

Date of dispatch to the parties:
April 29, 1999

AWARD

in the Arbitration ARB/94/2 of the

International Centre for Settlement of Investment Disputes
(ICSID)

Tradex Hellas S.A. (Greece)

represented by Mr. E. Koronis
Counsel: Prof. L. Georgakopoulos

vs.

Republic of Albania

represented by the
Ministry of Agriculture and Food
which was represented
by Ms. Rezarta Gaba
by Mr. Sali Metani
and by Ms. Julinda Hajno

Counsel: Prof. James Crawford
Mr. Philippe Sands

by the Arbitral Tribunal
consisting of
Prof. Dr. Karl-Heinz Böckstiegel, President
Mr. Fred F. Fielding, Esquire, Arbitrator
Prof. Andrea Giardina, Arbitrator

Date of Award:

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ABBREVIATIONS USED

For the many references made in this Award to the file of the Case, for convenience and shortness the Tribunal will use the following abbreviations:

Art.	= Article of 1993 Law
A I	= Albania's Counter Memorial of 28.12.97
A II	= Albania's Rejoinder of 2.3.98
A III	= Albania's Post-Hearing Memorandum of 8.12.98
A I Exh. 1 seq.	= Exhibits submitted by Albania with A I
A II Exh. 1 seq.	= Exhibits submitted by Albania with A II
H I-III	= Handouts by Parties at the Hearing
J	= Decision on Jurisdiction 24.12.96
T I	= Tradex' Request for Arbitration of 17.10.94
T II	= Tradex' Memorandum of 8.7.98
T III	= Tradex' 2nd Memorandum of 27.1.98
T IV	= Tradex' 3rd Memorandum of 25.6.98
T V	= Tradex' Post-Hearing Memorandum of 4.12.98
T 1 seq.	= Exhibits submitted by Tradex
Tr	= Transcript of Final Hearing

A. Introduction

1. The Claimant, "Tradex Hellas S.A.", is a corporation established in and according to the laws of Greece, with its head office in Thessaloniki, Greece, and is referred to hereafter as "**Tradex**".

2. The Respondent is the Republic of Albania, duly represented by its Government in Tirana, Albania, and is referred to hereafter as "**Albania**".

3. After the Tribunal provisionally accepted to have jurisdiction in this case by the terms of its Decision dated 24 December 1996, and after the procedure then continued on the merits, this is now the Award in this case.

4. This Award contains the declaration of closure of the proceeding according to Rule 38 (the term "Rule" is used to refer to the ICSID Arbitration Rules) as well as the award on the merits according to Rule 47. Therefore, any references to the file of the case, by using the abbreviations or otherwise, are not meant to be exhaustive. The Tribunal has taken into account all pleadings, documents and testimony in this case insofar as it considered them relevant.

B. Procedure

1. Procedure Leading to Decision on Jurisdiction

5. On 2 November 1994, the International Centre for Settlement of Investment Disputes (ICSID) received from Tradex a Request for Arbitration against Albania. The Request asserted a claim for compensation for an alleged expropriation in Albania. Details of the Request and the Claim are described in a later section of this Award.

6. In the absence of agreement upon the number of arbitrators and the method of their appointment more than 60 days after the registration of the Request, Tradex chose the formula provided for in Art. 37 (2) (b) of the ICSID Convention, i.e. a tribunal consisting of three arbitrators, one appointed by Tradex, one appointed by the Republic of Albania and the third, who would be the President of the Tribunal, appointed by agreement of the Parties. By letter dated 6 June 1995, Tradex appointed as arbitrator in this case Fred F. Fielding, Esquire, a US national. Mr. Fielding subsequently accepted his appointment.

7. Though ICSID in various ways communicated the Request for Arbitration and subsequent correspondence to Albania, no appointment of the second arbitrator was received from Albania, and no agreement was reached between the Parties with respect to the appointment of the third arbitrator. As Art. 38 of the ICSID Convention and Art. 4 of the ICSID Arbitration Rules provide that, if the tribunal has not been constituted within 90 days after the notice of registration of the Arbitration Request, the Chairman of the ICSID Administrative Council shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator(s) not yet appointed and designate an arbitrator to be President of the tribunal, Tradex requested ICSID to appoint the other two arbitrators.

8. In December 1995, after notifying the Parties, the Chairman of the Administrative Council of ICSID appointed Prof. Andrea Giardina, an Italian citizen, as the second arbitrator and Prof. Dr. Karl-Heinz Böckstiegel, a German citizen, as the third arbitrator and President of the tribunal. Both accepted the appointment.

9. By a decision of 26 December 1995, the Council of Ministers of Albania accepted the appointments of Prof. Giardina and Prof. Böckstiegel as arbitrators and charged the Ministry of Agriculture and Food with representing the Republic of Albania in the proceedings.

10. The Tribunal scheduled a first session with the Parties for 27 February 1996, in Washington. After consultation with the Parties and with their agreement, the session in Washington was cancelled and instead the first session of the Tribunal with the Parties was scheduled to take place in Frankfurt (Germany) on 10 April 1996.

11. At that session, in addition to other procedural details discussed and agreed, it was agreed that subsequent meetings of the Tribunal with the Parties would take place in London. Also at the session, counsel for Albania confirmed that Albania would shortly be sending to the Centre written objections to jurisdiction in accordance with Arbitration Rule 41(1). Counsel for Albania gave a summary presentation of the grounds on which such objections would be based. Counsel for Tradex responded. Thereafter the proceedings on the merits were suspended in accordance with Arbitration Rule 41(3). Dates for written submissions by the Parties were agreed upon and it was also provisionally agreed that an oral hearing on jurisdiction would take place in London on 10 September 1996.

12. After the session in Frankfurt, written submissions by Albania were received dated 15 April 1996, 10 June 1996, and 9 August 1996, and written submissions by Tradex were received dated 31 May 1996 and 30 July 1996.

13. At the Hearing in London on 10 September 1996, after an introduction by the President of the Tribunal regarding procedural matters, both Parties made presentations regarding jurisdiction, responded to the other Party's presentation in several rounds and answered questions by members of the Tribunal regarding certain factual or legal aspects related to jurisdiction. Also during the Hearing, Tradex asked whether Albania, in view of its objections to ICSID jurisdiction, was ready to accept this case under the UNCITRAL Arbitration Rules as provided for in the Albanian Investment Protection Law of 1992. Counsel for Albania responded that they were not authorized to express any commitment of Albania regarding submission to UNCITRAL arbitration.

14. By a letter dated 25 September 1996 addressed to Albania represented by the Minister for Agriculture and Food, Counsel for Tradex asked for a binding answer by Albania regarding acceptance of UNCITRAL arbitration in this controversy and added that, if no answer was received within 30 days, he would interpret this to the effect that Albania "has not preferred the arbitration of UNCITRAL".

15. By a letter dated 8 November 1996 to ICSID, Counsel for Tradex confirmed that no answer had been received from Albania.

16. On 5 December 1996, ICSID provided the Tribunal with a copy it had received of a letter dated 2 December 1996 from Counsel for Albania to Counsel for Tradex containing the following wording:

"I am instructed by the Minister to respond to your letter of 25 September 1996.

As indicated during the hearing held in London on 10 September 1996, the Ministry of Agriculture of the Republic of Albania considers that the dispute settlement rules applicable to the facts raised in Tradex' Request for ICSID arbitration, if any, are those set forth in Law No. 7594 of 4 August 1992.

Article 15 of the 1992 Law is therefore applicable. It provides

for UNCITRAL arbitration and sets forth certain conditions and exclusions for such arbitration to be effective. Whether those conditions or exclusions have been satisfied or are applicable in respect of the matter brought by Tradex to ICSID raises questions of fact and law which would need to be considered further by the Ministry of Agriculture and eventually by any arbitral Tribunal that might be constituted pursuant to the 1992 Law. In the first place it will be a matter for Tradex whether to decide to make an application for arbitration under UNCITRAL rules in reliance of the 1992 Law."

17. Thereafter, having deliberated by correspondence and in a meeting in New York on 14 November 1996, the Tribunal issued its Decision on Jurisdiction dated 24 December 1996 as follows:

- "1. The Tribunal has jurisdiction subject to the following:
The issue as to whether or not an "expropriation" has been shown as required by the 1993 Law is joined to the merits of this case.
2. After consultation with both Parties a procedural order will be issued regarding the further procedure."

2. Procedure Leading to Award on Merits

18. By a Procedural Order of 21 January 1997 the Tribunal informed the Parties of its intention regarding the further procedure on the merits, in particular regarding a possible schedule and the format and length of the Hearing, and asked for any comments from the Parties.

19. Having received such comments from Tradex and Albania by letters of 23 and 30 January 1997 respectively, the Tribunal then, by its Procedural Order of 7 February 1997, set a schedule for further filings by the Parties leading to a Final Hearing to be held from 29 September to 2 October 1997.

20. When Albania submitted a request for postponement dated 12 March 1997, and after Tradex had submitted its comments dated 26 March 1997, the Tribunal, by its Procedural Order of 7 April 1997, set a

new schedule postponing the time limits for the Parties' submissions by 3 months, indicating at the same time that new dates for a Hearing would be set at a later stage after consultation with the Parties.

21. On 8 September 1997, Albania submitted a request for a further postponement on which Tradex submitted its comments dated 10 September 1997. Taking these into account, the Tribunal, by its Procedural Order of 16 September 1997, set a new time schedule for filings from the Parties and suggested 28 April to 1 May 1998 as the new Hearing dates, subject to comments from the Parties.

22. With the agreement of the Parties, the Tribunal then, by its Procedural Order of 22 September 1997, confirmed these dates for the Hearing to be held in London.

23. After receiving Albania's Counter Memorial of 28 December 1997 and letters from Tradex of 8 and 9 January 1998 respectively, the Tribunal, by its Procedural Order of 9 January 1998, confirmed that, as expressly indicated in its previous Procedural Orders, the filings of both Parties were to deal with "all aspects of the merits" and the Final Hearing would deal with "all factual and legal aspects of the case", including the quantum of damages.

24. By its Procedural Order of 20 March 1998, the Tribunal, in conformity with its earlier Procedural Orders, provided the Parties with further details regarding the logistics and format of the Hearing and ruled on certain procedural requests that the Parties had submitted.

25. After some further submissions from the Parties regarding, in particular, the admissibility of certain witness testimony and arguments and evidence on the quantum of damages, the Tribunal, by its Procedural Orders of 13 and 16 April 1998, ruled on the respective objections and decided that the Hearing should not be postponed.

26. Having been informed by the Parties that visas to enter the United Kingdom for the purpose of giving evidence at the Hearing had not been granted to the Parties' witnesses of Albanian nationality, with the agreement of both Parties, the Tribunal, by its Procedural Order of 23 April 1998, postponed the Hearing to dates to be established later after contact with the Parties.

27. In consultations between the Tribunal and the Parties, it became clear that the period of 5 to 8 October 1998 provided the earliest set of dates when all members of the Tribunal and the representatives and witnesses of the Parties would be available for a Hearing. Accordingly, by its Procedural Order of 6 May 1998, the Tribunal rescheduled the Hearing to those dates. By the same Order, the Tribunal ruled that, in view of the late submission of certain arguments and evidence on the quantum of damages by Albania, Tradex was authorized to file a final submission on damages by 30 June 1998.

28. Responding to submissions by the Parties of 9 and 13 July 1998 respectively, the Tribunal, by its Procedural Order of 14 July 1998 ruled that it would only consider the final submission by Tradex insofar as it dealt with damages and that the Tribunal, in addition to the 4 days previously foreseen for the Hearing, would be available for a 5th day, should that become necessary.

29. The Tribunal's Procedural Order of 21 September 1998, in conformity with previous Orders, provided the Parties with some additional details regarding the logistics and format of the Hearing.

30. The Hearing was held in London at the seat of the European Bank for Reconstruction and Development (EBRD). It started in the morning of 5 October 1998 and was concluded on 8 October 1998 after the Parties had made their final oral presentations and it was agreed that the additional time reserved as a precaution for the Hearing was not needed.

31. A transcript was made of the Hearing which records the following as attending:

Tribunal Members

1. Professor Karl-Heinz Böckstiegel, President
2. Fred F. Fielding, Esquire
3. Professor Andrea Giardina

Secretary of the Tribunal

4. Mrs. Margrete L. Stevens

Tradex Hellas S.A.

5. Professor L. Georgakopoulos

6. Mr. E. Spinelis
7. Mr. C. Azas
8. Mr. S. Hadjigeorgiou
9. Mr. D. Stergioulas
10. Mr. S. Lapardhaja

Republic of Albania

11. Ms Rezarta Gaba
12. Mr. Fatos Gjini
13. Mr. Ardian Takaci
14. Mr. Arden Pata
15. Mr. James Crawford
16. Mr. Philippe Sands
17. Ms Ruth Mackenzie
18. Mr. Edward Helgesen
19. Mr. Anthony Nannini
20. Mr. Stephen Hodgson
21. Mr. Elez Lohja
22. Mr. Mark Ndoci
23. Mr. Nikolin Ujka
24. Mr. Frank Alexander
25. Professor Saul Estrin

Interpreters

Dr. Z. Tofallis, Greek Interpreter
Mr. Gezim Guri, Albanian Interpreter

32. The following Agenda had been indicated in previous Procedural Orders to the Parties and was implemented at the Hearing:

1. Introduction by the President of the Tribunal
2. First Round Presentation by Tradex
3. First Round Presentation by Albania
4. Questions by Arbitrators
5. Rebuttal Presentation by Tradex
6. Rebuttal Presentation by Albania
7. Further Questions by Arbitrators

33. In his introduction, the President of the Tribunal recalled again the major rulings regarding the Hearing which had been included in previous

Procedural Orders of the Tribunal starting with the Order of 21 January 1997. In particular, he reminded the Parties that both Parties would be given equal periods of time for their first round and rebuttal presentations and that each Party would be free to determine how much of its time it would spend on the presentation of evidence, including witnesses and experts, on arguments, and on cross-examination of witnesses and experts presented by the other Party.

34. There was some discussion on preliminary procedural matters (see Tr 7 seq.; Tr 17 and Handout H I Tradex). In particular as a preliminary matter, Tradex requested not to admit the testimony of witnesses Ujka and Ndoci because, as Tradex alleged, these testimonies were partly based on forged documents and partly contradicted by their own documents to the effect that their admission would be “contrary to the principles of fair trial”. Albania objected. The Tribunal, after a short internal deliberation, ruled that all witnesses should be heard including the two objected to by Tradex, and that the points raised by Tradex in this context could be raised in cross-examination of the witnesses which would be taken into account by the Tribunal in evaluating the evidence.

35. During the same preliminary procedural discussion (Tr 9 + 10), Albania withdrew objections it had earlier raised to the admissibility of certain documents filed by Tradex with its last submission. On that basis, with the consent of both Parties, the President stated that all documents submitted up to now, including their English translations, were ruled to be admissible.

36. The Parties then made their presentations as provided in the Agenda using the time available to them at their discretion for factual and legal arguments and for examination and cross-examination of witnesses. During the two rounds of presentations the following witnesses and expert witnesses were examined by the presenting Party, cross-examined by the other Party and questioned by members of the Tribunal:

Witnesses presented by Tradex:

Mr. C. Azas
Mr. S. Lapardhaja
Mr. D. Stergioulas
Mr. S. Hadjigeorgiou

Witnesses presented by Albania:

Mr. M. Ndoci
Mr. N. Ujka
Mr. E. Lohja
Mr. F. Alexander
Prof. S. Estrin

37. The Hearing was concluded by final questions by members of the Tribunal and final remarks by the President of the Tribunal including the rulings mentioned hereafter.

38. Regarding the details of the Hearing, which cannot be repeated in this Award, reference is made to the transcript of the Hearing. However, specific aspects of the Hearing which the Tribunal considers as of major relevance in coming to its decision, will to some extent be mentioned in the Section "Summary of Major Facts and Contentions" and to some extent in the Section "Reasons for the Decision" in this Award.

39. At the end of the Hearing, after consultation with the Parties, the Tribunal ruled that

- the transcript, when available, would be transmitted by the ICSID Secretariat simultaneously to the Parties and the members of the Tribunal,
- the Parties had 4 weeks after receiving the transcript to file Post-Hearing Memoranda with their final comments on the results of the Hearing and any errata in the transcript, but that no new documents could be submitted at that stage.

40. In concluding the Hearing, the President expressed the gratitude of the Tribunal to the representatives of the Parties for their professional participation in the Hearing and to Mrs. Stevens of the ICSID Secretariat for the efficient administrative support.

41. By letter of 6 November 1998, the ICSID Secretariat distributed the transcript of the Hearing to the Parties and the members of the Tribunal, indicating that, in accordance with the ruling of the Tribunal, the

Post-Hearing Memoranda by the Parties were due at the latest by 9 December 1998.

42. Within that time limit, the Memoranda were submitted by Tradex dated 4 December 1998 and by Albania dated 8 December 1998.

43. Furthermore, with an additional letter of 4 December 1998, Tradex submitted 11 attachments containing correspondence in the period between 10 March and 11 June 1997 as evidence “that negotiations took place towards settlement”. Albania objected to this submission by letter of 18 December 1998 and, by Procedural Order of 21 December 1998, the Tribunal ruled the submission to be inadmissible in view of its express earlier ruling that no new documents could be submitted by the Parties at this stage. This ruling is confirmed with reasons, in the next subsequent Section of this Award.

44. Thereafter, the Tribunal entered into deliberations by written communications and meeting in person in Bergisch-Gladbach (Germany) on 20 and 21 January 1999 which results in this Award.

3. Decision on Documents Submitted by Tradex with Letter of 4 December 1998

45. Procedural Orders preceding the Final Hearing had expressly ruled that no new documents could be submitted by the Parties at the Hearing. At the Hearing, in his introduction, the President of the Tribunal had recalled this, and at the end of the Hearing, without any objection from the Parties, the Tribunal had ruled expressly, as reflected in the Transcript, that, also with the Post-Hearing Memoranda, “no new documents and no new evidence can be submitted”.

46. Therefore, the Tribunal decides that the documents submitted with Tradex’ letter of 4 December 1998 are not admissible. But in order to indicate that this procedural decision is without relevance for the outcome of the case on the merits, the Tribunal subsidiarily adds that, in any case, these documents would not have changed its reasoning or decision on the merits.

4. Declaration of Closure of Proceeding (Rule 38)

47. ICSID Arbitration Rule 38 requires that, when the presentation of

the case by the Parties is completed, the proceeding shall be declared closed.

48. After reviewing the presentations by the Parties up to and including the Post-Hearing-Memoranda, the Tribunal came to the conclusion that there is no request by a Party nor any reason to reopen the proceeding, as is possible under paragraph (2) of Rule 38.

49. Therefore, by Order dated 2 March1999, the proceeding was declared closed according to paragraph (1) of Rule 38.

C. Relief Sought

50. Based on its Request of Arbitration of 17 October 1994 and as updated by its final submission, its Post-Hearing Memorandum of 4 December 1998, Tradex requests that Albania be obliged and condemned to pay:

	U.S. \$
a. Fair Market value as of 01.01.1993 per our Request for Arbitration:	2.200.000
Less: Machinery & equipment returned on Liquidation of the J.V. (attachment 20 of Request):	(352.187)
Net Fair Market Value of TRADEX share to T.& T.J.V.	1.847.813
b. Interest as per para 23 hereabove:	824.013
c. Arbitration fees:	107.000
d. Legal, Valuation and other consulting fees and services:	246.255
e. Travel, typing, printing, translations and other expenses:	81.993
Total	3.107.074"

51. After Albania had first raised objections to the jurisdiction of the Tribunal, on which the Tribunal decided by its Decision on Jurisdiction of 24 December 1996, in its final submission, its Post-Hearing Memoran-

dum of 8 December 1998, Albania requests the Tribunal to adjudge and declare:

- “– that Tradex has shown no *prima facie* act of expropriation attributable to the Albania, and that accordingly Albania has not under Article 25(1) of the ICSID Convention and Law No. 7764 of 2 November 1993 expressed its consent for the matters raised by Tradex in its Request for arbitration dated 17th October 1994 to be subject to ICSID jurisdiction, and that the Tribunal does not have jurisdiction to entertain the claim;
- further or alternatively, that no act of expropriation has occurred or is attributable to Albania within the meaning of Article 4 of Law No. 7764 of 2 November 1993;
- that the Request by Tradex be dismissed; and
- that Tradex and its shareholders be required to pay Albania’s costs in this matter and the costs of the Arbitral Tribunal.”

D. Summary of Facts and Contentions

52. Hereafter, the Tribunal will give a short summary of major facts and contentions in this case insofar as it is considered appropriate in the context of the decision given in this Award. Regarding further details, reference is made to the many and voluminous written briefs and documents submitted by the Parties as well as to the oral presentations by the Parties and witnesses, as recorded in the transcript of the final Hearing and the documents submitted with these oral presentations. Further details will be taken up in the later Section “Reasons for the Decision” in this Award.

53. Tradex entered into negotiations in 1991 with Albania in order to undertake an engineering, industrial, and agricultural investment in Albania. Negotiations were completed and Albania appointed a state-owned company, “T.B. Torovitsa”, to enter into a joint venture with Tradex for realizing the investment on the basis of a proportional participation of 67 to 33. The land would be contributed by T.B. Torovitsa for the use of the joint venture.

54. On 10 January 1992, Tradex and T.B. Torovitsa signed an agreement ("the Agreement") which established a joint venture between them. T.B. Torovitsa was the owner of 1170 ha farmland in T.B. Torovitsa, Lezha, Albania, and the object of the joint venture was the commercial and agricultural use of this land connected with "the development of the agricultural engineering, the cultivation of agricultural plants/crops, fruits and vegetables in the fields, development of stock raising/animal products, and the necessary activities pertaining to the processing of milk, meat, and any activities relative to the land and to products yielded by it for the domestic market or exportation" (Art. 2 of the Agreement). The investment was planned for a duration of 10 years, renewable by common agreement for another period of 10 years.

55. On 21 January 1992, the Agreement was approved by an act of the Albanian Ministry of Foreign Economic Affairs called Authorization No. 26. The registrations of the joint venture with competent courts and administrative authorities were completed by 7 March 1992.

56. Upon the authorization and the completion of formalities concerning the establishment of the joint venture, Tradex commenced the investment according to schedules contained in the Agreement in order to use the farm during the first crop raising period in spring and summer 1992. The investment included various payments totalling US \$ 786,343. T.B. Torovitsa contributed further payments and the capital thus established was used to finance the cattle production, the field cultivation, and the payment of 700 personnel.

57. Tradex claims that, in particular, the following measures made the development of the joint venture impossible and left the participation and investment in the joint venture valueless, so that these acts must be considered as acts of expropriation:

- a) On 22 August 1992, a most significant part of the farm was formally expropriated and transferred to villagers by Albania, namely 140 ha amounting to 15 % of the total farm and its most fertile area.
- b) Crop production, cattle, and seed supplies were stolen by the villagers at an almost steady rate of 15 % between March and October 1992 and work of the management of the joint ven-

ture was often impossible because of threats and acts of violence.

- c) Beginning December 1992, the entry of Tradex' personnel to the farm was made completely impossible because of the seizure and occupation of the farm by villagers.
- d) By letters in late 1992 and early 1993, Tradex requested in vain the intervention by Albania as a last effort to save the investment, but Tradex was obliged to hand over the 140 ha mentioned together with cultivations, cattle, and supplies.

58. Under the circumstances, Tradex and T.B. Torovitsa found it necessary to dissolve the joint venture; the dissolution was agreed on 21 April 1993 "as of 30.4.1993". The Minutes of the Liquidators' Meeting on 2 March 1994 resolved "that the liquidation was completed on 16.12.1993."

59. Further details and the various incidents that, according to Tradex, must be considered to be expropriations either each by itself or at least in their combination, will be taken up in the subsequent Section "Reasons for the Decision" in this Award.

60. In its Request for Arbitration of 17 October 1994, Tradex evaluated the market value of its investment according to recognized valuation methods and experience to US \$ 2,2 Mill., less US \$ 176,093 which represented the value of the machinery and equipment returned to Tradex as their share of the liquidation process. Thus, it estimated the net market value of its loss at US \$ 2,023,907 while it estimated its "real damages" to be much higher. On that basis, Tradex requested first that Albania be obliged and condemned to pay:

- a) the market value of Tradex's expropriated investment amounting to US \$ 2,023,907;
- b) interest on that amount mentioned at current banking interest rate, from December 1, 1992, until payment, and
- c) fees and legal expenses of Tradex, to be calculated later.

61. In its final submission, the Post-Hearing-Memorandum of 4 December 1998, Tradex updated the calculation of its claim, introducing new fig-

ures regarding the machinery and equipment returned on liquidation of the joint venture and regarding interest. Thus, Tradex now formulates its claim as identified in Section C. (Relief sought) above of this Award.

62. Albania, in a first stage of the proceeding, objected to the jurisdiction of the Tribunal invoking particularly five arguments which were considered by the Tribunal in the separate procedure and its Decision on Jurisdiction of 24 December 1996 mentioned in Section B. of this Award. As mentioned there, the Tribunal decided that it had jurisdiction in this case subject to the reservation that the issue as to whether or not an "expropriation" had been shown as required by the 1993 Law was joined to the merits.

63. Now, regarding this issue of jurisdiction joined to the merits and regarding the merits themselves, Albania requests the Tribunal to adjudge and declare as identified above in Section C. (Relief Sought) of this Award.

64. Albania submits that the facts as presented by Tradex do not support Tradex's claim and are, by themselves, sufficient to support its own request as cited above. Furthermore, regarding the factual background, Albania, in particular, points out the following additional aspects: Under Albanian law, T.B. Torovitsa is a separate legal entity with full capacity to sue and be sued. The capital provided by Tradex comprised machinery, chemicals, seeds, and irrigation investments while the capital provided by T.B. Torovitsa comprised buildings, machinery, life stock, and finished products as well as other assets. None of the joint venture's capital comprised land. The 1992 Agreement noted that T.B. Torovitsa was the owner of 1170 ha of land, that the area of land would not change "during the term of the agreement", and that the joint venture "shall respect the supplementary needs which will be created for the land" (Art. 15). In particular, Albania refers to Art. 16 of the Agreement which provides that disputes between the Parties shall be resolved by arbitration of the International Chamber of Commerce and that Swiss law shall be applicable. Furthermore, Albania points out that the authorization for the joint venture dated 21 January 1992 expressly provided that the joint venture should conform with Albanian legislation concerning land.

65. As far as the liquidation of the joint venture is concerned, Albania indicates that the Dissolution Agreement dated 21 April 1993, led to the dissolution completed on 16 December 1993 according to the liquidators'

report. At the state of liquidation, the liquidators' report valued the joint venture's net worth at Leke 6,175,599.05 to be distributed in the proportions 67 % to Tradex and 33 % to T.B. Torovitsa in accordance with Art. 5 of the 1992 Agreement. The liquidators' report proposed that Tradex receive a total of Leke 20,842,420 comprising Leke 8,804,675 in fixed assets and Leke 12,037,745 to be paid by T.B. Torovitsa in installments on the basis of the progress in the liquidation and not later than 31 December 1994. A final partners' meeting was held on 2 March 1994 which resolved to approve the balance sheets drawn up by the liquidators and approved the distribution of the net worth of the joint venture in accordance with the liquidators' report. Tradex did not reserve its rights against T.B. Torovitsa or Albania at that final meeting.

66. The Tribunal will deal with further contentions by both Parties later in this Award in the context of its reasons insofar as it considers such contentions relevant.

E. Legal Scope of Decision on Merits, Applicable Law

67. Before the Tribunal can enter into evaluating the facts and contentions of the Parties in this case for its decision on the merits, it seems appropriate to identify the legal framework in which the relevance of the factual aspects can and must be considered.

68. An important limitation of this framework is that, in its Decision on Jurisdiction of 24 December 1996, the Tribunal found that it only had jurisdiction on the basis of the Albanian Law No. 7764 of 2 November 1993 on Foreign Investments (the 1993 Law).

69. Therefore, in its consideration of the merits, the Tribunal is prevented from examining the claim on any other possible legal basis such as any other of the various investment laws issued in Albania, the Bilateral Investment Treaty between Albania and Greece, as well as other sources of international law. Although court and arbitral decisions and legal writings dealing with such other sources may be of relevance in interpreting the 1993 Law, it is this 1993 Law which the Tribunal will examine as to whether Tradex' claim is justified on the merits. This is in conformity with Art. 42 (1) of the ICSID Convention according to which "the Tribunal shall apply the law of the Contracting State party to the dispute (including

its rules on the conflict of laws) and such rules of international law as may be applicable". Accordingly, the Tribunal will make use of sources of international law insofar as that seems appropriate for the interpretation of terms used in the 1993 Law, such as "expropriation". In this context, it should be noted that, though the authentic version of the 1993 Law only exists in the Albanian language, both Parties have used the English translation of that Law in these proceedings and it has not been claimed that this translation is not a true reflection of the 1993 Law. Therefore, the Tribunal also bases its considerations on this English translation of the 1993 Law.

70. A further limitation comes from the 1993 Law itself. Art. 8 paragraph 2 of the Law which the Tribunal accepted as the basis of its jurisdiction provides for submission to ICSID only,

"if the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance of Article 7,...".

71. As no discrimination and no breach of the obligations under Art. 7 regarding transfers are claimed by Tradex (see latest Memorandum of 4 December 1998), in view of the above mentioned limitation, for the Tribunal's examination on the merits only the following Articles of the 1993 Law must be considered as possible sources of the claim insofar as they may become relevant for an expropriation and a compensation for expropriation:

Article 2
Entry and Treatment

1. Foreign investment in the Republic of Albania are not (sic) conditioned from a preliminary authorization. They are permitted and treated on a basis no less favourable than that accorded in like situations to Albanian investments, except that ownership of land which will be treated by a special law.
2. In all cases and at all times, foreign investment shall receive fair and equitable treatment, shall enjoy full protection and security.

3. In any case foreign investments shall be treated on a basis no less favorable than that accorded by rules generally accepted by international law.

Article 4
Expropriation and Nationalization

Foreign investments shall not be expropriated or nationalized either directly or indirectly or subject to any measure of tantamount effect, except for a public purpose determined on law, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation and in accordance with due process of law.

Article 5
Compensation for Expropriation and Nationalization

1. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or become known, whichever is earlier.
2. Compensation shall be paid without delay and include interest at a commercially reasonable rate from the date of the expropriation, be fully transferable and convertible at the market rate of exchange on the date of the expropriation.
3. In cases in which a foreign investor asserts that all or part of its foreign investment has been expropriated or considers the compensation therefor to be unsatisfactory, the foreign investor shall have a right to prompt review by the appropriate judicial or administrative bodies in accordance with the provisions of Article 8 of this Act.

72. Though Article 4 also mentions “Nationalization” as a possible basis for a claim, Tradex has not alleged that its investment was nationalized and, therefore, this aspect of a possible claim also does not have to be considered.

F. Reasons for the Decisions

1. Burden of Proof

73. As many factual aspects of this Case are disputed between the Parties, the Tribunal at the outset has to establish who has the burden of proof, i.e. who has to show the elements required as conditions for the claim, and—insofar as they are disputed—has to prove them to the satisfaction of the Tribunal.

74. As seen above, the conditions for the compensation claimed by Tradex are mentioned in Art. 4 and 5 of the 1993 Law. The wording of these provisions confirms what can be considered as a general principle of international procedure—and probably also of virtually all national civil procedural laws—, namely that it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim. In the ICSID Case Arb/87/3, Asian Agricultural Products Ltd. v. Republic of Sri Lanka (published in 6 ICSID Review—Foreign Investment Law Journal (1991), p. 527 seq.) the Tribunal considered this to be one of the “established international law rules” (at p. 549), relying on Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, Cambridge 1987, p. 327, and further sources. Relying also on Bin Cheng (p. 329-331, with quotations from further supporting authorities), the Tribunal also considered as an established international law rule that “A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof” (at p. 549).

75. Thus, taking these considerations into account, this Tribunal concludes that Tradex has the burden of proof, in the above sense, for the conditions required in the 1993 Law to establish its claim for compensation.

2. Rules of Evidence

76. After having established which Party, in principle, has the burden of proof, the Tribunal must now clarify the rules of evidence applicable in this Case in order to establish the procedural framework within which it has to decide whether or not a disputed fact has, indeed, been proved.

77. Primarily, the rules on evidence in this Case are established by Rules 33 to 37 of the ICSID Arbitration Rules. Particularly relevant is Rule 34 (1):

“The Tribunal shall be the judge of the admissibility and of any evidence adduced and of its probative value.”

78. In this context, the Tribunal must deal with some objections raised by a Party to evidence provided by the other Party in this Case:

79. Tradex (T V p. 2) has objected to the evidential value of witness statements submitted by Albania, because none of them are produced as sworn affidavits. In this regard, the Tribunal notes that, according to ICSID Rule 36 (a) it may

“admit evidence given by a witness or expert in a written deposition.”

80. As this provision does not call for a sworn affidavit, and as in many national jurisdictions non-sworn written witness statements are admissible and customary, the Tribunal is not prevented from giving evidentiary value to non-sworn written witness statements.

81. Regarding oral testimony, the Tribunal notes that ICSID Rule 35 expressly provides the wording of declarations that witnesses and experts have to make before giving their evidence. Each of the witnesses and experts heard in the Oral Hearing in this Case was asked by the President of the Tribunal to make, and then, indeed, made such a declaration. In view of the express declarations provided in Rule 35 without the requirement of an oath, the Tribunal has no hesitation to accept the evidentiary value of oral testimony given in this Case.

82. Both Parties have pleaded further reasons against the value of evidence submitted by the other Party (see: T V p. 2 to 10 and A III p. 3, 4 and 10). Both have claimed that witnesses lacked independence from the Party presenting them. Tradex particularly alleged interference by Albania on Albanian witnesses proposed by Tradex, testimony of Albania's witnesses “against their own signature”, forgery of documents, “the loan”, the “Ujka-letters”, and other reasons against the credibility of witnesses presented by Albania. Albania particularly objected, because Tradex did not bring certain witnesses and an expert to the Hearing for cross-examination, Tradex

did not cross-examine Albania's witnesses Ujka and Ndoci, and that certain testimony of witnesses presented by Tradex contained contradictions to their own earlier testimony and to the testimony of other witnesses.

83. The Tribunal finds that none of these objections makes the respective evidence inadmissible. But, in making use of its authority under ICSID Rule 34 (1) to "be the judge ... of its probative value", the Tribunal, in evaluating the respective evidence, shall take into account the objections raised by the Parties insofar as the Tribunal considers that the evidence objected to is relevant for the award on the merits. On the other hand, the Tribunal sees no need to deal with and decide on objections regarding evidence which, in the Tribunal's judgment, is not relevant for it in deciding on the claim before it.

84. In evaluating the evidence before it under Rule 34(1), the Tribunal is aware of certain principles accepted in earlier international cases which have some relevance here. While it does not seem necessary to go into much detail in this regard in this section of the Award, at least the following principles cited, with supporting sources, in the Final Award of ICSID Case Arb/87/3 (op. cit. at pages 549 and 550) may be mentioned:

"...Rule (J)—The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion.

Rule (K)—International tribunals are not bound to adhere to strict judicial rules of evidence. As a general principle the probative force of the evidence presented is for the tribunal to determine...

Rule (L)—In exercising the free evaluation of evidence provided for under the previous Rule, the international tribunals decided the case on the strength of the evidence produced by both parties, and in a case a party adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent."

3. Major Disputed Conditions for the Claim

85. After the Tribunal has thus identified its procedural approach

regarding the burden of proof and rules on evidence, it now will shortly identify which are the elements of the claim that have to be shown by Tradex—and proved if disputed—as conditions necessary for the claim to be successful on the merits. After this short identification, each of these conditions will have to be taken up in subsequent sections of this Award for a detailed examination.

a) "Foreign Investment"

86. The first condition for a successful claim by Tradex is that there must be a "foreign investment".

87. This is already required as a condition for the jurisdiction of the Tribunal according to Art. 8 of the 1993 Law which mentions "foreign investment" at the beginning of both its paragraphs 1 and 2. In this regard, reference can be made to the Decision on Jurisdiction of this Tribunal dated 24 December 1996. Particularly in section D.3. of that Decision the Tribunal found that Tradex had to be considered as a "foreign investor". And on that basis the Tribunal concluded that the conditions for its jurisdiction under the 1993 Law were fulfilled, leaving open, however, the question whether or not an "expropriation" has been shown as required by the 1993 Law, which issue was joined to the merits of the Case. As an expropriation can only be established, if a "foreign investment" has been made as the possible object of such an expropriation, the Tribunal now, in its consideration of the merits, has to examine whether Tradex has shown that, indeed, it made a "foreign investment". The Tribunal's Decision on Jurisdiction, therefore, does not prejudge its examination of a "foreign investment" in its consideration of the merits of the Case.

88. Regarding the merits, Art. 2 (1) as well as Art. 4 of the 1993 Law start their wordings with the term "Foreign investment" and thereby clearly indicate that their applicability, as a first condition, depends on such a foreign investment having been made. Furthermore, Art. 5 (1) of the 1993 Law, in establishing further standards for compensation, also refers to the "investment".

89. Therefore, there can be no doubt that the first condition for Tradex' claim to be successful is that a "foreign investment" has been made.

90. As Albania has disputed both the existence and the value of such an investment (see T V p. 5 and Tr 214, 228, 233 seq.), Tradex has to meet the burden of proof in this regard. The Tribunal, therefore, in Section 4 of this Award, will have to examine whether it has fulfilled, to the Tribunal's satisfaction, that burden of proof.

b) Expropriation

91. Both Art. 4 and Art. 5 (1) of the 1993 Law expressly use the term "expropriated" and thereby make it clear that a further condition for the claim to be successful is that there is an expropriation. Again, as Albania disputes that any expropriation took place, Tradex has the burden of proof in this regard.

92. The Tribunal recalls that, according to Art. 8 (2) "expropriation" is already a condition for the Tribunal's jurisdiction and that the Tribunal's Decision on Jurisdiction of 24 December 1996 expressly left that condition undecided and joined to the merits the "issue as to whether or not an "expropriation" has been shown as required by the 1993 Law".

93. Therefore, in the subsequent Section 5 of this Award the Tribunal will have to examine that issue in detail. In doing so, the Tribunal will have to take into account that Art. 4 expressly provides that three kinds of measures may qualify, namely direct expropriation, indirect expropriation, and thirdly "any measures of tantamount effect".

c) Illegality or Wrongfulness

94. Should the Tribunal find that, indeed, an expropriation has occurred, the question arises—and the Parties have discussed to some extent (see T II p. 4; T III p. 2, 22; Albania in Tr p. 229)—whether "illegality" or "wrongfulness" of that expropriation is a further condition for the claim to be successful.

95. The wording of Art. 4 of the 1993 Law clearly indicates that an expropriation is illegal, if:

- it is not "for a public purpose determined on law",
- or it is effected in a discriminatory manner,
- or it is not in accordance with due process of law.

96. But neither of these conditions is alleged by Tradex. Rather, Tradex alleges that it did not receive compensation for its expropriated assets, thereby relying on a fourth condition mentioned in Art. 4:

- “upon payment of prompt, adequate and effective compensation”.

97. Further requirements for the compensation are provided for in Art. 5 of the 1993 Law.

98. Though it is beyond doubt that in case of expropriation a compensation has to be paid, it seems less clear both in the discussion by the Parties and in legal writings on the subject what is the legal significance of this requirement. Is an expropriation illegal if no compensation is paid? Or is compensation always due, even if the expropriation is legal? The Tribunal feels it does not have to resolve these questions, however, because in any case it is clear from the 1993 Law that, if an expropriation occurred, compensation has to be paid to Tradex fulfilling the criteria for such compensation mentioned in Art. 4 and Art. 5 (1).

99. The issue of illegality might become relevant in another context in this Case: The authorization of the Joint Venture by Decree No. 26 dated 21 January 1992 (T 2) contains, in its Section 5, a reference to the Albanian “legislation concerning land” and a “necessary addendum” thereto. On that basis it could be argued that a privatization of land in conformity with this legislation must be considered legal, even without compensation, thereby granting an exception to the duty of compensation in the 1993 Law. The Tribunal will deal with this issue when, in the subsequent Section 4 of this Award, it considers the legal scope of Tradex’ investment.

d) Compensation

100. Should the Tribunal find that, indeed, all or part of Tradex’ investment has been expropriated, it would then have to examine in detail the quantum of the compensation due, applying the criteria for compensation mentioned in Art. 4 and Art. 5 of the 1993 Law. In that context, the Tribunal would have to take into account that Tradex received some assets back after the agreed dissolution of the Joint Venture so that only compensation is due insofar as its value goes beyond the value of such assets.

4. Foreign Investment by Tradex

101. The Tribunal will now examine in detail the first condition found to be necessary for a successful claim, namely whether and, if so, for what value a “foreign investment” by Tradex in Albania has been shown and proved.

102. As mentioned above in Section 3. a) of this Award, this condition is required by Art. 8 of the 1993 Law for jurisdiction and by Art. 2, 4 and 5 for the merits in this Case.

a) Investment by Tradex

103. As Tradex is the (only) Claimant in this Case, only an investment by Tradex itself is relevant. It is undisputed between the Parties that the Joint Venture “Tradex Torovice” formed by the Agreement of 10 January 1992 (T 1) is a separate legal entity under Albanian law (see Art. 1 paragraph 2 of the Agreement and Section 2 of the Authorization of 21 January 1992 = T 2). Therefore, while a Tradex contribution is an investment covered by the 1993 Law, any investment by the Joint Venture itself is not a “foreign investment”.

104. Furthermore, for the same reasons, the Joint Venture is not identical with the Albanian State and, therefore, any measures taken by the Joint Venture itself *per se* are not attributable to the Republic of Albania and thus cannot qualify as an expropriation. In any case, if and insofar as Tradex claims that measures taken solely by the Joint Venture or by its partner in the Joint Venture, T.B. Torovitsa are illegal and have caused damage to Tradex on one hand, procedurally, such a dispute would not fall under the jurisdiction of this Tribunal, because Art. 16 of the Joint Venture Agreement provides that disputes between the parties involved in the Joint Venture “will be resolved by arbitration of the International Chamber of Commerce in Paris according to its regulations”.

b) Broad Interpretation of “Foreign Investment”

105. Before examining in detail whether and to what extent Tradex has proved an investment, the Tribunal notes that Art. 1 (3) of the 1993 Law provides a very broad definition of what is to be considered a “foreign investment”:

- “3. “Foreign investment” means every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor, consisting of
- a) moveable and immovable, tangible and intangible property and any other property rights;
 - b) a company, shares in stock of a company and any form of participation in a company;
 - c) loans, claim to money or claim to performance having economic value;
 - d) intellectual property, including literary and artistic works, sound recordings, inventions, industrial designs, semiconductor mask works, know how, trademarks, service marks and trade names; and
 - e) any right conferred by law or contract, and any license or permit pursuant to law.”

106. The Tribunal considers this as a confirmation of the broad interpretation given in international law to “property” or “investment” as the possible object of an expropriation. (See most recently e.g. the Decisions of the ICSID Tribunal in the Case Fedax v. Venezuela: Decision on Jurisdiction of 11 July 1997, ILM XXXVII, 1998, p. 1378 seq. at sections 31 to 43; Award of 9 March 1998, ILM XXXVII, 1998, p. 1391 seq. at section 29).

107. In its examination of a possible foreign investment by Tradex in Albania, the Tribunal will, therefore, take into account the broad interpretation provided by the applicable law in this context.

c) Relevance of Financial Sources of Such Foreign Investment

108. There is a dispute between the Parties in this Case both regarding the factual basis and the legal relevance of the financial sources of Tradex’ alleged foreign investment in Albania (see: A II 2; A III 16; T V 10). In particular, Albania alleges that whatever Tradex invested in Albania was financed either by an “offshore company of unspecified identity and nationality, or by Greek state banks and the European Community”. Tradex claims that the financial sources of its investment are irrelevant in the context of its expropriation claim.

109. The Tribunal agrees with Tradex on this point. The 1993 Law, in its

definition of "Foreign investment" in Art. 1 (3), nowhere requires that the foreign investor has to finance the investment from his own resources. As seen above, quite to the contrary, the law provides for a broad interpretation of "investment". In the present context it may be particularly noted that Art. 1 (3) expressly includes "every kind of investment...owned directly or indirectly by a foreign investor", "loans, claim to money or claim to performance having economic value" and "any right conferred by law or contract..." .

110. The Tribunal also recalls that, in its Decision on Jurisdiction of 24 December 1996, in Section D.3. the Tribunal pointed out that the detailed wording in Art. 1 "Definitions" of the 1993 Law "does not give room for further conditions" and concluded that Tradex qualifies as a "foreign investor" under the 1993 Law.

111. On the basis of the above considerations, the Tribunal concludes here that the sources from which the investor financed the foreign investment in Albania are not relevant for the application of the 1993 Law as long as an investment is proved, which the Tribunal will examine hereafter.

d) Factual Considerations—Investment

112. As Albania disputes that any investment was made by Tradex, taking into account the considerations in Section F. 1., F. 2., F. 3. a) and F. 4. b) above of this Award, the Tribunal now has to examine how far Tradex fulfilled its burden of proof regarding the investment.

113. Regarding Tradex' **investment in kind**, by supply of equipment, the Document No. 31843, signed by the members of the Board of Directors of the Joint Venture Company and dated 30 December 1992 (= T 7) provides a

"Register

Regarding the itemized account and registration of the capital transferred from "Tradex Hellas" to the Agricultural Company Torovice till 30.12.1992."

114. It lists every piece of equipment together with a value in US Dollars and leads to a total value of US \$ 432,803.-, a value which is confirmed on the signed cover sheet of the document.

115. Albania has not submitted any concrete challenge of this document and, therefore, the Tribunal concludes that an investment by Tradex in Albania in that amount has been proved.

116. On the other hand, Tradex itself has admitted that equipment valued at US \$ 352,187.- was returned to Tradex in connection with the dissolution of the Joint Venture and, therefore, has to be deducted from the value of the original investment (T V 28). The “Liquidators Report” of 2 March 1994 attached to the “Minutes of Liquidators Meeting” of the same day (= T 20) provides a “List A” of the equipment returned to Tradex and evaluates it in total as Leke 20,842,420.-. Neither of these documents is challenged by Albania. Therefore, the Tribunal concludes that, indeed, a value of US \$352,187.- has to be deducted from Tradex’ original investment in kind.

117. Regarding Tradex’ **investment in payments**, however, many aspects are disputed between the Parties (see: T I 2; T V 6-8; A I 6-8; A II 5-11; A III 2 and 5; A in Tr 214 seq.).

118. In its summary of the investments it claims to have made (particularly in T III p. 7 seq.), Tradex mentions a number of investments not in Albania, but in other countries allegedly in favour of the Joint Venture. In this context, the Tribunal notes that, according to Art. 1 (3) of the 1993 Law, only those investments qualify to be covered by that Law that are made “in the territory of the Republic of Albania”. In principle, therefore, investments made by Tradex outside Albania do not qualify. This is particularly the case for the various investments for expenses Tradex evaluates as amounting to US \$ 160,000.- (see: T III 9) which, as Tradex concedes, were not debited to the Joint Venture.

119. On the other hand, investments in fact debited to the Joint Venture and recognized in the Liquidator’s Report (T 20) could qualify as “in the territory of the Republic of Albania”, because “loans, claim to money” are expressly mentioned as possible “foreign investment” in Art. 1 (3) paragraph c) of the 1993 Law. Tradex evaluates such investments debited and accepted in the Liquidator’s Report as amounting to US \$ 175,840.- and, for proof, refers to “items 3 b and 3 c in the Liquidator’s Report” (T III p. 9). Albania has not directly contested that figure, but has claimed in general, based on the testimony of Mr. Hadjigeorgiou, that “Tradex made no

financial contribution whatsoever” to the investment of the Joint Venture (A III 2 and also A II 10). That, in the opinion of this Tribunal, is sufficient to keep the burden of proof on Tradex.

120. The Joint Venture Agreement (T 1), in Art. 4 mentions certain contributions to be made by Tradex to the basic capital of the Joint Venture evaluated as a total of Leke 16,039,000.-, but none of these contributions is identified as an actual payment by Tradex.

121. The Articles of Association of the Joint Venture (T 3), in Art. 9, provide that the “contracting parties deposit a capital in the order of 957.575 USA dollars distributed according to the provisions of the contract”, but are not proof that any payments were actually made by Tradex in addition to its uncontested investment in kind discussed above.

122. The governmental Authorization of the Joint Venture (T 2) in its section 3, expressly mentions the same amount of US \$ 957,575.- as the initial capital and also as Tradex’ share: “Greek part 641.575 USD \$”. But that provision goes on to say that “the contributions of each part will be deposited and/or will be at disposal till 31/03/1992”. As the Authorization itself is dated 21 January 1992, it is clear that it does not indicate actual payment by Tradex, but only an obligation to contribute by 31 March 1992 leaving it open whether the contribution will be by payment or in kind.

123. Neither documents nor witness testimony has provided proof that actual payments were made by Tradex to the Joint Venture though, if actually money was transferred or paid in cash, such proof should be available.

124. On the basis of all the above considerations, the Tribunal concludes that on one hand an investment in kind in a value of US \$ 432,803.- has been proved, from which US \$ 352,187.- has to be deducted as the value of the equipment returned to Tradex. Thus an investment in the value of US \$ 80,616.- remains which could be an investment by Tradex as the object of an expropriation without compensation.

125. On the other hand, the Tribunal concludes that Tradex has not fulfilled its burden of proof regarding any other foreign investment in Albania, particularly by way of payment.

e) Legal Considerations—Investment

126. Once after the factual basis of the investment has been established, now the legal scope of Tradex' investment in Albania has to be established because the investment can only be the object of an expropriation—and a successful claim for compensation—insofar as Tradex has acquired legal rights as they are described in Art. 1 (3) of the 1993 Law under the definition of "Foreign investment".

127. Paragraph a) of that provision mentions "immoveable ... property" and "any other property rights". In this context, the Tribunal notes that Tradex does not claim to have acquired property rights on the land used by the Joint Venture. In fact, the Joint Venture being a separate legal entity under Albanian law, even if the Joint Venture had or acquired any property rights, these would not be rights of Tradex. Art. 15 of the Joint Venture Agreement mentions that Tradex' partner in the Joint Venture, the Torovitsa Agricultural Company, owns 1170 ha of land which will be used by the Joint Venture. No transfer of this ownership is recorded or alleged by the Parties and therefore, it is uncontested that neither Tradex nor the Joint Venture owned the land it used for its administrative and agricultural purposes, but that the Joint Venture had the right to use the land. But even that was only a right of the Joint Venture and not of Tradex itself. Thus, though this right to use the land may be considered as "any right conferred by law or contract" and thereby qualify as an "investment" under Art. 1 (3) e) of the 1993 Law, if that right was expropriated it was not expropriated from Tradex.

128. On the other hand, such an expropriation of a right of the Joint Venture could affect the value of Tradex' share in the Joint Venture and such a share clearly is a "foreign investment" according to Art. 1 (3) b) ("a company, shares in stock of a company and any form of participation in a company"). Therefore, the Tribunal will have to examine whether Albania expropriated the Joint Venture's right to use the land and thereby indirectly expropriated part of Tradex' share in the Joint Venture.

129. There is one further qualification for such an examination: The Joint Venture Agreement, in Art. 15 provides with regard to the land that "Such area will not change during the term of the agreement", but adds that "The joint venture shall respect the supplementary needs which will be created for the land". While it is not quite clear whether thereby a pro-

viso is made for the implementation of future privatization of land by law, a clearer reference is contained in the Authorization of 21 January 1992 of the Joint Venture (T 2). Section 5 of that Authorization provides:

“The joint venture will be also conformed to the necessary addendum will taken place to the albanian legislation concerning the land.” (sic the official translation provided to the Tribunal.)

130. The Parties have presented diverging views regarding the relevance of the Land Law (T III 2; T V 17; A I 5, 6, 8; A III 5 seq.; A in Tr 217, 221-223, 227, 228). In particular, Albania argues (Tr 221, 227; A I 8) that the Land Law 7501 of 1991 was well-known in the public and that the above references in the Joint Venture Agreement and particularly in the Authorization made it quite clear to Tradex that privatizations might take place on the basis of the Land Law. Tradex (T III 2), on the other hand, argued that it is irrelevant whether the expropriation is lawful according to local law. Indeed, as mentioned above (Section 3. c)), it can be argued that even a legal expropriation requires compensation according to Art. 4 of the 1993 Law, and this would have been the conclusion if no references to the Land Law were made in the Joint Venture Agreement and the Authorization. However, it must be assumed that these references were meant to have some legal significance and, therefore, they cannot be interpreted as leading necessarily to the same result as would be reached without such references. The legal significance could only be that the parties to the Agreement, including Tradex, accepted future applications of the Land Law and that the investment was subject to future applications of the Land Law, in other words: subject to future privatizations. If this was a legal limitation on Tradex' investment from the very beginning, then it could be argued that the actual application of the Land Law at a later stage did not infringe the investment and thus did not constitute an expropriation.

131. In view of these considerations, should the Tribunal find, in the subsequent Section of this Award on “Expropriation”, that an expropriation of Tradex' rights has in fact been made by the Albanian State, it would have to examine whether such rights were indeed acquired by Tradex or were covered by the reference to the Land Law and thus from the very beginning of the investment subject to possible privatization measures.

5. Expropriation

a) Preliminary Observations

132. First it should be recalled that the question whether there was an expropriation of Tradex' investment by Albania, is already relevant for the jurisdiction of this Tribunal according to Art. 8 (2) of the 1993 Law and that the Tribunal, in its Decision on Jurisdiction of 24 December 1996, did not come to a conclusion in this regard but rather joined that question to the consideration of the merits of the Case.

133. According to Art. 4 of the 1993 Law, foreign investment shall not be expropriated

- 1) directly
- 2) indirectly
- 3) or by any measure of tantamount effect.

134. Thereby, the Law covers a wide range of takings and makes it clear that not only government measures expressly denominated as "expropriations" or directly taking away all or part of the investment are prohibited, but also other measures that indirectly or by their effect lead to the foreign investor losing acquired rights of the kind mentioned under the definition of "foreign investment" in Art. 1 (3) of the 1993 Law. The Parties have extensively argued whether an expropriation has occurred in this Case (in particular see: T II 5; T III 15-27; A I 3, 22 seq., 25; A II 4; A III 3, 10; Tr 215-219, 222 seq., 226 seq.). In its examination of the facts of the Case, the Tribunal will, therefore, deal with every incident alleged by Tradex as having the effect of a taking.

135. An as similarly broad interpretation as in Art. 4 is given to "expropriation" in international law (e.g. see: In the Amoca Case: "a compulsory transfer of property rights", Iran-US Claims Tribunal Reports 15 (1997), p. 220; in the Otis Case: "necessary...to prove, firstly that its property rights had been interfered with to such an extent that its use of those rights or the enjoyment of their benefits was substantially affected and that it suffered a loss as a result...", Iran-US Claims Tribunal, 84 I.L.R. section 28), in evaluating particular incidents, the Tribunal may also get guidance from sources of international law in its interpretation of Art. 4 of the 1993 Law.

136. Therefore, though a broad range of takings may be considered in this context, there is always a second condition for such a taking to qualify as an expropriation: the attributability to the State. This is not mentioned directly, but also established in international law (e.g. see: Otis Case, as above, sections 28, 29 and 47; Protiva Case, Yearbook Commercial Arbitration 21 (1996) section 53). It is uncontested between the Parties that attributability to the State is, in principle, a condition of expropriation, but they disagree as to whether certain incidents of interference, in fact, can be attributed to the Albanian State.

137. Thus, the Tribunal now has to examine each of the incidents alleged by Tradex as expropriations with regard to two questions:

- 1) Is there a taking of rights acquired by Tradex as part of its investment?
- 2) If so, is that taking attributable to the Republic of Albania?

b) Privatization Process prior to August 1992

138. The privatization process in Albania started by Law No. 7501 of 19 July 1991 (A I Exh. 7) which provided for the distribution of the land of the state farming cooperatives. This 1991 Land Law provided for (Art. 7) and Decision No. 230 of the Council of Ministers of 27 July 1991 (A III Exh. 14) implemented the establishment of land commissions at the national, district and village levels. The criteria to be used by these commissions were authorized by Art. 24 of the 1991 Land Law and specified by Decision 255 of the Council of Ministers dated 2 August 1991 (A II Exh. 18). Regulations on the registration and transfer processes for the land were set out in Decision No. 256 of the Council of Ministers also dated 2 August 1991 (A II Exh. 15).

139. This privatization of the state farming cooperatives did not directly effect the land used by the Joint Venture "Tradeks Torovice", because that land was owned by Tradex' partner in the Joint Venture "Torovitsa" and "Torovitsa" was not a state farming cooperative, but was a state farm. The privatization process of the state farming cooperatives outlined above can only be seen as a legal background, which was in place at the time of the establishment of the Joint Venture in early 1992, to the privatization of state farms which was to follow.

140. Tradex alleges (T V 13) that the Democratic Party in Albania entered the elections of April/May 1992 with a policy to also privatize the state farms, and that after the Party had won the elections, it could implement this policy using the legal framework for previous privatizations outlined above.

141. But Tradex does not allege—and there is indeed no indication in the files of this Case—that any measures occurred prior to August 1992 which could be considered as expropriations.

c) Decision No. 364 of 22 August 1992

142. The first measure which Tradex alleges to be an expropriation—or a first step in a longer expropriation process—is the Decision No. 364 of 22 August 1992 of the Council of Ministers (T 11). That Decision first transferred the Mali Kolaj village, until then under the jurisdiction of the Prefecture of Shkoder, to the Prefecture of Lezhe, but then ruled:

- “2. The rural area of 140 ha of Mali Kolaj village remains to the prefecture of Shkoder.” (sic in the English translation provided to the Tribunal.)

143. The Parties have submitted very different interpretations and explanations of that ruling (T V 14 seq.; T in Tr 203 seq.; A I 17, 18, 20; A III 12; A III 6, 10; A in Tr 235 seq.). In particular, Tradex has claimed that this meant “that 140 ha from Torovitsa land should be distributed to the villagers of Mali Kolaj village” and “was the base of all expropriation” (T V 14). To the contrary, Albania considers the ruling as “purely administrative decision which has no effect on any property rights” and also claims that the 140 ha were not land used by the Joint Venture (A I 18; A III 6 seq.).

144. The Tribunal on one hand considers the exchange of written communications between the Executive Committee of the Prefecture, the Ministry of Agriculture and Food, and the Community of Balldren-Lezhe between 20 May and 12 July 1992 (T 8, 9, 10, 11, 17 and 18) as a clear indication that the administrative decision regarding the 140 ha had the intention to enable the distribution of that land to the villagers at a future date. But, on the other hand, the Tribunal sees no indication, in these documents or otherwise in the file, that in fact, by Decision No. 364, either

Torovitsa lost its ownership in any land or the Joint Venture lost the right and the factual possibility to use its land. In fact, the witness statement by Mr. Tusha (A II Exh. 12), to which Tradex particularly referred in this context (Tr 203), on one hand calls this decision "the basis" for "**subsequent decisions**" to "**begin**" the distribution of land, but on the other hand expressly mentions that this decision "does not affect the title on property" (emphasis added by Tribunal).

145. Therefore, that Decision cannot be qualified as an expropriation.

d) Alleged Invasion August/September 1992

146. From the beginning of this arbitration Tradex has alleged that villagers occupied the 140 ha (which were the object of the Decision No. 364 mentioned above) in August and September 1992 (T I 3). It is not quite clear to the Tribunal whether this incident is still alleged at the end of the procedure, because, in its Post-Hearing Memorial (T V 15), Tradex does not reference that period of August/September, but, on the other hand, does mention that Decision 364 "led the villagers of Mali Kolaj to take possession by force". The Tribunal does not see sufficient evidence that Tradex has fulfilled its burden of proof in this regard, because the testimony of witnesses does not provide a clear picture, there is no contemporaneous evidence of an August/September invasion, it is undisputed that neither Tradex nor the Joint Venture took formal steps complaining about the alleged invasion, and the first document mentioning any kind of invasion are the Minutes of 4 December 1992 (T 75) which, however, only mention an incident of 4 December. Also, Mr. Azas, in his subsequent letters to the Albanian Government, did not mention any invasion in August/September 1992 (T 12-T 18; Tr 42, 43).

147. In any case, no evidence has been provided to prove the second condition for an expropriation, namely the attributability to the Government. Tradex alleges "that the incident of the Mali Kolaj villagers has been provoked by a state act". But the Tribunal sees no evidence in the text of Decision 364 authorizing such an invasion and no evidence has been provided that other behaviour of the Albanian authorities encouraged villagers to invade the land. Tradex has also not shown that it contacted the authorities after these alleged invasions so that a failure to act by the authorities could be considered under the aspect of attributability to the State.

148. Therefore, the Tribunal concludes that no expropriation has been proved in connection with the alleged invasions in August/September 1992.

e) Decision 452 of 17 October 1992

149. Tradex alleges (T V 15-17) that “the formal expropriation of Toro-vitsa farm” took place by Decision 452 dated 17 October 1992 by the Council of Ministers (Text in A II Exh. 16) and that this decision was not depending on an implementation procedure or a formal title, or registration at the Cadaster office, but rather was a self-executing law (T V 16). According to Tradex an additional act was only necessary for the distribution of the expropriated land.

150. Albania, on the other hand, claims (A II 18 seq.) that Decision 452 only provided that the order and procedure for the privatization and restructuring of the state farms would be determined by the Central Agency for Restructuring and Privatisation of State Farms which had been created by Decision 300 dated 30 July 1992 of the Council of Ministers. According to Albania (A II 19), neither Decision 452 provided nor was it the intention of the Agency to privatize all agricultural enterprises and it was expressly intended that joint ventures that had been created by that time—October 1992—would not be subject to the privatization or redistribution of land.

151. Indeed, an examination of the text of Decision 452 shows that it contains no wording indicating an expropriation by that Decision itself, but rather wording authorizing such privatization:

- “1. ... be distributed”
- “2. ... to be distributed”
- “4. Land ... will be given ...”.

152. Particularly, section 8 of the Decision provides:

- “8. Central Agency for Restructuring and Privatisation is assigned to determine the agricultural enterprises or their components to be distributed, time and order of distribution and issuing of relevant instructions.”

153. From this provision it can be seen that not all agricultural enterprises are to be privatized, but that rather the Agency will select them or their components for privatization, as well as the time and order for each such privatization. There is no indication in the text of the Decision that land of the Torovitsa Joint Venture will be selected for such privatization.

154. The Tribunal, therefore, does not consider Decision 452 to be an expropriation of part of Tradex' investment.

f) Berisha Speech of 27 October 1992

155. Tradex (e.g. T V 15) gives great importance to the speech of Mr. Sali Berisha (text in T 69) of 27 October 1992 which was widely reported in the press and television, as an indication that the government intended to fulfill its pre-election promises and policies.

156. Indeed, shortly after Decision 452 of 17 October 1992, that speech of 27 October 1992 emphasized to the general public that the government intended to in fact implement its privatization program also regarding agricultural enterprises. But the Berisha speech was neither a legislative or executive act nor did it change the situation found above in Section e) created by Decision 452.

157. Therefore, the Berisha speech cannot be considered to be an expropriation, by itself or together with Decision 452.

g) Alleged Occupation October/November 1992

158. Tradex further alleges that, upon proclamation of Decision 452, the villagers of the other villages situated around Torovitsa rushed to the Torovitsa farm and occupied it (T V 15). During the Hearing this was confirmed by the direct testimony of Mr. Lapardhaja that from October till December 1992 300 hectares of land were taken by the villagers (Tr 54).

159. The Tribunal notes, however, that this testimony is, to some extent, not confirmed by other testimony of the same witness. First, Mr. Lapardhaja did not mention this occupation in his several and extensive written witness statements provided before the Hearing (T 45, 46, 48, 49, 50).

Secondly, in cross-examination during the Hearing, the witness could not identify the allegedly occupied 300 ha of land (Tr 83).

160. The testimony of Mr. Azas is also not clear in this regard. On one hand he said that 300 hectares were occupied “in the autumn of 1992, October, November, December” (Tr 37). On the other hand, in cross-examination, he said: “No, no. In October it was too early. We did not believe they will expropriate.” (Tr 45).

161. If, indeed, 300 hectares were taken by the villagers up to the end of 1992, it is also difficult to understand, why Mr. Azas, in his seven letters to the Government between 31 October 1992 and 12 July 1993 (T 12–18) complaining and asking for help never mentioned these alleged occupations by the villagers. When asked about this in cross-examination, he said that he did not remember why this was not mentioned in his letter of 12 December 1992 which did mention the incident of 4 December 1992 (Tr 42).

162. Mr. Lohja, the witness presented by Albania, denied that 300 hectares were occupied by villagers in November 1992 (Tr 168).

163. Furthermore, the only contemporaneous document about occupation of land of the Joint Venture, the Minutes of 4 December 1992 (T 75) do not mention the alleged occupations in October and November, but only an occupation on 4 December 1992, though it would have been normal to also mention occupations that allegedly occurred the two months before and therefore were a much more serious deprivation.

164. Taking into account the above considerations, the Tribunal concludes that Tradex has not fulfilled its burden of proof regarding these alleged occupations in October and November 1992.

165. Subsidiarily, even if the villagers felt encouraged to such occupations by Decision 452 and the Berisha speech, that would not be a sufficient basis to attribute such occupations to the State of Albania, and no other evidence has been provided as a basis for such an attributability. (See e.g. the ICSID Decision in the Amco Asia Case in which the Tribunal considered a much more direct and active involvement by the state in a private taking by army and police still not as sufficient for an attribution to the state; ICSID Reports 1, p. 377, at 455.)

*h) Alleged Occupation and Destruction of Crops by Animals
on 4 December 1992*

166. The only alleged occupation confirmed by a contemporaneous document is the one of 4 December 1992. The Minutes of Meeting of that day (T 75) have the following wording:

"We report that today the 4th December 1992 we caught the animals of the village Mali-Kolaj in the sown field with clover, cotton and maize. The parcels No. 1, 2, 3 shown with clover and parcel 13 with cotton and maize.

1. The parcel No. 3 destroyed completely.
2. The parcel No. 13, 4 ha cotton and 9 ha maize destroyed completely.

with the explanation that "today the land is ours because it was given to us by the Prefecture and the Commune of Ball-dren".

We prepared these minutes to demand idemnity.

The Supervisor
Pal Luli

The agronomist
Gjok Prela"

167. The Tribunal interprets this document, though it expressly only mentions "animals", to the effect that villagers either came on the land with their animals or at least let the animals on the land and then gave the cited explanation "today the land is ours because it was given to us by the Prefecture and the Commune of Balldren".

168. Tradex (T V 18) claims that these Minutes refer to damage done by the alleged invasions either in "August/September" or in "November/December" 1992. The Minutes clearly say that "today", i.e. on 4 December 1992 the animals were caught. Even if the Minutes—and the uncontested English translation—are made in unprecise language, the meaning of "today" is clear and it is highly unprobable that minutes expressly "prepared...to demand idemnity" (last phrase of the Minutes) would have chosen "today", if they intended to refer to an occupation that started much earlier in November.

169. But, as these Minutes are a contemporaneous document, the Tribunal is inclined to accept these Minutes as proof for the occupation on 4 December. But even if it also accepted that, indeed, the villagers said what is cited in the Minutes, attribution to the Albanian State would still have to be shown and proved. The cited explanation of the villagers may show what they believed, perhaps on the basis of Decision 452 and the Berisha speech, but it does not show that, in fact the Albanian State authorized the occupation. As seen above, neither Decision 452 nor the Berisha speech actually transfer property in or the right to use the land to the villagers. And Tradex has neither provided any evidence that any state authorities permitted the occupation, nor at least, that after being called by the Joint Venture or Tradex for protection, refused to grant protection.

170. Therefore, the Tribunal concludes that, in any case, the incident of 4 December 1992 cannot be considered as an expropriation due to lack of attributability to the Republic of Albania.

i) Alleged Occupation by Villagers in December 1992

171. The testimony of Mr. Lapardhaja during the Hearing indicates that a new situation arose in December 1992, because, while the villagers allegedly had occupied land before on their own, from December “the villagers began working together with the chairmen of the communes and the Titles Office” (Tr 54).

172. Tradex claims (T V 17) that their occupations are confirmed by the testimony of Mr. Azas. But Mr. Azas stated that his last visit to Torovitsa was on 4 December 1992 (Tr 20) and that, thereafter, he stayed in Tirana. Thus it is difficult to see how he can confirm occupations after the one on 4 December which has been dealt with above in Section h).

173. On the other hand, Mr. Lohja, in his testimony (Tr 167, 168) has confirmed one incident in December which seems to be the one on 4 December because he also mentions animals entering the fields, but Mr. Lohja goes on to say that the animals were removed and that no such incident occurred again (Tr 168).

174. The Tribunal also notes that the letters which allegedly Mr. Azas wrote in and right after December 1992, namely the letters dated 12 December, 21 December and 21 January 1992 (T 12, T 14, T 15), though

mentioning that “we cannot go to the farm, because we encounter many obstacles from several persons” (letter 21.12.1992, T 14), none of these letters mentions any occupation by villagers though it could have been expected that such an occupation would be included in the complaints to the Albanian government.

175. In conclusion, the Tribunal finds that Tradex has not fulfilled its burden of proof that such occupations occurred after 4 December 1992 nor that they were attributable to the Republic of Albania.

j) Dissolution of the Joint Venture in April 1993

176. Tradex further claims that the dissolution of the Joint Venture, though effected by consent between Tradex and its partner in the Joint Venture, was forced upon Tradex and constitutes an expropriation (see e.g. T V 11 seq.).

177. As expropriation by definition is a “compulsory” transfer of property rights (see e.g. Amoca Case, cited above, section 135), an agreement reached in consent with the foreign investor and signed by it as in the Dissolution Agreement dated 21 April 1992 (T 19) can hardly be seen as an act of expropriation in itself. This is even more so as, again with full consent of Tradex, the Agreement mandated “all necessary measures” for the “liquidation of the joint venture” and, in conformity therewith, the liquidators appointed by Tradex and the Ministry of Agriculture and Food presented a “Liquidators Report” and “Minutes of Liquidators Meeting” (T 20) completing the liquidation on 16 December 1993, identifying certain assets valued at Leke 20,842,420.- to be returned to Tradex which then indeed were given back to and accepted by Tradex without objection.

178. The Parties have discussed broadly and disagree considerably why the Joint Venture failed and whether Mr. Ujka in fact wrote certain letters (A I Exh. 12 and 13) in this context and what relevance these letters have (see e.g.: T II 13; T V 8, 11, 13 seq.; A I 13; A II 15 seq.).

179. The Tribunal feels it is only relevant in the context of this Award whether, in spite of Tradex’ consent to the dissolution and to its implementation, it has been shown—and, in view of Albania’s objection proved—that the dissolution was forced upon Tradex.

180. The Dissolution Agreement is helpful in this examination insofar as it expressly mentions “which problems made impossible the continuation of operation of the joint venture, namely:

- (1) The complete inexistence of security of the production of the J.V. and of the life of the managerial personnel of the J.V.
- (2) The destruction of the irrigation system of the farm by the inhabitants of the region.
- (3) The take-over of lands of the farm by inhabitants of the region with permission of the State.”

181. While the first two reasons obviously cannot be identified as expropriation measures, the third reason, also obviously could be such an expropriation measure.

182. The mere fact that this third reason is mentioned in the Dissolution Agreement provides, by itself, not yet proof that such a take-over took place and that there was a permission of the State. This is particularly so as not the representatives of the Republic of Albania, but “only” the representatives of the two partners in the Joint Venture, i.e. Tradex and Torovitsa N.B., signed the Agreement. Tradex has argued in this context (T V 3) that Mr. Ujka was a civil servant in the Cadaster Office of Lezhe and was the representative of the Albanian State in the Torovitsa N.B. and the respective state farm. But Mr. Ujka’s position as a civil servant does not by itself indicate that when he signed under the words “For Torovitsa N.B.” beyond that designated representation his signature also represented the Albanian State. Furthermore, in his oral testimony, Mr. Ujka explained that the take-overs never happened and he only accepted the respective third reason in the text of the Agreement because M. Azas convinced him that such a reference was in his own interest, that Tradex had started negotiations with the Ministry of Agriculture to be given land in another area, and that Mr. Azas could not come to Torovitsa “because of the pressure on the part of the workers and we cannot continue our operation here in Torovitsa” (Tr 160). Furthermore, in answer to more specific questions, Mr. Ujka denied that villagers had taken any land in August 1992, that in any way the local police was involved, that in October and November 1992 additional 300 hectares were taken over by vil-

lagers until the incident mentioned above occurred on 4 December 1992 (Tr 161).

183. Even if there is some contradiction between what Mr. Ujka signed in the Dissolution Agreement and his testimony, the Tribunal finds that the mere mentioning of the third reason in the Dissolution Agreement by itself is not sufficient for Tradex to fulfill its burden of proof both for the taking and the permission of the State. This is at least so if, as seen in the above Sections of this Award, none of the incidents alleged by Tradex can be considered as a proven taking attributable to the Albanian State.

k) Issuance of Titles to Mr. Pellumbi and Others

184. Tradex has submitted written witness statements by Mr. Pellumbi (T 44 and T 77), a villager of Torovitsa temporarily staying in Greece. In his statements, Mr. Pellumbi says that he was given a piece of land of 12,000.- square meters in the privatization process about the end of 1992 and, from his memory, he lists some 200 families in the same region to whom, according to him, about the end of 1992 and in the beginning of 1993 the whole farm was distributed by title deeds (T 44 page 2 seq.). None of the title deeds have been produced to the Tribunal except a title deed for Mr. Pellumbi dated much later, namely of 20 September 1993 (A I Exh. 16), and Mr. Pellumbi did not come to the Hearing to present oral testimony. Albania had requested his appearance and objects to the acceptance of his written statements because he was not made available for cross-examination. Tradex has indicated that Mr. Pellumbi did not appear in person because he was afraid to be exposed to undue pressure by Albania.

185. Be that as it may, the Tribunal finds that in view of the fact that Tradex has the burden of proof, the written statements of a single witness, who then—for whatever reason—is not available at the Hearing for cross-examination by the other Party and for questions by the members of the Tribunal, is not sufficient to prove that in fact land was distributed and title deeds issued in late 1992 and early 1993.

186. On the other hand, the only title deed produced to the Tribunal dates from September 1993, a time when the Joint Venture had already been dissolved by the Agreement dated 21 April 1993 and, therefore, by its timing cannot be proof of an expropriation measure.

*I) Decisions and Measures after the Dissolution Agreement of
21 April 1993*

187. A number of decisions and measures occurred after 21 April 1993 when the Joint Venture was agreed to be dissolved.

188. The first was a decision of 5 May 1993 of the Ministry of Agriculture and Food (A I Exh. 14) approving the liquidator of the Joint Venture. As the liquidation was mandated in the Dissolution Agreement itself and then performed without objections by Tradex, the approval of the Ministry of a procedure agreed to by Tradex cannot be an expropriation.

189. The next measure is the Protocol dated 10 May 1993 of the Division of Privatisation of the Ministry of Agriculture and Food (A I Exh. 15) “in application of Decision of the Council of Ministers No. 452 of 17 October 1992” to dissolve the “Agricultural enterprise Torovice” and distribute 920 ha of land to 2.800 workers and citizens of the enterprise each of them receiving 3.200 square meters of land. On that basis, as seems uncontested between the Parties, thereafter a Land Commission distributed the land to the villagers, these were registered in the cadastre and received title deeds such as the one granted to Mr. Pellumbi on 20 September 1993.

190. The Tribunal does not have to examine these measures starting with the Protocol of 10 May 1993. They could probably easily qualify as an expropriation if the land had still been used by the Joint Venture. But, as the parties to the Joint Venture, including Tradex, on 21 April 1992 had concluded the Dissolution Agreement, the use of the land had been discontinued and thus the privatization of the land no longer could effect the Joint Venture and Tradex’ investment. This conclusion is not changed by the fact that the liquidation of the Joint Venture still took until December 1993, because—as seen above—the ownership in the land did not belong to the Joint Venture and, therefore, was not part of the assets to be liquidated.

m) Combined Evaluation of the Decisions and Events as Expropriation

191. While the above examination in Sections b) to l) of this Award has come to the conclusion that none of the single decisions and events alleged by Tradex to constitute an expropriation can indeed be qualified by the

Tribunal as expropriation, it might still be possible that, and the Tribunal, therefore, has to examine and evaluate hereafter whether the combination of the decisions and events can be qualified as expropriation of Tradex' foreign investment in a long, step-by-step process by Albania.

192. Tradex has claimed (Tr 205-207 and T V II seq.) that such a qualification must be made.

193. It is uncontested between the Parties that there was a long privatization process in Albania which started with the Land Law No. 7501 of 19 July 1991 (A I Exh. 7). That Law provided for the distribution of the land of state farming cooperatives which was the land that had been in private ownership until 1945. In this context, it should be recalled that Torovitsa N.B., Tradex' partner in the Joint Venture which owned the land to be used by the Joint Venture, was not such a cooperative and thus the Land Law of 1991 did not apply to it. Art. 7 of the Land Law was implemented by Decision No. 230 of the Council of Ministers of 27 July 1991 establishing land commissions at the national, district and village levels (A II Exh. 14). Further criteria were specified by Decision No. 255 of the Council of Ministers dated 2 August 1991 (A II Exh. 18) and regulations on the registration and transfer processes for land set out in Decision No. 256 of the same day (A II Exh. 15).

194. This was the legal framework in place at the time when Tradex concluded the Joint Venture Agreement on 10 January 1992 (T 1) with Torovitsa N.B., a state farm to which, it may be repeated, that legal framework was not applicable.

195. It seems uncontested between the Parties that before the elections of April/May 1992 the Democratic Party announced that, should it win the elections and form the new government, it would expand the privatization program to the state farms (see e.g. T V 13). After the Democratic Party in fact had won the elections, appropriate steps were taken to implement that promise.

196. Regarding the land of Torovitsa which is relevant in this arbitration, though Albania stresses the purely administrative character of that decision (e.g. see A I 17, 18; A III 6, 10), the Tribunal accepts Tradex' explanation (e.g. see T V 13, 14) that Decision 364 of 22 August 1992 (T 11) transferring the Mali Kolaj village to the Prefecture of Lezhe, but retaining

its rural area of 140 ha in the Prefecture of Shkoder was the preliminary administrative decision on the basis of which the distribution of the 140 ha of land to the villagers took place at a later stage in the process of the privatization of that area. It seems plausible, as Tradex explains (T V 13, 14), that 140 ha which were far away from the village of Mali Kolaj and therefore not well fit to be used by the villagers after privatization, were to be replaced by an area of 140 ha of Torovitsa which was close to the village and therefore well fit to be used by the villagers. No other convincing explanation for this administrative decision to change the jurisdiction has been presented to the Tribunal. However, as seen above in Section 5. c) of this Award, that administrative decision did not deprive the Joint Venture from the use of those 140 ha and therefore cannot be qualified as an expropriation. The conceivable intention of Decision 364 to prepare for a later privatization does not change that conclusion.

197. As seen above, after that Decision 364, none of the decisions taken or alleged invasions by villagers examined in detail in the above Sections 5. d) to 5. k) can be qualified as an expropriation. The remaining question for the Tribunal is whether these events, in their combination, can nevertheless be qualified as an expropriation. Again, this would require that Tradex fulfills its burden of proof in this regard, namely that it proves a taking and its attributability to the Albanian State.

198. Regarding the condition that a taking has to be proved, this would require that, compared to the beginning of the relevant period, August 1992, at the end of the period Tradex would have less of an investment. If one accepts, in spite of the dispute between the Parties regarding the success of the Joint Venture up to August 1992, that the Joint Venture had all the land of Torovitsa N.B. available for the use of the Joint Venture, Tradex would have to meet the burden to prove that less was available at the time of the dissolution of the Joint Venture in April 1993. Now, the above examination in Sections c), e), f) has shown that none of the acts of the state authorities deprived Tradex of any of its rights, and the examination in Sections d), g), h) and i) has shown that Tradex could not prove that it lost use of land due to alleged invasions of villagers, and furthermore that such alleged invasions were attributable to the State of Albania.

199. The conclusion, therefore, is that at the end of the relevant period there is not sufficient evidence or proof that Tradex had less land available than in August 1992.

200. This conclusion is not changed by the undisputed fact that the Joint Venture, in the later part of that period did not actually agriculturally use all of the land and the Joint Venture was in difficulties and that the Parties have very different opinions why this was so (see in particular: The alleged Azas' letters, T 12-18; the alleged Ujka's letters, A I Exh. 12, 13; T II 13; T V 8, 11, 13, 14; A I 13, 20; A II 14-16; A III 9), because what is relevant in the context of this Award is only whether expropriation measures were the cause of these difficulties, which Tradex has not proved. As the International Court of Justice pointed out in the Elsi Case, it must be proved "that the ultimate result was the consequence of the acts or omissions" of the state authorities (I.C.J. Reports 1989, section 119). Or, as the Iran-US Claims Tribunal found in the Otis Case, "a multiplicity of factors affected Claimant's enjoyment of its property rights... However, the Tribunal is not convinced that the Claimant has established that the infringement of these rights was caused by conduct attributable to the Government of Iran. The acts of interference determined by the Tribunal as being attributable to Iran are not sufficient in the circumstances of this Case, either individually or collectively, to warrant a finding that a deprivation or taking of the Claimant's participation in Iran Elevator had occurred." (I.L.R. 84, section 47). Taking these standards into account, the Tribunal in this Case finds that Tradex has not proved that the failure of the Joint Venture was due to expropriation measures by the State of Albania.

201. The Tribunal finds some confirmation of this conclusion in the undisputed fact that Tradex ordered a feasibility study in January 1993 on expanding the Joint Venture and requesting loans from Greek banks and the European Community. Had Tradex considered that its investment had been expropriated by the Albanian State and the Joint Venture was failing for that reason, it is hard to understand why it then invested further money in such a feasibility study. In fact, during cross-examination, when asked whether he mentioned any acts of expropriation in his applications to the Greek banks and to the European Union, Mr. Azas said:

"I think no. We did not say we have the problem because, as I told you, we did not believe serious problems at this time."
(Tr 45, 46)

202. If this was so in January 1993 and as Tradex does not allege any further expropriation measures after January 1993, even Tradex' own

behaviour seems to confirm that it had not been deprived of its investment until the Joint Venture was dissolved in April 1993 in agreement with Tradex.

203. In view of all these considerations, the Tribunal concludes that Tradex has also not fulfilled its burden of proof that a general combined evaluation of the decisions and events starting August 1992 must be qualified as an expropriation.

n) General Conclusion

204. At the end of its examination in this Section 5 of the Award, therefore, the Tribunal concludes that Tradex has not been able to prove that an expropriation occurred regarding its foreign investment in the Joint Venture. And the Tribunal further concludes that the evidence presented by Tradex is not sufficient to support its allegation of an expropriation in such a way that the burden of proof would have shifted to Albania either regarding a taking or regarding the attribution of a taking to the Republic of Albania.

205. In view of this conclusion, if no expropriation occurred there is no jurisdiction according to Art. 8 of the 1993 Law and no compensation is due to Tradex according to Art. 4 of the 1993 Law. There is, therefore, no need for the Tribunal to enter into an examination of the quantum of such compensation.

6. Costs of the Proceeding

206. For its decision regarding the costs of the proceeding, the Tribunal first takes into account that Tradex prevailed in the procedure concluded by the Decision on Jurisdiction of 24 December 1996, and that now, Albania prevailed on the merits. Furthermore, though, taking the dispute as a whole, Tradex failed in its claim, it may be taken into account that, by no means, this claim can be considered as frivolous in view of the many difficult aspects of fact and law involved and dealt with in this Award.

207. Therefore, the Tribunal concludes that, in view of all the circumstances of this dispute, each Party should bear its own expenses and the costs of its own legal representation, and that the costs of the arbitration,

covered by equal advance deposits by both Parties, should be borne by the Parties equally in shares of 50 %.

G. Decisions

208. For the reasons stated in the preceding sections of this Award the Tribunal decides:

- a) The claim by Tradex is denied.
- b) Each Party shall bear its own expenses and the costs of its own legal representation in this Case.
- c) The costs of the arbitration, covered by equal advance deposits by both Parties, shall be born by the Parties equally in shares of 50 %.

Fred F. Fielding
Arbitrator

Andrea Giardina
Arbitrator

Karl-Heinz Böckstiegel
President of the Tribunal