMB Radio. But even if this is assumed, and also that he is an ally of the President of Ukraine, these circumstances give rise to some suspicion but, in the absence of any further evidence of political interference, fall short of indicating a manipulation of the tender process.

401. (ii) and (iii): Claimant further alleges that the channel of 29 frequencies had been specifically calculated for NBM Radio to enhance its national coverage. The only evidence submitted to prove this point is the statement from Mr. Zhebrodski (a manager of the State Centre)[152]. This statement was apparently made during a private meeting at Gala's premises held with certain

[150] Respondent's Post-Hearing Memorial, para. 408.
[151] See Respondent's Post-Hearing Memorial, para. 410.
[152] Claimant's Post-Hearing Memorial, para. 101.

officers of the company, identified simply as "Natalie, Dima, Kid". Neither Natalie, Dima nor Kid have appeared as witnesses in this arbitration or even submitted a witness statement. Then, after the meeting, some unidentified person prepared a transcript, translating what undoubtedly was spoken in Ukrainian into English. This two page English transcript is what has been presented, and there Mr. Zhebrodski is quoted as saying. *"Right now we have applications from NMB and Channel 5 and we have to do something about it, since Poroshenko has become a National Security Advisor*[153]*"*.

402. This evidence is weak. There is no certainty that Mr. Zhebrodski actually used these words, that they were correctly recorded and then correctly translated into English. But even if *arguendo* the quotation is accepted as true, Mr. Zhebrodski only indicates that the prominent position of Mr. Pereshenko (not necessarily his relationship with the President) added some sense of urgency for the State Centre to perform its duties (i.e. to calculate frequencies in the presence of applications); it did not necessarily imply any manipulation.

403. (iv): Finally, there is the alleged threat of prosecution by the National Council. What happened is that on September 15, 2005, Mr. Lemire sent a letter to the National Council, asking for a general suspension of tenders in view of allegations of corruption against the Ukrainian Government and also against the National Council[154]. As a reaction to this letter, on September 21, 2005, the National Council adopted a decision declaring Mr. Lemire's allegations "*groundless and far-fetched"* and *"consider[ing] them as the tool of exerting pressure on the National Council management"*, and informing the public of the *"blackmail efforts"* undertaken[155].

404. The documentary record does not evidence any threat of prosecution from the National Council. What seemed to have happened is that Claimant sent a strongly worded letter (to use an understatement) to the National Council, with copies to the President and the Prime Minister and to the American Ambassador, and that the National Council reacted with a decision, also drafted in strong terms, rejecting the accusations and describing Claimant's behaviour as blackmail.

405. Summing up, the Tribunal considers that each piece of evidence submitted by Claimant, by itself, is not sufficient to support an allegation that the tender decision was arbitrary or discriminatory. The Tribunal has finally considered whether the evidence in the aggregate might establish conclusive evidence of a manipulation of the tender process, even if none of these circumstances did so by itself. Such a conclusion might be appropriate in the absence of a plausible explanation for the result of the tender decision. Thus, it is necessary that the Tribunal analyse the details of the National Council's decision.

[153] Claimant's Exhibit CM-143.
[154] Claimant's Exhibit 30 to Request of Arbitration.
[155] Claimant's Exhibit CM-39.

The decision to award the frequencies

406. The record of this arbitration includes the transcript of the meeting of the National Council on October 19, 2006, in which both Gala and NBM (among various others) made presentations to defend their applications[156]. NMB spoke first, explaining that NBM Radio had started 10 years ago, and that it was the first radio station that conducted and continued to conduct the broadcasting exclusively in Ukrainian[157]. Gala, who spoke afterwards, accepted that the tender *"is an entirely different format, not the format of Gala radio Company*[158]*"* and declared that it would comply with the requirements of the National Council *"that all DJ's must speak Ukrainian, there should be Ukrainian music, and thus shape and form Ukrainian culture"*. Mr. Lemire finally added a phrase which could be understood to express some challenge to the National Council's determination that the channel should be 100% Ukrainian: *"We should allow the audience to determine what it wants and we think that since Ukraine is seeking the status of a country with a market-economy, it should not introduce Ukrainian culture by force – it needs to be developed*[159]*"*.

407. The National Council had defined as a fundamental condition for the new channel that it be 100% in Ukrainian. This was a legitimate decision, based on a public interest choice to extend the use of Ukrainian in the media. When awarding licences, the first criterion which the National Council must take into consideration is whether the winner will be able to fulfil the conditions to the best extent (Article 25.14 (a) of the LTR). Applying this criterion to the present tender, it seems both plausible and legitimate that NMB's and Gala's different experience and attitude towards broadcasting 100% in Ukrainian, swayed the Council members' votes in favour of Radio Era.

408. Against the satisfactory explanation of the tender decision, the four circumstances alleged by Claimant cannot be accepted as evidence of a manipulation of the tender process amounting to a violation of the FET standard defined in Article II.3 of the BIT.

G) The Award of Frequencies During the Time When the National Council Was Not Operative

409. The National Council became inoperative in March 1999, because its members were not appointed, and remained in this situation until June 2000[160]. Claimant submits that during this period, Respondent developed the practice of illegally awarding frequencies to companies other than Gala. The National Council then held its first tender on January 1, 2001, at which Claimant was not authorized to participate, and at which preferential treatment was given to the companies which had been illegally given licences during the National Council's black out period.

[156] Respondent's Exhibit R-279.
[157] Respondent's Exhibit R-279, p. 3.
[158] Respondent's Exhibit R-279, p. 10.
[159] Respondent's Exhibit R-279, p. 10.
[160] Claimant's Post-Hearing Memorial, para. 67.3.

The Tribunal's position

410. It is undisputed that between March 16, 1999 and June 9, 2000 the National Council did not function, because its members had not been appointed. After Parliament appointed its members on May 18, 2000 and the President made his appointment on June 9, 2000, a newly constituted National Council was able to resume its functions. It is also undisputed that on January 1, 2001 the first tender organized by the new National Council was held, and that Gala was not permitted to participate, because it was reserved for companies who had been affected by the National Council's black-out period.

411. There is an important dispute among the parties regarding the precise scope of companies which had access to this special tender.

412. Respondent submits that the tender was reserved to broadcasters whose licence had expired while the National Council was inoperative[161]. Claimant's explanation is totally different: during the interregnum Ukraine had developed the practice that the State Committee grant licences for radio broadcasting, in violation of the LTR, through a non-transparent and closed procedure that was not available to Claimant[162]. And the first tender was organized to legitimize these beneficiaries.

413. There is strong evidence that Claimant's explanation is the correct one.

414. First of all, the renewal of licences under the LTR does not require a tender (Article 24.9). Extension is a "*right*" of the licence holder, and the National Council can reject the application for extension only in very limited circumstances (Article 33.7). Respondent's explanation of what happened seems a legal impossibility, and is at any rate entirely implausible.

415. Secondly, there is a letter sent on September 28, 1999 by S. Aksenenko, a member of the National Council, to the Vice Prime Minister of Ukraine[163], in which Mr. Aksenenko protests that other institutions of the executive branch are usurping the National Council's powers, taking advantage of the fact that it is not operative.

416. Finally, Mr. Lemire has presented the transcript of a meeting held on March 19, 2001 with Mr. Koholod, the then chairman of the National Council, who acknowledged that during the interregnum "*some bad things [were] happening*" and that the State Committee, and not the National Council, had been issuing the licences[164].

417. The Tribunal concludes that during the period between March 16, 1999 and June 9, 2000, when the National Council was not operative, Respondent developed the practice that certain licences for radio broadcasting were issued directly by the executive branch of Government, without transparency or

[161] Respondent's counsel, Hearing Transcript 1, p. 71, at 16.
[162] Claimant's Post-Hearing Memorial, para. 57.2.
[163] Claimant's Exhibit CM-11.
[164] Claimant's Exhibit CM-101; Respondent has not challenged the accuracy of the transcript.

publicity and without meeting the requirements of or following the procedures established in the LTR. The *de facto* situation was then legalized through the first tender, convened by the National Council exclusively with this purpose. Claimant was excluded from this procedure.

418. In the opinion of the Tribunal, Respondent's above described practice constitutes a violation of the FET standard established in Article II.3 of the BIT, because it facilitates the secret awarding of licences, without transparency, with total disregard of the process of law and without any possibility of judicial review. The practice must be considered arbitrary, since it meets the *Saluka* test of "*manifestly violat[ing] the requirements of consistency, transparency, even-handedness and non-discrimination*[165]". The lack of propriety is such that – as the test was articulated in *Tecmed* and *Loewen* - the practice also "*shocks, or at least surprises, a sense of juridical propriety*[166]".

VII.3.5. CONCLUSIONS REGARDING THE AWARDING OF RADIO LICENCES

419. As a starting point the Tribunal has studied the administrative procedure defined in Ukrainian Law for the issuance of radio frequencies. The conclusion reached by the Tribunal is that the procedure was marred by significant shortcomings (although these have been ameliorated after the 2006 amendment to the LTR). These weaknesses facilitated arbitrary or discriminatory decision-taking by the National Council.

420. In six years Gala Radio, although it tried insistently, and presented more than 200 applications for all types of frequencies, was only able to secure a single licence (in a small village in rural Ukraine). Gala's main competitors were much more successful and each received between 38 and 56 frequencies. Although this macro-statistical analysis does not provide conclusive evidence that Respondent, when awarding radio licences, has been violating the FET standard, there are factors (the strikingly different success rates of Gala and of its competitors, the inexistence of any information regarding the real owners of the competing stations, the impossibility of verifying the reasons why Gala was rejected) which can be construed as indications that at least some of the decisions of the National Council when it awarded frequencies were arbitrary and/or discriminatory.

421. To confirm or reject these indications, the Tribunal then looked in detail at five tenders for radio frequencies and at the administrative practice for awarding licences in the interregnum while the National Council was not operative between 1999 and 2000. The Tribunal came to the conclusion that the following decisions did not meet the FET standard provided for in the BIT:

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[165] *Saluka Investments BV v. Czech Republic PCA*, UNCITRAL, Partial Award of 17.March 2006, para 307.

[166] See *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 154 and *Loewen Group Inc and Raymons L. Loewen v. United States of America*, ICSID No. ARB(AF)98/3, Award of 26 June 2003, para. 131.

- the National Council's decision adopted on October 19, 2005 granting an FM information channel to Radio Era, and the subsequent decisions to award 12 frequencies to radio Kokannya;
- the National Council's decision of May 26, 2004 denying Gala Radio the licence for an AM channel, and the decision of December 21, 2004 granting such licence to NART TV;
- the National Council's decision of February 6, 2008 denying Gala's application and accepting the application of Kiss Radio;
- Respondent's practice of awarding radio licences while the National Council's was not operative between March 16, 1999 and June 9, 2000, and the National Council's decision of January 1, 2001 to legalize the licences illegally granted during the interregnum.

422. On the other hand, the Tribunal is unconvinced by Claimant's allegation that the National Council's decisions of November 20, 2002 and of October 19, 2005 represented a breach of the FET standard.

VII.3.6 POSTPONEMENT OF DECISION REGARDING DAMAGES

423. Claimant has presented extensive allegations regarding damages, and an expert report prepared by Goldmedia. Respondent has submitted a counter report prepared by EBS. Both experts deposed during the hearing.

424. In its Post-Hearing Memorial, Respondent has added[167] that the damage reports were prepared in the summer of 2008, that since then the economic basis has completely changed, and that the Ukrainian economy has shifted from a high growth rate to a sharp drop. There have also been significant changes in the parity of the UAH vis-à-vis the USD. Ukraine asserts that its economy *"has been devastated by the worldwide economic crisis"* and that it will shrink dramatically in the future. These changes in the overall economic climate, according to Ukraine have a significant impact on the DCF analysis presented by the experts.

425. The Tribunal agrees with Respondent that the changes suffered by the Ukrainian and the world economy since the dates when the expert reports were prepared, and its effects on the *quantum* of the damage, require further investigation. Furthermore, the assumptions underlying the experts' reports do not coincide with the conclusions reached by the Tribunal in this Decision, and the quantum evidence therefore requires recalibration in accordance with the present decision. Consequently, the question of the appropriate redress of the breach, including the quantification of the damages, will be addressed in a short second phase of this arbitration. After hearing the parties, the Tribunal will issue a Procedural Order for the continuation of the procedure.

[167] Respondent's Post-Hearing Memorial, para. 646.

VII.4. CLAIMANT'S SECOND ALLEGATION: THE CONTINUOUS HARASSMENT BY RESPONDENT AND THE REQUEST FOR MORAL DAMAGES

VII.4.1. CLAIMANT'S ALLEGATIONS

426. Claimant submits[168] that the National Council, in a concerted effort to force Claimant out of the radio industry, has:

- abusively monitored and inspected Gala from 2005 through 2008;
- issued two warnings to Gala and threatened issuance of a third warning with the purpose of revoking Gala's licence;
- threatened Gala with non-renewal of its licence on the basis of the 2006 LTR disqualifying foreigners as "founders" of radio stations;
- delayed the decision on the renewal of Gala's licence with a view to imposing a tenfold licence fee under a newly enacted formula; and
- allowed only an unrealistically short period for payment for an exorbitant licence fee.

427. Claimant adds that Gala was the first radio company which complied with the 50% Ukrainian music requirement, despite the negative effects on its ratings. This notwithstanding, in September 2005 the National Council inspected Gala and, as a result, issued a first warning on October 5, 2005. This warning was voided on April 4, 2006 by the Kyiv Economic Court, with the National Council's appeal dismissed on September 26, 2006.

428. In October and November 2005, Gala was again repeatedly monitored and inspected, with a second warning (dated November 23, 2005) as a result. Due process defence against this warning was denied to Claimant. Upon Gala's redress, the second warning was also voided by the Kyiv Economic Court and the National Council's appeal against that decision was again dismissed on February 15, 2007.

429. In May/June 2006 Gala was monitored and inspected yet again; and on July 19, 2006, the National Council met to decide on a third warning. Under the new 2006 LTR, a third warning would have enabled the National Council to institute court proceedings for revoking Gala's licence. Against this threat, the meeting was attended by five Gala executives, Gala's local and international attorneys, and the First Secretary of the US Embassy in Ukraine. In view of this presence, the National Council shied away from issuing a third warning.

430. The two warnings and the threat of a third, terminal warning were based on frivolous grounds. Claimant refers to other radio stations which were rarely inspected and did not receive warnings despite graver violations.

431. Claimant further submits that the Chairman and other representatives of the National Council have repeatedly threatened to reject the renewal of Gala's broadcasting licence, which expired on September 18, 2008. They referred to Claimant's US citizenship and to Article 12(2) of the LTR, which prohibited

[168] Claimant's Post-Hearing Memorial, para. 125.

the "*foundation*" of TV/radio stations by "*foreign legal entities and physical persons*", although a similar prohibition already existed in the historic 1993 LTR. Besides the National Council representatives knew that Claimant had acquired his controlling share in Gala from the Ukrainian company Provisen and thus had not been Gala's founder.

432. While Gala had applied for an extension of its licence on March 13, 2008, the National Council delayed its final decision until July 19, 2008. It then applied a new formula for calculating the licence fee, which had been adopted by the Council of Ministers just on July 9, 2008. To make matters worse, the new formula was applied wrongly to Gala's detriment. As a result, Gala was invoiced a renewal fee of the equivalent of 1,039 million USD, more than ten times the fee that would have been due under the previous formula. Gala was allowed only 16 days for payment of this unexpectedly high fee. Other radio companies (e.g., HIT FM and Russkoye Radio owned by Mr. Bagrayev, a political ally of the President) had applied for a renewal of their licence later than Gala, but received the renewal before Gala, at a fee calculated under the previous formula.

433. On August 15, 2008, Claimant requested a Provisional Measure from the Tribunal, suspending ultimate payment of the renewal fee until the Final Award in this arbitration. On August 19, 2008, Respondent requested that Mr. Paulsson resign as an arbitrator in the present case, due to the involvement of his law firm in another case with Respondent as a party; this request and a subsequent official challenge by Respondent to Mr. Paulsson's impartiality, delayed the Tribunal's decision on the requested Provisional Measures.

434. The National Council finally reassessed the renewal fee to the amount expected by Claimant. This reassessment was prompted by an advice from the Ministry of Justice that the previous formula (rather than the new formula) was applicable to Gala's renewal fee.

435. Claimant acknowledges that the harassment finally has not been successful, because the broadcasting licences have been extended with the payment of the correct fees, Gala has not been fined and the warnings have been quashed by the Ukrainian Courts. But Claimant submits that this does not provide Claimant with immunity from paying damages for the harassment and moral harm that Ukraine's malicious acts have caused. Invoking the precedent of *DLP v. Yemen*[169], Claimant requests that Respondent "*be held to be liable to reparation for the injury suffered by Claimant, whether bodily, moral or material in nature*". Respondent's harassment has inflicted significant moral harm, including anxiety, pain and suffering, for which Respondent should be held liable in the amount of three million USD.

[169] *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008.

VII.4.2. RESPONDENT'S ALLEGATIONS

436. Respondent denies[170] that the National Council had any intention, let alone concerted action strategy, to shut down Gala and force Claimant out of the radio industry in Ukraine. All monitoring, inspections and other actions advanced by Claimant were performed by the National Council in the exercise of its regulatory and supervisory responsibilities as per the parameters and guidance provided in applicable legislation.

437. Statistics refute Claimant's allegation that Gala had been targeted for excessive monitoring and inspections. During 2004 – 2008, the National Council ordered a total of 1438 inspections and issued a total of 288 warnings. The five inspections of and two warnings to Gala are not egregious. Other broadcasters similarly had experienced between three and six inspections; and five broadcasters had even received three warnings and presently face court proceedings for cancellation of their licences.

438. The procedures for monitoring and inspections are not inequitable, arbitrary or discriminatory, and are equally applied to all broadcasters under the jurisdiction of the National Council. As a matter of administrative routine, broadcasters are continuously monitored to check whether they comply with applicable legislation and with their licences. Monitoring is based on an evaluation of the programmes broadcast; it does not involve the companies and does not interrupt their business. Inspections are ordered by the National Council if monitoring reveals indications of violations; they are carried out at the premises of the radio station and last one business day at most. Inspection reports are immediately shared with the broadcasters concerned and submitted for decision to the National Council. If the inspection reveals violations of either applicable legislation or the terms of a broadcaster's licence, the National Council may impose sanctions. These range from warnings (lightest sanction) and monetary penalties to court proceedings and revocation of licence. Sanctions imposed can be appealed to Ukrainian Courts.

439. Gala was monitored in September 2005, together with several other broadcasters, in accordance with the normal administrative process. Since violations of applicable legislation were detected (with respect to Ukrainian language and advertising rules), the National Council by letter of September 27, 2005 informed Gala of its decision to conduct a first inspection on September 30, 2005. When the National Council experts tried to perform this inspection, Gala representatives denied them access to Gala's premises. The National Council thereupon issued a first warning on October 5, 2005 and, at the same time, decided to repeat the inspection within two weeks. On April 4, 2006 this first warning was quashed by the Kiyv Economic Court, on the ground that the National Council had failed to prove receipt by Gala of the Council's aforementioned letter of September 27, 2005.

[170] Respondent's Post-Hearing Memorial, para. 516.

440. Gala was inspected again on October 19, 2005. This inspection detected violations of broadcasting and advertising legislation, and of the terms of Gala's licence regarding children's and educational programs. On November 2, 2005 the National Council discussed the inspection results with Gala and gave it two weeks to cure the violations. After negative results of a subsequent monitoring, the National Council issued a second warning on November 23, 2005, requiring Gala to cure the violations within six months. This second warning was also quashed by the Kiev Economic Court, on the ground that it was based on an inspection prompted by the first warning, which had been voided previously by the Court.

441. On May 27, 2006, i.e. six months after the second warning, a monitoring revealed that Gala had not ceased in its violations. Thereupon, a third inspection was carried out on June 2, 2006. It confirmed continuing violations as per the monitoring report, but also noted that Gala had rectified its previous violations regarding broadcasting in Ukrainian language. In view of this improvement, the National Council abstained from issuing a third warning.

442. In 2008, Gala was inspected twice, in April as a routine matter in advance of the pending renewal of Gala's licence and on June 3 after monitoring detected a violation of Ukrainian election legislation. The April inspection was inconsequential, while the June inspection confirmed the violation. Nevertheless, the National Council, in its meeting on June 18 accepted Claimant's explanation that the violation was accidental, did not issue a warning but rather proceeded with the renewal of Gala's licence.

443. National Council representatives have never threatened to deny the renewal of Gala's licence due to Claimant's US citizenship.

444. The licence was renewed on July 19, 2008 in due time before its expiry on September 18, 2008. The processing time was required for clarification of outstanding issues.

445. The renewal fee had initially been calculated under the new formula on the National Council's understanding that the Cabinet decree had entered into force at the date of its receipt by the National Council on July 11, 2008. Since the renewal had been granted thereafter (July 16), the Council had applied the new formula in good faith. Nevertheless, the National Council had sought the guidance of the Cabinet of Ministers on the issue as early as August 11, 2008, i.e. before Claimant's request for Provisional Measures challenging the fee. The Cabinet had referred the matter to the Ministry of Justice, which on September 15, 2008 advised the National Council that the formula entered into force only with the publication of the decree in the Official Bulletin of Ukraine on July 18, 2008, i.e. after the renewal of Gala's licence on July 16. In light of this advice, the National Council promptly recalculated the fee under the previous formula, more advantageous to Claimant, and informed the Tribunal accordingly.

446. The challenge of Mr. Paulsson as an arbitrator in the present proceeding had been prompted by disagreements between Claimant and Respondent regarding implications of the issue for the status of the final award. It had nothing to do with Claimant's request for provisional measures and/or the calculation of the renewal fee.

447. The fact that the two warnings against Gala have been set aside by Ukrainian Courts shows, in Respondent's view, that the Ukrainian system provided adequate redress against administrative error, in compliance with the FET standard under the BIT.

448. Claimant had suffered no harm as a result of the National Council's actions wrongly described by Mr. Lemire as harassment. All inspections together have taken at most four business days over a four-year period. Claimant is still operating a profitable business – a fact which according to Respondent precludes any claim on the basis of "*creeping expropriation*" or violation of "*full protection and security*".

VII.4.3. THE TRIBUNAL'S DECISION

A) Introduction

449. Claimant's basic line of reasoning is that, behind the individual facts of this case, an overall aim appears: the Ukrainian authorities' desire to get rid of an annoying American investor, by systematically denying any application for further frequencies, thwarting plans to create new channels, and harassing him with irregular inspections and difficulties for the renewal of his licence.

450. Respondent has vehemently denied the accusation. Chairman Shevchenko has stated that the National Council never resorted to procedures aimed at any revocation of the Gala Radio licence and has not even contemplated such steps[171].

451. The Tribunal has already come to the conclusion that Respondent's practice regarding the allocation of frequencies is not compatible with the FET standard defined in the BIT. As a consequence of the violation of the BIT Claimant is entitled to be indemnified for the economic damages he has suffered. As has already been stated (see paragraph 426 above), this issue will be addressed in a subsequent phase of this arbitration.

452. Claimant is now asking that the Tribunal decide whether the harassment which he allegedly suffered, entitles him to receive an additional indemnification, further to the economic loss, for the moral damage suffered. The harassment in itself cannot constitute additional violations of the BIT because, as Claimant himself acknowledges, in the end the inspections led to no sanctions and the licence was correctly extended. For this reason, Claimant restricts his prayer for relief to a request that the Tribunal indemnify Claimant for the moral harm he has suffered, caused by Respondent's continuing harassment.

[171] Reespondent's Rebuttal Witness Statement of Mr. Shevchenko dated 2 December 2008, p.31.

453. In order to decide this claim, the Tribunal has to analyze the two separate issues submitted by Claimant, the inspection of Gala Radio (B) and the renewal of the licence (C), leading to the Tribunal's conclusions (D).

B) The Inspection of Gala Radio

454. The National Council is the supervisor and regulator of the TV and radio sector in Ukraine (Articles 13 and 14 of the LNC). As such, the Council has the power to monitor and inspect radio companies, including Gala Radio. The procedure of inspection is defined in Articles 70 to 75 of the LTR, and in an Instruction of the National Council, issued in 2003 and amended in subsequent years[172]. Monitoring is a process of recording and analyzing the broadcasting of a radio company, and is done directly by the National Council, without involvement of the radio station. An inspection is a more serious review, which requires access to the company's premises. Inspections can be scheduled – i.e. in accordance with a plan approved by the National Council – or unscheduled – i.e. motivated by some exceptional circumstance.

455. The results of an inspection are formalized in an inspection report; the affected company has access to the report, and is entitled to give explanations, to provide evidence and to file claims (Article 73.3 of the LTR). The inspection report, prepared by the National Council staff, is submitted to the National Council which has the right either to close the file without sanction, or to issue a warning, to impose a penalty or to appeal to a Court in order to revoke the licence (Article 72.6 of the LTR). The practice of the National Council is to listen during the meeting to an oral explanation of the representative of the radio company[173].

456. It is undisputed that until 2005 Gala was never inspected. Since then, Gala has suffered five inspections, four of which were unscheduled[174].

The first warning

457. The first inspection took place on September 28, 2005, and it has been described in detail in the report prepared by the inspectors[175]. The day before the inspection, the inspectors had sent a fax to Radio Gala, announcing their visit for the next day. When they arrived, a female employee told them that the management of the company was outside Kyiv, and would not return until October 17, 2005. The employee stated that she *"was not authorized to provide any information or documents"*.

458. A week later, on October 5, 2005 the National Council decided to issue a warning to Gala because the personnel of Gala Radio *"prevented [National Council representatives] from carrying out their legitimate actions"* [176], by

[172] Responent's Exhibit RLA-15 (original text) and RLA-64 (amended text).
[173] Inspector Iulian Leliukh, Hearing Transcript 4, p.103, at 15.
[174] Mr. Denisenko, Hearing Transcript 2, p. 209, at 16.
[175] Respondent's Exhibit R-270.
[176] Respondent's Exhibit R-272.

refusing to produce the documents and materials required for conducting the inspection. The decision was abusive, because the inspectors' report did not reflect any refusal to cooperate, only the absence of management, and because the advance notice had been unreasonably short. Besides, there is no evidence that Gala was heard before the decision was adopted, and the LTR does not typify the refusal to produce documents as a sanctionable wrong. Gala successfully challenged the warning before the Kyiv Economic Court, and it was set aside by this Court on April 11, 2006. The National Council appealed, the appeal was rejected on February 14, 2008.

The second warning

459. On October 14, 2005 the National Council informed Gala that an inspection would be performed on October 19, 2005. The inspection took place on this date, in the presence of Mr. Lemire, who refused to sign the inspection report[177]. The inspection report reflects the following:

- the language of programs is Ukrainian;
- the language of commercials is predominantly Ukrainian, although two commercials were in Russian, which represents a violation of the Law on Advertising;
- there is one instance where a commercial was not separated from other elements of the program, in violation of the Law on Advertising;
- the air time devoted to information programs, to educational programs and to children programs were significantly less than the figures mentioned in the licence.

460. On November 2, 2005 the National Council met, heard representatives of Gala, and decided to postpone their vote for two weeks[178]. On November 23, the National Council met again and issued a warning against Gala, for the reasons set forth in the inspectors' report. The warning was cancelled by the Kyiv Economic Court on February 15, 2007, because the Court considered the inspection illegal[179].

The June 2006 inspection

461. With two warnings against Gala in the appeal Courts, on May 29, 2006 Chairman Shevchenko ordered the Control and Monitoring Department of the National Council to conduct a new inspection, which was carried out on June 2, 2006. Inspector Leliukh has declared that the inspection was conducted in a hostile environment, and that Mr. Lemire was accompanied by four lawyers and a representative of the American Embassy. The inspection report came to the following conclusions[180]:

[177] Respondent's Exhibit R-276.
[178] Respondent's Exhibit R-282; Respondent submits that the two weeks delay was to permit Gala to cure the irregularities; this does not derive from the transcript.
[179] See Claimant's submission to the Court in Respondent's Exhibit R-312.
[180] Respondent's Exhibit R-298.

- the advertising exceeded the 20% legal maximum per hour (i.e. 12 minutes maximum) in four hourly time periods: from 9 am to 10 am, by 18 seconds, from 12 pm to 1 pm, by 14 seconds, from 1 pm to 2 pm, by 3 seconds and from 5 pm to 6 pm by 12 seconds;
- Gala was basically complying with the licence conditions, it had broadcast 6.36 h. of cultural programs, when the licence required 3.50 h.; Gala had however failed to broadcast children's programs, as required by the licence;
- Gala was complying with the 50% Ukrainian music percentage;
- language is 100% Ukrainian, including advertisements;
- two advertisements were not clearly separated from the other elements of the program.

462. Claimant asserts that the inspection team, headed by Inspector Leliukh, included in its submission to the National Council a proposal that a third warning be issued. A third warning would have blocked the renewal process for the licence, which was then under discussion and might have triggered an action to revoke Claimant's licence (although this is not a must: the LTR does not require that a third warning triggers a procedure of licence revocation). Claimant was sufficiently worried about the prospect of a third warning and its consequences that he asked for the assistance of US Embassy officials and of his international lawyers at the meeting of July 19, 2006 to lobby against the issuance of the third warning.

463. Inspector Leliukh, asked by the Tribunal if he had recommended issuing a third warning, answered: *"I do not remember whether or not I recommended a warning*[181]*"*. And under cross examination, asked whether the draft resolution would be in the record of the National Council, he stated that *"as a rule a draft resolution is not maintained – resolutions themselves are archived, not draft resolutions*[182]*"*.

464. Although Inspector Leliukh does not remember, there is clear evidence in the file showing that a third warning was indeed proposed. Respondent has submitted the transcript of the July 19, 2006 session[183], and there it is clearly stated that Shevchenko put the draft decision for issuing a warning to the vote. The decision received one vote in favour (from Chairman Shevchenko) and five members abstained, and consequently it was rejected. Immediately thereafter, a new decision was tabled and carried unanimously. This decision states that the National Council:

- takes knowledge of the report resulting from Gala's inspection;
- obligates the management of Gala to bring its activities in line with the licence, Deputy Chairman Kurus being in charge of control of this obligation; and
- informs the founders of Gala that in accordance with Article 12 of the LTR foreigners are prohibited from being the founders of radio stations.

[181] Inspector Iulian Leliukh, Hearing Transcript 4, p. 111, at 8.
[182] Inspector Iulian Leliukh, Hearing Transcript 4, p. 116, at 7.
[183] Respondent's Exhibit R-306, p. 2070.

465. The reference to the founding of Gala, and to Article 12 of the LTR, is especially troubling. In accordance with the records, which must have been available to the National Council, Gala Radio had not been founded by Mr. Lemire, but by Provisen, an Ukrainian company, and Claimant subsequently bought a controlling stake in the company. The prohibition of foreign foundership of radio stations was already included in Article 13 of the 1993 LTR, and was then taken over into Article 12 of the 2006 LTR. Consequently, it existed when the National Council authorized Mr. Lemire's purchase of the control in Gala.

466. The July 19, 2006 decision of the National Council *"informs"* the founders of Gala that foreigners are prohibited from being founders of radio stations. This statement is difficult to understand, because:

- it seems incongruous in a decision regarding the imposition of a sanction to Gala;
- it is unnecessary, if it is just a reminder of a legal rule which had existed since 1993;
- it is without purpose, because a company can never retroactively change its founders;
- if it purports to be an anticipation of what the National Council would decide in the future (the licence will not be renewed, because Mr. Lemire is American), it is legally incorrect, because Mr. Lemire is not the founder and his investment had been duly authorized.

The 2008 inspections

467. In April 2008 Gala was subject to a further, scheduled inspection, which resulted in a conclusion that there was no irregularity.

468. Then, in June 3, 2008 an additional unscheduled inspection took place, which led to a decision of the National Council on June 18, 2008. What had happened was that on the day of the Municipal Elections, a candidate had spoken on Gala Radio, starting his words by saying *"I will not promote myself ... I will not advertise either. All I wanted to say is that everyone has to come"*. Hereafter, he made a short presentation why citizens should vote in his favour. The inspection report prepared by the National Council inspection team stated that the broadcasting of these declarations violated the Ukrainian Election Law which requires that *"campaigning"* cease 24 hours before the vote[184].

469. During the session of the National Council on June 18, 2008[185], a member of the National Council acknowledged that all TV channels show interviews with various candidates during the ballot casting. Gala explained at the hearing that they had committed a mistake. Respondent submits that the National Council decided not to issue a warning[186].

[184] Respondent's Exhibit R-373.
[185] Respondent's Exhibit R-375 (transcript of the meeting).
[186] Respondent's Post-Hearing Memorial, para. 548; not contradicted by Claimant; the transcript of the meeting, however, is not clear; Chairman Shevchenko's last words are: *"But they admit their fault, saying*

C) Renewal of the Licence

470. Gala Radio's licence was due for renewal on September 18, 2008. Claimant applied for renewal on March 13, 2008. The National Council reacted with a number of documentary requests, to which Gala duly responded[187]. The licence was eventually issued on July 16, 2008, on the last possible meeting of the National Council.

471. On July 25, 2008 Gala received an invoice for more than one million USD, which represented a 10 fold increase with regard to the renewal fee which would have been applicable in accordance with the guidelines approved in 1995. The new methodology for calculating had been approved by the National Council on November 22, 2006, but required a confirmation decision from the Cabinet of Ministers. On July 9, 2008 the Cabinet adopted the necessary decree, and the National Council at its meeting of July 16, 2008 declared that the new methodology would be used to calculate its fees – the same meeting which approved the extension of Gala's licence.

472. In Claimant's opinion, the National Council on purpose delayed the application process, in order to be able to charge the higher fee[188]. Claimant further alleges that Russkoie Radio and Hit FM – both allegedly owned by Mr. Bagrayev, National Council member until 2002 - applied for their renewal after Gala, but were awarded their licence on May 28, 2008, seven weeks before Gala[189]. This statement has not been denied by Respondent.

473. Claimant finally was only required to pay the lower, historic fee. The reason for this is that when the National Council issued the one million USD plus invoice, it failed to take into consideration, that on the date of Gala' renewal the decree had not yet been published in the Official Bulletin, and consequently it had not entered into force and could not be applied to the Gala licence renewal.

474. Claimant filed a request for interim measures in this arbitration, Ukraine eventually accepted Claimant's arguments and modified the licence renewal fee to the historic figure, which Claimant accepted and duly paid, desisting from the Request.

D) Decision of the Arbitral Tribunal

475. The Tribunal is in this case confronted with a request for moral damages, which Claimant allegedly has suffered as a consequence of harassment by the National Council. The moral damages – as alleged by Claimant – include anxiety, pain and suffering, and they are estimated at three million USD, a figure which is deemed *"very conservative ... in light of the long duration,*

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that it was all by accident, and we agree with this point, advising the company to take this fact into account as a warning"

[187] See Claimant's Exhibits CRIM-5, 6, 7, 8 and 9.

[188] Claimant's Reply Memorial, para. 248.

[189] Claimant's Reply Memorial, para. 253.

intensive and diverse harassment to which Respondent has subjected Claimant[190]*"*.

Moral damages in investment arbitrations

476. In most legal systems, damages which can be recovered by the aggrieved include not only the *damnum emergens* and *lucrum cessans*, but also moral damages. The Tribunal shares the conclusions reached in *Desert Line Projects*[191]*:*

> "*Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages"*.

477. The circumstances in *Desert Line Projects* were very exceptional indeed. Claimant had been subject to physical duress and suffered a siege by the armed forces of Respondent.

478. Can moral damages be applied in the factual situation of this case in which Claimant is not making any allegation of physical duress?

479. Claimant in essence is submitting that the National Council incurred in systemic bias against Gala Radio. Not only did the National Council reject the 200 applications made by the radio station for new frequencies, jeopardizing Gala's plans to expand its activities, but it also maliciously subjected Gala to a series of inspections, with the hidden agenda to close it down, and then in bad faith delayed the renewal of the licence, until a new regulation had come into force, which increased the renewal fee by 10.

480. Claimant's accusations are very grave indeed.

481. The National Council is Radio Gala's lawful supervisor and regulator, entrusted by Ukrainian law with authorizing, monitoring, inspecting and sanctioning TV and radio stations. Agencies with powers analogous to those of the National Council exist in most jurisdictions, because they have proven necessary in order to guarantee correct assignment of scarce frequencies, protection of rights of viewers and listeners and defence of liberty of information and plurality of opinions. Regulatory agencies, provided by law with wide powers to intervene, must act with absolute independence and impartiality. And regulated entities have an obligation to cooperate with their supervisor, to follow their supervisor's instructions and to comply with applicable rules.

482. In all jurisdictions regulated entities are also required to respect and cooperate with their lawful regulatory agencies. Mr. Lemire's behaviour vis-à-vis the National Council, and his extensive use of the Courts to obtain redress for his grievances and of the American Embassy to secure protection, may have

[190] Claimant's Post-Hearing Memorial, para. 147.

[191] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 29 January 2008, para. 289.

looked rude and disrespectful to the Ukrainian authorities. But the personal behaviour of the regulated should never impair on the impartiality of the supervisor.

483. Another important aspect to bear in mind is whether the Ukrainian legal system affords an efficient system for appealing the regulator's decisions before a Court. That right also exists in Ukraine, and it has worked. The Courts have twice quashed (in first instance and then on appeal) illegal decisions of the National Council. And in the case of the renewal fees, the Ministry of Justice has sided with Claimant against the National Council.

484. The Tribunal has analyzed in detail the relationship between Gala Radio and the National Council and certain facts stand out:

- Gala was never inspected until 2005, and in the next three years it was the object of five inspections, of which four were unscheduled;
- the first warning issued by the National Council against Gala was clearly abusive, and was correctly set aside by the Ukrainian Courts;
- the second warning was issued for alleged infractions which to an impartial bystander look petty; this warning was again set aside by the Courts;
- the draft resolution of the National Council proposed the issuance of a third warning, and Chairman Shevchenko voted in favour; the underlying inspection report showed that most of the infractions which led to the second warning had been cured, and only found some very minor infringements;
- the third warning was rejected, but the National Council adopted a decision which seemed to imply that Mr. Lemire, as an American, was prohibited by law from being the rightful owner of Gala;
- the facts which led to the 2008 inspection probably did not merit the commencement of an inspection procedure, since similar actions had been committed by other TV and radio stations, which were not inspected;
- Gala's application for extension of its licence was delayed in comparison with other applications; it was approved in the same session when the National Council approved a 10 fold increase in the renewal fees.

485. If these facts are added to the National Council's rejection of all (bar one) of Gala's applications for new licences, the resulting overall picture is that Gala has received a one-sided treatment from its regulator. Gala's reaction, consisting in a vehement defence of its rights, presence of US Embassy officials, protest before the National Council and successive appeals to the Ukrainian Courts, seem to have exacerbated the National Council's stance.

486. Since the Tribunal has already decided that certain of Respondent's actions related to awarding radio frequencies are not compatible with the FET standard defined in the BIT, Claimant will in any case be entitled to an economic indemnification. Whether the facts of the case constitute *"exceptional circumstances"*, which merit the awarding of moral damages, is a question which the Tribunal will decide in a future phase of this procedure

when it may have the benefit of further insights, notably into context and causation.

VII.5. CLAIMANT'S THIRD ALLEGATION: THE VIOLATION OF THE FET STANDARD BY OTHER ACTIONS PERFORMED BY RESPONDENT

487. Claimant's main allegation is that the allocation of frequencies has given rise to a violation of the FET standard. In addition, Claimant submits an ancillary claim: that a number of other actions or omissions, which primarily constitute a breach of the Settlement Agreement, are also are unfair, inequitable, arbitrary or discriminatory[192]. In Claimant's opinion these actions or omissions constitute not only a breach of the Settlement Agreement, but also a violation of the FET standard defined in the BIT.

488. The actions alleged by Claimant are the following:

- (i) the failure of the National Council to acknowledge its obligations under the Settlement Agreement[193] or to acknowledge the Settlement Agreement as legal or binding[194];
- (ii) the State Centre's decision to allocate low powered and contested frequencies[195]; and
- (iii) Respondent's failure to correct interferences.

489. The Tribunal has already analysed whether these actions and omissions represented defaults under the Settlement Agreement, and come to the conclusion that they did not. It will now review, albeit rather summarily, whether these actions conceivably could imply an international law delinquency of Ukraine and a violation of the BIT.

First and second claim

490. (i) and (ii): Since the Tribunal has come to the conclusion that Respondent did not breach its obligations under the Settlement Agreement, and that frequencies allocated were appropriate (see paragraph 209 above), Claimant's allegation that the failure to acknowledge the Settlement Agreement or the allocation of frequencies could conceivably constitute an international wrong has no chance of succeeding.

491. Claimant's first and second claims are dismissed.

Failure to correct interferences

492. (iii): There is a final type of action or failure to act, which Claimant submits amounts to a violation of the FET standard, and which merits a more in-depth analysis. This is Respondent's alleged failure to correct the interferences on Gala 100 FM. Such failure would have related to interferences that occurred

[192] Claimant's Post-Hearing Memorial, para. 67.
[193] Claimant's Post-Hearing Memorial, para. 67.4.
[194] Claimant's Post-Hearing Memorial, para. 67.6.
[195] Claimant's Post-Hearing Memorial, para. 67.7 and 67.8.

after the conclusion of the Settlement Agreement and would thus not have been affected by the Tribunal's decision that Respondent has performed its obligations under the Settlement Agreement.

493. Claimant's argument runs as follows[196]: Respondent, as the host state and as issuing authority and regulator of frequencies, has the duty to ensure that any investor can enjoy the normal operation and use of his investment. This includes – in Claimant's assertion - an obligation to provide a frequency that is free of interference, however caused, and an obligation to monitor and regulate other radio companies.

494. The Tribunal disagrees with Claimant's reasoning.

495. Interference occurs when other radio stations which are also broadcasting do not remain within the prescribed deviation level. The record shows that Claimant on seven occasions between 2000 and 2007 complained to the State Centre, protesting that Gala's signal was suffering interference. The complains were made in 2002, 2004, 2005, 2006 (2) and 2007 (2)[197]. The record shows that the State Centre reacted, at least trying to solve the problems. On August 17, 2004 the State Centre ordered two radio stations which were causing interference to cease doing so[198]. The State Centre monitored the 100 FM frequencies during the year 2007, and found no interference[199]. Finally, as Claimant acknowledges, after an extensive period of monitoring during the autumn 2008, the problem has now been – to use Claimant's words - *"significantly reduced*[200]*"*.

496. Claimant's allegation that Ukraine's conduct with regard to the interferences constitutes a violation of the BIT is bound to fail. The State Centre may have been performing the public service of monitoring and supervising radio frequencies with more or less diligence; the solution adopted in 2008 probably could have been anticipated; but even if Claimant's allegations were accepted to be true, they would never give rise to an international delinquency of Ukraine, nor amount to the violation of the FET and full protection standards defined in the BIT. Not every malfunctioning of a public service, suffered by a foreign investor, not every lack of diligence by a supervisory authority opens the door to a claim under the BIT. As has already been explained, the violation of the FET standard requires significantly more, namely that the actions of the State trespass a certain standard of propriety. The evidence does not support that in this instance the threshold has been surpassed.

VII.6. CLAIMANT'S FOURTH ALLEGATION: THE "UMBRELLA CLAUSE"

497. Article II.3 (c) of the BIT includes the so called Umbrella Clause:

[196] Claimant's Post-Hearing Memorial, para. 67.1.
[197] Respondent's Post-Hearing Memorial, para. 170.
[198] Respondent's Exhibits R-84 and R-85.
[199] Respondent's Exhibit R-146.
[200] Claimant's Post-Hearing Memorial, para. 48.

"Each party shall observe any obligation it may have entered into with regard to investments".

498. The Tribunal agrees with Claimant's submission that Article II.3 (c) of the BIT brings the Settlement Agreement into the ambit of the BIT, so that any violation of the private law agreement becomes *ipso iure* a violation of the international law BIT. This, however, exhausts the effect of the Umbrella Clause; the Umbrella Clause has no impact on the meaning or scope of the Settlement Agreement. In other words, any violation of the Umbrella Clause presupposes a breach of the Settlement Agreement. Since the Arbitral Tribunal has already come to the conclusion that Respondent has not breached its obligations under the Settlement Agreement, the Umbrella Clause of the BIT is moot and Respondent cannot have violated the BIT on this footing.

VII.7. CLAIMANT'S FIFTH ALLEGATION: THE PROHIBITION OF LOCAL PURCHASE

A) Allegation of the Parties

499. Claimant's final allegation[201] is that the 2006 LTR, by imposing a 50% Ukrainian music requirement, breaches Article II.6 of the BIT which does not allow the host state to "*impose performance requirements as a condition …*" Claimant acknowledges that Respondent has tried to justify the legal imposition on public policy grounds. Yet, even assuming its validity, this argument can, in Claimant's opinion, at best justify the breach, subject to the payment of the corresponding damages. And the damages sustained by Gala were significant, because its program concept is based 100% on hits. The high level of the local source requirement and its abrupt incorporation caused Claimant to lose advertising revenue, resulting in a damage of 958,000 USD.

500. Respondent disagrees[202]. A change in the host's State's regulatory framework does not equate with a breach of the BIT. The protection of the legitimate expectations must be balanced with the need to maintain a reasonable degree of regulatory flexibility on the part of the host State in order to respond to changing circumstances in the public interest. The imposition of a Ukrainian music requirement is neither abrupt, excessive nor unfair, and did not breach Claimant's legitimate expectations.

B) Decision of the Tribunal

501. The facts of this allegation are rather straightforward. Article 9.1 of the 2006 LTR required that *"… music produced in Ukraine shall constitute at least 50% of general broadcasting time of each … radio organization"*. This requirement applies to all broadcasters in Ukraine, not only to Gala Radio. *"Music produced in Ukraine"* includes any music where the author, the composer and/or the performer is Ukrainian.

[201] Claimant's Post-Hearing Memorial, para. 148.
[202] Respondent's Post-Hearing Memorial, para. 570.

502. The implementation of this new requirement was not immediate, but in steps. On July 21, 2006 the National Council and certain radio companies signed a memorandum[203], which provided that the requirement would be implemented in stages from October 1, 2006 through February 1, 2007. Gala adhered to this memorandum in August 2006.

503. Gala's basic criticism[204] with regard to the new Ukrainian music requirement is that there are too few hits of Ukrainian music, and since its formula is 100% hits, it must continuously replay the same few Ukrainian hits. In Claimant's opinion, the 50% Ukrainian music requirement violates Article II.6 of the BIT, which provides as follows:

> "*Neither party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods and services must be purchased locally, or which impose any other similar requirements*".

504. The Tribunal disagrees with Claimant's contention.

505. As a sovereign State, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government. The prerogative extends to promulgating regulations which define the State's own cultural policy. The promotion of domestic music may validly reflect a State policy to preserve and strengthen cultural inheritance and national identity. The "*high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*[205]" is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community.

506. The desire to protect national culture is not unique to Ukraine. France requires that French radio stations broadcast a minimum of 40% of French music[206], Portugal has a 25 – 40% Portuguese music quota[207] and a number of other countries impose similar requirements[208]. The Tribunal in *Plama* reasoned that a rule cannot be said to be unfair, inadequate, inequitable or discriminatory, when it has been adopted by many countries around the world[209]. If one adds that the 50% Ukrainian music rule is applied to all broadcasters, the necessary conclusion is that it is compatible with the FET standard defined in the BIT.

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[203] Respondent's Exhibit R-131.
[204] Claimant's Memorial, para. 207.
[205] *S.D. Myers Inc. v. Canada*, UNCITRAL, First Partial Award of 13 November 2000, para. 263.
[206] Article 12 I *Loi nº 86-1067 du 30 septembre 1986 relative à la Liberté de Communication*, amended by *Loi nº 94-88 du 1er février 1994.*
[207] Article 44 A 1 Lei 7/2006 de 3 de março.
[208] See K. Bhattachrjee: "*Local Content Rules in Broadcasting*", reproduced as Respondent's Exhibit RLA-41.
[209] See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/02, Award of 27 August 2008, para 269.

507. But this conclusion is really *obiter dicta*, because Claimant challenges the 50% Ukrainian music requirement not as a violation of the FET standard, but rather as a breach of the local content rule contained in Article II.6 which prohibits *"performance requirements … which specify that goods or services must be purchased locally"*. Is this rule applicable to a cultural restriction like the 50% Ukrainian music requirement?

508. The answer to this question requires that Article II.6 be interpreted *"in accordance with the* ordinary *meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"* (Article 31.1. Vienna Convention)[210].

509. The ordinary meaning of the terms used by a treaty provides the first criterion of interpretation. The BIT prohibits that local law specify that *"goods or services …must be purchased locally"*. It can be argued that the LTR does not fall foul of this rule: the law does not specify that radio stations must purchase any goods or services locally, but rather that a certain percentage of the music broadcast should be authored, composed or produced by Ukrainian artists. The argument, however, is not decisive, because it might be reasoned *de adverso* that although the LTR does not prohibit radio stations from obtaining Ukrainian music from non-Ukrainian sources, *de facto* the market for Ukrainian-authored, -composed or -produced music is located in Ukraine.

510. The object and purpose of Article II.6 sheds more light on its correct interpretation. The object of the BIT is to *"promote greater economic cooperation"* between the Parties (Preamble II). And the purpose of Article II.6 is trade-related: to avoid that States impose local content requirements as a protection of local industries against competing imports. When in 2006 Ukraine amended the LTR, the underlying reasons were not to protect local industries and restrict imports, but rather to promote Ukraine's cultural inheritance, a purpose which is compatible with Article II.6 of the BIT.

511. In conclusion, the Tribunal finds that Article 9.1 of the 2006 LTR, which requires that *"[…] music produced in Ukraine shall constitute at least 50% of general broadcasting time of each … radio organization"* does not amount to a violation of the local content rule contained in Article II. 6 of the BIT which prohibits *"performance requirements … which specify that goods or services must be purchased locally"*.

[210] Emphasis added.

VII.8. OTHER ALLEGATIONS

512. In his Memorial, Claimant included alleged additional violations of the BIT, referring to affiliation agreements, trademarks and the expropriation of a beauty salon. This last claim has been specifically withdrawn, and the other two have not been addressed either at the hearing or in the Post-Hearing Memorial, and seem to have been tacitly dropped. To the extent that these claims may still be alive, the Tribunal finds that Respondent's conduct with regard to Gala's affiliation agreements or to its request for trademark protection does not amount to a violation of the BIT.

VIII. DECISION

513. In view of the foregoing reasons, the Tribunal unanimously as regards Sections I trough VI, and by majority as regards some aspects and conclusions of Section VII, decides as follows:

1. to dismiss Respondent's objections to the jurisdiction of the Centre and the competence of the Tribunal;

2. to declare that Respondent has not breached any obligations assumed in the Settlement Agreement;

3. to declare that Respondent, in the manner in which it dealt with the award of radio frequencies as described in paragraph 422 of this Decision, breached Article II.3 of the BIT; and

4. to dismiss all other claims regarding the merits submitted by Claimant.

514. The question of the appropriate redress of the breach, including questions of *quantum*, will be addressed in a second phase of this arbitration, for which the Tribunal retains jurisdiction. The Tribunal will issue a Procedural Order for the continuation of the procedure. The question of costs is reserved until the Award.

[*signed*]

Mr. Jan Paulsson
Arbitrator

[*signed*]

Dr. Jürgen Voss
Arbitrator

[*signed*]

Professor Juan Fernández-Armesto
President

[*January 14, 2010*]

Date

EXHIBIT C-109

IN THE MATTER OF
AN INDEPENDENT REVIEW PROCESS
BEFORE THE
INTERNATIONAL CENTRE FOR
DISPUTE RESOLUTION

ICM REGISTRY, LLC, Claimant, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	ICDR Case No. 50 117 T 00224 08

EXPERT REPORT OF JACK GOLDSMITH

I. Introduction

1. My name is Jack Goldsmith. I have been asked by Claimant ICM Registry, LLC, to give an opinion on certain questions of conflicts of law, international law, and Internet law as they relate to the captioned Request for Independent Review.

2. I am the Henry L. Shattuck Professor of Law at Harvard Law School. I have also been on the faculties of the University of Chicago Law School (1997-2003) and the University of Virginia Law School (1994-1997; 2003-2004). My fields of academic research, scholarship, and teaching include public international law, conflicts of law, and the law of the Internet. I have published numerous law review articles in these fields in, among other places, the *Harvard Law Review*, the *Yale Law Journal*, the *University of Chicago Law Review*, and the *European Journal of International Law*. I am also the co-author of, among other publications, *Who Controls The Internet?: Illusions of a Borderless World* (2006), and *The Limits of International Law* (2005). In addition, I am a member of the State Department Advisory Committee on International Law, the American Society of International Law, and the National Academy of Science Study of the Policy Consequences and Legal Ethical Implications of Offensive Information Warfare.

3. Before teaching at Harvard Law School, I was Assistant Attorney General, Office of Legal Counsel from 2003 to 2004, and Special Counsel to the General Counsel of the Department of Defense from 2002 to 2003. In addition, from 1991 to 1992, I was a legal assistant at the Iran-U.S. Claims Tribunal in The Hague, where I assisted George Aldrich, one of the American arbitrators.

4. I received a B.A., *summa cum laude*, from Washington and Lee University (1984), a B.A., first class honours, from Oxford University (1986), a J.D. from Yale Law

School (1989), and a Diploma in Private International Law from the Hague Academy (1992). I am admitted to practice law in Washington, D.C. (1993). My CV, including a complete list of my scholarship, is attached as Exhibit A.

II. Background and Scope of Analysis

5. The Internet is the global network of computers that communicate with one another through a decentralized data routing mechanism. The Internet is, however, centralized in one crucial respect: its naming and numbering system. This system matches the unique Internet Protocol address of each computer in the world (for example, 123.456.78.912) with a recognizable "domain name" like <mcdonalds.com> or <whitehouse.gov> or <metmuseum.org.> Computers around the world are able to find and communicate with one another on the Internet because these Internet Protocol addresses uniquely and reliably correlate with domain names.

6. Some organization must ensure that this crucial naming and numbering system operates properly. Some organization must also decide which top-level domains (such as .COM, .GOV, and .ORG) shall exist. And some organization must administer the distribution and use of these top-level domains. From the 1970s until the late 1990s, these and related functions were performed by the Internet Assigned Numbers Authority ("IANA"), an informal organization run by Professor Jon Postel at the University of Southern California, pursuant to various contracts and understandings with the U.S. government.[1] Since the late 1990s, these functions have been performed by the Internet Corporation for Assigned Names and Numbers ("ICANN").

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[1] *See* MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 73-104 (2002); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE LAW J. 17, 51-69 (2000).

7. ICANN is a California non-profit corporation headquartered in Marina Del Rey, California. But it is perhaps the most unusual and powerful non-profit corporation in the world, for it creates and distributes billions of dollars of global property rights on the Internet. The mismatch between ICANN's ostensible private status and its plenary governance authority over one of the globe's most important resources generated significant controversy at ICANN's inception. The nub of the controversy was that ICANN's extraordinary authority over the Internet was untempered by any form of administrative law or other checks and balances that usually accompany such large exercises of effective governmental power.[2]

8. In Article 4 of its Articles of Incorporation, ICANN assumed obligations, including obligations under international law. These obligations were designed to add legitimacy to ICANN's decisions and to address the concerns of those in the United Sates and the international community who believed that ICANN is, and should function as, an international organization. The original draft of ICANN's Articles of Incorporation did not contain any reference to international law. The first version of what became Article 4 of the Articles was introduced in the "fifth iteration" of the draft Articles of Incorporation in September 1998. It provided:

> The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities with due regard for applicable local and international law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.[3]

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[2] *See, e.g.,* MUELLER,*s upra* note 1, at 1-11, 141-184; Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 212-217 (2000).

[3] *See* Internet Assigned Numbers Authority, Draft Articles of Incorporation – Fifth Iteration, *available at* http://web.archive.org/web/19990220074640/www.iana.org/articles5.html.

This "fifth iteration" draft explained that Article 4 "was added in response to various suggestions to recognize the special nature of this organization and the general principles under which it will operate."[4]

9. This initial effort to acknowledge ICANN's "special nature" and "the general principles under which it will operate" was viewed as inadequate. On November 21, 1998, following discussions with U.S. government officials, the ICANN Board of Directors held a special meeting "to approve revisions of the Corporation's articles of incorporation and bylaws."[5] The Board voted to revise Article 4 to what became its final version:

> The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

This final version of Article 4 amplified ICANN's international law obligations. While the original version obliged ICANN to carry out its activities "with due regard for applicable . . . international law," the final version obliged ICANN to carry out its activities "in conformity with relevant principles of international law and applicable international conventions." As ICANN's Interim Chairman of the Board explained to the Department of Commerce, these and other changes made to its Articles "reflect emerging

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[4] *Id.*

[5] *See* Internet Corporation for Assigned Names and Numbers, Minutes of Special Meeting (Nov. 21, 1998), *available at* http://www.icann.org/en/minutes/minutes-21nov98.html.

consensus about our governance and structure."[6] She added that Article 4 in particular "mak[es] it clear that ICANN will comply with relevant and applicable international and local law."[7]

10. ICANN in its Bylaws took complementary steps to bring basic due process mechanisms, including checks and balances, to its decision-making.[8] Article 3(1) of the Bylaws provides that the corporation "shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." The Bylaws further state that "[i]n carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws."[9] These core values include "open and transparent policy development mechanisms that . . . promote well-informed decisions based on expert advice," and a requirement to make decisions "by applying documented policies neutrally and objectively, with integrity and fairness."[10]

11. The Bylaws additionally require ICANN to "have in place a separate process for independent third-party review of Board actions alleged by an affected party

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[6] *Joint Hearings before the Committee on Science Subcommittee on Basic Research and Subcommittee on Technology To Consider Department of Commerce Discussion Draft Proposal To Restructure and Privatize the Internet Domain Name System (DNS)*, 105th Cong. 336 (1998) (Letter of Nov. 23, 1998 from Ester Dyson, ICANN Interim Chairman of the Board, to J. Beckwith Burr, Acting Associate Administrator, National Telecommunications and Information Administration, United States Department of Commerce)

[7] *Id.*

[8] Bylaws for Internet Corporation for Assigned Names and Numbers, art. IV, § 3(b) (May 29, 2008), *available at* http://www.icann.org/general/bylaws.htm.

[9] *Id.* at art. IV, § 1.

[10] *Id.* at art. I, § 2.

to be inconsistent with the Articles of Incorporation or Bylaws."[11] When a party affected by an adverse ICANN Board decision submits a request for "independent review" of the decision, the Independent Review Panel ("IRP") "shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[12]

12. This review process emerged from what ICANN's first Chairman of the Board described as the "need for a way to obtain recourse in the event that someone may believe ICANN or its staff has broken our own bylaws or otherwise not followed the rules that we have set up for ourselves and our successors."[13] The process was included in ICANN's Bylaws at "the insistence of the U.S. government" as a condition for delegating its control over the Internet's naming and numbering system to ICANN.[14] As Paul Twomey, ICANN's President and CEO, recently told Congress, the "independent review panel and independent arbitration" are the ultimate guarantors of ICANN's "accountability in its decision making."[15]

13. This is the first ICANN IRP ever formed. The issue before the IRP grows out of ICANN's rejection of an application by Claimant ICM Registry, LLC ("ICM"), a

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[11] *Id.* at art. IV, § 3(1).

[12] *Id.* at art. IV, § 3(3).

[13] Letter from Ester Dyson, *supra* note 6.

[14] *See* Weinberg, *supra* note 2, at 228-229 & nn. 211-213.

[15] *ICANN Internet Governance: Is It Working?,He aring Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce*, 109th Cong. 19 (2006).

Delaware corporation with its principal place of business in Jupiter, Florida, for a sponsored top-level domain ("sTLD"). ICM alleges that ICANN had determined that it qualified for a sTLD under a detailed "request for proposal" but then, under belated pressure from national governments and the Government Advisory Committee ("GAC"), changed its mind and rejected ICM's application. ICM further alleges that ICANN's decision to deny ICM the .XXX sTLD, and the process leading up to that decision, were arbitrary, lacking in transparency, discriminatory, contrary to ICANN's evaluation criteria, and outside ICANN's mission, all in violation of ICANN's Articles and Bylaws as well as international law and local law.

14. This Report will address some of the international law, conflicts of law, and Internet law issues raised by these allegations. Part III will explain why international law matters in this proceeding. Part IV will explain why the phrase "relevant principles of international law and applicable international conventions" in Article 4 of ICANN's Articles of Incorporation includes general principles of law. Part V will describe the content of some of the general principles of law that apply in this Review.

III. Why International Law Matters in This Proceeding

15. ICANN Bylaws require the IRP to determine whether an ICANN Board decision is consistent with ICANN's Bylaws and Articles of Incorporation. Article 4 of the ICANN Articles states that ICANN "shall . . . carry[] out its activities in conformity with relevant principles of international law and applicable international conventions and local law. . . ."[16] It follows straightforwardly from these provisions that this IRP must determine whether ICANN's decision to deny ICM a .XXX sTLD, as well as the process leading to that decision, were consistent with "relevant principles of international law and applicable international conventions and local law."

16. The IRP can reach this conclusion about governing law, and in particular about international law's relevance, without a choice-of-law analysis. But if the IRP performs a choice-of-law analysis, it will reach the same conclusion. This Independent Review is governed by the International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution Procedures (hereinafter "ICDR Rules"), as modified by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process.[17] Article 28 of the ICDR Rules provides that "[t]he tribunal shall apply the substantive law(s) or rules of

[16] Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, art. 4 (Nov. 21, 1998), *available at* http://www.icann.org/general/articles.htm.

[17] *See* American Arbitration Association, International Dispute Resolution Procedures [*hereinafter* IDRP Procedures], *available at* http://www.adr.org/sp.asp?id=33994; Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, *available at* http://www.adr.org/sp.asp?id=32197.

law designated by the parties as applicable to the dispute."[18] The parties to this dispute have designated the laws contained in Article 4 as applicable to this dispute.

17. An offer to arbitrate can be contained in a corporate charter or corporate bylaws.[19] Such charters and bylaws typically concern arbitration with shareholders or partners, but there is no reason that a corporation's charter or bylaws could not include an offer to arbitrate with affected third parties.[20] It is also well established that a party's participation in arbitral proceedings without protest can be the basis for a valid arbitration agreement.[21] Indeed, the ICDR Rules provide that any objections to arbitral jurisdiction must be raised in the statement of defense or are waived.[22]

18. Just as a corporate charter or corporate bylaws can contain an arbitration agreement, so too they can contain a governing law clause. In addition, parties can consent to governing law through other methods that reveal unambiguous intent. As Born's treatise notes, "[c]hoice-of-law agreements may be implied or tacit, as well as express. This is recognized in all developed legal systems and has particular importance

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[18] *See id.* at art. 28(1).

[19] *See, e.g.,* UNIF. ARBITRATION ACT § 6, cmt. 1, 7 U.L.A. 14-15 (2005) (citing authorities); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1223-26 (2009) (same).

[20] *Cf.* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REVIEW 232 (1995).

[21] *See, e.g.,* BORN, *supra* note 19, at 672 (citing arbitration legislation, national court decisions, and arbitral institution rules for proposition that "a party's tacit acceptance of its counterparty's initiation of arbitration, through participation in the arbitral proceedings without raising a jurisdictional objection, can provide the basis for a valid agreement to arbitrate.").

[22] *See* IDRP Procedures, *supra* note 17, arts. 3, 15(3).

in the context of international commercial arbitration."[23] Moreover, parties, including private parties, can choose to have their dispute governed by international law, including general principles of law.[24] In fact, Article 28's reference to "rules of law" is a standard way to establish that parties can choose non-national laws, including international law, to govern their disputes.[25]

19. Putting these principles together and applying them to this case, ICM and ICANN have agreed to arbitrate whether ICANN's denial of ICM's application for a .XXX sTLD (as well as the process leading to that denial) complied with "relevant principles of international law and applicable international conventions and local law." The Bylaws establish an offer to arbitrate board decisions under a standard of review of consistency with, among other things, "principles of international law." ICM accepted this offer when it brought this proceeding, effectively establishing an agreement to arbitrate and an agreement on governing law. Any uncertainty in the nature or scope of the agreement on arbitration and governing law was resolved by ICANN's Response, which acknowledged that the IRP must assess the consistency of its actions against the Articles of Incorporation, including Article 4's international law standard.

20. The same conclusion follows even if the parties have not effectively designated the governing laws or rules of law. In such a case, Article 28(1) of the ICDR

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[23] BORN,*s upra* note 19, at 2207; *see also* ALAN REDFERN & MARTIN HUNTER (WITH NIGEL BLACKABY & CONSTANTINE PARTASIDES), LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2-76 (4th ed. 2004).

[24] *See* REDFERN & HUNTER,*s upra* note 23, at 2-46 (noting that there is "no reason in principle" why private parties and corporations "should not select public international law, or alternatively the general principles of law, as the law which is to govern their contractual relationship").

[25] *See, e.g.,* BORN,*s upra* note 19, at 2144.

Rules requires the IRP to apply the "appropriate" law. The "appropriate" starting place for determining whether ICANN has acted consistent with its Articles and Bylaws (including the international law obligations it assumed in the Articles) is almost certainly California law.[26] California law permits a non-profit corporation like ICANN to limit its powers in its Articles of Incorporation without qualification.[27] And ICANN has in fact limited its power by agreeing to act in conformity with "relevant principles of international law and applicable international conventions and local law." As a result, and once again, the IRP must assess whether ICANN's actions are consistent with these laws in Article 4.

21. In sum, in an attempt to bring accountability and thus legitimacy to its decisions, ICANN (a) assumed in its Articles of Incorporation an obligation to act in conformity with "relevant principles of international law," and (b) in its Bylaws extended to adversely affected third parties a novel right of independent review in this arbitration proceeding for consistency with ICANN's Articles and Bylaws. The parties have agreed to international arbitration in this forum to determine consistency with the international law standards set forth in Article 4 of the Articles of Incorporation. California law allows a California non-profit corporation to bind itself in this way.

[26] This is so because, among other reasons, California law is "local law" within the meaning of Article 4 of the Articles of Incorporation and the law that would be chosen by all relevant state or national choice-of-law rules.

[27] *See* Cal. Corp. Code §§ 5131, 5140 (2007) (recognizing that a California nonprofit corporation's "articles of incorporation may set forth a further statement *limiting the purposes or powers* of the corporation," and that such a corporation has the powers of a natural person "[s]ubject to *any* limitations contained in the articles or bylaws.") (emphases added).

IV. The Meaning of Article IV

22. The phrase "principles of international law and applicable international conventions and local law" refers to three types of law. "Local law" means California law. "Applicable international conventions" refers to treaties. The term "principles of international law" includes general principles of law.[28]

23. The place to begin for understanding the meaning of "principles of international law" is Article 38 of the Statute of the International Court of Justice ("ICJ"), which has become the canonical reference for the sources of international law. It lists three primary sources of international law that the ICJ shall apply:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations; . . .[29]

The phrase "principles of international law" would normally be interpreted to include all three of these sources. Since the first one, "international conventions," is specified in the ICANN Articles, the reference to "principles of international law" in the Articles refers to the last two, customary international law and general principles of law.[30]

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[28] I also believe the phrase includes customary international law, but ICM has not asked me to address issues of customary international law in this Report.

[29] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S 993.

[30] It is conceivable that the reference to "*principles* of international law" (as opposed to "rules" of international law or merely "international law") was meant to pick out "general principles" but exclude customary international law. I doubt this is the correct interpretation. I know of no precedent for an entity to hold itself accountable to treaties and general principles and not custom, and I know of no reason why ICANN would wish to organize itself in this way. But in any event the important point is that Article 4 is best read to include a requirement to act in conformity with general principles of law.

24. This conclusion is confirmed by the drafting history of the ICANN Articles of Incorporation. As noted above, a draft of the Articles assumed an obligation to give "due regard" to "applicable . . . international law," a reference that would naturally have meant all three of the sources in Article 38 of the ICJ Statute. The final draft changed the standard of compliance from "due regard" to "conformity," and changed "applicable . . . international law" to "relevant principles of international law and applicable international conventions." This change ratcheted up ICANN's standard of compliance, for "conformity" is more demanding than "due regard." And it clarified that its commitment to international law extended to international law in all its forms.

25. This interpretation of "principles of international law" is further confirmed by the interpretation given to similar provisions in many other international law instruments. Most analogous is the Iran-U.S. Claims Tribunal, which is charged with applying "*principles of* commercial and *international law* as the Tribunal determines to be applicable."[31] The Tribunal has interpreted this phrase to include "general principles of law" and "general principles of international law."[32] Similarly, Article 31(3)(c) of the Vienna Convention on Treaties provides that, in interpreting treaties, account must be taken of "any *relevant rules of international law* applicable in the relations between the

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[31] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, art. V, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 9 (1983) (emphases added).

[32] *See* Grant Hanessian, *General Principles of Law in the Iran -U.S. Claims Tribunal*, 27 COLUM. TRANSNAT'L L. 309 (1989) (citing many examples); John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience,* 83 A.J.I.L. 278 (1989) (same).

parties," a term that has been interpreted to include general principles of law.[33] Arbitrators in the International Centre for Settlement of Investment Disputes ("ICSID") are charged, in the absence of party choice, with applying "such rules of international law as may be applicable."[34] Both the Report of the ICSID Executive Directors and ICSID Tribunals have interpreted "rules of international law" to include general principles of law.[35] NAFTA Chapter 11 similarly charges a Tribunal with applying "applicable rules of international law," and that term too has been interpreted to include general principles.[36] In short, references to "principles of international law" and the related phrase "rules of international law" are commonly interpreted to include "general principles."

26. It is perfectly appropriate to apply "general principles" in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation. ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when public goods are at stake. The "international" nature of this arbitration – which is evidenced by the global impact of ICANN's

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[33] *See, e.g.*, Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* ¶158, WT/DS58/AB/R (Oct. 12, 1998).

[34] Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42(1), opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[35] *See* Executive Directors of the International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, para. 40 (Mar. 18, 1965), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm; CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY art. 42, para. 113 (2001).

[36] *See Methanex Corporation v. United States (NAFTA)*, Final Award on Jurisdiction and Merits (Ad hoc) (UNCITRAL) (Aug. 3, 2005), at para. II(B)3.

decisions, by ICANN's self-description as a "special . . . organization" that should be governed by international law,[37] and by the fact that ICANN itself chose an international arbitral institution for this Independent Review – confirms the appropriateness of applying general principles. Moreover, ICANN is only nominally a private corporation. It exercises extraordinary authority, delegated from the U.S. Government, over one of the globe's most important resources. Though for reasons just explained its status as a de facto public entity is not necessary for the application of general principles here, its control over the Internet naming and numbering system does make sense of its embrace of the "general principles" standard. As explained above, the Article 4 limitations were a response to ICANN's legitimacy deficit and were designed to bring accountability and international legal order to ICANN's decisions.

27. While there is no doubt that ICANN can and has bound itself to general principles of law as that phrase is understood in international law, there is an issue about how general principles should be applied in conjunction with the other legal limitations ICANN assumed in Article 4, and, in particular, with its duty to act in conformity with "local law." When international law is included in a treaty or governing law clause as a source of law alongside national or local law, arbitrators sometimes conclude that international law, including general principles, should trump when in conflict with national law. Here, however, there are no conflicts between the various forms of law in Article 4. In fact, as explained below, the general principles relevant here complement, amplify, and give detail to the requirements of independence, transparency, and due process that ICANN has otherwise assumed in its Articles and Bylaws and under

[37] *See infra* text accompanying note 4.

California law. General principles thus play their classic supplementary role in this proceeding.

V. The Content of "General Principles of Law" in this Proceeding: Good Faith

28. The analysis thus far has shown that the IRP must assess whether ICANN's decision to deny ICM a sTLD, and the process leading to that decision, were consistent with ICANN's Articles of Incorporation and Bylaws, and that among the obligations assumed in the Articles was a substantive standard of conformity with general principles of law. I now turn to describe some of the "general principles" that apply in this proceeding.

29. The notion of "general principles" as originally articulated in the Permanent Court of International Justice referred to widely accepted principles recognized in national law, and was designed primarily as a gap-filler to avoid *non liquet* when treaties and custom did not address an issue. However, as international law has grown during the last sixty years, the concept of "general principles" has expanded to include general principles that emerge across different types of international legal relations and those that inhere in all forms of legal reasoning, domestic and international.[38] Brownlie correctly notes that "general principles" cannot be reduced to a

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[38] *See, e.g.,* Hermann Mosler, *General Principles of Law*, in THE ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW [hereinafter "ENCYCLOPEDIA"], vol. 2, at 511-512 (1992) ("general principles of law" can mean "principles applied as law generally in national law," "principles having their origin directly in international legal relations," and "principles recognized in all kinds of legal relations, regardless of the legal order to which they may belong").

"rigid categorization of sources," and that while many such principles can be "traced to state practice," they are "primarily abstractions from a mass of rules and have been so long and generally accepted as to be no longer directly connected with state practice."[39]

30. There are many ostensible general principles of law, but perhaps none as settled or important – across domestic legal systems and in international law – as the principle of good faith.[40] The general principle of good faith is "the foundation of all law and all conventions."[41] As the International Court of Justice has noted, "the principle of good faith is a well-established principle of international law."[42] It is a fundamental principle of treaty law,[43] of the U.N. Charter,[44] of the law of the World Trade Organization,[45] of international commercial law,[46] and of international investment

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[39] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19 (7th ed. 2008).

[40] J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 35 (1991) (noting that "[t]he principle of good faith probably receives more unqualified acceptance than any other in international law").

[41] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 105 (*quoting* Megalidis Case, 8 T.A.M. 386, 395 (1928)); *see also* MALCOLM SHAW, INTERNATIONAL LAW 97 (2002) ("[p]erhaps the most important general principle, underpinning many international legal rules, is that of good faith").

[42] Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (June 11).

[43] *See* Vienna Convention on the Law of Treaties, preamble ("*Noting* that the principles of free consent and of *good faith* and the *pacta sunt servanda* rule are universally recognized") (emphasis added); art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); art. 31(1) ("A treaty shall be interpreted in good faith . . .").

[44] U.N. Charter, art. 2, para. 2 ("All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.").

[45] *See* Helge Elisabeth Zeitler, *'Good faith' in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism*, 8(3) J. INT'L ECON. L. 721 (2005).

[46] *See* UNIDROIT Principles of International Commercial Contracts 2004 [hereinafter "UNIDROIT Principles 2004"], art 1.7, *available at* http://www.unidroit.org/english/principles/contracts/main.htm ("[e]ach party must act in accordance with good faith and fair dealing in international trade"). Note that the UNIDROIT

law.[47] Good faith is also a prevalent general principle in domestic commercial laws.[48]

31. ICANN voluntarily held itself to the good faith standard when, in Article 4 of its Articles of Incorporation, it obliged itself to act "in conformity with principles of international law." The good faith principle has at least three related applications in this proceeding: (a) the requirement of good faith in complying with legal restrictions; (b) the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights; and (c) the requirement of good faith in contractual negotiations.

A. Good Faith in Complying With Legal Restrictions

32. As Shaw has noted, summarizing many arbitral decisions, good faith operates as "a background principle informing and shaping the observance of existing rules of international law and in addition constraining the manner in which those rules may legitimately be exercised."[49] Shaw was writing about the good faith principle as it applied to relations among states governed by international law. But the good faith

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Principles provide that "[t]hey may be applied when the parties have agreed that their contract be governed by general principles of law," and as an interpretive guide and supplement to domestic law. UNIDROIT Principles 2004, Preamble.

[47] *See, e.g., Tecnicas Medioambientales Tecmed S.A. v. Mexico*, Award, May 29, 2004, 43 ILM 133, para. 154; *Waste Management v. Mexico*, Final Award, Apr. 30, 2004, 43 ILM 967, para. 138; *Eureko B.V. v. Poland*, Partial Award, Aug. 19. 2005, para. 235; *Saluka B.V. v. Czech Republic*, Partial Award, Mar. 17, 2006, paras. 361-432.

[48] *See, e.g.*, E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J.INT'L & COMP. L. 47 (1995).

[49] SHAW, *supra* note 41, at 98 (citing many sources). Shaw's dictum about good faith applying to extant legal rules explains what the International Court of Justice meant when it said that good faith, while "one of the basic principles governing the creation and performance of legal obligations," is "not in itself a source of obligation where none would otherwise exist." Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, 105 (Dec. 20).

principle is "equally applicable to relations between individuals and to relations between nations."[50]

33. The good faith principle attaches to the obligations and legal limitations that ICANN assumed in its Articles and Bylaws and demands that ICANN comply with them "honestly and fairly."[51] It "requires that one party should be able to place confidence in the words of the other," and insists that "promises should be scrupulously kept so that . . . confidence . . . may be reasonably placed upon them."[52] Similarly, in the investment dispute context, arbitral tribunals have applied the good faith principle, often through the lens of the fair and equitable treatment standard, to require the state to uphold the investor's legitimate law-based expectations.[53] The principle of good faith also encompasses the related principles of fairness, estoppel, and transparency.

34. Taking ICM's allegations as true, ICANN acted inconsistently with the good faith standard when it denied ICM's application for a .XXX sTLD, for ICANN did not apply its rules and procedures honestly and fairly and thus did not fulfill ICM's legitimate expectations based on these rules and procedures. According to the allegations, ICANN departed from its stated sponsorship criteria and instead used

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[50] CHENG,*s upra* note 41, at 105.

[51] Anthony D'Amato, *Good Faith*, in ENCYCLOPEDIA vol. 2, *supra* note 38, at 599; *see also* CHENG, *supra* note 41, at 119. It is important to note that the good faith principle imposes duties on top of ICANN's many obligations under its Articles of Incorporation and Bylaws, and provides a legal framework for the analysis of ICM's claims that numerous provisions of the Articles and Bylaws, including many that I do not mention here, were violated. My focus in this Report is only on the independent duties arising from ICANN's decision to conform its behavior to principles of international law.

[52] CHENG,*s upra* note 41, at 107, 119.

[53] *See supra* note 47.

sponsorship criteria related to vague and undefined public policy and law enforcement concerns that are beyond, and inconsistent with, ICANN's technical mandate. Moreover, ICANN allegedly violated its Bylaws by, among other things, singling out a particular party for disparate treatment and not operating in an open and transparent fashion. These allegations, if true, violate ICANN's good faith obligations.

B. Good Faith In Exercising Discretion: Abuse of Rights

35. Closely related to the general principle of good faith, and indeed a specific application of it, is the general principle of non-abuse of right. The prohibition on abuse of right has many dimensions, but its core meaning is that the exercise of legal discretion or legal rights must be made in good faith.[54]

36. In the *United States Nationals in Morocco Case*, for example, the ICJ held that French officials in Morocco had the legally circumscribed power to value U.S. goods at the Moroccan border, but concluded that the power "must be exercised reasonably and in good faith."[55] Similarly, in the *Anglo-Norwegian Fisheries Case*, the ICJ determined that Norway had committed no "manifest abuse" in part because its maritime delineation decisions were "moderate and reasonable."[56] And in the *Admissions of a State to the United Nations Case*, the ICJ held that Article 4 of the U.N. Charter prescribed the exclusive conditions that states could invoke in determining whether to admit a new

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[54] *See* Complaint by United States, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* ¶158, WT/DS58/AB/R (1998) (noting that "[o]ne application of this general principle [of good faith], the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights"); CHENG, *supra* note 41, at 121 (noting that the abuse of rights principle "is merely an application of this [good faith] principle to the exercise of rights").

[55] Rights of Nationals of United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 212 (Aug. 27).

[56] Anglo-Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 141-142 (Dec. 18).

nation to the United Nations, and added that "Article 4 does not forbid the taking of account of any factor which it is possible *reasonably and in good faith* to connect to the conditions laid down in that Article."[57]

37. In all of these cases, nations had legally circumscribed discretion to act, but this discretion was tempered by the good faith principle. Cheng deduces from these and many other arbitral decisions the following principle:

> Where the right confers upon its owner a discretionary power, this must be exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others. . . . They must not be exercised fictitiously so as to evade such obligations or rules of law, or maliciously so as to injure others. Violations of these requirements of the principle of good faith constitute abuses of right . . . .[58]

Or as O'Connor states the rule, drawing on subsequent decisions not analyzed by Cheng, "the expression 'abuse of rights' may be taken to include cases where a legal right – whether arising from a treaty or by virtue of customary rules – is exercised arbitrarily, maliciously or unreasonably, or fictitiously to evade a legal obligation."[59]

38. Taking ICM's allegations as true, ICANN violated the prohibition against abuse of right. There are many possible abuses of right alleged by ICM, but the one that strikes me as most obvious is the clearly fictitious basis ICANN gave for denying ICM's application. ICANN's reasons for denial included the following:

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[57] Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57, 63 (May 28) (emphasis added).

[58] CHENG,*s upra* note 41, at 136; *see also id.* at 132-34 ("discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused. . . . Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interest of others.").

[59] O'Connor, *supra* note 40, at 38; *see also* Alexandre Kiss, *Abuse of Rights*, in ENCYCLOPEDIA vol 1, at 4 ("In international law, abuse of rights refers to a State exercising a right . . . for an end different from that for which the right was created, to the injury of another state.").

> The ICM Application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct.
>
> The Board agrees with the reference in the GAC communiqué from Lisbon, that under the Revised Agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.[60]

This explanation appears fictitious, and thus an abuse of right, for at least two reasons.

39. First, the concern about "law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application" applies to many top-level domains besides .XXX. The website <pornography.com.> would be no less subject to various differing laws around the world than the website <pornography.xxx.> If anything, pornography on a website on the .XXX domain is *easier* for nations to regulate and exclude from computers in their countries because they can block all sites on the .XXX domain with relative ease but have to look at the content, or make guesses based on domain names, to block unwanted pornography on .COM and other top level domains.[61] In short, this reason for ICANN's denial, if genuine, would extend to many top-level domains and would certainly apply to all generic top-level domains (like .COM,

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[60] Adopted Resolutions from ICANN Board Meeting (Mar. 30, 2007), *available at* http://www.icann.org/en/minutes/resolutions-30mar07.htm.

[61] On the techniques of Internet content blocking and their effectiveness, see ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING (Ronald Deibert, John Palfrey, Rafal Rohozinski, Jonathan Zittrain, eds., 2008).

.INFO, .NET, and .ORG) where pornographic websites can be found.[62] But ICANN has only applied this reason for denial to the .XXX domain. This strongly suggests that the reasons for the denial are pretextual and thus that the denial is an abuse of right. Under the guise of content-neutrality, ICANN seems to be exercising power in a content-sensitive way; and it appears to be doing so without candor.

40. Second, and similarly pretextual, is ICANN's claim that "there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content." In fact it is hard to imagine such circumstances. In the unlikely scenario that (a) a national court ordered ICM to shut down a .XXX site that violated a law in that country, and (b) ICM ignored the court order, and (c) the court had jurisdiction over ICANN, it is possible that ICANN could become involved in a national law Internet content dispute. It is implausible to assume that this scenario would be "ongoing." But more importantly, *the same logic applies to generic top level domains* like .COM. The identical scenario could arise if a national court ordered VeriSign (as the registry operator for .COM) to shut down one of the hundreds of thousands of pornography sites on .COM. But ICANN has only expressed concern about an "ongoing management and oversight role regarding Internet

[62] The worry about multiple law enforcement is not limited to pornography, and .XXX is not the only sTLD that implicates the worry. National laws related to the Internet differ on scores of issues ranging from free speech to gambling to intellectual property to spam. And many sTLDs besides .XXX can potentially run afoul of these laws. For example, a website called <teens.jobs> that solicits the labor of teenagers would likely be illegal in some places and not in others. If national law enforcement compliance issues were a genuine reason not to grant a top-level domain, there would be many fewer top-level domains, and the Internet would be much less robust.

content" in connection with ICM's application. This strongly suggests, once again, that its reasons are pretextual, and thus that the denial was an abuse of right.

C. Good Faith in Contract Negotiations

41. An additional way that the good faith principle applies here is in requiring ICANN to negotiate its contracts in good faith. It is settled that "[a]s a general principle of law, contracts must be *negotiated* and performed in good faith."[63] In particular, a lack of candor in negotiations can violate the good faith principle.[64] The requirement of candor also flows from the UNIDROIT commercial principles. These principles apply in cases, like this one, that are governed by general principles.[65] They require that "each party must act in accordance with good faith and fair dealing in international trade," and state that it is "bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party."[66]

42. ICM has alleged an absence of good faith and a lack of candor on ICANN's part in its contractual negotiations. ICM essentially contends that the ICANN Board authorized ICM to enter into contract negotiations over technical and commercial

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[63] R. DOAK BISHOP, JAMES CRAWFORD, W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES AND CONTROVERSIES 15 (2005) (emphasis added); *see also* Nuclear Tests (Australia v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20) (noting that principle of good faith is "one of the basic principles governing the *creation* and performance of legal obligations") (emphasis added).

[64] *See* SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES: 1945-1986, at 173-74 (1989) (summarizing treaty and arbitral developments and concluding that "uncandidness . . . could well be taken as an indication that the negotiations were not being conducted in good faith").

[65] *See* UNIDROIT Principles 2004, Preamble (noting that UNIDROIT principles "may be applied when the parties have agreed that their contract be governed by general principles of law"); Iran v. Cubic Defense Systems, 29 F. Supp. 2d 1168, 1173 (S.D. Cal. 1998) (confirming International Chamber of Commerce Tribunals Award that appeared to apply UNIDROIT Principles to the dispute as an instance of "general principles of international law").

[66] UNIDROIT Principles 2004, arts. 1.7, 2.1.15.

matters without caveats or special instructions; that ICANN gave ICM every indication that ICM had satisfied the RFP evaluation criteria and that the contract negotiations would be straightforward and uncomplicated; that ICM negotiated agreement after agreement with the ICANN staff to meet the increasingly stringent demands imposed by the ICANN Board, acting under pressure from the GAC; and that the ICANN Board ultimately rejected the ICM proposed registry agreement on the basis of criteria that were unrelated to the original published evaluation criteria and beyond ICANN's mandate. These allegations, if true, suggest that the ICANN Board, after the GAC intervention, had no intention of reaching a registry agreement contract, and thus did not negotiate the contract in good faith.

* * *

43. I hereby declare that I have prepared this Expert Report to the best of my knowledge and belief.

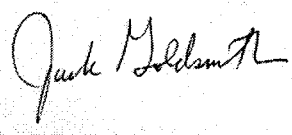

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EXHIBIT C-113

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Minutes | New gTLD Program Committee

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04 Jun 2013

Note: On 10 April 2012, the Board established the New gTLD Program Committee, comprised of all voting members of the Board that are not conflicted with respect to the New gTLD Program. The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of incorporation, Bylaws or ICANN's Conflicts of Interest Policy) to exercise Board-level authority for any and all issues that may arise relating to the New gTLD Program. The full scope of the Committee's authority is set forth in its charter at http://www.icann.org/en/groups/board/new-gTLD.

A Regular Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held telephonically on 4 June 2013 at 13:00 UTC.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all

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or part of the meeting: Chris Disspain, Bill Graham, Olga Madruga-Forti, Ray Plzak, George Sadowsky, Mike Silber, Judith Vazquez, and Gonzalo Navarro.

Thomas Narten, IETF Liaison was in attendance as a non-voting liaison to the Committee. Heather Dryden was in attendance as an observer to the Committee.

Erika Mann, Francisco da Silva (TLG Liaison), and Kuo-Wei Wu sent apologies.

ICANN Staff in attendance for all or part of the meeting: Akram Atallah, Chief Operating Officer; John Jeffrey, General Counsel and Secretary; Megan Bishop, Michelle Bright, Samantha Eisner, Allen Grogan, Dan Halloran, Jamie Hedlund, Liz Le, Karen Lentz, Cyrus Namazi, Erika Randall, Amy Stathos, and Christine Willett.

These are the Minutes of the Meeting of the New gTLD Program Committee, which took place on 04 June 2013.

1. GAC Advice Items
    a. Consideration of Non-Safeguard Advice in the GAC's Beijing Communiqué
        Rationale for Resolution 2013.06.04.NG01

1. GAC Advice Items

The Chair introduced the item on the main agenda regarding responding the GAC advice issued in the Beijing Communiqué. The Chair briefly outlined the proposed course of action for the meeting. The Chair noted that the Committee received a letter from ALAC, which will be placed on the agenda for discussion at the next meeting.

At the request of the meeting shepherd, Chris Disspain, Jamie Hedlund walked the Committee through each of the items on the proposed "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué (4 June 2013)" (the "1A Scorecard"), which is Annex 1 [PDF, 564 KB] of the proposed resolution and attached to the minutes for reference.

The Committee discussed accepting the GAC advice

The Committee discussed accepting the GAC advice regarding application number 1-1165-42560 for .AFRICA and application number 1-1936-2101 for .GCC. Olga Madruga-Forti inquired whether the applicants would be permitted to withdraw their applications within a certain amount of time if the Committee accepted the GAC advice. After further discussion of the appropriate language to include in the 1A Scorecard and consultation with the General Counsel, the Committee agreed that the 1A Scorecard should indicate that the applicants may withdraw or may wish to seek relief via ICANN's accountability mechanisms, subject to the appropriate standing and procedural requirements.

The Committee discussed its proposed response on the GAC advice regarding the .HALAL and .ISLAM strings, and decided to accept the advice. The Committee agreed that its response should note that it stands ready to enter into a dialogue with the GAC. The Chair questioned whether the Committee needed to write a formal letter to the GAC transmitting this response. Heather Dryden suggested that this was not necessary. The proposed response informs the GAC that the Committee looks forward to liaising with the GAC as to how such dialogue should be conducted.

Olga Madruga-Forti raised a concern about acting on GAC advice that is non-consensus advice. Chris provided a brief history of the genesis of the language in the Applicant Guidebook (AGB) regarding GAC advice where the GAC expresses concerns—citing to the experience with the application for the .XXX string where there were number of governments who had concerns. The provision in the AGB provides governments who have deep concerns on certain strings (even if not a GAC consensus) a mechanism to have a dialogue with the Committee about its concerns.

Jamie commented that staff looked into the issue and determined that pursuant to AGB Section 3.1.2, it does not make a different whether the concerns are raised by the entire GAC or a few members; the Committee is expected to enter into a dialogue to understand the scope of the concerns.

The Committee engaged in discussions regarding accepting

the GAC's advice on the list of strings that it advised should

the GAC's advice on the list of strings that it advised should not proceed beyond initial evaluation. Thomas questioned whether the proposed response was too open-ended. Chris confirmed that the Committee's proposed response is crafted to indicate that it will not proceed beyond initial evaluation and any dispute resolution until the Committee hears back from the GAC.

The Committee also discussed the proposed response on the GAC's advice regarding singular and plural strings. Bill Graham and the Chair suggested text edits to the 1A Scorecard to make it clear that the NGPC is accepting the advice to consider the issue of singular and plural strings. Mike Silber agreed that the response should be that the Committee will consider whether to allow single and plural versions of the same string.

The Committee decided that its response to the GAC's advice regarding protections for IGO names and acronyms was more appropriate to be sent in a letter and not within the 1A Scorecard. Jamie confirmed that the letter would be sent out under separate cover to the GAC.

The Committee agreed to accept the GAC's advice to finalize the RAA before approving any new gTLD contracts, and to advise the expert working group to take into account the GAC principles regarding WHOIS. After a review of the briefing materials, the Committee also agreed to accept the advice regarding protections for the IOC/RCRC names.

Jamie noted that the Committee was provided responses to the Annex II questions raised by the GAC in its Beijing Communiqué. The Committee agreed that it would transmit the responses to the GAC. Jamie also noted that the advice from the GAC requesting a written briefing on the ability to change strings was not included in the 1A Scorecard because it will be a separate briefing paper to the GAC.

Ray Plzak inquired whether the formulation of the responses to the GAC should reference the "Committee accepts this advice," or the "Board accepts this advice." The General Counsel responded that a whereas clause would be added to

the proposed resolution to indicate that the Committee has the

Board's authority to act on the GAC advice. George Sadowsky raised the issue that the 1A Scorecard being adopted by the Committee should be clearly labeled and identified so that it clear to the Committee and to the community which version of the 1A Scorecard is the final version adopted. The Chair, along with Chris and Ray concurred with this point and suggested that the 1A Scorecard be given a document number or other identifying information to give as much specificity as possible. The General Counsel read the proposed resolution as revised.

The Committee then took the following action:

a. Consideration of Non-Safeguard Advice in the GAC's Beijing Communiqué

Whereas, the GAC met during the ICANN 46 meeting in Beijing and issued a Communiqué on 11 April 2013 ("Beijing Communiqué");

Whereas, on 18 April 2013, ICANN posted the Beijing Communiqué and officially notified applicants of the advice, http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1;

Whereas, the NGPC met on 8 May 2013 to consider a plan for responding to the GAC's advice on the New gTLD Program, transmitted to the Board through its Beijing Communiqué;

Whereas, the NGPC met on 18 May 2013 to further discuss and consider its plan for responding the GAC's advice in the Beijing Communiqué on the New gTLD Program;

Whereas, the NGPC has considered the applicant responses submitted during the 21-day applicant response period, and the NGPC has identified nine (9) items of advice in the attached scorecard where its

position is consistent with the GAC's advice in the

Beijing Communiqué.

Whereas, the NGPC developed a scorecard to respond to the GAC's advice in the Beijing Communiqué similar to the one used during the GAC and Board meetings in Brussels on 28 February and 1 March 2011, and has identified where the NGPC's position is consistent with GAC advice, noting those as "1A" items.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2013.06.04.NG01), the NGPC adopts the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué" (4 June 2013), attached as Annex 1 to this Resolution, in response to the items of GAC advice in the Beijing Communiqué as presented in the scorecard.

Rationale for Resolution 2013.06.04.NG01

Why the NGPC is addressing the issue?

Article XI, Section 2.1 of the ICANN Bylaws http://www.icann.org/en/about/governance/bylaws#XI permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The

Board and the GAC will then try in good faith to find a

mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

What is the proposal being considered?

The NGPC is being asked to consider accepting a discrete grouping of the GAC advice as described in the attached "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué (4 June 2013)" (the "1A Scorecard"), which includes nine (9) items of non-safeguard advice from the Beijing Communiqué as listed in the GAC Register of Advice. These items are those for which the NGPC has a position that is consistent with the GAC's advice.

Which stakeholders or others were consulted?

On 18 April 2013, ICANN posted the GAC advice and officially notified applicants of the advice, http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1 http://newgtlds.icann.org/en/applicants/gac-advice-responses. The NGPC has considered the applicant responses in formulating its response to the GAC advice as applicable.

To note, on 23 April 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address GAC advice regarding safeguards applicable to broad categories of new gTLD strings http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm. The public comment forum on how the NGPC should address GAC advice regarding safeguards is open through 4 June 2013. These comments will serve as important inputs to the NGPC's future consideration of the other elements of GAC advice not being considered at this time in the 1A Scorecard.

What concerns or issues were raised by the

community?

As part of the 21-day applicant response period, ICANN received 383 applicant response documents representing 745 unique applications. Twenty-three responses were withdrawn and eleven were submitted after the deadline. Applicants appear to generally support the spirit of the GAC advice. The responses expressed concerns that the advice was too broad in its reach and did not take into account individual applications. Some applicant responses expressed concern that some elements of the advice seem to circumvent the bottom-up, multi-stakeholder model, while others proposed that the NGPC reject specific elements of the advice. A review of the comments has been provided to the NGPC under separate cover. The complete set of applicant responses can be reviewed at: http://newgtlds.icann.org/en/applicants/gac-advice-responses.

What significant materials did the Board review?

As part of its deliberations, the NGPC reviewed the following materials and documents:

- GAC Beijing Communiqué:

  http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf [PDF, 156 KB]

- Applicant responses to GAC advice:

  http://newgtlds.icann.org/en/applicants/gac-advice-responses

- Applicant Guidebook, Module 3:

  http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf [PDF, 261 KB]

- The NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué (4 June 2013)

Available as Annex 1 to the Resolution [PDF, 564 KB]

What factors did the Board find to be significant?

The Beijing Communiqué generated significant interest from applicants and resulted in many comments. The NGPC considered the applicant comments, the GAC's advice transmitted in the Beijing Communiqué, and the procedures established in the AGB.

Are there positive or negative community impacts?

The adoption of the GAC advice as provided in the 1A Scorecard will assist with resolving the GAC advice in manner that permits the greatest number of new gTLD applications to continue to move forward as soon as possible.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

There are no foreseen fiscal impacts associated with the adoption of this resolution.

Are there any security, stability or resiliency issues relating to the DNS?

Approval of the proposed resolution will not impact security, stability or resiliency issues relating to the DNS.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

ICANN posted the GAC advice and officially notified applicants of the advice on 18 April 2013

http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en. This triggered the

21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

The Chair took a roll call vote. All members of the Committee voted in favor of Resolution 2013.06.04.NG01. The Resolution carried.

Chris noted that the Committee's communications should be clear that the action taken is not the sum total of the 1As and that there could be additional iterations of the scorecard to address the other advice. Heather commented that it should be communicated to the GAC that this resolution is not related to the safeguard advice.

The Chair then called the meeting to a close.

Published on 26 June 2013

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EXHIBIT C-115

Members	ICANN Board Governance Committee	ICANN New gTLD Program Committee
 Cherine Chalaby	✓	✓
 Chris Disspain	✓	✓
 Raymond Plzak	✓	✓
 Mike Silber	✓	✓
 Bertrand de la Chappelle	✓	
 Fadi Chehade		✓
 Heather Dryden		✓
 Bill Graham		✓
 Olga Madruga-Forti		✓
 Erika Mann		✓
 Ram Mohan	✓	
 Gonzalo Navarro		✓
 George Sadowsky		✓
 Bruce Tonkin	✓	
 Judith Vazquez		✓
 Kuo-Wei Wu		✓

EXHIBIT C-116

Titles published in the Grotius Classic Reprint Series

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as applied by

INTERNATIONAL COURTS AND TRIBUNALS

BY

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WITH A FOREWORD BY

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TO
MY PARENTS

In the *Chorzów Factory Case* (Jd.) (1927), the Court held that:—

" When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered when, as in the present case, this intention can be demonstrated in a manner convincing to the Court." [11]

The task of the tribunal is therefore the same as in any case of treaty interpretation, namely to discover the intention of the parties. Thus the Arbitrator in the Greco-Bulgarian Arbitration under Article 181 of the Treaty of Neuilly (1919) held that:—

" [An arbitral] clause should be interpreted in the same way as other contractual stipulations. If analysis of the text and examination of its purpose show that the reasons in favour of the competence of the arbitrator are more plausible than those which may be shown to the contrary, the former should be adopted." [12]

[11] A. 9, p. 32.

[12] *Rhodope Forests Case* (Prel. Question) (1931), 3 UNRIAA, p. 1389, at p. 1403. (Transl.) See also U.S.-Ven. Cl.Com. (1885): *Howland Case*, 4 *Int.Arb.*, p. 3616, at pp. 3629, 3634 *et passim*. The middle course of the " ordinary standard of interpretation " adopted. See also I.C.J.: *Anglo-Iranian Oil Co. Case* (Jd.) (1952), D.O. by Hackworth, *ICJ Reports 1952*, p. 93, at p. 140.

Chapter 13

NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA

In *The Virginius Incident* (1873) the *S.S. Virginius* flying the American flag was captured on the high seas by a Spanish man-of-war, and 53 of her passengers and crew, including Americans, British and Cubans, were summarily tried and executed.[1] The Spanish Government inquired of the British Government whether the latter would be willing to arbitrate between the United States and Spain for the settlement of the incident. In a despatch to the British Minister in Spain, dated November 17, 1873, declining the invitation, the British Foreign Secretary, Earl Granville, said:—

" They [Her Majesty's Government] consider, moreover, that they are disqualified from acting as arbitrators, inasmuch as they are themselves parties to the claim which would have to be arbitrated upon." [2]

Indeed, as was stated in the Report on the Project concerning the establishment of an international Court of Arbitral Justice during the Second International Peace Conference, 1907:—

" It is a universally accepted doctrine that no one can be judge in his own cause and all systems of law adopt it." [3]

The existence of this general principle of law is hardly questioned or, indeed, open to question and its application extends beyond purely judicial procedures.[4] In its Advisory

[1] See Moore, 2 *Dig.*, pp. 895-903.

[2] 65 B.F.S.P. (1873-1874), p. 102, at p. 103.

[3] IIe Conférence internationale de la Paix: 1 *Actes et Documents*, 1907, p. 367 (Transl.). *Rapporteur*, James Brown Scott.

[4] *Cf.* U.S.-Ven. M.C.C. (1903): *Rudloff Case*, *Ven.Arb. 1903*, p. 182. Opinion of Commissioner Bainbridge: " The jurisprudence of civilised States and the principles of natural law do not allow one party to a contract to pass judgment upon the other, but guarantee to both the hearing and decision of a disinterested and impartial tribunal " (p. 197). Commissioner Grisanti, for the Commission: " The municipal council of the Federal District had no right to annul of its own free will the referred-to contract in the resolution of

Opinion No. 12 (1925), the Permanent Court of International Justice was asked the question whether representatives of the interested States on the Council of the League of Nations might vote in a decision concerning differences between themselves. Answering the question in the negative, the Court stated:—

"The well-known rule that no one can be judge in his own suit holds good."[5]

On this point, the position of national arbitrators taking part in international judicial proceedings comes to mind. The Court was perhaps not unmindful of this point when it said:—

"It may perhaps be well to observe that since the Council consists of representatives of States or Members, the legal position of the representatives of the Parties upon the Council is not comparable to that of national arbitrators upon courts of arbitration."[6]

In other words, the legal position of national arbitrators is not that of representatives of their respective countries, parties to the dispute.

Except perhaps for the isolated instance of Sir Alexander Cockburn's[7] dissenting opinion in *The Alabama Case* (1872) in which he considered himself to have sat on the Tribunal at Geneva "in some sense as the representative of Great Britain,"[8] the view of the Permanent Court that national arbitrators are not legally representatives of their State is supported by consistent international judicial practice.

In the words of Gore, the United States Commissioner, in *The Betsey Case* (1797):—

"Although I am a citizen of but one, I am constituted a judge for both. Each nation has the same, and no greater, right to demand of me fidelity and diligence in the examination, exactness and justice of the decision."[9]

Special mention may be made in this connection of the decision of the United States Commissioner Hassaurek in the claims of Captain Clark, known also as *The Medea* and *The Good Return Cases*.[10] 50 per cent., 21½ per cent., and 28½ per cent. of the claim were presented by the United States against New Granada, Ecuador and Venezuela, respectively as successor States of Colombia. Notwithstanding an earlier opinion of Umpire Upham of the Granadine-United States Claims Commission (1857) in favour of the United States,[11] the United States Commissioner Hassaurek decided against the United States, when the claim was presented to the Ecuadorian-United States Claims Commission (1862).

In his opinion Hassaurek said:—

"The Commissioners should consider themselves not the attorneys for either the one or the other country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice, and without

November 13, 1895; because, as the municipality was one of the contracting parties, it could not at the same time judge as to the validity of the nullity of the same. To obtain said nullity the municipality should apply for a lawsuit to the competent tribunals" (p. 200).

Salvador Commercial Co. Case (1902), U.S.F.R. (1902), p. 838, at pp. 871–2: "It is abhorrent to the sense of justice to say that one party to a contract, whether such party be a private individual, a monarch, or a government of any kind, may arbitrarily, without hearing and without impartial procedure of any sort, arrogate the right to condemn the other party to the contract, to pass judgment upon him and his acts, and to impose upon him the extreme penalty of forfeiture of all his rights under it, including his property and his investment of capital made on the faith of that contract. Before the arbitrament of natural justice all parties to a contract, as to their reciprocal rights and their reciprocal remedies, are of equal dignity and are equally entitled to invoke for their redress and for their defence the hearing and the judgment of an impartial and disinterested tribunal." This case also shows that in the application of this principle, one must look to the substance and not to the form. It is not the formal non-identity that is vital, but the real existence of impartial and disinterested judges.

U.S.-Ven. M.C.C. (1903): *Turnbull/Manoa Co., Ltd./Orinoco Co., Ltd. Cases, Ven.Arb. 1903*, p. 200, at p. 244. Umpire Barge considered the rule that "nobody can be judge in his own cause" as a rule of equity, and from this rule there sprang a "rule of the law of almost all civilised nations" that "in cases of bilateral contracts, the nonfulfilment of the pledged obligations by one party does not annul the contract *ipso facto*, but forms a reason for annulment, which annulment must be asked of the tribunals, and the proper tribunal alone has the power to annul such a contract."

[5] "*Mosul Case*" (1925), B. 12, p. 32.

[6] *Ibid.*, at p. 32.

[7] *Cf.* as a matter of interest J. B. Moore's opinion of Cockburn's "disturbing effects" upon the "even and accustomed flow" of the "majestic stream of the common law, united with international law," as represented by the latter's opinion in the case of *The Queen* v. *Keyn* (*The Franconia*) (1877) 2 Exch.Div., p. 63 (PCIJ: *The Lotus* (1927), D.O. by J. B. Moore, A. 10, p. 75).

[8] 2 *Alabama* (*Proceedings*), p. 7, at pp. 51 and 72 (Transl.). *Cf.*, however, *ibid.*, p. 52, where he said: "As *judge* and as an English lawyer, I maintain . . ." (Transl. Italics added). *Cf.* also Cockburn during the discussions: "We *are* here as *judges*" (1 *Int.Arb.*, p. 648. See 1 *Alabama* (*Proceedings*), p. 16).

[9] 4 *Int.Adj.*, M.S., p. 179, at p. 191.

[10] For a narrative of these cases, see *supra*, pp. 155 *et seq.*

[11] 3 *Int.Arb.*, pp. 2730–2731. Opinion was, however, set aside ultimately because of irregularity in the submission. See 2 *Int.Arb.*, pp. 1396–1405. See *supra*, p. 260, *infra*, pp. 291 *et seq.* At the time of Hassaurek's decision, this was not yet effected.

reference to which side their decision will affect favourably or unfavourably." [12]

It is, therefore, perhaps not without reason that Justice is always represented as being blindfolded.[13]

Furthermore, another American national Commissioner in the *McKenny Case* before the Mexican-United States Claims Commission (1868) clearly emphasised his legal independence from his own country in his capacity as arbitrator. This claim arose out of the destruction of property during the Zuloaga and Miramon régime. The Commissioners, especially the United States Commissioner, Wadsworth, refused to consider the Zuloaga and Miramon régime as a *de facto* government of Mexico although at one time it enjoyed temporary recognition by the United States. Commissioner Wadsworth said:—

" Certainly I do not consider that the recognition of Zuloaga by the Government of the United States (conceding this to be the fullest extent claimed) settles the question for Mexico or this commission; but it is argued by counsel that the act of the United States Government in recognising Zuloaga is conclusive upon Mr. Commissioner Wadsworth, because he is the ' judicial representative of the United States in this commission,' and that for this reason he is precluded from even inquiring into the propriety of the recognition by the United States of the Government of Zuloaga. It is scarcely necessary to remark that this view is founded upon a total misconception of the nature and character of the office of a commissioner under the convention between the United States and Mexico. Mr. Commissioner Wadsworth is not a ' judicial representative of the United States in this commission,' nor ' a judicial officer ' of that government. The authority which he possesses he derives from both the United States and Mexico, and is obliged to exercise it impartially for the benefit of both. He would possess neither office nor authority without the consent and concurrence of both nations, and is no more bound by the official acts or municipal regulations of the United States than by those of Mexico. He derives his appointment to a place on the board—a place created by the action of both governments—from the Government of the United States, indeed, but is no more bound by this appointment to represent

[12] 3 *Int.Arb.*, p. 2731, at pp. 2733–4.
[13] See allusion to this symbolism by the Venezuelan Commissioner in Fran.-Ven. M.C.C. (1902): *Cie générale de l'Orénoque Case* (1905), Ralston's *Report*, p. 244, at p. 287.

the interests of the United States than those of Mexico, and no more bound by the acts of that government than his colleague on the board, or their umpire. He is an impartial arbiter selected by the United States, but deriving all his powers from the United States and Mexico, nor more the officer of the former than of the latter." [14]

From the fact that national arbitrators in international tribunals are not agents of their respective States but independent and impartial judges for both parties appearing before them, as is evidenced by consistent practice, it is clear that their presence on the tribunal is compatible with the principle *nemo debet esse judex in propria sua causa*. In the section on imputability, the relation between the State and its representatives was considered.[15] It may be said that in so far as a national acts as a representative of his State, *qua* party to a dispute, he is an organ of one of the parties, and is identifiable with it. But in so far as the same national is divested of his capacity as an organ of his State *qua* party to the dispute, especially when he has been appointed to act impartially even in matters involving his own State, he may be regarded as unconnected with the dispute. This may apply not only to individuals but even to what is normally a State organ. Thus in the *Arakas Case* (1927), cited at the beginning of Part IV, when the Mixed Arbitral Tribunal held that the silence of the judgment of the Bulgarian Military Commission sitting as a prize court as to the grounds for its decision might " justify the view that the decision is a violation of the principle that no one should be judge in his own cause," [16] it evidently did not mean that this principle would be violated merely because the body which decided the case was an organ of the Bulgarian State. It can only be reasonably understood to mean that the absence of a statement of the grounds of the decision might give rise to the belief that the Commission had not acted in an impartial and independent capacity, but merely as an organ of the State *qua* party to the suit. If this interpretation is correct,[17] it may

[14] 3 *Int.Arb.*, p. 2881, at pp. 2883–4.
[15] *Supra*, Chap. 6, C. pp. 180 *et seq.*
[16] *Supra*, p. 258.
[17] *Cf. supra*, p. 279, note 4. According to those decisions, if the States concerned *qua* parties to a contract had applied to one of their own courts, the principle under discussion would not have been violated. And yet it cannot

be said that there was no violation of the principle *nemo debet esse judex in propria sua causa* even when the French Court of Cassation was chosen by Nicaragua and France as arbitrator in a dispute between the two countries.[18]

The *raison d'être* of the principle may be taken to be what Commissioner Gore said in *The Betsey Case* (1797), namely that:—

"Justice is impartial."[19]

The principle *nemo judex in propria sua causa* undoubtedly constitutes the most elementary and essential guarantee of impartiality in the administration of justice by disqualifying both parties from acting as judges of the dispute between them, since parties are by definition partial and not impartial.

The above survey should suffice to show that this general legal principle is not only recognised in international law but is not infringed by the institution of national judges, because the legal position of the latter is not that of representatives of the country to which they belong, but that of independent and impartial judges for both parties. In the Permanent Court of International Justice, judges were allowed to retain their seats on the Bench when their State appeared before the Court as a party and this is still the rule in the International Court of Justice.[20]

The Report of the Advisory Committee of Jurists for the Establishment of the Permanent Court explained that:—

"As they have given a solemn undertaking to administer justice impartially and conscientiously, there is no danger that they will fail in their duty by showing any partiality towards the State whose subjects they are. Chosen as they are from amongst men of the highest moral character, one may rest assured that their scruples

be denied that such courts would be part of the State machinery. Their capacity as independent and impartial judges would, however, distinguish them from the parties to the dispute.

18 *The Phare Case* (1880), 5 *Int.Arb.*, p. 4870. It need hardly be mentioned that the circumstances in which the British Government declined to act as arbitrator in *The Virginius Incident* were different, since in that case, it was the British Government as such or, at all events, its representative, that was asked to be the arbitrator.

19 4 *Int.Adj.*, M.S., p. 179, at p. 187. *Cf. supra*, p. 279, note 4.

20 Statute: Art. 31. *Cf.* however, Rules of Court of both the P.C.I.J. and the I.C.J. Art. 13 of both prevents a judge whose country appears before the Court from exercising the functions of president in respect of that case.

Cf. also Project for the Establishment of a Court of Arbitral Justice, Deuxième Conférence internationale de la Paix, 1907, 1 *Actes et Documents*, pp. 347–97; 2 *Actes et Documents*, pp. 603–6.

in the administration of justice will be increased in the event of their having before them as a party the State whose subjects they are."[21]

The fact remains, however, that, in the work of the Advisory Committee of Jurists, as the Report admitted, "one of the most difficult questions was that of the inclusion on the Court of judges of the nationality of the contesting parties."[22]

There are three cases in which national judges participate in the work of the Court.

The first concerns regular judges whose State appears before the Court as a party. Article 31, paragraph 1, of the Statute provides:—

"1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court."

In justification of this provision, the Report of the Advisory Committee of Jurists said that the withdrawal of the judges in such cases might reduce their number by too many, especially if several States had a joint interest in the same proceedings. The character of the Court as a World Court might thus be impaired.[23] This is undoubtedly true. It is indeed possible to go even further. At the time of the establishment of the Permanent Court there existed many international treaties to which the majority of nations were parties and this is even more true today. When a case involves the interpretation of one of these treaties, every party to such treaty may intervene in virtue of Article 63 of the Court's Statute.[24] If judges who are nationals of the parties were disqualified from sitting, the Court would hardly be able to function.[25] While it does not apply to *ad hoc* tribunals between two or a small number of States, the above consideration seems to provide a valid reason why national judges should be allowed to retain their seat in a World Court.

21 *Procès-verbaux*, pp. 720–1.

22 *Ibid.*, p. 720. For an account of the discussion in the Committee, see *ibid.*, pp. 121, 168–9, 172, 197–8, 222, 528–39.

23 *Ibid.*, p. 721.

24 Both of the P.C.I.J. and of the I.C.J.

25 This was also pointed out by Wang Chung-Hui, a former judge of the P.C.I.J., at a meeting of the Committee of Jurists set up to examine the project for the new Court, UNCIO: 14 *Documents*, pp. 126, 130.

Paragraph 2 of Article 31 envisages the second type of case and provides:—

"2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge . . ."

The Report of the Advisory Committee of Jurists said:—

" Although with men of the high moral character of our judges there would be no occasion to fear any lapse from impartiality, public opinion in the State without a judge on the Bench might consider that this inequality would affect it adversely, not as a State, but in its position as a contesting party."[26]

Although the validity of the premise that there would be an inequality if the Court included among its members a national of only one of the parties is open to question from a legal point of view, this provision may perhaps be regarded as justified by the consideration that there should not only be equality in substance but also equality in form so that justice will not only be done but will also appear to be done.[27]

The third case is provided for by paragraph 3 of Article 31:—

" 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article."

In justification of this provision, the Report said:—

" States attach much importance to having one of their subjects on the Bench when they appear before a Court of Justice." [28]

But the correctness of this statement is open to doubt and this desire of States, if it exists, is not fully acceded to even by the Committee. Should several States appear together on the same side, they are reckoned, for the purpose of the present provision, as one party only (Article 31, paragraph 5), so that some of the States would not have a judge of their nationality on the Bench.[29] Besides, in several cases before the Permanent Court,

[26] *Procès-verbaux*, pp. 721–22.
[27] See *infra*, p. 289, note 38.
[28] *Procès-verbaux*, p. 722.
[29] See PCIJ: *Austro-German Customs Union* (Order) (1931), A/B. 41, p. 88, at p. 89: " All governments which, in the proceedings before the Court, come

e.g., Advisory Opinion of March 3, 1928,[30] Advisory Opinion of December 11, 1931,[31] and Advisory Opinion of February 4, 1932,[32] and in the *Corfu Channel Case* (1948, 1949) before the International Court of Justice,[33] the party which had no judge of its own nationality on the Court appointed as judge *ad hoc* a person who was not one of its own subjects. Indeed, since the revision of the Statute of the Permanent Court in accordance with the Protocol of September 14, 1929, there is no restriction, based on nationality, in the Statute of the Permanent Court, and, following it, in that of the International Court, on the choice of the judge *ad hoc*. Prior to this revision, if a party had a deputy-judge of its nationality on the Court, it could appoint only him as *ad hoc* judge. From the point of view of the Statute and of States, therefore, it seems that it is not essential that the judge *ad hoc* should be a national of the State appointing him. But the reason given for the importance which States attach to having one of their subjects on the Bench appears to be that:—

" It is highly desirable that the judges should be able to the last minute during the deliberations, to put forward and explain the statements and arguments of the States [" *de l'Etat* "], and to ensure that the sentence, however painful it may be in substance, should be drawn up so as to avoid ruffling national susceptibilities in any way." [34]

The Report added:—

" If the opposing views are both represented on the Bench, they counter-balance one another." [35]

Were this so, it must be said that the Report is inconsistent, if, indeed, it has not fallen into an outright misconception of the legal position of the judge who is a national of one of the parties. Although this passage may be slightly ambiguous, it seems only reasonable to consider that the word " States,"

to the same conclusion, must be held to be in the same interest for the purpose of the present case." The Court held that there was no ground for the appointment of judges *ad hoc* either by Austria or Czechoslovakia in that case.
[30] *Jurisdiction of the Danzig Courts* (1928), B. 15.
[31] *Polish War Vessels in Danzig* (1931), A/B. 43.
[32] *Polish Nationals in Danzig* (1932), A/B. 44.
[33] *ICJ Reports 1947–48*, p. 15; *ICJ Reports 1949*, p. 4 and p. 244.
[34] Report of the Adv.Com.of Jurists, *Procès-verbaux*, p. 721.
[35] *Ibid.*, p. 721.

especially since it is used in the singular in the French text, refers to the respective States of the national judges. The Report assumed, therefore, that the national judge would take it upon himself to put forward the statements and arguments of his own State, and that the views of the two national judges would naturally be "opposing." This cannot be called consistent with the assurance of impartiality which the Report wished to give a few lines earlier. It comes nearer to the view of one of the co-authors of the article that national judges are "national representatives" of the parties who would "protect their interests,"[36] which, in the light of the international judicial decisions we have reviewed, would appear to be an erroneous conception of the office of the national judge. If this be the purpose of allowing both parties having no judge of their nationality on the Bench each to appoint a judge *ad hoc*, the purpose is not a legitimate one. Unless the prevention of offensive wording in the judgment constitutes a sufficient justification, this right of the parties needs serious reconsideration.

It would thus appear that the presence of national judges does not conflict with the principle *nemo judex debet esse in propria sua causa*. In the present framework of the international society, where the family of nations is but small in number, it may even be difficult to avoid it in a world court. This does not mean, however, that the institution of national judges is an ideal implementation of the principle that no one should be judge in his own cause. As the examples have shown, the misconception that national judges represent their own State, however unfounded, may easily arise. Moreover, the link of nationality between the judge and one of the parties affords too convenient a ground for insinuations of partiality, however rare and improper.[37] As the Report of the Advisory Committee for the establishment of the Permanent Court aptly said:—

[36] *Ibid.*, p. 528. *Cf. contra*, pp. 123, 367, 369.

[37] *Cf.* Fran.-Ven. M.C.C. (1902): *Cie Générale de l'Orénoque Case* (1905), Ralston's *Report*, p. 244, see pp. 284–5, 286–7, 314. The French Commissioner in his written opinion openly accused the Venezuelan Commissioner: "Because his patriotism may have led him to become a lawyer representing his country instead of the man who was called upon to pass judgment" (p. 284). The Venezuelan Commissioner rightly pointed out that such observations "are entirely foreign to the impersonal character which discussions between arbitrators must have when a difference of opinion divides them while investigating and deciding upon a case" (p. 286).

"Justice, however, must not only be just, but appear so. A judge must not only be impartial, but there must be no possibility of suspecting his impartiality."[38]

And it cannot be doubted that even where the principle *nemo judex debet esse in propria sua causa* obtains, and where the judge is in fact impartial, the fewer special links there are between the judge and one of the parties to the dispute, the less chance is there of suspicion, and the stronger is the appearance that justice is being done.[39]

[38] *Procés-verbaux*, p. 721.
Germ.-U.S. M.C.C. (1922): *Lehigh Valley Railroad Co. Case* (1936), *Dec. & Op.*, p. 1175, at pp. 1176–77: "In international arbitration it is of equal importance that justice *be done* and that *appearances* show clearly to everybody's conviction that justice *was done*." Original italics. Because he considered that the second requirement was not satisfied, the German Commissioner was willing to accede to the conclusion of his colleagues in the Commission to set aside a previous decision decided in favour of Germany.

[39] *Cf.* Statutes of the P.C.I.J. and the I.C.J. articles 17, 24, concerning incompatibility, disqualification and abstentions of judges.
Cf. also, Articles 24, 25, 26, 27 of the Rules of the Central American Court of Justice, 8 A.J.I.L. (1914), Supplement, pp. 184, 185.

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Board Governance Committee (BGC) Meeting Minutes

14 Jul 2013

BGC Attendees: Cherine Chalaby, Bertrand de La Chapelle, Chris Disspain, Ram Mohan, Raymond Plzak, Mike Silber and Bruce Tonkin – Chair

Other Board Member Attendees: Francisco da Silva

Staff Attendees: Susanna Bennett – Chief Operating Officer, John Jeffrey – General Counsel and Secretary; Megan Bishop, Michelle Bright, Elizabeth Le, and Amy Stathos

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The following is a summary of discussion, actions taken and actions identified:

1. Minutes: The BGC approved the minutes of the last two meetings.

Internationalized Domain Names

- Universal Acceptance Initiative
- Policy
- Public Comment
- Contact
- Help

2. Recommended Appointment of new IETF Liaison to Board Committees – The Internet Engineering Task Force (IETF) has appointed Jonne Soininen to replace the outgoing IETF Liaison to the Board, Thomas Narten. The BGC recommended that the Board appoint Jonne Soininen as a non-voting Liaison to the following ICANN Board Committees on which Mr. Narten sat: the IANA Committee, the New gTLD Program Committee, the Public and Stakeholder Engagement Committee, and the Risk Committee.

3. Reconsideration Request 13-4 – Mike Silber noted that he was abstaining from consideration of this matter. The BGC received a briefing from Staff regarding Reconsideration Request 13-4 (the "Request 13-4" or the "Request")), submitted by DotConnectAfrica Trust (DCA Trust).. The Request asked that the ICANN Board action (through the NGPC) of 4 June 2013 regarding DCA Trust's new gTLD application for .AFRICA be reconsidered. DCA Trust claims that the NGPC should have consulted with independent experts before acting on advice from the Governmental Advisory Committee ("GAC") regarding DCA Trust's new gTLD application. DCA Trust seeks a reversal of the Board's action of 4 June 2013 and that NGPC be directed to consult with independent experts prior to taking further action on DCA Trust's application. The BGC reviewed the three basis for reconsideration and determined that the only claimed ground was whether "one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act." The BGC identified the information that was reviewed by the NGPC related to DCA Trust's application and that was documented in the rationale of the 4 June 2013 NGPC action. The material information reviewed by the NGPC included the GAC Beijing Communiqué, the applicant responses to the GAC advice, the Applicant Guidebook Module 3, and the "NGPC scorecard 1As regarding non-safeguard advice in the GAC Beijing

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Communiqué." The BGC further considered whether the NGPC should have obtained additional expert advice and concluded that there was sufficient material information available for the NGPC to make its decision and that no other materials information was not considered. The BGC further noted that the reconsideration process provides the option for the complainant to provide new material information that was not available for the Board to make its decision, and that DCA Trust has failed to submit any new material.

- Action:
  - Revisions to Recommendation on Request 13-4 to be made and provided for BGC consideration at the next BGC meeting.

4. Board Procedure Improvements – The BGC discussed forming a working group for a six-month period to focus on Board procedural improvements. The BGC agreed that the working group should be comprised of approximately three members of the Board.

5. Expressions of Interest for NomCom Chair and Chair Elect – The BGC discussed the received expressions of interest for the NomCom Chair and Chair-Elect positions for 2014. The BGC also discussed conducting interviews of the current candidates.