International Court of Arbitration
of the International Chamber of Commerce

in ICC case [redacted]

before the Arbitral Tribunal composed of

Prof. Dr. [redacted], Chair
Prof. Dr. [redacted], Arbitrator appointed by the Claimant
Duncan W. Glaholt, Arbitrator appointed by the Respondent

FINAL AWARD

in the matter of

[redacted]
Serbia,

Claimant

versus

[redacted]
Canada

Respondent

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I. THE PARTIES and THE TRIBUNAL

1.1. The Claimant

[redacted]
Serbia

Represented by

[redacted]
Serbia

And by

[redacted]
Serbia

1.2. The Respondent

[redacted]
Canada.

Represented by

[redacted] Canada

Claimant and Respondent shall collectively be referred to as the "Parties".

1.3. The Arbitral Tribunal

Chairman confirmed by the Secretary General of the ICC International Court of Arbitration on 6 February 2012 upon joint nomination of the party-appointed Arbitrators (Article 9(2) of the ICC Rules of Arbitration in force as of 1 January 1998 ("ICC Rules"))

[redacted],
1211 Geneva 6

Co-arbitrator nominated by the Claimant confirmed by the Secretary General of the ICC International Court of Arbitration on 8 December 2011 (Article 9(2) of the ICC Rules)

[redacted]
Serbia

Co-**arbitrator nominated by the Respondent confirmed by the Secretary General of the ICC International Court of Arbitration on 8 December 2011 (Article 9(2) of the ICC Rules)**

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II. BACKGROUND TO THE DISPUTE and PROCEDURAL HISTORY

1. Background of the dispute

The dispute arises out of a contract negotiated and eventually concluded on 11 January 1991 ("Contract") by and between [redacted] and [redacted] for the manufacture and delivery of twelve polymerisation reactors and twenty-four baffles for [redacted] petrochemical plant in [redacted], Yugoslavia. These reactors and baffles are also globally referred to by the Parties as "the Equipment" or "the Vessels".

The delivery date of the Equipment was initially in March 1992, but was then extended to end of May 1992, then to end of July 1992, and finally to mid-October 1992. The relevant circumstances of these extensions will be addressed in more details hereafter (§§ 5-12, and 19).

However, on 30 May 1992, the United Nations imposed sanctions against the former Republic of Yugoslavia (UN Resolution 757, also referred to hereafter as "the Embargo"), as a consequence of which [redacted] did not complete the 11 January 1991 contract. The level of completion of the reactors and baffles in June-July 1992 is disputed by the Parties and will be addressed in more detail hereafter, to the extent it might be relevant. At the time the Embargo was imposed, [redacted] had paid CAD 3'042'000, which represented 90% of the agreed contract price of CAD 3'380'000 (as amended by the Parties' Modification Letter N° 1 – Exhibit C-7/R-4).

No completion of the Equipment and no delivery to [redacted] took place during the entire period of the Embargo, i.e. until the spring of 1996. The UN sanctions were indeed lifted in November 1995 and, in turn, the Canadian Government suspended its own embargoes/prohibitions in January 1996, with the effect that, by a letter dated 19 February 1996, [redacted] was informed by the Canadian External Affairs that they were no longer prohibited from performing the January 1991 contract.

The Parties entered then into negotiations in order to resume and complete the production and have the Equipment delivered to [redacted]. These negotiations led eventually to the signature of a Modification Letter N° 2 ("ML 2" – Exhibits R-98 and R-99) in March 1997, which provided for the payment by [redacted] of

(1) CAD 338'000 being the remaining 10% of the originally agreed contract price, plus

(2) another CAD 647'442 for the additional work performed and/or to be performed by [redacted] for preserving, storing and preparing the Equipment for shipping and delivery to [redacted].

The additional payment to be made by [redacted] pursuant to ML 2 had to be made by way of an irrevocable letter of credit ("L/C") for the full amount – i.e. CAD 985'442 – issued by a first class European bank and confirmed by a major Canadian bank, with an expiry six weeks after the delivery date. In turn, completion and preparation for shipment of the Equipment was 30 weeks after [redacted] would have received the new letter of credit.

This new letter of credit could not be provided to the Respondent, for reasons which shall be addressed in more detail below.

The Equipment was eventually never completed and was sold by the Respondent as scrap. The reality, circumstances and details of this sale are disputed by the Claimant. It is however a fact that the Equipment is obviously no longer in the possession of the Respondent since 2008 and has not been delivered to the Claimant.

As a consequence of the foregoing and as no satisfactory settlement could be reached by the Parties, the Claimant filed on 23 September 2011 a Request for Arbitration dated 23 September 2011 with the International Court of Arbitration of the ICC.

2. The Parties' respective submissions and prayers for relief

2.1. Claimant's claims

In its Request for Arbitration of 23 September 2011, the Claimant contends in substance that the Contract has never been properly performed and that the amount paid by the Claimant (CAD 3'042'000) has therefore to be paid back in full, plus interest from 31 May 1992. A damage compensation of at least CAD 1 or more was also sought.

In its Detailed Submission on the Merits, dated 8 June 2012, the Claimant sought the following detailed relief:

- Payment by the Respondent to the Claimant, within 10 days from reception of the award, of CAD 3'042'000 "*representing 90% of earlier paid contract price with interest by highest rate to commercial loans in Canada starting from May 31 1992 until the date of actual payment to the Claimant*"

- Payment by the Respondent to the Claimant, within 10 days from reception of the award, of USD 2'523'633, as compensation for the damage/lost profit suffered by the Claimant "*with interest by highest rate for commercial loans in USA starting from April 15, 1999 until the date of actual payment to the Claimant*"

- Payment by the Respondent to the Claimant, within 10 days from reception of the award, of "*all the costs incurred and related to this arbitration*"

In its Post-Hearing Submission dated 7 December 2012, the Claimant confirmed integrally the relief already sought in its 8 June 2012 Detailed Submissions on the Merits. It sought moreover that the Respondent's counterclaim for the payment of damages in the amount of CAD 347'472 be "*rejected as ungrounded*".

No new or amended relief was sought by the Claimant in its subsequent Briefs dated 1 March, 5 April, 4 October and 9 October 2013.

2.2. Respondent's counterclaims

In its Answer of 30 November 2011 to the Claimant's Request for Arbitration, the Respondent requested the Arbitral Tribunal

- to hold that [redacted] is not a validly existing legal entity,
- to decline jurisdiction over [redacted], and
- to dismiss [redacted]'s claims.

In the alternative, should the Arbitral Tribunal consider that it has jurisdiction over [redacted], the Respondent requested the Arbitral Tribunal

- to exclude certain Exhibits of the Claimant from the record (i.e Exhibits CX-19 and CX-20),
- to hold that [redacted] claim was statute-barred and therefore to be fully dismissed.
- to order [redacted] to pay to [redacted] additional costs (of an unspecified amount) as well as its lost profits, plus interest at a rate of 5% per year as from 18 March 1997.
- to order [redacted] to bear all costs and expenses of the present arbitral proceedings.

In its Detailed Submissions dated 10 July 2012, the Respondent requested the Arbitral Tribunal

- to order that all of [redacted]'s claims be dismissed
- to hold that [redacted]'s claims are statute barred
- to order [redacted] to pay to [redacted] its damages in the amount of CAD 347'472, together with interest at a rate of 5% per year; and
- to order [redacted] to pay all the costs and expenses incurred in this arbitration.

In its 7 December 2012 Post Hearing Brief, the Respondent sought from the Arbitral Tribunal an award

- ordering that all of [redacted]'s claims be dismissed
- ordering [redacted] to pay to [redacted] the amount of CAD 347'471,91, together with interest at a rate of 5% per year as from March 2004; and
- ordering [redacted] to pay all the costs and expenses incurred in this arbitration.

In its further written Submissions of 4 and 9 October 2013, the Respondent expressly refers to and relies upon the relief sought in its Post Hearing Brief of 7 December 2012.

No new or amended relief was sought by the Respondent in its Briefs dated 28 February, 4 April, and 30 May 2013.

3. Non-exhaustive summary of the procedural history

This summary of the procedural history is not exhaustive and mentions only the key milestones of the arbitration. However, all of the Parties submissions have been taken into account by the Arbitral tribunal.

The Claimant's Request for Arbitration was filed on 23 September 2011 with the International Court of Arbitration of the ICC, along with 20 Exhibits.

The Respondent has submitted its Answer to the Request for Arbitration on 30 November 2011, followed by a Document Brief in two volumes filed on 15 December 2011 with Exhibits 1 through 127.

The Arbitral Tribunal, once constituted (see details under 1.3 above), submitted to the Parties draft Terms of Reference (ToR) on 23 February 2012, which were then discussed and finalised by way of exchange of e-mails/correspondence, and could eventually be adopted by the Parties and the arbitrators by way of circulation during the last week of March 2012. The Terms of Reference were signed by all the Parties and the Arbitral tribunal on 4 April 2012.

On 5 March 2012, the Arbitral Tribunal issued Procedural Order N° 1 (PO 1), which organised a first round of submissions dedicated to the jurisdictional issues raised by the Respondent in its Answer of 30 November 2011 to the Claimant's Request for Arbitration (see above, 2.2), and reserving then a possible second round of submissions for the merits of the case.

The Arbitral Tribunal was informed on 10 April 2012 that the Parties had reached an agreement, by which the Respondent had agreed not to pursue the issue of the Claimant's alleged lack of legal standing, said issue being abandoned on a "without costs" basis. On 17 April 2012 Procedural Order N° 2 (PO 2) ordered accordingly as follows the continuation of the proceedings on the merits:

"*1. The bifurcation of the proceedings, as agreed on and decided by Procedural Order N° 1, is hereby formally cancelled.*

2. Phase 1 of the proceedings, dedicated to the issues raised by the Respondent as to the alleged absence of jurisdiction and/or Claimant's, is accordingly closed.

3. The proceedings shall now continue on the merits, according to a tentative time schedule to be agreed on between the Parties and the Arbitral tribunal".

Procedural Order N°3 (PO 3), issued on 7 May 2012, formalised the procedural timetable for the various written submissions of the Parties on the merits.

On 8 June 2012, the Claimant filed its Detailed Submission on Merits, along with its Exhibits C-21 to C-23.

By a separate letter of the Arbitral Tribunal dated 21 June 2012, some of the deadlines granted by PO 3 were slightly amended as follows:

10 July 2012:	Respondent's Detailed Submission (Reply) on the merits (including exhibits and witness/expert witness statements, if any)
24 July 2012:	Claimant's short Rebuttal
7 August 2012:	Respondent's short Sur-Rebuttal

The Respondent's Detailed Submission was filed on 10 July 2012, together with Supplementary Document Brief (with Exhibits 128 to 141), Brief of Witness Statements,

Brief of Inspection Reports for Reactors (2 volumes), and Brief of Inspection Reports for Baffles.

The Claimant filed a short Rebuttal on 24 July 2012 with Exhibits C-24 to C-26.

The Respondent indicated by an e-mail dated 7 August 2012 that it would not be delivering any Sur-Rebuttal.

A telephone conference was then held with the Parties' Counsel on 4 September 2012 to make the final decisions for the organisation and the logistics of the evidentiary hearing of 8-13 October 2012.

A 5-day evidentiary hearing took place in Zurich between 8 and 12 October 2012, dedicated to the examination of the witnesses called by both Parties. The following witnesses/expert witnesses were heard:

- On Day 1: [redacted], former Corporate Commercial Manager of [redacted],
- On Day 2: [redacted]. former Director of Supply/Procurement Department of [redacted],
- On Day 3: [redacted], member of [redacted]'s inspection services
- On Day 4: [redacted], Assistant Director of [redacted], in charge of investments
- On Day 5: [redacted], currently Director of Business Development et Fabrication Services with [redacted]
- [redacted](continued),
  [redacted] and [redacted](witness conferencing),
  [redacted], former Sales and Marketing Manager for [redacted], today retired
  [redacted], President of [redacted].
- [redacted], former Senior Official in the Canadian Department of Foreign Affairs and International Trade (from 1973 to 2010)

The verbatim transcripts of the hearing were submitted daily to the Parties. They are referred to in the present award as "Minutes 2012".

The Parties and the Arbitral Tribunal agreed that final Post Hearing Briefs would be submitted simultaneously on 7 December 2012 (see verbatim transcript, Day 5, p. 916, line 10, and letter to the Parties, 18 October 2012).

Both Parties delivered Post Hearing Briefs on 7 December 2012, and final Cost Submissions on 20 December 2012.

The Arbitral Tribunal by letter dated 28 January 2013 asked for the following additional evidence:

- In light of Exhibit R-140 and the evidence given by [redacted] (Verbatim transcript, day 3, p. 472 [24] to p. 480 [25]) and [redacted](Verbatim transcript, day 4, p. 779 [2] to p. 781 [5]), the Respondent was asked to produce detailed documentary evidence supporting each of the items listed in § 78 of the Respondent's Detailed Submission dated 10 July 2012;

- In light of Exhibit C-20, which is a letter sent by [redacted] to [redacted] on 17 May 2004 and which refers, in its first paragraph, to a letter of [redacted] to [redacted] of the same date, both Parties were invited to produce to the Arbitral tribunal [redacted]'s aforementioned letter to [redacted] dated 17 May 2004;

- As to the issue of the scrap value for the reactors and baffles, the Claimant was invited to produce all evidence which would support the allegation made in § 16 of its 24 July 2012 Rebuttal.

On 28 February 2013, the Respondent delivered a Production Brief, together with Exhibits R-148 to R 363.

On 1 March 2013, the Claimant submitted an additional Brief, together with its Exhibits C-29 to C-37.

By letter of the Arbitral Tribunal dated 10 March 2013, each Party was granted a unique, final and non-extendable deadline expiring on Friday 5 April 2013 to submit additional comments on the documents and/or information provided by its opponent.

The Claimant's comments were received on 5 April 2013, and those of the Respondent were delivered on 4 April 2013.

The Arbitral tribunal decided by a letter dated 19 April 2013 to request from the Claimant the production by 10 May 2013 of a formal written Witness Statement of [redacted], limited to the factual elements addressed in Exhibit C-38. The Respondent was then given the opportunity to produce Rebuttal Witness Statements (the factual scope of which was limited to the issues addressed in [redacted]'s Witness Statement) by 31 May 2013.

On 10 May 2013 the Claimant delivered a Witness Statement of [redacted]. The Respondent filed on 29 May 2013 additional/rebuttal Witness Statements of [redacted] and [redacted], along with Exhibits R-364 to R 370.

After an additional extensive exchange of correspondence between the Parties and the Arbitral Tribunal, a second evidentiary hearing took place on 12 September 2013 in the form of a videoconference organised between Toronto, Belgrade and Geneva. All witnesses were heard in/from the offices of [redacted] in Toronto, while Counsel for the Claimant were in Belgrade, those for the Respondent in a separate location in Toronto and the Arbitral Tribunal in Geneva.

The witnesses called for that additional hearing were:

- [redacted], former Sales and Marketing and Estimating Manager for [redacted]'s fabrication division
- [redacted], manager of Commercial Affairs at [redacted].

The verbatim transcripts of the 12 September 2013 hearing were submitted on 23 September 2013 by e-mail to the Parties. They are referred to in the present award as "Minutes 2013".

Both Parties delivered their closing submissions on 4 October 2013, followed on 9 October 2013 by their short comments on the other Party's closing submissions as well as their additional cost submissions.

The ICC International Court of Arbitration regularly extended the deadline for rendering the Final Award:

- At its session of 6 September 2012 – until 31 January 2013;
- At its session of 17 January 213 – until 30 April 2013;
- At its session of 18 April 2013 – until 28 June 2013;
- At its session of 13 June 2013 – until 30 September 2013;
- At its session of 19 September 2013 – until 31 January 2014;
- At its session of 23 January 2014 – until 31 March 2014.

The proceedings were formally closed by the Arbitral tribunal pursuant to Article 22(1) of the ICC Rules on 7 February 2014.

Neither party objected to how the proceedings have been conducted.

III. SUMMARY OF THE FACTS

A. THE ORIGINAL CONTRACT

1. In the summer of 1990, [redacted] and [redacted] entered into communications, with the assistance of [redacted] who served as an intermediary (see Exhibit C-22), regarding the possibility of [redacted] fabricating and delivering to [redacted] twelve polymerisation reactor vessels with two baffles in each vessel (Exhibits R-1 and C-1; Minutes 2012, p. 367, lines 3-25, p. 368, lines 1-2, p. 348, lines 6-16). In this context, on 31 July 1990 [redacted] submitted a detailed description of their company, their capabilities and achievements, as well as a pricing proposal for [redacted]'s new reactors/baffles (Exhibit C-22).

2. The Parties then met on two occasions in [redacted], Yugoslavia, to discuss [redacted]'s specifications and requirements and the terms and conditions, pursuant to which [redacted] would fabricate and supply the vessels (Minutes 2012, p. 367, lines 3-25, p. 368, lines 1-2, p. 272, lines 15-18, p. 348, lines 6-16).

3. [redacted] and [redacted] entered into a written contract dated 11 January 1991 with the following provisions (see Exhibits C-2/R-3):

   a. Contract price: CAD3,450,000 (Article 2);
   b. [redacted] would provide [redacted] with an irrevocable letter of credit confirmed by a North American bank for the full value of the contract with an expiry date of six weeks after the scheduled date for the delivery of the Vessels (Article 3);
   c. shipment of the Vessels would be made from [redacted]'s plant in Canada, by the end of March, 1992 (Article 4.1);
   d. final inspection of the Vessels would be carried out in the presence of [redacted]'s inspector and the inspection certificate would be signed by both parties (Article 7.2);
   e. if [redacted]'s inspector did not arrive on the scheduled date for the final inspection, [redacted] was entitled to proceed with the inspection and [redacted] was obliged to accept [redacted]'s inspection report, without [redacted]'s signature (Article 7.3);
   f. in the event of *force majeure*, such as wars, acts of civil authority or other causes beyond the reasonable control of the parties, the time for fulfilment of obligations would be extended for the period of such circumstances and [redacted] would extend the expiry date of the letter of credit, should the contract schedule date be extended due to *force majeure* (Article 8);
   g. the design of the Vessels would be based upon the specification provided by [redacted] and [redacted] would check to ensure that the design and fabrication would be in accordance with the American Society of Mechanical Engineers regulatory requirements ("ASME") (Annex 2, Sections 2.0 and 4.1);
   h. [redacted] was obliged to provide comments or approval on [redacted]'s design calculations, weld procedures and shop detailed drawings, within 10 to 14 days (Annex 2, Section 4.3.3);
   i. [redacted] was to provide an inspection test plan for the Vessels (Section 4.6); and
   j. [redacted] was obliged to paint and protect the surfaces of the Vessels from corrosion due to adverse weather conditions during transport, as well as for a period of six months outdoor storage (Annex 2, Section 10.3).

4. The Annex 2 of the Contract was prepared by [redacted] (Minutes 2012, p. 220, line 24, to p. 221, line 1).

B. THE FIRST MODIFICATION OF THE CONTRACT AND THE SUBSEQUENT POSTPONEMENTS OF THE DELIVERY DATE

5. This contract of January 1991 was modified on 20 May 1991, by Modification Letter N° 1 (Exhibit C-7 and R-4; hereafter "ML 1"). The amendments agreed on by the Parties were in particular:

   a. A price reduction to CAD 3'380'000, and

   b. A postponement of the delivery date to the end of May 1992, instead of end of March 1992 as initially contemplated/agreed in the original Contract.

6. A further postponement of the delivery date was then asked for by [redacted]– and apparently accepted by [redacted]– on 1 April 1992, so that the delivery date was moved to the end of July 1992 (Exhibit C-8/R-5).

7. The Parties are in disagreement as to the cause(s) of these successive postponements.

   a. The Claimant, on the one hand, is of the opinion that these postponements were attributable to the Respondent's own delays in the procurement of the necessary material (Claimant's Post-Hearing Brief, §§ 11 and 12, with further ref.), the finalisation of the various drawings and design calculations and the establishment of detailed fabrication schedules (Claimant's Post-Hearing Brief, §§ 13 and 14, with further ref.). The Claimant further contends that the Respondent would have experienced serious delays in the fabrication of the Equipment: in particular, in January 1992, the Respondent would not even have started to work on the baffles (Claimant's Post-Hearing Brief, § 15, p. 9) and, on the basis of the evidence given by Mr. [redacted], there would have been basically no fabrication started in May 1992 (Claimant's Post-Hearing Brief, § 17; Minutes 2012, p. 734).

   b. The Respondent, on the other hand, contends that the postponements were the consequence(s) of the Claimant's inability to provide design drawings which would be compliant with the ASME regulatory requirements. The consequence of this would have been that [redacted] could not proceed early enough with the preparation of the design calculations, weld procedures and detailed shop drawings for the vessels (Respondent's Post-Hearing Brief, §§ 11 and 12, with further ref.). [redacted]submits in this respect (1) that it would have identified for [redacted]numerous examples of how [redacted]'s drawings would not have complied with the ASME requirements, including the thickness of the material for the Baffles, and (2) that it would have offered two solutions to [redacted]by a letter dated 4 March 1991 (Exhibit R-128) to allow the project to proceed, one of them being that [redacted] provide the original design calculations for the Baffles currently in use in [redacted]'s existing reactor vessels, so that these design calculations might be used to demonstrate ASME compliance and obtain MCCR approval, and the other solution being to construct the Baffles pursuant to [redacted]'s drawings, without ASME approval, as the Baffles were entirely within the boundaries of a pressure vessel that would be ASME compliant.

c. [redacted] submits furthermore that [redacted] would not have responded to [redacted]'s request for delivery of the original design calculations for the Baffles until 15 January 1992, and [redacted]'s response at that time would have been limited to contact information for the manufacturer of the baffles in use in their existing reactor vessels, without providing the original design calculations. [redacted] contends that the consequence of this was that [redacted], in order to mitigate the delays caused by [redacted]'s delay in responding, would have been obliged to retain a third party ([redacted]) to do the Baffle design calculations, which were then presented to [redacted] (and approved by them) by the end of September 1991 and subsequently submitted in the fall of 1991 to the Ministry of [redacted], who monitor and enforce ASME compliance, which could then accept them, as being compliant with the ASME regulatory requirements (Respondent's Post-Hearing Brief, §§ 12 – 16, with further ref.).

8. The possible legal implications of these contentions of the Parties shall be addressed in more detail below, in the legal discussion. However, the evidence submitted by both Parties provides globally the following factual picture as to (1) the background of, and the circumstances surrounding the various postponements of the delivery date, (2) whether and when any fabrication work had started, and (3) what was approximately the level of completion of the Equipment when the UN sanctions were imposed.

9. ML 1 (Exhibit R-4) was signed on 16/20 May 1991 and extended effectively by two full months the final delivery date of the Equipment - i.e. more precisely the date of shipment of the Equipment - to the end of May 1992. The chronology of the documents, together with the explanations given by the various witnesses, tends to indicate that this postponement was linked to certain design calculations, such as those referred to in particular in Exhibit R-128 and R-129. In this respect, the joint examination of Mrs [redacted] and Mr [redacted] confirmed that [redacted] was to provide [redacted] with the drawings, dimensions and calculations which were made/used for the fabrication of their existing reactors, which were manufactured in the United States according to the ASME codes/requirements in force or in use at that time (Minutes 2012 of joint examination, p. 688, lines 10-18, p. 689, line 24, to p. 690, line 2).

10. However, the existing baffles of [redacted] were not in accordance with ASME, and [redacted] expected [redacted] to try to adapt their specifications/design calculations to ASME requirements (Minutes 2012 of joint examination, p. 688, lines 19-24). Mr [redacted] confirmed that once the mechanical engineers and the welding engineers started to "*go over the project, over the drawings with a fine tooth comb and establish their own design drawings to satisfy ASME code* ", [redacted] did identify that some of the joint details, some of the nozzle details, the reinforcing pads did not satisfy the requirements of the ASME Code (Minutes 2012 of joint examination, p. 690, lines 11-22); this is why [redacted] and [redacted] went back and forth "*with all the drawings to clarify all of that and rectify it such that [they] could submit their calculations and drawings to MCCR to finally get approved*" (Minutes 2012 of joint examination, p. 691, lines 3-8).

11. Be it as it may, both Parties are in agreement that it was basically [redacted]'s task to verify the drawings, documents and calculations given by [redacted], and to make the necessary transpositions/adaptations to have these drawings and calculations conform with the ASME specifications (Minutes 2012 of joint examination, p. 691, line 22, to p. 692, line 15; p. 694, lines 14-25; see also [redacted], Minutes 2012, p. 208, lines 18-24), although [redacted] would have expected that certain dimensions, such as the thickness of certain materials or the reinforcing pads, would have been ASME compliant so as to limit the amount/size of [redacted] redesign

work (Minutes 2012 of joint examination, p. 695, lines 19-25). On the basis of how these discrepancies were referred to in the written evidence produced by the Parties for the relevant period in 1991/92 (essentially Exhibits R-128, R-129), it is the Arbitral Tribunal's finding and considered opinion that, contrary to what [redacted] is depicting in its Post-Hearing Brief (§§ 12 and 13), these discrepancies were reasonably limited (see for instance Exhibit R-128, which refers expressly twice to a *minor* difficulty or problem).

12. On 1 April 1992, [redacted] asked [redacted] for another 2 month postponement of the agreed date for shipping the Equipment FOB Montreal (Exhibit C-8/R-5), moving it from end of May 1992 to end of July 1992.

13. It is again the Arbitral Tribunal's considered opinion that the tone and wording of this letter suggest very clearly that [redacted] was not blaming [redacted], nor making [redacted] responsible for this new extension. [redacted] obviously accepted (Exhibit R-6) the extension sought by [redacted], in a style and tone which, as well, do not reflect any intention of [redacted] to blame [redacted], nor to make it responsible for the delay/time extension. The reasons which led to this postponement might well be certain issues of thickness and/or reinforcing pads referred to by Mrs [redacted] (Minutes 2012, p. 200) and Mr [redacted] (Minutes 2012, pp. 397 ff.) in their oral testimonies. However, Mr [redacted] also suggested (Minutes 2012, p. 408, lines 20-25) that the extension granted in April 1992 until 31 July 1992 would have been the "*result of delays in getting answers back to questions from* [redacted]". The correspondence exchanged between the Parties around and after 1 April 1992 in connection with this time extension does basically not indicate that [redacted] would have been significantly late in their answers to [redacted]. All on the contrary, [redacted]'s tone and apologies in Exhibit R-5, as well as the gratitude which [redacted] is extending to [redacted]'s engineering department "*for their assistance and input throughout the engineering phase*" (Exhibit R-5, 2nd paragraph) tend to indicate that the postponement until end of July was not the consequence of any particular delay/failure on [redacted]'s part. Exhibits R-8, R-9, R-10, which did not contain any reservation of rights to claim compensation/damages and confirmed expressly that the postponement would not entail any interest charges, tend to confirm that the time extension agreed on by the Parties in April 1992 was not linked to, or the consequence of, any particular failure/fault of either Party.

14. A further extension of time was then discussed between the Parties as a consequence of the issues linked to the manholes/manways, for which [redacted] purchased what they considered to be standard items with eight bolts (Exhibit R-145; Mr [redacted], Minutes 2012, pp. 407-410), whereas [redacted] communicated to [redacted] for these manways drawings/information which applied the German engineering standard with some differences in shape and number of bolts (Mrs [redacted], Minutes 2012, p. 204, lines 3-18). This was apparently a key issue for [redacted], which used to plug a high pressure cleaning pump onto the manholes. [redacted], therefore, asked [redacted] to modify the manholes accordingly (see Mrs [redacted], Minutes 2012 p. 204, last line, and pp. 205-206; see also Exhibit R-145 with a reference to a fax of [redacted], dated 26 May 1992, which is however not on record).

15. In a letter dated 27 May 1992 (exhibit R-145), [redacted] advised [redacted] that they were unaware of [redacted]'s need to connect a special washing device to the manholes (see also Mr [redacted], Minutes 2012 p. 410, lines 11-22), and that a modification of these manways at this stage – they were obviously already welded to the reactors – would result in increased costs and duration of the fabrication schedule. [redacted]'s reply to this is to be found in a letter dated 5 June 1992 (Exhibit R-7), in which [redacted] (1) asked [redacted] to modify the manholes and (2) accepted the extension of time which would result therefrom.

C. THE UN AND CANADIAN SANCTIONS/EMBARGOES AND THE INTERRUPTION OF THE PRODUCTION

16. In the meantime, on 30 May 1992, the United Nations Security Council adopted Resolution 757, which imposed sanctions against Yugoslavia. These sanctions were followed, in Canada, by a trade, financial and air embargo, with effect as from 3 June 1992 (Exhibits R-12, 13 and 14). As a consequence thereof, [redacted]'s application for an export permit for the reactors and baffles (Exhibits R-11) – which [redacted] filed as early as 29 May 1992, as the Government was apparently known to be rather slow in responding, and [redacted] was concerned to get an export green light back at the time the vessels would be ready for shipping (Minutes 2012, p. 752, lines 1-8) - was eventually refused on 3 June 1992 (R-13). In light of the clear indications which appear on Exhibits R-11 and R-13, the Arbitral tribunal understands that Mr. [redacted], who testified that the export permit would have been refused already on 29 May 1992 (Minutes 2012, p. 572, lines 9-13, and p. 574, lines 4 and 5) obviously mixed the dates.

17. Due to the embargo/sanctions, [redacted] also had to cancel an interim control trip to Canada, and it informed [redacted] on 11 June 1992 that it would not be able to send representatives to perform/attend the interim control (Exhibit R-15). This had in fact already been announced by [redacted] on 5 June 1992 (Exhibit R-7).

18. [redacted] wrote to [redacted] on 15 June 1992 (Exhibit R-16) to (1) inform them about the refusal of the export permit application, and (2) suggest two different options as to the future of the contract:

    a. a full stop of any production work until the "*situation has changed*" (option 1); or

    b. a continuation/completion of the manufacture so as to be ready to ship the Equipment immediately once the sanctions are lifted (option 2).

19. In the context of option 2, [redacted] indicated furthermore (1) that the Equipment would only be completed in the week of 12 October 1992 as a consequence of [redacted]'s instructions of 5 June 1992 to modify the manholes, and (2) that the Equipment would be stored at [redacted]'s facility at no cost to [redacted], should the sanctions still be in force when the manufacture would be completed.

20. [redacted] replied on 19 June 1992 (Exhibit R- 17), stating first that they "*recognize and respect that you [i.e. [redacted]] have to follow the UN sanctions*" and that "*objective circumstances concerning sanctions of UN dictate that in the mutual interest we protect interests of both your and our company*". As far as the options proposed by [redacted] were concerned, [redacted] indicated clearly that they were not interested by option 1, but were ready to discuss option 2.

21. In its reply dated 23 June 1992 (Exhibit R-18), [redacted] confirmed its commitment, not to stop production and to continue fabrication. As to the issue of the manholes, [redacted] confirmed furthermore – with their sincere apologies for this "*most regrettable delay causing circumstance*" - that the manholes would be made by [redacted] in accordance with [redacted]'s project documentation. [redacted] accepted expressly "*full responsibility for the unfortunate manhole circumstance and will do everything possible to minimize the schedule delay*". They confirmed furthermore that they were proceeding in accordance with option 2 and that they would store the reactors and baffles at no cost to [redacted] if shipping to Yugoslavia was still

restricted. As to the level of completion of the Equipment, [redacted] re-assured [redacted] that the production of the reactors and baffles was significantly complete. They asked [redacted] to confirm in writing that they would pay the balance of the contract price (excluding the freight costs) upon completion of the manufacture.

22. In a message of 26 June 1992, [redacted] asked for [redacted]'s formal approval for the purchase of BUNA "N" type gaskets for the manholes, instead of BUNA "S" type ones (Exhibit R-19).

23. On 30 June 1992 (Exhibit R-20), [redacted] replied to [redacted] that they would pay the balance of the contact value (with the exclusion of the freight costs) upon completion, and that they would accept the BUNA "N" gaskets. They moreover thanked [redacted] for the modification of the manholes in conformity with [redacted]'s project documentation.

24. While in the early weeks of June 1992, [redacted] still believed that they could continue manufacturing the Equipment despite the UN and Canadian embargoes/sanctions, [redacted] decided around the end of June 1992 to interrupt the fabrication (Minutes 2012 pp. 716, line 10, to 719, line 9; Witness Statement [redacted], § 22). This had been ordered orally by Mr. [redacted] (Senior) personally (Minutes 2012, p. 787, lines 19-23; p. 792, lines 5-16; p. 569, lines 15-16). The background of Mr [redacted]'s decision to cease working and to demobilise was mainly an information given by [redacted]'s bankers that all assets in Yugoslavia had been frozen, so that [redacted] could/would not be paid any longer under the letter of credit (Minutes 2012, p. 718, lines 16-25, and p. 736, lines 4-12; see also p. 569, lines 17-19, and p. 576, lines 16-21; p. 578, lines 19-24; p. 586, lines 1-5; p. 609, lines 7-21; p. 791, lines 6-10).

25. The demobilisation took place progressively between the end of June and the end of July 1992 approximately (Minutes 2012, p. 568, lines 16-17; p. 578, lines 1-4; p. 580, lines 12-16; 582, lines 1-6; see also Minutes 2012 p. 719, lines 4-9).

26. The June-July 1992 progressive stoppage of work and the demobilisation of [redacted] were apparently not communicated to [redacted] by Mr [redacted] (Senior) himself or by Mr Pendlebury (Minutes 2012, p. 570, lines 10-19). Mr [redacted] believed he did, but had no precise recollection on that point (Minutes 2012, p. 721, lines 1-23).

27. Thus, in a first phase, [redacted] was of the opinion that, in light of the fact that production/construction/manufacture was not expressly mentioned in/captured by the 3 June 1992 decision of the Canadian Authorities (Exhibit R-13), the continuation of the production was still possible. This is why [redacted] submitted to [redacted] its 15 June 1992 proposal, offering in particular the completion of the work as option 2 (Exhibit R-15; see also Minutes 2012, p. 576, and p. 746, lines 4-10). Then, the information referred to above (§ 24) came from [redacted]'s bankers, and [redacted] sought professional legal advice from their lawyers to establish what was their position regarding the embargo. In this context, [redacted] was very much concerned that the wording of the Embargo Resolutions would encompass fabrication, and was therefore afraid to get severely fined if fabrication was to continue (Minutes 2012, p. 791, lines 11-16). Therefore, although the 3 June 1992 decision of the Canadian Authorities did not expressly forbid the fabrication of the Equipment, [redacted] decided around the end of June to interrupt the fabrication and to demobilise/"ramp down" (Minutes 2012, pp. 578 to 580, line 11; p. 583, lines 7-22; p. 585, line 1, to p. 586, line 5).

28. Both applications filed by [redacted]'s lawyers (Exhibits R-21 and R-146), which aimed in substance at getting the permission for [redacted] to complete the fabrication of the reactors and baffles, were eventually rejected on 16 October 1992 (Exhibit R-25), on the grounds that

    a. the relief sought on behalf of [redacted] could not be regarded as captured/covered by Section 14 of the Canadian Embargo/Sanction Decision (Exhibit R-14) dealing with possible exemptions, and

    b. "*Continuing to execute the contract would therefore be contrary to the Regulations* (…)".

29. [redacted] conveyed this information to [redacted] on 21 October 1992 (Exhibit R-23).

30. As a consequence of the demobilisation which took place in July 1992 and the subsequent mass layoff (Exhibit R-40), [redacted] had to pay to the Ontario Ministry of Labour severance indemnities in the amount of CAD 194'863,41, as well as termination indemnities in the amount of CAD 355'185,36 (Exhibit R-138).

31. As to the degree of completion of the Equipment at the time the fabrication was put on hold, various figures have been suggested by both Parties. Unfortunately no joint statement or estimate could be done when the work stopped.

    a. At a meeting held in Budapest in October 1994, when the Parties started to discuss the possibilities to resume fabrication, [redacted] made an estimate that only 50% of the work had been completed prior to the sanctions, while [redacted] was of the opinion that roughly 85% was done (Exhibit R-37; see also Minutes 2012, pp. 102).

    b. In January of 1996, however, [redacted] indicated to the Canadian Department of Foreign Affairs that the degree of completion at the time the work was interrupted was approximately 70% (Exhibit R-62). While Mrs [redacted] expressed the opinion that the percentage should have been lower (Minutes 2012, p. 107, lines 18-22), it is worth noting that [redacted], on the occasion of a site visit to Canada in April/May 1996, made their own (internal) estimate that the reactors were globally 65-70% completed and that the degree of completion of the baffles was around 60% (Exhibit C-21; see also Minutes 2012, pp. 106 and 107, and pp. 159 to 162, as well as p. 210, lines 17-19).

    c. In March 2000 (Exhibit R-113), the Respondent again indicated a level of completion of 80%.

32. Be it as it may, the degree of completion at the time of the UN sanctions does not *per se* have any special legal relevance in the present matter, as will be further explained in the legal discussion (see below, § 97). This being said, it seems factually reasonable to consider, in light of the Parties' own internal estimates (Exhibit R-62 on the one hand; Exhibit C-21 on the other hand), that the degree of completion of the Equipment must have been somewhere between 65% and 70% when the work had to be stopped in June 1992 as a consequence of the UN sanctions.

D. THE PARTIES' ATTEMPTS TO RESUME PRODUCTION – MODIFICATION LETTER N° 2

33. Although the embargo was not lifted until January 1996 (Exhibits R-61to R-65), on February 1994 the Parties entered in negotiations to possibly resume production and delivery (Exhibit R-24). [redacted] submitted a breakdown of its additional costs (Exhibit R-40), of which [redacted] accepted only a portion, specifying that they would have no other choice (Exhibit C-14).

34. As the sanctions were still in force, there was in particular an attempt to have the entire deal re-directed on another buyer outside Yugoslavia, first a Romanian company called [redacted] (see Exhibits R-25 to R-28) and then another [redacted]-company, namely the German [redacted]-Trade, in Frankfurt (see in particular Exhibits R-30 through R-57). This option could ultimately not be pursued (Exhibit R-57), and [redacted], after having raised some objections in January 1995 as to the payment mechanism contemplated by [redacted] for the additional completion costs (Exhibit R-48), expressed the opinion in April 1995 that the completion of the work should in fact be carried out pursuant to the provisions of the original January 1991 contract (Exhibit C-15/R-55).

35. After the embargo was eventually lifted in January 1996, the Parties resumed their discussions to resolve the matter. After extensive discussions and exchanges of correspondence, the Parties were able to sign Modification Letter N° 2 (ML2), the purpose of which was to specify the contractual rights and obligations of the Parties as follows (see Exhibits R-81, R-84, R-96, R-98 and R-99):

    a. The original contract price of CAD 3'380'000 was increased by CAD 647'442 to a revised total contract price of CAD 4'027'442;

    b. The payment of the price was to be made by an irrevocable letter of credit in favour of [redacted] in the amount of CAD 985'442 (which appears to be the sum of the still unpaid balance of the original contract price, i.e. CAD 338'000, and the additional contract price of ML2, i.e. CAD 647'442);

    c. The amount of this letter of credit would be paid to [redacted] upon shipment of the Equipment and presentation of a certain number of contractual documents, which were in fact already those mentioned and agreed on by the Parties in their original January 1991 contract (Exhibit C-2), in particular:

        i. a final inspection certificate, and

        ii. an original performance bond amounting to 10% of the amended contract price (i.e. CAD 4'027'442).

36. Various successive drafts have circulated between the Parties before ML2 was eventually executed (see Exhibits R-81, R-84, R-96, R-98, R-99 and R-101). A first draft was submitted to the Claimant by the Respondent on 20 November 1996 (Exhibit R-81), along with a detailed cover letter specifying certain particulars of the contemplated amendment, in particular

    a. a detailed breakdown of the price increase,

b. the agreed principle that work on the Equipment would only commence upon presentation of an irrevocable letter of credit issued by a first class European Bank and confirmed by a major Canadian bank,

c. certain details of the delivery.

37. This first draft was submitted to [redacted], which accepted the total additional amount of the work completion, and merely asked for another 10 days for the finalisation of all proposed conditions, in particular the payment conditions (Exhibit R-82). There is no evidence on the record that [redacted] would have objected to the L/C being opened and presented before any completion work could commence (§ 36 b, above). [redacted] granted the additional time (Exhibit R-83), and on 23 December 1996 sent to [redacted] two original copies of the final draft for signature (Exhibit R-84). [redacted] also indicated to [redacted] by a subsequent fax of 8 January 1997 a number of suitable banks for the confirmation of the L/C in Canada (Exhibit R-87). There were then a couple of adjustments/clarifications between [redacted] and [redacted] (and also Mr [redacted]) regarding in particular the delivery terms, the identity of the confirming bank, and the possibility to waive the requirement of having a major Canadian bank confirming the L/C if the latter was to be issued by one of the ten banks listed in [redacted]'s fax of 8 January 1997 (see Exhibits R-89 to R-97).

38. On 5 March 1997, [redacted] returned to [redacted] a signed copy of ML2, together with a short cover letter of the same date highlighting one additional amendment (i.e. the specification of the full contract price in article 3, last item – see Exhibit R-98). [redacted] replied on 11 March 1997 (Exhibit R-99) that the amendment proposed by [redacted] was accepted, and made moreover two other changes to the copy already signed by [redacted], namely:

a. Under the "terms of payment" (art. 3), the payment condition that [redacted] presents a "*final inspection certificate* <u>*signed by both contracting parties*</u>" (emphasis added) was replaced by the requirement that [redacted] presents a "*final inspection certificate*", the rationale of this amendment being, according to [redacted], to align it on the mechanism provided for in article 7.3 of the original January 1991 contract;

b. In article 4, the delivery terms were specified/clarified through the addition of the words "*ex works, delivered*".

39. On 2 April 1997, [redacted] replied that they agreed "*with article 7.3 in full of original contract*", as well as with the amendment made in article 4 (Exhibit R-101).

40. During their site visit to Canada in May 1996 (Exhibit R-74), as well as on other occasions referred to by Mrs [redacted] (Minutes 2012, p. 101, lines 16-24; p. 105, line 14, to p. 106, line 6; p. 164, line22, to p. 165, line 18), [redacted] asked [redacted] to provide a standby letter of credit in favour of [redacted] similar to those which were required in Art. 3.1 and 3.2 of the original January 1991 contract, or Art. 3.3 to 3.6 of ML1. The Arbitral tribunal concludes from the evidence produced that [redacted] did not provide such a standby letter of credit.

41. As shown in various documents referred to above (see Exhibits R-82, R-90, R-93, R-98 and R-101), [redacted] confirmed on several occasions that it was working towards the opening of the L/C. However, despite these efforts of [redacted], the L/C which [redacted] had committed itself to open pursuant to article 3 of ML2 was never, or could never be, issued between January 1997 and January 1999 (see in particular Exhibits R-104, R-105, R-107, R-109, R-112 and R-114).

E. THE NATO BOMBINGS AND THE TIME THEREAFTER

42. On 24 March 1999, the air forces serving under NATO started their bombing of Yugoslavia, until 10 June 1999.

43. After the NATO bombing, [redacted] asked in March 2000 whether it would be possible to obtain a Canadian loan out of funds dedicated to financial help/assistance (Exhibit R-114). It is a fact that after the NATO bombing, [redacted] could obviously not put the required L/C in place (Minutes 2012, p. 727, lines 1-14; p. 776, lines 17-19). As a consequence thereof [redacted] never resumed completion of the Equipment, as no work on the Equipment could commence without the presentation by [redacted] of the irrevocable letter of credit referred to in ML2 (Minutes 2012, p. 611, lines 3-8, p. 612, lines 5-9, p. 615, lines 8-13, p. 616, lines 15-21, p. 619, lines 6-13, p. 670, lines 7-12, p. 798, lines 6-13). Therefore the Equipment deteriorated further (Minutes 2012, p. 776, lines 11-16) as a consequence of the fact that it was most of the time – or at least for longer periods of time - in outside storage (Exhibits C-21, R- 31, R-103 and R-113, p. 2; Minutes 2012, p. 108, line 25, to p. 109, line 3; p. 210, lines 5-11; pp. 466-467; Minutes 2013, pp. 9-13 and pp. 75-76).

44. There is no evidence in the record that [redacted] would have issued the performance bond referred to in the last subsection of ML2's article 3.

45. In light of the evidence produced by both Parties, there was apparently no further contact and no correspondence between the Parties until the end of [redacted]. According to Exhibit C-29, it seems that, on 23 November 2001, [redacted] sent a letter to [redacted], to which the latter responded on 12 December 2001 (Exhibit C-29), asking [redacted] for an update as to the "*status of the job (financial, technical)*" and for additional explanation as to the meaning of a certain sentence in [redacted]'s letter (i.e. "*we intend to dispose of components or them for resale*"). [redacted] indicated that they would then make their final decision as to the completion of the work once they would have [redacted]'s answer.

46. Exhibit C-30, which is a letter of [redacted] to [redacted] dated 24 June 2002, together with handwritten notes on Exhibit C-29 (i.e. "*REPEAT ! - 09.01.02 – Please answer us – Thanks in advance*"), suggests that there was no answer of [redacted] to [redacted]'s 12 December 2001 letter (Exhibit C-29), which [redacted] probably resent on 9 January 2002 without getting any further answer from [redacted]. Therefore [redacted] asked [redacted] on 24 June 2002 to inform them about the status of the Equipment and its condition (Exhibit C-30).

47. Another 18 months elapsed until [redacted] wrote again to [redacted] on 23 December 2003 (Exhibit C-31/R-115) to complain that their January 2002 letter did not receive any answer from [redacted], and to enquire about the status of the Equipment and [redacted]'s "*proposal for finishing the job*".

48. This letter of [redacted] was answered by [redacted] on 30 March 2004 (Exhibit C-19), with a recommendation to discard the vessels, which, as a consequence of the length of time they had been in storage and the severity of the Canadian winters, could no longer be completed in a way which would meet the ASME technical requirements. [redacted] offered therefore to look for the best possible scrap value for the Equipment (see also Minutes 2012, p. 77, line 22, to p. 778, line 12).

49. [redacted] sent another letter on 22 March 2004 to [redacted], which is not in the record and which was apparently not answered by [redacted] (see Exhibit R-147). This 22 March 2004 letter was another proposal to [redacted] to obtain scrap value for the Equipment and to transfer that value to [redacted]. This proposal was then restated by [redacted] on 23 April 2004 (Exhibit R-147).

50. A further exchange of correspondence took place between [redacted] and [redacted], with a fax of [redacted] to [redacted] on 11 May 2004, to which [redacted] replied on 17 May 2004 (see Exhibit C-32), asking [redacted] to check once again the scrap value of the Equipment, taking into account the "*specific features of the material (quality) and quantity*". [redacted] reply of the very same day (Exhibit C-20) confirmed a scrap value of CAD 80'327, but [redacted] offered a global settlement payment of CAD 100'000.

51. On 16 July 2004, [redacted] expressed its reluctance to sell the material as scrap metal, and asked [redacted] to assist them in finding companies which might be interested to acquire the material for operational purposes other than using them as pressure vessels, such as pipeline companies (Exhibit C-33), which would agree to pay a higher price.

52. In light of the evidence produced, it seems that there was no further communication between the Parties between July 2004 and 2010. In particular no communication took place in or about March 2008, after the sale of the Equipment as scrap metal (see also Minutes 2012, p. 807, lines 19-21, and p. 812, line 21, to p. 814, line 1). On 26 April 2010, [redacted] again contacted Mr [redacted] to ask him when experts of [redacted] could to come to Canada to inspect the vessels before any final decision would be made (Exhibit C-34).

53. Mr Hughes replied swiftly on 29 April 2010 that the Equipment had been scrapped by [redacted] long time ago, which [redacted] obviously ignored when they wrote their 26 April 2010 letter. He also suggested that [redacted] would contact [redacted] directly, which [redacted] did by letter dated 5 May 2010 (Exhibit C-36), in which they indicated that two of their experts would come over to Canada in the course of the third week of May to "*make a final decision about* [redacted] *' offer and to finalise the contract*".

54. [redacted] replied on 19 May 2010 that the Equipment, as announced by Mr [redacted], had effectively been scrapped. They reconfirmed their offer to transfer to [redacted] the value of some CAD 75'000 which had been obtained for the scrap metal, on the basis that this would settle the matter amicably and be reflected in a written agreement of the Parties that no future claims would be made by either of them for any further outstanding costs (Exhibit C-37). It seems that the decision or the assessment that the vessels were scrap was already taken in 2004, but [redacted] waited until 2008 to actually sell them to a scrap handler (Minutes 2013, p. 137).

55. The decision to sell the Equipment as scrap metal was taken by Mr. [redacted] (Minutes 2012, p. 778, lines 14-22; p. 794, lines 16-23). There is no evidence in the record that [redacted], after [redacted]'s 16 July 2004 letter (above, § 51), would have sought [redacted]'s approval to dispose of the Equipment as scrap metal, or that [redacted] would have informed [redacted] of their intention to sell the Equipment as scrap.

56. [redacted] has produced numerous documents to support their allegation that the Equipment had effectively been sold as scrap in March 2008 to a professional metal scraper named [redacted]. for a value of roughly CAD 75'000 (Exhibits R-116 to R-127; R-139).

57. In this respect, Mr [redacted], Manager of commercial affairs of [redacted]., has given evidence:

    a. that [redacted] have purchased the [redacted] Equipment from [redacted] in March 2008, as scrap metal (Minutes 2013, p. 178, line 11, to p. 180, line 10; p. 190, lines 8-12 and 24-25);

    b. that the bills produced under R-139/R-362 are the bills issued for the various elements of the Equipment (see in particular Minutes 2013, p. 181, line 9, to p. 186, line 13), and

c. that the cheques shown in R-139/R362 are the cheques by which the purchase price of the Equipment was paid by [redacted] to [redacted] (Witness statement of Mr [redacted], § 5). Mr [redacted] has confirmed that these cheques (R-139) were those received from [redacted] for the Equipment sold to them by [redacted] as scrap metal (see testimony of Mr. [redacted], Minutes 2012, p. 781, lines 7-18; Exhibit R-363).

It was explained at the September 2013 evidentiary hearing that all of the Bills of Lading and the cheques relate to the sale of the [redacted] Equipment, as evidenced by the references on the cheques to the Bills of Lading numbers, which in turn are identical to the [redacted]'s job number for the [redacted] Contract, namely [redacted] (see the same ref. [redacted] on Exhibit R-73 + appendixes), with the exception of the sale of one "*scrap overpack*" as set out in the Bill of Lading number [redacted], which relates to an unrelated project number [redacted]. The price received by [redacted] for the scrap metal of job [redacted] was not taken into account in the calculation of the aggregate amount which [redacted] has received from [redacted] for the sale of [redacted]'s Equipment (see [redacted] bill/cheque [redacted] - Exhibit R-362, 5th blue folder; Exhibit R-139, 11th doc.; see also Minutes 2013, p. 162).

58. Mr [redacted] confirmed that [redacted] and [redacted] knew each other for already quite a long time (Minutes 2013, p. 209, lines 23-25), and that [redacted] had been contacted by [redacted] in February 2008 for the purchase of the Equipment as scrap metal (Minutes 2013, p. 210, lines 6-12; p. 177, lines 3-11; p. 190, lines 6-17). [redacted] and [redacted] had obviously not had any contact regarding the purchase of the reactors and baffles before February 2008 (Minutes 2013, p. 190, lines 13-17; p. 210, lines 6-12)

59. The amount paid to [redacted] appears to be CAD 73'190,86 (Witness Statement [redacted] § 8; Witness Statement [redacted], § 5; Minutes 2013, p. 191, lines 11-16; Minutes 2012, p. 781, lines 7-13), which is the sum of the amounts of the cheques filed under R-139/R-362.

60. This amount was never transferred to [redacted] (Minutes 2012, p. 797, lines 3-5).

61. The Claimant has contended that the Equipment would have been sold for roughly CAD 1 million (Claimant's Rebuttal, 24 July 2012, § 16). [redacted] has produced in this respect a Witness Statement of Mrs [redacted] (see in particular Witness Statement of Mrs [redacted], §§ 7, 10 and 11), as well as various documents (Exhibits C-39-C-41), according to which the [redacted] vessels:

a. would have been "*sold to an American Gentleman*" (see in particular Witness Statement, Mrs [redacted], p. 2, penultimate paragraph) - whose company name Mrs [redacted] did not know (Minutes 2013, pp. 43-44) - for the price of $875,000 in "*February/March 2009*";

b. would have "*disappeared over a weekend*" (see in particular Witness Statement, Mrs [redacted], p. 2, penultimate paragraph); and

c. would not have been scrap (see in particular Witness Statement, Mrs [redacted], p. 2, last paragraph, and Minutes 2013, p. 20, lines 15-23).

62. It is a fact that Mrs [redacted]'s statements are based on what she was allegedly told by others, and she did not generally have direct evidence and/or personal or first-hand knowledge of the facts she testified about (see Minutes 2013, p. 15, line 19, to p. 16, line 4; p. 17, lines 7-10; p. 22, lines 7-12; p. 26, lines 5-8; p. 29, lines 2 to 8; p. 35, lines 9-15; p. 36, lines 4-5; p. 37, lines 1-5; p. 38, lines 4-9; p. 39, lines 15-18).

63. As far as her assessment of the vessels' (scrap) condition is concerned, she never inspected the vessels personally, nor did she perform any tests, or conduct any analysis whatsoever of the vessels' condition, before expressing her opinion on the status and value of the vessels

(Minutes 2013, p. 26, lines 1-8; p. 39, lines 4-12 and lines 24-25; p. 42, lines 2-5; p. 47, lines 6-8). Furthermore she does not have any technical knowledge or qualifications, nor does she possess any work experience in respect of the fabrication of pressure vessels, inspection of pressure vessels, measuring the smoothness of a vessel surface, or establishing parameters for the life expectancy of a pressure vessel in a petro-chemical plant (Minutes 2013, p. 39, lines 21-23; p. 40, lines 16-20; p. 41, lines 4-13; p. 46, lines 3-25 and . 47, lines 15-19).

64. On cross-examination she did not dispute the fact that the reactors and baffles were, or might have been, shipped out over a period of several weeks, and did therefore probably not "*disappear over the weekend*" as she alleged originally in her witness statement (Minutes 2013, p. 45, lines 1-5).

F. THE LAUNCH OF THE ARBITRATION – THE CLAIMANT'S CLAIM FOR DAMAGES - THE RESPONDENT'S COUNTERCLAIMS

65. In September 2011, [redacted] engaged in the present arbitration and filed its Request with the ICC (see above, Procedural History).

66. In its Detailed Submission on the Merits of 8 June 2012 and its further written submissions (in particular Claimant's Post-Hearing Brief, § 47), the Claimant contends that it would also have lost a profit of USD 2'523'633 as a consequence of the Respondent's failure to deliver the reactors and baffles. The Claimant submits in this respect that if it could have disposed of the new Equipment after the lifting of the Embargo in March 1996, it would have been able to realise a turnover of USD 11'377'596 until April 1999, when the PVC production facilities of its supplier were destroyed by the NATO bombings. As the costs associated therewith would have been, in the Claimant's calculations, USD 8'853'963, the Claimant's profit between 1 March 1996 and April 1999 would have been USD 2'523'633 (Claimant's Detailed Submission of 8 June 2012, §§ 49 f., and Exhibit C-23). The Claimant contends therefore that this amount would be a lost profit, which the Respondent would have to compensate as a consequence of its failure to perform the contract properly.

67. In their successive replies/rebuttals (see above, Respondent's Counterclaims), [redacted] submitted a counterclaim in the amount of CAD 347'471,91 for the expenses and costs incurred by them in connection with the storage of the Equipment for nearly 16 years (July 1992 to March 2008), the various successive inspections which were carried out and the preservation measures which had to be taken during that time, etc.

68. The Respondent has produced in this respect Exhibit R-140, as well as Exhibits R-148 to R-363. In substance, Exhibit R-140, as commented by the Respondent in paragraphs 78 and 79 on pp. 19 f. of its Detailed Submission dated 10 July 2012, is a summary of all costs/expenses incurred by [redacted] in relation to the [redacted] project, while Exhibits R-148 to R-363, filed together with the Respondent's Production Brief submitted on 28 February 2013, provide detailed documentary evidence supporting each of the items listed in § 78 of its 10 July 2012 Detailed Submission. The correctness of the figures shown in Exhibit R-140 and in paragraphs 78 and 79 of the Respondent's 10 July 2012 Detailed Submission has been confirmed by Mr [redacted] (Minutes 2012, p. 779, line 2, to p. 781, line 2).

69. The summary of costs to be found in paragraphs 78 and 79 of the Respondent's 10 July 2012 Detailed Submission shows a balance of CAD 347'472 in favour of [redacted]. Mr [redacted] has confirmed, at the October 2012 Evidentiary Hearing, that the amount [redacted] would be seeking to recover in the present proceedings would in fact be CAD 347'472 less the amount of CAD 73'190,86 paid to [redacted] by [redacted]. for the scrap value of the metal, i.e. a total amount of CAD 274'281,10 (Minutes 2012, p. 781, lines 15-17, and p. 784, lines 2-7). In

light of the calculation shown on p. 34, § 82, of the Respondent's Post-Hearing Brief, the figure of CDN 347'472 already includes the deduction of CAD 73'190,86, so that the confirmation given by Mr [redacted] during his testimony in October 2012 must obviously have been a mistake.

IV. LEGAL DISCUSSION

1. AGREEMENT TO ARBITRATE AND JURISDICTION OF THE ARBITRAL TRIBUNAL

70. Both Parties refer to Article 9 of their Contract dated 11 January 1991 (Exhibit C-2/R-3), which provides the following:

"In case of any dispute in connection with this Contract the parties shall make effort to settle it in a friendly manner. Should the parties not succeed in reaching an agreement, disputes shall be finally settled by arbitration under the Rules of the International Chamber of Commerce Court of Arbitration, through 3 (three) arbiters appointed in accordance with these Rules. Any such arbitration proceedings shall be held in Paris, France and conducted in English language".

71. None of the Parties has challenged the jurisdiction of the Arbitral Tribunal. The jurisdictional objections raised initially by the Respondent as to the Claimant's alleged lack of legal standing have been withdrawn, and the agreement of the Parties in this respect has been communicated to the Arbitral Tribunal on 10 April 2012 (see above, Procedural history, p. 8).

2. PLACE OF ARBITRATION AND APPLICABLE LAW

72. Pursuant to Article 9 of the Contract (Exhibit C-2/R-3), the place of arbitration is Paris (France), and "*the legal relations between the parties hereto shall be determined in accordance with the Swiss Codes of Obligations"* (sic).

3. THE PARTIES' CLAIMS

A. THE CLAIMANT'S CONTENTIONS AND CLAIMS

73. As a consequence of the fact that the Respondent did not deliver the Equipment for which it had received 90% of the agreed contract price, the Claimant is seeking the payment of the amount of CAD 3'042'000, which has been paid in six instalments between February 1991 and February 1992 (Detailed Submission on the Merits, 8 June 2012, §§ 46 ff.; Claimant's Post-Hearing Brief, § 47), as well as damages in the amount of USD 2'523'633 as a compensation of the profits which the Respondent's alleged non-performance of the contract would have prevented the Claimant from realising (see above § 66).

74. The Arbitral Tribunal concludes from the (relatively limited) legal arguments to be found in the Claimant's written submissions that the basis for the payment sought would be Article 62 of the Swiss Code of Obligations (CO), together with Article 97 CO and 99 CO (see Detailed Submission on the Merits, 8 June 2012, § 46).

75. The Respondent, while it confirms that the contract price of CAD 3'042'000 was effectively paid by [redacted] (see in particular Exhibit R-140), contends in substance that (see Respondent's Post-Hearing Brief, §§ 137-147) :

a. The legal grounds on which [redacted] is advancing its claims would not have been clearly enunciated;

b. [redacted] would not have established that the requirements of Art. 97 CO would have been met;

c. [redacted] would have failed to substantiate the basis on which it was claiming its alleged lost profits, which, in [redacted]'s opinion, would be a mere estimate based on undisclosed assumptions, which would not be sufficient under Swiss law;

d. [redacted]'s claims for damages under Art. 97 CO would be time bared, either in 2002 or alternatively 2007;

e. Any claim of [redacted] for the repayment of the price based on unjust enrichment, on the basis of Art. 376 (1) CO and 119 (2) CO together with Art. 62 CO, would be time barred in 2005, i.e. one year after [redacted] would have become aware, around March 2004, of the existence of its claim for price repayment (Art. 67 CO).

f. Should [redacted] contend that it was forced to sign ML2, [redacted] would not have rescinded ML2 within the one-year period prescribed in Art. 31 (1) CO.

76. **The Arbitral Tribunal's findings are the following**.

77. The Contract between [redacted] and [redacted] (Exhibit C-2/R-3), as amended by ML1 and then ML2, is to be characterised under Swiss law as a "construction/work contract" (*Werkvertrag/contrat d'entreprise*) within the meaning of Art. 363 ff. CO, pursuant to which - as it is clearly materialised by Art. 1, 2 and 3 of the Contract and its Annex II (Exhibit C-4) - the contractor (i.e. [redacted]) has obligated itself to produce (along the lines of Annex II) a work (i.e. the reactors and baffles described in Art. 1 of the Contract) in exchange for a compensation (i.e. the price referred to in Art. 2 and 3 of the Contract) which the principal (i.e. [redacted]) has committed itself to pay (see Commentaire Romand du Code des Obligations, tome I, 2nd ed. 2012, Chaix, Art. 363 CO, N 1-8; Tercier/Favre/Carron, Les contrats spéciaux, 4th 2009, §§ 4204-4227 and 4232 ff.).

78. This legal characterisation is also the one used and referred to by the Respondent (see RDS, § 82; Respondent's Post-Hearing Brief, §§ 96-98, 100, 111, 113, 120, 122, 125-132), and by the Claimant (Claimant's Post-Hearing Brief, § 7), which never contested the Respondent's characterisation.

79. Under Swiss law (as in most European civil law systems), the construction contract is made basically of two main obligations of the contractor, which are (1) to produce and (2) to deliver a certain item/construction/piece of work. The construction contract thus obliges the contractor to deliver to the principal the result of its production activity (obligation de résultat) (Tercier/Favre/Carron, §§ 4232 ff.).

80. The parties are at liberty to agree on a delivery date (Art. 75 CO). In the present matter, they first agreed on a delivery "*by the end of March 1992*" (Exhibit C-2/R-3, Art. 4.1). They then agreed in ML1, dated 20 May 1991, on a first postponement of the delivery date until the end of May 1992 (above, §§ 5 and 9, and Exhibit C-7/R-4), and subsequently, in April 1992, on a second postponement until the end of July 1992 (above, §§ 6 and 12, and Exhibits C-8/R-5 and R-6).

81. [redacted] contends (Claimant's Post-Hearing Brief, §§ 14-18, pp. 8-11) that the postponement to the end of July 1992 would have been the consequence of [redacted]'s shortcomings and delays, but that [redacted] would have had no choice but to accept the new delivery date. If [redacted] were in delay, [redacted] had, as rightfully contended by [redacted] (Respondent's Post-Hearing Brief, §§ 100 ff.), the following possibilities/remedies under Swiss law:

a. They could have withdrawn from the contract pursuant to Art. 366 CO;

b. They could also have refused any time extension of the final delivery date, so that [redacted] - should they not have been able to meet the agreed contractual deadline of ML 1 (i.e. end of May 1992) - would have been in default pursuant to Art. 102 CO ff., and [redacted] would then have had the remedies provided for by Art. 107 (2) CO after having put [redacted] on qualified noticed.

82. In light of the evidence produced by the Parties,

a. it is a fact that [redacted] did not make use of its rights under Art. 366 CO,

b. [redacted] did not put [redacted] on notice throughout the entire production process,

c. [redacted] did not make any reservation whatsoever as to their right to be fully indemnified in case of late performance. In particular, Exhibits R-8, R-9 and R-10 do not contain any reservation of rights to claim compensation/damages and confirm expressly that the postponement would not entail any interest charges.

As already stated above (§ 13), [redacted]'s acceptance on 20 April 1992 of the postponement of the delivery date to end of July 1992 (Exhibit R-6) does not reflect any intention of [redacted] to blame [redacted], nor to make it responsible for the delay/time extension. Under these circumstances, by agreeing as they did on the delivery date extension until the end of July 1992, without any sort of reservation and before the previous delivery time had ever elapsed, [redacted] must be regarded under Swiss law as having waived any remedies or rights they would possibly have had against [redacted] as a consequence of possible delays or failures of [redacted]. After having agreed as they did and without any sort of reservation on the delivery date extension until the end of July 1992, [redacted] could not today attempt to avail themselves of alleged shortcomings and delays of [redacted]: such a contradictory attitude would not be protected by Swiss law, as it would be a so called *venire contra factum proprium*, which is prohibited by the rules of good faith (art. 2 (2) of the Civil Code; see in particular CR CC I – Chappuis, Art. 2 CC N. 33 and 36). In this perspective, a party will violate the principle of good faith under Article 2 CC and thus commit an abuse of right in the event that that party's behaviour is in blatant disregard of its previous conduct (see ATF 106 II 320 in JT 1982 II 115 ; ATF 108 II 523 in JT 1984 I 627 ; ATF 120 II 302 in JT 1995 I 562 ; ATF 121 III 350 in JT 1996 I 187 ; ATF 133 I 149 in SJ 2007 I 421).

83. In the same context, it is also the Arbitral Tribunal's considered opinion in light of the findings made above (§ 13) that the tone and wording of [redacted]'s 1 April 1992 letter (Exhibit C-8/R-5) suggest very clearly that [redacted] was not blaming [redacted], nor making [redacted] responsible for the extension until end of July 1992. As already analysed above (§ 13), the correspondence exchanged between the Parties around and after 1 April 1992 in connection with this time extension does basically not indicate that [redacted] would have been significantly late in their answers to [redacted]. On the contrary, [redacted]'s tone and apologies in Exhibit R-5, as well as the gratitude which [redacted] is extending to [redacted]'s engineering department "*for their assistance and input throughout the engineering phase*" (Exhibit R-5, 2nd paragraph) tend to indicate that the postponement until end of July was obviously not the consequence of any particular delay/failure on [redacted]'s part. In this respect, the Arbitral tribunal is of the opinion that the oral testimonies and witness statements produced by both parties after the crystallisation of the dispute have significantly less evidentiary weight than the letters and documents exchanged in good faith between the parties around and shortly after 1 April 1992.

84. On 30 May/3 June 1992, the UN Sanctions were implemented in Canada (above, §§ 16 ff. Exhibits R-13 and R-14). In this respect, [redacted] is contending in substance that:

a. in light of the wording of the Canadian embargo decision (Exhibits R- 13 and R-14), only the export to Yugoslavia would have been prohibited, so that [redacted] would not have

been prevented from manufacturing/completing the manufacture of the Equipment (Claimant's Post-Hearing Brief, §§ 21-22). [redacted] submits in this respect that option 2 of [redacted]'s 15 June 1992 proposal (Exhibit R-16) to continue with the manufacture of the Equipment and then to wait for the lifting of the export ban is a clear evidence that (1) manufacture would not have been forbidden and (2) [redacted] would have been perfectly aware of it (Claimant's Post-Hearing Brief, § 34).

b. [redacted], who would not have been able to fabricate the Equipment in compliance with the technical specifications and time requirements of the contract, would have been fully aware (as most of the business people worldwide), approximately three months in advance, of the forthcoming UN sanctions against Yugoslavia, and would have used them as an excuse for their inability to complete and ship the Equipment. In this context and to this effect [redacted] has applied for an export permit one day before the adoption of the UN embargo, knowing perfectly well that it would be refused, and that this refusal would therefore provide an indisputable excuse for [redacted]'s inability to complete the job (Claimant's Post-Hearing Brief, §§19-22).

c. In fact no prohibition to manufacture was ever notified to [redacted] under the Canadian embargo, at least until [redacted]'s applications (Exhibits R-21 and R-146) to complete fabrication were rejected on 16 October 1992 (Exhibit R-25 – see above, § 28 – Claimant's Post-Hearing Brief, pp. 15 and 23).

d. Despite the absence of any such prohibition to manufacture, [redacted] decided unilaterally to stop the production in June-July 1992, although they had taken the commitment towards [redacted] to continue/complete the manufacture of the Equipment in order to be ready to ship once the embargo would be lifted (Exhibit R-16; above, § 27; see also Claimant's Post-Hearing Brief, §§ 21-24, and § 29);

e. This interruption, which was decided unilaterally by Mr [redacted] Sr., was in fact not a consequence of the embargo, which did not impose any production ban, but rather the result of the advice given to [redacted] by their bankers (above, §§ 24 and 27; Claimant's Post-Hearing Brief, § 30).

f. [redacted] would not have been informed of this interruption/demobilisation before October 1992 (Claimant's Post-Hearing Brief, § 29).

g. All this amounts to a breach of [redacted]'s basic duties under the contract and more particularly of [redacted]'s duty to behave in compliance with the general rules of good faith (Art. 2 (1) of the Civil Code – see Claimant's Post-Hearing Brief, §§ 4 ff., 16 ff., 22 ff., 31-33, 34, 36).

85. In light of the evidence given by Mr [redacted], the Arbitral Tribunal has come to the conclusion that, while there was probably a more precise awareness in Europe of the risk of concrete sanctions being taken against Yugoslavia in a very close future, the awareness of that risk/threat was obviously not as acute in Canada and the US, until the sanctions were effectively enacted and communicated by the UN and/or the States participating in the sanction programme (Minutes 2012, p. 867, lines 15-24; p. 868, lines 14-16). Mr [redacted] testified in this respect that, in spite of his functions and missions in and/or for the Canadian Government, he would personally not have had any specific knowledge or information about the UN Resolution 757, which imposed the sanctions, before June 1992 (Minutes 2012, p. 866, line 12, to p. p. 867, line 24). There was seemingly a global awareness that things were disintegrating and more difficult but not impossible, "*it had not reached the breaking point*" (Minutes 2012, pp. 909-910). The Arbitral tribunal therefore holds that the sanctions which were actually taken by the UN and more particularly by Canada in May-June 1992 against

Yugoslavia were basically not as predictable in North America as they would probably have been in Europe. As a consequence thereof, in the absence of any evidence to the contrary, it cannot be held that [redacted] could have predicted, or would have known the issuance of the UN and/or Canadian embargoes against Yugoslavia. Correlatively, in the absence of any evidence to the contrary, the Claimant's contentions in §§ 19-22 of its Post-Hearing Brief cannot be followed, and it cannot be held in particular that [redacted], when applying for the export permit on 29 May 1992, or when asking [redacted] for a postponement of the delivery term in April 1992, would have known about the forthcoming UN/Canadian sanctions (or the likelihood of their adoption), and that they would have therefore, knowingly and in bad faith, created a situation to hide their own alleged shortcomings and/or inability to produce behind the screen of the UN/Canadian embargoes. It must be noted furthermore that the export permit applied for by [redacted] was compulsory, for the reasons explained in particular by Mr [redacted] (Minutes 2012, p. 854, line 1, to p. 867, line 11). [redacted]'s witness Mr [redacted] explained plausibly in this respect that [redacted] decided to make the application as early as possible, even though the delivery was planned for the end of July, as the Canadian administration was known to be rather slow in responding (see above, § 16).

86. It is also a fact that, according to the record of these proceedings, [redacted], which was based in Yugoslavia, did apparently not object to the postponements asked for by [redacted], although the proposed new delivery dates might have resulted in a conflict with possible sanctions. This might be an additional indication that the public and the business community, even in Yugoslavia, might not have been that much concerned by the likelihood of these sanctions. Additionally, if everybody worldwide including [redacted] was actually aware of the imminence of the sanctions, as [redacted] affirms it in particular in its Post-Hearing Brief on p. 10, the fact that [redacted] did not object to the postponements asked for by [redacted] would render the issue moot.

87. The Arbitral tribunal holds furthermore that the wording used in the Canadian decree ordering the embargo also extended to the manufacturing, and would not be limited to the export or the import. This was confirmed in the decision rendered by the Canadian Department of External affairs on 16 October 1992, rejecting [redacted]'s applications to be permitted to complete fabrication of the Equipment (Exhibit R-22, with ref. to Exhibit R-21 and R-146; see above § 28, and Minutes 2012, p. 887, line 25, to p. 888, line 4). This was also confirmed by Mr. [redacted] on cross-examination (Minutes 2012, p. 871, lines 9-12). His understanding of the embargo, which was a trade, financial and air embargo, was that it would capture the supply, the fabrication and the delivery of goods (Minutes 2012, p. 876, line 19, to p. 878, line 1). This is why, in his analysis, [redacted]'s request to be permitted to continue fabrication was impossible (Minutes 2012, p. 882, lines 7-13) and therefore ultimately rejected. Thus, the Arbitral tribunal understands that the Canadian embargo (Exhibit R-14), given its broad wording, was effectively, and had to be understood as, a full embargo on any sort of trade activity in favour of Yugoslavia/Yugoslav entities, including the manufacture of goods.

88. Thus, the Arbitral tribunal also holds that, in light of the broad wording of the Canadian Embargo (Exhibit R-14) - which, as explained by Mr. [redacted], was a trade, financial and air embargo (see above, § 86) - it was reasonable for any prudent business person in Canada to assume/understand that the trade embargo decided by the Canadian government pursuant to the UN Resolution 757 would also encompass the fabrication of goods, even though the terms fabrication, manufacture or production were not expressly mentioned in the text of the relevant governmental decree. This might all the more have been the case of [redacted], as they had already received from the Canadian External Affairs a refusal of their export application of 29 May 1992 (Exhibit R-11), which described expressly in its column 3 that their task was "*to supply and fabricate PVC reactor Vessels…*". Therefore, under all the circumstances referred to here and in the preceding paragraphs, and in light of how the Canadian embargo was

effectively enforced and applied in the present case, it is the Arbitral tribunal's considered opinion that the way [redacted], in July 1992, obviously understood the Canadian embargo to also possibly include a prohibition to manufacture cannot be regarded as a negligence/fault on the part of [redacted], nor as a breach of their contractual duties towards [redacted], and [redacted] cannot be blamed for having acted/reacted as any reasonably prudent business person or entity would have reacted under similar circumstances during that period of uncertainty, bearing in mind that an infringer of the embargo might have been exposed to sanctions, in particular imprisonment (Minutes 2012, p. 873, line 4, to p. 876, line 1; Exhibit R-14, Section 13).

89. Therefore, [redacted]'s decision, between end of June 1992 and sometime in July 1992, to demobilise progressively and "ramp down" (see above, §§ 24 to 27) has to be regarded as legitimate under the circumstances and fully justified and exclusively caused by the embargo imposed by the Canadian Government.

90. It is not clear whether [redacted]'s decision to demobilise was communicated to [redacted]. It was obviously not communicated to [redacted] by Mr [redacted] (Senior) himself or by Mr [redacted]. Mr [redacted] believed he did, but had no precise recollection on that point (see above, § 26). [redacted] contends that it was not communicated before October 1992 (see above, § 84 [f]). The Arbitral tribunal is of the opinion that this issue may remain open, as it has obviously no relevance in light of the claims made by [redacted]. It is a fact that the interruption and subsequent demobilisation were the direct consequences of the embargo, which shall be regarded as a case of *force majeure* (see following paragraph), i.e. an excuse for [redacted]'s interruption of performance. In this context, [redacted] has neither alleged, nor evidenced that the alleged absence of information about the demobilisation would have caused any sort of harm, and no specific relief has ever been sought in this respect.

91. The embargo imposed by Canada as a consequence of the UN Sanctions (Resolution 757) is to be regarded as a case of *force majeure* within the ambit of Art. 8 of the Contract. It is indeed an "*act of civil authority (…) beyond the reasonable control of the contracting parties … [which has arisen] after coming into force of this Contract and prevent totally the carrying out of the contractual obligations*" (see Exhibit C-2/R-3, Art. 8 [1]). This definition and its legal consequences are in line with, and fully admissible under, Swiss law (see Chappuis/Marchand/Meakin, *in* Recueil de Contrats Commerciaux, 2013, pp. 36-37, NN 9.2 and 9.7; Marchand, Clauses Contractuelles, 2008, pp. 206 f.).

92. The consequence of the embargo was, as expressly specified by Art. 8 (1) *in fine* of the Contract, that the time for the fulfilment of the obligations affected by the force majeure would be extended for the period of the obstacle.

93. The embargo/sanctions were lifted in January 1996 (see above, §§ 33-35).

94. As far as the period of the embargo is concerned (i.e. June 1992 – January 1996), the Arbitral tribunal has made the following findings.

95. At the very early stage of the embargo, [redacted] offered in substance to [redacted], in option 2 of its letter dated 15 June 1992 (Exhibit R-16), to complete the manufacture so as to be ready to ship the Equipment immediately once the sanctions would be lifted, and then to store the Equipment at [redacted]'s facility at no cost to [redacted], should the sanctions still be in force when the manufacture would be completed. The Arbitral tribunal concludes from the letters exchanged by the Parties during the second half-part of June 1992 that there was a basic understanding between them that they would pursue along the lines of option 2 (see above, §§ 18-23), and that one of the basics of this understanding was that [redacted] would store the Equipment for [redacted] at [redacted]'s premises at no additional cost for [redacted]. This understanding, which may be regarded

under Swiss law as an agreement (art. 1 (1) CO), created for [redacted] a good faith expectation that the Equipment would be stored for them at no extra cost.

96. In the Arbitral tribunal's view, the Parties' attempt, during the embargo's time, to have the entire deal re-directed on another buyer outside Yugoslavia, first a Romanian company called [redacted] and then another [redacted]-company, namely the German [redacted]-Trade, in Frankfurt (see above, § 34 and the relevant exhibits) does not have any particular relevance for the outcome of the present dispute as it never materialised.

97. Similarly, the degree of completion of the Equipment at the time the embargo was imposed on 3 June 1992 is of no relevance, for the following reasons

- The Parties had expressly agreed on 1 April 1992 on a postponed delivery date to the end of July 1992 (Exhibit C-8/R-5);
- [redacted] had furthermore accepted in advance, on 5 June 1992 (Exhibit R-7), another postponement of the completion date beyond end of July 1992 as the consequence of the manholes issue (see above, § 15).

Thus, in the absence in the record of any binding manufacturing schedule and/or any reference to binding production milestones, and despite Mr [redacted] statement that there would have been production schedules (Minutes 2012, p. 515, lines 8 to 19), the Arbitral tribunal is of the considered opinion

a. that [redacted] was only bound to deliver the Equipment to [redacted] on the agreed final completion/delivery date, and was correlatively free to organise and schedule its production activities and pace;

b. that there were accordingly no binding milestones at which a certain level/degree of completion had to be completed; and

c. that the level of completion at the time of the embargo – which can reasonably be estimated at roughly 65-70% (see above, §§ 31-32) – has no particular legal relevance, even if [redacted] contends today that [redacted] would have been particularly late, or would have failed to provide timely their fabrication schedules (see above, § 7, and Claimant's Post-Hearing Brief § 14, p. 9). Indeed, as already explained (see above, § 82), the way [redacted] agreed on the successive postponements of the final delivery date, without any reservation whatsoever as to possible delays or failures on the part of [redacted], must be regarded under Swiss law as a waiver by [redacted] of any remedies or rights they would possibly have had as a consequence of any possible delay/failure of [redacted].

98. After the embargo was lifted in January/February 1996, the Parties entered into negotiations to complete the manufacture of the Equipment (see above, §§ 35 ff.). After roughly one year, the Parties signed ML 2 (Exhibits C-18, R-98 and R-99). In this respect, [redacted] contends that the version of this letter which is attached to Exhibit R-99 would have "*never come into legal force*" (Claimant's Post-Hearing Brief, § 39, p. 29), because in substance certain words in Art. 3 would have been crossed out unilaterally by [redacted] after [redacted] had signed it.

As recapitulated above (§§ 38 and 39), the history of the discussions surrounding ML2 was as follows.

On 5 March 1997, [redacted] returned to [redacted] a signed copy of ML2, together with a short cover letter of the same date highlighting one additional amendment (i.e. the specification of the full contract price in article 3, last item – see Exhibit R-98). [redacted] replied on 11 March 1997 (Exhibit R-99) that the amendment proposed by [redacted] was accepted, and made moreover two other changes to the copy already signed by [redacted], namely:

a. Under the "terms of payment" (art. 3), the payment condition that [redacted] presents a "*final inspection certificate signed by both contracting parties*" (emphasis added) was replaced by the requirement that [redacted] presents a "*final inspection certificate*", the rationale of this amendment being, according to [redacted], to align it on the mechanism provided for in article 7.3 of the original January 1991 contract;

b. In article 4, the delivery terms were specified/clarified through the addition of the words "*ex works, delivered*".

On 2 April 1997, [redacted] replied that they agreed "*with article 7.3 in full of original contract*", as well as with the amendment made in article 4 (Exhibit R-101).

Art. 7.3 of the original contract (Exhibit C-2/R-3) referred to by both [redacted] and [redacted] has to be read in conjunction with Art. 7.2, which provided (a) for a final inspection of the Equipment to be carried out in the presence of [redacted]'s representative, and (b) for the issuance of an inspection report (or certificate) to be signed by both parties, which had then to be presented by [redacted] together with other documents to obtain the payment of the last tranche of the price (Art. 3.3). In this context, Art. 7.3 allowed for a unilateral inspection by [redacted] only, should [redacted] not be able to participate in the joint inspection and the joint establishment/signature of the inspection certificate.

The Arbitral tribunal concludes from the explanations given by [redacted] on p. 29 of its Post-Hearing Brief that it was of crucial importance for them to have a representative attending the final inspection of the Equipment. The Arbitral tribunal assumes and understands that this crucial importance was properly reflected in [redacted]'s agreement on 2 April 1997 "*with article 7.3 in full of original contract*", by which [redacted] agreed (a) with the basic rule of Art. 7.2 providing for the joint inspection of the Equipment, and the joint signature of the inspection certificate by both parties, and (b) with the exceptional inspection mechanism pursuant to which [redacted] could (1) carry out the inspection alone and (2) correlatively present for payment collection an inspection certificate signed only by [redacted].

The Arbitral tribunal holds that this mechanism, which was suitable for [redacted] and therefore accepted by them, was exactly the same mechanism as the one proposed by [redacted] in their 11 March 1997 amendment (Exhibit R-99). In other words, [redacted]'s intention, as expressed in their approval of 2 April 1997, matched fully [redacted]'s intention, so that the acceptance confirmed by [redacted] on 2 April 1997 is to be regarded as a final and binding acceptance of ML2 as amended by [redacted] on 11 March 1997. ML2 in the version which is attached to Exhibit R-99 is therefore final and binding upon the parties (art. 1 (1) CO). [redacted]'s contentions (Claimant's Post-Hearing Brief § 39, pp. 29 and 30) that this version "*could have never come into legal force nor produced legal effects*" and that ML2 "*was not and could not have never been legally binding*" shall therefore be disregarded. This is all the more true as [redacted] has confirmed on several occasions after April 1997 that they were working towards the opening of the L/C expressly referred to in ML2 (see above § 41 and Exhibits R-82, R-90, R-93, R-98 and R-101). Thus, the way [redacted] acted and behaved after their 2 April 1997 letter is a confirmation that they considered themselves validly bound by ML2, as amended on 5 March 1997.

99. [redacted] contends furthermore that they would have been forced to sign ML2 (Claimant's Post-Hearing Brief, § 39, p. 29). It is not fully clear whether this contention should mean that ML2 has to be regarded as invalid because of unconscionability within the meaning of Art. 21 CO. Should this be meant by [redacted], it would have been for them to rescind ML2 within one year from its date of signature, i.e. until April 1998 (see Art. 21 (1) and (2) CO). There is no element in the file which suggests that this would have been done by [redacted]. ML2, in its 5

March 1997 version appended to Exhibit R-99, shall therefore be regarded as validly binding upon the parties.

100. As stated above, § 35, ML 2 obliged [redacted] to put in place an irrevocable letter of credit in favour of [redacted] in the amount of CAD 985'442. As shown in various documents referred to above, [redacted] was asked on numerous occasions to open this L/C, and they confirmed regularly that they were working towards the opening of the L/C. However, despite these efforts of [redacted], the L/C which [redacted] had committed itself to put in place pursuant to article 3 of ML2 was never, or could never be, issued between January 1997 and January 1999 (see § 41 and the relevant exhibits).

101. [redacted] has stated that [redacted] would not have provided the performance bond as they would have been obliged to pursuant to the last bullet of Art. 3 of ML 2 (see Claimant's Post-Hearing Brief, § 38, p. 27, § 39, p. 29, and §41). It is not fully clear whether [redacted] considers (or considered) that the performance bond referred to in the last bullet of Art. 3 of ML 2 had to be put in place and presented by [redacted] before [redacted] had to issue its own irrevocable L/C for the payment of the balance of the price. Be it as it may, the Arbitral tribunal deems it appropriate to confirm that, pursuant to the clear wording of Art. 3 of ML 2, the issuance of a performance bond by [redacted] was obviously not conceived by the parties as a prerequisite to [redacted]'s opening of their irrevocable L/C, but as one of the conditions under which the L/C, once opened by [redacted], would be payable to [redacted] upon shipment of the Equipment. Indeed, pursuant to Art. 4 of ML 2, shipment of the Equipment would take place 30 weeks "*after receipt of Letter of Credit*". It flows thus from the clear wording and structure of ML 2 that the irrevocable letter of credit to be opened by [redacted] had to be put in place 30 weeks before shipment, while [redacted]'s performance bond would only be required upon shipment. Therefore, as [redacted]'s L/C could never be opened/issued, shipment did never take place and [redacted] can accordingly not be blamed for not having issued and presented a performance bond pursuant to art. 3 of ML 2.

102. [redacted] also contends that [redacted] would have breached their obligations to provide a standby letter of credit, despite several reminders and requests of [redacted] (see Claimant's Post-Hearing Brief, § 38, p. 27 with further ref., and § 41; see also above, § 40; Witness Statement of Ms [redacted], last page). It is a fact that ML 2, as signed by both Parties, did not impose on [redacted] to provide a standby letter of credit in favour of [redacted] which would have been similar to those required in art. 3.1 and 3.2 of the original January 1991 contract, or Art. 3.3 to 3.6 of ML1. There was, however, an obligation on [redacted] pursuant to Art. 8 of the original contract (Exhibit C-2/R-3) to extend the validity of the standby L/Cs in a case of *force majeure*, in order to match the postponement of the "*Contract schedule date*" which would be imposed by such a force majeure. During the time of the UN Sanctions, [redacted] should therefore have sought an extension of the standby L/Cs which it had opened in conformity with Art. 3.1 to 3.6 of the original contract and/or ML1. It is however the Arbitral tribunal's considered opinion that such an extension would have been prohibited by Art. 6.3 of the Canadian Resolution as long as the embargo was in force (Exhibit R-13). Once the embargo was lifted, [redacted] has obviously asked [redacted] on various occasions (see above, § 40) to "re-issue" or "re-activate" a standby L/C. Despite these reminders, [redacted] did nevertheless not make their signing of ML2 conditional upon the issuance by [redacted] of such a standby L/C, and [redacted] signed eventually ML2 without any reservation whatsoever as to the absence/non-reissuance of a standby L/C. Therefore, the Arbitral tribunal holds that, under these circumstances and pursuant to the rules of good faith which govern contract interpretation under Swiss law, [redacted] was entitled to understand [redacted]'s attitude as meaning that the reissuance, reactivation or extension by [redacted] of a standby L/C was no longer an issue for [redacted] and was therefore no longer required.

103. It seems that the issuance by [redacted] of the required L/C would no longer have been possible after the NATO bombings (see above, § 43), which obviously affected heavily the financial/economic structure of Yugoslavia. The Arbitral tribunal holds that the NATO bombings were another event of *force majeure* within the meaning of Art. 8 of the contract (Exhibit C-2/R-3). In light of the evidence produced, it appears that [redacted] never notified [redacted] about the beginning and the end of this event.

104. The Arbitral tribunal holds furthermore that the decision to sell the Equipment as scrap metal was taken without any approval of [redacted] (see above, § 55). Indeed, [redacted] decided unilaterally to dispose of the Equipment (see Respondent's Post-Hearing Brief, § 84), to ship it via [redacted] (Exhibits R-116-127) and to sell it as scrap metal to [redacted]. for an aggregate amount of CAD 73'190,86. This sale took place in March 2008, and the amount of CAD 73'190,86 was never remitted to [redacted] (see above, §§ 56-60). The Arbitral tribunal holds that [redacted]'s allegation that the Equipment would have been sold for an amount of roughly CAD 1'000'000 has not been satisfactorily substantiated and evidenced. The evidence given by Mrs. [redacted] in this respect is based on hearsay, and she did not generally have direct evidence and/or personal or first-hand knowledge of the facts she testified about. As far as her assessment of the vessels' (scrap) condition is concerned, she never inspected personally the vessels, nor did she perform any tests, or conduct any analysis whatsoever of the vessels' condition, before expressing her opinion on the status and value of the vessels. Furthermore she did not have any technical knowledge or qualifications, nor did she possess any work experience in respect of the fabrication and use of pressure vessels, on the basis of which she would have been able to reliably assess the status of the Equipment before it was sold as scrap metal (see above, §§ 61-64). Therefore, her testimony cannot be given any particular evidentiary value.

105. The reason for the sale was mainly:

    a. [redacted]'s assessment that the Equipment would have reached a level of deterioration where it could no longer be restored in a way which would allow the Equipment to satisfy the required safety standards (see Respondent's Post-Hearing Brief, § 78; see above § 48 and Exhibit C-19);

    b. The necessity for [redacted] to get space in its yard for other projects (see Respondent's Post-Hearing Brief, § 83 [d]).

106. The sale as scrap was contrary to [redacted]'s instructions. Indeed, the last communication of [redacted] in this respect was their letter of 16 July 2004 in reply to Exhibit C-19, in which [redacted] expressed their reluctance to sell the material as scrap metal, and asked [redacted] to assist them in finding companies which might be interested in acquiring the material for operational purposes other than using them as pressure vessels, such as pipeline companies (see above § 51 and Exhibit C-33). In light of the evidence produced, the Arbitral tribunal holds that there was no further communication between the Parties after [redacted]'s 16 July 2004 letter until 2010 (see above, § 52).

107. As a consequence of the *pacta sunt servanda* principle (which is the equivalent of the sanctity of contracts principle), the contractor (or the seller) has a duty under Swiss law to deliver to the principal (or the buyer) the equipment/items owed under the contract, and he may not dispose of them (see also Art. 363 CO). One exception is to be made where the principal/buyer is in a so-called *creditor (or obligee) default* (*Gläubigerverzug; demeure du créancier*) pursuant to Art. 91 to 96 CO, and the object - which cannot be delivered to the principal/buyer as a consequence of the latter's default - requires maintenance and/or a substantial expenditure for storage. In these cases the contractor may, subsequent to giving prior warning to the principal and with the authorisation of the judge, have the object publicly

sold and the proceeds of that public sale deposited in escrow (see Art. 93 (1) CO)[1]. [redacted]'s default as a creditor/obligee has been correctly addressed by [redacted](see Respondent's Post-Hearing Brief, § 120, with further references to Art. 91 to 96 CO): indeed, [redacted]did not open the required L/C (see § 41, 100 and 103), although this was a pre-requisite of the Equipment being shipped and delivered (see § 101 *in fine*). As a consequence thereof, [redacted], subsequent to giving prior warning to [redacted]and with the authorisation of the judge, would have been entitled to have the Equipment publicly sold and the proceeds of that public sale deposited in escrow, pursuant to Art. 93 (1) CO. However, in light of the evidence collected in the present matter, the Arbitral tribunal finds that the sale of the Equipment to [redacted]. was decided unilaterally by [redacted]in March 2008, with no prior warning given to [redacted] and no judicial authorisation.

108. Therefore, the sale of the Equipment by [redacted]in March 2008 was done in breach of their contractual duties under the original contract, as amended by ML1 and ML2. Moreover this sale of the Equipment made any delivery to [redacted]– and correlatively any final performance of the contract - definitively impossible. This impossibility is, in the Arbitral tribunal's analysis, attributable to [redacted].

109. This impossibility, however, did not put an end to the contract. [redacted]is nevertheless contending in substance (see Respondent's Post-Hearing Brief, §§ 121-123) that the contract would have already been terminated as early as in May of 2004, i.e. long time before the sale to [redacted]., as a consequence of the allegedly non-restorable level of deterioration (see above, §§ 49-50) which the Equipment had reached. [redacted]submits in this respect that, under Swiss law, the destruction of the "work" would put an end to the contract (Respondent's Post-Hearing Brief, § 122, with further legal ref.). [redacted]refers to Art. 376 (1) CO, which reads as follows: "*if the work is destroyed prior to the delivery by a fortuitous event, the contractor cannot demand compensation for his labour nor restitution of his expenditures (…)*". [redacted]'s analysis under Swiss law cannot be followed. Indeed, according to the most recent scholars, in particular Dr. François Chaix, Judge at the Swiss Federal Supreme Court and leading commentator on the construction contract in Swiss law, Art. 376 (1) CO does only apply to a quantitative (total or partial) destruction of the Equipment, and not to a qualitative deterioration (see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) - Chaix, Art. 376 CO, N. 5 with further ref. in footnote 8 to other recent commentators). On the basis of the evidence collected, it is the Arbitral tribunal's considered opinion that the Equipment was not quantitatively destroyed (or destructed), but was merely qualitatively deteriorated as a consequence of the passage of time. Therefore, contrary to what [redacted]is contending, the contract had not come to an end as a consequence of the Equipment's deterioration. As a further consequence of the foregoing, [redacted]cannot be followed when it states that the risk of destruction of the Equipment would have passed onto [redacted]pursuant to Art. 376 (1) CO *a contrario*, because [redacted]would have been in default as they failed to provide the new L/C (Respondent's Detailed Submission of 10 July 2012, p. 22, § 82 (f); Respondent's Post Hearing Brief, § 120). As already stated above, Art. 376 CO does only apply to a destruction of the goods, and not to deterioration of the kind observed in the present matter. Art. 376 (1) CO is therefore of no avail to the Respondent.

[1] Art. 93 (1) CO: "*If, due to the nature of the object, or due to the kind of business involved, a deposit is not appropriate, or if the object is perishable or requires maintenance, or a substantial expenditure for storage, an obligor may, subsequent to giving prior warning and with the authorisation of the judge, have the object publicly sold, and deposit the proceeds thereof*".

110. The contract thus remained in force beyond 2004, and was not terminated thereafter by either party (see Claimant's Post-Hearing Brief, § 46; Respondent's Post-Hearing Brief, §§ 80 and 81).

111. Through its unauthorised unilateral disposal of the Equipment, the Respondent has placed itself in a situation of definitive subjective incapacity to deliver the goods to [redacted] and consequently to properly perform the contract. This subjective incapacity is governed under Swiss law by the provisions on the debtor's default (*mora debitoris* – Art. 102 CO ff.; see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) - Thévenoz, Art. 102 CO, N 1; Vulliéty, Le transfert des risques dans les ventes internationales, 1998, § 2.34 with further ref.; Schönle, *in* Semaine Judiciaire 1977, p. 469). In this context, the definitive impossibility of performance induced by [redacted] unilateral disposal of the Equipment has to be regarded under Swiss contract law (see Art. 108 (1) CO) as a situation in which, as a consequence of its behaviour, [redacted] was - automatically and without any need to fix the additional time limit for performance required by Art. 107 (1) CO - in a so called "qualified" default (*qualifizierter Verzug; demeure qualifiée*) within the meaning of Art. 107 CO ff. (see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) -Thévenoz, Art. 108 N. 4).

112. As a consequence of [redacted]'s qualified default, [redacted] in their position as oblige/creditor had the choice between the remedies listed in Art. 107 (2) CO, namely:

    a. To seek specific performance and positive damages, i.e. a compensation aiming at replacing [redacted] into the financial/economic position which [redacted] would have been in if the contract had been properly performed (Art. 107 (2) CO, 1st option; see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) -Thévenoz, Art. 107 N. 26);

    b. To waive the right to claim specific performance but to keep the contract in force and claim exclusively positive damages (Art. 107 (2) CO, 2nd option - see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) -Thévenoz, Art. 107 N. 28 f.);

    c. To terminate the contract, reclaim whatever they would already have performed, and seek negative damages, i.e. the compensation of the harm suffered by [redacted] as a consequence of the contract coming to an end (Art. 107 (2) CO, 3rd option, and Art. 109 CO - see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) - Thévenoz, Art. 107 N. 36).

113. If the obligee is bound to fix an additional time for performance pursuant to Art. 107 (1) CO and no performance takes place at the expiration of this extended time limit, the obligee's/creditor's choice between the remedies listed in Art. 107 (2) CO must be expressed without delay upon the expiry of the additional time for performance (see Art. 107 (2) CO). Where there is no need to fix an additional time period for performance – as it is the case in the present matter because of [redacted]'s behaviour (see above, § 113, and Art. 108 (1) CO) – the obligee/creditor (here [redacted]) may express his/her choice at any time as long as the requirements of Art. 108 CO are met (see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) -Thévenoz, Art. 107 N. 20).

114. In the present matter, the sale by [redacted] to Cooper's Iron Metal Inc. created a definitive incapacity of [redacted] to perform the contract in favour of [redacted]. Consequently, this sale created a situation captured by Art. 108 (1) CO, the requirements of which are therefore met forever. [redacted] is therefore entitled to express at any time its choice in favour of one of the options of Art. 107 (2), with the exception of option 1 which would obviously and logically not make any sense.

115. The Arbitral tribunal is of the opinion that [redacted] made their choice in their Request for Arbitration of 22 September 2011. This Request, as amended by [redacted]'s Detailed Submission on Merits of 8 June 2012, is for the payment of CAD 3'042'000 representing the value paid for the Equipment, and USD 2'523'633 being the profit allegedly lost by [redacted] as a consequence of the fact that they could not have exploited the Equipment between 1 March 1996 and 15 April 1999.

116. By this relief, [redacted] did not clearly indicate whether they were choosing option 2 or option 3 of Art. 107 (2) CO. However, they are seeking the compensation of their allegedly lost profit, i.e. positive damages aiming at replacing [redacted] in the situation they would have been in if the Equipment had been properly delivered to them. That type of compensation for (positive) damages arising out of the non-performance of the contract falls precisely within the ambit of Art. 107 (2) CO, 2nd option, and can only be claimed if the contract is in force. According to the principle of trust (Art. 2 (1) CC; see also Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) - Thévenoz, Art. 107 N. 22), the relief sought by [redacted] must thus be understood as expressing their intention to choose option 2 of Art. 107 (2) CO, i.e.:

    a. to keep the contract in force,

    b. to have the specific delivery of the Equipment replaced by the payment of its counter-value (see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) - Thévenoz, Art. 107 N. 32),

    c. and to ask for positive damages within the meaning of Art. 107 (2) CO, 2nd option.

117. As regards [redacted]'s claim for lost profits (see above, § 66; [redacted]'s Detailed Submission on Merits, §§ 49-50 and Exhibit C-23), the Arbitral tribunal holds that it is based on mere assumptions (see Exhibit C-23, page 1, last paragraph), which do objectively not satisfy the level of detail/substantiation required under Swiss law for the proof of damage (see Art. 42 CO, which is applicable to contractual liability via Art. 99 (3) CO; ATF 122 III 219, § 3a). In particular, the actual/effective quantities, the possible quantities, and the possible prices alleged by the authors of the report filed as Exhibit C-23 cannot be verified on the document, and could not be verified in the context of these proceedings, as the authors of the report were not produced as witnesses by [redacted] and could therefore not be examined by the arbitral tribunal and cross-examined by [redacted]. It is therefore the Arbitral tribunal's considered opinion that Exhibit C-23 shall not, and cannot be given any evidentiary weight whatsoever, so that the lost profit of USD 2'523'633 alleged and claimed by [redacted] shall be considered as not substantiated and not evidenced.

118. In the context of Art. 107 (2) CO, 2nd option, the party to a *synallagmatic* contract (as the one concluded between [redacted] and [redacted]) which has paid the price, or performed its part of the contract, is basically entitled, as a consequence of the mechanism of the *synallagma*, to receive its counterpart's consideration. If said consideration can no longer be offered *in natura specifica*, as it is the case here, the creditor who nevertheless keeps the contract in force pursuant to the 2nd option of Art. 107 (2) CO has the right to receive a monetary compensation, which takes the place of the specific performance (see Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) -Thévenoz, Art. 107 N. 32). This means in the present case that [redacted], which has paid CAD 3'042'000, i.e. 90% of the original Equipment price, is now entitled to receive either the corresponding Equipment – which is no longer possible (see above, §§ 113 and 116) - or its monetary equivalent in the form of damages. Their claim for the payment of CAD 3'042'000 is therefore basically well-founded.

119. As any claim for contractual damages under Swiss law, [redacted]'s claim for the payment of the monetary equivalent of the Equipment has to meet the requirements of Art. 97 (1) CO,

pursuant to which "*if the performance of an obligation cannot at all or not duly be effected, the obligor shall compensate for the damage arising therefrom, unless he proves that no fault at all is attributable to him*". Thus, Art. 97 (1) CO requires that the aggrieved party suffers a damage, *i.e.* a decrease of assets or an increase of liabilities, which has to be the natural and adequate consequence of a breach of its obligations by the other party, the fault of the latter being presumed (see Tercier/Pichonnaz, Le droit des obligations, 5th ed., 2012, §§ 1209 ff.). The breach of a duty has to be the natural cause, *i.e.* the *condictio sine qua non*, of the damage, as well as its *adequate* cause: a breach is the adequate cause of a damage under Swiss law and court practice when, according to the ordinary course of things and the general experience of life, the breach in question would generally be able to trigger an effect of the kind which happened effectively, so that this effect appears to be generally favoured by the breach (see Tercier/Pichonnaz, § 1225). The Arbitral tribunal holds in this respect that

a. the amount of CAD 3'042'000 has been effectively paid by [redacted];

b. despite this payment, no delivery of the Equipment took place, and such a delivery appears today to be definitively impossible, so that the amount of CAD 3'042'000 is effectively a loss (or a decrease of assets), i.e. a damage;

c. one of the natural and adequate causes (within the meaning set out above) of this definitive loss is the unauthorised unilateral disposal of the Equipment by [redacted], which overlooked that they had no entitlement and no right to dispose of the Equipment as they did, and committed thereby an objective breach of their contractual duties;

d. [redacted]'s fault is presumed.

120. However, it is also the Arbitral tribunal's considered opinion that [redacted]'s following behaviour (see also below, §§ 130-132) must also be taken into account in this context:

a. In connection with the negotiation and then the signing of ML2, they created and perpetuated, between the spring of 1996 and the NATO bombings in March 1999, a good faith expectation of [redacted] that the financing required for the completion of the work would be put in place (see above, § 41);

b. After the NATO bombings in June 1999, they perpetuated another similar good faith expectation of [redacted] by not informing them that, as a consequence of the NATO bombings, they were very likely no longer in a position to find the required financing (see above, § 103);

c. After July 2004, they did not contact [redacted] at all until 2010, leaving them with no information or directions whatsoever as to their intentions regarding the financing of the completion, the Equipment and what could/should be done with it (see above, §§ 52 ff.).

121. These behaviours have contributed significantly to extend by globally 9 to 10 years (or 55-60% on a total duration of approximately 16 years, computed from spring 1992 to spring 2008) the unclear/unsettled situation of the Equipment, so that it was eventually kept by [redacted] partially inside, partially outside for at least 12 years (between March 1996 and March 2008), and progressively deteriorated, up to a point where [redacted] assessed that it had to be scrapped. While [redacted]'s decision to scrap the Equipment was, under the circumstances described above, a breach of their contractual duties to [redacted] (see above, §§ 108, 111 ff.), [redacted]'s long lasting absence of communication, together with their numerous confirmations that the financing for the completion would be put in place, have significantly contributed to the creation of this dramatic situation in which [redacted] decided finally to dispose of the Equipment. Therefore,

pursuant to Art. 43 (1)[2] and 44 (1)[3] CO, which apply by analogy to contractual liability (Art. 99 (3)[4] CO), the Arbitral tribunal holds that these behaviours of [redacted] amount to concomitant faults within the meaning of Art. 44 (1) CO, on the basis of which the Arbitral tribunal determines, pursuant to its empowerment under Art. 4 CC[5] (see Commentaire Romand du Code des Obligations, tome I, 2nd ed. 2012, Werro, Art. 44 CO, N 2 and 3), that [redacted] shall bear between 55% and 60% - *i.e.* more precisely a proportion of 57,5 % - of their own damage, in order to reflect the abovementioned proportion of 55-60% of [redacted]'s own contribution to 16 years of unclear/unsettled situation of the Equipment.

122. [redacted]'s choice of option 2 of Art. 107 (2) CO was expressed for the first time in their Request for Arbitration, dated 22 September 2011. This is thus when their claims arising out of Art. 107 (2) CO, 2nd option, originated. The period of limitation of these claims is 10 years, pursuant to Art. 127 CO. The objection of [redacted] that [redacted]'s claims would be time barred (see Respondent's Post-Hearing Brief, §§ 140 ff.) is therefore unfounded.

B. THE RESPONDENT'S ENTITLEMENTS AND COUNTERCLAIMS

123. [redacted]'s counterclaim is for the payment of an aggregate amount of CAD 347'471,91, which is the negative (or uncovered balance) of the total amount spent by [redacted] on the project (CAD 3'462'662) after deduction of the price instalments paid by [redacted] (CAD 3'042'000) and the price received from [redacted]. for purchase of the Equipment as scrap metal (CAD 73'190,86).

124. [redacted] submits that these additional costs should be compensated on the basis of either Art. 373 (2) CO, or Art. 376 (3) CO (Respondent's Post Hearing Brief, §§ 111 and 125 ff.).

125. Relying alternatively on both provisions is basically contradictory. Indeed, Art. 376 CO applies to situations in which the Equipment is destroyed (and not simply qualitatively deteriorated – see above § 109), so that the contract/the completion of the work is impossible and can therefore simply not continue, whereas Art. 373 CO deals typically with situations of hardship, where the contract/its completion can basically still continue (Commentaire Romand du Code des Obligations, tome I (2nd. ed. 2012) – Chaix, Art. 373, N 22).

126. As already stated above (§ 109), Art. 376 CO does not apply to the present matter, as the Equipment has not been destroyed as the consequence of a fortuitous event. It has been the Arbitral tribunal's finding that the passing of the time has only contributed to deteriorate the Equipment, but deterioration is not enough for Art. 376 CO to apply, as destruction is clearly required (Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) Chaix, Art. 376 N 5, with further ref. to Gauch and Zindel/Pulver). As a further consequence thereof, sub-section 3 of Art. 376 CO does not apply either. Indeed, in light of its clear wording, Art. 376 (3) CO would only apply – like sub-section 1 – where the work has been destroyed, which again was not the case in the present matter. Furthermore, and contrary to what [redacted] is submitting (Respondent's Post Hearing Brief, § 127), the list of alternatives in Art. 376 (3)

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[2] Art. 43 (1) CO: "*the judge shall determine the nature and amount of compensation for the damage sustained, taking into account the circumstances as well as the degree of fault*".

[3] Art. 44 (1) CO: "*the judge may reduce or completely deny any liability for damages if the damaged party consented to the act causing the damage, or if circumstances for which he is responsible have caused or aggravated the damage, or have otherwise adversely affected the position of the person liable*".

[4] Art. 99 (3) CO: "*The provisions concerning the extent of liability in case of tort* [i.e. Art. 41 CO ff.] *also apply by analogy to acts in breach of contract*".

[5] Art. 4 CC: "*The judge applies the rules of law and equity whenever a statute grants him a power of appreciation or entitles him to decide* […] *on the basis of the circumstances*".

CO is exhaustive (Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) Chaix, Art. 376 N 21), and Art. 376 (3) CO cannot be understood as extending the liability of the principal to the consequences of all and any circumstances which would have happened in his/her sphere of influence (Commentaire Romand du Code des Obligations, tome I (2nd ed. 2012) Chaix, Art. 376 N 21). Thus, Art. 376 (3) CO cannot be the proper legal basis for any claim of the Respondent in the present matter, and all claims and submissions made by [redacted] pursuant to that provision (Respondent's Post Hearing Brief §§ 125 to 133) have therefore to be rejected.

127. Art. 373 (2) CO entitles a party to seek from the judge an order that the contract price be increased or alternatively that the contract be terminated, should extraordinary circumstances have impeded heavily the completion of the work or made it exceedingly difficult. The extraordinary circumstances contemplated by Art. 373 (2) CO are circumstances which could not have been foreseen by the parties, or which were excluded from the assumptions made by them (art. 373 (2) CO). Correlatively, Art. 373 (2) CO does not apply if the parties have regulated by themselves, or at least suggested avenues to regulate, the consequences of a disruption, either in their (original) contract of in any subsequent/side agreement.

128. The Arbitral tribunal is of the opinion that ML 2 is such a side/subsequent agreement which gives sufficient guidance as to how the parties themselves have re-organised their contractual relationship after the disruption caused by the UN/Canadian sanctions. It has not been alleged (by either party, and in particular by [redacted]) that ML2 would not have addressed comprehensively and satisfactorily all the consequences of the disruption caused by the UN/Canadian sanctions. Thus, there is basically no possibility and no ground to resort to Art. 373 (2) CO. The Arbitral tribunal understands that [redacted] shares apparently a similar approach (see Respondent's Post Hearing Brief, §§ 111 *in fine* and 112-113). The question is therefore whether [redacted] is entitled to make claims pursuant to ML 2, and if so, what sort of claims.

129. Art. 82 CO, which lays down under Swiss law the *exceptio non adimpleti contractus*, prevents [redacted] from claiming from [redacted] the full and specific performance of ML 2. Indeed, as a consequence of the unauthorised sale of the Equipment to [redacted]. (above, §§ 108ff.), [redacted] is no longer in a position and able to perform the contract and/or ML2, or to tender its performance under the contract and/or ML 2.

130. However, the signature of ML 2 has created obligations on [redacted]'s part, and correlatively a good faith expectation (Art. 2 (1) CC) of [redacted] that these obligations would be properly performed. In light of the factual background of this case, it is the Arbitral tribunal's considered opinion that this good faith expectation of [redacted] started already during the negotiation talks which took place as from March 1996 (see above §§ 35 ff.) and ended with [redacted]'s decision during the spring of 2004 (see above, §§ 48-50, 104, 108) that the Equipment was to be sold as scrap metal.

131. In the course of these negotiations of ML2, which started in March 1996, [redacted] made no reservation whatsoever about their capacity to find and put in place a suitable financing for the last phase of the completion. Furthermore, after the execution of ML2, [redacted] made numerous communications to [redacted] that they were working on the opening/issuance of the requested L/C, which also entitled [redacted] to rely in good faith on the fact that [redacted] would carry out their obligations under ML2, and that the Equipment would eventually be completed. When the NATO bombings took place, no communication was made by [redacted] to [redacted], and in particular no information was given by [redacted] that it would have become extremely difficult to get the proper financing in Yugoslavia.

132. In reliance on the good faith expectation that ML 2 would be properly performed by [redacted], the Respondent has, between March 1996 and the spring of 2004, taken several steps and incurred several costs and expenses amounting to CAD 175'274.60.

i. Removal of Equipment from storage (1996): CAD 11'520,-- (Exhibits R-260 to R-267; Respondent's Post Hearing Brief, § 82, p. 34);

ii. Rust Inhibitors (March 1996-May 2004): CAD 18'357,63 (Exhibits R-299 to R-307; R-312 to R-316; Respondent's Post Hearing Brief § 82, p. 34);

iii. On-going inspections (March 1996-May 2004): 9'550, 06 (Exhibits R-321 to R-326; Respondent's Post Hearing Brief § 82, p. 34);

iv. Sandblasting and painting (1997): CAD 48'038,12 (Exhibits R-328 to R-336; Respondent's Post Hearing Brief § 82, p. 34);

v. Thickness check for sandblast parts (March 1996-May 2004): CAD 17'723,25 (Exhibits R-340 to R-348; Respondent's Post Hearing Brief § 82, p. 34);

vi. Repainting of all vessels and jackets (2002): CAD 49'708,37 (Exhibits R-352 to R-358; Respondent's Post Hearing Brief § 82, p. 34);

vii. Insurance (1996-2004): CDN 20'377,17 (Exhibits R-360 and R-361; Respondent's Post Hearing Brief § 82, p. 34).

133. The **costs and expenses** of [redacted] **after the spring of 2004** have not been taken into account here, as they have been incurred after [redacted] (1) found that the Equipment had to be discarded (see above §§ 48-50) and (2) considered therefore that the contract was terminated (see Respondent's Post Hearing Brief, § 121): indeed a party which considers – even wrongfully - that a contract has come to an end can no longer rely in good faith on the expectation that the other party will still perform that contract after (or despite) its termination. Therefore, [redacted]'s expenses and costs documented by Exhibits R-308 and R-310, R-317 and R-318, R-327, and R-349 to R-351, for a total amount of CAD 11'845,95, have been disregarded.

134. Similarly, the **costs and expenses** incurred by [redacted] **before the end of the embargo in January 1996** and documented in Exhibits R-296 to R-298, R-311, R-319, R-320, R-337 to R-339, have also been disregarded to the extent that they are obviously captured by option 2 of [redacted]'s offer of 15 June 1992 (see Exhibit R-16 and above, §§ 18 ff.), which was then accepted by [redacted] (see above §§ 20 and 21), according to which the Equipment was to be stored during the embargo at [redacted]'s facility at no extra cost to [redacted].

135. **Insurance premiums** can only be taken into account until end of May 2004, i.e. for 9 full years (1996-2004). This gives a total amount of CAD 20'377,17 (9x 2'264,13) instead of CAD 33'962 as submitted by the Respondent in its Further Production Brief of 28 February 2013, Index, p. 23.

136. The **legal costs** included in [redacted]'s claims (Exhibit R-359; Respondent's Post Hearing Brief, § 82, p. 34) are a direct consequence of the embargo which prevented [redacted] from performing/completing the contract and are thus to be regarded as a situation of *force majeure* pursuant to Art. 8 of the Contract (see above, §§ 89 and 91). Each party has therefore to bear the consequences of these sanctions which might have affected its scope of performance, and no compensation can be claimed from the other party.

137. The **mass lay-off costs**, amounting in [redacted]'s submissions to CAD 550'048,77 (see Respondent's Post Hearing Brief, § 82 [a]) are to be borne by [redacted] as a consequence of the UN/Canadian sanctions, which prevented [redacted] from performing/completing the contract and are to be regarded as a situation of *force majeure* pursuant to Art. 8 of the Contract (see

above, §§ 89 and 91). Each party has therefore to bear the consequences of these sanctions which might have affected its scope of performance, and no compensation can be claimed from the other party.

138. The Arbitral tribunal holds that the costs and expenses listed above in §§ 132 and 135 amounting to CAD 175'274.60 have to be compensated by [redacted] pursuant to Art. 97 (1) CO, as they appear in the Arbitral tribunal's assessment to be the natural and adequate consequence of a breach of [redacted]'s accessory duty – deriving under Swiss law from the rules of good faith (Art. 2 (1) CC) – (1) to act prudently as any reasonable business person would do under similar circumstances, (2) not to create for a contractual partner/counterpart any false or unfounded expectation and/or (3) to make all necessary reservations so as to avoid any such false expectation (see Commentaire Romand du Code des Obligations, tome I, 2nd ed. 2012, Thévenoz Art. 97 CO, NN 4 ff., in particular N 23; see also Schönle, *in* Semaine Judiciaire 1977, pp. 465 ff., in particular p. 471). Under Art. 97 (1) CO *in fine*, [redacted]'s fault is presumed. However, a portion of this claim of [redacted] has already been compensated in March 2008 by the proceeds of the sale of the Equipment as scrap metal, amounting to CAD 73'190,86 (see above, § 59), which [redacted] received from Cooper's Iron Metal Inc. but never transferred to [redacted] (see above, § 60). [redacted]'s claim is therefore for the payment of CAD 102'083,74.

C. SUMMARY OF THE AMOUNTS OWED AND DETERMINATION OF THE INTEREST

139. The **Claimant** will be awarded 42,5% of its claim for the payment of CAD 3'042'000, i.e. CAD 1'292'850, and will have to bear correlatively 57,5% of it (see above, § 121), while the Claimant's claim for damages in the amount of USD 2'523'633 shall be entirely dismissed (above, § 117).

140. The Claimant's total claim was for the payment of a global amount of CAD 5'630'000, i.e. CAD 3'042'000 and USD 2'523'633 (which was globally the equivalent of CAD 2'590'000 in June 2012, when this amount was claimed for the first time in Claimant's Detailed Submission on the Merits[6]). Thus, the amount of CAD 1'292'850 which is awarded presently to the Claimant represents roughly 23% of Claimant's total claim.

141. The Claimant has sought the payment of interest "*by highest rate to commercial loans in Canada starting from May 31 1992 until the date of actual payment to the Claimant*". The Contract (Exhibit C-2/R-3) is governed by the Swiss Code of Obligations (see above, § 72), which regulates expressly both the principle and the rate of interest (see art. 73, 104 and 106 CO). There is no substantiation in the Claimant's submissions as to why the Arbitral tribunal should apply *the highest rate to commercial loans in Canada*, instead of the interest rate provided for in the Swiss Code of obligations, which is the legal regime expressly chosen by both parties. There is furthermore no evidence in the Claimant's submission of any such *highest rate to commercial loans in Canada*, while it would have been for the Claimant to prove (see below, § 142, as well as the decision of the Swiss federal Supreme Court *in* 4C.459/2004/ech, section 3.1) that its loss of interest would have actually exceeded the 5% rate applied under Swiss law. Swiss law as the law expressly chosen by the Parties to apply to their contract, and the interest rate provided for by Swiss law, shall therefore govern the issue of interest. This is also the position of the Respondent (see below, § 146).

142. As a matter of principle under Swiss law, a party which, as a consequence of a wrongdoing/breach of contract committed by another party, suffers a damage in the form of a loss or decrease of assets is entitled to a compensation or indemnification interest (*intérêt compensatoire ou indemnitaire; Schadenszins*), to be calculated on the basis of the value of the lost assets (Chappuis, Le moment du dommage, 2007, §§ 783 ff., in particular § 785; CR CO 1 2nd ed. 2012, Werro, Art. 42 CO, N 17, and Thévenoz, Art. 104 CO, N 3 (b); ATF 131 III 12, 22 ff., section 9; see also Schönle, Intérêts moratoires, interêts compensatoires et dommages-intérêts de retard en arbitrage international, *in* Etudes en l'honneur de Pierre Lalive, 1993, pp. 649 ff.). This interest is owed to the aggrieved party until the loss/damage has been cured. It is owed automatically, i.e. without any formal notice/notification being served to the debtor/aggrieving party, as a mere consequence of the fact that the aggrieved party has lost the amount it claims. The rate of this compensation interest is basically 5% (see ATF 122 III 53, section 4b; Werro, *op. cit.*). Should the creditor contend that his/her damage would be higher than this 5% interest, he/she would have to evidence and substantiate his/her claim as well as the reality and extent of the higher rate he/she asks the judge to apply (see decision of the Swiss federal supreme court *in* 4C.459/2004/ech, section 3.1). Should the creditor/aggrieved party elect to put the debtor/aggrieving party on notice (*mise en demeure; Inverzugsetzung*), the 5% compensation interest would then be replaced by a default interest or penalty of 5% p.a. (*intérêt moratoire; Verzugszins*), which is owed by the debtor until full payment of the outstanding claim (art. 104 (1) CO). Again, the creditor/aggrieved party would have to prove the reality, extent and applicability of any higher interest rate he/she would

[6] The average exchange rate USD-CAD at that time was 0,996 (see www.oanda.com).

deem applicable. As a rule the default interest and the compensation interest cannot be cumulated for the same period of time (Thévenoz, *op. cit.*).

143. It is a fact that the Claimant (1) has not explained and substantiated why the Arbitral tribunal should apply the *highest rate to commercial loans in Canada*, and (2) has not submitted any evidence as to the effective rates applied in Canada to commercial loans and their possible fluctuations over the period 1992-2014. The applicable rate will therefore be the rate of 5% as provided for by Swiss law, which is the law chosen by the Parties to govern their contract (see above, § 141; Thévenoz, *op. cit.*; Swiss federal Supreme Court *in* 5C.270/2004, section 6, and 4C.459/2004, section 3.1).

144. The due date from which this compensation interest is to be calculated is the day on which the harm is caused to the aggrieved party (Thévenoz, *op. cit.* with further ref. to the relevant decisions of the Swiss federal Supreme Court), i.e. affects negatively the economic sphere of the aggrieved party (Perruchoud, Les interêts en matière de responsabilité civile, 1994, p. 14). In the present matter, the Arbitral tribunal finds that the price paid by the Claimant in six instalments between February 1991 and February 1992 (see above, § 73) has been definitively lost only once/after the Respondent sold the Equipment as scrap metal in March 2008 and made thereby any further delivery to the Claimant definitively impossible (see above, §§ 56 and 104 ff., in particular 108 ff.). As the sale as scrap metal took place during the course of March 2008 (above, §§ 56 f.), the Arbitral tribunal deems it appropriate to consider that end of March 2008 (i.e. 31 March 2008) shall be regarded as the day from which a compensation interest of 5 % per year shall be computed on the amount of CAD 1'292'850 which has been definitively lost by the Claimant as a consequence of the Respondent's unauthorised disposal of the Equipment. In its Detailed Submissions on the Merits, dated 8 June 2012 (see above, Procedural History, Section 2.1), the Claimant has additionally sought that the Respondent be ordered to pay "*within the term of 10 days after it receives the award*" any amount which the Arbitral tribunal would found to be owed to the Claimant. As a matter of principle under Swiss law, debts and obligations are usually enforceable immediately, and their payment/performance may be claimed by the creditor/obligor without delay. This principle however is non-mandatory and can be waived/modified by the parties (see, as an illustration of this principle, Art. 75 CO[7]). The Arbitral tribunal infers from the Claimant's prayer for relief that [redacted] has agreed to postpone by ten days the enforceability of any debt/obligation in their favour, and has accordingly waived their right to claim immediate performance/payment upon reception of the award. This shall be reflected in the dispositive section of the present Award (below, Part V).

145. The Respondent will be awarded an amount of CAD 102'083,74 (see above, §§ 130-138), which represents globally 30% of the amount of CAD 347'471,91 which the Respondent was counterclaiming in the present proceedings.

146. As far interest is concerned, the Respondent is claiming a default interest of 5% per year as from March 2004, on the basis of Art. 104 CO (Respondent's Post Hearing Brief, §§ 132 and 133).

147. As already explained (§ 142), art. 104 CO deals exclusively with the default interest, which a defaulting party owes to its counterpart as from (1) either the day on which the defaulting party was put on notice (2) or a due date which would have been agreed upon between the parties for performance. The Arbitral tribunal finds in the present case that March 2004 was

[7] Art. 75 CO : "*If neither the contract nor the nature of the legal relationship determines the time of performance, performance may be effected and claimed immediately*"

obviously not a due date agreed on between the parties for the payment of CAD 175'274.60 (or any other amount of damages possibly owed to the Respondent), and no notice of payment was served onto the Claimant by the Respondent in or about March 2004, be it for the payment of CAD 175'274.60 or of any other amount of damages possibly owed to the Respondent. Art. 104 CO is therefore not the proper legal basis for the interests of 5% sought by the Respondent as from March 2004, which have in fact, in the Arbitral tribunal's analysis, to be characterised as compensation interests (see above, § 142).

148. As detailed above, the various expenses listed in § 132 and which have to be compensated by [redacted] (see § 138) have been made/incurred by [redacted] on various dates between January 1996 and May 2004. [redacted] was therefore automatically entitled to a compensation or indemnification interest on these amounts, at a rate of 5% per year, as from the date(s) on which the expenses were incurred. However, as a consequence of the "*ne ultra petita*" rule, the Arbitral tribunal's decision cannot go beyond the relief sought by [redacted] in this respect, i.e. interest payment as from March 2004 only, which the Arbitral tribunal, in light of the factual elements of the case (see above, § 48) understands to mean the end of March in the absence of any specification to the contrary from [redacted].

149. There are in fact three expenses in the list above which have seemingly been made/incurred by [redacted] after 31 March 2004, namely CAD 1'969,20 on 31 May 2004 (Exhibit R-307), CAD 984,60 on 24 April 2004 (Exhibit R-326) and CAD 1'969,20 on 24 April 2004 (Exhibit R-348). The interests for these three expenses should therefore be calculated as from the respective dates at which the expenses were effectively incurred, and not from 31 March. However, in light of the insignificance of the difference (which is roughly CAD 25-28 for all three amounts) if interest is computed from 31 March or 31 May 2004, the Arbitral tribunal deems it appropriate, in light of the principle *de minimis non curat praetor*, not to make a separate interest computation for these three isolated expenses and to calculate the compensation interest as from the average date of 31 March 2004. In light of the fact that a partial compensation of [redacted]'s claim took place already in March 2008, with the payment of CAD 73'190,86 by [redacted]. (see above, § 138), the calculation of the interest owed to [redacted] is as follows:

    a. [redacted] will be entitled to interest at a rate of 5% per year from 31 March 2004 until 31 March 2008 on CAD 175'274.60, i.e. CAD 35'054,92. This amount is owed to [redacted] with no further interest, as interest can basically not be claimed on interest under Swiss law (Art. 105 (3) CO; CR CO 1, 2nd ed. 2012, Thévenoz, Art. 105 CO, N 6). As the sale as scrap metal took place during the course of March 2008 (above, §§ 56 f.), the Arbitral tribunal deems it appropriate to consider that end of March 2008 (i.e. 31 March 2008) shall be regarded as the day until which a compensation interest of 5 % per year shall be computed (see also above, § 144);

    b. [redacted] will be entitled to interest at a rate of 5% per year on CAD 102'083,74, from 31 March 2008 until full payment.

4. ALLOCATION OF COSTS AND LEGAL FEES OF THESE ARBITRAL PROCEEDINGS

A. GUIDING PRINCIPLES

150. Under Article 37 of the ICC Arbitration and ADR Rules (the ICC Rules), which are applicable to the present proceedings (art. 9 of the Contract; see also Section III of the Terms of Reference), the Award shall assess the costs of the arbitration and determine which party shall bear them or in which proportion they shall be allocated between them. This rule gives the Arbitral Tribunal a wide discretion in deciding on the costs of arbitration.

151. Under the definition of Article 37 (1) of the ICC Rules, the Costs of Arbitration include:

- the ICC administrative expenses as fixed by the Court;
- the fees of the Arbitral Tribunal;
- the expenses of the Arbitral Tribunal;
- the reasonable legal and other costs incurred by the parties for the arbitration.

152. As far as the allocation of these costs is concerned, the Arbitral Tribunal deems it fair and reasonable to follow the quite common and widespread method called "*costs follow the event*" scheme (or *loser-pays* rule), by which the costs are either awarded to the party which has prevailed in the dispute or, where there is no clear "winning party", are allocated in proportion to the outcome of the parties' respective claims. The allocation of costs may also be modulated in light of other criteria, such as the general conduct of a party and the more or less serious nature of the case it has defended. The only general requirement is that the Arbitral Tribunal give the grounds for the solution it adopts.

153. The Arbitral Tribunal shall in principle adjudge that the losing party contribute towards the attorney's fees of the other party. This provision also expresses and/or allows for the application of the above mentioned "*costs follow the event*" scheme (or *loser-pays* rule), subject to further modulation in light of other criteria, the only general requirement being again that the Arbitral Tribunal give the grounds for the solution it adopts.

154. In the present matter, the Arbitral Tribunal invited the Parties to present their final detailed statement of costs and fees. In accordance with the directives provided by the Arbitral tribunal, both Parties filed, on 21 December 2012 for the Claimant and on 20 December 2012 for the Respondent, their final submissions on costs. Additional Statements of Costs have been submitted on 9 October 2013 by both parties as a consequence of the additional clarifications/documents asked for by the Arbitral tribunal and the additional evidentiary hearing in September 2013. None of the Parties objected to the figures shown in its opponent's statements of costs.

B. AMOUNTS OF THE COSTS

155. The costs of arbitration (which include the fees and expenses of the Arbitral Tribunal and the ICC administrative expenses), fixed by the ICC Court at its session of 20 March 2014, amount to USD 390’000.

156. The Parties’ respective costs and fees are the following:

a) **Claimant**:

i) Costs of legal services

(1) USD 273’480 (December 2012)

(2) USD 96’500 (October 2013)

ii) Other expenses

(1) CHF 14’454 (December 2012 - travel & accommodation)

(2) USD 3’120 (December 2012 – travel & accommodation[8], DHL[9] and interpreter)

(3) USD 3’250 (December 2012 – Expert opinion)

(4) USD 2’230 (October 2013 – Regus and DHL)

i.e. a total of **USD 378’580** and **CHF 14’454**

b) **Respondent**:

i) Costs of legal services

(1) CAD 410’500,15 (December 2012)

(2) CHF 85’022,-- (December 2012)

(3) CAD 111’572, (October 2013)

ii) Other expenses

(1) CAD 27’252,68 (December 2012)

i.e. a total of **CAD 549’324,83** and **CHF 85’022,--.**

157. Each Party has made an aggregate advance payment of USD 195’000,-- to cover the administrative expenses of the ICC and the costs and fees of the Arbitral Tribunal.

C. RULING ON THE COSTS

158. As a preliminary remark in light of the principles referred to above, the Arbitral Tribunal wishes to thank both Parties and their representatives for their professional approach to this case. This leads the Arbitral Tribunal to consider that there is basically no ground to depart from, or modulate, the "*cost follow the event*" principle, as briefly referred to above, §§ 152 and 153.

159. Pursuant to the "*cost follow the event*" principle, the Arbitral tribunal has to take into account for the allocation of costs and fees that the Claimant will be awarded 42,5% of its CAD 3’042’000 claim (see above, § 139), while the Respondent will be awarded 30% of its counterclaim (see above, § 145).

160. It must however also be taken into consideration that the Claimant’s claim for damages is entirely dismissed (see above, §§ 117 and 140). In light of the relatively limited amount of time and work which had eventually to be dedicated by the Parties and the Arbitral tribunal to the Claimant’s claim for damages, which is rejected in the absence of any proper substantiation and evidence (see above, § 117), the Arbitral tribunal deems it appropriate to amend to the detriment of the Claimant the proportions identified in the previous paragraph and to rule that the Claimant will have to bear globally 60% of all costs and expenses of these proceedings.

161. The situation is therefore as follows:

[8] An amount of USD 2'380 (travel and accommodation), which appeared on p. 3 of Claimant’s Cost Submission of December 2012 (items 7.2 and 8), was omitted in its final Cost Submission of October 2013, p. 3.

[9] DHL costs are USD 620 in December 2012 and USD 630 in October 2013, *i.e.* a total amount of USD 1’250 and not 1’050 as mistakenly submitted by the Claimant on p. 3 of its final Cost Submission of October 2013.

iii) The Claimant shall be awarded 40% of all its costs and expenses, i.e. USD 151’432 and CHF 5’781,60;.

iv) The Respondent on its part shall be awarded 60% of all its costs and fees, i.e. CAD 329’594,89 and CHF 51’013,20.

162. Similarly, the Claimant shall bear 60% of the total costs of arbitration (fees and expenses of the Arbitral Tribunal and the ICC administrative expenses), fixed by the ICC Court. These costs and fees amount in the aggregate to USD 390’000 of which USD 234’000 are thus to be borne by the Claimant and USD 156’000 by the Respondent. In light of the advance payments made by both Parties (USD 195’000 each, see above, § 157), the Respondent is therefore entitled to a refund of USD 39’000 from the Claimant.

* * * * *

V. ORDER OF THE ARBITRAL TRIBUNAL

Based on the foregoing findings, the Arbitral Tribunal orders as follows:

1. The Respondent [redacted] shall pay to the Claimant [redacted], within ten days from the reception of this Award, an amount of CAD 1'292'850 plus interest at a rate of 5% per year as from 31 March 2008 until full payment;

2. The Claimant [redacted] shall pay to the Respondent [redacted] an amount of CAD 102,083.74 plus interest at a rate of 5% per year as from 31 March 2008 until full payment;

3. The Claimant [redacted] shall pay to the Respondent [redacted] an amount of CAD 35'054,92, with no further interest

4. The Respondent [redacted] shall pay to the Claimant [redacted], within ten days from the reception of this Award, an amount of USD 151'432 plus interest at a rate of 5% per year as from the 11th day after the notification of the present award until full payment;

5. The Respondent [redacted] shall pay to the Claimant [redacted], within ten days from the reception of this Award, an amount of CHF 5'781,60 plus interest at a rate of 5% per year as from the 11th day after the notification the present award until full payment;

6. The Claimant [redacted] shall pay to the Respondent [redacted] an amount of CAD 329'594,89 plus interest at a rate of 5% per year as from the date of the present award until full payment;

7. The Claimant [redacted] shall pay to the Respondent [redacted] an amount of CHF 51'013,20 plus interest at a rate of 5% per year as from the date of the present award until full payment;

8. The Claimant [redacted] shall pay to the Respondent [redacted] an amount of USD 39'000 plus interest at a rate of 5% per year as from the date of the present award until full payment;

9. All other requests and claims of the Parties are fully dismissed.

So done and signed in Paris (France) in 5 originals on ……

The Arbitral Tribunal

Prof. Dr. [redacted]	Prof. Dr. [redacted]	Duncan W. Glaholt