

EXHIBIT C-82

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Minutes | New gTLD Program Committee

08 May 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 8 May 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 or part of the meeting: Chris Disspain, Bill Graham, Olga Madruga-Forti, Erika Mann, George Sadowsky, Mike Silber,

▶ Policy

Ray Plzak and Kuo-Wei Wu sent apologies.

▶ Public Comment

Thomas Narten, IETF Liaison and Francisco da Silva, TLG Liaison, were in attendance as non-voting liaisons to the Committee. Heather Dryden, GAC Liaison, was in attendance as an invited observer.

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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, Karen Lentz, Margie Milam, Erika Randall, Amy Stathos, and Christine Willett.

These are the Minutes of the Meeting of the New gTLD Program Committee, which took place on 08 May 2013.

1. [Plan for Responding to the GAC Advice Issued in Beijing](#)

1. Plan for Responding to the GAC Advice Issued in Beijing

The Chair introduced the topic of responding the GAC advice issued in the Beijing Communiqué, and briefly outlined the contents of the briefing materials, including the "scorecard" document to assist in the resolution of the GAC's advice. The scorecard was modeled on the scorecard effectively used in the Board-GAC consultations on new gTLDs in Brussels and San Francisco in 2011.

Chris Disspain shepherded the discussion leading the Committee through items of the GAC advice where the Committee's initial position may be categorized on the scorecard as "1A," meaning the Committee agrees with the advice. Chris noted that final decisions by the Committee were subject to the Committee's consideration of the applicant and public comments solicited on the GAC advice.

Chris explained that staff was requested to go through and take each of the pieces of advice and consider whether it's possible that some of those are handled elsewhere or previously. Chris noted that he has also asked the legal team for an opinion about whether implementing GAC advice would require changes to the New gTLD Program.

The Committee's discussion included the GAC advice on applications for .AFRICA and .GCC. Chris commented that there is a WIPO consideration of the application of .GCC. Mike Silber noted that there were multiple fora in which to object to an application, and the Committee should not delay its final determination pending the WIPO objection process.

The Committee engaged in a discussion concerning the wording the GAC used for its advice on the applications for .HALAL and .ISLAM. Chris questioned whether the advice is the type specified in the Applicant Guidebook (AGB) that requires the Board to enter into a dialogue with the GAC to understand the scope of concerns when the GAC advises that there are particular concerns about an application. Dan Halloran agreed to take this issue under advisement and provide a response to the Committee at its next meeting. Heather Dryden also noted that she would review the specific wording of the AGB and provide clarity as to whether the GAC is advising and wants consultation, or whether the GAC simply is reporting the sentiment of some GAC members. She also cautioned that it is important to show responsiveness on this issue in whatever way the Committee decides to respond.

Chris opened the discussion on the GAC's advice to the Board that the advice of a community, which is clearly impacted by a new gTLD application, should be duly taken into account when the community expresses a collective and clear opinion on the applications. Mike noted that the advice looks to be applicable to the current and future rounds.

The Committee also engaged in a discussion of the GAC's advice on reconsidering singular and plural versions of a string. Chris recommended that the Committee accept the advice, but noted that the Committee had not previously

considered the issue as an initial matter. Olga Madruga-Forti agreed that the Committee should respond to the GAC that it will consider the issue. Mike inquired whether the Committee had received documentation regarding the singular versus plural decisions as made by the the new gTLD review panel.

In response, Christine Willett provided a brief overview on staff's work to compile procedure documents for each of the new gTLD review panels. Olga commented that it was important to distinguish between process or procedure documents and the reasoning used by panel members to make decisions. Gonzalo Navarro and Thomas Narten discussed the importance of ensuring that decisions of the review panels are delivered with a rationale for the sake of accountability.

Christine informed the Committee that the criteria and rationale for the review panels' decisions were based on the evaluation criteria in the AGB, along with additional guidance that was given in the form of supplemental notes and applicant advisories. Christine explained that the challenge with providing rationale for any one decision is that the decisions were the judgments of at least dozens of experts, and in some cases, hundreds of experts, to formulate the decisions. The Committee tasked staff with preparing additional briefing materials on this issue to facilitate further discussion at the Committee's meeting in Amsterdam.

The Committee also began discussions on the GAC's advice concerning IOC/RCRC names. Chris highlighted that this advice applies to all new gTLD applications and so it must be resolved before any applied-for strings can move forward. George Sadowsky questioned whether the advice was inconsistent with instructing the GNSO to undertake an expedited PDP on the issue of protections of IGO and INGO names and identifiers. Heather noted the GNSO's initiation of a PDP creates an issue because the GAC's position is that it is not within the purview of other parts of ICANN (i.e. non-governments) to identify which organizations should receive protections based on treaties. Thomas inquired whether and how the GAC is involved in the GNSO's PDP on this issue.

The Chair provided a brief overview of the Committee's past actions to protect the IOC/RCRC names, and the Committee directed staff to prepare a briefing document outlining the Committee's previous actions leading up to the decision to initiate the PDP on IGO/INGO names.

The Committee examined an action plan and timeline for addressing the GAC advice in the Beijing Communiqué. The Chair and Erika Mann advised that the Committee should provide an update of its progress to the community and to the GAC before the Amsterdam meeting so that the community stays informed. Thomas noted that the community is looking for publication of a clear roadmap showing how the Committee will tackle the GAC advice. Heather added that the best channel for communicating back to governments about next steps is by communicating via the GAC, and the Committee agreed to send a letter to the GAC to advise it of the Committee's next steps. Jamie Hedlund noted that the applicant response window, which closes on 10 May 2013, and the public comment forum on safeguard advice, which closes 4 June 2013, should be factored into the timeline. Thomas questioned whether the Committee was expecting to have a GAC consultation and what the timing and logistics of such a consultation are if necessary.

The Committee agreed to consider other items of GAC advice during the Committee's meeting in Amsterdam scheduled for 18 May 2013, including the advice on singular and plural strings and protections for IOC/RCRC names.

The Committee did not take formal action at the meeting, and the Chair adjourned the meeting.

Published on 19 June 2013



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EXHIBIT C-90



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Board Governance Committee (BGC) Meeting Minutes

01 Aug 2013

BGC Attendees: Cherine Chalaby, Bertrand de La Chapelle, Ram Mohan, Mike Silber, and Bruce Tonkin – Chair.

Other Board Member Attendees: Steve Crocker

Staff Attendees: John Jeffrey – General Counsel and Secretary, Megan Bishop, Michelle Bright, Elizabeth Le, Amy Stathos, and Christine Willett

Apologies: Chris Disspain and Ray Plzak

The following is a summary of discussion, actions taken and actions identified:

1. Approval of Minutes: The BGC approved the minutes of the last meeting.
2. Revised Recommendation for Reconsideration Request 13-4: The BGC reviewed and discussed the revised proposed

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recommendation for Reconsideration Request 13-4, which contains additional information consistent with the BGC's prior discussion on this issue. The BGC approved the recommendation for the New gTLD Program Committee. Mike Silber abstained from consideration and voting on this matter. the BGC abstained. Two members were unavailable to vote.

- Actions: Staff to submit the recommendation to the NGPC for consideration.

3. Reconsideration Request 13-5: The BGC received a briefing from Staff regarding Reconsideration Request 13-5 (the "Request"). The Request seeks reconsideration of staff action (based on the String Similarity Review Panel determination) placing the applications for .hotels and .hoteis into a string similarity contention set or alternatively, the requestor asks for a more detailed analysis and reasoning regarding the decision to place .hotels into a contention set. The BGC discussed timing of the request and asked that the recommendation more clearly specify what version of the Bylaws is applicable to the Request. The BGC determined that the requester failed to state the proper grounds for reconsideration because if failed to identify an established policy or process with which staff acted in contravention. The BGC approved a recommendation to the New gTLD Program Committee denying the Request, which is to be posted on the ICANN's website. Ram Mohan and Mike Silber abstained from consideration of this matter and two members were not available for voting.

- Actions: Staff to facilitate revisions being made to the Recommendation and submit the revised Recommendation to the NGPC for consideration.

4. Any Other Business: The BGC briefly discussed the nature of the available review mechanisms and whether any revisions need to be made; the BGC agreed to discuss at a later date.



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Minutes | Meeting of the New gTLD Program Committee

13 Aug 2013

A Special Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held telephonically on 13 August 2013 at 21:00 UTC.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Fadi Chehadé (President and CEO), Chris Disspain, Bill Graham, Olga Madruga-Forti, Erika Mann, Gonzalo Navarro, Ray Plzak, George Sadowsky, and Mike Silber. Kuo-Wei Wu sent apologies.

Jonne Soininen, IETF Liaison and Francisco da Silva, TLG Liaison, were in attendance as non-voting liaisons to the committee.

Steve Crocker, Bertrand de La Chapelle, Ram Mohan, Bruce Tonkin, and Suzanne Woolf were in attendance as invited observers for part of the meeting.

ICANN Staff in attendance for all or part of the meeting: Akram Atallah, Chief Operating Officer; John Jeffrey, General Counsel and Secretary; David Olive, Vice President, Policy Development Support; Megan Bishop; Michelle Bright; Samantha Eisner; Dan Halloran; Karen Lentz; Cyrus Namazi; and Amy Stathos.

1. [Main Agenda](#)

a. [Dotless Domains](#)

[Rationale for Resolutions 2013.08.13.NG01 – 2013.08.13.NG03](#)

b. [Durban GAC Advice Draft Scorecard](#)

c. [Reconsideration Request 13-4](#)

[Rationale for Resolution 2013.08.13.NG04](#)

d. [Approval of NGPC Meeting Minutes](#)

1. Main Agenda

a. Dotless Domains

The Chair introduced the issue, noting that advice has been received from the SSAC and other organizations recommending that the NGPC prohibits the use of dotless domains. There have also been a lot of comments from the Board as a whole that the NGPC needs to be very decisive and clear on whether dotless domains will be allowed in the New gTLD Program. The Chair noted that Steve Crocker, Bruce Tonkin, Sébastien Bachollet, Bertrand de La Chapelle, Ram Mohan and Suzanne Woolf had all been invited to the NGPC meeting for the purpose of sharing their views on this topics, and that the invited members would then be excused so that the NGPC could deliberate and vote on the matter.

Steve Crocker noted his position that based on all that has been presented, the NGPC should speak clearly that dotless domains at the top level are not going to happen at this time, to allow applicants to understand that this is not an available path.

Bruce Tonkin stated that the timing is wrong to allow the use of dotless domains, given the changes to the DNS that are coming already with the New gTLD Program. Though there could be a limited, narrow use in the corporate environment, allowing any usage today would also result in potential commercial uses, and inconsistent behavior. There could be the possibility of an intermediate route, that there be a moratorium period during which standardization work could occur, such as through the IETF. However, allowing dotless domains today would not be the right thing.

Sébastien Bachollet requested confirmation that any decision of the NGPC would only relate to the New gTLD Program, and that the Board would be required to make a decision that would impact other gTLDs or ccTLDs.

Steve Crocker clarified that the NGPC conversation was about new gTLDs only, and not about the existing gTLDs, nor about the ccTLDs. As it relates to ccTLDs, that topic is not really ripe to be addressed, even at the Board level. For existing gTLDs, each would have to come to ICANN to formally request dotless usage, and that would follow the existing RSEP processes.

Akram Atallah suggested that it might make sense for there to be some consideration of how to bring this subject forward with the full Board, to allow for future thinking on this topic.

Bertrand de La Chapelle noted his support for a a resolution specifically addressing dotless domains in new gTLDs.

Suzanne Woolf noted that she is not comfortable with the setting of a specific time limit for a moratorium. Instead, it is important to reinforce that this is a relatively straightforward questions with a relatively straightforward answer, and the answer is no because it is not a positive contribution to the security and stability of the DNS. There are tougher choices that will be ahead; this is not one of them. The key things to emphasize now are the problems that this could cause in the underlying functioning of the Internet, and there is no way to mitigate those concerns at this time.

Ram Mohan agreed with the suggested ban on dotless domains, as the issue for now is the potential for causing irreparable harm. In addition, there is the principle of least surprise, which is a foundational principle on which much of

the DNS is formed. Ram cautioned against setting a timeline for the allowance of dotless domains. Those who want this change have the onus of demonstrating that the irreparable harm will not be caused and the principle of least surprise are no longer valid; the onus is not on ICANN to figure out how to implement this change.

Chris Disspain requested some input from the invited experts on how an NGPC decision on dotless domains is different from some of the other technical issues that the NGPC has been considering.

Ram responded that there is data here that supports that there will be material harm if dotless domains are allowed; this is not a theoretical problem where experts on differing sides are able to create divergent theoretical outcomes. There, there is empirical evidence, practical usage and theoretical evidence that all point to the same outcomes.

Suzanne agreed that the empirical evidence on this point is there. In addition, trying to follow some principles of conservatism has been part of all of these types of decisions.

The Chair thanked the invited Board members and liaisons for their input and excused them from the call.

Jonne Soininen, acting as the shepherd for this item, refreshed the NGPC on the recommended action before them, which would be to ban the use of dotless domains completely within new gTLDs. There is always the possibility that someone could come forth with new specifications provided by the IETF or other technology or documentation that would support a different decision, but that would be in the future. Today, the NGPC is recommended to approve a ban. Jonne also confirmed that the resolution was limited to new gTLDs only.

Mike Silber raised some concerns with the Carve Report recommendations regarding further study of the issue, but otherwise expressed his support for the resolution. Olga Madruga-Forti supported Mike's position.

Chris confirmed that the resolution would contain a reference to the Carve Report, as it is one of the items that the NGPC received and considered in taking this decision.

George Sadowsky then moved and Chris Disspain seconded the resolution, and the NGPC took the following action:

Whereas, dotless domains consist of a single label and require the inclusion of, for example, an A, AAAA, or MX, record in the apex of a TLD zone in the DNS.

Whereas, Section 2.2.3.3 of the Applicant Guidebook (AGB) prohibits the use of dotless domain names without evaluation of the registry services and ICANN's prior approval.

Whereas, on 23 February 2012, the ICANN Security and Stability Advisory Committee (SSAC) published [SAC 053: SSAC Report on Dotless Domains](#) [PDF, 183 KB], and recommended that the use of DNS resource records such as A, AAAA, and MX in the apex of a Top-Level Domain (TLD) should be contractually prohibited where appropriate, and strongly discouraged in all cases.

Whereas, on 23 June 2012, the ICANN Board adopted resolution [2012.06.23.09](#) tasking ICANN to consult with the relevant communities regarding implementation of the recommendations in SAC053.

Whereas, on 24 August 2012, ICANN staff published the [SAC053 Report for public comment](#) requesting input to consider in relation to implementing the recommendations of the SSAC report.

Whereas, in May 2013 ICANN [commissioned](#) a study on the stability and security implications of dotless domain name functionality to help ICANN prepare an implementation plan for the SAC053 recommendations, and on 29 July 2013 Carve Systems delivered a report to ICANN identifying the security and stability issues that should be mitigated before gTLDs implement dotless domain names (the "Carve Report").

Whereas, on 10 July 2013 the Internet Architecture Board (IAB) released a [statement on dotless domain names](#), recommending against the use of dotless domain names for TLDs.

Whereas, the NGPC has considered the risks associated with dotless domains as presented in SAC053, the IAB statement and the Carve Report, and the impracticality of mitigating these identified risks. The NGPC has also considered the comments received from the community on this issue.

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 (2013.08.13.NG01), the NGPC acknowledges the security and stability risks associated with dotless domains as presented in SAC053, the IAB statement and the Carve Report and affirms its commitment to its security and stability mandates as the New gTLD Program is implemented.

Resolved (2013.08.13.NG02), in light of the current security and stability risks identified in SAC053, the IAB statement and the Carve Report, and the impracticality of mitigating these risks, the NGPC affirms that the use of dotless domains is prohibited.

Resolved (2013.08.13.NG03), the President, Generic Domains Division is authorized to take all necessary steps to implement these resolutions.

Ten members of the New gTLD Program Committee voted in favor of Resolutions 2013.08.13.NG01, 2013.08.13.NG02, and 2013.08.13.NG03. Kuo-Wei Wu was unavailable to vote on the Resolutions. The Resolutions carried.

Rationale for Resolutions 2013.08.13.NG01 –
2013.08.13.NG03

Why the NGPC is addressing the issue?

The SSAC issued SAC 053 to the ICANN board which requests action be taken to prevent gTLDs from being approved to operate as dotless domain names. The Board requested staff to prepare an implementation plan for SAC 053. The topic has gained attention of the community and was discussed in several forums at the ICANN Meeting 47 in Durban, South Africa.

What is the proposal being considered?

The NGPC is being asked to consider taking action to provide clarity to the community that dotless domain names continue to pose technical risks to the security and stability of the DNS and that mitigation of these risks will be very difficult to achieve.

Which stakeholders or others were consulted?

The SSAC published SAC 053 in February 2012 and have been consulted over the course of the last year on this issue. ICANN consulted with the community on the issue of dotless domains, and solicited public comment on SAC 053 in August – November 2012. Additionally, ICANN commissioned Carve Systems, LLC, a security consulting firm, to perform a detailed study of the potential risks that gTLDs operating as dotless domain names may pose. In July 2013, the Internet Architecture Board (IAB) issued a statement identifying concerns similar to the SSAC and Carve reports, and advising against the use of dotless domain names for gTLDs. The NGPC has considered the information provided from these stakeholders and outside experts on the issue.

What concerns or issues were raised by the community?

The SSAC expressed concern about the use of dotless domain names for gTLDs in SAC 053 and recommended against their use. During the public comment on SAC053, some members of the community supported the position of the SSAC and noted that due to the security and stability concerns posed by dotless domains, they should not be allowed. Others in the community have argued that dotless domains should be allowed for technical innovation and that the risk assessment is overly conservative as there are ways to mitigate the risks to not unduly upset the security and stability of the Internet. A report of the public comments can be reviewed at

<http://www.icann.org/en/news/public-comment/report-comments-sac053-dotless-domains-27nov12-en.pdf> [PDF, 137 KB].

What significant materials did the NGPC review?

The NGPC considered the following significant materials:

- [SAC 053: SSAC Report on Dotless Domains](#) [PDF, 183 KB]
- [The report of Public Comments on SAC 053](#) [PDF, 137 KB]
- [Carve Systems Report "Dotless Domain Name Security and Stability Study"](#) [PDF, 1.02 MB]

What factors did the NGPC find to be significant?

The NGPC considered ICANN's core role as coordinator of the Internet naming system for the security, stability and resiliency of the DNS and the Internet's unique identifier system. The NGPC also found the reports presented by the SSAC and Carve Systems to be significant factors in its decision. On balance, the NGPC believes technical concerns continue to exist with the implementation of dotless domain names and the use of DNS Resource Records in the apex of a TLD zone beyond SOA, NS, and related DNSSEC records.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

There is no anticipated fiscal impact of adopting this action.

Are there any security, stability or resiliency issues relating to the DNS?

The technical experts of the SSAC, Carve Systems and the IAB believe gTLDs operated as dotless domain names will negatively impact the security, stability and resiliency of the DNS. Approval of the proposed resolution to prohibit use of dotless domains in the DNS will not negatively impact security, stability or resiliency issues relating to the DNS.

This is an Organizational Administrative Function for which public comment was received.

b. Durban GAC Advice Draft Scorecard

Chris Disspain provided an overview of this issue for the NGPC, noting that there is a new version of the scorecard to address the GAC advice coming out of the Durban meeting. Most of that advice is expected to be easy to deal with, however the time for applicant responses to GAC advice is still open. The NGPC should therefore wait to consider the applicant comment before taking action. Chris also provided some suggestions on wording that could be used in the scorecard to provide clarity on items, as well as noting that additional work is still ongoing in relation to the IGO names protection issue as well as the protection of acronyms for the Red Cross and IOC. Chris noted that the NGPC will also need to discuss an appropriate response to the GAC advice on community priority evaluation. George Sadowsky provided some input on the NGPC's proposed response to this issue, and noted that consideration needs to be given to the community applicants/industry groups coming together around this issue.

Chris also led some discussion regarding a response to the GAC advice relating to conflicts of law and the Registry and Registrar agreements and addressing the steps that ICANN has taken to try to mitigate the potential for conflicts.

Chris presented to the NGPC that it is recommended that the Durban advice

be handled through the use of a scorecard. Olga stressed the import of continually updating all portions of scorecards relating to GAC advice, while only keeping the scorecards separate for the purpose of understanding timing of applicant responses and other time issues relating to each piece of advice.

The Chair asked for an update on the ongoing work relating to letters from applicant regarding the Category 1 protections raised in the Beijing Communiqué. Chris confirmed that work is still ongoing to review those communications and to develop methodologies to deal with the concerns raised. Chris also confirmed that work is still ongoing to clarify the Category 1 advice, as well as the IGO name/acronym issue.

Akram Atallah provided an update that a communication was being sent out to all of the Category 2 applicants requesting confirmation as to whether they intend to run the gTLD in a closed fashion.

No resolution was taken.

c. Reconsideration Request 13-4

Amy Stathos provided the NGPC with an overview of this history of this Reconsideration Request, noting that DotConnectAfrica Trust ("DCA Trust") sought reconsideration of the NGPC's acceptance of GAC advice as it relates to the DCA Trust application for the .AFRICA gTLD. DCA Trust based its request, in part, on its belief that the NGPC should have sought the advice of independent experts prior to taking a decision on the GAC advice. The Board Governance Committee noted in its recommendation on the request that the NGPC was not required to seek expert advice in this instance that that the NGPC had all material information needed to make the decision. The BGC also noted that DCA Trust had an opportunity, prior to the NGPC's consideration of the GAC advice, to mention the "requirement" to seek independent advice, which DCA trust did not do. As a result, there was no additional material information available that was not considered. The BGC therefore recommends denial of the request.

Amy also briefed the NGPC on DCA Trust's claims that the GAC advice issued should be questioned, because of a subsequent communication from the Kenyan GAC Representative on the GAC's advice. DCA Trust submitted this to both ICANN and the GAC representatives. Neither the Board nor the NGPC has received any indication from the GAC that it is intending to change, or has already changed, its advice on this application.

Ray Plzak then moved and Bill Graham seconded the following resolution:

Whereas, DotConnectAfrica Trust's ("DCA Trust") Reconsideration Request, Request 13-4, sought reconsideration of the Board action (through the New gTLD Program Committee) on 4 June 2013, accepting advice from ICANN's Governmental Advisory Committee regarding DCA Trust's new gTLD application for .AFRICA, and determining that this particular new gTLD application will not be approved.

Whereas, the BGC considered the issues raised in Reconsideration Request 13-4.

Whereas, the BGC recommended that Reconsideration Request

13-4 be denied because DCA Trust has not stated proper grounds for reconsideration.

Resolved (2013.08.13.NG04), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-4, which can be found at

<http://www.icann.org/en/groups/board/governance/reconsideration/recommenda-trust-01aug13-en.pdf> [PDF, 120 KB].

Seven members of the New gTLD Program Committee voted in favor of Resolution 2013.08.13.NG04. George Sadowsky and Mike Silber abstained from voting on the Resolution. Olga Madruga-Forti and Kuo-Wei Wu were unavailable to vote on the Resolution. The Resolution carried.

Mike Silber and George Sadowsky noted that their abstentions were based on the fact that DCA Trust has accused each of them of having a conflict as it relates to this issue, though neither has a conflict to announce on this issue.

Chris Disspain confirmed that he has carefully thought about his participation in a vote on this issue, as he too has previously been accused of having a conflict. Chris has confirmed that he has no conflict on this issue and that is the basis for his participation in the vote.

Rationale for Resolution 2013.08.13.NG04

ICANN's Bylaws call for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Reconsideration Request 13-4 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

This Request asserted that the NGPC should have consulted with and considered the inputs of independent experts before acting on advice from the Governmental Advisory Committee ("GAC") regarding DCA Trust's new gTLD application. The Request calls into consideration: (1) whether the NGPC was required to consult with independent experts prior to making the decision on the GAC Advice on DCA Trust's application and whether consultation with independent experts would have provided additional material information to the NGPC; and (2) whether the prescribed procedure for addressing GAC Advice in the Applicant Guidebook for the New gTLD Program was not complied with because the NGPC did not consult with independent experts in considering GAC Advice.

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachments, as well as the

briefing materials presented to the NGPC in advance of its 4 June 2013 decision, the rationale for that decision, the minutes of that meeting, and the material information from both the GAC and DCA Trust that was available and considered prior to the NGPC's decision. The BGC concluded that DCA Trust failed to adequately state a Request for Reconsideration of Board action because they failed to identify any material information that was not considered by the NGPC. The BGC noted that DCA Trust does not suggest in the Request that the discretionary use of an independent expert would have resulted in a different outcome on their application. The BGC further concluded that, as DCA Trust had an opportunity to provide additional information in their response to the GAC Advice, but remained silent on this point, the NGPC considered all material information in making its 4 June 2013 decision.

In consideration of the second issue, the BGC determined that DCA Trust's interpretation of the Applicant Guidebook to require the Board to seek advice is not accurate. Section 3.1 of the Guidebook provides with Board the discretion to seek the input of an independent expert when considering GAC advice, but does not obligate the Board to do so. Accordingly, the BGC concluded that the plain language of the Guidebook does not support the suggestion that the NGPC violated its process, and therefore made a decision without material information, when it did not seek the input of an independent expert.

In addition to the above, the full BGC Recommendation that can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommenda-dca-trust-01aug13-en.pdf> [PDF, 120 KB] and that is attached to the Reference Materials to the Board Submission supporting this resolution, shall also be deemed a part of this Rationale.

Although not detailed in DCA Trust's Request, and therefore not specifically discussed in the BGC Recommendation, the NGPC also considered DCA Trust's claim that because the designated Kenyan GAC Representative disclaimed the GAC Advice on DCA Trust's application, GAC Advice is in question. DCA Trust's communications on this topic were sent to ICANN and the GAC Chair. As the Board has not received any notice of change from the GAC regarding its advice on this application, DCA Trust's assertions on this topic do not provide any grounds for modification of the decision on Reconsideration Request 13-4.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. Approval of NGPC Meeting Minutes

The Chair called for consideration of the minutes of prior NGPC meetings. George Sadowksy moved, and Chris Disspain seconded the following resolution, and the Chair called for a vote.

Resolved (2013.08.13.NG05), the Board approves the minutes of the 18 June 2013, 25 June 2013 and 2 July 2013 New gTLD Program Committee Meetings.

Nine members of the New gTLD Program Committee voted in favor of Resolution 2013.08.13.NG05. Olga Madruga-Forti and Kuo-Wei Wu were unavailable to vote on the Resolution. The Resolution carried.

The Chair then called the meeting to a close.

Published on 30 September 2013



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Who We Are

- Get Started
- Learning
- Participate
- Board
- President's Corner
- Staff
- Careers
- Newsletter

Contact Us

- Offices
- Customer Service
- Security Team
- PGP Keys
- Certificate Authority
- Registry Liaison
- AOC Review
- Organizational Reviews
- Request a Speaker
- For Journalists

Accountability & Transparency

- Accountability Mechanisms
- Independent Review Process
- Request for Reconsideration
- Ombudsman

Governance

- Documents
- Agreements
- AOC Review
- Annual Report
- Financials
- Document Disclosure
- Planning
- Dashboard
- RFPs
- Litigation
- Correspondence

Help

- Dispute Resolution
- Domain Name Dispute Resolution
- Name Collision
- Registrar Problems
- WHOIS

EXHIBIT C-92

**CONFIDENTIAL INFORMATION
REDACTED**

**CONFIDENTIAL INFORMATION
REDACTED**

**CONFIDENTIAL INFORMATION
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EXHIBIT C-93

**CONFIDENTIAL INFORMATION
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EXHIBIT C-94

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EXHIBIT C-99

New gTLD Program
Initial Evaluation Report
 Report Date: 12 July 2013

Applicant ID:	1-1243-89583
Applicant for String:	AFRICA
Priority Number:	307
Applicant Name:	Un Forum SA (NPC) trading as Registry.Africa

Overall Initial Evaluation Summary

Initial Evaluation Result	Pass
<p>Congratulations!</p> <p>Based on the review of your application against the relevant criteria in the Applicant Guidebook (including related supplemental notes and advisories), your application has passed Initial Evaluation.</p>	

Background Screening Summary

Background Screening	Eligible
<p>Based on review performed to-date, the application is eligible to proceed to the next step in the Program. ICANN reserves the right to perform additional background screening and research, to seek additional information from the applicant, and to reassess and change eligibility upon the execution of the Registry Agreement.</p>	

Panel Summary

String Similarity	Pass - No Contention																						
<p>The String Similarity Panel has determined that your application is consistent with the requirements in Sections 2.2.1.1 and 2.2.1.2 of the Applicant Guidebook, and your application is not in contention with any other applications.</p>																							
DNS Stability	Pass																						
<p>The DNS Stability Panel has determined that your application is consistent with the requirements in Section 2.2.1.3 of the Applicant Guidebook.</p>																							
Geographic Names	Geographic Name - Pass																						
<p>The Geographic Names Panel has determined that your application falls within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4, and the documentation of support or non-objection provided has met all relevant criteria in Section 2.2.1.4.3 of the Applicant Guidebook.</p>																							
Registry Services	Pass																						
<p>The Registry Services Panel has determined that the proposed registry services do not require further review.</p>																							
Technical & Operational Capability	Pass																						
<p>The Technical & Operational Capability Panel determined that:</p> <p>Your application meets the Technical & Operational Capability criteria specified in the Applicant Guidebook.</p> <table border="1"> <thead> <tr> <th>Question</th> <th>Score</th> </tr> </thead> <tbody> <tr> <td>24: SRS</td> <td>1</td> </tr> <tr> <td>25: EPP</td> <td>1</td> </tr> <tr> <td>26: Whois</td> <td>2</td> </tr> <tr> <td>27: Registration Life Cycle</td> <td>1</td> </tr> <tr> <td>28: Abuse Prevention and Mitigation</td> <td>1</td> </tr> <tr> <td>29: Rights Protection Mechanism</td> <td>1</td> </tr> <tr> <td>30: Security Policy</td> <td>1</td> </tr> <tr> <td>31: Technical Overview of Registry</td> <td>1</td> </tr> <tr> <td>32: Architecture</td> <td>2</td> </tr> <tr> <td>33: Database Capabilities</td> <td>2</td> </tr> </tbody> </table>		Question	Score	24: SRS	1	25: EPP	1	26: Whois	2	27: Registration Life Cycle	1	28: Abuse Prevention and Mitigation	1	29: Rights Protection Mechanism	1	30: Security Policy	1	31: Technical Overview of Registry	1	32: Architecture	2	33: Database Capabilities	2
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32: Architecture	2																						
33: Database Capabilities	2																						

34: Geograph c D vers ty	2
35: DNS Serv ce	1
36: IPv6 Reachab ty	1
37: Data Backup Po ces & Procedures	1
38: Data Escrow	1
39: Reg stry Cont nu ty	2
40: Reg stry Trans t on	1
41: Fa over Test ng	1
42: Mon tor ng and Fau t Esca at on	1
43: DNSSEC	1
44: IDNs (Opt ona)	0
<hr/>	
Tota	25
M n mum Requ red Tota Score to Pass*	22

**No zero score allowed except on optional Q44*

Financial Capability

Pass

The F nanc a Capab ty Pane determ ned that:

Your app cat on meets the F nanc a Capab ty cr ter a spec f ed n the App cant Gu debook.

Quest on	Score
45: F nanc a Statements	1
46: Project ons Temp ate	1
47: Costs and Cap ta Expend tures	2
48: Fund ng and Revenue	1
49: Cont ngency P ann ng	2
50: Fund ng Cr t ca Reg stry Funct ons	1
<hr/>	
Tota	8
M n mum Requ red Tota Score to Pass**	8

***No zero score allowed on any question*

Disclaimer: Please note that these In t a Eva uat on resu ts do not necessar y determ ne the f na resu t of the app cat on. In m ted cases the resu ts m ght be subject to change. A app cat ons are subjected to due d gence at contract ng t me, wh ch may nc ude an add t ona rev ew of the Cont nued Operat ons Instrument for conformance to Spec f cat on 8 of the Reg stry Agreement w th ICANN. These resu ts do not const tute a wa ver or amendment of any prov s on of the App cant Gu debook or the Reg stry Agreement. For updated app cat on status and comp ete deta s on the program, please refer to the App cant Gu debook and the ICANN New gTLDs m cros te at <newgt ds. cann.org>.

EXHIBIT C-100

**AFFIRMATION OF COMMITMENTS BY THE UNITED STATES
DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS**

1. This document constitutes an Affirmation of Commitments (Affirmation) by the United States Department of Commerce (“DOC”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”), a not-for-profit corporation. In recognition of the conclusion of the Joint Project Agreement and to institutionalize and memorialize the technical coordination of the Internet’s domain name and addressing system (DNS)¹, globally by a private sector led organization, the parties agree as follows:

2. The Internet is a transformative technology that will continue to empower people around the globe, spur innovation, facilitate trade and commerce, and enable the free and unfettered flow of information. One of the elements of the Internet’s success is a highly decentralized network that enables and encourages decision-making at a local level. Notwithstanding this decentralization, global technical coordination of the Internet’s underlying infrastructure - the DNS - is required to ensure interoperability.

3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.

4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN’s processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

5. DOC recognizes the importance of global Internet users being able to use the Internet in their local languages and character sets, and endorses the rapid introduction of internationalized country code top level domain names (ccTLDs), provided related security, stability and resiliency issues are first addressed. Nothing in this document is an expression of support by DOC of any specific plan or proposal for the implementation of

¹ For the purposes of this Affirmation the Internet’s domain name and addressing system (DNS) is defined as: domain names; Internet protocol addresses and autonomous system numbers; protocol port and parameter numbers. ICANN coordinates these identifiers at the overall level, consistent with its mission.

new generic top level domain names (gTLDs) or is an expression by DOC of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.

6. DOC also affirms the United States Government's commitment to ongoing participation in ICANN's Governmental Advisory Committee (GAC). DOC recognizes the important role of the GAC with respect to ICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS.

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

9.1 Ensuring accountability, transparency and the interests of global Internet users:

ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and

(e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS; (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

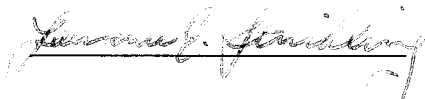
9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.

11. The DOC enters into this Affirmation of Commitments pursuant to its authority under 15 U.S.C. 1512 and 47 U.S.C. 902. ICANN commits to this Affirmation according to its Articles of Incorporation and its Bylaws. This agreement will become effective October 1, 2009. The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party. This Affirmation contemplates no transfer of funds between the parties. In the event this Affirmation of Commitments is terminated, each party shall be solely responsible for the payment of any expenses it has incurred. All obligations of the DOC under this Affirmation of Commitments are subject to the availability of funds.

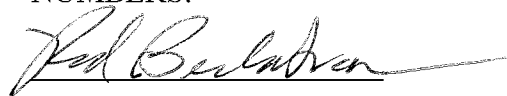
FOR THE NATIONAL
TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION:



Name: Lawrence E. Strickling
Title: Assistant Secretary for
Communications and Information

Date: September 30, 2009

FOR THE INTERNET CORPORATION
FOR ASSIGNED NAMES AND
NUMBERS:



Name: Rod Beckstrom
Title: President and CEO

Date: September 30, 2009

EXHIBIT C-101



1 of 1 DOCUMENT

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International and Comparative Law Quarterly (UK)

1 October 2011

International and Comparative Law Quarterly 60, 2011 pp 831-865

LENGTH: 18952 words

TITLE: Standards of Non-Discrimination In International Economic Law

AUTHOR: Nicolas F Diebold, PhD (University of Bern); LLM (Duke); MLaw (University of Geneva). Head of internal market, Secretariat of the Swiss Competition Commission. An earlier draft of this article was presented at the Second Biennial Global Conference of the Society of International Economic Law (SIEL) 2010 in Barcelona, available on SSRN and as IILJ Emerging Scholars Paper 18 (2010) under the working title 'Non-discrimination and the pillars of international economic law'. The author would like to thank Jürgen Kurtz, Simon Lester and the anonymous referees of ICLQ for valuable comments and discussions.

TEXT:

***Abstract** The principle of non-discrimination constitutes a corner-stone in different fields of international economic law, notably international trade in goods and services as well as intellectual property and investment protection. While its basic rationale appears to be straightforward, the application of the different legal elements which constitute a non-discrimination obligation has proven to be most challenging. Adjudicating bodies have been applying different interpretations and standards with regard to the legal elements of 'less favourable treatment', 'likeness' and 'regulatory purpose', which leads to a high fragmentation of the non-discrimination principle in international economic law. This article maps out the different theories for each of these elements on the examples of WTO law, NAFTA, bilateral investment treaties (BIT) and EU law and analyses how these theories affect the scope and liberalizing effect of the non-discrimination obligation. The article then attempts to develop a coherent factor-based application of non-discrimination rules suitable for all fields of international economic law. The article submits the theory that the elements of non-discrimination should not be applied as strict legal conditions which must be proven by a complainant, but as a range of factors which are weighed and balanced by the adjudicating bodies.*

International Law

I. Introduction

The principle of non-discrimination has a long-standing history in international trade relations and it has become a central pillar of modern international economic law. The non-discrimination principle provides that contracting parties to an international economic treaty shall not treat domestic market actors more favourably than foreign market actors (national treatment, NT) or differentiate between foreign market actors from different origins (most-favoured-nation

treatment, MFN). Non-discrimination obligations are found in all fields of international economic law, notably trade in goods and services,

investment protection and the protection of intellectual property rights. They apply to all types of governmental trade obstacles, such as border measures (eg tariffs and quantitative restrictions) and internal regulations (eg taxes and product standards). In addition, it is well established that non-discrimination obligations not only apply to measures which differentiate directly-or de jure-on the basis of origin, but they also prohibit indirect-or de facto-discriminatory measures.

In spite of these commonalities between non-discrimination obligations of different economic treaties, it would be wrong to assume that non-discrimination in international economic law has a firmly defined meaning. n1 Adjudicating bodies apply different interpretations and standards with regard to the elements of 'less favourable treatment', 'likeness' and 'regulatory purpose', which leads to a variety of different standards of non-discrimination in international economic law. The different standards may in some instances be explained by different intentions, objectives and expectations of the contracting parties or by different structures of the specific non-discrimination clause or of the entire treaty. However, the economic rationale underlying non-discrimination claims are very similar in trade and investment. In both cases, a foreign market actor seeks access to a domestic market under equal competitive parameters compared to domestic market actors. Hence, there are often times when there is no apparent reason, other than pure arbitrariness, for applying different standards in the respective fields of international economic law.

The rules of treaty interpretation set forth in article 31 of the Vienna Convention on the Law of Treaties ('VCLT'), n2 and reflected in customary international law, leave considerable discretion to adjudicators interpreting an obligation of public international law. The rules are not apt to ensure a consistent application of the non-discrimination provisions. Even though it appears that World Trade Organisation ('WTO') law has-to a certain degree - assumed a leading role for the general interpretation of international economic law, adjudicators applying a specific treaty have no obligation to take into consideration the jurisprudential developments and precedents from other fields of international economic law or even from prior arbitral tribunals applying the exact same provision of the same treaty. Considering that for historical and political reasons, international economic law is split up in innumerable mostly self-contained bilateral, regional and multilateral treaties, it is also not surprising that most scholarly contributions tend to focus on the principle of non-discrimination as it applies in a specific field of international economic law. n3

Nonetheless, non-discrimination obligations are constantly applied by international arbitral tribunals and, from a pragmatic perspective, the system appears to function. However, the current situation entails a number of shortcomings. Most importantly, contracting parties have no possibility to accurately anticipate the consequences when entering into an international economic treaty containing a non-discrimination clause. By the same token, private individuals -to the extent the treaty empowers them to assert their rights under the agreement-are virtually left in the dark when assessing their rights and risks prior to an investment decision. The scope, substance and standard of a non-discrimination obligation-and nota bene many other obligations-depends on the interpretation of the individual adjudicators who happen to be appointed to rule on the specific dispute. Moreover, even once the arbitral tribunal makes its ruling by applying a specific treaty, the concerned parties have no guarantee that a subsequent arbitral tribunal will follow the same interpretation. Consequently, the parties to a dispute-whether in state-to- state or investor-state arbitration-have little guidance on how to make their claim, how to present their legal arguments and most importantly, what evidence will be relevant. Granted, any legal proceeding-whether domestic or international-involves a considerable degree of legal uncertainty, but the risks and uncertainties are exceedingly high in disputes pertaining to international economic law in general and to the non-discrimination obligation in particular.

Against the background of these fragmented standards of non-discrimination, this article attempts to establish a typology of the theoretically possible standards on the basis of previous practice in the law of the WTO, n4 the Treaty on the Functioning of the European Union ('TFEU'), n5 the North American Free Trade Agreement ('NAFTA') n6 and bilateral investment treaties ('BITs'). n7 Part II compares the different standards which have been developed by the WTO adjudicating bodies, the European Court of Justice ('ECJ') and arbitral tribunals with regard to the

non-discrimination elements, namely the 'comparator clause', 'less favourable treatment' and 'regulatory purpose'. This overview does not pretend to provide an exhaustive and detailed analysis of the specific most-favoured-nation and national treatment provisions in the different agreements. Rather, Part II is designed to present a general analysis of the

different possible interpretations in order to illustrate to negotiators of international economic treaties the ambiguities arising from the text of today's non-discrimination provisions and to provide an overview of the possible standards of non-discrimination obligations to adjudicators and disputing parties. On this basis, Part III develops a structure containing the main formal and substantive elements which should be taken into consideration for the legal analysis of a non-discrimination claim.

The purpose of this article is to propose a methodology for the drafting of future non-discrimination obligations which is not based on ambiguous legal elements or conditions subject to interpretation, but on clearly defined factors which need to be weighed and balanced in order to determine whether overall a measure amounts to unlawful discriminatory protection of domestic market actors. n8

II. Current standards of non-discrimination

The principle of non-discrimination consists of two main elements, both of which are comparative in nature. First, the comparator clause calls for a comparison between the *market actors* subject to differential treatment. n9 The second element requires a comparison between the *treatments* accorded to the market actors at issue in order to assess whether one is treated less favourably than the other. The comparator clause and the element of 'less favourable treatment' constitute two cumulative legal conditions. n10 Depending on the structure of a specific non-discrimination provision, additional elements may be taken into consideration, such as '(non-)protectionist effect' or '(non-) protectionist purpose'. To date, the comparator clause-in particular the GATT 'like products' concept-has received by far the most attention in dispute settlement and legal scholarship. More recently, the focus has also shifted to the element of 'less favourable treatment' and its ambiguities. n11 However, scholarly research and case law does not yet sufficiently take into account the relationship and interdependency between the two elements.

Each element may be subject to different interpretations and standards, which considerably affects the reach of the non-discrimination

obligation. n12 The spectrum varies from very permissive forms of non-discrimination obligations which only outlaw the most apparent and blatant discriminatory measures, to very liberal and integrative forms which considerably restrict the contracting parties' regulatory autonomy to pursue domestic policy objectives. The present part illustrates the different standards by referring to examples from GATT 1947, WTO law (GATT 1994 and GATS), EU law, NAFTA and BITs.

A. Different Standards and Terminology for 'Comparator Clauses'

The fragmentation of comparator clauses in different international economic treaties is readily apparent from the differences in the terminology employed. Non-discrimination provisions in WTO law generally use the concept of 'likeness', such as 'like products' in articles I and III GATT or 'like service and service suppliers' in articles II and XVII GATS. In addition, one GATT non-discrimination provision applies the concept of 'directly competitive or substitutable products' instead of 'likeness'. n13 The TFEU refers to 'similar products' and 'other products' in its national treatment obligation concerning internal taxes (article 110 TFEU). Finally, non-discrimination obligations in NAFTA and certain BITs apply the concept of 'like circumstances', n14 while other BITs use the concept of 'same circumstances', n15 'like situations', n16 'comparable situations' n17 or 'similar situations'. n18

In spite of these different terminologies, all comparator clauses share the identical fundamental problem of identifying the relevant *tertium comparationis*, ie the quality or element which two 'situations' or 'objects' must have in common in order to conclude that they are 'alike' for the purpose of the comparison. n19 The practice of international

economic law determined different *tertia comparationis* which in turn leads to different standards of non-discrimination.

1. Objective Standard

Early GATT 1947 jurisprudence pertaining to articles I (MFN) and III (NT) interpreted the concept of 'like products' on the basis of purely formal and objective criteria, mostly ignoring or even denying the relevance of competition. n20 For instance, GATT Panels ruled that 'likeness' does not exist between three types of sardines (pilchard, herring and sprat) or between dimension lumber produced from different tree species (SPF and hemlock- fir lumber) for purposes of article III:2 GATT. Another GATT Panel explicitly refused to consider the competitive relationship between ammonium sulphate fertilizer and nitrate fertilizer and found the two products to be 'unlike'. Finally, the GATT Panel in *EEC-Animal Feed Proteins* held that different products used for the purpose of adding protein to animal feeds are 'unlike' under articles I and III:4 GATT. All these reports relied heavily on different tariff classifications as well as physical differences between the products as criteria of the 'likeness' analysis. n21 In 1970, a Working Party Report developed a test which later came to be known as the *Border Tax Adjustments* framework, identifying also 'end-uses' and 'consumer tastes and habits' as relevant criteria. n22 While these criteria may have implicitly introduced economic elements into the analysis, most GATT Panels refrained from explicitly recognizing that 'likeness' incorporates the economic theory of competitive relationships.

Similar to GATT 1947 practice, early ECJ jurisprudence pertaining to the national treatment obligation for internal taxes of article 110(1) TFEU (ex article 90 TEC, ex-ex article 95 TEC) also relied on purely formal criteria - such as fiscal, statistical or custom classification-for the assessment of the 'similar products' concept. n23

While all of the above examples from GATT 1947 and EU jurisprudence illustrate situations where formal criteria were used to find 'unlikeness' between largely competing products, formal criteria may be used to find 'likeness' between non-competing products. In the investor-state dispute *Occidental*, n24 for instance, the US oil exporter Occidental claimed that the denial of VAT reimbursements to domestic and foreign-invested oil exporters, while granting the reimbursement to domestic and foreign-invested exporters

of other goods, constituted a breach of the non-discrimination obligation. The claim was based mainly on the argument that 'in like situations' refers not to companies in the same business sector, but to all companies engaged in exports even across economic sectors. The tribunal distinguished the BIT 'like situations' terminology from GATT 'like products' and essentially defined the 'act of exporting' as the relevant *tertium comparationis*. n25 In consequence, the foreign invested oil exporter Occidental was considered 'in like situations' with domestic exporters of flowers, mining and seafood products as well as lumber and bananas. n26

In sum, under the objective standard the *tertium comparationis* may consist of factors such as physical characteristics, tariff classification, end-uses or even the act of exportation. Depending on which criteria are applied, the scope of non-discrimination obligations may be construed very narrowly (eg in case of physical characteristics as criterion) or extremely broadly (eg act of exporting as criterion).

2. Economic Standard

Under the economic standard, the *tertium comparationis* is defined by economic parameters indicating the extent to which the market actors are in a competitive relationship. This standard was first applied by GATT 1947 panels for the 'directly competitive or substitutable products' element in article III:2 GATT and by the ECJ for the concept of 'other products' in article 110(2) TFEU. n27

Under WTO jurisprudence, the distinction between 'like products' and 'directly competitive or substitutable products' in article III GATT is gradually disappearing. n28 The WTO adjudicating bodies are more and more prepared to extend the economic standard to the concept of 'like products'. The Appellate Body Report on *EC-Asbestos* nicely

illustrates this change in approach with regard to the assessment of discriminatory regulations (article III:4 GATT). n29

However, even though the WTO adjudicating bodies recognized the relevance of competitive relationships for the analysis of 'likeness' under this so called 'market place approach', they continue, in principle, to apply the formal criteria from the *Border Tax Adjustments* framework. n30

The ECJ jurisprudence pertaining to 'similar products' under article 110(1) TFEU, which was developed in parallel to the WTO jurisprudence on article III:2 GATT, moved from a formally objective interpretation to a test also taking into account economic considerations. n31 Consequently, the difference between the concepts of 'similar products' in article 110(1) TFEU and 'other products' in article 110(2) TFEU is gradually disappearing.

The same economic interpretation of 'likeness' will have to prevail for the WTO national treatment obligation pertaining to trade in services, considering that article XVII:3 GATS explicitly states that it is designed to protect competitive opportunities. n32 In comparison, the WTO has not yet had an opportunity explicitly to confirm an economic standard of 'like products' for purposes of MFN (article I GATT), n33 but numerous scholars rightfully demand such an approach at least with regard to internal taxes and regulations. n34 Similarly, to date no jurisprudential guidance exists

with regard to the standard of 'likeness' in article II GATS on MFN-treatment. n35

Finally, most arbitral tribunals applying the NAFTA rules on investment protection largely endorse an economic interpretation of the 'like circumstances' concept, even though the jurisprudence is not entirely consistent. The main criterion generally is whether investors or investments are in the 'same sector', including both economic and business sectors. While some tribunals omit explicitly to identify the competitive relationship as the decisive factor to delimit a 'sector', others base their analysis more specifically on competition. n36

3. Subjective Standard

The subjective standard of 'likeness' has been developed by different adjudicating bodies of international economic law in order to strike a balance between international obligations designed to liberalize trade and investment on the one hand, and domestic non-economic policy objectives such as environmental and consumer protection on the other hand. The doctrinal reasoning of the subjective standard is to argue that the *tertium comparationis* is defined by the regulatory purpose of the measure under scrutiny; for instance, if the measure is designed to protect the environment, then the products are compared on the basis of their environmental impact.

GATT 1947 jurisprudence developed a subjective standard with the so called 'aim and effects' test as part of the 'like products' analysis. n37 Following this approach, a GATT Panel ruled that low and high alcohol content beers are not 'alike' for the purpose of article III:4 GATT because the measures restricting points of sale, distribution and labelling were aimed to encourage the consumption of low alcohol beer. Conversely, wines made from different grapes were found to be 'like products' mainly because the respondent was unable to provide any valid public policy purpose in support of its differential

tax treatment. n38 While subsequently WTO panels and the Appellate Body strongly rejected the 'aim and effects' test for purposes of both GATT and GATS, n39 the very recent Panel report *US-Clove Cigarettes* has again taken into account the regulatory context under the 'likeness' analysis for purposes of the non-discrimination provision in article 2.1 TBT Agreement. n40

Similar to the 'aim and effects' test, most arbitral tribunals ruling on NAFTA non-discrimination provisions in the area of trade in services and investment protection interpret the concept of 'like circumstances' as containing a subjective element. Following this rationale, the question is not whether the foreign and domestic suppliers or investors are in 'like circumstances', but whether the differential treatment occurs in 'like circumstances'. In other words, the policy objective pursued by the measure under scrutiny may be taken into consideration to define the circumstances in

which the comparison of the foreign and domestic comparators takes place. n41

The same result is likely to prevail in certain BIT non-discrimination clauses. For instance, the former Norwegian draft model-BIT nicely illustrates the subjective standard by means of a footnote to the 'like circumstances' concept:

1. Each Party shall accord to investors of the other Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances^[fn] to its own investors and their investments, in relation to the establishment, acquisition, expansion, management, conduct, operation and disposal of investments.

[fn] The Parties agree/are of the understanding that a measure applied by a government in pursuance of legitimate policy objectives of public interest such as the protection of public health, safety and the environment, although having a different effect on an investment or investor of another Party, is not inconsistent with national treatment and most favoured nation treatment when justified by

showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment. n42

The main challenges of this approach are to determine the legitimate policy objectives and the appropriate standard for the reasonable relationship between the measure under scrutiny and the pursued objective (see below, II.C.3).

4. Combination of Standards

The objective, economic and subjective standards of 'likeness' may be applied individually or in combination. WTO adjudicating bodies combine the economic and objective standard for purposes of certain GATT non-discrimination provisions. For instance, 'like products' in terms of article III:1 GATT, first sentence, is interpreted as requiring both physical similarity and a competitive relationship. In comparison, the concept of 'like circumstances' as contained in NAFTA rules on non-discrimination is usually interpreted as providing both an economic and a subjective standard allowing differentiation between competing investors or service suppliers in order to pursue legitimate domestic policy objectives.

5. Absence of a Comparator Clause

Finally, the comparator clauses are not only highly fragmented in terms of their terminology and application; some international economic treaties even contain non-discrimination obligations that entirely lack a comparator clause. n43 The absence of a comparator clause may be subject to two different interpretations. The first and preferred approach consists of the argument that a comparative element is inherent to the logic and structure of the non-discrimination principle in international economic law. n44 Consequently, the claimant would still have to establish the existence of a competitive relationship between the allegedly discriminated foreign market participant and a domestic market participant who is receiving more favourable treatment. Conversely, under the second theory the absence of a comparator clause entails that competitive relationships or any other form of 'likeness' between the

domestic and foreign comparators are irrelevant. Consequently, equal treatment would have to be accorded to foreign and domestic market actors across economic sectors. n45

B. Different Standards of 'Less Favourable Treatment'

The term or standard of 'less favourable treatment' is usually not defined in non-discrimination provisions of international economic treaties. As a notable exception, article XVII:3 GATS states that 'different treatment shall be considered to be less favourable if it modifies the conditions of competition'. GATS incorporates the interpretations from prior GATT 1947 panel reports which developed the principle of conditions of competition under the analogous provision of article III GATT. n46 Considering that non-discrimination obligations aim to ensure equal conditions of competition for foreign and domestic market actors, it is logically consistent that differential treatment is only relevant to international economic law to the extent it modifies the conditions of competition to the detriment of certain foreign market actors. In principle, this rationale not only applies to international trade, but also to investment protection law.

n47 However, the standards or thresholds with regard to the element of 'less favourable treatment' differ considerably.

1. Disproportionate Disadvantage Test

The disproportionate disadvantage test requires assessing the negative (and potentially neutral or positive) economic effect of a measure on the group-as defined by the comparator clause-of domestic and foreign market actors. n48 The non-discrimination obligation is only breached if the group of foreign

market actors is disproportionately disadvantaged as compared to the domestic one.

Even though WTO jurisprudence is not entirely consistent on this issue, it appears that the Appellate Body explicitly endorsed the disproportionate disadvantage test in *EC -Asbestos*. In this case, the Panel ruled that the French sales ban for products containing asbestos fibres violated GATT national treatment, arguing that products containing asbestos fibres are 'like' products containing substitute fibres and that the measure resulted in less favourable treatment of asbestos products not produced in France. The Appellate Body reversed the Panel's ruling primarily on grounds of 'likeness', but it also reversed the Panel's approach in regard to 'less favourable treatment' in an *obiter dictum*. The Appellate Body held that 'a complaining Member must [...] establish that the measure accords to the *group* of "like" imported products less favourable treatment than it accords to the *group of domestic* products'. n49 This approach is supported by most commentators of WTO law. n50

In comparison, the ECJ also adopts the disproportionate disadvantage test in order to demonstrate whether a tax is of protective nature for purposes of article 110(2) TFEU prohibiting tax discrimination:

The protective nature of the tax system ... is clear. A characteristic of that system is in fact that an essential part of domestic production ... come within the most favourable tax category whereas at least two types of product, almost all of which are imported from other Member States, are subject to higher taxation ... The fact that another domestic product ... is similarly placed at a disadvantage does not rule out the protective nature of the system. ... n51

Considering the fact that a measure may have negative economic effects on certain competitors and no or even positive effects for other competitors, the disproportionate disadvantage test requires establishing a ratio threshold for 'disproportionality'. Assume, for instance, a theoretical model situation where hundred domestic products stand vis-à-vis hundred imported 'like' products. Presumably no 'less favourable treatment' occurs if domestic and foreign products are equally affected (eg ten domestic vs ten foreign or seventy domestic vs seventy foreign). However, there remains a large range between, for instance, a negative effect on ten foreign vs five domestic or ninety-five

foreign vs ten domestic products. It remains in the discretion of the adjudicators to define an appropriate ratio for each specific case.

2. Obligation to Grant the Best Treatment Accorded to any Domestic Market Participant

The non-discrimination principle may also be interpreted as an obligation to grant the best treatment accorded to any domestic market actor. n52 Following this approach the non-discrimination obligation is already breached if one individual foreign market actor receives treatment that is less favourable in comparison to any individual domestic market participant (NT) or to any foreign market participant from different origin (MFN). For instance, less favourable treatment occurs if a measure negatively affects only one out of hundred foreign market actors, even if ninety-nine out of hundred domestic market actors are also negatively affected. Consequently, the non-discrimination principle becomes an obligation to treat *all* foreign market participants equivalent to the best treatment accorded to any 'comparable' domestic or other foreign market participant. Under this approach, non-discrimination has a strong liberalizing effect and far reaching consequences for the regulatory autonomy of the contracting parties, in particular if additionally the comparator clause is interpreted widely.

This very liberal and intrusive interpretation is mostly adopted in the area of investment protection. n53 In

particular, the jurisprudence pertaining to NAFTA chapter 11 shows a clear tendency towards this 'best treatment' approach. n54 For instance, the tribunal in *Pope & Talbot* ruled 'that "no less favorable" means equivalent to, not better or worse than, the best treatment accorded to the comparator'. n55

The main argument made in support of this far reaching standard is that investment treaties are designed to protect the value of a specific investment, whereas international trade law protects a more abstract value of equal conditions of competition, not the actual value of the exported goods and services. This argument has some merit, insofar as the investment in a foreign

market is a more substantial and binding commitment to participate in the foreign market than merely exporting goods and services. A new regulation -for instance an environmental standard-may have severe consequences for the foreign investor who, in case he is unable to comply with the standard, may have to disinvest and suffer actual damages. Conversely, a foreign producer unable to meet the new standard may simply cease to export without incurring actual damages, but only loss of potential gains. n56

Yet, this circumstance is taken care of in that investment treaties accord to the foreign investor an individual right to claim damages, whereas trade agreements are only enforceable by the governments of the contracting parties which may only claim the abolition of the measure, but not damages. It is not entirely apparent, however, why the arguably different objects of protection in investment and trade law (ie value of investment vs conditions of competition) should also explain different substantive standards of non-discrimination obligations. In fact, most investment treaties go beyond the protection of foreign direct investment, in that they also apply to more mobile forms of investments, such as minority equity investment or debt holdings. n57 These types of investments are not subject to the same sunk costs as foreign direct investment and may even be retracted from the foreign market. Hence, if different objects protected by the respective economic treaties were apt to justify different standards of non-discrimination obligations, more than one standard would already have to apply in the context of investment law.

Moreover, distinguishing between a 'best treatment' standard for investment protection law and a 'disproportionate impact' standard for trade law is not appropriate in view of the fact that trade agreements may also apply to forms of investments. For instance, measures affecting trade in services under GATS mode 3 (commercial presence) would presumably have to be analysed under a disproportionate impact test in line with the Appellate Body's interpretation of 'less favourable treatment', even though the concept of commercial presence constitutes a form of investment. Conversely, some WTO panels have applied a standard along the lines of the 'best treatment approach' for purposes of the GATT national treatment provision in the trade context. n58

Similar examples exist in other areas of international economic law. For instance, it is to be expected that non-discrimination provisions in NAFTA chapter 12 on trade in services would follow the same standard as those in chapter 11 on investment protection in view of the similar terminology and structure of articles 1102ff and articles 1202ff, even though in substance chapter 12 is more closely related to the trade rules of NAFTA chapter 3 than to the rules on investment protection. Even within NAFTA chapter 11, the interpretation lacks consistency in that some tribunals seemed to favour the disproportionate disadvantage test which is generally applied in the trade context. n59

The more practical and pragmatic explanation for the different standards of non-discrimination in trade and investment protection may be found in the form of the challenged measure, rather than in the object protected by the respective treaty. In fact, the measures challenged in investor-state cases often consist of (individual and concrete) decisions by an authority applying to one foreign investor, whereas the measures challenged in trade disputes typically concern (general and abstract) regulations applying to all competitors in a relevant market. The 'best treatment' approach is arguably more appropriate with respect to 'decisions', as the concerned investor would only have to show that it is the only actor in a relevant market suffering from a competitive disadvantage due to the decision in question. In contrast, in order for a regulation to be discriminatory, the complainant must show that the group of foreign products suffers a higher competitive burden from the regulation than the group of 'like' domestic products.

These considerations illustrate that the circumstances may very well justify a 'best treatment' or similar standard in a trade case, whereas the 'best treatment' approach may just as well lead to absurd results in investment protection law. In view of the inconsistency in the interpretation of this core element of non-discrimination and the resulting lack of legal security, it would be preferable for international economic treaties to either specifically spell out the applicable standard in the agreement or to explicitly empower the arbitral tribunal with the competence to determine the applicable standard on a case-by-case basis.

3. Subjective Standard of 'Less favourable Treatment'

The subjective standard of 'less favourable treatment' takes into account the regulatory purpose in order to determine the *true basis* of the differential treatment. In the case of *de jure* discrimination, the measure differentiates directly on the basis of origin. However, cases of *de facto* discrimination differentiate directly on the basis of a permitted criterion. Under the different approaches to 'less favourable treatment' discussed above, the link from the

permitted to the prohibited criterion is presumed if predominantly foreign products suffer a competitive disadvantage under the measure (ratio threshold). In contrast, the subjective standard requires determining whether the measure truly pursues an objective related to the permitted criterion, or whether the true intent of the measure is to discriminate indirectly on the basis of origin.

This subjective theory of 'less favourable treatment' has not yet been explicitly recognized by the WTO adjudicating bodies or by arbitral tribunals. Some commentators understood the Appellate Body's *obiter dictum* in *EC-Asbestos* as a return of the 'aim and effects' test under the element of 'less favourable treatment';ⁿ⁶⁰ however, in this case the Appellate Body only addressed the issue of ratio, but not of purpose.ⁿ⁶¹

More pertinently, the Panel in *EC-Approval and Marketing of Biotech Products* seemed to consider a subjective standard of 'less favourable treatment':

Argentina is not alleging that the treatment of products has differed depending on their origin. In these circumstances, it is not self-evident that the alleged less favourable treatment of imported biotech products *is explained by the foreign origin of these products rather than, for instance, a perceived difference between biotech products and non-biotech products in terms of their safety, etc.* In our view, Argentina has not adduced argument and evidence sufficient to raise a presumption that the alleged less favourable treatment *is explained by the foreign origin* of the relevant biotech products.ⁿ⁶²

Most recently, the US argued in the WTO dispute *US-Tuna II*, that its 'dolphin safe' labelling provisions do not draw a distinction based on the origin of the tuna, but based on whether the tuna products contain tuna caught in a manner harmful to dolphins. The US further argues that there is a relationship between the purpose of the measure—which is to reduce the harm to dolphins and to properly inform consumers—and the conditions set forth by the measure by which tuna products can be labelled 'dolphin safe'.ⁿ⁶³ In essence, the US argument goes to say that the non-discriminatory intent of the measure shows that the differential treatment is not based on origin, but based on the US

objective of protecting dolphins. The Panel seems to have followed the US argument at least to a certain degree, finding that the 'dolphin safe' labelling provision does not result in less favourable treatment of Mexican tuna under article 2.1 TBT Agreement:

We first note that, the fact that the *measures distinguish between fish based on its capture method rather than its origin*, this distinction is not inherently tied to the "national" origin of the fish. The fishing method at issue, setting on dolphins, is accessible to any fleet operating in an area where such method can be practised. Therefore, denying the label to tuna caught by "setting on dolphins" does not, in itself, imply that "less favourable treatment" is afforded to Mexican tuna products. Indeed, any fleet operating anywhere in the world must comply with the requirement.ⁿ⁶⁴

The Panel then went on to conclude that even if tuna of Mexican origin might be more likely not be eligible for the

'dolphin safe' label, this would not necessarily mean that the tuna products processed and canned in Mexico would be less likely to qualify for the label. In the Panel's words, this 'is because Mexican processors could choose to make their products from tuna of other origins meeting the requirements of the label'. n65 In sum, it appears that the Panel was at the very least inspired by the purpose of the measure when concluding that, even de facto, the labelling provision does not differentiate based on origin.

C. Different Standards and Relevance of 'Regulatory Purpose'

The main objective of non-discrimination obligations in international economic law is to outlaw measures which are specifically designed to protect the domestic market from foreign competition. However, even measures which pursue a legitimate policy objective—such as measures setting standards related to health, environment, labour or human rights—may have a protectionist effect. In such cases, most international economic treaties provide that the policy objective of the measure is taken into account for the legal analysis. However, there are two different systemic approaches as to whether the purpose of a regulatory measure is analysed as part of the non-discrimination obligation itself or as a justification under the general exceptions clause. n66

1. Regulatory Purpose as Part of the Non-Discrimination Standard

As discussed above, the regulatory purpose may be considered as part of the comparator clause or as part of the 'less favourable treatment' element, to

the extent that a subjective standard is applied. This solution is very rarely explicitly adopted by international economic treaties, but adjudicating bodies occasionally choose one of these two approaches by applying and interpreting a specific non-discrimination obligation. A look at the relevant cases pertaining to non-discrimination provisions shows that this solution is mostly adopted when the treaty lacks a general exceptions clause. This is the case, for instance, for many BITs, NAFTA chapter 11 and the TBT Agreement.

Alternatively, the regulatory purpose could be considered as a distinct and separate legal element within the non-discrimination obligation. However, international economic treaties do not provide a textual basis for such an approach. The only provision allowing for some flexibility in this regard is article III:1 GATT, which states that measures 'should not be applied to imported or domestic products so as to afford protection to domestic production'. n67 Even though the Appellate Body emphasized that the test for the wording '*so as to afford protection*' is about protective *application*, not about protective *intent*, n68 indications of protectionist intent regularly flow into the legal analysis. n69

From a practical and pragmatic point of view, it seems irrelevant whether the regulatory purpose is considered under the comparator clause, the 'less favourable treatment' element or as a distinct and separate element. However, from a doctrinal and systemic angle it would be welcomed if the jurisprudence, or preferably the treaties themselves, would clarify whether and under which title the purpose of an allegedly discriminatory measure may be analysed. Such transparency would enhance legal certainty and facilitate the parties to a dispute in building their legal arguments. For clarity and structural reasons, the regulatory purpose should ideally be considered as its own legal element. However, due to the lack of a textual basis, adjudicating bodies mostly rely on the comparator clause or to a lesser extent on the element of 'less favourable treatment' for taking into account the purpose of a regulation.

2. Regulatory Purpose under the General Exceptions Clause

Under the second theory, the regulatory purpose is taken into account only once it is established that the measure under scrutiny is in breach of the non-discrimination obligation. This approach requires incorporating an explicit justification or exception clause in the structure of the respective international economic treaty. Importantly, general exception clauses not only legitimize the violation of a non-discrimination obligation, but also violations of other substantive obligations set forth in the respective treaty, such as the prohibition of quantitative restrictions.

International trade agreements regularly provide for a general exceptions clause. Article XX GATT, for instance, allows WTO Members to deviate from their obligations under GATT in order to pursue public interests such as the protection of public morals, of exhaustible natural resources or of human, animal and plant life or health. n70 The lists of public interests serving as grounds for justification in article XX GATT, article XIV GATS and most other trade agreements are exhaustive in nature. Consequently, general exceptions clauses only address interests which were recognized as important at the time the treaty was concluded, but due to their static nature, they fall short of addressing new concerns, such as for instance environmental or consumer protection.

One way of addressing new policy concerns in the framework of trade treaties would be to broadly interpret the general exceptions clauses. However, adjudicating bodies ruling on bi- and multilateral trade agreements generally lack the legitimacy to engage in legislative interpretation or to extensively depart from the treaty text of general exceptions clauses. n71 Only the ECJ transformed the general exceptions clause of article 36 TFEU (ex article 30 TEC) from an exhaustive to an illustrative list of public interests in order to counter-balance its very liberal application of the *Cassis de Dijon* concept, n72 generally referred to as principle of origin.

Another way of circumventing the limited scope of general exceptions clauses is to incorporate the regulatory purpose as an element into the standard of non-discrimination by adopting a subjective approach to 'likeness' or to

'less favourable treatment' as described above. n73 Adjudicating bodies ruling on trade disputes frequently use this approach, be it explicitly or implicitly, in order to resolve a conflict between free international trade and a domestic policy concern of the State that is bound by a non-discrimination obligation. n74

In contrast to trade agreements, most investment protection treaties do not contain any general exceptions clause. NAFTA, for instance, provides for a general exceptions clause with respect to trade in goods and trade in services (article 2101 NAFTA), but not with respect to chapter 11 on the protection of investments. This may be the reason why many investment tribunals ruling on a discrimination claim tend to consider the purpose of the measure as part of the non-discrimination obligation by adopting one of the approaches analyzed under Parts II.A.3 and II.B.3 above.

3. Legal Challenges Related to the Analysis of a Measure's Regulatory Purpose

While a proper consideration of a discriminatory measure's policy objective may provide the 'most just' result, adjudicating bodies are confronted with a number of very sensitive problems when analyzing the regulatory purpose of a State measure.

First, consideration of the regulatory purpose raises issues with respect to burden of proof, means of proof and standard of review. An unreasonably high bar would be raised by placing the burden on the complainant to prove a protectionist purpose of the respondent's measure. Preferably, it should be up to the respondent to demonstrate that its measure pursues a non-protectionist and legitimate objective. Either way, direct evidence of protectionist intent will rarely exist, considering that numerous governmental actors and interest groups are usually involved in the decision-making process. The disputing parties thus have to rely mostly on circumstantial evidence related to the design, structure, application and effect of a measure. In this context, the question arises of how much deference the adjudicating bodies should give to the respondent's evidence and assertions concerning the purpose of its own measure. This is a very sensitive issue related to the question of the appropriate standard of review. n75

Second, the adjudicators must determine which policy objectives are considered as sufficiently important and thus legitimate to justify a measure which-indirectly or directly-discriminates between foreign and domestic competitors. Some international economic treaties directly define the legitimate policy objectives. General exceptions clauses, for instance, set forth a list of legitimate objectives agreed upon by the contracting parties during the negotiations. As stated above, such lists are usually regarded as exhaustive; only the ECJ transformed the general exceptions clause of article 36 TFEU (ex article 30 TEC) from an exhaustive to an illustrative list of public interests serving as grounds for justification. n76 Conversely, adjudicating bodies may have more flexibility in defining new legitimate policy

objectives if no such treaty mandated exhaustive lists exist, by simply taking the regulatory purpose into account under the comparator clause or under the element of 'less favourable treatment'.

Third, a legitimate objective itself is not sufficient to justify the breach of a non-discrimination obligation; there must also be a certain nexus between the measure under scrutiny and the legitimate objective pursued. Most treaties which provide a justification or general exceptions clause explicitly state the required nexus. For instance, articles XX GATT and XIV GATS differentiate between measures which are 'necessary' to achieve the pursued policy objective or merely 'related to' the policy objective. Again, the adjudicating bodies are more flexible in defining the relevant nexus applying a subjective interpretation of the comparator clause or the element of 'less favourable treatment' if no treaty mandated standard exists.

Considering that any decision on any of these issues has far reaching consequences for the contracting parties' sovereignty and regulatory autonomy, it would be highly preferable that the international treaty either defines the applicable rules with respect to burden of proof, standard of review, legitimacy of objectives and standards of nexus or that the treaty specifically empowers and legitimizes the adjudicating body to develop the necessary rules on a case by case basis.

D. Overlap Between Non-Discrimination and Non-Restriction

Depending on how each element of the non-discrimination obligation is construed, the result may be that non-discrimination overlaps with the more integrative principle of non-restriction (*Beschränkungsverbot*). The legal concept of non-restriction goes much further in trade liberalization than the principle of non-discrimination. It is fundamental, for instance, to the freedom to provide services under EU law. According to the ECJ, article 56 TFEU

(ex article 49, ex-ex article 59 TEC) n77 'requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, *even if it applies without distinction to national providers of services and to those of other Member States*, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.' n78

Some commentators suggest that the national treatment obligation under WTO law should be interpreted as prohibiting any measure which is more burdensome than necessary for foreign goods, services or suppliers. n79 Under this approach, the elements of 'less favourable treatment' and 'likeness' are in effect replaced by a test of necessity and proportionality. n80

Another way of assimilating non-discrimination to non-restriction would be to combine the 'best of the best treatment' approach for 'less favourable treatment' with a broad economic interpretation of the 'comparator clause'. As it would be almost always possible to determine at least one distant competitor receiving more favourable treatment, the principle of non-discrimination would in essence be transformed into an obligation of non-restriction.

Finally, the overlap between non-discrimination and non-restriction becomes even more apparent where broad objective criteria such as 'the act of exporting' are applied under the 'comparator clause', which results in a comparison of different treatments concerning non-competing products. For instance, the true question in *Occidental* was not whether the differential tax

treatment between exporters of oil and exporters of flowers is discriminatory, but whether the tax treatment of foreign invested oil exporters is more burdensome than necessary or whether it violates legitimate expectations. It is highly questionable, however, whether the extensive interpretation of a non-discrimination obligation along the lines of *Occidental* is in conformity with the contracting parties' intended level of economic integration.

III. A flexible factor-based standard of non-discrimination

Considering that the interpretation of non-discrimination obligations in international economic law lacks coherence—which in turn creates legal uncertainty for the contracting parties, individuals and parties to a dispute—this part attempts to develop a factor-based framework for non-discrimination obligations. Pauwelyn in particular has argued that the non-discrimination analysis should treat 'likeness' as a mere threshold question and focus more specifically on 'less favourable treatment' as the substantive test, taking into account a mix of elements to determine whether differential treatment is based on origin.⁸¹ This part takes up this theory, suggesting that the entire analysis of non-discrimination obligations could be viewed as a threshold question. In other words, 'less favourable treatment', 'likeness' and other ambiguous elements such as 'so as to afford protection' or 'regulatory purpose' should no longer be implemented as strict legal conditions to be proven by the complainant or the respondent pursuant to the applicable standard of review. Instead, all the relevant elements could be viewed as factors to be weighed and balanced in order to come to an overall conclusion on whether or not a measure amounts to unlawful discrimination of foreign market actors.

Importantly, this article does not address the question whether specific existing non-discrimination provisions of WTO law, the TFEU, NAFTA, BITs or other international economic treaties provide a textual basis for such an approach. The more modest aim is to make adjudicating bodies aware of the significance and mutual relationship of the different legal elements and to propose an alternative approach to the concept of non-discrimination for the negotiations of future national treatment and MFN provisions.

A. Formal Basis of Differential Treatment

The first analytical step should be to determine whether the measure differentiates directly on the basis of origin (*de jure*) or on the basis of other criteria (*de facto*). All forms of *de jure* differentiations affecting the competitive opportunities to the detriment of foreign market actors constitute a strong factor

pointing towards unlawful discrimination. The discriminatory effect of such measures does not need any further analysis. However, the respondent must still have the opportunity to justify the measure by proving its legitimate policy objective and a strong nexus between the measure and the objective under scrutiny. In addition, the respondent may show that the measure does not accord a competitive advantage to domestic market actors due to the complete absence of any even remotely competing domestic goods or services.

In case the measure differentiates on a basis other than origin (*de facto* discrimination), the analysis needs to focus strongly on the effect of the measure in a specific market situation (below, Part III.D).

B. Form of the Measure

A second formal element that needs to be taken in consideration is whether the measure is adopted in the form of an individual and concrete *decision* adopted by an authority applying exclusively to a foreign market actor, or whether the measure consists of a general and abstract *regulation* applying to all products in a relevant market. The form of the measure has no value in itself for purposes of the weighing and balancing test. In other words, a decision is not *per se* more or less discriminatory than a regulatory measure. However, the form of the measure must be viewed in context with its effect.

For instance, a foreign investor subject to a *decision* should be able to demonstrate the measure's discriminatory effect by showing that only one domestic competitor is not subject to the same competitive constraints ('best treatment' standard), provided that the foreign and domestic investors are in like regulatory circumstances ('subjective standard' of non-discrimination). Conversely, it is unlikely that one single foreign market actor suffering a competitive disadvantage from a *regulatory* measure could claim that it is subject to discriminatory treatment if all its foreign and domestic competitors are not negatively affected by the same measure.

C. Extent of Competitive Relationship between Comparators

The current terminology used in non-discrimination provisions referring to 'like' or 'similar' products, situations or circumstances does not do justice to the underlying question of whether or not there is a competitive relationship between the foreign and domestic market actors. Often the wording of the comparator clause invites the adjudicating bodies to take into account the purpose of the regulation. While this subjective approach may be appropriate from a pragmatic perspective due to the lack of a general exceptions clause in the respective agreement, it does not live up to the required standards for legal security, consistency and transparency. Conversely, current comparator clauses may allow the adjudicating bodies to find illegal discrimination between market entities which are not in a competitive relationship at all. This approach

is also not satisfying as it opens the door to an unlimited number of irrelevant *tertia comparationis*, thereby stretching the principle of non-discrimination beyond its original purpose and scope. By comparing, for instance, an export tax on oil with the absence of such a tax on flowers, the true rationale is not whether foreign oil investors are treated less favourably than domestic growers of flowers, but whether the export tax on oil constitutes an unnecessary obstacle to trade or investment. Hence, regulations with no effect between domestic and foreign competitors should not be dealt with under a non-discrimination obligation, but under the more integrative instruments such as non-restriction in trade or legitimate expectations in investment protection.

To date, the economic concept is best reflected in *Ad* article III paragraph 2 of the GATT Annex I, which incorporates a standard of 'directly competitive or substitutable' products. Another interesting solution had been proposed during the GATS negotiations. An early draft of the GATS national treatment provision contained a specific reference to the marketplace, prohibiting differential treatment of foreign and domestic services and suppliers 'in the same market'.⁸² Future non-discrimination provisions in international economic agreements should follow these examples, prompting the adjudicating bodies to assess the approximate extent of the competitive relationship by focusing on the economic theory of demand substitutability.

D. Competitive Effect of the Measure

Once the approximate extent of the competitive relationship between the foreign and domestic market entity has been established, the question becomes whether there is less favourable treatment of the foreign entities. For this purpose, the adjudicating bodies need to analyse the competitive effect of the measure, both qualitatively and quantitatively, as well as the ratio of affected domestic and foreign market actors.

1. Qualitative Analysis

The qualitative analysis of a measure requires identifying the parameters of competition which are affected by a measure. Parameters of competition are market factors such as price, quantity, quality, marketing, general conditions, terms of delivery, customer service, etc. For instance, measures banning foreign products from the market, thereby neutralizing all parameters of competition, or measures affecting key parameters such as price or quantity of certain foreign products, are of the highest qualitative burden. In comparison, product regulations, technical regulations, environmental regulations or

administrative burdens may result in lower qualitative burdens, depending on which parameters of competition they affect. In such cases, the complainant needs to demonstrate how and to what extent the measure puts the foreign product or investment at a competitive disadvantage as compared to its domestic competitors.

2. Quantitative Analysis

Even more importantly, a measure's quantitative effect on competition must also be taken into consideration. The quantitative effect is primarily determined based on the additional burden placed on the foreign market entities by the measure. Ideally, the additional burden should be assessed in costs, which is relatively easy in the case of taxes. For instance, depending on the cost of the actual product, a tax differential of 1 per cent may be considered to have a low

competitive effect, whereas a differential of 30 per cent would presumably result in a strong distortion of competition.

The quantitative effect of the measure may then be placed in relation to the competitive relationship. If the foreign and domestic entities are in a very close competitive relationship, then a very small quantitative effect of the measure -such as a small differential tax or a small administrative burden-may be sufficient to constitute a breach of the non-discrimination obligation. Conversely, if the market players only compete very remotely, then the quantitative effect of the measure needs to be of a higher intensity so as to amount to illegal discrimination. This rationale of placing the quantitative effect of the measure in relation to the competitive relationship is currently reflected in the national treatment provisions of articles III:2 GATT and 110 TFEU with regard to taxes. For instance, if the products are 'like' in terms of article III:2, first sentence, GATT (ie competing and physically similar), every even very small difference in taxation to the detriment of imported products meets the 'in excess of' requirement and thus violates national treatment; no *de minimis* exception is granted. n83 In contrast, if the products in question are not 'like', but nevertheless in direct competition or substitutable (ie competing regardless of physical differences), the requirements on the difference in taxation are more strict. In these cases, a supplemental *de minimis* tax on imported products is not sufficient to find a breach of GATT article III:2, second sentence, and, unlike in the case of the first sentence, the taxation must be construed so as to afford protection. n84

3. Ratio Analysis

Another very important aspect that needs to be taken into account for the weighing and balancing test is the competitive effect of the measure on domestic as compared to foreign market entities. A new regulatory measure may have a positive or a negative competitive effect on a concerned market entity, or it may have no competitive effect at all. The ratio analysis requires assessing how the positive, negative or neutral effect is distributed among the foreign and domestic market entities. Instead of imposing a pre-defined standard, such as the 'disproportionate disadvantage test' or the 'best treatment' approach, the adjudicating bodies should have the flexibility to weigh and balance the ratio in light of the competitive relationship, the relevant market and the form of the measure. For instance, a measure is likely to amount to unlawful discrimination if it negatively affects predominantly foreign market entities in a narrowly defined market (ie with strong competitive relationship and high demand elasticity). Conversely, on the other end of the spectrum would be a measure which negatively affects only few or one foreign market entity in a broadly defined market (ie low competitive relationships with low demand elasticity).

In sum, the higher the competitive relationship between the market entities which are affected by the measure, the fewer foreign entities need to be negatively affected for the measure to amount to unlawful discrimination ('best treatment' approach). Conversely, if the entities affected by the measure are only remotely in competition, then discrimination would only occur if the measure negatively affects predominantly foreign market entities ('disproportionate impact' approach).

4. Supply Substitutability and Temporal Considerations

A final aspect that may be taken into consideration when assessing the effect of a measure relates to the issue of supply substitutability and temporal markets. Supply substitutability focuses on the question of what costs and within which time frame a supplier could switch its production from product A to product B. This analysis is particularly pertinent to assess the market position of a company for purposes of antitrust law. In the context of non-discrimination, however, the focus lies not on the market position, but on the ability-in terms of cost and time -of the foreign market entity to escape the negative effect of the measure by, for instance, making its product compliant with the regulation under scrutiny. n85 More specifically, if a foreign producer is banned from importing its product because it fails to meet a new environmental standard,

then the discriminatory effect could be mitigated by the fact that the foreign producer could relatively easily (ie at low costs and within a short period of time) switch its production from the non-compliant to a compliant product. Consequently, high supply substitutability could be considered as a factor supporting the conclusion that a measure does

not amount to unlawful discrimination. Ideally, the costs for the foreign market entity to switch from a non-compliant to a compliant product or service should be viewed in relation to the importance and value of the policy objective pursued by the measure.

E. Regulatory Purpose of the Measure

A final element which may be taken into consideration is the regulatory purpose of the measure under scrutiny. Importantly, the regulatory purpose should have its own value and should not be incorporated into the analysis of the previous elements.

1. Protectionist Purpose

It is up to the complainant to produce evidence of a protectionist purpose. In the rare cases where *direct evidence* shows that a measure was adopted with the aim to pursue a protectionist purpose, such evidence should be considered as a very strong-albeit not by itself decisive-indication that the measure amounts to unlawful discrimination. Direct evidence could be obtained from official documents or press coverage related to the legislative history of the measure.

In most cases the complainant is more likely to produce *circumstantial evidence* pointing towards protectionist intent of the responding government. However, the most important type of circumstantial evidence is the effect of the measure which is already taken into account as its own element. In addition, circumstantial evidence could relate to the design, structure and application of a measure. n86 Elements to be considered are, for instance, the purpose and objective of the government and legislature 'to the extent that they are given objective expression in the statute itself', n87 unexplained changes in drafts during the legislative history n88 or the application of differential standards. n89

Finally, the absence of a credible non-protectionist purpose could also be considered as circumstantial evidence of a protectionist purpose.

2. Non-Protectionist Purpose

While the complainant seeks to show protectionism, the respondent may submit evidence demonstrating that the measure was adopted with the objective to protect a public interest, such as health, morals, public order, environment, natural resources etc. Such an alleged non-protectionist purpose must not only be balanced with the previous elements, but it must also be analysed under the principle of necessity or, more broadly, the principle of proportionality.

a) Importance of the Public Interest

The contracting parties have it in their hands to negotiate either an exhaustive or an enumerative list of public interests that may be protected in violation of a non-discrimination obligation. Considering that the need for the protection of unforeseen interests may arise at short notice, an open list of public interests appears to be preferable. In many cases the contracting parties would have great difficulty to find a consensus for amending the exceptions of an existing international economic agreement. However, in order to prevent overreaching justifications, the adjudicating bodies need to have the authority to evaluate the objective value or importance of the allegedly protected public interest. This may be a difficult task as it entails second guessing the national values of sovereign contracting parties with different institutional, political and religious traditions. n90 Consequently, the value of the pursued public interest cannot by itself be a decisive element in the analysis, but more a consideration that reinforces the tendencies of the previous elements. For instance, the protection of a minor public interest may reinforce the conclusion that a measure is not discriminatory in cases where the measure differentiates de facto between remotely competing market entities and has a low qualitative and quantitative effect on few foreign entities. Conversely, a universally very important public interest, such as human life and health, may be used to justify measures which differentiate on a formal basis or between strongly competing market entities to the detriment of predominantly foreign entities.

b) Nexus between the Public Interest and the Respondent's Territory

Following the general territoriality principle of public international law, a sovereign State is generally prohibited from adopting extraterritorial measures which infringe the sovereignty of another State. Consequently, the question whether and to what extent a nexus exists between the policy objectives pursued by the regulatory State and its territory needs to be taken into account under the aspect of regulatory purpose. This nexus is usually existent in cases where a measure concerns a foreign investor or service supplier who is present on the territory of the regulatory State. In the case of trade in goods, no concerns of territoriality arise if the measure sets certain standards in order to pursue a domestic non-economic public interest, such as the protection of domestic health, environment or consumers. In contrast, an importing State may be inhibited from restricting the import of products for reasons of insufficient process or production methods used in the State of production, unless there is a nexus between the 'extraterritorial' value and the domestic territory. For instance, in the case *US-Shrimp* the Appellate Body recognized a sufficiently strong nexus between the United States' import ban on shrimp caught without a turtle excluder device and the United States territory due to the fact that sea turtles sought to be protected may migrate to the waters subject to United States jurisdiction.ⁿ⁹¹ The ban was designed to protect exhaustible natural resources under article XX(g) GATT.

c) Nexus between the Measure and the Objective

Finally, the most important element that needs to be considered in the analysis of the regulatory purpose is the extent of a nexus or causality between the trade restrictive measure and its objective. Such a nexus is crucial in order to avoid the risk that a measure under scrutiny is overly trade restrictive in view of achieving the pursued objective. For instance, a total import ban of cigarettes may not be necessary to achieve certain objectives related to ensure the quality or to reduce consumption of cigarettes.ⁿ⁹² This aspect is currently embodied in the general exceptions clauses, which require that a measure must be 'necessary to protect' or 'related to the protection of' a certain public interest (see eg articles XX GATT and XIV GATS). The factor-based approach to non-discrimination proposed here would not prescribe a fixed threshold, such as 'necessity' or 'related to', but it would allow the adjudicating bodies to weigh and balance nexus-related factors in light of the analysis of the previous factors. The necessity test, for instance, requires a process of weighing and

balancing a series of factors, namely (i) the relative importance of the interest protected by the measure, (ii) the contribution of the measure to the protection of the policy objective and the public interest, (iii) the impact of the measure on trade, (iv) the existence of alternative measures in light of (v) the level of protection chosen by the responding Member (eg zero-risk level).ⁿ⁹³ Under the factor-based approach, the arbitral tribunals would not be bound by a specific threshold, such as 'necessary' or 'related to', but they would add the extent to which the measure contributes to the protection of the policy objective as an additional factor to the overall analysis.

IV. Summary and conclusions: A flexible range of standards

This article analysed how each of the legal elements 'less favourable treatment', 'likeness' and 'regulatory purpose' constituting the non-discrimination obligation may be subject to different interpretations and how each interpretation affects the scope and integrative effect of the non-discrimination principle. Depending on how each element is interpreted and combined with the respective interpretation of another element, the non-discrimination obligation can be extremely intrusive or very permissive.ⁿ⁹⁴ The following interpretations are possible:

Comparator Clause

- Under the objective standard the *tertium comparationis* may consist of factors such as physical characteristics, tariff classification, end-uses, environmental impact or even the act of exportation;
- Under the *economic* standard, the *tertium comparationis* is defined by economic parameters indicating the extent to which the market actors are in a competitive relationship;
- Under the *subjective* standard the *tertium comparationis* is defined by the regulatory purpose of the measure under

scrutiny;

- The objective, economic and subjective standards of 'likeness' may be applied individually or in combination.

Less Favourable Treatment

- The *disproportionate disadvantage test* analyses whether the group (as defined by the comparator clause) of foreign market participants is disproportionately disadvantaged as compared to the domestic one. Different thresholds of disproportionality are theoretically possible;

- The *'best treatment' approach* leads to an obligation to grant the best treatment accorded to any domestic market participant to all foreign 'comparable' (as defined by the comparator clause) market participants;

- The *subjective standard* of 'less favourable treatment' takes into account the regulatory purpose in order to determine the *true basis* of the differential treatment.

Regulatory Purpose

- The regulatory purpose may be considered as part of the non-discrimination obligation itself (definitional stage), either (i) within the comparator clause (aims [and effects] test), (ii) within the 'less favourable treatment' element, or (iii) as its own substantive element;

- Alternatively, the regulatory purpose may be considered as part of a general exceptions clause (justificational stage).

Considering this wide variety of different possible interpretations and the lack of any guidance in most international economic law treaties, it would be preferable for such treaties explicitly to empower the adjudicating bodies to construe the non-discrimination obligation on a case-by-case basis. At the same time, the treaty should spell out the factors which the adjudicating bodies need to take into consideration under an overall weighing and balancing test. This article suggests an approach along the following lines:

First, the treaty should specifically spell out that all forms of de jure discrimination are considered a prima facie violation of the non-discrimination obligation and thus create a presumption of illegality. The respondent may only justify the measure by showing (i) that it has no impact on the competitive relationship or (ii) that it protects an important public interest and that there is a strong nexus between the measure and its objective as well as between the measure and the respondent's territory.

Second, prima facie violation of the non-discrimination obligation may also be established in case the complainant is able to produce direct evidence proving the protectionist intent on behalf of the respondent. Measures specifically designed to protect certain domestic market actors would not be justifiable. However, as a complainant will hardly ever be able to produce such evidence, this intent-based standard of non-discrimination is likely to remain theoretical.

Third, with regard to measures not formally differentiating on the basis of origin, the treaty should explicitly state that such measures are subject to an

analysis of their protectionist effect in the market place. The following criteria need to be taken into consideration for the assessment of the measure's protectionist effect:

- The extent of the competitive relationship between disadvantaged foreign market actors and domestic market actors;
- Form of the measure (ie individual and concrete decision or general and abstract regulation);
- The measure's qualitative effect on competition (ie parameters of competition restricted by the measure);
- The measure's quantitative effect on competition (ie extent of the additional burden or the competitive disadvantage imposed by the measure);

- The measure's effect on domestic vs foreign market entities (ie ratio of negative competitive impact between domestic and foreign market participants);

- Supply substitutability (ie costs and time for foreign market actors to escape the negative competitive impact of the

measure);

- Regulatory purpose of the measure, taking into account:

- (i) the relative importance of the public interest sought to be protected;
- (ii) the nexus between the measure and its objective; and
- (iii) the nexus between the measure and the regulatory country's territory.

The adjudicating bodies need to conduct a weighing and balancing test on the basis of these factors in order to determine whether a measure amounts overall to unlawful de facto discrimination. For instance, a clear violation of the non-discrimination obligation would occur in case (i) a measure affects only or predominantly imported market entities (ratio analysis) (ii) and constitutes a strong negative impact on an important parameter of competition (quantitative and qualitative elements) (iii) in a narrowly defined relevant market consisting of products, services or investments with high demand substitutability (competitive relationship); moreover (iv) foreign participants are unable to substitute their good or service with another one not subject to the trade restrictive measure (supply substitutability) and, finally, (v) the measure does not pursue a legitimate policy objective (regulatory purpose).

In practice it would be very rarely the case that all the factors clearly show that the measure under scrutiny either violates or complies with a non-discrimination obligation. Hence, under the factor-based approach suggested here it would still be difficult to accurately predict whether a given trade restrictive measure violates a certain non-discrimination obligation. However, the main advantage of this approach is that at least there would be significant legal security with regard to the applicable legal test and, to a certain degree, the legal standard of non-discrimination obligations. Due to the clarity of the legal test, it would be much easier for the parties in a dispute to make their case by bringing forward the pertinent arguments. At the same time, such a factor

based-test for non-discrimination is sufficiently flexible to allow adjudicating bodies to consider the framework and purpose of the agreement in which the obligation is found. Most importantly, the arbitral tribunals could set the appropriate standard in light of the fact that trade agreements aim to protect competitive opportunities and equal conditions of competition, whereas investment protection agreements are designed to protect the value of a specific investment.

Finally, it is important to point out that the factor-based solution for non-discrimination provisions entails the risk that the analysis will focus much more on the purpose and necessity of a measure than on the elements of differential treatment and comparability. In fact, adjudicating bodies may be tempted to qualify a measure as discriminatory if the measure does not pursue a legitimate policy objective or if the respondent fails to demonstrate a nexus between an alleged objective and the measure. Hence, arbitral tribunals must pay attention not to overemphasize the possible absence of a legitimate purpose in comparison to the elements of 'likeness' and 'less favourable treatment', in order to avoid undue extension of the non-discrimination provision into a more integrative obligation of non-restriction. The interpretation and application of a non-discrimination obligation must respect the contracting parties' intended level of economic integration.

FOOTNOTES

n1 G de Búrca, 'Unpacking the Concept of Discrimination in EC and International Trade Law' in C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 181, 182.

n2 Adopted 23 May 1969, entered into force 27 January 1980: 1155 UNTS 331.

n3 As a notable exception N DiMascio and J Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 AJIL 48.

n4 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, (concluded 15 April 1994) 1867 UNTS 14; including the General Agreement on Tariffs and Trade 1994 (GATT) (concluded 15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187 and the General Agreement on Trade in Services (GATS) (concluded 15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, (1994) 33 ILM 1168.

n5 Consolidated version, as amended by the Treaty of Lisbon, OJ 2008 C 115, 47-199; formerly Treaty establishing the European Community 'TEC' (Consolidated version, as amended by the Treaty of Amsterdam), OJ 2002 C 325, 33-184.

n6 Concluded 17 December 1992 by the US, Canada and Mexico, in force 1 January 1994: 107 Stat 2057; (1993) 32 ILM 605.

n7 BITs referred to in this paper are available at <http://www.unctadxi.org/templates/DocSearch_____779.aspx>.

n8 The approach of considering different elements on a case-by-case basis in order to assess whether a measure amounts to unlawful discrimination has been supported most prominently by J Pauwelyn, 'The Unbearable Lightness of Likeness' in M Panizzon and others (eds), *GATS and the Regulation of International Trade in Services* (CUP 2008).

n9 See also JY Qin 'Defining Nondiscrimination under the Law of the World Trade Organization' (2005) 23 Boston U Intl LJ 215, 223.

n10 WTO Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)* (adopted 5 April 2001) WT/DS135/AB/R [100].

n11 L Ehring, 'De Facto Discrimination in World Trade Law; National and Most-Favoured- Nation Treatment-or Equal Treatment?' (2002) 36 J of World Trade 921; Pauwelyn (n 8) 358; F Ortino, 'From "Non-discrimination" to "Reasonableness": A Paradigm Shift in International Economic Law' (*Jean Monnet Working Paper* 2005), available at <<http://ssrn.com/abstract=922524>>.

n12 De Búrca (n 1); H Horn and J H Weiler, 'European Communities-Measures Affecting Asbestos and Asbestos-Containing Products' (2004) 3 World Trade Rev 129, 131ff; Ortino (n 11) 14.

n13 See art III:2 (second sentence) GATT in connection with *Ad* art III:2 GATT.

n14 For an overview of comparator clauses in BITs see eg A Newcombe and L Paradell, *Law and Practice of Investment Treaties-Standards of Treatment* (Kluwer 2009) 160; UNCTAD, *National Treatment* (NY/Geneva: United Nations Publication 1999) 28ff, <<http://www.unctad.org/Templates/webflyer.asp?docid=191&intItemID=2322&lang=1>>.

n15 UK-Belize BIT (1982) art 3(1).

n16 US-Honduras BIT (1995) art II(1); US-Senegal BIT (1983), art II(2).

n17 China-Iran BIT (2000) art 4(1).

n18 Ethiopia-Turkey BIT (2000) art 3(1).

n19 On the *tertium comparationis* for non-discrimination in trade law see J English, *Wettbewerbsgleichheit im grenz[252]berschreitenden Handel: Mit Schlussfolgerungen f[252]r indirekte Steuern* (Mohr Siebeck GmbH & Co 2008) 293, 412 ff; in constitutional law see M Oesch, *Differenzierung und Typisierung-Zur*

Dogmatik der Rechtsgleichheit in der Rechtsetzung (Stmpfli Verlag; Auflage 2008) 34-38, with references.

n20 For an overview see also M Melloni, *The Principle of National Treatment in the GATT: A Survey of the Jurisprudence, Practice and Policy* (Emile Bruylant 2005) 122-25.

n21 GATT Panel Report, *Treatment by Germany of Imports of Sardines (Germany-Sardines)*, G/26 (adopted 31 October 1952) BISD 1S/53 [13]; GATT Panel Report, *Canada/Japan-Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber (Japan-SPF Dimension Lumber)*, L/6470 (adopted 19 July 1989) BISD 36S/167 [5.13] ff; GATT Working Party Report, *The Australian Subsidy on Ammonium Sulphate (EEC-Animal Feed Proteins)*, GATT/CP.4/39 (adopted 3 April 1950) BISD II/188, [4.2].

n22 GATT Working Party Report, *Border Tax Adjustments*, L/3464 (adopted 2 December 1970) BISD 18S/97, [18].

n23 eg Case 27/67 *Fink-Frucht* [1968] ECR 223.

n24 LCIA Arbitral Tribunal, Arbitral Award, *Occidental Exploration and Production Company v Ecuador*, LCIA Case No UN3467, 1 July 2004 (US-Ecuador BIT).

n25 *ibid* paras 168, 173, 176 ff.

n26 *ibid* paras 79, 168. The *Occidental* award has been subject to substantial criticism, see eg J Kurtz, 'The use and abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2005) 20 EJIL 749, 764ff; CQ McLachlan, L Shore and M Weiniger, *International Investment Arbitration-Substantive Principles* (Gruyter; Auflage 2007) 252; Newcombe and Paradell (n 14) 169-70; SD Franck, '*Occidental Exploration & Production Co. v Republic of Ecuador*. Final Award. London Court of International Arbitration Administered Case No. UN 3467' (2005) 99 AJIL 675, 679; DiMascio and Pauwelyn (n 3) 85.

n27 For the WTO see eg GATT Panel Report (n 21) [4.3]; for the EU see eg Case 170/78 *Commission v UK*, para 14 (competitive relationship between wine and beer).

n28 At least for purposes of art III:2 GATT it appears that the 'like products' concept is interpreted more narrowly than the 'directly competitive or substitutable' standard in that it requires both a competitive relationship and physical similarities between the products.

n29 *EC-Asbestos* (n 10) [99]: 'a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products'.

n30 See on this issue NF Diebold, 'Assessing Competition in International Economic Law-A Comparison of "Market Definition" and "Comparability"' (2011) 32 L Issues of Economic Integration 115, 123.

n31 Case 106/84 *Commission v Denmark* [1986] ECR 833, para 12: 'it is necessary first to consider certain objective characteristics ..., and secondly to consider whether or not both categories of beverages are capable of meeting the same need from the point of view of consumers'.

n32 See also NF Diebold, *Non-discrimination in International Trade in Services-'Likeness' in WTO/GATS* (CUP 2010) 117ff; Englisch (n 19) 414; PC Mavroidis, "'Like Products': Some Thoughts at the Positive and Normative Level" in T Cottier and PC Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law: Past, Present, and Future* (University of Michigan Press 2000) 126-27; JA Marchetti and PC Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution', (2004) 5 Eur Business Organization L Rev 511, 533; R Bhala, *International Trade Law:*

Interdisciplinary Theory and Practice, (3rd edn, LexisNexis/Matthew Bender 2007), 1589; EC submission in WTO Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling)* (20 April 2005) WT/DS285/R [4.40].

n33 In the more recent cases 'likeness' was either undisputed among the parties or the measure differentiated on the basis of origin; the adjudicating bodies thus refrained from ruling on the issue of 'like products'; with regard to border measures see eg WTO Panel Reports, *Canada-Certain Measures Affecting the Automotive Industry (Canada-Autos)* (19 June 2000) WT/DS139/R, WT/DS142/R [10.16]; *European Communities-Regime for the Importation, Sale and Distribution of Bananas [Complaint by the United States] (EC-Bananas III [US])* (25 September 1997) WT/DS27/R/USA [7.62]; with regard to internal measures see eg WTO Panel Report, *United States-Import Measures on Certain Products from the European Communities (US-Certain EC Products)* (10 January 2001) WT/DS165/R and Add.1 [6.53]f; with regard to both internal and border measures see eg WTO Panel Report, *Indonesia-Certain Measures Affecting the Automobile Industry (Indonesia-Autos)* (23 July 1998) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, and Corr. 3 and 4, [14.113].

n34 RE Hudec, "'Like Product": The Differences in Meaning in GATT Articles I and III', in Cottier and Mavroidis (eds) (n 32) 108-09; WJ Davey and J Pauwelyn, 'MFN Unconditionality', in Cottier and Mavroidis (eds) (n 32) 35; JH Jackson, WJ Davey and AO Sykes, *Legal Problems of International Economic Relations-Cases, Materials and Text* (5th ed, West 2008) 489 *in fine*; more nuanced MJ Trebilcock and R Howse, *The Regulation of International Trade* (n3 ed, Routledge 2005) 66-67; WM Choi, *'Like Products' in International Trade Law-Towards a Consistent GATT/WTO Jurisprudence* (OUP 2003) 97; sceptical also S Charnovitz, 'Green Roots, Bad Pruning: GATT Rules and their Application to Environmental Trade Measures' (1994) 7 *Tulane Environmental LJ* 299, 323; Qin (n 9) 241.

n35 Favouring an economic interpretation of 'likeness' in GATS art II: Diebold (n 32) 135ff; A Lang, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry' (2004) 7 *J of Intl Economic L* 822 822-23; C Pitschas, 'GATS', in J Prie[#223] and GM Berrisch (eds), *WTO-Handbuch-World Trade Organisation* (Beck Juristischer Verlag 2003) 495, 514.

n36 *SD Myers v Canada*, para 244; *Pope & Talbot v Canada*, para 78; *Feldman v Mexico*, para 171; *ADM v Mexico*, paras 198ff; *Corn Products v. Mexico*, paras 121-22; but see *UPS v Canada*, paras 102, 173ff; *Methanex v US*, part IV(B), paras 30ff, in particular para 37; all available at <www.naftaclaims.com>.

n37 Note that some commentators understand the aim and effects test as a self-standing substantive element within non-discrimination, as opposed to a variation of the 'likeness' element as suggested here; see eg M Krajewski, *National Regulation and Trade Liberalization in Services -The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer 2003) 100.

n38 GATT Panel Report, *United States-Measures Affecting Alcoholic and Malt Beverages (US-Malt Beverages)* (19 June 1992) DS23/R, BISD 39S/206 [5.23-26], [5.70-77]; see also GATT Panel Report, *United States-Taxes on Automobiles (US-Taxes on Automobiles)* (11 October 1994 unadopted) DS31/R [5.10]; both cases commented by RE Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test' (1998) 32 *Int'l Law* 619, 627.

n39 WTO Appellate Body Report, *Japan-Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages II)* (1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R [8]; *EC-Bananas III (US)* (n 33) [241].

n40 WTO Panel Report, *United States-Measures Affecting the Production and Sale of Clove Cigarettes (US-Clove Cigarettes)* (2 September 2011) WT/DS406/R [7.244]: 'As we have explained, we believe that such legitimate objective must permeate and inform our likeness analysis'.

n41 On chapter 12 trade in services NAFTA Arbitral Panel, *Final Report in the Matter of Cross- Border*

Trucking Services (6 February 2001) USA-MEX-1998-2008-01 [249]ff; on chapter 11 investment protection *Pope & Talbot v Canada*, para 78; *SD Myers v Canada*, paras 248 ff; *Feldman v Mexico*, paras 181ff; *Corn Products v Mexic*, paras 120, 136; T Weiler, 'Prohibitions Against Discrimination in NAFTA Chapter 11', in T Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational Publishers 2004) 37 ff, referring to a 'like circumstances exception'.

n42 Norway withdrew its model-BIT in June 2009, see Investment Treaty News, June 2009, <<http://www.iisd.org/itn/?view=archives>>; former draft version available at <<http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc>>.

n43 See eg art 3 of the German model-BIT (1998), reproduced in UNCTAD, *International Investment Instruments: A Compendium*, vol VII (NY/Geneva: United Nations Publisher 2002), 298, available at <http://www.unctad.org/en/docs/dite3vol7_en.pdf>; also Switzerland-India BIT (1997) art 4.

n44 In this sense see eg *Nykomb Synergetics v Latvia*, 34 (on art 10[1] of the Energy Charter Treaty): 'in evaluating whether there is discrimination in the sense of the Treaty one should only "compare like with like"; *Consortium RFCC v Morocco*, para 53 (on Italy-Morocco BIT (1990)); also Newcombe and Paradell (n 14) 160; OECD, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text, Negotiating Group on the Multilateral Agreement on Investment*, DAF/MAI(98)8/REV1 (1998) 11, <<http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf>>.

n45 In this sense R Adlung and M Molinuevo, 'Bilateralism in Services Trade: Is There Fire Behind the (BIT-) Smoke?' (2008) 11 J of Intl Economic L 365, 383-84; C Stadler, *Die Liberalisierung des Dienstleistungshandels am Beispiel der Versicherungen: Kernelemente bilateraler und multilateraler Ordnungsrahmen einschliesslich des GATS* (Duncker & Humblot 1992) 141; UNCTAD (n 14) 34.

n46 The first report to adopt this standard was GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery (Italy-Agricultural Machinery)*, L/833 (23 October 1958) BISD 7S/60 [12]; see also W Zdouc, *Legal Problems Arising under the General Agreement on Trade in Services-Comparative Analysis of GATS and GATT* (Difo-Druck 2002) 172-73; F Ortino, 'The Principle of Non-Discrimination and its Exceptions in GATS' in K Alexander and M Andenas (eds), *The World Trade Organization and Trade in Services* (Martinus Nijho ff 2008) 175.

n47 But see, *Pope & Talbot v Canada*, para 57.

n48 This test is also referred to as 'asymmetric impact test', 'disparate impact view', 'discriminatory effect test', 'aggregate comparison approach' or 'narrow' standard of *de facto* discrimination; see eg Ehring (n 11) 924-25; DH Regan, 'Regulatory Purpose and "Like Products "in Article III:4 of the GATT (With Additional Remarks on Article III:2)' (2002) 36 J of World Trade 443, 470; Davey and Pauwelyn (n 34) 38-41; J Pauwelyn, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' (2004) 15 EJIL 575, 583; F Ortino, 'WTO Jurisprudence on *De Jure* and *De Facto* Discrimination' in F Ortino and EU Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (Kluwer 2004) 260; Krajewski (n 37) 108-09.

n49 WTO Panel Report, *EC-Asbestos* WT/DS135/R and Add. 1 [8.155], as modified by WTO Appellate Body Report, *EC-Asbestos* (n 10) [100] (emphasis partly added); also *US-Clove Cigarettes* (n 40) [7.269].

n50 Comprehensively English (n 19) 394, 428ff; also Ehring (n 11), 942-46; Davey and Pauwelyn (n 34) 38-41, discussing whether the 'discriminatory effect' should play a role in the analysis of arts III and I GATT; Ortino (n 4848) 258-62; Ortino (n 46) 179-85; DiMascio and Pauwelyn (n 3) 66; F Ortino, *Basic Legal Instruments for the Liberalisation of Trade-A Comparative Analysis of EC and WTO Law* (Hart Publishing 2004) 336ff; S Puth, *WTO und Umwelt: Die Produkt-Prozess-Doktrin* (Duncker u. Humblot GmbH 2003) 251; Pauwelyn (n 8) 364.

n51 Case 168/78 *Commission v French Republic* [1980] ECR 00347, para 41; (nb 'come' should read 'comes'). For an overview and references to ECJ jurisprudence see Ehring (n 11) 948-49.

n52 This test is also referred to as 'diagonal test'.

n53 Same opinion Ortino (n 11) 22-24; TJ Grierson-Weiler and IA Laird, 'Standards of Treatment' in P Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 293; DiMascio and Pauwelyn (n 3) 77; AK Bjorklund, 'National Treatment' in A Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 54-56.

n54 Grierson-Weiler and Laird (n 53) 293.

n55 *Pope & Talbot v Canada*, paras 42, 43-72; see also *ADM v Mexico*, para 205: 'Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances'; *Loewen v US*, para 140: 'What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant'; *Methanex v US*, part IV(B), para 21: 'the investor or investment of another party is entitled to the most favourable treatment accorded to some members of the domestic class'; less clear *Thunderbird v Mexico*, para 177, but see Separate Statement by TW W[#228]lde, *Thunderbird v Mexico*, para 105.

n56 Note, however, that in certain circumstances a foreign producer of products may also suffer actual damages, for instance if goods or services imported by a state-controlled entity remain unpaid.

n57 See eg DAR Williams, 'Jurisdiction and Admissibility' in Muchlinski and others (eds) (n 53) 878ff, referring to awards qualifying promissory notes, loans and bank guarantees as investment; see also V Heiskanen, 'Of Capital Import: The Definition of "Investment" in International Investment Law' in AK Hoffmann (ed), *Protection of Foreign Investment through Modern Treaty Arbitration*, ASA Special Series No 34 (2010) 56, arguing that in certain cases an investment claim may arise out of an ordinary commercial transaction.

n58 WTO Panel Report (*EC-Asbestos*) (n 49) [8.155]ff; Ehring (n 11) 942-43.

n59 See *SD Myers v Canada*, para 252; similarly also *Corn Products v Canada*, para 138, which examined both effect and intent of the measure.

n60 R Howse and E Tuerk, 'The WTO Impact on Internal Regulations' in G De Búrca and J Scott (eds), *The EU and the WTO: Legal Constitutional Issues* (Hart Publishing 2001) 299; R Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A new Legal Baseline for the Trade and Environment Debate' (2002) *Columbia J of Environmental L* 493, 515; A Porges and JP Trachtman, 'Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects' (2003) 37 *J of World Trade* 783, 796; Trebilcock and Howse (n 34) 103; Horn and Weiler (n 12) 147; Lang (n 35) 831; see also Ortino (n 48) 261.

n61 Also rejecting this interpretation Ehring (n 11) 945-46.

n62 WTO Panel Report, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products* (21 November 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1 [7.2514] (emphasis added).

n63 *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS381), Answers of the US to the Second Set of Questions from the Panel to the Parties, 19 January 2011, paras 32ff, <<http://www.ustr.gov/node/5714>>.

n64 WTO Panel Report, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna II)* (15 September 2011) WT/DS381/R [7.305] (emphasis added).

n65 *ibid* [7.310].

n66 De Búrca (n 1) 191, speaks of 'definitional stage' and 'justificatory stage'.

n67 According to WTO jurisprudence on GATT art III:2, second sentence, the element 'applied so as to afford protection' is incorporated in the legal test by reference to paragraph 1 of art III and must thus be separately analysed, *Japan-Alcoholic Beverages II* (n 39) 25 ff.

n68 *ibid* 29: 'It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, "applied to imported or domestic products so as to afford protection to domestic production". This is an issue of how the measure in question is applied'; confirmed in WTO Appellate Body Reports, *Chile-Taxes on Alcoholic Beverages (Chile-Alcoholic Beverages)* (12 January 2000) WT/DS87/AB/R, WT/DS110/AB/R [61]f, [71]; *Korea-Taxes on Alcoholic Beverages (Korea-Alcoholic Beverages)* (17 February 1999) WT/DS75/AB/R, WT/DS84/AB/R [149].

n69 WTO Panel Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages (Mexico-Taxes on Soft Drinks)* (24 March 2006) WT/DS308/R [8.91]: 'the declared intention of legislators and regulators of the Member adopting the measure should not be totally disregarded'; *Chile-Alcoholic Beverages* (n 68) [71]: 'The conclusion of protective application reached by the Panel becomes very difficult to resist, in the absence of countervailing explanations by Chile'; WTO Appellate Body Report, *Canada-Certain Measures Concerning Periodicals (Canada-Periodicals)* (30 July 1997) WT/DS31/AB/R [30]ff, referring to statements by the Canadian government about the protectionist purpose of the measure.

n70 On the general exceptions clause see eg NF Diebold, 'The Morals and Order Exceptions in WTO Law' (2008) 11 J of Intl Economic L 43, 44.

n71 See eg Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (concluded 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401; 33 ILM 1226 (1994), art 3.2 in fine: 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

n72 Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung ffl#252jr Branntwein* [1979] ECR 649; T Cottier, P Delimatsis and NF Diebold, 'Commentary to Article XIV' in R Wolfrum and others (eds), *WTO-Trade in Services: Max Planck Commentaries on World Trade Law*, vol 6 (Brill 2008) 287, 297-98.

n73 See Parts II.A.3, II.B.3 and II.C.1.

n74 Scholars oftentimes criticize the implicit consideration of a measure's regulatory purpose in a non-discrimination analysis, see eg F Roessler, 'Beyond the Ostensible-A Tribute to Professor Robert Hudec's Insight on the Determination of the Likeness of Products under the National Treatment Provisions of the General Agreement on Tariffs and Trade' (2003) 37(4) JWT 771, 781; Diebold (n 32) 84, with references.

n75 See eg Appellate Body Report, *Australia-Measures Affecting the Importation of Apples from New Zealand* (17 December 2010) WT/DS367/AB/R [173]: the purpose of a measure is to be determined 'not only from the objectives of the measure as expressed by the responding party, but also from the text and structure of the relevant measure, its surrounding regulatory context, and the way in which it is designed and applied.' (concerning the SPS Agreement); also Diebold (n 32) 87ff, with references.

n76 See (n 72).

n77 Art 56 TFEU reads: 'restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'.

n78 Case C-76/90 *S[228]ger v Dennemeyer & Co. Ltd.* [1991] ECR I-04221, para 12 (emphasis added); Case C-17/00 *De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445, para 29; Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803, para 14; S O'Leary, 'The Free Movement of Persons and Services' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 1999) 402; M Holoubek, 'EGV Artikel 49/50' in J Schwarze and others. (ed), *EU-Kommentar* (2nd ed, Nomos Verlagsges.Mbh 2009), 726 ff.

n79 Note that some commentators suggest 'necessity' as an independent substantive standard, while others see 'necessity' as an additional element to 'less favourable treatment' and 'likeness' within non-discrimination; see eg A Mattoo, 'National Treatment in the GATS-Corner-Stone or Pandora's Box?' (1997) 31(1) *J of World Trade* 107, 131ff; A Mattoo and A Subramanian, 'Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution', (1998) 1 *JIEL* 303, 315-16; A Mattoo, 'Shaping Future GATS Rules for Trade in Services', *World Bank Policy Research Working Paper* (2001), 15, <<http://ssrn.com/abstract=632665>>; G Verhoosel, *National Treatment and WTO Dispute Settlement-Adjudicating the Boundaries of Regulatory Autonomy* (Hart Publishing 2002), 51ff; M Cossy, 'Some Thoughts on the Concept of "Likeness" in the GATS' in Panizzon and others (eds) (n 8) 327, 346ff; A Mattoo, 'MFN and the GATS' in Cottier and Mavroidis (eds) (n 32) 78; on this issue in general but rejecting a broad 'necessity' approach Krajewski (n 37) 109-10; M Krajewski and M Engelke, 'Commentary to Article XVII' in Wolfrum and others (eds) (n 72) 396, 412.

n80 See eg art 16 of the EC Services Directive 2006/123/EC, OJ 2006 L 376/36.

n81 Pauwelyn (n 8) 361-62, 366-67; DiMascio and Pauwelyn (n 3) 83; see also S Lester and B Mercurio, *World Trade Law: Text, Materials and Commentary* (Hart 2008) 321.

n82 GNS, Report to the Trade Negotiations Committee meeting at Ministerial level, Montreal, December 1988, MTN.GNS/21, 25 November 1988, para 11.

n83 In case of de facto discrimination, it could even be argued that the standard of 'less favourable treatment' for art III:2, first sentence, follows the diagonal test, meaning that the tax violates GATT even if only one imported product is taxed more heavily. This broad interpretation of 'less favourable treatment' is counterbalanced with a very narrow interpretation of 'likeness'.

n84 *Japan-Alcoholic Beverages II* (n 39) 28.

n85 At least one WTO Panel considered this aspect of 'adaptation costs' under the element of 'less favourable treatment', *US-Tuna II* (n 64) [7.342]: 'We do not exclude that costs of adaptation to a technical regulation may be pertinent to an examination of whether less favourable treatment is being afforded with respect to a technical regulation'; see also Diebold (n 30) 129 ff.

n86 See R Howse and DH Regan, 'The Product/Process Distinction-An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11 *EJIL* 249, 265, who argue that objective evidence by itself may be sufficient, but that *all* evidence-subjective and objective-must be 'carefully evaluated'.

n87 *Chile-Alcoholic Beverages* (n 68) [62]; commented by H Horn and PC Mavroidis, 'Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination' (2004) 15 *EJIL* 39, 49; on objective assessment of intent also Cossy (n 79) 348.

n88 WTO Appellate Body Report, *Australia-Measures Affecting Importation of Salmon (Australia-Salmon)*

(6 November 1998) WT/DS18/AB/R [170].

n89 *ibid* [176]: 'The Panel merely stated its doubts on whether Australia applies similarly strict sanitary standards on the internal movement of salmon products within Australia as it does on the importation of salmon products and considered that as a factor which can be taken into account in the examination under the third element of Article 5.5'.

n90 Such an evaluation of domestic values may also be required under current general exceptions clauses, for instance when the adjudicating bodies are asked to decide whether a protected value falls under the public morals or public order, see Diebold (n 70) 60 ff.

n91 Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)* (6 November 1998) WT/DS58/AB/R [33].

n92 See eg GATT Panel Report, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand-Cigarettes)* (7 November 1990) DS10/R, BISD 37S/200 [81].

n93 WTO Appellate Body Reports, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea-Various Measures on Beef)* (10 January 2001) WT/DS161/AB/R, WT/DS169/AB/R [164]; *EC-Asbestos* (n 10) [172]; *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling)* (20 April 2005) WT/DS285/AB/R [306]; *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes, (Dominican Republic-Import and Sale of Cigarettes)* (19 May 2005) WT/DS302/AB/R [70].

n94 For a different categorization see eg Horn and Weiler (n 12) 131ff; Ortino (n 11), 14; Diebold (n 32) 94 ff.

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THE "MINIMUM STANDARD" OF THE TREATMENT OF ALIENS*

Edwin Borchard †

IN its note of August 3, 1938, the Mexican Government, by its Minister of Foreign Affairs, contested the right of the United States to demand compensation for the agricultural lands of American citizens expropriated by Mexico since 1927. It asserted that the countries of this continent have vigorously maintained

"the principle of equality between nationals and foreigners, considering that the foreigner who voluntarily moves to a country . . . in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity."¹

The Mexican Minister of Foreign Affairs then invoked article 9 of the Convention on the Rights and Duties of States signed at Montevideo, 1933, which provides for complete jurisdiction of states within their national territory over all inhabitants, to the effect that

"nationals and foreigners are under the same protection of the law and the national authorities, and foreigners may not claim rights other than or more extensive than those of nationals."²

* Revision of an address made before the American Society of International Law, reprinted in part by permission from the Proceedings of the American Society of International Law, 1939.—*Ed.*

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¹ The entire correspondence is printed in 32 AM. J. INT. L. SUPP. 181-207 (1938). The above quotation is at page 188.

² U. S. DEPT. STATE, TREATY SER. No. 881 (1935).

Secretary Hull in his reply of August 22nd paid tribute to the doctrine of equality but contended that it "invariably referred to equality in lawful rights of the person and to protection in exercising such lawful rights."³ He then expressed surprise at Mexico's announcement of the "astonishing theory" that this beneficent principle of equality should be invoked not "to protect both human and property rights" but to deprive and strip "individuals of their conceded rights." He denied that this was permissible because Mexican nationals were also despoiled. As to exposure to the same risks and the claim that aliens enjoy a privileged position by seeking to escape confiscation, Secretary Hull maintained that the Mexican doctrine of risk

"presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations."⁴

He denied that this was a claim of special privilege in contravention of the Montevideo treaty and maintained that confiscation could not be excused by the "inapplicable doctrine of equality."

During the meeting of the Committee of Experts for the Codification of International Law at Lima, Mr. Cruchaga Ossa of Chile contended that article 9 of the Montevideo Convention on the Rights and Duties of States⁵ made the equality of rights the maximum that could be claimed by any alien. He denied the existence of any "minimum standard" for the treatment of aliens; but remarked that even if there were one recognized in Europe the countries on this continent had in the first, second, fifth and seventh Inter-American Conferences committed themselves to the doctrine of absolute equality, which henceforth constituted the rule of law in the Americas. Although Chile had in 1930 conceded that a denial of justice gave a foreign government a privilege of intervening diplomatically on behalf of its nationals, Mr. Cruchaga in 1938 was driven by the logic of his own position to dispute the possibility of invoking diplomatic protection against denials of

³ 32 AM. J. INT. L. SUPP. 198 (1938).

⁴ *Ibid.*

⁵ The United States made a long reservation to this convention, reserving its rights under international law. U. S. Dept. State, Treaty Ser. No. 881 (1935). The reservation was not referred to by Mr. Hull in his reply of August 22, 1938. 32 AM. J. INT. L. SUPP. 191 (1938).

justice, because nationals could not enjoy it.⁶ On September 10, 1938, President Cardenas of Mexico attacked the whole conception of diplomatic protection as an impairment of national sovereignty.

Source of the Rights of Aliens

These positions require us to re-examine the whole structure of international law. If it is true that the doctrine of equality is the final test of international responsibility, then the source of international responsibility lies in municipal law. Only when a state denies equality, may international responsibility be asserted. Although this would seem to contradict the rule that a state's international obligations are determined by international law, anything in its municipal law to the contrary notwithstanding,⁷ the growing spirit of nationalism, which Latin American countries have not escaped, and the memory of past impositions have persuaded some of their publicists and statesmen to advocate the suppression of diplomatic protection by Calvo clauses, by an assumed automatic nationalization if not naturalization of the alien, by restricted statutory or treaty definitions of the term denial of justice⁸ and now finally by the contention that the doctrine of equality forecloses all diplomatic protection.

In its note of September 2, 1938, Mexico insisted that municipal law, not international law, was the source of the rights of individuals, including aliens, and cited Oppenheim in support.⁹ It contended that

⁶ Borchard, "The 'Committee of Experts' at the Lima Conference," 33 AM. J. INT. L. 269 at 276-278 (1939). See the argument for equality in YÉPES, LE PANAMÉRICANISME 121-127 (1936).

⁷ Cf. I OPPENHEIM, INTERNATIONAL LAW, 5th ed., by Lauterpacht, 283 (1937): "It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations. For essentially the same reason a State, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a State which fails to measure up to that standard incurs international liability."

⁸ See Guerrero, "Report of Subcommittee," Annex to Questionnaire No. 4, L. OF N. 1927. V (C. 196.M.70), p. 100. The Report is discussed by Borchard, "Theoretical Aspects of the International Responsibility of States," I ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, pt. 1, p. 223 at 228 et seq. (1929).

⁹ 32 AM. J. INT. L. SUPP. 204-205 (1938), citing I OPPENHEIM, INTERNATIONAL LAW, 5th ed., by Lauterpacht 508-509 (1937). See also Monnot (U. S.) v. Venezuela, February 17, 1903, RALSTON, VENEZUELAN ARBITRATIONS OF 1903, p.

expropriation without compensation was in line with the "standards of international law in accordance with the evolution which the traditional concepts of that law have necessarily undergone."¹⁰ Without now entering upon the specific question whether international law protects against uncompensated expropriation, it may be agreed that the so-called "rights of man"¹¹ are not a product of international law and that the primary source of the alien's rights is municipal law. But the argument overlooks the fact that treaty and custom have in the course of the eighteenth and nineteenth centuries placed limitations on the arbitrary power of a state to deprive aliens of elementary rights, and that international tribunals enforce these claims. This is a body of law which can be disregarded by a state only at the peril of international responsibility, and while fashioned empirically it operates as a check on arbitrariness. Like the common law, it has grown interstitially from case to case. Thus, while equality is the ultimate that the alien may ask of municipal law, which is by no means bound to grant equality, the body of international law developed by diplomatic practice and arbitral decision, indefinite as it may be, represents the minimum which each state must accord the alien whom it admits. Whether called the fundamental, natural, or inherent rights of humanity or of man or of the alien, this minimum has acquired a permanent place in the protective ambit of international forums.

Growth and Function of International Law

But international law has not only been woven from the approved practice of states in their diplomatic intercourse and from the decisions of arbitral tribunals. It is also composed of the uniform practices of the civilized states of the western world who gave birth and nourishment to international law. Long before article 38 of the Statute of the Permanent Court of International Justice made the "general principles

171 (1904) [S. Doc. 316, 58th Cong., 2d sess. (1904)]; *Smith (U. S.) v. Mexico*, April 11, 1839, 4 MOORE, ARBITRATIONS 3374 (1898); *Lewis (Gt. Brit.) v. United States*, May 8, 1871, 3 *ibid.*, 3019; *Only Son (U. S.) v. Great Britain*, February 8, 1853, 4 *ibid.*, 3404. See also STEINBACH, *UNTERSUCHUNGEN ZUM INTERNATIONALEN FREMDENRECHT* 90, note (1931).

¹⁰ 32 AM. J. INT. L. SUPP. 202 (1938).

¹¹ Cf. Declaration of the Rights of Man, adopted by the Institute of International Law at its Briarcliff meeting, 1929, 24 AM. J. INT. L. 560 (1930); Kaufmann, "Règles Générales du Droit de la Paix," 54 *ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS* 313 at 427 (1935), where they are called the fundamental rights of aliens; bibliography in 1 OPPENHEIM, *INTERNATIONAL LAW*, 5th ed., by Lauterpacht, 510, note (1937).

of law recognized by civilized states" a source of common international law, foreign offices and arbitral tribunals had relied on such general principles to work out a loose minimum which they applied constantly in interstate practice. For example, the doctrine *nulla poena sine lege* is accepted by common practice as a fundamental right of the alien, and the professed revolutionary departure from this principle by certain states would, if applied to aliens, meet with strong resistance. The disability of the alien to claim political rights and his immunity from military service and other political obligations have now a stronger source than the statutes or treaties in which these disabilities and privileges were originally recorded. They now rest on common law. In most states, the elementary private rights of life, liberty and property, within their well-recognized and increasing limitations, are not denied to aliens any more than they are to nationals.

When, then, in particular cases they are withheld by administrative action in spite of the constitution or law, the international claim would rest on the state's violation of its own law and not on the minimum standard. It is well known that aliens may be denied numerous privileges, such as the ownership of real property and engagement in certain occupations, and may be restricted in other respects by municipal law. Yet the alien must enjoy police and judicial protection for such rights as the local law grants and its arbitrary refusal is a denial of justice. Bad faith, fraud, outrage resulting in injury, cannot be defended on the ground that it is a custom of the country to which nationals must also submit. The helpless position of the alien in the Roman law and through the Middle Ages has undergone a change with the growth of the national state and the migration of men. The unlimited power of spoliation has been subjected to the control of international law. Who can deny that this has been an advantage to the world?

Indeed, the limitations on arbitrariness have exerted a useful influence on municipal law, and these in civilized states have operated to the benefit of all men. Due process of law has been to some extent internationalized by the fact that international tribunals have drawn on the mores of the average and not of the crudest municipal practice. While at times diplomatic protection in the hands of dominant powers has oppressed weak states, I venture to say that the shoe is now on the other foot. Indeed, the effect of international adjudication, the growth of nationalism, the movements for codification, the greater tolerance of social experimentation have encouraged weak states to invoke their

national sovereignty either to escape the restrictions of international law, or to maintain that international law has changed content so as to support what it once disapproved.¹²

The Doctrine of Equality

The states of Latin America lay claim to a peculiar virtue in placing the alien on a footing of civil equality with the national. This provision was first introduced into modern civil codes by Andrés Bello, the famous Venezuelan who in 1855 drafted the Chilean Civil Code. In granting such equality, they go beyond the requirements of international law. But in so doing they cannot, as some profess, escape the obligations of international law. And the civil equality, even if it were in practice granted as written, is a very limited one and hardly different from that accorded by most western states. Most impositions and discriminations come from public law and administrative encroachments. If these could freely be perpetrated, and if the fact that nationals are also spoliated or prejudiced were an adequate defense, the state would escape the control of international law, and that in effect is the implied purpose of the argument. Mexico, in its note of September 2, 1938, frankly contended that the equality of treatment was not established "to protect the rights of foreigners against the state," but, on the contrary, to defend "weak states against the unjustified pretension of foreigners who, alleging supposed international laws, demanded a privileged position."¹³ But what of justified pretensions? The doctrine of equality as the final test of international obligations is thus in effect a repudiation of the many decisions of international tribunals which establish such obligations as a rule of international law.

And yet the campaign for equality as the final test is unrelenting. At the Hague Codification Conference, Dr. C. C. Wu of China made

¹² If there were no force in international law to insure respect for the rights of aliens, and if it had no substantive content, the Permanent Court of International Justice would have been wrong in asserting the existence of a common or generally accepted international law respecting the treatment of aliens, applicable to them despite municipal legislation. HAGUE, PERM. CT. INT. J., SER. A, No. 7, pp. 22, 23 (May 25, 1926). The Treaty of Lausanne of 1923 provides that citizens of the allied powers shall be treated in accordance with "modern" or "ordinary" international law. Art. 2, 18 AM. J. INT. L. SUPP. 68 (1924). The treaty between the United States and Germany, 1923, provides that nationals of each country shall be treated by the other with "that degree of protection that is required by international law." Art. 1, 20 AM. J. INT. L. SUPP. 5 (1926). See FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 502 et seq. (1938), an excellent summary of the evidence on the minimum standard.

¹³ 32 AM. J. INT. L. SUPP. 205 (1938).

the plausible argument that when a foreigner comes to a country he must be prepared for all the local conditions, political and physical, as he is prepared for the weather. He must take what he finds and cannot complain of a defective or corrupt administration any more than nationals can. Seventeen countries, mainly the lesser states, supported this argument, although it was restricted to the remedies available to injured aliens. Twenty-one countries, including all the great powers represented, opposed it as contrary to international law, and on that issue the projected draft of a convention fell to pieces. As in other cases, those who are opposed to prevailing rules of international law avail themselves of a codification conference to endeavor to break down rules of law that conflict with their interests. Sovereignty is more emotionally invoked by the less mature than by older states. These weaker countries often disregard the rule, axiomatic in fact, that a state claiming the privileges of international law must comply with its duties, or deny that there is any duty to establish any degree or standard of organization or perform any normal obligations with respect to aliens. All such requirements are deemed to impose upon them some external standard as a condition of statehood and this they resent. They thus claim that the test of their responsibility for injuries is purely domestic and that if nationals are despoiled aliens will also have to submit. Otherwise they maintain the alien would be to them a source of danger. They wish to be the exclusive judges of their conduct toward all inhabitants, including aliens.

Up to a certain point, we might agree. For nearly all purposes, equality of treatment with nationals would satisfy international law requirements. Most states comply with that vague minimum which has been posited as indispensable to an admissible state. Equality then grants more than the alien or his government can ordinarily ask, for in the absence of treaty there is no rule prohibiting certain discriminations against aliens. But in spite of and beyond equality, there is a margin of fundamental privileges and immunities which cannot be transgressed without responsibility under international law. While it is inaccurate to assume that this collection of "fundamental" rights is claimable by all individuals against any state, they are claimable on the alien's behalf by his own state, as yet the only authorized vindicator of local rights improperly denied; for their observance a state is responsible even if nationals have no redress.

Reasons Why Equality is Insufficient

The doctrine of equality has therefore little or no relation to the minimum which practice has established. If it delimited the international minimum, as it does the local maximum, municipal law would replace international law as the test of international responsibility. International tribunals seek their criteria of responsibility not merely in municipal law but in common experience rooted in the mores of the time. In the nineteenth and early twentieth centuries these were found in constitutions which placed the individual on a high plane of protection in his relations with the state. It is possible that the retrogressions of the twentieth century will create new mores which will disregard the rights of the individual, deny him all protection against the group and possibly even subordinate international law to the sovereign state. That will require something of a revolution in thought and law. But only then will we have reached the stage where the doctrine of equality will have become the final test of state responsibility. Until that time, we are warranted in assuming that the common practice of western civilization still respects the elementary rights which we have come to associate with the modern world and enlightened civilization and that the decisions of international tribunals which reflect these mores are to be deemed law. No single state or even group of states can resign from that law.

The doctrine of absolute equality—more theoretical than actual—is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, e.g., as the United States does through treaty in the matter of the ownership of real property in this country. While states naturally desire a free hand in dealing with all their inhabitants and while it is probably embarrassing to be restrained by treaty or international law in perpetrating excesses, this is one of the conditions of international intercourse. Contrary to the common view, the United States and other strong states probably pay more in damages for breach of international duty than do the smaller states, which are disposed to invoke their abstract sovereignty to escape international responsibility. For example, United States mob violence cases are unfortunately a frequent source of responsibility, and it would seem strange to an American to contend that aliens like nationals must suffer such excesses without redress. When the argument for equality is associated with a refusal to accept the requirement of some normal degree of state organization, it is apparent that it is a demand for escape from international obligations. Even an

admission that treaties have placed some limitations upon this freedom of action would not concede that general international law has any say in the matter.

As a further explanation of why the alien is not bound to submit to exceptional excesses, even if nationals cannot escape, John Bassett Moore in his brief in the *Constancia Sugar* case before the Spanish Treaty Claims Commission remarked that nationals are presumed to have a political remedy, whereas the alien's inability to exercise political rights deprives him of one of the principal safeguards against oppression.¹⁴

Yet another powerful reason is the fact that diplomacy, international practice and arbitral decision have established the rule that equality of treatment, while prima facie a fair defense, is not conclusive of international duty and responsibility. Acting Secretary Polk in 1918 was not the first to point this out.¹⁵ In the *Hopkins* case before the United States-Mexico General Claims Commission of 1923 the tribunal concluded that by virtue of their diplomatic and arbitral appeal aliens may on occasion receive "broader and more liberal treatment" than nationals under municipal law.¹⁶ But the court denied that this

¹⁴ In Library of Congress, Briefs and Records, Spanish Treaty Claims Commission, JX238.

¹⁵ "The Government of the United States is firmly of the opinion that the great weight of international law and practice supports the view that every nation has certain minimum duties to perform with regard to the treatment of foreigners, irrespective of its duties to its own citizens, and that in default of such performance, it is the right of the foreign government concerned to enter protest. . . . While the Mexican Government may see fit to confiscate vested property rights of its own citizens, such action is in equity no justification for the confiscation of such rights of American citizens and does not estop the Government of the United States from protesting on behalf of its citizens against confiscation of their property." Mr. Polk, Acting Secretary of State to Ambassador Henry P. Fletcher, December 13, 1918, FOREIGN RELATIONS OF THE UNITED STATES 786-787 (1918) (U. S. Dept. State). See also address by Mr. Root, "The Basis of Protection to Citizens Residing Abroad," 4 PROC. SOC. INT. L. 16 at 21 (1910); also 1 HYDE, INTERNATIONAL LAW 466 (1922); Note of Secretary Hull to Mexico, August 22, 1938, 32 AM. J. INT. L. SUPP. 191 (1938).

¹⁶ "If it be urged that under the provisions of the Treaty of 1923 as construed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the Treaty of 1923 contain many such instances. There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and,

amounted to a discrimination against a state's own citizens and in favor of aliens. In the *Roberts* case the tribunal remarked:

"Roberts was accorded the same treatment as that given to all other persons. . . . 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."¹⁷

*Disregard of the Doctrine of Equality in Most Cases
of Denial of Justice*

It is only in the matter of substantive law, when the claim is advanced that particular rights, such as the right of property, may not be withdrawn from aliens, that the issue of equality seriously arises to challenge the claim that the international standard has been violated. Mexico in its notes of 1938 referred to its agricultural expropriations as "general and impersonal" in character, affecting "equally all the inhabitants of the country." There were various considerations, historical, legal, and conventional, which militated against the uncompensated expropriation of American-owned agricultural lands, but in principle it is always difficult, though not impossible, to contend that a change in substantive national policy violates common international law. Such questions cannot be answered in the abstract. Few countries would concede that their substantive law or administration falls below a civilized standard.

The bulk of the cases arise out of a denial of justice in the matter of procedure, some gross deficiency in the vindication and enforcement

conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens." *Hopkins (U. S.) v. Mexico*, Mar. 21, 1926, 1 OPINIONS OF COMMISSIONERS, GENERAL CLAIMS COMMISSION (U. S. and Mexico, 1923), 42 at 50-51 (1927) [hereinafter cited Op. Comm.]. See also *Neer (U. S.) v. Mexico*, 1 OP. COMM. 71 (Oct. 15, 1926); *Faulkner (U. S.) v. Mexico*, *ibid.*, 86 (Nov. 2, 1926).

¹⁷ *Roberts (U. S.) v. Mexico*, 1 OP. COMM. 100 at 105 (Nov. 2, 1926). In its case against Belgium before the Permanent Court of International Justice, known as the Oscar Chinn case,—HAGUE, PERM. CT. INT. J., SER. C, No. 75, p. 41 et seq. (Dec. 12, 1934)—the British Government adduced the Sicilian sulphur monopoly case, the Uruguayan and Italian insurance monopolies of 1911, and the well-known collection of opinions solicited by Edouard Clunet on the propriety of the Italian monopoly, practically all of which support the principle that the mere equality of treatment of national and alien will not be sufficient to satisfy the international standard.

of alien rights. A corrupt administration of justice, judicial or administrative, which is now more common than in the nineteenth century, gives rise to responsibility, regardless of the question whether nationals must submit to the same corruption. A perversion of justice by judges carrying out a national policy and not applying impartially the rules of law, is especially reprehensible and excuses the resort to or exhaustion of local remedies. Bad faith cannot be tested by national standards; it invites a more general criterion which international tribunals have not hesitated to invoke.¹⁸ The more extreme denials of justice will be judged international delinquencies without reference to the question of equality.¹⁹

In order to limit the international responsibility of the state, several attempts have been made by Latin American countries to confine the term denial of justice by legislative definition to such matters as the

¹⁸ See address by Root, "The Basis of Protection to Citizens Residing Abroad," 4 *PROC. AM. SOC. INT. L.* 16 at 25 (1910): "in many countries the courts are not independent; the judges are removable at will; they are not superior, as they ought to be, to local prejudices and passions, and their organization does not afford to the foreigner the same degree of impartiality which is accorded to citizens of the country, or which is required by the common standard of justice obtaining throughout the civilized world." Accord: DUNN, *THE PROTECTION OF NATIONALS* 119 (1932); Kuhn, "Protection of Nationals Charged with Crime Abroad," 31 *AM. J. INT. L.* 94 at 96 (1937); BRIERLY, *THE LAW OF NATIONS*, 2d ed., 173 (1936). See also *Chattin (U. S.) v. Mexico*, 1 *OP. COMM.* 422 at 441 (July 23, 1927) (Nielsen's opinion); *Roberts (U. S.) v. Mexico*, *ibid.*, 100 at 105 (Nov. 2, 1926).

¹⁹ *Neer (U. S.) v. Mexico*, 1 *OP. COMM.* 71 at 73 (Oct. 15, 1926): "the propriety of governmental acts should be put to the test of international standards." The tribunal added: "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." See also *Garcia (Mexico) v. United States*, *ibid.*, 163 at 169 (Dec. 3, 1926); *Roberts (U. S.) v. Mexico*, *ibid.*, 100 at 105 (Nov. 12, 1926); *Fabiani (France) v. Venezuela*, Dec. 30, 1896, 5 *MOORE, ARBITRATIONS* 4878 at 4893 (1898). See also cases discussed in *FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 543 et seq. (1938).

HUBER, *RÉCLAMATIONS BRITANNIQUES DANS LA ZONE ESPAGNOLE DU MOROC* 54 (1925), after denying liability for the acts of individuals, added that "restriction thus attached to the right of States to intervene for the protection of their citizens assumes that the general security in the country of residence does not fall below a certain level and that at least their protection by the courts does not become purely illusory."

In several cases before the General Claims Commission, United States and Mexico, the facts disclosed a maladministration of justice "below the standard prescribed by international law." *Galvan (Mexico) v. United States*, 1 *OP. COMM.* 408 at 410 (July 21, 1927); *Swinney (U. S.) v. Mexico*, *ibid.*, 131 (Nov. 16, 1926). See numerous quotations in *FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 560-562 (1938), from the decisions of other tribunals.

refusal of access to the courts and the discriminatory refusal to exercise jurisdiction such as nationals enjoy, and to overlook as immaterial local bias the nature and integrity of the judicial machinery and its conformity with elementary principles of justice. This was the substance of the Guerrero Report to the Codification Conference of 1930.²⁰ International tribunals and Foreign Offices have not consented to such limitations of international responsibility.

The Standard of Civilized Justice

It is thus apparent²¹ that both in its substantive and procedural aspects international law, as evidenced by diplomatic practice and arbitral decision, has established the existence of an international minimum stand-

²⁰ Borchard, "The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners," 23 AM. J. INT. L. SPECIAL SUPP. (Part II) 175, 219 (1929); Guerrero, "Report of Subcommittee," Annex to Questionnaire No. 4, L. OF N. 1927. V (C. 196.M.70), p. 92 at 100; Borchard, "Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners," 20 AM. J. INT. L. 738 (1926).

²¹ Beside the cases referred to, see the report of the international conference at Paris on the treatment of aliens, 25 REVUE DE DROIT INTERNATIONAL PRIVÉ 218 (1930): "Without doubt it is recognized today in all civilized states that the treatment of aliens is subject to a certain standard of international law whose violation may give rise to diplomatic action of governments." Also the following publicists: Scelle, in 1 REVUE DE DROIT INTERNATIONAL (Lapradelle) 1116 (1927): "The Permanent Court of International Justice has held that aliens have the right to a treatment better than nationals whenever nationals are treated contrary to [international] common law." Kaufmann, "Der ungarisch-rumänische Streit über die rumänische Agrarreform vor dem Völkerbundsrate," [1927] ZEITSCHRIFT FÜR OSTRECHT 1243 at 1260, and in his brief before the Permanent Court, HAGUE, PERM. CT. INT. J., SER. C., No. 11, 343 at 412 (1926): "Whenever internal law with respect to aliens is found below the requirements of the international standard, notably if there is a denial of justice, the alien has even a right to treatment superior to that which internal law accords nationals." As put by STEINBACH, UNTERSUCHUNGEN ZUM INTERNATIONALEN FREMDENRECHT 80 (1931), the state only then meets the requirements of international law in granting equality to nationals and aliens when the treatment of nationals corresponds to the measures which international law requires. In support of this view, he cites an article by Barthélemy, 2 CAUSES CELEBRES 314 (1929); also Anzilotti, Richter and Schmid.

Other authors who sustain these views are: 1 HYDE, INTERNATIONAL LAW, §§ 266-267 (1922); Dunn, "International Law and Private Property Rights," 28 COL. L. REV. 166 at 175 (1928); 1 ACCIOLY, TRATADO DE DIREITO INTERNACIONAL PUBLICO 335-336 (1933); 8 LA PRADELLE, RÉPERTOIRE DE DROIT INTERNATIONAL, "Etranger," (Basdevant), ¶¶ 7-19, 303 et seq. (1930); 1 MÖLLER, INTERNATIONAL LAW IN PEACE AND WAR, translated from Danish by H. M. Pratt, 133, 148 (1931); Witenberg, "La protection de la propriété immobilière des étrangers," 55 J. DU DROIT INTERNATIONAL (Clunet) 566 (1928); HALL, INTERNATIONAL LAW, 8th ed., by Higgins, 59-60 (1924); Leibholz, "Das Verbot der Willkür und des Ermessensmissbrauches in Völkerrechtlichen Verkehr der Staaten," 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, pt. 1, p. 77 at 97-99 (1929);

ard to which all civilized states are required to conform under penalty of responsibility. Even Latin American authors sustain this view.²²

But the existence of the standard and its service as a criterion of international responsibility in specific instances by no means gives us a definition of its content. Frequent reference to it may easily give rise

see also III HATSCHKE UND STRUPP, WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE 821 (1924); STRUPP, DAS VÖLKERRECHTLICHE DELIKT 118 (1920) (3 HANDBUCH DES VÖLKERRECHTS, pt. 3); TRIEPEL, VÖLKERRECHT UND LANDESRECHT 330 (1907). CAVAGLIERI, CORSO DI DIRITTO INTERNAZIONALE, 3d ed., 334 (1934); I FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, part 1, 928 (1922); DECENCIÈRE-FERRANDIÈRE, LA RESPONSABILITÉ INTERNATIONALE DES ÉTATS 57 (1925); BRIERLY, THE LAW OF NATIONS, 2d ed., 172 (1936).

²² ALVAREZ, ESPOSÉ DE MOTIFS ET DÉCLARATION DES GRANDS PRINCIPES DU DROIT INTERNATIONAL MODERNE 52, 54-55 (1936): "In no case, may aliens claim more rights than nationals, unless the country in which they reside does not assure to its inhabitants, in permanent fashion, the minimum of rights to which Article 25(b) and Articles 28 and 29 refer" (Article 30). Article 25(b) provides that states must maintain a political and legal organization which permits all persons residing on their territory to exercise their rights and enjoy advantages which the sentiment of international justice to-day imposes on all civilized people. Article 28 provides that every state must assure to every individual on its territory the full and entire protection of the right to life, liberty, and property without distinction of nationality, race, language, or religion. Article 29 provides for the free exercise of all faiths, etc.

While these provisions may to some extent be deemed aspirations, they indicate that the author approves the minimum standard. See also the AMERICAN INSTITUTE OF INTERNATIONAL LAW, CODIFICATION OF AMERICAN INTERNATIONAL LAW, Projects 15 and 16 (1925), which establish that each Government is obliged to maintain "internal order and governmental stability indispensable to compliance with its international obligations," probably an excessive requirement, and that they only are responsible when they have not "maintained order in the interior" or have been "negligent in the suppression of acts which disturb that order," or have omitted to take "reasonable precautions to avoid" injuries to aliens. In "Diplomatic Protection" (project no. 16, *ibid.*), the American Institute established that aliens cannot claim more "obligations and responsibility" than are conceded to nationals in "the constitution, laws and treaties in force." But diplomatic protection is permitted when there has been a "denial of justice by those authorities, undue delay or violation of the principles of international law."

In 1933, the American Institute submitted to the Montevideo Conference the following article: "The jurisdiction of States, within limits of the national territory, extends to all the inhabitants. The inhabitants, nationals and aliens, enjoy a single protection as the national laws and authorities provide. Aliens cannot demand rights different or more extended than the rights of nationals. [This] equal protection must assure nationals and aliens the minimum [of rights] exacted by international law." See also I RUIZ MORENO, LECCIONES DE DERECHO INTERNACIONAL PUBLICO 238, 260 (1934); I ACCIOLY, TRATADO DE DIREITO INTERNACIONAL PUBLICO 268 (1933).

MAURTUA and SCOTT, RESPONSIBILITY OF STATES, 45 (1930): "There is a minimum juridical standard imposed by human civilization, without which neither the existence of the State as a sovereign entity nor that of the international community could be conceived." I ULLOA, DERECHO INTERNACIONAL PUBLICO, 2d ed., 224, 243 (1938).

to the erroneous inference that it is definite and definable,²³ whereas the variability of time, place and circumstance make it even less precise than the term "due process of law," which has also with the passage of time added substantive content to its procedural controls. The international standard is compounded of general principles recognized by the domestic law of practically every civilized country, and it is not to be supposed that any normal state would repudiate it or, if able, fail to observe it. Referring to its procedural aspects, Mr. Root in 1910 characterized it as "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world."²⁴

While the standard is mild, flexible and variable according to circumstances, some attempt has been made to collate out of experience a number of minimum rights which all states claiming membership in the family of nations may be required to accord. While not identical with the unofficial "rights of man" which the Institute of International Law hoped to exact from each state, the substantive content of the standard nevertheless is associated with certain elementary privileges of human existence which every state admitting aliens may be deemed to extend—mainly rights to life and the elementary liberties connected with the earning of a living. How far these privileges may be impaired or curtailed in the public interest must be determined from case to case, and equality of sacrifice with nationals is naturally an important test. As a rule, unjustified discrimination will be found an ingredient in sustainable claims.²⁵

In recent years the question whether the protection of private property against confiscation is included within the minimum standard has

²³ Cf. BATY, *THE CANONS OF INTERNATIONAL LAW* 133 (1930).

²⁴ Root, "The Basis of Protection to Citizens Residing Abroad," 4 *PROC. AM. SOC. INT. L.* 16 at 21 (1910), quoted in 1 HYDE, *INTERNATIONAL LAW* 466, note 2 (1922).

²⁵ In 1929 a conference was held in Paris under the auspices of the League of Nations to endeavor to work out a convention on the treatment of foreigners. Preparatory Documents, L. of N. 1929. II (C. I. T. E. 1. C. 36.M.21); Draft Convention on the Treatment of Foreigners, L. of N. 1928. II (C. 174.M.53). The Convention broke down largely because many states declined to commit themselves to concede equality to foreigners. Cutler, "The Treatment of Foreigners," 27 *AM. J. INT. L.* 225 (1933); Kuhn, "The International Conference on the Treatment of Foreigners," 24 *AM. J. INT. L.* 570 (1930). Interestingly, the Hague Codification Conference of 1930 on responsibility of states broke down largely because the majority of states refused to admit that equality of treatment satisfied in all cases the international standard.

given rise to much debate.²⁶ Mexico openly asserted in its notes to the United States of August 3 and September 3, 1938, that there is no international obligation to make compensation for the expropriation of property, "general and impersonal" in character, provided a social purpose is served, and that its only duty in the premises arose under Mexican law. In the light of the recent invasions of the institution of private property, in Russia, in the agrarian reforms of eastern European countries, in article 297 of the Treaty of Versailles, and in the many extensions of the police power, a few publicists, notably Sir John Fischer Williams, seem to support the Mexican view.²⁷ The great majority, however, rely on modern constitutions and treaties which still respect private property, permitting direct expropriation only against compensation, and regard the instances cited as aberrations not impairing the general principle.²⁸ Perhaps it is dangerous to rely on any general principle for decision of a concrete case, but it can hardly be maintained that private property has lost all legal protection and that the state can confiscate at its pleasure. But how far it may go will have

²⁶ See THE MEXICAN EXPROPRIATIONS IN INTERNATIONAL LAW, memorandum filed in Department of State, October 11, 1938, pp. 103-130.

²⁷ Williams, "International Law and the Property of Aliens," 9 BRITISH YEAR BOOK OF INTERNATIONAL LAW 1 (1928); MARBURG, DER RUMÄNISCH-UNGARISCHE OPTANTENSTREIT VOR DEM GEMISCHTEN SCHIEDSGERICHT UND DEM VÖLKERBUND (1928); also in 3 HATSCHEK UND STRUPP, WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE 820 (1929). Cf. I OPPENHEIM, INTERNATIONAL LAW, 5th ed., by Lauterpacht, 283-285 (1937) (partial compensation necessary).

²⁸ Chorzów case, HAGUE PERM. CT. INT. J. SER. A, No. 7, pp. 21-22 (May 25, 1926), immunity from confiscation deemed a part of the "accepted principles of international law." Peter Pázmány University (Hungary) v. Czechoslovakia, HAGUE PERM. CT. INT. J., SER. A/B, No. 61 (Dec. 15, 1933). Judge Robert Fazy (Switzerland) in the case between Germany and Rumania, September 27, 1928, held that the "respect of private property and vested rights of aliens is uncontestably a part of the general principles admitted by the law of nations." 3 REVUE DE DROIT INTERNATIONAL (Lapradelle) 558 (1929). See British Observations in Portuguese expropriations of religious properties, quoted in Fachiri, "Expropriation and International Law," 6 BRITISH YEAR BOOK OF INTERNATIONAL LAW 159 at 168 (1925). Also Fachiri, "International Law and the Property of Aliens," 10 BRITISH YEAR BOOK OF INTERNATIONAL LAW 32 at 38 (1929); Shufeldt (U. S.) v. Guatemala, 1931, U. S. DEPT. STATE, ARBITRATION SER. No. 3 (1932); STEINBACH, UNTERSUCHUNGEN ZUM INTERNATIONALEN FREMDENRECHT 90, note (1931); 34 REP. INT. L. ASSN. 248 (1926); Verdross, "Règles Générales du Droit International de la Paix," 30 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 271 at 442 (1929); Verdross, "Les Règles Internationales Concernant le Traitement des Etrangers," 37 *ibid.* 327 at 330, 359 (1931); Kaeckenbeeck, "The Protection of Vested Rights in International Law," 17 BRITISH YEAR BOOK OF INTERNATIONAL LAW 16 (1936).

to be determined from case to case. The doctrine of vested rights depends on so many variables that prediction is hazardous.²⁹

On the procedural side, we are perhaps in less doubt of the content of the standard, although we must still be satisfied with general principles. Fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control, seem essentials of international due process. While the details of procedure necessarily vary considerably from country to country, certain essential elements of a fair trial and objective justice are required of all systems. It is probably less difficult to apply than to define these principles, and we have in their application the aid of innumerable precedents from international practice. In spite of the legislative effort strictly to narrow the conception of denial of justice and the privilege of diplomatic interposition, few foreign countries have been willing to abandon their nationals to the arbitrariness of corrupt courts or administrative bodies.

Policy

It is well that this is so. Notwithstanding the determined effort of several countries to make equality the final test of international responsibility, it is doubtful whether even the Montevideo Convention will be given such an interpretation. For some Latin American countries this endeavor is part of the general campaign to get rid of diplomatic protection. It might be called an exemplification of the Calvo Clause; a Mexican author has recently baptized it as the Cardenas Doctrine.³⁰ What it means is a repudiation of international law, a claim for the supremacy of local law over international law, a denial that local law and arbitrariness may be limited by international requirements. Its assertion does not raise the prestige of the countries who advance it, but on the contrary creates suspicion. As already observed, few if any countries are now the victims of unjustified diplomatic interposition on behalf of foreign claimants; indeed, much is now tolerated which even ten years ago would have elicited forceful action. Countries that seek to escape international responsibility by maintaining that they have no or few obligations with respect to aliens neither win respect for their sovereignty nor awaken that confidence which is reflected in

²⁹ Cf. the excellent article of Dunn, "International Law and Private Property Rights," 28 COL. L. REV. 166 (1928).

³⁰ MENDOZA, LA DOCTRINA CARDENAS 78 (1939). It is partly expressed as follows: The national who migrates abroad [the alien] permanently or temporarily must accept the local law as if he were a national and must abandon any rights attached to alienage, including diplomatic protection.

foreign investment. Strong powers, able to make demands for unlimited sovereignty, refrain from so doing and submit frequently to arbitration and the test of international law. With the current general disapproval of the use of force in the collection of claims, there is no reason why weaker states cannot entrust their complaints and defenses to the test of law. The international standard restricts their freedom but very slightly. A voluntary conformity to the standard and to the rules of international law and practice which it embodies would be more profitable in the long run than the ill-will and lack of confidence aroused by unsuccessful revolt against the standard and by a professed freedom from the restraints on arbitrariness hitherto associated with international law.

EXHIBIT C-103

Date of dispatch to the parties: October 2, 2006

**INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES**

ICSID Case No. ARB/03/16

ADC Affiliate Limited

- and -

ADC & ADMC Management Limited

Claimants

- v. -

The Republic of Hungary

Respondent

Award of the Tribunal

TRIBUNAL

The Hon. Charles Brower

Professor Albert Jan van den Berg

Neil Kaplan CBE QC (President)

Secretary of the Tribunal
Ucheora Onwuamaegbu

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Award of the Tribunal

I. THE PARTIES

A. The Claimants

1. The Claimants (“*Claimants*”) are ADC Affiliate Ltd. (“*ADC Affiliate*”) and ADC & ADMC Management Ltd. (“*ADC & ADMC Management*”). Both are companies incorporated under the laws of the Republic of Cyprus.

2. In this arbitration, the Claimants are represented by:

Mr. Pierre Bienvenu
Mr. Martin Valasek
Mr. Jacques Demers
Ogilvy Renault SENC in Montréal;

Mr. René Cadieux
Mr. Daniel Picotte
Fasken Martineau DuMoulin LLP in Montréal;

Prof. Dr. Iván Szász
Squire Sanders & Dempsey LLP in Budapest; and

Prof. Dr. James R. Crawford SC
University of Cambridge and Matrix Chambers.

B. The Respondent

4. The Respondent (“*Respondent*”) is the Republic of Hungary and is a sovereign State.

5. In this arbitration, the Respondent was originally represented by:

Mr. John Beechey
Mr. Audley Sheppard
Clifford Chance LLP, London; and

Mr. Peter Köves
Köves & Társai Ügyvédi Iroda, Clifford Chance LLP, Budapest.

6. By letter dated 12 August, 2005, Clifford Chance LLP informed the Tribunal and ICSID that they no longer served as legal counsel for the Respondent in this arbitration.

7. By letter dated 29 September, 2005, the Respondent advised ICSID that it had appointed Prof. Dr. László Bodnár of the Bodnár Ügyvédi Iroda Law Firm (“*Bodnár Law Firm*”) as its replacement legal counsel in this arbitration.

8. Subsequently, the Respondent informed ICSID that Mr. Jan Burmeister and Dr. Szabo Levente Antal of BNT Budapest and Dr. Inka Handefeld of New York and Hamburg were retained as Co-Counsel for the Respondent.

9. Hence throughout the hearing on the merits the Respondent has been represented by Bodnár Law Firm and the Co-Counsel referred to above.

10. The Claimants and the Respondent are referred to hereinafter together as the “*Parties*”.

II. PROCEDURAL HISTORY

A. Arbitration Agreement and Constitution of Arbitration Tribunal

11. This arbitration arises from an alleged unlawful expropriation by the Respondent of the investment of the Claimants in and related to the Budapest-Ferihegy International Airport (“*Airport*”) which expropriation, as alleged by the Claimant, constituted a breach of the *Agreement between the Government of the Hungarian People’s Republic and the Government of the Republic of Cyprus on Mutual Promotion and Protection of Investment (“BIT”)*, which entered into force on May 24, 1989.

12. Article 7 of the BIT provides:

“1. Any dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation of an investment shall, as far as possible, be settled by the disputing parties in an amicable way.

2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, it shall, upon request of the investor, be submitted to one of the following:

(a) the Arbitration Institution of the Arbitral Tribunal of the Chamber of Commerce in Stockholm;

(b) the Arbitral Tribunal of the International Chamber of Commerce in Paris;

(c) the International Centre for the Settlement of Investment Disputes in case both Contracting Parties have become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.”

13. The Claimants have invoked the ICSID arbitration provisions in the BIT.

14. On May 7, 2003, the Claimants submitted their *Request for Arbitration* against the Respondent in which they invoked the ICSID arbitration provisions in the BIT.
15. On July 17, 2003, the Acting Secretary-General of ICSID registered the *Request for Arbitration* pursuant to Article 36(3) of the ICSID Convention and ICSID Institution Rule(6)(1)(a).
16. Shortly thereafter, the Parties agreed that there should be three arbitrators in this case and also agreed on the method of their appointment.
17. Further to that agreement, the Claimants appointed the Honorable Charles N. Brower, a national of the United States of America, as arbitrator and the Respondent appointed Professor Albert Jan van den Berg, a national of The Netherlands. The two party-appointed arbitrators appointed Mr. Allan Philip, a national of Denmark, to serve as President of the Tribunal.
18. By letter of January 26, 2004, the Acting Secretary-General of ICSID notified the Parties and the above-appointed arbitrators that the Tribunal had been constituted and the proceeding deemed to have begun on that day in accordance with ICSID Arbitration Rule 6(1).
19. On September 3, 2004, due to ill health, Mr. Allan Philip resigned from the Tribunal.
20. Immediately after Mr. Philip's resignation, the two party-appointed arbitrators appointed Mr. Neil T. Kaplan CBE, QC, a national of the United Kingdom, as President of the Tribunal to fill the vacancy created.
21. On September 28, 2004, with Mr. Kaplan's acceptance of the appointment, the Tribunal was reconstituted and the proceedings continued in accordance with ICSID Arbitration Rule 12.

B. Proceedings

22. On March 8, 2004, the Tribunal, as originally constituted, held its first session in The Hague. Present at the session were the full Tribunal, the ICSID Secretary of the Tribunal, Mr. Ucheora Onwuamaegbu ("*Secretary*"), and the legal counsel of the Claimants and the Respondent and/or their representatives.
23. At this first session, the Tribunal considered a series of procedural matters together with several other non-procedural matters as listed in the provisional Agenda circulated by the Secretary prior to the session and adopted at the start of the session.
24. Specifically, the matters considered at the first session were, *inter alia*, the following:
 - (a) applicable arbitration rules;

- (b) apportionment of costs and advance payments to the Centre;
- (c) quorum;
- (d) decisions of the Tribunal by correspondence or telephone conference;
- (e) place of arbitration;
- (f) procedural language;
- (g) pleadings: number, sequence, time limits; and
- (h) production of evidence and examination of witnesses and experts.

25. On May 11, 2004, the amended *Minutes of the First Session*, dated March 8, 2004 as signed by the President on behalf of the Tribunal and by the Secretary, were dispatched to the Parties by the Secretary.

26. Paragraph 15.3 of the *Minutes of the First Session* set out a procedural timetable for pleadings agreed by the Parties.

27. On July 30, 2004, in accordance with the agreed timetable, the Claimants submitted to ICSID the following:

- 1) Memorial of the Claimants, dated July 30, 2004;
- 2) Witness Statement of Mr. Michael Huang, dated July 29, 2004;
- 3) Exhibits referred to in Witness Statement of Mr. Michael Huang Vol.1;
- 4) Exhibits referred to in Witness Statement of Mr. Michael Huang Vol.2;
- 5) Exhibits referred to in Witness Statement of Mr. Michael Huang Vol.3;
- 6) Exhibits referred to in Witness Statement of Mr. Michael Huang Vol.4;
- 7) Witness Statement of Mr. Tamás Tahy, dated July 25, 2004 but signed on 28 July, 2004;
- 8) Witness Statement of Mr. György Onozó, dated July 28, 2004, and English translation thereof;
- 9) Expert Report by Manuel A. Abdala, Andres Ricover and Pablo T. Spiller of LECG LLC, dated July 29, 2004, entitled Damage Valuation of Claimants' Investment in the Airport ("*LECG Report*");
- 10) Annexes to LECG Report Vol.1;
- 11) Annexes to LECG Report Vol.2;
- 12) Annexes to LECG Report Vol.3;
- 13) Annexes to LECG Report Vol.4;
- 14) Annexes to LECG Report Vol.5;
- 15) Annexes to LECG Report Vol.6;
- 16) Annexes to LECG Report Vol.7;
- 17) Authorities Vol. I;
- 18) Authorities Vol. II; and
- 19) Authorities Vol. III.

28. On August 19, 2004, the Secretary confirmed with the Parties an agreed adjusted timetable for meetings and hearings which replaced the original timetable set forth in the *Minutes of the First Session*.

29. On January 17, 2005, in accordance with the pleading timetable agreed, the Respondent submitted to ICSID the following:

- 1) *Counter-Memorial of the Respondent*, dated January 17, 2005;
- 2) Expert quantum report by NERA Consulting ("*NERA Report*");
- 3) Witness Statement of Dr. László Kiss;
- 4) Witness Statement of Mr Gyula Gansperger;
- 5) Witness Statement of Mr. Gabor Somogyi-Tóth;
- 6) Exhibits of the Respondent's Counter Memorial; and
- 7) Authorities.

30. On February 7, 2005, and in accordance with the agreed timetable, both Parties served their *Requests for Production of Documents* on the other party.

31. As agreed at the First Session of the Tribunal, on February 14, 2005, a telephone conference was held between the Parties and the Tribunal to assess the status of the proceeding. At that telephone conference, the Respondent submitted to the Tribunal its *Application for Bifurcation of Jurisdiction from the Merits*.

32. On February 15, 2005, the Tribunal issued its *Decision on the Respondent's Application for Bifurcation of Jurisdiction from the Merits* in which it rejected the Respondent's application for bifurcation.

33. On February 22, 2005, in accordance with the agreed procedural timetable, the Parties submitted to the Tribunal their respective objections to the request by the other side for production of documents. Replies to the objections were filed on March 7, 2005.

34. On March 10, 2005, a hearing was held by the Tribunal in London on the requests for production of documents. At the hearing, the Tribunal granted certain of the Claimants' requests, and with respect to the Respondent's requests, it was agreed that the Respondent would file a revised request by March 21, 2005; the Claimants would file their response thereto by April 1, 2005; and the Tribunal would thereafter issue its decision on the revised requests.

35. On March 22, 2005, the Respondent filed its amended request for production of documents ("*Amended Request*").

36. On April 5, 2005, as agreed by the Parties, the Claimants made their submission in response to the Respondent's *Amended Request*. In this submission, the Claimants agreed to produce a number of documents requested by the Respondent but rejected the remaining requests. The Claimants' objections were mainly based on the argument that the remaining requests still violated specific instructions and observations made by the Tribunal at the hearing on March 10, 2005.

37. On April 15, 2005, having considered the *Amended Request* by the Respondent and the Claimants' submission in response, the Tribunal, in its decision of that date, granted several requests in the *Amended Request* and refused others.

38. On June 2, 2005, following correspondence between the Parties in regard to the adjustment of the procedural timetable, the Tribunal agreed and confirmed a revised schedule for the remaining written submissions, organizational meeting and main hearing.

39. On July 22, 2005, in accordance with the revised timetable, the Claimants submitted to the Tribunal and the Respondent the following documents:

- 1) Claimants' *Reply*, dated July 22, 2005;
- 2) Reply Witness Statement of Mr. Michael Huang, dated July 21, 2005;
- 3) Reply Witness Statement of Mr. Tamás Tahy, dated July 14, 2005;
- 4) Reply Witness Statement of Mr. György Onozó, dated July 20, 2005, and English translation thereof;
- 5) Supplemental Expert Report by Manuel A. Adbala, Andres Ricover and Pablo T. Spiller of LECG LLC, dated July 22, 2005, entitled Damage Valuation for the Investment of ADC Affiliate Limited and ADC & ADMC Management Limited in the Budapest-Ferihegy International Airport ("*Supplemental LECG Report*").

40. As stated above, on August 12, 2005, the Tribunal was notified by Clifford Chance LLP that the Respondent had terminated its engagement of the firm in this arbitration.

41. On September 15, 2005, in response to the Tribunal's inquiries as to whether it intended to appoint replacement legal counsel and to follow the fixed deadlines, the Minister of Finance of the Republic of Hungary sent a letter to ICSID in which it was stated that the Respondent was in the process of appointing new legal counsel. Further, the Respondent requested that the Tribunal re-schedule the deadline for filing the Respondent's *Rejoinder* to January 2006 and adjust the ensuing deadlines accordingly.

42. On September 21, 2005, the Tribunal informed the Parties that it was not satisfied with the grounds given by the Respondent for the postponement of the deadlines and that the schedule of this arbitration would remain unchanged. It also confirmed its decision that the organizational meeting, for which December 15, 2005 had been set aside, would be held in London at a venue to be determined.

43. On September 29, 2005, the Respondent notified ICSID via fax that it had appointed the Bodnár Law Firm as its counsel of record in this arbitration in replacement of Clifford Chance LLP. A copy of the Power of Attorney was attached to the fax.

44. On October 4, 2005, Prof. Dr. László Bodnár of Bodnár Law Firm, as legal counsel of the Respondent, sent a letter to the Tribunal requesting the deadline for service of Respondent's *Rejoinder*, Claimants' *Sur-Rejoinder on Jurisdiction* and the date of the Organizational Meeting be postponed while the date for final hearing should remain unchanged.

45. On October 6, 2005, the Tribunal informed the Parties that it had decided to amend the schedule in this arbitration as follows:

November 4, 2005	Deadline for filing the Respondent's <i>Rejoinder</i> ;
December 9, 2005	Deadline for filing the Claimants' <i>Sur-Rejoinder on Jurisdiction</i> ;
December 19, 2005	Organizational meeting in London, at 10a.m.;
January 17 to 27, 2006	Hearing on jurisdiction and merits in London or The Hague.

46. On November 4, 2005, the Respondent's counsel served its *Rejoinder* on the Tribunal and the Claimants.

47. On December 11, 2005, the Claimants' counsel served on the Tribunal and the Respondent the following:

- 1) *Sur-Rejoinder on Jurisdiction*; and
- 2) Supplemental Reply Witness Statement of Mr. Michael Huang.

48. On December 19, 2005, a second organizational meeting was held in London. Mr. Pierre Bienvenu, Mr. Martin Valasek, Mr. René Cadieux and Prof. Dr. Iván Szász appeared on behalf of the Claimants. Prof. Dr. Lazlo Bodnár, Mr. Jan Burmeister, Dr. Inka Hanefeld and Dr. Janka Ban appeared on behalf of the Respondent. Present at the meeting were the full Tribunal and the Secretary of the Tribunal.

49. At this meeting, the Parties agreed to and confirmed a series of administrative matters in regard to the conduct of the main hearing.

50. Also at the meeting, the Respondent informed the Tribunal and the Claimants that Mr. Matthew, author of the *NERA Report* and key expert witness for the Respondent, would be unavailable for cross-examination at the main hearing; instead, two new expert witnesses recently appointed by the Respondent would be produced at the hearing for cross-examination in regard to the *NERA Report*.

51. The Claimants' counsel opposed such arrangement and requested that Mr. Matthew be produced for cross-examination.

52. The Claimants also requested that the Respondent produce the transactional documents entered into by British Airports Authority ("BAA") a week previously in its acquisition of the majority shares of the company owning Budapest Airport.

53. Having heard the Parties at the meeting, the Tribunal issued its Procedural Order dated December 19, 2005, in which it was ordered, *inter alia*, that:

- 1) the Respondent shall use its best endeavours to procure Mr. Matthew to testify at the hearing in January; if this proves impossible, the Respondent shall serve on the Claimants and the Tribunal, before December 29, 2005, statements of the two new expert witnesses who will state that they entirely agree with and adopt the *NERA Report*;
- 2) the Respondent shall supply to the Claimants before December 23, 2005 various versions of the bid requirements and tender documents together with the agreement entered into by BAA in relation to BAA's acquisition of the shares in Budapest Airport; such production shall be subject to a Confidentiality Agreement annexed to the Procedural Order.

54. In accordance with the above Procedural Order, on December 31, 2005, counsel for the Respondent filed a *CRAI Rebuttal Report* issued and signed by its new expert witness, Dr. Alister L. Hunt ("*Hunt Report*").

55. In his Report, Dr. Hunt declared that he had "*read, understood, analyzed*" and, subject to one exception, "*agree(s) with the NERA Report.*" However, in paragraph 10 of this Report, Dr. Hunt made the important point that he concluded that the definition of the financial contribution made by Airport Development Corporation ("ADC") for the purposes of calculating compensation was US\$16.765 million and the Internal Rate of Return ("IRR") computations were to incorporate this initial cash infusion. This point deviated from the *NERA Report* and as Dr. Hunt noted, "*this deviation is in favour of the Claimants' position*".

56. On the same date, the Respondent's counsel in its covering letter attached to the *Hunt Report* informed the Tribunal and the Claimants that Dr. Kothari, its other proposed new expert, would not be produced at the January hearing and therefore was withdrawn.

C. The Hearing

57. The hearing took place at the International Dispute Resolution Centre in Fleet Street, London. It commenced on Tuesday January 17, 2006 and concluded on Wednesday January 25, 2006. Audio recording of the hearing was made and verbatim transcripts were also produced, the latter being concurrently available with the aid of LiveNote computer software.

58. At the hearing, the following appeared as legal counsel for the Claimants: Messrs. Pierre Bienvenu, Martin Valasek, Jacques Demers and Azim Hussein of Ogilvy Renault, Mr. René Cadieux of Fasken Martineau Dumoulin, Prof. Dr. Iván Szász and Miss Judith Kelman of Squire Sanders & Dempsey and Prof. Dr. James Crawford SC.

59. The following appeared as legal counsel for the Respondent: Prof. Dr. Bodnár of the Bodnár Law Offices, Messrs. Jan Burmeister and Dr. Levente Szabo of B&T law firm of Budapest and Dr. Inka Hanefeld, Dr. Ulf Renzenbrink and Mr. Daniele Ferretti of RRG law firm of Hamburg. Ms. Bernadette Marton also appeared at the hearing as a representative of the Hungarian Ministry of Finance.

60. Both sides made an oral presentation at the opening of the hearing. With regard to post-hearing submissions, the Tribunal confirmed the dates set forth in its December 19, 2005 Procedural Order, namely, written closing submissions to be served on March 7, 2006 and the written rebuttals to be served by March 21, 2006.

61. At the hearing, the following witnesses gave evidence, in sequence, for the Claimants and were cross-examined by the Respondent's counsel:

Mr. Michael Huang
Mr. György Onozó
Mr. Tamás Tahy
Mr. Manuel A. Abdala, Mr. Andres Ricover and Mr. Pablo T. Spiller of LECG LLC

62. The following witnesses gave evidence for the Respondent and were cross-examined by the Claimants' counsel:

Dr. László Kiss
Mr. Gyula Gansperger
Mr. Gabor Somogyi-Tóth
Dr. Alister L. Hunt of CRA International

63. At the conclusion of his evidence, Mr. Gansperger asked the Tribunal for a copy of the transcript of the proceedings and a copy of Mr. Tahy's witness statement.

64. The Tribunal heard oral arguments on the issue of confidentiality and made its decision on this issue in a letter to the Parties dated January 31, 2006. In this letter, the Tribunal referred to ICSID Arbitration Rule 19 and Articles 44 and 48(5) of the Convention.

65. Arbitration Rule 19 provides:

"The Tribunal shall make the orders required for the conduct of the proceeding."

66. Article 44 of the Convention provides:

"Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

67. Article 48 (5) of the Convention provides:

“The Centre shall not publish the award without the consent of the parties.”

68. Bearing in mind of these provisions, the Tribunal ruled in the above letter as follows:

“ ...

14. Having considered all the submissions on this matter, the Tribunal is satisfied that confidentiality does attach to all the documents produced in this ICSID arbitration. Confidentiality is important because parties to ICSID arbitrations may not want the details of the dispute made public and furthermore witnesses who come forward to assist the Tribunal in their difficult task should do so with the knowledge that what they say is confidential and cannot be released without an order of the Tribunal. Such a rule is necessary to preserve the integrity of the arbitral process.

15. That confidentiality is desirable is made evident by the frank statement of Mr. Gansperger that he wanted these documents for the purposes of ‘obtaining satisfaction’ against the statement made by Mr. Tahy.

16. Mr. Burmeister suggested that it was only fair to let a witness, who gave evidence in his native language and was translated into English for the benefit of the Tribunal, have the right to check the English translation of what he said and how that was recorded in the transcript. It is clear that Mr. Gansperger does speak English and therefore would be able to check the accuracy of his words.

17. The Tribunal accepts that it is only fair that Mr. Gansperger should be able to have access to the transcript to check the authenticity of the translation.

18. However, for that purpose, he does not require to be given a copy of the transcript of his evidence. What the Tribunal is prepared to allow is that Mr. Gansperger may, only at the offices of the Bodnár law firm, be shown a copy of the transcript of his evidence and be allowed to read it through and check it for accuracy. On no account is he to be given a copy to be taken away from the Bodnár law firm offices.

19. As to the request that Mr. Gansperger be given a copy of the statement or extract of the statement of Mr. Tahy, this application is refused. This refusal is based upon the importance of maintaining the confidentiality of ICSID arbitrations which involves protecting witnesses who come forward to assist the Tribunal. The Tribunal accepts that in ICSID arbitrations it is difficulty for some witnesses to give evidence against their own State and when this is coupled with a request for “satisfaction” from a co-national

who is clearly a powerful figure in that country, the importance of confidentiality looms large.”

This confidentiality issue was then closed.

69. On March 6, 2006, the Respondent’s counsel informed the Tribunal by email that by mutual agreement, the Parties agreed to postpone the dates for post-hearing submissions to March 10, 2006 and March 24, 2006 respectively.

70. On March 10, 2006, the Claimants served on the Tribunal their *Post-Hearing Brief* together with an *LECG Post-Hearing Report*. On the same date, the Respondent served on the Tribunal its *Closing Submissions*.

71. On March 16, 2006, Prof. Bodnár, on behalf of the co-counsel for the Respondent, by a letter to the Tribunal, objected to the newly submitted *LECG Post-Hearing Report* and claimed that said report and an updated electronic model therewith “*constitute new evidence*”.

72. On March 24, 2006, the Respondent served on the Tribunal the Respondent’s *Closing Reply*. On the same date, the Claimants served on the Tribunal Claimants’ *Post-Hearing Rebuttal*.

73. On March 30, 2006, the Claimants’ counsel, by a letter to the Tribunal, denied that the disputed report and model constituted new evidence.

74. In a letter to the Tribunal dated April 3, 2006, the Respondent reiterated its position concerning the report and the model in question and further claimed that the report also contained new factual allegations. The Respondent therefore requested the Tribunal to disregard the *LECG Post-Hearing Report* as well as the electronic model submitted with it.

75. On April 7, 2006, after reviewing the relevant correspondence and careful consideration of the issue, the Tribunal, through the Secretary, sent a letter to the Parties in regard to the “*new evidence*” matter and directed the Respondent to specify its allegation that “*new evidence*” was contained in the *LECG Post-Hearing Report* by May 1, 2006.

76. On May 1, 2006, in accordance with the Tribunal’s direction, the Respondent served on the Tribunal a *Supplemental Expert Report* prepared by Dr. Hunt which addressed the defects as the Respondent sees them in the *LECG Post-Hearing Report*.

77. On May 12, 2006, the Claimants’ co-counsel wrote a letter to the Tribunal in response to the *Supplemental Expert Report*. In this letter, the Claimants acknowledged certain minor calculation errors in the *LECG Post-Hearing Report* but maintained its position that no new evidence was introduced therein and argued that Dr. Hunt’s criticism on LECG’s methodology was unfounded.

78. On May 19, 2006, the Tribunal, through its Secretary, wrote to the Parties with the following ruling:

“After careful reading of the LECG Post-Hearing Report as well as Dr. Hunt’s Supplemental Expert Report and thorough consideration of the issue, the Tribunal is now satisfied that it can conclude that no new evidence was introduced in the LECG Post-Hearing Report. Therefore, the objection raised by the Respondent in this regard is rejected. The issue of new evidence is closed.”

III. FACTS

79. At a fairly early stage in these proceedings, the Tribunal requested the Parties to agree a non-contentious narrative statement of the background facts of this case. The Tribunal’s intention was to incorporate such agreed text in this Award. After much delay, doubtless caused by the change of counsel and through no fault of the Respondent’s able and new legal team, all that was provided was the Claimants’ version. The Respondent’s legal team had, by the end of the hearing, not been able to agree this text although they were not in a position to state with what they disagreed. The Tribunal gave the Respondent a period of two weeks following the conclusion of the hearing to either agree the Claimants’ text or to make suggested amendments. The text contained in paragraph 80 to 213 represents the Claimants’ version with some textual change made by the Tribunal. The Tribunal has also taken into account the Respondent’s version which was finally received on March 10, 2006.

A. THE PARTIES

80. The Claimants are companies incorporated under the laws of the Republic of Cyprus.

81. The Claimants were established on February 25, 1997 for the sole purpose of the Airport Project as defined in paragraph 94 below.

82. ADC Affiliate’s shareholders are:

Class A Voting Shares:	51% ADC, incorporated in Canada
Class A Voting Shares:	49% Aeroports de Montreal Capital Inc (“ADMC”), incorporated in Canada
Class B Participating Non-Voting Shares:	100% ADC Financial Ltd, incorporated in the British Virgin Islands
Class C Participating Non-Voting Shares:	100% ADMC

83. ADC & ADMC Management's shareholders are:

Class A Voting Shares:	50% ADMC
Class A Voting Shares:	50% ADC Management Ltd, incorporated in the British Virgin Islands
Class B Participating Non-Voting Shares:	100% ADC Management Ltd, incorporated in the British Virgin Islands
Class C Participating Non-Voting Shares:	100% ADMC

84. The controlling shareholders, directors and ultimate beneficiaries of ADC were two Canadians, Mr. Huang and Mr. Danczkay. ADC was a fully owned subsidiary of Huang & Danczkay Properties, a general partnership of Huang & Danczkay Limited and Huang & Danczkay Development Inc. organised under the laws of Ontario, Canada. The British Virgin Islands companies were also ultimately owned by Mr. Huang and Mr. Danczkay (and their relatives).

85. The directors of the Claimants are Cypriot lawyers and Canadian lawyers.

B. THE AIRPORT

86. The Airport is located approximately 18 km south-east of Budapest, the capital of the Republic of Hungary.

87. The Airport is the principal airport in Hungary for both domestic and international scheduled passenger flights.

88. The Airport also plays a military role, and, for example, was used during the Balkans War by NATO Member States for transporting military personnel, supplies and equipment.

89. In 1992, the Airport comprised of two passenger terminals. Terminal 1 had been built in 1950, and had a capacity of two million passengers a year, but it no longer met the then current commercial and security standards. Terminal 2/A, which had an additional capacity of two million passengers a year, had been built in 1985.

90. The Airport is an exclusive and non-negotiable asset of the State, as stated in Section 36/A of the Air Traffic Act (Act XCVII of 1995) and the Hungarian Civil Code. However, pursuant to Decree No. 12/1993 of the Minister of Transport and Water Management ("*Ministry of Transport*"), the Air Traffic and Airport Administration ("*ATAA*") had the authority to transfer revenue generating usage and revenue collection rights relating to the operation of certain facilities at the airport.

91. The Airport was held, managed and operated by ATAA, a Hungarian state entity, which was under the auspices of the Ministry of Transport. As from 1 January 1988, the Director of the ATAA had been Mr. Tamás Erdei. Before that he had been the Technical Deputy Director.

92. In 1992, United States and Hungarian advisors concluded that to accommodate future passenger requirements, the Airport would need to be expanded. It was also considered that the Airport had the potential to be developed into a hub with a much higher passenger turnover.

93. It was further concluded that it would be preferable financially to construct a new terminal, rather than renovate Terminal 1. Accordingly, the ATAA initiated a tender process for expansion of the Airport.

C. THE TENDER PROCESS

94. In September 1992, ATAA initiated a three-phase process to select a partner to renovate Terminal 2/A and to design a new Terminal 2/B at the Airport. The invitation to tender also involved the design of the adjoining public road and traffic entrance areas and related infrastructure, as well as the financing, construction, leasing and operation of Airport facilities (“*Airport Project*” or “*Project*”).

95. The ATAA was, at the time, an agency of the Hungarian Ministry of Transport and wholly under the control of the Respondent.

96. The first phase of the tender process involved the ATAA’s selection of qualified bidders. Only qualified bidders were allowed to participate in the second phase, which involved the ATAA’s selection of two “*Preferred Tenderers*”. The third and final phase involved the ATAA’s selection of the “*Selected Tenderer*”.

1. First Phase

97. The first phase began in September 1992 with the issuance by the ATAA of an “*International Prequalification*” document containing information relating to the Airport Project and an “*Application*”, including an Invitation to Prequalification, a description of the prequalification procedure and the Applicant’s Questionnaire, or “*Request for Qualification*” (“*RFQ*”).

98. ATAA received a total of 17 RFQs. On November 23, 1992, ADC submitted a RFQ to the ATAA.

99. The ATAA brought the first phase of the tender process to a close by announcing its short list of qualified tenderers. The ATAA’s short list of qualified tenderers included ADC and five other bidders.

2. Second Phase

100. In the second phase of the tender process, each qualified bidder was invited to submit a tender to the ATAA for the Airport Project. The invitation also included a tender on the construction of a covered and open air parking facility, a hotel and a business centre.

101. The ATAA's tender documentation, which was issued between December 13, 1993 and January 17, 1994, consisted of two parts in eleven volumes ("*Tender Documentation*"). Part A contained, *inter alia*, the Invitation to Tender and Instructions to Tenderers, as well as the Project Conditions and Requirements. Part B contained technical documents such as drawings, technical specifications, Bills of Quantities and Technical Descriptions.

102. The Tender Documentation required bidders to include in their tenders a "*Basic Tender*" conforming strictly to the conditions set forth by the ATAA. Bidders were also invited, but not obligated, to submit an "*Alternative Tender*", which did not need to conform to all of the conditions set out in the Tender Documentation.

103. On April 29, 1994, ADC, acting as an individual corporation, not as a consortium, submitted its tender ("*ADC's Tender*") to ATAA. ADC's Tender included both a Basic Tender, submitted in compliance with the Tender Documentation, and an Alternative Tender. ADC's Alternative Tender proposed an alternative concept for Terminal 2/B based on the same footprint as the Basic Tender building, but with more cost-effective and efficient design, reduced capital costs and lower operating expenses. It also increased the maximum passenger handling capacity of the terminals by one million passengers per year over the Basic Tender.

104. As part of its tender, ADC agreed to procure that the Canadian Commercial Corporation ("*CCC*"), a Canadian Crown corporation and agent of the Government of Canada, would enter into a turnkey fixed price contract for the construction of Terminal 2/B and the renovation of Terminal 2/A.

105. The ATAA received proposals from at least three other qualified bidding teams or consortia, led respectively by Siemens, Schiphol (Amsterdam) Airport and Lockheed.

106. The second phase of the tender process ended when ATAA selected ADC and Lockheed as Preferred Tenderers.

3. Third Phase

107. The third and final phase of the tender process went from May 1994 to August 1994, culminating in August 1994 with the selection of ADC as the Selected Tenderer.

108. ADC was selected as the Selected Tenderer on the basis of a unanimous recommendation from a selection jury of eleven persons. It is ADC's Alternative Tender that was chosen by the ATAA.

109. In specific, ADC was awarded contracts by the ATAA to (a) renovate Terminal 2/A, (b) construct Terminal 2/B, and (c) participate in the operation of Terminals 2/A and 2/B.

D. NEGOTIATION OF THE AGREEMENTS

110. Following ADC's selection as the Selected Tenderer, negotiations with the ATAA with respect to the legal documentation were officially launched. ATAA had reserved the right to enter into negotiations with the second Preferred Tenderer (*i.e.*, Lockheed).

111. ADC's negotiating team consisted of Mr. Huang and Mr. Béla Danczkay. ADC's legal advisers were Meighen Demers, since merged with Ogilvy Renault, and local Hungarian counsel. For its part, the ATAA was represented in the negotiations by a team led by Mr. Tamás Erdei, its General Director, and they were assisted by the global law firm Debevoise & Plimpton LLP, by local Hungarian counsel and by Lehman Brothers, as financial adviser.

112. The parties proceeded by first negotiating a "*Master Agreement*", which set out the fundamental terms and conditions of the transaction and provided the framework under which all the other agreements would be negotiated and ultimately executed.

1. The Master Agreement and the Incorporation of the Project Company

113. The negotiations of the Master Agreement began in August 1994 and it was executed on March 31, 1995. Parties to the Master Agreement are ADC and the ATAA. On the same day a Guarantee Agreement between Huang & Danczkay Properties and the ATAA was executed ("*Huang & Danczkay Guarantee*"). The Master Agreement is a legal instrument that laid down the fundamental structures of the whole Project. As stated in Article 2 of the Master Agreement, the purpose of the Master Agreement

"is to set forth the agreements among the parties as to the terms and conditions with respect to the following subjects:

2.1 the obligations and the satisfaction of the obligations of ADC and the ATAA in connection with the Project prior to the Construction Commencement Date;

2.2 the obligations of ADC, the Project Company and the ATAA in connection with the Project after the Construction Commencement Date;

2.3 the Operating Rights of the Project Company following the Operations Commencement Date;

2.4 the rights and obligations of the Project Company and the ATAA during the Operating Period;

2.5 the participation by ADC and the ATAA, provided that the necessary approvals are obtained, in the equity capital of the Project Company;

2.6 the management of the Project Company; and

2.7 the nature of other agreements to be entered into in connection with the Project."

114. In particular, the Master Agreement provided, *inter alia*, for the formation under Hungarian law of a wholly-owned subsidiary of ADC (“*Project Company*” or “*FUF*”) for the sole purpose of:

- “(a) *incurring the Project Debt and funding the Construction work following the Initial Drawdown.*
- “(b) *preparing operation and asset management plans and engaging in other preparatory work for the Terminal Operations prior to completion of the Construction work; and*
- “(c) *conducting the Terminal Operation on and after the Operations Commencement Date and servicing the Project Debt until expiration of the Term.[...]”*

115. The Master Agreement also provided that the ATAA and the Project Company would enter into an operating period agreement, which would grant to the Project Company, subject to certain conditions, the right to conduct the terminal operations and to collect the terminal revenues. It was also intended that the initial term (“*Initial Term*”) of the Master Agreement would be twelve years from the operations commencement date (“*Operations Commencement Date*”), which would be extended under certain conditions up to six additional years.

116. The Master Agreement also provided that the Project Company could establish the fees and charges to be levied at the terminals, but only in accordance with the regulatory framework (“*Regulatory Framework*”). That framework set forth the policies and procedures for preparing the Annual Business Plan, and became Schedule C to the Operating Period Lease.

117. The Master Agreement and the Regulatory Framework also refer to the concept of ADC’s “IRR”. The parties agreed on a target IRR on ADC’s initial equity investment of 15.4% (“*Target IRR*”), and an absolute ceiling of 17.5%.

118. Concurrently with the execution of the Master Agreement on March 31, 1995, ADC formed the Project Company, which was registered as a one-member limited liability company on June 15, 1995, with legal effect as of March 31, 1995. The Project Company was established by ADC for the limited purposes of the Project. Its objects included incurring and servicing Airport Project debt, funding construction of the Airport Project, preparing operation and asset management plans prior to completion of construction, and operating the terminals following construction. Under the terms of its Charter, the Project Company was established for an initial term of fourteen years. This term could be extended, on one occasion, by no more than four years.

2. The Project Agreements

119. The “*Project Agreements*”, as defined by the Master Agreement, means all those legal instruments as required in order to implement the contractual structure of the Project and to

set out the terms and conditions of all parties' participation in, and involvement with, the Project Company.

120. The Master Agreement set a target date for the execution of the Project Agreements as of six months after execution of the Master Agreement. The complexities of the Project did not permit the completion of the Project Agreements and the commencement of the Project by the initial target date. The parties mutually agreed to extend the target date with the final target date being set at March 31, 1997.

121. In its tender, ADC had proposed that the ATAA would receive its share in the Project Company in return for providing the Project Company with an in-kind contribution consisting of its rights to operate the airport terminals. This concept was accepted by the ATAA in the Master Agreement, but conditional on the ATAA receiving Government authorization, as required by Hungarian law, to acquire its quota in the Project Company.

122. Subsequently, ADC was advised that the Government had come to the conclusion that, for legal reasons, ATAA needed to make a cash contribution to the Project Company to receive its quota and that the proposed in-kind contribution by the ATAA would not entitle it to receive its 66% quota of the Project Company. In order to address this problem to the satisfaction of the ATAA, the parties agreed to the terms ultimately set out in the Project Agreements, namely that of the US\$16.765 million contributed by ADC to the equity of the Project Company, 66% or US\$11.065 million would be contributed by ADC to the Project Company on behalf of the ATAA in return for equivalent value from the ATAA, in the form of rental payments from the Project Company that would otherwise be due to ATAA under the Operating Period Lease. These rental payments were in turn converted into a stream of payments under a promissory note ("*Promissory Note*").

123. Among all the Project Agreements concluded, those executed in February 1997 (concurrently with the execution of the Credit Agreements described in the section below) included the following:

- (1) Quotaholders Agreement among ADC, the ATAA and the Project Company, executed on February 17, 1997;
- (2) Quota Transfer Agreement between ADC and the ATAA, executed on February 18, 1997;
- (3) Association Agreement between ADC and the ATAA, executed on February 18, 1997;
- (4) Subscription Agreement among ADC, the ATAA and the Project Company, executed on February 27, 1997;
- (5) Receipt and Acknowledgment among ADC, the ATAA and the Project Company, executed on February 27, 1997;
- (6) Release and Note Agreement between ADC and the Project Company, executed on February 27, 1997;

- (7) Assignment and Assumption Agreement between ATAA, ADC and ADC Affiliate, executed on February 27, 1997;
- (8) Operating Period Lease between the ATAA and the Project Company, executed on February 27, 1997;
- (9) Terminal Management Agreement for entrepreneurial operations among the ATAA, the Project Company and ADC & ADMC Management Limited, executed on February 27, 1997; and
- (10) ATAA Services Agreement between the ATAA and the Project Company, executed on February 27, 1997.

124. The Claimants contend that, at the end of the day (*i.e.*, referred to in the Subscription Agreement as the Equity Closing Date), through the simultaneous execution and operation of the Operating Period Lease, the Receipt and Acknowledgment and the Release and Note Agreement, ADC held a 34% quota in the Project Company and the Promissory Note from the Project Company, representing collectively a single investment in, and capital contribution to, the Project Company, in the amount of US\$16.765 million. The Respondent originally contested this but abandoned the point at the hearing in the light of Dr. Hunt's inability to support it.

3. Credit Agreement

125. From the outset of the tender process, the ATAA made it clear that the Project should be financed on a non-recourse project basis, and that all tenders should assume that neither the ATAA nor any other entity of the Government of Hungary would guarantee any debt incurred in connection with the Airport Project. These conditions were listed as the first "*fundamental objective*" and the first "*financial assumption*" in the Tender Documentation.

126. As part of its tender, ADC had secured letters of interest from the International Finance Corporation (IFC) and the European Bank for Reconstruction and Development (EBRD), each of which was prepared to lead a syndicate of lenders to finance the debt portion of the Airport Project. During the negotiations of the Credit Agreements, EBRD emerged as the front-runner to lead the lending syndicate. EBRD offered to provide the A-loan portion of the financing at an interest rate of LIBOR plus 2.5%. The negotiations proceeded on this basis through 1995 and through the better part of 1996.

127. In the course of 1996, Mr. Péter Medgyessy, who at the time was Hungary's Finance Minister, involved himself personally in the negotiations of the credit facility. Mr. Medgyessy wanted the Airport Project debt to be financed by a syndicate of commercial banks only and he thus rejected the EBRD loan offer. To this end, the Government was willing to provide a guarantee of the Airport Project debt in order to secure a precedent in the international commercial banking community for a long term Hungarian Government guaranteed debt of ten years at a favourable interest rate.

128. This was a significant departure from the financing conditions that the Government of Hungary had earlier set out in the Tender Documentation, where it was specified that there

would be no sovereign guarantee of debt. In connection with the higher profile and greater risk the Government of Hungary was now taking in the Airport Project, the ATAA took the position that its share of the voting capital in the Project Company should be increased from 49% to 66%, matching the ATAA's share capital, and the Project Agreements were amended accordingly.

129. The Credit Agreement (the “*Facility Agreement*” as the document was titled) was executed on February 27, 1997 in Budapest. Mr. Medgyessy himself signed the guarantee (“*Guarantee*”), on behalf of the Government, on the very same day. The syndicate of lending banks had agreed to provide US\$103 million of financing to the Project Company to realize the Project at an interest rate of LIBOR plus 0.95% to be paid over a period of ten years.

F. THE CLAIMANTS’ INVESTMENTS

130. The Claimants’ investments in the Project Company are set out below.

1. ADC Affiliate’s Investment

131. From the very beginning of this transaction, the parties shared the assumption that ADC's capital contribution to the Project Company would be made through an affiliate, so as to allow the investment to benefit from the tax treaty regime between Hungary and the jurisdiction of the affiliate's incorporation. Accordingly, Section 3.2(a) of the Master Agreement, for example, provided that the cash equity contribution would be made by ADC or by an “Affiliate” of ADC.

132. Having chosen Cyprus for its advantageous tax regime (among other reasons), ADC incorporated ADC Affiliate in Cyprus on February 25, 1997 in advance of the execution of the Subscription Agreement and the closing of the equity contribution. (ADC & ADMC Management was incorporated at the same time.)

133. Pursuant to a Shareholders' Agreement dated February 21, 1997 between ADC Financial Ltd., ADC and ADMC, ADC Financial Ltd. contributed US\$6.765 million and ADMC contributed US\$10 million to the equity capital of ADC Affiliate. These funds, totalling US\$16.765 million, were intended by ADC Affiliate and its shareholders to be used to fund the capital increase of the Project Company through a direct contribution of cash. This was reflected in Section 2.1(a)(ii) of the ADC Affiliate Shareholders' Agreement:

“[ADC Affiliate's] principal activities will be (i) to purchase and hold 100% of the Quotas currently owned by ADC in the Project Company; (ii) to subscribe for and purchase additional Quotas in the Project Company such that [ADC Affiliate's] holding of registered capital in the Project Company shall be 34%; and (iii) in accordance with Article 4.4(ii) of the Quotaholders' Agreement, to be jointly and severally bound with ADC towards ATAA for the performance of the obligations of ADC and the Project Company as contemplated in the Project Agreement.”

134. As the Parties approached the closing date, there were two options available to complete the transaction:

- i. the relevant Project Agreements could all be amended to refer to ADC Affiliate, and ADC Affiliate could participate directly in the closing by making the US\$16.765 million capital contribution itself, in exchange for the Quota and Note; or
- ii. the transactions could be completed through ADC (without needing to amend the relevant Project Agreements), followed by an assignment of the Quota and Note to ADC Affiliate.

135. It was decided to pursue the second option. In order to do so, ADC needed (i) to borrow the US\$16.765 million from ADC Affiliate, (ii) to agree to subscribe for the capital increase in the Project Company with those funds and, finally, (iii) to agree to transfer and assign all rights and interests associated with the quota and the Promissory Note to ADC Affiliate. This was accomplished through a Loan and Transfer Agreement dated 27 February 1997 between ADC Affiliate and ADC (“*Loan and Transfer Agreement*”) and a Quota Purchase Agreement dated February 28, 1997 between ADC and ADC Affiliate (“*Quota Purchase Agreement*”).

136. Pursuant to the Loan and Transfer Agreement:

- ADC acknowledged receipt of a loan in the principal sum of US\$16.765 million from ADC Affiliate;
- ADC agreed to assign, transfer and convey to ADC Affiliate all of its rights, title and interest in and to the ADC quotas and the Promissory Note as soon as practical following the giving by ATAA of the ATAA’s consent; and
- ADC Affiliate agreed to accept such assignment, transfer and conveyance.

137. Furthermore, ADC and ADC Affiliate agreed in Section 1 of the Quota Purchase Agreement as follows:

“Upon the terms and subject to the conditions contained herein, the Parties agree that in consideration of the loan which ADC Affiliate provided to ADC in the amount of US\$ 16,765,000 (the “Loan Amount”) pursuant to the Loan and Transfer Agreement referred to above:

- (a) *ADC hereby sells and delivers to ADC Affiliate, and ADC Affiliate hereby purchases the Sale Quotas together with all rights and interest in the Sale Quotas; and*
- (b) *ADC hereby assigns, transfers and conveys to ADC Affiliate, all of its rights, title and interest in the Fixed Rate Promissory Note issued by the Project Company to ADC pursuant to the Release and Note Agreement dated February 27, 1997 entered into between the Project*

Company and ADC, which assignment is accepted by ADC Affiliate hereby.”

138. The assignment was completed for all purposes when ADC assigned to ADC Affiliate, and ADC Affiliate assumed, the rights and obligations of ADC under the Quotaholders' Agreement pursuant to the Assignment and Assumption Agreement dated February 27, 1997 between the ATAA, ADC and ADC Affiliate.

139. Each of ATAA and the Project Company consented in writing to the assignment by ADC to ADC Affiliate of the quota, the note and the Quotaholders' Agreement and all associated rights, titles and interests. Such written consent was granted in Section 4.2 of the Receipt and Acknowledgement dated February 27, 1997:

“4.2 Assignment. Except as otherwise expressly provided herein, neither this Agreement nor any right or obligation arising hereunder or by reasons hereof shall be assignable by any party hereto without the prior written consent of the other parties hereto. Notwithstanding the foregoing, (a) the ATAA may assign its rights and obligations under this Agreement to any successor entity entrusted with the operation of the Airport that is a legal successor to the ATAA and assumes such rights and obligations in writing and (b) each of the ATAA and the Project Company hereby consent to the proposed assignment by ADC to ADC Affiliate Ltd. of all of the Quotas owned by ADC in the Project Company, all of ADC's rights under the Quotaholders' Agreement and all of ADC's right, title and interest in and to the Note [emphasis added], provided that ADC guarantees the obligations of ADC Affiliate Ltd. under the Quotaholders' Agreement by instruments reasonably satisfactory to the ATAA.”

140. ADC guaranteed the obligations of ADC Affiliate under the Quotaholders' Agreement in Section 2 of the Assignment and Assumption Agreement. Finally, ADC Affiliate's status as Quotaholder in the Project Company since 28 February 1997 is confirmed by Hungary's Company Register.

141. As a quotaholder of the Project Company, ADC Affiliate's return on its investment was governed by the Regulatory Framework adopted by ATAA and the Project Company as Schedule C to the Operating Period Lease. Section 4.1 of the Regulatory Framework defines the IRR as follows:

“4.1 Definition

The Internal Rate of Return (“IRR”) is defined as the discount rate that equates the discounted value of a stream of cash flows to the cost of the investment that produced the cash flows, calculated over the entire life of the investment.

Calculations of IRR shall be made by reference to each Quotaholders' initial equity investments (US\$ 16,765,000 in the case of the ADC Parties), with any dividend, interest or other distribution or payment

(including return of capital, redemption of note or repayment of principal on the note) or rentals payable pursuant to the Operating Period Lease being treated as part of such Quotaholders' return and not as reducing the base reference amount on which the return is to be calculated. [...]"

142. Section 4.1 of the Regulatory Framework thus provided that “[c]alculations of the IRR shall be made by reference to each Quotaholders’ initial equity investments (US\$16,765,000 in the case of the ADC Parties) ...”, with payments under the Promissory Note being treated as part of ADC Affiliate’s return. The Claimants contend that, at the time, the Parties considered the Promissory Note as part of one single equity investment in the Project Company, and that this equity investment was in the amount of US\$16.765 million. The Respondent originally disputed this contention but following Dr. Hunt’s Report (see below), this is no longer disputed.

143. In addition, the Regulatory Framework established a Target IRR of 15.4% (in Section 4.2) with an upper limit of 17.5% (Section 7.0). It also set out a procedure for devising the Business Plan for the Project Company so that the Target IRR would be met through the adjustments of Regulated Rates and Charges (Section 5.0), and committed the ATAA to implement such adjustments (Section 6.0).

144. The Regulatory Framework further provided that the Annual Business Plan for the first year of operation would set the initial Regulated Rates and Charges to yield an IRR of 15.4%. In subsequent years, if the IRR turned out to be higher than 15.4% but not exceeding 17.5%, the initial Regulated Rates and Charges would remain unchanged.

145. Finally, the Quotaholders' Agreement, like the Regulatory Framework, considered the payment of dividends, rental payments and payments under the Promissory Note as equivalent for purposes of calculating the IRR:

“7.2 Limitation on Dividends, Rental Payments and ADC Notes

(a) The Quotaholders in the Project Company shall be entitled to receive dividends in proportion to their Quotas from the after-tax profits of the Project Company determined by the Quotaholders' Meeting, provided that when the actual receipts by the Quotaholders which are ADC Parties, collectively, of dividends after any required withholding or other applicable tax (Net Dividends), any refund of withholding tax or other distributions and loan payments (including distributions of capital and payments of the principal of or interest (after withholding tax) on any ADC notes) and payments of rentals, if any, reach an amount representing an IRR (as defined in the Regulatory Framework) of 17.5% on their collective initial equity investment (i.e., initially US\$16,765,000), calculated as described in the Regulatory Framework, all additional future distributions that would otherwise accrue to the ADC Parties and their Affiliates or their transferees shall be waived by them and shall be retained by the Project Company and set aside as an asset reserve fund to be used for the improvement or renovation of the Terminals. [...][emphasis added]"

2. ADC & ADMC Management's Investment

146. ADC's Tender provided for management fees payable to ADC (in the event, ADC & ADMC Management), calculated as 3% of Airport Project revenues (net of interest income). These fees were designed to compensate ADC (ADC & ADMC Management) for the provision of management expertise to the Airport Project. The Project Company entered into the Terminal Management Agreement with ADC & ADMC Management as part of the Project Agreements executed in February 1997. It is pursuant to this agreement that ADC & ADMC Management provided Management Services (as defined in the Terminal Management Agreement) to the Project Company.

147. The Terminal Manager was obligated to provide Management Services both before and after the Operations Commencement Date. The term of this agreement commenced on the date of execution and not on the Operation Commencement Date. This distinction is important:

- The Management Services that the Terminal Manager was obligated to provide before the Operations Commencement Date were performed on its behalf by Mr. Huang and his associates, between February 1997 and December 1998.
- The Management Services that the Terminal Manager was obligated to provide after the Operations Commencement Date were performed on its behalf by the employees of the wholly-owned Hungarian subsidiary of ADC & ADMC Management, an entity named ADC & ADMC Management Hungary Ltd.

148. The management fee of 3% payable in each calendar year commencing on and after the Operations Commencement Date (pursuant to Section 4.1(a) of the Terminal Management Agreement) was designed in large part to compensate the Claimants for the services that had been rendered by the Terminal Manager (by Mr. Huang and his associates on its behalf) before the Operations Commencement Date, and otherwise served as an incentive payment linked to the performance (*i.e.*, the revenues) of the Project Company.

149. With respect to the Management Services provided after the Operations Commencement Date, the Terminal Manager incurred only minimal overhead costs and expenses associated with the on-going supervision and knowledge transfer it provided, inasmuch as the salaries and benefits of the employees in Hungary who provided the on-site Management Services during the Operating Period were paid by the Project Company, pursuant to Section 4.1(b) of the Terminal Management Agreement.

150. The management team employed by the Terminal Manager was composed of 10 individuals, namely:

- A. Mr. Mihaly Farkas, who replaced Mr. Tamás Tahy as Managing Director of the Terminal Manager beginning in September 1999;
- B. Ms. Krisztina Meggyes, chief accountant;

- C. Ms. Edina Tiszai and Ms. Krisztina Törteli, accountants;
- D. Mr. György Onozó, technical manager;
- E. Ms. Orsolya Bárány, commercial and technical assistant;
- F. Ms. Noémi Devecseri and Mr. Levente Tordai, commercial assistants;
- G. Ms. Mariann Bördös, who served as Mr. Huang's assistant; and
- H. Dr. Béla Keszei, financial and administration manager.

151. Dr. Keszei is an economist who served in a role equivalent to the company's controller. Dr. Keszei, together with Ms. Meggyes and the two accountants, were responsible for all financial accounting, reporting and taxation matters (billing, accounts receivable, accounts payable, etc.). They and the other members of the staff were under the supervision and direction of Mr. Tahy.

152. Mr. Onozó and Ms. Bárány were in charge of managing the relationship with Airport tenants as well as the various departments of the ATAA on all technical aspects of the operation of the Terminals. Mr. Tordai and Ms. Devecseri used data received from the airport to develop the statistics that served as the basis for billing and certain commercial arrangements at the airport, such as number of passengers on each flight and the time each airplane spent on the tarmac.

F. Construction of Terminal 2/B

153. The Project Company and the ATAA entered into a turnkey contract with CCC for the construction of Terminal 2/B on December 19, 1996. When the credit facility transaction closed in February 1997, monies were disbursed to the Project Company in order to fund the construction. CCC broke ground in March 1997 and construction proceeded through 1997 and 1998.

154. Terminal 2/B was commissioned and transferred to the Government of Hungary on or about December 25, 1998. Both the ATAA and the Project Company signed the Taking-Over Certificate dated November 25, 1998. The completed Terminal 2/B was opened to the public on or about 19 December 1998.

G. Business Planning Process for the Project Company

155. The original business plan for the Airport Project was contained in ADC's Tender dated April 29, 1994. This business plan was developed by ADC in cooperation with KPMG. In order to carry out the financial analysis of the project, KPMG developed a computerized financial model which generated projections for the duration of the Project. The original and subsequent business plans projected the Project Company's financial results for the entire twelve year operating period (1997-2009), subject to further extension.

156. An updated version of the business plan was prepared by KPMG in December 1996. The parties referred to this updated business plan as the “*feasibility study*,” and it was defined in the Master Agreement as the “*KPMG Feasibility Study*”.

157. Pursuant to Section 2.0 of Schedule C to the Operating Period Lease, the KPMG Feasibility Study served as the basis for the Project Company’s initial “Annual Business Plan,” as defined in Section 4.1 of the Operating Period Lease. Section 2.0 of Schedule C to the Operating Period Lease defines the procedure to be followed in order to develop subsequent Annual Business Plans for the Project Company. The highlights of that procedure are as follows:

- Prior to each operational year of the Project Company, the Terminal Manager was to prepare and submit to the ATAA a new draft Annual Business Plan covering each financial year, or portion thereof, for the remainder of the Term;
- The ATAA had twenty days, following submission of such first draft, to comment in writing on the draft;
- If no comments were made, such draft Annual Business Plan was to be submitted to the Quotaholders’ meeting for approval;
- If comments were made, a second (or third) draft would be produced by the Terminal Manager following consultations between the ATAA, the Terminal Manager and the Project Company; and
- The agreed draft of the Annual Business Plan would be submitted to the Quotaholders’ meeting for approval.

158. In keeping with the procedure set out in Schedule C of the Operating Period Lease, the Annual Business Plans for the years 1999 through 2002 were each approved by the Quotaholders as follows:

- The Quotaholders approved the Annual Business Plan for the year 1999 on October 9, 1998;
- The Quotaholders approved the Annual Business Plan for the year 2000 on September 13, 1999; and
- The Quotaholders approved the Annual Business Plan for the year 2001 on October 2, 2000.

159. Regarding the Annual Business Plan for the year 2002, the first paragraph of the 2002 Business Plan describes the drafting and review process for the document as follows:

“Pursuant to the Regulatory Framework, the Terminal Manager is required to prepare and submit to the ATAA a new draft Annual Business Plan by May 31 of each year. Accordingly, ADC & ADMC Management Ltd. (the “Terminal Manager”) submitted the first draft of the Annual Business Plan

dated May 29, 2001. The ATAA provided its comments on the first draft by letter dated June 20, 2001. The Terminal Manager submitted the second draft on June 30, 2001. Based on the request by the ATAA, the Terminal Manager submitted the third draft on August 23, 2001. On September 21, 2001, the ATAA requested further modifications to the third draft. The Terminal Manager submitted the Fourth Draft on October 12, 2001. Upon receipt of comments on November 15, 2001, the terminal manager submits this Fifth Draft for approval of the Quotaholders.”

160. The Claimants contend that the Quotaholders approved the Annual Business Plan for the year 2002 on December 11, 2001. The Respondent disputes this contention. By letter dated December 11, 2001 from Mr. Somogyi-Tóth, Acting Director of ATAA, addressed to Mr. Tamás Tahy, the Commercial Director of Ferihegy ADC Limited, it was stated as follows:

“We have received the 5th version of the Business Plan for 2002. Thank you very much for your taking into consideration our comments when revising it. We inform you that we accept the 5th version of the Business Plan and we ask you to do your best to perform all the tasks defined in the plan.

At the same time we ask you again to consult with MALÉV regarding the planned parking (bridge) fee structure and please to inform us about the results of this discussion at your earliest convenience. In addition we ask you to update the exchange rate forecast for the whole project period when preparing the next year plan.”

In the light of this letter, the Tribunal fails to see how it could be contended that the Annual Business Plan for the year 2002 was not approved. The Tribunal is satisfied that it was.

H. Project Company’s Financial Results

161. The Project Company began reporting its financial results as of its establishment in 1995. The Project Company’s results from 1995 through 2001 were presented in audited financial statements as follows:

- Independent auditors’ report on Project Company’s 1995 Annual Report dated May 30, 1996;
- Independent auditors’ report on Project Company’s 1996 Annual Report dated February 4, 1997;
- Independent auditors’ report on Project Company’s 1997 Simplified Annual Report dated May 4, 1998;
- Independent auditors’ report on Project Company’s 1998 Simplified Annual Report dated May 31, 1999;

- Independent auditors' report on Project Company's 1999 Annual Report dated March 31, 2000;
- Independent auditors' report on Project Company's Financial Statements for 2000, dated March 14, 2001; and
- Independent auditors' report on Project Company's 2001 Annual Report dated August 27, 2002.

162. Two types of distributions were made by the Project Company to ADC Affiliate. The first consisted of payments on the Promissory Note. These payments were made semi-annually. The second consisted of dividends from the profit of the Project Company, which were paid around March of each year (based on the profit of the previous year). The management fees payable to ADC & ADMC Management were paid semi-annually, after the semi-annual payments of debt service.

163. The Claimants contend that the financial results of the Project Company generally show that it was performing over and above the projections in the Business Plans. The Tribunal accepts that this was so.

I. Project Company's Operations from 1999 through 2001

164. The primary objective of the Project Company, after completion of the construction of Terminal 2/B and modifications of Terminal 2/A, was to perform or arrange for the performance of what the Operating Period Lease defined as Entrepreneurial Operations, and it was entitled to collect the revenues accruing from these Entrepreneurial Operations (defined in the Operating Period Lease as Terminal Revenues). These included passenger terminal usage fees, passenger handling activity fees, aircraft parking fees, ground handling fees, space rentals within the Terminals, retail activity fees, including duty-free outlets, revenues from advertising, within and on the exterior walls of the Terminals, revenues from business centre and VIP lounges, *etc.*

165. Section 4 of the Operating Period Lease set out the covenants of the Project Company, which included:

- (a) submitting annual business plans (prepared by the Terminal Manager in consultation with the Project Company) to the Quotaholders of the Project Company for their final approval;
- (b) conducting the Entrepreneurial Operations and the design, financing and construction of any Terminal improvement authorized in any Annual Business Plan or otherwise undertaken by it in a diligent workmanlike and commercially reasonable manner in accordance with Hungarian law;
- (c) using its best efforts to promote and optimize commercial revenues at the Terminals;

- (d) promoting the airport internationally so as to maximize potential air traffic and in connection therewith using its best efforts to create overseas hub operations at the airport; and
- (e) after soliciting bids, awarding retail franchises and entering into contracts for goods and services on a prudent and businesslike basis with the view to the profitable operation of the Terminals.

166. Project Company staff consisted of the two Managing Directors appointed by the Quotaholders, the Commercial Managing Director appointed by ADC Affiliate, and the Operations Managing Director appointed by the ATAA.

167. The Project Agreements gave the Terminal Manager (*i.e.*, ADC & ADMC Management) primary day-to-day responsibility for managing, administering, coordinating and ensuring the proper and efficient performance, on behalf of the Project Company, of most of the Entrepreneurial Operations, and for collecting the Terminal Revenues.

168. ADC & ADMC Management Hungary Kft. had a staff of ten individuals as of December 31, 2001. All of these individuals were Hungarian nationals.

169. In keeping with industry practice, the Project Company's operations and performance were closely monitored, notably by the syndicate of banks lending to the Project, the Project Company's auditors, and the Ministry of Finance in its capacity as the guarantor of the project loan. Pursuant to the Credit Agreement, the Ministry of Finance appointed CIB Bank as its "*financial adviser*" to review and monitor the financial performance of the Project Company during the term of the Facility.

170. There were at least three audits or inspections of the Project Company:

- In 1998, the Government Control Office investigated the Project's contractual system to determine whether it was lawful, and concluded that it was.
- In 2000, Ernst & Young was retained by the ATAA to perform a financial and business audit of the Project Company, and concluded that the Project was "*particularly favourable*" for the ATAA.
- In March 2001, the Supervisory Board of the Project Company retained its own outside expert to conduct "*a comprehensive review*" of the Project Company.

171. In 2001, the ATAA launched an investigation whose objective was to gather detailed information concerning many aspects of the Project Company.

J. Transformation of the ATAA, Legislative Amendments and the Decree

172. In 1999, the Ministry of Transport prepared a Proposal for the Government's Air Transportation Strategy, which requested that plans be drawn up to transform the ATAA. The ATAA was a State budgetary organ. The ATAA had two principal tasks: air traffic

control and the operation of the Airport. There had been concern that these two functions should be separated to prevent possible conflicts in decision-making and to ensure transparency in financial matters. It was also necessary to separate these two functions to comply with international and regional requirements and standards.

173. On November 25, 1999, a Ministerial Commissioner was appointed by the Ministry of Transport to prepare a plan for transformation of the ATAA.

174. The Government developed a national aviation strategy, embracing the entire aviation sector, of which part of its programme was to align with and implement EU law within the aviation sector in preparation for accession to the EU.

175. This national aviation strategy was adopted on April 14, 2000, when the Government passed Resolution No. 2078/2000 on The Strategic Tasks of the Development of Air Transport. The Resolution was published in the official Gazette “Collection of Resolutions”. This set out a 9-point programme to implement the national aviation strategy and harmonise the aviation sector with EU law. The plan included transformation of the ATAA. The Minister of Transport was in charge of the transformation. The Government Resolution required transformation to be complete by January 31, 2002.

176. The Ministry of Transport appointed a Management Committee to prepare, discuss, and implement proposals for transformation of the ATAA.

177. From autumn 2001, a change took place in the management of the ATAA in order to prepare for its transformation: Mr. Somogyi-Tóth remained Acting Director in charge of the day-to-day operations; Mr. Gansperger became responsible for starting up Budapest Airport Rt (the new company) (“BA Rt”) and the commencement of its operations; and Mr. Istvan Mudra became responsible for starting up HungaroControl (Mr. Mudra had been the Deputy Director of Air Traffic Control).

178. On September 20, 2001, BA Rt was established. On October 25, 2001, BA Rt was registered in the Court of Registration in Budapest.

179. Decree No. 45/2001 (XII.20) KöViM (“*Decree*”) was issued on December 20, 2001, by the Minister of Transport (“*KöViM Minister*”). It was issued with the agreement of the Minister of Finance, the Minister of the Prime Minister’s Office, the Minister of the Interior, the Minister of Health, the Minister of Defence and the Minister of Environment Protection.

180. The Decree was adopted under the authority of the Act No. XCVII of 1995 on Air Traffic (“*Air Traffic Act*”), following amendments made to the Air Traffic Act by Act No. CIX of 2001 on the Amendment of Various Traffic-Related Laws (“*Amending Act*”).

181. The Amending Act was introduced in Parliament in the form of a Government Bill in September 2001, and, following a series of amendments to the Bill, it was adopted on 18 December 2001. Section 19 of the Amending Act introduced an amendment to Section 45 of the Air Traffic Act by adding thereto, among others, Section 45(5). Section 45(5) of the Air Traffic Act contains the prohibition, repeated in Section 1(5) of the Decree, against

the transfer by ATAA (or its successor) of the activities of the type previously performed by the Project Company and the Terminal Manager (“*Project Company Activities*”) to any third party, *e.g.*, the Claimants.

182. Section 45(5) of the Air Traffic Act found its way into the Bill due to a subsequent Amendment Motion introduced by a Government MP, Dr. Dénes Kosztolányi. The Amendment Motion, introduced on November 8, 2001, advanced as justification, the following reasoning:

“Reasoning

The activities listed in Section (1) have substantial influence on the operation and development of Budapest-Ferihegy International Airport, and thus the State has such strategic interest connected to these activities that the law itself specifies that the operator performing such activities may only be an organization in which the State is the majority owner, or if it is a minor shareholder then it owns preference shares, or the organization is a concession company. If any of the activities specified in Section (1) may be transferred to a third party under a contract it may not be ensured that the strategic requirements of the State are fulfilled, in other words, the limitations and restrictions established under Section (1) may be circumvented pursuant to a contract concluded with a third party.”

183. On November 28, 2001, the same MP who had submitted the Amendment Motion submitted a “*Supplementary Amendment Motion*” in which he recommended that Section 45 of the Air Traffic Act be amended by the addition of two more paragraphs, paragraphs (6) and (7), in addition to paragraph (5). The reasoning for this Supplementary Amendment Motion reads as follows:

“Reasoning

The aim of the amendment motion is to implement the Community liberalization of air transport with respect to the ground service market when our country joins the European Union.

The amendment establishes the obligation for service providers with significant market power to enter into a contract. Pursuant to the Civil Code conclusion of a contract can be rendered obligatory by a legal regulation.”

184. The plenary session of the Hungarian Parliament considered the Amendment Motions on December 11, 2001. There were a total of seventeen Amendment Motions relating to the Bill. Parliament accepted the Motion of Dr. Kosztolányi as contained in the Supplementary Amendment Motion. On December 18, 2001, two days before the issuance of the Decree, the Hungarian Parliament voted in favour of the consolidated text of the Bill.

185. On December 21, 2001, the Project Company was informed of the Decree upon reception of a copy of same by Mr. Tahy. On Saturday, December 22, 2001, the Project Company received a letter from Mr. Gansperger and Mr. Gábor Somogyi-Tóth further

notifying it of the Decree. Mr. Gansperger signed the letter in his capacity as representative of the new Budapest Ferihegy International Airport Management Ltd. (“*Joint Stock Co.*”) and statutory successor of ATAA, and Mr. Somogyi-Tóth signed as representative of ATAA.

186. The letter stated that all operations and related activities of the Airport would be taken over effective January 1, 2002, by the Joint Stock Co. The translated text of this letter reads as follows:

“Dear Mr. Tahy,

As you probably know, issued No.149 of the Hungarian Official Gazette, 2001, published Transport and Water Management Ministry Order No.45/2001 (XII.20) of the Minister of Transport and Water Management on the abolition of the Air Traffic and Airport Directorate and on the creation of HungaroControl Hungarian Air Traffic Service. Said ministerial order designates the Budapest Ferihegy International Airport Management Joint-Stock Co. (hereinafter referred to as “JS Co.”) and HungaroControl Hungarian Air Traffic Service as the legal successors to the Air Traffic and Airport Directorate as regards all operations and management activities and all related rights and obligations, as well as all contracts made with the State Treasury Asset Management Directorate. Furthermore, paragraph (5) of Article 1 of the order unequivocally states that as of January 1, 2002, the JS Co. may not cede or transfer to any third parties any of the operations or activities performed up till now by the Ferihegy Passenger Development Ltd. Co. pursuant to the lease agreement concluded on February 27, 1997 between the Air Traffic and Airport Directorate and the Ferihegy Passenger Development Ltd. Co (“FUF”).

The effect of said ministerial order naturally also extends to the Terminal Management Agreement signed on February 27, 1997 by the ATAD, the FPD Ltd. Co., and the ADC&ADC Management Ltd. Co., as well as to the contracts held by the FPD Ltd. Co. concerning the operations and leasing of Terminal II/A and II/B.

In view of the above, therefore, we hereby notify you pursuant to the provisions of paragraph (1) of Article 312 of the Civil Code that the further performance of the above contracts have been rendered impossible, and thus the leasehold deed, the Terminal Management Agreement, the ATAD Service Agreement concluded between the FPD Ltd. Co. and the ATAD, and the lease agreements – including all Appendices and Supplements – shall lapse and become void as of January 1, 2002.

The activities covered by the leasehold deed, the Terminal Management Agreement and the Service Agreement will be wholly taken over as of January 1, 2002 by the JS Co. with full competence. We respectfully suggest that the appropriate executive officers of the JS Co. and the FPD Ltd. Co. should meet

in view of carrying out the appropriate consultations in the matter for the purpose of closing off business in progress and for the settlement of accounts.

Please be further informed of the fact that in the interest of carrying on with normal business operations, we are also sending notice to all contractual partners of the FPD Ltd. Co. concerning the developments and the resulting impossibilities to continue with the performance of said contracts so as to facilitate a smooth and speedy changeover.”

187. Also on December 22, 2001, ADC & ADMC Management received a similar letter from the Joint Stock Co. notifying it of the Decree and its principal provisions, including Article 1(5). The letter concluded that the Terminal Management Agreement between the Project Company, ATAA and ADC & ADMC Management:

“... shall similarly lapse and become void, and the activities performed by your company will be taken over and performed by the JS Co. as of January 1, 2002, with full competence. In order to facilitate the maintenance of normal business operations, it is respectfully suggested that we should begin consultations on the transfer without delay.”

188. On December 27, 2001 (the first business day following Christmas), Mr. Tahy was informed that the Project Company’s offices in Terminal 2/B had to be vacated within three business days, namely by 2 January 2002.

189. As a result of the Amending Act, the Decree and the actions taken in reliance thereon, the Project Company was no longer able to operate the Terminals and collect the associated revenues.

190. Since the Decree, ADC Affiliate has received no dividends on its Quota and no payments on the Promissory Note from the Project Company (including dividends due from the Project Company’s 2001 profit), and ADC & ADMC Management has received no management fees from the Project Company (including management fees due for the second part of 2001).

K. Developments after the Decree

1. Separation of the Functions of the ATAA

191. On January 1, 2002, ATAA’s functions were separated and allocated to BA Rt and HungaroControl as a result of the Amendment to the Air Traffic Act and the subsequent Decree. HungaroControl, according to the Decree, became “*the legal successor with respect to the management of air traffic, the performance of other aviation services and related activities*”. BA Rt, on the other hand, became “*the legal successor with respect to the operation of the Budapest Ferihegy International Airport and related activities*”.

192. The separation of the ATAA’s functions and the establishment of HungaroControl were deemed to be necessary to modernize Hungary’s aviation industry and to harmonize the aviation sector with EU law.

2. Passenger Traffic

193. Since 2001, passenger traffic at the Airport has increased substantially year over year, and is projected to continue to grow:

Period	Total Passengers (million)
2002	4.5
2003	5.0
2004	6.5
2005	7.5
2008	10
2010	Above 11

194. Data for the first quarter of 2005 show an increase in passenger traffic of 35.6% over the same period in 2004. This is triple the average growth in passenger traffic in Europe.

195. According to IATA, Hungary will be the world's third-fastest growing market during the period 2004 through 2008, behind only China and Poland, with a projected annual growth rate of 9.6%.

3. Parking Facility

196. Prior to the Decree, the Government hired a consultant to develop plans for a parking garage. A request for proposals for architectural services in connection with a parking facility dated April 23, 2004 was followed by a feasibility study for a parking facility prepared by PricewaterhouseCoopers dated September 2004.

4. Terminal Expansion and Reconstruction

197. Reconstruction of Terminal 1 started in October 2004 and was completed on July 15, 2005. According to a press release from Budapest Airport, this is the "*first stage*" in the "*long-term development*" of the Airport.

198. According to statements reported in the March 30, 2005 issue of the *Budapest Business Journal*, the deputy CEO of Budapest Airport, Mr. Balazs Bella, acknowledged that the Airport will soon be facing terminal capacity problems. He noted that "*further extension [of Terminal 1] is hindered by the fact that [Terminal 1] is listed as a building under national monument protection.*" He confirmed that the Airport plans to "inaugurate" a new Terminal 2/C in 2009. Mr. Bella also indicated that plans were under way to improve public transit and road accessibility to the Airport.

L. The Privatization of Budapest Airport

199. In anticipation of privatization, on June 1, 2005, Hungary amended Section 45(1) of the Air Traffic Act so that the majority shares in the Joint Stock Co. could be owned by a

foreign entity. On June 6, 2005, the Government of Hungary issued an invitation to tender for Budapest Airport Rt. The subject of the tender was the sale of shares representing 75% minus one vote of the registered capital of Budapest Airport Rt., which is currently wholly-owned by the Hungarian Privatization and State Holding Company Ltd. (“ÁPV Rt.”).

200. Pursuant to Article 5.2 of the invitation to tender, eleven interested parties submitted written non-binding expressions of interest to ÁPV Rt. by the deadline of June 28, 2005.

201. On July 12, 2005, ÁPV Rt. announced that all but one of these parties were invited to participate in the first round of the tender, namely the submission of non-binding bids by August 9, 2005. On August 26, 2005, ÁPV Rt. invited five bidders from among those who had submitted timely non-binding bids to participate in the second round of the tender, namely the submission of legally binding bids by November 2, 2005.

202. In the first round, the financial bids of the bidders were between HUF 202 billion (US\$1.01 billion) and HUF 390 billion (US\$1.96 billion).

203. On September 29, 2005, the Budapest Metropolitan Court invalidated the tender process on the grounds that the workers at Budapest Airport Rt. were not given a sufficient opportunity for input into the process. On October 20, 2005, ÁPV Rt. recalled the call for final binding bids from the five bidders it had invited into the second round of the invalidated process.

204. On October 28, 2005, ÁPV Rt. announced a closed, single-round tender for the sale of Budapest Airport Rt. (75% minus one vote) to replace the cancelled process. The bidders invited to participate in the restricted tender were those that had been selected for the second round of the previous tender, namely:

- Fraport AG Frankfurt Airport Worldwide (Germany) – operator of the Frankfurt and Frankfurt-Hahn airports, among others;
- BAA international Ltd. (United Kingdom) – operator of Heathrow, Gatwick and Stansted airports in London, among others;
- Hochtief Airport GmbH and Hochtief AirPort Capital (Germany) – operators of the Düsseldorf, Hamburg and Athens airports, among others;
- Macquarie Airports (Australia) – operator of the Rome, Brussels, Birmingham and Sydney airports, among others; and
- Copenhagen Airports (Denmark) – operator of Copenhagen airport, among others.

205. The five bidders were invited to make their bids by November 14, 2005. Three bidders submitted binding bids by the deadline: BAA, Hochtief and Fraport. The highest bid was submitted by BAA, which offered more than HUF 400 billion (US\$1.86 billion). On 8 December 2005, ÁPV Rt. announced its ranking of the bids based on technical and financial criteria. BAA was ranked first.

206. On December 18, 2005, ÁPV Rt. announced that it had signed a privatization contract for Budapest Airport Rt. with BAA (International Holdings) Ltd., for US\$ 2.23 billion (£ 1.26 billion).

207. On December 22, 2005, BAA (International Holdings) Ltd. closed the deal with BA Rt. Under the terms of the deal, BAA acquired a 75% minus one share stake in the Airport as well as moveable assets and agreed on a 75-year asset management contract with Hungary.

208. The press in Hungary has reported that Hungary's opposition Fidesz party has said that it would renationalize the Airport if it wins power in the elections to be held in the spring of 2006.

209. An illustration of the relevant contracts was set out in Claimants' Chart 3 which was submitted at the hearing and helpfully agreed by the Respondent. For ease of understanding the complex structure relevant to this case, the Tribunal sets this out as Appendix 1 to this Award.

M. Arbitration Proceedings Brought by the Project Company

210. In November and December 2005, the Project Company commenced four arbitration proceedings against the Joint Stock Co., which is the legal successor of the ATAA.

211. In the arbitration proceedings initiated on November 29, 2005, the Project Company seeks additional relief amounting to approximately US\$ 19.3 million in compensation for advance lease payments under the Operating Period Lease allegedly paid by the Project Company to the ATAA in excess of the actual utilization period of the Terminals.

212. In the arbitration proceedings initiated on December 15, 2005, the Project Company claims compensation for certain development and repair works under the Operating Period Lease in an amount of approximately US\$ 145,000.

213. The other two arbitration proceedings were both initiated on December 21, 2005. In one of these two proceedings, the Project Company claims damages in a preliminary amount of approximately US\$ 101.5 million on the grounds of an alleged breach of the Operating Period Lease by the Joint Stock Co. and consequential losses of income emanating from rights under the Operating Period Lease. In the other, the Project Company demands refund of VAT allegedly charged erroneously by the ATAA in an amount to be determined following submission of an itemised accounting.

IV. CONTENTIONS OF THE PARTIES

A. Contentions of the Claimants

214. The Claimants contend that the construction phase of the Project was completed without any significant problems or delays. The Project Company operated Terminal 2/A and 2/B efficiently, effectively and profitably.

215. The Claimants claim that under the business structure set forth in the Project Agreements, they constructed and operated Terminals of world class standards.

216. The Claimants claim that the parties put in place a business planning process that was rational, consensual and conservative. The annual business plans for the Project Company were subject to discussion and revision before, in each case, being expressly approved by the ATAA and ADC Affiliate, the Project Company's two quotaholders.

217. The Claimants contend that the distributions to ADC Affiliate and the management fees paid to ADC & ADMC Management were strictly in accordance with the agreements in place between the parties and were reasonable in light of the risks assumed by the Claimants and the value of the know-how transferred to the Airport and the Government partners.

218. The Claimants contend that the Respondent's issuance of the Decree and the following taking-over of all activities of the Project Company in the airport by BA Rt constitute an expropriation of the Claimants' investments in Hungary.

219. The Claimants contend that the Respondent's expropriation of the Claimants' investments, in December 2001, was unexpected, unjustified and uncompensated. As a result of the expropriation, the Project Company has been unable to pursue the sole purpose for which it has been established, namely the operation of the Terminals.

220. The Claimants contend that by reason of such expropriation, ADC Affiliate has been deprived of the stream of dividends on its quota and the payments due on the Promissory Note from the Project Company, and ADC & ADMC Management has been deprived of the management fees payable to it by the Project Company.

221. The Claimants also contend that had the expropriation not occurred, the Project Company would have benefited from the improvements in the market for commercial air travel, and the Project Company would have had the opportunity to participate in the financing, building and operation of the proposed new Terminal 2/C or in the renovation and reopening of Terminal 1, as well as in the construction and operation of a new parking facility.

222. The Claimants contend that the expropriation of the Claimants' interest constituted a depriving measure under Article 4 of the BIT and was unlawful as: (a) the taking was not in the public interest; (b) it did not comply with due process, in particular, the Claimants were denied of "*fair and equitable treatment*" specified in Article 3(1) of the BIT and the Respondent failed to provide "*full security and protection*" to the Claimants' investment under Article 3(2) of the BIT; (c) the taking was discriminatory and (d) the taking was not accompanied by the payment of just compensation to the expropriated parties.

B. Contentions of the Respondent

223. The Respondent denies the Claimants' claims and contentions in their entirety.

224. The Respondent claims that the Airport is an exclusive and non-negotiable asset of the State, as stated in Section 36/A of the Air Traffic Act (Act XCVII of 1995) and the Civil Code.

225. According to the Respondent, the Airport was managed by the ATAA, which was under the administration of the Ministry of Transport, Communications and Water Management.

226. The Respondent claims that ADC and the Claimants have not established a Terminal of "*world class standards*". They have not made it a hub airport, or attracted new carriers. They have not provided management services. They have made minimal investment and have taken on minimal risk.

227. The Respondent claims that neither ADC nor the Claimants took on any risk during the construction phase.

228. The Respondent claims that the Claimants and ADC have received back to date amounts in the order of US\$20 million.

229. The Respondent claims that ADC recovered its bidding and preparation costs during the construction phase.

230. The Respondent contends that the construction of Terminal 2/B was not completed on schedule nor on budget and there were also problems with the renovation of Terminal 2/A.

231. The Respondent claims that ADC & ADMC Management did not fulfil its obligations as the Terminal Manager. Rather, it was the ATAA that in reality managed and operated the Airport.

232. The Respondent contends that following the legislative changes, especially the issuance of the Decree, BA Rt has managed and operated the Airport.

233. The Respondent claims that BA Rt has offered to settle the accounts of the Project Company, but ADC and the Claimants have failed to cooperate.

234. The Respondent claims that the Claimants mischaracterized the dispute between the parties. Specifically the Respondent claims that the Claimants' claims are claims for damages for breach of contract and should be pursued against the Project Company, through the dispute resolution procedures prescribed in the applicable agreements.

235. The Respondent contends that the Claimants have not been deprived of their rights in the Project Company or under the Project Agreements. Nor have the Claimants been deprived of their rights to seek redress from the Project Company.

236. Without prejudice to its contention that this Tribunal lacks jurisdiction, the Respondent denies that it has violated the BIT.

237. In particular, the Respondent claims that it has not taken a measure that deprives the Claimants of their investments.

238. In the alternative, the Respondent claims that even if the Respondent's measure deprived the Claimants of their investments, any such measure was lawful, in that it was in the public interest, under due process of law, not discriminatory, and accompanied by provision for the payment of just compensation.

239. In any event, the Respondent claims that it has not violated any other standards of protection in the BIT, namely fair and equitable treatment, reasonable or non-discriminatory measure, and full security and protection (Article 3(1) and (2)).

240. The Respondent therefore claims that the Claimants are not entitled to the damages claimed.

V. RELIEF SOUGHT BY THE PARTIES

A. Relief Sought by the Claimants

241. The Claimants claim that they are entitled to damages measured under the international law standard of compensation for an unlawful taking.

242. The Claimants contend that due to the fact that actual restitution of the contractual rights confiscated by the Respondent is impractical and considering Article 4 of the BIT in the context of the relevant rules of international customary law, the Claimants are entitled to (a) the consequential damages of the taking, plus (b) the greater of:

- a. the market value of the expropriated investment at the moment of expropriation; and
- b. the sum of (x) the market value of the expropriated investment at the date of the award, calculated with the benefit of post-taking information and (y) the value of the income that the Claimant would have earned from the expropriated investments between the date of the taking and the date of the award.

243. Based on the *LECG Report*, the *LECG Supplemental Report* and the *LECG Post-Hearing Report*, all produced by Messrs. Abdala, Ricover and Spiller of LECG LLP, the Claimants submit that the damages to which they are entitled under each calculation approach as of 30 September, 2006 (including interest) as follows:

damages under the Time of Expropriation Approach	US\$ 68,423,638
damages under the Restitution Approach	US\$ 76,227,279
damages under the Unjust Enrichment Approach	US\$ 99,722,430

plus further interest as of October 1, 2006 until the date of payment.

244. The Tribunal notes that while the Claimants have continued to reserve their right to claim consequential damages caused by the expropriation, which include, as submitted by the Claimants, administrative and overhead costs and damages to the Claimants' reputation, such claims were never substantiated and pursued in the course of these proceedings. The Tribunal therefore deems it appropriate to treat these claims as being effectively withdrawn by the Claimants.

B. Relief Sought by the Respondent

245. The Respondent's requests to the Tribunal are threefold.

246. First, the Respondent requests the Tribunal to dismiss the Claimants' claims in their entirety on grounds of lack of jurisdiction and/or inadmissibility and/or their lack of merit.

247. Second and alternatively, the Respondent requests a stay of the arbitration to allow the Claimants to pursue their contractual remedies.

248. Third, in the event that the Tribunal should award compensation to the Claimants, the Respondent requests as a condition of any payment to the Claimants and ADC, on its behalf and on behalf of any companies controlled by ADC, that they first waive in writing any and all rights they may have under the Project Agreement (including Promissory Note) and transfer the 34% Quota in the Project Company to the Respondent (including any rights to unpaid dividends, and any rights to share in the assets of the Project Company). In a letter dated January 13, 2006 from Ogilvy Renault to the Bodnár Law Firm copied to the Tribunal, Ogilvy Renault stated in response to the argument that the FUF arbitration proceedings could lead to a double recovery:

"...this Tribunal has the discretion to fashion a remedy that would avoid any risk of double recovery. For example, as was done in other ICSID cases, the Tribunals award can provide that upon payment of the sum awarded by the Tribunal to the Claimants in this case, ADC Affiliate must surrender its quota in the Project Company to the Respondent. Indeed, paragraph 488 of the Respondent's Rejoinder contemplates precisely such an approach."

249. On Day 1 of the Oral Hearing, at the end of his helpful opening submission, Mr. Burmeister stated as follows:

"I may conclude with our prayers for relief, but only very briefly addressed. They have been set out in the submissions and briefs."

I only want to stress one point, again, and this is basically the last one. In the event that any award would be granted to the Claimants, this may only be conditional upon the transferring back the share in the Project Company to the Respondent, giving back the Promissory Notes they have received and waiving any future rights in relation to the Project Agreements.”

Judge Brower then said he “*expected those conditions would be agreeable to the Claimants*”.

Mr. Bienvenu then stated:

“You have seen the statement in our letter of January 13, 2006 subject to payment.”

VI. FINDINGS OF FACT

A. Credibility of Witnesses

250. The Tribunal has no difficulty in accepting the evidence of the Claimants’ witnesses of fact, Messrs Huang, Tahy and Onozó. They gave their evidence in such a way as to give the Tribunal confidence that they could be relied upon. They all had intimate knowledge with this matter - in Mr. Huang’s case, from inception of the Project to this arbitration. Their oral evidence was consistent with their written statements and, to be fair, their evidence was not seriously challenged in cross-examination.

251. The Respondent called three witnesses. Unfortunately for the Respondent, one of these witnesses, Mr. Somogyi-Tóth, cast considerable doubt on the testimony of Messrs. Gansperger and Kiss.

252. Dr. Kiss was asked when he first heard that the Project Company would be displaced and its operations taken over. Given his then position as the General Director of the General Directorate of Civil Aviation, which was at the time part of the Ministry of Transport, he gave the surprising answer that it was not until January 2002.

253. Mr. Gansperger also denied that he had any prior knowledge of the takeover. He maintained that the first he learned of the decision was when the legislation was adopted on December 18, 2001. He was asked specifically whether he knew that the legislation was contemplated prior to that date. He denied any such knowledge.

254. Mr. Somogyi-Tóth, on the other hand, told the Tribunal that all through the autumn and early winter months of 2001 talk was in the air about the impending changes. He confirmed that this possibility was being discussed between, *inter alia*, Messrs. Gansperger and Kiss from the Transport Department. He further confirmed that both these gentlemen were advocating in favour of the takeover.

255. It is the clear view of the Tribunal that Mr. Somogyi-Tóth's evidence is obviously correct and the Tribunal accordingly accepts it.

256. Even without his testimony, it would seem most unlikely that figures so involved as Messrs. Gansperger and Kiss were not aware of such major impending changes. With the evidence of Somogyi-Tóth, the Tribunal can be convinced that Messrs. Gansperger and Kiss were well aware of what was being planned.

257. Having considered the evidence of Messrs. Gansperger and Kiss in the light of the testimony not only of the witnesses of the Claimants but also that of Mr. Somogyi-Tóth, the Tribunal has no doubt that the evidence of the Claimants' witnesses is to be preferred when there is any conflict with the Respondent's witnesses. The Tribunal will deal with the expert witnesses under the quantum section of this award.

B. The Nature of the Claimants' Investment

258. The Tribunal is satisfied that Mr. Huang was the most competent witness to explain the tender process and the negotiation of the Project Agreements. The Tribunal accepts his evidence. The Tribunal is satisfied that the essence of this transaction never changed. The deal discussed and agreed in 1995 was the same deal as executed in the suite of agreements in 1997. The Tribunal accepts that the 1997 agreements involved a more complex structure. However, it was proposed by the Hungarian side for reasons which they thought necessary.

259. The Tribunal accepts that the return on equity contribution and management fees were part of one package deal. The Tribunal accepts the evidence of Messrs Huang and Ricover that this approach is prevalent in the airport industry.

260. It is worth noting that the competing Lockheed bid also contained such features. The Claimants' bid was the lowest and it is not now open to the Respondent to challenge these matters which were voluntarily agreed at that time.

261. The Tribunal accepts that it was understood and agreed that expenses would be incurred and work executed prior to the Operation Commencement Date because without it the Project would have been delayed. The annual management fee was an integral part of the return which the Hungarian party agreed to return to the Claimants. The Tribunal is satisfied that a management contribution was made by ADC & ADMC Management. If the management fee represented in part deferred compensation the Tribunal can see nothing wrong with this. It seems clear from the management agreement that this would be the case.

C. Complaints about the construction of the Terminal

262. Poor performance in the construction of Terminal 2B and the renovation of Terminal 2A has been hinted at as a possible reason why the agreements were terminated. It is clear to the Tribunal that this was not the reason. The contemporary documents do not support

such a conclusion and the Respondent's witnesses got no where near to establishing this as a justification. At the best, it was a half-hearted *ex post facto* attempt at justification. The Tribunal is satisfied that any problem that existed whether arising from construction or management was sorted out in the normal course of events.

263. Finally, it is not without significance that the third-party consulting firm of Booz-Allen Hamilton referred to Terminal 2B shortly before the events of December 2001 as “one of Europe’s safest and most modern establishments, which the Ministry of Transport can deservedly be proud of” (sic).

Effect of takeover

264. The Tribunal accepts that since the Decree was issued ADC Affiliate Limited has received no dividends on its quota and no payment under the Note. Further, the Terminal Manager has received no management fees. Even dividends and management fees due prior to the Decree have not been paid.

265. To add insult to injury, the Respondent caused, permitted or allowed BA Rt to claim debt repayment from the Project Company. Even the Ministry of Finance has refused to clarify the status of the project loan until this arbitration has been concluded.

266. It is also clear beyond any doubt that as from the date of the Decree the rights of the Claimants ceased to exist (the very language used in the Information Memorandum prepared for the purposes of the recent tender exercise that eventuated in the sale to BAA) and that the Decree has resulted in a total loss of the Claimants’ investment in the Airport Project.

D. Attempted Reasons for and Justification of the Decree

267. During the course of this arbitration, the Respondent has sought to rely on the following justifications for the Decree:

- (a) compliance with EU law;
- (b) strategic interests;
- (c) contractual non-performance by the Claimants;
- (d) lack of operating license; and
- (e) financial interest in terminating the Project Agreements.

(a) EU Law

268. As noted by the Claimants in their written closing submissions, two points have been raised under this head. The first is that ground handling at the Airport had to be harmonized with EU Directive 96/97 and the second is that air traffic control had to be separated from airport operation services pursuant to EU law.

269. As to ground handling, the Tribunal accepts the evidence of Mr. Tahy, who told the Tribunal that although the Project Company had responsibility for ground handling, it had discharged this responsibility by entering into contracts with ATAA as well as Malév, who were the actual ground handling providers. Furthermore, Mr. Tahy told the Tribunal, and the Tribunal accepts, that the EU Directive was never mentioned by Mr. Gansperger as a reason for the expropriation and that the Project Company was never asked to consider ground handling services being carried out by any third party. It is also not without significance that the position up to the BAA acquisition at the end of 2005 remains the same - ground handling is still in the hands of BA Rt (the legal successor of ATAA) and Malév.

270. As to the separation of air traffic control, it was never made clear to the Tribunal why ATAA could not have been reorganized to meet EU requirements relating to the separation of air traffic control from the commercial operation of the airport without the need for taking over the activities of the Project Company and without the need of the Decree. Mr. Somogyi-Tóth told the Tribunal that the transformation of ATAA did not require the exclusion of the Project Company.

271. Dr. Kiss was somewhat contradictory on this issue. However, he accepted that neither the Government Resolution of April 14, 2000 nor the May 2000 Draft Strategy paper contemplated the cancellation of the Operating Period Lease and the takeover of the activities of the Project Company. Mr. Gansperger's evidence on this point was also unconvincing because the Tribunal fails to see how the transformation of ATAA into a company limited by shares was in any way related to the takeover of the activities of the Project Company as in fact occurred.

272. The Tribunal does not accept that compliance with EU law mandated the steps actually taken by the Respondent, the subject matter of this arbitration.

(b) Strategic Interests

273. The term "*strategic interests*" finds its origins in the Amendment Motion dated November 8, 2001 put forward by Dr. Kosztolány. The same sort of phraseology appears in the Respondent's memorials, Dr. Kiss' witness statements and the Respondent's opening statement.

274. Two points satisfied the Tribunal that this argument is groundless. First, it is a fact that the airport was privatized in December 2005 by the sale to BAA. Second, Mr. Gansperger in his attempt to minimize the role played by the Project Company said in terms "*I did not see that FUF would have dealt with activities of strategic importance...it did nothing*". It seems to the Tribunal that the Respondent cannot have it both ways. If it wishes to minimize the Project Company's role and allege non-performance, it cannot in the same breath justify its actions by the mantra of "*strategic interests*", economic or security.

(c) Contractual Non-performance

275. This has already been touched on by the Tribunal above. Three areas of contractual non-performance were mentioned. Terminal management issues, hub development and North American expertise.

276. The problem with all three grounds, in so far as they are relied upon as a justification for the Decree, was that neither the Respondent nor any other Hungarian instrumentality ever put the Claimants on notice that they were allegedly in breach of their contractual obligations. No written notice was ever given and Mr. Tahy stated, and the Tribunal accepts, that no suggestion was ever made to him that the Project Company was derelict in its contractual obligations.

277. The Tribunal has already referred to the favourable comments in the Booz-Allen Report. Dr. Kiss attempted to dismiss these conclusions by simply stating that he did not agree with them without stating why these conclusions were incorrect. It should be noted that this report was financed by the US Trade and Development Agency at the specific request of the Ministry of Transport and, significantly, was not made available to Parliament when it was considering the bill that resulted in the Decree.

278. As to complaints concerning terminal management, the Tribunal does not believe that Messrs Kiss and Gansperger had much knowledge as to what the Project Company actually did. However, Mr. Somogyi-Tóth did have such knowledge and was in regular contract with Messrs Tahy and Onozó. He did accept that there had been some construction problem at Terminal 2B but the Tribunal accepts the evidence of Mr. Huang that all such problems were dealt with under the contractual warranty provisions of the contract and that ATAA ultimately approved such work. Doubtless this was why no notice of default was ever served.

279. As to the allegation that the Claimants were in breach by not providing North American experience, the Tribunal is satisfied that there is nothing in the point. Mr. Huang was from Canada. Mr. Tahy had experience with Malév in the USA. Mr. Huang had satisfied himself that there was sufficient talent within Hungary and, absent complaint at the time, this just cannot stand as a reason for the extreme measures taken by the Respondent.

280. As to the allegation that the Claimants were somehow in breach of their contractual obligations by not developing a hub development at the airport, this simply cannot be accepted because obviously it is for the airline, not the airport operator, to decide where to hub. This was confirmed by the Claimants' aviation expert Mr. Ricover, whose testimony and expertise the Tribunal accepts.

281. The Tribunal accepts that the Project Company performed at the very least in accordance with the projections contained in the business plans agreed from time to time. It is highly significant that the 2002 Business Plan was signed off by Mr. Somogyi-Tóth on behalf of ATAA on December 11, 2001 just days before the events complained of in this arbitration. Further, Mr. Somogyi-Tóth fairly confirmed that his deputy at ATAA, Mr.

Vertes (also a member of the Supervisory Board), must have reviewed the 2002 business plan prior to Mr. Somogyi-Tóth signing it.

(d) Lack of Operation License

282. This point was raised for the first time at the hearing in London by Messrs Kiss and Gansperger. Furthermore, as Mr. Gansperger admitted, it was not stated at the time as a reason for the takeover. Still further, as is indicated by the discussion on this point during the evidence of Mr. Gansperger on Day 4, it was never satisfactorily explained why the authorizations contained in the Operating Period License did not of themselves constitute the necessary license. It was never explained why, if this was a valid reason, the Respondent accepted the position and never raised it until January 2006. On any basis this point is unconvincing to the Tribunal.

(e) Financial Interest in Terminating the Project Agreements

283. The absence of primary evidence as to the reasons for the takeover is, to say the least, surprising. If Hungarian law did in fact require these extremes steps to be taken, one might have expected some evidence from ministerial level.

284. The Claimants invite the Tribunal to draw the inference that the Respondent was simply unhappy with the contractual arrangement with the Project Company and wished to determine them unilaterally. Mr. Somogyi-Tóth told the Tribunal that there was talk that the current contractual arrangements were disadvantageous to Hungary's interests. It goes without saying that one option open to the Hungarian Government, if the contracts were truly disadvantageous to Hungary's interests, was to buy the Claimants out. There is no evidence before the Tribunal to suggest that Hungary ever considered doing this. The Claimants seek to rely upon contemporaneous newspaper articles quoting Mr. Gansperger and others. Mr. Gansperger denied making the statements attributed to him and the Tribunal does not think it necessary to resolve this factual issue.

285. The Tribunal concludes that no satisfactory explanation has ever been given for the takeover and none of the reasons now sought to be relied upon are tenable.

VII. ISSUES TO BE CONSIDERED IN THIS ARBITRATION

286. Having considered all the submissions and evidence in this arbitration, the Tribunal is being asked to decide the following main issues:

a. **Applicable Law**

b. **Jurisdiction**

Does the Tribunal have jurisdiction to hear the present case? If it has, should the Tribunal limit its jurisdiction to certain claims of the Claimants and if so which ones?

c. **Breach of the BIT**

Has the Respondent breached any provision of the BIT by depriving the Claimants of their investments? If so, what are the consequences?

d. **Quantum of compensation**

If the Respondent's deprivation of the Claimants' assets breached the BIT, what compensation are the Claimants entitled to receive from the Respondent? In calculating the appropriate compensation due to the Claimants, what compensation standard should the Tribunal use? Is it the one set forth in the BIT or is the matter to be dealt with under customary international law? When deciding the quantum of the compensation, what should be the appropriate assessment approach? Is the Discounted Cash Flow ("DCF") approach the appropriate one? If it is not, what other approach is appropriate?

287. The Tribunal will decide each of these main issues as well as sub-issues arising thereunder. The Tribunal will refer to the main arguments put forward by each side in relation to the material arguments. However, the Tribunal will not mention each and every argument raised by the Parties although the Parties can rest assured that all of their arguments have been carefully considered by each member of the Tribunal and are subsumed in the reasons set forth below. Furthermore, because the Tribunal has attempted to do justice to the Parties' submissions, it proposes to give its decision on each material issue as succinctly as possible.

A. Applicable Law

288. The Parties have engaged in a traditional discussion about the applicable law in investor-State arbitration. In essence, Claimants contend that the BIT is a *lex specialis* governed by international law, while Respondent argues that Hungarian law applies.

289. Article 42(1) of the ICSID Convention provides:

"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."

290. In the Tribunal's view, by consenting to arbitration under Article 7 of the BIT with respect to "Any dispute between a Contracting Party and the investor of another Contracting Party concerning expropriation of an investment . . ." the Parties also consented to the applicability of the provisions of the Treaty, and in particular those set forth in Article 4 (see, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award, 25 May 2004, ICSID Case No. ARB/01/7, at ¶ 87). Those provisions are Treaty provisions pertaining to international law. That consent falls under the first sentence of Article 42(1) of the ICSID Convention ("*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties*"). The consent must also be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the

Treaty. This is so since the generally accepted presumption in conflict of laws is that parties choose one coherent set of legal rules governing their relationship (which is the case here as it will be seen below), rather than various sets of legal rules, unless the contrary is clearly expressed. Indeed, the State Parties to the BIT clearly expressed themselves to this effect in Article 6(5) of the BIT which Article pertains to disputes between the Contracting Parties concerning the interpretation and application of the BIT, as follows:

“Article 6

...

5. The arbitral tribunal shall decide on the basis of respect for the law, including particularly the present Agreement and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law.”

For example, where a term is ambiguous, or where further interpretation of a Treaty provision is required, the Tribunal will turn to Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.

291. That analysis also comports with the primary conflict of laws provisions in the various instruments listed in Article 7(2) of the BIT. Those appear to be similar by referring to party autonomy in the choice of law. In contrast, the subsidiary conflict of laws rules in those instruments differ, at least textually. For example, Article 42(1) of the ICSID Convention requires a tribunal to *“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,”* while Article 17(1) of the ICC Arbitration Rules (another option under Article 7(2) of the BIT) requires a tribunal to *“apply the rules of law which it determines to be appropriate.”* The application of those subsidiary conflict rules may give differing results, which in turn may affect the manner in which the Treaty provisions, in particular the substantive ones, are to be interpreted and applied. It cannot be deemed to have been the intent of the States Parties to the BIT to have agreed to such a potential disparity.

292. The sole exception to the foregoing is Article 4(3) of the BIT which provides: *“The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made.”* In the present case, that law is Hungarian law. As the reference to domestic law is used for one isolated subject matter only, it must be presumed that all other matters are governed by the provisions of the Treaty itself which in turn is governed by international law.

293. The Parties to the present case have also debated the relevance of international case law relating to expropriation. It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as

persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.

B. Jurisdiction

294. The first main issue this Tribunal must decide is whether it has jurisdiction to hear all the claims made in the present case in the light of Art.25(1) of the ICSID Convention. While Article 25 of the Convention refers to the “*jurisdiction of the Centre*” and Article 41(1) to the “*competence*” of the Tribunal, the Tribunal will use the term “*jurisdiction*” and “*competence*” of the Tribunal interchangeably.

The BIT Provisions and the ICSID Convention

295. The following articles of the BIT are applicable or relevant in deciding the Tribunal’s jurisdiction. They read as follows:

“ *Article 1*

For the purpose of this Agreement:

1. The term “investments” shall comprise every kind of asset connected with the participation in companies and joint ventures, more particularly, though not exclusively:

- (a) movable and immovable property as well as any other property rights in respect of every kind of asset;*
- (b) **rights derived from shares, bonds and other kinds of interests in companies** [emphasis added];*
- (c) title to money, goodwill and other assets and to any performance having an economic value;*
- (d) rights in the field of intellectual property, technical processes and know-how.*

These investments shall be made in compliance with the laws and regulations and any written permits that may be required thereunder of the Contracting Party in the territory of which the investment has been made.

A possible change in the form in which the investments have been made does not affect their substance as investments, provided that such a change does not contradict the laws and regulations and written permits of the Contracting Parties.

2. The term “income” means those net amounts received from the investments for a certain period of time [emphasis added], such as shares of profits, dividends, interest, royalties and other fees, proceeds from total or partial liquidation of the investments, as well as any other sums emanating

from such investments which are considered as income under the laws of the host country.

3. **The term “investor” shall comprise with regard to either Contracting Party:**

- i. *natural persons having the citizenship of that Contracting Party in accordance with its laws;*
- ii. ***legal persons constituted or incorporated in compliance with the law of that Contracting Party*** [emphasis added],

who, in compliance with this Agreement are making investments in the territory of the other Contracting Party.

Article 2

...

3. ***In cases of approved reinvestments, the incomes ensuing therefrom enjoy the same protection as the original investments.*** [emphasis added]

Article 3

1. ***Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors*** [emphasis added].

2. *More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded to investments of investors of any third State.*

...

Article 4

1. ***Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:***

- (a) *the measures are taken in the public interest and under due process of law;*
- (b) *the measures are not discriminatory;*
- (c) ***the measures are accompanied by provision for the payment of just compensation.*** [emphasis added]

2. *The amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation.* [emphasis added]

3. *The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made.*

4. *The compensation must be paid without undue delay upon completion of the legal expropriation procedure* [emphasis added], *but not later than three months upon completion of this procedure and shall be transferred in the currency in which the investment is made. In the event of delays beyond the three-months' period, the Contracting Party concerned shall be liable to the payment of interest based on prevailing rates.*

Article 5

1. *In compliance with its regulations in force, either Contracting Party will permit the investors of the other Contracting Party to transfer, in any convertible currency, income from investments and proceeds from total or partial liquidation of the investments.*

Article 7

1. *Any dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation of an investment shall, as far as possible, be settled by the disputing parties in an amicable way.*

2. *If such disputes cannot be settled within six months from the date either party requested amicable settlement, it shall, upon request of the investor, be submitted to one of the following:*

- (a) *the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm;*
- (b) *the Arbitral Tribunal of the International Chamber of Commerce in Paris;*
- (c) *the International Centre for the Settlement of Investment Dispute in case both Contracting Parties have become members of the Convention of 18 March 1965 on the Settlement of Investment Dispute between State and Nationals of Other States."*

296. The governing provision in the ICSID Convention in regard to jurisdiction of the Centre is Article 25, which reads as follows:

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the

Centre by that State) and a national of another Contracting State [emphasis added], which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include an person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1). ”

297. The Respondent also refers to Article 26 of the ICSID Convention in support of its rebuttals concerning the Tribunal’s jurisdiction:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

298. The Claimants contend in their submissions that all jurisdictional requirements in the ICSID Convention and the BIT have been satisfied and therefore the jurisdiction of the Tribunal has been duly established. The Respondent denies the Claimants’ claims and contends that the Tribunal lacks jurisdiction to hear the matter.

299. In order to do justice to all the points on jurisdiction raised by the Respondent, it is necessary to break the submissions down into a list of sub-issues. This involves breaking down the component parts of the Convention and the BIT. These sub-issues are:

- a. Is the nature of the dispute governed (a) by the BIT or (b) is it simply contractual in nature?
- b. If the answer to (a) is that it is governed by the BIT, did the Claimants make any investment in Hungary within the definition of the BIT and the ICSID Convention?
- c. Does the dispute arise “*directly*” out of an investment as required by the Convention?
- d. Does the dispute involve “*investors*” under the BIT who are nationals of a Contracting State to the ICSID Convention?
- e. Does the dispute fall within the scope of Art. 7 of the BIT?

1. Is the Nature of the Dispute Governed by the BIT or Is It Simply Contractual in Nature?

300. The Claimants claim that the dispute between the Parties in this arbitration arose from Respondent’s breach of its BIT obligations towards the Claimants. The present dispute, therefore, is one between the investor and the host State where the investor made investments.

301. The Respondent, however, claims that all the claims brought by the Claimants are contractual in nature rather than those that arise between investors and host States. Further, the Respondent contended that due to the fact that the legal recourse for breach of contracts was fully available to the Claimants, the commencement of this arbitration was premature.

302. In its *Rebuttal*, the Claimants contended that the Respondent’s “*contractual in nature*” argument was a mischaracterization of their claims. In support, the Claimants referred to the ICSID case of *SGS Société Générale de Surveillance S.A. v. The Republic of the Philippines* (ICSID Case No. ARB/02/06), in which the Tribunal confirmed its jurisdiction to hear the case based on the fact that the Claimants in that case “*fairly raise questions of breach of one or more provisions of the BIT*”. The Claimants claimed that the facts in this case raised questions about the breach of the Respondent’s BIT obligations. On this basis, the Tribunal would have jurisdiction to hear the case.

303. At this point, it is necessary to have regard to the allegation of expropriation which the Claimants actually make. Professor van den Berg specifically raised the question as to what was expropriated and when, and on Day 7 of the Oral Hearing, Professor Crawford SC at pages 76 to 80 of the transcript answered as follows:

“The first question asked by Professor van den Berg was the question: what was taken? What was expropriated? He associated that with the question: when was it expropriated? The information memorandum which was issued

on the authority of the privatization agency in October 2005 stated, paragraph 11.1.2 of the privatization agency information memorandum to which you have of course been taken numerous times, and I quote:

'Pursuant to legislative changes introduced with effect from 1st January 2002, certain rights of the project company to operate, use and exploit Terminal 2A and 2B ceased to exist.'

That is a Hungarian statement operative as of now. That is the view taken by the Hungarian Government persistently in December -- from the date of notice to the Project Company in December 2001 up to the present day. There has been no resiling from that statement. Thus the rights of the Project Company disappeared as a result of legislative acts attributable to the Hungarian state.

We do not have to ask who procured them, there is no problem of attribution here. This had the effect, direct and intended, of destroying the enterprise in which the claimants were directly involved and which was their investment, and of doing so without any compensation.

The Booz-Allen report, paragraph D.10, puts it this way:

'The right of use of the property assets earmarked for FUF', was transferred to Hungary without compensation.

'Under the BIT a stakeholder with a legal right or a legitimate expectation of income flows and other benefits under an investment agreement which has its investment destroyed or nullified in value as a direct result of such a transfer has been expropriated.'

That is plain hornbook law of expropriation. The fact it is indirect in the sense that the rights themselves were held by the Project Company is irrelevant, the BIT clearly contemplates that sort of situation. So that is the short answer.

The Chorzów case is fascinating because it prefigures so much of this and there is a very nice account of what constitutes the enterprise, as they put it, which you will find at page 17 of judgment A6, where it says -- it was actually referring to the phrase 'undertaking'...:

'An undertaking as such is an entity entirely distinct from the lands and buildings necessary for its working.'

...

The question here is: what was the undertaking? And it had to do in this case with the certain complications relating to who owned the actual land, not

entirely dissimilar from what we have here of course because we are talking about rights of use which can constitute an investment under the BIT:

‘But an undertaking as such is an entity entirely distinct from the lands and buildings necessary for its working, and in the present case, it can hardly be doubted that, in addition to the real property which belonged to the Reich, there were property, rights and interests, such as patents and licenses, probably of a very considerable value, the private character of which cannot be disputed.’

That carried right through the case up to the questions that were asked to the experts; what they were asked to value was the undertaking, in this case we would say the investment. So the short answer is that what was expropriated was that bundle of rights and legitimate expectations.

As to the date of expropriation, well, expropriations can take a few minutes or a few days or they can be a bit more protracted, we do not have to put a precise hour of the day on it, but it happened somewhere between 22nd December and 1st January, nothing turns on which particular date you choose within that very short window. That would be our response to the first question.” [sic]

The Respondent’s position as regards taking and expropriation is summarized in paragraphs 234 to 236 above.

Discussion

304. As will be explained later in the section dealing with liability, it is the opinion of the Tribunal that Professor Crawford articulated the matter correctly. There can be no doubt whatsoever that the legislation passed by the Hungarian Parliament and the Decree had the effect of causing the rights of the Project Company to disappear and/or become worthless. The Claimants lost whatever rights they had in the Project and their legitimate expectations were thereby thwarted. This is not a contractual claim against other parties to the Project Agreements. An act of state brought about the end of this investment and, particularly absent compensation, the BIT has been breached. It is common ground that no compensation was offered in respect of this taking. Further, the Tribunal is satisfied that no case has been made out that the taking was in the public interest. The subsequent privatization of the airport involving BAA and netting Hungary US\$ 2.26 billion renders any public interest argument unsustainable. In the opinion of the Tribunal, this is the clearest possible case of expropriation.

2. Did the Claimants Make Any Investment in Hungary within the Definition of the BIT and the ICSID Convention?

305. The issue of whether Claimants actually made investments in Hungary and therefore qualify as “investors” as defined in the ICSID Convention and the BIT was heavily debated by the Parties.

306. In their Memorial, the Claimants state that since the ICSID Convention does not provide a specific definition of “investment”, it is “*necessary to refer to the Cyprus-Hungary BIT*” to find what an “investment” is. After a brief review of Article 1 of the BIT, the Claimants conclude that their investment in the Airport and their corresponding returns, *i.e.*, ADC Affiliate’s 34% quota-holding in the Project Company, ADC & ADMC Management’s entitlement to 3% of each year’s net revenue of the Airport, “*qualify as ‘investments’*” under the BIT and the Convention. The Claimants further state that these investments are “*at the very least ‘assets’ connected with the participation in the Project Company.*”

307. The Respondent denies the Claimants’ above assertion vigorously and claims, in its Counter-Memorial, that the Claimants did not make any investment and cannot qualify as “investors” under the BIT and the Convention standards.

308. The Respondent lists four claims of the Claimants in relation to their “*alleged*” investments, namely:

1. ADC Affiliate’s claim in relation to its lost dividends derived from its 34% quota-holding in the Project Company;
2. ADC Affiliate’s claim in relation to non-payment under the Promissory Note;
3. ADC & ADMC Management’s claim of lost Terminal Management fees; and
4. the Claimants’ claim in relation to future development of the Airport.

309. In regard to the first claim of ADC Affiliate, the Respondent claims that it was ADC rather than ADC Affiliate who made the equity contribution in the amount of US\$5.7 million to the Project Company. The Respondent also claims that there is no evidence that ADC Affiliate paid any consideration when it received ADC’s assignment of its rights and obligations under the Quotaholders’ Agreement.

310. In line with the above claims, the Respondent raised the argument that in order to meet the BIT “investment” criteria, not only must the Claimants make investments in the host country, but also such investments must be “*fresh*”. Because ADC Affiliate merely received ADC’s rights and obligations via assignment, ADC Affiliate cannot be deemed to have made any “*fresh*” investment in Hungary.

311. Moreover, the Respondent further contends that under Article 25(1) of the ICSID Convention, only those investors who bear “*risk*” can claim they made an investment in the host State. Since ADC Affiliate did not bear much risk as a quotaholder of the Project Company, it cannot claim they made an investment in Hungary.

312. In regard to the other three claims listed above, the Respondent contends, in sequence, a) that ADC Affiliate did not make any investment through the Promissory Note, b) ADC & ADMC Management did not make any investment nor provide management services during the Operating Period and c) “*contractual provisions to which the Claimants are not a party does not constitute investment under the BIT.*”

313. The Claimants rebut each of the above claims of the Respondent in their *Reply*.

314. The Claimants contend that ADC Affiliate’s shareholding in the Project Company and its right under the Promissory Note fell well within the scope of “*investment*” as defined in the BIT. The Claimants refer in this regard to *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) where the Tribunal concluded that a shareholding interest is an “*investment*” when “*investment*” was defined to include “*shares of stock or other interest in a company*”.

315. The Claimants deny that there is a “*fresh*” investment requirement under the BIT and contend that the argument that an investment must be “*fresh*” in order to establish the Centre’s jurisdiction has been rejected by “*ICSID jurisprudence*”. In support of this assertion, the Claimants refer to *Fedax NV v. Venezuela* (ICSID Case No. ARB/96/3) and quote the Tribunal’s statement that:

“[...] the investment itself will remain constant, while the issuer will enjoy a continuous credit benefit until the time the notes become due. To the extent that this credit is provided by a foreign holder of the notes, it constitutes a foreign investment which in this case is encompassed by the terms of the Convention and the [BIT] Agreement. [...]”

316. In regard to the Promissory Note, the Claimants deny the Respondent’s claim that it is a loan to the ATAA. After a review of the economics of the Airport Project, the Claimants reaffirm that the Promissory Note is a finance instrument that constitutes a form of investment.

317. The Claimants deny that there is a “*risk-bearing*” requirement under Article 25 (1) of the ICSID Convention. The Claimants contend that the cases and legal literature relied upon by the Respondent in its Counter-Memorial were misread. The Claimants argue that rather than supporting the Respondent’s “*risk-bearing requirement*” conclusion, Professor Christopher Schreuer said in the same article which was relied upon by the Respondent that “*risk*” is only a factor for the Tribunal to consider when deciding jurisdiction, rather than a legal requirement under the ICSID Convention. The Claimants cite Professor Schreuer’s writing in regard to “*risk*” that:

“These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”

318. The Claimants deny that no investment was made by ADC & ADMC Management. The Claimants contend that ADC & ADMC Management's entitlement of the 3% net revenue qualifies as "*property rights*" and the Terminal Management Agreement qualifies as "*title to money [...] and to any [...] performance having an economic value*" under the BIT.

319. In response to the Respondent's claim that the Management Fees are "*income*" rather than "*investment*" under the definition in Article 1(2) of the BIT, the Claimants refer to Article 1(2), Article 2(3) and Article 5(1) of the BIT and contend that the BIT protects both "*original investments and approved re-investments and all income derived therefrom*". As a result, the Respondent's characterization of the Management Fees as "*income*" will not change the fact that they are protected by the BIT.

320. In regard to the Respondent's future development claims, the Claimants reply that the Respondent misunderstood their claims. As the Claimants put it, "*ADC Affiliate does not claim rights as an investor in lieu of the Project Company, but rights in the Project Company*". The Claimants also contend that arguments made by the Respondent in this regard are more quantum-related rather than jurisdiction-related.

321. Another round of debate on this "*investment*" issue followed between the Parties in their further submissions of the *Rejoinder* and the *Sur-Rejoinder*. Besides the reiteration and affirmation of certain arguments made in their previous submissions, a new point has been raised and argued by the Parties.

322. In the Respondent's *Rejoinder* submitted by its new legal counsel, it is argued that that the wording of Article 1(3) of the BIT that "*who...are making investments in the territory of the other Contracting Party [emphasis added]...*" indicates that only those who are taking active actions of investment are qualified to claim for BIT protection. The Respondent claims that since ADC Affiliate did not take any action of investment and at most could be said to be "*holding*" some investment in Hungary, it cannot claim for BIT protection.

323. In rebuttal to this point, the Claimants argue that the Respondent's argument is "*unavailing*" because Article 1(3) was drafted to limit the BIT's application to investments made "*in the territory of the other Contracting Party [emphasis added]*" and was not intended to and does not set another threshold for the injured party to seek BIT protection. Moreover, the Claimants contend that even if another test is imposed as argued by the Respondent, the fact that ADC Affiliate paid consideration for the assignment from ADC would pass such test.

324. In support of the above rebuttal, the Claimants, in their *Sur-Rejoinder*, again refer to *Fedax v. Venezuela* (Ibid.), which was challenged by the Respondent in its *Rejoinder*. The Claimants argue that the Tribunal should consider the substance of the transaction and examine whether any investment was made and should not be prevented from finding its jurisdiction by the wording of the relevant BIT.

Discussion

325. The Tribunal is in favour of the Claimants’ “*substance*” approach in considering this issue. Whilst attention need to be paid to the wording of the BIT with respect to “*investment*”, the Tribunal believes it is the substance of the transaction that reveals the answer as to whether any investment was made. Based on a thorough examination of the facts and careful consideration of the applicable law, the Tribunal concludes that the Claimants did make investments in Hungary and therefore the present dispute does arise out of an investment made as contemplated in the BIT and the ICSID Convention. Again it is necessary to have regard to the effect of all the Project Agreements. The Project Documents are clear that an investment in the sum of US\$16.765 million had been made. As for the argument relating to the Management Fees, the Tribunal is satisfied, on the evidence it has heard and on the law, that the income stream derived from the Management Services Agreement was protected by the BIT and also falls within the ICSID Convention. The Tribunal is also satisfied that it was intended by the parties to these agreements that the Management Services Agreement was meant to reimburse the Claimants for work and services carried out prior to the Operation Commencement Date. The argument relating to the amount of the investment has been abandoned. It is thus common ground that if an investment was made, as the Tribunal so concludes, then the amount of it was US\$16.765 million. As stated above, the Respondent has withdrawn the argument that the investment should be valued excluding the value of the Promissory Note.

3. Does the Dispute Arise “Directly” out of An Investment as Required by the ICSID Convention?

326. The Parties dispute the meaning of the phrase “*arising directly*” in Article 25 (1) of the ICSID Convention.

327. The Claimants claim that the current dispute arose directly out of their investments in Hungary. In the Claimants’ contention, a direct cause of action was rendered available to the Claimants by the Respondent’s issuance of the aforementioned Amending Act and the Decree, which, according to the Claimants, breached the obligation under the BIT and affected the investments made by the Claimants in Hungary. The Claimants also claimed that the jurisdiction of the Centre is established as long as the actions of the Respondent breached its BIT commitments of investment protection, even if such actions can be characterized as general economic measures.

328. Among all the cases the Claimants relied upon in support of their proposition in this regard, the Tribunal found the following passages of the following cases to be of particular relevance. In *CMS Gas Transmission company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), the Tribunal held that:

“27. It follows that, in this context, questions of general economic policy not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, will normally fall outside the jurisdiction of the Centre. A direct relationship can, however, be

established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislations or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments.” [emphasis added]

329. In *Enron Corporation, et al. v. The Argentine Republic* (ICSID Case No. ARB/01/03), the Tribunal wrote:

“60. *The Tribunal has noted above that the right of the Claimants can be asserted independently from the rights of TGS [the local project company] or CIESA [an intermediate holding company]. As the Claimants have a separate cause of action under the Treaty in connection with the investment made, the Tribunal concludes that the present dispute arises directly out of the investment made and that accordingly there is no obstacle to a finding of jurisdiction on this count.*” [emphasis added]

330. The Respondent denied that the Claimants met the “*directness requirement*” in Article 25(1) of the ICSID Convention. In its submissions, the Respondent claimed that the Claimants’ claims arose from contractual disputes under the Project Agreements and therefore do not pertain to disputes that arise “*directly*” out of an investment for the purpose of Article 25. The Respondent further challenged the Claimants “*directness*” arguments by saying that it is the rights of the Project Company which are “*directly*” affected and those of the Claimants can only be said as “*indirectly*” affected. The Respondent claimed that cases referred to by the Claimants were irrelevant.

Discussion

331. In considering whether the present dispute falls within those which “*arise directly out of an investment*” under the ICSID Convention, the Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements. The Tribunal does not find the “*commercial*” argument of Hungary to be availing. The Tribunal is not concerned whether the Claimants have rights against ATAA. This claim is posited on the basis that Hungary took action which had the effect of depriving the Claimants of their investment and that no compensation was offered or paid in respect thereof. The Tribunal fails to see how it can be contended that this dispute does not arise directly out of an investment. It plainly does. The fact that this case involved a complex series of carefully drafted agreements does not detract from the fact that the Claimants invested US\$16.765 million into the Hungarian Airport Project. By the Claimants making this investment, Hungary was relieved of having to find these funds for itself. This was a direct investment in Hungary within the terms contemplated in the BIT. The investment was no less direct because it was channelled through the Project Company. It would be absurd to argue that only cases where an investor transfers funds directly to the Hungarian Government would be covered by the Convention and the BIT. Further, when one reviews the Master Agreement which was executed by ATAA as early as March 1995, it can be seen that the

parties envisaged that a project structure of this sort actually executed. In one of the Recitals of the Master Agreement, it is clearly stated that

“the parties wish to set forth the terms and conditions of the development of the Project by ADC and operation of the Terminal by the Project Company with the cooperation of the ATAA....”

As a “roadmap”, this Master Agreement set forth the blueprint of how the Airport Project should be structured and financed. It was the Respondent who later demanded the adjustment of the project structure and who was furnished with a revised structure which met its needs. Nevertheless, it was still under the umbrella of the Master Agreement that the Project Agreements were executed. In the light of these facts, the Tribunal has to conclude that the Respondent was a willing party to the setting up of the structure through which the investments of the Claimants in Hungary were made. In this context, substance must be preferred over form.

4. Does the dispute involve “investors” under the BIT who are nationals of a Contracting State to the ICSID Convention?

332. It is clearly set forth in Article 25 of the ICSID Convention that the Centre’s jurisdiction shall only extend to disputes arising “*between a Contracting State...and a national of another Contracting State*”. Under the circumstances of the present case, the task of the Tribunal is to find out whether the Respondent is a “*Contracting State*” and whether, at the same time, each Claimant qualifies as “*a national of another Contracting State*”.

333. The Claimants contend in their Memorial that it is established that the Respondent is a “*Contracting State*” and the Claimants are “*nationals of another Contracting State*”. The Claimants contend that Hungary is a Contracting State to the ICSID Convention, which entered into force as to Hungary on March 6, 1987. On the other hand, the Claimants contend that both of them, namely ADC Affiliate and ADC & ADMC Management, are legal persons duly incorporated under the law of the Republic of Cyprus, which is also a Contracting State to the ICSID Convention. Moreover, since Article 25(2)(b) of the Convention states that the phrase “*national of another Contracting State*” includes “*any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration*”, and since the Claimants obtained their Cypriot nationality via due incorporation under the law of Cyprus prior to the date on which the Parties consented to submit their dispute to the Centre, the nationality requirement is fully met. In relation to the above claims, the Claimants also refer to the definition of “*investor*” set forth in Article 1(3)(b) of the BIT, which covers “*legal persons constituted or incorporated in compliance with the law*” of Cyprus.

334. The Respondent denies entirely in its Counter-Memorial that the Claimants’ case meets the “*nationality*” requirement under the Convention. The core arguments made by the Respondent are that:

1. the disputed investments in this case should in no way be deemed to be investments made by Cypriot nationals; instead, if any investment was ever made in Hungary, it was made by Canadian companies;
2. the claims made by the Claimants are not Cypriot pursuant to the object and purpose of the BIT and are not made by a Cypriot national pursuant to the BIT; and
3. the claims do not belong to a national of a Contracting State of the ICSID Convention.

335. The Respondent claims that the Claimants are nothing but two shell companies established by Canadian investors and all the facts, including those related to the structuring of the project, operation of the Project Company and even the involvement of the Canadian Government when the dispute initially arose, indicate that the investments were made by Canadian companies rather than Cypriot ones.

336. The Respondent further contends that the Claimants cannot establish their Cypriot nationality because the simple fact that they were incorporated in Cyprus under its law fails to meet the “*fundamental requirement of the rules of international law*” that there must be a genuine connection “*between the corporation and the State of its claimed nationality*”.

337. The Respondent cites in support of its argument the Barcelona Traction Case from the International Court of Justice. In that case Belgium sought relief on behalf of Belgian shareholders of the Barcelona Traction Company from Spain for actions taken against that company in Spain. The Court ruled, however, that as a matter of general international law only the State of the company's incorporation, namely Canada, would have standing to assert the company's rights against Spain, and that Belgium, not being the place of incorporation of the company, lacked such standing, in consequence of which the case was dismissed.

338. The Respondent also quotes from Professor Brownlie’s well-recognized international law treatise that:

“On the whole the legal experience suggests that a doctrine of real or genuine link has been adopted, and, as a matter of principle, the considerations advanced in connection with the Nottebohm case apply to corporations.” (Ian Brownlie, *Principle of Public International Law* (6th ed, 2003))

339. The Respondent states, in the alternative, that if a presumption of the Claimants’ Cypriot nationality can be established, such presumption must be disregarded “*when the corporate form is used to benefit from a connection with a jurisdiction that is not genuine and is only a matter of convenience.*” The Respondent argues that the legal principle of “*piercing the corporate veil*” shall apply to the present case and cites the following passage from another international law treatise, *Oppenheim’s International Law*:

“In many situations, however, it is permissible to look behind the formal nationality of the company, as evidenced primarily by its place of incorporation and registered office, so as to determine the reality of its relationship to a State, as demonstrated by the national location of the control and ownership of the company.” (*Oppenheim’s International Law*, (9th ed, 1992) vol I, p. 861)

340. The Respondent also borrows the following statement of the ICJ in its *Barcelona Traction* judgment to strengthen its “*piercing the corporate veil*” argument:

“[T]he process of lifting the veil, being an exceptional one admitted by municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality.”

341. The Respondent thus contends that Cypriot nationality is being misused by the Claimants and therefore should be disregarded.

342. Additionally, the Respondent argues that when deciding the nationality of the investor, the origin of the capital must be considered by the Tribunal. It refers to the recent ICSID case of *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18). In that case, Professor Prosper Weil, President of the Tribunal, dissented from the majority opinion, which held that the origin of the capital was irrelevant to the investor’s nationality and concluded that such majority opinion runs counter to “*the object and purpose of the ICSID Convention and system as explicitly defined both in the Preamble of the Convention and in the Report of the Executive Directors*”. (Ibid.)

343. The Respondent therefore contends that due to the fact that the origin of the capital in the present case is Canadian and Canada is not a Contracting State to the ICSID Convention, the Tribunal should reject the Claimants’ claims for the reason that the claims do not belong to nationals of a Contracting Party.

344. In their *Reply*, the Claimants countered each of the Respondent’s arguments.

345. Besides arguments previously raised in the Memorial, in response to the “*genuine connection*” argument, the Claimants contend that the general international law principle in this regard is that, in Professor Brownlie’s words, there is “*no certainty as to the criteria for determining [the] connection*” (Ian Brownlie, *Principle of Public International Law* (6th ed, 2003)) between the corporation and the State. While some treaties require the corporation to prove a “*genuine link*”, the Cyprus-Hungary BIT does not require so. The Claimants then compare the BIT at issue with five other BITs to which Hungary is a party. One of these five BITs was concluded before the one at issue and the rest of the BITs were concluded afterwards. The Claimants state that whether entered into before or after the Cyprus-Hungary BIT, these BITs all require that the relevant corporation not only was incorporated but also has business activities in the State the nationality of which the corporation claims. The Claimants conclude that had the parties to the BIT intended to require a “*genuine link*” requirement in the Cyprus-Hungary BIT, they could and would

have done so. The fact that there is no such requirement indicates that the parties to this BIT did not intend to set any limitation on the definition of an “investor”.

346. The Claimants reject the Respondent’s “*origin of capital*” argument. The Claimants first claim that ADC Affiliate, a Cypriot legal person and the lender of the US\$16.765 million which in turn was injected into the Project Company by ADC, is the “*real source*” of the investment.

347. The Claimants proceed to argue that the origin of the capital is irrelevant in the present case because, unlike other BITs, the Cyprus-Hungary BIT at issue does not address concerns about the origin of the capital. They claim that “*as long as one is a covered ‘investor’, one benefits from the provisions of the BIT, irrespective of the origin of the investment made.*” In support of this argument, the Claimants refer to *Olguin v. Republic of Paraguay* (ICSID Case No. ARB/98/5), where the ICSID Tribunal did not find an express “*origin of investment*” requirement in the Paraguay-Peru BIT and rejected Paraguay’s argument based on the assumption of such a requirement.

348. The Claimants also argue that the fact that Cyprus was chosen as the state of the Claimants’ incorporation was not a result of the Claimants’ “*arbitrary choice of jurisdiction*” but rather a “*commercially sensible*” decision of which the Respondent was fully aware.

349. In reply to the Respondent’s claim, which the Claimants labelled as the “*core assertion*”, that the real interests underpinning this dispute are Canadian rather than Cypriot, the Claimants argue that the nationality of the Claimants’ shareholders is not a “*relevant consideration*” under the Cyprus-Hungary BIT. The Claimants also argue that the alleged “*intervention*” of the Canadian Government does not prevent this Tribunal from finding jurisdiction.

350. In their *Rejoinder*, the Respondent’s new legal counsel re-emphasized the argument that there is no “*genuine link*” between the Claimants and Cyprus. They also reiterate that it is a Canadian interest, rather than one of Cyprus, that stands behind this dispute.

351. The Claimants further rebut the Respondent’s jurisdictional challenges in the *Sur-Rejoinder* based on an analysis of case law and the international law literature.

Discussion

352. The fact that Cypriot entities were to be used was known at the time to Hungary and consented to by it. The phrase “*a national of another Contracting State*” contained in Art 25 (1) of the Convention is defined in Art 25(2)(b) as “*any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date which the parties consented to submit the dispute to conciliation or arbitration*”. The definition of “*investor*” under Article 1 (3)(b) of the BIT also includes “*legal persons constituted or incorporated in compliance with the law of that Contracting Party*”.

353. The Tribunal also found the following facts through the submissions of the Parties and the hearing:

- It is not in dispute that Hungary and Cyprus are parties to the relevant BIT.
- It is not in dispute that ADC Affiliate was incorporated according to the laws of Cyprus on February 25, 1997, a date prior to the execution of the Project Agreements.
- It is not in dispute that ADC Affiliate has paid taxes in Cyprus since incorporation and has engaged Cypriot auditors to audit its financial statements. Furthermore, the Respondent admits that the Project Company has paid dividends to ADC Affiliate, one of its quotaholders in Cyprus.
- ADC Affiliate loaned US\$16.765 million to ADC for the project pursuant to the Loan Agreement. It also purchased the quota and the Note from ADC in exchange for the loan. By purchasing the quota it assumed rights and obligations under the Quotaholders Agreement as a quotaholder pursuant to the terms of the Assignment and Assumption Agreement. Finally, ADC Affiliate received payment pursuant to the Note and payment of dividends in accordance with the relevant Project Agreements and based on the business plan of the Project Company.
- It is not in dispute that ADC & ADMC Management was incorporated according to the laws of Cyprus on February 25, 1997. It is not in dispute that it has paid taxes in Cyprus since its incorporation and has engaged auditors to audit its financial statements since its incorporation.
- The Respondent admits that the Project Company has paid management fees to ADC & ADMC Management in Cyprus.
- It is contended, and not effectively denied, that ADC & ADMC Management had a perfectly lawful and legitimate role in the Project. It entered into the Terminal Management Agreement with ATAA and the Project Company in February 1997; it provided pre-billing services and supervision to the project through the efforts of Mr. Huang and others; it submitted annual reports and invoices from Cyprus relating to the performance of the Management Services; it was paid Management Fees in accordance with the Terminal Management Agreement and it owned a Hungarian subsidiary “ADC & ADMC Management Hungary Limited” which employed the staff of the Terminal Manager who undertook the day-to-day work of the Terminals. Some eight people were employed by the Hungarian subsidiary.

354. In light of the above, the Tribunal has before it two parties which fit into the definitions under the Convention and the BIT.

355. The Respondent's jurisdictional argument is however posited on the contention that the source of funds and the control of the Claimants rest with Canadian entities, thus preventing the Cyprus-Hungary BIT from being applicable.

356. The Tribunal cannot agree with the Respondent in this regard.

357. In this respect the BIT is governing, and in its Article 1(3)(b) Cyprus and Hungary have agreed that a Cypriot "*investor*" protected by that treaty includes a "*legal person constituted or incorporated in compliance with the law*" of Cyprus, which each Claimant is conceded to be. Nothing in Article 25(2)(b) of the ICSID Convention militates otherwise, as it grants standing to "*any juridical person which had the nationality*" of Cyprus as of the time the Parties consented to this arbitration. As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in *Barcelona Traction*, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant.

358. The Respondent makes reference to the principle of "*piercing the corporate veil*". Although that principle does exist in domestic legal practice in some jurisdictions, it is rarely and always cautiously applied. Further, it would be inapplicable in this case. The reason is that this principle only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability. In this case, however, Hungary was fully aware of the use of Cypriot entities and manifestly approved it. Therefore, it is the opinion of the Tribunal that the Respondent's "*source of funds*" and "*control*" arguments as well as the "*piercing the corporate veil*" argument cannot stand.

359. The Tribunal cannot find a "*genuine link*" requirement in the Cyprus-Hungary BIT either. While the Tribunal acknowledges that such requirement has been applied to some preceding international law cases, it concludes that such a requirement does not exist in the current case. When negotiating the BIT, the Government of Hungary could have inserted this requirement as it did in other BITs concluded both before and after the conclusion of the BIT in this case. However, it did not do so. Thus such a requirement is absent in this case. The Tribunal cannot read more into the BIT than one can discern from its plain text.

360. The legal authority the Respondent heavily relies upon in its objection is the famous Dissenting Opinion of Professor Prosper Weil in the *Tokios Tokelés* case. In that case, Professor Weil opined, in the minority, that to ignore the origin of capital when determining the nationality of the corporation claimant would run against "*the object and purpose of the ICSID Convention*". This Tribunal, however, concurs with the majority opinion in *Tokios Tokelés* and holds that the origin of capital is not a relevant factor in determining the Claimants' nationality. This is not only because the majority opinion in *Tokios Tokelés* still represents good international law, but also because, in essence, the fact pattern in *Tokios Tokelés* differs substantially from the facts in this case and thus renders Professor Weil's conclusion, be it reasonable or not, inapplicable. In *Tokios Tokelés*, the

Tribunal was asked to deal with the situation where the corporate claimant of one BIT State Party was effectively owned and controlled by the nationals of the other BIT State Party. But this is not the case here. In the present case, nationals of a third State, with substantial business interests and the express consent of the Hungarian Government, incorporated the Claimants in Cyprus. In the light of these facts and the above reasons, the Tribunal concludes that the Dissenting Opinion of Professor Weil is not applicable and must be disregarded at least on the facts of this case.

361. With regard to the Respondent's argument concerning the Canadian Government's involvement in the early stages of this dispute, the Tribunal cannot see how it can affect the application of the well-established international law rule applicable in this case. The BIT applies or it does not. It cannot be made to disapply simply because, rightly or wrongly, the Claimants' shareholders appealed for help to Canada.

362. In conclusion, the Tribunal is of the opinion that the Claimants are nationals of Cyprus and this dispute is between a Contracting State and nationals of another Contracting State under the ICSID Convention and there is nothing in the Cyprus-Hungary BIT that requires any different result.

5. Does the dispute fall within the scope of Art. 7 of the BIT?

363. Article 25(1) of the ICSID Convention requires the parties' "*consent in writing*" to arbitration before the Centre. The consent of Hungary to the institution of the proceedings before ICSID can be found in Article 7(2)(c) of the Treaty. The Claimants consented to ICSID arbitration by their letter of consent dated November 29, 2002 which consent was confirmed by their lodging of their Request for Arbitration with the Centre on July 27, 2003.

6. Conclusion on Jurisdiction

364. Based on a thorough consideration and careful analysis of the facts found through the arbitration proceedings and the terms of the Convention, the Hungary-Cyprus BIT and applicable customary international law, the Tribunal is satisfied that it has full jurisdiction to hear all of the claims made in this case.

C. Expropriation

365. The Tribunal now proceeds to consider the legal issues at the very heart of the present dispute, i.e., has the Respondent breached any provision of the BIT by depriving the Claimants of their investments? And if so, what are the consequences?

366. The Parties' positions submitted in different rounds of submissions in this regard are summarized as follows.

367. As mentioned in paragraphs 210 to 218 above, the Claimants' fundamental positions as set forth in their Memorial are that the Claimants' investment and the benefits to be

derived therefrom in and related to the Airport and the Airport Project were unlawfully and unjustifiably deprived by the Respondent through its unexpected, unjustified, illegal and non-compensatory appropriation in December 2001.

368. The Claimants contend that the Amending Act, the Decree and the actions taken in reliance thereon by the Respondent constitute a deprivation measure under Article 4 of the BIT, which, for the ease of reading, is set out again below:

- Article 4*
- 1. Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:*
- (a) The measures are taken in the public interest and under due process of law;*
 - (b) The measures are not discriminatory;*
 - (c) The measures are accompanied by provision for the payment of just compensation.*
- 2. The amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation.*
- 3. The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made.*
- 4. The compensation must be paid without undue delay upon completion of the legal expropriation procedure, but not later than three months upon completion of this procedure and shall be transferred in the currency in which the investment is made. In the event of delays beyond the three-months' period, the Contracting Party concerned shall be liable to the payment of interest based on prevailing rates.*
- 5. Investors of either Contracting Party who suffer losses of their investments in the territory of the other Contracting Party due to war or other armed conflict or state of emergency in the territory of the other Contracting Party, shall be treated, with respect to the compensations for these losses, as Investor of any third State."*

369. The Claimants emphasized that the wording of Article 4(1), compared with that in many other BITs, has a "very broad reach" so the Decree and the actions taken in reliance thereon by the Respondent fall well into the orbit of this provision.

370. The Claimants further contend that Article 4 of the BIT above stipulates four conditions for the deprivation measures to be deemed lawful. They are, respectively, (a) that the measures are taken in the public interest; (b) that the measures are taken under due process of law; (c) that the measures are non-discriminatory and (d) that the measures are

accompanied by provision for the payment of just compensation. The Claimants claim that the measures taken by the Respondent met none of these conditions and therefore are unlawful.

371. The arguments made by the Claimants with respect to each of these four conditions in their Memorial are as follows:

372. With regard to the first condition that the deprivation measures must be taken in the public interest, the Claimants contend that nowhere in the Amending Act or in the Decree were public interest even proffered or articulated. Neither has the Respondent ever articulated any public interest justification to the Claimants before, during or after the taking. Nor is the financial purpose backing the expropriation reported in the Hungarian press and attributed to officials of the Hungarian Government sufficient to be a “*public interest*” justification.

373. Further, the Claimants contend that while the stated purpose of the initial overall statutory amendments was to harmonize Hungarian law with European Union law and policy, the intended purpose of the inclusion of a prohibition of transfer provision was in fact to exclude foreign investors from the operation of the Airport. Moreover, although it was mentioned in the Amendment Motion presented by Dr. Kosztolányi which resulted in the Amendment Act that the prohibition was for the “*strategic interest connected*” of Hungary, the meaning of said “*strategic interest of the State*” was never specified.

374. The Claimants conclude therefore that no “*public interest*” justification can be found and the Respondent fails to meet this first condition in Article 4 of the BIT.

375. The Claimants’ contention that the taking was not made under due process of law expands in two steps under the headings of “*Minimum Treaty Standard*” and “*Additional Treaty Requirements*”.

376. Under the heading of “*Minimum Treaty Standard*”, after referring to some international law literature discussing the meaning of “*due process of law*” in the expropriation context, the Claimants contend that in order for the Respondent to effect the taking under due process of law, it should have provided the Claimants with an opportunity to seek judicial review of the Amending Act and the Decree. At least, the Claimants proceed to argue, a “*legal expropriation procedure*” as mandated by Article 4 of the BIT should have been set up by the Respondent and such a procedure should have at a minimum provided the Claimants reasonable notice and the right to a fair hearing and an impartial adjudicator.

377. The Claimants contend that in contrast, however, the self-evident facts in the instant case indicate that the Respondent provided for the Claimants no procedure at all.

378. Under the second heading of “*Additional Treaty Requirements*”, the Claimants refer to Article 3 of the BIT which, for the ease of reading, is set out in part below again:

“ Article 3

1. *Each Contracting Party shall ensure fair and equitable treatment to the investment of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measure, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.*

2. *More particularly, each Contracting Party shall accord to such investment full security and protection which in any case shall not be less than that accorded to investments of investors of any third State.*

...”

379. The Claimants contend, in light of Article 3, that the Respondent failed to provide the Claimants “*fair and equitable treatment*”. According to the Claimants, the Amending Act, the Decree and the actions taken in reliance thereon destroyed the Claimants’ basic expectation to have their contractual rights honoured and were imposed on the Claimants to their total surprise. The Claimants further claim that the lack of “*due process*” amounts to a denial of justice which in turn constitutes a breach of the “*fair and equitable treatment*” requirement. The Claimants also argue that the Respondent failed to accord “*full security and protection*” to the Claimants’ investment as required under Article 3(2) of the BIT.

380. In regard to the third condition of non-discrimination, the Claimants contend that the Amending Act, the Decree and the actions taken in reliance thereon were discriminatory in that all are specifically targeted at the Claimants and the Claimants only.

381. Finally, the Claimants contend that the measures taken by the Respondent were not accompanied by “*provision of just compensation*” and no compensation was ever paid, “*let alone ‘without undue delay’*”. In so arguing, the Claimants claim that an expropriation not accompanied by provision for the payment of just compensation is unlawful per se under the BIT.

382. As a result of the above, the Claimants conclude that the Decree and the actions taken in reliance thereon were illegal and constituted an internationally wrongful act.

383. The Respondent denies the Claimants’ allegations above entirely and vigorously. In its Counter-Memorial, the Respondent asserts that it has not violated the BIT and it has not taken a measure that deprives the Claimants of their investments. It contends that even if such a measure was found to have been taken, it was lawful because the measure met all of the conditions specified in Article 4 of the BIT. The Respondent also denies that any of the other standards of protection specified in Article 3 of the BIT has been violated, which are (a) fair and equitable treatment, (b) no discriminatory measure and (c) full security and protection.

384. At the outset of its rebuttal, the Respondent raises the argument that the Claimants argument as to unlawful expropriation is “*misconceived*” in that it denies the Respondent’s inherent and essential international law right to “*regulate its own economy, to enact and*

modify laws, to secure the proper application of law and to accede to international organizations". The Respondent refers to international investment law jurisprudence and contends that when an investor invests in a State, it subjects itself to the regulatory regime of and assumes the risk of being regulated by the host State.

385. Next the Respondent contends that the BIT's deprivation standard is narrower in scope and that it should be interpreted "consistently with Hungarian law." It asserts that the BIT in this case is narrower in scope than other investment treaties and the term "deprivation" is narrower than the term "expropriation".

386. The Respondent proceeds to argue that because Article 4 of the BIT refers to "depriving measures" only, the cases relied upon by the Claimants that apply the wider concept of expropriation are not relevant to the present case.

387. The Respondent then contends that in order for there to be an expropriation, two conditions must be present at the same time, namely (a) that the measures taken constitute a substantial deprivation and (b) that the measure is permanent.

388. The Respondent concludes, however, that neither of these two conditions is met in this case.

389. The Respondent argues that the Claimants have not been substantially deprived of their contractual rights, nor has there been any permanence in the effect of the Decree on their rights. According to the Respondent, the Claimants still possess said rights and the remedies to enforce those rights in the form of UNCITRAL Rules arbitration still exist. Therefore, it cannot be said that there has been an expropriation of those rights. The Respondent asserts that due to the fact that the Claimants failed to use the remedies agreed upon in the Project Agreements, any deprivation which might have taken place is neither substantial nor permanent.

390. The Respondent also argues that while the implementation of the Decree "impacted" the Project Company's operation, because there has been no substantial deprivation of the Claimants' rights caused by the Decree, there is no causal link between the Decree and any loss suffered by the Claimants.

391. After establishing the above preliminary defence, the Respondent proceeds to build its second level of defence by arguing that even if the Tribunal finds that there was an expropriation of the Claimants' investments, the depriving measure taken by the Respondent was lawful in that the measure was in the public interest, under due process of law and was not discriminatory.

392. With respect to public interest, the Respondent contends that the actions amending the transport legislation and enacting the Ministerial Decree were important elements of the harmonization of the Government's transport strategy, laws and regulations with EU law in preparation of Hungary's accession to the EU in May 2004. The Respondent also contends

that the legislative changes were in “*the strategic interests of the State*” though it does not continue to substantiate this argument with details.

393. With respect to due process of law, the Respondent firstly contends that the actions taken by the Respondent were not arbitrary but were carefully considered and formulated in accordance with Hungarian laws and policies as well as EU regulations in the light of Hungary’s accession to the EU.

394. Secondly, the Respondent claims that contrary to the Claimants’ case that they were in a complete surprise when being notified of the legislative changes, the Claimants were fully aware of these proposed changes well before actions were taken to effect them. The Respondent also contends that the Claimants were also fully aware of the activities of BA Rt which was established in October 2001 for the sole purpose to operate the Airport as a result of the Decree.

395. The Respondent further contends that contrary to the Claimants’ allegation that no procedure at all was provided, Hungarian law does provide the Claimants a number of methods to review the expropriation in question. The Respondent also refers to the argument it made before that the Claimants retained their contractual rights for dispute resolution.

396. In conclusion, the Respondent claims that the actions taken by the Hungarian Government were not unfair, unreasonable, nor unjustifiable.

397. With respect to discriminatory treatment, the Respondent rebuts the Claimants’ contention that they were the only targets under the Amending Act and the Decree by saying that no other foreign parties were involved in the operation of the Airport. It also contends that the prohibition set forth in the Amending Act and the Decree applies against all persons and business entities other than the statutorily appointed operator and therefore cannot be said to be discriminatory against the Claimants.

398. With respect to compensation, the Respondent contends that ATAA did seek to settle the accounts of the Project Company but it was the Claimants who failed to cooperate. In addition, the Respondent claims that in any event, provision for obtaining just compensation for expropriation is available under Hungarian law by applying to the Hungarian courts.

399. Concerning the Claimants’ contention that the Respondent by taking the depriving actions also breached other standards of protection stipulated in Article 3 of the BIT, the Respondent firstly denies that the Tribunal has jurisdiction to hear these claims. The Respondent then claims that if the Tribunal finds its jurisdiction in this regard, all allegations of breach of Article 3 of the BIT are denied.

400. In particular, the Respondent claims that Article 3 of the BIT does not provide definitions of “*fair and equal treatment*”, “*unreasonable or discriminatory measures*” or “*full security and protection*” and the meaning of these key phrases can only be determined

under the specific circumstances of each specific case. In this case, the Respondent contends that the Claimants failed to establish a prima facie case that the Respondent breached any of these requirements.

401. The second round of arguments concerning the Respondent's liability in its depriving actions starts with the Claimants' Reply.

402. In response to the Respondent's argument that by taking the depriving actions it is in fact exercising its inherent and essential international law right to regulate its own economy and to enact and modify its laws, the Claimants assert that such a claim is "*nonsense*" in that the State's right to regulate is not absolute and is subject to the duty to compensate in the event of an expropriation. The Claimants contend that it is a "*truism*" that a State's right to regulate is subject to respect for the rule of law, including treaty obligations, as well as obligations imposed by customary international law. Where a State fails to act in accordance with the rule of law or breaches a treaty obligation, it shall be liable and must compensate a party who suffers prejudice as a result thereof.

403. The Claimants contend that it is not enough for the Respondent to justify its depriving actions with a broad-brush argument of "*right to regulate*" and neither the BIT nor customary international law supports such a contention. The Claimants then refer to the awards in a number of expropriation-related cases and assert that the obligation to compensate in the event of expropriation is widely recognized. The Claimants contend that the issue to be determined in the present case is not whether the Respondent felt justified to take the actions in question, but whether the measures taken fall within the terms of Article 4 of the BIT. To this question, the Claimants again emphasise their answer in the affirmative.

404. The Claimants then proceed to make their defence against the Respondent's claims in respect of the scope of Article 4 of the BIT.

405. The Claimants contend in the first place that Hungarian laws do not apply to the interpretation of the BIT's deprivation standard and there is no legal basis for the Respondent to argue that the BIT should be read to be consistent with Hungarian domestic law.

406. Second, the Claimants argue that the Respondent has failed to find any case to support its contention that the BIT is narrower in scope than other investment treaties and that the term "*deprivation*" is narrower than the term "*expropriation*." Contrarily, the Claimants quote a recent OECD report on this topic and contend that these two expressions are frequently used in conjunction with one another. The Claimants therefore reemphasised that the Respondent's Decree and related actions are the direct cause of the Claimants' loss of their investment, and accordingly they squarely fall within the scope of Article 4.

407. Next the Claimants rebut the Respondent's contention that, due to the reason the Claimants still possess the right to UNCITRAL Rules arbitration under the Project

Agreements, the “*conditions of expropriation*” have not been met. The Claimants’ response to this argument is that in nature the present case is a State-investor expropriation case rather than a contractual dispute as mischaracterized by the Respondent. As a result, the Claimants contend that the case law relied upon by the Respondent is not applicable to this case.

408. Regarding the Respondent’s denial of its failure to meet the requirements for a lawful expropriation in Article 4, besides points already made in the first round of debate, the Claimants’ further rebuttal arguments are listed as follows:

409. In respect of public interest, the Claimants contend that no evidence has been offered by the Respondent to explain how public interest was served and the “*harmonization with EU law*” and “*strategic interests of the State*” arguments remain hollow.

410. In respect of due process of law, the Claimants contend that the Respondent’s version of the story that the Claimants were well aware of the forthcoming legislative changes in advance is groundless. The Claimants emphasized by referring the Tribunal to the witness statements of Messrs. Huang and Onozo that the Claimants were never made aware of the fact and never suspected that the transformation of the ATAA would entail the expropriation of their investment and the frustration of the Project Agreements. The Claimants also claim that the Respondent does not provide any evidence of a connection between the alleged “*need to transform the ATAA*” and the frustration of the Project Agreements. According to the Claimants, such a connection does not exist.

411. In respect of non-discrimination, the Claimants contend that the Respondent’s argument that not only the Claimants but all foreign investors are prohibited from operating the Airport in fact helps the Claimants’ position that as foreign investors, the Claimants are specifically targeted by the Amending Act, the Decree and the actions taken in reliance thereupon.

412. In respect of just compensation, the Claimants reiterate that no expropriation procedures were even in place and contend that the arguments such as “*accounts settlement*” or “*resort to Hungarian courts*” do not in any way provide evidence of compliance with the obligation to provide for the payment of just compensation to the Claimants.

413. As regards other protection requirements in Article 3 of the BIT, the Claimants reiterate their position that the actions taken by the Respondent violated these obligations.

414. The Respondent, as represented by its new counsel, raises some further arguments in response to the Claimants’ rebuttal above in its Rejoinder.

415. As to the State’s right to regulation under international law, the Respondent claims that if the state discerns that the beneficiary of the concession right operates in several areas not in line with the legal regulations, then the State has the right to restore order of its law.

416. The Respondent also contends by referring to awards in prior expropriation-related cases that the recourse to national remedies was necessary in order to substantiate an alleged deprivation.

417. For the first time, the Respondent raises the point that the Claimants could have sought legal remedies before the Hungarian Constitutional Court by contesting the legality of the Amending Act and the Decree but failed to do so.

418. With respect to public interest, the Respondent refers to a provision in the Hungarian Expropriation Act which reads as follows:

*“Public interests...
Section 4(1) Real estate properties may be expropriated for the following purposes:...
f) transportation.”*

The Respondent then concludes that measures taken by the Respondent in dispute were actually for the public interest.

419. With respect to due process of law, the Respondent argues that the legislative process was public and the Claimants were able to inform themselves about the content of the amendment at any time. Further, the Respondent denies the allegation that no procedure was provided at all by saying that the Constitutional Court of Hungary was specifically established for a discontented party to request for judicial review of whatever it believes to be in conflict with the Constitution.

420. With respect to non-discrimination, the Respondent claims that since discrimination can only be argued when a comparable party which was treated differently exists, it is not possible to refer to discrimination in the present case due to the fact no such comparable parties exist.

421. With respect to just compensation, the Respondent claims that the Claimants have obtained significant benefits through the Project and such benefits meet the “*just compensation*” requirement. In any event, the Respondent claims, just compensation can be obtained by the Claimants by applying to the Hungarian courts under Hungarian law.

422. Finally, the Respondent again denies that it breached any other standard of protection in Article 3 of the BIT.

Discussion

(a) State’s Right to Regulate

423. The Tribunal cannot accept the Respondent’s position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal’s understanding of the

basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.

424. The related point made by the Respondent that by investing in a host State, the investor assumes the “*risk*” associated with the State's regulatory regime is equally unacceptable to the Tribunal. It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise.

425. The Respondent's contentions as to a State's right to regulate and the investor's assumption of risk are therefore rejected.

(b) The Scope of Article 4 of the BIT

426. It is obvious to the Tribunal that the measures taken by the Respondent against the Claimants fall well within the scope of Article 4 of the BIT. The logic in the Respondent's argument that the deprivation standard set out in Article 4 should be interpreted “*consistently with Hungarian law*” is hard for the Tribunal to see and follow. Neither is the Tribunal attracted by the Respondent's effort in differentiating the meaning and scope of the terms of “*deprivation*” and “*expropriation*”. In the Tribunal's view, the plain language (“*any measure depriving...directly or indirectly...investors...of their investment*”) of Article 4 says what it says and there is no room for the Respondent to challenge its broad scope of coverage nor to read it down.

427. The Respondent's arguments on the issue of the scope of Article 4 are therefore rejected.

428. The Tribunal now proceeds to examine each requirement specified in Article 4 of the BIT.

(c) Public Interest

429. The Tribunal can see no public interest being served by the Respondent's depriving actions of the Claimants' investments in the Airport Project.

430. Although the Respondent repeatedly attempted to persuade the Tribunal that the Amending Act, the Decree and the actions taken in reliance thereon were necessary and

important for the harmonization of the Hungarian Government's transport strategy, laws and regulations with the EU law, it failed to substantiate such a claim with convincing facts or legal reasoning.

431. The reference to the wording "*the strategic interest of the State*" as used in the Amendment Motion by Dr. Kosztolányi does not assist the Respondent's position either. While the Tribunal has always been curious about what interest actually stood behind these words, the Respondent never furnished it with a substantive answer.

432. In the Tribunal's opinion, a treaty requirement for "*public interest*" requires some genuine interest of the public. If mere reference to "*public interest*" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.

433. With the claimed "*public interest*" unproved and the Tribunal's curiosity thereon unsatisfied, the Tribunal must reject the arguments made by the Respondent in this regard. In any event, as the Tribunal has already remarked, the subsequent privatization and the agreement with BAA renders this whole debate somewhat unnecessary.

(d) Due Process of Law

434. The Tribunal concludes that the taking was not under due process of law as required by Article 4 of the BIT.

435. The Tribunal agrees with the Claimants that "*due process of law*", in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "*the actions are taken under due process of law*" rings hollow. And that is exactly what the Tribunal finds in the present case.

436. One of the Respondent's defences in this regard is that the Claimants were aware of the depriving actions well before the legislative changes were adopted in December 2001. The Tribunal finds this assertion groundless. To recall, Dr. Kiss testified at the hearing that it was not until January 2002 that he first heard that the Project Company would be displaced and its operations taken over. Similarly, Mr. Gansperger denied at the hearing that he had any knowledge that the legislative changes were contemplated prior to the date they were adopted. Assuming these statements are true and correct, which the Tribunal does not accept, they would contradict the logic in the Respondent's argument. For if persons at the very centre of the decision making body had no prior knowledge of the

contemplated legislative changes, how could it be expected and argued that a foreign investor should have had such knowledge well in advance? Setting this evidence aside, the accepted evidence of Mr. Somogyi-Tóth indicates that the discussions of the takeover stayed well within governmental circles. The Tribunal therefore does not believe, as the Respondent has suggested, that Mr. Huang and his colleagues should have known the content of such discussions before the legislative changes were adopted on December 18, 2001.

437. The Respondent also failed to establish a connection between the “*need to transform the ATAA*” and the deprivation of the Claimants investments in the Airport Project.

438. As to Respondent’s argument that Hungarian law does provide methods for the Claimants to review the expropriation, the Tribunal fails to see how such claim was substantiated and in any event cannot agree in the light of the facts established in this case that there were in place any methods to satisfy the requirement of “*due process of law*” in the context of this case.

439. The Respondent’s argument that the Claimants still retain their contractual rights for dispute resolution is also unacceptable to the Tribunal due to the non-contractual nature of the current dispute.

440. The Respondent’s arguments in respect of “*due process of law*” are therefore rejected.

(e) Non-discrimination

441. The Tribunal cannot accept the Respondent’s argument that as the only foreign parties involved in the operation of the Airport, the Claimants are not in a position to raise any claims of being treated discriminately.

442. It is correct for the Respondent to point out that in order for a discrimination to exist, particularly in an expropriation scenario, there must be different treatments to different parties. However and unfortunately, the Respondent misses the point because the comparison of different treatments is made here between that received by the Respondent-appointed operator and that received by foreign investors as a whole.

443. The Tribunal therefore rejects the contentions made by the Respondent and concludes that the actions taken by the Respondent against the Claimants are discriminatory.

(f) Just Compensation

444. It is abundantly obvious to the Tribunal that no just compensation was provided by the Respondent to the Claimants and feels no need to expand its discussion here.

(g) Protection Standards under Article 3 of the BIT

445. As regards other investment protection standards set out in Article 3 of the BIT, the Tribunal has no objection to the approach suggested by the Respondent that the meaning of “*fair and equitable treatment*”, “*unreasonable or discriminatory measures*” and “*full security and protection*” are to be determined under the specific circumstances of each specific case. However, in the light of the facts established in this case and under the above approach, the Tribunal is satisfied to conclude that these requirements under Article 3 have all been breached by the Respondent.

D. Miscellaneous Points Raised by the Respondent

446. In the Respondent’s *Rejoinder*, under the heading “*Legal Risks of the Project*” in subsection B of Section VI Quantum, the Respondent raises the following points for the first time:

- a. the Operating Period Lease is invalid “*due to the inappropriate legal form of the Project Company*”;
- b. the Project Agreements are invalid “*due to the missing approval*” of a quotaholders’ meeting of the Project Company;
- c. the Project Agreements, especially the Operating Period Lease and Terminal Management Agreement, are subject to challenges because there is “*a grossly unfair difference in value*” regarding the service rendered and consideration for that service;
- d. the Terminal Management Agreement is “*unlawful*” since conclusion of this agreement violated the Public Procurement Act.

447. The Claimants set forth their rebuttal to each of these points in their *Sur-Rejoinder*.

448. Although these arguments are raised as arguments in response to Claimants’ claim for damages, it seems appropriate for the Tribunal to deal with them at this point and of course, if they are valid, take them into account when accessing quantum.

1. Is the Operating Period Lease Invalid “*Due to the Inappropriate Legal Form of the Project Company*”?

449. The Respondent contends that the Operating Period Lease is invalid “*due to inappropriate legal form of the Project Company*”. The Respondent’s legal basis of this argument is Section 45 of Act No. XCVII on Air Traffic (the “Air Traffic Act”). The relevant parts of Section 45 are as follows¹:

“(1) For the establishment, development, renovation, maintenance and operation of Budapest Ferihegy International Airport, and within this scope,

¹ The translation of this Section 45 by the Claimants differs from that by the Respondent. However, the Tribunal notes that the discrepancies in translation only exist at a linguistic level and the substance of both translations is the same. The translation quoted here is from that provided by the Claimants in their *Sur-Rejoinder*.

for the construction and operation of ground service facilities (hereinafter “operation”), the State shall:

- a) establish a business organization (Section 685(c) of the Hungarian Civil Code) operating with majority interest of the State or shall found a budgetary agency; or*
- b) shall transfer the temporary right of operation within the framework of a concession agreement.*

(2) The Minister shall be entitled to announce and evaluate the tender for the concession and to conclude the concession agreement.

...

(4) The winner of the tender shall establish the concession company as a company limited by shares, which shall be entitled to construct and operate commercial and catering facilities.”

450. It is contended by the Respondent that due to the fact that the Project Company received from the Government of Hungary certain operational rights by means of a concession, the Project Company is in nature a concessionaire. As such, in order to comply with Section 45, the Project Company should have been incorporated as a company limited by shares (Rt.). The Project Company, however, was incorporated in contravention of the requirement in Section 45 as a limited liability company (Kft.).

451. The Respondent goes on to contend that according to the Hungarian Civil Code (Act IV/1959), Section 200(2), “*contracts in violation of legal regulations and contracts concluded by evading a legal regulation shall be null and void*”. The conclusion it reaches, therefore, is that since the Project Company’s incorporation was in violation of a relevant legal requirement, *i.e.* Section 45 of the Air Traffic Act, “*any person is thus entitled to plead the invalidity of the agreement due to violation of legal regulations without any time limit*”. Accordingly, the Respondent claims that the Operating Period Lease concluded by the Project Company is invalid.

452. On the other hand, the Claimants contend that Section 45(1)(b) is not applicable in this case. The reason is that the ATAA, the majority quotaholder of the Project Company, is a budgetary agency under Section 45(1)(a) and maintains the right of operation of the Airport. The Project Company, under the Operating Period Lease, only has the right to perform entrepreneurial operations and such operation is subject to the monitoring and supervision of ATAA. In addition, Hungary has a majority interest in the Project Company via ATAA’s majority quotaholding. Thus the legal requirement under Section 45(1)(a) has been fully met and the application of Section 45(1)(b) is not applicable .

453. The Claimants also contend that ATAA, as a budgetary agency of the Hungarian Government, has provided a full warranty in the Operating Period Lease as to its competence to enter into the same as well as the validity thereof. Further, after almost nine years since the execution of the Operating Period Lease, the argument made by the Respondent that the Operating Period Lease is invalid should be time-bared.

454. The Claimants further contend that even if the Respondent were correct in its contentions concerning Section 45(1)(b) and Section 45(4), if any breach of the legal requirement thereof exists, it is the Respondent, rather than the Claimants, who should bear the legal consequence of the breach because it is the duty of the Respondent under Section 45 to adopt appropriate measures to comply with it. The Claimants refer to Section 4 of the Hungarian Civil Code, which states that “*no person shall be entitled to refer to his own actionable conduct in order to obtain advantages*”. They also refer to the statement of official commentators on the Hungarian Civil Code that “*if any entity caused invalidity by its own actionable conduct the same entity is not entitled to refer to the invalidity of the agreement*”.

Discussion

455. The Tribunal finds the arguments of the Claimants convincing. It is established that ATAA, at the time of the execution of the Operating Period Lease, was a budgetary agency of the Hungarian Government. It is also established that ATAA is a majority quotaholder in the Project Company with a quotaholding of 66%. Given these established facts, it appears to the Tribunal that the project structure, which was under the mandate of the Respondent and features ATAA as a majority quotaholder in the Project Company, falls squarely within the situation specified in Section 45(1)(a). Since the key word connecting Section 45(1)(a) and (b) is “*or*”, as appeared in translations from both Parties, the Tribunal is satisfied that Section 45(1)(b) does not apply to this case as the legal requirement in Section 45(1)(a) was fully met.

456. Even if the Tribunal were wrong in concluding the above, the Respondent would still be time-barred to challenge the validity of the Operating Period Lease. In considering this contention, the Tribunal cannot ignore the fact that the whole structure of these complex interwoven agreements was insisted upon and voluntarily entered into by organs of the Hungarian Government. The Hungarian Government provided a guarantee. Still furthermore, the Respondent was represented by eminent external and internal legal and financial advisors. It is difficult for the Tribunal to conclude that such a defect as is alleged would not have been noticed. However, this point is only taken at a very late stage in these proceedings which themselves commenced many years after the matters complained of. Even though the Respondent contends that there is no time limit on the right to contest the validity of the Operating Period Lease, it is the opinion of the Tribunal that the “*five-year time bar*” rule generally accepted by Hungarian judicial practice applies on the facts of this case. As was stated in the Concept of the New Hungarian Civil Code:

“It is disputed and will remain so what the term ‘without time limit’ means. In the monograph written by Emilia Weiss about invalid contracts, she correctly stated more than three decades ago that there is no reason why the five-year limitation period applicable for all contractual claims shall not apply to invalid agreements as specified in the Civil Code (the same is confirmed in the following rulings of the Supreme Court: Pf. IV. 21768/1993:

BH 1994/666, Gf. V. 30398/1981:BH 1982/298.). The proposal recommends that these principles shall be prescriptively set out in legislation.”

2. Are the Project Agreements Invalid “Due to the Missing Approval” of a Quotaholders’ Meeting of the Project Company?

457. The Respondent contends that in accordance with Item 8.2.7. of the Articles of Association of the Project Company and the Hungarian Company Act effective at the time of the incorporation of the Project Company, when a company is concluding a contract with a member of that company, the approval of a quotaholders’ meeting was necessary to make such a contract valid. The Operating Period Lease in the Project, the Respondent submits, is a contract between the Project Company and ATAA, a quotaholder and member of the Project Company. Accordingly, the approval of the Quotaholders’ Meeting of the Project Company “*would have been necessary for all Project Agreements as well as for valid issuance of the Promissory Note*”.

458. At this point, the Respondent refers to a published decision of the Hungarian Supreme Court which reads as follows:

“I. Establishment of a sale and purchase agreement of the company with its own Quotaholder is not to be regarded as being part of the regular activities of the Company, thus in case the Quotaholders’ Meeting has not approved of such an agreement in its decision, invalidity of the agreement may be ascertained.”

459. Given the Hungarian Supreme Court’s attitude expressed above and due to the fact that the said approvals were missing, the Respondent contends that the Project Agreements concluded by the Project Company are invalid.

460. The Claimants’ rebuttal to this argument is threefold. The Claimants firstly point out that not all of the Project Agreements were concluded between the Project Company and a member thereof. Rather, a number of the Project Agreements are between two members of the Project Company in which cases there is no need for an approval of a quotaholders’ Meeting.

461. Secondly, the Claimants argue that in the same paragraph of the Hungarian Company Act (ignored by the Respondent), it is clearly stated that where the conclusion of the contract “*is part of the regular activity of the company*”, the approval from a quotaholders’ meeting is unnecessary.

462. The Claimants then refer to the Master Agreement and the constitutional document of the Project Company and argue that the Project Company was established for the sole purpose of the Project and the conclusion of the Operating Period Lease fell well within its “*regular activity*”. Therefore, there was no need for the Project Company to obtain quotaholders’ meeting approval to conclude the Operating Period Lease.

463. Thirdly, the Claimants argue that a quotaholders' meeting of the Project Company did approve the conclusion of all of the Project Agreements. In this regard, the Claimants refer to the minutes of the quotaholders' Meeting dated February 26, 1997 as follows:

“Authorization for the Company and the management to sign various agreements and documents, to take all actions that are necessary or desirable in connection therewith, and to fulfil all of the Company’s obligations arising from these agreements and the related documents.”

464. The Claimants contend that the above indicates that approval of the Project Agreements was on the agenda of a quotaholders' meeting and a resolution concerning the approval under [the No.4/1997] has been duly and unanimously adopted and registered in the Book of Resolutions.

Discussion

465. In the light of the documentary evidence before it and the applicable sections of the Hungarian Company Act, the Tribunal sees no basis for the Respondent's “*lack of necessary approval*” argument.

466. It appears clear to the Tribunal that the Quotaholders have granted their approval to the execution of the Project Agreements. It is also clear to the Tribunal that the Project Company, as a company vehicle in a complex investment project, was incorporated for the sole purpose of taking part in the Project.

3. Is There “*a Grossly Unfair Difference in Value*” Regarding the Service Rendered and Consideration for That Service?

467. The Respondent argues that there is “*a grossly unfair difference in value*” between the service provided by the Claimants and the “*counter performance*” provided by ATAA. Under Section 201 of the Hungarian Civil Code, when such a “*grossly difference in value*” exists, ATAA as the “*injured party*” in this case, “*was entitled to raise objection against Claimants under the Project Agreements*”. The Section reads as follows:

“Section 201

(1) Unless the contract or the applicable circumstances expressly indicate otherwise, a consideration is due for services set forth in the contract.

(2) If at the time of the conclusion of the contract the difference between the value of a service and the consideration due, without either party having the intention of bestowing a gift, is grossly unfair the injured party shall be allowed to contest the contract.”

468. There are thus three conditions which have to be met before this section of the Code bites. They are:

- a) at the time of the conclusion of the contract;
- b) a grossly unfair difference in value must exist between the service and the consideration due for the service; and
- c) the aggrieved party shall not have the intention of bestowing a gift.

469. The Claimants contend that such conditions are not established and that the Respondent's argument is unfounded. The Claimants refer to Decision No. PK 267 of the Civil Law Department of the Hungarian Supreme Court, which the Claimants contend are the "guidelines" for Hungarian judicial practice in this regard. Decision No. PK 276 states:

"If a contract is challenged due to the grossly unfair difference in value between the service and the consideration due, in order to determine whether such difference is unfair the courts shall examine the circumstances of concluding the contract, the full content of the contract, the relation between the market values, the characteristics of the given transaction, the method of defining the services and the consideration due.

...

Section 201(2) grants the right to challenge a contract only if the difference between the service and the consideration due is grossly unfair. [...] Thus only after evaluating all of the circumstances of the case can it be stated that there is not only a difference between the value of the service and the consideration but that difference is also grossly unfair."

470. Based on the observations quoted above from Decision No. PK 267, the Claimants contend that considering all the circumstances of the structuring of the Project and the conclusion of the Project Agreements, no grossly unfair difference in value existed. Additionally, the Claimants make the following arguments in response to the Respondent's claim as well:

- a) there was no legal risk at the time of expropriation since the ATAA did not challenge the Project Agreements;
- b) the ATAA did not challenge the Operating Period Lease and the Terminal Management Agreement; and
- c) the Respondent never had a right to challenge the Project Agreements and that right was only available to ATAA.

Discussion

471. The Tribunal is clearly of the view that section 201 of the Hungarian Civil Code could not have been intended to apply to the facts of this case. This is not a case involving parties with markedly different bargaining power – a situation for which most legal systems attempt to provide. ATAA, backed by the Hungarian State, entered into these agreements with full knowledge of all the facts and for good and genuine reason. The Tribunal does not think it necessary to analyse the benefits received by ATAA because they were, in the opinion of the Tribunal, real and substantial. No challenge to any of the Project Agreements was ever made until well into these proceedings. These arguments are far

removed from the thinking of the parties at the relevant time. It is also noted that ATAA has never challenged these agreements. It is only Hungary now that seeks to do so as a shield to fend off this claim under the BIT. For all of the above reasons, the Respondent's submissions to this point are rejected.

4. Did the Conclusion of the Terminal Management Agreement Violate the Public Procurement Act and Therefore Become “Unlawful”?

472. The Respondent contends that due to the fact that the Claimants “*had exclusive licenses to provide national public services*”, according to the Act XL/1995 on Public Procurement, the Project Company cannot validly enter into the Project Agreements without going through public procurement proceedings. Since the Project Company failed to go through such proceedings, the Project Agreements it concluded are unlawful.

473. The Claimants in response state that such argument is entirely baseless. The Claimants firstly challenge the Respondent's contention by stating that “*it is not up to the Claimants or the Respondent to decide what qualifies as national public service*” and the statutory provision pursuant to which the Claimants may be deemed to have an exclusive right to provide national public services does not exist and no public procurement proceeding was required in this case. The Claimants then argue that the ATAA not only was fully aware of the contents of the relevant Project Agreements, but also “*represented and warranted that the agreement constitutes a valid, legal and binding obligation...*”

Discussion

474. This contention is unsustainable. Again an attempt is being made to challenge the validity of an agreement which was entered into with the full approval of the Respondent and which formed part of a complex structure of agreements. The whole corporate structure was insisted upon and/or fully approved by those representing the Respondent. ATAA took the benefits conferred by the Terminal Management Agreement and made no complaint about it at the time, nor at the time of the Decree, nor when the first round of Memorials had been completed. This point was only raised very late in these proceedings. If in fact the Project Company should have gone through some public procurement system, it can only be the fault of ATAA and the Respondent that they did not. ATAA went further and gave representations and warranties set out above and it would, in the opinion of the Tribunal, be unconscionable to permit them, at this very late stage, to resile from these representations and warranties. Furthermore, it is far too late now to complain of a matter of this nature given the factual scenario set out above.

Hungary's Conduct

475. Even if the Respondent was correct in any of its submissions on the miscellaneous points dealt with in Section D above, they would nevertheless fail on them simply because they have rested on their rights. These Agreements were entered into years ago and both parties have acted on the basis that all was in order. Whether one rests this conclusion on the doctrine of estoppel or a waiver it matters not. Almost all systems of law prevent

parties from blowing hot and cold. If any of the suite of Agreements in this case were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined to enter into such an agreement. However when, after receiving top class international legal advice, Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These submissions smack of desperation. They cannot succeed because Hungary entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. Hungary cannot now go behind these Agreements. They are prevented from so doing by their own conduct. In so far as illegality is alleged, they would in any event be seeking to rely upon their own illegality. This matter is put to rest by Section 4 of the Hungarian Civil Code which states:

“4. §(1) In the course of exercising civil rights and fulfilling obligations, all parties shall act in the manner required by good faith and honesty, and they shall be obliged to cooperate with one another.

...

(4) Unless this Act prescribes stricter requirements, it shall be necessary to proceed in civil relations in a manner deemed reasonable under the given circumstances. No person shall be entitled to refer to his own actionable conduct in order to obtain advantages. Whosoever has not proceeded in a manner deemed reasonable under the given circumstances shall be entitled to refer to the other party’s actionable conduct.”

E. Conclusion on Matters Other Than Quantum

476. The conclusion of the Tribunal on matters other than quantum are as follows:

- a) the Tribunal has jurisdiction to hear and consider all the claims made by the Claimants in this case;
- b) all of Hungary’s jurisdictional arguments are rejected;
- c) all of the points raised by Hungary as set out in paragraph 446 above (whether going to liability or quantum) are rejected;
- d) the expropriation of the Claimants’ interest constituted a depriving measure under Article 4 of the BIT and was unlawful as: (a) the taking was not in the public interest; (b) it did not comply with due process, in particular, the Claimants were denied of “*fair and equitable treatment*” specified in Article 3(1) of the BIT and the Respondent failed to provide “*full security and protection*” to the Claimants’ investment under Article 3(2) of the BIT; (c) the taking was discriminatory and (d) the taking was not accompanied by the payment of just compensation to the expropriated parties.

F. Quantum

477. Having reached the conclusions in the foregoing paragraph, the Tribunal now feels ready to consider the challenging issue of quantum. To recall and for the purpose of the discussion below, the “*date of expropriation*” and the “*date of taking*” both refer to January 1, 2002.

478. The Claimants’ claims for damages are set forth in paragraphs 242 and 243 above.

1. The Applicable Standard for Damages Assessment

479. The applicable standard for assessing damages has given rise to considerable debate between the Parties.

480. The principal issue is whether the BIT standard is to be applied or the standard of customary international law. The Claimants argue that the Respondent’s deprivation of its investments was a breach of the BIT and as an internationally wrongful act is subject to the customary international law standard as set out in *Chorzów Factory (Claim for Indemnity) (Merits), Germany v. Poland, P.C.I.J. Series A., No. 17 (1928)*. The Respondent contends that the BIT standard is a *lex specialis* which comes in lieu of the customary international law standard.

481. There is general authority for the view that a BIT can be considered as a *lex specialis* whose provisions will prevail over rules of customary international law (*see, e.g., Phillips Petroleum Co. Iran v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. at 121). But in the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. This would have been possible if the BIT expressly provided for such a position, but this does not exist in the present case.

482. The standard set forth in Article 4(1)(a) of the BIT refers to “*just compensation.*” Article 4 further provides:

“2. *The amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation.* 3. *The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made.*”

The latter refers to Hungarian law in the present case. Section 132 of the Hungarian Constitution provides that expropriation of ownership must be accompanied by “*full, unconditional and prompt compensation*” (Respondent’s Counter-Memorial at para.584).

483. Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.

484. The customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the *Chorzów Factory* case at page 47 of the Judgment which reads:

“reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”

In the same case at page 21, the PCIJ also pointed out that *“reparation therefore is the indispensable complement of a failure to apply a convention.”*

485. Moreover, the PCIJ considered that the principles to determine the amount of compensation for an act contrary to international law are:

“Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.” (Page 47 of the Judgment.)

486. This statement of the customary international law standard has subsequently been affirmed and applied in a number of international arbitrations relating to the expropriation of foreign owned property. Due to the considerable disagreement between the Parties on the continued existence of this standard it is necessary to recite the authorities in this area in some detail.

487. In *S.D. Myers, Inc. v. Canada*, UNICTRAL (NAFTA) Award (Merits), 13 November 2000, the Tribunal stated at para.311:

“The principle of international law stated in the Chorzów Factory (Indemnity) case is still recognised as authoritative on the matter of general principle”.

488. The Tribunal in *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, held at paragraph 122 of its Award that:

“[t]he award to Metalclad of the cost of its investment in the landfill is consistent with the principles set forth in Chorzów ... namely, that where the state has acted contrary to its obligations, any award to the claimant should, as far as is possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed (the status quo ante).”

489. Moreover, in *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Award, Case No. ARB/01/8, 12 May 2005, the ICSID Tribunal stated in para.400 of its Award the following:

“Restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation.”

490. Similarly, in *Petrobart Limited v. The Kyrgyz Republic*, Arbitration No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce (Energy Charter Treaty), 29 March 2005, the Tribunal held at pages 77 and 78 of its Award the following:

“Petrobart refers to the judgment of the Permanent Court of International Justice in the Factory at Chorzów case and to the International Law Commission’s Draft Articles on State Responsibility for Internationally Wrongful Acts in order to show that the Kyrgyz Republic is obliged to compensate Petrobart for all damage resulting from its breach of the Treaty. The Arbitral Tribunal agrees that, in so far as it appears that Petrobart has suffered damage as a result of the Republic’s breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred.”

491. The *Chorzów Factory* case has also been generally accepted by *Oppenheim’s International Law* which states:

“The principle is clear: out of an international wrong arises a right for the wronged state to request from the wrong-doing state the performance of such acts as are necessary for reparation of the wrong done. What kind of acts these are depends upon the merits of the case. For perhaps the majority of cases the guiding principle is as laid down in the Chorzów Factory (Indemnity) case, in the following terms: [the quotation omitted here is of the passage reproduced above from page 47 of the Judgment]. It is obvious that there must be pecuniary reparation for any material damage” (R. Jennings and A. Watts, *Oppenheim’s International Law* (9th ed., 1996), pages 528-529.)

492. For additional cases affirming and applying the *Chorzów Factory* standard for the assessment of damages in the context of expropriation of foreign owned property, see *Amoco International Finance Corporation v. Iran*, 15 IRAN–U.S. C.T.R. p.189 at p.246 (paras.191-194); and *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, 25 May 2004, para.238.

493. Finally, the International Court of Justice itself, the PCIJ's successor, in recent years repeatedly has reconfirmed the validity, indeed the primacy, of *Chorzów Factory* as the standard of compensation for acts by States unlawful under international law. Thus in 1997

in the Case Concerning the Gabčíkovo-Nagymaros Project, (Hung. v. Slovakia), 1997 I.C.J. 7 (Sept. 25), the Court, having found both Hungary and the Slovak Republic to have acted wrongfully in connection with a dam project, had been asked to “indicate on what basis they should be paid,” *id.* para.152, and in answering such petition referred in the first instance to *Chorzów Factory*, quoting the same phrase from that case as is set forth in paragraph 484 above. In 2001 the Court again, in the LaGrand Case, (Ger. v. U.S.), 2001 I.C.J. 466 (June 27), relied (at para.125) on the *Chorzów Factory* principle. In its 2002 Judgment in the Case Concerning the Arrest Warrant of 11 April 2000, (Democratic Rep. Of Congo v. Belg.), 2002 I.C.J. 3 (February 14), the Court again invoked (at para.76) the very same passage from *Chorzów Factory* it had cited in the Case Concerning the Gabčíkovo-Nagymaros Project as noted above (and which is quoted in paragraph 484 above) in connection with its finding that Belgium had committed an internationally wrongful act and its associated discussion of remedies. Just two years ago, in 2004, the Court twice had occasion to reconfirm *Chorzów Factory*'s principles. First, the Case Concerning Avena and other Mexican Nationals, (Mexico v. U.S.), 2004 I.C.J. 12 (March 31) at paras.119-121, relied on the same principle quoted from *Chorzów* in the Gabčíkovo-Nagymaros, LaGrand and Arrest Warrant Judgments (and set forth in paragraph 484 above) in fashioning the relief ordered in its Judgment. Then, in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9), the Court, after finding the “Wall” in question to be in breach of various international obligations incumbent on Israel, “recall[ed] that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms” and then proceeded in paragraph 152 to invoke the same passage from *Chorzów Factory* (as set forth in paragraphs 484 and 485 above) on which it had relied in the Gabčíkovo-Nagymaros, LaGrand, Arrest Warrant and Avena Cases.

The Court then went on to prescribe actual restitution as the preferred remedy, and in default thereof equivalent compensation:

“Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.” (para.153)

Thus there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.

494. It may also be noted that the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, concluded in 2001, expressly rely on and closely follow *Chorzów Factory*. Article 31(1) provides:

“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”

The Commission's Commentary (at (2)) on this Article states that “*The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the Factory at Chorzów case*” and then quotes the identical passage quoted by the International Court of Justice in all of the cases cited above (and set forth in paragraph 484 above). The Commission continues in Article 35 of the Draft Articles to conclude that restitution in kind is the preferred remedy for an internationally wrongful act, providing in Article 36 that only where restitution cannot be achieved can equivalent compensation be awarded.

495. The remaining issue is what consequence does application of this customary international law standard have for the present case. It is clear that actual restitution cannot take place and so it is, in the words of the *Chorzów Factory* decision, “*payment of a sum corresponding to the value which a restitution in kind would bear*”, which is the matter to be decided.

496. The present case is almost unique among decided cases concerning the expropriation by States of foreign owned property, since the value of the investment after the date of expropriation (1 January 2002) has risen very considerably while other arbitrations that apply the *Chorzów Factory* standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of the expropriation as the date for the valuation of damages.

497. However, in the present, *sui generis*, type of case the application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed. This kind of approach is not without support. The PCIJ in the *Chorzów Factory* case stated that damages are “*not necessarily limited to the value of the undertaking at the moment of dispossession*” (Page 47 of the Judgment. This passage being cited with approval in *Amoco International Finance Corporation v. Iran*, 15 IRAN–U.S. C.T.R. p.189 at p.247 (para.196).) It is noteworthy that the European Court of Human Rights has applied *Chorzów Factory* in circumstances comparable to the instant case to compensate the expropriated party the higher value the property enjoyed at the moment of the Court's judgment rather than the considerably lesser value it had had at the earlier date of dispossession. In *Papamichalopoulos and Others v. Greece* ((1966) E.H.R.R. 439) (available also on Westlaw at 1995 WL 1082483 (ECHR)) the Greek Government in 1967 had expropriated unimproved real estate for the purpose of building housing for Greek Navy personnel, and in 1993 the Court had ruled that “*the applicants de facto...have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possession*” ((1993) 16 E.H.R.R. 440, paras.35-46 and points 1 and 2 of the operative provisions). In the remedies stage the Court ruled (para.36), just as in the case here, that “[*t*]he act of the Greek Government...contrary to the Convention was not an expropriation that would have been legitimate but for the failure to pay fair compensation.” The Court continued (para.36):

“The unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession.”

Then, citing the oft-quoted passage from *Chorzów Factory* set forth in paragraph 484 above and repeated by the International Court of Justice on numerous recent occasions as noted earlier, the Court concluded (para.37):

“In the present case the compensation to be awarded to the applicants is not limited to the value of their properties at the date [1967] on which the Navy occupied them. . . For that reason [the Court had] requested the experts [appointed by the Court] to estimate also the current value of the land in issue.”

The Court ordered restitution of the land, including all of the buildings and other improvements made over the intervening years by the Greek Navy, and further (para. 39), that if restitution would not be made:

“[T]he Court holds that [Greece] is to pay the applicants, for damage and loss of enjoyment since the authorities took possession of the land in 1967, the current value of the land, increased by the appreciation brought about by the existence of the buildings and the construction costs of the latter.”

498. Moreover, Sole Arbitrator Dupuy in *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic* 53 ILR p.389 cited a number of authorities on the contours of the principle of *restitutio in integrum* as set out in the *Chorzów Factory* case. Dupuy cited in particular the view of former ICJ President Jiménez de Aréchaga, writing extra-judicially, who stated:

“The fact that indemnity presupposes, as the PCIJ stated, the ‘payment sum corresponding to the value which a restitution in kind would bear’, has important effects on its extent. As a consequence of the depreciation of currencies and of delays involved in the administration of justice, the value of a confiscated property may be higher at the time of the judicial decision than at the time of the unlawful act. Since monetary compensation must, as far as possible, resemble restitution, the value at the date when indemnity is paid must be the criterion.”

499. Based on the foregoing reasons, the Tribunal concludes that it must assess the compensation to be paid by the Respondent to the Claimants in accordance with the *Chorzów Factory* standard, i.e., the Claimants should be compensated the market value of the expropriated investments as at the date of this Award, which the Tribunal takes as of September 30, 2006.

500. Consequently, the Tribunal rejects the Claimants' claim for damages under the unjust enrichment approach, which, in the Tribunal's opinion, has not been substantiated by the Claimants with either sufficient facts or law.

2. Discounted Cash Flow (DCF) Method v. Balancing Payment Method

501. The next focus of the legal debate between the Parties is the appropriate method to compute the fair market value of the expropriated investments of the Claimants. The Claimants submit, based on their expert reports, i.e., the LECG reports, that the DCF method is appropriate in the present case. The Respondent contends that, based on the NERA Report and the later Hunt Report, a Balancing Payment method is to be followed.

502. Like many other tribunals in cases such as the present one, the Tribunal prefers to apply the DCF method, although it is mindful of the Respondent's admonishment that: "*international tribunals have exercised great caution in using the [DCF] method due to its inherently speculative nature.*" (Counter-Memorial at para.590).

503. The Respondent's Balancing Payment method "*is the sum required to provide the Claimants with an IRR return of 17.5% at the date of termination, after accounting for the payments already made.*" (Counter-Memorial at para.739). In the Tribunal's view, the Balancing Payment method does not take into account, at least not sufficiently, the remaining term of the investments. In this connection, the Regulatory Framework specifies in Section 4.1 that the term "*IRR*" is:

"discount rate that equates the discounted value of a stream of cash flows to the costs of the investment that produced the cash flows, calculated over the entire life of the investment." (emphasis added)

Moreover, the Balancing Payment method would imply that investors entering into an agreement can be excluded therefrom almost the morning after signing. Article 4.5 of the Quotaholders' Agreement appears not to support Respondent's proposed method either because it provides that ATAA

". . . undertakes that during the Term, it shall not vote its Quotas in favour of expulsion from the Project Company of any ADC Party that is a Quotaholder in the Project Company."

Dr. Hunt also testified that he did not rely on Article 4.5. Rather, one should rely on Article 4.6 of the Agreement which requires the parties to cooperate in good faith and act to implement fully the terms of the Agreement. In addition, the Claimants have demonstrated to the satisfaction of the Tribunal that the Project Company had insufficient funds, and was unable to obtain those funds externally without the consent of ADC Affiliate, to effect the Balancing Payment. Consequently, it would have been impossible for ATAA to have unilaterally accelerated distributions to bring ADC Affiliate's IRR to 17.5% as of December 31, 2001.

504. The Respondent's argument that the Balancing Payment method shall be used instead of the DCF method is therefore rejected.

3. The Respondent's Other Attacks on the LECG Reports

505. Except for the Respondent's attack on the DCF approach, the Respondent and its experts also criticize the LECG Reports on many other grounds, which the Tribunal will now consider in turn.

506. One of the Respondent's main criticisms concerns LECG's reliance on the 2002 Business Plan of the Project Company (subject to minor adjustments) as a basis for the DCF calculations, as incorporated in its own models (the "2002 LECG Model", "2004 LECG Model" and "2005 LECG Model"), because it would not provide a reliable basis on which to base projections as to the future performance of the Project Company for the purposes of assessing damages.

507. The Tribunal disagrees since the 2002 Business Plan was approved by ATAA in a letter of December 11, 2001, a few days before the Decree was issued that led to the expropriation and after five drafts had been discussed between the Quota Shareholders. The 2002 Business Plan, therefore, constitutes the best evidence before the Tribunal of the expectations of the parties at the time of expropriation for the expected stream of cash flows. The Respondent has not convincingly shown to the Tribunal that the 2002 Business Plan was limited to ascertaining whether in the short term Regulated Rates and Charges were to be changed or that LECG has failed to undertake scenario analysis or sensitivity testing (which LECG actually did).

508. The estimation of timing and magnitude of cash distributions to ADC Affiliate is, contrary to Dr. Hunt's criticism, based on a correct evaluation by LECG of contemporaneous forecasts of cash distributions as they are derived from the 2002 Business Plan. Dr. Hunt raised the question why ATAA would defer cash flows to later periods if the IRR of expected cash flows to ADC Affiliate is likely to be 17.5% maximum. That is conjecture which is contradicted by projections in the 2002 Business Plan. The same applies to the two alternative responses to better-than-expected Project Company performance (i.e., tariff adjustment and dividend waiver).

509. The Respondent further criticises the IRR used by LECG. Schedule C to the Agreement establishes a target IRR of 15.4% with an upper limit of 17.5%. In the Tribunal's view, LECG was justified in using the upper limit. As it is shown by the Claimants and it is borne out by the events subsequent to the expropriation, the Budapest Airport is indeed one of the fastest growing airports in the world. That increase in traffic would certainly have caused an IRR superior to the contractual cap of 17.5%. Furthermore, the fact that the 2002 Business Plan forecast substantially increased projected dividends in 2010 and 2011 is due to the fact that the Project Loan was scheduled to be repaid by the beginning of 2009, thereby decreasing the costs of the Project Company and increasing the revenues that were available for distribution as dividend in 2010 and 2011.

510. The Respondent's other criticism relates to the discount factor used by LECG. The Tribunal notes that the difference between the use of the cost of equity to discount dividends and promissory notes payments (9.11%) and of the WACC to discount the Management Fees (8%) is explained by the fact that the Management Fees have seniority over dividends. Revenue streams from dividends and promissory notes payments are indeed subordinate to other Project Company cash flows and therefore subject to increased risk. In this connection, BAA used an identical WACC of 8% for its acquisition in December 2005.

511. According to LECG, the cost of equity is equal to the return on risk-free securities, plus systemic risk of the investment (Beta), multiplied by the market risk premium. For a number of countries, an adjustment for country risk is also made. The Respondent's criticism of the use by LECG of the Beta is unfounded. It appears that LECG used a Beta of various representative airports, and not just one. The Respondent's assertion that the market risk premium as used by LECG "*may not be conservative*" falls short of any substantiation. The use of the geometric mean estimate rather than the arithmetic mean is professionally justified. Finally, the Respondent's contention that the country risk "*may be understated*" comes within the same category.

512. The Respondent also contends that LECG should have discounted the present value of the distributions for illiquidity and absence of control of ADC Affiliate's interest. The Tribunal cannot accept these contentions. As is correctly pointed out by Dr. Spiller of LECG, an illiquidity discount is usually associated with privately held companies that have erratic or volatile cash flows. Regulated entities, such as the Project Company, do not typically attract an illiquidity discount because of the relatively stable cash flows associated with them. This is also shown by BAA's acquisition of Budapest Airport Rt. on December 22, 2005 which did not involve an illiquidity discount. With respect to the alleged minority discount, no such discount is required to be applied since ADC Affiliate had adequate shareholder protections in the Project Agreements.

513. As regards the Management Fees, the Tribunal has already found that they are in essence deferred compensation for services rendered prior to the Operations Commencement Date. The Respondent asserts that LECG's compensation estimate is extreme as it is close to zero marginal cost. The evidence before the Tribunal shows, however, that the costs of the ongoing services provided in exchange for the management fees were approximately 2-3% of the overall fees. As a result, LECG was justified in making a corresponding deduction in its calculation of damages.

4. Conclusion on Quantification

514. In the light of all of the above, the Tribunal is fully satisfied that (a) the standard of compensation established in the *Chorzów Factory* case is the appropriate standard applicable to this case; (b) the restitution approach claimed by the Claimants shall accordingly be followed; (c) LECG's adoption of the DCF method is fully justified; and (d) the calculations carried out by LECG in line with the foregoing standard, approach and

method are reasonable and reliable and are endorsed by the Tribunal in calculating the final amount of damages.

515. With respect to Claimants' claim relating to Lost Future Development Opportunities (i.e., the parking garage facility and the additional terminal capacity), the Tribunal is of the view that they cannot be awarded since the Claimants had no firm contractual rights to those possible projects. Moreover, Claimants have been unable to quantify, with any fair degree of precision, the damages that would have resulted from the loss of those alleged opportunities.

516. The Tribunal would like to point out here that the LECG reports are, in the Tribunal's view, an example as to how damages calculations should be presented in international arbitration; they reflect a high degree of professionalism, clarity, integrity and independence by financial expert witnesses. LECG's valuation is fully validated by the amount of the acquisition by BAA of Budapest Airport Rt. on December 22, 2005, being US\$ 2.23 billion (£1.26 billion) for 75% minus one share and a 75-year assets management contract plus moveable assets.

5. The Amount of Compensation Payable to the Claimants

517. As dictated by the nature of the restitution approach, an award date has to be determined in order to calculate the damages. In its first report dated July 29, 2004, LECG assumed July 31, 2004 as the award date and reached its first total amount of compensation under the restitution approach of US\$66.1 million. In its Supplemental Report dated July 22, 2005, this benchmark date is brought forward to July 2005 and the updated figure is US\$69.7 million. In its Post-Hearing Report, LECG lists the updated amounts of damages as of different assumed award dates month by month from July 2005 to December 2006. For the purpose of this Award, the Tribunal takes September 30, 2006, as the likely date of the Award.

518. The claim for damages under the restitution approach fall into two parts: (a) the estimated value of the Claimants' stake in the Project Company as of the award date; and (b) all unpaid dividends and management fees from the date of expropriation until the date of the award.

519. Taking September 30, 2006 as the date of the Award, the Tribunal notes that the Supplemental Report of LECG arrives at a total amount of damages payable to the Claimants by the Respondent in the sum of US\$76.2 million.

520. Since the calculation is based on the value of the expropriated investments as of the date of the award, no pre-award interest has accrued.

521. The Tribunal is of course grateful to the experts on both sides for their enormous help on the issue of damages. However the Tribunal feels bound to point out that the assessment of damages is not a science. True it is that the experts use a variety of methodologies and tools in order to attempt to arrive at the correct figure. But at the end of

the day, the Tribunal can stand back and look at the work product and arrive at a figure with which it is comfortable in all the circumstances of the case. In the light of all of the above and in the light of the admission that there was a very minor error in LECG's final figure (See Ogilvy Renault's Letter dated May 12, 2006), the Tribunal awards ADC Affiliate US\$55,426,973 and ADC & ADMC Management US\$20,773,027 both sums to carry interest at 6% per annum with monthly rests until payment. Such interest rate is the same as the interest rate agreed by the parties in the Promissory Note.

522. As to post-Award interest, contrary to Respondent's submission, the current trend in investor-State arbitration is to award compound interest. Respondent relies on the statement "[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable" by Marjorie Whiteman in *Damages in International Law* (1943) Vol. III at 1997. While the Iran-U.S. Claims Tribunal echoed Ms. Whiteman's statement, tribunals in investor-State arbitrations in recent times have recognized economic reality by awarding compound interest (see, e.g., *Middle East Cement Shipping Co. S.A. v. Arab Republic of Egypt*, Final Award, 12 April 2002, ICSID Case No. ARB/99/6, at paras.174-175). In paragraph 104 of the award in *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), the Tribunal recognized that the reason for compound interest was not "to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances". Accordingly, the Tribunal determines that interest is to be compounded on a monthly basis in the present case.

G. Return of the Shares and Promissory Notes

523. As previously noted, Claimant ADC Affiliate has undertaken to return its shares in the Project Company (i.e., 34%) to Respondent upon payment of the sum awarded by the Tribunal (see paras.248-249 *supra*). Accordingly, the Tribunal orders ADC Affiliate to transfer the unencumbered ownership in those shares to Respondent immediately after receipt of payment in full of the sum awarded in this Award (including interest and cost). The promissory notes shall be deemed to have ceased to have any legal force and effect upon payment in full of the sum awarded in this Award (including interest and costs).

524. For the sake of completeness, the Tribunal rules that all claims raised by the Claimants but not specifically dealt with in this Award are dismissed and that all defences raised by the Respondent not specifically dealt with in this Award are likewise rejected.

H. Costs

525. Both Parties sought the costs of this arbitration in the event that they were successful.

526. The Tribunal ordered the Parties to set out their claims for costs in a brief schedule.

527. By letter dated August 21, 2006, Ogilvy Renault presented the Tribunal and the Respondent with a schedule claiming US\$7,623,693 in respect of the Claimants' costs and

expenses of this arbitration which included the sum of US\$350,000 paid to ICSID as deposit towards the fees and expenses of the arbitral Tribunal.

528. On the same date the Tribunal received a letter from the Bodnár Law Firm with a schedule claiming US\$4,380,335 in respect of the Respondent's costs and expenses of this arbitration which included the sum of US\$350,000 paid to ICSID as deposit towards the fees and expenses of the arbitral Tribunal.

529. The Claimants' counsel filed their comments on the Respondent's schedule of costs on September 6, 2006, and on September 18, 2006, the Tribunal received from the Respondent's counsel comments on the Claimants' claims for costs. The Respondent contended that the amount of the Claimants' costs and expenses was excessive and should be reduced. The Respondent noted that the Claimants' costs and expenses exceeded the Respondent's costs and expenses by approximately 74%. The Respondent makes the point that such a difference was incomprehensible. Accordingly, the Respondent requests the Tribunal to reduce the recoverable amounts of the Claimants' costs to a reasonable degree taking into account the costs and expenses of the Respondent.

1. Principle

530. It is clear from Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules that the Tribunal has a wide discretion with regard to costs.

Article 61(2) states:

“in the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”

Rule 28 provides:

“(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(b) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(c) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

- (2) *Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.”*

531. Further, it can be seen from previous awards that ICSID arbitrators do in practice award costs in favour of the successful party and sometimes in large sums (see for example *CSOB v. Slovakia* – US\$10 million).

532. In a recent article titled *Treaty Arbitration and Investment Dispute: Adding up the Costs* by M. Weiniger & M. Page, 2006 1:3 *Global Arb. Rev.*44), the authors state that “[r]ecently, ... some tribunals [in investment arbitration] have adopted a more robust approach, seeing no reason to depart from the principle that the successful party should have its costs paid by the unsuccessful party, as adopted in commercial arbitration.”

533. In the present case, the Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party. This was a complex, difficult, important and lengthy arbitration which clearly justified experienced and expert legal representation as well as the engagement of top quality experts on quantum. The Tribunal is not surprised at the total of the costs incurred by the Claimants. Members of the Tribunal have considerable experience of substantial ICSID cases as well as commercial cases and the amount expended is certainly within the expected range. Were the Claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole.

2. Quantum

534. At the outset it is worth recalling the wise comments of Howard Holtzmann who said:

“A test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers’ fees are well-known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexity involved. Where the Tribunal is presented with copies of bills for services or other appropriate evidence, indicating the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the United States and countries of Western Europe, where both claimants and respondents before the Tribunal typically hire their outside

counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation. While legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably required.

Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness.” (Separate opinion of Judge Holtzmann at 7; reported in Iranian Assets Litigation Reporter 10, 860, 10, 863; 8 Iran-US C.T.R. 329, 332-333.)

535. In addition to the obvious good sense of the passage cited above there are a number of features in this case which justify the Tribunal in ordering the Respondent to reimburse the Claimants the full amount of their legal and other expenses of this arbitration. However, at the outset, the Tribunal should make clear that it is quite satisfied that the amount claimed for costs by the Claimants is reasonable in amount having regard to all the circumstances of this case. The Tribunal rejects the submission that the reasonableness of the quantum of the Claimants’ claim for costs should be judged by the amount expended by the Respondent. It is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof. Although at the outset both sides were represented by top class international law firms, the Respondent changed counsel before the hearing and took on an able and dynamic younger legal team. The Respondent also engaged Dr. Hunt at the very last minute in place of its former expert firm NERA Consulting. All these factors can explain the discrepancy between the two sides’ costs and expenses.

536. The other factors are as follows. Firstly, the Tribunal has concluded that Hungary made no attempt to honour its obligations under the BIT. Hungary acted throughout with callous disregard of the Claimants’ contractual and financial rights.

537. Secondly, the Respondent took every conceivable point and put the Claimants to strict proof of every aspect of their case. Some of the points taken were unarguable but nevertheless they added to the time and cost of this arbitration.

538. Thirdly, the Respondent put forward an overly burdensome document request which the Tribunal ordered should be completely re-cast and which was.

539. Fourthly, not only did the Respondent change counsel in mid-arbitration thereby causing some extra expense, but it also changed experts at the very last minute. On change

of counsel, the Respondent sought an adjournment of the long fixed hearing dates which were properly opposed by the Claimants and rejected by the Tribunal.

540. Fifthly, the Tribunal can find no evidence of duplication of effort as between the co-counsel engaged by the Claimants. In fact, to the contrary, the division of labour at the hearing seemed most appropriate and was conducive to a smooth hearing.

541. The Tribunal hastens to add that no criticism whatsoever can be leveled at the new legal team which conducted the actual hearing with ability, clarity, expedition and above all extreme courtesy.

542. In the light of the foregoing, the Tribunal has no hesitation in concluding that it would be wholly appropriate, as well as just, in the exercise of its discretion to order the Respondent to reimburse the Claimants the sum of US\$7,623,693 in respect of their costs and expenses in this arbitration.

THE AWARD

543. Having heard and read all the submissions and evidence in this arbitration, the Tribunal AWARDS AND ORDERS AS FOLLOWS:

- 1) within 30 days of the date of this Award, the Respondent shall pay to ADC Affiliate Ltd. the sum of US\$55,426,973 together with interest thereon calculated from the 30th day following the date of this Award at the rate of 6% per annum compounded with monthly rests until payment;
- 2) within 30 days of the date of this Award, the Respondent shall pay to ADC & ADMC Management Ltd. the sum of US\$20,773,027 together with interest thereon calculated from the 30th day following the date of this Award at the rate of 6% per annum compounded with monthly rests until payment;
- 3) within 30 days of the date of this Award, the Respondent shall pay to the Claimants the sum of US\$7,623,693 in full satisfaction of both Claimants' claims for costs and expenses of this arbitration together with interest thereon calculated from the 30th day following the date of this Award at the rate of 6% per annum compounded with monthly rests until payment;
- 4) immediately upon receipt of all of the sums referred to in paragraphs 1), 2) and 3) above, ADC Affiliate Ltd. shall transfer the unencumbered ownership in all its shares in the Project Company to the Respondent and to its order.

544. The Tribunal wishes to make clear that it has read and taken into account all of the voluminous material submitted to it in this arbitration even if not every point has been replicated herein. Finally, the Tribunal would like to thank and pay tribute to both legal teams for their clear, concise, able and courteous submissions at all stages of this difficult arbitration and particularly at the hearing.

_____ Signed _____

Professor Albert Jan van den Berg

Dated this 25th day of September 2006

_____ Signed _____

The Honorable Charles N. Brower

Dated this 22nd day of September 2006

_____ Signed _____

Neil T. Kaplan CBE, QC

President

Dated this 27th day of September 2006

Appendix 1 Claimants' Chart 3

