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October 26, 2000

Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, D.C. 20463

AOR 2000-36

Re: Request for an Advisory Opinion on the Disaffiliation of Andersen Consulting PAC

Dear Commissioners:

Pursuant to 11 C.F.R. § 112.1, Andersen Consulting PAC (FEC identification no. C00300707), an independent multi-candidate committee which since January 1995 has solicited individual contributions solely from eligible partners of Andersen Consulting LLP, seeks an advisory opinion that it is not affiliated, within the meaning of 11 C.F.R. § 100.5(g), with Arthur Andersen PAC (which since January 1995 solicits individual contributions solely from eligible partners of Arthur Andersen LLP, none of whom is a partner of Andersen Consulting LLP). Because the partners of Andersen Consulting LLP are different persons than the partners of Arthur Andersen LLP, Andersen Consulting PAC is not "established or financed or maintained or controlled by" the same "person or by any group of such persons", and hence not "affiliated" with the Arthur Andersen PAC within the meaning of 2 U.S.C. § 441a(a)(5).

This conclusion is reinforced by the recent decision of the Secretariat of the International Court of Arbitration, International Chamber of Commerce that issued a 129 page opinion ("Arbitration Order") confirming the final separation of Andersen Consulting LLP and Arthur Andersen in all respects. A copy is attached as Exhibit A. The Arbitration Order, inter alia,

1. excused Andersen Consulting LLP (and the other 43 Andersen Consulting entities outside the United States, hereafter the "sister entities") from any further obligations to Andersen Worldwide Societé Cooperative (and thus to any AA member firm, including Arthur Andersen LLP) under previous agreements (Arb. Op. at 116, paragraph F);

2. ordered that Andersen Consulting LLP (and its sister entities) "cease to represent themselves as associated" with any Arthur Andersen member firm and discontinue use of the Andersen name[1/] no later than December 31, 2000 (Arb. Op. at 117, paragraph J); and

3. ordered that Andersen Consulting LLP (and its sister entities) return and cease use of certain "Andersen Technology" (Arb. Op. at 117, paragraph K).

This separation is final and the time for appeal has expired.

The dispositive effect of this Arbitration Order is similar to A.O. 1995-40 (1995) where the Commission held that a bankruptcy court order that Continental Airlines was no longer deemed to hold stock in Eastern Airlines justified disaffiliation of the Eastern and Continential PACs. Because Andersen Consulting LLP is no longer connected with Arthur Andersen LLP in any way, their respective PACs should likewise be found to be non-affiliated as of the effective date of the Arbitration Order, i.e. August 7, 2000.

Ordinarily, two different partnerships, with no overlapping members and whose partners had separately contributed to two different PACs since 1995, would not be considered in any sense to be "affiliated" PACs. Common sense application of the statute demonstrates readily that the partners of Andersen Consulting LLP who established, financed, maintained and controlled the Andersen Consulting PAC since 1995 are not the same group of persons who established, financed, maintained and controlled the Arthur Andersen PAC since 1995. And ordinarily that would and should end the analysis with a finding of non-affiliation.

Two unique facts are present in this case but do not change the common sense conclusion of disaffiliation. These historical facts have no ongoing significance with respect to the separate governance, operation and funding of the two PACs. First, as explained more fully under "PAC History" below, both PACs shared a common pre-1995 origin, due to the 1989 split of Andersen Consulting LLP

1/ Pursuant to the Commission's regulations, Andersen Consulting PAC will amend its statement of organization to change its name promptly in connection with the name change of Andersen Consulting LLP, which will occur no later than December 31, 2000 pursuant to the Arbitration Order.

from Arthur Andersen LLP and the January 1995 creation of the Andersen Consulting PAC. Second, the two partnerships had a former relationship as two of approximately 140 signatories to Member Firm Inter-Firm Agreements entered into with a Swiss entity, Andersen Worldwide Societé Cooperative.[2/] However, even this indirect, attenuated relationship was ended by the Arbitration Order effective August 7, 2000.

PAC History

By letter dated January 19, 1995, Arthur Andersen LLP and Andersen Consulting LLP divided their pre-existing PAC (then called Arthur Andersen/Andersen Consulting PAC) into two PACs. Each of the spin-off PACs was exclusively funded by, operated by and controlled by the eligible partners of their respective partnerships. There was no common control, but there was common origin.

At that time, Andersen Consulting PAC filed a new statement of organization as a multi-candidate committee that was neither a separate segregated fund[3/] nor a party committee. Although an open legal question (separate governance then and now of Andersen Consulting LLP, but common history and common name with Arthur Andersen) which the firms concluded not to raise at that time, Andersen Consulting PAC's statement of organization listed Arthur Andersen PAC as an "affiliated committee". Similarly, Arthur Andersen PAC amended its statement of organization to list Andersen Consulting PAC as "affiliated".

Opinion Request

Post-Arbitration Order, Andersen Consulting PAC requests an advisory opinion that the Andersen Consulting PAC is not affiliated with the

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2 As Annex 1 to the Arbitration Order (pps. 119-120) makes clear, Andersen Consulting LLP is the United States member among 44 Andersen Consulting firms worldwide and, as Annex 2 (pps. 122-126) makes clear, Arthur Andersen LLP is a United States member among 93 Arthur Andersen firms worldwide. The number of firms is as of the filing of the arbitration.

3/ Because Andersen Consulting LLP is a partnership and government contractor, partnership funds are not used to support expenditures of its PAC, unlike a corporate separate segregated fund of a connected organization.

Arthur Andersen PAC. Where an entity is not an acknowledged subsidiary of another entity,[4] Commission precedents examine various factors in the context of an overall relationship to determine whether one entity is an affiliate of another and, hence, whether their PACs are affiliated. The non-exclusive ten criteria in 11 C.F.R. § 100.5(g)(4)(ii), which apply by analogy to independent committees, are amply satisfied for the following reasons.

1. Neither partnership (Andersen Consulting LLP nor Arthur Andersen LLP) owns a controlling or any financial interest in the other. Neither PAC has control, or any interest, in the other.

2. No partner in Arthur Andersen LLP, nor any Arthur Andersen entity, has the authority or ability to direct or even participate in the governance of Andersen Consulting LLP. The Arbitration Order (at p. 116, para. F) makes clear that Andersen Consulting LLP has no obligations to any Arthur Andersen entity as of August 7, 2000 under any prior agreement, except to change its name and return certain Andersen Technology. Likewise, no partner in Arthur Andersen LLP, nor any Arthur Andersen entity, has authority or ability to direct or even participate in the Andersen Consulting PAC.

3. No partner in Arthur Andersen LLP, nor any Arthur Andersen entity, has personnel authority over any officer of Andersen Consulting LLP, which is separately governed. Likewise no partner in Arthur Andersen LLP, nor any Arthur Andersen entity, has personnel authority over any officer of the Andersen Consulting PAC. Article IV of the By-Laws of Andersen Consulting PAC is explicit: "The Committee shall have a Chairman and/or multiple Co-Chairmen, a Vice-Chairman, Treasurer and Secretary who shall be appointed by the Administrators [i.e. the managing partner] of Andersen Consulting. In addition,

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[4] As the Arbitration Order correctly found, "Andersen Consulting is not a division or subsidiary of Arthur Andersen". Arb. Op. at 77.

addition, three to six Committee members may be appointed in the same manner." (emphasis added)

4. There is no common or overlapping membership between the partners of Arthur Andersen LLP and the partners of Andersen Consulting LLP. FEC filings by both PACs confirm no common contributors to the two respective PACs from 1995 to date.

5. There is no common or overlapping officer or employee of Andersen Consulting LLP and Arthur Andersen LLP. Since 1995, there has been likewise no common or overlapping PAC officer or employee between Andersen Consulting PAC and Arthur Andersen PAC.

6. There is no on-going or formal relationship between Andersen Consulting LLP and Arthur Andersen LLP. Neither is a successor entity of the other. All vestiges of the common historical origin have been severed by the Arbitration Order. There is no ongoing or formal relationship between the Andersen Consulting PAC and the Arthur Andersen PAC other than coordination of PAC expenditures so as not to exceed the single contribution limit, in an effort to comply with the "affiliation" rules of the Commission.

7. There is no significant transfer of funds, services or goods between Andersen Consulting LLP and Arthur Andersen LLP and all such non-significant transfers are at arms-length. There are no transfers between the Andersen Consulting PAC and the Arthur Andersen PAC.

8. There is no transfer of significant funds, or on an ongoing basis, among Andersen Consulting LLP, Arthur Andersen LLP, and any particular third party. There are no transfers among the Andersen Consulting PAC, the Arthur Andersen PAC and any third party other than political contributions separately made and separately reported to the Commission by each PAC.

9. Since 1995, there has been no common history or active or significant role of one in the other with respect to the two PACs. Each is separately funded and controlled by the individual partners of the two separate entities. Moreover, with respect to the partnerships themselves, following the Arbitration Order, there has been no role, even attenuated, by Arthur Andersen LLP in Andersen Consulting LLP. Indeed, even prior to August 7, 2000, Andersen Consulting LLP was separately controlled, operated and owned by its individual partners, none of whom was a partner of Arthur Andersen LLP.

10. There is no formal or ongoing relationship between the two partnerships. Each is separately controlled, operated and owned by its respective partners. There are no common contributors to the two respective PACs. Due solely to the single contribution limit imposed by the Commission's affiliation rules, there is nominal monitoring of contributions by the other PAC in order not to exceed the single contribution limit.

Neither Commission regulations nor its advisory opinions provide an exact precedent for disaffiliation of two PACs that are independent committees. However, the Commission's analogous precedents of disaffiliation of a spin-off corporation's PACs strongly support a finding of disaffiliation here.

For example, as in A.O. 1993-23 (1994), there are no officers or directors in common between Andersen Consulting LLP and Arthur Andersen LLP – indeed, the evidence of disaffiliation is even stronger here because there is not even a common partner, much less a common controlling officer or director.

Similarly, as in A.O. 1995-36 (1995), "the passage of time [there 1994-1995; here 1989-2000 for separate operations and 1995-2000 for separate PACs] . . . along with the continuous separate operations during this time period (including the direct competition), further diminishes the effects of the historical relationship between the companies." The lack of an ownership interest, which was of particular significance to the Commission there and in A.O. 1996-23 (1996) involving the breakup of ITT into three companies, is likewise present here. Indeed since at least 1995 there has been no Arthur Andersen LLP ownership interest in Andersen Consulting LLP, which is owned solely by its partners and which competes directly

with Arthur Andersen LLP. Nor is there joint management, control or operation. Governance is exclusively by the partners of each entity. The factual demonstration of disaffiliation is stronger here than in the ITT spinoffs where there were common Board members.

As the Commission emphasized again in A.O. 1996-42 (1996) involving the disaffiliation of the Lucent and AT&T PACs, there is no ownership interest of one entity in the other and each is separately controlled. Such is clearly the case here also. An attenuated customer-supplier relationship was insufficient to prevent a finding of disaffiliation between the Lucent and AT&T PACs.

Similarly, as in A.O. 1996-50 (1996), the PACs are disaffiliated because neither organization participates in the governance, hiring or decisionmaking of the other. Significantly, the Commission held that such minor ongoing joint actions as sharing a building, office expenses, and a receptionist did not preclude disaffiliation.

In its most recent advisory opinion on disaffiliation, A.O. 1999-39 (February 18, 2000), the Commission emphasized that two entities no longer had any ownership interest in each other, no common owners, only one common Board member, only three common former employees and were now in direct competition with each other. The facts supporting disaffiliation of the Andersen Consulting PAC are even stronger with no overlap in governance.

Conclusion

For all the above reasons, Andersen Consulting PAC requests an advisory opinion of disaffiliation and respectfully requests that the effective date of such disaffiliation be no later than August 7, 2000, the effective date of the Arbitration Order.

Very truly yours,

John C. Keeney, Jr.
Attorney for Andersen Consulting PAC

JCKjr/dhd

SECRETARIAT OF THE INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CHAMBER OF COMMERCE
38, Cours Albert 1er,
75008 Paris, France

Case No. 9797/CK/AER/ACS

FINAL AWARD

In the Arbitration of

ANDERSEN CONSULTING BUSINESS UNIT MEMBER FIRMS

vs.

ARTHUR ANDERSEN BUSINESS UNIT MEMBER FIRMS

and

ANDERSEN WORLDWIDE SOCIETE COOPERATIVE

July 28, 2000

FINAL AWARD

CONTENTS

I. THE PARTIES AND THE ARBITRATION CLAUSE

Claimants are the Andersen Consulting Business Unit (ACBU) member firms listed in Annex 1 hereto.

Respondents are the Arthur Andersen Business Unit (AABU) member firms listed in Annex 2 hereto and Andersen Worldwide Société Coopérative (AWSC), a Swiss Cooperative entity.

The relevant arbitration clause to decide the present dispute is the following:

> "Subject to the exercise by Andersen, S.C. of its option under Paragraph 9.5 hereof, any and all disputes which cannot be settled amicably, including any ancillary claims of any party, arising out of or in connection with this Agreement (including the validity, scope and enforceability or this arbitration provision) shall be finally settled by arbitration conducted by a single arbitrator in Geneva, Switzerland. The proceedings shall be conducted pursuant to the then-existing Rules of Conciliation and Arbitration of the International Chamber of Commerce, except that the parties may select an arbitrator who is a national of the same country as one of the parties. If the parties to the dispute fail to agree on the selection of an arbitrator within thirty (30) days of the request for arbitration, either party may apply to the International Chamber of Commerce to make the appointment. The parties hereby express their wish that the decision of the arbitrator be rendered as promptly as possible.
>
> "The arbitrator shall be a lawyer and shall conduct the proceedings in the English language. The arbitrator shall decide in accordance with the terms of this Agreement and of the Articles and Bylaws of Andersen, S.C. In interpreting

the provisions of this Agreement, the arbitrator shall not be bound to apply the substantive law of any jurisdiction but shall be guided by the policies and considerations set forth in the Preamble of this Agreement and the Articles and Bylaws of Andersen, S.C., taking into account general principles of equity.

"The parties specifically agree to renounce all recourse to litigation to the extent not inconsistent with applicable law and further agree that the award of the arbitrator, including without limitation, an injunctive order of specific performance or similar equitable relief, shall be final and that neither the procedures followed by the arbitrator nor the award shall be subject to review by the courts, except as may otherwise be required by applicable law. Judgment with respect to any award may be entered in any court having jurisdiction over the parties or their assets."

II. THE PROCEEDINGS

Claimants filed a Request for Arbitration before the International Court of Arbitration of the International Chamber of Commerce on December 17, 1997. The Request was duly notified to the Respondents.

Respondents submitted their answers to Claimants' Request for Arbitration and objected to the Tribunal's jurisdiction. AWSC also filed Counterclaims against the ACBU member firms.

On October 5, 1998 the parties signed the Terms of Reference and agreed on a procedural schedule for the present arbitration

On April 29, 1999 the Tribunal issued an Interim Award on Jurisdiction ruling inter alia, that all Claimant ACBU member firms listed in Annex 1 hereto and the Respondent AABU member firms listed in Annex 2 hereto were subject to the jurisdiction of the arbitrator in this ICC arbitration. The Tribunal also ruled on the appropriate rules of law governing the parties' dispute.

Each party submitted a set of opening, reply and final memorials on jurisdiction and another set for the merits. The Tribunal held hearings for witness testimonies on jurisdictional objections and on the merits.

The parties were granted the right to a due process of law in every respect.

By deferring the present dispute to ICC arbitration, the parties have undertaken to carry out the present award without delay and have waived their right to any form of recourse insofar as such waiver can validly be made.

Therefore, upon the authority and jurisdiction conferred by the parties and the International Chamber of Commerce, this Tribunal hereby renders the following final Award.

III. APPLICABLE LAW

The Tribunal found that the Member Firm Interfirm Agreements (MFIFAs) entered into between AWSC and the Andersen Worldwide Organization member firms, together with the AWSC Articles and Bylaws are the relevant rules of law chosen by the parties to govern the present arbitration; in interpreting the provisions of the MFIFAs the arbitrator is not bound to apply the substantive law of any jurisdiction but shall be guided by the policies and considerations set forth in the Preamble to the MFIFAs and the Articles and Bylaws of AWSC; if the MFIFAs and the AWSC Articles and Bylaws are silent or do not provide guidelines for a decision, the Tribunal shall, pursuant to Article 17.1 of the ICC Rules, apply the rules of law it deems appropriate; those rules of law shall be the general principles of law and the general principles of equity commonly accepted by the legal systems of most countries. [1]

The UNIDROIT Principles of International Commercial Contracts are a reliable source of international commercial law in international arbitration for they "contain in essence a restatement of those '*principes directeurs*' that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice."[2]

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[1] Interim Award in the Arbitration of Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative, ICC Arbitration Case No. 9797/CK/AER issued on April 29, 1999 at pp. 7-9.
[2] June 5, 1996 Award on Preliminary Issues in ICC case No. 7375/CK.

IV. STATEMENT OF FACTS

A. Origins and Development of Arthur Andersen & Co.

Arthur Andersen & Co. commenced as a public accounting firm with audit as a core activity. The firm also performed financial analysis and special purpose investigations, installed financial, cost accounting and organization systems and prepared tax reports under the United States Federal Income Tax Law.

In 1942, Arthur Andersen & Co. created an Administrative Accounting practice to develop systems, methods and procedures. With the introduction of computer technology in the 1950s, the Administrative Accounting practice -renamed Administrative Services Division since 1951- expanded into systems consulting.[3] By the 1970s, the Division's scope of practice comprised "the design and installation of systems or the conduct of studies to produce the information needed by management to direct the activities of its organization."[4]

In 1979 the Administrative Services Division formalized its operational consulting activities into a new service line called Profit Improvement[5] and one year later reorganized that practice as the Management Information Consulting Division (MICD), to perform services then defined as "Information Business – providing information to people who run things."[6]

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[3] "A Vision of Grandeur" Arthur Andersen & Co.'s 75th Anniversary Publication in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 12, Exhibits, Tab 49 at pp. 84, 92-93.

[4] "The Administrative Services Division of Arthur Andersen & Co." in Volume I of Claimants' Exhibits, Tab 1, Preface.

[5] See: "AA Operational Consulting/Andersen Consulting Fact Finding Objectives" in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 6, Factual Affidavits, Tab 24, Att. J (Evolution of Practices).

The MICD's practice comprised business planning leading to more detailed determination of information requirements, followed by the planning of information systems, including development projects and information studies.

Soon the MICD began to prepare specialists in two new areas where Arthur Andersen did not yet possess a skill base, strategy and human resources on one hand and change management on another.[7] Then, in 1986 the MICD commenced a migration process from total systems solutions to total business solutions along five dimensions: strategic services, business and industry processes, organization and people services, building responsive systems infrastructures and planning, designing and implementing business applications.[8] The MICD also formalized a Strategic Services Practice to aid top corporate and business unit executives in strategic planning and studies.[9]

B. Development of the Accounting and Audit Division's Consulting Practice

Business type consulting was being performed by the Audit division prior to 1981. That year Arthur Andersen & Co. transferred its Profit Improvement practice from the

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[6] See: Minutes of the Meeting of the Board of Directors of Arthur Andersen & Co., S.C., held on May 18-19, 1980 in AWSC's Volumes of Exhibits, Volume I, Tab 12 at p. 25.
[7] "Andersen Consulting (Europe): Entering the Business of Business Integration." INSEAD, 1991, Fontainebleau, France in Volume I of Claimants' Exhibits, Tab 50 at pp. 9-10.
[8] See: "Excerpts from Presentation by Terry Neill, 1986" in Volume I of Claimants' Exhibits, Tab 9 at p. 4.
[9] See: "Specialized Skills – Strategic Interim Committee Report, July 1986" in Volume I of Claimants' Exhibits, Tab 10 at pp. 10-11.

MICD to the Accounting and Audit Division[10] where it became known as Impact four years later.[11]

By 1988, the Impact service line was engaged in analysis of business operations and performance efficiency.[12] Impact was later renamed Operational Consulting, a denomination it kept until 1994 when it was merged with the AABU member firms' Business Systems Consulting practice.[13]

In addition to its Operational Consulting service line, the firm's Accounting and Audit Division created a Small Systems Consulting practice in 1986 to provide systems related services to small to medium sized organizations and perform services for large organizations. The new practice's services would be complementary to the systems consulting services offered by the existing MICD and the Audit and Tax practices and would fill the market gaps left by the MICD's practice.[14]

Two years later, Small Systems Consulting had expanded. By then, the Accounting and Audit Division management was seeking to continue the aggressive development of its financial consulting services, Small Systems Consulting included. The head of the division commenced a visioning process to create opportunity and inject vitality in the Accounting and Audit practice around information services rather than audits of

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[10] See: "AA Operational Consulting/Andersen Consulting Fact Finding Objectives" in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 6, Factual Affidavits, Tab 24, Att. J (Evolution of Practices).

[11] See: Affidavit of Richard L. Measelle in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 6, Factual Affidavits, Tab 24, ¶12, footnote 5.

[12] See: Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on August 25-26, 1988 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 14, Exhibits, Tab 82 at p. SC 007313.

[13] See: Affidavit Richard L. Measelle in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 6, Factual Affidavits, Tab 24, ¶12, footnote 5.

[14] See: "Arthur Andersen & Co. Small Systems Consulting, Competitive Strategy, April 13, 1988" in Volume I of Claimants' Exhibits, Tab 31 at p. 1.

historical financial statements.[15] By 1988, the Accounting and Audit and Tax Divisions had devised an overall competitive strategy for their two consulting practices aiming to provide a full range of services on a worldwide basis in the fields of attest, consultation, information and taxes with broad based management consulting skills, including information technology, at the base of these services. Increasing levels of skills and sharing of markets among all the practice areas were viewed by the practices' leadership as necessary to their vision.[16]

The consulting area was conceived in the vision as an expanding activity, likely to become a source of shared revenues with Tax and MIC practices. Three broad categories of consulting were outlined in the vision: General Management Consulting, Specialty Consulting and Corporate Finance Consulting, not restricted to any consulting subset but rather embracing the full range of buyer need.[17]

C. The International Expansion of Arthur Andersen & Co. and the Creation of the AWO

Arthur Andersen & Co. began to expand internationally in the 1930s. At that time the firm operated through a network of international offices, branches and subsidiaries of the U.S. partnership premised under a "one firm" service concept which allowed these various entities to offer "seamless" services to all their clients as if such entities were part of one firm.

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[15] See: Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C., held on August 25-26, 1988 in Respondent ABBU Member Firms' Opening Memorial on the Merits, Volume 14, Exhibits, Tab 82 at pp. 22-23.

[16] See: November 7, 1988 Interoffice Communication from David L. Bucholz and Richard L. Measelle to Duane R. Kullberg in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 6, Factual Affidavits, Tab 24, Att. C at p. SC 011514.

[17] "The Worldwide Accounting and Audit Practice's Preliminary Breakthrough Vision in the 1995-2000, Visioning Process 1988", Att. to a February 17, 1989 Interoffice Communication

As the firm increased its global presence its leadership realized that a new structure was indispensable in order to address several legal, regulatory, tax and professional restrictions in the countries where it operated.[18] In 1977 the firm created that new structure: the Andersen Worldwide Organization (AWO), designed to maintain the one firm concept and deliver uniform seamless service to clients across the world. The AWO is comprised of a Swiss cooperative entity, Arthur Andersen & Co. Société Coopérative (AWSC)[19] acting as an "umbrella" entity for the organization, the AWO member firms and the Partners of AWSC, inter alia.[20]

AWSC was created to coordinate on a worldwide basis, the professional practices of its Practice Partners who are its members and of their member firms; to serve as the instrumentality through which the AWSC partners participate in shaping and implementing the reciprocal commitment of their resources and the coordination of their common efforts on a worldwide basis (Bylaws at Preamble). AWSC was not to engage in any professional practice of its own.

Each member of AWSC, namely an individual who applies for admission to partnership and signs the Agreement Among Partners is a Practice Partner, i.e. a partner, principal, shareholder, director, officer and/or employee of one or more member firms authorized to engage in professional practice (Bylaws at Preamble).

Every member firm and its Practice Partners enter into a Member Firm Interfirm Agreement (MFIFA) with AWSC, substantially in the form of a standard version

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from Richard L. Measelle to the Arthur Andersen & Co., S.C. Board of Partners, in AWSC's Volumes of Exhibits, Volume VIII, Tab 105 at p. ACM 0024.

[18] Lawrence A. Weinbach Witness Statement in AWSC's Witness Statements, Tab 1, ¶7-8, ¶11.

[19] Arthur Andersen & Co. S.C. later changed its name to Andersen Worldwide Société Coopérative (AWSC).

[20] Article 3 (C) of 1977 Bylaws of Arthur Andersen & Co., S.C. in Volume I of Claimants' Exhibits, Tab 2 at p. SC23831.

approved by the AWSC partners,[21] pursuant to which the member firm and/or its Practice Partners agree to adhere to professional standards and principles coordinated by AWSC, subject to compliance with applicable laws and professional regulations, to adopt appropriate compatible policies and to carry out certain other responsibilities.[22]

D. The 1989 Restructuring

As the AWO developed through the years, various difficulties began to strain the relationships between the partners practicing in the Accounting and Audit and Tax divisions on one side and those practicing in the MICD on the other. The earnings disparity between practices, the need for a new governance framework in light of the firm's internationalization, the desire of each division to run its own business and the regulatory issues stemming from auditors' independence requirements caused discomfort among the consulting partners and dissatisfaction with the status quo.[23]

The threat of the MICD partners' massive exodus to competing firms as a consequence of the internal tensions finally turned the resolution of the earnings disparities and governance disputes -which mainly affected those partners- into a priority.[24]

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[21] See: April 29, 1999 Interim Award in the Arbitration of Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative, ICC Arbitration Case No. 9797/CK/AER at p. 2.

[22] Article 3 (M) of 1977 Bylaws of Arthur Andersen & Co., S.C. in Volume I of Claimants' Exhibits, Tab 2 at p. SC23832.

[23] See: "Conclusions and Recommendations" Draft of the Arthur Andersen & Co. Change Management Task Force, in AWSC's Volumes of Exhibits, Volume II, Tab 28 at pp. SC 011109 and 011113 and Witness Statement of Jon M. Conahan, in Claimants' Witness Statements, Tab 2 at ¶5-7.

[24] See: Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on September 23, 1988 in AWSC's Volumes of Exhibits, Volume II, Tab 24 at pp. SC 007459-SC 007460; Lawrence A. Weinbach Witness Statement in AWSC's Witness Statements, Tab

In September 1988 AWSC appointed a Change Management Task Force (CMTF), primarily to work on a solution to the market issues affecting the consulting practice, the impact of such issues on the entire firm and the market forces affecting all of the firm's practices.[25]

The CMTF recommended to the AWSC Board of Partners a solution based on the existing structure with certain substantial amendments such as the creation of separate member firms for the MICD partners; the organization of two "Strategic Business Units" which would operate as separate management lines under the aegis of AWSC: one for the Accounting and Audit and Tax divisions, the Arthur Andersen Business Unit (AABU) and another for the MICD, the Andersen Consulting Business Unit (ACBU); a new income distribution model among partners; and the reinforcement of the existing bonding provisions contained in the standard Partnership Agreement and standard MFIFA.[26]

The AWSC Board of Partners endorsed the CMTF's recommendations with certain changes and subsequently, the AWSC partners overwhelmingly approved the Restructuring as submitted by the Board, at the January 1989 General Partners' Meeting. The amendments to the AWO organizational documents became effective on September 1, 1989.[27]

Thereafter, the member firms' practice was to be "conducted through two business units: ARTHUR ANDERSEN for audit/attest, tax and other financial and specialty

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1 at ¶19; Minutes of the Joint Annual Meeting of partners of Andersen & Co., S.C. and Arthur Andersen & Co. (Illinois) held on January 5, 1989 in Volume I of Claimants' Exhibits, Tab 38 at p. SC 013411.

[25] See: Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on September 23, 1988 in AWSC's Volumes of Exhibits, Volume II, Tab 24 at p. SC 007460.

[26] See: "Conclusions and Recommendations" Draft of the Arthur Andersen & Co. Change Management Task Force, in AWSC's Volume of Exhibits, Volume II, Tab 28 at Section 4, pp. SC 11163-11253.

advisory services, and ANDERSEN CONSULTING for strategic services, systems integration, information technology consulting and change management services."[28]

E. The AWO Governing Documents After the 1989 Restructuring[29]

AWSC did not suffer substantial changes as a consequence of the 1989 Restructuring. The purpose of this cooperative entity continued to be the coordination of the professional services practices of its partners' member firms on an international basis (Article 3 of the AWSC Articles).

The member firms' common practice which is the object of AWSC's coordination is guided by the following purposes and policies contained in the Preamble to the standard MFIFA:

1. Each member firm has found it necessary to cooperate with the other member firms for the purpose of providing uniform, high quality professional services for those clients who have interests in more than one nation. Cooperation is meant to satisfy the needs of all the member firms and their common clients.

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[27] Sep. 14, 1989 Memorandum from Jon N. Ekdahl to Gerard Van Kemmel and Lawrence A. Weinbach, in AWSC's Volumes of Exhibits, Volume IV, Tab 41 at p. SC 007981.

[28] See: "Understanding our Recent Restructuring: Guidelines for the 1990s", Attachment to Memorandum from Richard L. Measelle and George T. Shaheen to all Arthur Andersen & Co., S.C. Partners and all Managers (U.S. only) in Volume I of Claimants' Exhibits, Tab 39 at p. 8.

[29] Unless stated otherwise, allusions to AWSC's Articles and Bylaws refer to the version in force as of the date of the filing of this arbitration, i.e. the Articles as amended through December 22, 1995 produced in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 18, Exhibits, Tab 149 and the Bylaws as amended through December 12, 1997 produced in Volume II of Claimants' Exhibits, Tab 1. Allusions to the standard MFIFA refer to the version in force as of the date of the filing of this arbitration, i.e. the standard MFIFA produced in AWSC's Volumes of Exhibits, Volume I, Tab 1.

2. Each member firm must be afforded access to computer facilities, know-how, specialized software, personnel training and professional development programs, i.e. technology to enable the growth of its practice and furnish the kind of service delineated in the Preamble. A member firm alone would find it difficult to keep pace with the developing expertise in these fields. By cooperating with the other member firms' professional practice, a member firm seeks access, on an affordable basis, to that technology.

3. Member firms engaged in little international practice require a special capability to adhere to uniform professional standards and principles, needed to serve clients engaged in international business. The costs of that capability may outweigh the direct benefits of a client's international business. Interfirm arrangements are then required to support the costs incurred in developing such capability. Thus, a member firm may be required to make payments or contributions to share the costs incurred by other member firms in adequately serving clients on an international basis. Such payments are a necessary cost of conducting professional practices on an international basis.

The Preamble then proclaims that in furtherance of these cooperative goals, the member firms' partners have joined to organize AWSC for the purpose of arranging for the coordination, on an international basis, of their professional practices with those of their member firms.

By entering into an MFIFA, a member firm appoints AWSC as coordinator of the firm's professional practice on an international basis, with that of the other member firms within the framework of the purposes and policies of the Preamble and in accordance with AWSC's purposes as set forth in Article 3 of its Articles (Standard MFIFA, Paragraph 2.1).

As a coordinating body for the member firms, AWSC has the obligation to arrange for the performance of other functions such as developing quality control standards and procedures and other related policies, practices and procedures to assure a consistent and uniformly high quality of professional service by member firms (Paragraph 2.1 (A)); developing and implementing practice reviews programs to assure effective implementation by the member firms of such quality control standards and procedures and other related policies, practices and procedures (Paragraph 2.1 (B)); developing compatible policies and professional standards for member firms (Paragraph 2.1 (E)); developing annual operating plans to assure effective coordination of the member firms' practices (Paragraph 2.1 (F)); overseeing the development and use of Andersen Technology and regulating the use of the Andersen name by member firms and/or their right to hold themselves out to the public or otherwise represent themselves to be member firms (Paragraph 2.1 (K)).

Conversely, the member firms are committed to follow and meet in all respects the standards and policies recommended by AWSC to the extent such standards and policies are not in conflict with the laws and professional regulations applicable to each member firm (Paragraphs 6 and 9 of the MFIFAs).

F. The Business Units and the AWSC Governing Structure

The Meeting of the Partners, the Board of Partners, the Administrative Council and the Auditors are the AWSC governing bodies (Article 9 of the AWSC Articles). The Articles also authorize the creation of committees whose authority shall be set forth in the Bylaws and the delegation of management responsibilities to the partners (Article 24).

In application of the Articles, the AWSC Bylaws have created several committees and delegated several management responsibilities to AWSC partners, mostly along business unit lines, among them the Practice Unit-Executive Committee, the Oversight Committee, the Partners' Income Committee, the Managing Partner-Practice Unit, the Managing Partner-Practice Function, the Managing Partner-Area, the Managing Partner-Region and the Managing Partner-Country.

The Managing Partner-Practice Unit, as the highest individual management position within each business unit, is responsible for the overall coordination of his practice unit on an international basis and for any other duties delegated to him by the Chief Executive (AWSC Bylaws at Articles 3(R) and 6(A)(8)).

The AWSC Chief Executive appoints and removes the Managing Partner-Practice Unit, subject to confirmation by the Board of Partners' Oversight Committee of the respective business unit.

G. Scope of Service Issues and the Business Units' Strategies

Shortly before leaving office as AWSC Managing Partner-Chief Executive, Mr. Duane R. Kullberg wrote a memorandum for the AWSC file on certain governance matters which had not been previously covered by the CMTF or had been left out of the CMTF's final documents.[30] Mr. Kullberg was not only aware that scope of practice was one of such matters, a view shared by his successor;[31] he was also convinced

[30]See: December 28, 1988, Interoffice Communication from Duane R. Kullberg to the File in AWSC's Volumes of Exhibits, Volume VIII, Tab 104.

[31] See: April 6, 1989 Memorandum from Lawrence A. Weinbach for distribution to all partners, in AWSC's Volumes of Exhibits, Volume III, Tab 35 at p. 8

that the potential for scope conflicts had developed from the creation of the two business units.[32]

The unresolved scope of practice issue quickly gained momentum within the AWO.[33] Mr. Lawrence Weinbach, the new AWSC Managing Partner-Chief Executive then convened the AWSC Executive Committee for January 1990 to address this pressing matter and other related subjects.[34] The conclusions – known as the Florida Accords- drawn by the Executive Committee and supported by the AWSC Board of Partners,[35] proclaimed that although each business unit had to be a vigorous competitor in its own marketplace, its strategies had to fit within the overall strategy of the firm.[36] The Executive Committee also drew certain general guidelines to foster inter-business unit cooperation and established certain scope of service limitations initially to be applied only to the United States practices.[37]

The AABU member firms were given primary responsibility for systems consulting when the environment consisted of "proven hardware [and] prepackaged software, including the use of data bases and report writers for management information but

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[32] See: December 28, 1988 Interoffice Communication, from Duane R. Kullberg to the File in AWSC's Volumes of Exhibits, Volume VIII, Tab 104.

[33] "The scope of service overlap issue today, especially with the Audit practice, is very concerning to the Andersen Consulting partners." Scope of Practice Paper enclosed in an April 10, 1989, Memorandum from Ron Flores to Michael O. Hill in Volume VIII of AWSC's Volumes of Exhibits, Tab 107 at p. 032384. See also: December 18, 1989 Interoffice Communication, from Richard L. Measelle to the files, in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 12, Exhibits, Tab 53; and January 11, 1990 Interoffice Communication, from George T. Shaheen to Lawrence A. Weinbach in Volume I of Claimants' Exhibits, Tab 40.

[34] The Executive Committee is a "group of partners designated by the Chief Executive to assist in coordinating overall leadership and guidance in all areas of Andersen, S.C.'s activities. The S.C. Executive Committee, as a body, shall have no specific power or authority to act other than in the individual capacity of its members." (Article 3 (AA) of AWSC's Bylaws)

[35] See: Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on February 20-21, 1990 in Volume I of Claimant's Exhibits, Tab 43 at pp. 28-29.

[36] See: January 24, 1990 Memorandum from Lawrence A. Weinbach to each partner in AWSC's Volumes of Exhibits, Volume IV, Tab 44 at p. 1.

[37] Id. at pp. 2-8.

excluding custom programming and modification of code; and (...) [when] consolidated revenues of the client [were] below $175 million." [38]

The ACBU member firms were given primary responsibility when the client's consolidated revenues were in excess of $175 million "and regardless of size, when the environment [was] more complex that that set out above."[39]

Other consulting services such as strategic planning, organizational studies and marketing were recognized as ACBU member firm specialties, while financial consulting, in its broadest context, was considered a specialty of the AABU member firms. The ACBU member firms additionally reaffirmed their commitment to serve the AABU member firms' client base.[40]

The Florida Accords admitted however, that many areas of operational consulting (such as profit improvement and productivity, cost management, industry studies, and competitive benchmarking, manufacturing, just-in-time consulting and engineering consulting) could be identified with one particular business unit but often required the skills resident in both. Good coordination and cooperation through industry programs and by generally working together were the means recommended by the Accords to ensure optimal use of the operational skills resident in the member firms of each business units.[41]

When the Florida Accords were divulged among the member firms, the ACBU had already announced a repackaging of its member firms' services from systems

[38] Id. at p. 5.
[39] Id.
[40] Id at p. 5-6.
[41] Id. at pp. 6-7.

integration to business integration,[42] designed to "provide a service which ties together many components –business strategy, technology, processes, and people (...) [through a] Business Integration Model (...) described as the result of strategic intent and management action to reengineer and realign all components of a business to achieve a clear market objective." The purpose behind this repackaging effort was to modify the ACBU member firms' traditional approach and to position their practice "for entry into each and all components of the model".[43]

In turn, the AABU envisioned its present and future at that time not only as an audit and tax practice but also as a consulting business, "an area on which [the AABU was] putting increasing emphasis."[44]

In April 1990 Arthur Andersen Co. LLP (the U.S. AABU member firm) represented itself to the U.S. Securities and Exchange Commission (SEC) as "a full-service public accounting firm, offering clients a wide range of accounting and audit, tax and specialty and financial advisory services." Such services did not include systems integration consulting which accounted for the bulk of Andersen Consulting's business.[45]

Arthur Andersen Co. LLP also represented to the Securities Exchange Commission that: "[a]n important objective of the restructuring was the delineation of separate scopes of practice for Arthur Andersen & Co. and Andersen Consulting. Thus, Andersen Consulting offers clients a broad range of information technology consulting

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[42] See: Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on October 15, 1989 in Volume II of Claimants' Exhibits to the Reply Memorial, Tab 334 at p. 6.

[43] See: Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on October 14, 1991 in AWSC's Volumes of Exhibits, Volume IV, Tab 52 at p. 16.

[44] Minutes of the Annual Meeting of Partners of Arthur Andersen & Co., S.C. held on October 18-20, 1989, Exhibit I, Panel Presentation on Management's Responses to Questions Submitted by the Partners in AWSC's Volumes of Exhibits, Volume IV, Tab 43 at p.3.

services. It does not, however, perform attest services or hold itself out as engaging in the practice of public accounting."[46]

The scope of services issue did not cease to create friction after the Florida Accords, particularly in business systems consulting, strategic services and operational consulting.[47] Although the AWSC management admitted some non-significant overlap between the strategies of the business units at that time, AWSC promised it would not become significant and impair cooperation. By then, the AWSC leadership was also aware that they had not done a good job in the implementation of the Florida Accords.[48]

By 1992, the strategies of the business units were converging due to "[t]he changing nature of the accounting and audit practice [and to] business integration emphasis vs. Technology." The areas where overlap was patent were Operational Consulting/Business Process Reengineering and Technology/Business Systems Consulting.[49] On several occasions thereafter the AWSC governing bodies and leadership constantly revisited the scope of services and business unit cooperation related issues without reaching any consensus as to how to resolve them.[50]

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[45] June 20, 1990, SEC No-Action Letter, in Volume I of Claimants' Exhibits, Tab 45 at p. 77,458.

[46] Id. at p. 77,459.

[47] See: Memorandum from Lawrence A. Weinbach to each Andersen, S.C. partner dated March 27, 1991 in AWSC's Volumes of Exhibits, Volume IV, Tab 48 at p.5.

[48] January 24, 1992 Memorandum from Lawrence A. Weinbach to each Andersen, S.C. partner in Volume 1 of Claimants' Exhibits, Tab 54 at pp. 4-5.

[49] Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on February 18-19, 1992 in Volume I of Claimants' Exhibits, Tab 55 at pp. 30-31.

[50] See: Minutes of the Annual Meeting of Partners of Arthur Andersen & Co., S.C. held on November 3-4, 1992 in Volume V of Claimants' Exhibits, Tab 245 at pp. 3-5; Video Transcript of the Leadership Panel in the Annual Partners Meeting of Andersen, S.C. held on November 3-4, 1992 in Volume IV of Claimants' Exhibits to the Reply Memorial, Tab 488; Minutes of the Meeting of the Executive Committee held on December 10-11, 1992 in Volume I of Claimants' Exhibits to the Reply Memorial, Tab 303 at pp. ACM 033653-033655; and Memorandum from Lawrence A. Weinbach to each Andersen, S.C. partner dated February 26, 1993 in AWSC's Volumes of Exhibits, Volume IV, Tab 59 at p. 4.

In 1993, the AWSC Executive Committee issued a new set of guidelines, known as the 1993 Protocols, the Preamble to which acknowledges: "[a]s the Firm has developed new expertise based on our core competencies and found new and better ways to serve clients, scope-of-practice ambiguities and skills overlaps between partners in the business units have increased, particularly in operational consulting and to a lesser degree in business systems consulting."[51]

After admitting their responsibility in failing to resolve the conflict between the business units, the signatories to the Protocols further explained they had been stalemated at the policy level.[52] The Protocols declared that minimizing and managing overlap was the responsibility of the two business units and restated that cooperation between them was an essential philosophy of the firm.[53] The resolution of the overlap issues was left to those closest to the client and the marketplace

Like the Florida Accords, the 1993 Protocols established business unit cooperation guidelines for the Operational Consulting/Business Reengineering area but recognized in addition, that service overlap and competition in this area were inevitable and desirable.[54]

The AWSC Executive Committee further agreed in the Protocols that Business Systems Consulting (BSC) would be made a part of a new enterprise group within the Arthur Andersen business unit to provide audit, business advisory, tax, systems and family wealth planning services to owner-managed enterprises. Technology and

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[51] April 20, 1993 Memorandum from the Andersen, S.C. Executive Committee to each Andersen, S.C. partner, in Volume I of Claimants' Exhibits, Tab 58 at p. 1.
[52] Id.
[53] Id. at Att. 2, p.1.
[54] Business Unit Cooperation Protocols, Att. to an April 26, 1993 Memorandum from Richard L. Measelle, George T. Shaheen and Lawrence A. Weinbach to each Andersen, S.C. Partner in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 12, Exhibits, Tab 40 at p. 005493.

systems integration were recognized as core competencies of Andersen Consulting and the US $175 million limit set up in the Florida Accords was maintained.[55]

To minimize conflicts, the Protocols proclaimed that information technology skills were to be provided by the ACBU member firms while the AABU member firms would provide financial accounting and tax skills required for ACBU member firm engagements.

Before long the AWSC partners became unhappy with the 1993 Protocols. In response to a survey run in 1993, the partners surfaced their discontent and urged the AWSC leadership to expedite the resolution of the inter business unit differences. The AWSC management then promised to take a look at the market overlap and to look at AWSC's role "in more definitive terms".[56]

In May 1994, Mr. Weinbach admitted to the AWSC Board of Partners, that one of the challenges of operating two business units was the scope of service conflicts. In his opinion, one of AWSC's critical functions was the "Overall Strategic Direction (including oversight of business units, making sure that business unit strategies [were] within overall agreed to framework)."[57]

H. The Creation of Arthur Andersen Business Consulting

Five months later, while addressing the AWSC Annual Partners' Meeting the AABU management announced that the AABU member firms "would have information

[55] Id. at Att. 2, pp. 005493-005494

[56] See: Presentation by Lawrence A. Weinbach on Leadership Perspectives, Minutes of the Annual Meeting of Partners of Arthur Andersen & Co., S.C. held on November 9-11, 1993, in AWSC's Volumes of Exhibits, Volume IV, Tab 61 at pp. 15-17.

[57] See: Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on May 25-26, 1994 in Volume V of Claimants' Exhibits, Tab 251 at pp. 7-8.

technology as a core competence (...) one way or the other." In the words of Mr. Richard Measelle then head of the AABU member firms, "failure to have this competency in a shared sense would gradually spell the demise of Arthur Andersen". "The good news –concluded Mr. Measelle- is that right here in the firm we have the finest IT [information technology] capability in the world in Andersen Consulting."[58]

Mr. Measelle wanted the two business units to "work with a shared sense of core competencies (...) not a portfolio of business units each optimizing its performance at the expense of optimizing the whole."[59]

In December 1994, the AABU member firms combined their Business Systems Consulting and Operation Consulting practices to form Arthur Andersen Business Consulting and appointed Mr. Charles H. Ketteman as head of the new practice.[60]

The purpose of that merger was to build a broad based consulting capability (business, process, and supporting technology for the middle market) and a targeted world class operational consulting capability in certain areas for the largest companies.[61] The scope of the Arthur Andersen Business Consulting practice encompassed reengineering, knowledge management, information technology, cost management and performance measurement.[62]

"With Business Consulting –proclaimed Mr. Measelle- we'll have the ability to sustain our commitment to all segments of the middle market –under $200 million and over –

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[58] See: October 14, 1994 speech by Richard L. Measelle in Volume I of Claimants' Exhibits, Tab 70 at p. 22.
[59] Id. at p. 23
[60] See: January 18, 1995 Memorandum to all Arthur Andersen Partners from Richard L. Measelle in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 16, Exhibits, Tab 94.
[61] December 5, 1994 Memorandum from Joseph G. Reichner to John B. Burrows, James D. Edwards and Manuel Soto, in Volume II of Claimants' Hearing Exhibits, Tab 564 at p. 3.

and parts of the large global market where we want to and can compete in targeted, selected areas."[63] Many of AABC's competencies had been developed in recent years in response to changing market needs.[64]

The creation of AABC gave rise to further discussions on scope of service overlap. No final conclusion was reached but Mr. Weinbach reaffirmed his continued optimism that appropriate solutions could be developed.[65]

I. The Andersen 21 Process.

By October 1995 it was apparent that in many instances the AWSC partners did not want to work together. The expansion of both business units had caused service overlap and marketplace confusion had resulted from the way each business unit positioned itself in advertising and how it recruited on campuses.[66]

Mr. Weinbach knew that his role in the AWO was to resolve those issues with long-lasting solutions. Then he presented a set of "over-arching principles" agreed to by a group of high ranked officers of both business units. The principles were devised to serve as a framework for a comprehensive review of the AWO through a process denominated Andersen 21, the results of which were to be reviewed by the AWSC

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[62]Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on May 17-18, 1995 in Volume II of Claimants' Exhibits, Tab 77 at p. 14.

[63] "Arthur Andersen Business Consulting Statement of purpose" Att. to a January 18, 1995 Memorandum from Richard L. Measelle to all AA Partners in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 16, Exhibits, Tab 94 at p. 3.

[64] Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on May 17-18, 1995 in Volume II of Claimants' Exhibits, Tab 77 at p. 14.

[65] Id. at pp. 15-16.

[66] "Our Future", Presentation by Lawrence A. Weinbach at the Arthur Andersen & Co., S.C. Annual Partners' Meeting held on October 24, 1995 in Volume V of Claimants' Exhibits, Tab 262 at p. 9.

Executive Committee and Board of Partners, and later submitted to the partners at a special meeting scheduled for September 1996.[67]

The most relevant principles stated that strategies should reflect market realities and be complementary and not competitive; strategies built on core competencies should dictate scope of services; each business unit did not need to "own" all the skills and knowledge required to serve the market; and sharing the unique skills and competencies of the business units was the best way to bring to the marketplace world-class skills without creating redundancy and competition.[68]

One month after the presentation of the 'overarching principles',[69] a protocol was approved requiring that, prior to their implementation, the Andersen 21 proposals be voted by at least two-thirds of the AWSC partners of each business unit.[70]

When the Andersen 21 discussions ended in July 1996 without any conclusion or a series of recommendations that the Committee could support,[71] Mr. Weinbach decided to propose his own construct for the AWO: Vision 2000.[72]

Neither the AWSC Executive Committee nor the Board of Partners supported Vision 2000. The Board agreed however, that the status quo was unacceptable and requested a management report for January 1997 with new alternatives. If none of

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[67] Id. at pp. 10-11, 27-28.
[68] Id. at pp. 14-16.
[69] This was the time when Arthur Andersen & Co., S.C. changed its name to Andersen Worldwide Société Coopérative.
[70] See: November 27, 1995 Memorandum from Sharon A. Stachowiak to each Andersen, S.C. partner and Minutes of the Meeting of the Board of Partners of AWSC held on March 13-14, 1996 in AWSC's Volumes of Exhibits, Volume IV, Tab 71 at pp. SC 024296, SC 010328-SC 010330.
[71] July 15, 1996 Memorandum from Lawrence A. Weinbach to each AWSC partner in AWSC's Volumes of Exhibits, Volume IV, Tab 74 at p. 1.

the options offered in the report gained the requisite majority, the Board itself would submit several alternatives to the AWSC partners.[73]

The AWSC business unit leaders were unable to craft a proposed course of action.[74] Instead, profound differences had surfaced in critical aspects, such as business unit competition, income allocation between business units, partners' interests in each business unit with respect to the other and governance of the worldwide organization, including the role of AWSC.[75]

During the second quarter of 1997 and in light of Mr. Weinbach's announcement to step down from his position as AWSC Managing Partner-Chief Executive, Messrs. James Wadia (AABU Managing Partner-Practice Unit) and George Shaheen (then ACBU Managing Partner-Practice Unit) ran for election as AWSC Managing Partner-Chief Executive. Both failed to receive however, the requisite two thirds majority vote of the AWSC partners.[76]

In June 1997, facing a stalemated election, the Board of Partners appointed Mr. Robert Grafton, then Chairman of the Board, as Acting Managing Partner-Chief Executive effective September 1, 1997.[77] Mr. Grafton remains in office today.

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[72] See: Exhibit 1 to the Minutes of the Meeting of the Board of Partners of AWSC held on September 4-5, 1996 "Vision 2000, A Framework for the Future Success of Andersen Worldwide" September, 1996 in AWSC's Volumes of Exhibits, Volume V, Tab 76.
[73] See: Minutes of the Meeting of the Board of Partners of AWSC held on September 4-5, 1996 in AWSC's Volumes of Exhibits, Volume V, Tab 76 at pp. 2-5.
[74] February 5, 1997 Memorandum from Lawrence A. Weinbach to each Andersen Worldwide partner in Volume II of Claimants' Exhibits, Tab 106 at p. 2.
[75] "A Choice of Direction", April 1997 Information Package for the Andersen Worldwide Partners' Meeting, in AWSC's Volumes of Exhibits, Volume V, Tab 78 at pp. 6-7.
[76] Lawrence A. Weinbach, Witness Statement in AWSC's Witness Statements, Tab 1 at ¶ 72.
[77] See: Minutes of the Meeting of the Board of Partners of AWSC held on June 27-28, 1997 in AWSC's' Volumes of Exhibits, Volume V, Tab 83 at pp. 7-8.

This was the state of affairs in November 1997, when Mr. Richard Measelle wrote to all AA partners to restate three immutable objectives for the AABU in the Andersen 21 discussions: "*to pursue unconstrained growth; to provide consulting services, either directly or indirectly to all markets; and to have the technology we need to compete*" (italics provided in text).[78]

J. The AABU Member Firms' Construct

In mid-November 1997 Mr. James Wadia submitted a construct[79] to resolve the issues confronting the AABU and the ACBU which later became a draft proposal entitled "Breaking the Log Jam AA Construct for Step 1".[80]

On the subject of competition and working relationships, that document explained, among other things, "[t]he intent [of the Construct] is not to encourage competition *between* the business units (although that may arise from time to time), but to give each business units the freedom to respond to market opportunities and client needs in a rapidly changing external environment."[81]

Mr. Shaheen's reaction to the competition issue in the AA Construct was a November 20, 1997 memorandum to all Andersen Consulting Partners. "As I read Jim's paper, - commented Mr. Shaheen- it is apparent to me that AA views the traditional fabric of the firm as no longer relevant to its future. It is also apparent that AA intends to compete openly against AC in the marketplace. It is equally obvious, however, that

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[78] March 19, 1997 Memorandum from Richard L. Measelle to Arthur Andersen Partners in Volume II of Claimants' Exhibits, Tab 109 at p. 3.
[79] See: Minutes of the Meeting of the Board of Partners of AWSC held on November 11-13, 1997 in Volume V of Claimants' Exhibits, Tab 259 at pp. 25-28.
[80] See: November 20, 1997 "Breaking the Log Jam AA Construct for Step 1" in Respondent AABU Member Firms' Reply Memorial on the Merits, Volume 34, Exhibits, Tab 287.
[81] Id. at p. 6.

AA expects a continuation of the transfer of AC earnings to AA. As we become more familiar with the financial aspects of AA's offer, we will be better able to asses the impact and fairness of transferring AC earnings to a competitor."[82]

In response, Mr. Wadia explained: "[f]or avoidance of doubt, it is not the intention of AA management to encourage competition between AA and AC. We believe that each business unit should have the freedom to respond in its own marketplace; furthermore, we believe that the extent of marketplace overlap is limited."[83]

The final version of the AA Construct deleted the reference to the possibility that competition between business units might arise from time to time. [84]

K. The AWO Protection Committee

Facing the present arbitration, the AWSC Board of Partners issued a Resolution on February 1998 to take the necessary and appropriate measures to protect the interests of AWSC against Claimants misconduct, including if appropriate, the giving of notice to each individual Claimant member firm that Claimants had breached the MFIFAs, thereby entitling AWSC and/or the Respondent Member Firms, if such breaches were not cured, to terminate Claimant's MFIFAs. Among the grounds for

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[82] November 24, 1997 Memorandum from James Wadia to the AABU Partners enclosing a November 20, 1997 Memorandum from George T. Shaheen to all Andersen Consulting Partners, in Exhibits in Support of Respondent AABU Member Firms' Reply Memorial on the Merits, Volume 35, Exhibits, Tab 322 at p. 26.

[83] December 12, 1997 Memorandum from James Wadia to George T. Shaheen in Respondent AABU Member Firms' Reply Memorial on the Merits, Volume 35, Exhibits, Tab 323, p. 1.

[84] See also December 12, 1997 "Breaking the Log Jam AA Construct for Step 1" in Respondent AABU Member Firms' Reply Memorial on the Merits, Volume 34, Exhibits, Tab 288 at p. 6.

this decision, the Resolution lists the ACBU member firms' misconduct in formulating, approving and publicizing the request for the present arbitration. [85]

The Board of Partners then created an AWO Protection Committee comprised of "members of the (AWSC) Board other than those members who are partners of a Claimant Member Firm" for the purpose of efficiently protecting the interests of AWSC and the AWO.[86]

The Tribunal is not aware of any specific measure implemented by the AWO Protection Committee purporting to protect the interests of AWSC and the AWO.

L. The Transfer Payments

Under the MFIFAs, the AWO member firms are entitled to receive or bound to pay, as the case may be, an annual amount from or to the other member firms as a reciprocal of a commitment to cooperative action in serving common clients on an international basis and to reflect equitably the mutual and interdependent benefits of such practices. (Paragraph 8.2 of the MFIFAs and Preamble to the AWSC Bylaws).

In compliance with the transfer payment provisions, the ACBU member firms have transferred US $453.7 million to the AABU member firms since the 1989 Restructuring; of this amount US $397.6 million were transferred since 1994.

The ACBU member firms have placed US $476.2 million in an interest-bearing escrow account pending the result of the present arbitration. The moneys deposited

[85] February 12, 1998 Resolution of the AWSC Board of Partners in Volume II of Claimants' Exhibits, Tab 134.
[86] Id.

comprise the transfer payments due to the AABU member firms for fiscal years 1998 and 1999.[87]

[87] Claimants transfer payments for fiscal year 1998 were US$232.5 million while those for 1999 were estimated at US $243 million. (See: August 31, 1999 letter from Barry Ostrager to the Tribunal, in AWSC Volumes of Exhibits, Volume IX, Tab 143)

V. CONSIDERATIONS

As agreed in the Terms of Reference, the Tribunal shall not consider the issues it deems unnecessary to address and shall vary the order in which the issues were raised.

A. Whether AABU member firms breached their material obligations under their MFIFAs by:

- **establishing a broad-based and expanding business consulting practice that replicates and competes with ACBU member firms' business;**

- **disrupting Claimants' business opportunities;**

- **misappropriating the Andersen Consulting name and ACBU member firms' good will;**

- **causing marketplace confusion;**

- **seeking to hire away ACBU member firms' personnel or interfering with ACBU's recruiting of personnel;**

- **trading on Claimants' credentials and expertise.**

(Section IV. D. of the Terms of Reference)

1. Whether the AABU member firms established a broad-based and expanding business consulting practice that replicates and competes with ACBU member firms' business

Claimants accuse the Respondent member firms of expanding their advisory business into information technology consulting, strategic consulting, change management consulting and business process consulting, at least from 1994,[88] when the AABU leadership announced the creation of its AABC practice.[89]

AABC's announcement was made years after the ACBU member firms had implemented their Business Integration Model which included competencies in strategic services, change management, process and technology.[90]

The Respondent member firms acknowledge that AABC's services and skills are similar and in some degree overlap with those offered by Claimants but affirm that this overlap is not appreciable because the basic core competencies and the target markets of each business unit are different.[91]

Plainly, the ACBU and AABC average assignments differ in size and complexity. Uncontested AABU statistics demonstrate that Claimants' total revenues for 1997 were tenfold those of the AABC member firms during that year;[92] and Claimants' statistics for fiscal year 1997 show that 54% of the ACBU member firms' aggregate fees came from individual engagements of more than one half a million dollars, while

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[88] See: ACBU Member Firms' Request for Arbitration at p. 26.
[89] Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on May 17-18, 1995 in Volume II of Claimants' Exhibits, Tab 77 at p. 14.
[90] December 18, 1995 "Andersen Consulting, In-Depth Company Profile" by Dataquest, in Volume V of Claimants' Exhibits, Tab 227 at p. 15.
[91] See: Paragraph III.F.2 and III.F.3 of the Terms of Reference and Respondent AABU Member Firms Opening Memorial on the Merits at p. 56.
[92] Gary Fernandes Expert Affidavit, Att. R in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 2.

82% of AABC's aggregate fees came from assignments under that figure. Thirty six percent of those fees were generated by jobs under one hundred thousand dollars.[93]

The difference between the technology consulting skills resident in each business unit has always been apparent to the parties. AABC's technology and systems integration capabilities do not match those of the ACBU member firms in the high-end of the information technology services spectrum.

Nevertheless, overlap between the AABU and ACBU member firms' consulting practices -although almost impossible to measure in exact terms- is by no means minimal. As a matter of fact, it has rapidly increased, particularly in the information technology area.

Two circumstances contributed to expand the existing service overlap: the increasing complexity of the AABU member firms' information technology services; and the Respondent member firms' comprehensive definition of target clients, particularly in the middle market.

Indeed, AABC was created to expand the AABU member firms' ability to develop the "measurement and technology implementation processes that support the quest for better information – as well as [to] uncover creative, value-adding uses for that information"[94] through a strategy commenced in 1995.

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[93] See: George Foster's Reply Expert Report, in Reply Expert Reports submitted by Claimants at p. 22.

[94] January 1995 "Arthur Andersen Business Consulting, Statement of Purpose", enclosed in a January 18, 1995 Memorandum from Richard L. Measelle to all AA partners in Respondent AABU member firms' Opening Memorial on the Merits, Volume 16, Exhibits, Tab 94 at p. 3.

AABCs approach was successful. By 1997 its application software implementation business and other technology services accounted for about 40% of its business around the world.[95]

In the words of Mr. Charles Ketteman, AABC Managing Partner "our practices are adding deeper capabilities, deeper data warehouse, Internet and networking and other technical capabilities. Technology solutions are now being considered in all of the major engagements we're involved in around the world. (...) This is a key step towards our integrated solution strategy. (...) About a year ago, we decided to shift our strategy to work with higher end application software vendors, and I'm especially gratified with how aggressively our practices in North and South America have adopted this strategy, and how aggressively we're going to market with SAP, Peoplesoft, Baan, J.D. Edwards and Oracle."[96]

The AABC statement of purpose defined the practice's target market -where this practice intended to compete- as segments of the middle market, under 200 million and over and parts of the larger global market.[97]

Two years later Mr. Kettemman confirmed "[m]ore and more, (...) we're working with global companies. Although many of our technology-based services have been focused in broad middle market. You might be interested to know that 34 percent of our business, that is business in the past year, has been with Global 1000 companies, 34 percent. This is a critical market segment for Arthur Andersen,

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[95] See: Transcript of Videotape, "State of The Practice: Future Focus and BC Strategy" (1997 AABC Worldwide Workshop) in Volume IV of Claimants' Exhibits to the Reply Memorial, Tab 473 at p. 29.
[96] Id. at p. 25 and 29-31.
[97] January 1995 "Arthur Andersen Business Consulting, Statement of Purpose", enclosed in a January 18, 1995 Memorandum from Richard L. Measelle to all AA partners in Respondent AABU member firms' Opening Memorial on the Merits, Volume 16, Exhibits, Tab 94 at p. 3.

generally, and for us. We've got a lot to offer these companies and we need to begin to think about more to offer these companies."[98]

The Respondent member firms view Mr. Ketteman's statements as reflecting AABC's focus on aiding the finance and accounting departments of Global 1000 companies, not on competing for high-technology projects.[99] The Tribunal considers however, the documentary evidence produced as indicative of a rapid expansion of AABC's information technology services into the higher end of the marketplace in every respect.

Claimants have submitted 86 excerpts of AABU member firm proposals involving enterprise resource planning (ERP) and information technology projects, tendered between 1996 and 1997, to companies with revenues greater than US$175 million. Twenty five of these proposals were made to entities with annual revenues greater than three billion dollars.[100]

The number of proposals is not significant if compared to the total AABC submits every year (5,000 to 6,000),[101] but it does point out that AABC is participating in the information technology consulting market for large companies.

Uncontested evidence equally demonstrates that 35% of AABC's 1997 revenues were generated by clients with annual revenues above three billion dollars. This figure

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[98] Transcript of Videotape, "State of The Practice: Future Focus and BC Strategy" (1997 AABC Worldwide Workshop) in Volume IV of Claimants' Exhibits to the Reply Memorial, Tab 473 at pp. 25 and 29-31. According to the AABU member firms, AA LLP's revenues generated by Global 1000 clients amounted to 31% of its total business consulting revenues (Respondent AABU member firms Opening Memorial on the Merits at p. 61).

[99] Respondent AABU Member Firms' Post-Hearing Memorial on the Merits at pp. 62-63.

[100] See: Volume I of Claimants' Supplemental Appendix of AABC Bid Proposal Excerpts, Tab 1. The Tribunal has only considered the excerpts in which Claimants have provided the date of the proposal and the proposals made to clients with annual revenues above US$3 billion, when such figure is explicitly included.

[101] Testimony of Charles Ketteman, Hearing Volume 2, October 26, 1999 Tr. at p. 392.

is particularly relevant if compared with Claimants' 42% revenues originated in engagements for clients with annual income under the three billion dollar mark during the same year.

Finally, Mr. Wadia admitted that a handful of AABU member firms were engaged in Business Consulting practices and performed significant high-end computer systems or information technology consulting services, at the time of the filing of the ACBU member firms' Request for Arbitration.[102]

In summary, the AABU member firms' expansion into consulting practice in the information technology area, both in terms of capabilities and target market, substantially increased the opportunities for the member firms of the two business units to perform similar services to similar clients.

On certain occasions the Respondent member firms' expansion resulted in head to head competition against ACBU member firms.[103]

Along with its expansion in the information technology area, AABC adopted the business integration model ACBU member firms had successfully implemented since 1989. Several AABC proposals and recruiting advertisements explicitly mention this model, some with a bubble graphic almost identical to the one used by Claimants to describe their model.[104]

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[102] See: James Wadia Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 10, Factual Affidavits, Tab 36 at ¶ 63-64.

[103] There are no less than 48 uncontested events of head to head competition for clients with revenues above US$175 million.

[104] See: December 1994 Preliminary and Tentative proposal to Equifax in Volume IV of Claimants' Exhibits, Tab 212 at p. 4; March 27, 1997 "Bank One, Procurement Process Electronic Commerce Project" in Volume III of Claimants' Exhibits, Tab 208 at p. 4; November, 1997 Information Technology Strategic Planning (ITSP) Project for Pt. Bank Rakyat Indonesia (Persero), Attachments to Final Report in Volume IV of Claimants' Exhibits, Tab 218 at p. 4-12; December 1, 1997 proposal to Universal Studios Inc., Volume IV of Claimants' Exhibits, Tab 223 at p. 6; 1996 Arthur Andersen Recruitment Kick-off Meeting

The Tribunal must note however, that the concept behind the business integration model was not originally developed by Claimants.[105]

On these grounds, the Tribunal finds that Arthur Andersen Business Consulting is in fact, a broad based consulting practice that replicates and competes in some instances with the ACBU member firms' practice.

2. Whether the MFIFAs prohibit the AABU member firms from establishing a broad based consulting practice that replicates and competes in some instances with the ACBU member firms

Several provisions in the MFIFAs and the AWSC Articles and Bylaws regulate cooperation, coordination and compatibility among the practices of the AWO member firms.

Cooperation is a condition required to achieve the member firms' objective of providing uniform, high quality international service on an international basis.[106] For this reason, most of the obligations each member firm agrees to perform under the MFIFAs imply a duty to cooperate with the other member firms (e.g. to share in the costs of maintaining an international service capacity of uniformly high professional quality; refer clients or coordinate client service on an international basis with other

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Brochure for UCLA in Volume II of Claimants' Exhibits, Tab 90 and 1997 Arthur Andersen Recruitment Advertisement "Experienced BPCS and Oracle Consultant" in Volume II of Claimants' Exhibits, Tab 104.

[105] See: Paul Bracken Affidavit in AABU Member Firms' Reply Memorial on the Merits, Volume 22, Industry Expert Affidavits, Tab 220 at p. 18; "United Research, Sogeti, and Cap Gemini Sogeti form alliance", Business Wire dated June 16,1990, Dow Jones Interactive Publications Library in AABU Member Firms' Reply Memorial on the Merits, Volume 33, Exhibits, Tab 256 at pp. 1-2.

[106] Preamble to the MFIFAs.

member firms; bear a fair share of AWSC's costs and expenses for services rendered; and participate in training and quality control programs).

Coordination among the member firms' practices is the means to achieve the cooperative goals set forth in the Preamble to the MFIFAs. To this end, each member firm appoints AWSC to arrange for the performance of certain coordinating functions, among these, the coordination of its professional practice with that of the other member firms (Paragraph 2 of the MFIFAs).

Compatibility relates to the policies and standards recommended by AWSC which must be adopted by the member firms. In this connection, one of AWSC's functions as a coordinating body is to develop compatible policies and professional standards for the member firms. These in turn, agree to meet in all respects the policies and standards compatible with those recommended by AWSC and adopted by the other member firms (Paragraphs 2.1(E), 6.1, 6.2 (D) and 9.1 of the MFIFAs).

The Tribunal does not construe any of these principles as barring any individual member firm or a group of member firms from offering and performing services rendered by other member firms to the same segment of the marketplace. Indeed, the MFIFAs do not, explicitly or implicitly, impose any limitation (functional, geographical or otherwise) on the professional practices of the member firms.[107]

These principles and the other provisions cited in Section IV.E. above require that the member firms' practices be developed in accordance with the policies and standards dictated by AWSC in furtherance of the common goals of cooperation, coordination and compatibility among member firms.

The MFIFAs accordingly define the member firms' professional practice as the practice of performing professional services assignments of a type determined to be appropriate for member firms (Paragraph 1(G) of the MFIFAs);[108] and the AWSC Articles vest in the Board of Partners the authority and responsibility to receive and act upon recommendations of the Administrative Council[109] and/or the Chief Executive, as appropriate, in matters relating inter alia, to scope of professional practices and ethical standards for recommendation to the partners and/or their member firms (Article 16, Paragraph B (1) of the AWSC Articles).

With AWSC's coordinating role and functions in perspective, the only possible conclusion is that the AWO organizational documents do not limit the member firms' professional practice. Instead, the governing documents vest in AWSC the authority and responsibility to determine the appropriate scope of the member firms' practices.

The relevant evidence does not lead to a different conclusion or support the contention that a clear-cut separation of scope of practices between the AABU and the ACBU member firms was agreed as a premise of the 1989 Restructuring

Firstly, scope of services was not among the issues specifically addressed by the CMTF. This is understandable in light of the purpose of the 1989 Restructuring which was to resolve the earnings disparity and governance issues affecting the MICD partners.

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[107] The only express service restriction is AWSC's impediment to engage in any professional practice of its own in any nation of the world. (Preamble to the MFIFAs, Article 3 of AWSC's Articles and Preamble of AWSC's Bylaws)

[108] Under prior versions of the MFIFAs, the professional practice of the member firms was limited to specific fields, e.g. "public accounting and auditing, tax consulting and/or management information consulting, or any combination thereof." (1987 Standard MFIFA in Volume I of Claimants' Exhibits, Tab 16 at p. 52)

There are only a few mentions in the CMTF's Draft Consensus Report to scope of service issues. One is contained in a question/answer exercise explaining the relevant issues before the CMTF, where who sets the scope of practice was laid as an example of an area where governance comes into play; another includes minimizing adverse competition between the business units as one of the evaluation criteria of the governance model; finally, the scope of practice issue is mentioned to specify that the resolution of that issue was left to the AWSC Board of Partners and the Area Managing Partners.[110]

Secondly, since 1988, some members of the AWSC Board of Partners raised certain concerns regarding the use of the Andersen Consulting name. In the opinion of those Board members, the Andersen Consulting name might imply to potential clients that only the ACBU member firms would provide consulting services. The Board members regarded this implication as not true and reiterated that a significant portion of the services long provided by the Accounting and Audit and Tax practices consisted of consulting services. To the eyes of the Board, such implication conflicted with new initiatives to broaden the scope of non attest services.[111]

Thirdly, the AWSC Chief Executives during the time of the 1989 Restructuring (Messrs. Kullberg and Weinbach) agreed that scope of services was an issue not covered by the CMTF which had to be dealt with by AWSC.[112]

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[109] The Administrative Council is AWSC's executive body with the authority to decide on all matters not delegated or reserved by law or the AWSC Articles to the Meeting of the partners, the Board of Partners or any other governing body AWSC (Article 18 of AWSC's Articles).

[110] November 1988 Draft of Change Management Task Force Conclusions and Recommendations, in Volume 1 of Claimants' Exhibits, Tab 33 at pp. 1-12 and 4-4 and Volume II of AWSC's Volumes of Exhibits, Tab 28 at pp. 4-20 and 4-38.

[111] Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on August 25-26, 1988 in Respondent AABU Opening Memorial on the Merits, Volume 14, Exhibits, Tab 82 at p. 23.

[112]See: December 28, 1988 Memorandum from Duane R. Kullberg to the File in AWSC's Volumes of Exhibits, Volume VIII, Tab 104 at pp. 1-2 and April 6, 1989 Memorandum from

Fourthly, the MFIFAs were not amended in any significant way after the 1989 Restructuring to reflect any changes in the member firms' obligations or to limit the scope of their professional practice.

Lastly, Messrs. Measelle and Shaheen's description of the member firms' practices in January 1990 and Arthur Andersen & Co. LLP's representations to the U.S. Securities and Exchange Commission in 1990, although accurate at the time, can not be construed as implying a restriction on the future evolution of such practices.[113]

The Tribunal's interpretation is also founded on the AWSC leadership's pronouncements during the years following the 1989 Restructuring that the scope of services issue had to be dealt with by the AWSC governance structure.

Mr. Weinbach knew strategy was equal to scope of services and to the overall vision of the firm. He also knew it was AWSC's responsibility to deal with those issues.[114]

Mr. Shaheen considered that each business unit had to compete vigorously in its own marketplace and contribute to the overall success of the AWO. In his view, the firm management should establish the guidelines under which each business unit would operate.[115]

Lawrence A. Weinbach for distribution to all partners in AWSC's Volumes of Exhibits, Volume III, Tab 35 at p. SC 024081.

[113] "Understanding Our Recent Restructuring: Guidelines for the 1990s", January 2, 1990 Memorandum from Richard L. Measelle and George T. Shaheen to all AWSC Partners and U.S. Managers in Volume I of Claimants' Exhibits, Tab 39 at p. 8.

[114] Management Panel Discussion, Minutes of the Annual Meeting of Partners of Arthur Andersen & Co., S.C. held on October 15-16, 1991 in Volume I of Claimants' Exhibits, Tab 52 at p. SC 013875.

[115] "Scope of Practice Position Paper", enclosed in a January 11, 1990 Memorandum from George T. Shaheen to Lawrence A. Weinbach in Volume I of Claimants' Exhibits, Tab 40 at p. 2.

Mr. Richard Measelle was equally conscious that the answer to the scope of service conflicts lay in a series of actions by the AWSC leadership clearly and unequivocally showing that the firm and the business units were managed under one basic and fundamental principle: the firm would not split. "[T]he market is moving so rapidly – explained Mr. Measelle- that the scope of service delineations will need to be revisited at regular intervals to make sure that they are still operative."[116]

Likewise, the Florida Accords, the Portugal Protocols and the A21 process, are all admissions of AWSC's responsibility to deal with the scope of practice conflicts. For example, the 1990 Florida Accords explicitly declare that the AWSC Executive Committee would address these issues as they came up.[117] Had the MFIFAs imposed a limitation on the member firms' practices, the Accords and Protocols and all the other proposals to resolve the internal AWO conflicts would have been unnecessary.

In this light, the Tribunal finds the MFIFAs do not preclude the AABU member firms from competing with the ACBU member firms.

By the same token, nothing in the MFIFAs restrains the Respondent member firms from implementing operational or organizational models similar to the Business Integration paradigm adopted by Claimants.

Had Claimants' Business Integration Model been deemed intellectual property of the ACBU member firms, it would have been made available to all the member firms for their use in their professional practices; and if not, any AABU member firm would have been at liberty to adopt the model.

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[116] December 18, 1989 Memorandum from Richard L. Measelle to the files in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 6, Factual Affidavits, Tab 24, Att. K at pp. 2-5.

Claimants also accuse the AABU member firms of transgressing their obligations under the MFIFAs by ignoring legally binding AWSC policies and practices expressed in the Florida Accords and 1993 Protocols, which the AABU member firms were obliged to adopt.[118] In Respondents' opinion, the Accords and Protocols are not binding on the member firms and do not prohibit overlap of services.

The Florida Accords and 1993 Protocols were developed by the AWSC Executive Committee, a group of partners designated by the AWSC Chief Executive to assist in coordinating overall leadership and guidance in all areas of AWSC's activities, without any specific power or authority to act other than in the individual capacity of its members (Article 3(AA) of the AWSC Bylaws). For this reason, the Accords and Protocols cannot be deemed agreements binding on the member firms or practices established by the member firms, enforceable by or against them.

Hence, the issue before the Tribunal is whether the Accords and Protocols are binding policies recommended by AWSC (Paragraphs 6.2(D) and 9.1 of the MFIFAs), or simple internal AWSC management guidelines.

The Tribunal favors the second interpretation.

First, the AWSC Executive Committee referred to the conclusions expressed in the Florida Accords, including certain general guidelines and specific initiatives, as

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[117] See: January 24, 1990, Memorandum from Lawrence A. Weinbach to each partner in AWSC's Volumes of Exhibits, Volume IV, Tab 44 at p. 3.
[118] Claimants' Opening Memorial at p. 128-129.

operating principles,[119] and the AWSC Executive Committee regarded the 1993 Protocols as business unit cooperation guidelines.[120]

Second, both the Accords and Protocols discuss scope of services and business unit cooperation basically as matters to be implemented and developed by the business unit management lines.

Third, the Florida Accords and 1993 Protocols impose no direct responsibility on the member firms to implement any service constraints discussed by the AWSC Executive Committee.

Fourth, the Accords and Protocols explicitly required further implementation in the field of the information technology services entrusted to Andersen Consulting.

Fifth, neither the Accords nor the Protocols mention the AWO member firms.

The Florida Accords and 1993 Protocols are thus internal guidelines to be applied by the business unit management lines in fulfilling their coordinating responsibilities. Consequently, the AABU member firms could not have breached any obligation under those guidelines.

3. **Whether the AABU member firms disrupted Claimants' business opportunities, hired away ACBU member firms' personnel, interfered with ACBU member firm's recruiting of personnel, caused marketplace confusion, traded on Claimants' credentials and expertise and**

[119] See: Memorandum from Lawrence A. Weinbach to each partner dated January 24, 1990 in Volume IV of AWSC's Volumes of Exhibits, Tab 44 at pp. 1-2.

misappropriated the Andersen Consulting name and the ACBU member firms' good will

The ACBU member firms additionally accuse the Respondent member firms of breaching their obligations under the MFIFAs on the counts described above.

The AABU member firms deny both the factual and contractual basis of Claimants' allegations and challenge some assertions of the ACBU member firms.

In the Tribunal's view, only a few situations described by Claimants can be categorized as a breach under the MFIFAs.

There are ten uncontested events prior to this arbitration, of AABU member firms' partners or personnel misleading Andersen Consulting clients in order to sell their own services[121] and 18 situations[122] of AABU member firms bidding on ACBU member firms' existing clients for jobs similar to those performed by Claimants for such clients.[123]

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[120] April 20, 1993 Memorandum from the Andersen, S.C. Executive Committee to each Andersen, S.C. Partner, in Volume I of Claimants' Exhibits, Tab 58., Att.1, Philosophy for Business Unit Operations, Att. 2, Business Unit Cooperation Guidelines.

[121] The instances of AABU member firms misleading ACBU member firms' clients are: American Axle & Manufacturing Co., Bank Slaski, Chrysler Corporation, City of Vancouver, B.C., Commonwealth Title Insurance, Employers Reinsurance Company, Hallmark, Irvin & Johnson Ltd., Landamerica Financial Group, Inc., Walt Disney World in Claimants' Supplemental Appendix of Tables and Charts Tab 34.

[122] The examples of AABU member firms bidding on ACBU member firms' clients are: American Family Insurance Group, American Greetings Corporation, Amoco, Banque Et Caisse D'epargne De L'etat, Bath Iron Works, Bay Networks, Bell Atlantic, Burlington Air Express (Bax Global), Centeon LLP, Dow Chemical, Dupont, Eastman Chemical, Enova (Parent To San Diego Gas And Electric), Georgia-Pacific Group, Mcdonell Douglas Corporation, Quaker Oats Company, Telecom Finland, Toshiba America Electronics Components in Claimants' Supplemental Appendix of Tables and Charts Tab 34 .

[123] Additional cases of purported bidding on ACBU member firms' clients lack the necessary details to enable the Tribunal to determine whether the services offered by the AABU member firms were in fact similar to those rendered by the ACBU member firms or appear to be events in which the client was seeking for various proposals for a new engagement.

Claimants have also produced evidence of an incident involving an AABU member firm hiring away an ACBU member firm's employee. The former ACBU employee later solicited work to the same client he had assisted while serving with the ACBU member firm in spite of the AABU member firm's assurance that such situation would not occur.[124]

The MFIFAs contain no provision explicitly prohibiting that conduct; but the contractual agreements among the parties forbid the AWO member firms to engage in uncooperative acts to benefit themselves at the expense of other member firms. Such acts are contrary to the member firms' implicit obligation to cooperate and to pursue their professional practice in accordance with the principle of good faith and fair dealing inherent to international contracts.[125]

On five other occasions AABU member firms traded on Claimants' credentials and expertise, citing as Arthur Andersen's qualifications and skills exclusively belonging to ACBU member firms. That conduct is also contrary to the member firms' obligation to act in accordance with the principle of good faith and fair dealing.

The remaining violations alleged by Claimants are either not sufficiently supported by evidence or do not constitute a breach of the MFIFAs.

Claimants' accusations of AABU member firms underbidding ACBU member firms suggest that this situation was merely the result of two AWO member firms tendering simultaneous and independent proposals to a client and one of them offering the service at a better price. In some instances the ACBU member firm finally won the job after reducing the price.

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[124] Such incident took place in Royal Dutch/Shell Group in Claimants' Supplemental Appendix of Tables and Charts Tab 34 at p. 135.
[125] UNIDROIT Principles of International Commercial Contracts, Article 1.7.

A competitive environment as the one depicted above is perhaps undesirable for the AWO as a whole and fundamentally denotes the absence of coordination among the member firms. Lack of proper coordination is not however, attributable to a particular member firm but to the AWSC, unless AWSC's coordination efforts are purposely obstructed by a member firm.

Claimants' assertions that the AABU member firms teamed with ACBU member firms' competitors are not aided by any specific evidence. The vagueness of the ACBU member firms' accusation forecloses the possibility of any meaningful conclusion. The ACBU member firms have not described the type of job jointly performed by an AABU member firm and the alleged competitor or provided any information regarding the ACBU member firm's willingness to cooperate with the incumbent AABU member firm.

Moreover, cooperation among the AWO member firms seems improbable in most incidents mentioned by Claimants because the ACBU member firms had issued competing proposals.

The testimonial evidence of AABU member firms allegedly misrepresenting Claimants' abilities, strengths and client base is devoid of any specificity, and leaves the Tribunal with no elements to appraise the conduct of a given member firm.

Other alleged misconduct of the Respondent member firms such as blurring the distinction between AABC and the ACBU member firms and causing confusion in the marketplace, although proscribed by most legal systems as unfair competition, must be assessed in light of the AWO's unique structure and the parties' obligations under the MFIFAs.

The member firms are independent legal entities bound by an intricate network of contracts. The result of this contractual arrangement is that the member firms in many ways operate as if they were a single firm, notwithstanding their autonomous status and their individual rights and obligations. Thus, every member firm's individual market image and goodwill may be leveraged by the market image and goodwill of the other member firms.

Finally, there is no indication that the AABU member firms misappropriated the Andersen Consulting name.

The use of the Andersen name is not reserved to any particular member firm or group of firms. By entering into an MFIFA every member firm obtains the privilege to use the Andersen name as appropriate, under the direction of AWSC (Paragraphs 2.1(K) and 3 of the MFIFAs).

When the AABU member firms adopted the "Arthur Andersen Business Consulting" name they did so with AWSC's consent.

The Tribunal concludes that only a few of the alleged cases indicate that some AABU member firms -which Claimants did not even attempt to identify- breached their obligations under the MFIFAs by disrupting ACBU member firms' business opportunities and citing ACBU member firms' credentials and expertise as belonging to the AABU member firms.

Placed in the context of a longstanding relationship with thousands of potentially conflictive situations, those breaches cannot be characterized as fundamental.

Moreover, all Respondent member firms cannot be held liable for the behavior of a particular member firm. Neither the business unit structure nor the MFIFAs provide a

basis to pronounce all Respondent member firms jointly and severally liable for an eventual misconduct or breach of an individual member firm. This is particularly true in the present case for there is no evidence of other member firms' participation in or cognizance of the alleged wrongdoings.

Once again, the business units are not legal entities but AWSC organs responsible for certain AWSC functions; and the individuals in charge of management positions within each business unit are AWSC officers. In turn, AWSC is a separate and distinct legal entity with rights and duties of its own.

B. Whether AWSC breached its material obligations under the MFIFAs by:

- **failing to coordinate and ensure compatibility between the practices, ethical principles and policies of the member firms;**

- **allowing the AABU member firms to compete with Claimants;**

- **failing to develop an annual operating plan designed to assure the effective coordination, on an international basis, of the practices of the member firms;**

- **failing to enforce the mutual obligations between ACBU member firms and AABU member firms;**

- **failing to regulate the use of the "Andersen" or other names.**

(Section IV. F. of the Terms of Reference)

1. AWSC's obligation to coordinate the practices of the member firms

Claimants accuse AWSC of disregarding "its core function to assure that the basic purpose of the 1989 restructuring is met and to act as the *coordinator* of all Member Firms and the implementor of guidelines and policies to ensure compatibility among and the harmonious operation of all Member Firms".[126] (emphasis provided in text)

The ACBU member firms' contention rests on one basic assumption: AWSC has the obligation to coordinate the member firms' practices. AWSC answers that with minor exceptions, the MFIFAs do not impose an obligation on AWSC to coordinate.[127]

In the Tribunal's view, the language of the AWO organizational documents is not in accordance with AWSC's interpretation.

Member firm coordination is the cornerstone of the MFIFAs; it is the means to ensure that the AWO's cooperative goals are achieved. If adequate coordination were not well-founded and properly ensured in an organization such as the AWO -comprised of more than one hundred member firms worldwide- cooperation would be seriously impaired.

By entering into an MFIFA, a member firm appoints AWSC to arrange for the coordination of its professional practice on an international basis with that of the other member firms (Paragraph 2.1 of the MFIFAs) and legitimately expects its professional practice to be coordinated with that of the other member firms. Conversely, AWSC accepts such appointment and the responsibilities inherent to the coordinating function.

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[126] ACBU Member Firms' Request for Arbitration at p. 46.

Furthermore, one of AWSC's guiding principles is that the member firms' practices shall be correlated and coordinated on an international basis. (Preamble to the AWSC Bylaws)

In summary, the explicit MFIFA provisions, interpreted in light of the purposes and policies set forth in the Preamble thereto and in the AWSC Articles and Bylaws, demonstrate that AWSC's essential obligation is to coordinate the AWO member firms' diverse professional practices, subject to the purposes and policies set forth in the Preamble to the MFIFAs and in Article 3 of the AWSC Articles. Indeed, since its creation in 1977, AWSC's purpose has been the coordination of its member firms on an international basis. (Preamble to the AWSC Bylaws)

Those coordinating duties include specific functions, among others, developing compatible policies and professional standards for the member firms; developing annual operating plans to ensure the effective coordination of the member firms' practices[128] and determining the appropriate scope of practice for the member firms.

The Tribunal finds that the wording of these purposes, policies and functions indicates that AWSC must exercise its best efforts[129] to ensure cooperation, coordination and compatibility among the member firms' practices.

Now then, as the purpose of the 1989 Restructuring, the factual evidence and the AWSC management's statements reveal, the principles of coordination, cooperation

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[127] AWSC's Opening Memorial in Opposition to Claimants' Request for Relief and in Support of AWSC's Counterclaims at p. 13.
[128] Paragraph 2.1(E) and (F) of the MFIFAs.
[129] UNIDROIT Principles of International Commercial Contracts Article 5.4 (2). "To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances."

and compatibility are meant to apply to the practices of all the AWO member firms, not only to the practices of those belonging to the same business unit.

Albeit the creation of the business units significantly altered AWSC's internal structure, none of the changes to the AWO organizational documents modified AWSC's obligations in any meaningful way.

The partner compensation, governance and regulatory issues which finally led to the 1989 Restructuring were not responded to by the creation of two wholly independent and unrelated practices with nothing in common other that a few shared services rendered by AWSC. Instead, the model recommended by the CMTF and adopted by the AWSC partners was meant to preserve "the heart of partnership culture",[130] including income sharing among the member firms of the two business units and a common governance model.

Business unit autonomy was tempered by AWSC's role as the sole AWO coordinating entity, with the business units operating as management lines under the direction of a unified AWSC Board of Partners and a Managing Partner-Chief Executive. Those AWSC officers together with the Managing Partner-Practice Unit had the duty to conduct the AWO in a manner consistent with the "partnership culture", i.e. in accordance with the principles of cooperation, coordination, and compatibility.[131]

Several statements confirm that the AWSC leaders were aware of AWSC's responsibility to coordinate the AABU and ACBU member firms in a way that promoted "synergies and mutual support."[132]

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[130] See: "Conclusions and Recommendations" Draft of the Arthur Andersen & Co. Change Management Task Force, in AWSC's Volumes of Exhibits, Volume II, Tab 28 at p. SC 011162.

[131] Id. at pp. SC 011151, SC 011167-011183.

[132] December 18, 1989 Interoffice Communication from Richard L. Measelle in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 6, Tab 24, Att. K at p. 2.

For example, Mr. Measelle emphasized that the AABU and ACBU were better off, even unbeatable, approaching the market in a shared sense.[133] He proposed as well, that both business units work with a shared sense of core competencies instead of each business unit optimizing its performance at the expense of the whole.

In his view, the AWO needed an over-arching AWSC strategy, not just a set of protocols to manage the interface. That strategy, developed under the leadership of Mr. Weinbach with the full participation of both business units, would define the markets served by the business units and the terms of their relationships, particularly vis-a-vis the AWO's competitors. Finally Mr. Measelle wanted the business units to share opportunities and objectives.[134]

Mr. Shaheen's outlook of the AWSC after the 1989 Restructuring was not distant from Mr. Measelle's perception. Mr Shaheen considered that the AWSC management, including the Chief Executive, the business unit management and the Executive Committee should be responsible for determining how each business unit would operate and what combination of businesses would optimize the overall return to the firm. Each business unit would have a dual responsibility: to play its designated role as part of the overall firm strategy and to pursue its individual strategic objectives.[135]

Five years after the 1989 Restructuring, Mr. Weinbach admitted in a presentation to the AWSC Board of Partners, that operating two business units was "inherently complex". In his view, oversight of the business units, i.e. making sure that business

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[133] Script of October 1994 Speech by AA Managing Partner Richard L. Measelle in Volume I of Claimants' Exhibits, Tab 70 at p. 23.
[134] Id. at pp. 23-24.
[135] January 11, 1990 "Andersen Consulting Strategic Services. Position Paper on Scope of Practice", enclosed in a Memorandum from George T. Shaheen to Lawrence A. Weinbach dated January 11, 1990 at Volume I of Claimants' Exhibits, Tab 40 at p. 6.

unit strategies were within an overall agreed to framework, was one of AWSC's critical functions.[136]

The Executive Committee's position on scope of practice issues in the Florida Accords also illustrates the management's well founded knowledge of AWSC's coordinating role. The Florida Accords proclaimed that each business unit should be a vigorous competitor in its own marketplace and a contributor to the overall success of the AWO and recognized that the collective efforts of the AWO were critical to the firm's continued success.

The Executive Committee then insisted that the strategies of each business unit should fit within the overall strategy of the firm and each business unit should have the capability to grow, prosper and compete aggressively in its own marketplace, while recognizing that the whole is greater than the sum of the parts.[137]

2. Whether AWSC breached its obligations to coordinate the practices of the member firms

Did AWSC exercise its best efforts to achieve cooperation, coordination and compatibility between the practices of the AABU and ACBU member firms? As explained below, AWSC failed to fulfill such responsibility.

While each business unit developed and implemented its own uncoordinated individual strategy, AWSC proved unable to devise an organizational framework or operating plan for all the member firms' practices.

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[136] See: Minutes of the Meeting of the Board of Partners of Andersen, S.C. held on May 25-26, 1994 in Volume V of Claimants' Exhibits, Tab 251 at pp. 7-8.

[137] January 24, 1990 Memorandum from Lawrence A. Weinbach to each partner in AWSC's Volumes of Exhibits, Volume IV, Tab 44 at p. 1.

Likewise, AWSC did not act to resolve the scope of service conflict, despite the internal tensions and lack of cooperation between the AABU and ACBU member firms.

a. AWSC's failure to develop an annual operating plan to coordinate the AABU and the ACBU member firms' professional practices

Notwithstanding Messrs. Weinbach, Measelle and Shaheen –all AWSC leaders- proclaimed the need for an overall AWO strategic framework, and AWSC's explicit obligation to develop annual operating plans to assure the effective coordination of the member firms' practices,[138] no such plan was ever conceived or executed. Instead, -as Mr. Shaheen had anticipated in 1990- AWSC seemingly accepted that overall firm strategy was simply the result of the strategies of each business unit.[139]

Since its creation in 1989, each business unit only responds to its individual objectives and strategies, regardless of the other business unit's needs. As Mr. Richard Measelle pointed out in March 1992:[140] "each business unit concentrated on establishing and protecting their own markets with little concern or understanding of the strategies or market place needs of the other business unit."[141]

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[138] Paragraph 2 (F) of the standard MFIFA.

[139] January 11, 1990 "Andersen Consulting Strategic Services. Position Paper on Scope of Practice", enclosed with memorandum from George T. Shaheen to Lawrence A. Weinbach dated January 11, 1990 at Volume I of Claimants' Exhibits, Tab 40 at p. 2.

[140] March 3, 1992 Memorandum from Richard L. Measelle to each Arthur Andersen Partner in Volume I of Claimants' Exhibits, Tab 56 at p. 2.

[141] In a March 20, 1992 Interoffice Communication David Ashton, depicted the AWO's situation as one in which "[t]here is considerable ignorance within AA of exactly what AC does. At the same time, many AC partners, almost all AC managers and certainly the AC staff are completely ignorant of Arthur Andersen as an SBU. This ignorance is institutionalized."(March 20, 1992 from David Ashton to David Haxby in Respondent AABU Member Firms Opening Memorial on the Merits, Volume 3, Tab 5, Att. O at p. 1)

Despite Mr. Weinbach's insistence that each business unit "understand the strategy of the other",[142] the situation remained unaltered and the business units' uncoordinated strategies continued to respond individually to changing market imperatives.

When AABC was created in 1994 and the overlap of services conflict deepened, AWSC realized that an overall vision for the AWO was necessary and commenced the Andersen 21 process. This late initiative did not materialize however, into any conclusion or recommendation that the entire Executive Committee could support.[143]

Not surprisingly, Mr. Measelle's vision of the AWO in September 1996, -after the Andersen 21 process stalemated- was that the AABU and ACBU member firms shared the Andersen name but had "grown apart since 1989 in an important way." From his perspective, Arthur Andersen and Andersen Consulting behaved "essentially as two separate global partnerships."[144]

By 1997, the lack of coordination between the professional practices of the member firms belonging to each business unit had reached the point where separation of Arthur Andersen and Andersen Consulting was, in Mr. Measelle's words, "a confirmation of what in many respects is happening. A recognition that AA and AC are no longer together – that we do not share in value creation nor do we share a common vision."[145]

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[142] January 24, 1992 memorandum from Lawrence A. Weinbach to each AWSC partner in Volume I of Claimants' Exhibits, Tab 54 at p. 4.
[143] July 15,1996 Memorandum from Lawrence A. Weinbach to each Andersen Worldwide Partner in Volume IV of AWSC Volumes of Exhibits, Tab 74 at p. 1.
[144] Attachment No. 2 to a September 27, 1996 Memorandum from Richard L. Measelle to Arthur Andersen Partners in Volume II of Claimants' Hearing Exhibits, Tab 584 at p. 5.

The ultimate proposal to reconcile the differences among the business units' leaders - the AABU construct- abandoned the notion of an overall framework for the member firms and proposed in its stead, a new structure which substantially limited AWSC's role, and granted each business unit structural freedom and self-governance to meet its individual competitive market needs.[146]

Plainly, AWSC abandoned its responsibility to design and develop an operating plan to assure the effective coordination of the practices of the AABU and ACBU member firms as explicitly stipulated in the MFIFAs.

b. AWSC's failure to address the scope of service conflict

On several occasions after the 1989 Restructuring, Messrs. Weinbach and Shaheen acknowledged the undesirability of competition between the AABU and the ACBU member firms.

While explaining the Florida Accords Mr. Weinbach expressed: "[o]ne of the real keys that we have come up with is an understanding that we do not want to create a redundancy in skills between our business units. To be successful, we need to ensure that we have a broad array of skills and those skills are brought to bear in client situations, but we do not develop similar skills in each business unit."[147] Then, while addressing the AWSC Board of Partners in October 1991, he stated: "[t]he strategies of both Business Units must be understood, and we must recognize that the whole is greater than the sum of the parts. Scope of service issues must be resolved this

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[145] April 29, 1997 Speech by Richard L. Measelle at the April 28 - May 1, 1997 AWSC Partners' Meeting in Volume II of Claimants' Exhibits, Tab 112, Ex. H at SC 015548.
[146] See: December 12, 1997 "Breaking the Log Jam AA Construct for Step 1" in Respondents AABU Member Firms' Reply Memorial on the Merits, Volume 34, Tab 288 at pp. 1-4.
[147] Transcript of January 25, 1990 videotape entitled "Partnership Matters: Scope of Service" in Volume I of Claimants' Exhibits, Tab 42 at p.14.

(1992) fiscal year. (...) We can no longer talk about the issues; we must reach an agreement that will withstand the test of time or we will have to mandate a solution which is second best."[148]

A few months later, this time discussing the pros and contras of competition, Mr. Weinbach emphasized the enormous strains that would be placed on the AWO if the member firms were to compete. Prophetically he warned: "[t]he reasons underlying the decision to stay together under the restructuring agreements would be greatly eroded. We believe the totality of both Business Units is presently greater than the individual units standing alone. That condition would no longer prevail over the long period if we were to compete."[149]

In the same line of thought, Mr. Shaheen expressed: "[t]his whole area -- whether you call it business unit cooperation or scope of practice overlap -- I continue to be extremely concerned about. And I'm concerned about it because it tears at the fabric of the firm. It tears at the fabric of what brings us into this room and allows us to sit down."[150]

The Tribunal is aware of the AWSC Executive Committee's initial effort to tackle the scope of practice conflict by drawing internal guidelines for business unit cooperation in the Florida Accords. Nevertheless, as Mr. Weinbach, the AWSC Board of Partners and the Executive Committee conceded, the Accords were not properly implemented by AWSC.[151]

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[148] Minutes of the Meeting of the Board of Partners of AWSC held on October 14, 1991 in Volume II of Claimants' Hearing Exhibits, Tab 544 at p. 7.
[149] Minutes of the Meeting of the Board of Partners of the Andersen & Co., S.C. held on February 18-19, 1992 in Volume I of Claimants' Exhibits, Tab 55 at p. 29.
[150] November 3-4, 1992 Partners' Meeting - Leadership Panel, Excerpt from Video Transcript in Volume IV of Claimants' Exhibits to the Reply Memorial, Tab 488 at p. 17.
[151] In February, 1992 Weinbach stated before the AWSC Board of Partners: "we continue to support the Florida 'accords' of January 1990, but we have not been too successful in implementation." (Minutes of the Meeting of the Board of Partners of Andersen & Co., S.C.

When the Executive Committee tardily developed a new set of guidelines to address the scope of service issues, it was forced to admit a stalemate at the policy level[152] and the leadership's responsibility for not resolving the conflict.[153] Yet, once again, AWSC disregarded its own guidelines: the Business Systems Consulting practice was never repositioned as agreed to in the 1993 Protocols and the US$175 million mark was wholly ignored.[154]

Predictably, before the end of 1993, the AWSC partners surfaced their discontent with the Protocols and urged the AWO leadership to expedite the resolution of the internal conflicts.[155]

A year later, the AABU launched the AABC practice. The AABU member firms' expansion into the information technology area, both in terms of capabilities and

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held on February 18-19, 1992 in Volume I of Claimants' Exhibits, Tab 55 at p. 32). Previous concerns had been expressed in the AWSC Board of Partners "that the 'Florida accords' developed by the S.C. Executive Committee in January 1990 needed to be reemphasized and fully implemented." (Minutes of the Executive Session of the Board of Partners of Arthur Andersen & Co., S.C. held on August 28-29, 1991 in Volume I of Claimants' Hearing Exhibits, Tab 540 at p. 2). Similarly, the AWSC Executive Committee acknowledged that the Florida Accords were "still mostly applicable but were not being managed as tightly and directly as they should be managed." (See: November 13, 1991 Memorandum from Lawrence A. Weinbach to each AWSC Partner, in Volume I of Claimants' Hearing Exhibits, Tab 546 at p. 7)

[152] Similarly Mr. Weinbach conceded before the AC Executive Committee that the partners wanted to cooperate but were getting mixed signals from the management. (Minutes of the Meeting of the Andersen Consulting Executive Committee held on September 23-25, 1991 in Volume I of Claimants' Hearing Exhibits, Tab 543 at p. 6.)

[153] See: April 20,1993 Memorandum from the Andersen, S.C. Executive Committee to each Andersen, S.C. Partner, in Volume I of Claimants' Exhibits, Tab 58 at p. 1.

[154] Mr. Charles Ketteman, head of Arthur Andersen Business Consulting, explicitly admitted the practice's disregard for that limitation, which he characterized as "an arbitrary restriction of the past" that his colleagues at AABC had "[f]ortunately ... winked and nodded at ... a bit." (Excerpt from transcript of Videotape, May 5, 1995 "Practice Update" in Volume IV of Claimants' Exhibits to the Reply Memorial, Tab 450 at pp. 43-44)

[155] See: Presentation by Lawrence A. Weinbach on Leadership Perspectives, Minutes of the Annual Meeting of Partners of AWSC held on November 9-11, 1993 in AWSC's Volumes of Exhibits, Volume IV, Tab 61 at pp. 15 and 17.

target market, substantially increased the opportunities for the member firms of each business unit to perform similar services to similar clients.

The development and growth of AABC augmented the internal tensions within the AWO with respect to the overlap of services issue while the competitive tensions between the member firms of each business unit engendered mistrust instead of cooperation among the AWSC partners. In the opinion of Mr. Keith Burgess, a member of the ACBU management team, AABC's strategy would make it look more like Andersen Consulting and would lead to greater confusion among the ACBU's recruits and personnel and in the marketplace.[156]

As Mr. Weinbach acknowledged in 1995, when service overlap increased, the member firms did not use their collective capabilities to exploit the marketplace and in some instances the partners did not want to work together.[157] One year later, the conflicts confronting the AWO had deepened. "You all know –expressed Mr. Weinbach- that problems have developed between our two business units. Service overlap, confusing messages in the marketplace, erosion of our brand name equity, resentments over the income model, arguments over who owns what, partners competing rather than cooperating, suspicion, and recrimination instead of trust and instead of support."[158]

Even under those pressing circumstances the AWSC management was unable to agree on a course of action to address the scope of practice dispute or to draft a proposal for the consideration of the AWSC partners. Contrariwise, profound

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[156] July 27, 1995 Memorandum from Keith Burgess to Lawrence A. Weinbach on Business Unit Cooperation in Volume V of Claimants' Exhibits, Tab 228 at pp. 8-9.
[157] "Our Future" presentation by Lawrence A. Weinbach at the Arthur Andersen & Co., S.C. Annual Partners' Meeting held on October 24, 1995 in Volume V of Claimants' Exhibits, Tab 262 at p. 9.

differences surfaced among the participants during the various discussions held in 1995 and 1996, because each business unit "ultimately looked at all ideas and proposals along strictly business unit lines".[159]

The business units' leaders, including the members of the AWSC Board of Partners, overlooked their role as AWSC officers and failed to take a leadership position with emphasis on the firm responsibilities, rather than Business Unit alignment.

AWSC neglected to address the scope of practice conflict, even after the Board of Partners and Mr. Weinbach had admitted that the status quo was unacceptable and unsustainable.[160]

On these grounds, the Tribunal finds AWSC did not make its best efforts to ensure coordination, cooperation and compatibility among the practices of the AABU and ACBU member firms, because it failed to take any course of action when the scope of service conflict surfaced and extended; and because it failed to develop the annual operating plans required to coordinate the practices of all the AWO member firms.

AWSC further contends it cannot function independently of the collective will of its partners since its governance structure provides substantial authority to its partners.

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[158] Presentation by Lawrence A. Weinbach at the AWSC Regional Partners Meeting held on September, 1996 in Video Clip No. 23 of Revised Index of Audio and Video Clips Introduced by Claimants during Hearing.

[159] "A Choice of Direction" April 29, 1997 presentation by Mr. Lawrence A. Weinbach, to the AWSC Partners' Meeting held on April 28-May 1, 1997 in Volume II of Claimants' Exhibits, Tab 112 at p.13.

[160] See: Minutes of the Meeting of the Board of Partners of AWSC held on September 4-5, 1996 in Volume V of AWSC's Volumes of Exhibits, Tab 76 at p. 4; February 5, 1997 Memorandum from Lawrence A. Weinbach to each Andersen Worldwide Partner, in Volume II of Claimants' Exhibits, Tab 106 at p. 4; "A New Century, A New Chapter: Andersen's Moment of Choice"; Presentation by Mr. Lawrence A. Weinbach in Minutes of the Meeting of Partners of AWSC held on April 28-May 1, 1997 in Volume II of Claimants' Exhibits, Tab 112 at SC 015444.

This is an overstatement. Truly, the AWSC partners have substantial authority as a group, but certain decisions comprising overall policies, long-range plans and objectives and scope of service definitions are the responsibility of the Board of Partners acting upon recommendation of the Administrative Council and/or the Chief Executive. (Article 16(B)(1) of the AWSC Articles).

The Tribunal is cognizant of a Protocol endorsed by the AWSC partners declaring that the effectiveness of any Andersen 21 proposal was subject to ratification by 2/3 of the partners of each business units; but that protocol is no excuse for AWSC to abandon its coordinating duties to the member firms, particularly in light of the fact that during the Andersen 21 process the AWSC management did not submit a single proposition to the partners' consideration.

As Mr. Weinbach admitted, the Andersen 21 process was fruitless, not because the AWSC partners as a group were unable to reach a consensus, but because each business unit, lead by AWSC officers, ultimately looked at all ideas and proposals along strictly business unit lines.[161]

After the Andersen 21 process had stalemated, some members of the AWSC Board of Partners admitted they had failed to fulfill their responsibilities to the AWSC partners and suggested that AWSC management, including the Board and the business unit leaders resign if a solution could not be reached in the short term.[162]

On several occasions the AWSC partners urged management to resolve the differences between the business units. A survey and a series of interviews conducted before the April, 1997 AWSC Partners' Meeting specifically indicated that

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[161] "A Choice of Direction" April 29, 1997 presentation by Mr. Lawrence A. Weinbach, to the Andersen Worldwide Partners' Meeting held on April 28-May 1, 1997 in Volume II of Claimants' Exhibits, Tab 112 at p. 13.

the A21 process related issues were key and the partners wanted them resolved quickly. Moreover, the partners strongly favored the need for vision and leadership from the Managing Partner-Chief Executive.[163]

AWSC also argues that the gains to the AWO as a whole from maximizing the capabilities and reach of the member firms assigned to each business unit justified its course of conduct. From AWSC's perspective, the 1993 Protocols, the "Save the World" task force and the Andersen 21 process evidence AWSC's efforts to reconcile Claimants' strategy with the business imperatives of the AABU member firms.[164]

Those assertions are not supported by the AWO legal documents or the evidence submitted to the Tribunal.

First, AWSC failed to prove that its course of conduct did in fact maximize the capabilities of the member firms assigned to each business unit. On the contrary, the AWSC leadership's statements prior to the commencement of this arbitration show that the AABU and ACBU member firms would have been far better off sharing their skills and competencies instead of creating redundant skills and competing in the marketplace.[165]

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[162] Minutes of the Meeting of the Board of Partners of AWSC held on September 4-5, 1996 in AWSC Volumes of Exhibits, Volume V, Tab 76 at p. 4.
[163] "Report of Nominating Commission" by W. Robert Grafton, April 30,1997 Presentation to the AWSC Partners' Meeting in Volume II of Claimants' Hearing Exhibits, Tab 594 at p. 7.
[164] AWSC's Opening Memorial in Opposition to Claimants' Request for Relief and in Support of AWSC's Counterclaims at p. 35 and AWSC's Reply Memorial in Opposition to Claimants' Request for Relief and in Support of AWSC's Counterclaims at p. 52.
[165] See: Script of October 1994 Speech by AA Managing Partner Richard L. Measelle, in Volume I of Claimants' Exhibits, Tab 70 at pp. 23-24 and "Our Future" Presentation by Lawrence A. Weinbach at the Arthur Andersen & Co., S.C. Annual Partners' Meeting held on October 24, 1995 in Volume V of Claimants' Exhibits, Tab 262 at pp. 14-16.

Second, it was AWSC's obligation under the MFIFAs to make its best efforts to achieve cooperation, coordination and compatibility among all the member firms. AWSC can not simply disregard this obligation shielded on the member firms' success in the marketplace.

Third, AWSC absolutely failed to implement the guidelines agreed to in the Florida Accords and 1993 Protocols.

Fourth, the AWSC leadership's persistent but ineffectual discussions with respect to the scope of service conflict and other issues straining the AWO, cannot be taken as evidence of AWSC's performance of its obligations vis-à-vis the member firms.

AWSC's obligation to coordinate the practices of the AABU and ACBU member firms and to arrange for the performance of the specific functions listed in paragraph 2.1 of the MFIFAs cannot be understood as satisfied simply because these issues were exhaustively debated, without any specific action being taken by AWSC to implement such coordination.

AWSC did not prove that the innumerable discussions among its leaders ever culminated in any action to implement a policy for the AABU and ACBU member firms' scope of practice. The business units continued to respond to individual strategies without any relevant coordination between them.

3. Whether AWSC breached its obligation under the MFIFAs by failing to enforce the mutual obligations between ACBU and AABU member firms and regulate the use of the "Andersen" or other names

On few occasions a number of unidentified AABU member firms breached their obligations under the MFIFAs by disrupting the ACBU member firms' business opportunities and citing Claimants' credentials and expertise as belonging to the AABU member firms.

However, the evidence at hand did not allow the Tribunal to determine whether all those instances were known or should have been known by AWSC and the appropriate actions, if any, that AWSC should have taken in view of the incumbent member firms' conduct.

The Tribunal equally found that the AABU member firms had not improperly used the Andersen name or any derivation thereof, insofar as AWSC had acquiesced to the AABU adopting the "Arthur Andersen Business Consulting" name.

On these grounds, AWSC is not accountable for any additional breaches.

4. Whether AWSC's breach amounts to a fundamental non-performance of its obligations

AWSC's neglectful conduct is a breach of its obligations to coordinate the practices of the ACBU with those of the AABU member firms, to develop compatible policies and professional standards for member firms and to develop annual operating plans to assure the effective coordination of the member firms' practices (Paragraph 2.1. of the MFIFAs).

AWSC contends that any such breaches are not sufficiently material to warrant termination.[166] "The UNIDROIT factors –says AWSC- make clear that there has been no material, fundamental breach."[167]

The UNIDROIT criteria cited by AWSC proclaim:

"In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

> "a. the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
>
> "b. strict compliance with the obligation which has not been performed is of essence under the contract;
>
> "c. the non-performance is intentional or reckless;
>
> "d. the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
>
> "e. the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated."

Several prior findings made in this award must be considered in assessing AWSC's conduct in the light of the UNIDROIT criteria:

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[166] AWSC's Closing Memorial in Opposition to Claimants' Request for Relief and in Support of AWSC's Counterclaims at p. 38.
[167] AWSC's Reply Memorial in Opposition to Claimants' Request for Relief and in Support of AWSC's Counterclaims at p. 73.

"Member firm coordination is the cornerstone of the MFIFAs; it is the means to ensure that the AWO's cooperative goals are achieved. If adequate coordination were not well-founded and properly ensured in an organization such as the AWO -comprised of more than one hundred member firms worldwide- cooperation would be seriously impaired."

"By entering into an MFIFA, a member firm appoints AWSC to arrange for the coordination of its professional practice on an international basis with that of the other member firms (Paragraph 2.1 of the MFIFAs) and legitimately expects its professional practice to be coordinated with that of the other member firms. Conversely, AWSC accepts such appointment and the responsibilities inherent to the coordinating function."

"[T] the explicit MFIFA provisions, interpreted in light of the purposes and policies set forth in the Preamble thereto and in the AWSC Articles and Bylaws, demonstrate that AWSC's essential obligation is to coordinate the AWO member firms' diverse professional practices".

"[T] the principles of coordination, cooperation and compatibility are meant to apply to the practices of all the AWO member firms, not only to the practices of those belonging to the same business unit."

"AWSC neglected to address the scope of practice conflict, even after the Board of Partners and Mr. Weinbach had admitted that the status quo was unacceptable and unsustainable."

In light of the above findings, AWSC's conduct amounts to a fundamental non-performance of its obligations under the MFIFAs.

First, AWSC failed to coordinate all the AWO member firms, particularly by neglecting two of its critical functions: to develop annual operating plans for all the member firms' practices and to make its best efforts to address and resolve the scope of service issue.

AWSC's failure to exercise its best efforts to coordinate the member firms' practices substantially deprived Claimants of the cooperation they were entitled to expect under the MFIFAs.

AWSC's negligence led the AABU and ACBU member firms to behave essentially as two separate global partnerships, amid the internal tensions and disputes between them. Thus, as events unfolded, the benefits for Claimants' under their MFIFAs became increasingly unrelated to their association with the AABU member firms.

By any count, the ACBU member firms have been substantially deprived of the cooperative benefits which the contractual bonds with the AABU member firms were supposed to provide. In fact, the agreements between the AABU and ACBU member firms grew to be highly detrimental for Claimants, insofar as the ACBU member firms have been obliged to make massive transfer payments without receiving cooperation in return.

That kind of arrangement could not have been the result expected by the ACBU member firms or the result any reasonable party would expect from a contractual relationship.

Second, strict compliance by AWSC of its obligation to coordinate the practices of the ACBU and the AABU member firms is of the essence of the MFIFAs.

As stated above, coordination among the member firms' practices provides the means to ensure the cooperative goals set forth in the Preamble thereto are achieved. If the member firms are not adequately coordinated, cooperation among them is seriously impaired.

Also, by entering into an MFIFA, each ACBU member firm appointed AWSC to provide such coordination and legitimately expected its professional practice to be coordinated with that of the other member firms, including the AABU member firms.

Third, AWSC's non-performance gives Claimants reason to believe that they cannot rely on AWSC's future performance.

AWSC failed to coordinate the practices of the AABU and ACBU member firms despite Mr. Weinbach and the business unit leaders' admittance that the scope of service issues needed to be addressed. AWSC equally failed to define an overall operating framework for all the member firms and to comply with its obligations albeit its Board of Partners declared fifteen months prior to the initiation of this arbitration, that the status quo was unacceptable.

Nothing indicates that the ACBU member firms can rely on AWSC's future performance of its obligations, particularly in light of the internal division among most of its leaders along business units lines.

Fourth, Respondents will not suffer a disproportionate loss as a result of the preparation or performance if Claimants' MFIFAs are terminated.

AWSC cannot possibly suffer any harm from the termination of its contractual relationship with the ACBU member firms because AWSC is an instrumentality for the purpose of coordinating the member firms' professional practice. In fact, AWSC is

only paid for the services rendered to the member firms as long as Claimants' MFIFAs remain in force. (Paragraph 8.1 of the MFIFAs)

Moreover, the AABU member firms' past performance to the ACBU member firms has been more than compensated by the significant amounts received from the ACBU member firms as transfer payments.

Respondents' reliance on Paragraph 17.2 of the MFIFAs to determine the damages suffered as a result of Claimants' departure from the AWO is unfounded. The MFIFAs explicitly state that those liquidated damages are to be presumed as a valid measure of actual damages suffered by the party entitled to payment. Among them are the increased costs of establishing a relationship with other suitable practice entities or those associated with the inability to establish such replacement relationships, and the related decrease in revenues.

Respondents have neither right to termination payments nor the apparent need to establish new relationships with other suitable practice entities. The ACBU and AABU member firms virtually operate as two separate global partnerships with extensive and substantial consulting skills resident in the AABC practice .

C. Whether AWSC has breached its material contractual and fiduciary obligations under the MFIFA to each Claimant by:

- **unlawfully adopting a Resolution in contravention of AWSC's Articles and Bylaws, intended to obstruct and interfere with Claimants' exercise of their right to refer any and all disputes to arbitration;**

- **taking actions to implement such Resolution.**

(Section IV. G. of the Terms of Reference)

In February 1998 the AWSC Board of Partners issued a Resolution which determined, among other things, to take all the necessary and appropriate measures to protect the interests of AWSC and the Respondent member firms against Claimants' alleged misconduct in the course of the present arbitration including the giving of notice to each ACBU member firm that it had breached its MFIFA; and creating an AWO Protection Committee comprised of members of the AWSC Board who are not partners of an ACBU member firm, and authorized to determine the measures AWSC should take to protect the interests of AWSC and the Respondent member firms.[168]

There is no evidence of any specific measure taken by the AWO Protection Committee to protect the AWO's interest.

Claimants affirm that AWSC breached its contractual and fiduciary duties to each ACBU member firm, including the duty to act lawfully in accordance with the AWSC Articles and Bylaws and the duty to prevent AWSC partners and other member firms from interfering with Claimants' exercise of their contractual rights.[169]

The grounds for the alleged breach are that the Resolution purported to obstruct and interfere with this arbitration, and was illegally adopted because it was in fact, an amendment to the AWSC Bylaws.

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[168] Proposed Recitals and Resolutions Re: Misconduct by Member Firms in Connection with Arbitration approved on February 12, 1998 ("AWO Protection Committee") in Volume II of Claimants Exhibits, Tab 134.

[169] Addendum to Request for Arbitration p. 4

The first of these two grounds cannot be the basis of any violation. Indeed, mere intentions, devoid of any materiality cannot be subject to any kind of pronouncement. The Resolution itself did not affect the arbitration or the contractual relationships between Claimants and Respondents. After the Resolution was issued, no specific action ensued, i.e. the board members' intention did not materialize and the arbitration was not obstructed in any way.

The second argument advanced by Claimants is also groundless. Not every violation of the AWSC Articles and Bylaws is necessarily a breach of the MFIFAs. The Resolution itself does not disregard the principles of cooperation, coordination and compatibility among member firms.

D. Whether the ACBU member firms have engaged in inequitable conduct and/or breached their contractual and fiduciary obligations to the AABU member firms by:

- **planning and executing a bad faith strategy to separate from the AWO and avoid their obligations under their MFIFAs including those applicable upon termination;**

- **filing this proceeding in bad faith;**

- **filing this proceeding without complying with the contractual notice provisions;**

- **disparaging the AABU member firms and the AWO in the worldwide press and with clients, potential clients, employees, recruits and/or the general public;**

- **disrupting Respondents' business opportunities;**

- **trading on AABU member firms' credentials and expertise;**

- **refusing to team/work jointly with AABU member firms on various AWO engagements and potential engagements;**

- **refusing to serve and/or abandoning certain clients and potential clients of the AABU member firms and the AWO;**

- **refusing to share information, training material, and/or technology with the AABU member firms;**

- **refusing to refer clients to the AABU member firms.**

(Section IV. I. of the Terms of Reference)

1. Claimants' alleged bad faith strategy to separate from the AWO and avoid their obligations under their MFIFAs including those applicable upon termination

The Respondent member firms' allegation of a bad faith separation strategy devised by Mr. Shaheen to divorce Claimants from AWSC without making any termination payments is based on a plan conceived in 1992 to this effect. The AABU member firms accuse Mr. Shaheen of proclaiming that he was going to avoid working on the cooperation issue with the AABU member firms in the hope that the issue would grow and explode.[170]

[170] Respondent AABU Member Firms' Opening Memorial on the Merits at p. 84.

The accusation is developed from the testimony and personal notes of Mr. Gérard Van Kemmel, former ACBU Managing Partner for France and Area Managing Partner for Europe as well as former Chairman of the AWSC Board of Partners.[171]

The notes, typed in 1995 from original manuscripts, purport to demonstrate that Mr. Shaheen sought to incite anger among the ACBU partners to aid his separation plan by trying to raise issues of competition which did not exist in the marketplace.[172]

The Respondent member firms additionally adduce Mr. Shaheen's opposition to a proposal "to bring the Andersen Consulting and Arthur Andersen business units back together again"[173] as demonstrative of such plan.

The facts mentioned above and the evidence produced by Claimants, lead the Tribunal to a different conclusion.

In the first place, evidence shows that Mr. Weinbach was made aware of the plan when Mr. Van Kemmel showed him the notes in 1995; yet he paid little attention to them and to the scheme they allegedly unveiled.[174]

In the second place, Mr. Van Kemmel knew competition was an issue within the AWO. In 1992, answering to a survey among the ACBU partners, he acknowledged

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[171] According to Mr. Van Kemmel, "What I did in '95 was take back all those notes which I've kept and put effectively in a paper and I stored that paper because I was effectively in transaction and at one point I felt that, you know, I felt that I should go to the board, okay, because I was – I think it was too much. I felt that I tried to serve that firm by taking position which was in the best interests of that firm, and I honestly felt that I had been cut and I had been unsupported because of that position, okay." (Gerard Van Kemmel Testimony, Hearing Volume 8, November 10, 1999 at p. 2077.)

[172] See: Gerard Van Kemmel, Factual Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 9, Exhibits, Tab 35 at ¶ 5.

[173] Respondent AABU Member Firms' Opening Memorial on the Merits, footnote 195 at p. 85.

that competition did exist between the member firms of each business unit.[175] This position is clearly inconsistent with his subsequent proclamation that competition was non-existent.

Finally, nothing required Claimants to agree to the reunification of the business units, i.e. to return to the status quo prior to the 1989 Restructuring. Mr. Shaheen and the Andersen Consulting partners' opposition to bringing the business units back together cannot be construed as a part of a separation strategy.

The Respondent member firms consider Claimants' efforts to move away from the space they shared with the AABU member firms and to separate the administrative and other support services commonly shared by member firms of both business units, as part of the separation scheme.[176]

From the Tribunal's standpoint, such conduct does not appear to be symptomatic of a long standing separation plan. Independence and autonomy are inherent to the member firms' professional practices as recognized in the Preamble to the AWSC Bylaws.[177] As a matter of fact, the AWO member firms have been autonomous since their inception and did not lose their independence after the 1989 Restructuring.

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[174] Mr. Van Kemmel explains that Mr. Weinbach looked at the notes briefly and returned them to him. Gerard Van Kemmel Testimony, Hearing Volume 8, November 10, 1999, at pp. 2033, 2077, 2078.

[175] See: Volume I of Claimants' Exhibits to the Reply Memorial, Tab 296 and Volume IV of Claimants' Exhibits to the Reply Memorial, Tab 476 at p. ACM 0008592.

[176] See: Rene D. Ordogne Factual Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 8, Factual Affidavits, Tab 27 at ¶10; Clement W. Eibl Factual Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 3, Factual Affidavits, Tab 8 at ¶20 and Barbara J. Duganier Factual Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 3, Factual Affidavits, Tab. 7 at ¶14.

[177] The text of Paragraph 3 of the Preamble to the AWSC Bylaws is the following: "The coordination of the independent and autonomous professional practices of the Member Firms on an international basis is necessary not only to serve their own objectives; it is equally essential to meet their responsibilities to the public on an international basis."

Nothing in the MFIFAs or the AWSC Bylaws restricts a member firms' liberty to pursue its own market image and a separate identity for itself or requires a member firm to follow specific rules concerning the sharing of services or its physical location.

The AABU member firms also consider the separate publication of press releases[178] after 1990 as an example of Claimants' efforts to disassociate themselves from the AABU.[179] The press releases substantially indicate to press editors that Andersen Consulting is not a division or subsidiary of Arthur Andersen and that it should not be confused with that firm.[180]

In the first place, Andersen Consulting is not a division or subsidiary of Arthur Andersen.

Secondly, the AABU leadership is aware that Andersen Consulting sought to create from its inception, a separate name and image in the marketplace and that the ACBU member firms' efforts had been hindered by references in the media to Andersen Consulting as a subsidiary or affiliate of Arthur Andersen.[181] The press releases mentioned by Respondents serve the purpose of informing the media that the ACBU member firms are separate from the AABU member firms. Claimants' representations in the press releases are therefore correct in every respect and reflect the status of the ACBU member firms after the 1989 Restructuring.

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[178] See: Andersen Consulting press releases from 1992-1993 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 19, Exhibits, Tab 156.
[179] See: Respondent AABU Member Firms' Opening Memorial on the Merits at p. 95.
[180] See: Andersen Consulting press releases from 1992-1993 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 19, Exhibits, Tab 156.
[181] See: "Andersen Consulting", a newsletter for the partners of Arthur Andersen by Richard Measelle in "Sharing a Vision", a publication of Arthur Andersen (December 1992) in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 6, Exhibits, Tab 24, Att. V at p.1.

The Tribunal then finds that the ACBU had a legitimate right to publish the press releases indicating it was not an affiliate or subsidiary of Arthur Andersen.

In sum, a separation scheme as the one suggested by Respondents, cannot be founded on evidence produced by the Respondent member firms.

2. Filing this proceeding in bad faith

The Tribunal considers that arbitration is both a right and a duty under Paragraph 22 of the MFIFAs. In this context, Respondents' accusation must be construed as questioning the circumstances surrounding the filing of the arbitration, not the exercise of the right itself.

The Respondent AABU member firms adduce that the real purpose behind Claimants' filing of the present arbitration was to cause a permanent division within the AWO to facilitate the ACBU member firms' withdrawal therefrom.[182]

Respondents accuse the ACBU management of depriving the AWSC leadership of its contractual right to express to the AWSC partners its views on the ACBU management's course of action with respect to the arbitration; of obstructing the performance of the AWSC leadership's fiduciary obligations to the AWO and commencing these proceedings without any further communications with AWSC or any AABU member firm.[183]

[182] Respondent AABU Member Firms' Opening Memorial on the Merits at p. 98.
[183] Id. at pp. 100-101.

The first contention, i.e. that Claimants sought to create a permanent division between the AABU and ACBU member firms to facilitate Claimants' withdrawal from the AWO is contradicted by evidence.

The differences between the AABU and ACBU member firms surfaced less than a year after the 1989 Dallas Accords were put into practice. The factual background and the issues resolved by the Tribunal are fraught with references and examples of the internal tensions within the AWO.

Even specialized publications commented on the AWO internal division. One of such publications reported: "[s]peculation has been building in the media that Andersen Consulting may split with the Andersen Worldwide organization and that the AC partners are unhappy at the moves made by the Arthur Andersen business unit to build up its own consulting capability."[184]

Respondents' second and third contentions are true. The Tribunal finds Mr. Shaheen openly misrepresented to the AWSC Board of Partners' meeting held in November 1997,[185] the purpose of an oncoming ACBU member firm and partners' meeting to be held in San Francisco in mid-December 1997. The reunion was in fact, a meeting of "[t]he firm's 1,125 partners",[186] meaning the ACBU member firms' partners "and their

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[184] See also July 1996 media article: "Solid Year of Growth" published in "Management Consulting International" in AABU Member Firms' Opening Memorial on the Merits, Volume 12, Exhibits, Tab 42.

[185] "... George Shaheen noted that AC partners had not met since April 1997 in Paris, at which time he had given them his views on A21 issues and had received their input. Given the various events since April 1997, George said that he thought it important to bring the AC partners up to date and to solicit their views on the way forward." Minutes of the Meeting of the Board of Partners of AWSC held on November 11-13, 1997 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 18, Exhibits, Tab 136 at p. 36.

[186] See: December 17, 1997 Andersen Consulting press release Att. O to the James Wadia Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 11, Factual Affidavits, Tab 36.

respective 43 member firms", all of whom overwhelmingly voted for the filing of the arbitration before the ICC Court of Arbitration.[187]

The coverage of the San Francisco meeting was not fully disclosed by Mr. Shaheen during the AWSC Board of Partners' meeting. When certain Board members asked about AWSC's attendance at the ACBU meeting, Mr. Grafton replied he would attend the meeting for part of a day to present his views and not the whole meeting based on his understanding of what it was intended to cover.[188] As a result of Mr. Grafton not attending the whole reunion, he learned of the Request for Arbitration while reading the press.[189]

Mr. Shaheen's misrepresentations are certainly not in keeping with the standards expected from an AWSC partner. Claimants cannot however, be made responsible for the conduct of one of the ACBU leaders, even if such leader is the head of their business practice.

3. Filing this proceeding without complying with the contractual notice provisions

The Tribunal's findings with respect to this issue are applicable only to AWSC insofar as the AABU member firms explicitly waived their defense "on the ground of claimants' failure to provide notice and an opportunity to cure."[190] Besides, this issue

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[187] See: December 17, 1997 Memorandum from George T. Shaheen to all Arthur Andersen Partners, Att O to the James Wadia Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 11, Factual Affidavits, Tab 36.
[188] Minutes of the Meeting of the Board of Partners of AWSC held on November 11-13, 1997 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 18, Exhibits, Tab 136 at p. 36.
[189] W. Robert Grafton Witness Statement in AWSC Witness Statements, Tab 4 at ¶ 4.
[190] Respondent AABU Member Firms' Opening Memorial on the Merits at p. 3, footnote 3.

is of no relevance to those Respondents as a consequence of the Tribunal having found that the AABU member firms did not breach their obligations to Claimants.

The contractual notice provisions referenced in this issue allow a member firm or the AWSC to terminate the member firm's MFIFA upon receipt of a notice of termination in the event of breach or default. After a specific procedure has been followed, the complaining party may terminate the MFIFA (Paragraph 14.2 (F) of the MFIFAs).

AWSC states that Claimants simply ignored the termination provisions of the MFIFAs but acknowledges Claimants' complaints against AABU member firms offering consulting services as issues of policy, not as claims of legal right and hardly ever with reference to specific instances of competition.[191]

Paragraph 14 of the MFIFAs enumerates several termination events, among them, the proviso of Paragraph 14.2 (F), governing unilateral termination by a wronged party. Separate from the unilateral termination clause the MFIFAs also contain certain arbitration provisions for the resolution of any and all disputes which cannot be settled amicably, arising out of or in connection with the MFIFAs (Paragraph 22.1 of the MFIFAs) and regardless of whether the complaining party seeks to be released from its obligations under the MFIFAs.

The two paragraphs clearly regulate different events and offer a wronged party the alternative rights to terminate its MFIFA when a material breach has occurred or to resort to arbitration in search of a final decision that will resolve a dispute with another party.

In the event of unilateral termination, the notice of breach is an essential condition for the aggrieved party to be relieved from its obligations insofar as it sets in motion the

[191] AWSC's Reply Memorial at p. 71.

procedure regulated in Paragraph 14.2 (F). Such notice has not been established however, as a condition precedent to the commencement of an arbitration proceeding.

Claimants elected to exercise their right to arbitration under Paragraph 22 of the MFIFAs, instead of unilaterally terminating their MFIFA and therefore were not under the obligation to serve AWSC with a notice of breach.

Thus, Claimants did not file this proceeding in disregard of the notice provisions contained in the MFIFAs.

4. Disparaging the AABU member firms and the AWO in the worldwide press and with clients, potential clients, employees, recruits and/or the general public

The Respondent member firms rely on a "communications kit" distributed by Claimants immediately after the Request for this arbitration was filed to accuse Claimants of the behavior captioned above.

The kit substantially contains: a press release describing the ACBU meeting held on December 1997 and explaining the causes which, in the ACBU's view, originated the Request for Arbitration; a summarized presentation of how the ICC arbitration process operates; a chronology of events; a question and answers document on diverse subjects mentioned in the press release; a series of sample letters to recruits and clients explaining the reasons for the filing of the arbitration; a memorandum to all Arthur Andersen partners describing the motives for the decision; and a

memorandum to the Andersen Consulting Employees and Andersen Consulting Associate Partners giving notice of the filing of the Request for Arbitration.[192]

It is not bad faith for Claimants to explain through media releases or other means, their reasons for the filing of this arbitration or the steps taken to settle the AWO internal disputes through arbitration. Nothing in the AWO governing documents bars Claimants from acting in the way they did and nothing in the documents comprised in the communications kit in any way disparages the AABU member firms.

5. Disrupting Respondents' business opportunities

Two instances of disruption have been brought to the attention of the Tribunal: a potential combination between the Canadian AABU member firms and KPMG Canada and a merger between Anjin & Co. -the Korean AABU member firm-, with Saedong, a professional services firm associated with Price Waterhouse & Coopers.[193]

On February 22, 1999 Mr. Wadia informed Mr. Shaheen of the potential KPMG deal and requested him to evaluate the deal from the ACBU's perspective.[194] After a number of events, the KPMG operation was interrupted and the AABU leadership

[192] See: James Wadia Factual Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 11, Factual Affidavits, Tab 36, Att. O.
[193] Respondent AABU Member Firms' Opening Memorial on the Merits at pp. 105-113.
[194] James Wadia Factual Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 10, Factual Affidavits, Tab 36 at p. 31 and February 22, 1999 Memorandum from James Wadia to George T. Shaheen in Att. CC thereto in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 11, Factual Affidavits.

accused Mr. Shaheen and the ACBU management of disrupting the KPMG combination in Canada.[195]

The Respondent member firms' accusation developed into an ICC arbitration (ICC case No. 10411/AER/ACS) which the parties agreed to bring to the same arbitrator hearing the present ICC case 9797/CK/AER/ACS.

Therefore, any pronouncement by the Tribunal in connection with the KPMG combination may have the effect of prejudging ICC case No. 10411/AER/ACS.

Additionally, the KPMG conflict was initiated in February 1999, time after the Terms of Reference in the present arbitration had been signed. Despite the breaking-up of the KPMG combination has been captioned by the Respondent member firms as a disruption of the AABU member firms' business opportunities, clearly the Terms of Reference could not have been meant to encompass issues which did not exist at the time the ICC arbitration in case 9797/CK/AER/ACS was commenced.

The Saedong merger conflict is definitely beyond the limits established in the Terms of Reference given that the dispute commenced in January 1999, more than one year after the Request for this arbitration had been filed and three months after the Terms of Reference had been signed.

Once again, the Terms of Reference could not have been meant to encompass a dispute which had not risen at the time the present arbitration was initiated. On the other hand, the Tribunal was not requested to include the issue after the Terms of Reference were signed.

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[195] See: Respondent AABU Member Firms' Opening Memorial on the Merits at pp. 105-106 and James Wadia Factual Affidavit in Respondent AABU Member Firms' Opening Memorial

Considering those two circumstances and pursuant to Article 19 of the ICC Rules, the Tribunal shall not make any decision based on the Saedong merger conflict.

6. Trading on AABU member firms' credentials and expertise

The examples cited by the AABU member firms as demonstrative of Claimants trading on the Respondent member firms' credentials show that the ACBU member firms used the "Andersen" name -not the AABU member firms' credentials- on certain occasions.

The Respondent member firms do not object however, to Claimants listing their engagements and capitalizing on the AABU member firms' expertise.[196] Rather, the Respondent member firms seem to consider Claimants' accusation as an act of bad faith.

Nevertheless, Claimants' accusation was not lacking factual support. For this reason, Claimants could not have acted in bad faith in accusing the AABU member firms of trading on ACBU member firm's credentials.

7. Refusing to team/work jointly with AABU member firms on various AWO engagements and potential engagements

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on the Merits, Volume 10, Factual Affidavits, Tab 36 at pp. 34-35.

[196] Respondent AABU Member Firms' Opening Memorial on the Merits at p.118.

The Respondent member firms accuse Claimants of systematically failing to cooperate since the early 1990s, by refusing to team with them and declining to share resources including common support structures and personnel.[197]

The Tribunal found eleven instances prior to this filing of this arbitration, of ACBU member firms acting uncooperatively by inter alia, halting previous joint industry studies; excluding AABU member firms from engagements for clients introduced by AABU partners to ACBU member firms; excluding AABU personnel previously committed to work on certain ACBU member firm engagements and backing out of joint proposals with AABU member firms.[198]

That conduct is contrary to the member firms' implied obligation to cooperate under the MFIFAs and to the explicit obligation to pursue their professional practice with respect to one another in accordance with the principle of good faith and fair dealing, inherent to international contracts.[199]

Nevertheless, the events portrayed by the AABU member firms are not a material breach of the MFIFAs, particularly if those events are placed in the context of a long-standing relationship involving thousands of potentially conflicting situations.

Contrary to the Respondent member firms' assertion, the Tribunal found no documentary support showing that Claimants had issued a "directive" forbidding the ACBU member firms to cooperate with the AABU member firms.[200]

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[197] Respondent AABU Member Firms' Opening Memorial on the Merits at p. 87.
[198] Those instances are: Federal Reserve Bank, United Healthcare, McCambridge, Deixler, Marmaro & Goldberg, NextWave, United Airlines, Anthem, Chase Manhattan Bank, Iomega Corporation, Etsa, all in Att. E of Barbara J. Duganier Factual Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 3, Factual Affidavits.
[199] UNIDROIT Principles of International Commercial Contracts, Article 1.7.

8. Refusing to serve and/or abandoning certain clients and potential clients of the AABU member firms and the AWO

The Tribunal construes this accusation as encompassing the ACBU member firms' refusal to serve potential AWO clients and Claimants' failure to serve and/or abandonment of certain AABU member firms' actual clients referred to Claimants by the Respondent member firms.

a. Claimants' refusal to serve and/or abandonment of AWO's potential clients

According to the AABU member firms, in the mid-late 1980s Claimants began focusing on large engagements for large clients in countries such as the United States and the United Kingdom. Claimants' strategy allegedly created problems for the Audit and Tax practice with respect to serving the information technology needs of small to mid-size clients, the so called "consultancy gap."[201]

From the evidence at hand the Tribunal has established the following chain of events:

In 1985 and 1986 the MICD Managing Partner's strategy was to go after the big assignments,[202] i.e. toward the high end of the market: large, highly-leveraged design and installation projects for large clients.[203]

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[200] See: Mark W. Fagan Factual Affidavit in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 4, Factual Affidavits, Tab 14 at p. 7.
[201] Respondent AABU Member Firms' Opening Memorial on the Merits at pp. 56 and 58.
[202] See: "Assuring our Future" Presentation by Simon Moughamian during the October 10, 1985 Partners' Meeting Plenary Session in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 8, Factual Affidavits, Tab 26, Att. I at p. 22.

As computer technology became more pervasive, Claimants' engagements in their core competencies evolved alongside at a no less accelerated pace, specifically towards high-end technology.

The continuous expansion of the AABU member firms' consulting service lines, coupled with the scope of practice discrepancies between the business units, began to cause unrest among the ACBU member firms.[204] After the creation of AABC in 1994, Claimants' unrest turned into mistrust towards the Respondent member firms,[205] much of it due to the competitive tensions between AABC and the ACBU member firms.

By the time the AABU had created AABC, Claimants had implemented a "Best Client" strategy, under which "Andersen Consulting and the client benefit from a long-term, high-value relationship centered around the client's business imperatives" and the

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[203] See: September 3, 1986 Interoffice Communication from Simon Moughamian to Victor E. Millar in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 8, Factual Affidavits, Tab 26, Att. J at p.1.

[204] See: January 11, 1990 "Andersen Consulting Strategic Services" Position Paper on Scope of Practice from George T. Shaheen to Lawrence A. Weinbach in Volume I of Claimants' Exhibits, Tab 40 at p 2; December 10, 1991 Memorandum from George T. Shaheen to Lawrence A. Weinbach in Volume I of Claimants' Exhibits, Tab 53; Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on February 18-19, 1992 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 15, Exhibits, Tab 84 at p. 32; "Mentoring our Future" a November 3, 1992 Presentation by George T. Shaheen in AWSC's Volumes of Exhibits, Volume IV, Tab 57, Ex. E at pp. 4-5, and November 3, 1992 Leadership Panel Session in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 7, Exhibits, Tab 24, Att. BB at p. 16.

[205] See: February 7-9, 1996 Minutes of Andersen 21 Organizational Structure Working Party in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 18, Exhibits, Tab 129 at pp. 10-11.

client "offers highly profitable work for Andersen Consulting."[206] That strategy also implied working for fewer clients.[207]

Claimants' upstream movement in the market was perceived by specialized independent observers. The Wall Street Journal, for example, noted on April 23, 1997: "[t]he bigger Andersen Consulting has become, the more it has focused on deals with big companies."[208]

Summing up, Claimants' focus on high-end technology commitments at the higher end of the marketplace, their long-term relationships with their top tier clients, together with the mutual distrust and divisive environment within the AWO, caused the ACBU member firms' failure and/or refusal to serve potential AWO (and therefore AABU member firms') clients.

All things considered, the Tribunal does not find Claimants' conduct to be in breach of their MFIFAS.

Coordination of the business units' strategies is AWSC's responsibility. It was AWSC's duty to assure that the ACBU member firms' strategy evolved in accordance with the needs of the AWO as a whole and to address the scope of service issues straining the Andersen organization.

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[206] See: Excerpt from Memorandum on Andersen Consulting Global Business Development Framework in Volume I of Claimants' Exhibits to the Reply Memorial, Tab 273 at p. 7.
[207] For example, during 1995 when the ACBU grew 20% it had "halved the number of clients it [worked] for in western Europe". This was after ACBU had implemented its "Best Clients" strategy. See: July 1996 media article: "Solid Year of Growth" published in "Management Consulting International" in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 12, Exhibits, Tab 42.
[208] April 23, 1997 media article published in "The Wall Sreet Journal" in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 19, Exhibits, Tab 171 at p. 3.

The ACBU member firms' failure and/or refusal to serve potential AWO clients in accordance with the AABU member firms' needs, is attributable to such lack of coordination and thus to the AWSC.

b. Claimants' failure to serve and/or abandonment of clients referred by Respondent member firms

A member firm's obligation to perform engagements for clients referred by other member firms is limited by the recipient member firm's scope of practice and by its standards and practices for the acceptance of clients generally. (Paragraphs 5 and 9.1 of the MFIFAs).

Save for these limitations the recipient member firm is required to undertake and perform, in exchange for the fees agreed to with the client, such engagements as may be requested by other member firms or by any of their clients.

Thus, the MFIFAs specifically bar a recipient member firm from discriminating against an AWO client. In turn, AWSC as the AWO coordinating entity, is committed to exercise its best efforts to arrange for the recipient member firm to perform the engagements requested by other member firms.

Since 1985, the MICD was recognized as pursuing major engagements for AWO clients in lieu of providing consulting services for small and medium sized clients.[209]

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[209] See: August 7, 1985 Interoffice Communication from William J.Meurer to Simon Moughamian Jr. in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 8, Factual Affidavits, Tab 25, Att. A; "Assuring our Future" Presentation by Simon Moughamian Jr. during the October 10, 1985 Partners' Meeting Plenary Session in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 8, Factual Affidavits, Tab 26, Att. I at pp. 10, 22 and October 31, 1986 Presentation by Simon

After the 1989 Restructuring, the ACBU leadership commenced a three to five year strategic planning process denominated "Horizon 2000", to establish a worldwide strategy that would provide clear direction for the growth of the ACBU member firms during the 1990s. The strategy would define the industries and service lines which would be the focus for Claimants' expansion.[210]

The outcome of this process was, inter alia, a "Vision" for the ACBU,[211] a mission statement and a strategy to work with Best Clients,[212] which has been maintained by Claimants throughout the years.[213]

In sum, Claimants have consistently maintained clear-cut standards for client acceptance. The ACBU member firms' refusal to serve clients referred by the AABU member firms is therefore not a breach of the MFIFAs, but a conduct strictly in compliance with the provisions of Paragraph 5 thereof.

9. Refusing to share information, training material, and/or technology with the AABU member firms

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Moughamian Jr. to the partners of Arthur Andersen & Co., S.C. and Arthur Andersen & Co. in AWSC's Volumes of Exhibits, Volume I, Tab 18 at pp. 15 and 18.

[210] Minutes of the Meeting of the Board of Partners of Arthur Andersen & Co., S.C. held on February 18-19, 1992 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 15, Exhibits, Tab 84 at p. 17.

[211] This vision was built on five missions: "[O]ne Global Firm, committed to Quality, by having the Best People with Knowledge Capital, Partnering with the Best Clients to Deliver Value." July 24, 1992 Memorandum from George T. Shaheen to all Andersen Consulting partners in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 19, Exhibits, Tab 167, at p. 1; See also Horizon 2000 Presentation by Jon Conahan at the 1992 International Consulting Seminar held on March 9-11, 1992 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 19, Exhibits, Tab 165 at p. 1.

[212] See: Horizon 2000 presentation by Jon Conahan at the 1992 International Consulting Seminar held on March 9-11, 1992 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 19, Exhibits, Tab 165 at p. 11.

[213] See: Excerpt from Memorandum on Andersen Consulting Global Business Development Framework in Volume I of Claimants' Exhibits to the Reply Memorial, Tab 273 at pp. 6-7.

The AABU member firms rely on two premises to support their contention that Claimants refused to share information, training material, and/or technology with the AABU member firms: access by all AWSC partners to know-how and specialized software is for the use of all partners and member firms; knowledge and technology are part of the AWO's good will and have been recognized as the common property of all AWSC partners.[214]

The Respondent member firms have produced videotapes and other documents to demonstrate the ACBU leadership's responsibility in "promoting policies and behavior that run directly contrary to the 'One Firm' principles."[215]

Under Paragraphs 10.1 and 10.2 of the MFIFAs every member firm is obligated to make any Andersen and Local Technology available to other member firms for their professional practices. In turn, the AWSC has the responsibility to coordinate the sharing of information and knowledge between member firms (Paragraphs 2.1. (K) and 10.3 of the MFIFAs and Article 5 (C) (5) of the AWSC Bylaws).

The Respondent member firms have not produced evidence of any ACBU member firm refusing to share information, training material or technology with any AABU member firm. In fact, the ACBU member firms were willing to share technology with the Respondent member firms but the ACBU leaders were inimical to the common use of the technology developed by Claimants.[216]

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[214] Respondent AABU Member Firms' Opening Memorial on the Merits at pp. 129-130.
[215] Id. at p.130.
[216] See: 1994 Annual Partners' Meeting AC Session-Question and Answer Session in Video 12 (George Shaheen) and Respondent AABU Opening Memorial on the Merits, Volume 20, Exhibits, Tab 185 at pp. 23-24 (Charles Paulk). See also: 1996 New Executive Seminar-Perspective: Remarks by George T. Shaheen Video 4 and October 28, 1994 E-mail from John N. Kogan to Robert L. Elmore forwarding a transcription of an October 27, 1994 Octel telephone message from Robert Prince to John N. Kogan in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 20, Exhibits, Tab 186.

There is no indication however that AWSC issued any directive or instructions or provided the necessary coordination to regulate the use of Andersen or Local Entity Technology.

Once again AWSC fell short of its coordinating role this time in the sharing of information and knowledge between Member Firms.

10. Refusing to refer clients to the AABU member firms

There is no obligation under the MFIFAs to refer clients from one member firm to another. Client referrals are regulated to ensure that no AWO client will be refused by another member firm on grounds other than the member firm's standards and practices with respect to client acceptance. (Paragraph 5.1 of the MFIFAs)

Clearly, a member firm must abide by the principle of cooperation by referring its clients to other member firms when the referring member firm cannot, for a valid reason, serve its client. A member firm's decision to refer clients to another member firm is however, a strictly commercial decision dependant inter alia, on the scope and size of the engagement, the skills required to serve the client, the size of the client and from the client's point of view, his willingness to be served by the member firm to which he was referred.

Provided all conditions are given, the Tribunal finds that a member firm's failure to refer clients to another AWO member firm is an uncooperative behavior and a denial of the principle established in the Preamble to the MFIFAs, whereby the member firms are coordinated to meet the many and varied needs of their common clients.

The Tribunal has found no evidence of such behavior.

E. Whether the ACBU member firms' alleged bad faith filing of this proceeding, breaches of their obligations to the AABU member firms, and other inequitable conduct both before and after the filing of the proceeding bar the relief the ACBU member firms are requesting (Section IV. J. of the Terms of Reference)

The Tribunal found that Claimants had not filed the present arbitration in bad faith, materially breached any obligation to the AABU member firms or engaged in any inequitable conduct either before or after the filing of the arbitration. Thus, Claimants' conduct does not bar them from the relief requested.

F. Whether Claimants have breached their obligations under their MFIFAs or otherwise have engaged in conduct affecting any right to relief to which they otherwise might be entitled (Section IV. R. of the Terms of Reference)

Claimants did not materially breach their obligations or engage in any conduct affecting their right to any eventual relief to which they could have been entitled.

G. Whether Claimants are entitled to be excused from further obligations to AWSC and the AABU member firms under the MFIFAs (Section IV. K. and IV. L. of the Terms of Reference)

While AWSC breached its obligations to the ACBU member firms under Claimants' MFIFAs and was responsible for a fundamental non-performance thereunder, Claimants did not engage in inequitable conduct or breach their contractual or fiduciary obligations.

It is a well established rule of law that a fundamental breach of a contract gives the aggrieved party the right to terminate the contractual relationship. This general rule is reflected in the MFIFAs which provide that the effect of a material breach thereto entitles the wronged party to terminate its MFIFA (Paragraph 14.2 (F) of the MFIFAs).

Under the UNIDROIT Principles of International Commercial Contracts, a party may terminate a contract when the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance. The consequence of termination is to release the parties from their obligation to effect and to receive further performance.[217]

On account of AWSC's fundamental non-performance, the ACBU member firms' MFIFAs are terminated. Consequently, Claimants are released from all their obligations to AWSC and the AABU member firms under the MFIFAs as of the date the present award is notified to the parties.

H. Whether Claimants are entitled to recover from Respondents any sums by way of interest, damages, or compensation under or in respect of such breaches if any, and the amount thereof (Section IV. H. of the Terms of Reference)

[217] UNIDROIT Principles of International Commercial Contracts, Articles 7.3.1 (1) and 7.3.5 (1).

Claimants seek an award of US$100 million for damages caused to the Andersen Consulting brand and reputation, originated in marketplace confusion caused by AABC. Those damages stem from the time Claimants devoted to clarifying existing or prospective clients' perceptions; from lost accounts; from the cost of developing a new logo and identity, increased advertising and marketing communications; and from reputation effects on brand image and equity.[218]

The Tribunal found that the AABU member firms did not breach their obligations under the MFIFAs by causing confusion in the marketplace. For this reason, the ACBU member firms cannot claim any harm from the alleged breach and are not entitled to any compensation (Article 7.4.2 of the UNIDROIT Principles).

AWSC on the other hand, breached its material obligations under the MFIFAs by failing to coordinate the practices of the ACBU and AABU member firms. However, AWSC was not under the duty to coordinate the practices of the member firms by drawing clear distinctions among the member firms' marketplace images. Thus, none of the damages alleged by Claimants are a consequence of AWSC's non-performance.

Claimants also seek restitution of the transfer payments made to the AABU member firms since 1994, including the transfer payments placed in escrow, plus interest thereon.

The Tribunal has ruled that Claimants' MFIFAs are terminated as of the date this Award is notified to the parties.

Under general principles of law, upon termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently

[218] Report by Professor Kevin Lane Keller in Expert Reports Submitted by Claimants, at p. 30.

makes restitution of whatever it has received (See Article 7.3.6 (1) of the UNIDROIT Principles). Thus, restitution necessarily entails that both parties return what they have received under the contract.

Performance of Claimants' MFIFAs has extended over a period of more than ten years. During that time and even after 1994, Claimants have received several benefits from their association with the AABU member firms, e.g. the use of the Andersen name and client referrals by the AABU member firms. Albeit these benefits have decreased in the course of time they are by no means immaterial.

Restitution of the benefits received by Claimants is impossible. In fact, the ACBU member firms do not even offer to do so.

If the Tribunal were to grant the restitution of transfer payments made by Claimants, they would be unjustly enriched.

The Tribunal shall not grant Claimants the restitution they requested.

I. Whether relief requested by Claimants may be granted in a proceeding in which less than all AWO member firms are parties (Section IV. O. of the Terms of Reference)

The Respondent member firms explain that 10 to 15 AABU member firms were not made parties to these proceedings or mentioned in Claimants' Request for Arbitration. In addition 19 new AABU member firms entered the AWO shortly after the Request Arbitration and 12 more became AABU member firms by the time the closing

memorials had been submitted.[219] Respondents ask whether the relief requested by Claimants can be granted in the absence of those AABU member firms.

The Tribunal determined that none of the AABU member firms had materially breached their obligations under the MFIFAs and found no evidence of any AABU member firm having inflicted damage on an ACBU member firm. For this reason, Claimants could not have been, and in fact were not, excused from their further obligations under the MFIFAs on account of any AABU member firms' breach.

The basis for the Tribunal's termination of the ACBU member firms' MFIFAs was AWSC's fundamental non-performance. No AABU member firm would have needed to be a party to these proceedings for the Tribunal to terminate the MFIFAs on those grounds.

On the other hand, the proceedings and schedule agreed for this arbitration cannot be subordinated to the admittance of new AWO member firms. If each member firm joining the AWO after the commencement of this arbitration were entitled to be a party to this proceeding, -which would only make sense if such party could fully exercise its right to a proper defense- the arbitration would be left at the mercy of the AWSC officers who have the power to decide when it is appropriate for a new member firm to become a member of the AWO.

Furthermore, no AABU member firm entering into an MFIFA after the date this arbitration was filed could have incurred in the alleged misconduct and breaches described in Claimants' Request for Arbitration.

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[219] Respondent AABU Member Firms' Opening Memorial on the Merits at p. 155 and Post-Hearing Memorial on the Merits at p. 127.

Finally, there is no evidence of any ACBU member firm being absent from this arbitration. The Tribunal then assumes all Claimants are present.

On these grounds the Tribunal finds the relief requested by Claimants may be granted even if all the AABU member firms are not parties to this arbitration.

J. Provided the arbitrator finds that any or all Claimants are entitled for any reason to be excused from any of their obligations under their respective MFIFAs, whether those excused Claimants should:

- **pay damages to AWSC;**
- **meet their obligations under the MFIFAs through and including the effective date of the termination;**
- **cease using the "Andersen" name or any derivative thereof, or any other name AWSC is authorized to regulate;**
- **cease to represent themselves as in any way associated with AWSC or the remaining member firms, and**
- **return and cease using Andersen Technology.**

(Section IV. Q. of the Terms of Reference)

1. Claimants' obligation to pay damages to AWSC

It is a general rule of law that only the party which has willfully or negligently breached its obligations under a contract and has thereby inflicted a loss upon another is liable for damages.

The MFIFAs call for the application of certain principles in order to determine whether a party thereto has breached its obligations and is deemed to be at fault (Paragraph 17.3). One of such principles proclaims that the party whose action or failure to act was the predominant cause of termination or constituted a breach of the MFIFA, shall be deemed to be the party at fault (Paragraph 17.3 D).

The Tribunal found AWSC had breached its material obligations to coordinate the practices of the ACBU member firms with those of the AABU member firms. AWSC's failure to act was the cause of termination of Claimants' MFIFAs and constituted a fundamental non-performance thereunder. For this reason, AWSC is deemed the party at fault.

The provisions of Paragraph 17.2 (A) of the MFIFAs[220] on which Respondents specifically rely to demand the termination payments from Claimants require that the ACBU member firms be at fault, which they are not. Therefore, Claimants are under no obligation to make the Paragraph 17.2 (A) termination payments.

2. Claimants' duty to meet their obligations under the MFIFAs through and including the effective date of the termination

[220] The relevant segment of Paragraph 17.2 (A) provides: "(A) If Local Entity is the party at fault, Local Entity shall pay Andersen, S.C. (as agent for the other Member Firms) within sixty (60) days of the effective date of termination an amount equal to one hundred fifty percent (150%) of the fees (calculated on the accrual basis of accounting) from clients earned by Local Entity in the twelve (12) months immediately prior to termination."

The MFIFAs entered into between Claimants and AWSC shall terminate on the date this award is notified to the parties.

Claimants must therefore meet each and all of their obligations through and including the effective date of termination of their MFIFAs.

3. Claimants' obligations to cease using the Andersen name or any derivative thereof, or any other name AWSC is authorized to regulate and to cease representing themselves as in any way associated with AWSC or the remaining member firms

Effective March 22, 1977 Arthur Andersen LLP[221] obtained a trademark registration for its service mark Arthur Andersen & Co. and a renewal thereof in 1997 for a period of ten years.[222] In 1989, Arthur Andersen LLP[223] registered "Andersen Consulting" as a trademark and service mark.[224]

Arthur Andersen LLP granted Andersen Consulting LLP the right to use and permit other AWO member firms to use, the Andersen Consulting name, with bare legal title (or record ownership) and any residual interest in the name remaining with Arthur Andersen LLP. Andersen Consulting LLP's right to use the Andersen name would cease if Andersen Consulting LLP or other entities within the AWO authorized by

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[221] In 1977 the Partnership was called Arthur Andersen & Co.
[222] United States Patent and Trademark Office for Arthur Andersen & Co., Reg. No. 1,061,828 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 20, Exhibits, Tab 202.
[223] In 1988 the Partnership was still called Arthur Andersen & Co.
[224] December 16, 1988 Trademark Application in AWSC's Volumes of Exhibits, Volume II, Tab 30.

Andersen Consulting LLP to use the Andersen Consulting name, were no longer part of the AWO; then any residual interest would revert to Arthur Andersen LLP.[225]

On September 29, 1995 Arthur Andersen LLP confirmed Andersen Consulting LLP as the successor in interest of the Andersen Consulting registration "including the right to file renewals and to bring and maintain actions based on the aforementioned mark and to recover for any infringement thereof."[226]

On the same date, Arthur Andersen LLP signed a "Confirmation of Assignment" ratifying it had granted Andersen Consulting LLP "the right to use (and to permit other entities within the AWO to use) such names and marks so long as AC or such other user, respectively, remains a part of the AWO with legal title remaining in AA, the sole owner of the name and mark 'Arthur Andersen' and any derivative thereof".[227]

Visibly Arthur Andersen LLP is the holder of legal title to and the owner of the "Andersen" service mark, including the Andersen Consulting name.

Arthur Andersen LLP's legal title to the Andersen and derived names is confirmed by the provisions of its own MFIFA. Paragraph 2 (L) appoints AWSC to regulate the use of the Arthur Andersen name by other member firms and their right to hold themselves as member firms of the AWO. Paragraph 3.2 further states that Arthur Andersen LLP has licensed the existing AWO member firms to use the name 'Arthur Andersen & Co.' or any variation thereof and to incorporate such name to the name of the member firms, subject to several conditions, one of them being that such license

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[225] See: February 3, 1994 Memorandum from R. Richard Brown to Jon N. Ekdahl in Volume IV of Claimants' Exhibits to the Reply Memorial, Tab 449 at pp. SC 065673 and 065674.
[226] September 29, 1995 Assignment in AWSC's Volumes of Exhibits, Volume IV, Tab 67.
[227] September 29, 1995 Confirmation of Assignment in AWSC's Volumes of Exhibits, Volume IV, Tab 68.

can be used only in connection with the member firms' professional practice, i.e. performing assignments for clients in the member firms' fields of expertise. [228]

The member firms' MFIFAs contain a clause substantially restating Paragraph 3.2 of Arthur Andersen LLP's MFIFA (Paragraph 3 of the MFIFAs) and an additional proviso for the event of termination, whereupon no member firm or any of its individual partners may use the Andersen name or any of its derivatives or represent itself to be associated with AWSC or the member firms without the written permission of AWSC (Paragraph 18.1 of the MFIFAs).

AA LLP's ownership of the Andersen name has never been challenged by Claimants. On the contrary the ACBU member firms have always acknowledged AA LLP's title to the Andersen name. In 1988 in the perspective of the 1989 Restructuring, the MICD management was aware of its need to maintain a strong connection with Arthur Andersen & Co. to ensure the continued perception of professionalism, integrity, reliability and strength. The MICD also knew that the information consulting services were not widely known by the public. In fact, few potential clients had "any appreciation for [MICD's] true size, depth and scope." With the change in name and the related image initiative, MICD planned "to change that condition."[229]

In 1993 Mr. Shaheen proclaimed: "[w]hen Andersen Consulting faced the dilemma of creating its own image in the marketplace, we paid careful consideration to our name. From our research and discussions, and plain gut instinct, it became apparent that we would never want to change from the Andersen name." It was obvious to Mr.

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[228] See: Member Firm Interfirm Agreement between Arthur Andersen & Co. and Arthur Andersen & Co., S.C., Paragraph 3.2 in AWSC's Volumes of Exhibits, Volume I, Tab 16.

[229] October 5, 1988 Memorandum "Management Information Consulting Practice Image Initiative" to all personnel in Respondent AABU Member Firm's Opening Memorial on the Merits, Volume 18, Exhibits, Tab 150.

Shaheen that the reputation of Arthur Andersen had been built by the men and women who had preceded the actual partners over 75 years.[230]

Five years later Mr. Shaheen acknowledged to all Andersen Consulting Partners: "[w]e have a signed agreement giving Andersen Consulting the permanent and exclusive right to use the 'Andersen Consulting' name as long as we continue to honor our contractual obligations."[231]

Claimants have benefited from the good will inherent in the Andersen name. While describing the ACBU strategy in 1993, Mr. Jon Conahan[232] explained "[o]ur challenge here was to build and sustain an image that drew on the historical strengths inherent in the Arthur Andersen name while simultaneously establishing our credibility as a capable peer and competitive winner among the likes of EDS, IBM, Cap Gemini."[233]

Undeniably, the ACBU member firms have made substantial investments in the Andersen name.[234] They did so aware that, by their investment and by relying on the professionalism, integrity, reliability and strength associated with the name, they would be able to establish, as in fact they did, their credibility as capable peers and competitive winners among the leaders in their field of practice.

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[230] "Reputation by Choice" Presentation by George T. Shaheen, November 9, 1993 in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 13, Exhibits, Tab 68 at pp. SC 014140 and SC 014141.

[231] AWSC's Volume of Exhibits, Volume IX, Tab 131 at p. SC 079603.

[232] Mr. Jon Conahan is cited as "ACBU Managing Partner, Strategy" (AABU's "Quick reference List of Individuals cited in Submission" attached to their Opening Memorial on the Merits).

[233] "Speech to the Arthur Andersen Partners by Jon M. Conahan 'Andersen Consulting Strategy', Annual Partners Meeting, London, November 1993" in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 13, Exhibits, Tab 70.

[234] See: Exhibits B and C of Kevin Lane Keller's Expert Report in Expert Reports Submitted by Claimants and April 23, 1997 Wall Street Journal article in Respondent AABU Member Firms' Opening Memorial on the Merits, Volume 19, Exhibits, Tab 171.

Claimants' contention that the Andersen Consulting name "was built from scratch"[235] is openly contradicted by their own statements.

The Tribunal finds that Claimants cannot take with them the property to which Arthur Andersen LLP holds legal title. Moreover, it would be unfair to allow the ACBU member firms to keep a name built through the common effort of those men and women who had preceded the actual AWSC partners.

This finding is made regardless of the number of member firms departing the AWO, or the business unit to which they belong. While Arthur Andersen LLP holds clear title to the name, no individual member firm or a group of such firms could leave the AWO and further keep and use the name without Arthur Andersen LLP's consent.

Therefore, effective on December 31, 2000 Claimants shall cease using the Andersen name or any derivative thereof, or any other name AWSC is authorized to regulate and shall cease to represent themselves as in any way associated with AWSC or the AABU member firms.

The term for the ACBU member firms to cease using the Andersen name and to cease to represent themselves as associated with Respondents has been fixed by the Tribunal in order to allow Claimants a reasonable time frame to make the necessary changes and adjustments resulting from the resolution of the present counterclaim.

4. Claimants' obligation to return and cease using Andersen Technology

[235] Claimants' Opening Memorial at p. 153.

Andersen Technology is all commonly owned intellectual property jointly developed by member firms including, patents, copyrights, trademarks, goodwill, trade names, trade secrets, inventions, computer software and related documentation methodologies, technologies, know-how, internal management information systems, documentation, training materials as well as books, booklets, pamphlets, subject files and reference matter (Paragraph 1(B) of the MFIFAs).

The member firms –not AWSC- control the development of Andersen Technology and the funds allocated to such development. The use of that Technology by other member firms is subject to certain cost-sharing arrangements. AWSC has the obligation to recommend policies for the application of Andersen Technology and to oversee its development and use as well as the furtherance of that technology. (Paragraphs 2.1 (K), 10.1 and 10.1 (B) of the MFIFAs)

All member firms are entitled to use Andersen Technology in their professional practice. In exchange, they must inter alia, pay a compensation to the appropriate member firm designated by AWSC and use the Andersen Technology in accordance with the policies recommended by AWSC as agent for the member firms (Paragraph 10.1 of the MFIFAs).

In any event of termination of an MFIFA, except for the dissolution of AWSC, a departing member firm must return promptly to AWSC and cease using Andersen Technology (Paragraph 18.2 of the MFIFAs). A departing member firm is also entitled to receive the fair value of its interest in Andersen Technology reasonably determined by AWSC or by arbitration pursuant to the provisions of Paragraph 22 of the MFIFAs (Paragraph 17.2 (D) of the MFIFAs).

In addition to Andersen Technology, the MFIFAs regulate "Local Entity Technology", i.e. any technology, other than Andersen Technology owned or controlled by a

member firm which can only be used by the AWO member firms under certain conditions (Paragraphs 10.2 and 10.3 of the MFIFAs).

Read together, these provisions must be construed as applicable only to the departure of a single member firm and not to the separation from the AWO, of all the member firms of a business unit.

To arrive at this conclusion the first thing to consider is whether the Andersen Technology jointly developed by several member firms should be understood as commonly owned intellectual property of all the AWO member firms; as property of AWSC; or as property of those member firms responsible for developing such technology.

By acknowledging that the member firms control the funds to be allocated to the development of Andersen Technology, and the scope and direction of its development, Paragraph 10.1 of the MFIFAs favors the last interpretation.

Indeed, if a limited number of AWO member firms funded and developed a technology, it follows that common ownership can only include such firms investing in or developing that technology, to the exclusion of the rest.

The MFIFAs do not pronounce jointly developed and commonly owned Andersen Technology as belonging to all the AWO member firms or AWSC. The Paragraph 1(B) provision prescribes that "all commonly owned intellectual property developed jointly by Member Firms for their use" is Andersen Technology. Thus, the provisions of the MFIFAs regarding common ownership of the Andersen Technology exclude the non-participating member firms.

Another matter is how to reverse common ownership of jointly developed Andersen Technology when a member firm commonly owning this technology leaves the AWO.

The provisions of Paragraphs 17.2 (D) and 18.2 of the MFIFAs offer the solution. When such member firm leaves the AWO and without any consideration as to fault, it must return the Andersen Technology to AWSC as agent for the member firms which commonly own the Andersen Technology. However, as a recognition that it owns part of the Andersen Technology it leaves behind, the departing member firm is entitled to the fair value of its interest therein, which shall be paid by AWSC as agent for the other member firms commonly owning the Technology. The member firm leaving the AWO may take whatever Local Entity Technology it possesses because it is the exclusive holder of any right thereto.

The next question is what determination should the Tribunal make in case all the member firms which jointly developed and collectively own Andersen Technology depart the AWO. Neither the MFIFAs, nor any other AWO governing document known to the Tribunal provide an answer. Therefore, the general principles of law are the appropriate rules to decide this matter.

Under general principles of law, contracts must be interpreted according to the common intention of the parties.[236] If the intention cannot be established, the contract should be interpreted in light of the meaning reasonable persons of the same kind as the parties would give to it in the same circumstances.[237]

It would not be reasonable to hold –and reasonable persons of the same kind as the parties to this arbitration could not possibly claim- that the member firms not paying

[236] UNIDROIT Principles of International Commercial Contracts, Article 4.1 (1) and Principles of European Contract Law, Article 5:101 (1).

for or participating in the development of Andersen Technology are common owners of such technology or that the entities which funded and developed it are bound to forfeit their rights to those who have no title thereto.

Equity would not dictate a different solution. Indeed, the Tribunal found that the Respondent member firms established a broad-based consulting practice that competes with Claimants' activities. For this reason, it would be unfair to compel the ACBU member firms to surrender their technology which would capacitate the competing AABU member firms in Claimants' core activities.

The final question is what disposition should the Tribunal make in connection with Andersen Technology, if any, jointly developed and commonly owned by ACBU and AABU member firms.

The Tribunal has found no evidence among the myriad of documents submitted in this arbitration, of the extent to which any Andersen Technology was jointly developed by member firms from both business units. In any case, that Technology must remain within the AABU member firms as provided in Paragraph 17.2 (D) of the MFIFAs.

K. Provided the arbitrator awards any relief to Claimants, whether the other parties must reimburse AWSC for any and all costs, expenses and liabilities AWSC incurs as a result of this Tribunal granting such relief (Section IV. S. of the Terms of Reference)

[237] UNIDROIT Principles of International Commercial Contracts, Article 4.1 (2) and Article 5:101 (3) of the Principles of European Contract Law substantially contains the same provision.

Claimants are under no obligation to reimburse any costs, expenses or liabilities incurred by AWSC because the Tribunal terminated the ACBU member firms' MFIFAs.

Moreover, requiring Claimants to reimburse AWSC for the costs, expenses and liabilities incurred by AWSC as a consequence of AWSC's fundamental non-performance would amount to making the ACBU member firms pay for AWSC's breaches.

On the other hand, the AABU member firms' obligations to AWSC have not been modified in any way as a consequence of the present arbitration. The contractual arrangements between AWSC and the AABU member firms remain in full force. AWSC may then recover from the Respondent member firms whatever costs, expenses and liabilities are necessary to allow AWSC to operate on a break-even basis (Paragraph 8.1 of the MFIFAs).

L. To the extent amounts have been paid into escrow by or on behalf of ACBU member firms, whether such amounts have been properly placed in an interest-bearing escrow account (Section IV. U. of the Terms of Reference)

When payment of any amounts is the subject of disagreement or arbitration, the parties to an MFIFA may discharge their obligations by making those payments into an interest-bearing escrow account established for such purpose. Upon the resolution of the dispute, the escrowed amounts, plus accrued interest thereon, shall be disbursed in accordance with the decision of the arbitrator. (Paragraph 22.2 of the MFIFAs)

The parties to this arbitration asked the Tribunal whether the AABU member firms had breached their material obligations to the ACBU member firms (Issue IV. D.) and if, as a consequence of their conduct, the Respondent member firms had relinquished their right to receive transfer payments under the MFIFAs (Issue IV. E.).

Clearly the disbursement of the transfer payments is subject to this arbitration.

The Tribunal already found Claimants had acted in good faith, did not breach any material obligation to the AABU member firms and did not engage in inequitable conduct.

Therefore, Claimants properly placed the 1998 and 1999 transfer payments in an interest-bearing escrow account.

M. What disposition should be made of all or any part of the escrowed amounts and interest thereon (Section IV. V. of the Terms of Reference)

All escrowed amounts, including interest thereon, shall be paid forthwith to the AABU member firms as directed by AWSC.

N. How any costs, expenses and liabilities arising from the escrow and incurred by the parties should be allocated among them (Section IV. W. of the Terms of Reference)

All costs, expenses and liabilities arising from the escrow and incurred by any party shall be borne by Claimants.

VI. COSTS OF THE ARBITRATION

(Section IV. P. and T. of the Terms of Reference)

Article 31.3 of the ICC Rules of Arbitration requires that the final Award fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

The relevant costs to be fixed by the Tribunal are the fees and expenses of the arbitrator, the ICC administrative costs and reasonable legal and other costs incurred by the parties.

The costs of the present arbitration, expressed in United States dollars, are the following:

1. Arbitrator's fees and expenses and ICC administrative costs $ 2,230,000.00

2. Legal and other costs

   a. Claimants:

   <u>Jurisdictional Issues</u>

Attorneys' fees and legal services	$ 3,379,000.00
Expert fees	$ 185,189.00
Other expenses and disbursements	$ 972,275.00

   <u>Merits</u>

Attorneys' fees and legal services	$10,133,533.00
Expert fees	$ 1,462,278.00
Other expenses and disbursements	$ 3,999,128.00

b. AWSC:

<u>Jurisdictional Issues</u>	
Attorneys' fees	$ 910,800.00
Related Expenses and other costs	$ 89,390.00
<u>Merits</u>	
Attorneys' fees	$ 7,593,000.00
Related Expenses and other costs	$ 913,800.00

c. AABU Member Firms:

<u>Jurisdictional Issues</u>	
Attorneys' fees	$ 925,000.00
Costs	$ 200,000.00
<u>Merits</u>	
Attorneys' fees	$10,544,748.50
Expert fees	$ 1,125,323.90
Costs	$ 1,128,838.35

The Tribunal shall allocate the costs of the present arbitration as follows:

1. The jurisdictional objections raised by Respondents were decided in favor of Claimants. Respondents shall therefore pay 25% of the Arbitrator's fees and

expenses and 25% of the ICC administrative costs in equal shares, as well as all of Claimants' attorneys' fees and related costs incurred in the jurisdictional objections in equal shares. Each Respondent shall bear its own attorneys' fees and related costs incurred in the jurisdictional objections.

2. The Tribunal found that the Respondent AABU member firms had not breached their obligations under the MFIFAs. Nevertheless, those Respondents accused Claimants on several counts enumerated under Issue I of the Terms of Reference. The Tribunal found no merit to the Respondent member firms' accusations. For this reason, the AABU member firms shall pay 18.75% of the Arbitrator's fees and expenses and 18.75% of the ICC administrative costs. The Respondent member firms shall also pay 25% of their attorneys' fees, expert fees and costs incurred in the proceedings on the merits.

3. The Tribunal found AWSC had materially breached its obligation to Claimants under the MFIFAs. In addition, AWSC filed counterclaims, all of which were denied by the Tribunal, except for the issue concerning the use of the Andersen name. As a consequence, AWSC shall pay all of its attorneys' fees, related expenses and other costs; 50% of Claimants' attorneys' fees and legal services, expert fees and other expenses and disbursements incurred in the proceedings on the merits; 37.5% of the Arbitrator's fees and expenses; and 37.5% of the ICC administrative costs.

4. The ACBU member firms were awarded the separation from the AWO but were denied the use of the Andersen name and the restitution and damages sought from Respondents. Hence, Claimants shall pay 50% of their attorneys' fees and legal services, expert fees and other expenses and disbursements incurred in the proceedings on the merits; 75% of the AABU member firms attorneys' fees, expert fees, and costs incurred in the proceedings on the merits; 18.75% of the Arbitrator's fees and expenses; and 18.75% of the ICC administrative costs.

5. Finally, the Respondent AABU member firms request that their internal employee costs in an amount of $14,823,059.36 be awarded as a cost associated to the present arbitration. The Tribunal shall not grant the AABU member firms their internal costs because the allocation of their employees' time and efforts to the present arbitration is a decision dependant entirely on the AABU member firms' discretion and therefore, those costs must be assumed by such member firms.

Annex 3 hereto contains the allocation of all the costs fixed by the Tribunal.

VII. AWARD

Upon the issues addressed by the Tribunal, it is hereby adjudged:

A. The Respondent AABU member firms did not materially breach their obligations to Claimants under the Member Firm Interfirm Agreements on any of the grounds alleged by the ACBU member firms.

B. AWSC breached its material obligations to Claimants under the Member Firm Interfirm Agreements by failing to coordinate the practices of the ACBU member firms with those of the AABU member firms.

C. AWSC did not breach its material contractual and fiduciary obligations to Claimants under the Member Firm Interfirm Agreements by adopting a Resolution creating the "AWO Protection Committee".

D. Claimants acted in good faith, with a proper basis and in accordance with the Member Firm Interfirm Agreements in filing their Request for Arbitration and in their subsequent actions in connection with the arbitration proceedings.

E. The relief requested by Claimants can be granted even if less than all the AWO member firms are parties to the present arbitration.

F. Claimants are excused from any further obligations under the Member Firm Interfirm Agreements to the AWSC and the AABU member firms as a result of AWSC's fundamental non-performance of its contractual and fiduciary obligations under the Member Firm Interfirm Agreements.

G. Claimants are not entitled to restitution or to recover from Respondents any sums by way of damages, interest or compensation.

H. Claimants are not bound to make any termination payments or to pay any other damages to Respondents.

I. Claimants shall meet all their obligations under the Member Firm Interfirm Agreements through and including the date of termination thereof.

J. No later than December 31, 2000 Claimants shall cease using the "Andersen" name or any derivative thereof or any other name AWSC is authorized to regulate and shall cease to represent themselves as associated with Respondents.

K. Claimants shall return and cease using the Andersen Technology jointly owned, controlled and developed by Claimants and the Respondent member firms. Claimants shall keep the Andersen Technology jointly owned, controlled and developed by the ACBU member firms.

L. Claimants shall not reimburse AWSC for the costs, expenses and liabilities, including attorneys' fees, incurred by AWSC as a result of the relief granted by the Tribunal. The Respondent member firms shall reimburse AWSC for its costs, expenses and liabilities, including attorneys' fees incurred in the present arbitration as set forth in Paragraph 8.1 of the Member Firm Interfirm Agreements.

M. All the amounts placed in escrow including interest thereon, in respect of obligations owed to or for the benefit of the Respondent AABU member firms, shall be paid to said Respondent AABU member firms as directed by AWSC. All costs, expenses and liabilities arising from that escrow and incurred by the parties shall be paid by Claimants.

N. Claimants and Respondents shall pay the costs, expenses and liabilities incurred in the present arbitration including attorneys' fees, as set forth in Annex 3 hereto.

O. The Tribunal respectfully requests the Courts of the relevant jurisdictions to enforce this final award.

DONE and ORDERED in Geneva, Switzerland, this 28th day of July, 2000.

The Arbitrator,

GUILLERMO GAMBA POSADA

ANNEX 1

CLAIMANT ANDERSEN CONSULTING
BUSINESS UNIT MEMBER FIRMS

COUNTRY		MEMBER FIRM
ANDORRA	1	Sistemes Consulting, SA
ARGENTINA	2	Andersen Consulting Sociedad Anonima
AUSTRALIA	3	Andersen Consulting Australia
AUSTRIA	4	Andersen Consulting Unternehmensberatung GmbH
BELGIUM	5	Andersen Consulting SC
BELGIUM	6	Andersen Consulting BPM SC
BRAZIL	7	Andersen Consulting do Brazil Ltda.
CANADA	8	Andersen Consulting
DENMARK	9	Andersen Consulting I/S
FINLAND	10	Andersen Consulting Oy
FRANCE	11	Andersen Consulting SA.
	12	Andersen Consulting Conseils en Organisation Société Civile à Capital Variable
GERMANY	13	Andersen Consulting

		Unternehmensberatung GmbH
NETHERLANDS	14	AC Holdings C.V.
GREECE	15	Andersen Symvouleftiki S.A.
HONK KONG	16	Andersen Consulting
HUNGARY	17	Andersen Consulting KFT
INDONESIA	18	Andersen Consulting Indonesia
IRELAND	19	Andersen Consulting
ITALY	20	Andersen Consulting S.p.A.
JAPAN	21	Andersen Consulting (Japan)
LUXEMBOURG	22	Andersen Consulting S.A.
MALAYSIA	23	Andersen Consulting Sdn. Bhd.
MEXICO	24	Andersen Consulting, Sociedad Civil
NETHERLANDS	25	Andersen Consulting Management Consultants
NEW ZEALAND	26	Andersen Consulting- New Zealand
NORWAY	27	Andersen Consulting ANS
PHILIPPINES	28	Andersen Consulting, Inc.
POLAND	29	Andersen Consulting Sp.z.o.o.
PORTUGAL	30	Andersen Consulting (Portugal) Consultores de Gestao, S.A.
SINGAPORE	31	Andersen Consulting Singapore Pte., Ltd.
SOUTH AFRICA	32	Andersen Consulting (South Africa)
SPAIN	33	Andersen Consulting, S.L.
SWEDEN	34	Andersen Consulting AB
SWITZERLAND	35	Andersen Consulting AG
TAIWAN	36	Andersen Consulting Co., Ltd.
UNITED STATES	37	Andersen Consulting LLP
UNITED KINGDOM	38	Andersen Consulting A

	39	Andersen Consulting B
	40	Andersen Consulting C
	41	Andersen Consulting D
	42	Andersen Consulting E
	43	Andersen Consulting F
	44	Andersen Consulting G

ANNEX 2

RESPONDENT ARTHUR ANDERSEN
BUSINESS UNIT MEMBER FIRMS

COUNTRY		MEMBER FIRM
ARGENTINA	1	Pistrelli, Diaz y Asociados
	2	Arthur Andersen & Co., Sociedad Civil
AUSTRALIA	3	Arthur Andersen
	4	Andersen Legal
BELGIUM	5	Arthur Andersen CVBA / SCRL
BERMUDA	6	Arthur Andersen & Co.
	7	Scott Hunter & Co.
BRAZIL	8	Branco Advogados Associados
BULGARIA	9	Arthur Andersen Bulgaria OOD
CANADA	10	Arthur Andersen & Co.
	11	Arthur Andersen & Cie
CZECH REPUBLIC	12	Arthur Andersen s.r.o.
DENMARK	13	Arthur Andersen
EGYPT	14	Allied Accountants
	15	Arthur Andersen Shawki & Co. S.A.E.
	16	Arthur Andersen Egypt

FINLAND	17	Arthur Andersen Oy
	18	Arthur Andersen Kihlman Oy
	19	Arthur Andersen Verokonsultointi Oy
FRANCE	20	Barbier Frinault & Associés, [Société d'Expertise Comptable et de Commissariat aux Comptes] {SA}
	21	Barbier Frinault & Autres, Société Civile de Commissariat aux Comptes a Capital Variable
	22	PGA [SA]
	23	Arthur Andersen International S.A.
GERMANY	24	Arthur Andersen Wirtshaftsprüfungsgesellschaft Steuerberatungsgesellschaft m.b.H.
GREECE	25	Arthur Andersen- S. Pantzopoulos Orkotoi Elecktes Symvouli Epichiriseon Anonymous Etaireia (Arthur Andersen-S.Pantzopoulos Certified Auditors Business Consultants Societe Anonyme).
GUATEMALA	26	Aranky, Gonzalez y Asociados, S.C.
	27	Arthur Andersen y Cia. S.A.
HONG KONG	28	Arthur Andersen & Co.
HUNGARY	29	Arthur Andersen & Co. Kft
	30	Burai-Kovács & Partners
INDIA	31	Arthur Andersen & Co.
INDONESIA	32	Kantor Akuntan Publik Prasetio, Utomo & Rekan
	33	Prasetio Utomo Consult

IRELAND	34	Arthur Andersen-Ireland
ISRAEL	35	Luboshitz, Kasierer & Co.
ITALY	36	Arthur Andersen S.p.A.
	37	Arthur Andersen MBA, S.r.l.
JAPAN	38	Asahi & Co.
	39	Uno Tax Accountant Office
	40	Arthur Andersen & Co.
JORDAN	41	Dajani, Alaeddin & Co.
KOREA	42	Anjin & Co.
KUWAIT	43	Arthur Andersen Al Bazie & Co.
LATVIA	44	Arthur Andersen, Ltd. Riga
LEBANON	45	Arthur Andersen & Co.
LUXEMBOURG	46	Arthur Andersen S.A.
	47	Immobiliere S.T.O.R., Société Coopérative
	48	Arthur Andersen, Société Civile
MALAYSIA	49	Arthur Andersen & Co.
	50	Hanafiah Raslan & Mohamad
	51	Murugasu & Co.
	52	Lau Chua Kong & Co.
	53	Samad & Co.
MEXICO	54	Ruiz, Urquiza y Cia., S.C.
MOROCCO	55	Arthur Andersen SARL
THE NETHERLANDS	56	Arthur Andersen & Co. Accountants
	57	Arthur Andersen & Co. Belastingadviseurs
	58	AA Holdings CV
NEW ZEALAND	59	Arthur Andersen

NORWAY	60	Arthur Andersen & Co.
	61	Advokatfirmaet Arthur Andersen & Co. ANS
PERU	62	Medina, Zaldivar y Asociados Sociedad Civil de Responsabilidad Limitada
PHILIPPINES	63	SyCip, Gorres, Velayo & Co.
POLAND	64	Arthur Andersen Sp. z.o.o.
	65	Domanski, Szubielska i Wspolnicy Kancelaria Prawnicza Sp. z.o.o.
	66	Arthur Andersen Polska Sp. z.o.o.
PORTUGAL	67	Arthur Andersen, S.A.
ROMANIA	68	Arthur Andersen S.r.l.
RUSSIA	69	Arthur Andersen ZAO
SAUDI ARABIA	70	Arthur Andersen & Co.
SINGAPORE	71	Arthur Andersen
SLOVAK REPUBLIC	72	Arthur Andersen k.s.
SOUTH AFRICA	73	Arthur Andersen & Co.
	74	Arthur Andersen & Associates
SPAIN	75	Arthur Andersen y Cia., S. Com.
	76	J&A Garrigues, Andersen y Cia, S.R.C.
SWEDEN	77	Arthur Andersen AB
	78	Arthur Andersen Skattekonsulter AB
SWITZERLAND	79	Arthur Andersen AG
TAIWAN	80	T.N. Soong & Co.
	81	SGV- Soong & Co.
THAILAND	82	SGV -Na Thalang & Co.,Ltd.
	83	SGVN -Legal & Tax Consultants Ltd.

TURKEY	84	A.A. Aktif Analiz Serbest Muhasebecilik Mali Müsavirlik Anonim Sirketi
	85	Erdikler Eratalar Yeminli Mali Müsavirlik Anonim Sirketi
UKRAINE	86	Arthur Andersen (Kyiv), a Limited Liability Company
UNITED ARAB EMIRATES	87	Arthur Andersen & Co., (Dubai)
UNITED KINGDOM	88	Arthur Andersen
	89	Arthur Andersen Executive Services
UNITED STATES OF AMERICA	90	Arthur Andersen LLP
	91	VantageSource LLP
VENEZUELA	92	Piernavieja, Porta, Cachafeiro & Avocados
VIETNAM	93	Arthur Andersen Viet Nam Ltd.

ANNEX 3

COST ALLOCATION

ANDERSEN CONSULTING BUSINESS UNIT MEMBER FIRMS

Merits of the dispute

Arbitrator's fees and expenses	
and ICC administrative costs	$ 418,125.00
ACBU Legal and other costs	$ 7,797,469.50
AABU Legal and other costs	$ 9,599,183.06
TOTAL	$17,814,777.56

ANDERSEN WORLDWIDE SOCIETE COOPERATIVE

Jurisdiction

Arbitrator's fees and expenses	
and ICC administrative costs	$ 278,750.00
AWSC Legal and other costs	$ 1,000,190.00
ACBU Legal and other costs	$ 2,268,232.00

Merits of the dispute

Arbitrator's fees and expenses	
and ICC administrative costs	$ 836,250.00
AWSC Legal and other costs	$ 8,506,800.00
ACBU Legal and other costs	$ 7,797,469.50

TOTAL	$20,687,691.50
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ANNEX 3

COST ALLOCATION

ARTHUR ANDERSEN BUSINESS UNIT MEMBER FIRMS

Jurisdiction

Arbitrator's fees and expenses and ICC administrative costs	$ 278,750.00
AABU Legal and other costs	$ 1,125,000.00
ACBU Legal and other costs	$ 2,268,232.00

Merits of the dispute

Arbitrator's fees and expenses and ICC administrative costs	$ 418,125.00
AABU Legal and other costs	$ 3,199,727.69
TOTAL	$ 7,289,834.69