

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

In the Proceeding Between

JOSEPH CHARLES LEMIRE

(Claimant)

and

UKRAINE

(Respondent)

(ICSID CASE NO. ARB/06/18)

DISSENTING OPINION OF ARBITRATOR DR. JÜRGEN VOSS

SUMMARY

FACTS

Undisputed

This dispute was submitted to ICSID by Mr. Joseph Ch. Lemire – a United States citizen – (“Claimant”) against Ukraine (“Respondent”) under the Bilateral Investment Treaty between the United States and Ukraine of October 17, 1996 (the “BIT”).

The dispute is also governed by an agreement between Claimant and Respondent of March 20, 2000 (the “Settlement Agreement”) which settled a previous dispute between the Parties under the ICSID Additional Facility (the “First Arbitration”). On September 18, 2000, the Settlement Agreement was recorded as an award on agreed terms (the “2000 Award”).

In 1995, Claimant invested in CJSC “Radiocompany Gala” (“Gala”) through “CJSC “Mirakom Ukraina” (“Mirakom”). Gala and Mirakom are both closed joint stock companies under Ukrainian law. Initially the majority shareholder, Claimant since 2006 is the sole shareholder of Gala and Mirakom.

Claimant’s recorded investment in Gala is USD 141,000. However, his personal assets are commingled with those of Gala; and his actual contributions into Gala between 1995 and 2008 are estimated by the Majority to cluster somewhere between USD 2 and 3 million (with USD over 5 million alleged by Claimant and some 900,000 conceded by Respondent).

Gala is a radio company. Until 2001 focused on Kyiv, it presently broadcasts in 13 regions of Ukraine, reaching some 22 percent of the Ukrainian population. It received 11 of its 14 frequencies on a priority basis pursuant to the Settlement Agreement.

Under the Law of Ukraine on Television and Radio Broadcasting of 1993 (the “LTR”), all radio frequencies and attendant licences (summarily “frequencies”) are awarded by the “National Television and Radio Council of Ukraine” (the “National Council”). The National Council is independent from the Government of Ukraine, with half of its members appointed by the President and half by the Parliament.

The National Council awards frequencies in public tenders on the basis of criteria set forth in the LTR. All licensed broadcasters in Ukraine are entitled to participate in these tenders competing for frequencies. Only corporations under Ukrainian law qualify as licensed broadcasters so that foreign investors cannot apply for frequencies in their own right. This regime has been in existence from 1993 to present.

Claimant's Submission

Claimant has submitted that he intended to create three "*full national networks*". The National Council in 1995 has nurtured legitimate expectations that he would receive the frequencies necessary for realizing these plans. When these expectations were frustrated and additional grievances occurred, Claimant in November 1997 initiated the First Arbitration eventually settled by the Settlement Agreement.

Pursuant to the Settlement Agreement, Claimant received 11 frequencies as negotiated, but later than negotiated and with lower power than expected. Due to their low power, Gala's frequencies were insufficient to create the envisioned national networks.

During 2001 to 2008, Gala applied in tenders for additional frequencies. All these applications but one were denied.

Thereupon, Claimant has initiated this arbitration in September 2006. He has sought USD million 55,173 for loss of profits due to alleged breaches of the BIT and the Settlement Agreement preventing him from creating the envisaged national networks¹.

Respondent's Submission

Respondent has sought dismissal of all claims. It has denied any violation of either the BIT or the Settlement Agreement. The claims are beyond the Tribunal's jurisdiction. They are moreover precluded by the Settlement Agreement and on procedural grounds. Finally, Claimant has failed to prove his loss.

¹ Claimant has sought additional relief not relevant to my Opinion.

The Majority's Award

The Majority awards Claimant USD 8,717,860 plus USD 750,000 on costs. The award is based on Respondent's assumed breach of the Fair and Equitable Treatment standard of the BIT (the "FET standard") due to the National Council's failure of awarding Gala the frequencies needed for creating a full national network. All claims under the Settlement Agreement are dismissed.

The Award comprises two decisions – the "*Decision on Jurisdiction and Liability*" of January 14, 2010 (the "First Decision") and the Award of March 2011 (the "Award"). My Opinion concerns both the First Decision and the Award.

The First Decision establishes Respondent's liability in principle. It determines that the National Council's denial of Gala's applications for frequencies in three tenders between May 2004 and February 2008 have violated the FET standard. Moreover, the First Decision declares the practice of awarding frequencies during March 1999 through June 2000 to have breached the FET standard. During this period (the "Interregnum"), the National Council had not been operative and a Government agency had allotted frequencies without tender to broadcasters other than Gala.

The Award calculates the compensation due to Claimant on the basis of Respondent's liability as determined in the First Decision. For that purpose, the Majority relies solely on the practice during the Interregnum, The Majority concludes that Gala would have won additional 14 frequencies needed for creating one full national FM network if the frequencies during the Interregnum had been put to tender as required by law so that Gala could have applied for them.

My objections concern the Majority's disregard of the Settlement Agreement, the admission of Claimant's shareholder derivative suit on account of Gala, the delineation of the FET standard beyond its scope, the introduction of administrative practices during the Interregnum as a basis of Respondent's liability, the assumption of causation between such practices and Claimant's loss, and the award of loss of speculative profits.

SETTLEMENT AGREEMENT

The Majority ignores the Settlement Agreement in determining Claimant's rights under the FET standard. It thus disregards the Agreement's negative *res judicata* effect.

Terms

Claimant's grievances on account of Respondent's failure of awarding expected frequencies had already been at issue in the previous arbitration. They were settled by the Settlement Agreement. Under its para. 12, the Parties expressly acknowledge the absence of "*any claims or misunderstandings....as on the date on the signing of the Agreement*", i.e., March 20, 2000.

The Interregnum lasted from March 16, 1999 through June 2000. Any claims that might have arisen during the first 12 months of the Interregnum have thus been waived. Claimant, having the burden of proof, has not shown that any frequencies available for Gala had been allocated during the 3 months remaining after the cut-off-date. The waiver hence covers all claims on account of the Interregnum.

The Settlement Agreement further "*supersedes all prior correspondence, negotiations and understandings...with respect to matters covered herein*" (para. 27). Claimant's business expansion plans derive from correspondence and negotiations on the allocation of frequencies in 1995-1997. They are thus superseded.

Object and Purpose

As its express terms, *object* and *purpose* of the Settlement Agreement preclude the aforementioned claims and plans from consideration in this arbitration. By virtue of the Agreement, Claimant received 11 frequencies (out of his present 14) on a priority basis. These frequencies covered the very same regions for which Claimant sought frequencies in his 1995 – 1997 negotiations. In return for this priority treatment (at variance with applicable law), Claimant waived all claims, expectations and legally relevant plans ensuing from his 1995 – 1997 negotiations. This *quid pro quo* represents the basic synallagma of the Settlement Agreement.

Claimant had expected that the frequencies obtained pursuant to the Settlement Agreement would suffice to create his envisaged national network. This expectation foundered due to lower-than-aspired powers of the frequencies received. The Majority founds its award on an assumption of additional frequencies which Gala/Claimant should have received during the Interregnum to offset the lower-than-expected power of the frequencies under the Settlement

Agreement. Thus, the Majority places Claimant in the same position as if he had successfully negotiated the power of the frequencies under the Settlement Agreement. The FET protection is construed to *de facto* amend the Settlement Agreement. This defeats the latter's very purpose.

Res Judicata

Recorded as an award on agreed terms, the Settlement Agreement assumes *res judicata* status. It precludes awarding claims and considering plans in this arbitration that were waived in and superseded by the Agreement. By ignoring the *res judicata effect* of the Settlement Agreement, the Majority exceeds its powers.

SHAREHOLDER DERIVATIVE SUIT

As per the Majority's decision, the out-of-tender allocations of frequencies during the Interregnum breached the FET standard by depriving Gala of its right to participate in tenders required by Ukrainian law. This right belonged to Gala owing to its status as a licensed broadcaster in Ukraine. Claimant has brought this right under the umbrella of the FET standard by invoking it under the BIT in his capacity as a United States investor.

Gala is a joint stock corporation under Ukrainian law, Claimant Gala's controlling shareholder. Exercising a right of Gala in his own name, Claimant has filed a "*shareholder derivative suit*".

Ukrainian legislation reserves the status of a licensed broadcaster to corporate entities under Ukrainian law to the exclusion of foreign investors in their own right. This restriction imposed Gala's corporate veil on Claimant as condition of investing in the Ukrainian radio industry.

In the Annex to the BIT, Ukraine "*reserves its right to make or maintain limited exceptions to national treatment*". This Reservation applies to the radio sector; and it covers the aforementioned restriction. As a consequence, BIT protection does not extend to Gala's corporate rights under Ukrainian radio sector legislation.

The determined breach of the FET standard is founded on a violation of such rights, namely Gala's – assumed - rights to opportunities of winning frequencies illegally diverted from the tender process required by relevant legislation. Since such rights fall outside the ambit of BIT protection, their violation cannot be grounds for a breach of Claimant's rights as a United States investor under the FET standard.

The Majority objects that Respondent has not adequately pleaded the inadmissibility of Claimant's shareholder derivative suit. However, Respondent has undisputedly submitted the BIT (including the Reservation) and relevant Ukrainian legislation. In my view, the Tribunal was *ex officio* charged with determining the scope of BIT protection on the basis of the *iura novit curia* maxim.

Adjudicating a claim beyond the BIT's scope of protection, the Majority exceeds the Tribunal's powers.

FET STANDARD

The Majority interprets the FET standard broadly with respect to both its scope of protection and the legal consequences of its violation. The standard is liberally construed as an "umbrella clause" upgrading "blatant" violations of the host country's tender legislation *ipso iure* to international delicts even absent any specific relation to Claimant, let alone to Claimant as a foreign investor. The standard is moreover developed towards empowering tribunals *ex aequo et bono* to generate international case law superseding municipal laws in point even where they conform to *general principles of law recognized by civilized nations* (Art. 38(1) ICJ Statute).

The Majority ignores particular features of the scenario in this arbitration which suggest judicial self-restraint in delineating the FET standard with a view to reconciling BIT protection with conflicting public interests of the host country.

Tender Scenario

This arbitration concerns the treatment of Gala in public tenders. In these, Gala, itself a "corporate citizen" of Ukraine, competes with domestically-owned radio companies for market shares through allocation of frequencies.

In such tenders, a "*level playing field*" is essential where all contenders compete under the same framework conditions. Any preference accorded to some contenders tends to translate into "*reverse discrimination*" of other contenders. It thus undermines fair competition in and effectiveness of the tender process.

BIT protection accords protection to beneficiary investors in addition to the protection afforded to domestic investors and foreign investors without BIT protection by the laws of the host country. This is legitimate. However, BIT protection must be reconciled with the rights of contenders to fair competition and the host country's reserved regulatory powers.

This aspect militates against developing a protection level under the FET standard which grants BIT protected investors a competitive advantage over their contenders without such protection. Added protection can distort competition.

Tender applications represent investments in opportunities. Multiple contenders apply – only one can win. The economics of tender applications are determined by the chances of winning relative to the risk of losing the resources invested in the application. Legal protection and recovery rights in particular reduce the risk of loss. Where recovery rights extend to loss of profits, as awarded by the Majority, they even increase the chances of winning – not the award as such but the profits which would have accrued from the award. Such rights tend to enhance the risk-return ratio of tender applications. And if they are granted to selected applicants, e.g., BIT protected applicants, they tend to accord these applicants competitive advantages over their contenders.

Recovery rights of unsuccessful tender applicants imply considerable liability risks for the State. Typically multiple contenders apply so that any irregularity may trigger multiple claims. These can accumulate to incalculable liability avalanches.

Municipal laws therefore tend to restrict recovery rights in tenders with a view to containing fiscal exposure to liability. For instance, European law provides only for recovery of the costs incurred in relation to the tender (*damnum emergens*) but not for recovery of loss of profits (*lucrum cessans*) as awarded by the Majority.

Such restrictions must be taken into consideration in applying the FET standard to tenders for two reasons. Disregard of such restrictions may widen the gap between the protection of BIT protected applicants and their contenders with prejudice to fair competition. And such restrictions reflect a – widely accepted - public interest of limiting exposure to liability at taxpayer's expense.

Reservation

The particular dynamics of tenders legitimate the aforementioned restrictions on foreign investments in the radio industry established by Ukrainian sector legislation and covered by Ukraine's Reservation to national treatment. In essence, these restrictions seek to exclude broadcasters' rights in relation to tenders for frequencies from BIT protection. This assures a level playing field for all contenders and forestalls unforeseeable liabilities in accordance with practices in Europe and elsewhere. Ukraine accords these public interests in the radio sector priority over the investment promotion purpose of the BIT reflected in the latter's preamble.

In the Majority's opinion, the Reservation has "*no bearing whatsoever for the resolution of the present dispute*". Its application must be strictly confined to national treatment and has no ramifications for the FET standard.

This position in my view overlooks the substantive overlap between the national treatment and the FET standard, respectively. Authorizing less advantageous treatment of U.S. investors than of domestic investors, the Reservation *a fortiori* militates against converting the FET standard into a right to preferential treatment of U.S. investors over their domestic contenders, the non-contingent nature of FET notwithstanding.

I do not wish to suggest that the Reservation excludes tenders from FET protection in all conceivable scenarios. Yet, the Reservation in my view commands restraint in expanding the standard with respect to tender situations, especially in relation to an administrative practice affecting U.S. and domestically-owned radio companies alike.

Expanding the FET standard to an "umbrella clause" for tender violations without regard to the special tender scenario or the Reservation, the Majority in my view stretches the standard beyond its *object* and *purpose* in the *context* of the BIT. It thus exceeds the Tribunal's powers.

INTERREGNUM

Ne Ultra Petita

The First Decision declaring out-of-tender allocations of frequencies during the National Council's inoperativeness (the "Interregnum") in breach of the FET standard represents a "surprise decision". It has no basis in Claimant's pleadings.

Claimant had referred to this practice in the context of his claims for alleged non-performance of the Settlement Agreement. However, he has not, prior to the First Decision, asserted any claim on account of the administrative practice during the Interregnum. Only in response to the First Decision did Claimant amend his pleadings to include claims due to the Interregnum. These *post facto* pleadings cannot retroactively establish the procedural basis of the Majority's decision.

The decision violates the fundamental arbitration principle of *ne ultra petita*. It thus exceeds the Tribunal's powers.

Audiatur et Altera Pars

By introducing a liability not pleaded by Claimant, the Majority deprives Respondent of its Right to be Heard on this issue. Respondent could not submit its defence in time to avert the decision.

Respondent's submission (including documentary evidence) in response to the decision revealed major errors concerning the Majority's assumptions. Since the decision established Respondent's liability as *res judicata* for the award, Respondent's *post facto* submission was of no avail. It cannot cure the *departure from a fundamental rule of procedure*.

Claims Waived

The Interregnum in most part preceded the Settlement Agreement. Claims on account of occurrences during the Interregnum have thus been waived by the Settlement Agreement.

Venire Contra Factum Proprium

Co-terminus with the Interregnum, Claimant negotiated the Settlement Agreement which granted him 11 frequencies on a priority basis. Claimant's priority treatment was negotiated with the Government during the National Council's inoperativeness; and it impaired the opportunities of contenders under applicable law for the frequencies concerned. Claimant thus negotiated to his benefit a practice similar to the Interregnum practice on account of which he seeks FET protection. His claim is *estopped* as a *venire contra factum proprium*.

The Majority dismisses this aspect arguing that the Settlement Agreement just "*rebalanced*" injustice done to Claimant. However, settling an – assumed – injustice to Claimant cannot justify doing injustice to innocent stakeholders, i.e., Gala's contenders. The FET standard cannot legitimate compensating foreign investors at the expense of domestic.

FET Standard as Umbrella Clause

The Majority grounds its decision solely on a violation of applicable Ukrainian legislation assumedly entitling radio broadcasters to the allocation of frequencies in transparent tenders. Gala is affected – only – in its capacity as a licensed broadcaster in Ukraine, alongside with all other Ukrainian radio companies at the time (except the few benefiting from the practice). The violation entails no discrimination of Claimant, let alone of Claimant as a U.S. investor.

The FET standard is – in my view inadmissibly - extended to general administrative framework conditions of the host country unrelated to Claimant.

AWARD

Majority Decision

The Majority determines the award of compensation solely on the basis of the frustration of Gala's opportunities during the Interregnum. It concludes that Gala would have won 14 frequencies needed to create a "*full national FM network*" had the frequencies allotted during the Interregnum been awarded in public tenders in compliance with the law. Without reviewing any particular allocations of frequencies, the Majority reasons its conclusion with Gala's

popularity in Kyiv in 1999 and presentations of Claimant and his collaborators on Gala's program.

The Majority then proceeds with estimating Gala's loss of profits in terms of the balance between Gala's actual net enterprise value (USD 126,290) and its hypothetical net enterprise value if Gala's *full national network* had been operative as of January 1, 2001 (USD 8,844,150). In this way, the Majority arrives at a loss of profits in the amount of USD 8,717,850. This amount is awarded to Claimant, plus USD 750,000 compensation of costs of this arbitration.

This decision - in my view implausibly - construes causation between Respondent's assumed wrongdoing during the Interregnum and Gala's hypothetical *full national network*; and it awards (highly) speculative profits.

Causation

The Majority refers to the concept of "*transitive causation*" and distinguishes between two causal links, namely (i) the link between Respondent's practice during the Interregnum ("*the cause*") and Gala's hypothetical *full national network* and (ii) the link between such network and Gala's loss of profits (the final *effect*). I agree with this conceptual approach in principle. I disagree, however, with the Majority's application of this concept to tender situations and analysis of the facts at hand.

Causation in Tenders

International law, as far as ascertained, does not offer special rules for determining recovery in case of flawed or illegally averted tenders. Municipal laws do. They indicate *general principles of law* to be taken into account in interpreting more general international law principles (Article 38(1)© ICJ Statute). European and German laws offer examples in point.

The EU *Sector Surveillance Directive* provides for recovery of costs incurred in relation to public tenders infringing on EU law. It does not, though, envision any recovery of loss of profits. Even recovery of costs is conditional on proof of a *real chance* in a particular tender.

German case law jurisprudence under the Roman law doctrine of *culpa in contrahendo* awards loss of profits in tender situations. However, it requires for that purpose proof with a “*probability bordering at certainty*” that the plaintiff **would** have won the particular tender concerned but for the violation asserted.

These restrictions serve an obvious purpose – the avoidance of liability avalanches through claims by multiple frustrated tender applicants.

International law principles on State responsibility complementing the FET standard include recovery of loss of profits – but only “*insofar as it is established*” (Article 36(2) of the ILC Articles). This principle is concretized by precedents requiring “*particularization*” of damages and constraining award of “*speculative profits*”.

In my view, these principles as shaped in precedents encapsulate limitations on recovery in tender situations typical in municipal laws specifically addressing tenders. At the very least, they militate against liberal assumptions regarding a claimant’s success in tender situations and estimates of profits foregone.

Analysis of Facts

The Majority has not assessed Gala’s prospects with a view to any particular allocation of frequencies during the Interregnum. It just concludes that Claimant **should** have won the frequencies needed for realizing his business expectations plans; and it accepts Claimant’s affirmation that he would have needed 14 frequencies.

Claimants business expectation plans are precluded by the Settlement Agreement from consideration in this arbitration (supra). The Majority’s assessment thus ignores the *res judicata* effect of the Settlement Agreement.

Failing to *particularize* Gala’s opportunities in tenders if held in compliance with the law, the Majority’s assessment is inconclusive.

In its guidance to the Parties, the Tribunal had indicated that compensation would be determined on an assessment of Gala’s chances in particular tenders. The perfunctory summary assessment, relying entirely on submissions during the first phase of the proceedings and on Claimant’s business expansion plans, represents a “*surprise decision*” inconsistent with the maxim of *party equality*.

Finally, the Majority liberally estimates Claimant's foregone profits by benchmarking Gala's hypothetical financial performance (if it had created a full national network) against the performance of the four most successful radio companies in Ukraine. This approach departs from the international precedents against awarding speculative profits; and it contrasts the restrictions under municipal laws on the recovery of *lucrum cessans* in tender situations.

Plausibility of Findings

The Majority's findings are implausible.

The Majority concludes that Gala would have won 14 frequencies during the Interregnum if the administrative practice had complied with the law, although:

- At most some 20 frequencies were available for award to Gala so that Gala would have had to score a success rate of some 70 percent against potentially all Ukrainian radio companies at the time;
- As late as 2006, no private radio company in Ukraine had operated a *full national network* as Gala is found to have achieved in 2001 but for the assumed deprivation of its opportunities;
- Gala's market position in Kyiv relied on by the Majority eroded from no. 1 in 1999 to no.15 in 2010;
- Gala's recorded capital was clearly inadequate and its off-the-record funding by Claimant was not transparent.

Fourteen frequencies (in addition to Gala's present 13) would in the Majority's estimate have multiplied Gala's enterprise value seventy-times its present. Such foregone hypothetical profits compare with past actual losses of Gala exceeding USD 2 million during 1995 – 2010. In my view, this reflects audacious speculation.

The Majority in my opinion stretches the recovery of loss due to a breach of the FET standard beyond the limits set by applicable principles of international law. It thus again exceeds the powers of the Tribunal.

CONCLUSIONS

In my opinion, the Majority exceeds the Tribunal's powers by

- Failing to recognize the *res judicata* effect of the Settlement Agreement;
- Admitting Claimant's shareholder derivative suit on account of Gala;
- Construing the FET standard beyond its scope of protection;
- Introducing a liability of Respondent on account of the Interregnum without basis in Claimant's pleading (*ne ultra petita*);
- Construing *causation* between Respondent's breach of the FET standard and Claimant's loss at variance with established principles of international law and municipal laws in point; and
- Awarding "speculative profits".

Moreover, the Majority departs from fundamental rules of procedure by

- Depriving Respondent of its *Right to be Heard* with the "surprise decision" regarding the Interregnum; and
- Violating the principle of *Equality of Parties* in its determination of causation between Respondent's assumed wrongdoing and Claimant's loss.

The Majority's decision in my view sets an unfortunate precedent by

- Discouraging the amicable settlement of investment disputes;
- Side-stepping Ukraine's Reservation to BIT protection safeguarding the regulation of a sensitive sector;
- Overstretching the FET standard into an *ex aequo et bono* empowerment of tribunals to supersede municipal laws by international case law jurisprudence;
- Ignoring restrictions of municipal laws and international law principles widely recognized to safeguard legitimate public interests;

- Construing BIT protection towards unduly privileging foreign-owned enterprises over domestically-owned competitors; and
- Leading to a divergence of international law from municipal laws.

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GLOSSARY

Audio	Audio procedural conference of March 1, 2010
Award	The Final Award in ICSID Case No. ARB/06/18 dated March 2011
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, 1966
Claimant	Mr. Joseph Charles Lemire, a United States citizen
CMRI	Respondent's Counter-Memorial on Remaining Issues
Critique	The Majority's Comments on this Separate Opinion (ch. II.2 of the Award)
Cf.	Compare
Douglas	Zachary Douglas, <i>"The International Law of Investment Claims"</i> , Cambridge 2009
EBS	EBS Expertise Services
EBSR	EBS Report on Damages of November 3, 2008
EBSSR	EBS Supplementary Report of June 21, 2010
FET	Fair and Equitable Treatment
First Arbitration	Investment Arbitration under the ICSID Additional Facility between Claimant and Respondent filed on November 14, 1997 and settled by the Settlement Agreement (Case No. ARB(AF)/98/)
First Decision	Decision on Jurisdiction and Liability dated January 14, 2010 in ICSID Case No. ARB/06/18
Fn.	Footnote
Frequency	Radio frequency, including all licences required to broadcast on a frequency
Gala	CJSC "Radiocompany Gala"
Gami	<i>GAMI Investments, Inc. v. Mexico</i> , <u>Ad hoc Arbitration UNCITRAL (NAFTA)</u> , Final Award of November 15, 2004
Goldmedia	Goldmedia GmSH
GR	Goldmedia Report of August 28, 2008

GSR	Goldmedia Supplementary Report of April 16, 2010
HR	Hearing on Jurisdiction and Liability on December 8 to 12, 2008
HRI	Hearing on Remaining Issues on July 12, 2010
ICJ	International Court of Justice
ILC	International Law Commission
ILC Articles	ILC's Articles on Responsibility of States for Internationally Wrongful Acts
Interregnum	Period between March 16, 1999 and June 2000 when the National Council was not operative
LNC	Law on National Television and Radio Council of Ukraine last amended in 2006
LTR	Law of Ukraine on Television and Radio Broadcasting last amended in 2006
Majority	Professor Juan Fernandez-Armesto and Mr. Jan Paulsson,
MRI	Claimant's Memorial on Remaining Issues
Para.	Paragraph
PHM	Post-Hearing Memorial
Reservation	Ukraine's Reservation to National Treatment under para. 3 of the Annex to the Bilateral Investment Treaty between the United States of America and Ukraine
Respondent	Ukraine
Second Phase	Phase of this Arbitration following the Decision on Jurisdiction and Liability of January 14, 2010
Settlement Agreement	Agreement dated March 20, 2000 between Claimant and Respondent on the settlement of the First Arbitration, which was recorded as an award on agreed terms on September 18, 2000
Schreuer	Christoph H. Schreuer et al., „ <i>The ICSID Convention, A Commentary</i> “, 2nd ed., Cambridge 2009
Tudor	Iona Tudor, „ <i>The Fair and Equitable Treatment Standard in International Law of Foreign Investment</i> “, Oxford 2008
UAH	Ukrainian Hryvnia
USD	United States Dollars
Wena	<i>Wena Hotels v. Egypt</i> , Decision on Annulment, Febr. 5, 2002

WS

Witness Statement

All other defined terms correspond to the definitions in the Glossaries of the Award and the First Decision.

INTRODUCTION

1. Despite my deepest professional and personal esteem for my colleagues, I must dissent from:

- The award by the Majority of 8.717.850 USD to Claimant as compensation for Respondent's – assumed – violation of the Fair and Equitable Treatment standard (the "FET standard") of the Treaty between the United States and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment of November 16, 1996 (the "BIT");
- The Majority's decision that Gala's treatment with respect to the allocation of frequencies violates Claimant's rights under the FET standard of the BIT; and
- The award by the Majority of 750.000 USD as compensation for the costs and expenses incurred in this arbitration.

2. The aforementioned awards and decision are set out and reasoned in two Decisions, namely:

- The DECISION ON JURISDICTION AND LIABILITY of 14 January 2010 (hereinafter referred to as the "First Decision"); and
- The AWARD of March 2011 (hereinafter referred to as the "Award").

Accordingly, this Opinion relates to both the First Decision and the Award^{2,3}.

3. My disagreement with the First Decision concentrates on aspects and conclusions of Section VII of that Decision⁴, namely the Majority's determinations regarding Respondent's violations of the BIT on account of Gala's treatment with respect to the allocation of radio frequencies and broadcasting licences (hereinafter summarily referred to as "frequencies").

²This Separate Opinion is based on the most recent draft of the Award shared with me by the Majority. If subsequently changes have been introduced into that draft, references to the Majority's position in my Opinion may have become inaccurate.

³I had agreed with my colleagues to state my entire Separate Opinion together with the Award.

⁴See para. 513 of the First Decision.

4. In the First Decision, the Majority decides that Gala's treatment with respect to the award of frequencies breached the FET Standard of Article II.3 of the BIT in four instances⁵. My dissent from this Decision flows from three overriding legal aspects ignored by the Majority, namely:

- (I) The preclusion of Claimant's legitimate expectations and business expansion plans from consideration in this arbitration by virtue of the Settlement Agreement;
- (II) The inadmissibility of Claimant's shareholder derivative suit on account of Gala, a Ukrainian corporation, by virtue of Respondent's Reservation to National Treatment in the Annex to the BIT and the exercise of this Reservation by Ukrainian radio sector legislation; and
- (III) The limitations of the scope of the FET standard in light of (i) the particular dynamics of tenders where BIT protected investors compete with domestic investors and (ii) Ukraine's Reservation to National Treatment as exercised.

5. In chapters IV through VI, I review the Majority's pertinent assessment of the facts at hand in light of the conclusions from chapters I through III with a focus on aspects ignored by the Majority. My key points are:

- (IV) The imperfections of Ukrainian legislation in relation to tenders for frequencies were already embodied in the initial version of the Law of Ukraine on Television and Radio Broadcasting of December 21, 1993 (the "LTR"). Claimant has acquiesced with this legislative environment, including its imperfections, when he started his investment in 1995.
- (V) In assessing Gala's success record in tenders, the frequencies awarded under the Settlement Agreement must be taken into account. Gala's failures can be explained by reasons pervading all pertinent tender decisions, notably Gala's undercapitalisation, its limited technical capacities and its lack of program innovation.
- (VI) The administrative practice during March 1999 through June 2000 with respect to the allocation of frequencies when the National Council was

⁵See para. 513 (3) in conjunction with para. 421 of the First Decision.

inoperative (the “Interregnum”) should not have been considered in this arbitration on procedural grounds (*ne ultra petita, audiatur et altera pars*). It moreover does not violate any rights of Claimant under the FET standard of the BIT; and

(VII) The National Council’s decisions in the Tenders during May 2004 through February 2008 do not represent *arbitrary or arbitrary measures* against Claimant and, in any case, do not justify any inference with respect to the Interregnum.

6. In PART TWO of my Opinion, I address the Award and submit that the Majority

(I) Establishes *causation* between the Respondent’s assumed wrongdoing during the Interregnum and Claimant’s loss at variance with international law principles and municipal laws in point;

(II) Awards *speculative profits*; and

(III) Misconstrues the principle “*the loser pays*” in allocating costs.

7. PART THREE of my Opinion comments on the Majority’s critique of my Opinion incorporated in the Award.

**PART ONE: THE DECISION ON JURISDICTION AND
LIABILITY OF JANUARY 14, 2010 (THE “FIRST DECISION”)**

I. CLAIMANT’S LEGITIMATE EXPECTATIONS IN THE LIGHT OF THE SETTLEMENT AGREEMENT OF MARCH 20, 2000 (THE “SETTLEMENT AGREEMENT”)

I.A. Majority Position and Parties’ Submissions

I.A.1. Claimant

8. Claimant has built his case for a breach of the FET standard in the allocation of frequencies on the allegation that at the time he made his initial investment in 1995, *“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 was encouraged by them”*⁶. As evidence, Claimant has submitted correspondence between the National Council, the State Inspection on Electric Communications and himself dated 1995 as well as a draft “Plan of Measures” negotiated between Claimant and the National Council in 1997⁷. In the words of the Majority, *“the main thrust of Claimant’s submission is that his legitimate expectations were thwarted by Ukraine’s actions in violation of the BIT”*⁸.

I.A.2. Majority

9. In light of this submission, the Majority relates the notion of legitimate expectations to the FET standard of the BIT⁹. *“.....the FET standard is thus closely tied to the notion of legitimate expectations – actions or omissions by Ukraine are contrary to the FET Standard*

⁶Para. 210 of the First Decision

⁷Para. 211 of the First Decision

⁸Para. 212 of the First Decision

⁹Paras. 264 – 271 of the First Decision

*if they frustrate legitimate and reasonable expectations on which the investor relied at the time when he made the investment*¹⁰.

10. The Majority defines Claimant's legitimate expectations on a general and on a specific level. *"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"*¹¹. *"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"*¹².
11. Now the Majority proceeds to analyse Claimant's business expectations plans, concluding that *"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 (...)"*¹³. In summarizing its elaboration on the FET standard, the Majority again refers to *"the legitimate expectations of the investor, at the time he made his investment"*¹⁴.

I.A.1. Respondent

12. Respondent objects **to consideration** of Claimant's legitimate expectations and business expansion plans. Presented in Respondent Counsel's Opening Statement of the December 8 – 12, 2008 Hearings¹⁵, these objections are based on the terms of the Settlement Agreement between Claimant and Respondent of March 20, 2000 settling the previous arbitral proceedings between the Parties under the ICSID Additional Facility (Case No. ARB(AF)/98/1)¹⁶ (the "First Arbitration").
13. The relevant provisions of the Settlement Agreement referred to by Respondent are:

¹⁰ Para. 264 of the First Decision

¹¹ Para. 267 of the First Decision.

¹² Para. 268 of the First Decision.

¹³ Para. 270 of the First Decision.

¹⁴ Para. 285 of the First Decision.

¹⁵ See Hearing Transcript, pp. 50 – 53.

¹⁶ See para. 33 of the First Decision.

- Clause 10: “*The Parties agree and confirm that all the claims, complaints and requests contained in the Consent to Arbitrate, Notice of Arbitration, Ancillary Claims and all other official letters of the Claimant to the Respondent or ICSID, as well as other correspondence of the Claimant addressed to third parties are hereby settled*”.
- Clause 11: “*By such settlement the Parties, in the event of compliance with this Agreement, exclude all of the claims referred to in Item 10 of Section II “Settlement of the Dispute” from any further judicial or arbitration Settlement*”; and
- Clause 12: “*The Parties acknowledge the absence of any claims or misunderstandings between them as on the date of signing this Agreement*”¹⁷.

14. From these provisions, Respondent concludes that the Tribunal’s analysis should start from the terms of the Settlement Agreement rather than from correspondence dated 1995 and 1997: “*I think this is logically where the Tribunal would want to start their analysis because, (...) if the Tribunal finds that there was no breach of the prior settlement award, you do not look at anything that happened before the settlement award in terms of there being a breach because the settlement agreement cleared the decks as of the date of itself*”¹⁸.

I.B. My View

15. I agree with the Majority’s statement regarding Claimant’s legitimate expectations of a general nature – albeit subject to three caveats:
- The regulatory system was already in place when Claimant started his investment. He could not expect more fairness and transparency than provided by the existing system (paras. 158 – 161 *infra*);

¹⁷ See Exhibits CM – 12 and 13 as well as Respondent’s power point presentation at the Hearing Dec. 8, 2008, p. 5 - 7.

¹⁸ See Hearing Transcript, p. 50.

- Through Respondent's Reservation to National Treatment, Claimant was warned of possible measures to the detriment of foreign investors in the radio industry (paras. 134 – 137 *infra*); and
 - Only Gala, a corporation of Ukrainian law, was licensed to broadcast in Ukraine so that the entitlement to regulatory fairness may not in all circumstances accrue to Claimant in his own right (paras. 79 – 89 *infra*).
16. Respondent's objection relates to the consideration of Claimant's business expansion plans in the context of legitimate expectations in the present arbitration. So does my concern.
17. Legitimate expectations are established at the time when the pertinent investment is made¹⁹, and as a matter of logic, they can as such not be altered subsequently. To this extent, I agree with the Majority. The Majority, in my view errs, however, when it accepts expectations related to business expansion for its analysis of Claimant's treatment under the FET provision of the BIT subsequent to the Settlement Agreement.

I.B.1. Terms of the Settlement Agreement

18. Claimant's entitlement to frequencies under the FET provision of the BIT was at issue in the First Arbitration. This Arbitration was amicably settled by the Settlement Agreement signed on March 20, 2000 and recorded as an award on agreed terms on September 18, 2000 (ICSID No. ARB(AF)/98/1)²⁰. By virtue of clause 13 (b) of the Settlement Agreement, Claimant received frequencies in eleven cities on a priority basis²¹. These eleven cities coincide with the cities specified in the correspondence between the National Council and the State Inspection on Electronic Communications, cc'd to Claimant, of 18 July and 18

¹⁹See *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of May 9, 2003, para. 360; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of October 3, 2006, para. 127; *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award of August 12, 2008, para. 340 and *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Award of August 24, 2009, para. 129.

²⁰ See Claimant's Request for (the First) Arbitration, para. 27 and Claimant's Ancillary Claims of October 13, 1998 (Claimant's Exhibit CM – 18), pp. 5, 6.

²¹ See Claimant's Exhibits CM – 19, 20.

October 1995²² as well as in a draft “Plan of Measures” negotiated between Claimant and the National Council in 1997, but never signed²³.

19. The aforementioned correspondence and draft Plan of Measures had been submitted by Claimant as the documented basis of his legitimate expectations; and the Majority refers to these documents in this context²⁴. While these documents specify the cities for which Claimant expected frequencies, they do not entail any reference to further expectations of Claimant.
20. Since the allocation of frequencies was “*contained in the Consent to Arbitrate, Notice of Arbitration, Ancillary Claims*” [of the settled First Arbitration], it falls within the purview of clause 10 of the Settlement Agreement. This is all the more obvious, as the Settlement Agreement accords Claimant priority to frequencies for the very same cities on which his initial business interest and discussions with the National Council had concentrated.
21. As the aforementioned correspondence, the Settlement Agreement does not entail any reference to interests of Claimant in additional frequencies. To the contrary, under clause 12 of the Settlement Agreement the Parties “*acknowledge the absence of any claims or misunderstandings between them as on the date of signing this Agreement*” (emphasis provided). This provision is reinforced by clause 27 of the Settlement Agreement which provides that “*This 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*” (emphasis provided).
22. In the absence of any opening clause in the Settlement Agreement, any claims with respect to further frequencies could hence not be based on or affected by “*any correspondence, negotiations or understandings*” pre-dating the Settlement Agreement.
23. The relevance of Claimant’s business expansion plans ensues from his negotiations and alleged understandings at the time when the investment was made, i.e., in 1995 -

²² See Claimant’s Exhibits CM – 1,2.

²³ See Claimant’s Exhibit CM – 8 at para. 2.

²⁴ See paras. 210, 211 of the First Decision.

1997²⁵. This basis was precluded from consideration in the present arbitral proceedings by the clear terms of the Settlement Agreement.

I.B.2. Synallagma of the Settlement Agreement

24. The Majority confines *object* and *purpose* of the Settlement Agreement to the specific claims withdrawn by Claimant pursuant to the Settlement Agreement.
25. To understand the “*quid pro quo*” underlying the Settlement Agreement, though, the aforementioned provisions precluding further claims must be related to paragraph 13 of the Settlement Agreement, especially clause 13 (b). Absent this covenant, Claimant would under applicable Ukrainian law have had no right to any preferential treatment in competing with (domestic and foreign) applicants for radio frequencies. Rather, he would have had to rely on his success in tender proceedings under the Law on Television and Radio Broadcasting of December 21, 1993 (the “LTR”)²⁶. By virtue of the paragraph 13 (b), Claimant received on a priority basis eleven radio frequencies and licences – out of the fourteen frequencies and licences which he held at the close of the present arbitral proceedings. The frequencies obtained via the Settlement Agreement covered precisely the areas in the focus of his initial business interest.
26. Claimant’s priority to these eleven frequencies came at the expense of Claimant’s (mainly domestically-owned) competitors that were denied an opportunity to win these frequencies in tenders under the LTR. Respondent had accorded Claimant this significant business advantage for the obvious purpose of settling the First Arbitration and achieving legal certainty. Priority for specific frequencies in return for settlement of all alleged previous expectations of frequencies was fundamental to the synallagma of the Settlement Agreement. By relying on Claimant’s negotiations pre-dating the Settlement Agreement in the present arbitration, the Majority defeats the very purpose of the Settlement Agreement against its clear terms.

²⁵ See paras. 40 – 53 *infra* for details.

²⁶ See Respondent’s RLA – 2 for a partial translation of this law and para. 28 *infra*.

I.B.3. Background of the Settlement Agreement

27. The synallagma of the Settlement Agreement flows from the previous negotiations between Claimant and the National Council regarding the allocation of frequencies. In early 1995, Claimant assumed negotiations with the National Council with the aim of attaining frequencies for particular regions of Ukraine. These negotiations culminated in the 1995 correspondence and the 1997 draft Plan of Measures on which the Majority bases Claimant's legitimate expectations. In essence, Claimant tried to obtain frequencies directly out of tender or at least to secure a favourable consideration of his business expansion plans in tender decisions.
28. The LTR provides that frequencies and broadcasting licenses (summarily referred to as "frequencies") are awarded by the National Council on the basis of tenders open to all broadcasters licensed in Ukraine. Derogation from this process is allowed only where expressly authorized by LTR²⁷. The criteria for awarding frequencies are set forth in the LTR²⁸. Applicants' business expansion plans do not belong to these criteria.
29. The integrity of the tender process as an open competition of all contenders required assessment of all applications in a level playing field with **exclusive** reliance on the criteria provided in the LTR. Any consideration of individual business plans would have amounted to reverse discrimination of contenders whose expansion plans were not taken into account; and it would have undermined the effectiveness of the tender process in selecting the best contenders in terms of the criteria enshrined in the law²⁹. Giving credit to Claimant's business expansion plans would have amounted to according preferential treatment to an individual contender against the tenets of the tender process.
30. With the First Arbitration, Claimant had sought the allocation of frequencies to which he had felt himself entitled due to alleged legitimate expectations emanating from his aforementioned negotiations with the National Council. The Settlement Agreement tried to reconcile Claimant's alleged entitlement due to legitimate expectations with Respondent's interest in the integrity of the tender system for frequencies. To strike this balance, Respondent accorded Claimant priority with respect to the frequencies enumerated in

²⁷Article 23 (6) of the LTR. This regime was already enshrined in the initial 1993 version of the LTR.

²⁸Article 25 (14) of the LTR.

²⁹ This aspect is further developed in paras. 115 – 120 infra.

clause 13 (b) of the Settlement Agreement³⁰. As a corollary, Claimant's priority treatment was confined to these frequencies. Upon award of these frequencies, Claimant, with respect to applications for additional frequencies, was to be treated in strict compliance with the LTR on an equal footing with all other tender applicants. Thus, the integrity of the tender system was to be restored.

31. Against this background, clause 10, 11, 12 and 27 make it plain that Claimant could not invoke any alleged expectations or plans established prior to the Settlement Agreement in his quest for frequencies in addition to those enumerated in clause 13 (b). With his signature of the Settlement Agreement, Claimant has waived any future consideration of such expectations or plans, subject to Respondent's performance of the Settlement Agreement.

I.B.4. Claimant's Waiver of his Expectations with respect to Business Expansion

32. No previous ICSID award has seemingly addressed the effect of a subsequent agreement on an investor's rights under the FET standard in reliance on legitimate expectations. This issue in my view must be distinguished from the – established – question regarding the time at which legitimate expectations are established. The fact that Claimant's expectations were established as of the date when he made the investment (i.e., in 1995) did not prevent him from subsequently waiving the effect of his legitimate expectations on his legal position, including his protection under the FET standard of the BIT, in an agreement with the Host Government.
33. This follows in my view from the freedom of contract according to which entitlements (other than inalienable rights) may contractually be waived by those entitled. BITs protect economic rights. As a rule, these are not inalienable but at the disposal of the investor concerned. Claimant, by agreeing to the terms of the Settlement Agreement, waived any entitlement that may have derived from his initial negotiations concerning the allocation of frequencies in return for the award of specified frequencies on a priority basis. After the Settlement Agreement (and Respondent's compliance with it), Claimant could no longer legitimately expect any consideration of his initial business plans by the National Council in deciding on his tender applications for further frequencies. Whatever they might had been,

³⁰ To avoid an explicit violation of the LTR, the priority was veiled behind formal compliance with the procedures of the LTR.

these expectations and plans have been superseded by the Settlement Agreement and, with the latter's performance by Respondent, become obsolete.

I.B.5. Recognition of the Settlement Agreement as an Award on Agreed Terms

34. As per the request of the Parties, the Settlement Agreement was on September 18, 2000 recorded as an award on agreed terms. It thus obtained the status of an award under Section 4 of the ICSID Convention. According to Article 53(1) of the ICSID Convention, the Settlement Agreement was transformed into an "*award binding on the parties and (...) not subject any appeal or to any other remedy except those provided for in this Convention*". As a consequence, the Convention's provisions on recognition and enforcement became applicable to the Settlement Agreement; and its terms became *res judicata* as those of an arbitral decision.³¹
35. The *res judicata* effect of the Settlement Agreement flows from the ICSID Convention. The latter, together with the BIT and Claimant's claim as filed "*constitute the arbitration agreement and therefore prescribe the parameters of the Tribunal's powers*"³². The Tribunal thus exceeds its powers if it disregards the (negative) *res judicata* effect of the Settlement Agreement on a matter covered by it.
36. The allocation of frequencies is covered by the Settlement Agreement. The latter, according to its clause 27 "*supersedes all prior correspondence, negotiations and understandings between [the Parties] with respect to the matters covered therein*". This includes Claimant's negotiations and correspondence with the National Council relied on by the Majority as basis of Claimant's expectations and plans.
37. Pursuant to clause 12 of the Settlement Agreement, "*the Parties acknowledge the absence of any claims or misunderstandings between them as on the date of signing this Agreement*". The Agreement had been signed on March 20, 2000. Thus, all claims that might have existed on that date have effectively been waived³³.

³¹ See Christoph H. Schreuer et al., „*The ICSID Convention, A Commentary*“, 2nd ed., Cambridge 2009, article 48, note 79.

³² See *Helnan International Hotels A/S and Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee on the Application for Annulment of May 29, 2010, para. 40 .

³³ See paras. 200 – 204 and paras. 407 – 507 *infra* on the implications for claims awarded.

38. The aforementioned issue has been raised by Respondent before the Tribunal. The Majority fails to address it.

39. In sum, by awarding claims arisen before March 20, 2000 (paras. 200 – 204 *infra*) and building its Award on Claimant's business expansion plans without considering the impact of the Settlement Agreement on these plans, the Majority fails to recognize the *res judicata* effect of an award on agreed terms on a matter fundamental to its Award. The Majority hence exceeds its powers. In my view, it does so "*manifestly*", since the matter is clearly covered by the terms of the Settlement Agreement, is at the core of the Agreement's synallagma and has been pleaded by Respondent.

I.B.6. Claimant's Initial Business Expansion Plans

40. Even if I accepted *arguendo* the Majority's disregard of the Settlement Agreement in determining the implications of Claimant's initial business expansion plans for this arbitration, I still would have to disagree with the Majority's analysis and findings in point. Whatever Claimant might have had in mind, his alleged plans are not supported, let alone legitimated, by the correspondence between the National Council and the Ukrainian State Centre of Radio Frequencies (the "State Centre") of July/October 1995.

41. While the Majority focuses on Claimant's mindset at the time of his investment³⁴, it is generally established that only **legitimate** expectations qualify for protection under the FET standard and that expectations receive their legitimacy from conduct attributable to the host government³⁵. In the words of the PSEG Tribunal, "*legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed*"³⁶. Similarly, the *Parkerings* Tribunal stated that "*the expectation is*

³⁴ See para. 270 of the First Decision: „*The available evidence shows what Mr. Lemire had in mind when he bought into Gala Radio in June 1995.....The idea to create a third radio network.....seems to have been an afterthought*".

³⁵ See Ioana Tudor, „*The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*“, Oxford University Press 2008, pp. 163 et. seq.; and Sebastian Lopez Escarcena, „*The Elements of Fair and Equitable Treatment in International Investment Law*“, Leuven Centre for Global Governance Studies, Policy Brief No. 14, April 2010, p. 6 et seq.; both with further references.

³⁶ See *PSEG Global Inc and Konya Igin Elektrik Üretim ve Ticaret Limited Serketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of January 19, 2007, para. 241.

legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation (...).³⁷ Also in line with this jurisprudence is the more recent NAFTA based ad hoc-arbitral decision in *Glamis Gold v. USA*: “Article 1105 (1) NAFTA [the FET standard] requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce the investment”.³⁸

42. Yet, the Majority does not pinpoint any “promise” or assurance of Respondent in support of Claimant’s initial business plans; it just states that the National Council and the State Centre “*reacted positively*” to Claimant’s quest for frequencies and were “*considering the possibility*” of issuing them³⁹.

43. Such “*positive reaction*”, in my view too vague as a basis of legitimate expectations, is found in one-sided reliance on Claimant’s allegations.

44. The Majority relies primarily on Mr. Lemire’s, the Claimant’s, witness statement that he had from the outset envisaged to create three national networks for three different age groups and to become a “*national broadcaster*” able to broadcast throughout the entire territory of Ukraine; and that he “*was assured by National Council members (...) that he would be able to set up three national networks*”⁴⁰.

45. The Majority compares this witness statement with the aforementioned correspondence between the National Council and the State Centre (see paras. 12, 13 above) and considers the July 19, 1995 letter of the National Council to the State Centre as evidence that the National Council had been “*considering the possibility of issuing to Gala licences for a nationwide FM channel and for a second AM Band*”. The Majority further finds that “*the State Centre reacted positively*”⁴¹.

46. This assessment of evidence, however, overlooks three essential facts:

³⁷See *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8, Award on Jurisdiction and Merits of August 14, 2007, para.331.

³⁸*Glamis Gold v. USA*, Ad hoc Arbitration, Award of May 14, 2009, para. 620.

³⁹ See para. 270 of the First Decision.

⁴⁰ See paras. 269 and 270 of the First Decision; First Witness Statement of Joseph Ch. Lemire, para. 12 at p. 4; Mr. Lemire, Hearing Transcript, day 1, p. 121, at 17. Compare Claimant’s Memorial, paras. 42 et seq.and 107 et seq.

⁴¹ See para. 270 of the First Decision.

47. Firstly, the 18 July 1995 letter of the National Council, unlike recorded by the Majority, entails no reference to “*a nationwide FM channel*”. Rather, the letter just refers to “*1 radio program within FM 100-108 band*” in twelve specified cities⁴². Absent any reference to the concept of a “nationwide” FM network, the correspondence between the National Council and the State Centre can in my view not be quoted as evidence of Claimant’s nationwide network expectation.
48. Secondly, while the National Council’s inquiry letter of July 18, 1995 also included “*an AM band: Kyiv*”, the October 18, 1995 response letter of the State Centre specified eleven of the twelve cities where FM frequencies were available but did not make any reference to the requested AM frequency for Kyiv⁴³. As the State Centre’s response letter enumerates the cities with available frequencies but fails to mention the AM frequency for Kyiv, it clearly cannot be considered as a positive reaction to the National Council’s inquiry with respect to the AM frequency. In Claimant’s pleading, though, the AM frequency was envisaged to provide the basis for the planned second (talk) network. On that ground, the Majority accepts the reference to this channel as evidence for Claimant’s expectation regarding the second network.
49. Thirdly, while the Majority relies on Claimant’s own witness statement, it entirely ignores the statements of Respondent’s witnesses in point. Claimant, according to his initial witness statement, primarily relied on alleged “assurances” of Messrs. Viktor Petrenko and Yuriy Plaksyuk, then-Chairman and Member of the National Council, respectively, as a basis for his national coverage and three networks plans⁴⁴. Yet, in his rebuttal witness statement, Mr. Petrenko, while confirming two to three meetings with Claimant in 1995, denied having said anything that could be understood as a commitment of awarding Claimant frequencies for a three-tiers network with nationwide coverage, calling Claimant’s allegations in this respect “totally false”.
50. Mr. Petrenko witnessed that he had explained Claimant the procedure for awarding broadcasting frequencies and licences under the then-applicable version of the LTR⁴⁵. Hereunder, the National Council had first to obtain a confirmation from the State Centre that the frequencies sought by a radio company were available and, upon receipt of this

⁴² See Claimant’s Exhibit CM-1.

⁴³ See Claimant’s Exhibit CM-2.

⁴⁴ See Witness Statements of Joseph Ch. Lemire, para 12 at p. 4.

⁴⁵ See Respondent’s RLA – 2 for a partial English translation of this law.

confirmation, organize a tender process for those frequencies open to competitive bidding by interested radio companies. Only as a result of this process could the National Council award a broadcasting licence as a collegial decision. Neither Mr. Petrenko as Chairman nor any other member of the National Council had the legal authority to nurture expectations for broadcasting licences and, as witnessed, all that Mr. Petrenko had done was to refer Claimant to this process.

51. Before initiating tender proceedings, the National Council used to inquire with the State Committee whether the frequencies envisaged to be put for tender were available. In the frame of this procedure, the aforementioned July 18, 1995 letter from the National Council to the State Committee was nothing more than a routine inquiry as to the availability of the frequencies sought by Claimant.⁴⁶
52. The aforementioned three factual errors – (1) erroneous reading of a reference to a “nationwide FM channel” into the July 1995 letter; (2) erroneous extension of the (positive) October 1995 response to an AM frequency; and (3) failure to take Mr. Petrenko’s witness statement supported by the text of the 1993 LTR into account – led to the Majority’s conclusion regarding Claimant’s expectations to reach nationwide coverage and to be able to set up a second AM network. But for the erroneous assumptions (1) and (2), the 1995 correspondence offered no support to Claimant’s witness statement regarding a nationwide FM network and/or second AM network.
53. In the context of the procedure required by the 1993 LTR, the 1995 correspondence between the National State Committee (cc’d but not addressed to Claimant) can furthermore not be construed as an expression of any promise or commitment to award certain frequencies to Claimant. Claimant has not even disputed that he had been informed of the requirements of the LTR, i.e., the necessity of tenders and a collegial decision of the National Council to award frequencies. He thus was aware that no individual member of the National Council had the authority of promising an award of frequencies. The statement in the National Council’s letter that it was “*considering the possibility*” must in these conditions be read at face value, i.e., as an inquiry into the possibility of affording Claimant an opportunity to compete for such frequencies in tenders, but the statement cannot be construed as any commitment to facilitate Claimant’s business plans.

⁴⁶ See Rebuttal Witness Statement of Viktor Petrenko, paras. 12 – 34.

54. As noted before (para.19 supra), Claimant's initial expectations, as far as reflected in documents, were moreover focused on frequencies for the very same cities for which such frequencies were granted to Claimant in compliance with the Settlement Agreement. Respondent had thus fulfilled Claimant's documented (albeit not legitimated) expectations and plans as a matter of fact⁴⁷.
55. The Majority furthermore opines that "*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*"⁴⁸ (emphasis added). However, the Majority states no reason for this finding. Claimant has entered the Ukrainian market in the initial phase of the privatization program of the radio sector. He had to anticipate that with the progress of this program further companies would enter the industry and that the competition for market shares would increase (i.e., precisely what has happened). An expectation to preserve his initial market share in an industry growing from infancy to maturity would have been highly unrealistic.
56. Moreover, such an expectation has not been pleaded by Claimant. Claimant has pleaded an expectation to benefit from his "first mover advantage" in creating a three-tiers network with nationwide coverage; and he has focused his interest and discussions with the Ukrainian authorities from the outset on the regions specified before. He has never alleged a growth expectation "in parallel" with the growth of the private radio industry in Ukraine. This assumption of the Majority has no basis.

I.C. Conclusions

57. The Majority, with respect to violations of the FET standard, takes into consideration Claimant's legitimate expectations; and it relates them to Claimant's initial business expansion plans as discussed with the National Council in 1995 – 1997. In my view, the Majority's analysis in point entails legal and factual errors.

⁴⁷ The letter of July 18, 1995 lists two additional frequencies not included in either the response letter of October 18, 1995 or paragraph 13 (b) of the Settlement Agreement. It must therefore be assumed that Claimant has no longer pursued an interest in such frequencies.

⁴⁸ See para. 268 of the First Decision.

58. My principal legal dissent grounds on the Majority's failure to consider the implications of the Settlement Agreement, the latter's status of and legal force as an award on agreed terms notwithstanding. The Majority overlooks that Claimant's initial business expansion plans and expectations, whatever they might have been and to whatever extent they might have been legitimate, have been precluded by the Settlement Agreement from consideration in the present arbitration as a matter of *res judicata*. By nevertheless taking Claimant's business expansion plans into account, the Majority in my view exceeds the Tribunal's powers.
59. On the facts, the Majority accepts the 1995 correspondence between the National Council and the State Centre as evidence of representations legitimating Claimant's expectations for a nationwide FM network and an additional AM network, although this correspondence makes no mention of a nationwide FM network and the State Centre's response fails to confirm the availability of an AM frequency. Moreover, the Majority relies one-sidedly on Claimant's witness statement regarding alleged assurances of then - National Council Chairman and members, but ignores the witness statement of this Chairman refuting Claimant's allegations in point, even though the refuting testimony is supported by the then- applicable law submitted.
60. In my view, Claimant's business expansion plans and expectations provide no basis for supporting his claims under the FET standard with respect to Respondent's failure of awarding additional frequencies to Gala. The National Council had no obligation to consider such plans and expectations in its decisions on Claimant's tender applications.⁴⁹ Claimant could legitimately only expect that the applications be assessed and decided upon on a case-by-case basis and on an equal footing with competing applications in accordance with the criteria and guidelines set forth in the LTR⁵⁰.

⁴⁹Indeed, any consideration of such expectations by the National Council could probably have been challenged by competing tender participants as a violation of the LTR.

⁵⁰See Claimant's Exhibit CLA – 3.

II. CLAIMANT'S CAPACITY TO ASSERT RIGHTS OF GALA WITH RESPECT TO TENDERS

II.A. Disregard of Gala's Corporate Personality by the Majority

61. The Majority assumes a violation of Claimant's rights under the FET standard of the BIT on account of the treatment of Gala as an (actual or frustrated)⁵¹ applicant for radio frequencies in tenders under Ukrainian law. Gala, i.e., CJSC "Radiocompany Gala", is a closed joint stock company with juridical personality under Ukrainian law. At the time of all but one of the tenders in question, Claimant indirectly held the majority of Gala's stock through CJSC "Mirakom Ukraina" ("Mirakom"), another closed joint stock company with legal personality under Ukrainian law. In 2006, Claimant acquired all the stock of Mirakom and, thus, indirectly of Gala.⁵²
62. The licence to broadcast in Ukraine is held by Gala. The rights asserted by Claimant with respect to the (non)allocation of frequencies are derived from rights of Gala as a licenced broadcaster in Ukraine. Claimant has accordingly filed a shareholder's derivative suit.
63. Without offering an explanation, the Majority disregards Gala's and Mirakom's legal personalities, featuring Claimant as Gala's *alter ego*. In this way, the Majority *ipso iure* attributes Gala's rights under Ukrainian tender legislation to Claimant in his capacity as a United States investor in Ukraine. This approach brings Gala's treatment under the umbrella of the FET standard of the BIT and facilitates the award of damages to Claimant on account of (assumed) unfair, inequitable, arbitrary and discriminatory treatment of Gala by the National Council in and with respect to tenders.

⁵¹ In some instances, the Majority attaches the liability to the diversion of frequencies from tenders (para 257 *infra*) or the alleged futility of Gala to participate in a tender (para 464 *infra*).

⁵² See paras. 36 and 52 – 54 of the First Decision. Only the tender of February 6, 2008 (which is immaterial to the Award) falls in the period when Claimant was the sole indirect stockholder of Gala.

64. In my view, Gala's and Mirakom's legal personalities cannot be discarded as a foregone conclusion. Reasons would have to be offered for piercing Gala's and Mirakom's corporate veils. Possible reasons are discussed below under three headings, namely:

- International law in general and the BIT in particular recognize the legal personality of corporations with foreign investments in principle (II.B.).
- The legal personality of Gala/Mirakom cannot *ipso iure* be ignored on account of Claimant's majority/sole shareownership of Gala/Mirakom (II.C.); and
- Claimant's shareholder derivative suit is inadmissible under Ukraine's Reservation to National Treatment under the BIT(II.D.).

II.B. International law in general and the BIT in particular Recognize the Legal Personality of Corporations with Foreign Investments

II.B.1. Corporate Personality under International Law

65. Most municipal legal systems recognize corporations as legal persons distinct from their shareholders. The distinction between rights of corporations and those of their shareholders is commonplace in municipal legal systems. It pervades municipal legal systems in many areas and cannot be discarded as just a technicality⁵³.

66. In the *Barcelona Traction* case, the ICJ articulated the question "*whether international law recognizes for the shareholders in a company a separate and independent right or interest in respect of damage done to the company by a foreign government; and if so to what extent and in what circumstances*"⁵⁴. The ICJ determined that such a separate right is in principle recognized by international law and that its scope must be delineated in light of the pertinent principles generally accepted by municipal legal systems⁵⁵. The ICJ reaffirmed

⁵³ See Zachary Douglas, „*The International Law of Investment Claims*“, Cambridge 2009, paras.743 -749 with reference to USA, Reparation Commission, „*Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*“, 2 UNRIAA, p. 777.

⁵⁴ ICJ, *Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain)*, ICJ Reports 1964, p. 44 (Preliminary Objections).

⁵⁵ See Douglas, fn. 53, para 765 and note 20 with reference to *Barcelona Traction*.

this doctrine in the Case Concerning *Ahmadou Sadio Diallo*⁵⁶. And in *CMS v. Argentina*, the ad hoc Committee annulled the tribunal's decision on the umbrella clause because the tribunal had assumed, without analysis, that CMS, as shareholder of TGN, could enforce Argentina's obligations towards TGN under a licence to transport gas⁵⁷.

67. The legal personality of a corporate entity distinct from its shareholder(s) is thus in principle recognized in international law.

68. From this recognition follows the distinction between rights accruing directly to an investor in his capacity as shareholder ("shareholder rights") and rights of the corporate entity the violation of which diminishes the economic value of the shareholding ("corporate rights")⁵⁸. BIT protected investors have as a matter of principle *ius standi* for asserting the violation of their shareholder rights under the terms of the BIT concerned⁵⁹. However, a BIT protected investor may assert a violation of corporate rights under a BIT only in special qualifying circumstances⁶⁰.

II.B.2. Corporate Personality under the BIT

69. The BIT does not expressly cover "*corporate rights*". However, it extends protection to "*associated activities*" which include "*access to (...) licences, permits and other approvals (...)*"⁶¹. The protection against arbitrary or discriminatory measures moreover includes "*the (...) expansion (...) of investments*"⁶². With reference to these provisions, the Tribunal unanimously assumes its jurisdiction *ratione materiae* for claims based on the BIT.⁶³

⁵⁶ICJ, *Ahmadou Sadio Diallo*(*Guinea v. Congo*), ICJ Reports 2007 (II), p. 606, paras. 61 – 63 (Preliminary Objections). See Douglas, supra fn. 52, para. 771.

⁵⁷*CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision on Application for Annulment of August 21, 2007, paras. 95 – 97; Douglas, supra fn. 53, para. 769.

⁵⁸ See Douglas, supra fn. 53, para. 759 who distinguishes between „direct injury“ to and „reflective loss“ of an investor in a corporation.

⁵⁹ See Douglas, supra fn. 53, Rule 47 and paras. 773 – 779.

⁶⁰ See Douglas, supra fn. 53, Rule 49 and paras. 782 – 819.

⁶¹ See Articles I.1(e) and II.11(b) of the BIT.

⁶² See Article II. 3(b) of the BIT.

⁶³ See para. 91 of the First Decision.

70. In my view, the question of an investor's *ius standi* for asserting corporate rights under a BIT is a question of substantive law rather than of jurisdiction.⁶⁴ The issue is not prejudged by affirming jurisdiction.⁶⁵

71. The extension of the BIT to “*associated activities*” and “*expansion of investments*” does not, as a matter of *raison d’être*, imply the admissibility of shareholder derivative suits under the BIT. Investments in direct operations in Ukraine are not affected by the issue. Where investments are made in a corporate entity under Ukrainian law and shareholder derivative suits are disallowed, the protection of *associate activities* covers investors’ access to licences, permits and approvals for the acquisition of shares in the enterprise concerned, and the protection of *expansion* applies to the increase of an investor’s share in the enterprise, such as the acquisition of a controlling majority.

72. Without a compelling argument, the aforementioned extensions of the BIT cannot be interpreted broadly so as implicitly extending BIT protection across the board to shareholder derivative suits. The BIT fails to provide a threshold for the admissibility of such suits. Absent such a threshold, an admission of such suits would entitle all shareholders no matter how miniscule their shareholding to assert corporate rights under the BIT. Practically every Ukrainian corporation could buy into the BIT by persuading a U.S. national to buy a share in it. Such a consequence would clearly exceed the *object and purpose* of the BIT to “*promote greater economic cooperation between [the State Parties to the BIT], with respect to investment by nationals and companies of one Party in the territory of the other Party*”⁶⁶. It cannot be read into the BIT without clear support in its language⁶⁷.

73. It thus follows that:

- The legal personality of Gala and Mirakom under Ukrainian law is recognized in principle by international law and the BIT in particular.
- Gala’s rights under Ukrainian tender legislation cannot *ipso iure* be attributed to Claimant.

⁶⁴ See Douglas, *supra* fn. 52, paras 743, 744.

⁶⁵ The analysis in this chapter remains relevant if the question is considered as a question of jurisdiction. In that case, the Tribunal has exceeded its jurisdiction if Claimant lacks *ius standi* for claims derived from Gala’s treatment in the allocation of frequencies.

⁶⁶ See Preamble to the BIT.

⁶⁷ Cf. Douglas, *supra* fn. 53, paras. 747 and 748.

- Such attribution would have to be justified by special reasons for piercing Gala's and Mirakom's corporate veils and admitting Claimant's shareholder derivative suit.

II.C. Inadmissibility of Claimant's Shareholder Derivative Suit under Ukraine's Reservation to the BIT

II.C.1. Claimant's Majority/Sole Share Ownership Alone Does Not Justify Piercing Gala/Mirakom's Corporate Veil

74. In fact, Claimant acts as Gala's *alter ego*. He not only is the latter's majority shareholder and, since 2006 sole (indirect) shareholder; he also is its managing director; and his personal and Gala's corporate assets are commingled⁶⁸. This might explain why the Majority pays no attention to Gala's corporate personality.

75. Municipal courts tend to ease the requirements for piercing a corporation's veil in the case of closely-held majority/solely owned corporations. And the reasons for recognizing the corporate personality under international law are less persuasive with respect to such corporations⁶⁹.

76. Nevertheless, no rule is established in either municipal legal systems or international law authorizing the disregard of the corporate personality of such closely-held corporations *ipso iure*⁷⁰. The issue must be reasoned with a view to the particular interests involved. The Majority fails to do so⁷¹.

77. No established principle for piercing Gala's corporate veil applies to the case at hand: Claimant, with respect to the allocation of frequencies, does not assert rights attaching to his

⁶⁸ See para. 301 of the Award.

⁶⁹ The main reasons are potential for multiplicity of actions, double recovery, and prejudice to creditors. See Douglas, supra fn. 53, Rule 50 and paras. 853 – 858 as well as note 242: reference to American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations 1994*, para. 7.01.

⁷⁰ Cf. Douglas, supra fn. 53, Rules 47 – 49 listing the case groups where shareholder suits are admissible without including sole shareownership.

⁷¹ Cf. Douglas, supra fn. 53, p. 435 under the heading „INADMISSIBLE SHAREHOLDER CLAIMS FOR REFLECTIVE LOSS“(ii)“Breach by the host state of the obligation of fair and equitable treatment....with respect to measures attributable to the host state taken against the company.....“.

shareholding in Gala⁷². Neither does Claimant seek a remedy for the breach of an undertaking to him directly rather than to Gala⁷³, nor has Gala been deprived of a remedy or the capacity to sue on its own behalf, nor has Gala suffered a denial of justice⁷⁴.

78. As a particular feature of the present case, however, Gala's corporate veil is imposed on Claimant by Ukrainian law under Ukraine's Reservation to the BIT.

II.C.2. Ukraine's Reservation to the BIT as exercised Precludes Claimant's Shareholder Derivative Suit

79. As per section 3 of the Annex to the BIT, "*Ukraine reserves the right to make or maintain limited exceptions to national treatment (...) in the sectors or matters it has indicated below: (...) ownership and operation of (...) radio broadcasting stations*". Respondent has exercised this reserved right by prohibiting the "*Foundation of TV/radio organizations (...) for (...) foreign legal entities and physical persons*" as well as the "*Licensing of foreign TV/radio organizations*"⁷⁵. Article 25 (6) and (7) of the LTR moreover limits participation in tenders for frequencies to legal entities licensed to broadcast in Ukraine.

80. By dint of these restrictions, a foreign investor cannot receive a licence for radio broadcasting in Ukraine. He can participate in the Ukrainian radio industry **only** in his capacity as a shareholder of an existing Ukrainian corporate entity but not in his own right. In particular, he cannot in his own right participate in tenders for frequencies. All rights conferred by Ukrainian legislation to radio broadcasters with respect to the participation and treatment in such tenders are exclusively reserved to Ukrainian corporate entities licensed to broadcast. They cannot evolve to a foreign investor in such a company, no matter how

⁷² Cf. Douglas, supra fn. 53, Rule 47 and paras. 773 - 779 with a discussion of the ICJ decision in the *Case Concerning Elettronica Sicula SpA („ELSI") (USA v. Italy)*, ICJ Reports 1989, p.15 et seq..

⁷³ Cf. Douglas, supra fn. 53, Rule 48 and paras. 780, 781. Claimant has not pleaded, and the Majority has not determined, that his discussions with the National Council in 1995 – 1997 resulted in a legally binding undertaking of the National Council towards him on the allocation of frequencies. In any case, any rights on account of such an undertaking would be excluded from these arbitral proceedings by the Settlement Agreement as Claimant's (alleged) legitimate expectations.

⁷⁴ Cf. Douglas, supra fn. 53, Rule 49 and paras 782 – 799, 805 – 816. It is uncontested that Gala under Ukrainian law had remedies to challenge the decisions of the National Council satisfying rule of law standards. In the Majority's view, the effectiveness of these remedies is limited (see para. 281 of the First Decision). Yet, the Majority does not convert these limits into a denial of justice.

⁷⁵ See Articles 12(2) and 23(2) of the LTR.

significant his share in and control of the company may be. Recognition of the legal personality of the Ukrainian corporation licensed to broadcast is *conditio sine qua non* for the participation of a foreign investor in the Ukrainian radio industry. This system forestalls piercing the corporate veil of a licensed radio company for purposes of sector legislation, including tender regulations to the benefit of a foreign investor in such a company.

81. These restrictions were already enshrined in the initial 1993 version of the LTR and are still included in its present version. They thus apply to all tenders and tender situations providing the basis for the claims related to the allocation of frequencies.
82. If covered by Ukraine's Reservation, the aforementioned restrictions limit the scope of BIT protection and thus the powers of the Tribunal. The crucial question is thus whether the restrictions represent "*limited exceptions to national treatment*" with respect to the "*ownership and operation of (...) radio broadcasting stations*".
83. The restrictions leave untouched a U.S. investor's rights attaching directly to his shareholding in a radio company. However, they exclude "corporate rights" conferred by Ukrainian sector legislation on a licenced radio company as a basis of a foreign shareholder's derivative suit.
84. The restrictions aim at safeguarding the integrity of Ukraine's regulatory regime of the radio industry. Under this regime, frequencies and, thus, market shares are allocated through competitive tenders open to licensed radio broadcasters in Ukraine only⁷⁶. The tender process is the cornerstone of the sector regime. Ensuring the effectiveness and fairness of this process is a prime concern of sector legislation.
85. Fair competition of all participants in a level playing field is pivotal to the tender process. Special privileges accorded to some participants but not available to others tend to translate into "reverse" discrimination of underprivileged contenders and undermine both fair competition and the effective selection of the best.
86. BIT protection with respect to tenders may privilege some tender participants over their domestic contenders and foreign contenders without BIT protection. It thus tends to undermine the fairness and effectiveness of the process⁷⁷.

⁷⁶ See Articles 23(6) and 25 of the LTR.

⁷⁷ This aspect is further developed in paras. 117 - 120 infra.

87. To protect the integrity of the tender process, Ukraine, with the Reservation and its exercise, aims at excluding the extension of BIT protection to tenders. This approach ensures that all tender participants, whether domestic or foreign and whether from a country of origin with or without BIT, are all governed by the same rules set forth in applicable Ukrainian legislation to the exclusion of any superseding international law protection.
88. Safeguarding an essential and legitimate regulatory interest, i.e., the integrity of the tender process, the aforementioned restrictions are covered by Ukraine's Reservation.
89. Hence, the claims derived from Gala's participation or frustrated participation in tenders for frequencies are inadmissible in this arbitration. They had to be dismissed *a limine*.

II.D. Claimant's Derivative Suit Denotes Inconsistent Behaviour

90. The above conclusion is reinforced by the maxim of *non licet venire contra factum proprium* or behaviour contrary to Article 1.8 of the 2004 UNIDROIT Principles.
91. Claimant deliberately used the shell of Ukrainian corporations (Gala and Mirakom) to invest in the Ukrainian radio sector despite the aforementioned restrictions under the LTR. Towards this end, he initially established Gala and had Gala succeed to the rights of Provisen, a Ukrainian company that held the crucial licence for Kiev⁷⁸. He further insisted on his status as a shareholder of Gala/Mirakom (rather than a radio operator in his own right) in applying for the renewal of Gala's licence due on September 18, 2008. And he staged a harassment claim for moral damages on the ground that the National Council had raised the question whether the prohibitions for foreigners under the LTR might impede renewal of Gala's licence, although he was just a shareholder of Gala/Mirakom⁷⁹. The licence was renewed until 2015 on account of Gala/Mirakom's corporate personality, irrespective of Claimant's foreign citizenship.
92. By investing in Gala/Mirakom, seeking and obtaining in 2008 the extension of Gala's licence on account of the latter's corporate personality and filing an harassment suit on the notion that he could not legitimately be considered as anything but a shareholder of Gala/Mirakom, Claimant has relied on Gala/Mirakom's corporate personalities and accepted

⁷⁸ Claimant's Memorial, para. 205.

⁷⁹ Claimant's Memorial, paras. 203 – 205; Reply Memorial, paras. 225 – 231; Post Hearing Memorial, paras. 140 – 143.

the principle of Ukrainian law that all rights under industry regulations attach solely to Gala's status as a Ukrainian corporation without regard to Claimant's U.S. citizenship. This applies especially to Gala's rights with respect to tenders.

93. Against this conduct, Claimant cannot now bring a claim under the BIT derived from an (alleged) violation of Gala's rights with respect to tenders. In other words, Claimant cannot on the one hand hide behind Gala's corporate personality for purposes of Ukrainian sector legislation but on the other hand portray himself as Gala's *alter ego* for the purpose of disregarding Gala's corporate personality and thus invoking BIT protection for rights reserved to Gala under Ukrainian sector legislation. This approach denotes a *venire contra factum proprium* or inconsistent behaviour contrary to Article 1.8 of the 2004 UNIDROIT Principles.

II.E. The Majority Exceeds the Tribunal's Powers by Admitting Claimant's Shareholder Derivative Suit

94. The Majority notes Respondent's Reservation to national treatment under the BIT as well as the prohibition under Article 12(2) of the LTR. And the Majority affirms that the prohibition is covered by the Reservation⁸⁰. However, the Majority fails to apply either the Reservation and or the prohibition to the case at hand⁸¹.
95. The Majority explains its position as follows: "*Under this exception [i.e., the Reservation], 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*"⁸².
96. The Majority thus limits the Reservation to the initial authorization of Claimant's investments in the Ukrainian radio industry. This reading is inconsistent with the plain language of the Reservation. The latter encompasses the "*ownership and operation of*

⁸⁰ See para. 267 of the First Decision.

⁸¹ See para. 242 of the First Decision: The reservation „does not affect the principles which are being pleaded by Claimant in this procedure“.

⁸² See para. 267 of the First Decision.

radio broadcasting stations” (emphasis provided) and thus clearly extends to post-establishment treatment of radio stations, including tender applications for additional frequencies.

97. By the same token, the Majority considers only the prohibition for foreign investors of founding radio organizations. It discards this prohibition as a formality in the establishment of a radio company; and it ignores the further restrictions under the LTR outlined in paras. 79 to 81 *supra*.

98. Unlike stated by the Majority, Claimant had **not** “*been awarded the necessary administrative authorization to invest in the Ukrainian radio industry*” to the effect of operating in this industry in his own right. He has just obtained an *investment certificate* for investing in Mirakom, a Ukrainian corporation as Gala. Such certificate applies to all foreign investments in Ukrainian companies; it is not specific to the radio industry. Mirakom had in turn invested in Gala. And only Gala has received a broadcaster’s licence in its capacity as a Ukrainian corporation. The licence was awarded to Gala irrespective of the foreign nationality of Gala’s indirect majority shareholder.

99. Thus, Claimant owes his (indirect) involvement in the Ukrainian radio industry to Gala’s corporate personality strictly recognized by the National Council in awarding and renewing Gala’s broadcaster’s licence. Claimant has launched his investment through Mirakom. In this way, he benefitted from the practice of the National Council to note only direct owners of radio broadcasters and ignore “ownership chains” – a practice labelled by the Majority as a “*shortcoming of the system*”⁸³.

100. The Majority further opines that Claimant could expect “a level playing field”. In the same context, the Majority opines that “*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*”.

101. This position brings the regulatory system under the umbrella of the FET standard of the BIT elevating shortcomings and misapplications of the domestic regulatory system to violations of the BIT. It ignores that “*a level playing field*” requires equal conditions for all contenders, domestic and foreign alike, and, therefore, conflicts with special BIT protection of Claimant. As noted before, safeguarding the “level playing field” in tenders for frequencies

⁸³ See paras. 313, 314 of the First Decision.

is the obvious purpose of Ukraine's Reservation to the BIT in conjunction with the restrictions for foreign investors under the LTR⁸⁴.

102. To ensure a level playing field for all tender participants, only Ukrainian corporate entities can be licensed as broadcasters and participate in tenders. In this way, Ukrainian tender legislation is equally applied to all applicants for frequencies. Special protection of foreign investors under international law is excluded. This rationale precludes shareholder derivative suits of foreign investors in radio companies with respect to tenders. By admitting Claimant's derivative suit, the Majority defeats the very purpose of Ukraine's Reservation as exercised.

103. The Reservation limits the scope of the BIT and, thus, the powers of the Tribunal. By failing to apply the Reservation to the case at hand, the Majority hence exceeds the Tribunal's powers.

104. This conclusion still stands if the admissibility of Claimant's shareholder derivative suit is considered as an issue of jurisdiction *ratione materiae*⁸⁵. In this case, the Tribunal, myself included, has exceeded its jurisdiction.

105. The inadmissibility of Claimant's shareholder derivative suit inevitably leads to dismissal *a limine* of all claims on account of Gala's treatment in its quest for additional frequencies⁸⁶. The Majority's legal analysis of issues related to these claims⁸⁷ accordingly becomes obsolete. The subsequent discussion of the Majority's position disregards the inadmissibility of the pertinent claims *arguendo*.

⁸⁴ See paras. 84 – 88 supra.

⁸⁵ See paras. 69, 70 supra.

⁸⁶ See paras. 318 – 422 of the First Decision.

⁸⁷ See paras. 209 – 317 of the First Decision.

III. FAIR AND EQUITABLE TREATMENT IN COMPETITIVE TENDERS

III.A. The Majority's Approach

106. The Majority pays no attention to the particular dynamics of competitive tenders. Rather, it delineates the scope of the FET standard in general terms in light of the pertinent jurisprudence and literature⁸⁸. In five steps, it broadens the FET standard into an overarching umbrella concept encompassing Respondent's regulatory regime for the radio industry; and it positions the Tribunal as a court of appeals adjudicating the alleged misuse of administrative discretion by the National Council.

Step 1

107. At the outset, the Majority distinguishes the FET standard under the BIT from the international law minimum standard, considering the latter as a floor rather than a ceiling. The Majority concludes *"that actions or omissions of the Parties may qualify as unfair or inequitable, even if they do not amount to an outrage, to wilful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith"*⁸⁹.

Step 2

108. Second, the Majority interprets the *"ordinary meaning"* of the FET standard⁹⁰. For this purpose, it amalgamates subsections (a) (FET proper) and (b) (Arbitrary or Discriminatory Measures) of Article II.3 of the BIT into one provision. It considers the prohibition of arbitrary or discriminatory measures as *"an example of possible violations of the FET standard"* so that subsection (b) is *ipso iure* included in subsection (a) and the latter opens the door to broadening protection.

⁸⁸ See paras. 243 – 285 of the First Decision.

⁸⁹ See paras. 247 – 254 of the First Decision.

⁹⁰ See paras. 258 – 263 of the First Decision.

Step 3

109. Next, the Majority links the FET standard to Claimant's – assumed – legitimate expectations⁹¹. According to the Majority, 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”⁹²; and
- To “be allowed to expand, in parallel with the growth of the private radio industry in Ukraine”⁹³.

Step 4

110. Further, the Majority associates the FET standard with “the main purpose of the BIT” as stated in the latter's Preamble, i.e., “the stimulation of foreign investment....”⁹⁴. It thus implies that the standard be delineated in light of this overriding investor-friendly objective.

Step 5

111. Finally, the Majority discards Claimant's failure of having sought local remedies and puts the Tribunal in the position of a court of appeals against tender decisions of the National Council⁹⁵. Although expressing respect of the National Council's cognitive discretion, the Majority considers any “arbitrary or capricious” action as a violation of the BIT. In its view, “favouritism” and exercise of “undue influence over the decision-making of regulatory bodies” all constitute treaty violations⁹⁶.

112. Noteworthy is what the Majority does not require – namely that the challenged action specifically relate to a BIT protected investor. It apparently applies the BIT to any flaw in the system or major irregularity in its implementation as long as a BIT protected investor is somehow affected.

⁹¹ See paras. 265 – 271 of the First Decision.

⁹² See para. 267 of the First Decision.

⁹³ See para. 268 of the First Decision.

⁹⁴ See paras. 272 – 273 of the First Decision.

⁹⁵ See paras. 274 – 283 of the First Decision.

⁹⁶ See para. 283 of the First Decision.

113. My criticism of the Majority's position chiefly concentrates on two aspects peculiar to the present case but not addressed by the Majority, namely:

- The operation of the FET standard in competitive tenders (III.B.); and
- The impact of Ukraine's Reservation to National Treatment on the FET standard (III.C.).

As shown in chapter II. *supra*, these two aspects preclude Claimant's shareholder derivative suit. If such suit is erroneously admitted, the same aspects militate against a broad delineation of the FET standard.

114. In addition, I will comment on the relevance of post-BIT interpretations on the FET standard under the BIT (III.D.).

III.B. The FET Standard in Competitive Tenders

115. According to the LTR, frequencies are awarded by the National Council on the basis of tenders. These are publicly announced and in principle open to all radio broadcasters licenced in Ukraine. This system aims at selecting the best contenders in terms of criteria set forth in the LTR⁹⁷ and special conditions determined by the National Council for each tender.

116. Claimant's expert witness Wiegand describes the main determinants of success in these proceedings as follows:

"If you are applying for a radio frequency, you usually have to prove mainly two things: first that the format that you are presenting or want to do adds to the diversity of the market; and second, that you have the professional abilities to run a radio station"⁹⁸.

In other words, the tender proceedings are open competitions for market shares on the basis of the quality of the tender application and the demonstrated ability to perform. In addition to their performance in the process, broadcasters' financial and technical resources in participating in as many tenders as possible are decisive for broadcasters' market share.

⁹⁷ See Article 25(14) of the LTR and paras. 28, 29 *supra*.

⁹⁸ See Hearing Transcript of July 12, 2010, para. 183 at p. 142.

III.B.1. Equal treatment of all contenders is pivotal to the fairness and effectiveness of the tender process

117. Fair competition is crucial for such a system to function properly. All market participants must have equal access to the tenders and compete in the process on the same terms and conditions, in a “level playing field”. According equal treatment to all broadcasters in the Ukrainian market is essential to both the inherent fairness and the effectiveness of the system. Special privileges, priorities or preferences afforded to some broadcasters undermine the system. This begs the question whether BIT protection accorded only to foreign investors from certain countries is compatible with the inherent dynamics of a tender system or whether it implies “reverse discrimination” of all broadcasters in the market without the benefit of a BIT to the detriment of the effectiveness of the process.
118. BIT protection is at variance with the systemic requirements of the tender process if it affords BIT protected investors competitive advantages over their contenders. As noted before, the success in winning market shares through tenders depends on the quality and frequency of tender applications. This in turn largely depends on the resources which can be invested in tender applications on a sound business basis.
119. Tender applications are investments in business opportunities. Typically, only one of several contenders can win the award. Prospects of recovering the costs of unsuccessful applications in case of irregularities reduce the risks attendant to tender applications; and prospects of recovering the profits foregone due to tenders lost (as awarded by the Majority) increase the opportunities. In financial terms, rights of recovering foregone profits increase the number of potential winners in tenders – the actual winner in the tender and legal winners in subsequent litigation. Superior prospects of claims to recover the costs of tender applications or even recoup foregone profits thus enhance the risk/return ratio of tender applications. They place the beneficiary of such prospects in a privileged position over contenders without such prospects. Hence, they imply “reverse discrimination” of contenders without such prospects of recovery; and they distort competition.
120. BIT protection is available only to investors from countries of origin that have concluded a BIT with the host country concerned. Where these investors compete in tender proceedings with domestic investors and foreign investors without BIT protection, they inadvertently enjoy a privileged position over their contenders. BIT protection tends to lead

to unequal treatment of tender participants and thus undermine the integrity of the tender process.

III.B.2. The BIT Affords Higher Protection in Tenders than Ukrainian Law and Municipal Laws in General

121. BITs typically strengthen investment protection beyond the protection afforded under the host country's municipal law with a view to overcoming foreign investors' concerns about the impartiality of domestic courts and the compliance of municipal laws with widely accepted legal standards. Some competitive advantages of BIT protected investors over domestic business operators are implicit in the BIT system. They cannot, as a matter of principle, be grounds for denying BIT protection.

122. Tenders present a special situation, though. Here, undistorted competition is fundamental to the process. Municipal laws shape the rights of tender participants with a view to the particular features of tenders. BITs and the international law principles on the "*Responsibility of States for Internationally Wrongful Acts*"⁹⁹ complementing BITs do not take the special dynamics of tenders into account. Due to their generality, the aforementioned principles tend to provide broader substantive protection to tender participants than Ukrainian law in consonance with the typical practice of municipal laws.

123. Thus, appeals against adverse tender decisions of the National Council are subject to a one-month-deadline¹⁰⁰. The BIT, on the other hand, does not provide any deadline for actions under its protections; and the BIT itself has been concluded for an initial ten years and even perpetuity if not terminated¹⁰¹. While domestic tender participants must thus appeal National Council decisions individually and promptly, BIT protected investors may accumulate claims under BITs and file them summarily at any time of their convenience. Precisely this has happened in the present case. The Interregnum providing the basis of the Award ended in June 2000¹⁰² while Claimant's request for arbitration dates from September 6, 2006.

⁹⁹ See International Law Commission, "*Draft articles on the Responsibility of States for Internationally Wrongful Acts with commentaries*", ILC Yearbook 2001, Vol. II, Part Two (hereinafter referred to as "ILC Articles"). Pp. 26 et seq.

¹⁰⁰ See article 30 (4) of the LTR ; Claimant's Exhibit CLA -3 .

¹⁰¹ See article XII of the BIT.

¹⁰² See para. 180 infra

124. As the Majority correctly observes¹⁰³, moreover, appeals against tender decisions provide limited redress. If an appellant succeeds, the court can only set aside the decision concerned and the National Council may be obliged to repeat the tender. However, the National Council is normally still at liberty to award the frequency to another contender rather than to the successful appellant. The appellant might thus have invested time and money in two tender proceedings plus (successful) court proceedings and still end up empty-handed¹⁰⁴.

125. The aforementioned disadvantages of local remedies in comparison with BIT protection do not reflect any departure of Ukrainian law from recognized principles of law within the meaning of Article 38(1) of the ICJ Statute. Appeals against administrative decisions are in the interest of legal certainty usually subject to deadlines so that – unlike under BITs – grievances under municipal administrative law systems can normally not be accumulated over years and then be summarily submitted to court¹⁰⁵. And the aforementioned perils for appellants of tender decisions follow from the special nature of such decisions affecting several tender participants alike. Accordingly, the Majority has not found these limits at variance with recognized principles of law.

126. Moreover, municipal laws typically limit recovery rights of applicants losing out in flawed tenders to the costs incurred in connection with the bid (*damnum emergens*). Lost profits (*lucrum cessans*) can be recovered in exceptional circumstances only¹⁰⁶.

127. BIT protection thus significantly expands the substantive rights of tender participants beyond the protection accorded in like situations under Ukrainian law in particular or municipal laws in general. Extending the FET standard of the BIT to Gala's treatment with respect to tenders thus places Gala in a privileged position over its contenders without BIT protection – to the detriment of the integrity of the tender system. The broader the FET standard is delineated, the more the tender system becomes undermined.

¹⁰³ See para. 281 of the First Decision.

¹⁰⁴ Cf. para. 281 of the First Decision.

¹⁰⁵ For instance, under para. 74 of the German Law on Administrative Court Procedures (“Verwaltungsgerichtsordnung”), “*administrative acts*” must, as a rule, be appealed within one month of notification. This deadline coincides with the aforementioned one-month deadline under para. 30(4) of the LTR. The deadline precludes the possibility of accumulating grievances over time and bundle them into summary suits that may be filed at any time convenient.

¹⁰⁶ This issue is further developed in paras. 274 – 283 *infra* with references to European and German law.

128. This aspect in my view calls for a restrictive application of the FET standard to tenders. The standard cannot be interpreted as an “umbrella clause” *ipso iure* elevating violations of tender rules to international delicts. And Ukraine’s Reservation restraining BIT protection with respect to the broadcasting sector assumes particular attention in case of tenders¹⁰⁷.

III.C. The FET Standard in light of Ukraine’s Reservation to National Treatment

III.C.1. The Reservation Indirectly Limits the Scope of the FET Standard

129. As noted before, Ukraine, in para. 3 of the Annex to the BIT, has reserved its “*right to make or maintain limited exceptions to national treatment in special sectors, including ownership and operation of television and radio broadcasting stations*”. The Majority discards the Reservation as irrelevant to the case at hand¹⁰⁸.

130. The Reservation relates literally only to national treatment under article II.1 of the BIT while the Majority applies the FET standard under article II.3. However, the FET standard must be interpreted in light of its *object and purpose* as well as the *context* of the overall BIT, including the annex thereto¹⁰⁹.

131. In substance, the scope of national treatment overlaps with the FET standard. In particular, a violation of national treatment almost by definition also constitutes a “*discriminatory measure*” within the meaning of Article II 3 (b) of the BIT. The Majority defines “*discriminatory measure*” as a measure that either is “*discriminatory and expose[s] the claimant to sectional or racial prejudice*” or “*target[s] Claimant’s investments specifically as foreign investments*”¹¹⁰. This test corresponds to the interpretation of FET in the *Saluka* case as a standard which requires that “*any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing*

¹⁰⁷The complexities in applying BIT protection to tender proceedings moreover reinforce the arguments against admitting Claimant’s shareholder derivative suit (see ch. II supra).

¹⁰⁸See paras. 79 – 88 supra.

¹⁰⁹Article 31(1) and (2) of the 1969 Vienna Convention on the Law of Treaties.

¹¹⁰ See para. 261 of the First Decision with references.

*that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign owned investment*¹¹¹.

132. I agree with the Majority's definition of "*discriminatory measure*". It implies, though, that the FET standard must be interpreted with a view to avoiding a conflict with the Reservation. The latter's purpose would be defeated if the exercise of the Reservation would be considered as legitimate under national treatment but nevertheless as breaching the FET standard.

III.C.2. The Reservation Countervails the Emphasis on Fair and Equitable Treatment in the Preamble of the BIT

133. The Majority advocates interpreting the FET standard in the context of the Preamble of the BIT stating "*that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment...*"¹¹². While correct in principle, this argument is less persuasive with respect to Ukraine's radio industry covered by the Reservation.

134. The Reservation communicates that Ukraine attaches priority to its sovereign regulation of the radio industry over the "*fair and equitable treatment*" of foreign investors in that industry. This choice of priority is strengthened by the broad terms of the Reservation. It authorizes the introduction of new exceptions after conclusion of the BIT¹¹³; and it encompasses the admission as well as the subsequent treatment of foreign investments.

135. Thus, the Reservation operated as an alert to Claimant. He had to take serious regulations in existence when he made his investment which limited foreign investors' rights in the radio industry. And he even had to anticipate future policy measures adversely affecting him as a foreign investor in that industry¹¹⁴.

136. Cautioning foreign investors about the reliability of equal treatment with domestic investors, the Reservation compromises the principal purpose of the BIT as reflected in its

¹¹¹*Saluka v. Czech Republic*, Partial Award of March 17, 2006, para. 307. See Ioana Tudor, *supra* fn. 34, pp. 186 – 189 on the relationship between FET and National Treatment.

¹¹²Para. 264 of the First Decision.

¹¹³See Annex to the BIT: "***make or maintain...exceptions...***"

¹¹⁴The latter risk is alleviated (but not eliminated) by article II.1(3) of the BIT providing that future exceptions to national treatment will not apply to investments pre-existing the effectiveness of the exception.

Preamble, namely “to stimulate the flow of private capital...”¹¹⁵. The BIT Parties have deliberately accepted to weaken the incentive value of the BIT in order to preserve their sovereign control over specified sensitive or strategic sectors, including radio broadcasting. Beyond its direct impact on national treatment, the Reservation reflects the consensus of the BIT parties that, with respect to the specified sectors, the preservation of uncompromised sovereignty prevail over the principal purpose of the BIT. The Reservation must thus be taken into account in the analysis of “object and purpose” of the BIT¹¹⁶ as a factor countervailing the statements of the Preamble.

137. While the Reservation authorizes less favourable treatment of BIT investors than of domestically-owned radio operators, the issue at hand is whether the FET standard entitles Claimant to preferential treatment over domestic competitors. In this respect, the Reservation implies *a fortiori* a bias of the BIT Parties against preferential treatment of foreign investors in the radio industry where such treatment conflicts with industry-specific public policy interests. The proper functioning of the tender process is essential to developing this sector with a view to Ukraine’s overarching media policy objectives. This militates against according preferential protection to a BIT investor at variance with the dynamics of this process.

138. As noted before, Ukraine, in the exercise of its reserved sovereign freedom of regulating the radio industry, has prohibited the foundation and operation of radio stations by foreigners¹¹⁷. Claimant is permitted to operate in the Ukrainian radio industry only through Gala which he owns indirectly through CJSC “Mirakom Ukraine” which like Gala is incorporated in Ukraine¹¹⁸. According Gala in competitive tenders for market shares preferential treatment on account of its (indirect) foreign ownership would diametrically run counter Ukraine’s pertinent industry policy, as reflected in its relevant legislation and sanctioned by its Reservation to the BIT.

¹¹⁵See Preamble to the BIT and para. 272 of the First Decision.

¹¹⁶See paras. 272, 273 of the First Decision.

¹¹⁷See paras. 79 – 81 *supra*.

¹¹⁸See para. 36 of the First Decision.

III.D. The FET Standard in light of Post-BIT Interpretations

139. The Majority analyses the relationship of the FET standard in the BIT with the minimum standard of treatment of aliens established under customary international law. It notes that the FET standard has been assimilated with the minimum standard by a July 31, 2001 interpretation of the NAFTA Free Trade Commission of Article 1105(1) of the NAFTA¹¹⁹ as well as the 2004 US Model BIT¹²⁰. In the Majority's opinion, "*this principle of assimilation between customary minimum standard and FET standard*" does not apply to the US – Ukraine BIT of 1996¹²¹.
140. While I agree that the aforementioned positions do not retroactively apply to the BIT predating them, I disagree with the implication that they are of no relevance for interpreting the BIT. These positions were adopted in response to a trend of tribunals towards gradually expanding the scope of the FET standard as a non-contingent standard potentially according foreign investors preferential treatment over domestic investors in like cases. This trend started in 1997 with the *AMT case*¹²² and has since 2000 culminated in a proliferation of international investment claims on the basis of the FET standard¹²³.
141. The BIT had been signed on March 4, 1994 and negotiated on the basis of the 1992 and 1994 US Model BITs. The activation of the FET standard as an operative cause of action and the ensuing expansion of its scope by tribunals beyond the international law minimum standard could hardly have been foreseen by the BIT Parties when they negotiated and concluded the BIT. Even less could they anticipate the application of this standard to tender proceedings in a reserved industry where foreign investors compete with domestic contenders for market shares.

¹¹⁹"The concept of 'fair and equitable treatment'do[es] not require treatment in addition to or beyond that, which is required by the customary international law minimum standard of treatment of aliens"

¹²⁰Article 5(1) of the Model BIT provides that "Each Party shall accord to covered investments treatment in accordance customary international law, including fair and equitable treatment...".

See paras. 247 – 251 of the First Decision with references.

¹²¹See paras. 252 – 255 of the First Decision.

¹²²*American Manufacturing & Trading, Inc. v. Democratic Republic of Congo*, ICSID Case No. ARB/93/1, Award of February 21, 1997.

¹²³See esp. the three pre Interpretive Note findings based on FET that supposedly have led to the NAFTA States' decision to introduce the Interpretive Note: *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award of August 25, 2000; *S.D. Myers v. Mexico*, Ad hoc Arbitration, First Partial Award of November 13, 2000 and *Pope & Talbot v. Canada*, Ad hoc Arbitration, Award on the Merits of April 10, 2001. See also Ioana Tudor, supra note 33, pp. 3,4 with references.

142. Where an open-ended general clause as the FET standard meets with a situation clearly out of sight to the Parties to an agreement when it was concluded, the pertinent intent of the Parties needs to be hypothesised. Would the Parties have extended the standard to the situation at hand if they had anticipated it? Positions assumed by the Parties in the aftermath of the agreement can indicate their hypothetical intent at the conclusion of the agreement¹²⁴.

143. The 2004 US Model BIT shows the reaction of the United States to the post-BIT expansion of the FET standard – explicit assimilation of the standard to the scope of the international law minimum standard. A similar response had already before (in 2001) been given by the NAFTA Free Trade Commission to the first wave of claims based on the FET standard. The United States is the most prominent Member State of NAFTA so that the Commission’s position was at least indicative of the US position at that time. The hypothetical position of the United States at the conclusion of the BIT (1996) must be inferred from its actual position assumed when it became aware of the issue and reconfirmed subsequently. It further goes without saying that Ukraine would have shared the US position in point once aware of the issue. As the capital-importing Party to the BIT it was especially interested in containing its potential liability under international law. As “*reasonable persons of the same kind as the parties*” (Article 4.1(2) of the UNIDROIT Principles), the common intention of the Parties to the BIT – United States and Ukraine – must therefore be interpreted to the effect that they would have assimilated the FET standard with the international law minimum standard if they had anticipated the proliferation of claims under FET.

144. Nevertheless, I refer to post-BIT positions of the BIT Parties only as a subsidiary argument; and I do not suggest that such positions could limit the FET standard retroactively at variance with its statement in the BIT. Such a suggestion could indeed undermine the fundamental purpose of the BIT, i.e., enhancing investor confidence in the stability of investment conditions.

145. Yet, the present case for the first time (as far as researched) involves the application of the FET standard to competitive tenders. And it concerns a regulated sector where the BIT

¹²⁴Cf. Articles 4.1(2) and 4.3© of the UNIDROIT Principles according to which in cases where the common intention of the parties cannot be established, “*the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances*”; and “*regard shall be had to.....the conduct of the parties subsequent to the conclusion of the contract*”.

Parties have restricted BIT protection to reserve the exercise of sovereign powers. In this situation, the Majority's determination sets a precedent. It further expands the application of the FET standard to a scenario not contemplated before. This expansion counteracts the (hypothetical) intention of the Parties to the BIT.

III.E. Conclusions

146. As shown, the present case features five peculiarities confining the scope of the FET standard. These are:

- The alleged violations of the FET standard concern the treatment of Gala, a company incorporated and operating exclusively in Ukraine and owned by Claimant indirectly through another Ukrainian company.
- Ukrainian law restricts the participation of foreign investors in the radio industry to the acquisition of shares in an existing Ukrainian radio company so that foreign investors cannot operate in this sector in their own right.
- The above restriction is covered by the Reservation of Ukraine to National Treatment limiting BIT protection with respect to the radio sector.
- Gala's pertinent treatment pertains to tenders where
 - Gala competes with domestically-owned radio operators for market shares via frequencies,
 - special BIT protection would afford Gala a competitive advantage over its contenders to the detriment of the fairness and effectiveness of the tender process, and
 - BIT commensurable protection would expose Ukraine to unpredictable state liability excluded by tender-related legislation of developed countries.
- In response to the proliferation of claims under the FET standard since 1997, i.e., after conclusion of the BIT, the NAFTA Free Trade Commission and subsequently the United States have assimilated the FET standard

with the customary international law minimum standard, thus indicating a similar position if the implications of the FET standard had been anticipated when the BIT was negotiated.

147. In light of these special features of the case at hand, the FET standard can in my view not be construed as an “umbrella clause” elevating violations of Ukrainian tender legislation *ipso iure* to a violation of the FET standard. To breach the FET standard in such circumstances, an action or inaction would have to affect specific rights of Claimant protected by the BIT beyond his interest in the economic value of his shareholding in Gala¹²⁵.

148. Affirming a violation of the FET standard in the present case, would therefore require a finding that either

- Claimant, by an action or inaction of Respondent, has been directly affected in his own rights as a foreign investor in Gala; or
- Gala’s treatment is linked to Claimant in his capacity as a foreign investor and not covered by Respondent’s Reservation to the BIT; or
- Gala’s treatment is captured by an established case group of the FET Standard, notably denial of justice; or
- The action or inaction affecting Gala is that egregious that it amounts to a breach of the minimum standard of customary international law.

149. The suggested delimitation of the FET standard corresponds to the arguments advanced in chapter II D. against the admission of Claimant’s derivative suit on account of Gala. This is no coincidence. Both the inadmissibility of Claimant’s derivative suit and the

¹²⁵ The principal difficulty of the „umbrella” approach flows from the partial application of municipal law. The violation of municipal law is upgraded to a breach of international law. However, the procedural requirements and limitations of recovery rights tailored to the violation under municipal law are superseded by general principles of international law. Thus, the balance struck by municipal law between private interests and conflicting public interests is shifted under international law to the benefit of foreign investors. This accords competitive privileges of foreign-owned business operators over domestically-owned contenders. It might be considered in such cases to extend the application of municipal law under article 42(1) of the ICSID Convention to procedural requirements and recovery limitations under municipal law specific to the violation concerned, as long as the requirements and limitations do not themselves violate international law.

delimitation of the FET standard are rooted in the same crucial facts and legal restrictions summarized in para. 146 above.

IV. PROCEDURE FOR AWARDING FREQUENCIES

IV.A. The Majority Position

150. In paras. 287-317 of the First Decision, the Majority reviews the compliance of the procedure for awarding frequencies with the FET standard. This procedure is enshrined in two laws, the LTR setting out the regulatory regime for the radio (and TV) sector and the LNC establishing the National Council.

151. The Majority observes that *“the procedure presents some shortcomings which in essence affect:*

- *The independence of the members of the National Council;*
- *The existence of an interregnum, during which licences were awarded without tender procedure;*
- *The absence of a 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”*.¹²⁶

152. The Majority further notes that:

*“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”*¹²⁷.

¹²⁶ Para. 315 of the First Decision.

¹²⁷ Para. 317 of the First Decision.

IV.B. My View

IV.B.1. Imperfections of Ukrainian Sector Legislation Fall Short of a Violation of the FET Standard

153. I agree with the Majority's observations, with reservations¹²⁸. I also concur that the observed imperfections imply weaker than desired safeguards of "clean" tender decisions, although the Majority's finding that "*the procedure for allocating frequencies by the National Council is fraught with shortcomings that facilitate arbitrary decision making*"¹²⁹ in my view overstates the case.

154. I wish to emphasize, however, what the Majority does **not** conclude, namely that the imperfections were that grave that they stigmatize the entire process as arbitrary or, in the words of the Annulment Committee in the *Helnan Case* "*that the failure is one which displays insufficiency in the system, justifying international intervention*"¹³⁰.

155. Neither does the Majority find that any of the imperfections is specifically tailored on Claimant. In fact, all these imperfections are enshrined in legislation; and they affect Gala (and thus indirectly Claimant) only in its capacity as a business operator in the Ukrainian radio industry, alongside with all other radio broadcasters in Ukraine.

156. I should finally note that no *denial of justice* has been pleaded. Beyond dispute, rule-of-law compliant remedies against flawed tender decisions are provided and are sufficiently effective.

157. Hence, the imperfections under Ukraine's sector legislation do **not** meet any of the criteria suggested in para. 148 supra for justifying protection under the FET standard¹³¹.

¹²⁸The "Interregnum" concerned an administrative practice assumed to depart from applicable law; it does not belong into the context of procedural shortcomings provided by law. The independence of National Council members was strengthened in 2006.

¹²⁹See para. 316 of the First Decision.

¹³⁰See *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on the Application for Annulment of June 14, 2010, para. 48.

¹³¹Neither can these shortcomings serve as indicators of a "practice" in violation of the FET standard.

IV.B.2. Claimant has Acquiesced with the Imperfections of Ukrainian Radio Sector Legislation

158. Moreover, Claimant has acquiesced with all aforementioned imperfections. These had already been enshrined in the initial version of the LTR of December 21, 1993¹³². Claimant thus was aware of these imperfections when he started his investments in the Ukrainian radio industry in 1995. He has not pleaded to have raised these imperfections as an issue in his negotiations with the National Council in preparation of his investment.

159. Neither does the Settlement Agreement of March 20, 2000 entail any reference to such imperfections¹³³ nor has Claimant pleaded to have raised them in his negotiations of the Settlement Agreement. Rather, Claimant has continued to apply for frequencies under the procedure as established by law until 2008. He challenges the procedure for the first time in this arbitration.

160. Such conduct denotes a *venire contra factum proprium* or inconsistent behaviour under Article 1.8 of the UNIDROIT Principles.

161. For these reasons, the imperfections under Ukrainian sector legislation cannot support Claimant's claim under the FET standard.

¹³² The system of appointing and dismissing the members of the National Council was set out in the „*Law on National Television and Radio Council of Ukraine*” of September 30, 1998. It was amended in 2006 to strengthen the independence of Council Members.

¹³³Cf. paras. 18 – 22 supra.

V. CLAIMANT'S RECORD IN TENDERS

V.A. The Majority Position

162. The Majority further analyses the implications of Gala's failure of gaining additional frequencies in tenders between 2001 and 2008, i.e., after the Settlement Agreement (with the exception of one frequency in a small village)¹³⁴. Claimant has presented his failure record as evidence of a pattern of conduct on the part of the National Council designed to block his plans of further expanding his business. The Majority opines "*that the macro-statistical analysis cannot provide conclusive evidence that Respondent has violated the FET standard*"¹³⁵. To this extent I agree.

163. The Majority continues to conclude, though, that "*the overall numbers, the absence of any reasonable explanation...are all factors which cast doubts on the decisions of the National Council*" and that the individual tenders are analysed "*in order to substantiate these doubts*"¹³⁶. It ignores the explanations offered by Respondent for Gala's dismal success record, namely that Gala's financial and technical resources were inadequate and that its programming concept was not competitive¹³⁷.

V.B. My View

V.B.1. General Observations

164. Gala's failure record during 2001 – 2008 in my view bears no relationship to the Award. The latter is based **solely** on the Interregnum from March 1999 through June 2000 and, in particular, the assumption that Gala would have operated an FM network with nationwide

¹³⁴See paras. 318 – 331 of the Decision.

¹³⁵See para. 330 of the First Decision.

¹³⁶See paras. 330, 331 of the First Decision.

¹³⁷ These issues are only addressed in the Award in the context of computing Claimant's compensation.

coverage as of January 2001 had it not been denied the requisite frequencies by the “*irregular practice*” during the Interregnum¹³⁸.

165. Nevertheless, the Majority appears to draw conclusions from Gala’s record during 2001-2008 with respect to the Interregnum practice¹³⁹. For that reason, I will subsequently comment on the Majority’s pertinent assessment¹⁴⁰. My comments will rely on evidence presented during the first phase of the proceedings only, with cross-references to the Second Phase in footnotes.

166. My dissent from the Majority’s assessment rests upon the latter’s failure in the First Decision of taking Respondent’s explanations into consideration. In my view, these are plausible and relevant. In a nutshell, the explanation for Gala’s failure record is found in the relationship between Gala’s market share on the one hand and its financial capacity and programming concept on the other hand.

167. The Majority addresses Respondent’s pertinent explanations in the Award in the context of its analysis of the causal link between Respondent’s assumed breaches of the FET standard and Claimant’s loss¹⁴¹. In my Opinion, though, these explanations had (also) to be considered in the First Decision determining the question whether the National Council’s tender decisions violated the FET standard. If the explanations held true, the National Council would have exercised its powers in accordance with the criteria set forth in the enabling legislation, i.e., the LTR. Absent any misuse of authority, the tender decisions could not be considered as breaches of the FET standard.

V.B.2. Specific Comments

168. Firstly, the Majority ignores the eleven frequencies which Gala received since 2001 in tender proceedings owing to the Settlement Agreement on a priority basis. With the benefit of these frequencies, Gala operates in thirteen cities of Ukraine, including the major centres¹⁴²; and since 2007 Gala has the status of a “national broadcaster” under Article 23(4) of the 2006 version of the LTR. If these frequencies are included in Gala’s tender

¹³⁸ See para. 279 in connection with paras. 236 - 274 of the Award.

¹³⁹ See paras. 470 – 475 *infra*.

¹⁴⁰ See paras. 318 – 331 of the First Decision.

¹⁴¹ See paras. 187 – 190 of the Award.

¹⁴² See Respondents Rejoinder, para. 448 at p. 134 (information not contested by Claimant).

record and the latter is compared with that of all twelve national broadcasters (rather than just the three top performers selected by Claimant and the Majority as benchmarks), Gala scored about average results in all tenders from 2001 through 2008 where it participated¹⁴³.

169. Secondly, the Majority does not consider Respondent's submission that Gala's financial resources are inadequate for a national broadcaster. Indeed, Claimant documented only an investment in Gala totalling USD 141,000¹⁴⁴. Gala's balance sheet as of January 1, 2002 shows a net book value of just UAH 465,600 (roughly USD 51,000) and an equity of UAH 177,800 (USD 22,000)¹⁴⁵. Respondent further noted considerable payment delays¹⁴⁶.

170. Claimant did not contest the above figures or refute Respondent's submission that Gala's recorded resources as such were inadequate. He rather alleged that Claimant continuously provided off-the-record financial support to Gala so that behind Gala stood the personal wealth of Claimant. The Majority to some extent follows this submission by noting that *"the personal assets of Mr. Lemire and those of Gala appear to some extent commingled"* and that *"the evidence shows that Mr. Lemire has made payments with his own money on behalf of Gala"*. Yet, the Majority also observes that *"the record of the actual amounts paid has not been produced, and that the total exceeds 5,000,000 USD is nothing more than affirmation"*¹⁴⁷.

171. While the Majority thus pays attention to the magnitude of Claimant's investment in Gala¹⁴⁸, it fails to consider Respondent's submission that Gala's weak capital casts doubts on its credibility as a contender for frequencies in addition to the ones already held. Yet pursuant to Article 30(2)(d) of the LTR, the National Council **"shall deny the issuance of a license upon a tender application if (...) the applicant does not have the capacity (financial, economic, technical) to run a broadcasting operation within the defined broadcast requirements"**. Respondent's pertinent submission thus is to the point and had to be taken into account.

¹⁴³See Respondent's Exhibit R-412, "National radio broadcasting companies' participation to tenders 2001-today".

¹⁴⁴See Claimant's Memorial Exhibit CM-126.

¹⁴⁵See Appendix D of EBS Report. Exchange rate USD : UAH roughly 1 : 8; see Award, para. 271.

¹⁴⁶See Respondent's Rejoinder, para. 454 and PHM, paras. 621 – 624.

¹⁴⁷See paras. 52 – 54 of the First Decision.

In the Award, the Majority estimates Claimant's total investment in Gala to cluster somewhere between USD 2 and 3 million. (para.301 of the Award).

¹⁴⁸The Majority addresses the issue only with a view to *"jurisdiction razione materiae"* and the question of a *"common sense correlation"* between the magnitude of the investment and the loss of profits awarded.

172. In assessing Gala's capacity, the National Council, as regulator of the industry, had to rely on the financial records and other evidence submitted by Gala in conjunction with its tender applications and in compliance with Ukrainian law. As Gala is a closed joint stock company, Claimant had no legal obligation of subsidizing Gala's operations from his personal wealth. Neither has Claimant pleaded to have presented to the National Council any legally binding undertaking to inject additional capital into Gala. Whatever unrecorded support Claimant may have provided to Gala, such support was neither transparent nor reliable. It could not be taken into account by the National Council in assessing Gala's capacity. If the National Council thus downgraded Gala's tender applications in light of its modest capital base (as recorded in its financial statements and reflected in its payment record), it did no more than its statutory duty¹⁴⁹.

173. Thirdly, Respondent has submitted that Gala's failure in post-Settlement Agreement tenders were largely due to its program concept which had lost attractiveness over time and was not conducive to further expansion – another aspect not addressed by the Majority in the present context. Gala's brand recognition was that of a music broadcaster with a focus on contemporary hits, notably international ones. While this concept had been popular when Gala started, it had, according to Respondent, since been replicated by other radio stations (thus losing uniqueness) and faded in light of an increasing popularity of Ukrainian music. As per Respondent, Gala has failed to develop its program over time in response to changing trends¹⁵⁰.

174. Article 28 of the LTR sets out detailed requirements for program concepts. As confirmed by Claimant's expert witness¹⁵¹, the competitiveness of the program concept, in conjunction with the capacity properly to implement the program, were the principal determinants of success in tender proceedings. As also noted by Claimant's expert witness, special importance is attached to the contribution of the program concept "*to the diversity of the market*". Respondent's submission in this respect had to be considered as a possible explanation of Claimant's dismal record in post-Settlement Agreement tenders.

175. Where Claimant had to develop its program concept in response to tender requirements, the National Council had to consider the question whether Gala had the

¹⁴⁹ In the Award (para. 301), the Majority concludes that Claimant over time has injected an additional USD 2 – 3 million into Gala off-the record. Unrecorded financial support in this magnitude implies fundamental inaccuracy of Gala's financial statements (see paras 535 – 539 *infra*).

¹⁵⁰ See Respondent's Rejoinder at paras. 463 – 472. Cf. also paras. 313, 314 *infra*.

¹⁵¹ See para. 116 above.

requisite resources to do so satisfactorily. The credibility of plans for developing the program concept thus became dovetailed with the demonstration of adequate financial resources.

176. Fourthly, the two aspects – adequacy of Gala’s resources and attractiveness of its program concept – had to be related to Gala’s market share. The key question for National Council members in deciding on Gala’s quest for additional frequencies was: Does Gala have the resources to invest into additional operations without sacrifice to performance quality; and does its submitted program concept contribute to the quality and diversity of the radio broadcasting so as to prevail over its contenders? Gala’s financial records could inspire scepticism regarding Gala’s capacity of simultaneously extending its technical infrastructure and launching additional programs.

177. Thus, Respondent has in my view offered a reasonable, and even plausible, explanation for Gala’s dismal success record in its applications for additional frequencies: a perception on the part of National Council members that the Ukrainian market was already saturated with Gala-type music programs and that Gala lacked sufficient resources to develop new programs and technical capacities¹⁵².

178. Such concerns may have pervaded all challenged tender decisions. They are supported by facts (e.g., Gala’s financial records and the relatively narrow focus of its program experience); and they relate to principal criteria enshrined in the enabling LTR. No fault can in my view be found if such concerns were weighted against Gala in actual tender proceedings in light of the specific tender conditions and the comparative strength of contenders. Hence, the macro-setting furnishes possible justifications of the challenged tender decisions rather than casting *a priori* - doubts on them.

179. The explanations offered must be appreciated in the context of the National Council’s judgmental discretion. The Tribunal cannot substitute its own policy judgment for the National Council’s. It can only find fault with a decision if a misuse of administrative discretion is proven.

¹⁵²These aspects are discussed in detail in the Third Witness Statement of Ihor Kurus submitted in the second phase of the proceedings.

VI. THE ALLOCATION OF FREQUENCIES DURING THE PERIOD WHEN THE NATIONAL COUNCIL WAS NOT OPERATIVE (THE “INTERREGNUM”)

VI.A. The Majority Decision

180. During March 1999 through June 2000, the National Council was inoperative so that no tenders could be organized (the “Interregnum”). Nevertheless, the Ukrainian State Centre for Radio Frequencies (“UCRF”) allotted frequencies to some broadcasters and permitted (at least by acquiescence) broadcasting on such frequencies. Upon becoming operational again, the National Council on January 1, 2001 organized a first tender reserved to twenty-five of the broadcasters concerned and condoned the allocation of frequencies to these broadcasters.

181. Respondent had submitted that this practice was reserved to licences for frequencies which had been awarded by the National Council before the Interregnum and expired during the Interregnum. The Majority dismissed this argument with reference to the 2006 version of the LTR which did not require a tender for the renewal of broadcasting licences, unlike the version of the LTR in force at the time¹⁵³.

182. In the Majority’s opinion, *“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. 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”¹⁵⁴.*

¹⁵³ See paras. 412 – 414 of the First Decision.

¹⁵⁴ See para. 418 of the First Decision.

VI.B. My View

183. While condemning the Interregnum practice, the Majority fails to explain how the practice violates Claimant's rights under the FET standard. Gala had never applied for frequencies allocated during the Interregnum. At most, it was deprived of an opportunity to apply for them due to the diversion of these frequencies from the tender process as prescribed in the LTR. If at all, Gala was affected only in his business prospects as an operator in the Ukrainian radio industry, alongside with all other broadcasters in Ukraine at the time (save the few which had benefited from the practice).

184. The Majority's assessment of the Interregnum practice furthermore is not consistent with the undisputed facts. The process was not secret. The tender of January 1, 2001 had been announced; and all frequencies allocated during the Interregnum were recorded in an official list. On the basis of this list, Claimant has identified 32 frequencies allegedly available for allocation to Gala¹⁵⁵.

185. Pursuant to article 25(6) of the LTR, every licensed broadcaster was entitled to participate in tenders. If denied participation, the broadcaster was entitled to a "*reasoned decision*" of the National Council within thirty days of its application (Article 25(8) of LTR). Neither has Claimant submitted nor is there any indication that this entitlement did not apply to the January 1, 2001 tender. The process thus did not exclude "*any possibility of judicial review*".

186. Moreover, Claimant has not in time pleaded any claim arising from the allocation of frequencies during the Interregnum. The Interregnum in most part pre-dates the Settlement Agreement wherein Claimant has waived all previous claims. And by securing frequencies under the Settlement Agreement, Claimant has benefited from an administrative process similar to the one during the Interregnum.

187. Against this background, my comments will address both procedural and substantive issues. The procedural issues concern :

1. Claimant's failure of pleading (*ne ultra petita* and *audiatur et altera pars*); and

¹⁵⁵See Exhibit R-209 and Claimant's Memorial on Remaining Issues, para. 37 and note 63. Cf. also paras. 526 – 529 *infra*.

2. Claimant's waiver of claims under the Settlement Agreement;

The substantive issues cover:

3. Pleading a practice used for Claimant's benefit; and
4. Illegality of the Interregnum practice and its coverage by the FET.

VI.B.1. Failure of Pleading

VI.B.1.a. Ne Ultra Petita

188. Claimant has submitted that the Interregnum practice was illegal and that the tender of January 1, 2001 implied a violation of Respondent's obligation under Article 13 (b) of the Settlement Agreement to provide Gala with the broadcasting licences specified in the Settlement Agreement in due time. As per Claimant, the National Council had an obligation to avail itself of the opportunity of the first tender after the Council's reconstitution to award the broadcasting licenses specified in the Settlement Agreement to Gala or to authorize Gala straightaway to broadcast on the frequencies which it had already obtained from the State Committee in performance of the Settlement Agreement. However, Claimant has not, **prior to the First Decision**, pleaded a claim under the FET standard on account of Gala's alleged deprivation of opportunities to apply in tenders for frequencies allotted during the Interregnum.

189. Claimant has first referred to the Interregnum in his Reply Memorial under the heading "Respondent Did Not Comply With Its Obligation To Use Its Best Efforts To Award Frequencies To Gala Radio Pursuant To The Settlement Agreement/Award"¹⁵⁶. And in para. 134 of his Reply Memorial, Claimant specifically focused on frequencies in the cities specified in the Settlement Agreement¹⁵⁷. In his Post Hearing Memorial, Claimant similarly mentioned the Interregnum under the heading "Respondent's breach of the Settlement Agreement" and expressly related it only to Respondent's alleged failure to perform in time

¹⁵⁶See Claimant's Reply Memorial, pp. 57, 59, 60 (paras. 134 – 135).

¹⁵⁷Para. 135 of the Reply Memorial might be understood as submitting that the National Council in the January 1, 2001 tender awarded frequencies in cities named in the Settlement Agreement. This does not alter the fact, though, that Claimant did not claim any entitlement to frequencies on top of those eventually received in performance of the Settlement Agreement.

under clause 13 (b) of the Settlement Agreement¹⁵⁸. Moreover, Claimant enumerated Respondent's actions or inactions which in his view constituted violations of the FET standard. While these include all tenders challenged, they neither encompass the Interregnum practice nor the February 1, tender legalizing this practice post facto¹⁵⁹.

190. Hence, the Majority's decision, establishing Respondent's liability on account of the Interregnum¹⁶⁰, has no basis in Claimant's pleading. It violates the fundamental arbitration principle of *ne ultra petita*¹⁶¹.

VI.B.1.b. *Audiat et Altera Pars*

191. Since Claimant had not, prior to the First Decision, pleaded a violation of his rights under the FET standard during the Interregnum, the topic was never discussed in the first phase of the proceedings¹⁶². Respondent had thus no opportunity to react to the assumptions underlying the Majority's analysis. The analysis rests on key assumptions disproved by documentary evidence submitted in the Second Phase of the proceedings.

192. Thus, the Majority considers as crucial whether the Interregnum practice applied only to broadcasters whose licenses had expired during the interregnum period (Respondent's submission) or whether radio companies were granted frequencies *ab initio* "through a non-transparent and closed procedure that was not available to Claimant" (Claimant's submission). And the Majority finds that "there is strong evidence that Claimant's explanation is the correct one"¹⁶³.

193. As primary evidence, the Majority relies on Articles 24.9 and 33.7 of the LTR which entitle broadcasters to renewal of their licenses without requiring a tender (subject to limited exceptions). This evidence was tenuous at best already at the time of the First Decision.

194. Firstly, the Majority relied on the 2006 version of the LTR. Yet, the LTR had until March 2006 been amended 19 times since its promulgation in 1993. No complete version of the

¹⁵⁸See Claimant's Post Hearing Memorial, pp. 37, 39, 40 (para. 57.2).

¹⁵⁹See Claimant's Post Hearing Memorial, p. 2 (Table of Contents).

¹⁶⁰ See para. 421 of the First Decision

¹⁶¹ See paras 517 – 524 *infra* on the Majority's comments in point.

¹⁶²The references to Parties' submissions regarding the Interregnum practice in the First Decision concern both the discussion of the topic in the context of Respondent's performance under the Settlement Agreement (see notes 161 and 162 at p. 85 of the First Decision).

¹⁶³See paras. 412, 413 of the First Decision.

LTR as of the time of the Interregnum period and the January 1, 2001 tender had been submitted to the Tribunal before the First Decision. The Majority could not assume as a foregone conclusion that the 2006 version of the LTR reflected the regulation in force during 1999 – 2000.

195. Secondly, pursuant to Article 33(7)(a) of the 2006 LTR, a broadcaster forfeits its entitlement to an extension of a broadcasting license if it fails to apply for the extension at least 180 days before the relevant expiration date. Since the National Council had been inoperative during the Interregnum period of some 15 months, at least some broadcasters had likely been unable to apply for extension in time, thus had lost their entitlement to renewal of licenses and had to re-obtain their licenses through tenders.

196. Thirdly, the National Council organized a tender on January 1, 2001 to legalize the allocation of frequencies during the Interregnum *ex post facto*. The Majority assumes illegality of this action as a foregone conclusion.

197. Mr. S. Aksenenko's letter of September 28, 1999 and Claimant's transcript of a meeting with Mr. Koholod¹⁶⁴ alone clearly lack sufficient specificity to qualify as evidence sustaining the Majority's conclusion. Both documents just suggest that during the Interregnum "*some bad things were happening*", but fail to provide further clarification. The letter of Mr. Aksenenko mentions some examples, but these do not include the practice of the UCRF to allocate frequencies *ab initio* to some broadcasters as assumed by the Majority¹⁶⁵.

198. In response to the First Decision, Respondent submitted that all frequencies covered by the January 1, 2001 tender concern cases where broadcasters had previously held a valid licence which had expired during the Interregnum period. He produced the version of the LTR in force at that time showing that broadcasters had to seek renewal of expired licences in a new tender but enjoyed priority in that tender¹⁶⁶. Only subsequently was the LTR amended to the effect that renewals did not require a new tender as assumed by the Majority at the start of its analysis.

199. As soon as given the opportunity, Respondent has thus produced documentary evidence that the Majority's key assumption was false. The decision declaring the

¹⁶⁴See paras. 415, 416 of the Decision.

¹⁶⁵See Claimant's Exhibit CM – 11.

¹⁶⁶Exhibit RLA-107.

Interregnum practice a violation of the FET standard represents a “surprise decision” depriving Respondent of its right to be heard in time. It thus violates the maxim of *audiatur et altera pars*.

VI.B.2. Claimant’s Waiver of Claims under the Settlement Agreement

200. Clause 12 of the Settlement Agreement provides: “*The Parties acknowledge the absence of any claims or misunderstandings between them as on the date of signing this Agreement*”. The Settlement Agreement was signed on March 20, 2000. The Interregnum covered the period from March 16, 1999 through June 9, 2000¹⁶⁷. In most part, it thus pre-dates the signing of the Settlement Agreement.

201. As per the Majority’s decision, the out-of-tender allocation of frequencies during the Interregnum violated Claimant’s rights under the FET standard. If this decision is accepted *arguendo*, then the violations occurred whenever frequencies were allocated during the Interregnum which lawfully would have been put to tender, offering Gala an opportunity to apply for them. Claimant’s rights were thus violated at the time of out-of-tender allocations of frequencies.

202. Claimant’s pertinent claims under the FET standard arose *ipso iure* with the violation of his rights, i.e., simultaneously with the – assumedly illegal – out-of-tender allocation of frequencies. All claims related to allocations between March 16, 1999 (start of the Interregnum) and March 20, 2000 (signing of the Settlement Agreement) are thus covered by the waiver under clause 12 of the Settlement Agreement.

203. Claimant has not identified any out-of-tender allocations of frequencies in the period between March 20 and June 9, 2000 not covered by the terms of clause 12. He had to prove the violations of the FET standard and thus at least to identify the allocations alleged to constitute the violations. Absent such identification, it must be assumed that no allocations occurred during the relatively short period of the Interregnum post-dating the waiver.

¹⁶⁷See para. 409 of the First Decision.

204. Hence, all claims on account of the Interregnum have effectively been waived by Claimant pursuant to section 12 of the Settlement Agreement^{168, 169}.

VI.B.3. Violation of the FET Standard Although Claimant Benefitted from the Practice?

205. Claimant, with the Settlement Agreement, negotiated priority for eleven out of Gala's thirteen frequencies in derogation from tender procedure prescribed by the LTR. This process exhibits striking similarities with the administrative practice during the Interregnum:

- The Settlement Agreement was negotiated co-terminus with the Interregnum.
- The Settlement Agreement was negotiated with the Vice Prime Minister for Economy while administrative actions during the Interregnum were taken by the UCRF – without involvement of the National Council in charge under the law but inoperative at the time.
- Under the Settlement Agreement, Claimant received first frequencies from the State Committee and subsequently the requisite broadcasting licenses from the National Council upon the latter's reconstitution. Similarly, broadcasters during the Interregnum were permitted by the UCRF to broadcast on the frequencies allotted and subsequently received the requisite licences from the National Council¹⁷⁰.
- The subsequent decisions of the National Council were formally taken in tenders but actually accorded priority to Claimant and holders of frequencies received during the Interregnum, respectively.

206. As noted before (para. 183), the Interregnum practice could have affected Gala only by depriving it of the opportunity of applying for frequencies allotted to other broadcasters in

¹⁶⁸ Cf. paras. 497 – 513 infra on the Majority's critique in point.

¹⁶⁹ It should also be noted that Claimant had, prior to this arbitration, not expressed any interest in frequencies allotted during the Interregnum. He had discussed the Interregnum practice with then –Chairman of the National Council Kholod and others, in a meeting dated March 19, 2001, i.e., after the January 1, 2001 tender (Claimant's Reply Memorial, para. 135 and Exhibit CRM – 101). Although Claimant in this meeting noted the illegality of the Interregnum practice, he concentrated only on delays in obtaining the broadcasting licenses specified in the Settlement Agreement.

¹⁷⁰ Accordingly, 9 of the frequencies obtained by Claimant under the Settlement Agreement were recorded in Ukraine's official list of frequencies allotted during the Interregnum (see Respondent's Counter-Memorial on Remaining Issues, paras. 170, 171).

tenders consonant with the LTR. In this respect, Gala found itself in the same position as all other broadcasters in Ukraine at the time not benefiting from the practice.

207. Gala's position in relation to the Interregnum practice is similar to the position of other broadcasters in Ukraine in relation to Gala's treatment under the Settlement Agreement. While Gala was deprived of the opportunity to compete for frequencies allotted during the Interregnum, Gala's competitors were denied the opportunity of competing for the eleven frequencies awarded to Gala pursuant to the Settlement Agreement.

208. With a view to *bona fide* broadcasters in Ukraine, Gala's treatment under the Settlement Agreement can in terms of propriety not be distinguished from the Interregnum practice on the ground that the Settlement Agreement sought to redress an injustice done to Claimant. Firstly, the settled arbitration proceedings had not advanced to any decision on the merits so that no injustice to Claimant had been determined. Secondly, even if any injustice had been done, this would not have justified violation of the procedures and competencies enshrined in the LTR. Thirdly and most importantly, any injustice done to Claimant could not have justified violations of the rights of innocent contenders for the frequencies granted to Claimant.

209. The dilemma becomes even more apparent if it is hypostasized that the contenders for frequencies granted to Claimant included another BIT protected investor. In such case, Ukraine, as per the theory advanced by the Majority, would have incurred liability towards that investor under the FET standard of the BIT by granting frequencies to Claimant on a priority basis; and Ukraine would have become liable to Claimant under the Settlement Agreement by failing to grant him priority as promised.

210. In the final analysis, the substance of the Settlement Agreement and its negotiation/conclusion without participation of the National Council can only be justified on the theory that during the Interregnum the provisions of the LTR presupposing an operative National Council were suspended. The legality of the Settlement Agreement under either Ukrainian or potentially international law has not been challenged. Moreover, the Settlement Agreement has been recorded by the Tribunal into an award on agreed terms; this implies that the Tribunal had no doubt as to the legality of the Settlement Agreement.

211. The rationale for the legality of the Settlement Agreement would *mutatis mutandis* apply to the Interregnum practice so that no violation by this practice of either municipal

Ukrainian law or the FET standard of the BIT could have been determined on the basis of the facts submitted to the Tribunal.

212. If, on the other hand, the Interregnum practice did violate Ukrainian law, the Settlement Agreement did likewise. Invoking a claim under the FET standard on account of a practice used by Claimant to his benefit would denote a *venire contra factum proprium* or inconsistent behaviour, contrary to Article 1.8 of the 2004 UNIDROIT Principles.

VI.B.4. Illegality of the Interregnum Practice and its Coverage by the FET Standard

VI.B.4.a. Illegality of the Interregnum Practice under Ukrainian Law

213. In the Majority's assessment, the Interregnum practice violates Ukrainian law simply because it falls short of the procedures established in the LTR. True, Article 14 of the LTR required tenders under the aegis of the National Council. Yet, this does not necessarily imply that during a period when no National Council existed *interim* actions of the UCRF were *ipso iure* illegal and that deficiencies could not be cured subsequently by the National Council upon its reconstitution. Possibly, the provisions of the LTR pre-supposing an operative National Council had as a matter of impossibility of compliance been suspended during the Interregnum period by operation of general constitutional and/or administrative law of Ukraine.

214. The above question was neither addressed by the Parties nor the Tribunal. Neither the procedures of the UCRF in allocating frequencies were analysed (Did the UCRF just allot frequencies at will or did it use some rational criteria?) nor the pertinent decision-making of the National Council (Did it just rubber-stamp the measures of the UCRF or did it condone them upon substantive review?). Without such an analysis, however, the Majority has no basis for concluding that the practice violated Ukrainian law. In the absence of substantiated submissions of the Parties in point, it must in my view be assumed that the practice was legal. If the practice was legal, it cannot, at least not without further reasoning, be considered as a violation of the FET standard.

215. The inadequacy of submissions and analysis in point follows from Claimant's failure of pleading a claim on account of the Interregnum to begin with. And it underscores the deprivation of Respondent's Right to be Heard in time.

VI.B.4.b. Extension of the FET Standard to the Interregnum

216. Even if it is *arguendo* assumed that the Interregnum practice did violate Ukrainian law, Claimant in my opinion would still not be affected in his rights under the FET standard. As noted before (para. 183), Gala had never applied for frequencies allocated during the Interregnum. At most, it was deprived of an opportunity to apply for them due to the fact that these frequencies were not tendered in strict compliance with the LTR. This scenario begs the question whether the FET standard bestowed an entitlement, a subjective right, on Claimant to the allocation of all frequencies in Ukraine through tenders satisfying the LTR. The answer must in my opinion be negative.

217. There exists no direct link between the Interregnum practice and Claimant, let alone Claimant in his capacity as a foreign investor. At most, Claimant was affected as an investor in the Ukrainian radio industry alongside with all other radio broadcasters in Ukraine (whether foreign or domestically owned), except those which benefited from the Interregnum practice.

218. Applying the FET standard to the Interregnum process implies an unprecedented extension of FET protection to the general administrative regime in the host country. It would enable BIT investors to challenge any practice adversely affecting their business prospects under the FET standard, on account of any alleged impropriety. Nothing suggests, though, that the BIT Parties intended to upgrade the FET standard to a comprehensive protection of business prospects against adverse framework conditions. With a view to the radio sector, such an interpretation would diametrically fly into the face of Ukraine's Reservation of sovereign regulatory powers¹⁷¹.

VI.C. Conclusions

219. The Majority's decision that the occurrences during the Interregnum violate Claimant's rights under the FET standard of the BIT in my opinion:

1. Exceeds the powers of the Tribunal;
2. Departs from a fundamental rule of procedure; and

¹⁷¹ See paras. 129 – 138 supra.

3. Entails errors of substantive law.

VI.C.1. Excess of Powers

220. The Majority's decision in my view exceeds the Tribunal's powers by
- a. Awarding a claim not pleaded ("*ne ultra petita*");
 - b. Disregarding the waiver of the awarded claim under the Settlement Agreement ("*res judicata*"); and
 - c. Extending the FET standard beyond its limits under the BIT.

VI.C.1.a. Ne Ultra Petita

221. As explained in paras. 188 – 190 supra, the Majority awards a claim not pleaded and violates the principle of "*ne ultra petita*". It thus exceeds the scope of Claimant's *Request for Arbitration* as filed prior to the First Decision. The *Request*, together with the BIT and the ICSID Convention, constitutes the arbitration agreement prescribing the Tribunal's powers. By determining Respondent's liability towards Claimant on account of a violation of the BIT not pleaded, the Majority exceeds "*the scope of the task which the parties have charged the Tribunal to perform in discharge of its mandate*". It hence exceeds the powers of the Tribunal¹⁷².

VI.C.1.b. Res Judicata

222. As explained in paras. 200 – 204 supra, the Majority ignores the Settlement Agreement wherein Claimant has waived of any claims that might have arisen during the Interregnum. The Settlement Agreement, as an *Award on Agreed Terms*, established *res judicata*. Claims due to the Interregnum were thus precluded from consideration in this arbitration. By awarding such claims, the Majority exceeds the Tribunal's powers¹⁷³.

¹⁷² *Helnan*, fn. 32, paras. 40, 41

¹⁷³ Compare paras. 33 – 38 supra.

VI.C.1.c. Malapplication of the FET Standard

223. As explained in paras. 213 - 218 supra, the Majority, by applying the FET standard to the Interregnum occurrences, extends the standard beyond its ambit under the BIT. Thus, it transcends the scope of BIT protection and, as a consequence, the Tribunal's powers.

VI.C.2. Departure from Fundamental Rule of Procedure

224. As explained in paras. 191 – 199 supra, the Majority's decision on the Interregnum practice represents a "surprise decision" depriving Respondent of its opportunity of timely defence. Affording both parties an equal and adequate opportunity to be heard on all issues materially affecting their legal position is fundamental in adversarial proceedings. It is expressed in the maxim of "*audiatur et altera pars*" and reflected throughout the Arbitration Rules. A "*surprise decision*" resting on a theory that could not have been anticipated by the losing party, without providing such party an opportunity to be heard, violates the "*audiatur et altera pars*" maxim¹⁷⁴.

225. This maxim constitutes "*a fundamental rule of procedure*"¹⁷⁵. Disregarding the maxim, the Majority's decision departs from such a rule.

VI.C.3. Substantive Errors

226. In substance, the Majority's fails to take into account the fact that the Interregnum practice (if improper) entails similarly unfair priority treatment of certain broadcasters over Claimant as does the priority treatment of Claimant over competing broadcasters under the Settlement Agreement. Claimant in my view is estopped from invoking unfairness of a practice similar to the practice he has negotiated to his benefit.

227. Finally, the Majority assumes illegality of the Interregnum Practice without sufficient analysis of Ukrainian law.

¹⁷⁴ Gary B. Born, *International Commercial Arbitration*, vol. II, Wolters Kluwer, 2009, p. 2589

¹⁷⁵ Christoph H. Schreuer, *The ICSID Convention : A Commentary*, 2nd ed., 2009, article 52, notes 305 – 317.

VII. TENDERS 2004 – 2008

228. The Majority decides that certain tender decisions between May 2004 and February 2008 violate Claimant's rights under the FET standard¹⁷⁶.
229. The Award is based solely on occurrences during the Interregnum March 1999 – June 2000¹⁷⁷. The aforementioned tender decisions are thus not relevant to the Award. For that reason, I will confine myself to few summary observations.
230. In all aforementioned tenders Gala lost together with 2 to 14 (at least predominantly) domestic contenders. Claimant has neither pleaded that the adverse tender decisions were specifically directed against Gala/Claimant, nor has there been any indication to this effect. The decisions did not involve any discrimination of Claimant, let alone in his capacity as foreign investor. At most, Claimant/Gala suffered a "reverse discrimination", alongside with several domestically-owned contenders. Such discrimination does not meet the criteria suggested by the Majority for a "discriminatory measure" under article II 3 (b) of the BIT¹⁷⁸.
231. In essence, the Majority's determinations regarding the aforementioned tenders are based on – assumed – violations of Ukrainian legislation governing the tender process. These are upgraded to "arbitrary measures" under article II 3 (b) of the BIT by construing the FET standard as an "umbrella clause"¹⁷⁹. As explained in paras. 121 – 128 supra, I cannot agree with this approach.

¹⁷⁶ Para. 421 in conjunction with paras. 332 – 408 of the First Decision.

¹⁷⁷ Paras. 256, 261 of the Award.

¹⁷⁸ Para. 261 of the First Decision. See paras. 457 – 469 on the Majority's critique in point.

¹⁷⁹ Most clearly para. 385 of the First Decision: "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". Cf. paras. 476 – 478 infra on the Majority's critique in point.

PART TWO: THE AWARD OF MARCH 2011 (THE „AWARD“)

OVERVIEW

232. The First Decision has defined Respondent's violations of the BIT. These provide the legal basis for determining Claimant's loss attributable to these violations. Quantification of loss and causal link between the violations and the loss are the issues that remaining for the Award¹⁸⁰.
233. The Award is based solely on the assumed violation of Claimant's rights under the FET standard of article II.3. of the BIT by Respondent's administrative practice during the Interregnum¹⁸¹. The Majority dismisses additional claims on account of other tenders that have breached the FET standard according to the First Decision¹⁸². I agree with the dismissal of these claims, although not necessarily the underlying reasoning. My subsequent comments therefore focus on the Interregnum.
234. In Part One, Chapter VI of my Opinion, I have explained my objections against the Majority's decision that occurrences during the Interregnum breach the FET standard and provide a legal basis for Respondent's liability towards Claimant. The Award rests solely on this practice. It is thus infected with all procedural and factual errors underlying the Majority's decision of declaring the Interregnum Practice a violation of the FET standard¹⁸³.
235. I will nevertheless accept the Majority's decision on the Interregnum practice *arguendo* as basis of my subsequent comments on the Award. These will address the:

(I) Causal Links between the Interregnum and Claimant's Loss;

¹⁸⁰ A third issue reserved to the Award is Claimant's claim for moral damages due to alleged harassment. The Majority dismisses this claim (paras. 325 – 345 of the Award). I concur with this decision. However, I do not agree with the statement that “*Mr. Lemire was mistreated by his regulator*” (para. 344). And I note the statement “*that the moral aspects of his injuries have already been compensated by the awarding of a significant amount of compensation*” (para. 344). The statement must be appreciated in the context of the Majority's liberal estimation of damages (paras. 369 – 380 *infra*).

¹⁸¹ Paras. 256, 261 of the Award.

¹⁸² Paras. 257 - 260 of the Award.

¹⁸³ Paras. 219 – 227 *supra*.

(II) Implausibility of the Award; and

(III) Allocation of Costs.

I. CAUSAL LINKS BETWEEN THE INTERREGNUM AND CLAIMANT'S LOSS

I.A. Submissions of the Parties and Guidance of the Tribunal

I.A.1. Submissions of the Parties

236. The issue of causation was controversially discussed between the Parties throughout the Second Phase of this arbitration; and the Tribunal on several occasions advised the Parties on its position in point¹⁸⁴.

237. Claimant has consistently submitted that the causal link between Respondent's violation of the FET standard and Claimant's loss had already been decided by the Tribunal in the First Decision as a matter of *res judicata*¹⁸⁵. As a consequence, he has not addressed the issue in his Memorial on Remaining Issues.

238. Respondent has likewise consistently argued that the issue of causation had not been decided in the First Decision but rather reserved to the Award. In his view, "*Claimant is not entitled to assume causation, but must prove it*". Without prejudice to Claimant's burden of proof, Respondent has reviewed the tender situations specified in para. 421 of the First Decision as violations of the FET standard (the "para. 421 incidents") and substantiated his position that Gala could not have won any frequencies in these incidents even if all procedures and criteria prescribed by law had been fully complied with. As evidence, Respondent has submitted a witness statement of former National Council Member Kurus (the "WS Kurus")¹⁸⁶, together with documentary evidence. Respondent has requested

¹⁸⁴ While these discussions covered all tender situations qualified in para. 421 of the First Decision as violations of the FET standard, they also apply to the Interregnum practice alone.

¹⁸⁵ Para 125 of the Award and HTRI, p. 28. See also paras. 239 – 248 *infra* on the communications during the Second Phase of the proceedings.

¹⁸⁶ Third Witness Statement of Ihor Kurus, dated June 16, 2010.

dismissal of claims for damages due to Claimant's failure of showing the required causal connection between Ukraine's assumed wrongdoing and Claimant's loss¹⁸⁷.

I.A.2. Guidance of the Tribunal

I.A.2.a. Telephone Conference of March 1, 2010

239. On March 1, 2010, the Tribunal held a telephone conference with counsels of the Parties to discuss the procedure of the Second Phase in the wake of the First Decision. In his introductory remarks, the Chairman noted that the "*point of liability*" had been defined narrower in the First Decision than asserted by Claimant. He suggested that the Parties in the Second Phase concentrate on recalibrating Claimant's damages in light of the "*narrowing down of the issues of liability*" in the First Decision¹⁸⁸.

240. Subsequently, I clarified the narrowed down liability base as follows: "*The calculations now have to be related clearly to the four incidents specified in para. 421 of the [First] Decision*". I then explained that the required determinations will have to include the causal link between the four incidents and Claimant's damage¹⁸⁹.

241. The Chairman confirmed this explanation: "*We had now [in the First Decision] carefully defined the actions which have damaged.....there are two issues of course: causation and quantification*"¹⁹⁰.

I.A.2.b. Communications between March 1 (Telephone Conference) and July 12, 2010 (Hearings)

242. On March 4, 2010, the Tribunal issued Procedural Order No. 2 on the procedure during the Second Phase. It decided that the final Hearing be held on July 12, 2010 and that the admission of post-hearing submissions be decided in that Hearing.

¹⁸⁷ Paras. 133 -137 of the Award and paras. 131 - 299 of Respondent's Counter-Memorial on Remaining Issues.

¹⁸⁸ Audio procedural conference, March 1, 2010 ("Audio"), 8:10 – 8:40.

¹⁸⁹ Audio, 38:05 – 39:20.

¹⁹⁰ Audio, 40:10 – 41:00.

243. On April 26, 2010, Respondent requested the production of documents from Claimant in accordance with the aforementioned Procedural Order. The request included all applications by “*Gala Radio and Energy Media for the frequencies allocated by the National Council’s decisions referenced in paragraph 421*” of the First Decision. Respondent considered these documents as “*relevant and material to the establishment of a causal link between Respondent’s breaches and Claimant’s alleged damages*”.
244. On May 11, 2010, Claimant objected to the aforementioned request on the ground that the issue had already been decided by the First Decision. In Claimant’s view, “*a causal link between Respondent’s breaches and Claimant’s damages was already established*” by the First Decision. Respondent, on May 17, 2010 countered that the “*causation issue remains an open issue for the Tribunal’s next determination, as the Tribunal itself noted during the telephone conference held on March 1, 2010*”.
245. In a letter of June 25, 2010 (reiterating in part a letter of February 25, 2010), Claimant summarized the questions pending in the Second Phase as follows: “*Adapting Gala Radio’s different damages scenarios in the Report to the Tribunal’s holding at paragraph 421 of the [First] Decision (...)*”. He also objected to Respondent’s Counter-Memorial on Remaining Issues (the “CMRI”) on the ground that it addressed the issue of causation and had attached the aforementioned WS Kurus. Claimant requested to strike both the pertinent section of Respondent’s CMRI and the WS Kurus from the record.
246. The Tribunal, on June 29, 2010, denied this request and advised that “*The Tribunal has already given clear instructions to the parties, both in its Decision on Jurisdiction and Liability, and the conference call held with the parties on March 1, 2010, regarding the issues which remain outstanding in this phase of the proceedings, which include quantification of damages **and the relation between the unfair and inequitable treatment and the damages requested***” (emphasis provided).

I.A.2.c. Hearing on Remaining Issues on January 12, 2010

247. In the Hearing on Remaining Issues on January 12, 2010, my colleague Jan Paulsson, in the context of Respondent’s opening statement, drew the attention to the loss-of-chance scenario: “*I have a question for you at this stage, because I think it may colour the way I try to understand what happens in the rest of the day (...) I believe in fact that claimant has*

been putting forward to some extent a loss of chance case". Mr. Paulsson continued to explain this concept with a view to "causation"¹⁹¹.

248. In his closing statement, Respondent again reiterated his position that Claimant has pleaded loss of certainty rather than loss of chance: "*The Claimant (...) has made no effort to try to show how the individual breaches described in paragraph 421 would have resulted in Gala Radio (...) winning those tenders (...)*"¹⁹². Claimant, on the other hand, asserted to have pleaded a case of loss of chances: "*We did put forward a case of loss of opportunities, and we did this at every stage of the proceedings*"¹⁹³.

I.B. The Majority Position in the Award

I.B.1. Elements of Causation: Cause, Effect, Causal Link

249. Absent a provision in the BIT on the legal consequences of violations of the FET standard, the Majority relies on general principles on the responsibility of States for international wrongful acts as stated by the Permanent Court of International Justice in *Factory at Chorzow* and reflected in Articles 31, 36 of the ILC Articles on State Responsibility. The Majority distinguishes three elements of causation – *cause*, *effect* and logical *link* between cause and effect¹⁹⁴.

250. The para. 421 incidents, including the Interregnum practice, constitute the *cause* as a matter of *res judicata*¹⁹⁵.

251. Consonant with Claimant's submission, the Majority defines the *effect* in terms of the profits lost by Gala due to the practice during the Interregnum. This *lucrum cessans* is equated with "*the difference in value between Gala which [Claimant] actually owns (Gala's "as is" value) and the Gala which he had planned, and which he has not been able to achieve, due to Ukraine's wrongful acts (Gala's "but for" value)*".

¹⁹¹ See HTRI, pp. 85 – 89.

¹⁹² See HTRI, pp. 269 – 273.

¹⁹³ See HTRI, pp. 248 – 249.

¹⁹⁴ Paras. 157 – 172 of the Award.

¹⁹⁵ Paras. 158 – 160 of the Award.

252. Thus, the Majority determines the *effect* on the basis of Claimant's initial business expansion plans: "(...) *the question of Mr. Lemire's initial business plans becomes decisive*". Gala's "*but for value*" is defined as Gala's hypothetical enterprise value if the business expansion plans of 1995 had been realized as assumed by the Majority (and alleged by Claimant), i.e., if Gala had operated a nationwide FM music network as of January 2001 (plus a second AM channel). From this "*but for value*", Gala's actual ("*as is*") enterprise value is deducted. The balance represents Claimant's loss to be compensated by Respondent¹⁹⁶.

I.B.2. Causal Link

I.B.2.a. Concept¹⁹⁷

253. Now, the Majority defines the required *causal link* as "*an uninterrupted and proximate logical chain [that] leads from the initial cause (...the wrongful acts of Ukraine) to the final effect (the loss in value of Gala)*". This logical chain must be proven by Claimant while Respondent can break the chain by showing intervening causes.

254. The Majority further distinguishes between *pure* and *transitive* causal links. *Pure* links connect the wrongful act directly with the damage while *transitive* links denote a chain of events leading indirectly from the wrongdoing to the damage. Indirect losses must be compensated as long as they can be traced back to the wrongdoing in terms of *proximity* and *foreseeability*. The latter two notions serve to limit Claimant's burden of proof. He needs only to show that the wrongdoing featured as a proximate and foreseeable cause of the ultimate loss

255. As per the Majority, Claimant needs to establish two successive links, namely that (i) Gala "*would have won the disputed frequencies if the tenders had hypothetically been decided in a fair and equitable manner, and [if Gala] had participated in them*"; and (ii) "*with these frequencies, Mr. Lemire would have been able to grow Gala Radio into the broadcasting company he had planned: a FM national broadcaster (...)*."

256. These two links need in the Majority's opinion be shown in terms of probability rather than certainty: "(...) *it is impossible to establish, with total certainty, how specific tenders*

¹⁹⁶ Paras 243, 296, 297 of the Award. Cf. paras. 480 – 489 *infra* on the Majority's critique in point.

¹⁹⁷ Paras. 162 – 171 of the Award.

would have been awarded if the National Council would not have violated the FET Standard. The best that the Tribunal can expect Claimant to prove is that through a line of natural sequences it is probable – and not simple possible – that Gala would have been awarded the frequencies under tender”.

I.B.2.b. First Link: From Interregnum to Foregone Frequencies¹⁹⁸

257. The Majority accepts Claimant’s submission that during the Interregnum more than eighty frequencies had been allocated and Gala should have reached nation-wide coverage if it had obtained fourteen of these frequencies. The Majority continues to reason: “*If these 80 frequencies had been awarded by tender in accordance with the procedure set forth in the LTR, it is likely that Claimant would have won the 14 licences required to create a national FM network. The Tribunal bases its opinion on the undisputed fact that at the time of the Interregnum, Gala Radio was one of the most successful radio operators in Kyiv – it held the number 1 and 2 position. If the National Council had proceeded properly to award the new licences, it would have applied the criteria set forth in Article 25.14 of the LTR. Gala was well placed to meet these criteria – being one of the leading operators, it would have received high marks with regard to the first and third criteria [capability of fulfilling licence conditions and financial/technical strength] – and as regards the second criterion, Gala was well known to have broadcast socially relevant programs; moreover, as an independent broadcaster, its presence would reinforce freedom of speech*”¹⁹⁹.

258. The Majority does not, beyond the above summary observations, review the specific circumstances related to frequencies allotted during the Interregnum.

259. Rather, the Majority proceeds with dismissing Respondent’s submission that Gala would not have secured any frequency allocated during the Interregnum even if such frequencies had been put up for tender in accordance with the LTR²⁰⁰.

260. Upon the above-outlined analysis, the Majority concludes “*that under the hypothesis that Respondent’s wrongful acts (the practice of awarding radio licences while the National Council was not operative and the tender of January 1, 2001, to legalise the licences) had not occurred, and that the 80 licences had been correctly assigned in compliance with*

¹⁹⁸ Paras. 173 – 202 of the Award.

¹⁹⁹ Para. 179 of the Award (emphasis provided). See also paras. 189, 190, 207 of the Award.

²⁰⁰ Paras. 180 – 191 of the Award.

*Ukrainian legislation, Gala Radio should have received, no later than January 1, 2001 at least the 14 frequencies required to operate a nationwide FM music network*²⁰¹.

I.B.2.c. Second Link: From Frequencies to Full National Network²⁰²

261. The Majority proceeds to state that Claimant would have realized his initial business expansion plans had he obtained the aforementioned 14 frequencies. This leads it to the conclusion *“that Claimant has been able to prove that the initial cause (Claimant’s frustration to fulfil his plans and operate a nationwide FM channel (...)) are linked through a chain of causation*²⁰³.

262. Respondent had submitted that Claimant had not mustered the necessary financial resources and technical know-how to build and operate a nationwide FM network. Imposing the burden of proof on Respondent, the Majority considers Gala as adequately financed owing to contributions from Claimant’s personal wealth. The Majority further notes that *“Respondent has not been able to prove that Gala Radio’s competitors did not present the same shortcomings”*.

I.C. My View

263. In my view, the Majority construes causation principles in relation to tenders unprecedented in international law and in sharp contrast to municipal laws in point (I.C.1. infra). The Majority’s conclusions represent a *“surprise decision”* violating Respondent’s Right to be Heard (I.C.2. infra).

I.C.1. The Majority’s Causation Principles

264. I agree with the Majority’s introductory statements regarding State responsibility in the abstract. I also agree in the abstract with the Majority’s basic distinction of *cause*, *effect* and *causal link* and the latter’s division into *pure* and *transitive* links. I disagree, however, with

²⁰¹Para. 191 of the Award.

²⁰²Paras. 203 – 208 of the Award.

²⁰³Para. 208 of the Award.

the Majority's application of these notions to public tenders in general and the facts at hand in particular.

I.C.1.a. Cause Not Defined as Composite Act

265. The Majority portrays Respondent's assumed wrongdoing during the Interregnum as an "*irregular practice*" without referring to particular actions. This associates the practice with a "*Composite Act*" as defined in article 15 of the ILC Articles on State Responsibility. Yet, the Majority stops short of classifying the Interregnum Practice as a "*composite act*", for good reasons.

266. A "*composite act*" denotes "*a violation [of international law] separate from the individual violations (...) of which it is composed*". A practice of repeated breaches of an international obligation "*does not of itself constitute a violation separate from such breaches*"²⁰⁴. Only a "*systematic policy or practice*", as such constituting a violation of international law, may qualify as "*composite act*"²⁰⁵. The Majority does not find such a systematic policy or practice²⁰⁶.

267. Absent a "*composite act*", solely individual allocations of frequencies to Gala's competitors during the Interregnum could possibly breach Claimant's rights under the FET standard – not the administrative practice as such.

I.C.1.b. Effect Defined as Frustration of Business Expansion Plans

268. The Majority identifies "*Claimant's frustration to fulfil his plans and operate a nationwide FM channel*" as "*the final effect*" of Respondent's wrongdoing²⁰⁷. And it computes Claimant's foregone profits on the basis of these business expansion plans (What would Gala's value

²⁰⁴ ILC Articles, Commentaries, Article 15, note 5 with reference to *Ireland v. the United Kingdom*, Eur. Court H.R., Series A, No. 25, p. 64 (1978).

²⁰⁵ ILC Articles, Commentaries, Article 15, note 3.

²⁰⁶ Claimant had indeed alleged such a practice, insinuating an understanding among authorities concerned to deny all applications of Gala for additional frequencies: "*Respondent has refused to grant any new frequencies to Gala (...)*" and "*Respondent has blocked Gala's development of a second national framework*" (Claimant's Memorial, para. 106). However, Claimant has failed to substantiate, let alone, prove his insinuation.

The Majority also stops short of explicitly construing a violation of the FET standard through frustration of Claimant's legitimate expectations related to business expansion.

²⁰⁷ Para. 208 of the Award.

have been if these plans had been realized?). The assumed effect, however, does not relate to individual allocations of frequencies during the Interregnum. It rather refers to the administrative practice during the Interregnum as if it had been defined in aggregate as a *composite act*.

269. The Majority moreover defines the “*effect*” in terms of Claimant’s initial business expansion plans previously related to his assumed legitimate expectations²⁰⁸. My objections to the consideration of Claimant’s pertinent business plans in this arbitration²⁰⁹ therefore extend to linking the definition of the *effect* with these plans.

I.C.1.c. Causal Links

270. The Majority distinguishes between two “*causal links*” – (i) the link between Respondent’s assumed wrongdoing (the allocation of frequencies out of tender) and the (hypothetical) award of frequencies to Gala if they had been put to tender; and (ii) the link between the hypothetical award of frequencies to Gala and the realization of Claimant’s business expansion plans.

271. I agree with the distinction between two *causal links*. However, this distinction logically implies two *effects* – the award of frequencies to Gala and the realization of Claimant’s business plans. The existence of two successive *effects* and *causal links* breaks the “*transitive causation chain*” construed by the Majority; and it represents a special phenomenon in case of flawed or averted public tenders.

272. I have not detected any precedent in international investment arbitration applying the FET standard to public tenders or otherwise addressing the causation issue in public tenders²¹⁰. Absent an established rule of international law in point, “*the general principles of law recognized by civilized nations*” must be taken into account²¹¹. These are reflected in municipal laws in point. European and German law provide examples.

²⁰⁸ Paras 268 – 270 of the First Decision.

²⁰⁹ Paras. 32, 33 *supra*.

²¹⁰ Cf. Overview of loss of chance – cases in Irmgard Marboe, “*Calculation of Compensation and Damages in International Investment Law*”, Oxford University Press, 2009, paras. 3.219 – 3.225.

²¹¹ Article 38(1) of the Statute of the International Court of Justice.

273. Subsequently, European and German laws in point are outlined (i) and vetted against pertinent international law principles (ii). The Majority's analysis of the two *causal links* is then reviewed in light of European/German law in consonance with international law principles (iii, iv).

I.C.1.c.i. Recovery of Loss in Tenders under European and German Law

I.C.1.c.i.(a) European Law

274. In European law, the issue is addressed in article 2(7) of the "Sector Surveillance Directive". It provides: "*Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected*"²¹².

275. The *Directive* bestows a right of recovery to bidders that have lost out in legally flawed tenders on two conditions, namely (i) actual participation in or preparation for a particular tender and (ii) proof of a "*real chance*" of success in that tender. Most importantly, the *Directive* provides only for recovery of the costs incurred in relation to the tender concerned (*damnum emergens*); it does **not** extend to profits foregone due to losing the award (*lucrum cessans*).

276. Under European Union, Claimant's claim would thus have to be dismissed on (at least) three grounds, namely:

- Gala's failure of having participated in tenders during the Interregnum²¹³;
- Gala's failure of having proven a "*real chance*" in particular tenders²¹⁴; and
- The limitation of any recovery to *damnum emergens*.

²¹² Council Directive 92/13/EEC of 25. Febr.1992, Official Journal L 076, 23/03/1992, p. 14 - 20

²¹³ European law does not envisage any recovery rights of companies prevented from bidding in a tender which has not been organized although required by law.

²¹⁴ See paras. 298 – 303 infra.

277. Pursuant to Article 288(3) of the Treaty on the Functioning of the European Union, all *Directives* must be transformed by EU Member States into their municipal laws. The *Directive* therefore reflects the law common to all twenty-seven EU Member States.

278. The *Directive* sets a minimum standard regarding the protection of bidders in flawed tenders which must be observed by all EU Member States. It provides a protection standard on the European plane similar to the FET standard on the international plane. As the European standard addresses the tender situation particular to this arbitration, it merits consideration in concretizing the more general FET standard and international law principles complementing the standard.

I.C.1.c.i.(b) German law

279. German law offers an example of EU Member State laws that have transformed the *Directive* and exceed the latter's protection level by envisaging award of lost profits in certain circumstances.

280. Patterned after the *Directive*, para. 126 of the 2009 *Law Against Restraints of Competition* ("*Gesetz gegen Wettbewerbsbeschränkungen*") provides a cause of action for damages suffered by tender participants as a result of a violation of tender rules, provided that (i) the rule violated aims at protecting the claimant concerned; and the claimant proves a "*real chance*" to win the tender but for the violation²¹⁵.

281. As the *Directive*, the German remedy limits any compensation to "*the expenses incurred in preparing the tender offer or participating in the tender*", i.e., to the *damnum emergens*. Profits foregone as a result of winning the award (*lucrum cessans*) can be recovered only if and to the extent that provided by general remedies of German law.

282. Such general remedies are anchored in paras. 311(2) and 839 of the German Civil Code in conjunction with Article 34 of the German Basic Law (*culpa in contrahendo* and *misuse of office by public officials*, respectively). As a rule, both remedies are limited to recovery of the *damnum emergens* ("*negatives Interesse*")²¹⁶.

²¹⁵ Claimant must substantiate and prove this „real chance“ (See Löwenheim-Meessen-Riesenkampff, „*Kommentar zum Europäischen und Deutschen Kartellrecht*“, 2nd ed., 2009, para. 126 GWB, comments by Marc Bungenberg, note 5).

²¹⁶ See Palandt-Grüneberg, *Commentary on the Civil Code*, 68th ed., 2009, para. 311, notes 36, 37..

283. Nevertheless, German courts have awarded *lucrum cessans* where a claimant proves that “he **would** have won the award if the tender had been carried out in due process” (emphasis provided)²¹⁷. Yet, German courts require more than showing of a probability or a preponderance of evidence in this context. Claimant must prove that the authority in charge had no other lawful choice but to award the contract to claimant. In other words, lost profits cannot be recovered as long as the award to a contender of the claimant can possibly be justified as an exercise of the authority’s discretion in accordance with applicable legislation^{218, 219}.

I.C.1.c.i.(c) Rationale of Limiting Recovery of Lost Profits in Tenders

284. The limitation in municipal laws of recovery of lost profits due to flawed tenders ensues from a particular feature of public tenders – the inherent possibility that claims of unsuccessful bidders may accumulate to incalculable “*liability avalanches*”. This possibility derives from the typical situation where multiple bidders apply but only one can win. Theoretically, the chances of all bidders together cannot add up to more than hundred percent. However, if chances of individual claimants are determined without weighing them against the chances of contenders, several claims can in the aggregate easily exceed the value of the award. The more liberally chances are estimated, the greater is the potential of

²¹⁷ German Federal Supreme Court (BGHZ), vol. 120, p. 281 (Nov. 25, 1992).

²¹⁸ See German Federal Supreme Court, *supra*, p. 285 where the Court emphasises that Claimant had met all requirements while his only two competitors had to be excluded as a matter of law. Cf. also *obiter dictum* in Federal Supreme Court, vol. 139, p. 272 (Sept. 8, 1998) : “(...) *recovery of lost profits only (...) where the contract has been awarded and the losing contender would have received it*” [as a matter of certainty if the law had been complied with]. And the Court of Appeals of Brandenburg dismissed a claim for lost profits on the ground that “*the violations of tender rules have not been causal for the alleged loss of profits, because the plaintiff did not have to obtain the award if the tender rules had been complied with*” (Brandenburgisches Oberlandesgericht, dec. January 10, 2007, 4 U 81/06, p. 8).

The mentioned decisions are based on *culpa in contrahendo*. However, similar limitations apply to claims on account of misuse of office. In principle limited to *damnum emergens*, such claims may in exceptional cases extend to *lucrum cessans* where the violation has frustrated conclusion of the contract and claimant proves with “*a probability bordering at certainty*” that the contract would have been concluded but for the violation. This jurisprudence follows the principle of German law that the “*negative Interesse*” is normally confined to “*damnum emergens*”, but that it may extend to “*lucrum cessans*” in exceptional cases where the violation has frustrated conclusion of a contract and claimant proves with a probability bordering at certainty that the contract would have been concluded but for the violation (see Palandt-Heinrichs, fn. 216, introductory note 17 on para. 249 and Palandt-Sprau, para. 839, note 77).

²¹⁹ Recovery of lost profits is under German law subject to further restrictions which would require dismissal of Claimant’s claim. Notably, all claims under *culpa in contrahendo* become statute-barred within 3 years (paras. 280, 311(2), 195 of the German Civil Code); and claims for *misuse of office* are precluded if no remedy was sought against the misconduct in due time and due course (para. 839(3) of the German Civil Code). The Interregnum had ended in June 2000; and Claimant has filed his request for arbitration on September 6, 2006.

claims accumulating to excessive amounts. According all “losers” in such situations remedies to sue themselves into financial winners by claiming lost profits would expose States to incalculable fiscal risks.

285. The limits to State liability for violations of tender rules outlined under German law as an example serve an obvious purpose, i.e., to protect the State against “avalanches” of claims from multiple frustrated tender participants.

286. This liability scenario fundamentally distinguishes the situation of tenders from the bankruptcy scenario referred to by the Majority to illustrate its theory of “*transitive causal links*”²²⁰. In the bankruptcy scenario no multiple potential claimants (i.e., bankrupted companies) and resultant liability avalanches exist.

287. The outlined EU and German law relate to public procurement whereas the case at hand concerns the allocation of radio frequencies. This difference is immaterial, though. The dynamics of competitive public tenders with the ensuing liability scenario are the same, irrespective of the context in which the tender is held.

288. In brief, European and German laws, for recovery of loss in case of flawed tenders require proof of:

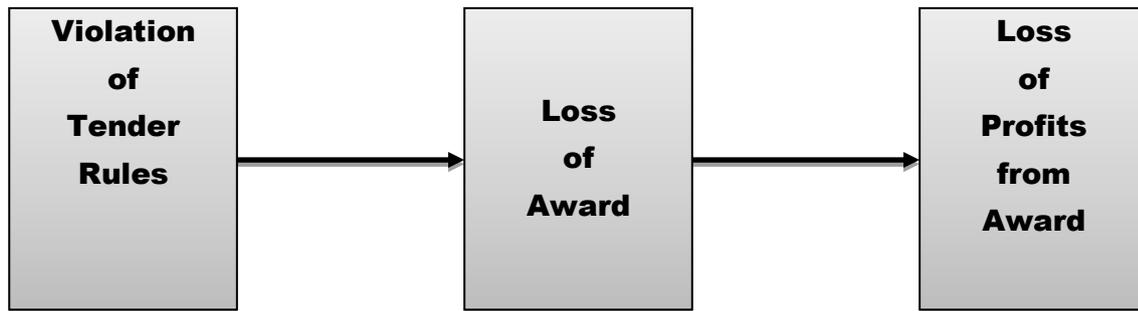
- A violation of applicable law in a particular tender in which the claimant has either participated or was prevented from participating by the violation; and
- A “real chance” of the claimant in the particular tender concerned but for the violation.

289. Recovery of profits lost due to flawed tenders is not foreseen in EU law at all. German law provides for this possibility but only where the claimant proves that he would have won the tender concerned but for the violation. This proof requires evidence of a degree of probability bordering at certainty.

Figure 1 illustrates the causation chain required for recovery of lost profits under German law:

²²⁰ Paras. 165, 167 of the Award.

Figure 1: Determination of Profits Lost due to Tender Violations



I.C.1.c.ii. Consistency of European and German Law with International Law

290. European and German laws in point in my view conform to relevant principles of international law, notably the bias against awarding “*speculative profits*” and the requirement of “*particularizing*” damages.

I.C.1.c.ii.(a) Speculative Profits

291. The Majority “*agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty*”²²¹.

292. The outcome of public tenders with myriad competitors is inherently speculative. The EU *Directive* excluding loss of profits in case of flawed tender is therefore consistent with the bias against speculative profits under international law. And the approach of German law requiring in such cases a level of probability bordering at certainty directly squares with the international rule in point. Article 36(2) of the ILC Articles on State Responsibility extends compensation to loss of profits only “*insofar as it is established*”.

I.C.1.c.ii.(b) GAMI case

293. Under international law, recoverable damages need to be “*particularized*”. This principle was developed in the *GAMI case*²²².

²²¹ Para. 246 of the Award.

²²² *GAMI Investments, Inc. v. Mexico, Ad hoc Arbitration UNCITRAL (NAFTA)*, Final Award of November 15, 2004.

294. In that case, the claimant had proven maladministration of Mexico's sugar regime and some loss to its investment as a result. Nevertheless, the Tribunal dismissed GAMI's claim under Article 1105(1) of the NAFTA (FET standard) on the ground that the claimant had failed to "particularize" its damage: "GAMI can assert only that the maladministration of the Sugar Program caused it some prejudice. **But the prejudice must be particularized and quantified**.....the Tribunal would have been in no position to award damages even if it had found a violation of Article 1105" (emphasis provided)²²³.

295. Applied to tender situations, *particularization* requires identification of the particular tenders on account of which recovery is sought. This conforms to the requirement under European and German laws to prove claimant's prospects to win with respect to particular tenders.

I.C.1.c.iii. First Causal Link²²⁴

296. The first *causal link* concerns the nexus between the unlawful out-of-tender allocation of frequencies to competitors and Gala's failure to obtain frequencies thus allotted. The Majority does not identify particular frequencies that Gala would have obtained but for Respondent's wrongdoing. It just accepts Claimant's summary allegation that Gala would have won 14 additional frequencies needed to operate a nationwide network. This approach in my view misconstrues applicable principles, inadmissibly shifts the burden of proof and entails factual errors.

297. The Majority tries to explain its approach by distinguishing the scenario at hand from a "loss of chance" – scenario: "*The Tribunal's conclusion is not that Gala Radio was relegated in certain specific tenders for frequencies, and was deprived of a chance to win in these procedures; what the Tribunal has found is that the initial cause (Ukraine's wrongful acts) and the damage (Claimant's frustration to carry out his plans and create a nationwide FM channel (...)) are linked through a proximate chain of causation. The investor's loss does not consist in being deprived of some chance to win additional frequencies; what has been proven is that Ukraine's wrongful acts have resulted, through a foreseeable and proximate chain of events, in the damage suffered by the investor*"²²⁵.

²²³ GAMI, fn. 222, para. 85.

²²⁴ See paras. 173 – 202 of the Award.

²²⁵ Para. 252 of the Award.

I.C.1.c.iii.(a) Particularization

298. Claimant has failed to substantiate Gala's prospects with respect to particular frequencies allotted during the Interregnum if these had been put up for tender in accordance with the LTR. The Majority apparently tries to overcome this failure by considering as "*cause*" the occurrences during the Interregnum in the aggregate and construing the causation chain from such aggregate rather than the individual allocations of frequencies constituting the practice. This approach, however, would assume existence of a "*composite act*" within the meaning of Article 15 of the ILC Articles on State Responsibility; and it is inconsistent with municipal laws on recovery of loss in tender situations as well of international law precedents in line with these municipal laws.

299. The Majority does not qualify the occurrences during the Interregnum as a "*composite act*" (para. 265 – 267 supra). Thus, each diversion of a frequency sought by Claimant from the tender process during the Interregnum severally constitutes an assumed breach of the FET standard. The effects must be related to each such breach severally; they must be determined frequency-by-frequency on the basis of an assessment of Gala's prospects in each (hypothetical) tender of which Gala was allegedly deprived²²⁶.

300. European and German laws admittedly only concern cases where tenders are held but violate applicable law. They do not directly address the present scenario where tenders prescribed by law are evaded and potential applicants thus deprived of their chances. However, the rationale of limiting recovery in tender situations – and especially recovery of lost profits – applies *a fortiori* to the scenario at hand. If liberal recovery of loss were allowed in the present scenario, practically all operators in the business related to evaded tenders could sue for loss of profits; and the "*liability avalanches*" germane to tenders could encompass all market participants rather than just the participants in particular tenders.

301. A tender-by-tender assessment would have to take into account the specifics of each situation. According to Claimant's expert witness, chances of success in tenders were primarily determined by the added value of the proposed program to the diversity of the radio market as well as applicant's technical/professional capabilities in relation to the

²²⁶ I do not wish to speculate whether a causation chain could be construed on the basis of a whole-sale assessment of the Interregnum practice in the aggregate if the latter were considered as a "*composite act*". Suffice to note that the Majority neither has not done so and nor could have done so in view of the *res judicata* effect of the First Decision.

proposed program²²⁷. Gala's competitive strength had thus to be assessed with a view to the particular program and market conditions of individual (hypothesized) tenders as well as the competitive strength of contenders likely to have participated in such tenders. And Respondent's principal arguments (priority of previous licence holders, Gala's existing presence in the region) would have to be analyzed in each instance.

302. Rather than conducting such assessments, the Majority's offers just some summary observations: Gala in 1999 was "*one of the most successful radio operators in Kyiv*", Claimant and his staff made impressive presentations to the Tribunal regarding Gala's program and technology²²⁸. From these observations, the Majority concludes that "*Gala Radio should have received, no later than January 1, 2001, at least the 14 licences required to create a national FM network*" if the 80 frequencies allotted during the Interregnum had been put to tender²²⁹.

303. This cursory summary assessment cannot substitute for the case-by-case determinations required for awarding loss of profits in tenders. Indeed, the Tribunal was procedurally unable to make the required determinations, because Claimant had only submitted that sufficient frequencies had been available which **could** (rather than would) have been allocated to Gala. He had not substantiated Gala's prospects in any hypothetical tender, let alone offered proof²³⁰.

I.C.1.c.iii.(a) Burden of Proof

304. The Majority notes that causation must be established with a higher "*level of certainty*" than the amount of damages²³¹. However, such level of certainty is deemed to be established by proof "*that through a line of natural sequences it is probable – and not simply possible – that Gala would have been awarded the frequencies under the tender*"²³².

²²⁷ See Andre Wiegand, HT, 1st day, para. 183 at p. 142 and para. 116 supra.

²²⁸ Paras 189, 190 of the Award. See paras. 312 – 328 infra on the accuracy of these observations.

²²⁹ Para. 191 of the Award. Cf. also paras. 179, 201 of the Award and 253 – 256 supra.

²³⁰ See Claimant's Memorial on Remaining Issues, paras. 32 – 37 and HTRI p. 20 – 24.

²³¹ Para. 246 of the Award.

²³² Para. 169 of the Award.

305. Respondent has submitted that Gala would not have obtained any of the frequencies allotted during the Interregnum even if they had been put up for tender in accordance with the LTR²³³. The Majority dismisses this submission, notably the argument that

- Gala never planned to apply for Interregnum frequencies by assuming that Gala would have applied if tenders had been announced;
- Claimant has waived his rights due to the Interregnum by denying such waiver²³⁴;
- Gala would not have obtained frequencies in locations for which it already held frequencies by opining that Gala broadcasted in Kyiv only and its frequencies in eleven other cities “*had very low power*”;
- Broadcasters previously holding frequencies had priority to their re-allocation by finding that this argument affected only 31 frequencies;
- Gala was inadequately funded by referring to Claimant’s off-record contributions to Gala and noting that “*Respondent has not been able to prove that Gala Radio’s competitors did not present the same shortcomings and thus were not better qualified in this respect*”; and
- Gala was not competitive by referring to statements of Claimant and his witnesses during the first phase of the proceedings²³⁵.

306. To dismiss Respondent’s arguments as outlined, the Majority shifts the burden of proving the underlying facts on Respondent. This in my view is procedurally incorrect.

307. As explained before, Claimant had the burden of proving Gala’s prospects of winning frequencies allotted during the Interregnum. This included proof by Claimant of the facts underlying Respondent’s submission on a frequency-by-frequency basis. Respondent’s

²³³ Respondent’s Memorial on Remaining Issues, paras. 160 – 188.

²³⁴ This issue relates to the question whether the Interregnum practice could establish Respondent’s liability towards Claimant in principle and is commented on in this context. See paras. 200 – 204 *supra* and paras. 499 – 505 *infra*.

²³⁵ Paras. 188 – 190 of the Award. See paras. 312 – 328 *infra* on the plausibility of the Majority’s findings..

objections could therefore not be dismissed on the ground of insufficient evidence provided by Respondent²³⁶.

308. The Majority's assessment can thus on procedural grounds not sustain the conclusion that Gala would have obtained the requisite frequencies for a nationwide FM network but for Respondent's wrongdoing.

309. The procedural insufficiency of the Majority's assessment becomes even more striking if it is assumed in accordance with German law that recovery of lost profits in tender situations is contingent on proof of a probability bordering at certainty that the claimant would have won the tender if rules had been complied with. Such proof appears to be difficult in the scenario at hand where Claimant's prospects in a series of hypothetical tenders with unknown tender conditions and unknown competitors (potentially all broadcasters operative in Ukraine during the period of the Interregnum) must be assessed.

310. Providing a hurdle to recovery, though, does not necessarily disqualify German law from providing guidance in the interpretation of international law. As shown before, European law does not at all envision recovery of lost profits due to flawed tenders; and precedents under international law militate against awarding speculative profits. In the present inherently highly speculative scenario, the award of lost profits is in my view inadmissible.

I.C.1.c.iii.(b) Key findings

311. Further to my objections to the procedural adequacy of the Majority's assessment, I should note that at least some key findings are doubtful at least.

I.C.1.c.iii.(b).(i) Gala's market position

312. The Majority "*bases its opinion on the **undisputed** fact that at the time of the Interregnum, Gala Radio was one of the most successful radio operators in Kyiv – it held number 1 and 2 position*" (emphasis added)²³⁷. Repeated several times throughout the

²³⁶ See Respondent's Memorial on Remaining Issues, paras 131 – 157 with references.

²³⁷ Para. 179 of the Award.

Award, this finding is apparently pivotal to the Majority's conclusions²³⁸. However, it is misleading at best.

313. As evidence that its finding is undisputed, the Majority refers to statements of Respondent's Counsel during the Hearing on Remaining Issues²³⁹. However, the reference corresponds to Counsel's explanation that Gala's market position in Kyiv had only initially been strong "*when there were no competitors*". After 1999, this position eroded quickly and consistently down to rank 15 in 2010²⁴⁰. Gala, from 1995 to present, has held a strong frequency which covered the entire territory of Kyiv. Unlike assumed by the Majority (fn. 176 of the Award), the erosion of Gala's market share in Kyiv can logically not be attributed to a denial of frequencies – Gala has had the requisite frequency at its disposal. In Respondent Counsel's explanation, Gala's loss of market share is due to its unattractive music program.

314. Thus, although Gala's historic market position in Kyiv in 1999 was not disputed as such, the sustainability of this position was. And subsequent development has confirmed this weakness. This discredits the Majority's reliance on Gala's overall competitive strength as principal evidence of its assumed success in (hypothetical) tenders during the Interregnum²⁴¹.

I.C.1.c.iii.(b).(ii) Frequencies in locations covered by Gala's frequencies

315. The Majority dismisses Respondent's argument that many of the frequencies allotted during the Interregnum concerned locations covered by Gala's 13 frequencies finding that "*Gala Radio was only transmitting in Kyiv, and the frequencies it then obtained in 11 cities*

²³⁸ See paras. 179, 189, 190, 207 of the Award.

²³⁹ See fn. 176 of the Award with reference to HTRI, p. 65.

²⁴⁰ See Respondent's power point presentation at HRI, p. 25 (facts undisputed). The erosion of Gala's market share in Kyiv is confirmed by Claimant's expert report, showing a drop of Gala's audience in Kyiv from 270,000 in 2003 to 104,000 in 2008. See Goldmedia Supplementary Report, 2010, Exhibit 21 at p. 30.

See further findings of the "Brand Support Report Gala", a consultancy study commissioned by Claimant and attached to his expert consultant's "Goldmedia Report". According to the Brand Support Report, Gala in 2007 ranked no. 7 in total and no. 10 in terms of most favorite music station in the areas in which Gala did broadcast.

²⁴¹ Such reliance moreover appears to be inconsistent with the Majority's conclusions in the First Decision. There, the Majority has found that Gala's failure to obtain any but one frequency on more than 200 applications between 2001 and 2007 "*cannot provide conclusive evidence that Respondent has violated the FET standard*" (para. 330 of the First Decision). The Majority further noted that these statistics, in conjunction with three other factors, "*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*" (para. 420 of the First Decision). Gala's market position in Kyiv was not mentioned as one of the indicators.

*had very low power*²⁴². This finding is inconsistent with Claimant's pleading and the Majority's reasoning in the First Decision; it is also flawed in substance.

316. Claimant, in his Memorial on Remaining Issues, had identified 32 frequencies allotted during the Interregnum which concerned locations not covered by Gala's 13 frequencies. And he had submitted that "*a fraction of these 32 frequencies would have enabled Claimant to achieve a full national network as of January 1, 2001*"²⁴³.

317. In the Hearing on Remaining Issues, Claimant's Counsel started his explanations on frequencies available for Gala with reference to "*38 frequencies that could have been complementary to its [Gala's] network*"²⁴⁴. Claimant had thus accepted Respondent's position that out of some 80 frequencies allotted during the Interregnum only 38 for locations not covered by Gala's frequencies merited further consideration. The Majority disregards a limitation agreed between the Parties.

318. Unlike in the Award, the Majority in the First Decision found that *the power of the frequencies awarded to Claimant was not abnormally low (...) [but] matched that of frequencies allocated to major competitors*²⁴⁵. Moreover, the power of these frequencies ranged widely from 0.1 to 4 kW²⁴⁶. Thus, a need for an additional frequency to cover a certain location could only be determined on a case-by-case basis rather than be assumed across the board.

319. Finding that Gala, at the time of the Interregnum, broadcasted only in Kyiv, the Majority overlooks the fact that Claimant at the very same time was negotiating for frequencies in additional 11 cities. There is no indication that Claimant would have applied for overlapping frequencies if they had been put to tender. Such applications could have interfered with his negotiations of the Settlement Agreement.

²⁴² Para. 187 of the Award.

²⁴³ Claimant's Memorial on Remaining Issues, para. 37 and Fn. 64.

²⁴⁴ HTRI, p. 18

While Claimant, in para. 37 of his MRI, had referred only to 32 frequencies, he had identified 38 frequencies in Fn. 64. Respondent has accepted the reference to 38 frequencies (Respondent's Counter-Memorial on Remaining Issues, paras. 176, 177 and HTRI, p. 48; and Claimant has based its subsequent position on this figure.

²⁴⁵ Para. 197 of the First Decision.

²⁴⁶ Para. 194 of the First Decision.

I.C.1.c.iii.(b).(iii) Priority of previous licence holders

320. The Majority dismisses Respondent's argument that most frequencies allotted during the Interregnum were encumbered with priority rights of previous licence holders finding that this argument affected only 31 frequencies out of which 20 could have been awarded to Gala²⁴⁷. This finding is inconsistent with Claimant's pleading in point relied on by the Majority.
321. Claimant had related the 31 frequencies with priority rights only to the aforementioned 38 frequencies in locations not covered by Gala rather than the some 80 frequencies allotted during the Interregnum in total. This left only seven frequencies without priority rights attached²⁴⁸.
322. Claimant had further argued that in six of the 38 instances, frequencies had been allotted to broadcasters other than the previous licence holders, and in seven instances previous licence holders had forfeited their priority rights because of legal violations²⁴⁹. With these - contested²⁵⁰ - arguments, Claimant tried to increase the number of available frequencies from seven to twenty.
323. Respondent's had submitted the following facts: Out of the seven frequencies unencumbered with priority rights, two concerned locations for which Gala had obtained frequencies under the Settlement Agreement and two were for the same city. The remaining four frequencies were formally awarded by the National Council in tenders on March 22 and June 21, 2001 (rather than the January 1, 2001 tender). In these two tenders, Gala did participate but did not apply for any of the frequencies in question (what it could have done)²⁵¹. Claimant had not contested these facts. The Majority ignores them nevertheless.
324. Thus, according to the common submission of the Parties a total between nil (Respondent) and twenty (Claimant) frequencies allotted during the Interregnum had been available for possible award to Gala. The Majority concludes that "*Gala Radio should have*

²⁴⁷ Para. 186, 187 of the Award. Cf. also para. 109 of the Award and paras. 526 – 529 infra.

²⁴⁸ HTRI, p. 20: "*The argument is that 31 of those 38 frequencies that we had identified were under what is called a "priority procedure (...) That leaves seven which had no priority rights (...)"*

²⁴⁹ HTRI, p. 23.

²⁵⁰ HTRI, p. 49.

²⁵¹ HTRI, p. 50, 51 and Third WS Kurus, para. 20.

received....at least the 14 frequencies required to operate a nationwide FM music network²⁵².

325. The availability of up to twenty frequencies does not imply an entitlement to them on the part of Claimant/Gala. Rather, Claimant would have had to establish the required probability (under German law bordering at certainty) that Gala would have won the frequencies had they been put up for tender. In the Majority's conclusion, Claimant has proven that Gala would have won at least 14 frequencies (out of 20 available at most)²⁵³. This seventy percent success record is assumed despite Claimant's failure to substantiate Gala's prospects in any hypothetical tenders.

I.C.1.c.iii.(b).(iv) Applications of Gala

326. The Majority discards as irrelevant the fact that Gala has never (prior to the First Decision) expressed an interest in frequencies allotted during the Interregnum, opining that Gala would have done so had the frequencies been duly put up for tender²⁵⁴. At the same time, the Majority accepts Claimant's submission that he sought these frequencies to supplement the low powered frequencies obtained under the Settlement Agreement²⁵⁵.

327. Co-terminus with the Interregnum, however, Claimant had been negotiating for priority allocation of frequencies as per the Settlement Agreement. He had expected higher powered frequencies facilitating his business expansion plans²⁵⁶. Even if additional frequencies had been put up for tender at that time, Claimant would thus have not seen a business reason to apply for them.

I.C.1.c.iii.(b).(v) Gala's financial resources

328. The Majority assumes that Gala had adequate resources at its disposal owing to Claimant's off-record contributions from his personal wealth²⁵⁷. However, the National Council could determine Gala's financial strength only on the basis of the records submitted to it. Gala's recorded rather than its actual resources were decisive to its prospects of

²⁵² Paras. 191, 201, 202 of the Award.

²⁵³ Para. 202 of the Award.

²⁵⁴ Paras. 181, 182 of the Award.

²⁵⁵ Paras. 174 - 177 of the Award.

²⁵⁶ Claimant's Post Hearing Memorial, para. 57.12

²⁵⁷ Para. 206 of the Award.

winning tenders. With a recorded equity of some USD 22,000 and a total investment of USD 141,000, Gala clearly did not exhibit the financial capacity needed to create and operate a nationwide network²⁵⁸.

I.C.1.c.iv. Second Causal Link

329. In the context of a conventional claim for recovery of lost profits, the second link would be defined in terms of the nexus between the assumed award of 14 additional frequencies and the profits anticipated to have flown from such 14 frequencies as the second and final effect²⁵⁹. Yet the Majority links the assumed award to Claimant's business expansion plans: "*would Mr. Lemire have been able to develop Gala into the successful broadcasting company he had planned, a FM national broadcaster, for music format (...)?*"²⁶⁰.

330. As stated, the second link (and effect) overlaps with the first. As explained before, Gala qualified for winning frequencies only if it demonstrated the "*financial, economic, technical capacity*" to broadcast on the frequencies concerned in accordance with the applicable tender conditions²⁶¹. The Majority's conclusion that Gala should have been awarded the frequencies needed for a nationwide network thus implies an assumption that Gala disposed of the capacity to build and operate such network once it obtained the frequencies for it.

331. The Majority's consistent emphasis on Claimant's business plans implies yet another problem. It leads to determining the scope of Respondent's liability with a view to Claimant's business plans. Claimant defines and largely controls his business plans. Relying on these plans, the Majority empowers Claimant to influence parameters determining the scope of Respondent's liability by stating his business plans. Thus, the Majority could, with the reasoning offered, have awarded Claimant an entitlement to any number of Interregnum frequencies between 1 and 20, depending on Claimant's submission regarding his business plans.

332. This aspect is especially disquieting against the background that Claimant has never produced any business plan or other record documenting his business plans at a certain point in time.

²⁵⁸ See paras. 169 - 172 supra.

²⁵⁹ See Figure 1 in para. 289 supra.

²⁶⁰ Para. 203 of the Award.

²⁶¹ See especially para. 171 supra with reference to Article 30(2)(d) of the LTR.

333. Moreover, the notion of a “nationwide network” underlying the Majority’s assumptions is subject to several definitions. The term “*national broadcasting*” is defined in the LTR. Under the initial definition (programs in “*over more than half of oblasts of Ukraine*”) only the Ukrainian State Radio Company was a national broadcaster. In 2006, the definition was changed and Gala became registered as a “*national broadcaster*”, together with 14 other broadcasters in Ukraine (out of 538 in total)²⁶².

334. The notion of a “nationwide network” covering Ukraine in its entirety was first introduced by Claimant in this arbitration. Such a network is nowhere mentioned in Claimant’s 1995 correspondence with National Council relied on by the Majority as evidence of Claimant’s business expansion plans²⁶³.

335. The Majority’s emphasis on business plans defined by Claimant ad hoc for the purpose of this arbitration reinforces the risk of awarding “*speculative profits*”²⁶⁴.

I.C.2. Determination of Causation as “Surprise Decision” (“*Audiat et Altera Pars*”)

336. In the First Decision, the Majority has introduced the out-of-tender allocations of frequencies during the Interregnum as violations of the FET standard without basis in Claimant’s pleadings. This represented a first “surprise decision” depriving Respondent of its “Right to be Heard”²⁶⁵. Now, the Majority construes the effect of these allocations on Claimant with sweeping references to submissions in the first phase of the proceedings – again as a surprise with prejudice to Respondent.

337. The Parties, and Respondent in particular, could legitimately expect that the incidents during the Interregnum would be assessed in accordance with the Tribunal’s reasoning in the First Decision and its subsequent guidance.

²⁶² Respondent’s Counter-Memorial on Remaining Issues, paras. 325 – 328 with references – undisputed.

²⁶³ Para. 47 supra. In his first witness statement, Claimant still explained that his initial expectations concerned a “*regional network*” (WS Lemire, para. 44).

²⁶⁴ See further paras. 369 – 380 and 483 - 490 infra.

²⁶⁵ See paras. 191 – 199 supra.

In addition, Claimant’s business expansion plans were excluded from consideration in this arbitration by dint of the Settlement Agreement (paras. 200 – 204 supra).

338. In the First Decision (para. 418), the Majority has branded the practice during the Interregnum as “arbitrary”, “because it facilitates the secret awarding of licences, without transparency, with total disregard of the process of law (...)”. The process of law was the tender process prescribed by the LTR. Its disregard in the Majority’s determination violated the FET standard, because it deprived Gala of its assumed right to apply in tenders evaded.

339. Accordingly, Claimant’s prejudice would have to be determined in terms of Gala’s frustrated chances of winning additional frequencies in such tenders. The Parties could expect the Tribunal to assess in the Second Phase of the proceedings Gala’s prospects in (hypothetically assumed) tenders that would have been held if the law had been followed.

340. In its guidance to the Parties during the Second Phase, the Tribunal confirmed Respondent’s position that the causal connection between Respondent’s breach of the FET standard and Claimant’s loss had not been pre-determined by the First Decision but was reserved to the Second Phase²⁶⁶. This guidance reinforced Respondent’s legitimate expectation that prospects would be assessed during the Second Phase on a (hypothetical) tender-by-tender assessment in light of new submissions.

341. The burden of substantiating and proving Gala’s prospects was undisputedly on Claimant. Claimant has failed to substantiate these prospects, let alone prove them, due to his position that the issue of causation had been pre-determined by the First Decision as a matter of *res judicata*²⁶⁷. Claimant has maintained this position despite the Tribunal’s advice to the contrary²⁶⁸.

342. Respondent has requested the Tribunal to infer from Claimant’s failure of substantiating Gala’s prospects the absence of a causal link between Respondent’s assumed wrongdoing and Claimant’s failure of realizing his – alleged – business expansion plans²⁶⁹. In support of this request, it has submitted that Gala had no prospects of winning additional frequencies. This submission has been substantiated frequency-by-frequency

²⁶⁶ See paras. 239 – 248 supra.

²⁶⁷ Yet, Claimant had conceded his burden of proof if the issue were to still to be heard (Audio procedural conference March 1, 2010, Mr. Gharavi).

²⁶⁸ See especially paras. 239, 244 – 246 supra.

²⁶⁹ Respondent’s Counter-Memorial on Remaining Issues, para. 153.

allotted during the Interregnum. It has furthermore been confirmed by the Third WS Kurus which in turn is supported by documentary evidence²⁷⁰.

343. Mr. Kurus was presented as a witness in the Hearing on Remaining Issues of July 12, 2010. However, Claimant did not cross-examine him with a view to his insistence that the topic had been pre-determined by the First Decision. Although it had previously rejected this position, the Tribunal did not address any question to Mr. Kurus either.

344. I did not question Mr Kurus, because Claimant had the burden of proof for the facts to be testified by Mr. Kurus. Therefore, I considered Mr. Kurus' testimony as procedurally obsolete, its relevance in substance notwithstanding.

345. Contrary to my position, however, the Majority accepts a causal link between the Interregnum occurrences and Claimant's failed business expansion. This decision in my view required careful consideration of the only facts in point submitted during the Second Phase.

346. The Majority bases its decision solely on facts submitted during the first phase of the proceedings (Gala's market position in 1999, witness statements of Claimant and his collaborators during the first phase)²⁷¹. While it has reserved its decision to the Second Phase, it thus could have taken it already in the first phase (as Claimant had understood it did).

347. The Majority dismisses Respondent's submission on causation. However, the Majority's determinations in point not only entail errors and oversights²⁷². They are in my view procedurally inconclusive, as they fail to assess these objections frequency-by-frequency.

348. In quintessence, the Majority had throughout the Second Phase advised that the issue of causation had still to be litigated but remedied Claimant's failure of substantiating his case by construing the required causal links entirely on the basis of facts and evidence submitted during the first phase of the proceedings. Based on summary observations rather than particularized assessments, the conclusions on the causal links are moreover inconsistent

²⁷⁰ See para. 238 supra.

²⁷¹ See para. 302 supra.

²⁷² See paras. 311 – 328 supra.

with the definition of the “*cause*” as deprivation of opportunities in tenders required by law but evaded.

349. In my view, this process has in effect relieved Claimant from his burden of substantiating (and proving) Gala’s prospects with respect to frequencies allotted during the Interregnum, although this burden was implicit in the First Decision and the Tribunal’s guidance in the Second Phase of the proceedings. As a consequence, Respondent was misled in building its defence.

350. The process violates Respondent’s Right to be Heard (*audiatur et altera pars*) as set out by the annulment committee in the *Wena* case: “*It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its (...) defence and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level (...)*”²⁷³.

²⁷³ *Wena Hotels v. Egypt*, Decision on Annulment, Febr. 5, 2002. paras. 56, 57. Cf. also Christoph H. Schreuer at al., supra fn. 30, article 52, comments 285 – 287, 294, 295, 305ff; Gary B. Born, *International Commercial Arbitration*, vol. II, Wolters Kluwer, 2009, p. 2589.

II. IMPLAUSIBILITY OF THE AWARD

II.A. The Majority's Key Conclusions

351. In the previous chapter, I have discussed the procedural and substantive errors in the Majority's analytical process. In this chapter, I will address the doubts cast on the principal conclusions in light of common sense plausibility.

352. Key to the Award are the conclusion that

- Gala would have operated a "*full national network*" as of January 1, 2001 but for Respondent's out-of-tender allocation of frequencies during the Interregnum (chapter II.B. *infra*); and
- Such a network would have boosted Gala's actual net enterprise value of USD 126,290 to a hypothetical net present value of USD 8.844.150 (chapter II.C. *infra*).

353. These conclusions must be appreciated in the light of different levels of probability required in the Majority's opinion for establishing "*causation*" (i.e, the *full national network*), and damages (the net present values), respectively:

354. *"The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination claimant only needs to provide a basis upon which the Tribunal can, with reasonably confidence, estimate the extent of the loss"*²⁷⁴.

²⁷⁴ See para. 246 of the Award.

II.B. Full National Network

355. The Majority concludes its analysis of *causation* with the decision that Respondent's compliance with the FET standard during the Interregnum would have added fourteen frequencies to Gala's network boosting its coverage from twenty-two percent to the entire population of Ukraine from 2001 onwards.

356. Before 2006, only the Ukrainian State Radio Company covered more than half of the oblasts of Ukraine²⁷⁵. The Majority's decision thus implies that Gala would during the Interregnum have received more frequencies than any other broadcaster in Ukraine had Claimant been treated fairly and equitably.

357. At most twenty frequencies allotted during the Interregnum could possibly have been awarded to Gala. The Majority thus assumes a success rate of Gala of some seventy percent in all tenders in which it would have qualified. This assumption must be appreciated against the background that all broadcasters in Ukraine at the time would in principle have been entitled to compete in these (hypothetical) tenders and that the Majority has not considered the particular circumstances of any tender. And even the assumption of twenty available frequencies is based on the dismissal of all objections by Respondent²⁷⁶.

358. In the First Decision, the Majority has concluded that the denial of over 200 applications of Gala for additional frequencies between 2001 and 2008 "*cannot provide conclusive evidence that Respondent has violated the FET standard*"²⁷⁷. The reasons advanced for Gala's assumed success during the Interregnum – Gala's alleged overall competitive strength – would in principle have also applied to the tenders between 2001 and 2008. This makes it difficult to reconcile a decision that Fair and Equitable Treatment required allocation to Gala of 14 out of 20 available frequencies in hypothetical tenders during March 1999 and June 2000 (the Interregnum) while it did not require any award on over 200 applications in actual tenders during 2001 to 2008.

359. If anything, only the erosion of Gala's market position from 1999 onwards could in my view explain this distinction. This explanation, however, confirms my point that Gala's

²⁷⁵ See para. 333 supra.

²⁷⁶ See paras. 315 – 328 supra.

²⁷⁷ Para. 330 of the First Decision.

position in 1999, while relatively strong, was not sustainable²⁷⁸. Gala's 1999 position in the Kyiv market thus provides no evidence of Gala's outstanding competitive strength assumed by the Majority as foundation of its decision that Gala would have gained the needed fourteen frequencies but for Respondent's wrongdoing²⁷⁹.

360. Gala's initial success and subsequent market failure can indeed be explained quite naturally. Gala assumed its operations in 1995 right upon the (partial) privatisation of the radio sector and shortly after the collapse of the Soviet Union and the lifting of the "iron curtain". In this historical environment, Gala started a program focussing on Western hit music, riding on the first wave of pro-Western enthusiasm, especially among the youth in Kyiv. Subsequently, this "first mover's advantage" subsided, as other stations also broadcasted Western music and a new emphasis on Ukrainian cultural identity supplanted the orientation towards the West and, with it, the popularity of Gala's program²⁸⁰. This development was foreseeable in 1999, placing Gala in a weaker competitive position for additional frequencies than its one-time popularity might have suggested at first glance.

361. Furthermore, Gala, pursuant to the Settlement Agreement was afforded ten frequencies by the State Committee during the period of the Interregnum²⁸¹. The Majority's decision that Gala should have received fourteen frequencies during the Interregnum implies that it should have been awarded a total of twenty-four frequencies during the same period – fourteen in hypothetical tenders and another ten under the Settlement Agreement.

²⁷⁸ See para. 313, 314 supra.

²⁷⁹ See para. 312 supra.

²⁸⁰ This explanation is supported by the record of this arbitration. In 2006, a fifty percent Ukrainian music requirement was introduced through amendment of the LTR (new article 9(1)). Claimant considered this amendment as an "expropriation", seeking USD 958,000 compensation. He alleged that "*this new requirement will adversely affect Gala, which built its image on a "100% Hits" slogan*" (Claimant's Memorial, para. 207 and Post-Hearing Memorial, paras 148, 149). The Tribunal unanimously dismissed this claim (paras. 501 – 511 of the First Decision). The claim shows, however, that Gala still in 2006 adhered to its initial program concept and lost out due to market and policy developments unrelated to the denial of additional frequencies.

This fact is moreover documented by Gala's financial record. In 2008, its expenses skyrocketed to UAH 10, 4 million against UAH 6,3 million in each 2007 and 2009. This was due to the expenses of a Brand Support report commissioned to innovate Gala's program and reposition it on the Ukrainian music market (see Goldmedia Supplementary Report, Exhibit 25 at p. 34).

²⁸¹ Six frequencies were allocated by May 15 and another four by June 13, 2000 (para. 157 of the First Decision). The attendant licences of the National Council were granted subsequently. This process mirrors the administrative process during the Interregnum where frequencies had first been allotted by the UCRF and attendant frequencies were subsequently granted by the National Council upon its reconstitution.

362. Read together, the above facts cast serious doubts on the plausibility of the Majority's decision that, absent Respondent's wrongdoing, Gala would have won fourteen additional frequencies needed for a nationwide network during the Interregnum. These doubts are reinforced by Claimant's burden of proving Gala's assumed success in the hypothetical tenders. As per the Majority, this proof requires showing a "reasonable certainty"²⁸²; under German law (complementing pertinent recovery rights under EU law) a "probability bordering at certainty" must be established²⁸³.

II.C. Gala's Hypothetical Net Enterprise Value

II.C.1. The Majority's Calculation

363. The Majority calculates Claimant's loss in terms of the difference between Gala's actual net enterprise value (Scenario I) and Gala's hypothetical net enterprise value estimated but for Respondent's breaches of the FET standard (Scenario II), both values as of 2010. This difference reflects the profits lost by Claimant due to Respondent's wrongdoing. The profits are computed in accordance with the discounted cash flow method for the period 2001 through 2015²⁸⁴.

364. The calculation is presented in para. 296 of the Award:

Actual Enterprise Value (Scenario I):	126.290 USD
Hypothetical Net Enterprise Value (Scenario II):	8.844.150 USD
Claimant's Compensation Awarded:	8.717.860 USD

365. The Majority's calculations follow Claimant's expert witness^{285, 286}. The Majority makes one exception, though. Claimant had added to the cash flows for 2001 – 2015 a "terminal

²⁸² Para. 245 of the Award.

²⁸³ Para. 28383 supra.

²⁸⁴ See paras. 255, 260, 261 – 294 of the Award.

²⁸⁵ Goldmedia First Report 2008 ("GFR") and Goldmedia Supplementary Report 2010 ("GSR").

²⁸⁶ GFR, p. 18 and HTRI, p. 128. and paras. 288, 294 of the Award.

value” equal to seven times the discounted cash flow estimated for 2015. In line with Respondent’s objection, the Majority declines addition of this “*terminal value*”²⁸⁷.

366. Respondent had objected to Goldmedia’s (Claimant’s expert witness’) assumptions and calculations²⁸⁸ and submitted two reports of EBS Expertise Services (initial report 2008 and supplementary report 2010). EBS has performed an alternative calculation of Claimant’s losses, accepting *arguendo* Claimant’s basic assumption, i.e., nationwide coverage of Gala 2001 – 2015, but substituting assumptions as to exchange rate USD:UAH, inflation rate, revenue and expense estimates, etc deemed to be more realistic than the ones relied on by Goldmedia. On that basis, EBS has calculated a net loss of Claimant of USD 190,490 USD, comparing with USD 26,787,330 calculated by Goldmedia and USD 8,844,150 awarded by the Majority²⁸⁹.

367. The Majority portrays its award as a “*fair estimate*”: “*While it is true that some of the assumptions are debatable, the Tribunal finds that, all in all, the model created by Claimant’s expert witness represents a fair estimate of how Gala would have developed until 2015, if it had been awarded the necessary licences to become a national network in 2001(...) it is reasonable to project that Gala Radio would have managed to produce a free cash flow of roughly 3M USD in 2008 and 6 M USD in 2015*”²⁹⁰.

368. Finally, the Majority considers the award to be proportional to Claimant’s investment, although only some USD 141,000 have been duly recorded. The Majority finds that Claimant’s “*personal assets and those of Gala Radio have been somewhat commingled*” and estimates his actual investments “*in the region of between 2 and 3 M USD*”. In the Majority’s opinion, consideration of a risk and commitment premium is in order: “*Adequate proportionality (...) [cannot be measured] in cash alone but in a combination of cash, risk-taking, personal commitment, and the essential contribution of a path-breaker*”²⁹¹.

²⁸⁷ Paras. 267 – 271 of the Award.

²⁸⁸ See Respondent’s Counter-Memorial on Remaining Issues, paras. 337 - 399.

²⁸⁹ See EBS Supplementary Report, pp. 52, 53.

²⁹⁰ Para 289 of the Award.

²⁹¹ See paras. 303 – 306 of the Award.

II.C.2. Award of Speculative Profits

369. In the Majority's determination, additional profits due to fourteen frequencies that Gala should have won during the Interregnum would have catapulted Gala's present enterprise value from USD 126.290 to 8.844.150, i.e., they would have multiplied Gala's value by 70. This conclusion in my view, reflects audacious speculation.

370. The disproportionality between Gala's actual performance and its estimated performance but for Respondent's assumed wrongdoing during the Interregnum becomes even more striking if the Majority's estimate of Claimant's USD 2 to 3 million investment in Gala is factored into the calculation. If this investment is related to Gala's actual net enterprise value of 126,290 USD assumed by the Majority, then Gala must have generated a net loss of some 2 million USD between 1995 (the time of Claimant's initial investment) and 2010. In the Majority's estimation, fourteen frequencies in addition to its existing thirteen would have turned around Gala's record of losses into a profitability multiplying Gala's net enterprise value 70times.

371. Such an assumption would have to be explained against the background that Gala's ratings in Kyiv have dropped from no. 1 or 2 to no. 15 in 2010. Since Gala has had a strong frequency in Kyiv since 1995, this erosion of its position cannot be linked to a lack of frequencies²⁹². Moreover, Gala's existing frequencies cover the locations focal to Claimant's initial business plans²⁹³. Furthermore, as one of 15 national broadcasters out of some 538 radio stations in Ukraine, Gala is still a relatively large radio company. If profitability were primarily determined by economies of scale, the bulk of Ukrainian radio stations would be prone to making losses. Against this background, the Majority's reference to potential economies of scale (fn. 320 of the Award) appears to be a tenuous explanation at best for the assumed dramatic impact of the additional frequencies.

372. The Majority furthermore accepts Goldmedia's reliance on the accuracy of Gala's financial statements, dismissing Respondent's pertinent objections²⁹⁴. However, the financial statements are bound to be inaccurate since they fail to reflect Claimant's actual

²⁹² See para. 313 supra.

²⁹³ See paras. 19, 54 supra.

²⁹⁴ Paras. 293, 294 of the Award.

contributions to Gala and thus overstate its profits or understate its losses, as the case may be.

373. In the Majority's determination, the unrecorded investment is more than 14 times the recorded. As per Claimant, the unrecorded investment was made over time; it included the rent-free lease of office space, the out-of-pocket payment of operational equipment, licence fees and marketing expenses as well as the provision of a credit facility²⁹⁵. Claimant's off-the-record "investments" thus covered operating expenses of Gala; in fact, they subsidized Gala's operations. As they were not reported, they resulted in over-reporting Gala's profits or under-reporting Gala's losses, as the case may be. Thus, Gala's financial statements, and its profits and loss accounts in particular, were evidently inaccurate²⁹⁶.

374. Goldmedia's reliance on inaccurate financial statements casts doubts on its projections. A comparison of Gala's earnings for 2008 and 2009 as anticipated in Goldmedia's initial 2008 report with Gala's actual earnings in these years reinforces these doubts. Goldmedia had projected combined earnings for the two years of 715,000 USD while Gala subsequently reported combined losses of 345,000 USD²⁹⁷.

375. In these circumstances, the striking discrepancy between the projections of Claimant's and Respondent's expert witnesses of Gala's hypothetical value but for Respondent's wrongdoing (USD 26,787,330 v. USD 190,490) indicates the speculative nature of any figure.

376. As is commonly recognized in international law, compensation includes loss of profits only "*insofar as it is established*"²⁹⁸. The Commentary on the ILC Articles on State

²⁹⁵ Paras. 132, 299 – 302 of the Award.

²⁹⁶ The Majority considers the inaccuracy of Gala's financial statements as "*unproven*" and "*not addressed by any of the experts*" (fn. 315 of the Award). However, the inaccuracy follows logically from the failure of reporting Claimant's out-of-his-own-pocket payments of Gala's business expenses. Also, Respondent and its expert witness EBS have challenged the accuracy of Gala's financial statements (EBS Supplementary Report 2010, p. 13, 28, 29 and Respondent's CMRI, paras. 337 – 366). See paras. 535 – 539 on the Majority's critique in point.

²⁹⁷ See EBS Supplementary Report, Appendices B-1-8 and B-1-9, Gala's Financial Statements for 2008 and 2009. The discrepancy cannot just be attributed to the financial crisis of 2008. While the crisis may in part be responsible for the drop of Gala's revenues from million 9,1 UAH in 2008 to 5,66 UAH in 2009, it cannot explain the increase of Gala's expenses from million 6,3 UAH in 2007 to 10,497 UAH in 2008 (see GSR, Exhibit 25, at p. 34)..

²⁹⁸ Article 36(2) of the ILC Articles.

Responsibility explains: “*Tribunals have been reluctant to provide compensation for claims with inherently speculative elements*”²⁹⁹.

377. The Majority “*agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty ...*” However, the Majority continues to opine that “*Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss*” (para. 246 of the Award).

378. This position is inconsistent with established international practice on the recovery of lost profits: “*In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable. This has normally been achieved by virtue of contractual arrangements or, in some cases a well-established history of dealings*”³⁰⁰. “*Clear and convincing evidence of ongoing and expected profitability*” is the commonly accepted yardstick for the award of *lucrum cessans*. Gala’s assumed profits neither ensue from income-producing property nor do they represent “*a contractually protected income stream*”. They meet established standards only if evidenced by Gala’s earnings history – past profits are the primary indicator of future profits³⁰¹.

379. However, for the period of 2001 – 2009 Gala reports highly volatile net earnings, clustering between minus 1.691.000 UAU, i.e., 211.375 USD in 2008 and plus 136.000 UAH, i.e., 17.000 USD in 2005, accruing to a net loss of 2.677.000 UAH, i.e., 334.625 USD for the entire period³⁰². Gala’s actual loss moreover significantly exceeds its recorded loss due Claimant’s unreported “investments” into Gala (para. 370 supra). As per the Majority’s estimation of these investments, Gala has generated a net loss of some 2 million USD between 1995 (the time of Claimant’s initial investment) and 2010 (the time of determining Gala’s present net enterprise value)³⁰³. Thus, Gala’s earnings record provides anything but

²⁹⁹ Commentaries on Article 36 of the ILC Articles, note 27.

³⁰⁰ Commentaries on Article 36 of the ILC, note 27 and fn. 566 with references.

³⁰¹ Commentaries on Article 36 of the ILC Articles, note 28 and fn. 570 with references.

³⁰² See GSR, Exhibit 25 at p. 34.

³⁰³ In the Majority’s critique (fn. 332 of the Award), my alleged comparison of “*an accounting item – investments – with an enterprise value calculated under a DCF analysis – [compares] apples with oranges. But that is not all: applying basic accounting and financial logic, it is not true that (i) amounts invested minus (ii) DCF enterprise value equates to (iii) losses*”.

an indication of future profits the anticipation of which could multiply Gala's present enterprise value by seventy.

380. The Majority acknowledges the aforementioned precedents but opines that they are not applicable to the FET standard in general and to the case at hand in particular³⁰⁴. This position reverts to the core of my dissent. In my view, the established limitations for recovery of lost profits clearly apply to violations of the FET standard; and they especially command respect in the tender scenario of this arbitration³⁰⁵.

II.D. Conclusions

381. The analysis of the Award in chapters I and II supra boils down to the following conclusions:

II.D.1. The Majority Construes an Implausible "Full National Network" at variance with Precedents under International Law and Municipal Laws

382. The Majority concludes that Gala would have operated a "full national network" as of January 1, 2001 with the benefit of fourteen additional frequencies. These Gala would have won in tenders during the Interregnum had such tenders been held as required by law. The assumption of such "full national network" provides the foundation for calculating Claimant's

The Majority overlooks that Claimant's "investments" do not represent an "*accounting item*" – they have not been accounted for at all. They rather represent off-the-record contributions into Gala over time with a cumulative monetary value clustering in the Majority's estimate between million USD 2 and 3. The "*DCF enterprise value*" in the Majority's definition represents the "*as is*" value of Gala Radio – what the investor now actually owns –" (para. 262 of the Award). If the Majority's definitions are followed, the monetary value of Claimant's cumulative contributions into Gala minus the "real" value of Gala in 2010 represent Claimant's accumulated loss. The formula admittedly entails an imprecision in that it ignores accrued interests from Claimant's contributions in the past. Capturing interests through a reverse cash flow calculation would further increase Gala's loss.

³⁰⁴ Fn. 318 of the Award: "*But what Dr. Voss does not see is that this general rule cannot be applied for the calculation of damages in cases of violation of the FET Standard*". The Majority further comments: "*The „but for“ value [of Gala] , however, has no relationship with Gala Radio's actual profits; it is premised on Gala's hypothetical earnings (not on its actual) earnings record, if Ukraine had adhered to the FET Standard*".

The comment overlooks that under applicable precedents the credibility and thus recoverability of hypothetical future earnings depends on past actual earnings.

³⁰⁵ See paras. 284 – 286 supra. See also paras. 535 – 539 infra on the Majority's critique.

compensation. However, the assumption has been construed at variance with applicable precedents under both international law and municipal laws.

383. Although Respondent's liability, as determined in the First Decision, attaches to a frustration of Gala's chances in hypothetical tenders, the Majority has not analyzed such chances in any particular tender situation. It just has concluded that Gala would have won fourteen frequencies needed for a "full national network" owing to its superior competitive strength (market position in Kyiv in 1999 and impressive presentations of Claimant and his staff).

384. Specific circumstances cast serious doubts on the plausibility of the above conclusion, notably

- The availability of twenty frequencies at most for allocation to Gala, suggesting a success rate of seventy percent in tenders against potentially all radio broadcasters in Ukraine at the time;
- The erosion of Gala's market position in Kyiv after 1999; and
- Gala's inadequate recorded capital.

385. The Majority's above conclusion without assessment of particular tenders falls short of the analysis required by the Tribunal in the *GAMI* case³⁰⁶. Claimant has not "*particularized*" which additional frequencies Gala would have secured but for Respondent's violations and what additional profits would have accrued to such frequencies.

386. The Majority's analytical process moreover contrasts European and German laws. These require, as a condition of any recovery in tender situations, proof of a "real chance" in particular tenders. Moreover, European law does not provide for recovery of lost profits in tender situations; and precedents under German law for that purpose require proof of probability bordering at certainty that claimant would won the tender but for the rule violation. These precedents indicate specific general principles of law in point³⁰⁷.

³⁰⁶See paras. 293 – 295 supra.

³⁰⁷See paras. 272, 273 supra.

II.D.2. The Majority Estimates an Implausible Loss at variance with Established Principles of International Law and Municipal Laws

387. The Majority concludes that a “full national network” as of January 2001 would have boosted Gala’s net enterprise value seventy-times. And the Majority calculates Claimant’s compensation in terms of the balance between Gala’s assumed net enterprise value (with the national network) and its actual value as of 2010.

388. Again, specific circumstances cast doubts on the plausibility of this conclusion, notably:

- Gala’s negative earnings history with a cumulative loss of some USD 2 million during 1995 to 2010;
- The unreliability of Gala’s financial statements in light of unrecorded “investments” estimated by the Majority between USD 2 and 3 million against recorded investments of USD 141,000;
- The erosion of Gala’s market position in Kyiv; and
- Gala’s inadequate and Claimant’s unproven financial capacity.

389. Against the above background, the Majority’s estimate of Claimant’s loss in my view represents audacious speculation. It departs from the established international law principles militating against an award of speculative profits. And it diametrically runs counter municipal laws confining or not at all envisaging recovery of lost profits in tender situations.

II.D.3. The Majority’s Decision Sets an Unfortunate Precedent.

390. The present case, as far as researched, represents the first case awarding lost profits due to frustrated tender opportunities. It thus is bound to set a precedent for the development of international law in point.

391. Competitive tenders are commonplace in economic life. In market economies, they are usually required by law for public procurement. This makes the precedent set by this Award important in practice.

392. In tenders, BIT protected investors compete with domestically-owned enterprises (and foreign investors without BIT protection). Special protection of (some) foreign investors may conflict with the fairness and effectiveness of the tender process (level playing field concept). BIT protection must be balanced against the integer functioning of the host country's legal system. This draws attention to this Award in legal doctrine.

393. In my view, the Majority's Award sets an unfortunate precedent. It not only departs from principles for good reason established in international law against awarding speculative profits; and it not only contrasts municipal laws in point³⁰⁸. More importantly, it extends recovery rights in competitive tenders beyond the level sustainable as a general principle. It thus fosters divergence of international law principles from corresponding municipal laws. This is especially sensitive in an area where BIT protection must be reconciled with fair competition.

394. The Award operates precisely towards the peril curbed by municipal laws in point – it opens the floodgate of claims from frustrated tender applicants potentially accumulating to “liability avalanches” for the States concerned³⁰⁹. Ukraine's practice during the Interregnum has deprived all broadcasters in Ukraine at the time of tender opportunities just as Gala (except few beneficiaries)³¹⁰. If municipal Ukrainian law corresponded to international law as construed by the Majority, all deprived broadcasters could successfully bring similar claims as Claimant. If then Ukrainian courts estimated losses with a view to claimants' alleged business expansion plans as liberally as the Majority, the awards could in the aggregate easily exceed the value of the frequencies allotted during the Interregnum manifold – at the expense of the Ukrainian taxpayer.

³⁰⁸ In the Majority's opinion, European and German laws “*have no bearing whatsoever on the calculation of damages for an international wrong committed by Ukraine against an American investor*” (fn. 322 of the Award). In my view, however, these laws, by way of examples, reflect “*general principles of law recognized by civilized nations*” within the meaning of Article 38(1) of the ICJ Statute.

European law is more than just the law of the Union. Due to its mandatory transformation into the laws of Member States, it determines the municipal laws in point of 27 States (para. 277 supra).

The German law referred to provides an example of the transformation of the relevant EU Directive into Member State law. The German case law - jurisprudence complementing EU law by allowing recovery of lost profits due to tender violations is based on the doctrine of *culpa in contrahendo* (paras. 282, 283 supra). This doctrine emanates from Roman law and is found in many legal systems. It moreover bears some analogy to the FET standard, notably regarding the protection of legitimate expectations.

As explained above (para. 287 supra), it finally is immaterial that the relevant European and German law is placed in the context of competition legislation. What justifies the analogy is the fact that it specifically addresses recovery rights in competitive tenders, i.e., the scenario present in this arbitration.

³⁰⁹ See paras. 284 – 286 supra.

³¹⁰ See paras. 216 – 218 supra.

II.D.4. The Award Exceeds the Tribunal's Powers

395. In the First Decision, the Majority has – in my opinion - overstretched the scope of the FET standard to construe a liability of Respondent in principle³¹¹. With the Award, the Majority over expands customary international law principles on the responsibility of States for internationally wrongful acts complementing the FET standard of the BIT. The Majority thus facilitates awarding compensation which appears excessive in relation to Claimant's (proven) investment and his past earnings record.

396. The Majority departs from international law principles containing State liability (no award of speculative profits); and it ignores municipal laws serving a similar purpose with a view to the special tender scenario underlying this arbitration. It thus one-sidedly shifts the balance between the protection of Claimant under the BIT and Ukraine's interest in the proper functioning of its domestic regulatory system.

397. Such balance in my view is fundamental to the FET standard; and it determines its scope. The latter cannot be construed to resulting in unfairness to the host state and other stakeholders involved – in the present case Gala's domestic contenders for frequencies. *Object and purpose* of the FET standard in the *context* of the BIT do not cover the extension of Ukraine's liability beyond established principles with prejudice to the functioning of its regulatory system.

398. These limits command special respect in the present case where the liability is solely based on an assumed violation of domestic law incorporated into the FET standard by construing it as an umbrella clause. Here, recovery under the FET standard cannot be liberally construed to awarding compensation neither available to domestic Ukrainian business operators nor to business operators in other jurisdictions in like situations. Ukraine's Reservation to BIT protection³¹² further reinforces this aspect.

399. This arbitration features a special scenario, with public tenders in competition with domestic actors, a regulated industry with limited BIT protection under a Reservation of the host country and priority treatment of Claimant under the Settlement Agreement as principal

³¹¹ See paras. 146 – 149 supra.

³¹² See paras. 129 – 138 supra.

characteristics. In such scenario, the contours of the FET standard had to be carefully delimited with a view to countervailing interests.

400. The Majority does exactly the opposite. It not only ignores the aforementioned special features of the case. It moreover takes the road towards expanding both the FET standard itself and complementing international law principles at every crossing along the way of its analysis, ignoring established stop signs and barriers. In this way, the Majority systematically drives towards awarding Claimant compensation for his failure of realizing his alleged business expansion plans - a result somehow satisfying the Majority's feeling of fairness.

401. In quintessence, the Majority in my view transforms the FET standard into an empowerment to decide *ex aequo et bono*. This exceeds the boundaries of the FET standard, thus the scope of the BIT and hence the powers of the Tribunal.

III. ALLOCATION OF COSTS

III.A. THE MAJORITY DECISION

402. The Majority departs from the tradition in international investment arbitration of splitting the costs of the arbitration equally among the parties. Instead, it applies the “the loser pays” – principle.

403. The Majority further declares Claimant “*the overall winning party, without having prevailed in each single issue.....*” and awards him a partial reimbursement of his expenses in the amount of 750,000 USD. It reasons this award with its decision that “*Respondent breached the BIT in most (but not all) of the situations alleged by Claimant, [and has been] awarded compensatory damages in an amount of 8,717,860 USD (...)*”. The Majority further declares Claimant “*the overall winning party*”³¹³.

404. Claimant’s arbitration costs total 1,764,348 USD while Respondent’s costs amount to 4,827,814 USD.

III.B. MY VIEW

405. Rather than offering a position on the basis of my dissent from the Award in substance, I will discuss below the Majority’s allocation of expenses with a view to its Award.

406. The drafters of the ICSID Convention had initially envisaged that each party pay its own expenses and that the cost of the Tribunal and the Secretariat be borne equally by the parties. Tribunals were anticipated to depart from this principle only where one party has generated costs frivolously or in bad faith. Tribunals increasingly tend to award partial reimbursement of expenses to the victorious party, although no departure from the aforementioned traditional division of costs is established as principle³¹⁴.

³¹³ See para. 381 of the Award.

³¹⁴ See Christoph H. Schreuer et al., *supra* fn. 31, article 61, notes 16 – 21.

407. The initially envisioned formula is acknowledged by Article VII(4) of the BIT as standard formula from which Tribunals may depart in their discretion.
408. In my view, the traditional apportionment of costs remains to be appropriate in cases where either party wins and loses in part, and neither party is responsible for frivolous or bad faith generation of costs. This would apply to the present case as decided by the Majority. And it would be fair to Claimant whose expenses are less than half of those of Respondent.
409. The “the loser pays” – principle is enshrined in many municipal laws. Its application is covered by the Tribunal’s discretionary power under Article 61(2) of the ICSID Convention and Article VII(4) of the BIT. Nevertheless, recognition of the cost-sharing principle as the established standard under both the ICSID Convention and the BIT in my view militates against departing from it without good cause.
410. Moreover, if the Tribunal resorts to the “loser pays” – principle, it is in my opinion not at liberty to construe the principle at will; it must take into account the established practice of municipal laws adhering to this principle.
411. The German Code of Civil Procedure offers an example of such laws. Its para. 91(1) provides: “*The losing party has to bear the costs of the litigation, especially to reimburse the costs of his opponent, to the extent that they were necessary for the purposeful pursuit or defence of rights*”.
412. Para. 92(1) of the Code sets the rule in cases where each party wins and loses in part: “*If each party wins in part and loses in part, the costs have to be offset against each other or apportioned proportionally. If the costs are offset, each party bears half of the costs of the court*”. The Code does not recognize the notion of an “overall winner” in case of partial losing.
413. A proportional apportionment of costs, as a rule, follows the ratio of the amount sought by claimant to the amount awarded by the court, i.e., $\text{Ratio } x = \text{Amount Sought} : \text{Amount Awarded}$. This ratio is then applied to the entire costs of the proceedings (costs of both

parties plus court)³¹⁵. As a result, Respondent could recover his costs from Claimant (rather vice versa) in the amount of USD 4,035,787^{316, 317}.

414. Reliance on the amount sought v. the amount awarded as starting formula for splitting costs under the “the loser pays” principle is not only established practice of (at least some) municipal laws; it is in my view also the most appropriate application of the principle. This approach discourages inflated claims. More importantly, it provides the only objective benchmark for measuring the relative merits of the parties’ respective positions – the notion underlying the “the loser pays” principle.

415. The Majority’s declaration of Claimant as the “*overall winning party*”, moreover, relies entirely on Claimant’s success with claims brought under the BIT with respect to the allocation of frequencies. It ignores in particular that all his claims under the Settlement Agreement were dismissed. The declaration thus illustrates the subjectivity inherent in splitting costs on purely judgmental considerations.

³¹⁵ See Baumbach-Lauterbach-Albers-Hartmann, *Zivilprozessordnung*, 66th ed., 2008., para. 92, comment 33 and para. 2, comment 5.

³¹⁶ In the present case, the above formula leads to the following calculations: Ratio $x = 55.173.000 : 8.717.860 =$ roughly 6 (Claimant) : 1 (Respondent). Total costs of arbitration: USD 920.000 (Tribunal) + 1.764.348 (Claimant)³¹⁶ + 4.827.814 (Respondent) = 7.512.162.

The total cost would then be split in the ratio 1 : 6; i.e., Respondent would bear 1/6 times USD 7.512.162 = USD 1.252.027; and Claimant would bear USD 6.260.135.

As a result, Respondent would in principle be entitled to reimbursement from Claimant in the amount of USD 4.035.787 ($x = (4.827.814 + 460.000) - 1.252.027 = 4.035.787$).

³¹⁷ The above amount could then be adjusted by the costs for which one party is exclusively responsible. As regards Respondent, these are amounts caused by the unsuccessful challenge of Mr. Paulsson and the moot proceedings on a provisional measure prompted by an erroneous calculation of the fee for renewal of Gala’s licence. Claimant, on the other hand, would be exclusively responsible for the costs attributable to abandoned claims (Beauty Salon, Kiss and Energy trademarks, “affiliation agreements”, “continuous interference” on FM 100 frequency).

PART THREE. THE MAJORITY'S CRITIQUE OF MY SEPARATE OPINION

Overview

416. The Majority includes in its Award a detailed critique of my Separate Opinion regarding the First Decision³¹⁸. I had in the deliberations preceding the First Decision raised my main objections but reserved my Opinion to the Award. This approach had been agreed with my colleagues, because the relevance of my points of criticism to the award had not been anticipated at that time. It became clear with the Award based on the Interregnum.

417. For the sake of convenience, my subsequent comments follow the Majority's critique, addressing

- (I) Claimant's legal standing;
- (II) The delineation of the FET standard;
- (III) Claimant's legitimate expectations and the Settlement Agreement;
- (IV) Gala's record in tenders; and
- (V) The Interregnum.

I will finally add some observations on the Majority's critique of my Opinion regarding the Award (ch. VI).

³¹⁸Paras. 32 – 116 of the Award relating to paras.1 – 231 supra.

I. CLAIMANT'S LEGAL STANDING³¹⁹

418. In Part One, Chapter II *supra*, I argue that Claimant's claim with respect to Gala's failure to obtain additional frequencies represents a "*shareholder derivative suit*" on account of Gala (paras. 61, 62 *supra*); and I conclude that this suit is inadmissible (especially) by dint of Ukraine's Reservation to the BIT (paras. 79 – 89 *supra*).

419. The Majority apparently agrees that the claim represents a "*shareholder derivative suit*". However, the Majority objects that

- (A) the issue concerns the Tribunal's jurisdiction *ratione materiae* (para. 35 of the Award);
- (B) the suit is covered by Article I.1(a) of the BIT extending to "*indirect investment*" (para. 39 of the Award); and
- (C) the inadmissibility of the suit (assumed by me) cannot be considered since it was not pleaded (paras. 36 – 38 of the Award).

I.A. ISSUE OF JURISDICTION OR MERITS

420. In my opinion, the issue concerns the merits of the case rather than the Tribunal's jurisdiction *ratione materiae*³²⁰. Claimant's shareholding in Gala is covered by the BIT. The question is what rights are attached to this shareholding, specifically whether it includes Claimant's right to seek recovery under the BIT for a violation of Gala's rights under Ukrainian industry regulations enjoyed by Gala in its capacity as a licensed broadcaster in Ukraine. The answer depends on pertinent Ukrainian law (Does it restrict exercise of the relevant rights to Gala as a corporate entity?) and Ukraine's Reservation to the BIT (Does it cover the restrictions under Ukrainian law?). These are issues of substantive Ukrainian law and the substantive scope of BIT protection³²¹.

³¹⁹ See para. 70 *supra*.

³²⁰ See paras. 68, 102 *supra*.

³²¹ Cf. Douglas, *supra* fn. 52, paras. 743, 744.

I.B. INDIRECT INVESTMENT

421. This issue is related to the aforementioned. Claimant's shareholding in Gala is undeniably covered by the BIT, although owned indirectly through Mirakom, another Ukrainian corporation. An encroachment by Ukraine on Claimant's shareholder rights could trigger BIT protection. Yet, the shareholder rights, by dint of the Reservation, do not encompass Gala's corporate rights attendant to its broadcaster's licence³²².

I.C. RESPONDENT'S PLEADING

422. It follows from the aforementioned observations that the issue at hand does not concern a "*jurisdictional objection*" but the substantive application of Ukraine's Reservation to restrictions under Ukrainian law. Thus, Respondent did not have to raise a pertinent jurisdictional objection. Indeed, he could not have done so successfully³²³.

423. Respondent has denied any violation of the BIT; it has specifically objected to the Tribunal's jurisdiction for claims out of requests for additional frequencies³²⁴; and it has submitted both the BIT (with Ukraine's Reservation to it) and the LTR (including all relevant restrictions). Yet, Respondent has not in express terms invoked the inadmissibility of Claimant's shareholder derivative suit. The question is therefore whether this argument had to be presented as a condition of the Tribunal's consideration or whether it was governed by the Tribunal's ex officio – mandate and the "*iura novit curia*" maxim.

424. My co-arbitrator Jan Paulsson directs to the answer: "*(...) are international tribunals in investment disputes organs of the international legal system and therefore bound to apply international law whether or not it is pleaded by the parties? The parallel with the ICJ and its Article 38 are obvious, and the implications are equally clear, as the ICJ put it in the Fisheries Jurisdiction cases:*

³²² Cf. para. 83 supra.

³²³ The Tribunal would not depend on a Party's objection, even if the issue were considered as jurisdictional (see para. 426 infra).

³²⁴ Respondent's Rejoinder, paras. 183 – 188.

'The Court (...) as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required (...) to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstance of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties for the law lies within the judicial knowledge of the Court'

*In other words, a tribunal in an investment dispute cannot content itself with inept pleadings (...)*³²⁵.

425. In my view, Claimant's derivative suit is precluded by Ukraine's Reservation to the BIT³²⁶. The Reservation constitutes an integral part of the BIT delimiting the extent of its protection. The BIT is the primary basis of the Tribunal's power and represents an "international convention" in the meaning of Article 38(1a) of the Statute of the International Court of Justice. In interpreting and applying the BIT, the Tribunal "cannot content itself with inept pleadings" but must decide in accordance with "iura novit curia"³²⁷.

426. This view is supported by Article 41(1) of the ICSID Convention and Rule 41(2) of the Arbitration Rules, providing that "The Tribunal shall be the judge of its own competence" and that it "may on its own initiative consider, at any stage of the proceeding, whether the dispute (...) is within (...) its own competence". The ex officio – authority of the tribunal "is designed to avoid awards that exceed the tribunal's powers"³²⁸. This rationale applies regardless of whether the issue is regarded as a matter of jurisdiction or of the substantive extent of the BIT's protection (para. 420 supra).

427. The Tribunal should thus have dismissed Claimant's claim on ground of Respondent's failure of awarding Gala additional frequencies for want of admissibility of Claimant's shareholder derivative suit, Respondent's "inept" pleading on this point notwithstanding.

³²⁵ Jan Paulsson, „International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law“ in Transnational Dispute Management, vol. 3, issue 5, Dec. 2006, p. 12/13.

³²⁶ Paras. 79 – 89 supra.

³²⁷ It is immaterial in my view that the application of the Reservation is dovetailed with the latter's exercise by Ukrainian law since the relevant law – the LTR – has been submitted to the Tribunal.

³²⁸ Christoph H. Schreuer, fn. 30, Article 41, comment 44.

Before doing so, the Tribunal should have heard the Parties, giving especially Claimant an opportunity to react³²⁹.

428. As the inadmissibility of Claimant's derivative suit flows from the Reservation limiting the extent of the BIT's protection, the topic dovetails with the scope of protection afforded by the FET standard. Even if the Tribunal had hesitated to dismiss the claim for want of proper pleading, it would have to take the admissibility aspect into account in delineating the ambit of the FET standard³³⁰.

³²⁹ Cf. para. 38 of the Award.

³³⁰ Cf. para. 149 supra.

II. DELINEATION OF THE FET STANDARD³³¹

429. The Majority raises four objections to my Opinion on the delineation of the FET standard, namely that

- (A) Some of my arguments were not pleaded;
- (B) Ukraine's Reservation has no bearing on the FET standard;
- (C) Foreign investors legitimately enjoy additional protection over domestic to offset their lack of political rights; and
- (D) I misconceive the Majority's recognition of violations of tender rules as breaches of the FET standard.

II.A. Arguments Covered by Pleadings

430. The Majority notes that "*the Separate Opinionsubmits certain new arguments, which have never been pleaded in the case*"³³², without specifying what arguments are new.

431. Respondent has extensively argued against an "*expansionist*" application of the FET standard to the effect of construing an entitlement of Claimant to "*special treatment*" and "*positive discrimination*" over his domestically-owned competitors. In support of this position, Respondent has submitted a wealth of legal arguments and authorities³³³. My arguments are covered by this submission.

432. Moreover, the delineation of the FET standard of the BIT is governed by the "*iura novit curia*" maxim (cf. para. 425 supra).

³³¹ See paras. 40 – 66 of the Award and paras. 104 – 153 supra.

³³² Para. 41 of the Award.

³³³ See, e.g., Respondent's Counter-Memorial, paras. 328 – 335 and Post-Hearing Memorial, paras. 390 – 396; 635, 636.

II.B. RESERVATION RELEVANT TO FET STANDARD

433. As per the Majority, Ukraine's Reservation in the Annex of the BIT is immaterial to the FET standard, because

- (1) *"The scope of the exception is limited to the national treatment principle";* and
- (2) *Application of the exception requires prior notification and there is no evidence that such requirement has been complied with*³³⁴.

II.B.1. National Treatment Overlaps with FET Standard

434. I agree that the Reservation directly applies just to the "national treatment" principle of Article II(1) of the BIT. Nevertheless, it is relevant to the interpretation of FET standard of Article II(3) of the BIT. This follows from the substantive overlaps of the two standards in the context of the BIT.

435. As rightly noted by the Majority³³⁵, the FET standard must be interpreted "*in [the] context and in the light of [the] object and purpose*" of the BIT³³⁶. The text of the BIT in its entirety provides the *context* of both the FET and the national treatment standard. This *context* comprises the Annex to the BIT and thus Ukraine's Reservation³³⁷. The national treatment principle and its qualification by the Reservation must hence be taken into account in interpreting the FET standard.

436. By dint of the national treatment principle, Ukraine has undertaken to treat Claimant's investment in Gala "*on a basis no less favourable than that accorded in like situations to investment (...) of its own nationals (...)*". However, this undertaking is qualified by Ukraine's "*right (...) to make or maintain exceptions falling within one of the sectors (...) listed in the Annex to the Treaty*", i.e., the Reservation. The radio sector is included in the Reservation.

³³⁴ See para. 45 of the Award.

³³⁵ Para. 257 of the First Decision.

³³⁶ Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (*United Nations Treaty Series*, vol. 1155, p. 331)

³³⁷ Article 31(2) of the Vienna Convention on the Law of Treaties.

437. With its Reservation to national treatment, Ukraine pursues the *purpose* of safeguarding its freedom of according preferential treatment to its nationals over United States investors in the radio sector. This *object and purpose* connects the national treatment with the FET standard. The latter outlaws any “*discriminatory measure*” in relation to a U.S. investment in Ukraine (Article II 3 (b) of the BIT). Discrimination is the flip side of preference. A legitimate exercise of the Reservation according domestically-owned investments preference over U.S. owned would thus constitute a violation of the FET standard if the Reservation were ignored in the context of the latter.

438. Since both FET standard and national treatment principle are placed in the logical *context* of the BIT, a preferential treatment of Ukrainian nationals cannot be considered as legitimate with respect to national treatment but at the same time as a breach of the FET standard. Such an interpretation would clearly defeat the *purpose* of the Reservation. The latter cannot be evaded simply by applying the FET standard rather than the national treatment principle.

439. In the present arbitration, Claimant, by virtue of the FET standard, asserts a right to treatment better than the treatment afforded to domestically-owned radio companies. Legitimizing disadvantageous treatment of U.S. investors vis-à-vis Ukrainian investors in the radio industry, the Reservation *a fortiori* militates against converting the FET standard into a right to preferential treatment³³⁸.

II.B.2. Notification

440. The Majority further refers to Article II.1(ii) of the BIT requiring notification of all exceptions to national treatment pursuant to the Reservation. In its view, exceptions are not covered by the Reservation unless notified. Respondent has not proven notification.

³³⁸ Cf. paras. 129 – 138 supra with references.

The drafting of the BIT referred to by the Majority's (paras. 46, 47 of the Award) in my view reflects the undisputed fact that the Reservation directly applies to national treatment only. This does not, however, preclude its consideration in the interpretation of the FET standard in accordance with Article 31 of the Vienna Convention. The BIT had been signed in March 1994, i.e. before the proliferation of international investment claims under the FET standard (see paras. 139 – 145 supra). When they negotiated the Reservation, the State Parties had focused on national treatment only, because they had not foreseen the implications for the FET standard. While the Reservation cannot be retroactively applied to the FET standard, it still must be taken into account in interpreting the latter with a view to an unprecedented scenario.

*“Consequently, it is legitimate to proceed on the basis that no such notification took place”*³³⁹.

441. I disagree.

442. All exceptions to national treatment relevant in this arbitration are enshrined in the LTR. The validity of the LTR, including its exceptions to national treatment, is undisputed between the Parties. Claimant operates through Gala as its (indirect) shareholder in view of the exceptions restricting the role of foreign investors in the radio sector to investing in Ukrainian corporate entities. In the First Decision (para. 267), the Majority itself recognizes the validity of pertinent exceptions. Due notification of the LTR (if required), and all relevant exceptions with it, must therefore be assumed.

442. My argument for considering the Reservation in the interpretation of the FET standard moreover flows from the latter’s authorization of exceptions to national treatment in principle, i.e., the very existence of the Reservation. The latter reflects the *common intent* of the Parties to the BIT to safeguard regulatory freedom in the radio sector with prejudice to the promotional purpose of the BIT; and, as a corollary, it cautions foreign investors in that sector³⁴⁰. This aspect is not related to specific exceptions and thus does not depend on their notification.

II.C. ADDITIONAL PROTECTION OF FOREIGN INVESTORS

II.C.1. The Majority Position

443. The Majority observes that BITs accord additional protection to foreign investors unavailable to domestic investors. *“A wider scope of protection”* for foreigners is in the Majority’s opinion legitimate in view of limitations of most municipal laws as well as foreigners’ lack of political rights heightening their exposure to arbitrary actions³⁴¹.

444. As per the Majority, the case at hand illustrates the legitimacy of expanded BIT protection: Initially received *“with open arms”*, Claimant, *“precisely because he was a*

³³⁹ Paras. 48 – 51 of the Award.

³⁴⁰ See paras. 133 – 136 *supra*.

³⁴¹ Paras. 56, 57 of the Award.

*foreigner, and lacked the close political connections of the Ukrainian media groups, was pushed aside, and deprived of the opportunity to compete with local investors on a level playing field". The BIT restored the level playing field, "which had been tilted against the foreign investor"*³⁴².

445. To support its position, the Majority highlights two tenders which in its decision have breached the FET standard. These tenders occurred on May 26, 2004 and October 19, 2005, respectively. Gala had participated in both tenders but lost out against broadcasters allegedly owned by political allies of then-President Yushtschenko.

II.C.2. Legitimacy of BIT Protection

446. I agree with the Majority's observation that BITs accord additional protection unavailable to domestic business operators. Such protection may, in particular, be afforded by the FET standard due to its "*non-contingent*" nature³⁴³. I also appreciate the legitimacy of such protection in principle³⁴⁴. However, I cannot subscribe to the Majority's explanation of the legitimacy of BIT protection; and I am concerned about the potential consequences of the Majority's legal policy position.

447. The Majority starts its reasoning from the proposition that municipal laws typically deny adequate protection to business operators against unfair or inequitable treatment by authorities (para. 56 of the Award). Yet, municipal laws commonly provide broader remedies than reflected by the Majority. Remedies conventionally include recovery of damages in case of misuse of authority, breach of undertakings, false statements as well as rights to specific performance of public contracts or public law entitlements.

448. It is true that remedies under municipal laws are typically subject to restrictions, notably deadlines for challenging administrative decisions, statutes of limitations, requirements of mitigating damages and limitations of recovery³⁴⁵. Such restrictions normally serve legitimate public interests, such as legal certainty, efficiency of the legal and economic system, protection of conflicting stakeholder interests, prevention of misuse. It should also

³⁴² Paras. 59, 64 of the Award.

³⁴³ Cf. Iona Tudor, fn. 34, p. 182, 183 with references.

³⁴⁴ Cf. para. 119 supra.

³⁴⁵ Cf. paras. 124 and 274 – 283 supra on European and German laws with respect to public tenders.

be recalled that recoveries of damages are ultimately paid by taxpayers. Limiting fiscal risks is not only legitimate; it is required by the public interest. By offering remedies on the one side and limiting them on the other, municipal laws legitimately try to balance the protection of individual rights with conflicting public interests³⁴⁶.

449. Against this background, I find disquieting the Majority's attempt at grounding the legitimacy of BIT protection on perceived restrictions of municipal laws and explaining the fundamental rationale of BIT protection with a desirability of overcoming these restrictions to the benefit of BIT protected business operators. This legal policy position indeed can pave the way to construing the FET standard into an empowerment of tribunals *ex aequo et bono* to develop a case law superseding host countries' administrative laws even where they conform to recognized principles of law within the meaning of Article 38(1) of the ICJ Statute. The Majority's decision sets a – in my view unfortunate – precedent into this direction³⁴⁷.

450. Due to its sweeping open-ended language, the FET standard can indeed be expanded into a catch-all clause encompassing the entire legal and administrative framework for the interaction between business operators and public authorities. This feature explains the attractiveness of the standard and its growing importance in international investment arbitration. Yet, it also entails a grave risk – that the balance carefully crafted in developed market economy legal systems between individual and public interests becomes undermined through superseding case-law jurisprudence under international law.

451. The Majority's suggestion that foreigners deserve "*a wider scope of protection*" to compensate for their lack of political rights reinforces my concern.

452. Unlike assumed by the Majority, an investor's exposure to arbitrary actions by authorities bears little relation to voting or other political rights. The Majority seems to confuse political rights with political connections. Foreign investors may, but by no means must, be at a disadvantage in building such connections. Large foreign investors might even be privileged in this respect.

453. Lack of political rights and differences regarding access to diffuse, or even illicit, political connections can in my view not be advanced to construing structural inequalities

³⁴⁶ See para. 125 supra.

³⁴⁷ Cf. paras. 390 – 394 supra.

between domestically and foreign-owned businesses for the purpose of legitimating offsetting unequal legal protection. Such a doctrine would undermine the principle of equality of all private legal subjects under the law, fundamental to the rule of law.

454. In market economies, unequal legal protection moreover tends to distort competition. Fair and effective competition requires the same framework conditions for all business operators competing in the same economy. This necessity militates against different levels of legal protection, depending on the nationality of business owners. This aspect is gaining importance with the rapid globalization of capital movements, with increasing foreign ownership of domestic corporate citizens as a result.

455. These complexities in my view require self-restraint of tribunals in extending the FET standard to the treatment of businesses operating in the host country as its “corporate citizens” but owned by foreign investors³⁴⁸. This issue is especially sensitive where BIT protection tends to strengthen benefiting foreign investors in their competition with domestically-owned companies and thus may lead to “reverse discrimination” of the latter³⁴⁹.

456. The Majority sees no need to consider the impact of BIT protection on fair competition from the perspective of domestic investors³⁵⁰. This aspect is pivotal to my dissent from the Majority. In my view, it is captured by the *object* and *purpose* of the FET standard, especially in the *context* of Ukraine’s Reservation³⁵¹.

II.C.3. No Discrimination of Claimant

457. The Majority suggests that “*the facts proven in the present case are a good example of the role played by BITs*” (para. 58 of the Award).

³⁴⁸ This distinction mirrors the distinction between “shareholder rights” and “corporate rights” in the context of recognizing the legal personality of foreign-owned corporations under international law (para. 68 supra). BIT protection of shareholder rights rarely entails conflicts with legitimate interests of the host country but special protection of corporate rights may.

³⁴⁹ Cf. paras. 84 - 88 supra.

³⁵⁰ Cf. paras. 54, 55 of the Award.

³⁵¹ See Article 31 (1) of the Vienna Convention on the Law of Treaties and paras. 84 - 87, 117 – 120, 393 – 401 supra.

458. I agree that the present case illustrates the ramifications of BIT protection and thus sets a precedent³⁵². However, the Majority in my view misrepresents the facts proven and draws erroneous conclusions. The Majority features Claimant as a victim of discrimination. In support of this assertion, the Majority refers to the award of some 38 to 56 frequencies to “Gala’s main competitors, controlled by powerful Ukrainian investors while Gala secured only one frequency on more than 200 applications”; and it highlights two specific tenders³⁵³.

459. The Majority relies on occurrences in the period 2004 to 2008. The “main competitors” are the four most successful radio stations of Ukraine (out of 538 stations in total) which Claimant, to the Majority’s satisfaction, has selected as Gala’s benchmarks³⁵⁴. Out of the tenders with Gala’s over 200 applications, Claimant has espoused five incidents with alleged improprieties. The Majority has found that three of these incidents breached the FET standard³⁵⁵, including the two highlighted tenders..

460. In the aforementioned three incidents, Gala lost alongside with some two to fourteen (at least predominantly) domestically-owned applicants. The Majority, in line with Claimant’s pleading, has found violations of the FET standard due to the – assumedly – illicit preference accorded to the – purportedly politically connected - winners of these tenders. However, the Majority has not found (and Claimant has not pleaded) that Gala was targeted in its capacity as a foreign-owned company or in any way treated worse than the other unsuccessful applicants in these tenders. At most, Gala suffered a “reverse discrimination” alongside with several domestically-owned contenders in each instance³⁵⁶.

³⁵²Cf. paras. 390 – 394 supra.

³⁵³ Paras. 59 and 61 - 63 of the Award.

³⁵⁴ See paras. 321, 322, 327 of the First Decision.

³⁵⁵ Paras. 421, 422 of the First Decision.

³⁵⁶ See paras. 228 – 231 supra and paras. 354 - 356, 369 – 371, 383 – 385 of the First Decision.

The Majority challenges this analysis asserting that “domestically owned radio companies eventually obtained the number of licences required to create nation-wide radio channels” (para. 64 of the Award). However, Claimant has not pleaded, and no indication has been submitted, that any radio station in Ukraine has received the number (and power) of frequencies required for a “nation-wide network” as understood by Claimant (reach of the entire population of Ukraine). Undisputedly, as late as 2006 no private broadcaster has operated such a network (para. 333 supra). Thus, no domestically-owned radio company has received the frequencies for such a network during the Interregnum March 1999 – June 2000, i.e., during the period in which in the Majority’s decision Gala should have obtained all frequencies required for such a network operative as of January 2001.

Gala became a “national broadcaster” with the statutory redefinition of this term in 2006. It since shares this status with 14 other Ukrainian radio companies out of a total 538 (para. 333 supra). Thus, at most 14 radio companies have received more frequencies (or frequency power) than Gala while at least 523 have obtained less. I cannot see how a statistical evidence of a discrimination of Gala can be inferred from the fact that relatively few domestically-owned

461. The two highlighted tenders both concern frequencies sought to create a second – AM information broadcasting - network. The first such tender was held on May 26, 2004 and the second on October 19, 2005.

462. In the **May 26, 2004 tender**, Gala competed with two non-profit broadcasters. Since no applicant received the required five votes, the National Council cancelled the tender and put the frequency up for a new tender on December 21, 2004. Gala did not participate in that second tender. The frequency was awarded to NART TV allegedly owned by Mr. Tretyakov, as per Claimant's submission a political ally of President Yushchenko. The only evidence for Mr. Tretyakov's "*ownership*" was a newspaper article stating that "*Mr. Tretyakov ...is of direct relevance*" to NART TV.

463. The cancellation of the first tender affected Gala's domestically-owned contenders more than Gala. Those had each secured four votes and Gala only one. And as non-profit organisations, they were *prima facie* better qualified for information broadcasting than commercial Gala with no experience in this field³⁵⁷.

464. The Majority discards Gala's failure to participate in the second tender, accepting Claimant's explanation that "*he deemed the effort futile*"³⁵⁸. Yet, this explanation had been discredited by Claimant's initial allegation that the second tender had not been publicly announced and that "*if such tender had been announced, Claimant would certainly have re-tendered for the frequency*"³⁵⁹.

465. As regards the tender of **October 19, 2005**, the Majority's account omits two crucial facts, namely that (i) Gala lost alongside with five domestically-owned contenders and (ii)

companies topped Gala's success rate – and even that after the period establishing Respondent's liability as per the Majority's award.

³⁵⁷ Information broadcasting is the domain of non-profit organizations due to its inherent lack of profitability. For that reason, the Majority has not included the denial of pertinent frequencies in its calculation of compensation (see paras. 256 - 259 of the Award).

³⁵⁸ See para. 372 of the First Decision.

³⁵⁹ Claimant's Reply Memorial, para. 205.

the winner undisputedly was the leading information broadcaster in Ukraine at the time while Gala was a newcomer. Absent the President's interference, the tender decision appeared to be unobjectionable.

466. I nevertheless agree that the President's interference with the independent decision-making of the National Council violated applicable Ukrainian law. I disagree, though, that this violation amounted to a "*discriminatory measure*" within the meaning of Article II.3(b) of the BIT. In the Majority's own, in my view correct, notion, such a measure "*must expose the claimant to sectional or racial prejudice*" or "*target Claimant's investments specifically as foreign investment*"³⁶⁰.

467. The President's interference did not "*target*" Gala. Nothing in the Parties' submissions indicates that the President was even aware of Gala's participation in the tender concerned. Gala at most suffered a "reverse discrimination" alongside with five other unsuccessful contenders due to the President's support for one preferred contender. This is unrelated to Gala's foreign ownership³⁶¹.

468. I hence fail to appreciate how the tenders during 2004 – 2008, including the highlighted tenders in 2004 and 2005, can support the Majority's proposition that Claimant has been victimized in his capacity as a foreign investor and therefore merits additional BIT protection to re-establish a level playing field between him and his domestically-owned contenders for market shares.

469. The Majority's reflection of the key facts of the case moreover shows its focus on political connections rather than political rights in reasoning the legitimacy of BIT protection (para. 452 supra). The Majority seems to consider Respondent's failure to extend political favouritism to Claimant as legitimate grounds for according him BIT protection. I cannot share such a proposition.

³⁶⁰See para. 261 of the First Decision with references.

³⁶¹The interference might nevertheless qualify as an "*arbitrary measure*" within the meaning of Article II.3.(b) of the BIT. As a "*non-contingent standard*", the FET standard indeed potentially accords additional protection unavailable to domestically-owned competitors (para. 446 supra). However, Ukraine's Reservation to the BIT in my view precludes this possibility in the present case (see paras. 133 – 138 supra). This incident might represent a borderline case, though.

II.C.4. Inference from Tenders during 2004 – 2008 to Interregnum 1999 - 2001

470. The Majority has not awarded compensation on account of any of the aforementioned three tenders which had occurred between May 2004 and February 2008. The award of compensation is rather exclusively based on the Interregnum, i.e., the allocation of frequencies to Gala's competitors between March 1999 and June 2000³⁶². In relying on incidents between 2004 and 2008 as justification of an award based on occurrences in 1999 - 2000, the Majority implies an inference from the subsequent to the preceding period³⁶³.

471. This inference in my view is both inadmissible and inconclusive. The Majority does not explain the relationship of the aforementioned three incidents to the occurrences during the Interregnum. In fact, no such relationship exists:

- The three incidents concern particular tenders while the Interregnum concerns the allocation of frequencies without tenders.
- In the three incidents, Gala was affected as a tender participant while in the Interregnum, Gala was deprived of opportunities of participating in tenders not held but assumedly required by law.
- The three incidents represent decisions of the National Council (an independent body under the Constitution) while the decisions during the Interregnum were made by the UCRF (a Government agency) in the absence of an operative National Council; and
- The three incidents concern the award of frequencies to (presumed) political allies of then-President Yushchenko while the Interregnum precedes the Yushchenko presidency.

472. The two highlighted tenders in particular concern frequencies earmarked for politically sensitive information broadcasting while no political relevance has been determined with respect to the frequencies allotted during the Interregnum. The President's interference with the October 19, 2005 represents a singular incident which bears no apparent relationship to the practice during the Interregnum.

³⁶² See para. 233 supra and paras. 256, 261 of the Award.

³⁶³ See paras. 92, 93 of the Award. Cf. also para. 243 of the Award where the Majority, as introduction to the determination of compensation, refers to Gala's failure of obtaining additional frequencies "for six years" on "more than 200 applications" as "the main finding in....the First Decision".

473. The administrative practice during the Interregnum in no way targeted or singled out Gala, let alone Claimant as a foreign investor. At most, Gala was affected in its opportunities as a radio station in Ukraine, indistinguishably from any other station at the time, save the few which had – assumedly illegally – benefited from the practice³⁶⁴.

474. The Majority cannot attribute the practice during the Interregnum to political favouritism, because it has not reviewed the particular allocations of frequencies during this period³⁶⁵. No information as to broadcasters that had benefited from the practice has been submitted. There is in particular no information as to whether any of the four “benchmark radio companies” (para. 461 supra) belongs to the beneficiaries. The Majority thus motivates its award of compensation with findings concerning occurrences unrelated to the incidents on which its award is based.

475. In the Majority’s reasoning, the three tenders during 2004 – 2008 “*are fundamental factors for establishing Respondent’s liability*” but “*a completely separate issue is that, for the purpose of calculating Claimant’s damages*”, the Tribunal relies only on Claimant’s lost opportunities during the Interregnum, i.e., in 1999 – 2000³⁶⁶. This reasoning implies that the Tribunal’s misgivings of the three tenders influenced its decision on Respondent’s liability on account of the practice during the Interregnum. It thus confirms an - in my view inadmissible - inference from the three tenders to the assumed deprivation of Gala’s opportunities during the Interregnum³⁶⁷.

II.D. Umbrella Concept

476. In the Majority’s view, my reservation against construing the FET standard as an “umbrella clause” elevating breaches of tender rules to international delicts is based on “a

³⁶⁴ See paras. 183, 216 – 218 supra.

³⁶⁵ See paras. 287, 291 – 293 supra.

³⁶⁶ Paras. 92, 93 of the Award.

³⁶⁷ This impression is reinforced by the Majority’s reflection on the role of BIT protection in the present case: “*What the Treaty has achieved is the reestablishment of a level playing field, which had been tilted against the foreign investor. Gala was competing against domestic players which were able to use their preferential relationship with the public administration and the regulators to their own advantage. What the application of the BIT achieves is to redress a situation of discrimination – it does not create any privilege*” (Para. 64 of the Award). The practice during the Interregnum in the Majority’s finding was “*arbitrary*” but not “*discriminatory*” (para. 418 of the First Decision). The Majority thus justifies BIT protection with an assumed discrimination of Claimant that has occurred four to eight years after the Interregnum incidents to which it attaches Respondent’s liability. Such a retroactive activation of BIT protection is in my view inadmissible.

misconception". The Majority explains that "not every violation of domestic law necessarily translates into (...) a violation of the FET standard" but "a blatant disregard of applicable tender rules, distorting fair competition among tender participants" does³⁶⁸.

477. I have always stated my position specifically with a view to tender legislation rather than domestic law in general³⁶⁹. And I have argued that fair competition in tenders requires a "level playing field" including all contenders, irrespective of their nationality. BITs afford protection only to investors from home countries which have concluded such treaties with the host country concerned. They thus accord added protection to some contenders on account of their (corporate or personal) nationality unavailable to contenders without BIT umbrella. Such added protection might distort the "level playing field".

478. For that reason, I caution against instrumentalizing BITs for policing fair competition in tenders; and I suggest that a violation of tender rules does not *ipso iure* amount to a breach of the FET standard. To do so, the breach must affect rights (not just business prospects) of a BIT protected investor covered by the protective purpose of the BIT³⁷⁰. This requirement in my view is compelling in light of Ukraine's Reservation limiting BIT protection³⁷¹. I therefore cannot subscribe to the Majority's approach of deducing a breach of the FET standard from a "blatant disregard of applicable tender rules" without further analysis³⁷². This aspect is essential to the assessment of the practice during the Interregnum since this practice bears no relationship to Claimant in his capacity as a foreign investor³⁷³.

³⁶⁸ Para. 43 of the Award.

³⁶⁹ See paras. 126, 147 supra.

³⁷⁰ See paras. 121 – 128 and 147, 148 supra.

³⁷¹ See paras. 129 – 138 supra.

³⁷² See para. 385 of the First Decision.

³⁷³ Cf. paras. 216 – 218 supra.

III. LEGITIMATE EXPECTATIONS AND THE SETTLEMENT AGREEMENT³⁷⁴

479. The Majority rejects my proposition that Claimant's initial business expansion plans are precluded from consideration in this arbitration by dint of the Settlement Agreement and that they can, in particular, not be related to legitimate expectations in the context of the FET standard. More specifically, the Majority asserts that:

- (A) Claimant's legitimate expectations play only a subsidiary role to the Award;
- (B) Claimant's legitimate expectations must be separated from his business expansion plans;
- (C) The Settlement Agreement cannot be construed as a waiver of BIT protection; and
- (D) Different assumptions of the Majority and me are rooted in different weight given to testimonies.

III.A. SIGNIFICANCE OF LEGITIMATE EXPECTATIONS

480. The Majority tones legitimate expectations down to play "*a subsidiary role as a normative criterion*"³⁷⁵. Nevertheless, legitimate expectations feature prominently in the Majority's reasoning, explicitly in the First Decision and implicitly in the Award.

481. In the words of the First Decision, "the *FET standard is closely tied to the notion of legitimate expectations*" (para. 264). Accordingly, the Majority performs a detailed analysis of Claimant's expectations (paras. 265 – 271 of the First Decision). In para. 285, legitimate expectations are recognized as a factor in establishing a violation of the FET standard. And in para. 371, the Majority declares the tender of May 26, 2004 as a violation of the FET standard with a view to Claimant's legitimate expectations.

³⁷⁴ See paras. 67 – 91 of the Award and paras. 8 – 60 supra.

³⁷⁵ Para. 67 of the Award.

482. In the Award, the Majority strongly relies on Claimant's business expansion plans but no longer refers explicitly to legitimate expectations³⁷⁶.

III.B. LINKAGE BETWEEN CLAIMANT'S LEGITIMATE EXPECTATIONS AND HIS BUSINESS EXPANSION PLANS

483. The Majority distinguishes between legitimate expectations "*on a general level*" and "*on a more specific and personal level*"³⁷⁷. I will focus on the specific expectations³⁷⁸, notably their relation to Claimant's business expansion plans.

484. The latter are essential to the Award. They provide the basis for the Majority's decision that Claimant during the Interregnum would have received the fourteen frequencies required for a "full national network" had frequencies been put up for tender as required by law³⁷⁹. This decision in turn provides the basis for calculating Claimant's compensation. This begs the question of the legal context in which the business expansion plans assume such weight, more specifically, how they are related to Claimant's – assumed – legitimate expectations.

485. The Majority relies on Claimant's business expansion plans also to Claimant's prejudice. It denies inclusion of Claimant's alleged plan of creating a second FM channel for young audience in its calculation of compensation ("Scenario III") on the ground "*that Claimant's initial plans did not include the creation of a second FM network*"³⁸⁰.

486. The First Decision reflects the Majority's assumption that Claimant's legitimate expectations encompass his business expansion plans. Its Chapter VII on "*Violations of the BIT*" starts with restating Claimant's position as follows: "*Claimant's starting point is that, after having made the investment in Gala Radio, he had a legitimate expectation that he*

³⁷⁶ See paras. 90, 161, 162, 171, 174, 176, 177, 201, 203, 208, 243, 252, 256, 261, 296, 297 of the Award. Cf. paras. 252, 253 supra.

³⁷⁷ Para. 69 of the Award.

³⁷⁸ See para. 15 supra on general expectations.

³⁷⁹ See paras. 161, 261, 302, 329 - 335 supra.

³⁸⁰ See para. 257 of the Award and cf. para. 270 of the First Decision.

would be authorized (...) to establish three radio networks (...)” (para. 210 of the First Decision). This leads to the Majority’s analysis of Claimant’s pertinent expansion plans in paras. 269 – 271 under the heading “Legitimate expectations”. The analysis flows directly from the definition of Claimant’s “*specific legitimate expectations*” (para. 268).

487. The latter are defined as expectations “*that Gala.....would be allowed to expand, in parallel with the growth of the private radio industry*”³⁸¹. The Majority redefines “*in parallel with the growth of the private radio industry..*” as “*under the same conditions as the private radio industry in Ukraine*” (para. 72 of the Award). Referring to framework conditions, I fail to see the difference between the redefined *specific expectations* and the *general expectations*; I just see the redefinition leading away from the business expansion plans.

488. The Majority now features legitimate expectations and initial business plans, respectively, as “*separate concepts*” – the former as a criterion “*to construe the meaning of Article II.3 of the BIT*” and the latter “*for the calculation of the damage suffered by Claimant*” (para. 72).

489. The discussion of the relationship between Claimant’s business plans and legitimate expectations, respectively, explains itself from the difference of opinion between the Majority and me regarding the effect of the Settlement Agreement on the Majority’s decision. While the Majority denies any such effect, the Settlement Agreement in my view precludes consideration of Claimant’s legitimate expectations in this arbitration with (negative) *res judicata* effect.

490. This difference of opinion cannot be resolved, though, by an attempt at conceptually divorcing Claimant’s business expansion plans from his legitimate expectations. As stated by the Majority, “*Claimant’s starting point is that (...) 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...*”³⁸². The Majority, in the Award, tries to separate Claimant’s business expansion plans from his legitimate expectations. Nevertheless, the Majority assesses the evidence summarily with a view to these plans (paras. 296 – 299 supra); it defines the final effect of Respondent’s assumed wrongdoing in terms of “*Claimant’s frustration to fulfil his plans and operate a nationwide FM channel*” (para. 208 of the Award);

³⁸¹ Para. 268 of the First Decision. I had understood this language as implying an expectation for preservation of Claimant’s market share (cf. paras. 55, 56 supra).

³⁸² Para. 210 of the First Decision.

and it computes Claimant's loss as the difference between the present value of Gala and the hypothetical value if the business expansion plan had been realized (para. 161 of the Award). Thus, in the Award, the Majority in fact relies on Claimant's business plans as if they had been established as legitimate expectations; and in the First Decision, the Majority does not differentiate Claimant's business plans from his legitimate expectations. In my view, the crucial question is whether and, if so, to what extent the Settlement Agreement precluded the consideration of Claimant's business expansion plans in this arbitration. This question must be answered through interpretation of the Agreement (paras. 497 – 507 *infra*).

III.C. EVIDENCE OF BUSINESS EXPANSION PLANS

491. The Majority challenges my Opinion on its assessment of Claimant's business expansion plans in light of the evidence submitted³⁸³.

492. These plans are relevant to the Award only inasmuch as they concern Gala's FM network (Scenario II)³⁸⁴. I will therefore confine my comments to the question whether the evidence can possibly sustain the Majority's key conclusion that Claimant's initial plans covered the creation of a "*full national network*".

493. Unlike suggested by the Majority, my disagreement with its assessment is not just rooted in attaching "*more weight to Mr. Petrenko's witness statement and less to (...) Mr. Lemire's (...)*"³⁸⁵. It is based on the documentary evidence submitted and the consistency of Mr. Petrenko's statement with applicable law at the time (cf. paras. 47 - 53 *supra*).

494. The Majority accepts the letter of July 18, 1995 of then-National Council Chairman Petrenko "*as clear proof that Mr. Lemire planned to build a FM national broadcaster (...) and that Respondent was aware of it*". It further finds that "*Respondent has not denied*" that Claimant sought to achieve "*national coverage*"³⁸⁶.

³⁸³ See paras. 74 – 80 of the Award and paras. 40 – 54 *supra*.

³⁸⁴ Paras. 256, 261 of the Award.

³⁸⁵ Para. 74 of the Award.

³⁸⁶ Paras. 78 of the Award.

495. However, Respondent has contested its awareness of Claimant’s national coverage aspirations at that time, let alone admitting any indication of support. As per Respondent, discussions with Claimant as late as 1999 concerned creation of a “*regional*” rather than a “*national*” network³⁸⁷.

496. Moreover, the aforementioned letter does not entail any mention of “*national coverage*”, “*national network*” or any other language referring to this notion³⁸⁸. It thus cannot possibly serve as proof of such an initial plan. And even less can it sustain the Majority’s conclusion that Gala, as of January 1, 2001, would have operated a “*full national network*” but for its deprivation of tender opportunities during the Interregnum through Respondent’s wrongdoing – the conclusion providing the foundation of the Award.

III.D. PRECLUSIVE EFFECT OF SETTLEMENT AGREEMENT

497. The Majority confines the Settlement Agreement to the claims filed in the First Arbitration: “*The purpose of the Settlement Agreement was to finally settle all claims which Claimant had filed in an ICSID Additional facility Arbitration against Ukraine. Claimant agreed to waive these claims, and as a quid pro quo Ukraine agreed to appoint a commission of experts.....and to use its best efforts to consider in a positive way certain applications for radio frequencies submitted by Gala (...). This implies that the settlement cannot refer to claims which did not exist as of the date of execution of the Settlement Agreement, or which, existing at that time had never been mentioned in documents, letters or correspondence*”. Since the claims pending in this arbitration were not “*mentioned in documents, letters or correspondence predating March 20, 2000*”, they are in the Majority’s opinion not affected by the Settlement Agreement³⁸⁹.

498. The Majority further dismisses Respondent’s argument that the Settlement Agreement precluded an award on account of the allocation of frequencies under the Interregnum. As per the Majority, “*there is no evidence that, when the Settlement Agreement was executed, Claimant was even aware of Respondent’s irregular practice (...) whatever may have been*

³⁸⁷ See Respondent’s Counter-Memorial on Remaining Issues, paras. 321, 322.

³⁸⁸ See paras. 47, 48 *supra*.

³⁸⁹ Paras. 85, 87, 88 of the Award.

*agreed in the Settlement Agreement cannot be considered as Claimant's acquiescence with Ukraine's wrongful conduct"*³⁹⁰.

499. In my view, the Settlement Agreement has sought to settle the dispute underlying the First Arbitration rather than just the claims filed in that arbitration. This follows clearly from clauses 10, 11, 12, 27 of the Agreement which must be read in context.

500. Clause 10 extends the settlement to all "*complaints and requests*" contained in the Consent to Arbitrate....., in addition to "*claims*". Clause 11 settles the claims pending in the First Arbitration. Beyond these claims, clause 12 "*acknowledge[s] the absence of any claims or misunderstandings.....as on the date of signing the Agreement*". And pursuant to clause 27, the Agreement "*supersedes all prior correspondence, negotiations and understandings between [the Parties] with respect to the matters covered herein*".

501. The Majority erroneously confines the effect of the Settlement Agreement to clause 11 above, disregarding the other clauses broadening the effect³⁹¹.

502. Clause 12 above applies to the claims arisen in the Majority's decision during the Interregnum. These claims had effectively been waived. It is immaterial whether Claimant had known of such claims at that time. The sweeping acknowledgement of the "*absence of any claim or misunderstanding*" clearly expresses the Parties' common intent of clearing the desk as of the date of the Settlement Agreement, including any unknown incidents³⁹².

503. Clause 27 governs Claimant's business expansion plans. They have been pleaded and are accepted by the Majority on the basis of Claimant's negotiations and correspondence with the National Council in 1995- 1997³⁹³. This basis superseded by the Settlement Agreement and thus precluded from consideration in this arbitration. So are Claimant's business expansion plans as a consequence, however they might conceptually be related to Claimant's legitimate expectations³⁹⁴.

³⁹⁰ Para. 185 of the Award.

³⁹¹ Cf. paras.12 – 23 supra.

³⁹² The issue is thus not one of Claimant's „*acquiescence*“ with the allocations during the Interregnum as assumed by the Majority (para. 185 of the Award).

³⁹³ See paras. 270, 271 of the First Decision and paras. 71 – 80 of the Award.

³⁹⁴ I agree with the Majority that the Settlement Agreement could not "*extinguish facts which have occurred*" (para. 90 of the Award). However, the parties to the Agreement could agree, and have agreed, that former negotiations and correspondence shall henceforth play no role in the legal relations between them.

506. The Majority finally queries the nexus between my comments regarding the “*contractual*” and the procedural side of the Settlement Agreement³⁹⁵. The scope of the Settlement Agreement is determined through its interpretation as a contract between the parties thereto³⁹⁶. The *res judicata* effect of the Settlement Agreement flows from the latter’s status as an “award on agreed terms”. This effect precludes consideration in this arbitration of claims settled and facts superseded. Thus, the definition of such claims and facts (through interpretation of the Settlement Agreement) determines the scope of the (preclusive) *res judicata* effect of the Agreement.

507. The Majority interprets the scope of the Settlement Agreement narrower than provided by its terms and purpose. As a consequence, the Majority fails to give full credit to the Agreement’s *res judicata* effect. The latter limits the powers of the Tribunal. By failing to recognize these limits, the Majority exceeds the Tribunal’s powers³⁹⁷.

III.E. BIT PROTECTION COMPLEMENTING THE SETTLEMENT AGREEMENT

508. My above comments on the preclusive effect of the Settlement Agreement rely primarily on the *ordinary meaning* of the latter’s terms, owing to their clarity. In my view, the literal interpretation furthermore conforms to the *object* and *purpose* of the Settlement Agreement, as derived from its synallagma and background³⁹⁸. The Majority’s decision in my opinion defeats the *purpose* of the Settlement Agreement.

509. Claimant had expected (though not legitimately) to receive frequencies with sufficient power to achieve national coverage on a priority basis owing to the Settlement Agreement³⁹⁹. He has failed to negotiate the power of the frequencies under the Settlement Agreement, though, and the power of the frequencies received fell short of his aspirations. When he learned of the First Decision surprisingly declaring a liability of Respondent on account of the Interregnum, he hastened to claim that “*a fraction of these 32 frequencies*

³⁹⁵ Paras. 81, 84 of the Settlement Agreement.

³⁹⁶ See paras. 18 – 33 *supra*.

³⁹⁷ Cf. paras. 34 – 39 *supra*.

³⁹⁸ See paras. 24 – 30 *supra*.

³⁹⁹ See Claimant’s Post Hearing Memorial, para. 57.12.

[available for allocation to Gala] *would have enabled Claimant to achieve a full national network as of January 1, 2001*⁴⁰⁰.

510. In the First Decision, the Tribunal unanimously has dismissed Claimant's claim under the Settlement Agreement on account of the allegedly low power of the frequencies awarded⁴⁰¹. However, in the Award, the Majority assumes an entitlement of Claimant under the FET standard to additional fourteen frequencies required for the full national network to complement the lower than expected power of the frequencies obtained pursuant to the Settlement Agreement⁴⁰². This entitlement is construed on the basis of occurrences co-terminus with the negotiation of the Settlement Agreement. And it assumes that, but for Respondent's wrongdoing, Gala would have received all frequencies needed for its aspired national network as of January 1, 2001, i.e., even before the time Gala received its frequencies pursuant to the Settlement Agreement in proper performance thereof⁴⁰³.

511. In the final analysis, the Majority construes Claimant's protection under the FET standard to the effect of complementing the Settlement Agreement. And it does this so perfectly to place Claimant in the same (or even better) legal and financial position in which he would have found himself had he successfully negotiated the powers of the frequencies specified in the Settlement Agreement and, as a consequence, prevailed with his claim for non-performance of the Agreement.

512. I submit that the Majority in this way has achieved precisely the effect which the aforementioned provisions on the preclusive effect of the Settlement Agreement intended to avoid. They clearly served the purpose of preventing subsequent claims seeking *de facto* amendments of the Settlement Agreement. This purpose in my view is essential to the very function of the Agreement, i.e., to put at rest all grievances related to the dispute in the interest of legal certainty.

513. I must hence confirm my previous conclusion that the Settlement Agreement precludes consideration of Claimant's initial business expansion plans in this arbitration.

⁴⁰⁰ See Claimant's Memorial on Remaining Issues, para. 37.

⁴⁰¹ See paras. 194 – 199 of the First Decision.

⁴⁰² See paras. 194 – 197 of the Award.

⁴⁰³ See paras. 180 – 193 of the First Decision.

IV. CLAIMANT'S RECORD IN TENDERS

514. The Majority asserts that my comments on the First Decision's analysis and conclusions in point⁴⁰⁴ are based on the Third Witness Statement of Ihor Kurus submitted in the Second Phase of the proceedings, i.e., subsequent to the First Decision⁴⁰⁵.

515. However, all my arguments are based on submissions in the first phase of the proceedings, as the footnoted references show⁴⁰⁶. My arguments are:

- If the frequencies obtained pursuant to the Settlement Agreement are included in the record (what they should), Gala scored average success on its applications during 2001 - 2008⁴⁰⁷.
- The National Council had to make its decisions in light of Gala's **recorded** capital and this was clearly inadequate⁴⁰⁸.
- Gala had failed to renew its program in response to changing market trends.⁴⁰⁹

516. Unlike suggested by the Majority⁴¹⁰, these arguments are at most marginally related to the National Council's failure of reasoning its decisions⁴¹¹.

⁴⁰⁴ See paras. 318 – 331 of the First Decision and paras. 162 – 179 supra.

⁴⁰⁵ Para. 96 and fn. 68 of the Award.

⁴⁰⁶ The footnotes entail only cross-references to the Award and Mr. Kurus' witness statement, without relying on these sources (see fns. 140, 146, 148, 152 supra).

⁴⁰⁷ Para. 168 and fn. 141 supra.

⁴⁰⁸ Para. 172 supra.

⁴⁰⁹ Para. 173 supra.

⁴¹⁰ Para. 96 of the Award.

⁴¹¹ In restating its arguments, the Majority refers to the Hearings on Remaining Issues after the First Decision (fn. 69 of the Award). See paras. 312 – 328 supra on the conclusiveness of these arguments.

V. INTERREGNUM

517. The Majority challenges my critique of its decision declaring the out-of-tender allocations of frequencies during the Interregnum in breach of the FET standard⁴¹² on three accounts, namely

- (A) my submission that the decision violates the principles of “*ne ultra petita*” and “*audiatur et altera pars*”⁴¹³;
- (B) my rebuttal of key assumptions of the Majority⁴¹⁴; and
- (C) my comparison of the administrative practice during the Interregnum with Claimant’s priority treatment under the Settlement Agreement⁴¹⁵.

V.A. NE ULTRA PETITA AND AUDIATUR ET ALTERA PARS

518. The Majority contests my observation that Claimant has failed to plead a denial of frequencies during the Interregnum. As per the Majority, “*there can thus be no doubt that, since his initial pleading, Claimant has continuously alleged that Respondent’s denial of licences during the Interregnum period represented a violation of the BIT*”⁴¹⁶. This assertion is not confirmed by the pleadings referred to by the Majority.

519. The Majority quotes para. 86 of Claimant’s Memorial: “*Respondent instead awarded the frequencies to other applicants (...) In doing so, Respondent breached the BIT (...)*”⁴¹⁷. This pleading does not relate to frequencies allotted during the Interregnum.

520. Rather, the pleading relates to the period March 2000 to October 2002 while the Interregnum lasted from March 1999 to June 2000. Moreover, the pleading concerns

⁴¹² See paras. 409 – 418 of the First Decision and paras. 180 – 227 supra.

⁴¹³ See paras. 101 - 104 of the Award and paras. 188 – 199 supra.

⁴¹⁴ See paras. 105 – 110 of the Award and paras. 192, 197 – 199 supra.

⁴¹⁵ See paras. 109 – 115 of the Award and paras. 200 – 212 supra.

⁴¹⁶ Para. 103 of the Award.

⁴¹⁷ Para. 103 and fns. 77, 78 of the Award.

Claimant's claim brought under the Settlement Agreement for Respondent's alleged failure of awarding Gala frequencies by May 15, 2000 in 9 of the 11 cities specified in the Agreement⁴¹⁸. Claimant submitted that "*Respondent organized tenders for many frequencies in each of the 9 Cities. Gala participated in all of them, but received none of these frequencies*"⁴¹⁹.

521. The pleading referred to by the Majority thus concerns the award of frequencies in tenders in which Gala had participated. During the Interregnum, however, frequencies were allotted out-of-tender. These are not covered by the above pleading.

522. The Majority further refers to para. 67.3 of Claimant's Post-Hearing Memorial. This pleading, as the aforementioned, relates to Respondent's actions or inactions in violation of the Settlement Agreement. Claimant has submitted that such actions or inactions have breached the FET standard in addition to the Settlement Agreement⁴²⁰. He has not pleaded, though, that occurrences during the Interregnum have violated Gala's right to apply for frequencies in addition to those specified in the Settlement Agreement.

523. The fact thus remains that Claimant has failed to plead any claim on account of the Interregnum practice. He has first asserted such a claim in response to the Majority's decision in point⁴²¹. Such pleading cannot retroactively establish the procedural basis for the decision. Violating *ne ultra petita*, the decision in my view exceeds the Tribunal's power.

524. As regards "*audiatur et altera pars*", the Majority states that "*Respondent had ample opportunity to counter these allegations (...) and did react, both before and after the First Decision*"⁴²². However, prior to the First Decision, Respondent did not address any claims regarding additional frequencies on account of the Interregnum; and he had no reason to do so since no such claims had been submitted by Claimant.

525. Such claims were for the first time addressed in paras. 154 *et seq.* of Respondent's post-First Decision Counter-Memorial on Remaining Issues in response to the Majority's surprise decision in point. The possibility of response after the decision on Respondent's

⁴¹⁸ See Claimant's Memorial, heading at p. 24 and para. 84.

⁴¹⁹ Claimant's Memorial, para. 85.

⁴²⁰ See heading: "*Respondent's Actions That Constitute A Breach Of The Settlement Agreement Also Constitute A Breach Of The Respondent's Obligations Under The BIT*" (Claimant's PHM, p. 51).

⁴²¹ See Claimant's Memorial on Remaining Issues, paras. 32 – 37.

⁴²² Para. 103 of the Award and fn. 110.

liability, however, cannot *ex post facto* cure the violation of the *audiatur et altera pars* maxim. The process clearly departs from established rules of procedure⁴²³.

V.B.ERRONEOUS KEY ASSUMPTIONS

526. The Majority “*ad argumendum*” accepts Respondent’s post-First Decision submission that pursuant the LTR in force at the time of the Interregnum, new tenders had been required for renewing expired licences to frequencies but that previous licence holders had enjoyed priority in such tenders. Yet, the Majority finds that only “*25 of the 80 licences granted during the Interregnum corresponded to renewals upon expiration*”. The Majority sees “*no reason to modify its conclusions*” (...) “*taking into account that more than 80 frequencies were awarded*” during the Interregnum at variance with the LTR⁴²⁴.

527. However, the Majority’s assumption that the renewals affected only 25 of the 80 frequencies awarded in total⁴²⁵ is inconsistent with the undisputed facts. These 25 frequencies related just to the tender of January 1, 2001 rather than to the total of 80 frequencies allotted during the Interregnum. This tender only concerned 25 frequencies where previous licences had expired. Thus, “*all of the frequencies put to tender on January 1, 2001 concerned expired licenses*”⁴²⁶.

528. Respondent’s pertinent submission is beyond dispute. As per Claimant’s Counsel account, 38 of the 80 frequencies allotted during the Interregnum concerned locations not covered by Gala’s existing frequencies. Out of these 38 frequencies, 31 corresponded to renewals of expired licences⁴²⁷.

529. The submissions and evidence referred to by the Majority thus fail to sustain the assumption that only 25 of the 80 frequencies allotted during the Interregnum were encumbered by priority rights of previous licence holders while some 65 could have been freely allocated to Gala. The referred evidence rather supports Respondent’s submission that “*most of these 80 frequencies corresponded to existing licences...which had*

⁴²³Cf. paras. 191 – 199 supra.

⁴²⁴ See para. 109 of the Award. Cf. paras. 192 – 194 supra.

⁴²⁵ Cf., however, para. 187 of the Award where the Majority states that “*priority rights of previous broadcasters ...only affected 31 frequencies*”.

⁴²⁶ Respondent’s Counter-Memorial on Remaining Issues, para. 181 and Third WS Kurus, paras. 6, 10.

⁴²⁷ Mr. Fouret, HTRI, p. 20.

expired...⁴²⁸. And this evidence reinforces my doubts about the Majority's conclusion that Gala would, or just could, have received fourteen frequencies during the Interregnum if frequencies had been put up for tender in accordance with applicable law⁴²⁹.

V.C.INTERREGNUM AND SETTLEMENT AGREEMENT

530. The Majority takes issue with my proposition that Claimant pursuant to the Settlement Agreement benefited from an administrative practice similar to that during the Interregnum. As per the Majority, my point has not been pleaded, Claimant has received no privilege, and the award of frequencies to him on a priority basis just rebalanced an injustice done to Claimant⁴³⁰.

531. My argument has been advanced by Respondent⁴³¹.

532. The Majority concedes that Gala, by dint of the Settlement Agreement, has received eleven frequencies on a priority basis⁴³². In a competitive tender, priority treatment accords the beneficiary a privilege over his contenders⁴³³.

533. The priority granted to Gala impaired the opportunities of Gala's contenders for the frequencies concerned – similarly to the impairment of Gala's opportunities through out-of-tender allocations of frequencies during the Interregnum. An injustice done to Claimant cannot be rebalanced by doing injustice to Claimant's innocent contenders⁴³⁴.

⁴²⁸ Respondent's CMRI, para. 174.

⁴²⁹ Cf. paras. 320 – 325 and 355 – 362 supra.

⁴³⁰ See paras. 111 – 116 of the Award and paras. 205 – 212 supra.

⁴³¹ Respondent's Counter-Memorial on Remaining Issues, para. 172.

⁴³² Para. 113 of the Award: "*The National Council eventually recognised Gala's priority position and granted Gala 11 broadcasting licences mentioned in Clause 13(b)...*". See also paras. 182, 183 of the First Decision.

⁴³³ It is immaterial in my view that the wording of the Settlement Agreement thinly clothed Claimant's privilege to avoid an outright violation of Ukrainian law and possible claims of contenders placed at a disadvantage (cf. para. 113 of the Award). The priority was in fact granted as per Claimant's demand owing to the Settlement Agreement.

⁴³⁴ See paras. 207 - 209 supra.

VI. THE AWARD

534. The Majority comments in footnotes on my Opinion regarding the Award. I will address only the comments regarding

(A) Claimant's financial statements; and

(B) European and German laws.

VI.A. CLAIMANT'S FINANCIAL STATEMENTS

535. The Majority disagrees with my observation that Gala's profits and loss account were bound to be inaccurate due to Claimant's unrecorded "investments" in Gala and that Gala must have generated a net loss of some USD 2 million between 1995 and 2010 if these investments, as estimated by the Majority, are taken into account⁴³⁵.

536. As submitted by Claimant and accepted by the Majority, Claimant during 1995 – 2010 had leased office space to Gala rent-free, paid equipment and licence fees of Gala out-of-pocket, and waived repayment of loans to Gala. These contributions into Gala were not recorded in Gala's financial statements. The Majority estimates their monetary value to cluster between USD 2 and 3 million.⁴³⁶

537. Such contributions have covered business expenses of Gala which would have had to be paid by Gala out of its cash flow had they not been covered by Claimant. The Majority has taken these contributions into account in order to assess the actual amount of "*resources which Claimant brought into Ukraine*" with a view to featuring "*a common sense relationship*" between Claimant's actual investments into Gala and the amount of foregone profits awarded. As a result, the Majority shows foregone profits awarded in an amount of about three times Claimant's total investment into Gala⁴³⁷.

⁴³⁵ See fns. 315, 332 of the Award and paras. 370 – 374 supra.

⁴³⁶ See paras. 120, 299 – 302 of the Award and Claimant's Memorial on Remaining Issues, paras. 12 – 22.

⁴³⁷ USD 8,717,850 (loss awarded) : 3,000,000 (max. actual inv.)

538. Had the Majority relied only on Claimant's recorded investment , i.e., USD 141,000, the loss of profits awarded would have been about 62 times Claimant's investment into Gala⁴³⁸, clearly showing anything but a "*common sense relationship*" and indicating an award of highly speculative, even exotic, profits.

539. Relating Claimant's estimated actual – rather than recorded – investments to the loss of profits awarded, the Majority must also relate Gala's actual past earnings to its estimated future earnings foregone by Claimant. The actual past earnings represent the balance between the sum of all actual investments into Gala and Gala's 2010 net enterprise value, i.e., the residual value of these investments⁴³⁹. Thus, investments totalling some USD 2 to 3 million compare with a residual (net enterprise) value of USD 126,290. This reflects an aggregate actual loss in excess of some USD 2 million for 1995 – 2010, i.e., the past lifetime of Claimant's investment in Gala⁴⁴⁰.

VI.B. EUROPEAN AND GERMAN LAWS

540. The Majority takes issue with my comments on the restrictions under European and German laws addressing recovery of damages in tender situations. It opines that these (1) restrictions are irrelevant to this arbitration since not pleaded, (2) EEC Directive 92/13 "*does not limit the type of damages which can be awarded*", and (3) para. 126 of the German "*Gesetz gegen Wettbewerbsbeschränkungen*" refers to recovery beyond *damnum emergens*⁴⁴¹.

VI.B.1. Not Pleaded

541. The mentioned EU and German laws have admittedly not been pleaded. They are quoted as reflections of recognized principles of law to be taken into account in interpreting international law principles of State responsibility which do not address tender situations⁴⁴².

⁴³⁸ USD 8,717,850 : 141,000

⁴³⁹ All earnings had undisputedly been retained in Gala.

⁴⁴⁰ See also para. 533 and fn. 297 supra.

⁴⁴¹ See fn. 322 of the Award.

⁴⁴² See paras. 272, 279 supra.

VI.B.2. EEC Directive 92/13

542. As noted before, the Directive sets a minimum standard regarding the protection of bidders in flawed tenders⁴⁴³. This standard does not envision recovery of loss of profits. Article 2.1(d) of the Directive quoted by the Majority refers to laws of EU Member States (rather than other EU legislation). Member States may establish additional recovery rights but they are not required to include recovery of loss of profits⁴⁴⁴.

VI.B.3. German Law

543. German law has been presented as an example of EU Member State laws which have both transformed the aforementioned EEC Directive into municipal law and, in addition, extended recovery to *lucrum cessans*. Para. 126 of the “Gesetz gegen Wettbewerbsbeschränkungen” concerns specifically recovery rights on account of flawed tenders. This cause of action itself is limited to *damnum emergens*⁴⁴⁵.

544. The reference in para. 126 above to further reaching recovery rights noted by the Majority concerns the provisions of the German Civil Code outlined supra⁴⁴⁶. These allow for recovery of *lucrum cessans* but require for that purpose proof with a “*probability bordering at certainty*” that the claimant **would** (rather than could or should) have won the award if the tender had been carried out in due process.

545. As regards the Majority’s suggestion that my restatement of European and German laws in point reflect my “*personal unproven opinion*”, I refer to the authorities quoted supra⁴⁴⁷.

⁴⁴³ See para. 278 supra.

⁴⁴⁴ See paras. 274 – 278 supra.

⁴⁴⁵ See paras. 280, 281 supra.

⁴⁴⁶ Paras. 282, 283 supra.

⁴⁴⁷ See fns. 215 - 219 supra.

Jürgen Voss

Dr. Jürgen Voss

Date: March 1, 2011