

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

In the Proceeding Between

JOSEPH CHARLES LEMIRE
(Claimant)

and

UKRAINE
(Respondent)

(ICSID CASE NO. ARB/06/18)

DECISION ON JURISDICTION AND LIABILITY

Members of the Tribunal:

Professor Juan Fernández-Armesto, *President*
Mr. Jan Paulsson, *Arbitrator*
Dr. Jürgen Voss, *Arbitrator*

Secretary of the Tribunal:

Mr. Ucheora Onwuamaegbu

Representing Claimant:

Dr. Hamid G. Gharavi
Mr. Julien Fouret
Ms. Nada Sader
Derains & Gharavi
Paris, France

Representing Respondent:

Mr. John S. Willems
Mr. Michael A. Polkinghorne
Ms. Olga Mouraviova
White & Case LLP
Paris, France

Mr. Sergii Svyryba
Ms. Marta Khomyak
Ms. Olha Yaniutina
Magisters
Kyiv, Ukraine

I N D E X

		Page
I.	PROCEDURE	6
II.	BASIC FACTS	11
III.	THE PARTIES	12
IV.	RELIEF SOUGHT	13
V.	JURISDICTION	15
	V.1. POSITIONS OF CLAIMANT AND RESPONDENT	15
	V.2. DECISION OF THE TRIBUNAL	15
	V.3. JURISDICTION <i>RATIONE PERSONAE</i>	16
	V.4. JURISDICTION <i>RATIONE MATERIAE</i>	17
	V.5. JURISDICTION <i>RATIONE VOLUNTATIS</i>	18
	A) Jurisdiction With Respect to Claims Based on an Alleged Breach of the Settlement Agreement/2000 Award	18
	B) Jurisdiction With Respect to Claims Based on an Alleged Violation of the BIT	22
VI.	ALLEGED BREACHES OF THE SETTLEMENT AGREEMENT	25
	VI.1. APPLICABLE LAW	25
	VI.2. INTERPRETATION	26
	VI.3. RESPONDENT’S FAILURE TO CORRECT INTERFERENCES	27
	A) The State Centre as the “Commission of Experts”	29
	B) Examination of Interferences	29
	C) Adoption of Technical Measures To Remove Interferences	30
	VI.4. ALLOCATION OF FREQUENCIES	31
	A) Issuance of Radio Frequencies by the State Committee	33
	B) Late Constitution of the National Council	34

	C) Failure of National Council To Promptly Acknowledge the Settlement Agreement as Binding	35
	D) Award of Licences to Other Companies at National Council's First Meeting in January 2001	35
	E) Late Award of Broadcasting Licences by National Council	37
	F) Allocation of Low-Powered Frequencies	40
	G) Allocation of Four Frequencies Which Were Contested by the Armed Forces of Ukraine	41
VII.	ALLEGED VIOLATIONS OF THE BIT	43
	VII.1. CLAIMANT'S GENERAL ALLEGATIONS	43
	VII.2. RESPONDENT'S GENERAL ALLEGATIONS	45
	VII.3. CLAIMANT'S FIRST ALLEGATIONS: THE VIOLATION OF THE FET STANDARD IN THE AWARDING OF FREQUENCIES	47
	VII.3.1. INTRODUCTION	47
	VII.3.2. THE FET STANDARD AS DEFINED IN THE BIT	50
	A) Customary International Law Minimum Standard and FET Standard	51
	B) Meaning of Article II.3. of the BIT	53
	C) Pursuit of Local Remedies	56
	D) Summary	59
	VII.3.3. PROCEDURE FOR THE AWARDING OF LICENCES IN THE BROADCASTING SECTOR UNDER UKRAINIAN LAW	60
	A) The National Council	60
	B) The Administrative Procedure for the Issuance of Licences	61
	VII.3.4. GALA'S APPLICATIONS FOR ADDITIONAL FREQUENCIES	66
	A) Overview of Gala's Participation in Tenders for Additional Frequencies	66
	B) The Tender of October 19, 2005 and the Interference of the President of Ukraine	69
	C) The Tender of May 26, 2004 for an AM Frequency	73
	D) The Tender of February 6, 2008 with 40% Ukrainian Language Requirement	76
	E) The Tender of November 20, 2002 in Which Claimant Was the Only Applicant	80
	F) The Tender of October 19, 2005 in Favour of NMB Radio	81

	G) The Award of Frequencies During the Time When the National Council Was Not Operative	84
	VII.3.5. CONCLUSIONS REGARDING THE AWARDING OF RADIO LICENCES	86
	VII.3.6. POSTPONEMENT OF DECISION REGARDING DAMAGES	87
	VII.4. CLAIMANT’S SECOND ALLEGATION: THE CONTINUOUS HARASSMENTS BY RESPONDENT AND THE REQUEST FOR MORAL DAMAGES	88
	VII.4.1. CLAIMANT’S ALLEGATIONS	88
	VII.4.2. RESPONDENT’S ALLEGATIONS	90
	VII.4.3. THE TRIBUNAL’S DECISION	92
	A) Introduction	92
	B) The Inspection of Gala Radio	93
	C) Renewal of the Licence	97
	D) Decision of the Arbitral Tribunal	97
	VII.5. CLAIMANT’S THIRD ALLEGATION: THE VIOLATION OF THE FET STANDARD BY OTHER ACTIONS PERFORMED BY RESPONDENT	100
	VII.6. CLAIMANT’S FOURTH ALLEGATION: THE “UMBRELLA CLAUSE”	101
	VII.7. CLAIMANT’S FIFTH ALLEGATION: THE PROHIBITION OF LOCAL PURCHASE	102
	A) Allegation of the Parties	102
	B) Decision of the Tribunal	102
	VII.8. OTHER ALLEGATIONS	105
VIII.	DECISION	106

GLOSSARY

2000 Award	Award dated September 18, 2000 finalizing the First Arbitration
Arbitration Clause	Dispute resolution provision contained in the Settlement Agreement which provides that all the disputes arising from or in connection with the Settlement Agreement shall be resolved through arbitration
BIT	Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment which entered into force on November 16, 1996
Centre	International Centre for Settlement of Investment Disputes
Claimant	Mr. Joseph Charles Lemire
FET	Fair and Equitable Treatment
First Arbitration	An investment arbitration proceeding filed with ICSID on November 14, 1997 between Claimant and Respondent, which was finalized by the 2000 Award
Gala	CJSC “Radiocompany Gala”
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on March 18, 1965.
Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
LNC	Law on National Television and Radio Council of Ukraine last amended in 2006
LTR	Ukrainian Law on Television and Radio Broadcasting last amended in 2006
Mirakom	CJSC “Mirakom Ukraina”
NAFTA	North American Free Trade Agreement entered into force in 1994
National Council	Ukrainian National Council for Television and Radio Broadcasting
Request	Claimant’s request for arbitration against Respondent dated September 6, 2006
Respondent	Ukraine
Settlement Agreement	Agreement dated March 20, 2000 between Claimant and Respondent on the settlement of the First Arbitration
State Centre	Ukrainian State Centre of Radio Frequencies
State Committee	Ukrainian State Committee on Communications and Information Technology
UCRF	Ukrainian State Centre of Radio Frequencies
Umbrella Clause	Clause contained in Article II.3 (c) of the US-Ukraine BIT which permits a breach of contract to be characterized as a breach of the BIT
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	Principles of International Commercial Contracts adopted by UNIDROIT

I. PROCEDURE

1. On September 11, 2006, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received from Joseph Charles Lemire (“Mr. Lemire” or “Claimant”), a citizen of the United States, a request for arbitration (the “Request”) dated September 6, 2006, against Ukraine (“Respondent”).
2. On September 12, 2006, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”) acknowledged receipt of the Request and on the same day transmitted a copy thereof to Ukraine with a copy to its Embassy in Washington, D.C.
3. The Request, as supplemented by Claimant’s letter of November 14, 2006, was registered by the Centre on December 8, 2006, pursuant to Article 36(3) of the ICSID Convention. By letter of the same day, the Secretary-General of ICSID, in accordance with Rules 6 and 7 of the Institution Rules, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.
4. The parties not having reached agreement on the number of arbitrators and the method of their appointment more than 60 days after the registration of the Request, Claimant invoked Article 37(2)(b) of the ICSID Convention by letter of February 8, 2007. Article 37(2)(b) prescribes a Tribunal consisting of three arbitrators, one appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties.
5. On February 22, 2007, Claimant appointed Mr. Jan Paulsson of France as arbitrator and on March 7, 2007, Respondent appointed Dr. Jürgen Voss of Germany as arbitrator, each of whom the parties had also appointed in the earlier concluded ICSID Additional Facility case *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1).
6. The Tribunal not having been constituted 90 days after the registration of the request, Claimant requested by letters of March 9, 2007, and March 20, 2007, that the Chairman of the ICSID Administrative Council designate an arbitrator to be the President of the Tribunal, pursuant to ICSID Arbitration Rule 4(1).
7. On June 6, 2007, the Chairman of the ICSID Administrative Council, in consultation with the parties, designated Professor Juan Fernández-Armesto, a national of Spain, as the presiding arbitrator.
8. All three arbitrators having accepted their appointments, the Secretary-General of ICSID, by letter of June 14, 2007, informed the parties that a Tribunal consisting of Professor Juan Fernández-Armesto, Mr. Jan Paulsson and Dr. Jürgen Voss, had been constituted and that the proceeding was deemed to have commenced on that day, pursuant to ICSID Arbitration Rule 6(1).

9. At the time of the filing of the Request, Claimant was represented by the law firm of Salans. From December 2008 to December 2009, Claimant was represented by the law firm of Derains Gharavi & Lazareff in Paris, France, and, subsequently, by the law firm of Derains & Gharavi.
10. By letters of June 25, 2007 and July 9, 2007, Respondent notified the Centre of the appointment of the law firm of White & Case LLP in Paris, France, and of the law firm of Magisters in Kyiv, Ukraine, as its legal representatives in this matter.
11. The first session of the Tribunal was held on July 23, 2007, at the World Bank's offices in Paris, and various aspects of procedure were determined at the session. Present at the session were:

Members of the Tribunal

Prof. Juan Fernández-Armesto, *President*
Mr. Jan Paulsson, *Arbitrator*
Dr. Jürgen Voss, *Arbitrator*

Secretary of the Tribunal

Mr. Ucheora Onwuamaegbu (*by video conference*)

Attending for Claimant

Mr. Joseph C. Lemire, *Claimant*
Mr. Sergey Denisenko, *Executive at Gala*
Ms. Julia Tumash, *Executive at Gala*
Mr. Hamid G. Gharavi, *Salans*
Ms. Brenda Horrigan, *Salans*
Mr. William Kirtley, *Salans*

Attending for Respondent

Mr. Sergiy Beketov, *Ministry of Justice of Ukraine*
Mr. John S. Willems, *White & Case LLP*
Mr. Michael Polkinghorne, *White & Case LLP*
Ms. Olga Mouraviova, *White & Case LLP*
Ms. Anna-Marta Khomyak, *Magisters*

12. On November 12, 2007, Claimant filed its Memorial on the Merits.
13. On February 25, 2008, Respondent filed a Memorial in Support of Its Objections to Jurisdiction and, on February 26, 2008, Respondent filed its Counter-Memorial on the Merits, dated February 25, 2008.
14. On March 17, 2008, Claimant filed observations on Respondent's Memorial in Support of its Objections to Jurisdiction.
15. On March 26, 2008, the Tribunal notified the parties that it had decided to join the issue of jurisdiction to the merits.

16. Also on March 26, 2008, the parties filed their respective requests for production of documents and, on April 18, 2008, exchanged responses on their respective requests for production of documents. On May 13, 2008, the Tribunal issued Procedural Order No. 1 concerning the requests for production of documents.
17. On July 31, 2008, Respondent filed a further request for production of documents. On August 8, 2008, Claimant filed observations on Respondent's request, and on August 13, 2008, Respondent filed a response to Claimant's observations of August 8, 2008. Claimant answered Respondent's request on August 28, 2008.
18. On August 15, 2008, Claimant filed a request for provisional measures, concerning Ukraine's decision to charge a certain fee for the renewal of Gala's broadcasting licence.
19. On August 20, 2008, Claimant filed its Reply on the Merits.
20. On August 29, 2008, Respondent filed a proposal for the disqualification of Mr. Jan Paulsson as arbitrator, and the proceeding was suspended in accordance with ICSID Arbitration Rule 9(6). Existing deadlines and schedule of the proceeding remained in effect and continued to run during the period of suspension of the proceeding.
21. On September 2, 2008, Respondent filed observations on Claimant's request for provisional measures.
22. On September 10, 2008, Claimant filed a response to Respondent's observations on Claimant's request for provisional measures.
23. On September 23, 2008, the Centre notified the parties that in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4), the proposal for the disqualification of Mr. Jan Paulsson had been decided by the other members of the Tribunal, Prof. Juan Fernández-Armesto and Dr. Jürgen Voss. The proposal for disqualification of Mr. Paulsson was dismissed and the suspension of the proceeding was lifted as of the date of the notification. The reasoned Decision on Respondent's proposal for the disqualification was communicated to the parties on September 29, 2008.
24. On October 22, 2008, Claimant withdrew the request for provisional measures of August 15, 2008.
25. On November 6, 2008, Respondent filed a Rejoinder on the Merits.
26. On November 13 and November 18, 2008, Claimant filed requests for production of witnesses, and on November 14, 2008, the parties filed witness statements.
27. On November 19, 2009, the President of the Tribunal held a pre-hearing conference by telephone with the parties.

28. On November 25, 2008, Respondent filed observations on Claimant's requests of November 13 and 18, 2008, for production of witnesses.
29. On December 1, 2008, the parties filed rebuttal witness statements and on December 3, 2008, the President of the Tribunal held a further pre-hearing conference by telephone with the parties.
30. The hearing on jurisdiction and the merits was held from December 8, 2008 to December 12, 2008, at the at the World Bank's offices in Paris. Present at the hearing were:

Members of the Tribunal

Prof. Juan Fernández-Armesto, *President*

Mr. Jan Paulsson, *Arbitrator*

Dr. Jürgen Voss, *Arbitrator*

Assistant to the Tribunal

Ms. Deva Villanúa Gómez

Attending for Claimant

Mr. Joseph C. Lemire, *Claimant's witness*

Mr. Hamid G. Gharavi, *Derains Gharavi & Lazareff*

Mr. Nabil Lodey, *Derains Gharavi & Lazareff*

Mr. Julien Fouret, *Derains Gharavi & Lazareff*

Ms. Nada Sader, *Derains Gharavi & Lazareff*

Mr. Sergiy Koziakov, *Derains Gharavi & Lazareff*

Mr. Eric Degand, *witness*

Mr. Viktor Petrenko, *Claimant's witness*

Mr. Pavol Shylko, *witness*

Mr. Piotr Jalowiec, *witness*

Mr. Sergey Denisenko, *witness*

Dr. Andre Wiegand, *expert*

Dr. Klaus Goldhammer, *expert*

Attending for Respondent

Mr. John S. Willems, *White & Case LLP*

Mr. Michael Polkinghorne, *White & Case LLP*

Ms. Olga Mouraviova, *White & Case LLP*

Mr. Sergii Svyryba, *Magisters*

Ms. Nathalie Makowski, *White & Case LLP*

Ms. Olga Boltenko, *White & Case LLP*

Ms. Olga Glukhovska, *Magisters*

Ms. Olga Ianiutina, *Magisters*

Mr. Markkian Kliuchkovskyi, *Magisters*

Ms. Tuuli Timonen, *White & Case LLP*

Ms. Renee Bissell, *White & Case LLP*

Ms. Ludmila Zaporozhets, *National Television and Radio
Broadcasting Council of Ukraine*

Mr. Vitaliy Shevchenko, *witness*

Mr. Ihor Kurus, *witness*

Mr. Volodymyr Kirichenko, *witness*
Mr. Iulian Leliukh, *witness*
Mr. Viktor Petrenko, *Respondent's witness*
Mr. Vladyslav Lyasovskyi, *witness*
Ms. Olena Volska, *expert*

31. As decided at the hearing, the parties filed their respective post-hearing briefs on March 4, 2009 and their respective statements of costs on March 20, 2009.
32. Members of the Tribunal deliberated using various means of communication.

II. BASIC FACTS

33. This dispute was submitted to ICSID by Claimant against Respondent under (1) the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, done in Kyiv on October 17, 1996 (the “BIT”) and (2) an agreement between Claimant and Respondent on the settlement of a dispute, dated March 20, 2000 (the “Settlement Agreement”), which was recorded as an award on agreed terms on September 18, 2000 (ICSID No. ARB (AF) 98/1 (the “2000 Award”).
34. Article VI of the BIT entitles any national of a State party to the BIT to submit to ICSID any dispute with the other State party to the BIT relating to either “*an investment agreement between that Party and such national*” or “*an alleged breach of any right conferred or created by this Treaty with respect to an investment*”.
35. On November 14, 1997, Claimant filed with ICSID a first arbitration request (the “First Arbitration”) against Respondent, with regard to the same investments that underlie the present arbitration. This First Arbitration eventually led to the Settlement Agreement, which was then recorded in the 2000 Award. Paragraph 31 of the Settlement Agreement provides for the resolution of all disputes arising from or in connection with the Agreement by ICSID Arbitration in accordance with the ICSID Additional Facility Arbitration Rules.

III. THE PARTIES

36. Claimant, Mr. Joseph Charles Lemire, is a national of the United States of America residing at 91 Saksagansko St., Office 8,01032 Kiev, Ukraine. Claimant is a majority shareholder, through CJSC “Mirakom Ukraina” (“Mirakom”) of CJSC “Radiocompany Gala” (“Gala”), a closed joint stock company constituted in 1995 under the laws of Ukraine with its principal office located at the same address as Mr. Lemire’s residence. Gala is a music radio station in Ukraine currently licenced to broadcast on various frequencies in Ukraine.
37. Respondent is the State of Ukraine. With respect to the events giving rise to the present arbitration, Respondent has acted through its President, Prime Minister, Parliament, Ministry of Defence, the National Council for Television and Radio Broadcasting (the “National Council”), the Ukrainian State Centre of Radio Frequencies (the “State Centre”), the State Committee on Communications and Information Technology (the “State Committee”), all of which are organs for which Ukraine is responsible under international law.

IV. RELIEF SOUGHT

38. Claimant seeks relief for alleged breaches of the Settlement Agreement/2000 Award and for alleged breaches of the BIT following the 2000 Award. More specifically, Claimant seeks¹:
- a) a decision declaring that Respondent has breached the 2000 Award and the BIT;
39. b) a decision ordering Respondent to pay Claimant damages in the amount of 55,173 million USD on account of its breaches of the 2000 Award and the BIT which had the effect of preventing Claimant from developing Gala into a full national network as of January 1, 2001 and from establishing two other national networks (an FM radio network as of January 1, 2002 and an AM network as of July 1, 2004); or
- alternatively ordering Respondent to pay Claimant damages in the amount of 51,277 million USD on account of its breaches of the 2000 Award and the BIT which blocked Claimant from developing Gala into a full national network as of January 1, 2004 and developing a second FM national network as of January 1, 2002; or
 - alternatively ordering Respondent to pay Claimant damages in the amount of 34,732 million USD on account of its breaches of the 2000 Award and the BIT which blocked Claimant from developing Gala into a full national network as of January 1, 2001;
- c) a decision ordering Respondent to pay Claimant damages in the amount of one million USD for Respondent's failure to take reasonable measures to correct interference with Gala's 100 FM frequency, in breach of the Award and the BIT from the year 2000 to August 2008;
 - d) a decision ordering Respondent to pay Claimant damages in the amount of 958,000 USD representing loss of profits for Respondent's enactment of the Law on Television and Radio Broadcasting (the "LTR") and/or application thereof in breach of the BIT;
 - e) a decision ordering Respondent to pay Claimant moral damages in the amount of three million USD for Respondent's harassment of Claimant, in breach of the BIT;
 - f) the costs of this arbitration, including all expenses that Claimant has incurred, legal counsel, experts and consultants, as well as Claimant's internal costs in pursuing this arbitration, all of the fees and expenses of the arbitrators, fees for use of the facilities of the Centre;

¹ Claimant's Post-Hearing Memorial, para. 151.

- g) compound interest at a rate of LIBOR + 3, compounded semi-annually, to be established on the above amounts as of the date these amounts are determined to have been due to Claimant; and
- h) any such other and further relief as the Arbitral Tribunal shall deem appropriate.

40. Respondent seeks²:

- a) a decision dismissing all Claimant's claims, or a substantial part thereof, for lack of jurisdiction;
- b) a decision dismissing Claimant's claims in their entirety; and
- c) a decision awarding to Respondent its fees, costs and expenses in connection with this proceeding.

² Respondent's Rejoinder, para. 252; Respondent's Post-Hearing Memorial, para. 653.

V. JURISDICTION

41. The Tribunal has decided to join Respondent's objections on jurisdiction to the merits of the dispute, in accordance with Article 41(2) of the ICSID Convention.

V.1. POSITIONS OF CLAIMANT AND RESPONDENT

42. Claimant's basic allegations in this arbitration are twofold:

- first, that Respondent's actions constitute a breach of the Settlement Agreement; and
- second, that Respondent has breached the BIT by subjecting Claimant to unfair, inequitable, arbitrary and discriminatory treatment, harassment and creeping expropriation and by enacting a new law in violation of Article II.6 of the BIT.

43. Respondent raises a number of jurisdictional objections³:

- that the Centre lacks jurisdiction for claims arising out of the Settlement Agreement;
- that there is no investment underlying the claims related to the tenders for additional frequencies;
- that Claimant's capital invested did not emanate from abroad as required;
- that Claimant has not made out a *prima facie* case of expropriation.

44. Claimant denies these jurisdictional objections and affirms the Centre's jurisdiction and the Tribunal's competence to decide all claims raised.

V.2. DECISION OF THE TRIBUNAL

45. In order for the Centre to have jurisdiction and for the Tribunal to have competence with regard to these claims, four well known conditions must be met, three deriving from Article 25 of the ICSID Convention and a fourth resulting from the general principle of law of non-retroactivity:

- first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State;
- second, a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment;
- third, a condition *ratione voluntatis*: the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration;
- fourth, a condition *ratione temporis*: the ICSID Convention must have been applicable at the relevant time.

³ Respondent's Memorial in Support of its Objections to Jurisdiction; Respondent's Rejoinder, paras. 146-256.

46. The jurisdictional requirements of Article 25 of the ICSID Convention must be read in conjunction with those of the BIT. The relevant provisions are Article VI.1 and VI.4 of the BIT, which read as follows:

“VI.1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

[...]

VI.4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.”

47. In addition, Article I.1(a) of the BIT defines the term “investment”:

“I.1. For the purposes of this Treaty,

(a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; ...”

48. Jurisdiction *ratione temporis* has not been challenged and the Tribunal will not analyze it. It will focus on jurisdiction *ratione personae* (V.3), *materiae* (V.4) and *voluntatis* (V.5).

V.3. JURISDICTION *RATIONE PERSONAE*

49. Claimant is, and at all relevant times has been, a national of the United States and thus a “*national of another Contracting State*” under Article 25 of the ICSID Convention as well as a “*national of a Party*” under the BIT. Ukraine, since July 7, 2000, is a State Party to both the ICSID Convention and to the BIT.

50. The requirements for ICSID jurisdiction *ratione personae* are hence satisfied.

V.4. JURISDICTION *RATIONE MATERIAE*

51. Article 25(1) of the ICSID Convention further requires a “*legal dispute arising directly out of an investment*”. Claimant submits that he has made investments in Gala Radio and that he is Gala’s major shareholder. It is undisputed that the present dispute is a legal dispute and that it arose directly out of these investments.

Claimant’s investment

52. Gala was not founded by Mr. Lemire – in fact, Ukrainian legislation requires that radio broadcasters be founded by Ukrainian nationals⁴. The law however authorizes foreign investments in the broadcasting sector (Article 12.3 of LTR). Mr. Lemire bought participations in Gala, an existing company, which already had a radio licence, and which had been promoted by a Ukrainian citizen, Mr. Gliub Maliutin⁵, and founded by a Ukrainian company called Provisen. On June 8, 1995, two Investment Agreements were signed by Mr. Lemire providing (somewhat diffusely) for contributions in cash and in kind amounting to 290,000 USD plus 3,000,000 USD⁶.

53. The actual amount contributed by Mr. Lemire is disputed. Respondent’s expert acknowledges that at least 141,000 USD were invested by Mr. Lemire⁷ and Respondent has accepted an investment of 236,000 USD⁸. Claimant himself states that his investment amounts to well over 5,000,000 USD⁹. This number seems to include real estate held in Mr. Lemire’s name, and let rent free to Gala, and payments made directly by him on behalf of the company¹⁰. No document has actually been produced in this arbitration, giving a precise breakdown of Mr. Lemire’s contributions. It seems, moreover, that for accounting purposes, the expenditures made directly by Mr. Lemire on behalf of Gala are not recorded in Gala’s books¹¹.

54. Summing up the evidence, the Tribunal has no doubt that Mr. Lemire actually made an investment in Ukraine, although the undisputed total amount is only 236,000 USD. Respondent has not challenged that Mr. Lemire is – at least since 2006 – indirect owner of 100% of the share capital of Gala. The evidence shows that Mr. Lemire has made payments with his own moneys on behalf of Gala. But the record of the actual amounts paid has not been produced, and that the total exceeds 5,000,000 USD is nothing more than affirmation¹².

⁴ Article 13 of the 1993 Law on Television and Broadcasting

⁵ Respondent has presented a Witness Statement from Mr. Maliutin.

⁶ Annex F of EBS Expert Report.

⁷ EBS Expert Report, p. 5.

⁸ Respondent’s Exhibit at the hearing RH-1, p. 23.

⁹ Mr. Lemire, Hearing Transcript 1, p. 279, at 10.

¹⁰ Mr. Lemire, Hearing Transcript 1, p. 281, at 14.

¹¹ Mr. Lemire, Hearing Transcript 1, p. 286, at 23.

¹² Mr. Lemire, Hearing Transcript, p. 285, para. 20 and p. 304, para. 9.

55. It is immaterial that Claimant holds his controlling stake in Gala through Mirakom. Article I.1(a) of the BIT accords treaty protection to “*every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals...of the other Party*”.

Transfer of funds from abroad

56. Respondent further submits that Claimant has failed to prove the transfer of his invested funds into Ukraine from abroad. However, neither the BIT nor the ICSID Convention includes an origin-of-capital requirement. Nor is such a requirement to be inferred from the purposes of the BIT and/or the ICSID Convention.
57. In setting out the purposes of the BIT, the Preamble emphasises the promotion of investments of nationals of one party in the territory of the other, without any reference to the origin of the funds invested; and Article I.3 of the BIT implies that reinvested earnings qualify as investments under the BIT; these earnings by definition originate within the host country.
58. Moreover, Claimant’s certificate of registration dated September 18, 1995 shows that at least part of his investment capital originates from abroad; this suffices for jurisdictional purposes.
59. Hence, the requirements for ICSID jurisdiction are also satisfied *ratione materiae*.

V.5. JURISDICTION *RATIONE VOLUNTATIS*

60. A singular feature of this arbitration is that consent to ICSID arbitration was formalized in two different legal instruments: the Settlement Agreement and the BIT. Each will be analyzed separately.

A) Jurisdiction With Respect to Claims Based on an Alleged Breach of the Settlement Agreement/2000 Award

61. The Settlement Agreement contains the following dispute resolution provision in clause 31 (the “Arbitration Clause”):

“All the disputes arising from or in connection with this Agreement shall be settled by negotiations. In the event no solution is achieved within 60 days from the date of beginning of negotiations, either party may address to the ICSID its application for settlement under the ICSID Additional Facility Arbitration Rules.”

62. Respondent however objects to the Tribunal’s jurisdiction for alleged claims under the Settlement Agreement on two grounds, namely the fact that (a) the Settlement Agreement was recorded as an award, and (b) the Arbitration Clause refers, for settlement of disputes under the Agreement, to the ICSID Additional Facility Arbitration Rules, rather than the ICSID Arbitration Rules.

a) Settlement Agreement as an award

63. Respondent argues that the parties voluntarily transformed the Settlement Agreement into an enforceable award, in order to benefit from the jurisdictional effect of such measure. Claimant thus waived his right to the dispute resolution mechanism contained in the original accord¹³. Awards under the ICSID Additional Facility must be enforced through the New York Convention – there is no scope for enforcement through the arbitration clause inserted in the Settlement Agreement.
64. The Tribunal disagrees with Respondent’s theory. It is not supported by the text of the ICSID Convention or applicable arbitration rules, and it is based on a misunderstanding of the differences between disputes arising out of a contract and enforcement of an award.
65. The Settlement Agreement is first and foremost a contract, product of consent expressed by both parties. Settlement agreements, like all contracts, may give rise to disputes. In the Settlement Agreement Mr. Lemire and Ukraine agreed that disputes arising “*from or in connection*” with this contract should be settled by arbitration.
66. After executing the Settlement Agreement both parties requested, and the Tribunal in the First Arbitration agreed that “the Tribunal shall record the settlement in the form of an award” (as authorized by Article 49(2) of the ICSID Additional Facility Arbitration Rules).
67. The precise text of the 2000 Award is as follows:
- “Accordingly the Tribunal orders unanimously that the said agreement between the Parties as set forth below shall be recorded verbatim as an award on agreed terms”.*
- And then the award copies *ad pedem literae* the full text of the Settlement Agreement, including the Arbitration Clause.
68. Respondent’s basic argument is that, by accepting that the Settlement Agreement be recorded as an award, Claimant was waiving his right to the Arbitration Clause.
69. The Tribunal disagrees. There is no hint that, by requesting the Tribunal to issue the consent award, Claimant proposed and Respondent accepted neutralisation of the Arbitration Clause.
70. It is very telling that the 2000 Award reproduces the complete text of the Settlement Agreement, including the Arbitration Clause. The parties could have requested that the Arbitration Clause be excluded from the 2000 Award. They did not. What the 2000 Award proves is that as of the date of the request of its issuance, each party reiterated its consent that all disputes arising from or in connection with the Settlement Agreement be solved by arbitration.

¹³ Respondent’s Rejoinder, para. 155.

71. In fact, the purpose and meaning of the consent award is very transparent. What the parties were seeking when they asked for the 2000 Award was twofold:

- on the one hand, they wished to have the possibility of recognition and enforcement of the Settlement Agreement through the New York Convention; i.e. that a Court recognise the legal force and effect of the award and ensure that it is carried out in accordance with its terms;
- on the other, if any dispute arose from or in connection with the Settlement Agreement, the parties reiterated their agreement that disputes should be resolved by arbitration.

72. With regard to the Settlement Agreement, the relief sought by Claimant in this arbitration is a declaration that Respondent has breached its obligations and an order for payment of damages. The thrust of Claimant's argument is that during the execution of the Settlement Agreement, Respondent has defaulted. Respondent denies such accusation. Consequently, a dispute regarding the execution of the Settlement Agreement has arisen.

73. This dispute can and must be submitted to arbitration in accordance with Clause 31 of the Settlement Agreement:

- first, because that is what the parties bargained for in the Arbitration Clause; and
- second, because a procedure under the New York Convention before a national Court can only result in the recognition and enforcement of the award, not in resolving a dispute related to the breach of obligations and the determination of damages; if Claimant had submitted the relief sought in this procedure to a national Court, Respondent could have validly raised the defence of Article II.3 of the New York Convention¹⁴, and requested that the judge refer the dispute to arbitration.

b) Reference to ICSID Additional Facility Arbitration Rules

74. The Arbitration Clause provides for "*settlement under the ICSID Additional Facility Arbitration Rules*" of "*all the disputes arising from or in connection with this Agreement*".

75. When the Settlement Agreement was signed on March 20, 2000 Ukraine had not ratified the ICSID Convention, and consequently the Centre could only administer arbitrations involving Ukraine under the Additional Facility Rules (Article 2(a)). Things moved quickly thereafter. On July 7, 2000 the ICSID Convention entered into force in Ukraine. With the effectiveness in Ukraine of the ICSID Convention, the Additional Facility became unavailable and was superseded by arbitration under ICSID Rules. Notwithstanding this fact, the

¹⁴ Article II.3 of the New York Convention provides that: "*The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*".

parties requested, and on September 18, 2000 the Tribunal in the First Arbitration issued the 2000 Award, with an unchanged Arbitration Clause.

76. Claimant argues that the reference to the Additional Facility in the Arbitration Clause implicitly includes a reference to ICSID proper, once it became available¹⁵.
77. Respondent objects and refers to the clear, unambiguous terms of the Arbitration Clause¹⁶.
78. On this issue the Tribunal sides with Claimant.
79. The Arbitration Clause states that “*either party may address to the ICSID its application for settlement*”, and then adds “*under the ICSID Additional Facility Arbitration Rules*”. These Rules were available when the Clause was signed, but no longer once the Clause was incorporated into the 2000 Award, and since then they have ceased to be available. They have been superseded by the ICSID Arbitration Rules.
80. Imprecise arbitration clauses are a frequent occurrence in commercial arbitration. They must be interpreted by the arbitrators, in order to restore the true intention of the parties, distorted by the parties’ ignorance of the mechanics of arbitration, error in designating the correct institution or rules, or, as here, supervening legal developments¹⁷.
81. In our case, the true intent of the parties is very clear: the Arbitration Clause explicitly says that “*either party may address to ICSID its application for the settlement*” of the dispute. The very wording of the Arbitration Clause evidences the parties’ wish that disputes arising from the Settlement Agreement be settled through arbitration administered by ICSID, and not through any other dispute settlement mechanism, nor by any national Court.
82. Where the parties were unclear is not in the description of the dispute settlement mechanism which they preferred, but in an ancillary point: the precise rules which the institution entrusted with the administration of the arbitration should apply. The parties correctly referred to the Rules which were applicable at the time the Settlement Agreement was executed – the ICSID Additional Facility Arbitration Rules. And when the Settlement Agreement was recorded as an award a couple of months later, they did not take into account that in the meantime Ukraine had ratified the ICSID Convention, that the applicable arbitration rules now were the ICSID Arbitration Rules, and that the rules which they were referring to– the ICSID Additional Facility Rules – were in fact no longer available.

¹⁵ Claimant’s letter dated March 17, 2008, paras. 13 and 14; Claimant’s Reply Memorial, paras. 39-43.

¹⁶ Respondent’s Memorial in Support of its Objections to Jurisdiction, para. 19.

¹⁷ This is not controversial: see e.g. Fouchard/Gaillard/Goldman, “International Commercial Arbitration” (1999), p. 263.

83. The ambiguity elided by the parties when they recorded the Settlement Agreement as an award is purely technical and ancillary, and cannot distort the real intent: that any dispute arising from or in connection with the Settlement Agreement be settled by arbitration administered by ICSID, and governed by the appropriate rules approved by the Centre: before Ukraine had ratified the ICSID Convention, the ICSID Additional Facility Arbitration Rules; thereafter, the ordinary ICSID Arbitration Rules.

B) Jurisdiction With Respect to Claims Based on an Alleged Violation of the BIT

84. By Article VI.3 of the BIT, Ukraine agreed that investment disputes with American investors be submitted to arbitration administered by the Centre. Claimant accepted the offer by filing this arbitration. Respondent objects to the Centre's jurisdiction and the Tribunal's competence, but not with regard to the claims *in toto*, but only with regard to some specific claims.

85. These claims, and the reasons for objecting to jurisdiction, are explained in the following paragraphs.

a) Claims related to tenders for frequencies and broadcasting licences

86. Respondent objects to the Tribunal's competence with respect to claims arising out of Claimant's failure in tenders for additional frequencies on the ground that such tenders precede investments and that pre-investment activities fall outside the ICSID Convention. Respondent, however, seems to concede that such pre-investment activities are within the scope of the BIT¹⁸.

87. Claimant disagrees¹⁹, arguing that Mr. Lemire established investments in radio networks in Ukraine, and that they were harmed by Respondent's acts and omissions.

88. The Tribunal sides with Claimant.

Pre-investment activities

89. Mr. Lemire's claim related to tenders for frequencies and broadcasting licences does not refer to, and cannot be considered as, a pre-investment activity. Pre-investment activities are those which precede the actual investment. Whether pre-investment activities merit treaty protection is debatable. But it is irrelevant for the purpose of adjudicating Claimant's claims in this arbitration, since the Tribunal has already established that Mr. Lemire has made investments in Gala Radio and is Gala's sole shareholder, and that these investments qualify for protection under the BIT.

90. If an investor claims that his investment, once made, was subsequently denied frequencies and broadcasting licences in violation of Ukraine's obligations as assumed in the BIT, this claim constitutes an "investment dispute" for the

¹⁸ Respondent's Rejoinder, para. 184.

¹⁹ Claimant's Reply Memorial, para. 52.

purposes of Article VI of the BIT; the Centre has jurisdiction and the Tribunal competence to adjudicate it.

91. This conclusion is confirmed by the text of the BIT. The BIT expressly extends protection to “*associated activities*” which include “*access to ... licences, permits and other approvals...*” (see Articles I.1 (e) and II.11 (b) of the BIT). Article II.3 (b) moreover provides that “*Neither Party shall in any way impair by arbitrary or discriminatory measures the . . . expansion . . . of investments*”. The allocation of frequencies was a condition for Claimant’s ability to expand his investment. Claimant’s allegations related to tenders for frequencies and licences thus fall within the scope of the BIT.

Article 25(1) of the ICSID Convention

92. Respondent submits that disputes related to the allocation of new frequencies, while arguably within the ambit of the BIT, do not arise “*directly*” out of an investment and therefore fall short of the requirements of Article 25(1) of the ICSID Convention. In Respondent’s view, moreover, the narrower definition in the ICSID Convention prevails over the broader definition in the BIT.
93. The Tribunal sees the force in Respondent’s submission that bilateral treaties cannot extend the scope of the multilateral ICSID Convention. However, where the ICSID Convention is open to interpretation, such interpretation should seek compatibility rather than contradiction.
94. The Tribunal must therefore determine whether disputes related to the allocation of frequencies and issuance of broadcasting licences may be considered as “*arising directly out of an investment*” within the meaning of Article 25(1) of the ICSID Convention. For this purpose, Claimant’s case must be distinguished from the scenario where an applicant intends to enter a market for the first time. In such scenario, the application for frequencies and licences indeed is a step towards facilitating a planned investment, because no investment exists at the time of the allocation process.
95. In the present case, Claimant had already invested in Gala Radio; and Gala was a going concern at the time of the tenders. The applications for additional frequencies and licences formed an integral part of Gala’s business operations. They were intended to defend and expand Gala’s market share against growing competition and thus enhance the sustainability and profitability of Claimant’s investment. Disputes affecting these objectives thus are directly related to Claimant’s investment as controlling shareholder of Gala.
96. In accordance with the purposes of the ICSID Convention and consistent with its wording, the Tribunal therefore affirms its jurisdiction for disputes arising out of Gala’s treatment in tender proceedings for additional frequencies and licences.
97. For this conclusion, it is immaterial whether the receipt of additional frequencies had already been envisaged in Claimant’s initial business plan and whether Respondent had made any commitment to support such a business

plan. It suffices that the additional frequencies were sought by Gala as part of its strategy to defend and/or expand its market share.

98. It is furthermore immaterial whether additional frequencies were sought to extend the reach of Gala's existing program or to access new audiences with newly designed programs. In either case, the applications were part of Gala's business strategy to maintain and enhance its position in the Ukrainian market. They formed an integral part of Gala's overall business operation. The Tribunal's assumption of competence thus extends to applications by Gala for frequencies with a view to creating new networks for young and mature audiences²⁰.

b) Claimant has failed to establish a *prima facie* case of expropriation

99. Respondent has raised the issue that there is an initial threshold that must be crossed by any claimant arguing expropriation: that the facts adduced show at least *prima facie* the legal requirements of expropriation under international law²¹. And in Ukraine's opinion, the very facts alleged by Claimant are not capable of constituting expropriation, and consequently the Tribunal should dismiss this claim for lack of jurisdiction – as did the Tribunal in the *Telenor v. Hungary* case²².

100. Claimant countered Respondent's objection arguing that for jurisdictional purposes the *prima facie* test was in fact easily met. As Claimant explained²³, he was presenting claims for:

- expropriation of a beauty salon;
- expropriation of the rights to the Energy trademark; and
- creeping expropriation of the Gala Radio network, a process that yet has to be completed but which, in Claimant's submission, appears imminent.

101. In the course of the procedure, Claimant has however dropped the claims for expropriation of the beauty salon and of the Energy trademark²⁴, and the creeping expropriation of the Gala Radio network is subsumed in the allegation of harassment and a request for moral damages (see paragraph 500 below).

102. Respondent's allegation consequently has become moot.

²⁰ Respondent's Rejoinder, paras.189 and 202.

²¹ Respondent's Rejoinder, para. 239.

²² *Telenor Mobile Communication A.S. v. The Republic of Hungary*, ICSID Case No.ARB/04/15, Award of 13 September 2006.

²³ Respondent's Rejoinder, para. 88.

²⁴ See Claimant's Post-Hearing Memorial.

VI. ALLEGED BREACHES OF THE SETTLEMENT AGREEMENT

103. In the Settlement Agreement of March 20, 2000, Respondent assumed the following obligations:

- Clause 13(a):

“By April 15, 2000 the Commission of experts, appointed by the Respondent, shall examine the quality of broadcasting within the radio frequencies band of FM 100-108. Based on the conclusions of the Commission, the Respondent will take necessary, reasonable among others, technical measures to remove the obstacles (if any) for radio broadcasting of Gala Radio on FM 100 in Kiev by June 1, 2000”.

- Clause 13(b):

“By May 15, 2000 the Respondent in person of the State Committee on Communications and Information Technology, agrees to use its best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licences for radio frequencies (provided there are free frequencies bands) in the following cities: [...]

The Claimant can apply for the radio channels in the above cities to the National Council for TV and Radio Broadcasting (hereinafter called “the National Council”) in a due course in accordance with the current legislation after the National Council has been fully personally formed under the existing law of Ukraine. The Respondent, within the limits of its powers, will assist for the positive consideration of this issue at the National Council.

The granting of licences for radio frequencies and broadcasting channels will be made in accordance with the requirements of Ukrainian legislation upon payment of the licence fees”.

104. Claimant alleges that Respondent has defaulted on both sets of obligations. Respondent’s position, on the contrary, is that it has fully complied with these obligations.

105. Before analysing the parties’ allegation, it is necessary to establish the law applicable to the Settlement Agreement (VI.1), and the criteria to be applied in its construction (VI.2).

VI.1. APPLICABLE LAW

106. Clause 30 of the Settlement Agreement provides that the applicable law shall be that determined by “*Article 55 of the ICSID Additional Facility Arbitration Rules*”. The relevant article in the Additional Facility Rules is in fact Article 54. The mistake is an obvious typographical error, and the Tribunal has no doubt that the common intent of the parties was to refer to Article 54. In accordance with this rule the Tribunal shall apply “(a) *the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable*”.

107. Should the Tribunal make use of this authorization to apply not only a municipal law, determined through conflict of laws rules, but also the “*rules of international law ... the Tribunal considers applicable*”?
108. The Settlement Agreement contains an extensive chapter called “*Principles of Interpretation and Implementation of the Agreement*”, which includes Clauses 20 through 26. These Clauses were reproduced, with very light linguistic adjustments, from the 1994 UNIDROIT Principles²⁵.
109. It is impossible to place the UNIDROIT Principles – a private codification of civil law, approved by an intergovernmental institution – within the traditional sources of law. The UNIDROIT Principles are neither treaty, nor compilation of usages, nor standard terms of contract. They are in fact a manifestation of transnational law.
110. As the Preamble to the Principles states, they “*shall be applied when the parties have agreed that their contract be governed by them*” and they “*may be applied when the parties have agreed that their contract be governed by ‘general principles of law’, the ‘lex mercatoria’ or the like*”.
111. When negotiating the Settlement Agreement, the parties evidently gave thought to the issue of applicable law, and were apparently unable to reach an agreement to apply either Ukrainian or US law. In this situation, what the parties did was to incorporate extensive parts of the UNIDROIT Principles into their agreement, and to include a clause which authorises the Tribunal either to select a municipal legal system, or to apply the rules of law the Tribunal considers appropriate. Given the parties’ implied negative choice of any municipal legal system, the Tribunal finds that the most appropriate decision is to submit the Settlement Agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles.

VI.2. INTERPRETATION

112. The parties have discussed the principles of interpretation to be applied to the Settlement Agreement. This issue is extensively dealt with in Clauses 20 through 26 of the Agreement.
113. Claimant has emphasized Clauses 20 (“*good faith and fair dealing in international business*”), 22 (“*common intent of the Parties* “), 23 (especially reference to “*preliminary negotiations*”) and 26 (non-performance to include “*improper performance or late performance*”) as well as Articles 1.7 and 4.1 of the 1994 UNIDROIT Principles. Respondent has referred to Clause 27 of the Settlement Agreement, pursuant to which the Settlement Agreement “*constitutes the entire agreement between the Parties on the subject matter hereof and supersedes all prior correspondence, negotiations and understandings between them with respect to the matters covered herein*”. Ukraine also relies on Article 5.5 of the 1994 UNIDROIT Principles (“*the way*

²⁵ The 1994 UNIDROIT Principles have now been superseded by the 2004 edition.

in which the obligation is expressed in the contract") as the primary factor in determining the scope of an obligation.

114. The Tribunal agrees with Claimant that the "common intent" of the parties determines the scope of contractual obligations. However, the analysis of the common intent must start from the wording of the contract; and it must be presumed that the wording, as understood by a reasonable impartial person, properly reflects the common intent. While this presumption may be rebutted, the party doing so bears the burden of proof that the common intent differs from the wording. "Good faith" and "fairness in the market place" arguments are appropriate for interpreting ambiguous wording and filling lacunae in the text, but they can scarcely prevail against the clear wording of a contractual provision.
115. In accordance with Clause 23 of the Settlement Agreement, preliminary negotiations must – among other factors - be taken into account "for interpreting this Agreement". But Clause 27 provides that the Settlement Agreement "supersedes all prior correspondence, negotiations and understandings". Read together, these Clauses require that expectations raised during the negotiations of the Settlement Agreement must be reflected in the text of the Agreement. The text of the Settlement Agreement is the only source of obligations. The fact that an undertaking was discussed, or even orally agreed to during the negotiation phase, is not enough. The obligation must have been recorded in the Settlement Agreement. If the Settlement Agreement does include an obligation, then the scope of the undertaking can be construed in accordance with the expectations of the parties during the negotiation. Without support in the text, expectations nurtured by Claimant do not give rise to contractual obligations of Respondent.

* * *

116. Claimant argues that Respondent has breached its obligations under the Settlement Agreement to correct interferences (VI.3.) and to award 11 FM frequencies (VI.4). Each allegation will be examined separately.

VI.3. RESPONDENT'S FAILURE TO CORRECT INTERFERENCES

117. Clause 13(a) of the Settlement Agreement sets out Respondent's undertaking on this matter as follows:

"By April 15, 2000 the Commission of experts, appointed by the Respondent, shall examine the quality of broadcasting within the radio frequencies band of FM 100-108. Based on the conclusions of the Commission, the Respondent will take necessary, reasonable among others, technical measures to remove the obstacles (if any) for radio broadcasting of Gala Radio on FM 100 in Kiev by June 1, 2000".

118. Claimant argues that Respondent defaulted on its obligations under the above provision by failing to²⁶:
- appoint a Commission of experts;
 - examine the quality of broadcasting on FM 100 between March 20, 2000 (execution of the Settlement Agreement) and April 15, 2000; and
 - cure interference with Gala's FM 100 frequency by June 1, 2000.
119. According to Claimant, such interference "*has continued unabated from prior to the time of the Settlement Agreement until today*"²⁷ (August 2008), and "*there was ongoing work between UCRF personnel and engineers from Gala Radio to attempt to cure the problem and Claimant had indeed continually complained about the existing interference on Gala's 100 FM frequency*"²⁸.
120. Respondent counters that the function of the "Commission of Experts" was performed by the State Centre, which under Ukrainian law was in charge of detecting interferences with radio frequencies and was adequately equipped for that task. Between January 1999 and March 2000, the State Centre carried out a series of measurements and tests regarding alleged interference with FM 100; and tests on March 9 and 10, 2000 showed that no interference existed at that time with Gala's FM 100.
121. According to Respondent, there was no interference with FM 100 between March 20 (the date of the execution of the Settlement Agreement) and June 1, 2000 (the final date for remedial measures against any interference under Clause 13(a))²⁹. Only a total of seven complaints about interferences were received from Claimant, the first on January 30, 2002 and the other between July 2004 and June 2007; no complaint was received in 2000 and 2001. The complaints in January 2002 and thereafter related to incidents that had arisen long after June 2000 and were thus outside the scope of the Settlement Agreement. Claimant consistently cooperated with the State Centre on the matter of interference and, before the institution of the present arbitral proceedings, Claimant never insisted on the appointment of an *ad hoc*-expert commission for examining interferences with Gala's FM 100.
122. Claimant has presented three specific breaches by Respondent of its obligations under Clause 13(a):
- the State Centre is not the appropriate "Commission of Experts" (A);
 - the interferences were not examined as provided for in the Settlement Agreement (B); and
 - insufficient measures were taken to correct interferences (C).
123. These contentions will be analysed in the following sections.

²⁶ Claimant's Post-Hearing Memorial, para. 54.

²⁷ Claimant's Reply Memorial, para. 125.

²⁸ Claimant's Post-Hearing Memorial, para. 46.

²⁹ Respondent's Rejoinder, para. 291.

A) The State Centre as the “Commission of Experts”

124. Clause 13(a) of the Settlement Agreement entrusts the duty to examine the interferences to “*the Commission of experts, appointed by the Respondent*”. It does not require that the commission be constituted *ad hoc*.
125. Furthermore, Clause 13(a) clearly states that the Commission be appointed exclusively by Respondent, without participation of Claimant in the appointment process. The provision does not include any requirements for the composition of the commission, such as a representation of several agencies, or the inclusion of independent experts. Respondent was therefore free to entrust the tasks under Clause 13(a) to any group of experts with the technical skills to do the job.
126. Respondent chose the State Centre as the “Commission of Experts” with the duty to perform the examinations required under Clause 13(a). Claimant has not pleaded that the State Centre was unfit to examine the alleged interferences. In fact, the State Centre is the public entity which in accordance with Ukrainian legislation supervises interferences in radio frequencies, and it is adequately equipped to perform this task. To the Tribunal, the choice of the State Centre is appropriate, given the wording of the Settlement Agreement, and reasonable, given its experience and scope of activity.
127. There is one further argument: the record shows that Claimant never challenged the State Centre’s role as expert commission before instituting this arbitration, i.e. for some seven years. To the contrary, he has co-operated with the State Centre and addressed his complaints to it. He has thus acquiesced to the role of the State Centre.
128. The Tribunal can hence not find a violation of Clause 13(a) in Respondent’s assignment of the State Centre as expert commission.

B) Examination of Interferences

129. Pursuant to Clause 13(a), the examination of interferences should have taken place by April 15, 2000. In fact, such examinations were carried out between January 1999 and March 10, 2000, i.e. before execution of the Settlement Agreement on March 20, 2000. Claimant argues that these pre-agreement examinations are not sufficient to comply with the undertaking assumed by Ukraine in Clause 13(a) of the Settlement Agreement.
130. In Respondent’s opinion, the March 2000 tests proved the absence of any interference with Gala’s FM 100, so that any further tests were pointless. The Settlement Agreement had been negotiated since November 1999, and during these negotiations, and as a sign of goodwill, Respondent carried out the examinations required by Clause 13(a), even before the Settlement Agreement was signed and came into force. The Settlement Agreement signed on March 20, 2000 provided that the examination of the quality of broadcasting be performed “*by April 15, 2000*”. In fact, the examination had thus already been performed, before the signing of the Settlement Agreement.

131. Does this pre-agreement examination imply a default of Clause 13(a)?
132. One begins with the literal wording of the Clause, which requires that the examination be performed “*by April 15, 2000*”. An examination on March 10, 2000 evidently meets that requirement. But a literal interpretation is just a first approach. In accordance with Clauses 20 and 22 of the Agreement, the guiding principles of any interpretation shall be the common intent of the parties and good faith.
133. Did the common intent of the parties require that the examination be carried out after the signature of the Settlement Agreement? There is a very revealing fact: Claimant never requested that a second examination be performed after the signature of the Settlement Agreement. If he had, good faith would have precluded Respondent from refusing the request. But Mr. Lemire never did so. He accepted, at least tacitly, that the pre-agreement examination complied with the requirements of the Settlement Agreement.
134. Article 1.8 of the 2004 UNIDROIT Principles prohibits inconsistent behaviour:
- “A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment”.*
135. Mr. Lemire did not require a second examination, and Ukraine reasonably understood that Claimant felt satisfied with the first examination, and consequently did not carry out a second one. Mr. Lemire cannot now retrace and argue that Respondent defaulted on its contractual obligations.

C) Adoption of Technical Measures To Remove Interferences

136. Clause 13(a) of the Settlement Agreement obliges Respondent to “*take ... technical measures to remove the obstacles (if any) for radio broadcasting of Gala Radio on FM 100 ... by June 1, 2000*”. This language clearly limits the scope of the obligation to obstacles that existed before June 1, 2000; obstacles that might have arisen after this date fall outside the scope of the Settlement Agreement. (As to Respondent’s alleged duty to cure such obstacles under the BIT, see paragraph 493 below).
137. To find a breach of the Settlement Agreement, it is therefore crucial that interferences with Gala’s FM 100 preexisted June 1, 2000. Claimant has pleaded this by alleging that interference “*has continued unabated from prior to the time of the Settlement Agreement until today*”³⁰. Respondent, on the other hand, argues that no interference occurred between March 10 and June 1, 2000 and that any interference which occurred long after June 1, 2000 was isolated and cannot be traced back to a cause pre-existing on June 1, 2000³¹.

³⁰ Claimant’s Reply Memorial, para. 125.

³¹ Respondent’s Rejoinder, para. 291-293.

138. As evidence for his assertion, Claimant presented a DVD of July 30, 2008³² and witness statements on interferences of Messrs. Lemire³³ and Denisenko³⁴ (a manager of Gala). The witness statements, while confirming several interferences after June 2000, do not prove that the cause of such interferences pre-dated June 2000.
139. Claimant has submitted seven letters to the State Centre or the National Council complaining about interferences with FM 100³⁵. However, these letters date from January 2002 to June 2007; they do not offer any indication, let alone evidence, that the cause pre-dated June 2000. Respondent, on the other hand, has submitted some eighty documents with test results showing that at different times after June 2000, there was no interference with Gala's FM 100³⁶.
140. If interferences with FM 100 had been observed between March and June 2000, Claimant could at that time have requested the examinations and remedial measures foreseen in Clause 13(a) of the Settlement Agreement. Yet, there is no record of any complaint or other action of Claimant in this respect during the period March 2000 through January 30, 2002.
141. On the basis of the above record and in light of the language of Clause 13(a), the Tribunal concludes that Claimant has failed to prove a violation of the Settlement Agreement in this respect.

VI.4. ALLOCATION OF FREQUENCIES

142. The second allegation presented by Claimant refers to the granting of frequencies to Gala. Under Clause 13(b) of the Settlement Agreement, Respondent assumed several obligations with respect to the allocation of radio frequencies and broadcasting licences to Gala in 11 cities. The Clause reads as follows:

“By May 15, 2000 the Respondent, in the person of the State Committee on Communications and Information Technology, agrees to use its best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licences for radio frequencies (provided there are free frequencies bands) in the following cities: Kharkiv, Lviv, Donetsk, Zaporizhyya, Lugansk, Simpheropol, Dniepropetrovsk, Odessa, Vynnytsya, Kryviy Rog, Uzhgorod.

The Claimant can apply for the radio channels in the above cities to the National Council for TV and Radio Broadcasting (hereinafter called “the National Council”) in a due course in accordance with the current

³² Claimant's Exhibit CM-96.

³³ Claimant's Witness Statement of Mr. Joseph Lemire dated 14 November 2008, p. 18 *et seq.*

³⁴ Claimant's Witness Statement of Mr. Sergey Denisenko dated 14 November 2008, pp. 7 and 8.

³⁵ Claimant's Exhibits CM-24, CM-63, CM-88, CM-114, CM-115 and CM-154; Respondent's Exhibit R-82.

³⁶ See Respondent's Exhibits R-29, R-63, R-87, R-88, R-104, R-140, R-141, R-146, R-149, R-155, R-205, R-314, R-315, R-316, R-317, R-318, R-322, R-326, R-347, R-369 and R-396.

legislation after the National Council has been fully personally formed under the existing law of Ukraine. The Respondent, within the limits of its powers, will assist for the positive consideration of this issue at the National Council.

The granting of licences for radio frequencies and broadcasting channels will be made in accordance with the requirements of Ukrainian legislation upon payment of the licence fees”.

Summary of facts

143. Under Ukrainian law, broadcasting requires both (i) a “radio frequency licence” from the State Committee on Communications and Information Technology and (ii) a “broadcasting licence” from the National Council. The National Council is a regulatory body established directly by law³⁷, independent of the Government and reporting to both the President and the Parliament of Ukraine.

Delivery of the licences required

144. Claimant obtained all the licences mentioned in Clause 13(b) by October 9, 2002, i.e. within a period of some thirty months from the date of the Settlement Agreement.
145. The 11 radio frequency licences from the State Committee were obtained relatively expeditiously – two of them prior to the Settlement Agreement, four on April 14, 2000, another four on June 13, 2000, and the last on September 1, 2000.
146. The broadcasting licences suffered longer delays: two were received prior to the Settlement Agreement, seven on September 18, 2001, one on March 26, 2002, and the last on October 9, 2002.
147. Two broadcasting licences had already been awarded by the National Council prior to the Settlement Agreement. Thereafter, the National Council was temporarily inoperative. It was reconstituted in June 2000. After building the necessary administrative capacities, it resumed issuance of broadcasting licences in January 2001. Under the Ukrainian Law on Television and Radio Broadcasting, such licences were awarded on the basis of competitive tenders.
148. At its first meeting after its reconstitution on January 1, 2001, the National Council focused on issuing broadcasting licences to companies which were broadcasting on frequencies allocated to them by the State Committee during the time when the National Council was inoperative. Claimant was excluded from this tender. Shortly thereafter, on March 22, 2001, the National Council announced a tender, including eight of the nine frequencies still expected by Claimant under Clause 13(b) of the Settlement Agreement. The broadcasting licences for seven of these frequencies were granted to Gala on September 18,

³⁷ Article 5, Law on Television and Radio Broadcasting dated December 21, 1993.

2001. In March and October 2002, Claimant received the last two outstanding broadcasting licences.

149. Four of the 11 frequencies allocated to Claimant under the Settlement Agreement were subsequently contested by the Armed Forces of Ukraine. These challenges were eventually resolved in 2008.

Violations asserted by Claimant

150. Claimant alleges seven violations of Clause 13(b) of the Settlement Agreement:

- late issuance of frequency licences by the State Committee (A);
- late constitution of the National Council (B);
- award of licences to other companies at National Council's first meeting in January 2001 (C);
- failure of National Council promptly to acknowledge the Settlement Agreement as binding (D);
- late award of broadcasting licences by National Council (E);
- allocation of low powered frequencies (F); and
- allocation of four frequencies which were contested by the Armed Forces of Ukraine (G).

151. Respondent denies all of the alleged violations.

152. Each alleged breach will be analysed *seriatim*.

A) Issuance of Radio Frequencies by the State Committee

153. Under Clause 13(b), paragraph 1 of the Settlement Agreement, “*by May 15, 2000 the Respondent, in the person of the State [Committee] agrees to use its best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licences for [11] radio frequencies [...]*”. In accordance with the express terms of this contractual provision, Respondent undertook only to apply its best efforts, so that the applications from Gala to the State Committee would be granted by May 15, 2000 – not to achieve that result.

154. Article 5.1.4 of the 2004 UNIDROIT Principles defines the duty of best efforts in the following terms:

“[...] To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances”.

155. For Claimant to establish a violation of this best efforts obligation, it is not sufficient to prove that by May 15, 2000 the 11 radio frequency licences had not been granted – the required test is that he produce evidence showing that

Ukraine has failed to make such efforts as would be made by a reasonable government in the same circumstances.

156. What is the factual situation?
157. In accordance with the Settlement Agreement Ukraine had to use its best efforts to grant the frequency licences within two months of signature (signature was on March 20, and the deadline was May 15). Of the 11 licences envisaged, six were granted by the State Committee before the May 15, 2000 deadline, another four by June 13, 2000 (i.e. within one month of May 15) and the last one on September 1, 2000 (within 2 ½ months of the deadline).
158. Ukraine's efforts to induce its State Committee to grant the licences resulted in 11 of the 12 licences being issued within one month of the deadline. One licence was then granted with 2 ½ months delay.
159. In the Tribunal's opinion, these delays do not amount to a violation of Ukraine's best efforts obligation. There is often a gap between political decision and bureaucratic compliance. Paragraph 3 of Clause 13(b) explicitly requires that "*the granting of licences ... will be made in accordance with the requirements of Ukrainian legislation*". There is no evidence that Ukraine abated its pressure on the State Committee to perform. The State Committee issued the licences within time limits which are not unreasonable in the context of Ukrainian administrative practices.

B) Late Constitution of the National Council

160. It is undisputed that the National Council – which had been founded in 1993 – became inoperative in March 1999, because its members were not appointed. It remained inoperative until it was reconstituted in June 2000.
161. Claimant argues that the time period while the National Council was inoperative was abnormal and could not legitimately be expected³⁸. This constitutes, in Claimant's opinion, a violation of the Settlement Agreement, and specifically of Respondent's obligation of good faith and fair dealing (Clause 20 of the Settlement Agreement).
162. The Tribunal is unconvinced.
163. The Settlement Agreement lacks any obligation to reconstitute the National Council, nor even an indication of when this could happen. To the contrary, Clause 13(b), paragraph 2, specifically states that applications for broadcasting licences must be made "*after the National Council has been fully personally formed*", without referring to any time frame – an explicit acceptance by Claimant that he was aware that the National Council was not operative at the time, and that the political decision to designate new members had to be implemented before the granting of the licences.

³⁸ Claimant's Post-Hearing Memorial, para. 57.1.

164. The National Council was in fact reconstituted in June 2000, three months after the signature of the Settlement Agreement. Nothing in the Settlement Agreement legitimizes an expectation on the part of Claimant of a faster rehabilitation of the National Council. The absence of any time frame, and the explicit warning in Clause 13(b), paragraph 2, that Gala's applications will have to wait for the reconstitution of the National Council, point to the contrary.

C) Failure of National Council To Promptly Acknowledge the Settlement Agreement as Binding

165. When the National Council was eventually reconstituted in June 2000, Claimant immediately made numerous attempts to contact its members and to establish the process for obtaining the frequencies. In Claimant's opinion, the National Council's lack of reaction violated Ukraine's duties to act in good faith (Clause 20) and to cooperate (Clause 24)³⁹.

166. Claimant's argument is not totally accurate.

167. It is undisputed that on March 20, 2001 the National Council adopted its Resolution No. 36 in which it decided to "*recognize priority position of CJSC Radio Company Gala*" in the allocation of broadcasting licences for the cities listed in Clause 13(b). It is immaterial whether the National Council's decision thus acknowledged a legal obligation, or whether it followed political considerations. In any case, it implies an acknowledgement of the Settlement Agreement and it granted Claimant the best position that he could expect.

168. Was this acknowledgement by the National Council unduly late?

169. The National Council had just started in January 2001 the process of organizing tenders for broadcasting licences. Given the complexities surrounding the Gala decision (reconciling "*positive consideration*" of Claimant's interests under the Settlement Agreement with the independence of the National Council and competing interests of other applicants), the March 20, 2001 decision cannot be considered as unduly late.

D) Award of Licences to Other Companies at National Council's First Meeting in January 2001

170. The Settlement Agreement regulates the issuance of broadcasting licences by the National Council in subparagraphs II and III of Clause 13(b) (reproduced above). These provisions create an obligation by Ukraine to "*assist [Claimant] for the positive consideration of this issue [the awarding of licences] by the National Council*". This obligation is not absolute, but subject to important caveats:

³⁹ Claimant's Post-Hearing Memorial, para. 57.3.

- first of all, there is no time limit for the awarding of the licences (the May 15, 2000 deadline only works for the licences from the State Committee);
- second, Ukraine's obligation to assist is qualified with the words "*within the limits of [Respondent's] power*" – thus acknowledging that, in accordance with the law, the National Council is an independent public entity;
- third, Claimant could apply "*in a due course ... after the National Council has been fully personally formed*";
- fourth, application and granting of the licences were to be "*in accordance with the requirements of Ukrainian legislation*"; Clause 16 specifically added that "*the Agreement shall not be treated as a document granting any rights, benefits or privileges which are different or additional to the ordinary rights and obligations of a foreign investor in Ukraine in accordance with the Ukrainian laws and international treaties to which Ukraine is a party*".

171. The National Council held its first tender in January 2001, i.e. some six months after its reconstitution. This time was used by the National Council to build the logistics and administrative capacities for proper tender procedures. No fault can be found in the fact that the National Council gave first priority to creating the enabling logistics and administrative capacities for such proceedings.

172. In its first tender in January 2001, the National Council did not include any of the frequencies for which Gala had received frequencies from the State Committee. Rather, the National Council focused only on frequencies on which radio stations had been broadcasting without a valid broadcasting licence at that time.

173. Claimant submits that the organization of this first tender, from which Gala was excluded, implied a breach of the Settlement Agreement on two different counts:

- first, the National Council should have taken the opportunity of the first meeting to act on the licences for Gala; and
- second, the very existence of the first tender proves that radio stations existed which were broadcasting only with a licence from the State Committee, but without a licence from the National Council; since Gala already had licences from the State Committee, it should have been authorized to broadcast straight away.

174. The Tribunal disagrees with Claimant's first argument. Nothing in the Settlement Agreement implies that the National Council was bound to give first priority to Claimant. The National Council decided first to regularize broadcasting outside the law, which had developed during the time when it had been inoperative. This prioritization cannot be challenged under the Settlement Agreement. (As to the claim for violation of the Fair and Equitable Treatment ("FET") standard defined in the BIT, see paragraph 410 below).

175. The second argument merits a more in-depth analysis. Respondent itself has acknowledged that during the period when the National Council became inoperative, “*the State [Committee] became the central authority of the executive power, administering communications and radio frequencies of Ukraine and it developed the practice of granting licences for use of radio frequencies before the tenders for frequencies were announced*⁴⁰”. What happened was illegal: under Ukrainian law, a radio station could not start broadcasting until it had obtained the necessary authorization from the National Council. Notwithstanding the legal requirements, during the 15-month period when the National Council was inoperative, certain Ukrainian companies were *de facto* awarded frequencies and authorized to broadcast, although they had only received the authorization from the State Committee.
176. Given this factual situation, Claimant argues that it could and should have been awarded frequencies and authorized to broadcast, once it had obtained the authorization from the State Committee in the summer of 2000, without having to wait for the reconstitution of the National Council and its formal tender procedure. And that, by not having done so, Ukraine violated its obligations under the Settlement Agreement.
177. After due consideration and some hesitation, the Tribunal rejects Claimant’s argument. In the Settlement Agreement, Ukraine could not undertake to perform acts contrary to Ukrainian law nor to authorise Claimant to operate new frequencies without the licence from the National Council; this would have violated the LTR. And Clause 13(b) specifically refers to the need for the National Council to be reconstituted and to issue the necessary licences.
178. But while it was agreed between Claimant and Respondent to act as required by Ukrainian law, Ukraine *de facto* authorized domestic radio companies to start broadcasting without the necessary authorizations. This situation was then cured in the first tender organized by the National Council after its reconstitution. While these actions do not constitute a violation of the Settlement Agreement, their status under the BIT will be analysed as such *below* at paragraph 410.

E) Late Award of Broadcasting Licences by National Council

179. The facts regarding the issuance of the broadcasting licences by National Council can be summarized as follows.

Facts

180. On March 1, 2000 (i.e. before the Settlement Agreement had actually been signed), the Minister of Economy of Ukraine wrote a proposal to the Cabinet of Ministers in order to “*entrust the [State Committee] and the [National Council] to allocate to CJSC RC “Gala” the following frequency assignments ...*⁴¹”. The frequencies referred to were five of those mentioned in the Settlement Agreement. Respondent has not provided any similar proposal for

⁴⁰ Respondent’s Post-Hearing Memorial, para. 207.

⁴¹ Respondent’s Exhibit R-27.

the remaining six frequencies promised in the Settlement Agreement, nor has Respondent submitted any decision from the Cabinet of Ministers approving the proposal of the Minister of Economy.

181. The record shows no further documents relating to the National Council, before a letter dated February 22, 2001 sent by Mr. Lemire to the Ministry of the Economy⁴². In the meantime, the State Committee had issued its licences, and the National Council had been reconstituted. Mr. Lemire's letter starts by stating that "*we have practically reached finalization of performance of the terms of the Dispute settlement Agreement*". This recital is important, because it shows that, at that moment, Claimant was convinced that Ukraine had not breached its obligations. Mr. Lemire then goes on, stating that a "*serious problem*" has arisen with the National Council because "*now this authority says that our frequencies are subject to a tender that will begin in some weeks*". He adds "*we understand that such situation has arisen due to the fact that the National Council is not properly informed*" and asks the Ministry of the Economy to intervene.
182. The record does not show the actions adopted by the Ministry of the Economy, but some advice must have been transmitted from the Ministry of the Economy because it is a fact that three weeks later, on March 20, 2001, the National Council decided to "*recognize priority position of CJSC Radio Company Gala*" in the allocation of broadcasting licences for the cities listed in Clause 13(b)⁴³.
183. Claimant has argued that in a meeting on March 19, 2001 the Chairman of the National Council, Mr. Kholod, did not consider the Settlement Agreement as binding, stating that the National Council is a "*constitutional independent body, not subordinated to the government*" and "*that the government cannot adopt any act influencing the development of TV/radio broadcasting in Ukraine*". Claimant has produced a transcript of the meeting, which Mr. Lemire prepared at that time⁴⁴. Mr. Kholod's statement has not been challenged and the Tribunal is inclined to accept it as true. But what is undeniable is that one day after the meeting, the National Council approved an official decision recognizing Gala's priority position to receive the frequencies promised in the Settlement Agreement.
184. Not only that, on March 22, 2001, i.e. only two days after this decision in favour of Gala, the National Council announced a new tender for frequencies, which included eight of the 11 frequencies mentioned in Clause 13(b) of the Settlement Agreement. In meetings in June and July 2001, the National Council decided to allocate seven of these frequencies to Gala; and the seven broadcasting licences were issued on September 18, 2001. Two other licences had already been issued on October 9, 1997 (long before the Settlement Agreement)⁴⁵. Two remained pending – those in Dniepropetrovsk and Lviv - and were eventually issued on March 26 and October 9, 2002, respectively.

⁴² Respondent's Exhibit R-39.

⁴³ Respondent's Exhibit R-40.

⁴⁴ Claimant's Exhibit CM-101.

⁴⁵ In Kryviy Rog and Uzhgorod.

185. The frequency in Dnipropetrovsk was put to tender on July 26, 2001, but because of accumulated workload of the National Council, it was not approved until March 2002. As regards Lviv, the frequency under discussion had already been granted to other radio companies, whose rights had first to be cancelled, and this justifies the delay.
186. Summing up, in the end the National Council eventually granted to Gala all 11 broadcasting licences mentioned in Clause 13(b). Two had been issued before the Settlement Agreement, seven were issued in September 2001, one in March 2002 and the final one in October 2002.
187. Claimant alleges that this late performance of the Settlement Agreement is tantamount to non-performance, and asks the Tribunal to declare that Ukraine has breached the terms of the Settlement Agreement.

Ukraine's alleged breach

188. The Tribunal acknowledges that there were delays in the issuance of the broadcasting licences by the National Council. But this is not really the point under discussion. What is relevant is whether Ukraine has breached the terms of the Settlement Agreement and for this, it is paramount to look at the actual text of what was agreed.
189. As noted above, Clause 13(b) of the Settlement Agreement does not establish obligations of the National Council, nor does it create a deadline for the National Council to issue its decisions. It simply states Ukraine's commitment to "*assist for the positive consideration of this issue at the National Council*".
190. The difference between Clause 13(a) and Clause 13(b) is striking. The first Clause creates a best efforts obligation to issue the State Committee's authorization within an agreed time frame. It proves that when the parties wanted to establish obligations and time limits, they were perfectly capable of doing so in clear and unambiguous terms. Clause 13(b), however, lacks any specific time frame, and only refers to Ukraine's commitment to "*assist*" Mr. Lemire in his endeavours vis-à-vis the National Council.
191. Did Ukraine comply with its part of the bargain, assisting Claimant "*within the limits of its power*" and "*in accordance with the requirements of Ukrainian legislation*" in the obtaining of the licences?
192. The record suggests that the Ministry of the Economy's assistance was helpful indeed. Mr. Lemire wrote for the first time complaining on February 22, 2001. The National Council's initial attitude had been rather negative, as proven by the meeting with its Chairman. This was overcome, undoubtedly because of advice from the Government. On March 19, 2001 – one month after Mr. Lemire's first complaint – the National Council reversed its opinion and acknowledged Claimant's rights to the licences. Two days later, the first

tender was launched and nine of the 11 frequencies were duly awarded by September 2001 – not bad a record for an agency which had been recently reconstituted. The two other licences were delayed – one just because of bureaucratic delays, the other because of underlying problems with the entitlement to the frequency.

193. The facts proven in this arbitration do not substantiate Claimant's claim that Ukraine failed to assist Claimant in his endeavour to obtain the broadcasting licences required from the National Council. In hindsight, it is unfortunate for Claimant that he only bargained for such a weak commitment from the counterparty. But the terms agreed are *lex contractus*, and it is those terms which the Tribunal must apply.

F) Allocation of Low-Powered Frequencies

194. The power of frequencies allocated to Gala ranged from 0.1 to 4kW with an average of 1,17 kW. On all its frequencies combined, Gala reaches some 22% of the population of Ukraine.

195. Claimant complains that the power of the frequencies allocated to Gala under the Settlement Agreement was far below his legitimate expectations and failed to meet his business purposes⁴⁶. He alleges that in the negotiations of the Settlement Agreement as well as in pre-settlement communications with the National Council and other agencies of Respondent, much higher powers had been envisaged. In this respect, Claimant refers to correspondence between the National Council and State Inspection of Electric Communication of July 18 and October 18, 1995 which suggested the availability of much higher powered frequencies for Claimant⁴⁷.

196. The Settlement Agreement, in any case, is silent on the power of frequencies sought by Claimant. Nor does it include any reference to Claimant's business purposes – e.g. his desire to cover the whole territory of Ukraine - from which a minimum power could be inferred. While the preliminary negotiations between the parties and the purpose of the Settlement Agreement are to be taken into account in determining the common intent of the parties (per Clauses 23(a) and (d) of the Settlement Agreement), Clause 27 provides that the Settlement Agreement “*constitutes the entire agreement between the Parties on the subject matter hereof and supersedes all prior correspondence, negotiations and understandings...*”. This disqualifies prior correspondence and negotiations as a basis of obligations deliberately not mentioned in the Settlement Agreement. Claimant can therefore not derive a claim from pre-Settlement Agreement correspondence and negotiations.

197. Furthermore, the power of the frequencies awarded to Claimant was not abnormally low. Claimant has acknowledged that the average power of the frequencies allocated to him matched that of frequencies allocated to major competitors⁴⁸. If Mr. Lemire felt that he was entitled to higher powered

⁴⁶ Claimant's Post-Hearing Memorial, para. 57.12.

⁴⁷ Claimant's Exhibits CM-1 and CM-2.

⁴⁸ Claimant's Post-Hearing Memorial, para. 57.12.

frequencies than his competitors, he would have had to include such entitlement in the Settlement Agreement. That has not happened.

198. Finally, Claimant learned the actual power of the frequencies allocated to him by September 1, 2000, when Gala received the licences from the State Committee. He thus knew the power of the frequencies on September 20, 2000 when the Settlement Agreement was recorded as the 2000 Award. Claimant did not seek any amendment of the Settlement Agreement, nor did he reserve his position.
199. The power of the frequencies was specified in the announcement of the tenders by the National Council. Claimant applied for these frequencies without complaining about the power. Thus, even if Claimant had been entitled to higher powered frequencies (which in the Tribunal's opinion does not derive from the Settlement Agreement), he acquiesced with the power of the allocated frequencies. To claim now that this lack of power gives rise to a breach of the Settlement Agreement denotes inconsistent behaviour, contrary to Article 1.8 of the 2004 UNIDROIT Principles.

G) Allocation of Four Frequencies Which Were Contested by the Armed Forces of Ukraine

200. Claimant finally complains that four of the frequencies allocated to him were contested by the Armed Forces of Ukraine⁴⁹. In Claimant's opinion, Ukraine failed to de-conflict with the Army the frequencies awarded to Gala.
201. Respondent counters that the contests were prompted by Gala itself, which decided to change the location of its radio transmitters in three cities, by a distance of between 4.6 and 1.87 km, and increased the height of its antenna from 55 to 70 m in another⁵⁰. These changes require the approval of the State Centre, which issues such authorization only with the approval by the General Headquarters of the Armed Forces. What happened in these four cases is that the General Headquarters of the Armed Forces refused to approve the changes. Refusal however did not mean that the frequencies became contested – Gala Radio in fact continued to broadcast on them. Gala was required only to change the locations and/or parameters of the transmitters following the recommendations of the State Centre, and obtained all required permits in 2008.
202. In the Tribunal's opinion, the difficulties incurred by Claimant with regard to these four frequencies do not constitute a breach of Respondent's obligations under the Settlement Agreement.
203. Under Clause 13(b) paragraph 2 Ukraine is bound to "*assist*" Claimant "*within the limits of its powers*" to obtain the authorization of the National Council. There is no express reference to the Armed Forces. But in an interpretation based on good faith, and bearing in mind that Clause 24 creates an obligation for each party to cooperate with the other, the Tribunal is prepared to admit

⁴⁹ Claimant's Post-Hearing Memorial, para. 57.13.

⁵⁰ Respondent's Post-Hearing Memorial, para. 271.

that the obligation to assist should be extended to encompass not only the National Council, but also any other institution controlled by Ukraine. Consequently, in accordance with the Settlement Agreement, Respondent was under an obligation to assist Mr. Lemire in obtaining or maintaining the necessary authorizations from the Armed Forces.

204. Did Respondent fail to do so?

205. Claimant has argued that a senior manager of the State Centre admitted that Ukraine failed to de-conflict the four frequencies and apologized for the mistake by stating that “*unfortunately we failed to coordinate with military department*”⁵¹. An analysis of the evidence submitted by Claimant to prove this allegation does not support the conclusion. Claimant has presented a summary, prepared by his own officers, of a meeting on February 21, 2005 with Mr. Zhebrodski, a senior manager of the State Centre⁵². The exact exchange of words which, in accordance with that summary, took place between the officer of Gala and Mr. Zhebrodski is the following:

“[...] Dima: Also, we have had interferences for the past few months and we have uncertain situation with Donetsk...”

Zhebrodski: I am going to call military department in Donetsk, what happened is back in 2000 we had a straight order to give you licence in Donetsk (107,2 fm) and unfortunately we failed to coordinate it with military dpt. Are they complaining?

Dima: No complaints so far, we have been working there for quite awhile.

Zhebrodski: Good. I am sure we can sort it out at least I am gonna try [...]”.

206. The exchange of words between the officer of Gala and the senior manager of the Centre does not prove a breach by Ukraine of its obligation to assist Claimant. Quite to the contrary. What it shows is that, up to that moment (2005), the Army had not complained about the changes in Donetsk, that Gala was broadcasting there and that the State Centre was offering its help if a problem with the Army eventually arises. The problem afterwards materialized, and it was then, it appears, satisfactorily settled by 2008.

207. Summing up, the Tribunal is of the opinion that the problems which Gala encountered with the Army regarding four frequencies, which were eventually solved, do not amount to a default by Ukraine of its obligations under the Settlement Agreement.

* * *

208. For the reasons explained above, the Tribunal concludes that, although Claimant encountered difficulties and delays in the obtaining of the frequencies expected under the Settlement Agreement, and although the end

⁵¹ Claimant’s Post-Hearing Memorial, para. 57.13.

⁵² Claimant’s Exhibit CM-143.

result may not have satisfied all the expectations harboured by Claimant, Respondent did not breach any of the obligations it had assumed in that Agreement.

VII. ALLEGED VIOLATIONS OF THE BIT

209. The Tribunal will first summarize Claimant's general allegations (VII.1), then Respondent's (VII.2), before analyzing and deciding the claims:
- in first instance, the Tribunal will study the alleged violation of the FET standard in the awarding of frequencies, and will effectively come to the conclusion that certain actions of Respondent are not compatible with this standard (VII.3);
 - a second section will be devoted to the alleged continuous harassment of Claimant, and his request for moral damages (VII.4);
 - in the next sections the Tribunal will reject Claimant's additional allegations, regarding an alleged violation of the FET standard by other actions performed by Ukraine (VII.5) and the applicability of the "Umbrella Clause" (VII.6); and
 - the Tribunal will then decide whether the 2006 amendment of the LTR and in particular the 50% Ukrainian music requirement amounts to a violation of the BIT (VII.7), and finally devote a short section to other allegations submitted by Claimant (VII.8).

VII.1. CLAIMANT'S GENERAL ALLEGATIONS

210. Claimant's starting point is that, after having made the investment in Gala Radio, he had a legitimate expectation that he would be authorized to increase the size and audience of his radio company, and to establish three radio networks in Ukraine aimed at three different age groups. This plan had been discussed with the National Council members and encouraged by them.
211. As evidence of his expectations, Claimant especially relies on three documents, namely:
- a letter of July 18, 1995 from the Chairman of the National Council to the Chairman of the State Inspection on Electric Communications. This letter advises that "*the National Council...considers possibility to issue a licence to radio company GALA*" and requests the State Inspection "*to consider a possibility to give the company the frequency channels*" in 13 cities "*up to*" a specified power⁵³;
 - a letter from the Chairman of the State Inspection on Electronic Communications to Claimant of October 18, 1995 informing of the availability of high power frequencies in the cities concerned and advising that the requisite permissions would be issued after Gala had received the pertinent broadcasting licences from the National Council⁵⁴; and

⁵³ Claimant's Exhibit CM-1; the English translation by mistake does not include the words "*up to*" which appear in the Ukrainian original.

⁵⁴ Claimant's Exhibit CM-2.

- a “Plan of Measures” negotiated between Claimant and the National Council in 1997 envisaging the allocation of frequencies to set up the Gala networks.
212. The main thrust of Claimant’s submission is that his legitimate expectations were thwarted by Ukraine’s actions in violation of the BIT. Claimant divides his allegations regarding these violations into four different sections⁵⁵.
213. (i): In the first section, Claimant argues that Ukraine has violated the FET standard applicable to protected investments, and the prohibition of arbitrary and discriminatory measures, established in Article II.3. (a) and (b) of the BIT. Respondent’s specific actions, which have resulted in violation, can be divided in two groups:
- denial by the National Council of nearly 300 applications for frequencies submitted by Gala or Energy (a company also owned by Claimant), and illegal award of frequencies to companies other than Gala, during the period when the National Council was not operative; and
 - other actions performed by Respondent, like failure to correct the interferences on Gala’s 100 FM frequency, failure of the National Council to acknowledge its obligations under the Settlement Agreement; allocation of low powered frequencies to Gala; allocation of frequencies contested by the Army.
214. Of the alleged violations, the first one, the systematic denial of applications, is by far the most important one. Claimant argues that the Ukrainian legal procedure for allocation of frequencies is in itself unfair, inequitable, discriminatory and arbitrary. The procedure was moreover applied by the National Council in an unfair, inequitable and discriminatory fashion. It was tainted by interferences from other political organs of Respondent, including the President of Ukraine. The National Council’s aim was to preclude Gala from establishing multiple networks with national coverage. And it was successful in achieving this.
215. Claimant specifically refers to six tenders for frequencies, from 2002 through 2008, which in his view demonstrate Respondent’s practice in breach of the BIT.
216. (ii): In the second section, Claimant asserts that Respondent is submitting Gala to continuous harassment, in violation of Article II.3 (a) of the BIT. Respondent attempted to rely on the “founder” principle to deny Gala Radio an extension of its licence beyond the expiry date of September 18, 2008. Furthermore, there have been concerted efforts by the National Council to force Claimant out of the radio industry through ongoing actions of harassment and the issuance of unlawful warnings.
217. Claimant acknowledges that Respondent, after a few years of costly and lengthy litigation, ultimately cancelled the warnings, renewed the broadcasting

⁵⁵ Claimant’s Post-Hearing Memorial, para. 64.

licence and applied the correct fee. But this eventual acceptance of Claimant's rights does not provide Ukraine with immunity from paying damages. Claimant alleges that Respondent's harassment since the Award has inflicted significant moral harm for which Respondent should be held liable in an amount of three million USD.

218. (iii): In the third section, Claimant submits that the 50% local music requirement in the LTR implies a violation of Article II.6 of the BIT, namely of the prohibition to "*impose performance requirements ... which specify that goods and services must be purchased locally, or which impose any other similar requirements*". Respondent has tried to justify the local music requirement on public policy grounds. In Claimant's opinion, the argument can at best justify an expropriation subject to the payment of the corresponding damages. The abnormal high level of the requirement and its abrupt incorporation caused Claimant to suffer loss for 2008 of advertising revenue, and such loss will continue until the expiration of the licence in 2015.
219. (iv): Finally, Claimant submits that, as a consequence of the Umbrella Clause contained in Article II.3 (c) of the BIT, all the contractual breaches of the Settlement Agreement have also been transformed into violations of the BIT, which entitle Claimant to be compensated for the damages suffered.

VII.2. RESPONDENT'S GENERAL ALLEGATIONS

220. Respondent submits that its legal procedures for tenders involving radio frequencies are consistent with the requirements of the BIT; the implementation of these procedures also conforms with the BIT requirements.
221. The procedures for allocation of frequencies meet the standards of due process and procedural fairness, including the right to be heard. Frequencies are awarded by means of tenders announced in the press; prospective participants may submit their applications within one month of the notice. Such applications must include an information package. Thereafter, the National Council reviews the requests applying statutory criteria, and especially valuing the programming content proposed by each applicant. The meetings of the National Council are public, and the National Council holds briefings with representatives of the radio industry. A frequency is awarded to a radio company if the application receives at least five of the votes of the eight members of the National Council. All decisions of the National Council are published on the National Council's official website. Finally, the decisions of the National Council are subject to judicial review.
222. The National Council is an independent body. Each of its members exercises his or her judgment without external pressure, and Claimant's allegations of corruption and undue pressure are unsupported by any evidence. Furthermore, the LTR was amended in 2006, and since then members may be removed from their functions only by a joint decision from the Parliament and the President. Claimant's allegations of political influence were not corroborated during the hearing. No member of the National Council has been impeached, no one

associated with the National Council has been prosecuted for corruption, and no one has been convicted of wrongdoing.

223. Gala Radio was treated in a fair and equitable manner and was not discriminated against during the tenders. Claimant lost the four tenders which were analyzed during the hearing for objective reasons. There is no proof of unfair, inequitable, arbitrary and discriminatory treatment against Claimant.
224. Respondent also addresses Claimant's allegations regarding harassment. In Respondent's opinion, the procedure and practice of monitoring radio companies is consistent with Ukraine's obligations under the BIT. The results of any inspection are reviewed in a meeting of the National Council, where its members listen to a presentation of one of them, review a set of documents, listen to oral explanations from the representative of the radio company, and only thereafter take a decision.
225. All radio stations are continuously monitored. Those inspected and sanctioned are publicly mentioned in the Annual Report of the National Council. None of Gala's inspections was conducted in an unfair, inequitable or abusive manner. The warning issued against Gala on October 5, 2005 sanctioned Gala's refusal to produce documents and materials required for the inspection. This warning was successfully challenged before the Ukrainian Courts. On November 23, 2005 a second warning was issued for violating the quota of broadcasting in Ukrainian, the law on advertising, and the terms of its licence. The second warning was also cancelled by the Kiev Court. In May 2006 a third inspection was carried out. Since Gala had significantly improved its business activities, compared to previous periods, the National Council decided not to issue a third warning. There were subsequent inspections in March and June 2008, but they did not lead to any sanction, although Gala Radio admitted that by accident it had committed violations of the election legislation.
226. Other radio companies have also been inspected and received warnings - some of them three, and the National Council has started court proceedings in five cases in order to cancel the broadcasting licence.
227. The 2006 LTR had been debated by members of Parliament for more than three years, and its purpose was to make Ukrainian Law comply with European requirements. In Respondent's opinion, the LTR must be considered as part of the State's legitimate right to organize broadcasting. The 50% Ukrainian music requirement, which requires that either the author, the composer and/or the performer of 50% of the music broadcast be Ukrainian, was neither abrupt, nor excessive nor unfair. Gala Radio signed in August 2006 a Memorandum proposed by the National Council for the progressive implementation of the 50% requirement, and Gala Radio and all its competitors are presently in compliance. There is no link between the 50% Ukrainian music quota and the decline in Gala Radio's ratings.
228. Respondent finally makes three additional allegations:
 - Claimant did not behave as a diligent businessman;

- Gala Radio did not take advantage of available remedies; and
- Claimant abused his position as a foreign investor.

VII.3. CLAIMANT’S FIRST ALLEGATION: THE VIOLATION OF THE FET STANDARD IN THE AWARDING OF FREQUENCIES

229. The main thrust of Claimant’s allegation is that Ukraine has failed to provide fair and equitable treatment to its investment in Gala, and subjected it to arbitrary or discriminatory measures. Ukraine rejects both allegations. The Tribunal will analyze this dispute – which is the basic issue submitted to its adjudication - in a short introduction and three separate sections:

- the first devoted to the concept of FET standard, as defined in the BIT (VII.3.2);
- the second to the procedures for awarding frequencies under Ukrainian law (VII.3.3); and
- the third to the facts surrounding Gala’s applications for frequencies (VII.3.4).

VII.3.1. INTRODUCTION

Claimant

230. Claimant, Mr. Joseph Charles Lemire, is an American citizen residing in Ukraine. By profession, Mr. Lemire is a lawyer, although he also has experience in accounting. He is the owner and chairman of Gala, a closed joint stock company constituted in 1995 under the laws of Ukraine. His participation in Gala is held through another Ukrainian company, Mirakom. He initially purchased 30% of Gala, but since 2006 he indirectly owns 100% of the company⁵⁶. The proven amount of his investment is 236,000 USD. There is circumstantial evidence that Mr. Lemire has made payments with his own monies on behalf of Gala. But the record of the actual amounts paid has not been produced, and Mr. Lemire’s statement that the total exceeds 5,000,000 USD⁵⁷ has not been locked up with hard evidence. The personal assets of Mr. Lemire and those of Gala appear to some extent commingled⁵⁸.

Gala

231. Gala is a company which since 1995 operates a contemporary music radio station. It holds a licence to broadcast on two frequencies in Kyiv and on 12 other frequencies in nine areas of Ukraine. Gala Radio applied for and received a licence recognizing its status as a national broadcaster on October 17, 2007⁵⁹. In the late 1990’s, Gala ranked amongst the most popular radio stations in Ukraine. Claimant acknowledges that its market share has declined – and attributes this decline to Respondent’s actions.

⁵⁶ Mr. Lemire, Hearing Transcript 1, p. 283, at14.

⁵⁷ Mr. Lemire, Hearing Transcript 1, p. 285, at 20 and p. 304, at 9.

⁵⁸ Mr. Lemire, Hearing Transcript 1, p. 288, at 25.

⁵⁹ Respondent’s Exhibit R-153.

232. Gala has been a reasonably successful company. Its revenues have gone up from 600,000 USD in the year 2000 to 1.369,000 USD in the year 2007 (with a profit of 121,000 USD)⁶⁰. As Respondent's expert witness says, "*while being small business in a competitive market and risky environment, it is obvious that Gala has become a successful national radio station, and as investor, Joseph Charles Lemire has achieved reasonably good results and revenue growth*⁶¹".
233. On a qualitative basis, Claimant has alleged and Respondent has accepted that Gala won the Radio Company of the year award for brand recognition in 1999, won an award for the best radio program on Olympic News from the Golden Pen competition organized by journalists and that four of the top 10 disk jockeys in Ukraine work for Gala, including the well-known DJ Pascha (the alias of Mr. Pavel Shylko), who testified in this arbitration⁶².

Mr. Lemire's relationship with the National Council

234. Respondent has insisted, throughout the procedure, that Mr. Lemire abused his position as foreign investor and harassed the National Council with rude, disrespectful and to some extent even aggressive conduct⁶³. Respondent argues that Mr. Lemire has sent scores of hostile letters to the National Council, copying the former President of Ukraine, the current President of Ukraine, the Vice President of the United States, the US Ambassador and others. He also video-recorded meetings of the National Council.
235. The relation between Mr. Lemire and the National Council was not always tense. At the outset of the investment, in 1995, the relationship seems to have been friendly, and the National Council supported Mr. Lemire's efforts to invest in the Ukrainian radio sector. Suddenly the relationship soured in 1996, for no obvious reason. Asked by the Tribunal why his relationships with the National Council became hostile, Mr. Lemire has declared under oath that the reason was that "*at one point I was asked for a bribe and I said I would not pay*⁶⁴". No further evidence of this alleged request for bribes has been produced.
236. What is undisputed is that in 1996 Gala Radio sued the National Council before the Ukrainian Courts, because Gala had been removed from the air by a decision of the National Council. On February 26, 1997, the Supreme Arbitration Court of Ukraine ruled in Gala's favor⁶⁵. In 1997, Mr. Lemire initiated the First Arbitration against Ukraine, which eventually led to the Settlement Agreement and 2000 Award. In 2006 Gala challenged before the

⁶⁰ EBS Expert Report, p. 6.

⁶¹ EBS Expert Report, p. 5.

⁶² Claimant's Memorial, para. 117.

⁶³ Respondent's Counter Memorial, para. 83.

⁶⁴ Mr. Lemire, Hearing Transcript 1, p. 309, at 3.

⁶⁵ Mr. Lemire, Hearing Transcript 1, p. 166, at 5.

Ukrainian Courts, and again successfully, two decisions of the National Council to issue warnings⁶⁶. Finally, Mr. Lemire of course started this arbitration, accusing the National Council of having treated him in “*an unfair, inequitable, arbitrary and discriminatory manner in breach of its BIT obligations*”.

237. The fact that Mr. Lemire challenged a number of decisions of the National Council before the Ukrainian Courts and filed two successive investment arbitrations against Ukraine cannot have helped to improve the climate between Gala Radio, a company acting in a highly regulated and supervised legal environment, and the National Council, its regulator and supervisor. The existence of successive court actions may have been one of the reasons for deterioration of the relationship. The Tribunal is also convinced that on certain occasions, Mr. Lemire felt threatened, and that he was afraid that Gala would be taken off the air by the authorities. There were at least two incidents – the third inspection, which could have led to a third warning and revocation of the licence, and the difficulties in obtaining a renewal of Gala Radio’s licence – where Mr. Lemire’s reaction shows real worry. Mr. Lemire’s tactics vis-à-vis Gala’s regulator and supervisor may seem high handed and sometimes even aggressive, but they may have been the only method available to a small, private radio company in Ukraine owned by a foreigner, to draw attention to its situation.

Respondent

238. Respondent in this arbitration is the Republic of Ukraine. The actions and omissions on which Claimant bases his claims were carried out by the National Council, the State Centre and the State Committee, all of which are organs of Ukraine, for which under international law the Republic is responsible.
239. As Respondent has explained to the Tribunal, Ukraine became an independent State on August 24, 1991, and after independence its political, economic and legal systems underwent a substantial transformation⁶⁷. Ukraine has acknowledged that in the initial years of independence, constant political battles and economic instability caused a lack of coordination in the activities of state bodies and hampered their ability to create an effective system of government.
240. Ukraine is an independent and sovereign state, governed by a Constitution, which entrusts to Parliament, elected by general democratic vote, the task of promulgating laws. The Arbitral Tribunal naturally respects the legislative function of the Ukrainian Parliament. It certainly is not the task of this Arbitral Tribunal, constituted under the ICSID Convention, to review or second-guess the rules which the representatives of the Ukrainian people have promulgated. The powers of this Tribunal are much more limited: they only encompass the authority to decide on a case-by-case basis whether Ukraine has violated

⁶⁶ Claimant’s Exhibit CM-50 and Respondent’s Exhibit R- 353.

⁶⁷ Respondent’s Memorial, para.18.

certain guarantees, offered to American investors under the BIT, and to establish the appropriate remedies.

241. The respect for Ukraine's sovereignty is reinforced by the sector in which Claimant made his investment: radio broadcasting. In all jurisdictions, Radio and TV are special sectors subject to specific regulation. There are two reasons for this:

- first, radio frequencies are by technical nature scarce assets, and consequently the law must articulate systems for allocating licences to prospective bidders;
- but there is also a second reason: when regulating private activity in the media sector, States can, and frequently do, take into consideration a number of legitimate public policy issues; thus, media companies can be subject to specific regulation and supervision in order to guarantee transparency, political and linguistic pluralism, protection of children or minorities and other similar factors.

242. The exceptional character of media companies, and specifically of radio broadcasting companies, is accepted in the BIT itself. In its Annex, both the United States and Ukraine reserve the right to make or maintain limited exceptions to the national treatment principle (provided for in Article II.1 of the BIT) with regard to radio broadcasting stations. The exception does not affect the principles which are being pleaded by Claimant in this procedure, but it proves the special sensitivity towards the media shown by both States when approving the BIT.

VII.3.2. THE FET STANDARD AS DEFINED IN THE BIT

243. The purpose of this section is to determine the general scope and meaning of the FET standard defined in the BIT.

244. Article II.3 (a) and (b) of the BIT reads as follows:

“3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party”.

245. The origin of Article II.3 (a) and (b) can be traced to the 1992 and 1994 US Model BIT, which proposed the following wording:

“Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded

treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments”⁶⁸.

246. Article II.3 of the BIT was thus taken literally from the US Model BIT which was in force at the time when the BIT was negotiated, with only the addition of the phrase referring to judicial review. It is a rule of Delphic economy of language, which manages in just three sentences to formulate a series of wide ranging principles: FET standard, protection and security standard, international minimum standard and prohibition of arbitrary or discriminatory measures.

A) Customary International Law Minimum Standard and FET Standard

247. A classic debate in investment arbitration law is whether the FET standard established by bilateral or multilateral investment treaties coincides with or differs from the international minimum standard of protection for aliens imposed by customary international law.

248. The starting point of this debate is the very definition of the international minimum standard – a question which is fraught with difficulties⁶⁹. For claims arising from administrative or legislative acts of Governments – which are the type of claims typically submitted in investment disputes – the historic leading case seems to be *Roberts*⁷⁰, issued by the United States – Mexico General Claims Commission in 1926, which defined the minimum treatment as that required “*in accordance with ordinary standards of civilization*”. Mr. Roberts, a US citizen, had been imprisoned in Mexico in what he held to be inhumane conditions. Mexico had argued that Mexicans were held in identical conditions. And the Tribunal decided:

“Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment”.

249. *Roberts* is understood to stand for the propositions that a certain treatment may give rise to international responsibility notwithstanding that it affects citizens and aliens alike, and that administrative and legislative actions may amount to

⁶⁸ As quoted in I. Tudor, “The Fair and Equitable Standard in the International Law of Foreign Investment” (2008) p. 28.

⁶⁹ For a *status quaestionis* see Paulsson/Petrochilos: “*Neer-ly Mised?*” ICSID Review: Foreign Investment Law Journal (2007), vol.22.2, pp. 242-257.

⁷⁰ *Harry Roberts (U.S.A.) v. United Mexican States*; November 2, 1926; U.N. Report of International Arbitral Awards, IV, p. 71.

a violation of the customary minimum treatment even if the State did not act in bad faith or with willful neglect of duty⁷¹.

250. The relationship between FET and customary minimum standard has been the subject of much debate, especially in NAFTA based arbitrations, and has led the NAFTA Free Trade Commission to issue a binding interpretation on July 31, 2001. According to this interpretation:

“2. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concept of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that, which is required by the customary international law minimum standard of treatment of aliens. [...]”.

251. The same proposition, that the FET standard should be reduced to the customary international law minimum standard, was afterwards adopted in the new 2004 US Model BIT. Article 5 of this model provides⁷²:

“Article 5: Minimum Standard of Treatment”⁷³

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments”.

252. Is this principle of assimilation between customary minimum standard and FET standard also applicable to the US – Ukraine BIT?

253. The answer must be in the negative. The BIT was adopted in 1996, and was based on the standard drafting then proposed by the US. The words used are clear, and do not leave room for doubt: *“Investments shall at all times be accorded fair and equitable treatment ... and shall in no case be accorded treatment less than that required by international law”*. What the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of

⁷¹ While for claims based on denial of justice, aggravating circumstances like outrage, bad faith, willful neglect of duty or other egregious behavior are required; see *L.F.H. and P.E. Neer (U.S.A) v. United Mexican States*; October 7, 1926; U.N. Report of International Arbitral Awards, IV, p. 60

⁷² Quoted in I. Tudor, “The Fair and Equitable Standard in the International Law of Foreign Investment” (2008) p. 57.

⁷³ Footnote omitted.

protection could and should be transcended if the FET standard provided the investor with a superior set of rights⁷⁴.

254. In view of the drafting of Article II.3 of the BIT, the Tribunal finds that actions or omissions of the Parties may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith.
255. This leads to the next question: what is the exact meaning of the FET standard acknowledged by the BIT?

B) Meaning of Article II.3 of the BIT

256. The words used by the Article II.3. are the following: “*Investments shall at all times be accorded fair and equitable treatment [...] Neither party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments*”.
257. These general principles require interpretation in order to give them specific content and this interpretation must comply with the requirements of Article 31.1. of the Vienna Convention – it must be done “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”⁷⁵”.
- a) Ordinary meaning
258. An inquiry into the ordinary meaning of the expression “fair and equitable treatment” does not clarify the meaning of the concept. “Fair and equitable treatment” is a term of art, and any effort to decipher the ordinary meaning of the words used only leads to analogous terms of almost equal vagueness.
259. The literal reading of Article II.3 of the BIT is more helpful. In accordance with the words used, Ukraine is assuming a positive and a negative obligation: the positive is to accord FET to the protected foreign investments, and the negative is to abstain from arbitrary or discriminatory measures affecting such investments. Any arbitrary or discriminatory measure, by definition, fails to be fair and equitable. Thus, any violation of subsection (b) seems *ipso iure* to also constitute a violation of subsection (a). The reverse is not true, though. An action or inaction of a State may fall short of fairness and equity without being discriminatory or arbitrary⁷⁶. The prohibition of arbitrary or discriminatory measures is thus an example of possible violations of the FET standard.
260. The literal interpretation also shows that for a measure to violate the BIT it is sufficient if it is either arbitrary or discriminatory; it need not be both.

⁷⁴ In agreement: I. Tudor, “The Fair and Equitable Standard in the International Law of Foreign Investment” (2008) p. 29.

⁷⁵ Emphasis added.

⁷⁶ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No.ARB/02/1, Decision on Liability of 3 October 2006, para. 162.

261. Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification⁷⁷; a measure must be “*discriminatory and expose[s] the claimant to sectional or racial prejudice*”⁷⁸; or a measure must “*target[ed] Claimant’s investments specifically as foreign investments*”⁷⁹.
262. Arbitrariness has been described as “*founded on prejudice or preference rather than on reason or fact*”⁸⁰; “*...contrary to the law because...[it] shocks, or at least surprises, a sense of juridical propriety*”⁸¹; or “*wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety*”⁸²; or conduct which “*manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination*”⁸³. Professor Schreuer has defined (and the Tribunal in *EDF v. Romania*⁸⁴ has accepted) as “arbitrary”:
- a. *a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
 - b. *a measure that is not based on legal standards but on discretion, prejudice or personal preference;*
 - c. *a measure taken for reasons that are different from those put forward by the decision maker;*
 - d. *a measure taken in wilful disregard of due process and proper procedure.”*
263. Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.

b) Context

264. Words used in treaties must be interpreted through their context. The context of Article II.3 is to be found in the Preamble of the BIT, in which the contracting parties state “*that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment...*”. The FET standard is thus closely tied to the notion of legitimate expectations - actions or omissions by Ukraine are contrary to the FET standard if they frustrate

⁷⁷ *Saluka Investments BV v. Czech Republic PCA*, UNCITRAL, Partial Award of 17 March 2006, para. 313.

⁷⁸ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award of 30 April 2004, para. 98, confirmed in *Methanex Corporation v. United States of America*, UNCITRAL, Award of 3 August 2005, para. 274.

⁷⁹ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 147.

⁸⁰ *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award of 3 September 2001, para. 221.

⁸¹ *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, 29 May 2003, para. 154.

⁸² *Loewen Group Inc and Raymons L. Loewen v. United States of America*, ICSID Case No. ARB(AF)98/3, Award of 26 June 2003, para. 131.

⁸³ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 307.

⁸⁴ See *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009, para. 303; Professor Schreuer acted as expert and his opinion was quoted and accepted by the Tribunal.

legitimate and reasonable expectations on which the investor relied at the time when he made the investment⁸⁵.

Legitimate expectations

265. Which were the legitimate expectations of Claimant at the time he made his investment?
266. It must be recalled that when in 1995 Mr. Lemire made his first investment and acquired a controlling stake in Gala Radio, this was a small company in a nascent industry. Historically, before independence and political change, the radio industry in Ukraine had been in the hands of the State. In the mid 1990s the sector began to be privatized, a first Law on TV and Radio having been approved on December 21, 1993. All these factors had a bearing on Claimant's legitimate expectations.
267. On a general level, Claimant could expect a regulatory system for the broadcasting industry which was to be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions. It is true that Ukraine and the United States, when accepting the BIT, had reserved their right to make or maintain limited exceptions to the national treatment in the radio sector⁸⁶. Under this exception, Ukraine could e.g., validly require that the founders of broadcasting companies be Ukrainian nationals. But Mr. Lemire could equally expect that, once he had been awarded the necessary administrative authorization to invest in the Ukrainian radio sector, there would be a level playing field, and the administrative measures would not be inequitable, unfair, arbitrary or discriminatory.
268. And on a more specific and personal level, Mr. Lemire undoubtedly had the legitimate expectation that Gala, which at that time was only a local station in Kyiv, would be allowed to expand, in parallel with the growth of the private radio industry in Ukraine.
269. The actual level of anticipated expansion has been the object of much discussion by the parties. Mr. Lemire has submitted that his intention at that time was to create three radio networks, two in FM, and one in AM, centered around three different age groups⁸⁷. Respondent has challenged this statement, and has referred to the absence of any formal business plan setting out the intended business structure.
270. In the Tribunal's opinion, the available evidence shows that what Mr. Lemire had in mind when he bought into Gala Radio in June 1995, was to convert Gala into a national broadcaster and to create a second AM channel. The idea to create a third radio network – called "Energy" – seems to have been an

⁸⁵ The relationship between FET and legitimate expectations has been established in a number of decisions: *Saluka Investments BV v. Czech Republic PCA*, UNCITRAL, Partial Award of March 17, 2006, para. 302 which then quotes *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, *CME v. Czech Republic* and *Waste Management v. United Mexican States*.

⁸⁶ See Annex to BIT.

⁸⁷ Mr. Lemire, Hearing Transcript 1, p. 121, at 17.

afterthought. At the time of the acquisition of Gala, Claimant must have approached the National Council, and asked whether a national licence for Gala and an AM licence could be obtained. The National Council reacted in positive terms, as proven by a letter addressed to the State Centre, in which the National Council states that it is “*considering the possibility*” of issuing to Gala licences for a nationwide FM channel and for a second AM Band, and enquires whether the frequencies would be available. There is no reference to a third channel⁸⁸. The State Centre reacted positively⁸⁹.

271. Respondent has insisted that Claimant has not been able to produce a formal business plan⁹⁰. That is true. But the Tribunal does not attach too much weight to this omission. Formal business plans are customary in sizeable investments in settled economic and business environments. None of these characteristics applied to Mr. Lemire’s investment in Gala Radio: a small amount was involved and the situation of Ukraine was anything but settled.

c) Object and purpose

272. The object and purpose of the BIT - the third interpretive criterion - is defined in its Preamble: the parties “*desir[e] to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party*” and recognize that the BIT “*will stimulate the flow of private capital and the economic development of the Parties*”. The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital.

273. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.

C) Pursuit of Local Remedies

274. Respondent has submitted that Gala Radio, although it asserts a list of errors concerning the tenders, never challenged any of the decisions before the Ukrainian Courts⁹¹. In Respondent’s opinion, Claimant should have taken advantage of the available local remedies that would have been capable of correcting the alleged administrative wrong. Claimant did so when confronted with the warnings issued by the National Council, and successfully challenged two decisions before the Ukrainian Courts. Respondent draws the Tribunal’s attention to the *Generation Ukraine* award, which stressed the need for the

⁸⁸ Claimant’s Exhibit CM-1.

⁸⁹ Claimant’s Exhibit CM-2.

⁹⁰ Claimant’s Post-Hearing Memorial, para. 90.

⁹¹ Respondent’s Post-Hearing Memorial, para. 625.

investor to make a reasonable effort to obtain the legal correction of an administrative fault:

“[...]In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction⁹²”.

275. The question which the Tribunal must answer is whether, given the fact that Gala Radio has not challenged the decisions of the National Council, it is now precluded from presenting its claim in this arbitration.

276. The starting point of the Tribunal’s analysis must be the text of the BIT. The BIT – unlike other Treaties – does not include any clause requiring the initiation or exhaustion of local remedies before the filing of an investment arbitration. Quite the contrary: Article II.3 deviates from the standard US Model BIT in only one point, the insertion of the following phrase:

“[...] For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party”.

277. The literal meaning of this phrase could not be clearer: even if a party has had (and has not exercised), or has exercised (with whichever outcome) the right to judicial review, such action or omission is irrelevant in an investment arbitration deciding whether the measure is arbitrary or discriminatory. The consequence is that in an arbitration under the US-Ukrainian BIT, the possibility to file a claim against a specific measure, is not burdened by any requirement to previously appeal to the national Courts.

278. This does not mean that an investor can come before an ICSID tribunal with any complaint, no matter how trivial, about any decision, no matter how routine, taken by any civil servant, no matter how modest his hierarchical place. In this case, however, the claim is raised against the conduct of the National Council, that is to say the highest regulatory organ for the broadcasting industry. On this basis, the Tribunal considers that there should be no impediment to Claimant seeking to hold Ukraine accountable for an alleged breach of the BIT.

279. Given the clear language of the BIT, the Tribunal rejects Respondent’s submission that Claimant is precluded from pursuing his claims in the present arbitration, due to his failure to appeal the tender decisions of the National Council.

⁹² *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, para. 20.30.

Generation Ukraine

280. The Tribunal would like to add that – even if Article II.3 of the BIT had lacked a specific reference to local remedies – the present case has significant differences with *Generation Ukraine*. In *Generation Ukraine*, the claim filed by Claimant was based on expropriation, and the appropriate level of compensation - a type of claim which could have been submitted to and decided by the local Courts. In the present arbitration, the situation is quite different: the claim is for damages arising from the violation of the BIT standards, and such claim can only be filed before an international arbitration tribunal.
281. It is true that under Article 30.4 of the LTR, Gala Radio would have had the opportunity to challenge the decisions of the National Council awarding frequencies to other companies. But those claims would only have succeeded in setting aside the National Council’s decision, and forcing that the tender be repeated. Gala Radio would never be certain that in this repeat tender it would be successful. The practical result of an appeal against a tender decision of the National Council is very limited – if the procedure is unfair or the administrative body biased, it could again decide to grant the licence to another contender and not to Gala. The effect is quite different from that of an appeal against a warning – in this case the Court’s decision provokes the immediate setting aside of the measure.
282. The test proposed by *Generation Ukraine* is based on reasonableness. Claimant is only required to put in a reasonable effort to obtain correction of the wrong decision. In the circumstances of the present case, it would have been unreasonable to require Claimant to have fought in the Ukrainian Courts the National Council’s decisions adjudicating frequencies.
283. The Tribunal is not thereby suggesting that a breach occurs if the National Council makes a decision which is different from the one the arbitrators would have made if they were the regulators. The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal’s sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is materially wrong will not suffice. It must be proven that the State organ acted in an arbitrary or capricious way. A regulatory organ charged with the attribution of licences on a competitive basis plainly violates essential notions of fairness if it refuses to consider the information provided by a qualified applicant, or if it engages in favouritism. And the State itself breaches its obligations under the treaty if it exercises undue influence over the decision-making of regulatory bodies.

D) Summary

284. The FET standard defined in the BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis. It requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm. The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including among others the following:

- whether the State has failed to offer a stable and predictable legal framework;
- whether the State made specific representations to the investor;
- whether due process has been denied to the investor;
- whether there is an absence of transparency in the legal procedure or in the actions of the State;
- whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State;
- whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent.

285. The evaluation of the State's action cannot be performed in the abstract and only with a view of protecting the investor's rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred:

- the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors;
- the legitimate expectations of the investor, at the time he made his investment;
- the investor's duty to perform an investigation before effecting the investment;
- the investor's conduct in the host country.

* * *

286. Once the scope and meaning of the FET standard has been defined in the abstract, the Tribunal must establish the facts and decide whether they constitute a violation of such standard. This will be achieved by reviewing the legal procedure created by Ukrainian law for the awarding of licences in the broadcasting sector (VI.3.3), then by analyzing in detail the facts surrounding the allocation of frequencies which affected Gala (VI.3.4).

VII.3.3. PROCEDURE FOR THE AWARDING OF LICENCES IN THE BROADCASTING SECTOR UNDER UKRAINIAN LAW

287. Two fundamental laws regulate the Ukrainian radio sector:

- the Law on National Television and Radio Council of Ukraine (“LNC”), originally issued on September 30, 1998⁹³, amended on a number of occasions, the last on January 12, 2006; the scope of this law is the designation and scope of responsibilities of the National Council;
- the Law on Television and Radio Broadcasting (“LTR”), originally issued on December 21, 1993, amended significantly a number of times, lastly on March 1, 2006⁹⁴, and which provides the general rules regarding the functioning of radio and TV in Ukraine.

A) The National Council

288. The LNC establishes the National Council as a “*constitutional permanent collegiate agency*”⁹⁵. Its activities “*shall be based upon the principles of legality, independence, impartiality, transparency...*”⁹⁶. The eight members of the National Council are appointed in parity by the President and the Parliament respectively, for five-year terms with the possibility of a single reappointment⁹⁷. Until 2006, the President and the Parliament could at any time disqualify any of their appointees from office. That was no empty threat: on February 2, 2004 the Parliament’s Committee on Freedom of Speech and Information approved a resolution, recommending that Parliament carry out a “*credibility impeachment*” of all the members of the National Council⁹⁸.

289. Since 2006 the situation has improved because the LNC has been amended, and the National Council *in toto* can be dismissed only upon a vote of no confidence carried by Parliament and confirmed by the President⁹⁹.

290. The National Council derives its status and mandate directly from a constituent law. Its independence and impartiality is expressly guaranteed by that law. Formally, it thus is independent. The appointment of independent regulators by Parliament and/or the Head of State follows wide-spread practice. Before 2006, the power of the President and the Parliament, respectively, to remove their appointees from office indeed represented a threat to Council members’ independence. With the requirement of a concurring decision of both the President and the Parliament for removing the Council *in toto* from office, a safeguard against undue political pressure was introduced.

⁹³ Claimant’s Exhibit CM-2; the Tribunal used Claimant’s translation, to which Respondent has not made any objection.

⁹⁴ Claimant’s Exhibit CM-3; the Tribunal will quote from the translation prepared by Claimant, to which Respondent has made no objection.

⁹⁵ Article 1 of the LNC.

⁹⁶ Article 3.1 of the LNC.

⁹⁷ Article 4 of the LNC.

⁹⁸ See Claimant’s Exhibit CM-31.

⁹⁹ Article 16.5 of the LNC.

291. The level of political interference with the decisions of the National Council is difficult to gauge from the outside. The only incident which is proven beyond any doubt is the interference of the President of Ukraine with the tender of October 19, 2005, which was awarded to the bidder mentioned in the President's letter to the National Council (which will be analyzed in detail below). During the hearing, Mr. Lyasovsky, a member of the National Council, was directly asked whether National Council members follow the instructions of the political establishment. His answer, under oath, was the following¹⁰⁰:

“Well, we’re very accustomed to hearing this kind of language, I’ll be honest and frank. Yes, there have been – there are attempts at putting pressure on the council. However, due to the specifics of how the council is formed, such attempts are ineffective, especially since recently, since amendments were made, passed in 2006. Indeed, we now are an independent body and we’re not subject, or rather we’re immune to pressure”.

292. The answer acknowledges that pressure has been exercised on the National Council, but expresses the contention that since 2006 – when the LNC was amended and the Council was given a higher level of independence – the situation has been improving.

B) The Administrative Procedure for the Issuances of Licences

293. The LTR is an extensive law, comprising 75 articles, regulating the creation, licensing, functioning, supervision and sanctioning of companies operating in the TV and radio sectors. Section III of the Law, as it now stands, is devoted to the rules governing the tender procedure and the issuance of broadcasting licences.

294. From a historical perspective, the system for granting radio licences has gone through four phases:

- in a first phase, between 1993 and 1995, licences were issued by the National Council under Article 14 of the 1993 LTR, upon individual application of persons interested in setting up a radio station;
- after 1995, radio frequencies were awarded by means of tender announced in the press¹⁰¹;
- the third phase began on December 15, 1998, when the National Council became inoperative because it ceased to have five duly designated members, and consequently could not validly carry decisions; during this interregnum, radio frequencies were awarded directly by the State Committee, in clear violation of the LTR¹⁰². The situation was solved in June 2000, when the National Council regained all its members, and a

¹⁰⁰ Mr. Lyasovsky, Hearing Transcript 2 p. 73, at 24.

¹⁰¹ Mr. Petrenko, Hearing Transcript 4, p. 81, at 25.

¹⁰² See Claimant's Exhibit CM-11, letter of National Council member S. Aksenenko to the Vice Prime Minister of Ukraine.

first tender in accordance with the LTR was then organized on January 1, 2001;

- since January 2001, licences have all been awarded by way of tenders supervised by the National Council.

295. The LTR contains detailed rules with regard to the organization of tenders. The decision to launch a tender for new frequencies is adopted by the National Council, then published in the press. Prospective bidders have a one-month period to present their applications, which must include information required by Article 24 of the LTR. Applications are then reviewed by the individual members of the National Council. The criteria of review are now those established in Article 25.14 of the LTR:

“While considering the applications the National Council shall prefer TV/radio organization that:

- a) is capable to fulfill the licence conditions to the best extent;*
- b) prefers socially important programs (informational, social and political, children, etc.), satisfies informational needs of national minorities and secures freedom of speech;*
- c) has an advantage in financial and economical as well as professional and technical capabilities for TV/radio broadcasting;”*

296. The system for deciding the winner of the tender is simple: the National Council holds a formal meeting, the various applications for each frequency are presented, each member of the National Council expresses a vote and the licence is awarded to the applicant supported by at least five members of the National Council¹⁰³. If no applicant reaches this threshold, the frequency is not awarded, although it may be put again to tender on a future occasion.

297. The voting system gives rise to three different issues:

- a) Publicity of the vote

298. The first is the publicity of the vote.

299. The LTR contains no provision regarding the formal requirements of the National Council’s decision. Practices seem to have developed. It is undisputed that in an initial phase, the votes would be cast in a private meeting of the Council, behind closed doors, and that there was no transparency of how each member of the National Council had voted. The parties have debated when this phase ended. Claimant has submitted that the change occurred in 1995¹⁰⁴; while Respondent’s position is that this happened in 2000¹⁰⁵. The evidence submitted by Respondent in order to support its position are minutes of National Council meetings which took place from December 24, 2003 onwards. These minutes list representatives of participating radio companies as “invited persons” present during the discussions.

¹⁰³ This is not controversial; see Respondent’s Post-Hearing Memorial, para. 350.

¹⁰⁴ Claimant’s Reply Memorial, para.104.

¹⁰⁵ Respondent’s Rejoinder, para. 511.

300. The Tribunal concludes that from the end of 2003 onwards, the practice of the National Council has been to “invite” interested parties to attend its meetings. This constitutes a significant improvement in the transparency of the decision procedure.

b) Reasoning of the vote

301. The second issue is the reasoning underlying the votes.

302. The LTR does not require that the votes of each member of the National Council, or the National Council’s decision as such, be reasoned. This derives clearly from the drafting of Article 25 of the LTR.

303. In paragraph 8 of this provision, the law specifically establishes that if the National Council is to exclude a person from participating in a tender, such decision must be “*reasoned*”. In the documents presented in this arbitration there is at least one example of a decision excluding a participant in the tender, and that decision is duly reasoned¹⁰⁶.

304. The situation is different as regards decision for the awarding of frequencies. Paragraph 13 of the same article describes the procedure for awarding the licence to the winner of the tender:

“A decision on the winner of a tender and on broadcast licence issuance shall be made by the National Council within a 30-day period after application period is finished”.

305. It is very telling that for this decision of awarding frequencies the law omits the requirement that it be “*reasoned*” – a requirement which the same article of the Law specifically requires for exclusion of applicants.

306. The administrative practice of the National Council when awarding frequencies adhered to the principle established in the LTR. Respondent has presented a great number of minutes of decisions taken by the National Council. These minutes simply state in favour of whom each member is casting his vote. And if a participant received five votes, the frequency was awarded to him. The minutes do not include any discussion among the members or the reasoning of the decision.

307. The evidence presented in this arbitration does not indicate that before the National Council’s meeting, either the administrative staff of the Council, or its members, prepared a reasoned and researched report with a valuation and ranking of the applications submitted. This is surprising, since Article 25.14 of the LTR orders that in considering the application, the National Council “*shall prefer*” radio organizations that offer socially important programs, satisfy minorities, secure freedom of speech, have better financial resources or professional or technical capabilities. The evidence submitted seems to show

¹⁰⁶ See Respondent’s Exhibit R-350, regarding the exclusion of NBCU from two tenders.

that the National Council made no formal effort to measure to what extent each application complied with the requirements of the Law¹⁰⁷.

308. Respondent has acknowledged that “*the members of the National Council are not obliged by the existing legislation to explain the details of their reasoning during the voting process*”¹⁰⁸. But Respondent has added that in practice the members of the National Council did explain their reasoning at the meeting, during debates with the candidates and during the discussions with other members of the National Council, and after the meetings at briefings with the press. In the opinion of the Arbitral Tribunal, these informal explanations, which started in 2004, although certainly a step forward, do not off-set the absence of any reasoning justifying the vote of each Council Member, and the corporate decision of the National Council as a body.
309. The absence of reasoning of the decision represents a significant weakness in the administrative procedure for the issuance of licences.
310. Thus, a participant who has lost cannot ascertain why his application was rejected, how he was ranked with regard to other participants, and what he could do to improve his chances to be successful in the next bidding.
311. The absence of reasoning also jeopardizes the possibilities of public scrutiny and of judicial review. A Court cannot judge the reasonableness of the National Council’s decision to award the tender to one participant or the other, if there is no formal explanation of the reasons which prompted the decision. Absence of reasoning *de facto* reduces the causes of judicial review to procedural irregularities during the tender.
312. In April 2007, three Deputies from the parliamentary majority proposed to Parliament the creation of an Investigating Committee centred on the activities of the National Council, including the “*transparency and publicity of broadcasting licences issuing and renewal*”¹⁰⁹. Although the proposal of the three Deputies may also have had political motivations, the mere fact that it was presented – it is unclear from the record if the Committee was actually set up¹¹⁰ – proves the existence of significant unease with the degree of transparency and publicity of the procedure for awarding broadcasting licences.

¹⁰⁷ Respondent has submitted that in order to help members of the National Council, an “informational passport” for each region of Ukraine was prepared by National Council Staff (Post-Hearing Memorial, para. 347); but this passport did not include any valuation of the various applications submitted.

¹⁰⁸ Respondent’s Rejoinder, para. 512.

¹⁰⁹ Claimant’s Exhibit CM-86.

¹¹⁰ In Claimant’s Post-Hearing Memorial, para. 71.3, Claimant submits that it was created; in Claimant’s Memorial, para. 32 and Claimant’s Reply Memorial, para. 170, the assertion is that it was proposed.

c) Lack of knowledge of ultimate owners

313. A third characteristic of the system for allocation of frequencies is that participants were under no obligations to disclose the ultimate owners of their companies. While the direct controlling owners of companies bidding for frequencies were registered with the National Council, the owners of the owners were not. The Council members, who deposed as witnesses, when asked on several occasions by counsel to Claimant and by the Tribunal, were not able to provide any information regarding the beneficial owners of the radio companies to whom they had awarded significant numbers of licences¹¹¹.
314. Politically influential individuals are thus able to beneficially own radio stations, which participate in tenders for new frequencies, and to hide behind “ownership chains”, so that their interest in the decision remains undisclosed. This lack of transparency clearly represents a shortcoming of the system. The LTR does not require information about ultimate owners, and the National Council apparently never asked any of the participants to disclose the names of their controlling shareholders. This is especially troubling, since the legal criteria which National Council should apply when selecting the winner must include freedom of speech and financial and economic capability of the applicants – criteria difficult to apply if there is no transparency regarding beneficial owners of radio stations. It also makes it difficult for the public – and for judicial bodies – to determine whether there has been undue influence.

* * *

315. The Tribunal has already stated its respect for Ukraine’s sovereignty and for Ukraine’s right to promulgate the laws which its Parliament deems are best suited to further the Nation’s public interest. The powers of this Tribunal are limited to judging whether Respondent has acted in ways that affect Claimant and breach the FET standard enshrined in the BIT. But in order to value specific measures, the Tribunal must analyze the general legal framework within which specific conduct took place. That analysis has revealed that the procedure presents some shortcomings, which in essence affect:
- the independence of members of the National Council;
 - the existence of an interregnum, during which licences were awarded without tender procedure;
 - the absence of formal valuation of the applications for licences against clearly established criteria;
 - the absence of reasoning for National Council decisions, whether collectively or for individual votes; and
 - the lack of transparency of ultimate owners of radio companies.
316. While none of the above features alone stigmatizes the entire tender process as arbitrary, there is a risk that the shortcomings may end up mutually reinforcing each other. Members of the National Council, by virtue of the designation

¹¹¹ Mr. Lyasovski, Hearing Transcript 2, p. 52, at 17; Mr. Shevchenko, Hearing Transcript 3, p. 13, at 1; Mr. Kurus, Hearing Transcript 4, p. 7.

system, tend to have political affiliations and interests. Deficient disclosure and transparency requirements ease the misuse of discretionary powers by Council members to accommodate political or personal interests. In sum, the procedure for allocating frequencies by the National Council is fraught with shortcomings that facilitate arbitrary decision making.

317. A final note is important: Ukraine gained its independence only in 1991 and still is in the process of developing its institutional framework. During this formative period, legal imperfections are to be expected. Ukrainian law has improved, and after the 2006 amendments of the LTR, a significant number of weaknesses have been ameliorated.

VII.3.4 GALA'S APPLICATIONS FOR ADDITIONAL FREQUENCIES

318. In the preceding section the Tribunal has concluded that the tender procedure for the issuance of licences presents certain shortcomings, which although falling short of disqualifying the entire system as arbitrary, remain relevant for the assessment of the National Council's measures. In this section the Tribunal will establish the facts surrounding Gala's applications for additional frequencies, and will decide whether the actions or omissions of Respondent amount to a violation of the FET standard guaranteed in the BIT to protected investors.

A) Overview of Gala's Participation in Tenders for Additional Frequencies

319. It is undisputed that between 2001 and 2007 Gala Radio participated in a great number of tenders for broadcasting licences, additional to those that were awarded to Gala pursuant to the Settlement Agreement. The exact number of frequencies for which Gala applied, however, is debated. Claimant states that the number of applications amounts to more than 200 for Gala, plus 100 more for Energy (a second chain of radio stations which Claimant tried to create)¹¹². Respondent accepts 180 applications for Gala¹¹³ and 71 for Energy¹¹⁴.
320. What is not disputed is that all those applications were unsuccessful – with one exception: Claimant was awarded the frequency in Chechelnyk, a village of 5,000 inhabitants without any satellite receiver (which implies that the station cannot be linked to Gala's network). It is undisputed that the business relevance of this frequency is minimal. Claimant adds that the National Council's decision to reward Gala's continuing efforts with the awarding of this local frequency in a remote, unconnected village was intended to rub salt in the wound¹¹⁵.

¹¹² Respondent's Reply, para. 167; see also Claimant's Exhibit CM-99 with a list of the applications.

¹¹³ Respondent's Exhibit R 344-A.

¹¹⁴ Respondent's Post-Hearing Memorial, paras. 434 and 453.

¹¹⁵ Claimant's Reply, para. 168.

Claimant's argument

321. Claimant argues that Gala's dismal record in receiving frequencies stands in stark contrast with that of its competitors, all controlled by powerful and well-connected personalities. Claimant gives the following examples¹¹⁶:
- Radio Era applied for 93 frequencies and was awarded 38 (41% success rate); the station is allegedly owned by Mr. Derkach, who is said to be a supporter of the current President of Ukraine;
 - Hit Radio applied for 139 frequencies and was awarded 42 (30%); Claimant alleges that it is owned by Mr. Bagrayev, a Deputy (i.e. member of Parliament) and member of the National Council 2000-2002;
 - NBM Radio applied for 205 frequencies and was awarded 56 (27%); it is allegedly owned by Mr. Poroshenko, also an ally of the current President;
 - Russkoe Radio applied for 111 and was awarded 31 (28%); allegedly also owned by Mr. Bagrayev¹¹⁷.
322. Claimant has produced circumstantial evidence to substantiate that these radio chains are actually owned by the above-mentioned individuals¹¹⁸. During the hearing, Claimant asked the members of the National Council who deposed, to clarify the ownership structure of these radio stations. They all declined, in essence arguing that information regarding beneficial owners is not available to the National Council. The Tribunal also notes that Respondent has not produced any evidence contradicting Claimant's allegations.

Respondent's arguments

323. Respondent's main argument is that Claimant cannot assert a breach of the BIT while remaining at a "macro-statistical" level. Each tender is different from the next, and each applicant is different from the rest. As regards the statistics themselves, Respondent submits that of the 180 frequencies Gala applied for, only 68 were destined for broadcasting a music format that could be similar to Gala Radio's program concept¹¹⁹. Respondent also states that in some tenders which it eventually lost, Gala received the favourable votes of some of the Council members – but it never received the five votes necessary for the awarding of the licence.
324. The main thrust of Respondent's argument is that Gala Radio did not win tenders because it "*is an average radio station*"¹²⁰ and that it is not at the top level of the overall Ukrainian broadcasting market. Its programming concept is no longer as popular and innovative as it used to be. This would, in Respondent's assertion, justify the National Council's decision to deny new licences to Gala.

¹¹⁶ Claimant's Exhibit CM-129.

¹¹⁷ Claimant's Post-Hearing Memorial, para.106.

¹¹⁸ Claimant's Exhibits CM-105, CM-116 and CM-124 and Mr. Lemire's Witness Statement, para. 123.

¹¹⁹ Respondent's Post-Hearing Memorial, para. 438.

¹²⁰ Respondent's Post-Hearing Memorial, para. 447.

The Tribunal's position

325. The Tribunal agrees with Respondent that mere statistics are insufficient for maintaining a claim for violation of the FET standard. But on the other side, statistics do give an overview of how the facts have developed and may provide valuable insight into patterns of behaviour.
326. If an impartial bystander looks at the gross, macro-statistical numbers, an impact cannot be avoided. In six years Gala Radio, a radio company in good standing, although it tried insistently, has not been able to obtain additional frequencies (except in a small village in rural Ukraine and except for the frequencies allocated pursuant to the Settlement Agreement). Whether one takes Claimant's numbers (200 applications for all types of frequencies) or Respondent's (68 applications for music format frequencies similar to Gala's) is really irrelevant. Respondent's number is in fact even more striking, because it refers to cases where the National Council denied Gala an additional frequency for the type of programming it was already offering, and with good success.
327. It is undisputed that Gala's main competitors – Era, Hit, NMB, Russkoe – were much more successful than Gala: they received between 38 and 56 frequencies. Respondent has tried to justify this differential treatment stating that Gala “*is an average radio station*”, that its programming concept is stale and that other competitors offer better broadcasting.
328. The problem with Respondent's argument is that, since the National Council does not reason or explain its decisions, it is totally impossible for a third party (be it a local judge or this Tribunal) to verify whether Gala's applications were rejected because its programming concept was worse than that of its competitors (as Respondent now submits), or due to some other cause, and whether this cause was good, arbitrary or discriminatory.
329. A suspicion in any case remains: if Gala, as Respondent readily admits, “*is an average radio station*”, the natural consequence would seem to be that Gala should have had an average success rate in its tenders. And the record shows that it had a success rate which was much below average.
330. Summing up, the Tribunal feels that the macro-statistical analysis cannot provide conclusive evidence that Respondent has violated the FET standard; but the overall numbers, the absence of any reasonable explanation, the strikingly different success rates of Gala and of its competitors, the impossibility of verifying the reasons why Gala was rejected, are all factors which cast doubts on the decisions of the National Council.
331. In order to substantiate these doubts, it is necessary that the Tribunal analyze each of the tenders in particular. This will be done in the next sections.

B) The Tender of October 19, 2005 and the Interference of the President of Ukraine

Undisputed facts

332. On July 2004 the National Council announced a tender for 15 frequencies, with the special condition that the channel thus created be used solely for “informational broadcasting”. Radio channels which exclusively or predominantly broadcast music, like Gala or Kiss, are of limited political relevance. Informational channels, however, are politically more sensitive, since they represent important elements for the formation of public opinion.

333. It is an undisputed fact that on July 20, 2004, i.e. four days after the announcement of the tender, the President of Ukraine sent a “Doruchennya” to Mr. Shevchenko, the Chairman of the National Council, which literally stated as follows¹²¹:

“DORUCHENNYA OF THE UKRAINIAN PRESIDENT

...

*To: O. SHEVCHENKO
O. GAJDUK*

In accordance with the set procedure to consider the matter relating to the allocation of the frequency resource to “Radio Era” and “Radio Kokhannya”

Signed V. YUSCHENKO”.

334. The “Doruchennya” included a further paragraph, addressed to top officials of the Ukrainian Government and the City of Kiev, asking for support for the activities of TRC “Era” and “Radio Era”.

335. Radio Era was an already existing talk radio, broadcasting informational programs. Claimant has alleged that Radio Era (and Radio Kokhannya) are widely reported to be owned by Mr. Derkach, a political ally and supporter of the current President of the Ukraine.

336. There has been some discussion about the precise translation of the word “Doruchennya”. During the hearing the Chairman of the National Council Mr. Shevchenko was questioned regarding the precise meaning, and it was agreed that the best English translation would be “instruction”, not “order”¹²².

337. The “Instruction” was followed up by a letter sent on August 2, 2005, in which the “First Deputy State Secretary of Ukraine” asked Chairman Shevchenko to “*inform the Secretariat of the President of Ukraine of status of the task commissioned by the Head of the State*”¹²³.

¹²¹ Claimant’s Exhibit CM-45.

¹²² Mr. Shevchenko, Hearing Transcript 3, p. 161, at 19; Claimant has accepted the translation; see Claimant’s Post-Hearing Memorial, fn. 271.

¹²³ Claimant’s Exhibit CM-108.

338. The record shows no letter from either Mr. Shevchenko or the National Council reacting either to the “Instruction” or to the Secretariat’s reminder.
339. On October 19, 2005 the National Council decided to award the 15 frequencies on tender to Radio Era. It is undisputed that during the discussion which led to the Council’s decision, a deputy of the Ukrainian Parliament called Derkach attended the meeting. Radio Kokhannya was later on awarded 12 frequencies more.

Claimant’s position

340. In Claimant’s view, Gala lost the tender to Radio Era due to the President’s intervention and then later due to the physical presence of a Parliamentary Deputy at the tender meeting itself. The tender was procedurally improper, and the outcome was unfair, inequitable, arbitrary and discriminatory. As a consequence of these measures, Claimant lost the opportunity to establish a separate talk radio format in an FM format that solely focused on news, informational programs, culture, education and sports¹²⁴.

Respondent’s position

341. Respondent asserts¹²⁵ that the channel was awarded to Radio Era in view of the latter’s supremacy in information broadcasting. The message of the President, in Respondent’s view, did not constitute an order. Deputy Derkach does not own Radio Era and did not intervene in the National Council’s deliberation. Thus, no undue influence was exercised on the National Council’s tender decision.

The Tribunal’s position

342. The National Council was established by the LNC as a “*constitutional permanent collegiate agency*”; and its activities “*shall be based on the principles of legality, independence, impartiality, transparency...*” (Articles 1 and 3 of the LNC). Decisions on the allocation of radio frequencies in particular are to be made in accordance with a tender process and tender evaluation criteria prescribed by law (see Article 25 of the LTR). Independence and impartiality of National Council members from other State bodies is pivotal to the integrity of the system.
343. Any interference by a State body in the statutory tender process and the supposedly independent and impartial evaluation of tenders must therefore be considered as violating both the LNC and the LTR. This applies especially to any interference by the President, who appoints and reappoints half of the members of the National Council. It must also be remembered that at the time of the Instruction, members of the National Council could be removed by a decision of the President.

¹²⁴ Claimant’s Post-Hearing Memorial, para. 92.

¹²⁵ Respondent’s Post-Hearing Memorial, para. 398.

344. Taken literally, the “Instruction” of the President only states that the Chairman of the National Council shall “*in accordance with the set procedure [...] consider the matter relating to the allocation of the frequency resource to “Radio Era” and “Radio Kokhannya”*”. Respondent, supported by the deposition of Messrs. Shevchenko and Kurus, tries to depict the message as a routine call by the President on the National Council to do its job.
345. The Tribunal does not have to decide whether the message qualified as a Presidential order which must be obeyed. As noted before, it is sufficient if it constituted an interference with the independent and impartial decision-making process of the National Council, i.e. an indication of the President’s expectations with respect to the pertinent decisions.

Impact of the “Instruction”

346. Did the “Instruction” from the President amount to interference?
347. Respondent submits that the “Instruction” should be construed exclusively on the basis of its plain language, and that it amounts to no more than an admonition to the National Council to do its job. No explanation has, however, been given why the National Council needs such an admonition. In the hearings of the present case, National Council members Shevchenko and Kurus could not refer to any similar action of the President, before or after this incident. Its singularity draws attention to the Presidential message and heightens its potential to influence decision making.
348. Moreover, the message was written in the context of an instruction to other State officials to “*remove obstacles*” to Radio Era’s activities and “*report on the measures taken*” within seven days. The different language used for addressing these officials, who do not enjoy independence guaranteed by law, and the National Council Chairman, respectively, shows the President’s awareness of the National Council’s independence. Yet, it also reflects the President’s standing in support of Radio Era.
349. An additional factor to be borne in mind is that within two weeks of the Presidential “Instruction”, but before the pertinent tender decision, the Secretariat enquired on the status of the “*task commissioned*” by the President. This letter is a clear indication of the President’s support of Radio Era’s offer and his expectation that his message would be duly taken into account in the process.
350. In these circumstances, the attendance at the decisive National Council meeting on October 19, 2005 by Deputy Derkach is clearly more than a routine participation of a deputy in a Council meeting. It appears as a demonstration of vigilance, intended to remind Council members that their decisions are watched.

Deputy Derkach

351. It has proven impossible for the Tribunal to ascertain whether Mr. Derkach actually owns or is somehow connected to Era Radio, as alleged by Claimant. Specifically asked by the Tribunal, Chairman Shevchenko could not confirm whether Mr. Derkach was the owner of Era Radio, nor could he give any information regarding the person or persons who controlled this radio station¹²⁶. It is highly implausible that the Chairman of the National Council, who had been twice elected as a Parliamentary Deputy, who had received an “Instruction” from the President to consider Era’s application favourably, and who voted in favour of awarding Era the licences to strengthening it as a leading broadcaster in Ukraine, should remain completely unaware of the ownership structure of this company.
352. In any case, for present purposes it suffices to record that, as documented by Claimant, Mr. Derkach has been reported in the media as being associated with Era Radio¹²⁷, so that his presence at the National Council meeting must have been perceived as a supporter of this radio station. It can also remain open whether he has expressed his support by his body language, as maintained by Claimant. His mere attendance at this meeting in conjunction with his publicly reported association with Radio Era constitutes an action in support of this applicant.

Respondent’s counter-argument

353. Respondent has asserted that the President’s “Instruction” was inconsequential, because the channel of frequencies in question had been reserved for informational broadcasting and Radio Era was the national champion in this market segment. Even Claimant concedes that according to a market survey (the so-called “SIREX Report”) Radio Era was the national leader on information broadcasting, with an established track record, while Gala intended to set up a new “talk format radio network” in order to satisfy the tender condition. Claimant adds, however, that in accordance with the SIREX Report Gala was number two (after Radio Era) in news broadcasting, and Radio Era’s closest competitor¹²⁸.
354. The Arbitral Tribunal is again confronted with the impossibility of reviewing the reasons underlying the National Council’s decision. A decision in favour of the established leader in the relevant field over a newcomer may under certain circumstances be appropriate. But Article 25.14 (b) of the LTR also orders the National Council to take into account the objective of “*secur[ing] freedom of speech*”. Since Radio Era already had a radio network, pluralism could arguably be better served if the new channel was awarded to a different company. Gala had a realistic prospect of winning this tender against Radio Era, and such opportunity was taken away by the Presidential interference.

¹²⁶ Mr. Shevchenko, Hearing Transcript 3, p. 172.

¹²⁷ Claimant’s Exhibits CM 105 and CM 124; Claimant’s Post-Hearing Memorial, para. 81.

¹²⁸ Claimant’s Post-Hearing Memorial, para. 91.

355. The President’s “Instruction” referred not only to the tender applications of Radio Era, but also to those of Radio Kokhannya. It is undisputed that radio Kokhannya received 12 frequencies from July 2005 through January 2006¹²⁹, in tenders in which Gala also participated.

Decision

356. In light of the aforementioned circumstances, the Tribunal concludes that the President’s “Instruction” amounted to interference with the independent and impartial decision of the National Council in favour of two of Claimant’s competitors – Radio Era and Radio Kokhannya. It thus constituted a violation of applicable Ukrainian legislation, namely the LNC and LTR, which meets the *Saluka* test, since it “*manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination*” and thus amounts to an “*arbitrary or discriminatory measure*” within the meaning of Article II.3 (b) of the BIT. Furthermore, the apparently politically motivated preference for one competitor represents a discrimination against Claimant, who was applying in the same tender processes for the same frequencies.
357. In conclusion, the Tribunal determines that when the National Council at the meeting of October 19, 2005 granted 15 frequencies for an information broadcasting channel to Radio Era, and subsequently awarded 12 frequencies to Radio Kokhannya, such decisions violated the FET standard established by Art II.3 of the BIT.

C) The Tender of May 26, 2004 for an AM Frequency

358. In May 2004 Gala applied for an AM frequency for Kiev, together with two competitors (Odessa Legal Academy and Charity Public Fund Radio). In the National Council meeting on May 26, 2004, the two competitors received each four votes and Gala secured one vote. As no application was supported by the requisite five votes, the National Council cancelled this tender, convened a new tender and awarded the frequency to NART TV.
359. Gala has been broadcasting on FM frequencies, which are appropriate for a program based fundamentally on music. The AM frequency is not suitable for music programs but only for talk and information programs.

Claimant’s position

360. Claimant submits that with the AM frequency for which it was applying, Gala had intended to establish a new talk radio format¹³⁰. Gala was the only qualified applicant in the May 26, 2004 tender, as its competitors lacked the necessary financial resources, radio experience and management capability. Notwithstanding Gala’s qualifications, in an arbitrary and *discriminatory* decision the National Council decided not to award the frequency to Claimant, to retender it and to issue to NART TV, a company which had the correct political connections.

¹²⁹ See Mr. Lyasovski, Hearing Transcript 2, p. 81, at 23.

¹³⁰ Claimant’s Post-Hearing Memorial, para. 114.

Respondent's position

361. Respondent contests Gala's assertion that it was the only qualified applicant in the May 26, 2004 tender¹³¹. In Respondent's view, Gala's competitors did have adequate resources and capabilities and Gala's failure can be explained by the lack of experience in informational talk programs and the perception by Council members that Gala was a music channel, without an information broadcasting concept.

The Tribunal's position

362. The Tribunal has already established (see paragraph 271 *above*) that Mr. Lemire's expectations, when in 1995 he started his investments in the Ukrainian radio sector, were to create two channels, one in FM and the other in AM. The concepts for both programs would have been different: the FM channel would be based on music, the AM channel structured as a talk radio (because AM technically is not appropriate to broadcast music in a quality format).
363. In May 2006 the National Council put to tender an AM frequency in Kiev with 50 kW. This was an important tender, since AM frequencies are powerful and have an extensive range of coverage. Claimant has asserted¹³² that the frequency to be awarded actually covered a radius of 800 to 1000 km around Kyiv, i.e. the entire Ukrainian territory. Whoever won the tender for this frequency would be able to create a talk radio network, and broadcast news and information to the entire nation.
364. It is undisputed that the only participants in the tender, in addition to Gala, were the Odessa Legal Academy (a University) and Charity Fund Radio. In its meeting of May 26, 2006 the National Council rejected all three applications. The reasons for the Tribunal's decision have never been made public. The only document in the file referring to the decision is the minutes (not the transcript) of the meeting of the National Council¹³³. These minutes state only that the two other applicants received four votes each and Gala only one. There is no explanation of the decision, not even a summary of the presentations made by the applicants.
365. During the hearing Chairman Schevchenko was expressly asked about the reasons underlying the National Council's decision. His explanation was very vague¹³⁴:

"But in this particular case, I must say that Gala Radio had fewer chances to become a winner of this contest because in many indicators was lagging behind the other contestants. Therefore the results of this voting is not accidental. I can explain to you my motives in voting this way, but it did not win this competition due to objective reasons".

¹³¹ Respondent's Post-Hearing Memorial, para. 460.

¹³² Claimant's Memorial, para. 173.

¹³³ Respondent's Exhibit R-79.

¹³⁴ Mr. Shevchenko, Hearing Transcript 3, p. 102, at 18.

366. In its Post-Hearing Memorial, Respondent justifies the National Council's decision by saying that the National Council was under the impression that Gala intended to broadcast music on the AM frequency, since Gala never presented to the National Council a different concept. As evidence of this assertion, Respondent only relies on a statement from Chairman Shevchenko. Claimant has submitted that it presented a talk radio proposal for the AM channel¹³⁵. In the Tribunal's opinion, Claimant's position is more plausible. It makes no business sense to broadcast a music program through an AM channel, and it seems unlikely that Mr. Lemire, an experienced radio operator, would be proposing such a business plan. Unfortunately, with the evidence presented by Respondent in this procedure, it is impossible to ascertain what Mr. Lemire actually told the National Council with regard to his plans. Mr. Lemire had the opportunity to speak at the Council's meeting, but Respondent has only produced the minutes, not the transcripts of this meeting.
367. Summing up, the Tribunal accepts as proven that Gala proposed to create a radio channel with talk radio format, and that for reasons which have not been explained, the National Council decided not to award the frequency to Claimant.
368. There is a second important factual element: the National Council decided, in the same meeting in which it rejected Gala's bid, to retender the same frequency (and this decision was carried unanimously). Only four months thereafter, in September 2004, the new tender was announced. The frequency was awarded on December 21, 2004 to NART TV, through a tender in which Gala did not participate. Claimant has asserted, and has presented circumstantial evidence¹³⁶ proving that NART TV is associated with Mr. Tretwakov, the head of financial affairs in the campaign of President Yuschenko¹³⁷. After obtaining the frequency, NART TV never used it. The National Council cancelled it and announced new tenders in 2007 and 2008, in which Gala did not participate.

Decision

369. The Tribunal must decide whether the National Council's decision in May 26, 2004, denying Gala the AM frequency in Kyiv, and then immediately thereafter retendering the frequency, and awarding it in December 2004 to NART TV, violates the FET standard, by constituting an arbitrary or discriminatory measure. After due consideration, and not without some hesitation, the Tribunal comes to the conclusion that there is a preponderance of evidence showing that the National Council's decisions indeed were arbitrary and discriminatory.
370. The decisions of the National Council in May/December 2004, to reject Claimant's application and award the frequency to NART TV, must be viewed together with the decision of October 2005, denying Gala's application for a FM channel, and granting it to Radio Era. Both decisions affected talk radio

¹³⁵ Claimant's Reply Memorial, para. 204.

¹³⁶ Claimant's Exhibit CM-106.

¹³⁷ Claimant's Reply Memorial, para. 206.

channels devoted to information. In both, Claimant was denied the licence, and in both the licence was awarded to radio companies which – in accordance with circumstantial evidence – are owned by or associated with persons closely connected with the Government. The Tribunal has already decided that the October 2005 decision, in which 15 FM frequencies were granted to Radio Era, violated the FET standard. The same consideration must be extended to the decision of the National Council affecting the AM frequency and adopted in the period May/December 2004.

371. The *Saluka* test requires that the National Council’s decision “*manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination*”. The Tribunal finds that the National Council’s decisions to award the AM frequency to NART TV and to deny it to Gala, meets these requirements. In reaching this conclusion, the Tribunal relies on the following factors:

- Claimant’s expectation that it would be awarded an AM licence and that it would be granted the possibility of setting up a talk radio channel;
- the utter absence of any reasoning justifying why the National Council denied Claimant’s request to be awarded the AM frequency in the initial tender;
- the immediate decision of the National Council of retendering of the frequency, the announcement of the new tender four months thereafter and the subsequent issuance of the licence in favour of NART TV; and
- the total lack of official information regarding the ultimate ownership of NART TV.

372. The findings of the Tribunal are not affected by Claimant’s failure to participate in the second tender. In his deposition, Mr. Lemire explained that he had decided not to participate, because he deemed the effort futile¹³⁸. The justification is reasonable. Given that Gala had been unsuccessful in the first tender, in which the other participants were weak and inexperienced operators, its chances of succeeding in the retender, in which a high profile company like NART TV participated, were likely nonexistent. The arbitrary and discriminatory nature of the Council’s decisions arises from the rejection of Claimant’s initial application, the immediate retender and the awarding of the channel to a politically influential applicant. Whether Claimant participated or not in the second tender is immaterial for the Tribunal’s decision.

D) The Tender of February 6, 2008 With 40% Ukrainian Language Requirement

373. The tender of February 6, 2008 had a singular characteristic: the frequencies to be awarded were subject to an additional language requirement, namely that 40% of the program had to be in the Ukrainian language (this being in addition to the 50% Ukrainian music requirement under the 2006 LTR).

¹³⁸ Mr. Lemire, Hearing Transcript 1, p. 273, at 25.

Claimant's position

374. Claimant submits that Gala competed with Kiss FM radio (the station whose ultimate owner allegedly is Mr. Bagrayev) for a number of frequencies in this tender¹³⁹. At that time, Gala was broadcasting 37% of its program in Ukrainian language and thus fell 3% short of the tender condition. (Additionally Gala was meeting a second requirement introduced by the 2006 amendment to the LTR: in more than 50% of the music broadcast, the author, the composer or the performer were Ukrainian). When in the February 6, 2008 meeting of the National Council Mr. Lemire tried to explain how Gala would reach compliance with the 40% tender condition, he was cut off by Council member Kurus with the words: *"It's very straightforward, I must say. According to the tender requirements, you must have no less than 40 percent"*. Mr. Lemire was not allowed to give any further explanation.
375. During the same meeting, a member of the National Council Secretariat reported the corresponding figures of Kiss: share of songs in Ukrainian language 1%, share of music by Ukrainian authors and performers 11%. Nevertheless, Kiss received three frequencies in the February 6, 2008 tender, and Gala received none.
376. When National Council Chairman Shevchenko, in the December 8 – 12, 2008 hearings of the present case, was confronted with the transcript of the February 6, 2008 Council meeting, he explained that applicants were not required to comply before the tender with the 40% Ukrainian language condition, but that they had to demonstrate how they would meet this condition in the future (*"what they had before the competition doesn't matter"*). In Claimant's interpretation, Mr. Shevchenko, who voted for Kiss FM, has admitted that his decision was pre-determined before the National Council meeting discussed the case.

Respondent's position

377. Respondent, without refuting Claimant's allegations in detail, argues that Mr. Shevchenko's testimony as relied on by Claimant with respect to the February 8, 2008 tender *"is of no probative value"*¹⁴⁰. In Respondent's view, Claimant confused Mr. Shevchenko by referring him to parts of the transcript relating to tenders other than those won by Kiss. Kiss FM had won the tender for the frequency 89.0 for Ternopil against 14 competitors, while Mr. Shevchenko had been referred to the discussions of the tenders for frequencies for Sumy and Ivano-Frankivsk. Notably the record of Kiss FM was reported in the context of Ivano-Frankivsk. As Mr. Shevchenko's testimony did not relate to the discussion of a tender won by Kiss FM, it cannot provide the basis for a comparison of the treatment of Kiss and Gala, respectively.

¹³⁹ Claimant's Post-Hearing Memorial, para.105.

¹⁴⁰ Respondent's Post-Hearing Memorial, para. 433.

378. Respondent does not, however, explicitly refute Claimant's allegation that all tenders discussed in the February 8, 2008 meeting were equally subject to the 40% Ukrainian language condition.

The Tribunal's position

379. Since there are divergencies between the parties regarding the facts, it is important that, as a preliminary step, the Tribunal establish as precisely as possible what actually happened.

380. On February 6, 2008 the National Council met, in order to award a large number of frequencies. Mr. Kurus, a member of the National Council, has deposed during the hearing that every frequency to be issued during that meeting was subject to the requirement that at least 40% of its programming be broadcast in Ukrainian¹⁴¹.

381. An official transcript of the meeting, prepared by the National Council itself, and consequently of high probative value¹⁴², reveals the following incidents:

- Mr. Lemire was asked to speak during the tender for the frequencies in Sumy Oblast; although Gala had applied for a number of frequencies, the transcript shows that not all participants were invited to speak at each of the tenders; this tender was the only occasion when Mr. Lemire was authorized to speak; he explained that Gala Radio was complying with the 50% Ukrainian music requirement, and that the Ukrainian language percentage was 37%. He was interrupted by Mr. Kurus, a member of the National Council, who said: *"It is very straight forward, I must say. According to the tender requirements you must have no less than 40%"*;
- during the tender for Ivano-Frankivsk – in which Gala, Kiss and many other radio stations participated – President Shevchenko requested Mr. Sokur, a civil servant from the National Council, to provide the relevant statistics for Kiss (the official name of which is Utar TV and Radio Broadcasting UC); his answer was the following: *"We have statistics for Utar TV and Radio Broadcasting UC as a competitor. And the figures are the worst. The share of music by national authors and performers is only 11% and the share of songs in Ukrainian 1%"*;
- during the hearing, Chairman Shevchenko was cross examined with regard to this statement; he accepted that statistic prepared by National Council staff were correct¹⁴³ and that if it were proven that Kiss was only broadcasting 11% Ukrainian music, this would constitute a violation of the law¹⁴⁴; as regards the 1% Ukrainian language content, his explanation was that the percentage before the tender was irrelevant,

¹⁴¹ Mr. Kurus, Hearing Transcript 4, p 42, at 12; Mr. Shevchenko, when asked the same question, answered that there *"could be different conditions for different frequencies"* (Tr. 3, p. 138, 6); the Tribunal, after reviewing the transcript of the National Council meeting, coincides with Mr. Kurus' opinion, because references to the 40% requirement appear repeatedly when discussing various frequencies.

¹⁴² Respondent's Exhibits R-351 and R-352.

¹⁴³ Mr. Shevchenko, Hearing Transcript 3, p 81, at 16.

¹⁴⁴ Mr. Shevchenko, Hearing Transcript 3, p. 89, at 11.

what was important was that the bidder had a good program concept, and in future could reach the 40% threshold¹⁴⁵.

382. There has been some discussion among the parties regarding which radio company won which frequencies during the February 6, 2008 National Council meeting. It is undisputed that Kiss won the frequency for Ternopil with seven of the eight votes, because a copy of the official transcript clearly states so¹⁴⁶. Claimant submits that Kiss won two additional tenders. Respondent has not provided clear evidence for this fact (because the transcript is not complete). It is undisputed that Gala was awarded no frequency.
383. At the core of Claimant's grievance is the unequal treatment of Gala and Kiss with respect to the Ukrainian language tender condition. This condition applied to all tenders – including the tender for Ternopil won by Kiss FM and all the tenders lost by Gala. But it was interpreted in a completely different way when applied to Gala as compared to Kiss. Respondent has tried to defend the National Council's record, stressing that the different interpretations were voiced in different tenders. The argument is unconvincing, because all tenders had the same basic requirement. And the fact remains that Kiss has been awarded (at least) a frequency, despite its nearly nil Ukrainian language record and its violation of the 50% Ukrainian music requirement (known to the National Council), while Gala has been disqualified on the basis of a much stronger record.
384. As noted before, a measure violates Article II.3 (b) of the BIT if it is either “discriminatory” or “arbitrary”. It is readily apparent from the record that Gala and Kiss were treated differently in a similar case (i.e. on the same issue in the same tender proceeding, although not necessarily for the same frequency) without justification and, worse, in violation of applicable tender conditions. According to Article 25.14 (a) of the LTR, in its tender decisions the National Council must prefer applicants “capable to fulfil the licence conditions to the best extent”. The Ukrainian language requirement was a highly relevant condition for all the tenders, and Gala's capability of fulfilling that condition was far superior to that of Kiss. While Kiss won at least a tender, Gala's record was pretextually discounted in order to exclude it from further consideration.
385. Although not every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET standard, in the Tribunal's view a blatant disregard of applicable tender rules, distorting fair competition among tender participants, does. In conclusion, the Tribunal considers that when the National Council at its meeting of February 6, 2008 decided to award at least a frequency to Kiss, and to deny all applications submitted by Gala, such decision violated the FET standard required by Article II.3 of the BIT.

¹⁴⁵ Mr. Shevchenko, Hearing Transcript. 3, p. 82, at 23

¹⁴⁶ Respondent's Exhibit R-352, p. 10.

E) The Tender of November 20, 2002 in Which Claimant Was the Only Applicant

386. On November 20, 2002, the National Council denied Gala's application for a frequency for the city of Zhytomir, although Gala was the only applicant in this tender. The National Council's decision to reject Claimant's application for Zhytomir was not reasoned. Without providing further specifics, Claimant regards this decision as a violation of the FET standard¹⁴⁷.

The Tribunal's position

387. Claimant is only alleging two circumstances in order to prove the arbitrary or discriminatory character of the National Council's decision to reject the Zhytomir application:

- that Gala was the only applicant; and
- that the decision was not reasoned.

Factual situation

388. Before analyzing these circumstances in more detail, it is important to stress that the factual situation asserted by Claimant with respect to this tender was quite different from that pleaded and decided in section C). In the case of the AM channel, what happened was that Claimant's application was denied, and immediately thereafter the same frequency was assigned to a competitor, who apparently enjoyed privileged political connections. In the Zhytomir decision there is no allegation that the channel was afterwards retendered and awarded to a third party, in circumstances which could represent a violation of applicable rules. Nor does Claimant make any other indication of impropriety with regard to the actions of the National Council.

389. The starting point of the Tribunal's analysis must be whether the Zhytomir decision violated Ukrainian Law. In accordance with the practice of the National Council, which conforms with the LNC (Article 26.4), every allocation of a broadcasting licence required the affirmative vote of a majority of members, i.e. five. The same rule applied for tenders with only one participant. The single applicant had to secure five supportive votes in order to win the tender; otherwise the frequency was not allocated at all.

390. The lack of reasoning does not by itself constitute a violation of the LTR. As has already been explained (see paragraph 303 above), the LTR only requires reasoning for the National Council's decisions not to allow a company to participate in a tender (Article 25.8) – but not for the decision to award or deny the frequency (Article 25.13).

391. Against these rules, Gala's position as the single applicant did not *ipso iure* entitle it to the Zhytomir frequency, but only to an unbiased consideration of the application in accordance with the statutory guidelines. The burden of

¹⁴⁷ Claimant's Post-Hearing Memorial, para. 118.

proof that the decision was discriminatory or arbitrary (or otherwise violated the FET standard) lies with Claimant.

The National Council's decision

392. The National Council's decision denying Gala's application could never be considered discriminatory, because in this case no third party existed which benefited from it.
393. It could nevertheless be arbitrary.
394. After due consideration, the Tribunal rejects Claimant's assertion, for want of sufficient evidence. Under Ukrainian law, the National Council was entitled to deny a licence, even if the applicant was the only entity applying, and Ukrainian law does not require that decisions be reasoned. The Tribunal has already indicated that the absence of reasoning represents a significant weakness in the administrative procedure for the issuance of licences (see paragraph 312 above). But this weakness does not imply *ipso iure* that all unreasoned decisions of the National Council are arbitrary. For a decision to be considered arbitrary, an additional element of lack of probity must have been pleaded and proven. Claimant has not succeeded to do so in the case of the Zhytomir frequency, and consequently Claimant's challenge to the National Council's decision fails.

F) The Tender of October 19, 2005 in Favour of NMB Radio

395. On July 16, 2005 the National Council announced a tender for 29 frequencies grouped in a channel, which was to broadcast in Ukrainian only, with 100% Ukrainian language content. On October 19, 2005, NBM Radio was awarded this channel in a tender with 14 applicants, including Gala.

Claimant's position

396. According to Claimant, NBM Radio is owned by Mr. Poroshenko, a friend and political ally of the President. Claimant asserts¹⁴⁸ that the outcome of the tender was pre-determined and that the channel of 29 frequencies was specifically calculated for NBM Radio, as evidenced by the fact that NBM Radio was the only one of the 14 applicants for this channel that had no overlap in its coverage with the frequencies allocated for tender. Claimant has also produced minutes of a meeting in Gala on February 21, 2003 where Mr. Zhebrodki, a manager of the State Centre, allegedly stated that the State Centre had received applications for frequencies from NBM and had "*to do something about it, since Mr. Poroshenko has become a National Security Advisor*"¹⁴⁹.

¹⁴⁸ Claimant's Post-Hearing Memorial, para. 98.

¹⁴⁹ Claimant's Exhibit CM-143.

Respondent's position

397. Respondent pleads ignorance regarding Mr. Poroshenko's ownership of NBM Radio¹⁵⁰ and submits that some 15 companies had participated in the tender (rather than 14 as alleged by Claimant), that these applications were discussed in meetings of the National Council during October 19 – 26, 2005, and that Radio NBM was awarded the channel because it best promised compliance with a key tender condition. This condition was to broadcast in Ukrainian language only with a 100% "Ukrainian content". While Claimant in the hearing of the National Council had criticized this tender condition, NBM Radio had promised full compliance and referred to its already superior record in this respect.

The Tribunal's position

398. Claimant submits that the October 19, 2005 National Council decision awarding 29 frequencies in favour of NMB Radio was arbitrary and discriminatory; the evidence presented is the following:

- (i) NMB Radio is owned by Mr. Poroshenko, a close ally of the President;
- (ii) the channel was specifically calculated to fit with NMB's present coverage;
- (iii) a statement from Mr. Zhebrodki, Manager of the State Centre; and
- (iv) a threat of prosecution from the National Council against Mr. Lemire.

399. The Tribunal will analyse each piece of evidence separately.

Valuation of the evidence

400. (i): As regards the ownership of NMB Radio, the Tribunal has again been unable to ascertain the ultimate owner because all the members of the National Council have deposed that they lack this information¹⁵¹. The deposition is so implausible, that the Tribunal – in the absence of any convincing evidence to the contrary - is prepared to accept the circumstantial evidence presented by Claimant and assume that Mr. Pereshenko is indeed the owner of NMB Radio. But even if this is assumed, and also that he is an ally of the President of Ukraine, these circumstances give rise to some suspicion but, in the absence of any further evidence of political interference, fall short of indicating a manipulation of the tender process.
401. (ii) and (iii): Claimant further alleges that the channel of 29 frequencies had been specifically calculated for NBM Radio to enhance its national coverage. The only evidence submitted to prove this point is the statement from Mr. Zhebrodski (a manager of the State Centre)¹⁵². This statement was apparently made during a private meeting at Gala's premises held with certain

¹⁵⁰ Respondent's Post-Hearing Memorial, para. 408.

¹⁵¹ See Respondent's Post-Hearing Memorial, para. 410.

¹⁵² Claimant's Post-Hearing Memorial, para. 101.

officers of the company, identified simply as “Natalie, Dima, Kid”. Neither Natalie, Dima nor Kid have appeared as witnesses in this arbitration or even submitted a witness statement. Then, after the meeting, some unidentified person prepared a transcript, translating what undoubtedly was spoken in Ukrainian into English. This two page English transcript is what has been presented, and there Mr. Zhebrodski is quoted as saying. “*Right now we have applications from NMB and Channel 5 and we have to do something about it, since Poroshenko has become a National Security Advisor*”¹⁵³.

402. This evidence is weak. There is no certainty that Mr. Zhebrodski actually used these words, that they were correctly recorded and then correctly translated into English. But even if *arguendo* the quotation is accepted as true, Mr. Zhebrodski only indicates that the prominent position of Mr. Pereshenko (not necessarily his relationship with the President) added some sense of urgency for the State Centre to perform its duties (i.e. to calculate frequencies in the presence of applications); it did not necessarily imply any manipulation.
403. (iv): Finally, there is the alleged threat of prosecution by the National Council. What happened is that on September 15, 2005, Mr. Lemire sent a letter to the National Council, asking for a general suspension of tenders in view of allegations of corruption against the Ukrainian Government and also against the National Council¹⁵⁴. As a reaction to this letter, on September 21, 2005, the National Council adopted a decision declaring Mr. Lemire’s allegations “*groundless and far-fetched*” and “*consider[ing] them as the tool of exerting pressure on the National Council management*”, and informing the public of the “*blackmail efforts*” undertaken¹⁵⁵.
404. The documentary record does not evidence any threat of prosecution from the National Council. What seemed to have happened is that Claimant sent a strongly worded letter (to use an understatement) to the National Council, with copies to the President and the Prime Minister and to the American Ambassador, and that the National Council reacted with a decision, also drafted in strong terms, rejecting the accusations and describing Claimant’s behaviour as blackmail.
405. Summing up, the Tribunal considers that each piece of evidence submitted by Claimant, by itself, is not sufficient to support an allegation that the tender decision was arbitrary or discriminatory. The Tribunal has finally considered whether the evidence in the aggregate might establish conclusive evidence of a manipulation of the tender process, even if none of these circumstances did so by itself. Such a conclusion might be appropriate in the absence of a plausible explanation for the result of the tender decision. Thus, it is necessary that the Tribunal analyse the details of the National Council’s decision.

¹⁵³ Claimant’s Exhibit CM-143.

¹⁵⁴ Claimant’s Exhibit 30 to Request of Arbitration.

¹⁵⁵ Claimant’s Exhibit CM-39.

The decision to award the frequencies

406. The record of this arbitration includes the transcript of the meeting of the National Council on October 19, 2006, in which both Gala and NBM (among various others) made presentations to defend their applications¹⁵⁶. NMB spoke first, explaining that NBM Radio had started 10 years ago, and that it was the first radio station that conducted and continued to conduct the broadcasting exclusively in Ukrainian¹⁵⁷. Gala, who spoke afterwards, accepted that the tender *“is an entirely different format, not the format of Gala radio Company¹⁵⁸”* and declared that it would comply with the requirements of the National Council *“that all DJ’s must speak Ukrainian, there should be Ukrainian music, and thus shape and form Ukrainian culture”*. Mr. Lemire finally added a phrase which could be understood to express some challenge to the National Council’s determination that the channel should be 100% Ukrainian: *“We should allow the audience to determine what it wants and we think that since Ukraine is seeking the status of a country with a market-economy, it should not introduce Ukrainian culture by force – it needs to be developed¹⁵⁹”*.
407. The National Council had defined as a fundamental condition for the new channel that it be 100% in Ukrainian. This was a legitimate decision, based on a public interest choice to extend the use of Ukrainian in the media. When awarding licences, the first criterion which the National Council must take into consideration is whether the winner will be able to fulfil the conditions to the best extent (Article 25.14 (a) of the LTR). Applying this criterion to the present tender, it seems both plausible and legitimate that NMB’s and Gala’s different experience and attitude towards broadcasting 100% in Ukrainian, swayed the Council members’ votes in favour of Radio Era.
408. Against the satisfactory explanation of the tender decision, the four circumstances alleged by Claimant cannot be accepted as evidence of a manipulation of the tender process amounting to a violation of the FET standard defined in Article II.3 of the BIT.

G) The Award of Frequencies During the Time When the National Council Was Not Operative

409. The National Council became inoperative in March 1999, because its members were not appointed, and remained in this situation until June 2000¹⁶⁰. Claimant submits that during this period, Respondent developed the practice of illegally awarding frequencies to companies other than Gala. The National Council then held its first tender on January 1, 2001, at which Claimant was not authorized to participate, and at which preferential treatment was given to the companies which had been illegally given licences during the National Council’s black out period.

¹⁵⁶ Respondent’s Exhibit R-279.

¹⁵⁷ Respondent’s Exhibit R-279, p. 3.

¹⁵⁸ Respondent’s Exhibit R-279, p. 10.

¹⁵⁹ Respondent’s Exhibit R-279, p. 10.

¹⁶⁰ Claimant’s Post-Hearing Memorial, para. 67.3.

The Tribunal's position

410. It is undisputed that between March 16, 1999 and June 9, 2000 the National Council did not function, because its members had not been appointed. After Parliament appointed its members on May 18, 2000 and the President made his appointment on June 9, 2000, a newly constituted National Council was able to resume its functions. It is also undisputed that on January 1, 2001 the first tender organized by the new National Council was held, and that Gala was not permitted to participate, because it was reserved for companies who had been affected by the National Council's black-out period.
411. There is an important dispute among the parties regarding the precise scope of companies which had access to this special tender.
412. Respondent submits that the tender was reserved to broadcasters whose licence had expired while the National Council was inoperative¹⁶¹. Claimant's explanation is totally different: during the interregnum Ukraine had developed the practice that the State Committee grant licences for radio broadcasting, in violation of the LTR, through a non-transparent and closed procedure that was not available to Claimant¹⁶². And the first tender was organized to legitimize these beneficiaries.
413. There is strong evidence that Claimant's explanation is the correct one.
414. First of all, the renewal of licences under the LTR does not require a tender (Article 24.9). Extension is a "*right*" of the licence holder, and the National Council can reject the application for extension only in very limited circumstances (Article 33.7). Respondent's explanation of what happened seems a legal impossibility, and is at any rate entirely implausible.
415. Secondly, there is a letter sent on September 28, 1999 by S. Aksenenko, a member of the National Council, to the Vice Prime Minister of Ukraine¹⁶³, in which Mr. Aksenenko protests that other institutions of the executive branch are usurping the National Council's powers, taking advantage of the fact that it is not operative.
416. Finally, Mr. Lemire has presented the transcript of a meeting held on March 19, 2001 with Mr. Koholod, the then chairman of the National Council, who acknowledged that during the interregnum "*some bad things [were] happening*" and that the State Committee, and not the National Council, had been issuing the licences¹⁶⁴.
417. The Tribunal concludes that during the period between March 16, 1999 and June 9, 2000, when the National Council was not operative, Respondent developed the practice that certain licences for radio broadcasting were issued directly by the executive branch of Government, without transparency or

¹⁶¹ Respondent's counsel, Hearing Transcript 1, p. 71, at 16.

¹⁶² Claimant's Post-Hearing Memorial, para. 57.2.

¹⁶³ Claimant's Exhibit CM-11.

¹⁶⁴ Claimant's Exhibit CM-101; Respondent has not challenged the accuracy of the transcript.

publicity and without meeting the requirements of or following the procedures established in the LTR. The *de facto* situation was then legalized through the first tender, convened by the National Council exclusively with this purpose. Claimant was excluded from this procedure.

418. In the opinion of the Tribunal, Respondent's above described practice constitutes a violation of the FET standard established in Article II.3 of the BIT, because it facilitates the secret awarding of licences, without transparency, with total disregard of the process of law and without any possibility of judicial review. The practice must be considered arbitrary, since it meets the *Saluka* test of "*manifestly violat[ing] the requirements of consistency, transparency, even-handedness and non-discrimination*"¹⁶⁵. The lack of propriety is such that – as the test was articulated in *Tecmed* and *Loewen* - the practice also "*shocks, or at least surprises, a sense of juridical propriety*"¹⁶⁶.

VII.3.5. CONCLUSIONS REGARDING THE AWARDING OF RADIO LICENCES

419. As a starting point the Tribunal has studied the administrative procedure defined in Ukrainian Law for the issuance of radio frequencies. The conclusion reached by the Tribunal is that the procedure was marred by significant shortcomings (although these have been ameliorated after the 2006 amendment to the LTR). These weaknesses facilitated arbitrary or discriminatory decision-taking by the National Council.
420. In six years Gala Radio, although it tried insistently, and presented more than 200 applications for all types of frequencies, was only able to secure a single licence (in a small village in rural Ukraine). Gala's main competitors were much more successful and each received between 38 and 56 frequencies. Although this macro-statistical analysis does not provide conclusive evidence that Respondent, when awarding radio licences, has been violating the FET standard, there are factors (the strikingly different success rates of Gala and of its competitors, the inexistence of any information regarding the real owners of the competing stations, the impossibility of verifying the reasons why Gala was rejected) which can be construed as indications that at least some of the decisions of the National Council when it awarded frequencies were arbitrary and/or discriminatory.
421. To confirm or reject these indications, the Tribunal then looked in detail at five tenders for radio frequencies and at the administrative practice for awarding licences in the interregnum while the National Council was not operative between 1999 and 2000. The Tribunal came to the conclusion that the following decisions did not meet the FET standard provided for in the BIT:

¹⁶⁵ *Saluka Investments BV v. Czech Republic PCA*, UNCITRAL, Partial Award of 17.March 2006, para 307.

¹⁶⁶ See *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 154 and *Loewen Group Inc and Raymons L. Loewen v. United States of America*, ICSID No. ARB(AF)98/3, Award of 26 June 2003, para. 131.

- the National Council's decision adopted on October 19, 2005 granting an FM information channel to Radio Era, and the subsequent decisions to award 12 frequencies to radio Kokannya;
- the National Council's decision of May 26, 2004 denying Gala Radio the licence for an AM channel, and the decision of December 21, 2004 granting such licence to NART TV;
- the National Council's decision of February 6, 2008 denying Gala's application and accepting the application of Kiss Radio;
- Respondent's practice of awarding radio licences while the National Council's was not operative between March 16, 1999 and June 9, 2000, and the National Council's decision of January 1, 2001 to legalize the licences illegally granted during the interregnum.

422. On the other hand, the Tribunal is unconvinced by Claimant's allegation that the National Council's decisions of November 20, 2002 and of October 19, 2005 represented a breach of the FET standard.

VII.3.6 POSTPONEMENT OF DECISION REGARDING DAMAGES

423. Claimant has presented extensive allegations regarding damages, and an expert report prepared by Goldmedia. Respondent has submitted a counter report prepared by EBS. Both experts deposed during the hearing.

424. In its Post-Hearing Memorial, Respondent has added¹⁶⁷ that the damage reports were prepared in the summer of 2008, that since then the economic basis has completely changed, and that the Ukrainian economy has shifted from a high growth rate to a sharp drop. There have also been significant changes in the parity of the UAH vis-à-vis the USD. Ukraine asserts that its economy "*has been devastated by the worldwide economic crisis*" and that it will shrink dramatically in the future. These changes in the overall economic climate, according to Ukraine have a significant impact on the DCF analysis presented by the experts.

425. The Tribunal agrees with Respondent that the changes suffered by the Ukrainian and the world economy since the dates when the expert reports were prepared, and its effects on the *quantum* of the damage, require further investigation. Furthermore, the assumptions underlying the experts' reports do not coincide with the conclusions reached by the Tribunal in this Decision, and the quantum evidence therefore requires recalibration in accordance with the present decision. Consequently, the question of the appropriate redress of the breach, including the quantification of the damages, will be addressed in a short second phase of this arbitration. After hearing the parties, the Tribunal will issue a Procedural Order for the continuation of the procedure.

¹⁶⁷ Respondent's Post-Hearing Memorial, para. 646.

VII.4. CLAIMANT’S SECOND ALLEGATION: THE CONTINUOUS HARASSMENT BY RESPONDENT AND THE REQUEST FOR MORAL DAMAGES

VII.4.1. CLAIMANT’S ALLEGATIONS

426. Claimant submits¹⁶⁸ that the National Council, in a concerted effort to force Claimant out of the radio industry, has:
- abusively monitored and inspected Gala from 2005 through 2008;
 - issued two warnings to Gala and threatened issuance of a third warning with the purpose of revoking Gala’s licence;
 - threatened Gala with non-renewal of its licence on the basis of the 2006 LTR disqualifying foreigners as “founders” of radio stations;
 - delayed the decision on the renewal of Gala’s licence with a view to imposing a tenfold licence fee under a newly enacted formula; and
 - allowed only an unrealistically short period for payment for an exorbitant licence fee.
427. Claimant adds that Gala was the first radio company which complied with the 50% Ukrainian music requirement, despite the negative effects on its ratings. This notwithstanding, in September 2005 the National Council inspected Gala and, as a result, issued a first warning on October 5, 2005. This warning was voided on April 4, 2006 by the Kyiv Economic Court, with the National Council’s appeal dismissed on September 26, 2006.
428. In October and November 2005, Gala was again repeatedly monitored and inspected, with a second warning (dated November 23, 2005) as a result. Due process defence against this warning was denied to Claimant. Upon Gala’s redress, the second warning was also voided by the Kyiv Economic Court and the National Council’s appeal against that decision was again dismissed on February 15, 2007.
429. In May/June 2006 Gala was monitored and inspected yet again; and on July 19, 2006, the National Council met to decide on a third warning. Under the new 2006 LTR, a third warning would have enabled the National Council to institute court proceedings for revoking Gala’s licence. Against this threat, the meeting was attended by five Gala executives, Gala’s local and international attorneys, and the First Secretary of the US Embassy in Ukraine. In view of this presence, the National Council shied away from issuing a third warning.
430. The two warnings and the threat of a third, terminal warning were based on frivolous grounds. Claimant refers to other radio stations which were rarely inspected and did not receive warnings despite graver violations.
431. Claimant further submits that the Chairman and other representatives of the National Council have repeatedly threatened to reject the renewal of Gala’s broadcasting licence, which expired on September 18, 2008. They referred to Claimant’s US citizenship and to Article 12(2) of the LTR, which prohibited

¹⁶⁸ Claimant’s Post-Hearing Memorial, para. 125.

the “*foundation*” of TV/radio stations by “*foreign legal entities and physical persons*”, although a similar prohibition already existed in the historic 1993 LTR. Besides the National Council representatives knew that Claimant had acquired his controlling share in Gala from the Ukrainian company Provisen and thus had not been Gala’s founder.

432. While Gala had applied for an extension of its licence on March 13, 2008, the National Council delayed its final decision until July 19, 2008. It then applied a new formula for calculating the licence fee, which had been adopted by the Council of Ministers just on July 9, 2008. To make matters worse, the new formula was applied wrongly to Gala’s detriment. As a result, Gala was invoiced a renewal fee of the equivalent of 1,039 million USD, more than ten times the fee that would have been due under the previous formula. Gala was allowed only 16 days for payment of this unexpectedly high fee. Other radio companies (e.g., HIT FM and Russkoye Radio owned by Mr. Bagrayev, a political ally of the President) had applied for a renewal of their licence later than Gala, but received the renewal before Gala, at a fee calculated under the previous formula.
433. On August 15, 2008, Claimant requested a Provisional Measure from the Tribunal, suspending ultimate payment of the renewal fee until the Final Award in this arbitration. On August 19, 2008, Respondent requested that Mr. Paulsson resign as an arbitrator in the present case, due to the involvement of his law firm in another case with Respondent as a party; this request and a subsequent official challenge by Respondent to Mr. Paulsson’s impartiality, delayed the Tribunal’s decision on the requested Provisional Measures.
434. The National Council finally reassessed the renewal fee to the amount expected by Claimant. This reassessment was prompted by an advice from the Ministry of Justice that the previous formula (rather than the new formula) was applicable to Gala’s renewal fee.
435. Claimant acknowledges that the harassment finally has not been successful, because the broadcasting licences have been extended with the payment of the correct fees, Gala has not been fined and the warnings have been quashed by the Ukrainian Courts. But Claimant submits that this does not provide Claimant with immunity from paying damages for the harassment and moral harm that Ukraine’s malicious acts have caused. Invoking the precedent of *DLP v. Yemen*¹⁶⁹, Claimant requests that Respondent “*be held to be liable to reparation for the injury suffered by Claimant, whether bodily, moral or material in nature*”. Respondent’s harassment has inflicted significant moral harm, including anxiety, pain and suffering, for which Respondent should be held liable in the amount of three million USD.

¹⁶⁹ *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008.

VII.4.2. RESPONDENT'S ALLEGATIONS

436. Respondent denies¹⁷⁰ that the National Council had any intention, let alone concerted action strategy, to shut down Gala and force Claimant out of the radio industry in Ukraine. All monitoring, inspections and other actions advanced by Claimant were performed by the National Council in the exercise of its regulatory and supervisory responsibilities as per the parameters and guidance provided in applicable legislation.
437. Statistics refute Claimant's allegation that Gala had been targeted for excessive monitoring and inspections. During 2004 – 2008, the National Council ordered a total of 1438 inspections and issued a total of 288 warnings. The five inspections of and two warnings to Gala are not egregious. Other broadcasters similarly had experienced between three and six inspections; and five broadcasters had even received three warnings and presently face court proceedings for cancellation of their licences.
438. The procedures for monitoring and inspections are not inequitable, arbitrary or discriminatory, and are equally applied to all broadcasters under the jurisdiction of the National Council. As a matter of administrative routine, broadcasters are continuously monitored to check whether they comply with applicable legislation and with their licences. Monitoring is based on an evaluation of the programmes broadcast; it does not involve the companies and does not interrupt their business. Inspections are ordered by the National Council if monitoring reveals indications of violations; they are carried out at the premises of the radio station and last one business day at most. Inspection reports are immediately shared with the broadcasters concerned and submitted for decision to the National Council. If the inspection reveals violations of either applicable legislation or the terms of a broadcaster's licence, the National Council may impose sanctions. These range from warnings (lightest sanction) and monetary penalties to court proceedings and revocation of licence. Sanctions imposed can be appealed to Ukrainian Courts.
439. Gala was monitored in September 2005, together with several other broadcasters, in accordance with the normal administrative process. Since violations of applicable legislation were detected (with respect to Ukrainian language and advertising rules), the National Council by letter of September 27, 2005 informed Gala of its decision to conduct a first inspection on September 30, 2005. When the National Council experts tried to perform this inspection, Gala representatives denied them access to Gala's premises. The National Council thereupon issued a first warning on October 5, 2005 and, at the same time, decided to repeat the inspection within two weeks. On April 4, 2006 this first warning was quashed by the Kiyv Economic Court, on the ground that the National Council had failed to prove receipt by Gala of the Council's aforementioned letter of September 27, 2005.

¹⁷⁰ Respondent's Post-Hearing Memorial, para. 516.

440. Gala was inspected again on October 19, 2005. This inspection detected violations of broadcasting and advertising legislation, and of the terms of Gala's licence regarding children's and educational programs. On November 2, 2005 the National Council discussed the inspection results with Gala and gave it two weeks to cure the violations. After negative results of a subsequent monitoring, the National Council issued a second warning on November 23, 2005, requiring Gala to cure the violations within six months. This second warning was also quashed by the Kiev Economic Court, on the ground that it was based on an inspection prompted by the first warning, which had been voided previously by the Court.
441. On May 27, 2006, i.e. six months after the second warning, a monitoring revealed that Gala had not ceased in its violations. Thereupon, a third inspection was carried out on June 2, 2006. It confirmed continuing violations as per the monitoring report, but also noted that Gala had rectified its previous violations regarding broadcasting in Ukrainian language. In view of this improvement, the National Council abstained from issuing a third warning.
442. In 2008, Gala was inspected twice, in April as a routine matter in advance of the pending renewal of Gala's licence and on June 3 after monitoring detected a violation of Ukrainian election legislation. The April inspection was inconsequential, while the June inspection confirmed the violation. Nevertheless, the National Council, in its meeting on June 18 accepted Claimant's explanation that the violation was accidental, did not issue a warning but rather proceeded with the renewal of Gala's licence.
443. National Council representatives have never threatened to deny the renewal of Gala's licence due to Claimant's US citizenship.
444. The licence was renewed on July 19, 2008 in due time before its expiry on September 18, 2008. The processing time was required for clarification of outstanding issues.
445. The renewal fee had initially been calculated under the new formula on the National Council's understanding that the Cabinet decree had entered into force at the date of its receipt by the National Council on July 11, 2008. Since the renewal had been granted thereafter (July 16), the Council had applied the new formula in good faith. Nevertheless, the National Council had sought the guidance of the Cabinet of Ministers on the issue as early as August 11, 2008, i.e. before Claimant's request for Provisional Measures challenging the fee. The Cabinet had referred the matter to the Ministry of Justice, which on September 15, 2008 advised the National Council that the formula entered into force only with the publication of the decree in the Official Bulletin of Ukraine on July 18, 2008, i.e. after the renewal of Gala's licence on July 16. In light of this advice, the National Council promptly recalculated the fee under the previous formula, more advantageous to Claimant, and informed the Tribunal accordingly.

446. The challenge of Mr. Paulsson as an arbitrator in the present proceeding had been prompted by disagreements between Claimant and Respondent regarding implications of the issue for the status of the final award. It had nothing to do with Claimant's request for provisional measures and/or the calculation of the renewal fee.
447. The fact that the two warnings against Gala have been set aside by Ukrainian Courts shows, in Respondent's view, that the Ukrainian system provided adequate redress against administrative error, in compliance with the FET standard under the BIT.
448. Claimant had suffered no harm as a result of the National Council's actions wrongly described by Mr. Lemire as harassment. All inspections together have taken at most four business days over a four-year period. Claimant is still operating a profitable business – a fact which according to Respondent precludes any claim on the basis of "*creeping expropriation*" or violation of "*full protection and security*".

VII.4.3. THE TRIBUNAL'S DECISION

A) Introduction

449. Claimant's basic line of reasoning is that, behind the individual facts of this case, an overall aim appears: the Ukrainian authorities' desire to get rid of an annoying American investor, by systematically denying any application for further frequencies, thwarting plans to create new channels, and harassing him with irregular inspections and difficulties for the renewal of his licence.
450. Respondent has vehemently denied the accusation. Chairman Shevchenko has stated that the National Council never resorted to procedures aimed at any revocation of the Gala Radio licence and has not even contemplated such steps¹⁷¹.
451. The Tribunal has already come to the conclusion that Respondent's practice regarding the allocation of frequencies is not compatible with the FET standard defined in the BIT. As a consequence of the violation of the BIT Claimant is entitled to be indemnified for the economic damages he has suffered. As has already been stated (see paragraph 426 above), this issue will be addressed in a subsequent phase of this arbitration.
452. Claimant is now asking that the Tribunal decide whether the harassment which he allegedly suffered, entitles him to receive an additional indemnification, further to the economic loss, for the moral damage suffered. The harassment in itself cannot constitute additional violations of the BIT because, as Claimant himself acknowledges, in the end the inspections led to no sanctions and the licence was correctly extended. For this reason, Claimant restricts his prayer for relief to a request that the Tribunal indemnify Claimant for the moral harm he has suffered, caused by Respondent's continuing harassment.

¹⁷¹ Respondent's Rebuttal Witness Statement of Mr. Shevchenko dated 2 December 2008, p.31.

453. In order to decide this claim, the Tribunal has to analyze the two separate issues submitted by Claimant, the inspection of Gala Radio (B) and the renewal of the licence (C), leading to the Tribunal's conclusions (D).

B) The Inspection of Gala Radio

454. The National Council is the supervisor and regulator of the TV and radio sector in Ukraine (Articles 13 and 14 of the LNC). As such, the Council has the power to monitor and inspect radio companies, including Gala Radio. The procedure of inspection is defined in Articles 70 to 75 of the LTR, and in an Instruction of the National Council, issued in 2003 and amended in subsequent years¹⁷². Monitoring is a process of recording and analyzing the broadcasting of a radio company, and is done directly by the National Council, without involvement of the radio station. An inspection is a more serious review, which requires access to the company's premises. Inspections can be scheduled – i.e. in accordance with a plan approved by the National Council – or unscheduled – i.e. motivated by some exceptional circumstance.

455. The results of an inspection are formalized in an inspection report; the affected company has access to the report, and is entitled to give explanations, to provide evidence and to file claims (Article 73.3 of the LTR). The inspection report, prepared by the National Council staff, is submitted to the National Council which has the right either to close the file without sanction, or to issue a warning, to impose a penalty or to appeal to a Court in order to revoke the licence (Article 72.6 of the LTR). The practice of the National Council is to listen during the meeting to an oral explanation of the representative of the radio company¹⁷³.

456. It is undisputed that until 2005 Gala was never inspected. Since then, Gala has suffered five inspections, four of which were unscheduled¹⁷⁴.

The first warning

457. The first inspection took place on September 28, 2005, and it has been described in detail in the report prepared by the inspectors¹⁷⁵. The day before the inspection, the inspectors had sent a fax to Radio Gala, announcing their visit for the next day. When they arrived, a female employee told them that the management of the company was outside Kyiv, and would not return until October 17, 2005. The employee stated that she “*was not authorized to provide any information or documents*”.

458. A week later, on October 5, 2005 the National Council decided to issue a warning to Gala because the personnel of Gala Radio “*prevented [National Council representatives] from carrying out their legitimate actions*”¹⁷⁶, by

¹⁷² Respondent's Exhibit RLA-15 (original text) and RLA-64 (amended text).

¹⁷³ Inspector Iulian Leliukh, Hearing Transcript 4, p.103, at 15.

¹⁷⁴ Mr. Denisenko, Hearing Transcript 2, p. 209, at 16.

¹⁷⁵ Respondent's Exhibit R-270.

¹⁷⁶ Respondent's Exhibit R-272.

refusing to produce the documents and materials required for conducting the inspection. The decision was abusive, because the inspectors' report did not reflect any refusal to cooperate, only the absence of management, and because the advance notice had been unreasonably short. Besides, there is no evidence that Gala was heard before the decision was adopted, and the LTR does not typify the refusal to produce documents as a sanctionable wrong. Gala successfully challenged the warning before the Kyiv Economic Court, and it was set aside by this Court on April 11, 2006. The National Council appealed, the appeal was rejected on February 14, 2008.

The second warning

459. On October 14, 2005 the National Council informed Gala that an inspection would be performed on October 19, 2005. The inspection took place on this date, in the presence of Mr. Lemire, who refused to sign the inspection report¹⁷⁷. The inspection report reflects the following:

- the language of programs is Ukrainian;
- the language of commercials is predominantly Ukrainian, although two commercials were in Russian, which represents a violation of the Law on Advertising;
- there is one instance where a commercial was not separated from other elements of the program, in violation of the Law on Advertising;
- the air time devoted to information programs, to educational programs and to children programs were significantly less than the figures mentioned in the licence.

460. On November 2, 2005 the National Council met, heard representatives of Gala, and decided to postpone their vote for two weeks¹⁷⁸. On November 23, the National Council met again and issued a warning against Gala, for the reasons set forth in the inspectors' report. The warning was cancelled by the Kyiv Economic Court on February 15, 2007, because the Court considered the inspection illegal¹⁷⁹.

The June 2006 inspection

461. With two warnings against Gala in the appeal Courts, on May 29, 2006 Chairman Shevchenko ordered the Control and Monitoring Department of the National Council to conduct a new inspection, which was carried out on June 2, 2006. Inspector Leliukh has declared that the inspection was conducted in a hostile environment, and that Mr. Lemire was accompanied by four lawyers and a representative of the American Embassy. The inspection report came to the following conclusions¹⁸⁰:

¹⁷⁷ Respondent's Exhibit R-276.

¹⁷⁸ Respondent's Exhibit R-282; Respondent submits that the two weeks delay was to permit Gala to cure the irregularities; this does not derive from the transcript.

¹⁷⁹ See Claimant's submission to the Court in Respondent's Exhibit R-312.

¹⁸⁰ Respondent's Exhibit R-298.

- the advertising exceeded the 20% legal maximum per hour (i.e. 12 minutes maximum) in four hourly time periods: from 9 am to 10 am, by 18 seconds, from 12 pm to 1 pm, by 14 seconds, from 1 pm to 2 pm, by 3 seconds and from 5 pm to 6 pm by 12 seconds;
- Gala was basically complying with the licence conditions, it had broadcast 6.36 h. of cultural programs, when the licence required 3.50 h.; Gala had however failed to broadcast children's programs, as required by the licence;
- Gala was complying with the 50% Ukrainian music percentage;
- language is 100% Ukrainian, including advertisements;
- two advertisements were not clearly separated from the other elements of the program.

462. Claimant asserts that the inspection team, headed by Inspector Leliukh, included in its submission to the National Council a proposal that a third warning be issued. A third warning would have blocked the renewal process for the licence, which was then under discussion and might have triggered an action to revoke Claimant's licence (although this is not a must: the LTR does not require that a third warning triggers a procedure of licence revocation). Claimant was sufficiently worried about the prospect of a third warning and its consequences that he asked for the assistance of US Embassy officials and of his international lawyers at the meeting of July 19, 2006 to lobby against the issuance of the third warning.

463. Inspector Leliukh, asked by the Tribunal if he had recommended issuing a third warning, answered: "*I do not remember whether or not I recommended a warning*¹⁸¹". And under cross examination, asked whether the draft resolution would be in the record of the National Council, he stated that "*as a rule a draft resolution is not maintained – resolutions themselves are archived, not draft resolutions*¹⁸²".

464. Although Inspector Leliukh does not remember, there is clear evidence in the file showing that a third warning was indeed proposed. Respondent has submitted the transcript of the July 19, 2006 session¹⁸³, and there it is clearly stated that Shevchenko put the draft decision for issuing a warning to the vote. The decision received one vote in favour (from Chairman Shevchenko) and five members abstained, and consequently it was rejected. Immediately thereafter, a new decision was tabled and carried unanimously. This decision states that the National Council:

- takes knowledge of the report resulting from Gala's inspection;
- obligates the management of Gala to bring its activities in line with the licence, Deputy Chairman Kurus being in charge of control of this obligation; and
- informs the founders of Gala that in accordance with Article 12 of the LTR foreigners are prohibited from being the founders of radio stations.

¹⁸¹ Inspector Iulian Leliukh, Hearing Transcript 4, p. 111, at 8.

¹⁸² Inspector Iulian Leliukh, Hearing Transcript 4, p. 116, at 7.

¹⁸³ Respondent's Exhibit R-306, p. 2070.

465. The reference to the founding of Gala, and to Article 12 of the LTR, is especially troubling. In accordance with the records, which must have been available to the National Council, Gala Radio had not been founded by Mr. Lemire, but by Provisen, an Ukrainian company, and Claimant subsequently bought a controlling stake in the company. The prohibition of foreign foundership of radio stations was already included in Article 13 of the 1993 LTR, and was then taken over into Article 12 of the 2006 LTR. Consequently, it existed when the National Council authorized Mr. Lemire's purchase of the control in Gala.
466. The July 19, 2006 decision of the National Council "*informs*" the founders of Gala that foreigners are prohibited from being founders of radio stations. This statement is difficult to understand, because:
- it seems incongruous in a decision regarding the imposition of a sanction to Gala;
 - it is unnecessary, if it is just a reminder of a legal rule which had existed since 1993;
 - it is without purpose, because a company can never retroactively change its founders;
 - if it purports to be an anticipation of what the National Council would decide in the future (the licence will not be renewed, because Mr. Lemire is American), it is legally incorrect, because Mr. Lemire is not the founder and his investment had been duly authorized.

The 2008 inspections

467. In April 2008 Gala was subject to a further, scheduled inspection, which resulted in a conclusion that there was no irregularity.
468. Then, in June 3, 2008 an additional unscheduled inspection took place, which led to a decision of the National Council on June 18, 2008. What had happened was that on the day of the Municipal Elections, a candidate had spoken on Gala Radio, starting his words by saying "*I will not promote myself ... I will not advertise either. All I wanted to say is that everyone has to come*". Hereafter, he made a short presentation why citizens should vote in his favour. The inspection report prepared by the National Council inspection team stated that the broadcasting of these declarations violated the Ukrainian Election Law which requires that "*campaigning*" cease 24 hours before the vote¹⁸⁴.
469. During the session of the National Council on June 18, 2008¹⁸⁵, a member of the National Council acknowledged that all TV channels show interviews with various candidates during the ballot casting. Gala explained at the hearing that they had committed a mistake. Respondent submits that the National Council decided not to issue a warning¹⁸⁶.

¹⁸⁴ Respondent's Exhibit R-373.

¹⁸⁵ Respondent's Exhibit R-375 (transcript of the meeting).

¹⁸⁶ Respondent's Post-Hearing Memorial, para. 548; not contradicted by Claimant; the transcript of the meeting, however, is not clear; Chairman Shevchenko's last words are: "*But they admit their fault, saying*

C) Renewal of the Licence

470. Gala Radio's licence was due for renewal on September 18, 2008. Claimant applied for renewal on March 13, 2008. The National Council reacted with a number of documentary requests, to which Gala duly responded¹⁸⁷. The licence was eventually issued on July 16, 2008, on the last possible meeting of the National Council.
471. On July 25, 2008 Gala received an invoice for more than one million USD, which represented a 10 fold increase with regard to the renewal fee which would have been applicable in accordance with the guidelines approved in 1995. The new methodology for calculating had been approved by the National Council on November 22, 2006, but required a confirmation decision from the Cabinet of Ministers. On July 9, 2008 the Cabinet adopted the necessary decree, and the National Council at its meeting of July 16, 2008 declared that the new methodology would be used to calculate its fees – the same meeting which approved the extension of Gala's licence.
472. In Claimant's opinion, the National Council on purpose delayed the application process, in order to be able to charge the higher fee¹⁸⁸. Claimant further alleges that Russkoie Radio and Hit FM – both allegedly owned by Mr. Bagrayev, National Council member until 2002 - applied for their renewal after Gala, but were awarded their licence on May 28, 2008, seven weeks before Gala¹⁸⁹. This statement has not been denied by Respondent.
473. Claimant finally was only required to pay the lower, historic fee. The reason for this is that when the National Council issued the one million USD plus invoice, it failed to take into consideration, that on the date of Gala' renewal the decree had not yet been published in the Official Bulletin, and consequently it had not entered into force and could not be applied to the Gala licence renewal.
474. Claimant filed a request for interim measures in this arbitration, Ukraine eventually accepted Claimant's arguments and modified the licence renewal fee to the historic figure, which Claimant accepted and duly paid, desisting from the Request.

D) Decision of the Arbitral Tribunal

475. The Tribunal is in this case confronted with a request for moral damages, which Claimant allegedly has suffered as a consequence of harassment by the National Council. The moral damages – as alleged by Claimant – include anxiety, pain and suffering, and they are estimated at three million USD, a figure which is deemed *“very conservative ... in light of the long duration,*

that it was all by accident, and we agree with this point, advising the company to take this fact into account as a warning”

¹⁸⁷ See Claimant's Exhibits CRIM-5, 6, 7, 8 and 9.

¹⁸⁸ Claimant's Reply Memorial, para. 248.

¹⁸⁹ Claimant's Reply Memorial, para. 253.

*intensive and diverse harassment to which Respondent has subjected Claimant*¹⁹⁰”.

Moral damages in investment arbitrations

476. In most legal systems, damages which can be recovered by the aggrieved include not only the *damnum emergens* and *lucrum cessans*, but also moral damages. The Tribunal shares the conclusions reached in *Desert Line Projects*¹⁹¹:

“Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages”.

477. The circumstances in *Desert Line Projects* were very exceptional indeed. Claimant had been subject to physical duress and suffered a siege by the armed forces of Respondent.

478. Can moral damages be applied in the factual situation of this case in which Claimant is not making any allegation of physical duress?

479. Claimant in essence is submitting that the National Council incurred in systemic bias against Gala Radio. Not only did the National Council reject the 200 applications made by the radio station for new frequencies, jeopardizing Gala’s plans to expand its activities, but it also maliciously subjected Gala to a series of inspections, with the hidden agenda to close it down, and then in bad faith delayed the renewal of the licence, until a new regulation had come into force, which increased the renewal fee by 10.

480. Claimant’s accusations are very grave indeed.

481. The National Council is Radio Gala’s lawful supervisor and regulator, entrusted by Ukrainian law with authorizing, monitoring, inspecting and sanctioning TV and radio stations. Agencies with powers analogous to those of the National Council exist in most jurisdictions, because they have proven necessary in order to guarantee correct assignment of scarce frequencies, protection of rights of viewers and listeners and defence of liberty of information and plurality of opinions. Regulatory agencies, provided by law with wide powers to intervene, must act with absolute independence and impartiality. And regulated entities have an obligation to cooperate with their supervisor, to follow their supervisor’s instructions and to comply with applicable rules.

482. In all jurisdictions regulated entities are also required to respect and cooperate with their lawful regulatory agencies. Mr. Lemire’s behaviour vis-à-vis the National Council, and his extensive use of the Courts to obtain redress for his grievances and of the American Embassy to secure protection, may have

¹⁹⁰ Claimant’s Post-Hearing Memorial, para. 147.

¹⁹¹ *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 29 January 2008, para. 289.

looked rude and disrespectful to the Ukrainian authorities. But the personal behaviour of the regulated should never impair on the impartiality of the supervisor.

483. Another important aspect to bear in mind is whether the Ukrainian legal system affords an efficient system for appealing the regulator's decisions before a Court. That right also exists in Ukraine, and it has worked. The Courts have twice quashed (in first instance and then on appeal) illegal decisions of the National Council. And in the case of the renewal fees, the Ministry of Justice has sided with Claimant against the National Council.

484. The Tribunal has analyzed in detail the relationship between Gala Radio and the National Council and certain facts stand out:

- Gala was never inspected until 2005, and in the next three years it was the object of five inspections, of which four were unscheduled;
- the first warning issued by the National Council against Gala was clearly abusive, and was correctly set aside by the Ukrainian Courts;
- the second warning was issued for alleged infractions which to an impartial bystander look petty; this warning was again set aside by the Courts;
- the draft resolution of the National Council proposed the issuance of a third warning, and Chairman Shevchenko voted in favour; the underlying inspection report showed that most of the infractions which led to the second warning had been cured, and only found some very minor infringements;
- the third warning was rejected, but the National Council adopted a decision which seemed to imply that Mr. Lemire, as an American, was prohibited by law from being the rightful owner of Gala;
- the facts which led to the 2008 inspection probably did not merit the commencement of an inspection procedure, since similar actions had been committed by other TV and radio stations, which were not inspected;
- Gala's application for extension of its licence was delayed in comparison with other applications; it was approved in the same session when the National Council approved a 10 fold increase in the renewal fees.

485. If these facts are added to the National Council's rejection of all (bar one) of Gala's applications for new licences, the resulting overall picture is that Gala has received a one-sided treatment from its regulator. Gala's reaction, consisting in a vehement defence of its rights, presence of US Embassy officials, protest before the National Council and successive appeals to the Ukrainian Courts, seem to have exacerbated the National Council's stance.

486. Since the Tribunal has already decided that certain of Respondent's actions related to awarding radio frequencies are not compatible with the FET standard defined in the BIT, Claimant will in any case be entitled to an economic indemnification. Whether the facts of the case constitute "*exceptional circumstances*", which merit the awarding of moral damages, is a question which the Tribunal will decide in a future phase of this procedure

when it may have the benefit of further insights, notably into context and causation.

VII.5. CLAIMANT'S THIRD ALLEGATION: THE VIOLATION OF THE FET STANDARD BY OTHER ACTIONS PERFORMED BY RESPONDENT

487. Claimant's main allegation is that the allocation of frequencies has given rise to a violation of the FET standard. In addition, Claimant submits an ancillary claim: that a number of other actions or omissions, which primarily constitute a breach of the Settlement Agreement, are also unfair, inequitable, arbitrary or discriminatory¹⁹². In Claimant's opinion these actions or omissions constitute not only a breach of the Settlement Agreement, but also a violation of the FET standard defined in the BIT.

488. The actions alleged by Claimant are the following:

- (i) the failure of the National Council to acknowledge its obligations under the Settlement Agreement¹⁹³ or to acknowledge the Settlement Agreement as legal or binding¹⁹⁴;
- (ii) the State Centre's decision to allocate low powered and contested frequencies¹⁹⁵; and
- (iii) Respondent's failure to correct interferences.

489. The Tribunal has already analysed whether these actions and omissions represented defaults under the Settlement Agreement, and come to the conclusion that they did not. It will now review, albeit rather summarily, whether these actions conceivably could imply an international law delinquency of Ukraine and a violation of the BIT.

First and second claim

490. (i) and (ii): Since the Tribunal has come to the conclusion that Respondent did not breach its obligations under the Settlement Agreement, and that frequencies allocated were appropriate (see paragraph 209 above), Claimant's allegation that the failure to acknowledge the Settlement Agreement or the allocation of frequencies could conceivably constitute an international wrong has no chance of succeeding.

491. Claimant's first and second claims are dismissed.

Failure to correct interferences

492. (iii): There is a final type of action or failure to act, which Claimant submits amounts to a violation of the FET standard, and which merits a more in-depth analysis. This is Respondent's alleged failure to correct the interferences on Gala 100 FM. Such failure would have related to interferences that occurred

¹⁹² Claimant's Post-Hearing Memorial, para. 67.

¹⁹³ Claimant's Post-Hearing Memorial, para. 67.4.

¹⁹⁴ Claimant's Post-Hearing Memorial, para. 67.6.

¹⁹⁵ Claimant's Post-Hearing Memorial, para. 67.7 and 67.8.

after the conclusion of the Settlement Agreement and would thus not have been affected by the Tribunal's decision that Respondent has performed its obligations under the Settlement Agreement.

493. Claimant's argument runs as follows¹⁹⁶: Respondent, as the host state and as issuing authority and regulator of frequencies, has the duty to ensure that any investor can enjoy the normal operation and use of his investment. This includes – in Claimant's assertion - an obligation to provide a frequency that is free of interference, however caused, and an obligation to monitor and regulate other radio companies.
494. The Tribunal disagrees with Claimant's reasoning.
495. Interference occurs when other radio stations which are also broadcasting do not remain within the prescribed deviation level. The record shows that Claimant on seven occasions between 2000 and 2007 complained to the State Centre, protesting that Gala's signal was suffering interference. The complains were made in 2002, 2004, 2005, 2006 (2) and 2007 (2)¹⁹⁷. The record shows that the State Centre reacted, at least trying to solve the problems. On August 17, 2004 the State Centre ordered two radio stations which were causing interference to cease doing so¹⁹⁸. The State Centre monitored the 100 FM frequencies during the year 2007, and found no interference¹⁹⁹. Finally, as Claimant acknowledges, after an extensive period of monitoring during the autumn 2008, the problem has now been – to use Claimant's words - "*significantly reduced*"²⁰⁰.
496. Claimant's allegation that Ukraine's conduct with regard to the interferences constitutes a violation of the BIT is bound to fail. The State Centre may have been performing the public service of monitoring and supervising radio frequencies with more or less diligence; the solution adopted in 2008 probably could have been anticipated; but even if Claimant's allegations were accepted to be true, they would never give rise to an international delinquency of Ukraine, nor amount to the violation of the FET and full protection standards defined in the BIT. Not every malfunctioning of a public service, suffered by a foreign investor, not every lack of diligence by a supervisory authority opens the door to a claim under the BIT. As has already been explained, the violation of the FET standard requires significantly more, namely that the actions of the State trespass a certain standard of propriety. The evidence does not support that in this instance the threshold has been surpassed.

VII.6. CLAIMANT'S FOURTH ALLEGATION: THE "UMBRELLA CLAUSE"

497. Article II.3 (c) of the BIT includes the so called Umbrella Clause:

¹⁹⁶ Claimant's Post-Hearing Memorial, para. 67.1.

¹⁹⁷ Respondent's Post-Hearing Memorial, para. 170.

¹⁹⁸ Respondent's Exhibits R-84 and R-85.

¹⁹⁹ Respondent's Exhibit R-146.

²⁰⁰ Claimant's Post-Hearing Memorial, para. 48.

“Each party shall observe any obligation it may have entered into with regard to investments”.

498. The Tribunal agrees with Claimant’s submission that Article II.3 (c) of the BIT brings the Settlement Agreement into the ambit of the BIT, so that any violation of the private law agreement becomes *ipso iure* a violation of the international law BIT. This, however, exhausts the effect of the Umbrella Clause; the Umbrella Clause has no impact on the meaning or scope of the Settlement Agreement. In other words, any violation of the Umbrella Clause presupposes a breach of the Settlement Agreement. Since the Arbitral Tribunal has already come to the conclusion that Respondent has not breached its obligations under the Settlement Agreement, the Umbrella Clause of the BIT is moot and Respondent cannot have violated the BIT on this footing.

VII.7. CLAIMANT’S FIFTH ALLEGATION: THE PROHIBITION OF LOCAL PURCHASE

A) Allegation of the Parties

499. Claimant’s final allegation²⁰¹ is that the 2006 LTR, by imposing a 50% Ukrainian music requirement, breaches Article II.6 of the BIT which does not allow the host state to “*impose performance requirements as a condition ...*” Claimant acknowledges that Respondent has tried to justify the legal imposition on public policy grounds. Yet, even assuming its validity, this argument can, in Claimant’s opinion, at best justify the breach, subject to the payment of the corresponding damages. And the damages sustained by Gala were significant, because its program concept is based 100% on hits. The high level of the local source requirement and its abrupt incorporation caused Claimant to lose advertising revenue, resulting in a damage of 958,000 USD.
500. Respondent disagrees²⁰². A change in the host’s State’s regulatory framework does not equate with a breach of the BIT. The protection of the legitimate expectations must be balanced with the need to maintain a reasonable degree of regulatory flexibility on the part of the host State in order to respond to changing circumstances in the public interest. The imposition of a Ukrainian music requirement is neither abrupt, excessive nor unfair, and did not breach Claimant’s legitimate expectations.

B) Decision of the Tribunal

501. The facts of this allegation are rather straightforward. Article 9.1 of the 2006 LTR required that “*... music produced in Ukraine shall constitute at least 50% of general broadcasting time of each ... radio organization*”. This requirement applies to all broadcasters in Ukraine, not only to Gala Radio. “*Music produced in Ukraine*” includes any music where the author, the composer and/or the performer is Ukrainian.

²⁰¹ Claimant’s Post-Hearing Memorial, para. 148.

²⁰² Respondent’s Post-Hearing Memorial, para. 570.

502. The implementation of this new requirement was not immediate, but in steps. On July 21, 2006 the National Council and certain radio companies signed a memorandum²⁰³, which provided that the requirement would be implemented in stages from October 1, 2006 through February 1, 2007. Gala adhered to this memorandum in August 2006.
503. Gala's basic criticism²⁰⁴ with regard to the new Ukrainian music requirement is that there are too few hits of Ukrainian music, and since its formula is 100% hits, it must continuously replay the same few Ukrainian hits. In Claimant's opinion, the 50% Ukrainian music requirement violates Article II.6 of the BIT, which provides as follows:
- “Neither party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods and services must be purchased locally, or which impose any other similar requirements”.*
504. The Tribunal disagrees with Claimant's contention.
505. As a sovereign State, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government. The prerogative extends to promulgating regulations which define the State's own cultural policy. The promotion of domestic music may validly reflect a State policy to preserve and strengthen cultural inheritance and national identity. The *“high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”*²⁰⁵ is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community.
506. The desire to protect national culture is not unique to Ukraine. France requires that French radio stations broadcast a minimum of 40% of French music²⁰⁶, Portugal has a 25 – 40% Portuguese music quota²⁰⁷ and a number of other countries impose similar requirements²⁰⁸. The Tribunal in *Plama* reasoned that a rule cannot be said to be unfair, inadequate, inequitable or discriminatory, when it has been adopted by many countries around the world²⁰⁹. If one adds that the 50% Ukrainian music rule is applied to all broadcasters, the necessary conclusion is that it is compatible with the FET standard defined in the BIT.

²⁰³ Respondent's Exhibit R-131.

²⁰⁴ Claimant's Memorial, para. 207.

²⁰⁵ *S.D. Myers Inc. v. Canada*, UNCITRAL, First Partial Award of 13 November 2000, para. 263.

²⁰⁶ Article 12 I *Loi n° 86-1067 du 30 septembre 1986 relative à la Liberté de Communication*, amended by *Loi n° 94-88 du 1er février 1994*.

²⁰⁷ Article 44 A 1 *Lei 7/2006 de 3 de março*.

²⁰⁸ See K. Bhattacharjee: *“Local Content Rules in Broadcasting”*, reproduced as Respondent's Exhibit RLA-41.

²⁰⁹ See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/02, Award of 27 August 2008, para 269.

507. But this conclusion is really *obiter dicta*, because Claimant challenges the 50% Ukrainian music requirement not as a violation of the FET standard, but rather as a breach of the local content rule contained in Article II.6 which prohibits “*performance requirements ... which specify that goods or services must be purchased locally*”. Is this rule applicable to a cultural restriction like the 50% Ukrainian music requirement?
508. The answer to this question requires that Article II.6 be interpreted “*in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*” (Article 31.1. Vienna Convention)²¹⁰.
509. The ordinary meaning of the terms used by a treaty provides the first criterion of interpretation. The BIT prohibits that local law specify that “*goods or services ... must be purchased locally*”. It can be argued that the LTR does not fall foul of this rule: the law does not specify that radio stations must purchase any goods or services locally, but rather that a certain percentage of the music broadcast should be authored, composed or produced by Ukrainian artists. The argument, however, is not decisive, because it might be reasoned *de adverso* that although the LTR does not prohibit radio stations from obtaining Ukrainian music from non-Ukrainian sources, *de facto* the market for Ukrainian-authored, -composed or -produced music is located in Ukraine.
510. The object and purpose of Article II.6 sheds more light on its correct interpretation. The object of the BIT is to “*promote greater economic cooperation*” between the Parties (Preamble II). And the purpose of Article II.6 is trade-related: to avoid that States impose local content requirements as a protection of local industries against competing imports. When in 2006 Ukraine amended the LTR, the underlying reasons were not to protect local industries and restrict imports, but rather to promote Ukraine’s cultural inheritance, a purpose which is compatible with Article II.6 of the BIT.
511. In conclusion, the Tribunal finds that Article 9.1 of the 2006 LTR, which requires that “[...] *music produced in Ukraine shall constitute at least 50% of general broadcasting time of each ... radio organization*” does not amount to a violation of the local content rule contained in Article II. 6 of the BIT which prohibits “*performance requirements ... which specify that goods or services must be purchased locally*”.

²¹⁰ Emphasis added.

VII.8. OTHER ALLEGATIONS

512. In his Memorial, Claimant included alleged additional violations of the BIT, referring to affiliation agreements, trademarks and the expropriation of a beauty salon. This last claim has been specifically withdrawn, and the other two have not been addressed either at the hearing or in the Post-Hearing Memorial, and seem to have been tacitly dropped. To the extent that these claims may still be alive, the Tribunal finds that Respondent's conduct with regard to Gala's affiliation agreements or to its request for trademark protection does not amount to a violation of the BIT.

VIII. DECISION

513. In view of the foregoing reasons, the Tribunal unanimously as regards Sections I through VI, and by majority as regards some aspects and conclusions of Section VII, decides as follows:
1. to dismiss Respondent's objections to the jurisdiction of the Centre and the competence of the Tribunal;
 2. to declare that Respondent has not breached any obligations assumed in the Settlement Agreement;
 3. to declare that Respondent, in the manner in which it dealt with the award of radio frequencies as described in paragraph 422 of this Decision, breached Article II.3 of the BIT; and
 4. to dismiss all other claims regarding the merits submitted by Claimant.
514. The question of the appropriate redress of the breach, including questions of *quantum*, will be addressed in a second phase of this arbitration, for which the Tribunal retains jurisdiction. The Tribunal will issue a Procedural Order for the continuation of the procedure. The question of costs is reserved until the Award.

[signed]

Mr. Jan Paulsson
Arbitrator

[signed]

Dr. Jürgen Voss
Arbitrator

[signed]

Professor Juan Fernández-Armesto
President

[January 14, 2010]

Date