

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Marco Gavazzi and Stefano Gavazzi v. Romania
(ICSID Case No. ARB/12/25)**

PROCEDURAL ORDER NO 1

Prof. Hans van Houtte, President of the Tribunal
Mr. V. V. Veeder, Arbitrator
Mr. Mauro Rubino-Sammartano, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

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Introduction

The first session of the Arbitral Tribunal was held on February 19, 2013, at World Bank Conference Center in Paris, 66 av. d'Iéna.

Present at the session were:

Members of the Tribunal

Prof. Hans van Houtte, President of the Tribunal
Mr. V. V. Veeder, Arbitrator
Mr. Mauro Rubino-Sammartano, Arbitrator

ICSID Secretariat

Ms. Martina Polasek, Secretary of the Tribunal (by telephone conference)

Participating on behalf of the Claimants

Prof. Avv. Giorgio Sacerdoti
Dr. Avv. Anna de Luca
Mr. Marco Gavazzi

Participating on behalf of the Respondent

Dr. Alina Cobuz - Lawyer
Ms. Simona Tanciu - Lawyer
Ms. Emilia Toader - Lawyer
Ms. Carmen Saricu - Lawyer
Mr. Laurent Niddam - Lawyer

The President of the Tribunal (President) opened the session at 2 p.m. and welcomed the participants. The President introduced the Tribunal and invited the parties to introduce their respective representatives.

The Tribunal and the parties considered the following:

- The Agenda adopted by the Tribunal (Annex 1), including the items proposed by the Respondent and approved by the Claimants, in addition to the items of the Draft Agenda circulated by the Secretary on January 3, 2013;
- The Draft Procedural Order (Annex 2) circulated by the Secretary on January 22, 2013; and

- The parties' comments on the Draft Procedural Order received on February 1 and 12, 2013 (from counsel for the Claimants) and February 11, 2013 (from counsel for the Respondent), (Annex 3), indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

The Tribunal and the parties discussed the items on the Agenda in order.

The parties' agreements and the Tribunal's decisions are recorded in the Procedural Order below.

The session was adjourned at 5.47 p.m.

An audio recording of the session was made and deposited in the archives of ICSID. A USB drive containing the recording of the session was distributed to the Members of the Tribunal and the parties.

Order

Pursuant to ICSID Arbitration Rule 19, this first Procedural Order sets out the Procedural Rules that the Claimants and the Respondent have agreed and the Arbitral Tribunal has determined shall govern this arbitration.

1. Applicable Arbitration Rules
Convention Article 44

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 2006.

2. Constitution of the Tribunal and the Tribunal Members' Declarations
Arbitration Rule 6

- 2.1. The Tribunal was constituted on November 26, 2012 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties confirmed that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the parties by the Secretary on November 26, 2012.

3. Fees and Expenses of the Tribunal Members
Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees

- 3.1. The fees and expenses of each arbitrator shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees

and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.

- 3.2. Under the current Schedule of Fees, each arbitrator receives:
 - 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
 - 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to Regulation 14 of the ICSID Administrative and Financial Regulations.
- 3.3. The Members of the Tribunal shall submit their claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
- 3.4. Each Member of the Tribunal shall receive a fee equivalent to 25% of the hearing time reserved but not used due to postponement or cancellation of a hearing at the request of one or both parties less than 30 days prior to commencement of the hearing. Non-refundable expenses incurred in connection with the hearing as a result of such postponement or cancellation shall be reimbursed.

4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)

- 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings, including by any appropriate means of communication.

5. Decisions of the Tribunal
Arbitration Rule 16

- 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
- 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence except that where the matter is urgent, the President may issue procedural decisions without consulting the other Members, subject to possible reconsideration of each such decision by the full Tribunal.

6. Delegation of Power to Fix Time Limits
Arbitration Rule 26(1)

- 6.1. The President has the power to fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with all Members of the Tribunal except that where the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

7. Representation of the Parties
Arbitration Rule 18

- 7.1. Each party shall be represented by its respective counsel listed below and may designate additional agents, counsel, or advocates by notifying the Tribunal and the ICSID Secretariat promptly of such intended designation.
- 7.2. By letter of February 27, 2013, the Respondent confirmed the names of the attorneys authorized to represent Romania during the first session of the Tribunal, corresponding to the above attorneys participating in the session.

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Vice-President

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8. Apportionment of Costs and Advance Payments to ICSID
Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28
- 8.1. The parties shall defray the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.
- 8.2. By letter of November 28, 2012, ICSID requested that each party pay US\$ 150,000 to defray the initial costs of the proceeding. ICSID received Respondent's payment on December 27, 2012 and Claimants' payment on January 25, 2013.
- 8.3. ICSID shall request further advances as needed. Such requests shall be accompanied by an interim statement of account providing details of the direct costs of the proceeding, including the total fees and expenses of all arbitrators. At the end of the case, the financial statement will include a breakdown of each arbitrator's fees and expenses.
9. Place of Proceeding
Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)
- 9.1. Paris shall be the place of the proceeding. The Tribunal can hold hearings at any other place that it considers appropriate after consulting with the parties. The Tribunal may deliberate at any place it considers convenient.
10. Procedural Language(s)
Administrative and Financial Regulation 30(3) and (4); Arbitration Rules 20(1)(b) and 22
- 10.1. English is the procedural language of the arbitration. Documents filed in any other language must be accompanied by a translation into English. If the document is lengthy and relevant only in part, it is sufficient if only the relevant parts are translated, provided that the Tribunal may require a fuller or a complete translation at the request of any party or upon its own initiative. Translations need not be certified, unless there is a dispute as to the content of a translation provided and the party disputing the translation specifically requests a certified version.
- 10.2. A witness may testify in a language other than the procedural language with simultaneous interpretation into the procedural language.
- 10.3. Simultaneous interpretation shall be arranged by the ICSID Secretariat and charged to the case account, without prejudice to the Tribunal's final allocation of costs. The parties shall inform the ICSID Secretariat of

interpretation requirements at least four weeks in advance of the hearing. The parties will be entitled to involve their own interpreters to check, for internal purposes, the accuracy of the interpretation of the interpreters selected by ICSID (if the case may be). Any proposed corrections to the interpretation, as reflected on the English transcript, should be raised with the Tribunal.

11. Means of Communication and Copies of Instruments

Administrative and Financial Regulations 24 and 30; Arbitration Rules 20(1)(d) and 23

a) Communications:

11.1. ICSID shall be the channel of written communications between the parties and the Tribunal. Written communications (except the submissions mentioned below under 11(b)) shall be transmitted by email or other electronic means to the other party and the ICSID Secretariat. The Secretary shall acknowledge receipt of a communication received by a party and transmit it to the Tribunal. The Secretary shall not be copied on direct communications between the parties when such communications are not intended to be transmitted to the Tribunal.

b) Instruments/Submissions:

11.2. The parties shall:

11.2.1. by the relevant filing date, submit by email to the ICSID Secretariat, the opposing party, and the Tribunal an electronic version without exhibits of pleadings, witness statements, and expert reports;

11.2.2. courier to the ICSID Secretariat by the following business day:

11.2.2.1. two hard copy sets in A5 booklet double sided print format of the entire submission, including witness statements and expert reports, together with exhibits (the brief, exhibits, witness statements and expert reports should be bound separately) but excluding legal authorities; and

11.2.2.2. two USB drives, with full copies of the entire submission, including the pleading, witness statements, expert reports, exhibits, and legal authorities (organized in consecutive order in the USB, eg. C-001, C-002 for exhibits + a short description of the document, C-Memorial 1, C-Memorial 2 (in case there is any addition to the Memorial filed by the Claimants), CEW1-last name of expert witness I (for an expert witness' first report), CW1-last name of witness II (for a factual witness' second statement).

11.2.3. at the same time, courier to the opposing party:

for the Claimants, one hard copy set in A-4 format as per item 11.2.2.1 and one USB drive as per item 11.2.2.2 to the following address:
c/o Prof. Avv. Giorgio Sacerdoti, Via Privata Maria Teresa 4, 20123
Milano Italy;

for the Respondent, one hard copy set in A-4 format as per item 11.2.2.1 and one USB drive as per item 11.2.2.2 to the following address:
c/o Ms. Emilia Toader, Bostina & Associates, 70 Jean Louis
Calderon, 2nd district Bucharest, 020039.

- 11.2.4. at the same time, courier to each Tribunal Member one hard copy set as per item 11.2.2.1 and one USB drive as per item 11.2.2.2 to the following addresses:

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Iran - United States Claims Tribunal
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2585 JH The Hague
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Mr. V.V. Veeder, QC
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Mr. Mauro Rubino-Sammartano
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- 11.3. For email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Ms. Martina Polasek
ICSID
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- 11.4. Legal authorities shall be submitted in electronic version only, unless specifically requested by the Tribunal.
- 11.5. The parties will endeavor to submit electronic versions of pleadings and exhibits, where feasible in text searchable format (i.e., OCR PDF or Word).
- 11.6. Each submission transmitted by courier will be notified by e-mail to the recipients. The recipients shall acknowledge receipt of the courier packages indicating the date when the courier was received.

12. Written and Oral Procedures
Arbitration Rules 20(1)(e) and 29

- 12.1. The proceeding shall consist of a written phase followed by an oral phase.

13. Schedule for Submission of Pleadings
Arbitration Rules 20(1)(c), 31 and 40

a) Period of Time Filings

- 13.1. The schedule shall be as follows:

- 13.1.1. The Claimants' Request for Arbitration is accepted as the Claimants' Memorial on the Merits, excluding quantum;
- 13.1.2. The Claimants shall complete their Memorial on the Merits with its submission on quantum by Monday, July 15, 2013;
- 13.1.3. The Respondent shall file its Counter-Memorial on the Merits, excluding quantum, but including any Objections to Jurisdiction and Admissibility and any Counter-Claim that it may have by Monday, July 15, 2013.
- 13.1.4. The Claimants shall file any Objections to Jurisdiction to and Admissibility of the Counter-Claim, as well as its submission on whether or not the parties' objections to jurisdiction and admissibility should be bifurcated from the merits of the case by Wednesday, July 31, 2013;
- 13.1.5. The Respondent shall file its submission on bifurcation by Friday, August 23, 2013;
- 13.1.6. Provided that the parties do not agree on whether or not the proceedings should be bifurcated, the Tribunal shall hold a telephone conference with the parties on Thursday, September 5, 2013;
- 13.1.7. The Tribunal shall make its best effort to issue a decision on bifurcation by Friday, September 13, 2013;
- 13.1.8. If the Tribunal decides to bifurcate the proceeding on jurisdiction from the merits, see 13.2 Scenario A;
- 13.1.9. If the Tribunal decides to join the objections to jurisdiction to the merits of the case, see 13.3 Scenario B.

13.2. Scenario A - Bifurcation of the Proceedings (Respondent's Objections to Jurisdiction and Claimants' Objections to Jurisdiction with respect to the Counter-Claim)

- 13.2.1. The Claimants shall file their Counter-Memorial on Jurisdiction by Friday, November 15, 2013;
- 13.2.2. The Respondent shall file its Reply on Jurisdiction and Counter-Memorial on the Jurisdiction of the Counter-Claim by January 31, 2014;
- 13.2.3. The Claimants shall file their Reply on the Jurisdiction of the Counter-Claim by February 28, 2014;
- 13.2.4. The Tribunal shall hold an organizational pre-hearing telephone conference on March 10, 2014; and
- 13.2.5. A hearing on jurisdiction will be held in Paris on March 27 and, if necessary, March 28, 2014.

13.3. Scenario B – No Bifurcation

- 13.3.1. The Claimants shall file a Reply on the Merits, excluding quantum, and a Counter-Memorial on Jurisdiction and the Counter-Claim by Tuesday, December 17, 2013;
- 13.3.2. The Respondent shall file a Counter-Memorial on quantum by Tuesday, December 17, 2013;
- 13.3.3. The Respondent shall file a Rejoinder on the Merits and a Reply on Jurisdiction and the Counter-Claim by March 31, 2014;
- 13.3.4. The Claimants shall file a Reply on quantum by March 31, 2014;
- 13.3.5. The Respondent shall file a Rejoinder on quantum by Tuesday, April 30, 2014;
- 13.3.6. The Claimants shall file a Rejoinder on Jurisdiction and the Counter-Claim by Tuesday, April 30, 2014;
- 13.3.7. The Tribunal shall hold an organizational pre-hearing telephone conference on Monday, May 12, 2014; and
- 13.3.8. A hearing on jurisdiction and the merits will be held in Paris the week of June 2, 2014 (while the whole week is reserved, the exact amount of days will be determined in due course).

14. Document Production

Convention Article 43(a); Arbitration Rule 34

- 14.1. Articles 3 and 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) shall guide the Tribunal and the parties regarding document production in this case.
- 14.2. The parties shall address any request for production of documents to the Tribunal within two (2) weeks from the other party's submission. Every request for production of documents shall identify with precision each document or category of documents sought and establish its relevance. The requests shall be recorded in a joint schedule (populating columns 1 through 4) in the form below.
- 14.3. Each party shall produce the requested documents that are in its possession, custody or control and to which it does not object within four (4) weeks from

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the request for production of documents.

- 14.4. Each party shall state its response to each request and any objections to any request within two (2) weeks from the request for production of documents. Such responses and objections shall be recorded in column 5 of the joint schedule following the format below:

1	2	3	4		5	6	7
No.	Requesting Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Responses / Objections to Document Request	Reply to Objections to Document Request	Tribunal's Decisions
			Ref. to Submissions	Comments			

- 14.5. Each party shall respond to these objections within one week from the receipt thereof. Such responses shall be recorded in column 6 of the schedule above. Each party shall provide the other party and the Tribunal with the completed schedule (in both Word and PDF formats).
- 14.6. The Tribunal will make its best efforts to rule on the objections as soon as possible after receipt of the Reply to the objections (No. 6 in Table).
- 14.7. A party shall produce those documents for which no objection is sustained by the Tribunal within one week of the ruling.
- 14.8. The failure to produce as ordered may result in adverse inferences drawn by the Tribunal as regards the merits of the defaulting party's case.
- 14.9. Further requests for the production of documents sought by either party, if any, shall be permitted only at the discretion of the Tribunal. The request must be substantiated with reasons.
- 14.10. Introduction by a party of evidentiary materials following the filing of the last written submission will be permitted only in exceptional circumstances at the discretion of the Tribunal upon a reasoned written request followed by observations from the other party. Any such request shall not attach the new evidentiary materials. If the Tribunal admits the new evidentiary materials, the opposing party shall be allowed to submit evidence in rebuttal.
- 14.11. For the avoidance of doubt, Power Point slides, demonstrative exhibits and charts or other similar materials in aid of argument may be used by either party during any oral hearing, subject to the discretion of the Tribunal, and

provided always that such slides or materials reflect evidence on the record (with citations to such evidence) and do not constitute or introduce any new evidence, whether directly or indirectly.

14.12. The Tribunal may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).

15. Evidence: Witnesses and Experts, Written Statements and Reports, Supporting Documentation

Convention Article 43(a); Arbitration Rules 24 and 33-36

15.1. The parties shall include all of the evidence on which they intend to rely, including written witness statements, expert opinions or reports, and other evidence in whatever form, with their written submissions. If a document is lengthy, the parties shall mark the portions on which they rely.

15.2. Considering that, as undertaken within the hearing, the Claimants intend to appoint Deloitte as their expert counsel who shall provide an expert report on the quantum of the damages claimed as loss of profit resulting from the destruction and loss of their investment, starting with the issuance date of the Procedural Order no. 1, the Respondent shall take all the necessary steps in accordance with the applicable laws and regulations, including carrying out any procurement procedure and fulfilling any related administrative operation, if the case, in order to nominate and contract the experts who shall draft the accounting expert report and/or answer to the Claimants' expert report and who shall further assist the Respondent in all related issues in respect with this case.

15.3. Duly certified copies of documents are not required unless the authenticity of the copy is contested and the Tribunal considers the certification necessary.

15.4. Each party shall number the accompanying documentation consecutively throughout the entire proceeding (C-001 or R-001 for documentary evidence and CLA-001 or RLA-001 for legal sources) and shall number the paragraphs of each of their written pleadings. Any documents previously submitted to which the parties wish to refer shall not be refiled but referred to using the earlier number.

15.5. In their second written submissions, the parties shall include only additional written witness testimony, expert opinion testimony, documents or other evidence that responds to or rebuts matters raised by the opposing party's prior written submission subject to documents obtained in the course of the document production phase.

15.6. The Tribunal shall not admit any testimony or other evidence that has not been filed with the written submissions, unless the Tribunal determines that it is appropriate under the circumstances.

15.7. All witness statements or expert reports shall be signed and dated by the

submitting factual witness or expert witness, and shall have attached a copy of their identification document.

- 15.8. Within 60 days prior to the date of the evidentiary hearing, but not earlier than 60 days following the receipt of written statements and expert reports, each party will identify the factual witnesses and expert witnesses of the opposing party (having filed written statements and expert reports) whom it intends to cross-examine. Shortly after the parties' notifications, the Tribunal will indicate the witnesses and experts not called by the parties that it wishes to question, if any.
 - 15.9. Examination by video-conference shall not be permitted.
 - 15.10. The Tribunal may disregard the testimony of a witness or expert called to testify at the hearing who fails to appear at the hearing without justified reasons.
 - 15.11. Witnesses and experts shall be examined by each party under the control of the Tribunal. Before giving evidence, witnesses shall make the declaration set out in ICSID Arbitration Rule 35(2), and experts shall make the declaration set out in ICSID Arbitration Rule 35(3). The Tribunal may examine the witness or expert at any time during the oral procedure.
 - 15.12. The direct examination is given in the form of witness statements and expert reports. However, the party presenting the witness may conduct a brief direct examination. Subject to the direction of the Tribunal, there shall be no limitation on the scope of the cross-examination to the contents of the witness statement or expert report. Re-direct examination shall be limited to the subject of cross-examination.
 - 15.13. Unless the parties and the Tribunal agree otherwise, factual witnesses shall not be allowed in the hearing room before giving their oral evidence. The potential sequestration of expert witnesses will be discussed during the pre-hearing organizational telephone conference.
 - 15.14. Other matters regarding hearings, including the possibility of witness conferencing, shall be addressed at the pre-hearing organizational telephone conference.
 - 15.15. The Tribunal will discuss the contents and modalities of post-hearing briefs with the parties at the end of the hearing on jurisdiction or hearing on merits and jurisdiction.
16. Submissions of Non-Disputing Parties
Arbitration Rule 37(2)
- 16.1. Pursuant to ICSID Arbitration Rule 37(2), and after consulting with the parties, the Tribunal may allow a person or entity that is not a party to the

dispute to file a written submission with the Tribunal regarding a matter within the scope of the dispute.

- 16.2. The parties agreed that any non-disputing party seeking to file written submissions and approaching either party or the Tribunal shall be referred to the ICSID Secretariat, who shall advise such non-disputing party of the provisions agreed below regarding the criteria and the procedure for the written submissions by non-disputing parties.
- 16.3. Non-disputing parties seeking to make a written submission shall file a petition with the Tribunal for leave to file a written submission and such petition shall include the following information:
 - 16.3.1. the identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties to the dispute;
 - 16.3.2. the nature of the petitioner's interest in the case;
 - 16.3.3. whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case; and
 - 16.3.4. the reasons why the Tribunal shall accept petitioner's written submission.
- 16.4. Upon receipt of a petition for leave to file a written submission, the Tribunal shall provide copies of the petition to both parties and ask for their views. In deciding whether to grant a non-disputing party leave to submit a written submission, the Tribunal shall consider the factors enumerated in Arbitration Rule 37(2) as well as:
 - 16.4.1. all information contained in the petition;
 - 16.4.2. the views of the parties;
 - 16.4.3. any undue burden or unfair prejudice which the acceptance of written submissions by non-disputing parties may place on the parties, the Tribunal, and the proceedings; and
 - 16.4.4. the degree to which the proposed written submission is likely to assist the Tribunal in the determination of a factual or legal issue related to the proceeding.
17. Hearings (including Pre-Hearing Organizational Meetings)
Arbitration Rule 13(2)

See under item 13

18. Records of Hearings

Arbitration Rule 20(1)(g)

- 18.1. Sound recordings shall be made of all sessions. The sound recordings shall be provided to the parties and the Tribunal Members.
- 18.2. The Secretary may prepare summary minutes of hearings or sessions upon request, under the direction of the Tribunal.
- 18.3. Verbatim transcript(s) in the procedural language(s) shall be made of any sessions other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcripts shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the parties and the Tribunal on a same-day basis.
- 18.4. The parties shall attempt to agree on any proposed corrections to the transcripts within 15 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the [parties/court reporter] in the transcripts (“revised transcripts”). In case of disagreement between the parties, the Tribunal shall decide upon such disagreement and any correction adopted by the Tribunal shall be entered by the [parties/court reporter] in the revised transcripts.

19. Publication

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4)

- 19.1. ICSID shall not publish any procedural order, decision, or award related to the proceeding without the consent of the parties. However, the parties consent to ICSID publishing the texts of any procedural order, decision, or award in these proceedings previously published by any other source once the award has been rendered.
- 19.2. ICSID shall promptly publish excerpts of the legal reasoning of the Tribunal’s award unless it is already in the public domain.

[signed]

Prof. Hans van Houtte
President of the Tribunal
Date: 11 March 2013