

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

In the matter between

JOSEPH CHARLES LEMIRE
(Claimant)

and

UKRAINE
(Respondent)

(ICSID CASE NO. ARB/06/18)

AWARD

Members of the Tribunal:

Professor Juan Fernández-Armesto, *President*

Mr. Jan Paulsson

Dr. Jürgen Voss

Secretary of the Tribunal:

Ms. Aïssatou Diop

Representing Claimant:

Mr. Hamid G. Gharavi

Mr. Stephan Adell

Ms. Nada Sader

Derains & Gharavi

Paris, France

Representing Respondent:

Mr. John S. Willems

Mr. Michael A. Polkinghorne

Ms. Olga Mouraviova

Ms. Nathalie Makowski

White & Case LLP

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Mr. Sergii Svyryba

Ms. Olga Glukhovska

Ms. Olha Yaniutina

Mr. Markiyan Kliuchkovskyi

Ms. Oksana Tsymbriivska

Magisters

Kyiv, Ukraine

Date of Dispatch to the Parties: March 28, 2011

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I. GLOSSARY

Amoco	<i>Amoco International Finance Corp. v. Iran</i> , (Iran United States Claims Tribunal Case No. 56), Partial Award of July 14, 1987
Award	This Final Award in ICSID Case No. ARB/06/18
BIT	Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment, done in Kyiv on October 17, 1996, which entered into force on November 16, 1996
Biwater	<i>Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania</i> , Doc. RLA 74, (ICSID Case No ARB/05/22), Award of July 24, 2008
Bludgeon Approach	Valuation method based on discounted rates including a separate country risk premium, as calculated by Prof. Aswath Damodaran, introduced by Goldmedia
Bollecker-Stern	Brigitte Bollecker-Stern: “Le prejudice dans la théorie de la responsabilité international”, 1973
Centre	International Centre for Settlement of Investment Disputes
Cheng	Bin Cheng: “General Principles of Law as applied by international Courts and Tribunals”, 1987
Claimant	Mr. Joseph Charles Lemire
CMRI	Claimant’s Memorial on Remaining Issues
CMS	<i>CMS Gas Transmission Company v. Argentine Republic</i> (ICSID Case No. ARB/01/8), Award of May 12, 2005
CPFR	Charity Public Fund Radio
DCF	Discounted Cash Flow
Desert Line	<i>Desert Line Projects LLC v. Republic of Yemen</i> (ICSID Case No. ARB/05/17), Award of February 6, 2008
Dr. Voss	Dr. Jürgen Voss
EBITDA	Earnings Before Interest, Taxes, Depreciation and Amortization
EBS	EBS Expertise Services
EDF	<i>EDF (Services) Limited v. Romania</i> , (ICSID Case No. ARB/05/13), Award of October 8, 2009
ELSI	Case concerning <i>Elettronica Sicula S.p.A. (United States v. Italy)</i> , Doc. RLA 113, International Court of Justice, July 20, 1989
ESR	EBS Supplementary Report

<i>Factory at Chorzów</i>	<i>Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)</i> , merits, 1928, PCIJ, Series A, No. 17, p. 21 <i>et seq.</i>
FET	Fair and Equitable Treatment
Final Award	This Final Award in ICSID Case No. ARB/06/18
First Decision	Decision on Jurisdiction and Liability issued on January 14, 2010 in this arbitration
Gala Radio	CJSC “Radiocompany Gala”
GFR	Goldmedia First Report
Goldmedia	Goldmedia GmbH
GSR	Goldmedia Supplementary Report
HT	Transcript of the hearing on jurisdiction and merits that took place on December 8 to 12, 2008
HTRI	Transcript of the hearing on remaining issues that took place on July 12, 2010
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on March 18, 1965
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 9, 2000, when the National Council was not operative
IPO	Initial Public Offering
July 18, 1995, Letter	July 18, 1995, letter signed by Mr. Petrenko and addressed to the State Committee
Kantor	Mark Kantor: “Valuation for Arbitration”, 2008
LG&E	<i>LG & E Energy Corp., LG & E Capital Corp. and LG&E International, Inc. v. Argentine Republic</i> , (ICSID Case No. ARB/02/01), Award of July 25, 2007.
LNC	Law of Ukraine on National Television and Radio Council of Ukraine last amended in 2006.
LTR	Ukrainian Law on Television and Radio Broadcasting last amended in 2006
<i>Lusitania</i> Cases	More than 50 cases decided by the Mixed Claims Commission (United States-Germany), included in Volume VII of the November 1, 1923 to 1930, Reports of International Arbitral Awards prepared by the UN.
M	Million
Marboe	Irmgard Marboe: “Calculation of Compensation and Damages in International Investment Law”, 2009

McLachlan / Shore / Weiniger	Campbell McLachlan/Laurence Shore/Matthew Weiniger: “International Investment Arbitration: Substantive Principles”, 2007
Mirakom	CJSC “Mirakom Ukraina”
Mr. Lemire	Mr. Joseph Charles Lemire
MTD	<i>MTD Equity Sdn. Bhd. and MTH Chile S.A v. Republic of Chile</i> (ICSID Case No. ARB/01/7), Award of May 25, 2004
NACVA	United States National Association of Certified Valuation Analysts
National Council	Ukrainian National Council for Television and Radio Broadcasting
PCIJ	Permanent Court of International Justice
PSEG	<i>PSEG Global Inc. Et al. v. Republic of Turkey</i> (ICSID Case No. ARB/02/5), Award of January 19, 2007
PHB	Post-Hearing Brief
Radio Academy	Odessa Legal Academy
Request	Claimant’s request for arbitration against Respondent dated September 6, 2006
Respondent	Ukraine
RMRI	Respondent’s Counter-Memorial on Remaining Issues
ROI	Return on investment
Rumeli	<i>Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v., Republic of Kazakhstan</i> (ICSID Case No. ARB/05/16), Award of July 29, 2008
Scenario I	Base scenario calculated by Goldmedia representing the value of Gala Radio as it operates today
Sempra	<i>Sempra Energy International v. Argentine Republic</i> (ICSID Case No. ARB/02/16), Award of September 28, 2007
Separate Opinion	Dr. Jürgen Voss’ separate dissenting opinion appended to the Final Award
Settlement Agreement	Agreement dated March 20, 2000 between Claimant and Respondent on the settlement of a dispute, which was recorded as an award on agreed terms on September 18, 2000 (ICSID No. ARB (AF)98/1)
Siag	<i>Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt</i> , (ICSID Case No. Arb/05/15), Award of June 1, 2009
Treaty	Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment, done in Kyiv on October 17, 1996, which entered into force on November 16, 1996
Tudor	Ioana Tudor: “The Fair and Equitable Treatment Standard in International Law of Foreign Investment”, 2008

UAH	Ukrainian Hryvnia
UMH	Ukrainian Media Holding
UNIDROIT Principles	Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law
US	United States
USD	United States Dollar
WS	Witness Statement

II. PROCEDURE

II.1. REGISTRATION OF THE REQUEST

1. Mr. Joseph Charles Lemire [“Mr. Lemire” or “Claimant”], a national of the United States, submitted his request for arbitration [the “Request”] against Ukraine [“Respondent”] to the International Centre for Settlement of Investment Disputes [“ICSID” or the “Centre”] on September 11, 2006. The next day, the Centre acknowledged receipt of the Request and transmitted copies thereof to Ukraine and its Embassy in Washington, D.C.
2. On December 8, 2006, the Centre registered the Request, as supplemented by Claimant’s submission of a letter dated November 14, 2006, and notified the parties of the registration, inviting them to constitute a tribunal.

II.2. CONSTITUTION OF THE TRIBUNAL

3. On February 8, 2007, 60 days after the registration of the Request, Claimant invoked Article 37(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on March 18, 1965, which entered into force on October 14, 1966 [“ICSID Convention”], and on February 22, 2007, appointed Mr. Jan Paulsson of France as arbitrator. On March 7, 2007, Respondent appointed Dr. Jürgen Voss of Germany as arbitrator. Each of them had also been similarly appointed in the ICSID Additional Facility case *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1).
4. After the passage of 90 days from the registration of the Request, Claimant invoked Article 38 of the ICSID Convention by letters of March 9, 2007 and March 20, 2007, requesting the Chairman of the ICSID Administrative Council to designate an arbitrator to be the President of the Tribunal. On June 6, 2007, the Chairman of the ICSID Administrative Council, in consultation with the parties, designated Professor Juan Fernández-Armesto of Spain as the presiding arbitrator.
5. On June 14, 2007, the Secretary-General of ICSID informed the parties that the Tribunal had been constituted and that the proceedings were deemed to have commenced on that day, pursuant to ICSID Arbitration Rule 6(1).

II.3. THE JURISDICTION AND LIABILITY PHASE

6. The Tribunal held its first session on July 23, 2007.

7. Following the procedural calendar agreed at the first session, Claimant filed his Memorial on the Merits on November 12, 2007. Respondent filed its Memorial on Jurisdiction on February 25, 2008 and Counter-Memorial on the Merits on February 26, 2008. Claimant filed observations on Respondent's Memorial on Jurisdiction on March 17, 2008.
8. The Tribunal decided on March 26, 2008 to join jurisdiction to the merits.
9. The document production phase took place between March 26, 2008 and August 28, 2008.
10. Claimant filed a request for provisional measures on August 15, 2008.
11. Claimant filed his Reply on the Merits on August 20, 2008.
12. On August 29, 2008, Respondent filed a proposal for the disqualification of Mr. Jan Paulsson as arbitrator, and the proceedings were suspended in accordance with ICSID Arbitration Rule 9(6). On September 2, 2008, Respondent filed observations on Claimant's request for provisional measures. On September 10, 2008, Claimant filed a response to Respondent's observations on Claimant's request for provisional measures.
13. On September 23, 2008, the other members of the Tribunal, Prof. Juan Fernández-Armesto and Dr. Jürgen Voss dismissed the proposal for disqualification of Mr. Paulsson. The suspension of the proceedings was lifted on the same day. On October 22, 2008, Claimant withdrew the request for provisional measures of August 15, 2008.
14. On November 6, 2008, Respondent filed its Rejoinder on the Merits.
15. On November 19, 2008, the President of the Tribunal held a pre-hearing conference by telephone with the parties, and on December 3, 2008 a further similar conference was held.
16. The hearing on jurisdiction and the merits took place on December 8 through 12, 2008.
17. The parties filed simultaneous post-hearing briefs ["PHB"] on March 4, 2009 and simultaneous statements of costs on March 20, 2009.
18. The Tribunal rendered its Decision on Jurisdiction and Liability on January 14, 2010.

II.4. THE REMAINING ISSUES PHASE

19. On February 1, 2010, the Tribunal proposed to hold a consultation with the parties for the purposes of discussing the continuation of the procedure. By separate letters of February 11, 2010 from Claimant and February 12, 2010 from Respondent, the parties agreed to the Tribunal's proposal.

20. On March 1, 2010, the Tribunal held a telephone conference with the parties and, on March 4, 2010, issued Procedural Order No. 2, setting out the procedural calendar for the remainder of the proceeding.
21. On April 16, 2010, Claimant filed his Memorial on Remaining Issues ["CMRI"]. On June 21, 2010, Respondent filed its Counter-Memorial on Remaining Issues ["RMRI"]. Each contained submissions with regard to costs.
22. Following the Tribunal's direction in Procedural Order No. 2, Respondent submitted its document production request to Claimant on April 26, 2010, *i.e.* in the first 10 days of the allotted time period for the preparation of its Counter-Memorial. Claimant delivered the documents with comments on May 11, 2010, *i.e.*, within 15 days of the request.
23. On May 17, 2010, the deadline for the document production phase to be finalized, Respondent submitted observations on Claimant's production and reserved its rights to request the Tribunal's assistance in obtaining documents alleged missing in Claimant's production.
24. On July 2, 2010, the President of the Tribunal acting on behalf of the Tribunal held a pre-hearing conference by telephone with the parties to discuss procedural matters relevant to the hearing. Minutes of points covered and agreements reached were circulated to the parties on July 8, 2010.
25. On July 12, 2010, the Tribunal held a hearing on Remaining Issues at the World Bank offices in Paris. Attending the hearing were:

The Tribunal

Prof. Juan Fernández-Armesto, President of the Tribunal
Mr. Jan Paulsson
Dr. Jürgen Voss

The ICSID Secretariat

Ms. Aïssatou Diop, Secretary of the Tribunal

Participating on behalf of Claimant

Mr. Joseph Charles Lemire, Claimant
Mr. Sergey Denisenko, Technical Director of CJSC "Radiocompany Gala" ["Gala Radio"]
Mr. Hamid G. Gharavi, Derains & Gharavi
Mr. Stephan Adell, Derains & Gharavi
Ms. Nada Sader, Derains & Gharavi
Mr. André Wiegand, Goldmedia GmbH
Ms. Aurore Descombes, Intern, Derains & Gharavi
Ms. Ana Paula Montans, Intern, Derains & Gharavi

Participating on behalf of Respondent

Ms. Tetyana Aparina, Ministry of Justice of Ukraine

Mr. John S. Willems, White & Case LLP

Ms. Olga Mouraviova, White & Case LLP

Ms. Nathalie Makowski, White & Case LLP

Ms. Oksana Tsymbriivska, Magisters

Mr. David Bonifacio, Lalive

Mr. Ihor Kurus, former member of the Ukrainian National Council for Television and Radio Broadcasting [“National Council”]

Ms. Olena Volska, EBS LLC

Ms. Noor Davies, Intern, White & Case LLP

26. As regards the fundamental rules of procedure, at the end of the hearing on Remaining Issues, the Chairman of the Tribunal asked the parties whether they were aware of any breach of due process at that stage. Both parties declared that they had no objections to assert¹.
27. On July 23, 2010, the Secretary of the Tribunal circulated to the parties and Tribunal members an audio recording made of the entire hearing.
28. On August 6 and 9, 2010, Claimant and Respondent, respectively, filed their final submission on costs.

¹ Transcript of the Hearing on Remaining Issues that took place on July 12, 2010 [“HTRI”], p. 274.

III. THE FIRST DECISION

III.1 INTRODUCTION

29. Claimant originally submitted this dispute to ICSID invoking:
- the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, done in Kyiv on October 17, 1996, which entered into force on November 16, 1996 [the “BIT” or the “Treaty”]; Article VI of the BIT entitles any national of a State party to the BIT to submit to ICSID any dispute with the other State party to the BIT relating to either “*an investment agreement between that Party and such national*” or “*an alleged breach of any right conferred or created by this Treaty with respect to an investment*”; and
 - an agreement between Claimant and Respondent on the settlement of a dispute, dated March 20, 2000 [the “Settlement Agreement”], which was recorded as an award on agreed terms on September 18, 2000 (ICSID Case No. ARB (AF)98/1).
30. On January 14, 2010 the Arbitral Tribunal issued a “Decision on Jurisdiction and Liability” [the “First Decision”], in which the Tribunal:
- partially accepted Claimant’s First Allegation (“*The Violation of the FET Standard in the Awarding of Frequencies*”) and concluded that Respondent’s practice regarding the allocation of radio frequencies was not compatible with the Fair and Equitable Treatment [“FET”] standard defined in the BIT²;
 - analysed Claimant’s Second Allegation (“*The Continuous Harassment by Respondent and the Request for Moral Damages*”) and decided that the decision of whether the facts of the case constitute “*exceptional circumstances*”, which merit the awarding of moral damages, would be decided in this award [this “Award” or the “Final Award”]³; and
 - dismissed all other contentions of Claimant.
31. The relevant findings with respect to the First and Second Allegations were summarized in the First Decision:

First Allegation⁴

“419. As a starting point the Tribunal has studied the administrative procedure defined in Ukrainian Law for the issuance of radio frequencies. The conclusion reached by the Tribunal is that the

² First Decision, para. 451.

³ First Decision, para. 486.

⁴ Footnotes omitted.

procedure was marred by significant shortcomings (although these have been ameliorated after the 2006 amendment to the LTR). These weaknesses facilitated arbitrary or discriminatory decision-taking by the National Council.

420. In six years Gala Radio, although it tried insistently, and presented more than 200 applications for all types of frequencies, was only able to secure a single licence (in a small village in rural Ukraine). Gala's main competitors were much more successful and each received between 38 and 56 frequencies. Although this macro-statistical analysis does not provide conclusive evidence that Respondent, when awarding radio licences, has been violating the FET standard, there are factors (the strikingly different success rates of Gala and of its competitors, the inexistence of any information regarding the real owners of the competing stations, the impossibility of verifying the reasons why Gala was rejected) which can be construed as indications that at least some of the decisions of the National Council when it awarded frequencies were arbitrary and/or discriminatory.

421. To confirm or reject these indications, the Tribunal then looked in detail at five tenders for radio frequencies and at the administrative practice for awarding licences in the interregnum while the National Council was not operative between 1999 and 2000. The Tribunal came to the conclusion that the following decisions did not meet the FET standard provided for in the BIT:

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

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

Second Allegation

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

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

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

III.2. THE SEPARATE OPINION

32. The Arbitral Tribunal adopted its First Decision regarding jurisdiction and liability “*unanimously as regards Section I through VI, and by majority as regards some aspects and conclusions of Section VII*”. Section VII was devoted to “*Alleged Violations of the BIT*”. During the deliberation phase of this Final Award Arbitrator Dr. Jürgen Voss [“Dr. Voss”] has seen fit to append a lengthy separate dissenting opinion [the “Separate Opinion”], identifying propositions and conclusions to which he could not assent both in the First Decision and in the present Award. He comes to the conclusion that the Tribunal has manifestly exceeded its powers and that there has been a serious departure from fundamental rules of procedure.

33. Since Dr. Voss’ detailed comments with regard to the First Decision did not emerge until the deliberation of this Final Award, the Arbitral Tribunal could not react to them in the First Decision. This Final Award will, consequently, start with a concise section, explaining why Dr. Voss’ opinion with regard to the First Decision has not persuaded the Tribunal to resile from the norms which it believes should guide its decision, nor from the conclusions derived from them. This section will cover (1) Claimant’s legal standing, (2) the definition of the FET Standard, (3) Claimant’s legitimate expectations and (4) Claimant’s record in tenders. Comments to Dr. Voss’ submissions regarding the present Award will be inserted as footnotes where appropriate in the text of this document.

1. Claimant's legal standing

34. Dr. Voss submits that “*without offering an explanation*” the First Decision disregards Gala’s and Mirakom’s⁵ legal personalities, piercing their corporate veils, and attributing Gala’s rights under Ukrainian legislation to Claimant in his capacity as a United States [“US”] investor in Ukraine⁶. In Dr. Voss’ opinion, the BIT does not extend its protection to shareholder derivative suits, and no established principle for piercing Gala’s veil applies to the case⁷. To the contrary: in Dr. Voss’ opinion, Gala’s corporate veil is imposed on Claimant by Ukrainian law (which limits the participation of foreigners in the radio industry to acting as shareholders) and under the reservation made by Ukraine in Section 3 of the Annex to the BIT⁸. He submits that Claimant cannot on the one hand hide behind Gala’s corporate personality for purposes of the Ukrainian sector legislation, while simultaneously on the other hand portraying himself as Gala’s *alter ego* in order to invoke the BIT⁹.
35. The Separate Opinion concludes that all of Claimant’s claims should have been dismissed *in limine*, because the Tribunal lacks jurisdiction *ratione materiae*¹⁰ to decide a shareholder’s derivative suit, and that the First Decision and the Award exceeded the Tribunal’s powers¹¹.
36. Dr. Voss’ point was conceived by him alone; it was never pleaded by Respondent.
37. Respondent did present and argue a number of jurisdictional objections. On February 25, 2008, it submitted a Memorial in Support of its Objections to Jurisdiction, which included six separate objections. These arguments were further developed in Respondent’s Rejoinder¹² and analysed and decided in the First Decision. The argument that shareholder derivative suits are inadmissible under the BIT was not among them.
38. If, on the basis of a jurisdictional objection never articulated by Respondent nor therefore answered by Claimant, the Tribunal had dismissed the arbitration, it would indeed have seriously departed from fundamental rules of procedure.

⁵ CJSC “Mirakom Ukraina”.

⁶ Separate Opinion, para. 63.

⁷ Separate Opinion, paras. 64 to 78.

⁸ Section 4 of the Annex to the BIT: “3. *Ukraine reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:*

Production of equipment used exclusively for nuclear power plants; maritime transportation including ocean and coastal shipping; air transportation; nuclear electric energy generation; privatization of those educational, sports, medical and scientific facilities financed by the national budget; mining of salt; mining and processing of rare earth, and of uranium and other radioactive elements; ownership and operation of television and radio broadcasting stations; and ownership of land.”

⁹ Separate Opinion, para. 93.

¹⁰ *Sic.*

¹¹ Separate Opinion, paras. 103 to 105.

¹² Paras. 146 to 256.

39. Inadmissible as a matter of procedure, Dr. Voss' argument is also flawed in substance. Article I.1(a) of the BIT protects “*every kind of investment in the territory of one Party, owned or controlled directly or indirectly by nationals or companies of the other Party*”¹³. Indirect investments, as the one held by Claimant, are included within the scope of protection of the BIT.

¹³ Emphasis added.

2. The Definition of the FET Standard

40. The Separate Opinion submits¹⁴ that the circumstances of the case, and specifically the fact that frequencies are awarded through public tenders, require that a specially restrictive interpretation of the FET Standard be applied, and that a violation would only exist if:
- Claimant is directly affected in his rights as foreign investor;
 - Gala's treatment is linked to Claimant's capacity as a foreign investor;
 - Gala's treatment is captured by an established category of the FET Standard, notably, denial of justice;
 - the treatment amounts to denial of justice or is so egregious as to amount to a breach of the minimum standard of customary international law.
41. The Tribunal has already explained in its First Decision¹⁵ the general scope and proper interpretation of the FET standard as defined in the BIT. It has addressed all arguments submitted by the parties and sees no reason to amend its opinion or expand its reasoning. The Separate Opinion, however, submits certain new arguments, which were never pleaded in the case, and the Tribunal, consequently, never had the opportunity of expressing its opinion; it will do so, as concisely as feasible, in the following paragraphs.
42. Before doing so, the Tribunal has to dispel a misconception that appears repeatedly in Dr. Voss' Separate Opinion¹⁶. Dr. Voss states that the FET standard "*cannot be interpreted as an "umbrella clause" ipso iure elevating violations of tender rules to international delicts*". He seems to imply that the Tribunal is in disagreement with this principle. In fact, the Tribunal agrees. Dr. Voss adds that the FET standard cannot be construed as "*an empowerment of tribunals ex aequo et bono to develop a case law superseding host countries' administrative laws*"¹⁷. The Tribunal concurs.
43. But neither the First Decision nor this Award have ever stated that violations of tender rules *ipso iure* amount to international wrongs, nor has the Tribunal ever assumed that it enjoys *ex aequo et bono* powers to disregard Ukrainian administrative law. Quite the contrary. As the First Decision stated, "*not every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET Standard*"¹⁸. For this to happen, it is necessary that the State incurs in "*a blatant disregard of applicable tender rules, distorting fair competition among tender participants*"¹⁹. And this is what has occurred: the First Decision found that on

¹⁴ Separate Opinion, para. 148.

¹⁵ First Decision, para. 243 *et seq.*

¹⁶ Separate Opinion, para. 128.

¹⁷ Separate Opinion, para. 449.

¹⁸ First Decision, para. 385.

¹⁹ First Decision, para. 385.

four occasions (three tenders plus an administrative practice) Ukraine indeed acted in “*blatant disregard of applicable tender rules*”²⁰.

2.1. The Annex to the BIT and its Importance for Interpreting the FET Standard

44. The main argument with which Dr. Voss supports his restrictive interpretation of the FET standard is by advocating an extensive application of the exception contained in the Annex to the BIT²¹. This exception reads as follows:

“3. Ukraine reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

Production of equipment used exclusively for nuclear power plants; maritime transportation including ocean and coastal shipping; air transportation; nuclear electric energy generation; privatization of those educational, sports, medical and scientific facilities financed by the national budget; mining of salt; mining and processing of rare earth, and of uranium and other radioactive elements; ownership and operation of television and radio broadcasting stations; and ownership of land”²².

45. In the Tribunal’s opinion, Dr. Voss’ argument lacks merit, (A) because the scope of the exception is limited to the national treatment principle, and (B) because application of the exception requires prior notification, and there is no evidence that such requirement has been complied with.

A. The Scope of the Exception

46. In the Annex to the BIT, both the US and Ukraine reserved the right “*to make or maintain limited exceptions to national treatment*”²³ in the “*ownership and operation of radio stations*”. The literality of the Treaty does not leave room for doubt: the parties can make or maintain exceptions, but the scope of these limitations must be restricted to the principle of national treatment. This conclusion is confirmed by the definition of national treatment contained in Article II.1:

“Each Party shall permit and treat investment and activities associated therewith, on a basis no less favourable than that accorded in like situations to investment or associated activities of its own nationals or companies ... subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex of the Treaty”²⁴.

²⁰ See para. 31 *supra*.

²¹ Separate Opinion, para. 137.

²² Emphasis added.

²³ Emphasis added.

²⁴ Emphasis added.

Article II.1 is thus structured as a general principle, subject to an exception (for investment in listed sectors and matters). It strengthens the literal interpretation of the Annex: the exception is linked to the national treatment principle.

47. Moreover: only Article II.1 (the rule defining national treatment) includes a reference to the exception for investments in protected sectors or matters. Article II.3 (which defines the FET standard) lacks any similar reference. The difference in the drafting of both sections of Article II reinforces once more the literal interpretation of the Annex: the exception can only be applied in the context of national treatment – not with regard to FET. And since the Tribunal’s findings in the First Decision are based on a violation of the FET standard, the exception contained in the Annex to the BIT is irrelevant.

B. Procedural Requirements

48. There is an autonomous reason why the exception contained in the Annex can have no impact in this case: a State’s right to make or maintain exceptions to the national treatment in protected sectors is not unlimited, but subject to specific notification requirements; Art. II.1. provides:

“Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception ... and to limit such exceptions to a minimum”.

49. Previous notification of limiting laws and regulations is not simply a formality: it is a fundamental requirement in order to guarantee that investors enjoy legal certainty, and that States cannot invoke the exception *ex post facto*, surprising the investor’s good faith.
50. Has Ukraine notified the US of any laws or regulations concerning the radio sector? Respondent has never argued the existence of such notification, and there is no evidence in the file showing that it has taken place. Consequently, it is legitimate to proceed on the basis that no such notification took place.
51. Non-compliance with the procedural safeguards included in the BIT is a final factor reinforcing the conclusion that the exceptions mentioned in the Annex have no bearing whatsoever for the resolution of the present dispute.

2.2. The Alleged Privilege Enjoyed by Protected Foreign Contenders

52. Dr. Voss submits that equal treatment between participants is pivotal to the fairness and effectiveness of a tender process²⁵.
53. The Tribunal agrees.

²⁵ Separate Opinion, para. 117.

54. But Dr. Voss goes on to reason that where protected foreign investors compete in tender proceedings with domestic investors and with other foreign investors without BIT protection, they enjoy a privilege. In Dr. Voss' opinion, BIT protection thus undermines the integrity of the tender process²⁶.
55. Here, the Tribunal disagrees.
56. When agreeing to BITs, States confer rights to foreign investors, which are unavailable to their own citizens. Most jurisdictions deny local investors, who have suffered unfair or inequitable treatment at the hands of their own authorities, a specific cause of action. Municipal law typically restricts remedies to the annulment of administrative acts, to the declaration, under limited circumstances, of the public administration's tort liability or to the right to compensation in certain cases of expropriation.
57. Foreign investors covered by a BIT enjoy an additional level of protection: they can avail themselves of the same instruments open to local investors, and additionally they can draw protection from the international law rights conferred by the treaty. The different treatment between foreign and domestic investors is a natural consequence of a BIT. However, this unequal treatment is not without justification: justice is not to grant everyone the same, but *suum cuique tribuere*. Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection.
58. The facts proven in the present case are a good example of the role played by BITs.

Role of the BIT

59. When in the 1990s Mr. Lemire proposed to invest in Ukraine in a then unexplored sector – that of commercial radio, traditionally dominated by State owned stations – he was received with open arms and authorised to buy a local radio station. Claimant quickly developed his venture and became one of the leading broadcasters in the Kyiv area. But then local, better connected groups became aware of the opportunities. Gala's main competitors, controlled by powerful Ukrainian investors, were each able to obtain from the National Council between 38 and 56 additional frequencies, while Gala, although it tried incessantly, and presented more than 200 applications, was only able to secure a single licence (in a small village in rural Ukraine).
60. Radio channels can be divided into two basic categories: those which fundamentally broadcast music and those which fundamentally broadcast information. The first are of limited political relevance. Informational channels, however, are politically more sensitive, because they are important elements for the formation of public opinion²⁷.

²⁶ Separate Opinion, para. 120.

²⁷ First Decision, para. 332.

61. Gala Radio was and is predominantly a music broadcaster, although it also broadcasts news. On at least two occasions, Gala tried to obtain the necessary authorisations to create a second channel, devoted to informational broadcasting. The first was the AM tender of May 26, 2004, and the second a specific tender for 15 FM frequencies reserved for informational radio held on October 19, 2005²⁸. Both tenders had a high political importance: the AM tender, because it covered the entire Ukrainian territory; the FM tender, because it would allow the winner to create a nationwide information radio channel. On both occasions, Gala's bid was rejected, and the frequencies concerned awarded to close political friends of President Viktor Yuschenko. In the case of the AM frequency, this happened after declaring the first tender void and retendering the frequency. In the case of the FM frequency, Claimant was able to trace and submit in evidence a written "Instruction", signed by the President of Ukraine himself and directed to the National Council, expressing his expectations that the frequencies be awarded to Radio Era, a company controlled by Deputy Derkach, a close political ally²⁹.
62. The President of Ukraine interfered in this administrative procedure, not once, but twice: first by sending an "Instruction" to the National Council, indicating the recipients of the frequencies, and then by having one member of his staff follow up on the Instruction and enquire about the results. The interference must be deemed wilful, because the President knew – or should have known – that the National Council was an independent agency, under a legal obligation to decide tenders impartially, in accordance with the process and criteria prescribed by the law, and that his interference was subverting that legal order³⁰.
63. The significance of the President's interference is magnified by the powers which he held at that time. The members of the National Council could at any time be removed from office by a decision of the President or of the Parliament³¹. There was an unspoken but evident threat in the messages from the President and his staff: if the licences were not awarded to the radio stations indicated by the President, the tenure of the National Council members was threatened. The National Council duly granted the licences to the radio channels indicated in the presidential Instruction.
64. The weaknesses in the Ukrainian legal procedure for the issuance of radio frequencies and the lack of transparency in the administrative procedures resulted in an arbitrary advantage to local investors with greater political clout. It is not true, as Dr. Voss assumes, that "*at most, Gala suffered a "reverse discrimination" alongside with several domestically-owned contenders in each instance*"³². Domestically owned radio companies eventually obtained the number of licences required to create nation-wide radio channels. Mr. Lemire, precisely because he was a foreigner and lacked the close political connections that the Ukrainian media groups had, was pushed aside and deprived of the opportunity to compete with local investors on a level playing field.

²⁸ First Decision, para 370.

²⁹ First Decision, para. 351.

³⁰ First Decision, para. 342.

³¹ First Decision, para. 290.

³² Separate Opinion, para 460.

65. Under these circumstances, application of the BIT has not resulted – contrary to Dr. Voss’ assertions – in any privilege in favour of Claimant. 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 who were able to use their preferential relationship with the public administration and the regulators to their own advantage. The effect of the application of the BIT is to redress a situation of discrimination – it does not create any privilege. To affirm the contrary, as the Separate Opinion does, is to confuse the victim with the offender.

Interpretation of the BIT

66. Dr. Voss adds that BIT protection in tender processes, since it could lead to an unjustified privilege in favour of foreign investors, should be construed narrowly³³. The Tribunal disagrees. There is nothing in the text of the BIT which supports this conclusion. The BIT must be construed, like any other treaty, in accordance with the principles set forth in the Vienna Convention.

³³ Separate Opinion, paras. 127 and 128.

3. Legitimate Expectations

3.1. Definition of Legitimate Expectations and of Gala's Business Expansion Plans

67. The Separate Opinion includes an extensive section criticising the conclusions established in the First Decision regarding Mr. Lemire's legitimate expectations and Gala's business expansion plans³⁴. In order to address this criticism, it is necessary, as a first step, to recapitulate how these matters were treated in the First Decision.

Legitimate Expectations

68. In the First Decision, the Tribunal referred to legitimate expectations in the course of its interpretation of Article II.3 of the BIT³⁵. In the Tribunal's reasoning, legitimate expectations play a subsidiary role as a normative criterion³⁶. The cornerstone of the Tribunal's findings was the law, and specifically the FET standard enshrined in Article II.3 of the BIT. It is worth remembering that legitimate expectations are nowhere mentioned in that article, nor anywhere else in the BIT.

69. Treaties must be interpreted in accordance with the Vienna Convention. Article 31.1 of this Convention provides that terms used in a treaty must be construed "*in their context*". For this purpose, the Tribunal resorted to the Preamble of the BIT, which establishes "*that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment...*" and concluded that the FET standard was closely tied to the notion of legitimate expectations. The Tribunal then went on to analyse what gives rise to investors' legitimate expectations, and came to the conclusion that these expectations can be defined on a general and on a specific level:

- On a general level, the Tribunal found that Claimant was entitled to expect that the Ukrainian regulatory system for the broadcasting industry would be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions³⁷;
- More particularly, Mr. Lemire had the legitimate expectation that Gala, which at the time was only a local station in Kyiv, would be allowed to expand on its own merits, in parallel with the growth of the private radio industry in Ukraine³⁸.

³⁴ Separate Opinion paras. 8 to 60.

³⁵ First Decision, para. 264.

³⁶ First Decision, para. 257.

³⁷ First Decision, para. 267.

³⁸ First Decision, para. 268.

70. These legitimate expectations were not based on an individual negotiation between Mr. Lemire and the Ukrainian State; they represent the common level of legal comfort which any protected foreign investor in the radio sector could expect.

Gala's Business Expansion Plans

71. The First Decision then went on to analyse the related matter of Mr. Lemire's initial business plans. This was much discussed by the parties, because Claimant was not able to produce a formal business plan. From circumstantial evidence, the Tribunal concluded that his initial plans had been to convert Gala into a national broadcaster and to create a second AM channel, and that the Ukrainian authorities were informed of his plans³⁹.
72. Legitimate expectations and Gala's initial business plans are thus separate concepts:
- one concept is constituted by Mr. Lemire's expectations regarding the protection afforded by the Ukrainian regulatory system and the possibility of expanding Gala on its own merits and under the same terms and conditions as the private radio industry in Ukraine; these legitimate expectations are a criterion which the Tribunal used to construe the meaning of Article II.3 of the BIT;
 - a separate concept are the actual business plans which Claimant had at the time when he made his initial investment, *i.e.* whether he envisaged to create a local or a nationwide radio channel, whether his plans also included the incorporation of additional channels, and whether the authorities were aware of these projects; this issue is relevant for the calculation of the damage suffered by Claimant because it defines Gala's "but for" scenario⁴⁰, but it has no direct bearing on Mr. Lemire's legitimate expectations.
73. The Separate Opinion disagrees with the Tribunal's findings, because (3.2.) Dr. Voss rejects the Tribunal's assessment of evidence, and (3.3.) because he submits that the initial business plans were affected by the Settlement Agreement.

3.2. Assessment of Evidence Regarding Gala's Planned Expansion

74. Dr. Voss disagrees with the Tribunal's assessment of evidence regarding Gala's business expansion plans⁴¹, because he attaches more weight to Mr. Petrenko's witness statement, and less to that of Mr. Lemire's, and because he induces certain consequences from a particular reading of two administrative letters⁴².
75. The Tribunal will not engage in a detailed analysis or evaluation of Dr. Voss' assessment of the evidence. But a few remarks are needed.

³⁹ First Decision, para. 270.

⁴⁰ See para. 253 *infra*.

⁴¹ Separate Opinion, para. 46.

⁴² Separate Opinion, paras. 47 to 50.

76. Mr. Lemire affirmed in his witness statement that his initial plan, when he entered into the radio industry, was to have two national FM broadcasters, with distinct music programming targeted at different age ranges, and a talk radio. According to Mr. Lemire, these plans were included in a business plan which he submitted to Respondent⁴³. Mr. Lemire went on to explain that, in his meetings with Mr. Petrenko (the Chairman of the National Council) he was advised to buy an existing radio company in Kyiv – that became Gala Radio – and was assured that it would be allowed to expand and create the envisaged additional networks. Mr. Lemire explained that he asked Mr. Petrenko to give him some written assurance. Mr. Lemire alleged that the July 18, 1995, letter signed by Mr. Petrenko and addressed to the State Committee [the “July 18, 1995, Letter”]⁴⁴ is written proof of such assurances⁴⁵.
77. Mr. Petrenko, on the other hand, confirmed that he met with Mr. Lemire two or three times during this period, but otherwise rejects having ever made any promises or assurances as regards the expansion of Gala Radio. Mr. Petrenko explains that the only purpose of the July 18, 1995, Letter was to check with the State Committee on the availability of certain frequencies⁴⁶. And that the October 18, 1995, response from the State Committee⁴⁷ does no more than confirm such availability⁴⁸.
78. In fact, the July 18, 1995, Letter was signed by Mr. Petrenko as the Chairman of the National Council and addressed to the Chairman of the State Inspection on Electronic Communications. Chairman Petrenko indicates in his letter that the National Council is considering the possibility to issue a licence to Gala Radio and expressly asks the State Inspection to “*consider the possibility to give the company stated above [i.e. Gala Radio] the frequency channels for establishing radio broadcasting service according to their license application in the following cities ...*”. The letter then mentions 12 cities for the FM band and Kyiv for the AM band, and defines the power allocation for each station. Claimant has argued that the frequencies and power mentioned in this letter would allow for national coverage⁴⁹. Respondent has not denied it. The Arbitral Tribunal views this letter as clear proof that Mr. Lemire planned to build a FM national broadcaster and an AM channel, and that Respondent was aware of it. Since Claimant has not been able to produce his business plan⁵⁰, there is not sufficient evidence, apart from Mr. Lemire’s statement, that his plans also included a second FM network, and that Respondent was aware of it.
79. Dr. Voss has argued that the answer from the State Committee does not mention the AM channel, and that this is evidence against the inclusion of the AM channel among the initial investment plans of Claimant⁵¹. It is true that the October 18,

⁴³ Hearing Transcript of the hearing on jurisdiction and merits that took place on December 8 to 12, 2008 [“HT”], Day 1, pp. 121 and 122.

⁴⁴ Doc. CM-1.

⁴⁵ Witness Statement [“WS”] of Mr. Lemire, para. 17.

⁴⁶ WS (Rebuttal) of Mr. Petrenko, paras. 25 *et seq.*

⁴⁷ Doc. CM-2.

⁴⁸ WS (Rebuttal) of Mr. Petrenko, paras. 30 *et seq.*

⁴⁹ Claimant’s PHB, para. 57.12.

⁵⁰ HT, Day 1, pp. 122 and 128.

⁵¹ Separate Opinion, para. 48.

1995 letter from the State Committee does “*recommend*” high powered FM frequencies for 11 of the 12 cities applied for by Claimant, but that it does not mention any AM channel. There is no evidence in the file to clarify the State Committee’s position with regard to the availability of an AM frequency. But even if *arguendo* the Tribunal accepted that the AM frequency was not available, that fact would not change the Tribunal’s conviction that Mr. Lemire’s initial business plan included the creation of an AM band and that Respondent was aware of it, and that its initial reaction was positive – it would just show that while the FM frequencies were immediately available, it is uncertain whether AM frequencies were available at that moment.

80. Summing up, after having heard the oral evidence of both Mr. Lemire and of Mr. Petrenko and carefully weighed the documentary evidence, the Tribunal came to the conclusion that Mr. Lemire’s initial plans when he bought into Gala Radio in June 1995 were to create an FM national broadcaster, for music format, plus a second AM channel, for talk radio⁵².

3.3. Effect of the Settlement Agreement on Gala’s Initial Business Plans

81. Dr. Voss opines that the Tribunal by building its Award on Claimant’s business expansion plans, without considering the impact of the Settlement Agreement, fails to recognize the *res iudicata* effect of the ICSID award which formalizes the Settlement Agreement and manifestly exceeds its powers⁵³. Towards the end of the Separate Opinion Dr. Voss reprises the same issue, but on this occasion, the reasoning provided is of a contractual nature: in his opinion, the Settlement Agreement constitutes a waiver of any claims on account of the allocation of frequencies before the Settlement Agreement, and precludes consideration of all prior correspondence, negotiations and understandings⁵⁴.
82. The Arbitral Tribunal disagrees with both of Dr. Voss’ formulations.
83. As a first step, it is important to briefly recall what the Tribunal has actually decided. In the First Decision, the Tribunal came to the conclusion that three tenders for the allocation of licences and the administrative practice followed by Ukraine during the Interregnum (which lasted from March 16, 1999, through June 9, 2000, and then led to a regularization of the frequencies irregularly awarded on January 1, 2001) did not meet the FET standard provided for in the BIT⁵⁵. And in this Award, the Tribunal will establish the appropriate compensation, by comparing Gala’s “as is” value (*i.e.* what Gala is now worth), with Gala’s “but for” value (*i.e.* what Gala would be worth, if no violation of the BIT had taken

⁵² The discussion of whether Mr. Lemire’s initial plans were limited to creating a single national broadcaster (as Dr. Voss asserts), or also included a second AM channel (as the Tribunal concluded), is in any event irrelevant for the purpose of calculating the amount of compensation due to Claimant: the Tribunal will establish Claimant’s damages assuming the so called Scenario II, which foresees Gala Radio simply as a national broadcaster, without an AM channel. Whether Mr. Lemire planned or did not plan the AM channel, and whether the authorities knew or ignored it, therefore has no impact whatsoever on the quantum of damages.

⁵³ Separate Opinion, para. 39.

⁵⁴ Separate Opinion, para. 502.

⁵⁵ First Decision, para. 421.

place)⁵⁶. In order to establish the “but for” value, the Tribunal will assume that Gala would have become a national broadcaster and would have created a second AM channel, as Mr. Lemire foresaw when in 1995 he prepared his initial business plans⁵⁷.

84. Against this background, Dr. Voss’ first formulation – that the Tribunal is violating the *res iudicata* effect of the September 18, 2000, ICSID award which formalized the Settlement Agreement – is difficult to follow. The Tribunal will therefore focus on Dr. Voss’ second formulation, namely that the Settlement Agreement (i) constitutes a waiver of pre-existing claims regarding the allocation of frequencies, and (ii) precludes consideration of all prior correspondence, negotiations and understandings.

The scope of the Settlement Agreement

85. The purpose of the Settlement Agreement was to finally settle all claims which Claimant had filed in an ICSID Additional facility Arbitration against Ukraine⁵⁸. Claimant agreed to waive these claims, and as a *quid pro quo* Ukraine agreed to appoint a commission of experts for the examination of the quality of Gala’s broadcasting (taking corrective action if necessary), and to use its best efforts to consider in a positive way certain applications for radio frequencies submitted by Gala⁵⁹.
86. The scope of the claims being settled was defined in Clause 10 of the Settlement Agreement, which states as follows:

“The Parties agree and confirm that all the claims, counterclaims, complaints and requests contained in the Consent to Arbitrate, Notice for 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 finally settled”.

87. Clause 10 of the Settlement Agreement thus provides that all claims, complaints and requests were being settled, subject to one condition: claims must have been referred to in the submissions made during the arbitration or in pre-existing letters and correspondence. 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 pre-existing documents, letters or correspondence.
88. Can any of the claims awarded in the First Decision coincide with the claims affected by the Settlement? The claims accepted by the First Decision consist in the declaration that three tenders and the administrative practice during the Interregnum amounted to violations of the FET standard. Respondent has never

⁵⁶ See para. 253 *infra*.

⁵⁷ First Decision, para. 270 and para. 201 *infra*; the Tribunal will however not assign any specific value to the AM channel, due to its speculative nature.

⁵⁸ Clause 10.

⁵⁹ Clause 13 (a) and (b).

alleged that any of these claims was mentioned in documents, letters or correspondence predating March 20, 2000. In fact, it is impossible that these claims could by that date have been mentioned in any type of documents, letters or correspondence, because they materialized after that date. Thus it is factually impossible that Claimant's claims awarded in this arbitration could be affected by clause 10 of the Settlement Agreement.

89. Dr. Voss submits a second line of argument: in his opinion, the Tribunal falls foul of clause 10 of the Settlement Agreement, because when it analysed the available evidence regarding Mr. Lemire's initial business plans, it took into consideration not only the Witness Statements of the relevant witnesses, but also an 1995 exchange of letters between Mr. Lemire and the Ukrainian authorities.
90. Dr. Voss is mistaking claims with facts. Settlement agreements can extinguish all existing claims between the parties in relation to the matters which are being settled. This is what clause 10 of the Settlement Agreement purports to achieve (subject to the additional requirement that claims must have been mentioned in existing written documents). But what settlement agreements in general, and clause 10 of the Settlement Agreement in particular, simply cannot accomplish is to extinguish past factual occurrences. It is a fact – proven in the First Decision – that in 1995 Mr. Lemire developed certain expansion plans for Gala. And when the Tribunal in this Award establishes the compensation owed to Claimant, and for this purpose has to determine Gala's "but for" value, the Tribunal can and must take into account, as a fact, Mr. Lemire's historic plans. Without doing so, the Tribunal would be unable to develop, with a minimum of certainty, the "but for" value of Gala.
91. The above conclusions are reinforced by clause 27 of the Settlement Agreement, which provides that the Agreement "*supersedes all prior correspondence, negotiations and understandings between the parties with respect to the matters covered herein*". The purpose of this standard clause is that the final Settlement Agreement replace all prior understandings between the parties "*with respect to the matters covered herein*", *i.e.* with regard to the claims being settled and the obligations being assumed. It does not preclude the possibility that this Tribunal, in order to calculate the compensation in a subsequent arbitration, in which different claims are being discussed, takes into account facts which occurred prior to the execution of the Settlement Agreement.

4. Claimant’s Record in Tender Decisions

4.1. Introduction

92. Dr. Voss starts his analysis of Claimant’s record in tender decisions, with the statement that this record is not directly relevant to the Award. He adds: “[t]he latter is based *solely*⁶⁰ on the Interregnum from March 1999 through June 2000 and, in particular, the assumption that Gala would have operated an FM network with nationwide coverage as of January 2001 had it not been denied the requisite frequencies by the ‘irregular practice’ during the Interregnum”⁶¹.
93. This statement does not reflect the truth. The Tribunal’s findings (summarized in paragraphs 420 and 421 of the First Decision⁶²) are that three irregular tenders and the irregular practice during the Interregnum amounted to a violation of the FET standard provided for in the BIT. The determination that, in addition to the Interregnum practice, three tenders – including the tender of October 19, 2005, in which the personal and direct interference of the President of Ukraine could be conclusively proven – were tainted by irregularities and gave rise to international wrongs, are fundamental factors for establishing Respondent’s liability.
94. A completely separate issue is that, for the purpose of calculating Claimant’s damages, the Tribunal will use a comparison between Gala’s “as is” value, and its “but for” value (*i.e.* its value if Mr. Lemire’s initial plan had not been thwarted by Ukraine’s irregular behaviour). For that purpose, the Tribunal will assume⁶³ that Gala had received during the Interregnum the licences necessary to create a national network. But this assumption does not imply that the irregularities committed by Ukraine in the three relevant tenders can be conveniently forgotten or minimized.

4.2. Alternative Explanation for Gala’s Dismal Success Record

95. The Separate Opinion submits that Respondent has offered a reasonable, even plausible explanation for Gala’s dismal success record in its applications for additional frequencies: the perception on the part of the National Council members that the Ukrainian market was already saturated with Gala’s type of music, and that Gala lacked sufficient resources⁶⁴.
96. The problem with Dr. Voss’ assumption is that the National Council never published the reasons for its decision to award or deny licences – and this represents, as the First Decision found, a “*significant weakness in the*

⁶⁰ Emphasis in the original.

⁶¹ Separate Opinion para. 164; the same idea is repeated in para. 229.

⁶² Copied in para. 31 *supra*.

⁶³ See para. 261

⁶⁴ Separate Opinion, paras. 169, 173 and 176.

*administrative procedure*⁶⁵. Consequently, there is no contemporary evidence in the file, in which the National Council explains the reasons for its repeated rejections of Claimant's applications. Dr. Voss bases his assumptions on a Witness Statement of a member of the National Council, presented in the second phase of this arbitration, *i.e.* after the issuance of the First Decision, and upon this evidentiary basis he sees fit to criticise the First Decision⁶⁶.

97. In fact, the Tribunal is of the opinion that the evidence presented in this arbitration proves the contrary to what is asserted in the Separate Opinion:
- it is undisputed that in the years 1997 - 1999 Gala Radio held the number 1 and number 2 positions among the broadcasting stations in Kyiv⁶⁷, that it was capable of attracting talent (including DJ Pascha, the alias of Mr. Pavel Shylko, who acted as the presenter in the Eurovision Festival held in Ukraine, and the Olympic gold medallist Mr. Viktor Petrenko⁶⁸), that it won prizes for the quality of its broadcasting⁶⁹ and that its news services were ranked in second place, immediately after those of Radio Era⁷⁰; on the basis of the evidence produced, the Tribunal is convinced that if Gala Radio had been awarded the appropriate licences, it had the necessary talent and know how to provide a successful radio service in different segments of the market;
 - Gala Radio has been financed by capital and loan injections made by its only shareholder, Mr. Lemire; broadcasting is not a capital intensive business; there is no reason to doubt that if the National Council had granted additional licences, Mr. Lemire would have been able to contribute the necessary funds for financing the additional investment (which Goldmedia, the expert designated by Claimant, has established would amount to 2,757,430 UAH, approximately 500,000 USD⁷¹).
98. Besides these general comments on the reasons underlying the National Council's decisions, the Separate Opinion includes a lengthy analysis of the administrative practice during the Interregnum. The Tribunal will only make a few remarks with regard to certain new issues, which the Separate Opinion has brought up for the first time.

4.3. Administrative Practice during the Interregnum

99. In the First Decision the Tribunal concluded that during the Interregnum (between March 16, 1999 and June 9, 2000), when the National Council was not operative, Respondent developed the practice of issuing licences for radio broadcasting directly, without publicity and without complying with the requirements or applying the procedures established in the law. The *de facto* situation was then

⁶⁵ First Decision, para. 309.

⁶⁶ Separate Opinion, para. 177, which refers to the third WS of Ihor Kurus, which was submitted in the second phase of this arbitration and which was not available to the Tribunal when it issued its First Decision.

⁶⁷ Doc. CM-131; HTRI, p. 65.

⁶⁸ Both appeared as witnesses in the first hearing of the arbitration.

⁶⁹ Doc. CM-89 with a list of Gala Radio's awards and prizes.

⁷⁰ According to the ratings produced by Sirex.

⁷¹ GSR, p. 52.

legalised through a tender held on January 1, 2001, in which Claimant was not authorised to participate, and which gave preferential treatment to the companies that had been illegally awarded licences during the Interregnum⁷².

100. The Separate Opinion makes a number of comments with regard to these conclusions.

A. *Ultra Petita and Audiatur et Altera Pars*

101. In first instance, the Separate Opinion affirms that Claimant only alleged the illegality of the Interregnum practice as a violation of the Settlement Agreement, but not as a violation of the BIT, and, based on this assertion, concludes that the First Decision violated the principle of *ne ultra petita*⁷³.

102. The Tribunal disagrees.

103. In his first Memorial, Claimant described Respondent's practice of granting licences in the time period which expands between the execution of the Settlement Agreement, on March 20, 2000, and the date when the last frequency provided for in Settlement Agreement was actually given to Gala (in October 2002). For this time period, which overlaps with the Interregnum, Claimant presented two specific claims:

- first, that Respondent's practice of systematic rejection of Gala's application constituted a violation of the Settlement Agreement⁷⁴; this claim was dismissed by the Tribunal in its First Decision;
- secondly, Claimant submitted that "*Respondent instead awarded the frequencies to other applications who were clearly less qualified than Gala. In doing so, Respondent breached the BIT, in particular the requirement that Gala be protected against unfair, inequitable, arbitrary and discriminatory treatment*"⁷⁵; the same allegation was repeated in para. 67.3 of Claimant's PHB⁷⁶ (submitted before the First Decision); 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, and Respondent had ample opportunity to counter these allegations.

104. Dr. Voss' assertion that "*Respondent had thus no opportunity to react*"⁷⁷ to the Tribunal's decision is groundless. Respondent did react, both before and after the First Decision⁷⁸.

⁷² First Decision, paras. 409 and 418.

⁷³ Separate Opinion, paras. 188 to 190.

⁷⁴ Claimant's Memorial, para. 85.

⁷⁵ Claimant's Memorial, para. 86. Dr. Voss, in para. 520 of his Separate Opinion, argues that this pleading relates to the period March 2000 to October 2002. The Tribunal disagrees; para. 85 of Claimant's Memorial defines the applicable time period as "*up until and well after the May 15, 2000 deadline*"; such time period covers the Interregnum, which lasted from March 1999 through June 2000.

⁷⁶ "*Respondent's practice of illegally awarding frequencies to companies other than Gala from the period immediately after the Settlement Agreement until well into 2001, as described in paragraph 57.2 above, constitutes a breach of the BIT provisions of fair and equitable treatment (Article II.3.(c))...*".

⁷⁷ Separate Opinion, para. 191.

B. Alleged Falsehood of the Tribunal's Key Assumption

105. In the First Decision the Tribunal dismissed Respondent's defence that the new licences issued during the Interregnum only affected frequencies which came up for renewal. Dr. Voss now submits that the Tribunal erred, because "*Respondent has thus produced documentary evidence that the majority's key assumption was false*"⁷⁹.
106. The Tribunal disagrees.
107. The First Decision rejected Respondent's argument that the Interregnum practice only extended to renewals, and it did so on three grounds⁸⁰:

"414. First of all, the renewal of licences under the LTR does not require a tender (Article 24.9). Extension is a "right" of the licence holder, and the National Council can reject the application for extension only in very limited circumstances (Article 33.7). Respondent's explanation of what happened seems a legal impossibility, and is at any rate entirely implausible.

415. Secondly, there is a letter sent on September 28, 1999 by S. Aksenenko, a member of the National Council, to the Vice Prime Minister of Ukraine 163, in which Mr. Aksenenko protests that other institutions of the executive branch are usurping the National Council's powers, taking advantage of the fact that it is not operative.

416. Finally, Mr. Lemire has presented the transcript of a meeting held on March 19, 2001 with Mr. Koholod, the then chairman of the National Council, who acknowledged that during the interregnum "some bad things [were] happening" and that the State Committee, and not the National Council, had been issuing the licences".

108. After the First Decision had been issued, Respondent submitted in its RMRI⁸¹ that Articles 24.9 and 33.7 of the Ukrainian Law on Television and Radio Broadcasting, last amended in 2006, ["LTR"], to which the Tribunal had referred⁸², in fact were not in force in year 2000, and that, at that time, the applicable provision was a previous version of Article 17 of the LTR. Respondent attached the text of this Article to his RMRI as Document RLA 108⁸³. Respondent also produced with its RMRI a third WS from Mr. Kurus, in which Mr. Kurus states that in the year 2000 renewals of licences had to be made through tenders,

⁷⁸ See Respondent's PHB (submitted before the First Decision), para. 388 analysing Mr. Aksenenko's letter (Doc. CM 11), which is an important piece of evidence regarding the Interregnum period (see para. 415 First Decision); see also RMRI, paras. 154 *et seq.*

⁷⁹ Separate Opinion para. 199.

⁸⁰ First Decision paras. 414 to 416; footnotes omitted.

⁸¹ Para. 174.

⁸² And which the Tribunal had taken from a translation of the LTR submitted by Claimant as CLA 3, which bears the title "*The Law of Ukraine in Television and Radio Broadcasting of December 21, 1993*".

⁸³ In the relevant passage. art. 17 states: "*To continue broadcasting the TV and radio company must repeatedly receive the license according to the procedure stipulated by this Law*"

and that of the frequencies irregularly awarded during the Interregnum, 25 corresponded to previously expired licences⁸⁴.

109. The Tribunal is prepared to accept, *ad arguendum*, that Respondent's submission and Mr. Kurus' WS are correct, and that 25 of the licences granted during the Interregnum corresponded to renewals upon expiration; but even if this hypothesis is accepted, taking into account that more than 80 frequencies were awarded, the Tribunal would see no reason to modify its conclusions regarding the irregularity of the administrative practice during the Interregnum⁸⁵.
110. There is overwhelming evidence – including the statements from Messrs. Aksenenko and Koholod referred to above – that during this period, while the National Council was not operative, the executive branch of Government acted wrongfully: it awarded significant numbers of radio licences directly, without transparency or publicity and without meeting the requirements of or following the procedures established in the LTR – a practice which in the opinion of the Tribunal and due to its blatant disregard of the law implies a violation of the FET standard established in Article II.3 of the BIT.

C. Licences Granted Under the Settlement Agreement

111. Dr. Voss finally presents a third argument, which is new and has never been advanced by Respondent: in his opinion,

“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”⁸⁶.

Since there is no doubt about the legality of the Settlement Agreement, the rationale for legality would apply *mutatis mutandis* to Ukraine's Interregnum practice⁸⁷.

112. The Tribunal disagrees. The facts do not support Dr. Voss' allegations.
113. On 29 December 1997 Mr. Lemire presented the notice to institute his first ICSID arbitration against Ukraine. At that time, Mr. Lemire alleged (*inter alia*) that he had suffered unfair, inequitable and discriminatory behaviour on the part of Ukraine in the awarding of frequencies. The procedure commenced, and two years later the parties eventually reached a Settlement Agreement, in which Claimant agreed to withdraw his claims and Respondent assumed certain obligations in order to redress Mr. Lemire's situation. The Settlement Agreement regulated the issuance of broadcasting licences in favour of Gala in subparagraphs II and III of Clause 13(b). In accordance with these provisions Ukraine undertook to “*assist [Claimant] for the positive consideration of this issue [the awarding of licences] by the National Council*”. This obligation was not absolute, but subject to important caveats, the most important of which was that the licences were to be

⁸⁴ Paras. 7 and 10. In the hearing, the number used by Respondent was 31 (see HTRI, pp. 48 and 49).

⁸⁵ See also paras. 187 to 188 *infra*.

⁸⁶ Separate Opinion, para. 207

⁸⁷ Separate Opinion, para. 211.

issued “*in accordance with the requirements of Ukrainian legislation*”. The National Council eventually recognised Gala’s priority position and granted to Gala all 11 broadcasting licences mentioned in Clause 13(b) – albeit with significant delays.

114. Dr. Voss now submits that if one accepts this treatment of Gala by the National Council for the purposes of giving effect to the Settlement Agreement, one must condone Ukraine’s practice during the Interregnum of *de facto* awarding frequencies and authorisations to broadcast without transparency or publicity and in disregard of Ukrainian legislation.
115. Dr. Voss here, too, confuses victim and offender.
116. Mr. Lemire had been denied frequencies. He had been forced to file an ICSID arbitration. His claims must have carried some weight: Respondent preferred to settle, and accepted to redress the injustice by agreeing to assist Gala in its future applications for 11 frequencies – without granting Gala any privileges “*which are different or additional to the ordinary rights and obligations of a foreign investor in Ukraine in accordance with the Ukrainian laws and international treaties to which Ukraine is a party*”. It seems a travesty to state – as Dr. Voss does – that this act of rebalancing of an unjust situation “*can in terms of propriety not be distinguished*”⁸⁸ from Ukraine’s practice during the Interregnum of arbitrarily granting frequencies and authorisations with total disregard of the Law.

⁸⁸ Separate Opinion, para. 208.

IV. LEGAL ANALYSIS

117. The Tribunal reserved two questions to be addressed in this Final Award: the first is “*the question of appropriate redress of the breach, including the quantification of damages*”, resulting from the First Allegation, *i.e.* the violation of the FET standard defined in the BIT; the second is whether the circumstances of the case, and the harassment which Claimant has allegedly suffered, merit the awarding of moral damages.
118. Each of the two questions identified in the preceding paragraph will be analysed in separate sections (IV.1 and IV.2) and additional sections will cover (IV.3) interest and (IV.4) costs.

IV.1 QUANTIFICATION OF DAMAGES FROM THE BREACH OF FET STANDARD

1. Claimant’s Case

119. On April 16, 2010 Claimant submitted his Memorial on Remaining Issues. His arguments and allegations were further developed during the hearing held on July 12, 2010, when his Counsel presented oral Opening and Closing Statements.

Mr. Lemire’s Investment in Gala Radio

120. Mr. Lemire is the shareholder, through Mirakom, of Gala Radio⁸⁹. Claimant considers that the loss suffered to the value of his investment corresponds entirely to the prejudice caused to Gala Radio by reason of Ukraine’s breaches of the BIT. He submits that he invested significant amounts of his own money in furthering the business of Gala Radio. These investments include⁹⁰:
- the letting of 10 apartments with 619 m² rent free to the company; this real estate belongs directly or indirectly to Mr. Lemire; the total rental value of these properties for the 1996 - 2010 period is alleged to be 1,310,341 United States Dollar [“USD”];
 - certain payments made by Claimant, on behalf of Gala Radio, either in fixed assets or in licence fees, amounting to 832,589 USD;
 - investments in the development of Gala Radio’s brand, amounting to 2,296,366 USD;
 - credit facilities granted to Gala Radio by an offshore company belonging to Mr. Lemire, and not reimbursed, for 277,915 USD;

⁸⁹ First Decision, paras. 36, 53 and 54.

⁹⁰ CMRI, para. 11.

- the value of the time Mr. Lemire has invested in support of the radio company, at a rate of 360,000 USD per year, amounting to, approximately, 5 millions [“M”] USD.

121. Claimant admits that the assets of Mr. Lemire and Gala Radio are commingled⁹¹, but submits that even Respondent has accepted between 900,000 USD and 1 M USD as an investment, and has challenged the rest based on technicalities⁹². In the radio industry, what matters is expertise and know-how more than resources. As an example, Claimant refers to the purchase by a company called Ukrainian Media Holding [“UMH”] of a 50% participation in Radio 5, a full network radio station, for 10 M USD. From this, Claimant infers that a full network has a value of approximately 20 M USD⁹³.

Structure of Claimant’s Calculation of Damages

122. Mr. Lemire’s calculation of damages is based on the comparison of a base scenario [“Scenario I”]⁹⁴, which represents the value of Gala Radio as it operates today, with four alternative hypothetical Scenarios, which represent under different assumptions what its present value would have been, if the violation of the FET standard had not occurred. Claimant submits that the difference between the actual (“as is”) and the hypothetical (“but for”) value of Gala Radio represents the damage caused by Respondent to Claimant⁹⁵.

123. Claimant underlines that the calculation of damages should place Claimant in the position he should have been in, had there not been a breach by Respondent. Since the outset, Mr. Lemire wanted to establish two full networks, and thereafter a third network, Energy. He applied and was defeated each time, and was prevented from creating the three networks because the tenders and procedures for awarding the frequencies breached the FET standard enshrined in the BIT⁹⁶. During the Interregnum or “blackout period”⁹⁷, during which the National Council was not functioning, Respondent awarded directly more than 80 frequencies⁹⁸; Claimant submits that with 14 of these frequencies Gala Radio could have covered the whole country; and with seven, two thirds of it⁹⁹. Thus Gala Radio could have become a national broadcaster. A second FM network could have been obtained by Gala Radio if Ukraine had not acted in breach of the BIT when awarding 12 frequencies to Kokhannya in 2006 and one frequency to Kiss in 2008¹⁰⁰. And the AM network could have been awarded in 2004, and been converted to FM in 2006, in the wake of the Radio Era tender¹⁰¹.

⁹¹ HTRI, p. 14.

⁹² HTRI, p. 14.

⁹³ HTRI, p. 14; see also Doc. CM-117 with press report about the transaction.

⁹⁴ The exact meaning of each scenario will be explained in paras. 256 to 259 *infra*.

⁹⁵ CMRI, para. 30.

⁹⁶ HTRI, p. 13.

⁹⁷ HTRI, p. 19.

⁹⁸ HTRI, p. 18.

⁹⁹ HTRI, pp. 23 and 24.

¹⁰⁰ HTRI, p. 24.

¹⁰¹ HTRI, p. 25.

124. Claimant has calculated the present value of the various Scenarios using the Discounted Cash Flow [“DCF”] methodology developed by its expert, Goldmedia GmbH [“Goldmedia”], who issued a report dated April 16, 2010, and testified during the hearing (in the person of Dr. André Wiegand). The conclusions of this calculation are the following¹⁰²:

- Scenario II: the total damage would amount to 30,469,000 USD;
- Scenario III: the total damage would amount to 40,402,000 USD;
- Scenario IV: the total damage would amount to 46,651,000 USD;
- Scenario IV A): the total damage would amount to 43,617,000 USD.

Causation

125. Claimant submits that causation has already been decided by the Tribunal in its First Decision, and that the Tribunal should not second-guess the outcome of the tenders or engage in an additional review of the procedures in order to establish whether Gala Radio would have won the frequencies¹⁰³.

¹⁰² CMRI, para. 53 *et seq.*

¹⁰³ HTRI, p. 28.

2. Respondent's Case

126. On June 21, 2010 Respondent submitted its RMRI, and then presented arguments and allegations during its Opening and Closing Statements at the Hearing.

The Financial Crisis and its Impact on Gala Radio

127. Respondent submits that the financial crisis hit the Ukrainian economy in the second half of 2008. A sharp decline ensued in industrial production, in new construction and in the GDP¹⁰⁴. The 2008 State budget had to be saved by an emergency loan of 16 billion USD from the International Monetary Fund¹⁰⁵. The media market in Ukraine could not avoid the effects of the crisis. Advertising revenues in the radio market declined by 26.4 % in 2009.
128. Gala Radio's financial results for 2008 and 2009 also suffered. Profit of 121,000 USD in 2007 became a loss of 264,000 USD in 2008 and a further loss of 81,000 USD in 2009. Revenues also decreased by about 50% from 2008 to 2009 and the EBITDA¹⁰⁶ turned negative¹⁰⁷.
129. Respondent further argues that Gala Radio's statutory financial report does not accurately reflect Gala Radio's performance. Its revenues and costs are understated. Most employees are paid unrealistically low wages. Respondent suspects that cash payments to employees are made with the purpose of avoiding corporate and payroll taxes¹⁰⁸.
130. Gala Radio is declining, because its format is no longer popular. In 2010 it did not appear in the rating of the top 10 radio stations, whether in Kyiv or, generally in Ukraine¹⁰⁹. This contrasts with the years 1997 - 1999, when its popularity increased to the number 1 position in Kyiv¹¹⁰. In Respondent's opinion, Gala Radio is a reasonably popular radio station, which has achieved average results, notably in Kyiv and, generally, in Ukraine. But it is not a leader, because it lacks a distinctive music format.
131. In sum, Respondent views Gala Radio as a business which has incurred losses for two years in a row, and has never generated more than 121,000 USD profits per year (Gala Radio's profit's having been 105,000 USD, 94,000 USD and 121,000 USD in 2005, 2006 and 2007, respectively¹¹¹). Respondent furthermore suspects that Gala Radio's financial records understate income and expenses.

¹⁰⁴ Gross domestic product.

¹⁰⁵ RMRI, para. 69.

¹⁰⁶ "Earnings Before Interest, Taxes, Depreciation and Amortisation".

¹⁰⁷ RMRI, para. 78.

¹⁰⁸ HTRI, p. 68.

¹⁰⁹ RMRI, para. 83, based on Doc. R 459: DAR Kyiv rating from February 15 to April 25, 2010, which show Gala Radio in place 14.

¹¹⁰ Doc. CM-131 and HTRI, p. 65.

¹¹¹ Respondent's Opening Statement (presentation for the Hearing on Remaining Issues), p. 24.

Claimant's Investment in Gala Radio

132. Respondent argues that the damages claimed are disproportionate to the capital invested, which over a 15-year period in fact amounted to less than 1 M USD¹¹². Respondent then analyses in detail the various categories of investment claimed by Mr. Lemire:
- *Real estate*: Respondent submits that Claimant has not shown that the apartments were actually used by Gala Radio, and not by Mr. Lemire personally; there are only three lease agreements between Gala Radio and the owners of the apartments, and the rent-free leases do not appear in the company's financial statements¹¹³;
 - *Fixed assets*: with regard to this category of assets, Respondent argues that Claimant has not specified whether the outlay was made by Claimant personally or by Gala Radio; in the first case, such payments would not represent an outlay or investment of Claimant himself; after reviewing the record of evidence, Respondent concludes that out of the 832,589 USD claimed by Mr. Lemire under this heading, only 352,439 USD correspond to real investments¹¹⁴;
 - *Brand support and marketing*: In Respondent's opinion, marketing costs are not classified as investments, but rather as expenses accounted for in the P & L account; there is no evidence that they were paid with Gala Radio's own funds, rather than contributed by Mr. Lemire¹¹⁵;
 - *Credit facilities*: Claimant has only provided supporting documentation for a single line of credit granted by a BVI¹¹⁶ company ("Gala Entertainment Ltd.") to Gala Radio in 2008 in the modest amount of 470,000 USD¹¹⁷;
 - *Mr. Lemire's time*: Respondent submits that Mr. Lemire's own time should not be included in the quantification of Claimant's investments; Mr. Lemire received compensation from Gala Radio – 36,000 USD per annum – and absent evidence to the contrary this sum must represent a fair payment for his time¹¹⁸.

Causation

133. Respondent argues that Claimant has decided to ignore the issue of causation altogether, simply hiding behind rhetoric. In any BIT arbitration, damages may only be awarded to the extent that there is sufficient causal link between the breach and the loss sustained by the investor. Claimant is not entitled to assume causation, but must prove it¹¹⁹.
134. Since Claimant did not even attempt to establish a causal link between breaches and alleged loss, the Tribunal should infer that:

¹¹² RMRI, para. 100.

¹¹³ RMRI, para. 105.

¹¹⁴ RMRI, para. 110.

¹¹⁵ RMRI, para. 114.

¹¹⁶ British Virgin Islands.

¹¹⁷ RMRI, para. 115.

¹¹⁸ RMRI, para. 119.

¹¹⁹ RMRI, paras. 131 to 135.

- Gala Radio would not have won frequencies in any of the tenders that were identified by the Tribunal in paragraph 421 of the First Decision;
- the breaches were not a proximate cause, let alone dominant cause of Claimant's loss, because there was an intervening cause for the damage alleged¹²⁰; and
- it is inherently speculative to find a causal link in any tender process which involves multiple qualified contestants and the application of both objective and subjective criteria.

For these reasons, the Tribunal should declare that the causal link is not established and Claimant is not entitled to compensation¹²¹.

135. Respondent further submits that Gala Radio would not have won the FM frequencies allocated in 1999 - 2000¹²², nor in the tender of January 1, 2001¹²³. As regards the AM frequency, Gala Radio would also have been unsuccessful, because the documents in the record confirm that Gala Radio's proposed programming concept for the AM frequency was the same as the general FM frequency¹²⁴. In any case, Gala Radio had no long-term interest in maintaining an AM network in Ukraine, as proven by Claimant's allegation that a year after obtaining a hypothetical AM frequency, he would have switched the AM talk radio into an FM frequency¹²⁵. Respondent also analyses the tender of Radio Era and comes to the conclusion that an informational channel of 15 frequencies would never have been allocated to a company with hits music entertainment experience like Gala Radio¹²⁶. Ukraine further submits that Gala Radio and Energy Media could not have won the Radio Kokhannya tenders of January 25, 2006 and March 30, 2006, because they never participated¹²⁷. Finally, Respondent alleges that even if Kiss FM had not participated in the tender of February 6, 2008, Gala Radio and Energy would not have won the frequencies, because their applications were not sufficiently convincing and other competitors were better positioned¹²⁸.

136. Summing up, Respondent submits that Gala Radio lost the tenders identified at para. 421 of the First Decision because of¹²⁹:

- a lack of a distinct programming;
- an absence of innovation;
- vague and confusing presentations before the National Council;
- under-capitalisation of its business and lack of financial capabilities;
- better qualified competitors.

¹²⁰ HTRI, p. 42.

¹²¹ RMRI, para. 153.

¹²² RMRI, para. 168.

¹²³ RMRI, para. 184.

¹²⁴ RMRI, para. 202.

¹²⁵ RMRI, para. 221.

¹²⁶ RMRI, para. 244.

¹²⁷ RMRI, para. 262.

¹²⁸ RMRI, para. 272.

¹²⁹ RMRI, para. 285 *et seq.*

137. Since the results of the tenders can be fully explained by causes independent of the BIT breaches, Claimant cannot establish the required proximity between the breaches and the loss, and should be awarded no damages¹³⁰.

Claimant's Assessment is Unreliable and Speculative

138. As a subsidiary argument, Respondent states that Claimant bears the burden of proving the *quantum* of the compensation. The amount of damages must be certain, unchallengeable and not resulting from speculative calculations¹³¹. The methodology of Goldmedia's report, on which Claimant relies, is fundamentally flawed and has led to inaccurate results:
139. (i) Respondent rejects Claimant's use of the enterprise value or fair market value under various Scenarios. In Ukraine's opinion the calculation should be performed under a lost profits analysis¹³². This correction alone, without changing Goldmedia's other assumptions, would provoke a sharp decrease in the amount of compensation (by more than 14 M USD in Scenario II)¹³³.
140. (ii) Although Goldmedia acknowledged that the Ukrainian radio advertising market was affected by the economic crisis in 2009, and that the overall decrease in media advertising revenues reached 22%, it did not apply this percentage, but only 9%, on the basis that first movers suffered a smaller reduction. In Respondent's view, this number is a sheer invention by Claimant's expert¹³⁴.
141. (iii) Respondent submits that Goldmedia's projections are unreliable; the expert had projected for 2008 and 2009 that Gala Radio's profits would amount to 715,000 USD, when in fact there has been a combined loss of 345,000 USD¹³⁵. In Ukraine's opinion, this and other similar discrepancies seriously undermine the credibility of Goldmedia's assessment of damages.
142. (iv) Furthermore, Goldmedia's analysis is permeated by errors, which include the use of incorrect discount rates, of incorrect starting dates, of incorrect data and of inflated revenues and understated costs¹³⁶, the inconsistent use of USD versus Ukrainian Hryvnia ["UAH"]¹³⁷ and excessive reliance upon a supposed "First Mover Advantage"¹³⁸.

EBS's Restatement of Goldmedia's Calculations

143. For illustration purposes, EBS Expertise Services ["EBS"] – Respondent's expert – has performed a calculation of Claimant's alleged damages on the basis

¹³⁰ HTRI, p. 42.

¹³¹ RMRI, para. 302.

¹³² HTRI, p. 78 to 79.

¹³³ RMRI, para. 348.

¹³⁴ RMRI, para. 350.

¹³⁵ RMRI, para. 338.

¹³⁶ RMRI, para. 361.

¹³⁷ RMRI, para. 367.

¹³⁸ RMRI, para. 373.

of Goldmedia's basic damage theory, but with the adjustments discussed above. As a consequence, Claimant's restated damages would be the following¹³⁹:

- Scenario II: 190,490 USD;
- Scenario III: 178,780 USD;
- Scenario IV: 205,660 USD;
- Scenario IV A): 145,550 USD.

144. Respondent finally provides, for illustration purposes only, and without admission that Claimant is entitled to compensation, an alternative damage calculation, based on the assumption that Gala Radio would have been granted seven additional frequencies (two FM frequencies in 2001, one AM frequency in 2004, one FM frequency in 2005 and two FM frequencies in 2008). In this new scenario Respondent calculates that the additional profit which Gala Radio could have expected would have amounted to 22,000 USD in 2010. Reduced to net present value, the total damages to be awarded to Claimant would be in the range of 122,000 USD¹⁴⁰.

¹³⁹ RMRI, paras. 398 to 399; by reference to EBS Supplementary Report ["ESR"].

¹⁴⁰ RMRI, para. 403.

3. The Arbitral Tribunal's Decision

145. In order to decide this issue, the Tribunal will first (3.1) make some general observations regarding the calculation of damages in scenarios where a State has violated the FET standard of a BIT; thereafter, (3.2) it will analyse Respondent's argument that Claimant's request should be rejected *ab initio* because of lack of causation; then (3.3) review the expert reports submitted by both parties; finally leading to (3.4) the Tribunal's determination of the *quantum* of prejudice and to its (3.5) conclusions.

3.1. General Considerations Regarding the Calculation of Damages

146. In its First Decision the Tribunal established that Respondent, when awarding radio frequencies to Claimant, breached the FET standard enshrined in Article II.3 of the BIT, and that the relief must consist in an order to Respondent to pay compensation equal to the damages caused. This leads to the issue under discussion, namely the proper quantification of damages.
147. Article II.3 of the BIT does not provide any rule regarding the appropriate redress in cases of violation. This contrasts with Article III.1, which prohibits unlawful expropriations and includes precise rules for the calculation of “*compensation*”¹⁴¹, based on the concept of “*fair market value*”. The failure of Article II.3 of the Treaty to specify the relief which an aggrieved investor can seek does not imply that a violation of the FET standard may be left without redress: a wrong committed by a State against an investor must always give rise to a right for compensation of the economic harm sustained¹⁴². The *quaestio vexata* is how this economic harm is to be measured.
148. The BIT establishes the rule that compensation for expropriation is to be based on “*fair market value*” of the investment; this principle, however, is of little use in the present arbitration, because the breach does not amount to the total loss or deprivation of an asset. Gala Radio still exists and Claimant still owns it: compensation thus cannot be based on fair market value of assets expropriated¹⁴³.
149. It is generally admitted that in situations where the breach of the FET standard does not lead to total loss of the investment, the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT¹⁴⁴. In the classic formulation of the Permanent Court of International Justice [“PCIJ”] in the *Factory at Chorzów*¹⁴⁵, reparation:

¹⁴¹ Article II.3 of the BIT: “*Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation; be fully realizable; and be freely transferable*”.

¹⁴² See Article 31.1 International Law Commission [“ILC”] Draft Articles on State Responsibility [“ILC Articles”] (“*The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act*”); see also Campbell McLachlan/Laurence Shore/Matthew Weiniger: “International Investment Arbitration: Substantive Principles”, 2007, [“McLachlan/Shore/Weiniger”], p. 334; and Irmgard Marboe: “Calculation of Compensation and Damages in International Investment Law”, 2009, [“Marboe”], para. 3.114.

¹⁴³ *LG & E Energy Corp., LG & E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, (ICSID Case No. ARB/02/01), Award of July 25, 2007, [“LG&E”], para. 36.

¹⁴⁴ Marboe, para. 3.288.

¹⁴⁵ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, merits, 1928, PCIJ, Series A, No. 17, p. 21 *et seq.* [“*Factory at Chorzów*”].

*“... must, so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ...”*¹⁴⁶.

150. Reparation can thus take the form of restitution or compensation. In our case, the relief requested by Claimant is limited to compensation, and it is this form of reparation which the Tribunal must address.

Compensation

151. The aim of compensation is the elimination of all negative consequences of the wrongful act, through the payment to the injured party of an amount sufficient to cover “*any financially assessable damage including loss of profits insofar as it is established*” (Article 36.2 ILC Articles).
152. But this is only a theoretical definition of a general standard; the actual calculation of damages cannot be made in the abstract, it must be case specific: it requires the definition of a financial methodology for the determination of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, “but for” the State’s breach. The parties have submitted extensive expert evidence with the purpose of defining and applying this financial methodology. The Tribunal will analyse it in sections 3.3, and 3.4 below. But before that, it is necessary to address one of the fundamental defence lines articulated by Respondent: the absence of causation.

¹⁴⁶ *Factory at Chorzów*, p. 47.

3.2. Respondent's Argument of Lack of Causation

Respondent's Position

153. Respondent has argued insistently that the Tribunal should *ab initio* reject Claimant's request for compensation, because there is no causal link between Respondent's breaches and Claimant's alleged losses. Respondent submits that Gala Radio would never have won any frequencies in the irregular tenders identified in para. 421 of the First Decision, but would have lost these tenders in any case, because it was a weak applicant and its competitors were better-positioned¹⁴⁷.

Claimant's Position

154. In response, Claimant has argued that it is impossible to second-guess now who would have won certain tenders, and that the issue of causation has already been settled in the First Decision, when the Tribunal decided that Gala Radio had been the subject of unfair and inequitable treatment¹⁴⁸.
155. The Tribunal agrees with Respondent that it is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed *quantum* of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (*i.e.* not "too remote"). The duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act¹⁴⁹. Article 36.1 of the ILC Articles reflects this general principle:

*"The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby"*¹⁵⁰.

156. But beyond this general principle, the ILC Articles remain silent on the particulars of the issue. It is therefore left to judges and arbitrators to define and give content to the specific elements required¹⁵¹. The only supplementary guidance is provided in Article 39 of the ILC Articles entitled "Contribution to the injury", which states:

"[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of

¹⁴⁷ RMRI, paras. 153 and 285.

¹⁴⁸ HTRI, p. 28.

¹⁴⁹ Bin Cheng: "General Principles of Law as applied by international Courts and Tribunals", 1987, ["Cheng"], p. 322.

¹⁵⁰ Emphasis added.

¹⁵¹ Brigitte Stern: "The Obligation to make reparation" in "The Law of International responsibility" (James Crawford/Alain Pellet/Simon Olleson – Eds.), 2010, p. 570.

the injured State or any person or entity in relation to whom reparation is sought”.

Requirements of Causation

157. Proof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established.

A. Cause

158. The wrongful acts attributable to Ukraine, in breach of the FET standard, constitute the initial cause. The existence of such acts was established in the First Decision and is *res iudicata*. The First Decision made the following ruling¹⁵²:

*“To declare that Respondent, in the manner in which it dealt with the award of radio frequencies as described in paragraph 421 of this Decision, breached Article II.3 of the BIT”*¹⁵³

And paragraph 421 provided as follows:

“[...] The Tribunal came to the conclusion that the following decisions did not meet the FET standard provided for in the BIT:

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

159. In order to reach this decision, the Tribunal concluded that

*“there are factors (the strikingly different success rates of Gala and of its competitors, the inexistence of any information regarding the real owners of the competing stations, the impossibility of verifying the reasons why Gala was rejected) which can be construed as indications that at least some of the decisions of the National Council when it awarded frequencies were arbitrary and/or discriminatory”*¹⁵⁴.

¹⁵² First Decision, para. 513.

¹⁵³ The First Decision initially referred, by mistake, to para. 422. This typographical error was duly corrected.

¹⁵⁴ First Decision, para. 420.

The Decision went on to say:

*“To confirm or reject these indications, the Tribunal then looked in detail at five tenders of radio frequencies and the administrative practice for awarding licences in the [Interregnum]”*¹⁵⁵.

160. The result of this analysis was that a number of tenders, plus the administrative practice while the National Council was not operative, were found not to meet the minimum standard required by the BIT.

B. Effect

161. Without licences granted by the National Council, it is unlawful to engage in the business of broadcasting. Consequently the effect of the irregular denial of licences was that Gala Radio’s business plans could not be achieved, that its planned development was curtailed, its market position eroded, its capacity to generate profits impaired and its potential market value was never achieved; and Claimant, as owner of Gala Radio, suffered the corresponding losses. The damage due to Mr. Lemire can be established as the difference in value between Gala which he 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). Claimant is requesting *lucrum cessans*, compensation for an asset or profit which he never acquired, but which, absent the wrongdoing, he would have earned.
162. If the damage is defined as the difference in value between the Gala Mr. Lemire planned and the real Gala which Claimant now owns, the question of Mr. Lemire’s initial business plans becomes decisive. This question has already been clarified in the First Decision¹⁵⁶: Mr. Lemire’s initial plans when he bought into Gala Radio in June 1995 were to create an FM national broadcaster, for music format, plus a second AM channel, for talk radio – this is the “but for” scenario. But the “as is” reality is quite different from the plan: Claimant is the owner of what basically is a local Kyiv radio station, complemented by low power frequencies in 11 Ukrainian cities, which Gala Radio obtained under the Settlement Agreement (plus an additional frequency in a remote village in rural Ukraine). The whole network only covers 22% of Ukraine’s population¹⁵⁷.

C. Causal Link

a) Introduction

163. The third element of causality is the so called causal link, the chain which leads from cause to effect. The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause (in our case the wrongful acts of Ukraine) to the final effect (the loss in value of Gala); while the negative aspect

¹⁵⁵ First Decision, para. 421.

¹⁵⁶ And further analysis has been provided in paras. 71 *et seq.* of this Award.

¹⁵⁷ CMRI, para. 36.

permits the offender to break the chain by showing that the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like *force majeure*)¹⁵⁸.

164. Another preliminary distinction is important: causal links can be divided into pure or transitive¹⁵⁹. Pure causal links exist when the damage derives directly from the wrongful act, without intermediary elements. In practice, this situation is rare, because it is difficult to prove that a certain factor is the immediate and unique cause of a result. Normally, the link between wrong and damage is more complex, and additional elements intervene to form a chain of events.
165. Thus, if a State wrongfully arrests a vessel, thereafter the shipping company is forced into bankruptcy, and if its shareholders finally suffer a loss, the causal link between wrongful act and loss is transitive: the loss has not been caused directly by the arrest, but rather by the bankruptcy, which in its turn was caused by the wrongful action.
166. Transitive causal links do not exclude the responsibility of the wrongdoer – even in cases where a *lucrum cessans* is claimed¹⁶⁰. But the victim must prove that the chain of events is neither too remote nor too aleatory¹⁶¹. The classic definition of this principle is contained in the *Administrative Decision num. 2* of November 1, 1923 of the US-German Mixed Commission¹⁶²:

“It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany’s act and the loss complained of. – It matters not how many links there may be in the chain of causation connecting Germany’s act with the loss sustained, provided there is no breach in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany’s act... All indirect losses are covered provided only that in legal contemplation Germany’s act was the efficient and proximate cause and source from which they flowed”.

167. In the shipping example given above, the victim, in order to be entitled to compensation, would have to prove each element of the chain of events: that the arrest of the ship led to losses for the shipping company, that the losses led to its bankruptcy and that, as a consequence of the bankruptcy, the shareholders lost their investment. And *vice versa*: the State could escape responsibility if it could

¹⁵⁸ The Tribunal in the *Lauder case (Ronald S. Lauder v. Czech Republic, UNCITRAL case, Award of September 3, 2001, para. 234)* seems to have placed on the aggrieved party the burden of proving that such intervening causes were not the immediate cause for the damage. This Tribunal, however, sees no reason to deviate from the generally accepted principle *alleganti probatio incumbit*. If the offender claims that other intervening causes exist, which are the superseding cause for the damage, it is for such offender to marshal the necessary evidence.

¹⁵⁹ The terminology is from Brigitte Bollecker-Stern: “Le prejudice dans la théorie de la responsabilité internationale”, 1973, [“Bollecker-Stern”], p. 186.

¹⁶⁰ Cheng, p. 247.

¹⁶¹ Bollecker-Stern, p. 211-214.

¹⁶² Doc. RLA 38, p. 29.

prove that some other cause (*e.g.* mismanagement) provoked the bankruptcy and the shareholders' loss.

168. In the case submitted to the Tribunal, the causal link is not only transitive (because damage is not caused directly by Ukraine's wrongful acts), it also has a second, more specific characteristic: the State's irregular behaviour took place in public tenders, convened for the awarding of radio frequencies in accordance with pre-established legal criteria. The presence of tenders within the causal chain creates at least two additional difficulties:
- first of all, a number of *bona fide* third parties – and not only Claimant and the media groups irregularly privileged by the authorities – participated in the tenders; the possibility that these *bona fide* third parties could have been awarded frequencies in preference over Claimant must be factored into the analysis;
 - the difficulty is increased by a specific feature of the Ukrainian process: although the law established a number of criteria for awarding frequencies by tender, the National Council was not required to explain the reasons underlying its decisions – each member simply voted in favour of the participant he preferred, and the participant who received five votes was awarded the frequency.

Proximity and Foreseeability

169. Given the characteristics of the Ukrainian process for the awarding of licences, it is impossible to establish, with total certainty, how specific tenders would have been awarded if the National Council had not 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 simply possible – that Gala would have been awarded the frequencies under tender¹⁶³. If it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.
170. The chain of causation can also be seen from the opposite point of view: offenders must be deemed to have foreseen the natural consequences of their wrongful acts, and to stand responsible for the damage caused. Proximity and foreseeability are related concepts: a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage. As the Portuguese-German Arbitral Tribunal said in the *Angola case*¹⁶⁴:

“It would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links”.

¹⁶³ Bollecker-Stern, p. 201; see also Decision in *Maninat* by the French-Venezuelan Mixed Commission of July 31, 1905; Recueil des Sentences Arbitrales, Volume X, p. 81.

¹⁶⁴ 31 July 1928, Recueil des Sentences Arbitrales, Volume II, p. 1031.

171. In summary, the specific circumstances of this case require that two links in the causal chain be analysed and be proven:

- if the tenders had hypothetically been decided in a fair and equitable manner, and Claimant had participated in them, he (and not some of the other participants) would have won the disputed frequencies;
- with these frequencies, Mr. Lemire would have been able to grow Gala Radio into the broadcasting company he had planned: a FM national broadcaster, for music format, plus a second AM channel, for talk radio.

172. The Tribunal has already established the existence of wrongful acts attributable to Ukraine, in breach of the FET standard. What remains to be analysed is whether the first and second links of the chain of causation can be deemed to have been proven and whether they are sufficiently proximate.

b) The First Link

173. Could Gala have obtained the frequencies necessary to create a national FM broadcaster and an AM channel for talk radio?

National FM Broadcaster

174. Gala Radio had two avenues open in order to expand its franchise in Kyiv, and to become a national FM broadcaster: the first possibility was to obtain high powered frequencies in a small number of cities, and the second to receive low powered frequencies in a larger number of cities.

175. (i) In the beginning, Gala appears to have pursued the first route: during the negotiations with the National Council in 1995, the alternative discussed was that Gala receive frequencies in 12 cities, with a (high) power of between 5 and 10 kW¹⁶⁵. The frequencies were never awarded and Claimant filed the first ICSID arbitration. This led to the Settlement Agreement, dated March 20, 2000, in which Respondent agreed to “*use its best possible efforts to consider in a positive way the application*” in 11 of the 12 cities originally discussed. The Settlement Agreement did not require that the new frequencies to be awarded attain a specific power, and those eventually allocated only had an average of 1.17 kW¹⁶⁶. Because of the low power, Gala was only able to reach some 22% of the population of Ukraine¹⁶⁷. Claimant’s first route to obtaining a national FM broadcaster was thus thwarted.

176. (ii) The second route for achieving this objective would have required the allocation of low powered frequencies in a larger number of cities. Claimant has averred – and Respondent has not disputed – that with additional licences in 14

¹⁶⁵ The evidence is clear: the National Council’s July 18, 1995 Letter, Doc. CM-1, addressed to the State Committee; the reaction of the State Committee was encouraging: it offered FM frequencies in 11 cities with an average power of 22 kW; see letter from the State Committee of October 18, 1995 (Doc. CM-2).

¹⁶⁶ First Decision, para. 194; the First Decision came to the conclusion that the allocation of low powered frequencies did not constitute a breach of the Settlement Agreement.

¹⁶⁷ First Decision, para. 194.

locations, Gala would have been able to cover the whole country¹⁶⁸. And Claimant has alleged that these frequencies could and should have been awarded to Gala during the Interregnum, when the National Council was not operative, or in the tender organized on January 1, 2001 to legalize the situation¹⁶⁹.

177. The Tribunal concurs.

178. During the period between March 16, 1999 and June 9, 2000, when the National Council was not operative, more than 80 licences¹⁷⁰ for radio broadcasting were issued directly by the executive branch of the Government, without transparency or publicity and without meeting the requirements of or following the procedures established in the LTR. The *de facto* situation was then legalised through a subsequent tender, convened by the National Council exclusively for this purpose. Claimant was excluded from this procedure¹⁷¹.

179. If these 80 plus 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 position¹⁷². 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 LTR¹⁷³. Gala Radio 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; and as regards the second criterion, Gala was well known to have broadcast socially relevant programs¹⁷⁴; moreover, as an independent broadcaster, its presence would reinforce freedom of speech.

Respondent's Counterarguments

180. Respondent has argued¹⁷⁵ that in a hypothetical tender, Claimant would not have won these frequencies, and submits a number of arguments:

¹⁶⁸ HTRI, p. 23 and 24.

¹⁶⁹ CMRI, para. 37.

¹⁷⁰ The number is not contentious: see Doc. R 209.

¹⁷¹ First Decision, para. 417.

¹⁷² Doc. CM-131 and HTRI, p. 65. In para. 314 of his Separate Opinion, Dr. Voss accepts that in 1999 Gala held a predominant market position, adding that this position eroded quickly and consistently down to rank 15 in 2008. In his opinion, these facts discredit the Award's reliance on Gala's overall competitive strength. The Tribunal disagrees. It sees Gala's decadence as additional evidence that Respondent's irregular behaviour, denying frequencies, provoked that what originally was a successful radio operator became relegated to an ancillary position in the Ukrainian broadcasting market.

¹⁷³ "While considering the applications the National Council shall prefer TV/radio organization that: a) is capable to fulfil the licence conditions to the best extent; b) prefers socially important programs (informational, social and political, children, etc.), satisfies informational needs of national minorities and secures freedom of speech; c) has an advantage in financial and economical as well as professional and technical capabilities for TV/radio broadcasting".

¹⁷⁴ It sponsored events as the Olympics, Chestnut Run, Burs' Night Charity Ball, We are the Champions, Golden Lilya and many others. See WS of Mr. Denisenko, p. 3.

¹⁷⁵ RMRI, paras. 168 to 180.

181. (i) In first place, Respondent alleges that Gala never planned to compete for the additional 14 frequencies¹⁷⁶.
182. The argument is without merit, because the key issue is not whether Claimant participated or not in the irregular practices and the rigged tenders, since no one can be held to task for failing to participate in irregular administrative procedures. The question which must be proven is premised upon the hypothesis that the tenders had been announced and then decided in strict compliance with Ukrainian law and without violating the FET standard, and that Gala had been compliant. Under these assumptions, the Tribunal finds that Gala, in all probability, would have been awarded, at the least, the comparatively small number of frequencies required to fulfil its plans.
183. (ii) In second place, Respondent submits that the Settlement Agreement was signed on March 20, 2000¹⁷⁷ and later confirmed in the Award by Consent of September 18, 2000; consequently, in Respondent's opinion, any allocation of frequencies by the State Committee before September 18, 2000 could not serve as a foundation for damages claims¹⁷⁸.
184. The Tribunal disagrees.
185. When Claimant signed the Settlement Agreement on March 20, 2000, he accepted to withdraw his claims, against Ukraine's best efforts obligation to assign a number of frequencies on the terms and conditions established in such Agreement. By executing the Settlement Agreement, Claimant did not, however, acquiesce to Ukraine's violations of the FET standard. The Settlement does not state so, and none of its clauses can be interpreted to provide for such acceptance. There is no evidence that, when the Settlement Agreement was executed, Claimant was even aware of Respondent's irregular practice of awarding licences without publicity and without tenders. This violation continued throughout the Interregnum, which lasted till June 9, 2000, and then extended to the tender of 1 January 2001, in which the National Council legalized the licences illegally granted during the Interregnum; whatever may have been agreed in the Settlement Agreement cannot be considered as Claimant's acquiescence to Ukraine's wrongful conduct.
186. (iii) In third place, Respondent argues that the 80 plus licences awarded during the Interregnum in fact would never have been available to Gala Radio, because they either referred to locations where Gala was already broadcasting or were allocated to other broadcasters already using these frequencies with a preferential right¹⁷⁹.
187. The argument cannot be accepted, because Gala Radio was only transmitting in Kyiv, and the frequencies it then obtained in 11 cities had very low power; as regards the priority rights of previous broadcasters, this only affected 31 frequencies¹⁸⁰ and Claimant has convincingly shown that 20 of these could have

¹⁷⁶ RMRI, para. 160.

¹⁷⁷ This date, when the meeting of minds took place, is the relevant date; and not September 18, 2000, when the Settlement Agreement was formalized into an Award.

¹⁷⁸ RMRI, para. 167.

¹⁷⁹ RMRI, para. 168; HTRI, p. 20.

¹⁸⁰ HTRI, p. 20.

been awarded¹⁸¹. The Tribunal concludes that during the Interregnum there were enough frequencies available so that Gala Radio, the leading operator in the Kyiv area, should have been able to secure at least 14 radio stations in order to create a nationwide music radio network.

188. (iv) As a fourth argument, Respondent submits that Gala suffered a lack of distinct programming, an absence of innovation and that its presentations before the National Council were vague and confusing¹⁸².
189. The Arbitral Tribunal is disinclined to accept that Gala Radio's alleged shortcomings could have had an effect on the denial of frequencies, especially in 2000 and early 2001, when Gala Radio undoubtedly was one of the leading radio stations in Ukraine and was broadcasting a highly successful concept. Mr. Lemire has made a detailed description in his witness statements¹⁸³ of the technology used by Gala and how state of the art equipment was for the first time introduced in Ukraine; the Arbitral Tribunal is unpersuaded by Respondent's allegations of absence of innovation.
190. The record also contains Gala's appearance before the National Council, which were far from being considered vague and confusing. Well-known Ukrainian celebrities like DJ Pasha (the best known DJ in Ukraine¹⁸⁴) and Mr. Viktor Petrenko (a role model in Ukraine due to his accomplishments as the only male Winter Olympic Gold Medal winner in ice figure skating in Ukraine¹⁸⁵) attended tenders to make presentations on behalf of Claimant; which shows that Claimant made efforts to impress the National Council. Statements were also made by Mr. Lemire himself, Mr. Sergey Denisenko and Gala Radio's lawyer¹⁸⁶. Claimant often encountered the problem that the National Council ignored or even prevented Gala Radio from making its presentation¹⁸⁷.
191. In summary, the Tribunal 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 more than 80 licences had been correctly assigned in compliance with 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 network¹⁸⁸.

¹⁸¹ HTRI, p. 23.

¹⁸² RMRI, para. 288.

¹⁸³ WS of Mr. Lemire, para. 21; WS of Mr. Shylko, para. 5.

¹⁸⁴ HT, Day 2, p. 137.

¹⁸⁵ WS of Mr. Petrenko, para. 13.

¹⁸⁶ HT, Day 1, p. 252.

¹⁸⁷ HT, Day 1, p. 253; WS of Mr. Petrenko, para. 20.

¹⁸⁸ Dr. Voss in his Separate Opinion states that Respondent was misled in building its defence and that his right to be heard was violated (p. xiv of his summary). The argument lacks any merit. Both parties presented well-reasoned and extensive Submissions on Remaining Issues. During the hearing held on July 12, 2010, Claimant and Respondent had the opportunity to orally present Opening Statements and Closing Statements (see pp. 2 to 93 and 248 to 273 of the HTRI). At the end of the hearing, the Tribunal asked the parties whether "*they [were] aware of any breach of due process*" (HTRI p. 274); Respondent answered "*We have no objections to assert*" (HTRI, p. 274).

AM Channel for Informational Radio

192. Would Gala Radio also have been awarded an AM channel for informational radio?
193. There is no evidence in the file that during the Interregnum AM frequencies were assigned, thus, the Tribunal cannot assume that Gala Radio could have received at that time the licence for an AM channel. The opportunity arose three years later, when in May 2004 the National Council convened a tender for a powerful AM frequency with nationwide coverage. In the First Decision¹⁸⁹ the Tribunal declared that the National Council's decision of May 26, 2004 denying Gala Radio the licence for an AM channel had violated the FET standard defined in the BIT.
194. Claimant has submitted that if the May 26, 2004 National Council decision had been properly adopted, Gala Radio should have been the winner of the tender¹⁹⁰.
195. The Tribunal concurs.
196. Three participants decided to bid in the 2004 tender for a nationwide AM frequency: Odessa Legal Academy ["Radio Academy"], Charity Public Fund Radio ["CPFR"] and Gala Radio. The applicable legislation at the time of the tender set forth the following criteria for selecting the winner (Article 14 LTR, as amended on January 10, 2002¹⁹¹):

“The interests of television viewers and radio listeners; the need to protect national interests, to promote cultural values; the need for more complete coverage of the viewpoints of various social groups in television and radio programs; compliance with the conditions specified in the application for license and with the tender conditions; compliance with technical capacities and creative potential during arrangement of television and radio broadcasting to the stated characteristics, to the obligations of television and radio organizations as regards social broadcasting; previous use of the broadcasting channel”.

197. Radio Academy was a small radio company, created two years before, which was using an AM frequency in Mikolayiv Oblast, a region of Ukraine, to broadcast to villagers; its plan was to use the new frequency to expand its coverage to other rural areas¹⁹². CPFR was a non-commercial radio, which had been broadcasting for two years through the internet. It intended to use the AM frequency for a simpler, more popular program, with a ratio of 60% informational and 40% music entertainment¹⁹³. Compared with these two competitors, Gala Radio had been

¹⁸⁹ Para. 421.

¹⁹⁰ CMRI, para. 42.

¹⁹¹ Doc. RLA 13.

¹⁹² Doc. R 439, transcript of the session of the National Council, p. 2.

¹⁹³ Doc. R 439, transcript of the session of the National Council, p. 3.

transmitting for 10 years, it was Kyiv's most successful music broadcaster and it had been ranked number two as regards the quality of its news services¹⁹⁴.

198. Confronted with these three applications, the National Council's decision was to let the tender fail, not awarding the frequency to any of the participants, and to immediately convene a new tender; and in this new procedure to award the channel to NART TV – an entity with close ties to the President of Ukraine. The Tribunal has already decided that, in doing so, the National Council violated the FET standard enshrined in the BIT.
199. What would have happened under the hypothesis that the National Council had properly decided the tender of May 26, 2004, in accordance with the criteria set forth in Ukrainian law then in force?
200. The Tribunal finds that in such case it is probable that Gala, by far the best qualified of the three competitors, the only one with a broadcasting experience in Kyiv, with a proven and successful track record as a music transmitter and as a news provider, should have been successful. It certainly was the participant which best complied with the criteria established by legislation.

* * *

201. In summary: the Tribunal finds that, under the assumption that Ukraine's wrongful acts had not occurred, and that tenders had been correctly awarded under applicable Ukrainian legislation, it is probable that Gala would have been able to fulfil its initial plans:
 - by 2001 it would be operating a nationwide FM music channel;
 - by 2004 Gala would additionally have received an AM informational channel.
202. The Tribunal thus concludes that the first link of the causal chain, the assumption that if the tenders had hypothetically been decided in a fair and equitable manner, and Claimant had participated in them, he (and not some of the other participants) would have won the disputed frequencies, has been satisfied.

c) **The Second Link**

203. This leads to the second link of the chain: having received these frequencies, would Mr. Lemire have been able to develop Gala into the successful broadcasting company he had planned, a FM national broadcaster, for music format, plus a second AM channel, for talk radio¹⁹⁵?

¹⁹⁴ See paras. 97 and 179 *supra*.

¹⁹⁵ In his Separate Opinion (paras. 331 and 335), Dr. Voss disqualifies Gala's business plans, alleging that they were created "*ad hoc for the purpose of this arbitration*". This is contrary to the proven facts. The Tribunal has established (see para. 270 of the First Decision), on the basis of coetaneous documentary evidence and of witnesses' declarations, that in 1995 Mr. Lemire's business plans were to convert Gala into a national broadcaster and to create a second AM channel.

204. Respondent submits¹⁹⁶ that under no circumstances would this have happened, arguing that Gala Radio was a weak, undercapitalized company, lacking the financial clout to develop its business¹⁹⁷, even if the frequencies had been available. Respondent pleads that Gala's own shortcomings were the proximate cause of its lack of growth¹⁹⁸ and, subsidiarily, that this should at least be considered as a contributing cause¹⁹⁹.
205. The Tribunal disagrees. In its opinion Gala Radio was a reasonably well funded corporation, and it had the financial strength and the necessary know how to successfully operate the two radio channels.
206. It is true that Gala Radio is not a large company. It is a private company owned by an individual, Mr. Lemire. But throughout its life time, Gala Radio has been a reasonably successful broadcaster. Its revenues went up from 568,900 USD in 2001 to 1,369,050 USD in 2007. Its real EBITDA continuously grew, reaching almost 6 M UAH in 2005²⁰⁰. It has financed its development with capital contributions and loans from its shareholder. Although there is little information in the record regarding Mr. Lemire's net worth, there also is no indication that Gala Radio was insufficiently funded or that it had to abandon any business project because of lack of financing. But even if such shortcomings existed (*quod non probatur*), Respondent has not been able to prove that Gala Radio's competitors did not present the same shortcomings and thus were better qualified in this respect – especially not in a system in which the National Council, when awarding frequencies, apparently did not know the ownership and the actual financial strength of the companies to whom it was assigning the tenders²⁰¹.
207. The Tribunal is also convinced that, if the National Council had awarded Gala Radio the authorisations, Gala Radio had the necessary know how to successfully manage the channels. Gala had won a number of awards for the quality of its broadcasting²⁰², it employed four of the top 10 disc jockeys in Ukraine, including the well-known DJ Pascha²⁰³, its news services were highly ranked, and it had held the number 1 or number 2 position among the broadcasting stations in Kyiv²⁰⁴. There is no reason to believe that it would not have been able to provide excellent nationwide music and informational programs.

* * *

208. In conclusion, the Tribunal finds that Claimant has been able to prove that the initial cause (Ukraine's wrongful acts) and the final effect (Claimant's frustration to fulfil his plans and operate a nationwide FM channel plus an AM informational channel) are linked through a chain of causation. And this chain of causation is proximate and foreseeable: Ukraine was aware of Claimant's business plans,

¹⁹⁶ RMRI, paras. 8 and 9.

¹⁹⁷ Respondent's PHB, para. 618 *et seq.*

¹⁹⁸ RMRI, para. 139.

¹⁹⁹ RMRI, para. 141.

²⁰⁰ ESR, p. 39; this is the expert's estimation of Gala Radio's real EBITDA.

²⁰¹ WS of Mr. Shevchenko (Rebuttal), para. 74.

²⁰² Doc. CM-89 with a list of Gala Radio's awards and prizes.

²⁰³ First Decision, para. 233.

²⁰⁴ HT, Day 2, p. 65.

Ukraine could foresee that irregularities in the tender procedures would result in the rejection of Gala Radio's applications thwarting Gala's expansion and eventually leading to a reduction in the value of the company and to a loss for its investor. And Respondent has not been able to prove that the denial of frequencies was due to causes other than the National Council's wrongful behaviour, that if tenders had not been rigged, Gala would not have succeeded in receiving the authorisations required to create a nationwide FM network plus an AM channel and that, once awarded, Gala would not have been able to muster the financial resources and know how to successfully operate both channels.

d) Analysis of the Case Law Submitted by Respondent

209. Respondent has drawn the Tribunal's attention to two awards, which in Respondent's opinion, support its arguments.

210. (i) The first case is *Biwater*²⁰⁵:

In 2003 *Biwater* was awarded different contracts for the implementation of the Dar es Salaam Water and Sewerage Infrastructure. The most important contract was a lease agreement, under which claimant was to lease certain assets belonging to the State and to use them to supply water and sewerage services. The project turned out to be a failure. Claimant filed an ICSID arbitration, claiming, among other things, expropriation and breach of the FET standard. The arbitral tribunal concluded that as at the date immediately prior to the first act of respondent in breach of the BIT, the performance of the lease contract was already encountering serious problems²⁰⁶, which showed that claimant would suffer significant operating losses going forward²⁰⁷. The proximate or direct cause of the loss and damage for which *Biwater* sought compensation were acts and omissions which had already occurred prior to the BIT breach. None of respondent's violations of the BIT in fact caused the loss and damage in question, or broke the chain of causation that was already in place²⁰⁸.

211. The Arbitral Tribunal does not think that this case, quoted by Respondent, in fact helps to support Respondent's position. In *Biwater* claimant's damages were the consequence of the desperate financial condition which claimant had put itself into, prior to the violation of the BIT. In our case, the first violation of the BIT took place during the Interregnum, at a time when Gala Radio was a successful radio operator and a leader in its field. Thus, Claimant's damages, its loss of business, can in no way be due to the situation in which Claimant found himself immediately prior to the violation of the BIT.

²⁰⁵ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Doc. RLA 74, (ICSID Case No. ARB/05/22), Award of July 24, 2008, [*"Biwater"*].

²⁰⁶ *Biwater*, paras. 788 and 789.

²⁰⁷ *Biwater*, para. 790.

²⁰⁸ *Biwater*, para. 798.

212. (ii) Respondent has also referred to *ELSI*²⁰⁹:

ELSI was an Italian company wholly owned and controlled by two American companies. Since September 1967 it was obvious for its shareholders that a financial crisis was imminent and the responsible officers were keeping a close watch on the declining funds, to ensure that *ELSI* did not reach a point where continued operations would be contrary to Italian law. On April 1, 1968 representatives of *ELSI* met representatives of its banking creditors to discuss the company's plans for an orderly liquidation. However, no agreement was reached. On the same day the Mayor of Palermo issued an order, effective immediately, requisitioning *ELSI*'s plant and related assets for a period of six months. A decree of bankruptcy was issued by a Palermo Court on May 16, and a trustee and creditors committee was appointed. Subsequently, *ELSI*'s premises, plant and equipment were sold in an auction. The Chamber denied the existence of a violation of the Treaty. The Chamber held that *ELSI* had no practical possibility of successfully carrying out a scheme of orderly liquidation under its own management and consequently it was not the requisition that deprived it of this faculty of control and management. The Chamber went on to say that there was an uncertain and speculative character in the causal connection between the requisition and the results attributed to it by the United States. The Chamber acknowledged that there were several causes acting together that led to the disaster of *ELSI* and that the requisition might have been one of them, but the underlying cause was *ELSI*'s headlong course towards insolvency²¹⁰.

213. *ELSI* hardly presents any similarities with the present case and in no way can it be interpreted in favour of Respondent's position.

214. Although the judgment refers to a "*causal connection*", what the Chamber is actually doing is analysing whether the facts (basically, the requisition) constitute a violation of the Treaty (and not, whether the violation had caused damages to the aggrieved). The question under discussion is not the issue of causation with regard to damages, and the conclusions reached have no significant bearing for the present Award.

²⁰⁹ Case concerning *Elettronica Sicula S.p.A. (United States v. Italy)*, Doc. RLA 113, International Court of Justice, July 20, 1989 [*"ELSI"*].

²¹⁰ Para. 101 of the judgment.

3.3. Review of the Expert Reports Submitted by the Parties

215. Both Claimant and Respondent have retained damage experts.
216. Claimant has submitted two damage reports, one dated August 20, 2008²¹¹ and a supplementary report dated April 16, 2010²¹². Both were prepared by Goldmedia, a research institute and strategic consultancy founded in 1998 and based in Berlin, specialised in the fields of media and telecommunications²¹³. Dr. André Wiegand, Goldmedia's Co-Managing Director, was the person responsible for the reports, and was examined by the parties and the Tribunal at the hearing held on July 12, 2010²¹⁴.
217. Respondent has also presented two damage reports, one dated November 3, 2008 and one dated June 21, 2010²¹⁵. These reports were prepared by EBS, a consultancy founded in 1998 in Ukraine, specialized in financial consulting services. Ms. Olena²¹⁶ Volska is the person responsible for the reports. She is EBS' Managing Partner and Director and was examined by the parties and the Tribunal at the hearing held on July 12, 2010²¹⁷.

A. Goldmedia's Calculations

218. Goldmedia's calculation of damages is based on the differences in value between five different Scenarios, of which Scenario I represents an evaluation of Gala Radio as it exists today, from January 1, 2001 up until September 18, 2015. The other four scenarios (which all end in 2015) represent hypothetical situations: they show the value which Gala Radio would have reached, under certain assumptions, if Respondent had not breached the FET standard. The four Scenarios, denominated II through IV A), are the following:
- **Scenario II** represents the present value of Gala Radio if it had been a full national network; it assumes that Gala Radio would have been able to establish itself as a full national network as of January 2001, because it would have participated in tenders held in the 1999 - 2000 period, from which it was excluded while the National Council was inactive;
 - **Scenario III** represents the present value of Gala Radio as a full national network from 2001, plus a second FM radio network for young audiences, which would have been granted to Gala Radio by 2006, if Respondent had not breached its BIT obligations;

²¹¹ Goldmedia First Report ["GFR"].

²¹² Goldmedia Supplementary Report ["GSR"].

²¹³ GFR, p. 79.

²¹⁴ HTRI, p. 103.

²¹⁵ ESR.

²¹⁶ Sometimes referred to as Helena.

²¹⁷ HTRI, p.193.

- **Scenario IV** represents the present value of Gala Radio as a full national network from 2001, plus a second FM radio network for young audiences from 2001, plus a third nationwide AM radio network with talk radio format; in this Scenario, the AM network would have been granted by 2004 and Claimant foresees that the AM network would have switched to FM from 2006 onwards;
- **Scenario IV A)** finally represents the present value of Gala Radio as a full national network from 2001, plus a second nationwide AM radio network with talk radio format.

219. Using a DCF methodology Goldmedia projected and compared the enterprise value of Gala Radio operating one or more networks, depending on the Scenarios, to the estimated enterprise value of Gala Radio as it operates today. In order to do so, Goldmedia carried out its analysis through the following steps:

- it assessed the incremental revenues, depending on each Scenario; the evaluation of the future revenues was done with a bottom-up approach, *e.g.* taking as its starting point not the actual performance by Gala Radio, but rather business ratios and operating figures from benchmark radio networks²¹⁸;
- it then assessed the incremental costs for each Scenario;
- it next calculated the free cash flows for each year from 2001 up to 2015 and, using DCF methodology, established its net present value;
- the terminal value of the investment in 2015 was calculated by multiplying the free cash flow in that year by seven;
- net present value plus discounted terminal value were added, to establish enterprise value;
- enterprise value for Scenario I (Gala Radio “as is”) was deducted from enterprise value for each of Scenarios II through IV A), and thus the amount of damages was established.

220. The final total damages derived under each Scenario were the following:

- Scenario II: 30,469,000 USD²¹⁹;
- Scenario III: 40,402,000 USD²²⁰;
- Scenario IV: 46,651,000 USD²²¹;
- Scenario IV A): 43,617,000 USD²²².

Revenue and Costs Forecast

221. All hypothetical Scenarios were based on bottom-up revenue calculations²²³, taking the advertising prices of the first movers in the radio market (HIT,

²¹⁸ GSR, p. 12.

²¹⁹ GSR, p. 67.

²²⁰ GSR, p. 68.

²²¹ GSR, p. 68.

²²² GSR, p. 77.

²²³ An alternative top down approach was abandoned in the GSR.

Russkoye, Nashe and Europa Plus²²⁴) and on an estimation of the additional costs which a national network would generate.

Discount Rate

222. For its calculations, Goldmedia used discount rates obtained applying the methodology of the US National Association of Certified Valuation Analysts [“NACVA”]²²⁵. Goldmedia used Category 1 (*i.e.* least risky company) for the hypothetical Scenarios II – IV A), and Category 2 (*i.e.* somewhat more risk) for Scenario I (*i.e.* for Gala Radio “as is”)²²⁶.
223. As an alternative, and in order to meet criticism by Respondent’s expert, Goldmedia also introduced an alternative valuation based on discounted rates including a separate country risk premium, as calculated by Prof. Aswath Damodaran²²⁷ [“Bludgeon Approach”]. Applying discount rates adapted from Prof. Damodaran’s approach, the total damages would be reduced to the following amounts²²⁸:
- Scenario II: 26,791,000 USD;
 - Scenario III: 35,303,000 USD;
 - Scenario IV: 40,696,000 USD;
 - Scenario IV A): 38,066,000 USD²²⁹.

Currency

224. In its Supplementary Report, Goldmedia carried out all the relevant calculations in UAH, while only final results were converted and discounted into USD²³⁰.

EBITDA Valuation

225. To cross check the findings of the DCF valuation, Goldmedia also carried out an EBITDA valuation, applying an 8.0 multiple, which it describes as a very moderate and conservative multiple²³¹. Taking Scenario II, the total enterprise value for 2007 would have been 34,983,000 USD and for 2008 30,960,000 USD. Goldmedia submits that these figures confirm its damage calculation (which showed a figure for this Scenario II of approximately 30 M USD). Goldmedia also acknowledges that for 2009 the EBITDA valuation only provides a total enterprise value of 16,739,000 USD, which does not match the damage valuation. In Goldmedia’s opinion, this lack of confirmation is attributable to the severe economic crisis which in 2009 affected Ukraine²³².

²²⁴ GSR, p. 36.

²²⁵ GSR, p. 13.

²²⁶ HTRI, p. 178.

²²⁷ GSR, p. 18.

²²⁸ GSR, pp. 71 to 73.

²²⁹ GSR, p. 78.

²³⁰ GSR, p. 11.

²³¹ GSR, p. 26.

²³² GSR, p. 69.

Gala's P & L 2008/2009

226. Gala incurred a negative EBI (net earnings)²³³ both in 2008 (-1,691,000 UAH) and 2009 (-859,000 UAH). The losses in the first year are attributable – in Goldmedia's opinion – to a substantial increase in research and marketing expenses, caused by a repositioning of music format and brand image entrusted to Brand Support, and in the second year to the general crisis which hit Ukraine.

B. EBS' Calculations

227. EBS accepts Goldmedia's position that the appropriate methodology to calculate damages must be based on comparing Gala Radio's "as is" situation, with hypothetical Scenarios, applying a DCF analysis. Respondent's expert, however, disagrees with the system adopted by Goldmedia to value Gala Radio, which implied measuring Gala Radio's enterprise value, *i.e.* the sum of the net present value of future free cash flow, plus the present value of the terminal value in year 2015. EBS recommends the adoption of a lost profit approach, which (using the same methodology used by Claimant's expert) calculates the net present value of future free cash flow, the fundamental difference being that no terminal value is added²³⁴.
228. If this alternative methodology is adopted, the amount of damages is significantly reduced; as EBS concludes²³⁵:
- Scenario II: 11,946,000 USD;
 - Scenario III: 14,432,000 USD;
 - Scenario IV: 16,224,600 USD;
 - Scenario IV A: 15,297,000 USD.

Currency

229. EBS disagrees with Goldmedia as to the application of the UAH instead of the USD and submits that Goldmedia's mixed approach, relying alternatively on UAH or USD, is misleading²³⁶. Goldmedia converts the UAH denominated discounted cash flows of each year into dollars at a fixed and predetermined exchange rate of 8 UAH to 1 USD. In EBS' opinion, this approach renders the calculations unreliable, because neither the country itself nor world financial institutions are able to give reliable forecasts in relation to the Ukrainian currency. A more consistent approach would have been to do the whole damage assessment in UAH and after applying the appropriate discount rate, convert the final UAH amount into USD at today's exchange rate²³⁷.

²³³ GSR, p.34.

²³⁴ ESR, pp. 12 and 13.

²³⁵ ESR, p.13.

²³⁶ ESR, p. 16.

²³⁷ HTRI, p. 202; Ms. Volska had some doubts whether the appropriate rate should be that as of the award or that as of the date of actual payment.

Discount Rate

230. EBS submits that the NACVA approach to establishing discount rates is only correct for developed countries, and that in developing countries like Ukraine the Bludgeon Approach pioneered by Prof. Damodaran is more appropriate. This latter methodology includes a country risk, which reflects the difference of running similar businesses in different countries, and also the exchange rate risk. Nor does EBS agree with Goldmedia's attempt at proposing an alternative calculation using the Bludgeon Approach, because it finds that Goldmedia is using Prof. Damodaran's *formulae* incorrectly. Applying this system in what EBS deems the appropriate fashion, EBS arrives at a discount rate of 18.51%. EBS submits that if this alternative were applied, without changing any of Goldmedia's other assumptions, the actual damages would be 33% lower than those presented by Goldmedia in its GSR²³⁸.

Valuation Through Comparable Transactions

231. EBS also presented an alternative valuation based on recent mergers and acquisitions of radio companies in Ukraine²³⁹. Some information about these deals is available in open sources and in the press, but the terms of significant transactions are confidential and the public information is not always reliable. Taking into consideration the available information, and assuming that Gala Radio as a national radio network with a second FM network and an AM talk radio would have reached a 5% market share, EBS comes to the conclusion that its market value could not exceed 6 M USD²⁴⁰, while the value of Gala Radio "as is" would amount to 1.5 M USD.
232. Under this methodology, the detriment suffered by the investor would be equal to 4,5 M USD (the difference between the enterprise of Gala Radio "as is" and the hypothetical enterprise value if it had developed three networks and reached a 5% market share).

Undervaluation of Gala Radio's Official Figures

233. EBS submits that, in order to dodge taxes, most of the Ukrainian media market is not working in a transparent way and that revenues and salaries declared in official statements prepared by media companies are understated²⁴¹. In EBS' opinion this also applies to Gala Radio.
234. Based on this premise, and using information from other competitors and from MediaMonitor, EBS calculates that Gala Radio's 2009 underreported income was 7.2 M UAH (the official revenues being 5.6 M UAH)²⁴². EBS also concludes that personnel costs were underreported, in order to avoid payroll tax. In EBS' opinion, this is proven by the fact that a significant portion of personnel (about

²³⁸ ESR, p. 21.

²³⁹ ESR, p. 25.

²⁴⁰ ESR, p. 27.

²⁴¹ ESR, p. 31.

²⁴² ESR, pp. 34 and 35.

75 - 80%) is working at the minimum wage salary level, and all personnel is being paid at a level that was significantly below the average market level²⁴³.

Criticism of Different Scenarios

235. EBS voices a significant number of criticisms with regard to each of the Scenarios developed by Goldmedia:
236. With regard to Scenario I, EBS is of the opinion that Gala Radio's past financial performance is underreported. If Gala Radio's financial statements are restated, this would show that Gala Radio is more profitable than what Goldmedia is assuming, thus reducing the amount of damages. Taking Scenario II as an example, the restatement of Gala Radio's financial statements in Scenario I would result in a reduction of the total damages to 22,967,860 USD²⁴⁴.
237. Scenario II is also criticised by EBS for a number of reasons²⁴⁵:
- 2001 - 2006 numbers are based on 2007 rates, deflated by US average consumer price index, not by the Ukrainian domestic inflation rate;
 - Goldmedia's proposed average rate for Kyiv is 49% higher than Gala Radio's actual rate, without any support for this increase;
 - the benchmark radios should be Hit and Europa Plus, excluding Nashe and Russkoe Radio;
 - personnel costs are underestimated and must be increased to reflect reality.
238. These changes alone would result in a reduction of damages to 18,528,830 USD²⁴⁶.
239. In Scenario III, EBS objects that the forecasted revenues for the second FM network are higher than Gala Radio's actual revenues for the same relevant year. In EBS' opinion, Kiss is not the appropriate benchmark to be used to assess potential rates for the second FM network. Goldmedia's projection for the advertising load is aggressive and EBS suggests a more reasonable increase. EBS also disagrees with the proposed CAPEX expenditures, and suggests decreasing the time span by one year and increasing the personnel costs. These changes would result in a reduction of damages to 30,339,420 USD²⁴⁷ (from a maximum calculated by Goldmedia of 40,402,000 USD²⁴⁸).
240. As regards Scenarios IV and IV A, EBS disagrees with Goldmedia's proposed plan of converting the AM frequency to an FM format in 2006 and also with the Era Radio rates quoted by Goldmedia²⁴⁹. In EBS' opinion, the AM format is generally considered commercially unjustified because the target audience is mostly the rural population, which is not of high interest for commercial

²⁴³ ESR, p. 36.

²⁴⁴ ESR, p.38.

²⁴⁵ ESR, p. 40.

²⁴⁶ ESR, p. 44.

²⁴⁷ ESR, p. 47.

²⁴⁸ ESR, p. 37.

²⁴⁹ ESR, p. 47.

advertisers and commands lower advertising rates; furthermore, AM requires significant additional CAPEX investments. Evidence of this is provided by the fact that tenders for AM frequencies frequently could not be held, as there were no applicants. There is only one commercial AM operator in Ukraine, Radio Majak, and most AM broadcasters are motivated by non-commercial objectives. EBS also proposes that a number of assumptions regarding personnel cost, time span and price growth be adjusted.

241. Summing up, EBS is of the opinion that if Gala Radio had operated an AM network it would have incurred constant losses²⁵⁰. If it is assumed that Gala Radio would have switched its AM format to FM, then EBS anticipates that the total damages would have amounted to 36,294,600 USD²⁵¹ (and not 46,651,000 USD as proposed by Goldmedia²⁵²).

Alternative Calculations

242. EBS also performed an alternative assessment of damages, outlined in two Scenarios:
- a bottom-up approach based on Goldmedia's approach but using EBS assumptions; this leads, for Scenario II, to a calculation of damages amounting to 190,490 USD²⁵³;
 - a top-down approach based on the original methodology used by Goldmedia in its first report, but using EBS assumptions and a 5% annual market growth rate; with this methodology and taking again Scenario II as an example, the damages would amount to 2,805,630 USD²⁵⁴.

²⁵⁰ ESR, p. 50.

²⁵¹ ESR, p. 51.

²⁵² ESR, p. 37.

²⁵³ ESR, p. 53.

²⁵⁴ ESR, p. 54.

3.4. Determination of the Compensation by the Arbitral Tribunal

A. Introduction

243. The main finding in the Tribunal’s First Decision was that Gala Radio, although it tried insistently for six years, and presented more than 200 applications for all types of frequencies, was prevented, because of wrongful actions of the National Council, from obtaining a single licence (except for one in a small village in rural Ukraine)²⁵⁵. If it had not been for this delictual treatment, Gala Radio would now be a bigger, more profitable and more valuable radio operator.
244. The damage suffered by Claimant can thus be defined as the difference between a real “as is” value of Gala Radio – what the investor now actually owns – and a hypothetical “but for” value – what the investor would have owned if the host State had respected the BIT²⁵⁶. This second evaluation requires that the Tribunal assume that the National Council had acted in a way different from its actual behaviour. But this is not the only relevant factor. Broadcasting is a heavily regulated and supervised business. There is an interrelation between the actions of the regulator and the decisions of the regulated entities. If the National Council had acted in a different manner, Claimant would also have in all likelihood taken different decisions. When reconstructing the “but for” scenario, the Tribunal must assume not only that the Ukrainian authorities adhered to the BIT standards, but also that Claimant reacted in the manner to be expected from a diligent and reasonable investor (*i.e.* making the CAPEX investments required to operate the radio licences).

Is the damage speculative?

245. Respondent has drawn the Tribunal’s attention to the statement of the Iran-US Claims Tribunal in *Amoco v. Iran*²⁵⁷ that:

“[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded”.

The same idea is expressed in Article 36.2 of the ILCA Articles, which provides that “*compensation shall cover any financially assessable damage including loss of profits insofar as it is established*”. As the Commentary notes, “*Tribunals have been reluctant to provide compensation for claims with inherent speculative elements*”²⁵⁸.

²⁵⁵ First Decision, paras. 420 and 451.

²⁵⁶ See para. 161 *supra*.

²⁵⁷ *Amoco International Finance Corp. v. Iran*, (Iran United States Claims Tribunal Case No. 56), Partial Award of July 14, 1987, [“*Amoco*”], para 238.

²⁵⁸ James Crawford: “The international Law Commission’s Articles on State Responsibility”, 2002, para. 27.

246. 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 reasonable confidence, estimate the extent of the loss²⁵⁹.
247. In our case, it is the Tribunal's firm conviction, based on the available evidence, that Claimant has indeed suffered a loss, resulting from Gala Radio's curtailed growth, and consequent loss of value, and that the proximate cause of the loss were the wrongful actions of Respondent.
248. While the existence of damage is certain, calculating the precise amount of the compensation is fraught with much more difficulty, inherent in the very nature of the "but for" hypothesis. Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is to make an informed and conscientious evaluation, taking into account all the relevant circumstances of the case, not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings.
249. The issues surrounding the measure of compensation for breaches of the FET standard are – as the Tribunal in *LG & E* said – "*particularly thorny*"²⁶⁰. To estimate the damages, the Tribunal will inevitably have to accept certain assumptions. These assumptions can and must be checked, applying tests of reasonableness. But in the end, there is no denying that the calculation of damages in a case like this, inevitably requires a certain amount of conjecture as to how things would have evolved "but for" the actual behaviour of the parties. This difficulty in calculation cannot, however, deprive an investor, who has suffered injury, from his fundamental right to see his losses redressed.

Is the damage a loss of chance?

250. The Tribunal's certainty that Claimant has indeed suffered a loss has another important implication: it excludes the possibility that Mr. Lemire's injury be classified as a simple loss of chance.
251. Compensation for a lost chance is admissible, and is normally calculated as the hypothetical maximum loss, multiplied by the probability of the chance coming to

²⁵⁹ Mark Kantor: "Valuation for Arbitration", 2008, ["Kantor"], p. 72; Jan Paulsson: "The Expectation Model" in "Evaluation of Damages in International Arbitration", (Yves Derains and Richard H. Kreindler Eds.), 2006, p. 60.

²⁶⁰ *LG & E*, para. 30.

fruition²⁶¹. To take the example given in the Official Comment to the UNIDROIT Principles²⁶²:

“[T]he owner of a horse which arrives too late to run in a race as a result of delay in transport cannot recover the whole prize money, even though the horse was the favourite”.

In this example, the owner must be satisfied with compensation proportionate to the probability of the win.

252. But the facts of our case do not fit the example: 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 plus an AM informational 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.

The Tribunal’s task

253. The compensation to which Mr. Lemire is entitled is the loss of value which his investment has suffered, and this loss must be established by subtracting the actual value of Gala Radio in its “as is” condition from the hypothetical value of the investment “but for” the wrongful acts of Respondent. This task has been addressed by the experts appointed by each party, who acquitted themselves to a very professional standard, but nevertheless came to strikingly different results (with Goldmedia arriving at figures of between 30 and almost 50 M USD²⁶³, and EBS of significantly less than 0.5 M USD²⁶⁴).
254. The only aspect on which both experts have agreed is that the appropriate methodology to establish the damage in a case like this one is a DCF analysis. This methodology, based on the prediction of a future stream of cash flow, which is then discounted at a given rate, has been acknowledged and frequently applied in the recent practice of investment arbitration²⁶⁵. Given this acceptance and the common proposal of both experts, the Tribunal sees no difficulty in using a DCF methodology. The Tribunal will thus adopt the basic philosophy proposed by the experts, but will critically review their assumptions and calculations.

²⁶¹ Kantor, p. 74.

²⁶² Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law [“UNIDROIT Principles”], Article 7.4.3(2).

²⁶³ GSR, p. 6.

²⁶⁴ ESR, p. 52.

²⁶⁵ Marboe, p. 209.

B. Selection of a Scenario

255. As explained above²⁶⁶, Goldmedia compared Scenario I, which represents Gala Radio in “as is” conditions, with one of four hypothetical Scenarios, numbered II, III, IV and IV A) which represent the “but for” situation. The Tribunal’s first task is to determine which, if any, of these four alternatives may serve as a foundation for the most plausible assessment of damages.
256. **Scenario II** assumes the existence of a national FM channel as of 2001. The Scenario thus correctly reflects the Tribunal’s assumption that, had Respondent not engaged in irregular practices during the Interregnum, Gala should have received, by January 1, 2001, the 14 frequencies required to operate a nationwide FM music network²⁶⁷.
257. **Scenario III** adds to Scenario II the existence of a second FM radio network for young audiences, which would have been granted to Gala Radio. The Tribunal has concluded that Claimant’s initial plans did not include the creation of a second FM network, that there is no causal link between the violation and the inexistence of this second network and that consequently this unforeseeable and remote factor must be excluded from the calculation of damages²⁶⁸.
258. **Scenario IV** adds to Scenario III the existence of a nationwide AM radio network with talk radio. Since the Arbitral Tribunal has already rejected Scenario III, the possibility of accepting Scenario IV becomes moot.
259. **Scenario IV A)** adds to Scenario II – which has already been accepted – the existence of a nationwide AM radio network with talk radio. The Tribunal has already decided that, absent the National Council’s wrongdoing, Gala would have received in 2004 the necessary authorisation to incorporate an AM network²⁶⁹. Consequently, Scenario IV A) is the one which, *prima facie*, best represents Claimant’s initial plans and which could serve as basis for the calculation of damages.
260. Scenario IV A), however, suffers important shortcomings, due to the particular difficulties of establishing a proper DCF value for an AM channel:
- in Ukraine most AM channels are operated by non profit organisations²⁷⁰, there being only one commercial AM network, Radio Majak, and its reach is not comparable to that which Gala Radio could have obtained²⁷¹; there is a lack of comparable entities to perform a bottom up calculation of revenues, with the result that the projected income of an AM channel in Ukraine cannot be predicted with a minimum level of certainty;
 - secondly, the audience which uses AM receivers is mostly the rural population, which is not of high interest for commercial advertisers; when

²⁶⁶ See para. 218 *supra*.

²⁶⁷ See para. 179 *supra*.

²⁶⁸ See para. 162 *supra*.

²⁶⁹ See para. 201 *supra*.

²⁷⁰ Confirmed by Dr. Wiegand, HTRI, p. 177.

²⁷¹ ESR, p. 50.

AM frequencies were put out to tender, in many cases the tender process could not be concluded, as there were no applicants²⁷²;

- thirdly, Goldmedia itself acknowledges the economic difficulties of AM channels, and in its GSR for the first time includes the assumption that the AM frequency would have been converted into an FM licence in 2006²⁷³; this assumption is speculative, because there is no evidence that Gala Radio had at any time envisaged such a switch.

261. For these reasons, the Tribunal finds that Scenario IV A) is too uncertain, because it incorporates a type of business – broadcasting talk radio on AM band in Ukraine – which has not been developed on a commercial for profit basis in Ukraine, and for which it is impossible to prepare a DCF valuation without an intolerable level of speculation. Consequently, the Tribunal will opt for the most conservative Scenario and adopt Scenario II, which foresees Gala Radio as a full national broadcaster but without an AM channel. The Tribunal finds that in this Scenario the projections for income and costs offer a much higher level of certainty, and that the requirement that speculative losses be excluded from the calculation is better served. Besides, the Tribunal is unconvinced that the existence of an AM talk radio channel would have produced significant additional net income.

C. The Calculation of Gala Radio’s “Enterprise Value”

262. Goldmedia calculated the value of Gala Radio under Scenario II using an “enterprise value” methodology²⁷⁴. This methodology is based on two elements:

- the discounted free cash flow, which represents the cash flow available for distribution among all the securities holders of an enterprise, discounted at the corresponding discount rate; and
- the discounted terminal value, which is the value that the enterprise would be worth at the end of the valuation horizon, similarly discounted.

263. In order to obtain the **discounted free cash flow**, the report applied the following steps:

- it first estimated Gala Radio’s EBITDA in UAH for the years 2001 - 2015;
- it then deducted the taxes for that period of time;
- it so obtained the operating cash flow of Gala Radio;
- the next step consisted in subtracting capital expenditures, which it assumed only occurred in 2001;
- thus obtaining the free cash flow for each year in UAH;
- which is then converted into USD;
- discounted at 13.46%;
- resulting in a net present value of **12,515,000 USD**.

264. Golmedia equates the **terminal value** to the discounted free cash flow in 2015 multiplied by an estimated further company lifetime of seven years (assuming a

²⁷² ESR, p. 48 and Appendix B 5.

²⁷³ GSR, p. 10; HTRI, p. 175.

²⁷⁴ Different valuation methodologies in these situations are described in Kantor, p. 42.

typical licence period)²⁷⁵. This rather simple definition turns into more complex calculations²⁷⁶:

- the discounted free cash flow in 2015 has been calculated as 6,087,000 USD²⁷⁷;
- the report divides this amount by 0.3258;
- this number is obtained through the following formula:

$$\text{Discount interest rate} * (1 + \text{discount interest rate}) ^ \text{further company lifetime} = 13.46\% * (1+13.46\%)^7$$

- the terminal value is thus fixed at **18,682,000 USD**.

265. Goldmedia added the two elements to establish Gala Radio's "as of" "enterprise value" of 31,198,000 USD²⁷⁸, deducted from this amount the "enterprise value" in "as is" conditions, 728,000 USD, and thus calculated the total damage for Scenario II as 30,469,000 USD²⁷⁹.

266. EBS disagrees with this "enterprise value" methodology and has advocated that the valuation be performed using a "lost profits" approach instead. Under this approach, damages would be calculated on the basis of the discounted free cash flows from 2001 through 2015²⁸⁰, without taking into consideration any terminal value. EBS has not disputed Goldmedia's proposal that the basis of the DCF analysis should be the free cash flow available to Gala Radio (and not EBIT or any other similar accounting concept).

The Tribunal's Position

267. The Tribunal agrees with Respondent's expert, EBS, that the terminal value should not be added when calculating the damages. The Tribunal bases its decision on the following reasons:

268. (i) In first instance, the Tribunal notes that under the Goldmedia methodology the terminal value is by far the most important element in the establishment of the "enterprise value"; thus it is fundamental that the quantification of this element is sufficiently certain; in the Tribunal's opinion, this requirement is not met, since the terminal value is calculated using the estimation for the 2015 free cash flow and then multiplying this already rather uncertain figure by a factor – a product of the expert's personal judgement – of seven; thus any inaccuracy in the calculation of the 2015 cash flow provokes a multiplied effect in the terminal value²⁸¹.

²⁷⁵ GFR, p. 18, HTRI, p. 128.

²⁷⁶ The formula applied is available at the excel spread sheet of damage calculation provided by Goldmedia on October 10, 2008.

²⁷⁷ GSR, p. 67.

²⁷⁸ (12,515,000 USD + 18,682,000 USD = 31,198,000 USD). The slight differences in the above amounts are a result of the rounding of numbers by Claimant's expert.

²⁷⁹ GSR, p. 67; again there are differences caused by the rounding of numbers.

²⁸⁰ EBS agrees for the Scenario II with the 2001 to 2015 time span; see ESR, p. 17.

²⁸¹ Acknowledged by Dr. Wiegand, HTRI, p. 129.

269. (ii) Secondly, although it is rational in principle that someone assessing the value of a business today would consider not only the value of an income stream from today until 2015, but would also project net income from that year forward as establishing a residual additional present value, the Tribunal does not view Gala Radio in this light. The evidence, particularly witness testimony, in this case creates an irresistible impression that Gala Radio's fortunes depend on the initiatives and personal commitment of Mr. Lemire. Gala Radio cannot be described as an institutionalised enterprise, nor can the industry or environment in which it operates be described as one that gives assurance of such a corporate evolution.
270. In other words, the Tribunal believes that the case of Gala Radio presents in a rather emphatic way the problem of the "succession factor" present in the valuation of family-owned small-to-medium businesses, and on that basis sees no warrant to endorse Claimant's inclusion of a residual value beyond the one that reflects lost value until the 2015 horizon. The Tribunal is aware that this is quite a conservative approach, in effect giving no credit for possible profit beyond a five-year period, but believes it appropriate in the circumstances of this case.
271. If EBS's "lost profit" methodology is applied in Scenario II, and all other parameters and conditions in Goldmedia's calculation are preserved, the amount of damages suffered by Claimant is reduced to 12,388,000 USD (the result of subtracting a Scenario I net present value of 127,000 USD from a Scenario II net present value of 12,515,000 USD²⁸²).

D. Application of UAH v. USD

272. In GFR, Goldmedia's original 2008 Report, USD was the main currency for the presentation of Gala Radio's historical financial statements and the currency for forecasts and valuations. That approach may have seemed reasonable, because until the recent financial crisis the Hryvnia was relatively constant vis-à-vis the USD²⁸³. In 2008, however, the Ukrainian currency suffered a major and rapid devaluation of up to 40% and prices uncoupled from the USD²⁸⁴. As a consequence of these changes, in its final presentation Goldmedia switched currencies. For historical periods of up to 2008 inclusive, Goldmedia first took Gala Radio's actual cash flows in UAH, and then converted them into USD at the historic exchange rate. All *post* 2008 cash flows are calculated in UAH, and then translated into USD at a forecasted exchange rate of 8 UAH/USD²⁸⁵; the annual free cash flows denominated in USD are finally discounted at the appropriate discount rate²⁸⁶.
273. EBS has submitted that there is a methodological flaw in the way Goldmedia is using the different currencies. The Tribunal disagrees, and on this issue sides with Goldmedia.

²⁸² GSR p. 67; ESR, p. 13 arrives at slightly different figure, because it applies a different discount rate.

²⁸³ HTRI, p. 138.

²⁸⁴ HTRI, p. 141.

²⁸⁵ ESR, p. 16.

²⁸⁶ Acknowledged by Dr. Wiegand, HTRI, p. 138.

274. For reason to be explained below, the Tribunal will adopt Prof. Damodaran's approach for calculating the discount rate, and will accept EBS's number, established under this methodology, of 18.51%. This rate is the result of adding a Riskfree Rate based on the ROI²⁸⁷ of US Bonds, a Mature Market Premium based on the US market, plus a Country Risk Premium of 7.43%. Since the Risk Free rate is expressed in nominal (*i.e.* without taking into account the effect of inflation) Dollar terms, consistency requires that discounted cash flows also be expressed in nominal Dollars²⁸⁸. In Goldmedia's model, the cash flows are expressed in nominal Hryvnias, and then converted into Dollars at a fixed exchange rate. Goldmedia has chosen 8 UAH/USD, which reflects present market situations, and EBS has not proposed an alternative calculation. All in all, the Tribunal finds that Goldmedia is using Dollars and Hryvnias in a consistent way and that Goldmedia's application of the UAH/USD exchange rate is reasonable.

E. Discount Rate

275. Goldmedia and EBS disagree on the discount rate to be applied in the DCF model.

NACVA

276. Goldmedia initially applied NACVA methodology²⁸⁹, a rather simple system, based on five defined risk categories. Claimant's expert used Category 1 (*i.e.* least risky company) for the hypothetical Scenarios II – IV A), and Category 2 (*i.e.* slightly more risk) for Scenario I (*i.e.* for Gala Radio "as is")²⁹⁰. By picking a higher, riskier discount rate for Scenario I compared to Scenarios II through IV A), the valuation performed by Goldmedia increased the amount of damages²⁹¹.

277. The overall discount rate used by Goldmedia in the GSR added up for Scenarios II through IV A) to 13.46%²⁹². In Goldmedia's opinion, the reasonableness of this rate was confirmed in the 2008 IPO²⁹³ in the Frankfurt Stock Exchange of the company UMH, in which Concorde Capital, in order to value the company, applied an average discount rate for 2009 - 2012 of 13%. The discount used for Scenario I is 18.46%.

278. EBS submits that the NACVA approach for establishing discount rates is only correct for developed countries, but that in developing countries like Ukraine the Bludgeon Approach pioneered by Prof. Damodaran is more appropriate. EBS adds that, even if the NACVA methodology is selected, Claimant's expert is applying it incorrectly, because the same discount rate must be used both for Scenario I and for all the remaining Scenarios. The use of a higher discount rate for Gala Radio "as is" increases the difference in valuation between Scenario I and all other Scenarios.

²⁸⁷ Return on Investment ["ROI"].

²⁸⁸ Aswath Damodaran: "Estimating Risk free Rates", Paper, p. 5, available at <http://pages.stern.nyu.edu/~adamodar/pdfiles/papers/riskfree.pdf>.

²⁸⁹ GSR, p. 13.

²⁹⁰ HTRI, p. 178.

²⁹¹ HTRI, p. 180 and 181.

²⁹² GSR, p. 15.

²⁹³ "Initial Public Offering"; GSR, p. 67.

279. On this issue, the Tribunal sides with EBS.
280. NACVA represents a domestic methodology, which is appropriate to value companies in the US and possibly in other developed nations. It does not, however, reflect country risk, *i.e.* the fact that the same company, situated in the US or in Ukraine, is subject to different political and regulatory risks; to reflect this difference, *ceteris paribus* the discount rate in Ukraine must be higher (and the valuations lower) than in the US. The NACVA approach does not acknowledge this difference, while the Damodaran methodology includes a specific item to reflect country risk and thus is to be preferred.
281. Goldmedia has argued that if the investor had sold Gala Radio, the buyer would have been a domestic player, which would not take country risk into account²⁹⁴. The Tribunal is unconvinced: a buyer will rationally pay more when investing in the equity of companies located in nations with low country risk.

Prof. Damodaran's Approach

282. EBS already proposed in its first report that the appropriate methodology for calculating the discount rate is Prof. Damodaran's approach. Aswath Damodaran is a Professor at Stern School of Business, NY, and a prominent authority in the valuation of companies and cash flows and the creator of a frequently used web page with *formulae* and data²⁹⁵. Both experts agree that, in accordance with his methodology, the cost of equity is equal to the sum of:
- the Riskfree Rate, based on the ROI of US bonds;
 - a Beta (namely the stock price volatility of individual equities) multiplied by a Mature Market Premium, based on the US market; and
 - a Country Risk Premium, which is dependent on the country in which the investment is located.
283. In its GSR Goldmedia accepted the Bludgeon Approach, as an alternative to the NACVA system, and submitted a calculation of the discount rate based on Prof. Damodaran's methodology²⁹⁶. Goldmedia used the average Beta of all stock companies operating in all industries in Central and Eastern Europe, as listed in Prof. Damodaran's homepage. The result was a total discount rate, which would be different for each year between 2001 and 2015, and which would float between 10.81% for 2005 and 16.10 % for 2010²⁹⁷.
284. In its second report, while welcoming the use by Goldmedia of the Damodaran approach, EBS disagreed with Goldmedia's alternative calculation, because in its opinion Goldmedia was using Prof. Damodaran's *formulae* incorrectly. Applying the system in what EBS deemed the appropriate fashion, EBS arrived at a uniform discount rate of 18.51%²⁹⁸.

²⁹⁴ GSR, p. 18.

²⁹⁵ <http://pages.stern.nyu.edu/adamodar>.

²⁹⁶ GSR, p. 18.

²⁹⁷ GSR, p. 24.

²⁹⁸ ESR, p. 21.

285. Not without hesitation, the Tribunal prefers EBS' calculation of the discount rate. The reasons are the following:
- EBS' calculation of the Riskfree Rate is based on the exact data from the Prof. Damodaran's web site;
 - the Beta used by EBS for the broadcasting industry in developing markets appears to better reflect Gala Radio's risk than the Beta proposed by Goldmedia, which refers to all companies in Central and Eastern Europe;
 - EBS' use of a 10 year average of the Mature Market Premium is to be preferred to Goldmedia's proposal of selecting the Market Premium in one single year (2009).
286. The Tribunal thus concludes that the appropriate discount rate, both for Scenario I and II, is 18.51%. Since the discount rate will be applied to a stream of nominal Dollars, the Tribunal finds that it is inappropriate that this rate be increased by the projected inflation rate in Ukraine.
287. Goldmedia has drawn the Tribunal's attention to the 2008 IPO in the Frankfurt Stock Exchange of the company UMH, in which Concorde Capital valued the company applying an average discount rate for 2009 - 2012 of 13%. In the Tribunal's opinion, it is not appropriate to compare Gala Radio with UMH, because UMH is a diversified holding, listed on the Frankfurt stock exchange, while Gala Radio is a much smaller, undiversified radio broadcaster in Ukraine. Furthermore, as EBS has pointed out²⁹⁹, the UMH discount rate was estimated as weighted average cost of capital, whereas Gala Radio does not have any debt.

F. Determination of Free Cash Flow

288. As in all other hypothetical Scenarios, Goldmedia has calculated Gala Radio's Scenario II income using a bottom-up approach³⁰⁰, *i.e.* applying the advertising prices of the first movers in the radio market (HIT, Russkoye, Nashe and Europa Plus)³⁰¹. In Scenario II these calculations lead to the following predictions:
- "but for" revenues in year 2008 would amount to 32,770,000 UAH and in 2015 to 81,116,000 UAH³⁰²;
 - "but for" costs for the same years would be 12,386,000 UAH and 16,322,000 UAH;
 - a predicted CAPEX investment of 2,757,430 UAH;
 - leading, after conversion of amounts denominated in Hryvnias into Dollars, to predicted free cash flow of 2,840,000 USD in 2008 and 6,087,000 USD in 2015³⁰³.
289. The Tribunal has reviewed the methodology used by Goldmedia when calculating Gala Radio's available free cash flows³⁰⁴. While it is true that some of the

²⁹⁹ ESR, p. 24.

³⁰⁰ An alternative top down approach was abandoned in the GSR.

³⁰¹ GSR, p. 36.

³⁰² GSR, p. 54.

³⁰³ GSR, p. 67; EBS Appendix A-3 calculates the 2008 free cash flow as 2.839.900 USD and the 2015 free cash flow as 6.083.500 USD – possibly due to rounding discrepancies.

assumptions are debatable, the Tribunal finds that, all in all, the model created by Claimant's expert represents a fair estimate of how Gala Radio would have developed until 2015, if it had been awarded the necessary licences to become a national network in 2001. In the opinion of the Tribunal, in that case, and with the additional support of a talk radio in AM format, it is reasonable to project that Gala Radio would have managed to produce a free cash flow of roughly 3 M USD in 2008 and of 6 M USD in 2015. To achieve these results, Mr. Lemire would have needed to provide an additional funding for CAPEX of 2,757,430 UAH (less than 350,000 USD) – an investment which appears to be within his financial capabilities.

Criticism by EBS

290. EBS has criticized Goldmedia's cash flow predictions for a number of reasons³⁰⁵:
291. EBS argues first of all that the 2001 - 2006 numbers are based on 2007 rates, deflated by US average consumer price index, not by the Ukrainian domestic inflation rate. The Tribunal does not share EBS' argument, because until 2008 prices in Ukraine fluctuated consistently with the Dollar, and thus it is logical to apply US inflation rates before that year.
292. Secondly, EBS submits that Goldmedia's proposed average rate for Kyiv is 49% higher than Gala Radio's actual rate, without any justification, and that the benchmark radios should be Hit and Europa Plus, not Nashe and Russkoe Radio. The Tribunal again disagrees, and accepts Goldmedia's detailed calculations explained in Exhibit 29 to its GSR³⁰⁶. Goldmedia has factored in that the increase in the advertising prices will not be higher than the expected inflation³⁰⁷, and has taken the average price of the first four movers³⁰⁸ – all reasonable assumptions.
293. Thirdly, EBS has stated that Gala Radio's official accounting underreports income and underestimates personnel costs, and that Gala Radio's books are not reliable. EBS made this allegation for the first time in its final report, but did not present any hard evidence in support. EBS simply asserts that most of the Ukrainian media market is working in a non-transparent way and that 75 - 80% of Gala Radio's employees are working at the minimum wage salary level³⁰⁹. In the Tribunal's opinion, this is clearly insufficient to prove the serious allegation that the whole Ukrainian media sector, including Gala Radio, is working with two sets of accounting books – one official, but false, the other unofficial but correct³¹⁰.

³⁰⁴ GSR, pp. 36 to 38.

³⁰⁵ ESR, p. 40.

³⁰⁶ GSR, p. 39.

³⁰⁷ GSR, p. 36.

³⁰⁸ HTRI, p. 165.

³⁰⁹ ESR, p. 36.

³¹⁰ Dr. Voss in his Separate Opinion submits that “[h]owever, the financial statements are bound to be inaccurate since they fail to reflect Claimant's actual contributions to Gala and thus overstate its profits or understate its losses, as the cast may be” (para. 372). The Tribunal has concluded that Mr. Lemire's personal assets and those of Gala Radio are somewhat commingled, and that Mr. Lemire has invested approximately 2.4 M USD of his own monies, which are not reflected in Gala's balance sheet. The Tribunal consequently agrees with Dr. Voss' statement. But Dr. Voss then takes his argument one step further, concluding that Gala's “*profits and loss accounts* [...] *were evidently inaccurate*” (para. 373). This statement is unproven. There is no evidence on the record quantifying the impact on the profit and

294. The Tribunal's conclusion is reinforced by the testimony of Dr. Wiegand, Claimant's expert. Asked by counsel, he confirmed that he had not found any irregularities in Gala Radio's accounts and that all financial statements which he had been shown were audited by an independent certified accountant³¹¹.
295. Summing up, the Tribunal is satisfied that the free cash flow predictions made by Claimant's expert with regard to Scenarios I and II are reasonable, that they present a fair estimate of Gala Radio in "as is" and in "but for" conditions, and that these projections – summarized in Exhibit 50³¹² of Goldmedia's GSR – are the appropriate numerical basis for the DCF analysis³¹³.

loss account, if Mr. Lemire's investments had actually been put on the balance sheet of the company. The issue has not been addressed by any of the experts. Neither have the alternatives for capitalization of the investments been discussed or analysed. Dr. Voss' estimate that capitalization would increase losses is unproven speculation.

³¹¹ HTRI, p. 122.

³¹² GSR, p. 67.

³¹³ In paras. 378 and 379 of his Separate Opinion, Dr. Voss adds one further criticism: in his opinion "*past profits are the primary indicator of future profits*"; and since Gala Radio's earnings are volatile and there is an accumulated net loss for the entire period, in his opinion the estimates of lost profits are not supported by the earning record. The Tribunal agrees that under normal circumstances, lost future profits must be supported by a record of earnings. 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. In these circumstances, damages must be established by deducting Gala's "as is" value, from its hypothetical "but for" value. The "as is" value will be low, because earnings will be depressed as a consequence of Respondent's wrongful actions. The "but for" value, however, has no relationship with Gala Radio's actual profits: it is premised on Gala's hypothetical (not on its actual) earnings record, if Ukraine had adhered to the FET Standard.

3.5. Conclusion

296. The Tribunal has already decided that the correct discount rate is 18.51%, as calculated by EBS applying the Bludgeon Approach. This discount rate must be inserted into the Scenario I and II free cash flow predictions worked out by Goldmedia. This calculation is not available in the spread sheets prepared by Goldmedia – because Goldmedia uses a different discount rate – but it is provided by EBS in Appendix A - 3 to its ESR³¹⁴. The resulting amounts (which have not been disputed by Claimant or by Goldmedia) are the following:

- net present value of the discounted cash flows in Scenario I: 126,290 USD;
- net present value of the discounted cash flows in Scenario II: 8,844,140 USD³¹⁵;
- loss suffered by the investor: 8,717,850 USD³¹⁶.

297. In view of the above reasoning, the Tribunal concludes that the total compensation which Respondent is to pay to Claimant as a result of Respondent's violation of the FET standard defined in the BIT amounts to 8,717,850 USD³¹⁷.

³¹⁴ The numbers used by Goldmedia and EBS are the same, with small rounding differences.

³¹⁵ In para. 369 of his Separate Opinion, Dr. Voss states that “[i]n 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.” What Dr. Voss does not take into account is that the “as is” enterprise value is small, because Gala Radio has been affected by Respondent’s wrongful acts. And the “but for” enterprise value is (comparatively) large, because as a broadcaster with nation-wide coverage Gala Radio would have been able to reap the benefit of economies of scale, applying the same rates for advertising as its privileged competitors and earning a much higher income, without significantly increasing its costs. The Tribunal, after carefully weighing the available evidence and analysing in detail the submission of both experts, is convinced that the free cash flow calculations made by Claimant’s expert are fair and reasonable.

³¹⁶ 8,844,140 USD – 126,290 USD.

³¹⁷ In paras. 540 to 545 of his Separate Opinion Dr. Voss includes certain references to European Procurement Law contained in Directive 92/13/EEC and to the 2009 German “*Gesetz gegen Wettbewerbsbeschränkungen*”. These laws have not been pleaded by any of the parties, have never been discussed in the course of the arbitration until Dr. Voss presented his Separate Opinion and, in the opinion of the Tribunal, have no bearing whatsoever on the calculation of damages for an international wrong committed by Ukraine against an American investor.

Furthermore, Dr. Voss’ assertion that under Directive 92/13/EEC Claimant’s claims would be dismissed (i) because of Gala’s failure to participate in the tenders, (ii) because of Gala’s failure of proving a real chance in particular tenders and (iii) because any recovery is limited to *damnum emergens*, is but a personal and unsubstantiated opinion. Even if Directive 92/13/EEC had any relevance to the case (*quod non*), Dr. Voss’s conclusions seem to be at odds with Article 2.1 (d) of the Directive which, in cases when a procurement decision has been declared illegal, does not limit the type of damages which can be awarded.

Finally, Dr. Voss’ statement that para. 126 of the “*Gesetz gegen Wettbewerbsbeschränkungen*” limits any compensation to the expenses incurred, excluding *lucrum cessans*, is also his personal unproven opinion. The final words of para. 126 (“*Weiterreichende Ansprüche auf Schadensersatz bleiben unberührt*”) seem to imply the contrary.

298. The amount of damages has been established applying a DCF model, developed on a number of assumptions, some of which necessarily involve more estimation than certitude, and the resulting amounts are not free of doubt and debate. It is thus important that the overall result be tested against other parameters, in order to confirm the reasonability of the calculation.

Amounts Invested

299. (i) The first test of reasonability involves comparing the compensation to be awarded with the amount invested by Claimant.

300. Investment and damages are of course separate concepts: investment refers to the resources which Claimant brought into Ukraine in order to create and fund Gala Radio, and damages to the loss of value which Gala Radio suffered as a consequence of the breaches in the BIT. Although the amounts invested do not constitute a ceiling to the compensation, there must, with respect to most enterprises, be a common sense correlation between both concepts: the amounts invested influence the size of the enterprise, and the size of the enterprise, together with the investor's activities and skills, define the earning expectations and the value of the business³¹⁸. And in certain cases, arbitral tribunals have rejected calculations based on DCF methodology by reason of the disproportionality of the sums invested and the damages sought³¹⁹.

301. The true amounts invested have been much debated between the parties. Claimant has submitted that his total investment amounts to approximately 4.5 M USD, plus the personal dedication of Mr. Lemire, valued for a minimum of 5 M USD³²⁰. Respondent has acknowledged an investment of only 0.9 M USD³²¹.

302. In fact, it is not easy to define the exact amount of Mr. Lemire's investment, because, as he himself has accepted, his personal assets and those of Gala Radio have been somewhat commingled³²². The Tribunal is satisfied that the total proven amount of investment made by Mr. Lemire since 1995 is in the region of between 2 and 3 M USD: 1.3 M USD real estate³²³, 0.8 M USD assets³²⁴, 0.3 M USD loans³²⁵ (the marketing expenses seem to have been funded by Gala Radio, and as such do not qualify as investment³²⁶). To this must be added his own management time during 15 years, which undoubtedly represents a significant economic value, at any rate well in excess of the modest salary he was attributed by Gala Radio; as well as the hypothetical additional amounts which Mr. Lemire

³¹⁸ Some large corporate enterprises diversify discrete investments, accepting the high likelihood of zero returns for individual projects (*i.e.* costly dry holes in the petroleum industry) by reason of confidence in the probability that they will be compensated for by high returns on others. Claimant in this case was not a diversified investor of such dimensions.

³¹⁹ *Wena Hotels Ltd. v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4), Award of December 8, 2000, para. 123; *Técnicas Medioambientales S.A. v. México*, (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, para. 186.

³²⁰ CMRI, para. 22.

³²¹ RMRI, para. 121.

³²² CMRI, para. 20.

³²³ CMRI, para. 13.

³²⁴ CMRI, para. 17.

³²⁵ CMRI, para. 20.

³²⁶ RMRI, para. 113.

would have invested if he had been granted the additional licences which were denied to him³²⁷.

Risk Environment

303. (ii) Another important factor which must be taken into account is the risk environment in which Mr. Lemire made his investment. Mr. Lemire was not a passive investor in a mature market. He had the courage to venture into a transitional State and to create from scratch a completely new business. Transitional economies need such investors, who take considerable risks and commit themselves with great energy, notwithstanding the absence of clear recovery horizons. Such investors come and go, many of them risking and losing everything because their idea was not sound, or they were too quickly discouraged, or the venture turned out to require greater resources than what they were able to mobilise. When they lose, they have no right to compensation. Legal liability by the host state arises only if the duties of legal investment protection have been breached, and is transformed into monetary recovery only when there has, in consequence, been an appreciable loss.
304. The Tribunal has found that Mr. Lemire is in this situation; the Tribunal has made an evaluation of the loss suffered, using the DCF methodology submitted by the experts. It has applied this procedure and established a number. Is this amount a fair reflection of the actual loss, reasonably proportional to the investment?
305. Mr. Lemire is not to be equated with a US investor who purchases Treasury bonds, or invests in a residential project in a region known for steady economic growth and increased demand for housing. The risk/reward ratio which Mr. Lemire and such a passive investor can expect are radically different. Two additional factors stand out: Mr. Lemire has devoted a significant proportion of his career to the Gala Radio project in Ukraine, and he brought and implemented a new conception of commercial radio which was entirely new in this ex-USSR environment. Mr. Lemire seemed to have been on his way to becoming a dominant figure in the radio industry in Ukraine. Once he proved that it could be done, others with greater political clout shouldered him aside, and this was clearly facilitated by the conduct of the State.
306. On that basis, the Tribunal finds that there is indeed an adequate proportionality between the compensation awarded to Mr. Lemire and his investment – not in cash alone but in a combination of cash, risk-taking, personal commitment, and the essential contribution of a path-breaker.

³²⁷ In para. 370 of his Separate opinion, Dr. Voss argues that if the investment made by Mr. Lemire since 1995 is – as the Tribunal finds – in the region of between 2 and 3 M USD, and this determination is related to Gala's actual net enterprise value of some 126.290 USD assumed by the Tribunal, then Gala must have generated a net loss of some 2 M USD between 1995 and 2010. Dr. Voss' argument is difficult to follow. First of all, Dr. Voss is comparing an accounting item (investments) with an enterprise value calculated under a DCF analysis – 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.

Comparable Transactions

307. (iii) EBS, Respondent's expert, has made the effort of submitting a valuation of Gala Radio based, not on a DCF analysis, but on recent mergers and acquisitions of comparable companies in Ukraine³²⁸. As EBS itself acknowledges, the number of transactions is limited, the available information incomplete or not confirmed, and the exercise is not fully reliable.
308. Subject to these caveats, and assuming that Gala Radio had only been able to secure a 5% market share, EBS calculates that the value of Gala Radio as a national network operating additionally a second AM talk network would amount to approximately 5 M USD. It must be stressed that EBS' calculation is based on an assumed 5% market share. In the Tribunal's opinion, this figure is low, because it does not take into consideration that during the late 90's Gala Radio was the number 1 or number 2 radio station in Kyiv and that it was deprived of its first mover advantage. It seems reasonable to accept that, but for the wrongful breach of the BIT, Gala Radio would have grown into one of the main radio broadcasters in Ukraine, with more than a 5% market share, and consequently with a value well above the 5 M USD proposed by EBS.
309. If one accepts EBS' calculation that a reasonable valuation of Gala Radio in "but for" conditions would significantly exceed 5 M USD, and if one remembers that the actual "as is" value of the company is very low or almost nil, the figures again confirm the reasonableness of the compensation established by the Tribunal.

³²⁸ ESR, p. 25.

IV.2 THE EXISTENCE OF MORAL DAMAGES

310. The First Decision devoted section VII.4.3 to a preliminary analysis of Claimant's request for a compensation for moral damages, which he claimed in an amount of 3 M USD. The Arbitral Tribunal noted that Gala Radio was not treated in an even-handed fashion by the National Council as its regulator, and identified three sets of facts which, in theory, could lead to the awarding of moral damages:
- the rejection of all (bar one) of Gala Radio's applications for new frequencies³²⁹;
 - the fact that Gala Radio was never inspected until 2005, and in the next three years was the object of five inspections, of which four were unscheduled and warnings against Gala Radio followed³³⁰;
 - Gala Radio's application for extension of its licence was delayed and was granted in the same session when a substantial increase in the renewal fees was approved³³¹.
311. The Tribunal acknowledged that moral damages could only be awarded in exceptional circumstances³³² and postponed the decision on whether the facts of the case constituted "*exceptional circumstances*", until further briefed on the context and causation of the moral damages³³³.

³²⁹ First Decision, paras. 485 and 486.

³³⁰ First Decision, para. 484.

³³¹ First Decision, para. 484.

³³² First Decision, para. 476.

³³³ First Decision, para. 486.

1. Claimant's Case

312. Mr. Lemire considers that the “*exceptional circumstances*” test is met. He refers to the *Lusitania* Cases as a standard for such exceptional circumstances. In that case, the Commission found that injuries inflicted which “*result in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation*” should receive compensation “*commensurate to the injury*”³³⁴.
313. Claimant also submits that the intensity and duration of Respondent’s breaches of the BIT in relation to the allocation of frequencies, as well as of Respondent’s other breaches, have caused Claimant intense moral injuries, tantamount to bodily injury, which merit compensation in the amount of 3 M USD³³⁵.

Allegations regarding BIT Breaches Related to the Awarding of Frequencies

314. As regards the breaches in the awarding of frequencies, Claimant stresses that these warrant not only an economic compensation, but also the award of moral damages as compensation for the efforts in applying for frequencies. The efforts referred to by Claimant consist in the preparation of numerous applications throughout the last decade, as well as attendance at meetings, the recording of the National Council’s sessions and the necessary follow-up³³⁶. Claimant also lists the disrespect suffered by Mr. Lemire and his team during the procedures, where he was refused the floor during tender meetings.
315. As a result of these practices Mr. Lemire claims to have suffered “*constant indignity, frustration, stress, shock, affront, humiliation, shame, degradation...*”³³⁷. More specifically, Claimant states that the constant rejections resulting from the BIT breaches incurred by Ukraine eroded his image, turning him from a “*great pioneer*” into a “*loser incapable of expanding his business and playing in a bigger league*”³³⁸, thus depriving him of the first mover advantage and a promising leadership position in the radio industry.
316. Moreover, Mr. Lemire claims that the constant portrayal of him as a loser by Respondent continued even after the Tribunal’s Decision acknowledging Ukraine’s breaches.

³³⁴ More than 50 cases decided by the Mixed Claims Commission (United States and Germany), included in Volume VII of the November 1, 1923 to 1930, Reports of International Arbitral Awards prepared by the UN, [“*Lusitania* Cases”].

³³⁵ CMRI, para. 93.

³³⁶ CMRI, para. 81.

³³⁷ CMRI, para. 81.

³³⁸ CMRI, para. 82.

317. As a result of these practices Claimant submits that his other activities (such as the development of his group of companies and business in general or the enjoyment of life) were disrupted.

Allegations regarding other Breaches

318. As regards damage resulting from other breaches, Claimant stresses Respondent's acts and omissions, which, as the Arbitral Tribunal acknowledged, resulted in a one-sided treatment of Gala Radio³³⁹, such as for instance the number of inspections suffered, or the warnings issued by the National Council against Gala Radio, warnings which later on were set aside by the Ukrainian courts.

³³⁹ CMRI, by reference to the First Decision, paras. 484 and 485.

2. Respondent's Case

319. Respondent considers that moral damages cannot be awarded, since the facts of the case do not rise to the standard set by international investment tribunals. Ukraine compares the circumstances of these proceedings to those found in *Desert Line Projects v. Yemen*³⁴⁰ and draws the conclusion that the standard of “*exceptional circumstances*” refers to cases where the government exerts malicious physical duress and displays “*egregious behaviour*”³⁴¹.
320. According to Respondent, the “*great effort*” which Claimant allegedly had to deploy is not sufficient to meet the standard necessary to award moral damages, since the sufferings Mr. Lemire says he endured are not comparable to military siege or physical arrest. Ukraine further states that Gala Radio’s situation was no different than that of other national broadcasters, which were subject to the same monitoring and inspection procedures and were treated in a similar way in the renewal of their licences³⁴².
321. Respondent also makes reference to the decision in *Siag*³⁴³, where the claim for moral damages was rejected under the basis that the “*exceptional circumstances*” threshold is very high and applies only to extreme cases of harassment. Ukraine maintains that there is no evidence that Claimant was maliciously treated or that he or his company suffered any physical harm or direct threats. In fact, Respondent considers that it was the National Council who was harassed and intimidated by Mr. Lemire³⁴⁴.
322. Ukraine also rejects Claimant’s representation that he has become “*a beggar merely trying to survive*”³⁴⁵. Respondent considers that Gala Radio has shown a certain level of success, which places the company in a respectable position within the Ukrainian broadcasting market, as proven *i.e.* by the awards received for its performance.
323. In any case, Respondent considers that Claimant has failed to demonstrate that the award of moral damages is necessary to place Mr. Lemire in the position he would have been in had there been no breaches of the BIT³⁴⁶.
324. If the Arbitral Tribunal were to determine that Claimant is entitled to moral damages, Respondent considers that the amount requested by Claimant is disproportionate and unsupported, since he has provided no basis for his

³⁴⁰ *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award of February 6, 2008 [“*Desert Line*”].

³⁴¹ RMRI, para. 406.

³⁴² RMRI, paras. 409 *et seq.*

³⁴³ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, (ICSID Case No. ARB/05/15), Award of June 1, 2009 [“*Siag*”].

³⁴⁴ RMRI, para. 415.

³⁴⁵ RMRI, para. 416, by reference to CMRI, para. 82.

³⁴⁶ Standard set by the *Factory at Chorzów* case, according to Respondent.

quantification³⁴⁷. Furthermore, Respondent points out that the amounts awarded for moral damages before international human rights courts and tribunals are much lower than that requested by Claimant.

³⁴⁷ RMRI, para.418.

3. The Arbitral Tribunal's Decision

325. The Arbitral Tribunal will first (3.1) elaborate on the standards for the awarding of moral damages and then (3.2) apply these standards to three distinct sets of facts: (A) breaches in the awarding of frequencies; (B) inspections and (C) renewal of licences, and (3.3) finally will state its conclusions.

3.1. The Standards for Moral Damages

326. The Arbitral Tribunal has acknowledged in the First Decision that moral damages may be awarded, but only under exceptional circumstances. No precise definition exists on what constitutes “*exceptional circumstances*”. The definition must be induced from existing case law. Both parties have submitted case law on this issue:

The Desert Line Case

327. This case³⁴⁸ is a prominent example in the award of moral damages.

Claimant was a construction company which was engaged by the Republic of Yemen to build asphalt roads. In early 2004, after completing all constructions works, claimant requested payment of amounts due. The parties commenced an arbitration, which ended in an award favourable to claimant's interests. Claimant then complained about some clerical and calculation mistakes in the award. An altercation followed between claimant's personnel and the Yemeni army, which resulted in a four-day arrest of three of claimant's personnel. Later that same year respondent applied for the annulment of the award and the parties exchanged proposals for a settlement agreement, which was signed at the end of the year. Claimant challenged the validity of the settlement agreement and thereafter commenced an ICSID arbitration.

328. The award acknowledged that claimant was subject to what it describes as a siege with heavy artillery, an armed assault, an act of terror in its worst image³⁴⁹, that claimant suffered threats and attacks on the physical integrity of its investment³⁵⁰ and that the settlement agreement was imposed onto claimant under physical and financial duress³⁵¹. The award described the cause of the moral damages as the “*stress and anxiety of being harassed, threatened and detained*” and “*intimidated*” and the “*significant injury to [claimant's] credit and reputation and [claimant's] los[s] [of its] prestige*”³⁵². The award further characterises the prejudice suffered

³⁴⁸ *Desert Line*, see footnote 340 *supra*.

³⁴⁹ *Desert Line*, para. 166.

³⁵⁰ *Desert Line*, para. 185.

³⁵¹ *Desert Line*, para. 186.

³⁵² *Desert Line*, para. 286.

by claimant as “*substantial*”, since it affected the physical health of claimant’s executives and claimant’s credit and reputation³⁵³. The Tribunal finally awarded 1 M USD for moral damages, including loss of reputation.

The Lusitania Cases

329. The *Lusitania* Cases are some of the earliest international decisions dealing with the concept of moral damages.

The decisions go back as far as to World War I and grew out of the sinking of the British ocean liner *Lusitania*, which was torpedoed by a German submarine off the coast of Ireland on May 7, 1915, during the period of American neutrality. Of the 197 American citizens aboard the *Lusitania* at that time, 69 were saved and 128 lost.

330. The Umpire³⁵⁴ acknowledged the mental suffering or shock caused by the violent severing of family ties by reason of the deaths³⁵⁵. The decision further elaborated on the concept of damages, finding that “*one injured is ... entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation*”³⁵⁶; excluding, however, exemplary (punitive, vindictive) damages³⁵⁷.

The Siag Case

331. Respondent has presented this case to support its allegations that no moral damages shall be awarded.

Claimants, Mr. Siag and his late mother Mrs. Vecchi, filed a claim against the Republic of Egypt for alleged expropriation of a property on which claimants planned to implement a luxury resort. Egypt seized claimants’ property with five separate decrees and took physical control of the property on two occasions. Each seizure was in time revoked by Court decisions; Egypt, however, disregarded such decisions and new seizures followed. The seizures were carried out by force, which included the beating of one of Mr. Siag’s employees, who required hospital care, and led to the arrest of Mr. Siag and three of his lawyers.

332. Claimants did not seek an award on punitive damages, but submitted that Egypt’s conduct entitled claimants to enhanced damages and so urged the Tribunal to impose a measure of damages which would afford full reparation by indulging all reasonable inference in favour of Claimants³⁵⁸. In a *dictum* the tribunal made a

³⁵³ *Desert Line*, para. 290.

³⁵⁴ Of the Mixed Claims Commission United States-Germany in accordance with the Agreement of August 10, 1922, extended by Agreement of December 31, 1928, within the Treaty of Peace between the United States and Germany, signed at Berlin, August 25, 1927.

³⁵⁵ *Lusitania* Cases, p. 35.

³⁵⁶ *Lusitania* Cases, p. 40.

³⁵⁷ *Lusitania* Cases, p. 33.

³⁵⁸ *Siag*, para. 505.

clear distinction between two issues: one is the question whether punitive damages are available; another is whether recovery for an unlawful expropriation should proceed on a more generous basis than that for a lawful expropriation. On the first question, the award stated that punitive damages were, by their very nature, not compensatory and that the prevailing view of tribunals is that, in international law, they are generally not available except in extreme cases of egregious behaviour³⁵⁹. On the second question, the tribunal was not prepared to draw any inferences other than those justified by evidence³⁶⁰.

* * *

333. The conclusion which can be drawn from the above case law is that, as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that
- the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
 - the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
 - both cause and effect are grave or substantial.

3.2. Application of the Standards to the Facts

334. Claimant submits that Respondent should compensate him for the moral damages allegedly caused by the irregular awarding of frequencies, the excessive inspections and the attempt to charge abusive renewal fees. The Arbitral Tribunal will apply the required standards, defined in the preceding section, to the three sets of acts identified by Respondent:

A. Breaches in the Awarding of Frequencies

335. Claimant argues that he suffered two kinds of injuries provoked by the National Council's procedures for awarding radio licences: (i) the disproportionate and excessive efforts which Claimant had to incur in the preparation of applications and (ii) the disrespect and humiliation caused by the constant rejections.
336. (i) The Arbitral Tribunal finds that excessive or disproportionate efforts which an applicant may have incurred when requesting administrative licences, by their nature, are most unlikely to give rise to moral damages, since the injury does not meet any of the three standards required for the existence of moral damages.
337. The Arbitral Tribunal acknowledges that Claimant has devoted a significant effort to preparing and submitting more than 200 applications to the National Council and that he may have been despondent, when all applications bar one were rejected. But the Arbitral Tribunal does not consider that Claimant suffered extraordinary stress or anxiety – especially since Mr. Lemire is an experienced

³⁵⁹ *Siag*, para. 545.

³⁶⁰ *Siag*, para. 547.

professional and a seasoned entrepreneur. And the economic compensation which the Tribunal has already awarded constitutes sufficient redress for incidental difficulties which Mr. Lemire may have endured.

338. (ii) Claimant has also submitted that recurring rejections of applications had a negative impact on his entrepreneurial image. The Tribunal accepts that the second requirement for the existence of moral damages – a requirement which *inter alia* includes loss of reputation – is probably met. However, this is not enough: the main question is to determine whether the injury inflicted is substantial.
339. The Arbitral Tribunal has pondered the circumstances of the case and decides that the gravity required under the standard is not present. The Arbitral Tribunal accepts that Mr. Lemire was first invited into Ukraine as a leading investor in the nascent radio industry and then suffered an unlawful treatment by the Ukrainian media regulator. The Tribunal sympathizes with Mr. Lemire's predicament, but feels that the injury suffered cannot be compared to that caused by armed threats, by the witnessing of deaths or by other similar situations in which Tribunals in the past have awarded moral damages. And the acknowledgement in the First Decision that Ukraine has indeed breached the BIT, and the present award of substantial compensation, are elements of redress which may significantly repair Mr. Lemire's loss of reputation.

B. Inspections

340. In its First Decision the Tribunal established that Gala Radio was in a short time period inspected five times by the National Council, that four of these procedures were unscheduled, and that two cases finalized with the National Council issuing warnings against the radio broadcaster, which were eventually set aside by the Ukrainian Courts.
341. The Arbitral Tribunal accepts that inspections by a regulator, if improperly used as tools of intimidation against regulated entities, constitute egregious behaviour and an abuse of power, which can cause extreme stress and anxiety to the supervised and result in an entitlement to be compensated for the moral damage inflicted. But this is not the case at hand. Claimant has not alleged, and the Tribunal has not found any indication, that the National Council tried to intimidate Gala Radio through its inspections. Additionally, the two warnings issued by the National Council were annulled by Court decisions. There is no evidence that Ukraine had orchestrated a cat-and-mouse game of some kind. It thus appears that Claimant's situation prior to the inspections has already been re-established and, thus, no lasting prejudice was caused.

C. Renewal of Licence

342. The National Council initially decided that Gala Radio's renewal of licence should be charged at the new increased fee rate, but the National Council finally

reassessed its decision, and accepted to significantly reduce the amount, applying the previous formula³⁶¹.

343. This situation is similar to that of the inspections analysed in the preceding section. The National Council's initial decision was incorrect, Claimant may have suffered some degree of stress or anxiety until the mistake was corrected, but in the end Mr. Lemire's arguments were accepted and he has paid the renewal fee at the correct lower rates. There is no warrant for Claimant to be awarded additional moral damages.

3.3. Conclusion

344. Summing up, although the Tribunal acknowledges that Mr. Lemire was mistreated by his regulator, the National Council, and has sympathy and understanding for the stress and anxiety which he must have felt at certain times during his long fight in the defence of his rights, the Tribunal is of the opinion that the moral aspects of his injuries have already been compensated by the awarding of a significant amount of economic compensation, and that the extraordinary tests required for the recognition of separate and additional moral damages have not been met in this case.

345. Additionally, it must be remembered that Mr. Lemire may not have been consistently adroit: his continuous appeals to the Courts to obtain redress and to the American Embassy to secure protection, his repeated letter writing to a wide array of authorities, and the video recording of the sessions of the National Council, may have appeared rude and disrespectful to the Ukrainian authorities³⁶². Finally, another important aspect to bear in mind is that the Ukrainian legal system has, to some extent, afforded Claimant an effective means for appealing the regulator's decisions. In the case of the renewal fees, the Ministry of Justice has sided with Claimant against the National Council³⁶³. These elements reinforce the conclusion that a separate redress for moral damages is not appropriate.

³⁶¹ First Decision, para. 473.

³⁶² First Decision, para. 482.

³⁶³ First Decision, para. 483.

IV.3. INTEREST

1. Claimant's Case

346. Claimant had initially requested that Respondent be ordered to pay interest at a rate of LIBOR +3³⁶⁴ compounded semi-annually on the amounts to be paid by Respondent as of the date they were determined to have been due to Claimant. However, he later decided to reduce the interest rate claimed in his Reply Memorial and PHB to a rate of LIBOR +2³⁶⁵ compounded semi-annually “to keep in line with the practice of ICSID Arbitral Tribunals”³⁶⁶.
347. To support his assessment of the practice of arbitral tribunals, Claimant makes reference to the awards in the cases *PSEG Global, Inc. et al. v. Republic of Turkey*³⁶⁷, *Sempra Energy International v. The Argentine Republic*³⁶⁸ and *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*³⁶⁹.

³⁶⁴ Claimant's PHB, para. 151.

³⁶⁵ CMRI, para. 99.

³⁶⁶ CMRI, footnote 126.

³⁶⁷ *PSEG Global Inc. Et al. v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of January 19, 2007, [“PSEG”], para. 90.

³⁶⁸ *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Award of September 28, 2007, [“Sempra”], para. 137.

³⁶⁹ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v., Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award of July 29, 2008, [“Rumeli”], para. 227.

2. Respondent's Case

348. Respondent considers that if compensation should be awarded to Claimant, he should only be entitled to simple interest at the LIBOR rate³⁷⁰, as decided in the *MTD Equity Sdn. Bhd. and MTH Chile S.A v. Republic of Chile*³⁷¹.
349. Respondent submits that tribunals in recent investment treaty cases have concluded that simple interest suffices for claimants to be fully compensated. It does not consider that there are any particular circumstances in this case justifying the award of compound interest³⁷². It refers to the award in the case *CMS*³⁷³, where the Tribunal decided that the interest rate should be simple rather than compounded semi-annually.
350. Furthermore, Respondent points out that no justification was given by Claimant to uphold his request for the application of a rate of LIBOR +2 compounded semi-annually³⁷⁴.

³⁷⁰ RMRI, para. 449.

³⁷¹ Respondent has referred in RMRI footnote 594 to *MTD Equity Sdn. Bhd. and MTH Chile S.A v. Republic of Chile* (ICSID Case No. ARB/99/7), Award of May 25, 2004, [“*MTD*”], para. 280. However, the Arbitral Tribunal notes that the correct ICSID Case No. for those parties is ARB/01/7 and that there is no paragraph 280; the issue of interest is addressed in para. 251.

³⁷² RMRI, para. 448.

³⁷³ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005, [“*CMS*”], para. 471.

³⁷⁴ RMRI, para. 448.

3. The Arbitral Tribunal's Decision

351. Claimant has requested that, if compensation is awarded, interest should accrue with LIBOR as the rate of reference. Respondent, although it has denied Claimant's right to be compensated, has accepted that if the Tribunal were to award compensation, interest should be calculated by reference to LIBOR. The Tribunal agrees.
352. LIBOR represents the interest rate at which banks can borrow funds from other banks in the London interbank market and is fixed daily by the British Bankers' Association for different maturities and for different currencies. LIBOR is universally accepted as a valid reference for the calculation of variable interest rates. In the present case, an additional reason for the selection of LIBOR is that it is consistent with Article III.1 of the BIT, which provides that compensation for expropriation shall include "*interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin*". Although the rule refers to expropriation, it can be extended without difficulty to compensation for violations of other provisions of the BIT.
353. Since the compensation is expressed in USD, the appropriate rate of reference for the calculation of interest should be the LIBOR rates for six month deposits denominated in USD, calculated as of the date of delivery of this Award. The rate shall be adjusted every six months thereafter, to reflect changing market conditions.
354. Although the parties have agreed on the generic use of LIBOR as a reference rate, they disagree on two issues: (i) whether the LIBOR rate should be increased by a margin of 2% as Claimant suggests; and (ii) whether the interest rate should be simple or compounded semi-annually.

(i) Margin

355. As regards the addition of a margin to the LIBOR reference rate, the Tribunal sides with Claimant. LIBOR reflects the interest at which banks lend to each other money. Loans to customers invariably include a surcharge, and this surcharge must be inserted in the calculation of interest to reflect the financial loss caused to Claimant by the temporary withholding of money. A claimant to whom money is awarded would not be fully compensated, if the interest rate applied did not include an appropriate margin. This is acknowledged by Article III.1 of the BIT, which expressly provides that the LIBOR rate should be increased by "*an appropriate margin*".

356. Claimant has proposed a margin of 2%. The Tribunal concurs: 2% is a reasonable margin, which reflects the surcharge which an average borrower would have to pay for obtaining financing based on LIBOR³⁷⁵.

(ii) Simple or semi-annually compounded interest

357. Claimant has requested that the interest should be compounded semi-annually, while Respondent proposes that simple interest be applied. It is important to clarify what Claimant is requesting: he is not asking that interest be continuously capitalised and itself bear interest, in accordance with the compound interest formula. Such a request is incompatible with LIBOR, which is always calculated applying the simple interest methodology.

358. What Claimant requests, and the question to be decided by the Tribunal, is whether the unpaid LIBOR interest, calculated as simple interest and accruing at the end of each six month period, should be added to the principal, and as such accrue interest in the succeeding interest periods. Claimant submits that this should be done, Respondent that it is inappropriate.

359. The question whether interest should be accumulated periodically to the principal has been the subject of diverging decisions³⁷⁶. While older case law tended to repudiate this possibility, recent case law tends to accept annual or semi-annual capitalisation of unpaid interest³⁷⁷.

360. The Tribunal sides with the more modern decisions. Loan agreements in which interest is calculated on the basis of LIBOR plus a margin usually include a provision that unpaid interest must be capitalised at the end of the interest period, and will thereafter be considered as capital and accrue interest. The financial reason for this provision is that an unpaid lender has to resort to the LIBOR market, in order to fund the amounts due but defaulted, and the lender's additional funding costs have to be covered by the defaulting borrower.

361. This principle implies in our case that, if Claimant were to take out a LIBOR loan to anticipate the amounts to which he is entitled under the Award, the bank would insist that unpaid interest be capitalised at the end of each interest period. Consequently, if Claimant is to be kept fully indemnified for the harm suffered, interest owed under the Award should be capitalised at the end of each six month interest period. The Tribunal, thus, decides that due and unpaid interest shall be capitalized semi-annually, from the *dies a quo*.

³⁷⁵ LIBOR plus a 2% margin was applied in a number of recent investment arbitration decisions: *PSEG*, para. 90; *Sempra*, para. 137; and *Rumeli*, para. 227.

³⁷⁶ Respondent has drawn the attention of this Tribunal to cases *MTD*, para. 251 (which is incorrectly quoted) and *CMS*, paras. 470 to 471. However, the Arbitral Tribunal notes that in the former, the interest awarded was compounded; and in the latter, simple interest was only awarded for a period of 60 days after the date of the decision or the date of effective payment, if before; thereafter the interest would be compounded semi-annually.

³⁷⁷ *MTD*, para. 251; *PSEG*, para. 348; *LG& E*, para. 106; see also *Marboe*, para. 6.233.

(iii) *Dies a quo* and *dies ad quem*

362. There is one final issue to be decided: when interest should start accruing, and when it should stop. Claimant has left the determination of the *dies a quo* rather vague, referring to the date on which the compensation is determined to have been due to Claimant.
363. The Tribunal is of the opinion that the appropriate *dies a quo* is the date of delivery of this Award. This is the date when the actual amount of damages is established, the date when Respondent's obligation to pay the compensation arises and, consequently, the appropriate date for interest to start accruing. Notwithstanding the above, the Tribunal acknowledges that Respondent, being a State, requires a certain period of time to perform the legal formalities required for the payment of a sum of money. Therefore, Respondent shall have a 60 day grace period from the date of delivery of this Award to pay the amounts owed, without interest. If after such period of time any amounts remain pending, interest shall accrue on such amounts as from the date of delivery of the Award³⁷⁸.
364. Interest shall continue to accrue, until all amounts owed in accordance with this Award have been finally paid.

³⁷⁸ The Arbitral Tribunal in *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award of November 13, 2000, para. 97, granted the same grace period: "*The Kingdom of Spain shall make such payment within a period of 60 days as of the date of this Award. Should the payment of this amount not be made within the period specified above, the amount shall accrue interests at a rate of 6% per annum compounded monthly as of the date of the Award to the date of payment*".

IV.4. COSTS

1. Claimant's Request

365. Claimant's total arbitration costs are quantified at 1,764,348 USD, all of which have been paid, and are broken down as follows³⁷⁹:

-	ICSID and the Tribunal	USD 424,921
-	International Counsel	USD 956,950
-	Ukrainian Counsel	USD 86,000
-	Damages Expert	USD 138,687
-	Expenses	USD 157,790

366. Claimant submits that his costs are reasonable and, since all jurisdictional issues and principal claim were won, it is only fair that all costs be awarded³⁸⁰. If, against Claimant's expectations, the Tribunal were to award only partial costs, the Tribunal should bear in mind that the requested amount already represents only a part of the total costs which Mr. Lemire will incur. Claimant's counsel is working in consideration of a success fee, which has not been included in the above calculation, because it has not yet been invoiced³⁸¹.

³⁷⁹ Claimant's final statement of costs of August 6, 2010.

³⁸⁰ HTRI, p. 4.

³⁸¹ HTRI, p. 4.

2. Respondent's Request

367. Respondent quantified its fees, costs and expenses as follows³⁸²:

- Fees and Disbursements of international counsel	USD 3,042,206
- Fees and Disbursements of Ukrainian counsel	USD 1,330,338
- Fees and Disbursements of EBS	USD 55,270
- Advance on Costs for the Arbitration	USD 400,000

368. The total amounts to 4,827,814 USD, of which 1,549,180 USD have been paid. Respondent requires that it be awarded all or, substantially all, of its costs³⁸³.

369. Respondent advances three reasons: (2.1) Claimant asserted but then conceded four significant claims; (2.2) the Tribunal's First Decision dismissing the majority of Claimant's claims; and (2.3) Claimant's general conduct throughout the arbitration.

2.1. The Abandonment of Claims

370. Claimant has abandoned some of his initial claims, namely those related to the Beauty Salon in Kyiv, to Kiss and Energy trademarks, to the "affiliation agreements" and to the "continuous interference" on the FM 100 frequency in Kyiv.

371. Respondent spent a significant amount of time and resources in order to address these claims which were later abandoned by Claimant³⁸⁴. Some of the claims were discussed in witness statements, in the Counter-Memorial, the Rejoinder and the PHB³⁸⁵, and other compelled investigations of the facts³⁸⁶.

2.2. The Dismissal of Claims

372. Respondent requests that Claimant should bear most, if not all³⁸⁷, of these costs under the principle of "*loser pays*"³⁸⁸. The Arbitral Tribunal dismissed all of Claimant's claims related to the Settlement Agreement³⁸⁹, the claims related to the tender of November 20, 2002 and of October 19, 2005, those related to the local music requirement of the Ukrainian Law on Broadcasting and those related to the alleged breach of the Clause contained in Article II.3 (c) of the US-Ukraine BIT

³⁸² Respondent's final statement of costs of August 9, 2010.

³⁸³ RMRI, para. 442.

³⁸⁴ RMRI, para. 426.

³⁸⁵ Such as the trademarks, affiliation agreement and "continuous interference" issues.

³⁸⁶ Such as the beauty salon issues.

³⁸⁷ RMRI, para. 423.

³⁸⁸ RMRI, para. 423.

³⁸⁹ RMRI, para. 431.

which permits a breach of contract to be characterised as a breach of the BIT (the Umbrella Clause)³⁹⁰.

2.3. The Misconduct

373. According to Respondent, Claimant's conduct throughout this case has significantly and unnecessarily increased the cost of Ukraine's defence³⁹¹. Claimant also attempted to reverse the burden of proof in relation to Gala Radio's unsuccessful applications for frequencies in various tenders³⁹². In addition, Claimant took a combative attitude during the arbitration on the issue of document production and substantiating his claims³⁹³.
374. Respondent finally raises an argument to dismiss Claimant's request for costs, based on the lack of causation. Taking such lack of causation into consideration, and when the minimal economic effect of awarding even a significant number of additional frequencies to Gala Radio is factored, it becomes apparent that Claimant has, at best, mounted an expensive and over-inflated claim, for which the defence costs are more than the amount at issue. Thus, the breaches of the BIT found in the First Decision do not represent a "win" in favour of Claimant³⁹⁴.

³⁹⁰ RMRI, para. 434.

³⁹¹ RMRI, para. 423.

³⁹² RMRI, para. 438.

³⁹³ RMRI, para. 441.

³⁹⁴ RMRI, para. 437.

3. Claimant's Reply

375. Claimant characterises Ukraine's approach on costs as novel. Despite having lost its jurisdictional and liability claims, it does not shy away from claiming costs and also complaining about costs³⁹⁵.
376. If this arbitration procedure has been costly, it is not only attributable to the complexity of the issues in dispute, but also to the fact that Ukraine engaged in a number of unnecessary and costly measures. First, it unsuccessfully challenged one of the arbitrators. Second, it has delayed the renewal of Claimant's licence, then tried to charge an exorbitant renewal licence fee that led to a request for interim measures. Third, it advanced new arguments and factual contentions, and submitted voluminous new documentation, at untimely stages of the process³⁹⁶.

³⁹⁵ HTRI, p. 3.

³⁹⁶ HTRI, p. 3.

4. The Arbitral Tribunal's Decision

377. Under Article 61(2) of the ICSID Convention:

“... the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid”.

378. Article VII.4 of the BIT states as follows:

“Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties”.

379. In accordance with these rules, there being no specific agreement among the parties as regards legal expenses, the BIT provides as a general principle that costs shall be paid equally, but it grants the Tribunal full discretion to assess the fees and costs of the arbitration and the legal expenses incurred by the parties and to decide how and by whom these fees, costs and expenses are to be borne³⁹⁷.

380. The traditional position in investment arbitration is to split the arbitration costs equally among the parties³⁹⁸. The Arbitral Tribunal, however, welcomes the newly established and growing trend, that there should be an allocation of costs that reflects in some measure the principle that the losing party should contribute in a significant, if not necessarily exhaustive, fashion to the fees, costs and expenses of the arbitration of the prevailing party³⁹⁹.

381. The final result of this procedure is that the Tribunal (i) has found that Respondent breached the BIT in most (but not all) of the situations alleged by Claimant, (ii) has awarded compensatory damages in an amount of 8,717,850 USD, (but significantly below the amount claimed), and (iii) finally has rejected all claims for moral damages. Claimant is the overall winning party, without having completely prevailed in a single issue, and after having abandoned a number of claims initially submitted. Claimant therefore should only be entitled to a partial reimbursement of his global arbitration costs.

382. Respondent also filed on August 29, 2008, a proposal for the disqualification of one arbitrator. On September 23, 2008, the other members of the Tribunal

³⁹⁷ See also Rule 47(1) (j) ICSID Arbitration Rules.

³⁹⁸ Christoph H. Schreuer “The ICSID Convention: A Commentary”, Second Edition, 2009, p. 1232.

³⁹⁹ *EDF*, para. 327; *Plama Consortium Limited v. Republic of Bulgaria*, (ICSID Case No. ARB/03/24) Award of August 27, 2008, para. 316; *Phoenix Action, LTD. v. The Czech Republic*, (ICSID Case No. ARB/06/05), Award of April 15, 2009, para. 151.

dismissed the proposal. Since this proposal for disqualification was rejected, the Tribunal finds that the full costs and expenses incurred by this incident are attributable to Respondent.

383. Taking all these factors into consideration, the Arbitral Tribunal hereby orders Respondent to reimburse Claimant a proportion of the reasonable costs and expenses of pursuing this arbitration in an amount equivalent to 750,000 USD. This amount, if unpaid within 60 days from the delivery of this Award, shall accrue interest in accordance with Section III.3⁴⁰⁰.
384. The Secretariat is to provide the parties a detailed breakdown of the fees paid to the arbitrators and of the costs incurred. Any excess amounts shall be reimbursed equally to the parties.

⁴⁰⁰ In para. 413 of his Separate Opinion, Dr. Voss applies para. 92(1) of the German Code of Civil Procedure, and comes to the conclusion that in this case Respondent is entitled to reimbursement from Claimant in an amount of approximately 4 M USD. Para. 92(1) of the German Code of Civil Procedure has not been pleaded by any of the parties. Even if it had been pleaded, the Tribunal fails to understand how this domestic German rule could have any bearing on the allocation of costs and expenses in international investment arbitration under the Treaty and the ICSID Convention.

V. DECISION

On the basis of the reasons given both in its First Decision and in the present Award, the Tribunal, by majority decision, hereby:

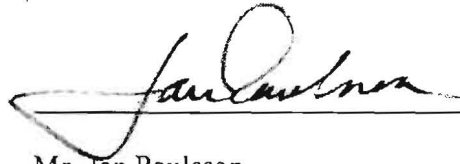
1. Orders Respondent to pay to Claimant 8,717,850 USD as compensation for Respondent's violation of the FET standard defined in the BIT, within 60 days from the delivery of this Award;
2. Orders Respondent to pay to Claimant 750,000 USD as compensation for the costs and expenses incurred in this arbitration, within 60 days from the delivery of this Award;
3. Orders Respondent to pay to Claimant interest on the amounts established in the two preceding paragraphs, if such amounts have not been paid within 60 days from the delivery of this Award; interest shall (i) accrue as from the date of delivery of this Award until full payments of any amounts owed, (ii) be calculated at the LIBOR rate for six month deposits denominated in USD, on the date of delivery of this Award, and adjusted every six months thereafter, plus a margin of 2% and (iii) be capitalised every six months from the date of delivery of this Award;
4. Dismisses all other claims.

Dr. Voss dissents from this Award and, as authorized by Rule 47(3) of the ICSID Arbitration Rules, attaches his individual opinion. In accordance with Rule 47(2) of the ICSID Arbitration Rules, the Award is signed by the members of the Tribunal who voted for it.

DWSD

Professor Juan Fernandez-Armesto
President

Date: 10.3.11



Mr. Jan Paulsson
Arbitrator

Date: 3/3/11