

**World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, 4 October 2006**

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WORLD DUTY FREE COMPANY LIMITED V. REPUBLIC OF KENYA

(ICSID Case No. ARB/00/7)

Award

**I - PROCEDURE**

***A – The Parties***

1. World Duty Free Company Limited is represented in these proceedings by:

Geoffrey Robertson, QC and  
Ms. Olivia Holdsworth  
11 Doughty Street  
London WC1N 2PG  
United Kingdom

Mr. Paul K. Muite  
P.O. Box 47122  
Nairobi, Kenya

Mr. Peter Buscemi  
Morgan, Lewis & Bockius LLP  
1800 M Street, NW  
Washington, D.C. 20036-5869

The Claimant was also represented by Mr. Philip K. Murgor of Murgor & Murgor Advocates, Nairobi, Kenya until 5 June 2003, when Mr. Murgor was appointed Director of Public Prosecutions.

2. The Republic of Kenya is represented in these proceedings by:

Mr. Jan Paulsson,  
Mr. Constantine Partasides and  
Mr. Mitesh Kotecha  
Freshfields Bruckhaus Deringer  
2-4 rue Paul Cézanne  
75375 Paris Cedex 08  
France

***B - Procedural History***

3. It is important to note at the outset that the former President of Kenya, Mr. Daniel arap Moi, was not a party to these arbitration proceedings and was not legally represented in these proceedings. He was not heard as a witness. This Tribunal has no jurisdiction over the former President. The Tribunal decided on the dispute submitted to it on the evidence adduced and the submissions made by the parties to the case.

4. On 16 June 2000, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received from World Duty Free Company Limited, a company incorporated in the Isle of Man (“World Duty Free” or the “Claimant”), a request for arbitration of the same date against the Republic of Kenya (“Kenya” or the “Respondent”). On 19 June 2000, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“the Institution Rules”) acknowledged receipt of the request and on the same day transmitted a copy to the Republic of Kenya and to its Embassy in Washington, D.C., U.S.A.

5. The request, as supplemented by the Claimant’s letter of 5 July 2000, was registered by the Centre on 7 July 2000, pursuant to Article 36(3) of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”). On the same day, the Acting Secretary-General of ICSID, in accordance with Rule 7 of the Institution Rules, notified the parties of the registration and invited them to proceed to the constitution of an Arbitral Tribunal as soon as possible.

6. Article 9 of the Contract invoked by the Claimant provides as follows:

“9 Arbitration: (1) The parties hereby consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes, (“the Centre”) all disputes arising out of this Agreement or relating to any investment made under it for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (“the Convention”). (2) It is hereby stipulated (a) that the Company is a national of the United Arab Emirates;(b) that the transaction to which this Agreement relates is an “investment” within the meaning of the Convention; (c) that any arbitral tribunal constituted pursuant to this Agreement shall apply English law; (d) that any arbitration proceeding pursuant to this Agreement shall be conducted in accordance with the Rules of Procedure for Arbitration Proceedings of the Centre in effect on the date on which the proceeding is instituted.”

On 24 August 2000, the parties agreed that the Arbitral Tribunal would be composed of three arbitrators, one appointed by each party, and the third and presiding arbitrator appointed by the two party-appointed arbitrators. By letter of 9 October 2000, the Claimant appointed the Honourable Andrew Rogers, QC, an Australian national, as arbitrator. By letter of 28 October 5 2000, the Respondent appointed Professor James Crawford, SC, an Australian national, as arbitrator. Both Mr. Rogers and Mr. Crawford accepted their appointments.

7. On 22 November 2000, the two party-appointed arbitrators appointed Judge Gilbert Guillaume, a French national, to serve as President of the Tribunal. Judge Guillaume accepted his appointment.

8. By letter of 29 November 2000, the Acting Secretary-General of ICSID informed the parties that all the arbitrators had accepted their appointments and that the Tribunal was deemed to have been constituted and the proceeding to have begun on that date, pursuant to Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “ICSID Arbitration Rules”). By the same letter, the Secretary-General informed the parties that Ms. Margrete Stevens, Senior Counsel, ICSID, would serve as Secretary of the Tribunal. All subsequent written communications between the Arbitral Tribunal and the parties were made through the ICSID Secretariat. Due to a reorganization of ICSID’s caseload, Mr. José Antonio Rivas, Counsel, ICSID, was appointed as Secretary of the Tribunal on 7 July 2004, and Ms. Eloise M. Obadia and Mr. Ucheora Onwuamaegbu, both ICSID Senior Counsel, were subsequently appointed as Secretary of the Tribunal on 10 May 2005 and 24 August 2006, respectively.

9. By letters of 28 December 2000 and 8 January 2001, the Respondent raised objections *in limine*. The Claimant responded by letters of 5 and 11 January 2001. This matter and others were addressed at the first session of the Tribunal which was held with the parties in London on 15 January 2001.<sup>1</sup> At the conclusion of the first session, the Tribunal directed in regard to the further written and oral procedures:

- i) that the Claimant file its statement of case no later than 25 April 2001;
- ii) that the Respondent file a memorial setting out all, if any, objections to jurisdiction, competence and admissibility it might have together with any evidence proposed to be relied upon no later than 20 May 2001; and
- iii) that, should the Respondent make any such objections, the Claimant file a response memorial together with any evidence proposed to be relied upon no later than 29 June 2001.

These directions were made upon the Claimant undertaking to apply to the court in the Isle of Man within two months from 15 January 2001 for an Order that its name be restored to the register.

10. During the first session, the Claimant raised the issue of Professor Crawford’s professional relationship with the law firm of Freshfields Bruckhaus Deringer. By letter of 16 January 2001, Professor Crawford voluntarily resigned from the Tribunal. Pursuant to Rule 10(1) of the ICSID Arbitration Rules, ICSID informed the parties of Professor Crawford’s resignation and the proceedings were suspended. On 26 January 2001, the Centre informed the parties that Judge Guillaume and Mr. Rogers had accepted Professor Crawford’s resignation pursuant to Arbitration Rule 8(2).

11. By letter of 29 January 2001, the Respondent appointed Mr. V.V. Veeder, QC, a U.K. national, as arbitrator pursuant to ICSID Arbitration Rule 11(1). Mr. Veeder accepted his appointment and ICSID informed the parties on 2 February 2001 that the Tribunal had been reconstituted and that the proceeding was deemed to have recommenced on that date, pursuant to ICSID Arbitration Rule 12.

12. On 29 January 2001, the Respondent also filed a request for provisional measures on confidentiality. The Claimant replied to this request by letter of 15 February 2001. By letter of 26 February 2001, the Respondent maintained its request.

13. By letter of 16 March 2001, the Claimant filed its objections to Mr. Veeder's appointment. By letter of 21 March 2001, the Respondent objected to the Claimant's objection. Mr. Veeder filed his observations on 11 April 2001. By letter of 12 April 2001, the Tribunal requested that the parties submit their observations on Mr. Veeder's letter of 11 April 2001 no later than 19 April 2001. The Claimant filed its observations on 17 April 2001 and the Respondent filed its observations on 18 April 2001.

14. By their respective letters of 18 April 2001, both parties filed comments on the issue of the Claimant's status. The Claimant also requested a 60-day extension of the time limit fixed for the filing of its memorial informing the Tribunal that there had "been delay in the Claimant completing the process of being restored to the [company] register [of the Isle of Man]."

15. By letter of 24 April 2001, the President of the Tribunal and Mr. Rogers informed the parties that they did not consider the Claimant's letters of 16 March 2001 and 18 April 2001 as constituting a proposal for the disqualification of an arbitrator under Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules; furthermore, Judge Guillaume and Mr. Rogers had found no basis for upholding the objection to Mr. Veeder's appointment to the Tribunal.

16. On 25 April 2001, the Tribunal issued its Decision on a Request by the Respondent for a Recommendation of Provisional Measures. The Decision reads in part as follows (page 2):

The Request raises the question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either Party. Neither the ICSID Convention nor the ICSID Arbitration Rules contain any express restriction on the freedom of the Parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the Parties includes such a restriction, each of them is still free to speak of the arbitration. Especially in an arbitration to which a Government is a Party, it cannot be assumed that the Convention and the Rules incorporate a general obligation of confidentiality which would require the Parties to refrain from discussing the case in public.

In its Decision in the *Amco v. Indonesia* arbitration, the Tribunal refused to endorse provisional measures following the unilateral release of information by a Party during proceedings pending before the Tribunal. The Tribunal said:

"... as to the 'spirit of confidentiality' of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the Parties from revealing their case ... (see ICSID Reports 410, 412)."

Although this decision does not have the force of precedent, it is consistent with the interpretation that we place upon the Convention and the Rules.

The Tribunal nevertheless directs the Parties to avoid any action that would aggravate or exacerbate the dispute. The Tribunal further directs that any public discussion should be an accurate report.

The Request also raises the question of the privacy of the hearings insofar as the Respondent complains that the minutes and the audio-recordings of the preliminary session were disseminated to the press “even though the Claimant [had] yet to make an application to open hearings in these proceedings to the media.” In this respect the Tribunal notes that ICSID Arbitration Rule 32(2) provides that the Tribunal shall decide, with the consent of the Parties, which other persons besides the Parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings. Under Regulation 22 of the ICSID Administrative and Financial Regulations, the Centre may only arrange for the publication of the minutes and other records of proceedings with the consent of the Parties. The Tribunal concludes that when no decision has been taken to open the hearings to the public, the records of such hearings should not be disseminated unilaterally by one of the Parties.

In the instant case neither Party has submitted a request for the hearings to be open to the public, and no decision has been made in this respect by the Tribunal. Thus, the minutes and audio-recordings of hearings may not be disseminated to the public by one of the Parties.

17. By letter of 25 April 2001, counsel for the Respondent filed its observations on the Claimant’s request of 18 April 2001 for an extension of the time limit for the filing of its memorial. By letter of 1 May 2001, the Tribunal granted the Claimant’s request of 18 April 2001 and fixed the following time limits:

- i) filing of Claimant’s statement of claim no later than 25 June 2001;
- ii) filing of all the Respondent’s objections, if any, to jurisdiction, competence and admissibility no later than 19 July 2001; and
- iii) filing of the Claimant’s response memorial no later than 28 August 2001.

18. By letter of 7 May 2001, counsel for the Respondent requested an extension of the time limit for the filing of its objections to jurisdiction, if any.

19. By letter of 10 May 2001, the President of the Tribunal granted the Respondent’s request of 7 May 2001, and fixed the following time limits:

- i) filing of all the Respondent’s objections, if any, to jurisdiction, competence and admissibility no later than 31 July 2001; and
- ii) filing of the Claimant’s response memorial no later than 10 September 2001:

20. On 28 May 2001, the Centre received from Mr. Charles Kariuki Githungo (“receiver” of World Duty Free Company Limited) a letter dated 24 May 2001, requesting the discontinuance of the proceeding, together with an Order of the High Court of Justice of the Isle of Man dated 26 March 2001. By letter of 6 June 2001, Mr. Githungo’s letter was circulated to the parties. The Respondent filed its comments on 11 June 2001.

21. On 22 June 2001, the Claimant filed its Memorial dated 20 June 2001. By letter of 18 July 2001, the Tribunal requested that the Claimant file its observations on preliminary jurisdictional issues related to the letter sent by the “receiver” of World Duty Free no later than 10 August 2001. By letter of 25 July 2001, the Claimant filed a request for an extension of time, until 25 August 2001, to file its response to the Tribunal’s questions of 18 July 2001. By letter of 31 July 2001, counsel for the Respondent filed its observations on the Claimant’s request of 25 July 2001. By letter of 3 August 2001, the President of the Tribunal granted the extension of time requested by the Claimant on 25 July 2001.

22. On 24 August 2001, the Claimant filed its observations on the preliminary jurisdictional issues, dated 20 August 2001, together with its supporting documentation. By letter of 24 August 2001, the Claimant submitted further supporting documentation to its observations.

23. By letter of 26 September 2001, counsel for the Claimant forwarded copies of interim Orders of the High Court of Justice of the Isle of Man respecting petitions CP2001/52 and CP2001/121, under which the further hearing of the petitions were adjourned until 15 October 2001. Copies of the petitions were submitted by counsel for the Claimant on 1 October 2001. By letter of 2 October 2001, the Respondent requested an opportunity to respond.

24. By letter of 8 October 2001, Mr. D.P. Craine informed the Tribunal of his appointment as “joint receiver” by the Isle of Man High Court of Justice.

25. By letter of 12 October 2001, the Tribunal invited the Claimant to file, no later than 17 October 2001, any further orders that might be made by the High Court in regard to petitions CP 2001/52 and CP 2001/121; and invited the Respondent to file, no later than 31 October 2001, its response to the issues raised by the Claimant’s submissions on the preliminary jurisdictional issues.

26. By letter of 16 October 2001, counsel for the Claimant informed the Tribunal that the hearing of the petitions by the High Court of Justice of the Isle of Man had been adjourned until 19 November 2001. By letter of 15 November 2001, the Tribunal invited the Claimant to file any further Orders that might be made by the High Court in regard to petitions CP 2001/52 and CP 2001/121 no later than 21 November 2001. Meanwhile, the Respondent filed its Preliminary Preliminary Objections on 31 October 2001.

27. By letter of 20 November 2001, counsel for the Claimant informed the Tribunal that the hearing of the petitions by the High Court had been adjourned until 17 December 2001. By letter of 5 December 2001, the Tribunal invited the Claimant to file any further Orders of the High Court no later than 19 December 2001. By the same letter, the Tribunal also requested that the Claimant file, no later than 15 January 2002, its observations on the Respondent's Preliminary Preliminary Objections of 31 October 2001.

28. By letter of 19 December 2001, counsel for the Claimant informed the Tribunal that the hearing of the petitions by the High Court had been adjourned to 28 January 2002. On 17 January 2002, the Claimant filed its response to the Respondent's Preliminary Preliminary Objections, dated 11 January 2002.

29. By letters of 1 and 15 February 2002, counsel for the Respondent requested that the Claimant be ordered to provide copies of "all submissions, petitions, evidence and Orders relating to the proceedings in the Isle of Man." By letters of 5 and 20 February 2002, the Claimant filed its response to the Respondent's letters of 1 and 15 February 2002.

30. By letter of 25 February 2002, counsel for the Respondent reiterated its request for production of documents of 1 and 15 February 2002; and requested, alternatively, that the Tribunal rule on the question of the authority of those that purported to speak for World Duty Free Company Limited on the basis of the Republic of Kenya's Preliminary Preliminary Objections dated 31 October 2001, and that the Tribunal dismiss the claims brought in the proceedings in the name of World Duty Free Company Limited.

31. By letter of 25 March 2002, Mr. Caine wrote to the Tribunal, with the authorization of counsel for the Claimant, to clarify the status of the litigation in the Isle of Man. By letter of 25 April 2002, the Tribunal informed the parties of its decision to hold a one-day hearing on the objections raised by the Respondent to the capacity to bring and maintain the proceedings before ICSID of the Claimant and the authority of its legal representatives.

32. On 26 April 2002, the High Court of the Isle of Man ordered, *inter alia*, "that the Receiver(s) should not proceed in the name of the Company or take part on behalf of the Company in the proceedings brought by the Company against the Republic of Kenya before ICSID," and that in relation to the proceedings before ICSID "the company shall be represented by its directors and by legal representatives appointed by its directors."

33. By letter of 30 April 2002, counsel for the Claimant acknowledged the above Order and requested that the Tribunal set dates for a hearing on the merits.



34. By letter of 6 May 2002, the Respondent reiterated its 15 February 2002 request for documents. By the same letter, the Respondent reiterated its “preliminary” jurisdictional objections set out in its letter to the Tribunal of 8 January 2001, namely that:

- i) the claim was not attributable to a party to the contract containing the ICSID clause;
- ii) the claim did not arise under that contract; and
- iii) in any event, the claim was premature.

The Respondent further invited the Tribunal to order the Claimant to respond to its “preliminary” objections in writing.

35. By letter of 10 May 2002, counsel for the Claimant made observations on the Respondent’s letter of 6 May 2002 and reiterated his request that hearing dates on the merits be given. By letter of 17 May 2002, counsel for the Respondent made observations on the Claimant’s letter of 10 May 2002. By letter of 20 May 2002, counsel for the Claimant made observations on the Respondent’s letter of 17 May 2002. On 20 May 2002, the Tribunal confirmed to the parties its decision to hold a one day procedural hearing on 2 July 2002 at The Hague.

36. On 2 July 2002, the Tribunal held a procedural hearing at The Hague.<sup>2</sup> The Tribunal issued a Procedural Order joining the preliminary objections to the merits and decided on the following schedule:

- i) 15 November 2002: Memorial from the Claimant setting out its full factual and legal case; together with all documentary evidence and a detailed synopsis of the testimony of each witness to be called at the oral hearings;
- ii) 16 December 2002: Counter-memorial developing all objections to jurisdiction, competence and admissibility intended to be maintained by the Respondent;
- iii) 17 March 2003: Second Counter-memorial from the Respondent setting out the other factual and legal elements, together with all documentary evidence and a detailed synopsis of the testimony of each witness to be called at the oral hearing;
- iv) 17 April 2003: Reply from the Claimant with any further documentary evidence and synopsis of testimony;
- v) 19 May 2003: Rejoinder from the Respondent with any further documentary evidence and synopsis of testimony;
- vi) 16-20 June 2003: Oral hearing.

The Tribunal also directed the Claimant to supply to the Respondent within 14 days, i.e., no later than 17 July 2002, true copies of the documents filed in the Manx courts or issued by these Courts. The Claimant was to report promptly to the Tribunal on the progress of the proceedings in the Manx courts with true copies of any Orders rendered by these Courts to be provided to the Tribunal and to the Respondent.

37. By letter of 18 October 2002, counsel for the Respondent reminded the Claimant of the Tribunal's direction and requested the Tribunal to direct, once again, the Claimant to provide true copies of the documents filed with, or issued by, the Isle of Man courts since 13 June 2002. By letter of 31 October 2002, counsel for the Claimant indicated that there had been no further Orders made by the Isle of Man courts and that with respect to the other documents filed in the Isle of Man courts, the Tribunal was asked to clarify its Order requiring the Respondent to pay for the copying and sending the documents. Further letters were exchanged by the parties on this issue.

38. By letter of 22 November 2002, the Claimant requested an extension, until 4 December 2002, to file its Memorial. On 27 November 2002, the President of the Tribunal granted the Claimant's request of 22 November 2002. On 5 December 2002, the Claimant filed its Memorial dated 1 December 2002.

39. By letter of 10 December 2002, the Tribunal reiterated its Order of 2 July 2002 directing the Claimant to supply the Respondent with true copies of the documents filed with, or issued by, the Isle of Man courts since 13 June 2002 and clarified the question of the payment of the costs associated with photocopying.

40. By letter of 31 December 2002, counsel for the Respondent indicated the Claimant's failure to submit its Memorial according to the directions given by the Tribunal. Consequently, the Respondent indicated that it would not be able to develop its objections related to the proceedings in the Isle of Man courts and would respond to the Claimant's case only "as presented." Counsel for the Claimant replied by letter of 6 February 2003. By letter of 24 February 2003, counsel for the Respondent asked the Tribunal to rule on these procedural issues. On 12 March 2002, the Tribunal requested that the Respondent file its objections to jurisdiction, competence and admissibility, together with its counter-memorial on the merits no later than 18 April 2003. The Tribunal extended the time limits for the further exchanges of written pleadings. The Claimant was accordingly to file its reply no later than 16 May 2003, and the Respondent its rejoinder no later than 13 June 2003. The Tribunal also fixed 18-20 June 2003 as dates for an organizational hearing.

41. On 19 March 2003, the Respondent filed an Application for Dismissal of the Claimant's Claims with Prejudice. By letter of 26 March 2003, the Tribunal requested that the Claimant file, no later than 12 May 2003, its observations on the Respondent's Application of 19 March 2003.

42. On 22 April 2003, the Respondent filed its counter-memorial dated 18 April 2003. By letter of 5 May 2003, counsel for the Claimant asked the Tribunal whether the Claimant's observations on the Respondent's Application of 19 March 2003 could be incorporated into the Claimant's reply. By letter of 6 May 2003, the President of Tribunal indicated that he had no objection to the Claimant's proposal. On 21 May 2003, the Claimant filed its reply dated 15 May 2003.

43. By letter of 3 June 2003, the Respondent submitted an expert legal opinion of Lord Mustill on certain legal issues raised by the Respondent's Application of 19 March 2003, to which counsel for the Claimant objected by letter of 9 June 2003.

44. On 5 June 2003, counsel for the Claimant asked for a postponement of the hearing scheduled for 18-20 June 2003 due to the withdrawal of Mr. Philip Murgor from the case. As indicated in its letter of 10 June 2003, the Respondent did not object to this postponement.

45. On 21 July 2003, the Claimant proposed to the Tribunal that "a day's pre-hearing" take place, in September 2003, on the preliminary issue raised by the Respondent in its Application of 19 March 2003. By letter of 28 July the Tribunal requested that the Respondent file, no later than 18 August 2003, its observations on counsel for the Claimant's letter of 21 July 2003. Counsel for the Respondent replied on 21 August 2003 proposing a hearing with another agenda on the Respondent's Application and related procedural matters. Counsel for the Respondent also indicated that Lord Mustill should be heard, as an expert on English law, and that they were trying to find an available date. By letter of 5 September 2003, counsel for the Respondent indicated the months when Lord Mustill would be available.

46. By letter of 29 January 2004, the Tribunal invited both parties to indicate their respective availability for a hearing over the next several months. The Tribunal invited the Claimant to report on the progress of the proceedings in the Manx courts, particularly as to whether there had been any developments since counsel for the Claimant had informed the Tribunal on 15 November 2002 of further delays in the hearing schedule. Finally, the Tribunal invited the Claimant to submit any further observation it might have on the admissibility of the expert opinion of Lord Mustill following counsel for the Respondent's letter of 21 August 2003.

47. Counsel for the Claimant replied on 11 February 2004 and submitted a judgement of the High Court of Justice of the Isle of Man delivered on 14 November 2003, together with the Order of the Court dated 23 December 2003 dismissing an application for a stay of the above judgement. By letter of 24 February 2004, the President of the Tribunal invited the Respondent to reply by 8 March 2004. By letter of 8 March 2004, counsel for the Respondent requested a rescheduling of the hearing on its application to dismiss.

48. By letter of 22 March 2004, the Tribunal indicated that the hearing was scheduled for 30 June and 1 July. It asked the parties to summarize the issues to be dealt with at the hearing, and to make submissions on any such issues—including the admissibility of Lord Mustill’s expert opinion—by 14 April 2004. The Tribunal further invited the parties to make simultaneous reply submissions by 7 May 2004. On 14 April 2004, the Claimant filed a letter dated 10 April 2004 and its List of Issues and Submissions of Law and Fact dated 13 April 2004. The Respondent also filed a letter on 14 April 2004 on the issues to be dealt with at the hearing.

49. By letter of 13 May 2004, the Tribunal circulated a draft agenda for the hearing. Counsel for the Claimant gave his comments on the draft agenda by letter of 26 May 2004 and counsel for the Respondent by letter of 4 June 2004. A revised draft was circulated on 14 June 2004. On 22 June 2004, counsel for the Claimant submitted a letter dated 19 June 2004 commenting on counsel for the Respondent’s letter of 4 June 2004 and requesting Mr. Veeder to disqualify himself if Lord Mustill’s opinion were to be admitted by the Tribunal. The parties exchanged further letters on this issue before the hearing.

50. The Tribunal held the hearing at The Hague on 30 June and 1 July 2004.<sup>3</sup> At the onset of the hearing, the Claimant withdrew its request for a possible disqualification of Mr. Veeder. During the course of the hearing, the Tribunal decided that it was unnecessary in the circumstances of the case to adduce any expert evidence of English law, but that it considered Lord Mustill’s opinion as part of the materials submitted by the Respondent and would treat it that way. On the second day of the hearing, the Tribunal decided that it would accept a supplemental memorial from the Claimant in response to the application of 19 March 2003, substantially in the form of the draft presented on 1 July 2004, but with the excision of any noncontractual claim. The Tribunal invited such final application of the Claimant to be submitted no later than 15 July 2004, and invited the Respondent to file its reply within one month of its receipt of such application.

51. On 15 July 2004, the Claimant submitted its response, dated 10 July 2004, to the Respondent’s Application of March 2003. On 18 August 2004, the Respondent filed its Response to the Claimant’s memorial in reply.

52. On 15 December 2004, the Tribunal issued a Procedural Order in which it decided the following:

1. Preliminary Issues

[..]

B. The Tribunal orders an oral hearing on preliminary issues on the merits of the Claimant’s claims and the Respondent’s defences, as pleaded in the parties’ respective written pleadings, limited to the following issues:

- i) Whether the Respondent was legally entitled to avoid and did avoid by its Counter-Memorial dated 18 April 2003, the “House of Perfume Contract”;
- ii) Whether the Respondent at any time prior to 18 April 2003 lost its legal right to avoid the “House of Perfume Contract” by affirmation or otherwise; and
- iii) Whether the Claimant is legally entitled to maintain any of its claims in these proceedings as a matter of public policy or *ordre public international*, including any rule based on the maxims “*ex turpi causa non oritur actio*” or “*nemo auditur propriam turpitudinem allegans*”.

As will be self-evident, these issues do not include any issues relating to any breach of the “House of Perfume Contract” or any issue of quantum.

C. The Tribunal intends to decide these preliminary issues on the facts admitted by the parties or not disputed between the parties, or to be found by the Tribunal after the oral hearing referred to in B above. The parties may adduce such further evidence as they may be advised in accordance with the ICSID Arbitration Rules but should restrict any such further evidence to the preliminary issues only.

D. The Tribunal invites the parties to confer and, by no later than 31 December 2004, propose a time table for written submissions, including evidence, considering as first option for the hearing on preliminary issues 9-12 March 2005. As alternative dates for the hearing, the parties are invited to consider 14-17 March 2005.

## 2. Security for Costs

The Tribunal invites the Claimant to provide written observations by no later than 31 December 2004, on the Respondent’s request for security for costs included in its Response of 18 August 2004.

53. By letter of 20 December 2004, received by the Centre on 28 December 2004, the Claimant filed its observations on the Respondent’s request for security for costs and proposed a timetable. On 31 December 2004, counsel for the Respondent replied to the Claimant’s letter of 20 December 2004. Counsel for the Claimant sent further comments by letter of 11 January 2005. The parties exchanged further letters on these issues.

54. By letter of 25 January 2005, the Tribunal proposed alternative dates in May 2005 for the hearing on preliminary issues. On 31 January 2005, the Tribunal issued a Procedural Order in which it decided that:

- i) the written submissions on the preliminary issues on the merits were to be filed successively by the parties: Memorial by the Claimant, Counter-Memorial by the Respondent and Reply by the Claimant;
- ii) the Respondent's request for security for costs included in its Response of 18 August 2004 was rejected;
- iii) the Claimant's request for the Tribunal to issue witness summons to Messrs. Daniel Toroitich arap Moi and Rashid Sajjad included in Claimant's letter of 11 January 2005 was rejected.

55. On 1 February 2005, counsel for the Claimant indicated that his client was not available for a hearing in May 2005. By letter of 15 February 2005, the Respondent objected to a postponement of the hearing. On 17 February 2005, the Tribunal proposed to hold the hearing on 12-14 September 2005; both parties agreed. On 8 March 2005, the Tribunal issued a Procedural Order by which it decided on the time limits for the filing of written submissions on the preliminary issues on the merits as follows:

- i) 19 April 2005 for the Claimant's Memorial;
- ii) 31 May 2005 for the Respondent's Counter-Memorial; and
- iii) 12 July 2005 for the Claimant's Reply.

The Tribunal reminded the parties that the written submissions, hearing and any further evidence were limited to the three issues identified in its Order of 15 December 2004.

56. On 18 April 2005, the Claimant filed its Memorial on Preliminary Issues on the Merits dated 15 April 2005. On 31 May 2005, the Respondent filed its Submission on the Three Preliminary Issues Identified by the Tribunal. By letter of 19 August 2005, the Claimant informed the Tribunal that it would not file a reply.

57. By letter of 26 August 2005, counsel for the Claimant requested a rescheduling of the hearing and indicated that the Respondent did not object to this request. By letter of 31 August 2005, counsel for the Respondent confirmed that his client was not opposing this request. By e-mail of 5 September 2005, the Tribunal informed the parties that, further to the Claimant's request, the hearing on preliminary issues was postponed until 18-19 January 2006.

58. By letters of 7 September 2005 and 25 October 2005, counsel for the Claimant and counsel for the Respondent respectively confirmed their availability. By letter of 10 November 2005, the Tribunal asked the parties to agree on a timetable for the hearing no later than 5 December 2005. By letter of 9 December 2005, received by

the Centre on 13 December 2005, counsel for the Claimant requested that the hearing be re-scheduled to a later date. By letter of 14 December 2005, the Tribunal informed the parties that it had unanimously declined the Claimant's request for a further rescheduling of the hearing.

59. On 18 January 2006, the Tribunal held a hearing on the preliminary issues at The Hague.<sup>4</sup> During the hearing, counsel for the Claimant filed a written submission on the preliminary issues. The Tribunal asked the Claimant to provide copies of the authorities referred to in this submission by 3 February 2006 and invited the Respondent to provide its comments, if any, by 21 February 2006.

60. By letter of 26 January 2006, counsel for the Claimant submitted the authorities referred to in the Claimant's written submission of 18 January 2006 and filed further comments in answer to the observations made by the Respondent during the hearing on this submission. By letter of 21 February 2006, counsel for the Respondent submitted a reply to the Claimant's submission of 18 January 2006.

61. Members of the Tribunal deliberated through various means of communication, including a meeting at The Hague on 19 January 2006, following the hearing of 18 January 2006. The Tribunal has taken into account all pleadings, documents and testimony in this case.

## **II - SUMMARY OF THE PARTIES' SUBMISSIONS ON THE MERITS**

### ***A – The Claimant's Request and Memorial***

62. In its Request of 16 June 2000 and its Memorial of 1 December 2002, the Claimant recalls that Kenya, on 27 April 1989, concluded an agreement for the construction, maintenance and operation of duty-free complexes at Nairobi and Mombassa International Airports with a company called the "House of Perfume". The lease was to be for a period of 10 years, and the company was to have an option to renew it "for a further 10 years upon the same terms and conditions, subject only to renegotiation of the rent payable". The agreement specified that: "In consideration of the grant of the lease, the Company shall pay to the Government the sum of US\$1,000,000 per annum for both Complexes".

63. This agreement was amended on 11 May 1990 to substitute "World Duty Free Company Ltd", a company incorporated under the laws of the Isle of Man (United Kingdom) for "House of Perfume".

64. According to the Claimant, "at the time of the incorporation of World Duty Free and at the time of the 1990 amendment, World Duty Free (like the House of Perfume) was owned by members of the Al-Ghurair family". Those companies were managed by Mr. Nasir Ibrahim Ali, who, on their behalf, signed both the 1989 agreement and the

1990 amendment. However, in September 1991, the Al-Ghurair family sold its shares in World Duty Free. As a result of that transaction, Mr. Ali held in his own name 10% of the World Duty Free shares and 90% of the stock was registered in the name of “Dinky International SA,” whose shareholders are Mr. Ali at 90% and his wife, who owns the rest.

65. As a follow-up to the 27 April 1989 Agreement (as amended in 1990) the Lease was signed on 25 August 1995 between the Kenya Airports Authority, acting on behalf of the Government of Kenya and World Duty Free for a term of 10 years from 1 July 1990, under the Terms and Conditions contained in the 1989 Agreement.

66. The Claimant states that in order to be able to do business with the Government of Kenya, Mr. Ali was required in March 1989 to make a “personal donation” to Mr. Daniel arap Moi, then President of the Republic of Kenya. The Claimant adds that this donation amounted to US\$2 million, and contends that the donation was “part of the consideration paid by House of Perfume to obtain the contract”.

67. According to the Claimant, Mr. Ali spent approximately US\$27 million to construct and equip the Duty Free complexes at Nairobi and Mombassa Airports, and to renovate and upgrade their passenger facilities. The Claimant adds that the complexes created in terminals 1 and 2 of Nairobi Airport were formally opened by the President and the Vice-President of Kenya in 1990.

68. The Claimant submits that he suffered no interference from the Respondent until April 1992. In that month, however, President Moi “required Mr. Ali to assist his Emissaries, Mr. Joshua Kulès and Kamlesh Pattni to obtain secret funds from abroad to finance his re-election campaign”. According to the Claimant, later in 1992, Mr. Pattni devised “a massive fraud through his company, Goldenberg International Ltd, to provide illicit funds for President Moi’s campaign” and “It was accomplished through the fabrication of documentation purporting to evidence the export of gold and diamonds to a foreign consignee. On presentation of their documents to the Treasury and the Central Bank of Kenya, Goldenberg was paid export-compensation and an amount in Kenyan shillings equivalent to the hard currency value shown for the exports”. The Claimant further asserts that World Duty Free was “shown on most of the false documentation as the consignee of the non existent gold and diamonds”, and that this was done without knowledge or consent of the Claimant. The Claimant contends that the extent of the fraud could be estimated at a minimum of US\$438 million.

69. The Claimant states that it “was initially made aware of this unwitting role in the fraud as a result of media enquiries”. It adds that, notwithstanding threats from representatives of the Kenyan Government, World Duty Free publicly denied having been a Goldenberg consignee and provided an affidavit to this effect to Interpol and to the Kenyan Police. It contends that “the Kenyan prosecutors made no attempts to prosecute the fraud until the beginning of 1994, when, under pressure from the International Monetary Fund, Pattni and a number of persons were arrested”.



70. The Claimant then submits that, “in order to ensure the destruction of essential evidence for any successful prosecution of the fraud”, the Government of Kenya “instigated the take over of the control, shares and assets” of the Claimant. By Order of 24 February 1998, the High Court of Kenya, on Mr. Pattni’s request, declared him the beneficial owner of the company from 1992 and placed it in receivership. According to the Claimant, this Order was unlawful: “no notice of any kind was given to it”, the Order was based on forged documents and was manifestly and grossly erroneous. The Government of Kenya was responsible for this “fabrication of evidence and perversion of justice” and “used its power to block any appeal”. The Claimant was, however, able to prove the forgery and the Kenyan police indicted Mr. Pattni, but “the Government through its Attorney General intervened and refused to bring the case to trial”.

71. The Court-appointed “receiver” immediately enforced the Order of 24 February 1998 with the assistance of the Kenyan police. A new “receiver”, Mr. Githungo, was appointed in July 1998. According to the Claimant, he proceeded to mismanage and run down World Duty Free “and destroyed its investment and assets in Kenya”.

72. The Claimant further submits that in 1999 Mr. Ali persisted in his attempt to have the receivership lifted. He did not succeed and “was informed that the company would only be taken out of receivership and restored to its contractual position if he declined to give prosecution evidence in the Goldenberg trial”. He responded to these threats “by making a statement to the press on 19th July 1999 in which he implicated President Moi and others in the Goldenberg fraud”. On 24 July 1999, he was “unlawfully arrested by Government order, held, and deported to the United Arab Emirates”. According to the Claimant, this was done in order to prevent Mr. Ali from i) challenging the take over of World Duty Free and ii) providing vital evidence for any effective prosecution in the Goldenberg fraud.

73. Finally, the Claimant submits that “following an *ex parte* hearing, a formal judgment and decree was entered in favour of Mr. Pattni” in the High Court of Kenya on 24 and 27 September 2001, “which purported to legitimise the illegal expropriation of World Duty Free”. Following that judgment, “a duplicate World Duty Free” was incorporated by Mr. Pattni in the British Virgin Islands and registered in Kenya with the same place of business as the Claimant.

74. In short, “the Claimant’s contention is that the Government of Kenya expropriated the Claimant’s property and destroyed its rights under the [1989] Agreement in using its executive, judiciary and agents like Kamlesh Pattni and his hand picked purported receivers”. In this respect, the Claimant identifies several breaches of the agreement: i) use of World Duty Free in the Goldenberg fraud; ii) illegal expropriation of the Company; iii) placing of World Duty Free in receivership; iv) damage suffered from Court-appointed “receiver”; v) Court refusal to protect World Duty Free from crime; vi) unlawful deportation of the company’s Chief Executive Officer; vii) final judgment in defiance of ICSID; and viii) registration of a duplicate World Duty Free during the pendency of the ICSID proceedings.

75. The Claimant stresses that “this case is a classic example of the type of investment dispute that ICSID was established to resolve” under the Washington Convention. In this respect, the Claimant recalls that it is incorporated in the United Kingdom (ICSID Convention ratified on 18 January 1967), that it is resident and headquartered in the United Arab Emirates (ICSID Convention ratified on 22 January 1982), and that it operates in Kenya (ICSID Convention ratified on 2 February 1987). The Claimant adds that the consent relied upon as the basis for instituting proceedings is contained in Clause 9 of the 1989 House of Perfume Contract.

76. On that basis, the Claimant states that it “shall seek orders for payment of full compensation. This should take the form of restitution, i.e., return of the duty free complexes at both airports under leases running until April 2009, together with payment of:

- i) Legal costs (on an indemnity basis) incurred in the arbitration and in all Kenyan, IOM [Isle of Man] and any other proceedings concerning the receiver;
- ii) The full amount needed to restore the duty free complexes to world class standards;
- iii) Profits expected to have accrued, if there had been no court order, from February 1998 until the date of full restitution;
- iv) Lost opportunity profits for the above period in respect of this inability to expand his business;
- v) Aggravated and exemplary damages for the bad faith, high-handed and unlawful behaviour the Government of Kenya has demonstrated”.

77. Alternatively, the Claimant submits that “if the Tribunal does not order restitution, there must be compensation assessed on an international law basis, i.e., ‘the value of the undertaking at the moment of dispossession (24 February 1998) plus the interest to the day of payment’. (*Chorzów Factory Case (1928) PCIJ series A N°17*). This, as the arbitral award in *Amco v. Indonesia (1985) ICSID Reports 2*) points out, must encompass ‘the full compensation of prejudice, by awarding to the injured party the *damnum emergens* (loss suffered) and the *lucrum cessans* (expected profits).’ Under this head too, the Claimant will rely on the international rule that unlawful behaviour by a State in dispossessing the property of aliens calls for the award of exemplary damages”.

78. The Claimant adds that “the dispossession destroyed its plans for establishing a matrix of duty free stores” in the region and concludes that it “will be seeking an award of compensation in the vicinity of US \$ 500 million”.

79. It should be noted that the claim for restitution is advanced under a contractual complaint exclusively, arising from the House of Perfume Contract, as the Claimant’s written pleadings confirm. The Claimant states that the

Government of Kenya is “responsible for 7 breaches of the investment agreement with WDF”. It stresses that “[t]he nature of the damage caused is irreparable and founds a legitimate claim for damages” (para. 99(a) of the Memorial of 1 December 2002). In addition, the Claimant stresses that the substantive issues “arise from a foreign investment that is the subject of a foreign investment agreement and the deliberate failure of the Government of Kenya and its agents to protect that investment, and their involvement in numerous breaches of it” (para. 100 of the Memorial of 1 December 2002). The pleaded case for restitution is thus clearly founded in contract, based on the different breaches of the investment agreement.

### ***B – Kenya's Counter-Memorial***

80. In its Counter-Memorial dated 18 April 2003, Kenya deals from the outset with outstanding matters of procedure and refers to its preliminary objections (see paras. 94 to 104 below).

81. Kenya then submits that the Claimant’s allegations of breach of contract are devoid of merit. In this respect, Kenya recalls first that the Goldenberg fraud was perpetrated in 1992. Under both Kenyan and English Law, a six-year statute of limitation applies to actions founded in contract. The claim based on the use of World Duty Free’s name in that fraud is thus time-barred. In any event, such use did not constitute a breach of the contract by Kenya and no damage to World Duty Free arose from the alleged breach.

82. Kenya further contends that the claims submitted to the Tribunal “relate exclusively to a dispute between two individuals, Nasir Ibrahim Ali and Kamlesh Pattni, over ownership of World Duty Free”; this dispute was first brought before the Kenyan Courts and “no evidence has been presented to taint the ownership proceedings in Kenya with illegality”. “Moreover, even if Mr. Ali were able to establish that the appointment of a receiver” by the Kenyan Court “was corruptly procured by Mr. Pattni, he has certainly presented no evidence to substantiate his allegation that, in doing so, Mr. Pattni was acting as an “agent” of the Government of Kenya”. On this ground also, there has been no breach of contract by Kenya.

83. The Respondent adds that, in fact, “World Duty Free defaulted on its rent payment obligation from the outset” and “remained in default through to early 1998”. Consequently, “in February 1999, the Kenyan Airports Authority purported to terminate the Lease agreement. However, following a vigorous defence of World Duty Free’s rights by the Court-appointed receiver before the Kenyan Courts”, the Lease agreement was renewed and World Duty Free continues to operate its business at the Nairobi and Mombassa Airports. Thus the appointment of receivers did not cause the Claimant any damage and “the ownership dispute has still to be finally determined in the Isle of Man, the place of World Duty Free’s incorporation”.

84. Kenya states that Mr. Ali, “from the very beginning of his battle for the control of World Duty Free, attempted to enlist the Government of Kenya’s support in his civil dispute with Mr. Pattni”. Kenya further submits that “there is no legal or constitutional basis under the law of Kenya for the Attorney General to intervene in a private civil dispute on behalf of one of the parties”, and yet recalls that criminal prosecutions were engaged by the Attorney General against Mr. Pattni on various grounds. Thus, according to Kenya, Mr. Ali’s allegation that the Government of Kenya has favoured Mr. Pattni against World Duty Free is without basis.

85. Kenya adds that Mr. Ali was not deported from Kenya in 1999 “in order to prevent him from both challenging the take-over of World Duty Free and providing vital evidence for any effective Goldenberg prosecution”, but that, in actual fact, Mr. Ali had been convicted in Dubai in absentia for having issued worthless cheques and the Kenyan police was asked, through Interpol, to enforce a warrant for his arrest. Mr. Ali was for this reason deported to Dubai, where he was subject to various criminal prosecutions. Since Mr. Ali’s release from prison in Dubai, “there has been no legal impediment preventing him from returning to Kenya”. Moreover, “there was nothing to stop him from defending the ownership dispute from Dubai, if he so wished”. “It is impossible to discern a claim for breach of the House of Perfume Contract from these circumstances that pertains to World Duty Free, much less any damage to it resulting therefrom”.

86. Finally, Kenya denies that its Government “has been complicit in the creation of a duplicate World Duty Free incorporated in the British Virgin Islands and registered in Kenya”. On this point, Kenya contends that “there exists no basis in law for the Kenyan Registrar of Companies to refuse a compliance certificate to a second foreign company named World Duty Free”.

87. In short, Kenya submits that there has been no breach of the 1989 Agreement by its Government, and that there has been no damage to World Duty Free. Kenya requests that the Arbitral Tribunal:

“(i) dismiss the Claimant’s claims in their entirety; and

(ii) order the Claimant to pay on an indemnity basis all the costs and expenses of this arbitration, including the fees and expenses of the Arbitral Tribunal, ICSID’s administrative expenses, and the fees and expenses of the Republic of Kenya’s legal representation in respect to this arbitration and any other costs of this arbitration”.

#### *C - World Duty Free’s Reply*

88. In its Reply dated 15 May 2003, World Duty Free reiterates all the contractual breaches listed in its Memorial, which it says are causally linked, and reiterates the relief sought therein.

89. World Duty Free stresses that “in the Company Registry and by decision of the High Court of the Isle of Man, Ali and Dinky are the beneficial owners of the Claimant’s shares. In Kenya, the management and control of the company has, through forgery, crime and complicity of the Republic of Kenya, been taken over by Kamlesh Pattni”. The illegal expropriation is now complete. “Alarming, the Claimant has also been told that the Lease with Kenya Airports Authority is now in the name of World Duty Free (British Virgin Islands)”.

90. The Claimant reasserts that Mr. Ali was illegally deported to Dubai in 1999. Mr. Ali “was never confronted with an Interpol warrant of arrest and the legal extradition procedures were not followed. He could not come back to Kenya, having previously been expressly threatened with death”.

91. World Duty Free further contends that, as previously stated, Kenya’s judiciary was at the time corruption-infested and stresses that this has now been clearly established by measures recently taken in this area by the Government of Kenya itself and by the work done by the Commission of Enquiry on the Goldenberg fraud.

92. The Claimant adds that the information provided by the Respondent concerning the performance of World Duty Free in 1992 and 1993 is mere makeweight with no bearing on either the expropriation or the value of the Claimant’s investment as at February 1998.

93. Finally, the Claimant submits that the Respondent’s Counter-Memorial is full of deceptive elisions and misrepresentations, which it enumerates and analyses; and it concludes that Kenya has no defence to World Duty Free’s claim.

### **III – PRELIMINARY OBJECTIONS TO THE CLAIMS RAISED BY KENYA IN 2000 AND 2001**

94. *In limine litis*, by letter dated 28 December 2000 the Respondent drew the attention of the Tribunal to the fact that World Duty Free had been struck off the Isle of Man Companies Register approximately a year before these proceedings were commenced and required “as a preliminary to its preliminary objections” that those bringing the action demonstrate both “the resurrection of the Company and its authorisation to commence the action”.

95. During the first session of the Tribunal in January 2001, the Claimant undertook to apply to the Court in the Isle of Man to have its name restored to the register (see para. 9 above). In fact, this restoration was done on the initiative of the “receiver” appointed by the Kenyan Courts, Mr. Githungo, who for that purpose seized the High Court of Justice of the Isle of Man. By Order of 26 March 2001, this Court also appointed him as receiver of the property and assets of World Duty Free under the laws of the Isle of Man.

96. By letter of 24 May 2001, Mr. Githungo informed the Tribunal of this appointment. In this letter, he objects “to the institution and maintenance of ICSID arbitral proceedings” and asks that the case be struck from the ICSID docket. This request was made part of the file by the Respondent on 10 June 2001.

97. In a letter dated 26 August 2001, the Claimant recalled the various judgments relating to the status of World Duty Free both in Kenya and in the United Kingdom; it contended that “the appointment of a receiver to a Company does not oust the powers of the directors or shareholders to commence or continue an action in the name of the Company” and therefore asked the Tribunal to dismiss Mr. Githungo’s request.

98. On 31 October 2001, Kenya developed its “Preliminary Preliminary Objections” to the proceedings; it recalled the Order of the High Court of the Isle of Man of 26 March 2001 and informs the Tribunal that, on 24 September 2001, the High Court had modified its previous Order in appointing two “joint receivers”, Mr. David Peter Craine and Mr. Githungo. Kenya stresses that those receivers were empowered to act in the name of the Company and that the directors of World Duty Free were consequently disempowered to do so. Kenya submits that Mr. Githungo had disowned the action initiated by Mr. Ali and that Mr. Craine had requested the “same sort of holding brief”, and concludes that, “at this time there is no legal basis on which the arbitration can proceed”.

99. In its response of 11 January 2002, World Duty Free contends that “the bona fide directors of the Claimant through its duly constituted organs can commence and maintain actions in the name of the Company without consent and authorisation of Mr. Githungo”. It requires that Kenya’s “Preliminary Preliminary Objections” be dismissed.

100. By Order dated 26 April 2002, the High Court of Justice of the Isle of Man again modified its previous Orders to specify that the joint receivers of the Company appointed by the Court “should not proceed in the name of the Company or take part on behalf of the Company in proceedings brought by the Company against the Republic of Kenya before ICSID in case N°ARB/00/07 and that relevant to the latter proceedings the Company is to be represented by its directors and by legal representatives appointed by the Company’s directors”.

101. By letter of 6 May 2002, the Respondent noted the terms of this Order, “which on its face appears for now to answer the Republic of Kenya’s concerns as to the authority of those that purport to represent World Duty Free in these proceedings”. Proceeding on the grounds that they have such authority, the Respondent recalled, nonetheless, that “in addition to its “Preliminary Preliminary Objections” it has raised “Preliminary Objections” in its letter of 8 January 2001, namely that:

- (i) “the claim is not attributable to the contract containing the ICSID claim;
- (ii) the claim does not arise under the contract;

(iii) in any event, the claim is premature”.

102. At the hearing of 2 July 2002, the Tribunal decided “that the Preliminary Objections, as they now stand, are closely linked with the merits of the dispute and are to be joined to the merits under Rule 41(4) of the ICSID Arbitration Rules”.

103. Thus the Tribunal will no longer deal with those remaining objections but will only recall that, in its Counter-Memorial dated 18 April 2003, Kenya reaffirmed that “Mr. Ali is not a party to the House of Perfume Contract and so cannot bring his own claims in these proceedings”. However, Kenya added that “subject to the outcome of the ownership proceedings still pending before the Courts of the Isle of Man, which will impact on not only the merits of the claim, but on the capacity of those bringing this action in the name of World Duty Free, the Republic of Kenya is content for this baseless claim to be determined by the ICSID Tribunal on the merits”.

104. This Tribunal will also note that, on 14 November 2003, the High Court of Justice of the Isle of Man decided that the judgment rendered on 27 September 2001 by the High Court of Kenya (see para. 73 above) is a judgement *in rem* and that the Kenyan Court had no jurisdiction to make such a judgment.

#### **IV – KENYA'S 2003 APPLICATION RELATING TO THE LEGALITY OF THE CONTRACT**

105. On 19 March 2003, Kenya submitted to the Tribunal an application alleging that the 1989 Agreement is unenforceable and requesting the dismissal of the claims with prejudice on that basis. In that application, the Respondent states that “it is the Claimant’s case that the Contract upon which its claims in these proceedings are based was procured by paying a bribe of US\$2 million to the then President of Kenya, Daniel arap Moi”. It adds that “the payment of a bribe is criminal”. “As a matter of Kenyan, English and International ordre public, the resulting Contract does not have the force of law”.

106. The Respondent recalls that the 1989 Agreement refers both to Kenyan Law in its Article 10 (A) and to English Law in its Article 9 (2) (c). It alleges that this “does not change the legal consequences of the Claimant’s criminal behaviour. On this fundamental issue of public policy, Kenyan and English Law are unsurprisingly the same”. In this respect the Respondent contends that corrupting Governmental officials is in Kenya a crime punishable by up to 10 years’ imprisonment and that, in Kenyan Law, “contracts tainted with illegality are unenforceable”. The same is true in English Law, as illustrated by judgments rendered recently in *Soleimany v. Soleimany* [1999] 1 QB 785 and *Westacre Investments Inc. v. Juogoinport - SPDR Holding Co. Ltd.* [2000] 1 QB 288.

107. The Respondent further submits that “Bribery of the type that the Claimant has now affirmed is contrary to international public policy”. In support of this submission, the Respondent invokes the award given in ICC case n° 1110 by Judge Lagergren; the interim Report of the ILA Committee on International Commercial Arbitration of 2000; the OECD Convention on combating bribery of foreign public officials in international business transactions of 21 November 1997; and other conventions concluded or in preparation within the framework of the Council of Europe, the Organisation of American States and the United Nations.

108. In short, the Respondent asks the Arbitral Tribunal to decide that the contract on which the claims rely is unenforceable, that the application requires no oral hearing and that it must be “dismissed with prejudice at the earliest possible juncture”.

109. One month later, in its Counter-Memorial dated 18 April 2003, Kenya reaffirmed that “the Claimant’s claims must fail because they arise from a contract that, on the Claimant’s own case, is unenforceable, and which the Republic of Kenya now avoids”. It adds that the submissions on the merits made in the Counter-Memorial “are without prejudice to this position”.

110. At the invitation of the Tribunal (see paras. 50 and 51 above), World Duty Free filed, on 10 July 2004, a supplemental memorial in response to Kenya’s application of 19 March 2003. The Claimant submits that the facts as laid out in Mr. Ali’s witness statement do not amount to a confession of bribery; it stresses that “bribery is not a strict liability offence, mens rea is relevant”. Mr. Ali made a payment to President Moi that he believed lawful. At that time, it was routine practice to make such donations in advance of doing business in Kenya; said practice had cultural roots and was buttressed by the “Harambee” system, one which mobilized resources through private donations for public purposes.

111. World Duty Free also contends that the alleged bribery is a collateral contract prior to and severable from the House of Perfume Contract. This collateral contract “between Mr. Ali and Mr. Sajjad was in terms that the latter would procure an audience for Mr. Ali with President Moi for a consideration of US\$2 million”. “That transaction was not referred to in the negotiations and was not treated or even mentioned as part of the consideration for the House of Perfume Contract”. In the present case, the claim does not rest on the US\$2 million transaction, but on the Contract.

112. The Claimant adds that “where a contract is supported by both legal and illegal consideration, the illegal consideration is severable”.

113. It also submits that “Article 53 of the ICSID Convention does not set out public policy as a ground for annulment” and that dismissal of the case on such a ground would allow Kenya “to profit from its much more



serious illegalities, and in particular from the pressure unlawfully exercised by Kenya upon Mr. Ali. Moreover, in equity, ‘where both parties to a transaction are guilty of illegality, but their respective guilt is not equal, the claim of the person who is less blame worthy should not be defeated by the defence of illegality’”.

114. World Duty Free submits that the actions of President Moi and his colleagues were the action of the Government of Kenya. Thus Kenya negotiated the Contract with full knowledge of the payment it now seeks to impugn. In addition, Kenya later performed its side of the Contract and is estopped by conduct. In other words, rescission is not available to the Respondent; “it has already affirmed the House of Perfume Contract by its conduct between 1989 and 1998”.

115. Moreover, according to the Claimant, Kenya “lost its right of rescission when it breached the House of Perfume Contract by the illegal expropriation of World Duty Free’s investment in February 1998”. Finally “the emerging international consensus on which the Respondent has founded its charge that the contract is illegal as a matter of international ordre public is inapplicable” *ratione temporis* and ICC case n° 1110 invoked by Kenya “can be distinguished from the situation in this case”.

116. In conclusion, World Duty Free requests the immediate dismissal of the Respondent’s application of 19 March 2003.

117. On 18 August 2004, Kenya submitted its Reply. It repeats that Mr. Ali bribed President Moi in 1989 and that this bribe was paid to procure the House of Perfume Contract and was successful in its intent. The Respondent notes that the Claimant “confirmed its acceptance of the contents of Lord Mustill’s opinion as an accurate reflection of English Law, including the conclusion that a contract procured by bribery is voidable at the instance of the party whose agent was bribed”, and states that “bribery was as unacceptable prior to 1997 as it has been since”. In its Reply, Kenya stresses that “bribing a head of state does not immunise the Contract from the consequence of illegality”, and adds that “the bribe was not a collateral contract to obtain an audience with Mr. Moi” and, further, that “the bribe taints the entirety of the contract”. Thus the Contract had been validly avoided.

118. Furthermore, according to the Respondent, “public policy demands that the claims be dismissed”. Contrary to what the Claimant contends, the Tribunal does not have to examine the Parties’ “relative moral culpability”, or to determine whether or not Kenya had breached the Contract. Claims founded on illegality have to be dismissed for the benefit of the public and not for the advantage of the defendant. Moreover, the doctrine of undue influence is not applicable in the present case and, in any event, Mr. Ali “had a free and deliberate choice in deciding whether or not he wanted the investment contract”.

119. In accordance with the Orders of the Tribunal dated 15 December 2004, 31 January 2005 and 8 March 2005, the Parties submitted further memorials dealing in particular with three issues raised by the Tribunal (see paras. 52 to 56 above).

120. In its Memorial dated 15 April 2005, the Claimant reiterates and develops its previous arguments and submissions. It adds that “the personal donation” made by Mr. Ali “was sanctioned by customary practices and was regarded a matter of protocol by the Kenyan people”. “The Contract was neither illegal, nor voidable”. It further stresses that “The Claimant, as a successor in title to the House of Perfume Contract” was not in existence as a juristic person at the time a personal donation was being given to President Moi. Why should its rights to be taken away by acts committed when it was non-existent and when it has no knowledge, actual or constructive, of any payment which could be characterized as improper and unlawful?” It adds that “before the proceedings were filed in the Arbitral Tribunal, the Respondent did not attempt to avoid the contract even though it had” such a knowledge. Additionally, Kenya “is not legally entitled to renege from a contract it breached three years” before such a filing. In any event, a party should not be “enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other”. Finally, the Tribunal “must pay sufficient regard to the domestic public policy” of Kenya under which the donation made was “not only acceptable, but fashionable”.

121. In its submission of 31 May 2005, Kenya repeats that “[a]ccording to the Claimant’s own evidence and arguments, Mr. Ali paid his bribe specifically in order to obtain the House of Perfume Contract”. This cash payment was made in a “heavily concealed manner”. It could not be considered as an “exchange of gift” and was not acceptable in the Kenya system of “Harambee”. Furthermore as a matter of English law, there “exists an irrebuttable presumption in civil matters that such a payment has been ‘made with the intention that its recipient should be influenced . . . and was influenced by it’“. The Kenyan Prevention of Corruption Act of 1956 also establishes a presumption of bribery in corresponding circumstances. “It is impossible to “sever” a bribe and then to enforce a contract that would never have existed but for the bribe”. Therefore Kenya “was legally entitled to avoid the House of Perfume Contract, which it validly avoided on 18 April 2003”.

122. Kenya further submits that it “cannot be presumed to have had knowledge of Mr. Ali’s bribes”, which “was concealed from everyone other than its recipient and his close associates”. As a consequence, Kenya “has not lost its right to avoid the House of Perfume Contract”.

123. Finally, Kenya contends that “the Claimant’s claims arise ex turpi causa and as such are unsustainable as a matter of public policy” and “Public policy in Kenya is not different from that subsisting in England or internationally”. Moreover and contrary to the Claimant’s allegation, “Kenya has not been enriched by a bribe that was paid to Mr. Moi personally” and in any event such enrichment would be no basis upon which to validate the Claimant’s illegally obtained contract.

124. At the oral hearing held on 18 January 2006, the Parties reiterated and developed their written arguments and submissions.

## **V - DECISION OF THE TRIBUNAL**

125. The Tribunal observes from the outset that, in the present case, the proceedings have been unusually lengthy. It must be noted that both Parties have some responsibility in this situation. *In limine litis*, Kenya raised “Preliminary Preliminary Objections” relating to the legal personality of World Duty Free and the capacity of the persons who initiated the action to represent the Company. Those questions were to be dealt with under the laws of the Isle of Man, where the Claimant was incorporated. The High Court of the Isle of Man rendered several orders and judgments in this respect from March 2001 to November 2003. In November 2002, Kenya recognised that those orders “on their face” appeared “for now” to answer its initial “concern” (see para. 101 above). It maintained, however, other “Preliminary Objections” which the Tribunal joined to the merits (see para. 102). In March 2003, Kenya alleged, in light of World Duty Free’s memorials, that the Contract invoked by the latter was illegal and unenforceable. A hearing was scheduled for June 2003 but had to be postponed at the request of the Claimant and with the agreement of the Respondent. The holding of this hearing in September 2003 and the following months was contemplated, but it was not possible to schedule the same before July 2004. It was only during this hearing that World Duty Free submitted substantive observations on the Respondent’s application of March 2003. In consideration of memorials which were then exchanged between the Parties, in December 2004 the Tribunal raised three threshold issues on which it asked for comments and proposed to hold a hearing on in March 2005, then in May 2005. These dates not having been agreed on, the Tribunal scheduled the hearing for 12-14 September 2005. On 26 August, the Claimant requested a rescheduling of the hearing. The Respondent did not oppose this request and the hearing was again postponed to 18-19 January 2006. A new request for postponement was presented in December 2005 and was declined by the Tribunal.

126. Proceeding to consideration of the case, the Tribunal recalls that the Government of Kenya, on 27 April 1989, concluded an agreement with a company, called the “House of Perfume” for the construction, maintenance and operation of duty-free complexes at Nairobi and Mombassa Airports. This agreement was amended on 11 May 1990 to substitute “World Duty Free Ltd” for the “House of Perfume”. As a follow-up to this agreement, a Lease was concluded on 25 August 1995 between the Kenya Airports Authority—acting on behalf of the Government of Kenya—and World Duty Free. All of these documents were signed by Mr. Nassir Ibrahim Ali, acting on behalf of the Companies.

127. World Duty Free contends that Kenya breached the 1989 Agreement in several respects, illegally expropriated its properties and destroyed its rights under the agreement. On this basis, it requests restitution or, in the alternative, compensation (see paras. 62 to 79 above).

128. Kenya, for its part, submits that the 1989 Agreement was procured by paying a bribe to the then President of Kenya, Daniel arap Moi. It adds that the payment of such a bribe is criminal and that the resulting contract does not have the force of law. It is unenforceable and the claims cannot be heard as a matter of public policy. Furthermore, as a matter of applicable law, the contract is voidable and has been validly avoided by Kenya. Consequently, the claims must be dismissed with prejudice (see para 105 to 124 above).

129. The Tribunal will consider first whether a bribe has been paid by Mr. Ali to President, Moi in the present case, and whether the 1989 Agreement has been procured as a result of such a payment. If so, the Tribunal will have to examine the consequences of the bribe on the enforceability and the validity of the Agreement, both under ordre public international and the applicable laws.

### ***A - The Existence of a Bribe***

130. In its Procedural Order dated 2 July 2002, the Tribunal required the Parties to provide summaries of the witness evidence they intended to adduce. On 1 December 2002, World Duty Free provided a “full statement” dated 30 November 2002 from Mr. Nasir Ibrahim Ali, “Chief Executive Officer and shareholder of World Duty Free”. In this document Mr. Ali states: “in the mid-1980s, I was the General Manager of a company called the House of Perfume” which “was the leading distributor of famous American and European perfumes in the Middle East”. Mr. Ali adds that in 1988 he attended a seminar in London on the prospect for duty-free market after the European Union became a reality, when duty free in Europe would be abolished. The consensus at the seminar was that the focus should shift to the Middle East and Africa which at that time were ‘virgin’ grounds for the duty free business. “I saw the potential for the development of duty free facilities of an international standard in selected African countries” and “I wanted to begin in Kenya as the logical start for the East African region, given the historically strong trade links between Mombassa and Dubai”.

Then, in paras. 11 to 25 of this statement, Mr. Ali testifies:

"11. As a leading businessman in Dubai, I met in normal business circles, one Rashid Sajjad, a Kenyan, who would come to Dubai frequently in order to buy goods for export to Kenya for his company, Bawazir & Co."

"12. From my discussions with Sajjad, I came to understand that he was politically and powerfully connected in the Kenya Government. Wishing to diversify my business from perfumes into the duty-free market, I raised my interest with Sajjad and asked his advice on arranging the necessary licences and authorisation for the establishment of duty free complexes in Nairobi and Mombassa airports. Sajjad informed me that he would arrange meetings for me with the relevant officials in Kenya."

"13. In March 1989 Sajjad informed me that the necessary appointments had been arranged. The first was an audience with His Excellency Daniel arap Moi (HEDAM). Sajjad informed me that although my concept for establishing duty-free complexes at Nairobi and Mombassa airports to an international standard would require heavy investment, which I believed would be for the national

benefit of Kenya, Protocol in Kenya required that I should in addition make a ‘personal donation’ to HEDAM. I was given to believe, that this was payment for doing business with the Government of Kenya.”

"14. Sajjad advised me that the appropriate donation, given the estimated value of the investment, was US\$2 million. I was further advised by him that the donation should be in cash.”

"15. Sajjad arranged a letter of credit for the value US\$2 million from his bank, Banque Indosuez, London Branch, dated 7 February 1989 in the name of Mr. Sajjad of Bawazir & Co. Against this letter of credit I remitted US\$ 2 million cash in his favour at Banque Indosuez on 16 February 1989. (See copy of letter of credit and supporting documents at Exhibit 5(b).”

"16. I travelled to Nairobi from Dubai in March 1989 in order to attend my audience with HEDAM. I flew into Nairobi airport and was greeted by Sajjad and two official vehicles. Sajjad drove me to HEDAM’s Kabarak Residence In Nakuru District of Kenya, which is approximately 150 kilometres from Nairobi.”

"17. I was received by one Joshua Kulei (JK), who introduced himself as the Personal Assistant to the President. Sajjad and I met the President and I presented and explained my proposed investment to him. I realise that Sajjad was in fact very close to HEDAM. I refer to a copy of photograph showing Sajjad, seated to the left and behind HEDAM at a critical political meeting on 14 October this year at Exhibit 5(a).”

"18. I understood that Sajjad had received the cash worth US\$500,000 against the letter of credit on 16 February 1989. He had then arranged for this to be exchanged into Kenyan Shillings (KSh). He brought the KSh in cash to my meeting with HEDAM in a brown briefcase. When we entered the room where the President received us, he put the briefcase by the wall and left it there. After the meeting we collected the briefcase from where we had left it. On the departing journey I looked in the briefcase and saw that the money had been replaced with fresh corn.”

"19. I felt uncomfortable with the idea of handing over this “personal donation” which appeared to me to be a bribe. However, this was the President, and I was given to understand that it was lawful and that I didn’t have a choice if I wanted the investment contract. I paid the money on behalf of House of Perfume, treating it as part of the consideration for the agreement and documented it fully as can be seen from the documentary evidence I have referred to.”

"20. During my presentation of the proposed investment I stated that I foresaw that the duty-free complexes would benefit Kenya in the following ways:

- i) It would make considerable foreign exchange earnings. This seemed to me a particularly important consideration given that strict exchange controls operated in Kenya at the time and the economy’s need for more foreign exchange. It was my understanding that at that time the foreign exchange turnover for the seventeen retail units in the Nairobi/Mombassa airport complexes was on average US\$ 1.5 million annually. By contrast WDF’s turnover in the first year of operations was in excess of US\$ 10 million.
- ii) My company would meet the entire cost of the construction and renovation. It was my understanding that at that time, both the Jomo Kenyatta International Airport, Nairobi and the Moi International Airport, Mombassa were in a poor state of disrepair, and required renovation. Surveys I had had carried out showed that both Nairobi and Mombassa Airports required renovation of the immigration hall, ceilings, toilets, corridors and First and

Business Class lounges. I did in fact make these extensive renovations and by 1993 WDF had invested just over US\$ 27 million. (I refer to copies of promotional material showing photographs of facilities after renovation at Exhibit 6(a) and 6(b).

- iii) I undertook to advertise Kenya overseas as a tourist and business destination to the cost of US\$ 2 million annually and I did so. (I refer to copies of advertisements arranged by WDF/KDF to promote the Airports and Kenya at Exhibit 45.)
- iv) The investment would create employment. In fact the Airports employed a workforce of over 300 once they were completed.
- v) I undertook to improve management of the complexes. I was given to understand that the complex was at that time poorly managed and little rent was being recovered for use of the retail space. I was given to understand that this was in part due to the fact that the people running the shops had political connections with the President. For instance, I was told that Abraham Kiptanui, who managed the airport at Nairobi before being appointed State House Controller, ran six units out of the seventeen, and JK, the President's Personal Assistant had four."

"21. The President approved my proposed investment and suggested that I meet the Vice-President and the Minister for Finance, Professor George Saitoti. Then followed a series of meetings with other high-level Government officials and ministers, including the Governor of the Kenya Central Bank Eric Kotut, and Minister of Transport and Communications Honourable JJ. Kamotho, in order to obtain the required permits and licences."

"22. Subsequently, I was introduced to the late Hezekiah Oyugi, who was the Accounting Officer and Permanent Secretary/Administration in the Office of the President, and directly in charge of the Aerodromes Department and of internal security."

"23. After lengthy discussions, Oyugi approved the project and the contract was drawn up and signed on 27th of April 1989, by him on behalf of the Government of the Republic of Kenya, and by myself on behalf of the House of Perfume. I refer to 4 photographs at Exhibit 3 showing myself, Sajjad, Oyugi & Mr. Wamburra at the signing of the agreement in the Office of the President in Kenya on 27 April 1989."

"24. The investment agreement made provision for a 10 year renewable lease for the same period for 3,000 square metres at Nairobi and 2,000 square metres at Mombassa Airport, between WDF and Kenya Airports Authority (KAA). The parent ministry of KAA was the Office of the President."

"25. During the negotiations of the investment agreement, I was frequently travelling backwards and forwards between Dubai and Kenya. During this time I received several requests for gifts to bring for officials in the Kenyan Government. I was not given any money in return for these items and it appeared to me that it was expected that I would bring what they requested. I received a request by fax from Sajjad on 2 May 1989 with a shopping list for watches for Oyugi, his wife and secretary and Mr. Mbindyo who was an official in the Treasury and a signatory of investment agreement and Director of Aerodromes. On 3 May 1989 I received a telex from Sajjad requesting a gift of the latest model Polaroid camera. I refer to copies of said documents at Exhibit 4."

131. During the hearing held by the Tribunal on 18 January 2006, Mr. Ali was heard as a witness and confirmed his written statement, adding that during his meeting with President Moi, the President welcomed his proposal, and that after that meeting, Mr. Sajjad—having seen the maize inside the briefcase—told him: “the President likes your proposal; it is a very good sign”. Mr. Ali also added that Mr. Sajjad showed him copies of British newspaper articles relating to Harambees officially given to President Moi. He concluded that he did not at any time think he was “bribing to get this job”.

132. The Respondent does not deny Mr. Ali’s payments to President Moi in the circumstances related by the witness in his written statement. Such a payment must then be considered as established.

133. Nevertheless, the Parties differ on the way in which they qualify that payment. Kenya considers that it is a bribe given in order to obtain the Agreement on which the claims are based. World Duty Free considers it a gift of protocol or a personal donation made to the President to be used for public purposes within the framework of the Kenyan system of Harambee; the Claimant recalls that this system is “largely anchored in cultural practices when people are able to pull whatever resources they have, ‘in particular’ to finance community projects”.

134. The Tribunal is aware of the fact that, on the occasion of visits to heads of State, gifts are often exchanged as a matter of protocol. It has also noted the report of the Task Force on Public Collections or “Harambees” presented in December 2003 to the Minister of Justice of Kenya. According to this report “the concept of Harambee had its root in the African culture where societies made collective contribution toward individual or communal activities” and this practice became popularised by President Kenyatta just after Kenyan independence. However, the report adds that “over the years, the spirit of Harambee has undergone a metamorphosis which has resulted in gross abuses. It has been linked to the emergence of oppressive and extortionist practices and entrenchment of corruption and abuse of office”.

135. In the present case, Mr. Ali asked Mr. Sajjad for advice on arranging the necessary licences and authorisations for the establishment of duty-free complexes in Kenya. Mr. Sajjad informed Mr. Ali that he would arrange meetings with the relevant officials for him. The first meeting was to be with President Moi. Before that audience, Mr. Sajjad informed Mr. Ali that a “personal donation” of US\$2 million in cash should be made to the President, and Mr. Ali understood that “this was payment for doing business with the Government of Kenya”. This sum was transferred by Mr. Ali to Mr. Sajjad’s account in London in February 1989. Mr. Ali then visited with the President at his residence in Kabarak, and on this occasion US\$500,000 in cash was “left in a brown briefcase by the wall”. After the meeting, Mr. Ali “saw that the money had been replaced with fresh corn”. Mr. Ali says that he was “uncomfortable with the idea of handing over this “personal donation” which appeared to him to be a bribe”. But he adds that he did not have a choice if he wanted the investment contract, and that he paid “the money on behalf of House of Perfume, treating it as part of the consideration for the agreement and documented it fully”.



136. Under these circumstances, such as described by Mr. Ali himself, the Tribunal has no doubt that the concealed payments made by Mr. Ali on behalf of the House of Perfume to President Moi and Mr. Sajjad could not be considered as a personal donation for public purposes. Those payments were made not only in order to obtain an audience with President Moi (as submitted by the Claimant), but above all to obtain during that audience the agreement of the President on the contemplated investment. The Tribunal considers that those payments must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement.

### ***B - The Consequences of the Bribe***

137. Kenya submits that as a matter of international public policy, as well as Kenyan and English law, the 1989 Agreement thus obtained “does not have force of law” and that World Duty Free’s claims must therefore be dismissed.

#### **1. International Public Policy**

138. The concept of public policy (“ordre public”) is rooted in most, if not all, legal systems. Violation of the enforcing State’s public policy is grounds for refusing recognition or enforcement of foreign judgments and awards. The principle is enshrined in Article V.2 of the New York Convention of 10 June 1958 and Article 36 of the UNCITRAL Model Law recommended by the General Assembly of the United Nations on 11 December 1985. In this respect, a number of legislatures and courts have decided that a narrow concept of public policy should apply to foreign awards. This narrow concept is often referred to as “international public policy” (“ordre public international”). Although this name suggests that it is in some way a supra-national principle, it is in fact no more than domestic public policy applied to foreign awards and its content and application remains subjective to each State.

139. The term “international public policy”, however, is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It has been proposed to cover that concept in referring to “transnational public policy” or “truly international public policy” (see, for example, P. Lalive - “Transnational (or Truly International) Public Policy and International Arbitration”, *ICCA Congress Series n°3*, 1986 p. 257; see also the report of the International Law Association on “International Commercial Arbitration on Public Policy as a Bar to Enforcement of International Arbitral Awards”, Report of the Seventieth Conference, New Delhi, 2002).

140. Domestic courts generally refer to their own international public policy. One should nonetheless mention some judgments in which reference has been made, in one way or another, to a universal conception of public policy (see, for example, the Milan Court of Appeal decision dated 4 December 1992, reported in (1997) *XXII Yearbook*



*Com. Arb.* 725; the judgment of the Paris Court of Appeal in *European Gas Turbines SA v. Westman International* - 30 September 1993 - *Revue de l'arbitrage* 1994 p. 359; the decision of the Swiss Federal Tribunal in *W. -v- F. and V* dated 30 December 1994 (1995) *Bull. ASA* 217).

141. Arbitral tribunals have more often based their decisions on universal values in using various formulations such as “good morals”, “bonas mores”, “ethics of international trade” or “transnational public policy” (see Abdulhay Sayed - *Corruption in International Trade and Commercial Arbitration* - Kluwer Law International 2004). But it has been rightly stressed that Tribunals must be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards. (See, for example, Emmanuel Gaillard - *Trente ans de Lex Mercatoria* - Pour une application sélective de la méthode des principes généraux de droit - *Journal du droit international* 1995 p. 5).

142. In this respect, the Tribunal first notes that bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries. This was the case in Kenya in particular in 1989, under the Kenyan Prevention of Corruption Act of 1956, and is still the case under the Anti-Corruption and Economic Crimes Act of 2003.

143. In order to render more effective this general condemnation, a number of international conventions were concluded during the last decade. The first was adopted within the framework of the Organisation of American States on 29 March 1996.<sup>5</sup> A convention on combating the bribery of foreign public officials in international business transactions was then concluded within the Organisation for Economic Cooperation and Development on 21 November 1997.<sup>6</sup> It has thus far been ratified by 36 States. Afterwards, two conventions on corruption—one relating to criminal law and one dealing with civil law—were adopted by the Council of Europe on 27 January 1999<sup>7</sup> and 4 November 1999.<sup>8</sup> The first has been supplemented by a Protocol of 15 May 2003.<sup>9</sup> Those three instruments are in force. The first has been signed by 45 countries and ratified by 31 countries; the second has been signed by 39 countries and ratified by 25 countries.

144. The same trend can be observed in Africa: on 11 July 2003, in Maputo, Mozambique, the Heads of States and Governments of the African Union approved a Convention on Preventing and Combating Corruption<sup>10</sup>, which has been signed by 39 African States (including Kenya) and has already been ratified by 11 of these 39 States. In this Convention, the Member States of the African Union declare themselves “concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples”. They “acknowledge that corruption undermines accountability and transparency in the management of public affairs as well as socioeconomic development in the continent”. Article 4 of the Convention lists the acts of corruption to which it applies and covers in particular “the solicitation or acceptance, directly or indirectly, by a public official or any other

person, of any goods of monetary value or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange of any act or omission in the performance of his or her public functions”. Under Article 5 of the Convention, legislative and other measures must be taken to establish such acts as offences.

145. For its part, the General Assembly of the United Nations adopted, on 16 December 1996, a Declaration against Corruption and Bribery in International Commercial Transactions.<sup>11</sup> It also established an ad hoc Committee for the preparation of a convention against corruption. This convention was later finalised and was approved by the General Assembly on 31 October 2003 (Resolution 58/4).<sup>12</sup> It has been signed by 140 States and has already been ratified by 46 States (including Kenya). It entered into force on 14 December 2005. It should be noted that, in this Convention, the State Parties declared themselves “concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law”. In order “to prevent and combat corruption effectively”, each State party to the Convention must adopt a number of legislative and other measures and it must in particular establish bribery of foreign public officials as a criminal offence (Article 16).

146. These various Conventions only bind State parties and do so only from the date States become parties. They deal mainly—and sometimes exclusively—with criminal law. In concluding these Conventions, States have shown their common will to fight corruption, not only through national legislation, as they did before, but also through international cooperation. In doing so, States not only reached a new stage in the fight against corruption, but also solidly confirmed their prior condemnation of it.

147. Domestic courts also had occasion to judge that bribery is contrary to public policy. They did so in most cases by referring to their own international public policy. However, there had been some cases in which Courts also referred to transnational public policy. Thus, in the *European Gas Turbines v. Westman* case, the French Court of Appeal of Paris ruled, on 30 September 1993, that “a contract having influence-peddling or bribery as its motives or object is, therefore, contrary to French international public policy as well as to the ethics of international business as conceived by the largest part of the members of the international community (Abdulhay Sayed - *Corruption in International Trade and Commercial Arbitration* – Kluwer Law International – 2004 – page 307).

148. A number of arbitral tribunals had to consider cases involving corruption. A first award which has often been commented on was rendered in Paris in 1963 by Judge Lagergren in ICC case n° 1110. In that case, Judge Lagergren had to decide whether an agreement, entered into in 1959 between an undertaking and an Argentine businessman, for the payment to that businessman of a 10% commission for an energy project also covered the sale of equipment by the same undertaking in Argentina in 1958 for a similar project. The arbitrator observed that the commissions to be paid involved enormous amounts of money. He added in para. 20 of the award that: “[a]lthough these

commissions were not to be used exclusively for bribes, a very substantial part of them must have been intended for such use. Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations."

Then, after having verified that no party had, in that particular case, been enabled "to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other", Judge Lagergren concluded:

"After weighing all the evidence I am convinced that a case such as this, involving such gross violation of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes."

(See the award in [1994] *Arbitration International* 277, with a note by Dr. J. Gillis Wetter - "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case n° 1110").

149. Since 1968, a number of Arbitral Tribunals have had to consider other cases of alleged corruption. They either decided that corruption was not established and applied the contract (see ICC case n° 6401 - *Westinghouse and Burns v. National Power Corporation* - Republic of the Philippines - in Mealey's International Arbitration Report - Vol. 7 - (1) 1992; ICC case n° 7664 - *Frontier AG and Brunner Sociedade v. Thomson CSF* - reported in Abdulhay Sayed - *Corruption in International Trade and Commercial Arbitration* - Kluwer Law International - p. 119), or that corruption was proven and refused to apply the contract, referring themselves to international or transnational public policy.

150. In ICC case n° 3916 (*Loewe*), which related to the payment of commissions, the arbitrator referred to Judge Lagergren's award and added that: "[m]ême si, dans un certain pays et à une certaine époque, la corruption de fonctionnaires est une méthode généralement acceptée dans les relations d'affaires, on ne peut du point de vue d'une bonne administration ni de celui de la moralité dans les affaires, clore ses yeux devant l'effet destructif de telles pratiques nocives"<sup>13</sup> (see Yves Derains - *Collection of ICC Awards 1974-1985* - Kluwer 1990 - p. 507-511). The arbitrator concluded that the contract invoked was contrary to both French and Iranian international public policy and to "ce qui est considéré être la moralité dans les affaires internationales"<sup>14</sup> (see *Journal du droit international* - 1984 - p. 934).

151. In a similar case (ICC case n° 3913) concerning a commission claimed by a British undertaking, the arbitrator also found that “[c]ette solution n’est pas seulement conforme à l’ordre public français interne, elle résulte également de la conception de l’ordre public international tel que la plupart des nations le reconnaît. Si de telles pratiques ont pu être constatées dans certains pays, il est patent, néanmoins, que la communauté internationale des affaires et la plupart des gouvernements s’opposent à toute pratique corruptrice”<sup>15</sup> (see Yves Derains – *Collection of ICC Awards – 1974-1985* Kluwer 1990 – p. 497-498; see also *Journal de droit international* 1985 p. 989).

152. In *Hilmarton v. OTV*, ICC case n° 5622, the first Arbitral Tribunal decided “[e]n l’occurrence, il n’a toutefois pu ainsi être établi avec certitude l’existence de versements de pots-de-vin”<sup>16</sup>, but that the claimant had performed its activity in violation of an Algerian law relating to international trade. The arbitrator considered that “la violation d’une telle loi s’inscrivant dans l’ordre public international doit être jugée comme contraire à la notion de bonnes mœurs de l’art. 20 al. 1 CO faisant partie de l’ordre public suisse”<sup>17</sup> (*Revue de l’arbitrage* - 1993 n°2 - p. 334). For this reason, the arbitrator considered the commission contract “nul pour contrariété aux bonnes mœurs”<sup>18</sup> and rejected the application (*Revue de l’arbitrage* - 1993 n°2 - p. 341). The Geneva Court of Justice and the Swiss Federal Tribunal did not share the arbitrator’s qualification of the Algerian law and the award was annulled. However, the Courts, the second arbitrator and the English Courts which had later knowledge of the case all admitted—in the words of the Commercial Court in London—that “a finding of fact of corrupt practices”, if established—which it was not in this particular case—”would give rise to obvious public policy considerations” (*OTV v. Hilmarton* [1999] 2 Lloyd’s Rep 224).

153. In ICC case n° 7047 (*Westacre v. Jugoimport*) which related to the implementation of a “consultancy” contract, the Arbitral Tribunal recognised that legal provisions to fight corruption and bribery are part of the “ordre public international” (Bulletin de l’Association suisse d’arbitrage 1995 p. 332). This was not denied in the subsequent proceedings with the Swiss Federal Tribunal, the Commercial Court in London and the English Court of Appeal, which in that case left the “issue of illegality by reason of corruption to be determined by the ICC Arbitration” (*Westacre v. Jugoimport* - [1998] 2 Lloyd’s Rep. 131).

154. In ICC case n° 7664 (*Frontier AG and Brunner Sociedade v. Thomson CSF*), the Arbitral Tribunal decided that “un contrat ayant pour cause et pour objet l’exercice d’un trafic d’influence par le versement de pots-de-vin est [...] contraire à l’ordre public international français ainsi qu’à l’éthique des affaires internationales telle que conçue par la plus grande partie des Etats de la communauté internationale”<sup>19</sup> (Abdulhay Sayed - *Corruption in International Trade and Commercial Arbitration* - Kluwer Law International 2004 p. 307 - Note 947).

155. Finally, in ICC case n° 8891 the Arbitral Tribunal stated that: “[s]ur la base des considerations qui précèdent, le tribunal arbitral estime qu’un contrat incitant ou favorisant la corruption des fonctionnaires est contraire à l’ordre

public transnational et que, si tel s'avère être l'objet du contrat de consultance, il n'a d'autre option que d'en constater la nullité"<sup>20</sup> (Journal du droit international (2000 p. 1080).

156. The Tribunal notes that, in some of these cases, it was alleged that corruption is widespread either within the purchasing country or in the particular sector of activity. However, all arbitral tribunals concluded that such facts do no [sic] alter in any way the legal consequences dictated by the prohibition of corruption (see ICC case n° 1110 paras. 19-20; ICC case n° 3916, Yves Derains - *Collection of ICC awards 1974-1985* - Kluwer 1990 - p. 509; ICC case n° 8891 - *Journal du droit international 2000* n°4 p. 1083). They recognised that in some countries or sectors of activities, corruption is a common practice without which the award of a contract is difficult—or even impossible—but they always refused to condone such practices. The present Tribunal agrees with such conclusion.

157. In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.

## **2. English and Kenyan Law**

158. The Tribunal now turns to the applicable laws chosen by the Parties in their Agreement of 27<sup>th</sup> April 1989, as required by Article 42(1) of the ICSID Convention. As already recorded above, Article 9(2)(c) of this Agreement provides that “any arbitral tribunal constituted pursuant to this Agreement shall apply English law”; and Article 10(A) provides that “This Agreement shall be governed by and construed in accordance with the law of Kenya”.

159. As an express choice of applicable law to their contractual relations, these two provisions are perhaps awkwardly worded. For present purposes, however, no practical difficulty arises from their apparent inconsistency. By Section 2 of the Kenyan Law of Contract Act 1961, the common law of England relating to contract applies in Kenya, save as modified by (inter alia) Kenya's written laws; and further, as was confirmed by Mr Robertson for the Claimant at the hearing in June 2004, there is no material difference on the specific points at issue between the position at common law in England and Kenya: see the Transcript for 30<sup>th</sup> June 2004, pp. 12-13. Moreover the Tribunal considers the two legal systems to have the same material effect as applied to this case (save where expressly indicated below).

160. It is appropriate to start with English law. The content of the general principles at English common law is not materially at issue between the Parties. It therefore suffices for present purposes to cite two statements of general

principle, the first relating to the “procedural” issue of public policy and the second to the “substantive” contractual issue of avoidance.

161. *Public Policy - General Principles*: As to the first, in *Chitty on Contracts*, Volume 1 at paragraph 17-007 (28th edition, cited by Kenya as the leading English treatise), the editors express the English common law principles in regard to public policy as follows (with footnotes here omitted):

“Illegality may affect a contract in a number of ways but it is traditional to distinguish between (1) illegality as to formation and (2) illegality as to performance ...”

“Where a contract is illegal as formed, ..., the courts will not enforce the contract, or provide any other remedies arising out of the contract. The benefit of the public, and not the advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract. ‘The principle of public policy’, said Lord Mansfield, ‘is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendentis*.’<sup>21</sup> The rules on illegality have been criticised as being unprincipled but a better way of viewing them, as the previous dictum from *Holman v. Johnson* illustrates [see also below], is as ‘being indiscriminate in their effect and are capable therefore of producing injustice.’ The ‘effect of illegality is not substantive but procedural’, it prevents the plaintiff from enforcing the illegal transaction. The ‘*ex turpi causa* defence’, as was stated by Kerr L.J. in *Euro-Diam Ltd v. Bathurst* [1990] QB 1, ‘rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts’ illegal contracts are not devoid of legal effect, but the *ex turpi causa* maxim entails that no action on the contract can be maintained.”

162. This last reference to an illegal contract’s non-contractual legal effects is significant under English law in regard to possible restitutionary and proprietary consequences. For example, as stated by Lord Browne-Wilkinson in *Tinsley v Milligan* [1994] 1 A.C. 340, at p. 385, “A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality”. In the Tribunal’s view, as explained further below, this qualification is not relevant for present purposes in deciding the Preliminary Issues listed in paragraph 52 above.

The Tribunal has also considered the passages from Treitel, *The Law of Contract* (11<sup>th</sup> ed; pp. 843-844 above) submitted by the Claimant. The Tribunal is not aware of any material difference in this well-known treatise’s treatment of the relevant general principles of English law.

163. *Avoidance - General Principles*: As to the second, the statement of general principle is taken from the legal opinion by Lord Mustill tendered in submission by Kenya (to which reference has already been made earlier in this Decision, at paragraphs 43, 45-46 & 117). This opinion is a useful template for this Tribunal not only because its author is one of the most eminent jurists in England but also because Mr. Robertson for the Claimant expressed at the hearing in June 2004 general agreement as regards its treatment of English legal principle: Transcript for 30 June 2004, pp.13 & 19-20 (whilst nonetheless submitting firmly that on the facts of this case the opinion was “a million miles away”). The Tribunal did not understand Lord Mustill to be advancing any view on any the facts of this case; and if it had, it would discount them. The Tribunal was and remains concerned only to ascertain the relevant legal principles; and it accepted Lord Mustill’s opinion not as expert evidence by a party-appointed expert witness but rather “as part of the materials submitted by the Respondent” Transcript for 30 June 2004, p. 56 (and see paragraph 50 above). In the Tribunal’s view, Mr. Robertson was entirely correct in accepting the general tenor of Lord Mustill’s opinion as to English law.

164. The relevant part of Lord Mustill’s opinion merits reciting at length. It reads as follows:

“4. In order to avoid any engagement in the factual aspects of the dispute I think it convenient to re-state the question posed [by Kenya’s legal representatives] in a more general form, as follows:

If, in the course of negotiating a contract between X and Y, an improper inducement is offered by B (acting on behalf of Y) to A (acting on behalf of X) which causes or contributes to the making of a contract; and if this fact is afterwards discovered, to what extent is X bound by the contract thus made?

I answer this question, in terms of English law, as follows:

(a) X is entitled at his option to rescind the contract; and in any event to regard it as no longer binding for the future;

(b) X is not however compelled to take this course. He may choose to waive his right to rescind the contract; keep the contract alive and enforce it according to its terms.

5. Before stating my reasons for this conclusion, I must clear the ground with some preliminary observations.

6. In the first place, a distinction must be made between contracts which are void and those which are voidable. The former expression denotes a bargain which, although apparently possessing all the indicia (such as consensus, consideration, intention to create legal relations, certainty etc.) which are necessary and sufficient to make an agreement binding as a contract, is in reality so defective as to make it entirely ineffectual in the eyes of the law. It is from the outset empty of content. No lasting consequences can flow from it, and when the vitiating element is later discovered the remedy is not to have the bargain set aside, but to obtain a declaration that it was void *ab initio*.

7. A voidable contract, by contrast is intrinsically valid, but is one which due to the circumstances of its making the court in its equitable jurisdiction will not enforce. In such a case, the injured party on discovering the vitiating circumstances has the option of *rescinding* the contract, declaring itself free from further obligations, and if necessary going to the court to obtain a decree to that effect. The outcome is *restitutio in integrum*. So far as the practicalities permit, the position



of the parties is restored to that which they would have occupied if the contract had not been made.

8. In practice, the outcome of these two ways in which a contract may fail is often very much the same, but there are important differences. Notably, in that, in the comparatively rare instances where a contract is *void*, no action by either party is needed to expunge it, for its failure is an automatic and necessary consequence of its inherent defect. Thus, although a party may find it useful to obtain a declaration from the court to clarify the position, the grant of relief does not involve the court in setting the bargain aside, but merely amounts to a formal recognition of a situation which has existed from the start. By contrast, where a contract is voidable, the injured party must take positive action to set it aside; as happened here through the medium of the [Kenyan] Government's Counter-Memorial dated 18 April 2003. He is not compelled to do so, and has the option of waiving his right to rescind, and keeping the contract in being for whatever benefits he may obtain.

9. I should mention at this stage the considerable, and rather amorphous, body of case-law often informally grouped under the heading of illegality. Although this grouping may be convenient, as [exemplifying] generally the reluctance of English courts to recognise contracts and the results of contracts entered into in circumstances of misconduct, it must be recognised that the factual contexts of the decisions and *dicta* are not all the same as each other or as those of the present case. I do not enter upon these authorities here, for in my opinion they shed no light on the question now before me. Instead, I prefer to go straight to a simple answer which is clearly established by a small group of well-established decisions, including most notably *Panama & South Pacific etc. v. India etc. Works Company* (1875) 10 Ch. App. 515; *Armagas v. Mundogas* [1986] 1 A.C. 717; and *LogiRose v. Southend United Football Club* [1988] 1 W.L.R. 1256, copies of which I append to this Opinion [Exhibits 2, 3 and 4 respectively]. For a succinct statement of the English law on the topic as it now stands one need look no further than the judgment of Mr. Justice Millett in the latter case. (At the time, the learned judge was sitting in the High Court, so that his decision and reasoning are not formally binding on other courts, but he is now a member of the Appellate Committee of the House of Lords, and one of the most authoritative Chancery Judges of recent times. I am confident in accepting his opinion, which is the same as the one which I would have formed in its absence.) The learned judge said this, at page 1260 of the report:

'It is well established that a principal who discovers that his agent in a transaction has obtained or arranged to obtain a bribe or secret commission from the other party to the transaction is entitled, in addition to other remedies which may be open to him, to elect to rescind the transaction *ab initio* or, if it is too late to rescind, to bring it to an end for the future.'<sup>22</sup>

10. Here we have a direct and unequivocal answer to the question posed for my consideration. The contract is voidable at the option of Party X. Two consequences flow:

(a) The contract is not void *ab initio*, and remains valid unless and until steps are taken to set it aside. There is nothing wrong with it as a contract, the position being simply that the circumstances in which it was made require that the injured party should be given the opportunity to relieve himself from its burdens. (The headnote of the *LogicRose Case* is misleading, so far as it may suggest that the contract was void *ab initio*. This [is] not what Mr. Justice Millett said).

[(b)] Since the remedy of Party X takes the shape of an option to treat the contract as rescinded, it may, like any other option, be waived by words or conduct. In particular, if Party X *with knowledge of the relevant circumstances* chooses to continue with its enforcement and performance he may be held to have lost the right thereafter to have it set aside. The words italicized are, however, crucial. A party cannot waive a right which he does not know to exist ..."



165. The Tribunal, as already indicated, treats these English legal principles as forming part of Kenyan law. It is now appropriate to apply these general principles of English and Kenyan law to the facts of this case, as found by the Tribunal.

166. *Public Policy - The Facts:* The relevant facts are indisputable on the evidence adduced before this Tribunal: this is not a case which turns on legal presumptions, statutory deeming provisions or different standards of proof under English or Kenyan law. Indeed the decisive evidential materials came from the Claimant itself, including Mr. Ali's own written and oral testimony.

167. As recited above in Part V(A) of this Decision, Mr. Ali paid a substantial bribe in cash, in Kenyan shillings, to the Kenyan head of state in March 1989. The bribe was made covertly; and it was not included in the contractual consideration set out in Articles 1(iii) and 3(A) of the Agreement of 27 April 1989, despite the "entire agreement" clause in Article 7(A) of the Agreement. This bribe was nonetheless an intrinsic part of the overall transaction, without which no contract would have been concluded between the parties: Mr. Ali himself regarded the payment as part of the contractual consideration paid by his principal, as did the Claimant in its written submissions in support of its claims (pleading the payment as a recoverable "investment cost" and "investment facilitation fee": the Claimant's Reply of 15 May 2003, at p. 6; and the Claimant's Memorial of December 2003, Statement of Facts at paragraph 28). Mr. Ali made the payment to the Kenyan President intending to induce the President to act in his principal's favour; and he also intended that bribe to remain confidential as between his side and the President, as it did from March 1989 until December 2002, more than thirteen years later. The payment of the bribe was made by Mr. Ali as agent for his principal and with its authority; and the bribe is legally to be imputed to the Claimant.

168. On the facts of this case, contrary to the Claimant's submission, it is not appropriate for the Tribunal to draw any legal distinction between the conduct and knowledge of Mr. Ali and his two successive principals, (a) the House of Perfume of Al-Ghurair Enterprises (of Dubai) as the original contracting party in April 1989 and (b) the Claimant (of the Isle of Man) as its contractual successor in May 1990. As Mr. Ali testified in paragraph 27 of his witness statement: "Just as I had been the driving force behind House of Perfume, I continued to be the driving force for WDF [the Claimant]". The Tribunal thus rejects the Claimant's submission that it cannot be tainted by a bribe paid by other persons before its own legal creation and contractual succession: the common link to both parties was Mr. Ali; and as the alter ego of both companies, it is not appropriate to immunise the Claimant from Mr. Ali. The Claimant cannot in this case acquire a better legal or equitable position than that of the House of Perfume; and for present purposes Mr. Ali's knowledge and conduct is to be treated as the knowledge and conduct of both the House of Perfume and the Claimant.

169. Mr. Ali's payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself. If it were otherwise, the payment would not be a bribe. It is

also important to recall that the Respondent in this proceeding is not the former President of Kenya, but the Republic of Kenya. It is the latter which is the contracting party to the ICSID Convention; and although the Agreement of 27 April 1989 describes the Government of Kenya as the Claimant's co-contracting party, the Claimant has treated that Agreement as having been made with the Republic of Kenya throughout this proceeding, for obvious reasons.

170. No English or Kenyan statute or other law rendered legal any part of the Claimant's conduct; and as already found by the Tribunal it cannot legally be justified by reference to the Harambee system in Kenya. Indeed, by Sections 3 and 4 of the Kenyan Prevention of Corruption Act 1956, (being in force at the time of the bribe in March 1989), it was a felony for any person or agent corruptly to give or to receive any gift, fee, reward, consideration or advantage whatever, as an inducement to, or reward for, any member, officer or servant of a public body doing, or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the public body is concerned ...". The relevant penalties under Section 3 included imprisonment for a term not exceeding fourteen years and, under Section 4, seven years. (This 1956 Act was subsequently repealed and replaced by the Anti-Corruption and Economic Crimes Act 2003: but it likewise does not here assist the Claimant's case).

171. Nor is the Claimant assisted by Article 14(1) and (2) of the Kenyan Constitution, as submitted by the Claimant. Article 14 confers immunity on the Kenyan President for criminal and civil proceedings during his time in office. It does not however bar such proceedings after the expiry of such office, as Article 14(3) makes clear by suspending time-limitations during the barring period. Accordingly, these provisions do not exculpate the President from illegal conduct in office (as distinct from legal proceedings to inculcate him whilst in office); and more particularly, Article 14 cannot relieve the Claimant from its own illegal conduct at any time.

172. It is thus unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what would otherwise violate transnational public policy or the foreign applicable law chosen by the contractual parties for their transaction. Nonetheless the Tribunal notes the approach taken by the English House of Lords in *Kuwait v Iraqi Airways (Nos 4 & 5)* [2002] AC 883 at 1100ff, as expressed by Lord Steyn in paragraphs 111-116. The House of Lords there declined to recognise as a matter of English public policy a local Iraqi law (as part of the applicable law) which formed part of flagrant breaches of international law by Iraq. Lord Steyn, invoking "l'ordre public véritablement international" relied on, inter alia, the "magisterial paper" by Professor Pierre Lalive cited by the Tribunal earlier in this Decision (at paragraph 139 above). If it had been necessary, therefore, the Tribunal would likewise have been minded to decline in the present case to recognise any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy and (if different) English public policy as part of English law.<sup>23</sup>

173. In the Tribunal's view, it is significant that in England, historically, the common law has traditionally abhorred the corruption by bribery of officers of state, ranking its offence next to high treason. Such corruption is more odious than theft; but it does not depend upon any financial loss and it requires no immediate victim. Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage; and its long-term victims can be legion. The offence lies in bribing a person to exercise his public duty corruptly and not in accordance with what is right and proper for the state and its citizens. Like any other contract, a state contract procured by bribing a state officer is legally unenforceable, as an affront to the public conscience. The fact that the transaction is performed outside England or is subject to a law other than English law is immaterial. As was held by Mr. Justice Phillips (now Lord Phillips LCJ) in *Lemenda Trading Co Ltd v. African Middle East Petroleum Co. Ltd* [1988] 1 QB 428: "In my judgement, the English courts should not enforce an English law contract which falls to be performed abroad where (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same policy applies to the country of performance under the law of that country. In such a situation international comity combines with English domestic public policy to mitigate against enforcement." In the Tribunal's view, this same statement describes the converse position at common law in Kenya.

174. The Tribunal dismisses the Claimant's submissions that the bribe was an independent collateral transaction or at least severable from the Parties' Agreement of 27<sup>th</sup> April 1989. On the facts found in this case, the bribe was no separate agreement or otherwise severable from the Agreement. As to separateness, it is no answer for the Claimant to assert that the fact that the bribe was covert and kept confidential (with no mention of any such payment in the Agreement) is proof that it was a distinct transaction from the Agreement itself. Its secrecy was because it was a bribe; and as such, it therefore cannot be invoked by the Claimant to establish its separateness from the Agreement. This was one overall transaction and not two unrelated bargains. Moreover, the Claimant's submission proves too much: every bribe is intended to be secret by payer and payee; and accordingly the submission of a separate or collateral bribe based on such secrecy would save every illegal transaction tainted by bribery - if the Claimant was right. The Tribunal considers the Claimant's submission to be wrong both in principle and on the facts of the present case.

175. As to severability, Mr. Partasides for Kenya submitted at the hearing in January 2006 that the doctrine of severance has no application under English law to any contract procured by bribery. He contended, *inter alia*, that severing a bribe from a contract procured by bribery leaves behind no contract at all, because it is the bribe that brought about the contract. He may be right as regards the traditional approach under English law, but the Tribunal notes that, in the recent *Kuwait Case (supra)*, the House of Lords was prepared to consider the issue of severance in a non-contractual setting, albeit ultimately rejecting it on the facts of that case. This Tribunal would likewise reject the Claimant's submission on the facts of this case: there can here be no severance when the bribe, as known and

intended by Mr. Ali, formed an intrinsic part of the overall transaction without which no contract would have been agreed by the parties.

176. The Claimant also submitted that this Tribunal has a discretion to adjust the application of English public policy, by a balancing operation reflecting the relative misconduct of the Claimant and the Kenyan President so as to relieve the Claimant from the one-sided burden of public policy in this case. The Claimant here invoked a growing groundswell in England of judicial and extra-judicial criticism at this strict English rule procedurally favouring a defendant over a plaintiff, accompanied by like criticism from the common law countries of the British Commonwealth (particularly New Zealand and Australia). Judicially, the Claimant cited Bingham and Nicholls LJ in *Saunders v. Edwards* [1987] 2 All ER 651; Staughton and Taylor LJ in *Howard v. Shirlstar Computer Transport* [1990] 1 WLR 1292; and Nourse LJ in *Tribe v. Tribe* [1996] Ch 107. Extra-judicially, the Claimant cited the English Law Commission's Consultation Paper on Illegal Transactions (1999). In addition, the Tribunal notes the concluding passage in the dissenting judgement of Waller LJ in *Westacre v. Jugoimport* [1992] 2 Lloyd's Rep 65 (partly mirroring the qualification by Judge Lagergren in paragraph 21 of his award in ICC Case No 1110).

177. The Tribunal has some sympathy with these criticisms; but none can be applied in this case for two reasons. First, the strict rule still remains settled English law, whatever the pressure for change by judicial or statutory reforms. It is to be noted that the Law Commission's proposals remain still-born; and judicially, the orthodox view is still that expressed by Lord Mansfield in *Holman v. Johnson* (1775, supra). It was confirmed by the House of Lords in *Tinsley v. Milligan* (1994, supra), as expressed by Lord Browne-Wilkinson (with whom Lords Lowry, Jauncey and Goff were expressly in agreement on this point): "[t]he consequences of being a party to an illegal transaction cannot depend on such an imponderable factor as the extent to which the public conscience would be affronted by recognizing rights created by a legal transaction". This strict rule of public policy is thus established by a long line of unbroken English authorities stretching back more than two hundred years, even preceding *Holman v. Johnson*. There is accordingly no legal basis at English law for the Tribunal to operate a discretionary balancing exercise, as requested by the Claimant.

178. Secondly, even if there were, the Tribunal would not be minded to make that exercise in favour of the Claimant because this case, on its facts, does not remotely fall within the class of cases where reform of the strict rule is advocated. This is not a case where an innocent party has been unwittingly caught up in an incidental or peripheral illegality. This is a case where the Claimant (by Mr. Ali) was steeped in illegal conduct in paying the bribe to the Kenyan President. Albeit that the balance of illegality may not be factually identical between Mr. Ali and the Kenyan President, this remains a case, legally, of *par delictum*. The bribe was not procured by coercion or oppression or force by the Kenyan President nor by "undue influence"; and as regards any investment, there was at the material time no "hostage factor" because there was then no investment or other commitment in Kenya by Mr. Ali or his principal. Prior to paying the bribe, Mr. Ali retained a free choice whether or not to invest in Kenya and

whether or not to conclude the Agreement; but Mr. Ali chose, freely, to pay the bribe. In the words of Kerr LJ in *Euro-Diam* (supra) it would be “an affront to public conscience” to grant to the Claimant the relief which it seeks because this Tribunal “would thereby appear to assist and encourage the plaintiff in his illegal conduct”. Further, the Tribunal does not identify the Kenyan President with Kenya; and in any balancing exercise between Kenya and the Claimant, the balance against the Claimant would remain one-sided. Accordingly, the Tribunal rejects the Claimant’s submission.

179. In conclusion, as regards public policy both under English law and Kenyan law (being materially identical) and on the specific facts of this case, the Tribunal concludes that the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur actio*. These claims all sound or depend upon the Agreement of 27 April 1989 (as amended); and no other claim is pleaded, including any non-contractual proprietary or restitutionary claim.

180. It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant’s bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant’s claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings. It is not therefore surprising that Mr. Ali feels strongly the unfairness of the legal case now advanced by Kenya, as eloquently expressed at the hearing in January 2006 in his own evidence, together with Mr. Muite’s cogent submissions on the Claimant’s behalf.

181. The answer, as regards public policy, is that the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world. Mr. Ali’s complaint of unfairness was voiced centuries ago by earlier English litigants; and it was fully answered, as recorded in *Chitty* (see above), by Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp. 341, 343. It merits citing in full:

“..the objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, but accidentally, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditione defendantis*”.

In other words, if Kenya were guilty of bribery and the claimant in this proceeding, it would likewise fall at the same procedural hurdle, to the benefit of the Claimant as respondent.

182. *Avoidance - The Facts:* As regards the private legal remedy of avoidance under English and Kenyan law, the relevant additional facts can be stated simply. The Claimant asserted for the first time in its Memorial of 1 December 2002 (received by Kenya after 5 December 2002) that Mr. Ali procured the Parties' Agreement by making a covert payment to the Kenyan President; this fact was not previously known to Kenya; Kenya made an application on 19 March 2003 to dismiss the Claimant's pleaded claims on the basis that the Agreement was tainted with illegality and thus unenforceable; and on 18 April 2003, by its Counter-Memorial, Kenya formally avoided the Agreement for bribery by the Claimant.

183. In the Tribunal's view, the avoidance of the Agreement by Kenya was made unequivocally and timeously; and accordingly Lord Mustill's statement of general principle is here satisfied on the facts: "Where a contract is voidable, the injured party must take positive action to set it aside." (*supra*). It is no legal bar to avoidance of the contract that the innocent party may previously have committed a breach of that contract. Subject to the Claimant's several submissions based on waiver or affirmation, the Tribunal decides that Kenya validly avoided the Agreement under both English and Kenyan law. The Tribunal dismisses the Claimant's lesser argument in "estoppel".

184. The Claimant's submissions on waiver and affirmation depend on the allegation that Kenya knew of the bribe long before December 2002. As already indicated above, there was no mention of the payment in the Agreement (or its amendment); nor in any contemporary document exchanged between the Claimant and Kenya over the subsequent eleven years before this proceeding was commenced in June 2000. More significantly, the Claimant itself made no mention of the payment in the early part of this proceeding or throughout the other legal proceedings in the Isle and Man and Kenya. The Tribunal finds that the payment was first made known by the Claimant to Kenya in December 2002, thirty months after the Claimant's Request for Arbitration. It had not previously been known to Kenya. There can be no affirmation or waiver by Kenya without knowledge; and as Lord Mustill stated in his opinion, "[a] party cannot waive a right which he does not know to exist".

185. Moreover, there can be no affirmation or waiver in this case based on the knowledge of the Kenyan President attributable to Kenya. The President was here acting corruptly, to the detriment of Kenya and in violation of Kenyan law (including the 1956 Act). There is no warrant at English or Kenyan law for attributing knowledge to the state (as the otherwise innocent principal) of a state officer engaged as its agent in bribery. The Claimant ripostes that the Kenyan President was "one of the remaining 'Big Men' of Africa, who, under the one-party State Constitution was entitled to say, like Louis XIV, he was the State": paragraph 5 of its written submissions dated 18 January 2006. In the Tribunal's view, this submission is ill-founded under Kenyan law: the President held elected office under the Kenyan Constitution, subject to the rule of law (including the 1956 Act). As Lord Denning MR famously said in *Ex*

*p. Blackburn* [1968] 2 QB 118, 148 (quoting Thomas Fuller): “Be ye never so high, the law is above you”; and in law, in Kenya as in England, the position is materially the same.

186. Two minor points remain for consideration. First, there may be legal consequences following the avoidance of the Agreement, although *restitutio in integrum* cannot include the return of the bribe to the Claimant: see *LogicRose v. Southend United* (1988; *ibid*), per Mr. Justice Millett, at pp. 1263-1264. These legal consequences are not pleaded claims by the Claimant in this proceeding and they do not form part of this Award.

187. Lastly, the Tribunal notes that no evidence was adduced or argument submitted by either of the Parties to the effect that the bribe specifically procured Article 9 of the Agreement, containing the Parties’ agreement to arbitration under the ICSID Convention. Accordingly, in accordance with well-established legal principles under English and Kenyan law, the Tribunal operates on the assumption that the Parties’ arbitration agreement remains subsisting valid and effective for the purpose of this proceeding and Award.

188. In conclusion:

1. The Respondent, Kenya, was legally entitled to avoid and did avoid legally by its Counter-Memorial dated 18 April 2003 the “House of Perfume Contract”, namely the Agreement of 27 April 1989 as amended on 11 May 1990, under its applicable laws, the laws of England and Kenya;
2. The Respondent, Kenya, did not lose its right to avoid the said contract by affirmation or otherwise before 18 April 2003 under these applicable laws; and
3. The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract’s applicable laws.

## **VI – LEGAL AND ARBITRATION COSTS**

189. Each party has claimed against the other its own legal costs and its contribution to the costs of the arbitration. It is convenient to address them separately.

190. In different circumstances, the Tribunal would be minded to follow the general practice in transnational arbitration that the successful party under an award should recover its legal costs, i.e., its own costs and expenses reasonably incurred in those arbitration proceedings. Such an approach would not here be appropriate at all. Of the two grounds on which the Respondent’s case has prevailed over the Claimant’s pleaded claims, the more substantive



is *ordre public international* and public policy under the contract's applicable laws. On that ground, in this case, there can be no successful party on the merits in the traditional sense. Accordingly, the Tribunal considers it appropriate that each party shall bear in full, without any recovery from the other party, all its own legal costs. In these circumstances, no issue arises as to the assessment of the parties' legal costs under Article 28(2) of the ICSID Arbitration Rules or otherwise.

191. As to arbitration costs, i.e., the fees and expenses of the Tribunal and charges of ICSID, each party shall bear half such costs, without any recovery from the other party.

## VII – DISPOSITIVE PART OF THE AWARD

192. For the reasons set out earlier in this Award, the Tribunal decides:

- 1) The claim advanced by World Duty Free Limited is dismissed;
- 2) Each party shall bear in full, without any recovery from the other party, its own legal costs;
- 3) As to the costs of the arbitration, each party shall bear half such costs, without any recovery from the other party.

*(signed)*

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H.E. JUDGE GLIBERT GUILLAUME  
President of the Tribunal  
Date: *(31 August 2006)*

*(signed)*

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HON. ANDREW ROGERS, QC  
Member  
Date: *(25 September 2006)*

*(signed)*

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V. V. VEEDER, QC  
Member  
Date: *(5 September 2006)*

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### ENDNOTES

<sup>1</sup> Present at the first session were the Members of the Tribunal: H.E. Judge Gilbert Guillaume, President, Prof. James Crawford, SC, FBA and the Hon. Andrew Rogers, QC, arbitrators; the Secretary of the Tribunal: Ms. Margrete Stevens; Representing the Claimant: Mr. Geoffrey Robertson QC (Counsel), Mr. Paul K. Muite (Counsel) and Mr. Philip K. Murgor (Counsel); Representing the Respondent: the Hon. Amos Wako, Attorney General of Kenya, Dr. Kenneth Kiplagat (Counsel), Mr. Jan Paulsson (Counsel) and Mr. Constantine Partasides (Counsel).

<sup>2</sup> Present at the procedural hearing at The Hague on 2 July 2002 were the Members of the Tribunal: H.E. Judge Gilbert Guillaume, President, Mr. V.V. Veeder and the Hon. Andrew Rogers, QC, arbitrators; the Secretary of the Tribunal: Ms. Margrete Stevens; Representing the Claimant: Mr. Geoffrey Robertson QC (Counsel), Mr. Paul K. Muite (Counsel) and Mr.

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Philip K. Murgor (Counsel); Representing the Respondent: the Hon. Amos Wako, Attorney General of Kenya, Dr. Kenneth Kiplagat (Counsel), Mr. Jan Paulsson (Counsel), Mr. Constantine Partasides (Counsel) and Mr. Mitesh Kotecha (Counsel).

- 3 Present at the hearing at The Hague on 30 June and 1 July 2004 were the Members of the Tribunal: H.E. Judge Gilbert Guillaume, President, Mr. V.V. Veeder and the Hon. Andrew Rogers, QC, arbitrators; the Secretary of the Tribunal: Ms. Margrete Stevens; Representing the Claimant: Mr. Geoffrey Robertson QC (Counsel), Ms. Olivia Holdsworth (Counsel), Mr. Paul K. Muite (Counsel), Mr. Wachira Maina and Mr. Nasir Ibrahim Ali (World Duty Free); Representing the Respondent: the Hon. Amos Wako, Attorney General of Kenya, Dr. Kenneth Kiplagat (Counsel), Mr. Jan Paulsson (Counsel), Mr. Constantine Partasides (Counsel) and Mitesh Kotecha (Counsel). Also present on 30 June 2004 was Lord Mustill, who was brought by the Respondent as Legal Expert.
- 4 Present at the hearing on the preliminary issues at The Hague on 18 January 2006 were the Members of the Tribunal: H.E. Judge Gilbert Guillaume, President, the Hon. Andrew Rogers, QC and Mr. V.V. Veeder, QC, arbitrators; the Secretary of the Tribunal: Ms. Eloïse M. Obadia; Representing the Claimant: Mr. Paul K. Muite (Counsel), Mr. Kioko Kilukumu (Counsel) and Mr. Nasir Ibrahim Ali (World Duty Free); Representing the Respondent: the Hon. Amos Wako, Attorney General of Kenya, Dr. Kenneth Kiplagat (Counsel), Mr. Constantine Partasides (Counsel), Mr. Mitesh Kotecha (Counsel), H.E. Mrs. Kalimi M. Mworira, Ambassador, Embassy of Kenya, Netherlands, Mr. Keriako Tobiko, Director of Public Prosecutions and Mr. Gideon Kimulu, Senior Assistant Commissioner Police of Kenya.
- 5 Inter-American Convention against Corruption, March 29, 1996, 35 Int'l Legal Materials 724 (1996).
- 6 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, 37 Int'l Legal Materials 4 (1998).
- 7 Criminal Law Convention on Corruption, January 27, 1999, 38 Int'l Legal Materials 505 (1999).
- 8 See <http://conventions.coe.int/Treaty/Commun/QueVoulez-Vous.asp?NT=174&CM=8&DF=5/5/2006&CL=ENG>.
- 9 See <http://conventions.coe.int/Treatv/Commun/QueVoulez-Vous.asp?NT=191&CM=8&DF=5/5/2006&CL=ENG>.
- 10 African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 Int'l Legal Materials 5 (2004).
- 11 United Nations Declaration against Corruption and Bribery in International Commercial Transactions, December 16, 1996, 36 Int'l Legal Materials 1043 (1997).
- 12 United Nations Convention against Corruption, October 31, 2003, 43 Int'l Legal Materials 37 (2004).
- 13 Courtesy translation: “[e]ven if, in a certain country and at a certain time, the corruption of civil servants is a generally accepted practice in business dealings, one cannot from the point of view of good administration nor that of morality in business, close one’s eyes to the destructive effect of such harmful practices”.
- 14 Courtesy translation: “morality in international affairs”.
- 15 Courtesy translation: “[t]his solution is not only in conformity with domestic French law, it also results from the conception of public international law such as the majority of nations understand it. If such practices could be observed in certain countries, it is nevertheless obvious that the international business community and the majority of governments oppose any corruptive practices”.
- 16 Courtesy translation: “as such the payment of bribes could, nonetheless, not thus be established with certainty”.
- 17 Courtesy translation: “[t]his is why the violation of this Law, which falls within the framework of international public policy, must be considered as contrary to the notion of morality as set forth in Art. 20(1) CO, which is part of Swiss public policy”.
- 18 Courtesy translation: “null and void on the ground of violation of morality”.
- 19 Translation by Abdulhay Sayed: “a contract having influence-peddling or bribery as its motive or object is, therefore, contrary to French international policy as well as to the ethics of international business as conceived by the largest part of the members of the international community”.

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- <sup>20</sup> Courtesy translation: “[o]n the basis of the preceding considerations, the Arbitral Tribunal estimates that a contract inciting or favouring the corruption of civil servants goes against the transnational public policy and that, if such proves to be the object of the consultancy contract, it has no option other than to declare its nullity”.
- <sup>21</sup> The full Latin maxim provides: “in pari delicto potior est conditio defenditis”: i.e., where the guilt is shared, the defendant’s position is the stronger.
- <sup>22</sup> The Tribunal notes the similar statement by Robert Goff LJ made earlier in *Armagas Ltd v Mundogas SA* (ibid, at pp. 742-743) whereby “the defendants would have been entitled to rescind the contract on discovering the bribe; or if it was too late to rescind, to bring the contract to an end ...”, citing the *Panama* case (supra).
- <sup>23</sup> This approach under English (and Kenyan) law is consistent with analogous cases decided under other national laws: see Abdulhay Sayed (op cit) and Professor Crivellaro, “*Arbitration Case Law on Bribery*”, *ICC Institute Dossier on Money Laundering Corruption and Fraud* (ICC Publishing, Paris).